33 BOLI ORDERS

In the Matter of

OAK HARBOR FREIGHT LINES, INC.

Case No. 66-12
Final Order of Commissioner Brad Avakian
Issued January 15, 2014

SYNOPSIS

The Agency's Formal Charges alleged that Respondent violated OFLA by requiring that Complainant provide a medical note to verify that each of his absences from work was related to his OFLA qualifying condition and constructively denying him intermittent OFLA leave to which he was entitled by disciplining him for absences and tardies that were due to his serious health condition. The Formal Charges also alleged that Respondent violated Oregon's employment disability laws by failing to reasonably accommodate Complainant's disability, by failing to initiate an interactive process with Complainant related to his disability, and by utilizing standards, criteria or methods of administration that had the effect of discriminating on the basis of disability. The forum found that Respondent engaged in one unlawful employment practice by failing to reasonably accommodate Complainant's disability on one occasion. However, the forum did not award damages because there was no evidence that Complainant lost any pay, incurred any out-of-pocket expenses, or suffered any emotional, mental, and physical suffering that was attributable to Respondent's unlawful employment practice. Although Respondent's practice of requiring Complainant to provide a "medical note" for each OFLA-related absence did not violate the OFLA with respect to Complainant because Complainant's OFLA-related absences fit within the exceptions in OAR 839-009-0260(9), the forum noted that this practice would violate the OFLA if no exceptions applied.

The above-entitled case came on regularly for hearing before Alan McCullough, designated as Administrative Law Judge ("ALJ") by Brad Avakian, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on April 2, 3, 4, and 9, 2013, at the W. W. Gregg Hearing Room of the Oregon Bureau of Labor and Industries, located at 800 NE Oregon Street, 10th floor, Portland, Oregon. Closing arguments were held by phone on May 1, 2013.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by case presenter Chet Nakada, an employee of the Agency. Robert Argyle ("Complainant") was present throughout the hearing. Joseph Haddad, Complainant's attorney, was present through part of the hearing. Oak Harbor Freight Lines, Inc.

("Respondent") was represented at the hearing by Richard Hunt, attorney at law. Also present throughout the hearing was Matthew Scudder, the person designated by Respondent to assist Mr. Hunt in the presentation of Respondent's case, and Desiree Marek, Mr. Hunt's legal assistant.

The Agency called the following witnesses: Complainant; Kerry Johnson, former Agency investigator; David Miller, Complainant's shop steward; Thomas Strickland, Teamsters Local 81 secretary/treasurer; and Georgia Garza, Complainant's girlfriend.

Respondent called the following witnesses: Shae Tangredi, physical therapist; Robert Braun, Jr., Respondent's Director of Human Resources and Labor Relations; Kim Cookson, Respondent's Human Resources manager; Matthew Scudder, Respondent's Portland terminal manager; Scott Pitton, private investigator; and Desiree Marek, legal assistant to Mr. Hunt.

The Agency and Respondent both called Complainant and Jonathan Blatt, Complainant's treating physician (by phone), as witnesses.

The forum received into evidence:

a) Administrative exhibits X1 through X41 (submitted prior to hearing) and X42 through X56 (submitted after hearing).

b) Agency exhibits A1 through A3, A5 through A7, A9, A10, A11, pp. 2-10 and A12. Agency exhibits A4, A8, and A13 were offered but not received.

c) Respondent exhibits R2 through R7, R10 through R12, R15, R18, R19, R24 through R27, R28 except for Bates ##s 476, 498, 499, and 516, R30, R31, R33 through R35, R37 through R42, R45, R66, R70, R72, R74, R79, R84: Bates 1, 3-4, 27-30, and R86 through R88.

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

FINDINGS OF FACT – PROCEDURAL

1) On August 18, 2011, Complainant filed a verified complaint with the Agency's Civil Rights Division alleging that he was the victim of the unlawful employment practices of Respondent based on disability and invoking the Oregon Family Leave Act ("OFLA"). After investigation, the Agency issued a Notice of Substantial Evidence Determination on May 17, 2012, in which it found substantial evidence that Respondent had engaged in unlawful employment practices based on Complainant's disability and OFLA in violation of ORS 659A.183 and ORS 659A.112. (Testimony of Johnson; Exs. A1, A9)

2) On October 26, 2012, the Hearings Unit issued a Notice of Hearing to Respondent, the Agency, and Complainant stating the time and place of the hearing as February 26, 2012, beginning at 9:00 a.m., at the W. W. Gregg Hearing Room of the Oregon Bureau of Labor and Industries, located at 800 NE Oregon Street, 10th floor, Portland, Oregon. Together with the Notice of Hearing, the forum sent a copy of the Agency's Formal Charges, a document entitled "Summary of Contested Case Rights and Procedures" containing the information required by ORS 183.413, a document entitled "Servicemembers Civil Relief Act (SCRA) Notification, a multi-language notice explaining the significance of the Notice of Hearing, and a copy of the forum's contested case hearings rules, OAR 839-050-000 to 839-050-0445. (Ex. X2)

3) Summarized, the Agency's Formal Charges alleged that:

(a) At all times material, Respondent employed Complainant.

(b) Complainant has a disability as defined in ORS 659A.104 and OAR 839-006-0205 consisting of lumbar radicular pain and spondylolisthesis.

(c) Respondent, through a November 2, 2010, letter and as applied to Complainant, discriminated against Complainant in terms, conditions, and privileges of employment based on disability by utilizing standards, criteria or methods of administration that had the effect of discriminating on the basis of disability, in violation of ORS 659A.112(1)(c) and OAR 839-006-0200(2) & (3).

(d) Respondent did not reasonably accommodate Complainant's disability, thereby violating ORS 659A.112(2)(e), OAR 839-006-0200(1)(e), and OAR 839-006-0206(3).

(e) Respondent did not perform its duty to initiate an interactive process with Complainant related to his disability, thereby violating OAR 839-006-0206(4), (5), & (6).

(f) Respondent's requirement that Complainant provide a medical note to verify that each of his absences from work were related to his FMLA/OFLA qualifying condition violated ORS 659A.168 and OAR 839-009-0260(9).

(g) Respondent constructively denied Complainant OFLA to which he was entitled and disciplined him for his absences and late arrivals that were due to his serious health condition, thereby violating ORS 659A.183(1) and OAR 839-009-0320(3).

(h) Complainant is entitled to damages of at least $50,000 for emotional, mental, and physical suffering caused by Respondent's alleged unlawful employment practices, along with lost wages for a two day suspension of at least $400.

In addition, the Formal Charges asked that (1) Respondent be required to provide training to its managers, professional staff and employees who work in Oregon or supervise or manage employees working in Oregon on the OFLA's requirements, provided by BOLI's Technical Assistance for Employers Unit or other training agreeable

to the Agency; and (2) the entry of an appropriate Cease and Desist Order if the Agency prevails in this matter. (Ex. X2)

4) On November 13, 2012, Respondent, through counsel Richard Hunt, filed an answer in which Respondent denied engaging in the alleged unlawful practices and further numerous affirmative defenses. (Ex. X3)

5) Prior to hearing, the Agency filed three motions for *in camera* review and corresponding protective orders related to Complainant's medical records sought through informal discovery by Respondent. The ALJ granted all three motions and issued appropriate protective orders. (Exs. X6 through X15)

6) On February 11, 2013, Respondent moved for a postponement based on the illness of Respondent's counsel, his legal assistant, his secretary, and an automobile accident that morning involving Matthew Scudder, Respondent's Portland terminal manager who was scheduled to assist Respondent's counsel with hearing preparation. The Agency did not object and the hearing was reset to begin on April 2, 2013. (Exs. X16, X17, X18)

7) On March 15, 2013, Respondent filed a motion to take Complainant's deposition, a motion in limine to allow and/or exclude evidence, and another motion to postpone the hearing. On March 21, 2013, the Agency filed objections to all three motions. On March 25, 2013, the ALJ denied all three of Respondent's motions. (Exs. X23, X27 through X32)

8) On March 26, 2013, Respondent filed a motion for a discovery order to compel the Agency to: (a) supplement its answer to Respondent's interrogatory inquiring about Complainant's alleged emotional, mental and physical suffering; and (b) produce any documents not already produced in response to Respondent's earlier informal request for production seeking "[a]ll notes, correspondence, diaries, calendars, tape recordings, or other writings of any kind with respect to Complainant's employment * * *." (Ex. X34)

9) On March 26, 2013, Respondent filed a motion to have the hearing reported by an official court reporter. On March 27, 2013, the ALJ issued an order denying Respondent's motion to have the hearing reported by an official court reporter. In pertinent part, the order stated:

> "The forum's audio recording will be the official record of the hearing and any transcript made from it will be the official transcript of the hearing. However, with three conditions, Respondent is free to bring a court reporter to the hearing if it believes that an accurate and complete record cannot be otherwise obtained. First, Respondent bears all responsibility for paying the court reporter. Second, the court reporter is not disruptive of the proceedings. Third, the court reporter must sign a Protective Agreement confirming that he or she has read the four

Protective Orders issued by the forum and agrees to be bound by them. * * *" (Exs. X35, X37)

10) On March 27, 2013, the ALJ issued a discovery order granting Respondent's March 26, 2013, motion. In pertinent part, the order stated:

"On March 26, 2013, Respondent filed a motion to compel seeking a discovery order to compel the Agency to provide additional discovery in two categories. **First**, by supplementing its answer to Respondent's Interrogatory No. 5 by specifically identifying:

"a. The specific types of emotional, mental, and physical suffering experienced by Complainant;

"b. As to alleged suffering occurring prior to August 18, 2011, the approximate duration of each type of suffering; and

"c. Whether Complainant's suffering has ended or is continuing to the present."

"Second, to compel the Agency to produce any documents not produced in response to Respondent's Request for Production No. 5 that seeks "All notes, correspondence, diaries, calendars, tape recordings or writings of any kind with respect to Complainant's employment * * *."

"The forum has already received documentation of Respondent's informal discovery requests containing the above interrogatory and request for production. As noted in my ruling denying Respondent's motion to depose Complainant, the information sought in Respondent's request for response to Interrogatory No. 5, although not identical, is within the scope of Respondent's original Interrogatory. In response to that interrogatory, the Agency's answer offered no substantive information whatsoever. In response to Respondents' Request for Production No. 5, the Agency responded by stating it 'has not been able to locate, if they exist' any such documents or records.

"OAR 839-050-0200, in pertinent part, provides:

"(4) Except as provided in sections (6) and (9) of this rule, before requesting a discovery order, a participant must seek the discovery through an informal exchange of information.

"(5) Except as provided in sections (6) and (9) of this rule, a request for a discovery order must be filed with the Hearings Unit, be in writing, and must include a description of the attempts to obtain the requested discovery informally. The administrative law judge will consider any objections by the participant from whom discovery is sought.

"* * * * *

> "(7) Any discovery request must be reasonably likely to produce information that is generally relevant to the case. * * *"
>
> "I find that Respondent's motion for a discovery order meets the criteria set out in paragraphs "(4), (5), and (7)" above. The Agency has already had an opportunity to file objections to these requests and did so in response to Respondent's motion to depose Complainant. Those objections are overruled." (Ex. X38)

11) At the start of the hearing, the ALJ orally advised the Agency and Respondent of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing. (Statement of ALJ)

12) On April 11, 2013, after the conclusion of the evidentiary portion of hearing, the ALJ issued an order scheduling oral closing argument for May 1, 2013, by telephone. The order also set out a briefing schedule. (Ex. X43)

13) On April 23, 2013, Respondent filed a motion for summary judgment. The Agency filed objections; Respondent supported its motion with a reply to the Agency's objections; and the Agency objections to Respondent's reply. Respondent's motion is **DENIED**. The forum's rules do not specifically state that a motion for summary judgment must be made prior to the hearing. However, summary judgment is intended to be a tool to shorten proceedings by eliminating the need for litigation of undisputed material facts. In this case, Respondent's motion was made after all material facts were litigated, and the forum does not consider it. (Exs. X46 through X49)

14) Respondent and the Agency timely filed briefs and responsive briefs. (Exs. X50 through X53, X55)

15) On June 5, 2013, Respondent filed a motion requesting the forum to take official notice of an ongoing federal district court proceeding "addressing the lawfulness of [Respondent's] medical note procedure" and a "filing by Complainant * * * in that federal court proceeding." On June 11, 2013, the Agency filed a response to Respondent's motion in which it attached additional documents related to the federal court proceeding "in order for the Forum to have a complete record." The forum GRANTS Respondent's motion, and also takes official notice of the documents filed by the Agency. (Exs. X54, X56)

16) On October 18, 2013, 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 Agency timely filed a motion for extension of time to file exceptions that was granted, and the Agency and Respondent both timely filed exceptions on December 2, 2013. Those exceptions are addressed in changes in the Opinion section of this Final Order.

FINDINGS OF FACT – THE MERITS

1) At all times material herein, Respondent was a business corporation registered in the state of Washington that employed 25 or more persons, including Complainant, in the State of Oregon during each of 20 or more calendar workweeks in 2010 and 2011. (Formal Charges; Respondent Answer; Ex. A2)

2) At all times material in 2010 and 2011, Complainant had OFLA leave available to him. (Ex. R70)

3) Respondent is in the business of making freight deliveries by truck. At all times material, Respondent and Teamsters Local 81 ("Local 81") were parties to a collective bargaining agreement. Respondent's truck drivers, including Complainant, were members of Local 81. (Testimony of Scudder, Complainant, Strickland; Exs. R4, R6)

4) On-time delivery is critical to Respondent's business. Since the 1984 deregulation of the trucking industry, Respondent has marketed itself as a business that makes early deliveries, on-time deliveries, and performs quality handling of goods. If Respondent fails to make timely deliveries on "guaranteed" deliveries, the customer gets the delivery for free. (Testimony of Braun, Scudder)

5) When Respondent's drivers are tardy to work, this may result in Respondent being unable to meet a guaranteed delivery time to a customer or Respondent may have to get another driver to "flex his start time" and come in earlier to cover that time, which may result in that driver working extra overtime at the end of the driver's shift, resulting in extra labor costs to Respondent. (Testimony of Scudder)

6) At all times material, Respondent had an unwritten leave policy for employees who have provided OFLA/FMLA[1] medical verification[2] and been granted OFLA/FMLA intermittent leave. Summarized, Respondent only excuses a medically-related absence as intermittent OFLA/FMLA leave if the employee who has been granted OFLA/FMLA intermittent leave provides a short "note" from their medical provider that connects the medical condition documented in their original medical verification with their absence. The employee is not required to actually visit their medical provider each time they use intermittent leave and it is sufficient if the employee's medical provider faxes a note to Respondent. (Testimony of Braun, Cookson)

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[1] Respondent is covered by both OFLA and FMLA and the terms were used interchangeably by the participants and witnesses during the hearing.

[2] Respondent used the term "medical certification," the term used in FMLA. OFLA uses the term "medical verification" to describe the same medical documentation and the forum uses the latter term, even though the term "medical certification" may have been used at hearing.

7) Respondent's attendance policy, agreed to with the Teamsters Local 81, provides that an employee is charged with an "Occurrence" whenever "the employee does not report for work as scheduled." All disciplinary procedures related to attendance are taken on the basis of the number of "Occurrences" charged to an employee. "Occurrences" are calculated as follows:

- "1 Occurrence – Any one-day absence that was not a prescheduled day off.

- "1 Occurrence – Any 2 tardies (Consisting of 3 minutes or more late). Habitually being 3 minutes late will also lead to discipline.

- "1/2 Occurrence -- Any day where worked 4 hours or less and your schedule requires you to work 8."

Related to "Call in Procedure," the policy provides:

> "Employees must report absences to their supervisor two (2) hours prior to the start of their scheduled work time, (Supervisor will be appointed by the terminal). In no event will a call of less than one (1) hour be acceptable."

Related to tardiness, the policy provides:

> "Arriving at work late will be recorded as ½ occurrence. Three (3) minutes late from an employee's scheduled work time will constitute a tardy. Two such late arrivals will be one occurrence."

Related to discipline, the policy provides:

> "Employees who accumulate occurrences (resulting from Unscheduled absences) will be deemed to have unreliable attendance and be subject to discipline. Employees who continue to have unreliable attendance will be subject to discipline and termination.
>
> - "3rd Occurrence -- Verbal warning with written documentation
> - "4th Occurrence -- The manager/supervisor will issue a formal written warning
> - "5th Occurrence -- The manager/supervisor will issue a suspension
> - "6th Occurrence -- The employee will be terminated (when agreed by manager)

"(The above are for occurrences all within a rolling nine (9) month period)" (Exs. A3, R6, R7).

8) Complainant was initially employed by Respondent as a pick-up and delivery ("P&D") truck driver in October 16, 2006. Initially, he worked as a "floater" who filled in for more senior drivers when they were absent from work. Under the collective bargaining agreement, Complainant and other members of Local 81 can bid on jobs every year in March. As Complainant gained seniority, he bid on different starting times

and at different times worked as a “floater,” pickup and delivery driver, a hostler, and a line driver. At different times, Complainant bid on jobs that had starting times of 8:00 a.m., 8:30 a.m., 9:00 a.m., 10:30 a.m., noon, 3 p.m., 5 p.m., and 9 p.m. From October 2010 until April 11, 2011, Complainant’s regular start time was noon. (Testimony of Complainant, Scudder; Formal Charges; Respondent Answer; Ex. R45)

9) Respondent's written job description for Complainant's job as “Tractor Trailer Truck Driver," updated as of March 2007, included the following language:

> “Because the Company's customers rely on us to meet time critical commitments it is an essential element of this position that each employee be able to meet the Company's long hours of work required and our attendance reliability standard. Each employee is responsible for their unscheduled absences or tardy. Any employee not able to meet or exceed the minimum standards with (or without) a reasonable accommodation will be given a leave of absence (in accordance with applicable Policy) without pay (unless otherwise eligible for pay) until such time as the employee can meet this standard or standards with (or without) an accommodation. FMLA may be available for the leave period."

(Testimony of Complainant; Ex. R3)

10) Respondent’s written “Driver Standards” that were in place during Complainant’s employment included the following language:

> “Make a habit of reporting to work on time. The extent to which the company is able to provide on-time service to customers begins with you.
>
> “Unscheduled absenteeism is detrimental to the service of our customers and will not be tolerated. If unable to report for duty, you must notify your supervisor as early as possible prior to your anticipated start time. Unscheduled absenteeism places a hardship on fellow employees and efficient functions of operation."

(Testimony of Scudder, Complainant; Ex. R4)

11) Complainant has spondylolisthesis and has experienced lumbar radicular pain since an accident in 1992 when he fell from an Army helicopter. He feels “a constant pain that radiates in my lower back and shoots down my outside of my left leg * * * [with] the outside of my leg * * * numb due to the nerve damage.” He expects to have surgery sometime in the future to improve his condition. (Testimony of Complainant, Blatt; Ex. A11)

12) Spondylolisthesis is a condition that occurs when one vertebrae slips onto another and causes a narrowing and irritation of nerve root openings. In Complainant’s case, it causes lumbar radicular pain, which is pain down his leg. (Testimony of Blatt)

13) Throughout his employment with Respondent, Complainant’s spondylolisthesis has made it difficult for him to climb in and out of truck trailers. Lifting heavy objects has made him extremely sore and unable to sleep at night and created a possibility that his back will be further damaged. (Testimony of Complainant)

14) By October 2010, Complainant's spondylolisthesis had intensified and made him uncomfortable if he had to sit for "periods for time." Standing also became "very uncomfortable at times" for him and bending down to pick up freight was "extremely painful." (Testimony of Complainant)

15) Dr. Jonathan Blatt, a pain management physician, was Complainant's treating physician from 2010 until December 2012. In 2010, Dr. Blatt began treating Complainant with a new regimen of pain medication that caused Complainant stomach and intestinal problems and "extreme vomiting." Among other things, Dr. Blatt recommended that Complainant stretch before going to work, lose weight to help with his back pain, and consult a pain psychologist. At the time, Complainant, who is of average height, weighed approximately 350 pounds. (Testimony of Complainant, Blatt; Observation of ALJ)

16) Complainant was absent from work on October 13 and October 22, 2010. (Testimony of Complainant)

17) October 25, 2010, Respondent issued a "Notice of Verbal Warning" to Complainant that stated, in pertinent part:

> "On (10/22/2010) your 3rd occurrence triggered this warning.
> "Please be advised that further absences and tardiness may result in further disciplinary action, up to and including Termination.
>
> **"OCCURRENCES:**
>
> **"*****
> "**TARDY:**
> **NONE**
>
> **"ABSENT:**
> **05/06/2010 = 1 occurrence**
> **10/13/2010 = 1 occurrence**
> **10/22/2010 = 1 occurrence**
>
> **"TOTAL OCCURRENCES: 3"** (Ex. A6)

18) Sometime in October 2010, Complainant called Kim Cookson, Respondent's Human Resources Manager, told her he had a medical condition he felt qualified him for OFLA/FMLA, and asked to have an OFLA/FMLA packet mailed to him. Cookson sent an OFLA/FMLA packet to Complainant that included a FMLA Medical Certification Form ("FMLA Form"). Complainant gave the Form to Dr. Blatt to fill out, telling Dr. Blatt he was requesting FMLA leave to protect his job because he was "being disciplined for being tardy and absences" related to the condition for which Dr. Blatt was treating him. (Testimony of Complainant, Cookson)

19) On October 29, 2010, Dr. Blatt filled out Respondent's FMLA Form for Complainant, noting that Complainant had a "Serious Health Condition" involving a "chronic condition requiring treatment."[3] Dr. Blatt provided handwritten answers to several questions on the form, reprinted verbatim below. The questions are set out in bold and underlined, with Blatt's answers in italics.

> "**State the patient's diagnosis, approximate date the condition commenced and the probable duration of the condition**. *lumbar radicular pain & spondylolisthesis. Duration is until he gets back surgery -- he hopes for next year*.
>
> "**What are the medical facts that support the diagnosis?** *MRI findings & physical exam*
>
> "**If leave is required to care for a family member of the employee with a serious health condition, does the patient require assistance for basic medical or personal needs or safety or for transportation? Yes/No** *No*
>
> "**An estimate of the number of treatments and expected interval between such treatments** *ongoing monthly office visits*. **Actual or estimated dates of treatment known** *monthly -- once, sometimes twice* **Period required for recovery, if any** *after surgery once it is scheduled*
>
> "**If a regimen of continuing treatment by the patient is required under your supervision, provide a general description of such regimen**. *he is on his own incorporating a fitness weight-loss program*
>
> "**Is necessary for the employee to be absent from work for the patient to receive treatment?** *Yes* **Please describe.** *He will be at our office for those visits. There may also be occasional tardiness due to severe pain.*

(Testimony of Complainant, Blatt; Ex. A11)

20) Respondent received Dr. Blatt's certification. On November 2, 2010, Kim Cookson, Respondent's Human Resources manager, sent a letter to Complainant stating that he was eligible for leave under FMLA/OFLA based on a "serious health condition that [made him] unable to perform the essential functions of [his] job." In the same letter, Cookson stated:

> "I have received certification of your need for intermittent Family and Medical Family Leave and Oregon Family Medical leave (FMLA/OFLA). * * * Upon the future use of this intermittent leave a medical note will be required from your provider. The note will need to indicate the absence is related to the FMLA/OFLA

[3] The Form defined "chronic condition requiring treatment as: "A chronic condition which (a) requires periodic visits for treatment by a health care provider and (b) continues over an extended period of time (including recurring episodes of a single underlying condition) and (c) may cause episodic rather than a continuing period of incapacity[.]"

> qualifying condition. Without this information, I would be unable to apply FMLA/OFLA to any specific future absences."

(Testimony of Complainant, Cookson; Ex. A11)

21) Cookson sends a similar letter to all employees who apply for intermittent OFLA/FMLA leave and are deemed eligible by Respondent. (Testimony of Cookson)

22) On November 2, 2010, Cookson sent a letter to Dr. Blatt, "cc'd" to Complainant, that stated:

> "I am the Human Resources manager with Oak Harbor Freight Lines, the employer of your patient, Mr. Shane Argyle. I am in receipt of the attached FMLA paperwork dated 10/29/2010. It is my understanding Mr. Argyle is requesting to be tardy from work under FMLA/ADA. Being at work on time is an essential job duty that all employees whether disabled or not must be able to comply with. Thus OHFL is not able to excuse Mr. Argyle's tardies based on his health condition. OHFL remains hopeful that an accommodation can be achieved where he will be able to perform the essential duties of the job.
>
> "I am writing to solicit ideas for accommodations which will assist Mr. Argyle in meeting all essential job performance duties while preserving his health. I am copying this letter to Mr. Argyle so that he can provide you with a HIPPA release if you believe one necessary to properly respond.
>
> "What reasonable accommodations can the employer make to assist Mr. Argyle in performing all essential work duties?
>
> I respectfully request your response to these questions by November 17, 2010. If no response is received, OHFL will assume Mr. Argyle is meeting his obligation to timely report for work without accommodation. Your response can be faxed to my confidential fax at [][4] or mailed to my attention at the address on the letterhead. I can be reached at [][5] to answer any specific questions you might have. Please leave a detailed message on my confidential voicemail if I am not available."

(Testimony of Cookson, Complainant; Ex. A11)

23) In response to Cookson's letters, Complainant called Cookson and explained that his tardies were not a result of his inability to get up on time, but because he became ill on the way to work due to his medications that caused him to have to stop and vomit before he could continue on his way to work. Cookson directed Complainant to talk with Scudder, Respondent's Portland terminal manager, who told Complainant that Respondent is a time sensitive business and if Complainant couldn't be at work on

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[4] The forum has deleted Cookson's fax and phone numbers because they are not essential to this Final Order and to protect Cookson's and Respondent's privacy.

[5] *Id*.

time, "they have to give [Complainant's] route to somebody else so that the truck can go out on time * * *." Dr. Blatt did not contact Cookson. (Testimony of Complainant, Blatt)

24) Complainant missed scheduled work on November 2, 3, and 4, 2010. He called into work at 10:30 a.m. on November 2 and told the Respondent's dispatcher he would be absent due to "stomach pains." On November 3, he called into work at 8 p.m. and told the dispatcher he would still be out sick on November 4, 2010. On November 4, 2010, he called Respondent's dispatcher at "2015/4"[6] and left a message that he would be absent due to "FMLA?".[7] (Testimony of Complainant; Ex. A7)

25) On November 4, 2010, Respondent issued a "Notice of Written Warning" to Complainant that stated, in pertinent part:

> "This letter serves as a Written Warning Associated with your 4th occurrence. On (11/02/2010) your 4th occurrence triggered this warning.
>
> "Please be advised that further absences and tardiness may result in further disciplinary action, up to and including Termination.
>
> **"<u>OCCURRENCES:</u>**
>
> **"***
> "**<u>TARDY:</u>**
> **None**
>
> **"<u>ABSENT:</u>**
> **05/06/2010 = 1 occurrence**
> **10/13/2010 = 1 occurrence**
> **10/22/2010 = 1 occurrence**
> **11/02/2010, 11/03/2010 and 11/04/2010 = 1 occurrence**
>
> **"TOTAL OCCURRENCES: 4"** (Testimony of Cookson; Ex. R66)

26) On December 14, 2010, Respondent granted Complainant retroactive OFLA/FMLA leave for November 2-4, 2010, after Complainant obtained a note from Dr. Blatt's physician's assistant stating that he was absent from work those days "due to his FMLA condition" and gave the note to Respondent. (Testimony of Complainant; Ex. A28)

27) Complainant was tardy on November 9, 2010, for a reason unrelated to his OFLA condition. (Testimony of Complainant)

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[6] Respondent's dispatchers write down the time of calls in military notation. "2015/4" is the handwritten notation on the Attendance Form filled out by the dispatcher next to "Time of Call."

[7] "FMLA?" is the handwritten notation by the dispatcher.

28) On December 6, 2010, Complainant called in at 10:30 a.m. and said he would be absent from work that day due to "FMLA?".[8] Complainant did not provide a medical note to Respondent to show that his absence was related to his OFLA condition.[9] (Testimony of Complainant; Ex. A7)

29) On December 9, 2010, Complainant was tardy to work for reasons unrelated to his OFLA leave.[10] (Testimony of Complainant; Ex. A6)

30) On December 13, 2010, Complainant arrived at work eight minutes late because he had to vomit on his way to work due to the side effects of the medication Dr. Blatt prescribed for Complainant's back problem and related pain. Complainant did not provide a medical note to Respondent to show that his absence was related to his OFLA condition but did call Respondent on the way to work and said he would be tardy because of his "FMLA" condition. (Testimony of Complainant; Exs. A6, R71)

31) On December 14, 2010, Respondent issued a "Notice of Written Warning" to Complainant that stated, in pertinent part:

> "This letter serves as a Written Warning Associated with your 4th occurrence. On (12/13/2010) your 4th occurrence triggered this warning.
>
> "Please be advised that a 5th occurrence will result in suspension without pay. Further absenteeism/tardiness may result in further disciplinary action, up to and including Termination."
>
> **"<u>OCCURRENCES:</u>**
>
> **<u>TARDY:</u>**
> **11/09/2010 and 12/13/2010 = 1 occurrence**
> **<u>Absent:</u>**
> **05/06/2010 = 1 occurrence**
> **10/13/2010 = 1 occurrence**
> **10/22/2010 = 1 occurrence**
>
> **"TOTAL OCCURRENCES: 4**"

"FMLA" is handwritten after the words asking for "Employee signature," followed by initials that appear to be Complainant's. (Testimony of Cookson; Exs. A6, R66)

32) Complainant was tardy to work on December 28, 2010, for a reason unrelated to his OFLA condition. (Testimony of Complainant, Ex. A10)

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[8] *Id.*

[9] Complainant was not given an "Occurrence" for this absence and there is no evidence in the record to explain why.

[10] *Id.*

33) Complainant was absent from work because of intestinal problems from January 17-28, 2011.[11] On February 1, 2011, Cookson sent Complainant a letter that stated as follows:

> "For your recent medical leave you appear eligible for * * * (FMLA). FMLA allows qualifying employees up to twelve weeks of job protected leave during a fiscal year for qualifying events * * *.
>
> "Attached is a medical certification which your provider will need to complete. The certification will need to be returned by February 16, 2011 in order to assure your absence is FMLA qualifying.
>
> "I wish you a full and speedy recovery. Please call me if you need any assistance."

Complainant did not respond to Cookson's letter, based on his belief that his absence was covered by his existing medical verification. Complainant was not disciplined for his absence. (Testimony of Cookson, Complainant, Scudder, Garza; Exs. A7, A10, R5, R70, R71)

34) Complainant took vacation on February 7-8, 2011, but missed no other scheduled days of work in February. (Testimony of Complainant, Cookson; Ex. R71)

35) Complainant went home sick due to intestinal problems after working five hours on March 2, 2011, and missed work on March 3 and 4 because of the same problems. (Testimony of Complainant; Ex. R7)

36) Dispatcher's "Supervisor Absence Sheet" for March 3, 2011, notes that reason Complainant was absent was "sick" and his "absence code' was "SWOP."[12] (Testimony of Complainant; Ex. A7)

37) Dispatcher's "Supervisor Absence Sheet" for March 4, 2011, notes the reason for Complainant's absence as "FMLA" and an "absence code" of "SWOP." (Testimony of Complainant)

38) On March 4, 2011 Respondent issued a Notice of Written Warning" to Complainant stating, in pertinent part:

> "This letter serves as a Written Warning Associated with your 4th occurrence. On (03/03/2011) your 4th occurrence triggered this warning.
>
> "Please be advised that a 5th occurrence will result in a suspension without pay. Further absenteeism/tardiness may result in further disciplinary action, up to and including Termination.

---

[11] He worked 1.9 hours on January 18.

[12] Complainant testified that "SWOP" means "sick without pay."

"<u>OCCURRENCES:</u>

<u>TARDY:</u>
11/09/2010 and 12/13/2010 and 12/28/2010 = 1.5 occurrences
<u>Absent:</u>
10/13/2010 = 1 occurrence
10/22/2010 = 1 occurrence
03/03/2011 = 1 occurrence

"**TOTAL OCCURRENCES: 4.5"** (Ex. A6)

39) Complainant took vacation time from Tuesday, March 22 through Tuesday, March 29, 2011, worked March 30, then called in sick on March 31 and April 1 because of intestinal problems related to his OFLA condition. He was not paid for the latter two days and provided no medical note to show that his absence was related to his OFLA condition. (Testimony of Complainant, Cookson; Ex. R71)

40) Complainant missed work on April 5, 2011, because of sickness related to his OFLA condition. (Testimony of Complainant)

41) Between October 2010 and April 8, 2011, Complainant notified Respondent's dispatcher that his absence was "FMLA" related each time that he called in his absence or tardy when his sickness was related to his OFLA-condition. (Testimony of Complainant)

42) Between October 2010 and April 8, 2011, Complainant missed no work due to any doctor's appointment. (Testimony of Complainant)

43) On April 1, 2011, Respondent issued a "Notice of Written Warning" to Complainant that stated, in pertinent part:

> "This letter serves as a Written Warning Associated with your 4th occurrence. On (3/31/2011) your 4th occurrence triggered this warning.
>
> "Please be advised that a 5th occurrence will result in suspension without pay. Further absenteeism/tardiness may result in further disciplinary action, up to and including Termination."

"<u>OCCURRENCES:</u>
<u>TARDY:</u>
11/09/2010 = .5, 12/13/2010 = .5, 12/29/2010 = .5
Total Tardy: 1.5
<u>ABSENT:</u>
10/22/2010 = 1, 03/03/2011 = 1, 03/31/2011 = 1
Total Absent = 3

TOTAL POINTS: 4.5" (Ex. A6)

44) On April 5, 2011, Complainant was absent because of sickness related to his OFLA condition. Complainant did not provide a medical note to Respondent to show that his absence was related to his OFLA condition (Testimony of Complainant; Ex. A10)

45) On April 7, 2011, Respondent issued a "Notice of Intent to Suspend" to Complainant that stated, in pertinent part:

> "This letter informs you of [Respondent's] intent to suspend. Your fifth (5th) occurrence on **04/05/2011** triggered this intent. You will be notified of your suspension day(s) at a later date.
>
> "Please be advised that one further occurrence may result in Termination of employment from [Respondent]."
> "* * * * *
> **"TARDY:**
> **11/09/2010 = .5, 12/13/2010 = .5, 12/29/2010 = .5**
> **Total Tardy: 1.5**
>
> **"ABSENT:**
> **10/22/2010 = 1, 3/03/2011 = 1, 03/31/2011 = 1, 04/05/2011 = 1**
>
> **TOTAL OCCURRENCES: 5.5"** (Ex. A6)

46) Starting April 11, 2011, Complainant was granted a float bid in which he did not have a designated start time and drove a "straight" truck with a lift gate on the back,[13] a position he bid into for medical reasons. This float bid was in response to conversations Complainant had with Respondent's dispatcher about giving him a "more accommodating shift" that would help him more easily get to doctor's appointments. As a result of this bid, Complainant was able to attend several medical appointments that he would not have been able to attend with his former noon shift. (Testimony of Complainant; Exs. A10, R45)

47) Complainant was 11 minutes tardy to work on April 13, 2011, for a reason unrelated to his OFLA condition. (Testimony of Complainant)

48) On April 14, 2011, Respondent issued a "Notice of Suspension" to Complainant that stated, in pertinent part:

> "This suspension letter is being issued for attendance. Your seventh (7th) occurrence on 04/13/2011 triggered this suspension. You are to be suspended for two (2) days on Wednesday **04/20/2011** and Thursday **04/21/2011**.

[13] Previously, he had driven a "tractor-trailer."

"Please be advised that one further occurrence may result in further disciplinary action up to and including discharge from Oak Harbor Freight Lines, Inc.
"* * * * *
"**TARDY:**
11/09/2010 = .5, 12/13/2010 = .5, 12/28/2010 = .5, 4/13/2011 = .5
Total Tardy = 2
ABSENT:
10/13/2010 = 1, 10/22/2010 = 1, 03/03/11 = 1, 03/31/2011 = 1, 04/05/11 = 1
Total Absent = 5
TOTAL OCCURRENCES: 7" (Ex. A6)

49) Complainant was suspended without pay on April 20 and 21, 2011. At that time, he was earning $20.21 per hour. (Testimony of Complainant)

50) Johnson, Blatt, Strickland were credible witnesses. (Testimony of Johnson, Blatt, Strickland)

51) Despite her inherent bias, the forum finds that Garza, Complainant's live-in girlfriend and the mother of one of his children, was a credible witness except for her testimony about the extent of Complainant's emotional and physical suffering caused by his suspension, which she substantially exaggerated. (Testimony of Garza)

52) Cookson was a credible witness in all her testimony but her testimony that Complainant never contacted her after receiving Cookson's November 2, 2010, letter to Dr. Blatt. The forum has credited Complainant's testimony about his contact with Cookson because of Complainant's motivation to call Cookson in response to her letter and his credible testimony that Cookson directed him to talk with Scudder, his terminal manager. (Testimony of Cookson)

53) Complainant was a credible witness except on two key issues. First, his testimony about his emotional and physical distress that he directly attributed to Respondent's alleged unlawful employment practices was substantially exaggerated. Second, his testimony that Dr. Blatt refused to write medical notes excusing his OFLA-related absences was suspect. It is telling that the Agency called Dr. Blatt as a witness, but elicited no testimony from him on this key issue, as Dr. Blatt's corroboration of Complainant's testimony would have buttressed Complainant's credibility on this issue. (Testimony of Complainant)

CONCLUSIONS OF LAW

1) At all times material herein, Respondent was an "employer" as defined in ORS 659A.001(4) and a "covered employer" as defined in ORS 659A.150(1) and ORS 659A.153(1).

2) The Commissioner of the Bureau of Labor and Industries has jurisdiction of the persons and of the subject matter herein. ORS 659A.800 to ORS 659A.865.

3) Respondent did not reasonably accommodate Complainant's disability by excusing him for his December 13, 2010, tardy, thereby violating ORS 659A.112(2)(e) and OAR 839-006-0206(3).

4) Respondent performed its duty to initiate and engage in an interactive process with Complainant related to his disability and did not violate OAR 839-006-0206(4), (5), & (6).

5) Under the facts of this case,[14] Respondent's requirement that Complainant provide a medical note to verify that each of his absences from work were related to his FMLA/OFLA qualifying condition did not violate ORS 659A.168 and OAR 839-009-0260(9).

6) Respondent did not constructively deny Complainant OFLA leave by disciplining him for absences and one tardy that were due to his serious health condition and did not violate ORS 659A.183(1) and OAR 839-009-0320(3).

7) Respondent did not discriminate against Complainant in terms, conditions, and privileges of employment based on disability by utilizing standards, criteria or methods of administration that had the effect of discriminating on the basis of disability and did not violate of ORS 659A.112(1)(c) and OAR 839-006-0200(2) & (3).

8) Pursuant to ORS 659A.850, the Commissioner of the Bureau of Labor and Industries has the authority under the facts and circumstances of this case to award Complainant back pay and damages for emotional, mental, and physical suffering sustained and to protect the rights of Complainant and others similarly situated. The actions required of Respondent in the Order section of this Final Order are an appropriate exercise of that authority.

OPINION

I. OREGON FAMILY LEAVE ACT

A. OFLA – Requirement of Medical Verification

The Agency alleged that Respondent violated ORS 659A.168 and OAR 839-009-0260 by requiring Complainant to provide a “medical note,” which the Agency contends should be considered a “medical verification,” for each of his OFLA-related absences or suffer the consequence that each absence would be considered unexcused and counted against him for disciplinary purposes.

[14] As discussed in the Opinion, the forum finds that Respondent’s requests for a “medical note” constituted a request for “medical verification” but did not violate the OFLA in these instances because the exceptions in OAR 839-009-0260(9) entitled Respondent to seek medical verification for each of Complainant’s absences.

The events that gave rise to this case began in October 2010 when Complainant initially requested an OFLA/FMLA leave packet from Respondent. On October 29, 2010, Dr. Blatt completed Respondent's FMLA certification form, stating that Complainant had the serious health condition of "lumbar radicular pain & spondylolisthesis,"[15] with a duration "until he gets back surgery" that required "ongoing monthly office visits" and might also involve "occasional tardiness due to severe pain." At that time, Complainant already had three "occurrences"[16] on his disciplinary record related to three earlier unexcused absences in May and October 2010. After receiving the completed form, Kim Cookson, Respondent's Human Resources manager, sent a letter to Complainant on November 2, 2010, stating that he was eligible for intermittent leave under FMLA/OFLA based on his serious health condition.[17] In her letter, Cookson issued the following directive that forms the basis of the Agency's allegation:

> "Upon the future use of this intermittent leave a medical note will be required from your provider. The note will need to indicate the absence is related to the FMLA/OFLA qualifying condition. Without this information, I would be unable to apply FMLA/OFLA to any specific future absences."

Through that letter, Respondent required Complainant to provide a medical note stating that his absence was related to his OFLA condition for every future absence related to that condition.[18]

ORS 659A.168 provides, in pertinent part:

> **"Medical verification and scheduling of treatment.** (1) Except as provided in subsection (2) of this section, a covered employer may require medical verification from a health care provider of the need for the leave if the leave is for a purpose described in ORS 659A.159 (1)(b) to (d). If an employee is required to give notice under ORS 659A.165 (1), the employer may require that medical verification be provided by the employee before the leave period commences. If the employee commences family leave without prior notice pursuant to ORS 659A.165 (2), the medical verification must be provided by the employee within 15 days after the employer requests the medical verification. * * * In addition to the medical verifications provided for in this subsection, an employer may require subsequent medical verification on a reasonable basis.

[15] For the rest of this Final Order, the forum refers this serious health condition as Complainant's "OFLA condition."

[16] *See* Finding of Fact #7 – The Merits for a description of how Respondent calculates "occurrences" and how they relate to disciplinary proceedings.

[17] In the absence of any evidence to the contrary, the forum infers that Respondent received Complainant's medical verification on November 2, 2010.

[18] The forum only looks at the period from November 2, 2010, through April 21, 2011, because that is the last date that the Formal Charges allege Respondent disciplined Complainant for taking leave related to his OFLA condition.

"* * * * *

"(3) Subject to the approval of the health care provider, the employee taking family leave for a serious health condition of the employee or a family member of the employee shall make a reasonable effort to schedule medical treatment or supervision at times that will minimize disruption of the employer's operations."

OAR 839-009-0260 provides, in pertinent part:

"(1) An employer may require an employee to provide medical verification of the need for OFLA leave, except that an employer may not require medical verification for parental leave. All requests for medical verification must be in writing and must state the consequences for failure to provide the requested medical verification.

"* * * * *

"(9) An employer may not request subsequent medical verifications more often than every 30 days and then only in connection with the employee's absence except when:

(a) Circumstances described by the previous medical verification have changed significantly (e.g., the duration or frequency of absences, the severity of conditions, or complications); or

(b) The employer receives information that casts doubt upon the employee's stated reason for the absence."

Respondent's defense to this allegation has two prongs. First, Respondent contends that its policy did not violate ORS 659A.168 or OAR 839-006-0260 because its continuing request for a "medical note" did not constitute a request for "medical verification." Second, Respondent contends that even if the forum finds that Respondent's request for a "medical note" constituted a request for "medical verification," OAR 839-050-0260(9) permitted Respondent to request medical verification for each of Complainant's absences related to his OFLA condition because : (1) more than 30 days elapsed since Respondent's last request; (2) because circumstances described by Dr. Blatt's October 29, 2010, medical verification had changed significantly; or (3) because Respondent received information that cast doubt upon Complainant's stated reason for his absence.

To evaluate these defenses, it is necessary to review Complainant's attendance record from November 2, 2010, through April 21, 2011, in detail. That record is set out below:

33 BOLI ORDERS

1. Dr. Blatt completed Respondent's medical verification form documenting Complainant's serious health condition October 29, 2010, noting that Complainant's issue was "lumbar radicular pain & spondylolisthesis," that Complainant would be at Blatt's office for "ongoing monthly visits" and there might be "occasional tardiness due to severe pain."

2. Respondent received the form on November 2, 2010. On the same day, Respondent notified Complainant that he was eligible for intermittent leave under FMLA/OFLA based on his serious health condition and that whenever he used OFLA intermittent leave a medical note would be required from his provider that indicated his absence was related to the FMLA/OFLA qualifying condition.[19]

3. Complainant missed scheduled work on November 2, 3, and 4, 2010, due to his OFLA condition. On November 4, 2010, Respondent issued a "Notice of Written Warning" to Complainant for his absence and charged him 1 occurrence for the three-day absence. On December 14, 2010, Respondent granted Complainant retroactive OFLA/FMLA leave for November 2-4, 2010, after Complainant obtained and provided a medical note from Dr. Blatt's physician's assistant stating that he was absent from work those days "due to his FMLA condition" and deleted the occurrence from Complainant's disciplinary record.

4. Complainant was tardy to work on November 9, 2010, for reasons unrelated to his OFLA condition and was penalized a .5 occurrence for his tardiness.

5. Complainant missed work on December 6, 2010, for reasons related to his OFLA condition, did not provide a medical note, and was not disciplined.

6. Complainant was tardy to work on December 13, 2010, for reasons related to his OFLA condition, did not provide a medical note, and was issued a written warning in which he was penalized a .5 occurrence for his tardiness.

7. Complainant was tardy to work on December 28, 2010, for reasons unrelated to his OFLA condition and was penalized a .5 occurrence for his tardiness.

8. Complainant was absent from work January 17-28, 2011, for "intestinal" problems, provided no medical note, and received no discipline.

9. Respondent sent Complainant a letter on February 1, 2011, attached to which was a medical certification form that Respondent said "your provider will need to complete."

10. Complainant missed no work in February 2011 except for two days of scheduled vacation.

[19] Based on Cookson's letter and testimony, the forum considers that Respondent's November 2, 2010, request for a medical note was continuous through April 21, 2011, the last date on which the Formal Charges allege Respondent committed an unlawful employment practice.

11. Complainant was absent from work on March 2-4, 2011 (Wednesday-Friday), for reasons related to his OFLA condition, did not provide a medical note, and was issued a written warning in which he was penalized 1 occurrence for his absence.

12. Complainant took vacation time from Tuesday, March 22 through Tuesday, March 29, 2011, worked March 30, then called in sick on March 31 and April 1, 2011 (Thursday-Friday) because of intestinal problems related to his OFLA condition. He provided no medical note to show that his absence was related to his OFLA condition and was issued a written warning in which he was penalized 1 occurrence for his absence.

13. Complainant was absent from work on Tuesday, April 5, 2011, for reasons related to his OFLA condition, did not provide a medical note, and was issued a written warning in which he was penalized 1 occurrence for his absence and notified of Respondent's intent to suspend him.

14. Complainant was tardy to work on April 13, 2011, for reasons unrelated to his OFLA condition, and was issued a suspension letter in which he was penalized .5 occurrence for his tardy and notified that Respondent was suspending him from work for two days on April 20 and 21, 2011.

1. Application of BOLI's "30-day" rule to the Complainant's tardies and absences.

The forum first examines Respondent's "30 day" defense. Under OAR 839-006-0260(9), Respondent was entitled to request medical verification from Complainant every 30 days, with the initial 30 day period starting on November 2, 2010. For reasons stated later in this Opinion, the forum regards Respondent's requirement of a medical note as a request for "medical verification." ***Based solely on the application of BOLI's "30 day" rule*** to the above facts, the forum draws the following conclusions:

a) Respondent was not entitled to ask Complainant for additional medical verification based on his November 2-4, 2010,[20] absences.

b) Respondent was entitled to ask for medical verification for Complainant's December 13, 2010, tardy because more than 30 days had passed since the Respondent received Complainant's original medical verification.

c) Respondent was entitled to ask for medical verification on February 1, 2011, for Complainant's January 17-28, 2011, absences because more than 30 days had passed since December 13, 2010.

[20] Since Respondent grouped Complainant's consecutive day absences together as a single occurrence for disciplinary purposes and all of Complainant's multiple consecutive day absences were related to his OFLA condition, the forum treats each OFLA-related absence counted as an "occurrence" as one request by Respondent for a medical certification.

d) Respondent was entitled to ask for medical verification for Complainant's March 2-4, 2011, absences because 30 days had passed since February 1, 2011.

e) Respondent was not entitled to ask for medical verification for Complainant's March 31 and April 1, 2011, absences because fewer than 30 days had passed since March 4, 2011.

f) Respondent was not entitled to ask for medical verification for Complainant's April 5, 2011, tardy because fewer than 30 days had passed since April 1, 2011.

In conclusion, the BOLI's 30-day rule permitted Respondent to ask Complainant for medical verification for his December 13, 2010, January 17-28, 2011, and March 2-4, 2011, absences. Accordingly, Respondent's requests for a medical note regarding those absences did not violate ORS 659A.168 or OAR 839-006-0260. This leaves only Complainant's November 2-4, 2010, and March 31- April 1, and April 5, 2011, absences for the forum's consideration.

2. Application of BOLI's "changed circumstances" rule to Complainant's November 2-4, 2010; March 31-April 1, 2011, and April 5, 2011 absences.

Under OAR 839-009-0260(9)(a), Respondent was entitled to request medical verification from Complainant for his absences on March 31, April 1, and April 5, 2011, if "[c]ircumstances described by the previous medical verification have changed significantly (e.g., the duration or frequency of absences, the severity of conditions, or complications)." Respondent's argument focuses on the increasing frequency and duration of Complainant's absences. BOLI's rule provides that any evaluation of a change in duration or frequency and duration of absences is to be conducted with reference to the circumstances described "by the previous medical verification." In this case, those circumstances were described by Dr. Blatt in his October 29, 2010, medical verification as "lumbar radicular pain & spondylolisthesis" requiring "ongoing monthly visits" with Blatt, with possible "occasional tardiness due to severe pain." The medical verification contains no mention of any possibility of multiple day absences. In addition, Complainant testified that his reason for asking Dr. Blatt to complete the medical verification form was to provide him with a medical excuse for the tardies he was experiencing due to nausea from the medication Dr. Blatt had prescribed for him.[21]

[21] Complainant's pertinent testimony on this issue follows: "I did not ask him to write that line. I told him that we had -- I informed him about our attendance policy and I explained to him that, uh, how the occurrences work, and that I had been getting sick and I was in a lot of pain, and that I had already received a tardy, I believe it was one or two tardies, I don't recall for sure, for those -- that type of situation, being in pain and/or extreme vomiting. And so because of that, for fear of me getting in trouble, he incorporated that line to try and insist that they understood that there would be this type of situation going on so that they were aware of it."

Because Dr. Blatt's October 29 medical verification does not project any multiple day absence, Complainant's three-day absence from November 2-4, 2010, which did not involve a doctor's appointment, qualifies as a "changed circumstance" under OAR 839-006-0260(9)(a), even though that leave commenced on the very day that Respondent approved his intermittent OFLA leave. Between November 4, 2010, and April 5, 2011, Respondent received no additional medical verification stating that Complainant's OFLA condition might involve absences for an entire day or more that did not involve a doctor's appointment. There was no evidence that Complainant had a doctor's appointment on March 31, April 1, or April 5, 2011.[22] Because Complainant's medical verification did not state that his OFLA condition might involve absences for an entire day or more that did not involve a doctor's appointment, Respondent was entitled to ask for medical verification for both absences under OAR 839-006-0260(9)(a).[23] [24]

3. Respondent's request for a "medical note" from Complainant was the equivalent of asking for a "medical verification."

Based on the ALJ's conclusion in the Proposed Order that the exceptions in OAR 839-006-0260(9) gave Respondent the right to ask for medical verification for each of

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[22] Complainant testified that he missed no work due to doctor's appointments related to his OFLA condition.

[23] *Cf. In the Matter of WINCO Foods, Inc.,* 28 BOLI 259, 297 (2007) (respondent was entitled to ask for subsequent medical verification under OAR 839-009-0260(6)(a), subsequently renumbered as OAR 839-009-0260(9)(a), when complainant's original medical verification anticipated that complainant's absences due to migraines would occur one to two times per month and complainant used OFLA leave eight times and missed 13 work days during a five week period).

[24] *See also* ORS 659A.186, which provides that "ORS 659A.150 to 659A.186 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." 29 C.F.R. § 825.308, entitled "**Recertifications for leave taken because of an employee's own serious health condition or the serious health condition of a family member,"** provides in pertinent part:

> "(a) *30-day rule.* An employer may request recertification no more often than every 30 days and only in connection with an absence by the employee, unless paragraphs (b) or (c) of this section apply.
>
> "* * * * *
>
> "(c) *Less than 30 days.* An employer may request recertification in less than 30 days if:
>
> "* * * * *
>
> "(2) Circumstances described by the previous certification have changed significantly (*e.g.,* the duration or frequency of the absence, the nature or severity of the illness, complications). For example, if a medical certification stated that an employee would need leave for one to two days when the employee suffered a migraine headache and the employee's absences for his or her last two migraines lasted four days each, then the increased duration of absence might constitute a significant change in circumstances allowing the employer to request a recertification in less than 30 days. Likewise, if an employee had a pattern of using unscheduled FMLA leave for migraines in conjunction with his or her scheduled days off, then the timing of the absences also might constitute a significant change in circumstances sufficient for an employer to request a recertification more frequently than every 30 days[.]"

Complainant's OFLA-related absences, the ALJ found it was unnecessary to decide whether Respondent's request for a "medical note" was the equivalent of asking for a "medical verification." Respondent and the Agency both filed exceptions to this conclusion and asked that the question be decided. The forum grants their exceptions.

Under the OFLA, employers may require an employee who requests OFLA leave to provide medical verification "of the need for the leave if the leave is for a purpose described in ORS 659A.159(1)(b) to (d)." ORS 659A.168. Respondent argues that its requirement of a "medical note" is not "medical verification" under OFLA because it merely requests confirmation that intermittent leave taken is connected to the employee's OFLA condition. In its case summary, Respondent further argues that (1) creation of this policy was a necessity for Respondent "because of the nature of [Respondent's] business and because some employees have abused intermittent leave"; and (2) because neither FMLA nor OFLA specifically prohibit employers from requesting a "short medical note," it is therefore allowed.

The forum rejects Respondent's arguments and concludes that Respondent's policy requiring a "medical note" for each OFLA intermittent leave absence is the legal equivalent of a request for "medical verification" under ORS 659A.168 and OAR 839-006-0260(9) and was so in the application of its policy to Complainant. Absent the circumstances set out in OAR 839-006-0260(9), Respondent's policy, as applied, violates the OFLA.

B. OFLA – Denying OFLA Leave for Qualifying Absences

In paragraphs 33-35 of its Formal Charges, the Agency alleged that Respondent "constructively denied" OFLA leave to Complainant "to which he was entitled," thereby violating ORS 659A.183(1) and OAR 839-009-0320(3), by engaging in the following practices:

> "33. Respondent required Complainant to obtain medical verification for every absence that already been documented by a doctor as a serious health condition, regardless of the length of time since the last certification.
>
> "34. Respondent disciplined Complainant for absences and late arrivals that were due to Complainant's serious health condition, for which Complainant had submitted a medical verification form signed by a doctor and which had been designated by Respondent is eligible for OFLA leave."

ORS 659A.183(1) provides that it is an unlawful practice for a covered employer to "[d]eny family leave to which an eligible employee is entitled under ORS 659A.150 to 659A.186[.]" OAR 839-009-0320(3), BOLI's interpretive rule, provides:

> "Pursuant to ORS 659A.183, it is an unlawful employment practice for an employer to deny family leave to an eligible employee or retaliate or in any way discriminate against any person with respect to hiring, tenure or any other term or

> condition of employment because the person has inquired about OFLA leave, submitted a request for OFLA leave or invoked any provision of the Oregon Family Leave Act."

In this case, it is undisputed that Complainant inquired about and submitted a request for OFLA leave that Respondent granted. Based on Complainant's credible testimony, the forum has also concluded that Complainant's tardies and absences on November 2-4, 2010, December 13, 2010, March 2-4, 2011, March 31-April 1, 2011, and April 5, 2011, were related to his OFLA condition. It is also undisputed that all but the November 2-4, 2010,[25] absences and tardy resulted in disciplinary action taken against Complainant because he did not provide medical notes showing those absences were related to his OFLA condition. There is no documentary evidence in the record to show that Complainant was or was not granted OFLA leave on those dates. However, the forum infers that he was not based on Cookson's November 2, 2010, letter to Complainant in which she stated that she would "be unable to apply FMLA/OFLA to any specific future absences" without any note indicating Complainant's absence was "related" to his "FMLA/OFLA qualifying condition" and Complainant's corresponding failure to provide any such notes.

Having established that Complainant was an "eligible employee" who was denied use of OFLA leave, the forum must determine whether or not Complainant was denied OFLA leave to which he was "entitled under ORS 659A.150 to 659A.186[.]" Under ORS 659A.159(1)(c), Complainant was entitled to take OFLA leave based on his serious health condition. Similarly, Respondent was entitled to deny OFLA leave to Complainant for any absences or tardies for which Respondent was entitled to request medical verification under OAR 839-009-0260(9) and for which Complainant failed to provide the requested verification.[26] As discussed in the previous section, this covers all of Complainant's absences and the tardy related to his OFLA condition, except for his November 2-4, 2010, absence for which Respondent was entitled to ask for subsequent medical verification and Complainant provided a medical note. The forum concludes that Respondent did not violate ORS 659A.183(1) and OAR 839-009-0320(3) in the manner alleged in the Formal Charges because Complainant was not "entitled" to OFLA leave based on the application of the exceptions in OAR 839-009-0260(9).

II. DISABILITY

The Formal Charges allege that Respondent violated three different provisions of Oregon's employment disability laws by: (1) failing to reasonably accommodate Complainant's disability; (2) failing to engage in an interactive process with Complainant after Complainant disclosed a disability that might require reasonable accommodation;

[25] Although Complainant was initially disciplined for his absences on November 2-4, 2010, this discipline was later withdrawn when Complainant provided a note from his medical provider indicating that his absence was related to his OFLA condition.

[26] *Cf. Winco* at 297-98 (when complainant's changed circumstances constituted an exception to the 30 day limit on seeking subsequent medical verification, the forum concluded that respondent did not constructively deny complainant OFLA leave by asking for subsequent medical verification).

and (3) utilizing standards, criteria or methods of administration that have the effect of discriminating on the basis of disability. Since all three alleged violations are predicated on the forum finding that Complainant has a disability as defined in ORS 659A.104(1)(a) and OAR 839-006-0025, the forum first examines Complainant's claim that he is an individual with a disability.

ORS 659A.104 provides, in pertinent part:

"(1) An individual has a disability for the purposes of ORS 659A.103 to 659A.145 if the individual meets any one of the following criteria:

"(a) The individual has a physical or mental impairment that substantially limits one or more major life activities of the individual.

"* * * * *

"(2) Activities and functions that are considered major life activities for the purpose of determining if an individual has a disability include but are not limited to:

"* * * * *
(b) Performing manual tasks;

"* * * * *
(f) Sleeping;

"* * * * *
"(h) Standing;

"(i) Lifting;

"(j) Bending;

"* * * * *
"(3) An individual is substantially limited in a major life activity if the individual has an impairment * * * that materially restricts one or more major life activities of the individual. An impairment that substantially limits one major life activity of the individual need not limit other major life activities of the individual."

OAR 839-006-0025 provides, in pertinent part:

"(1) 'Disability' means:

"(a) A physical or mental impairment that substantially limits one or more major life activities of the individual.

"* * * * *

"(6) 'Major life activity' includes, but is not limited to:

"* * * * *
"(b) Performing manual tasks;

"* * * * *
"(i) Standing;

"(j) Lifting;

(k) Bending;

"* * * * *

"(9) 'Physical or mental impairment' means any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin and endocrine; or any mental or psychological disorder, such as mental retardation, organic brain syndrome, traumatic brain injury, emotional or mental illness, and specific learning disabilities.

"* * * * *

"(12) 'Substantially limits' means that an individual has an impairment, had an impairment or is perceived as having an impairment that restricts one or more major life activities of the individual.

"(a) An impairment that substantially limits one major life activity of the individual need not limit other major life activities of the individual.

"(b) In determining whether an impairment substantially limits a major life activity, the ability of the individual with the impairment to perform that major life activity is compared to that of individuals in the general population.

"(c) Factors that could affect whether an impairment 'substantially limits a major life activity' include, but are not limited to, the presence of other impairments that combine to make the impairment disabling."

In this case, testimony by Complainant and Dr. Blatt, Complainant's treating physician, established that Complainant has spondylolisthesis, a condition that occurs when one vertebrae slips onto another and causes a narrowing and irritation of nerve root openings. In Complainant's case, it causes lumbar radicular pain, which is constant pain down his leg. This pain began in 1992, when he fell out of an Army helicopter. Complainant credibly testified that his spondylolisthesis has made it difficult for him to climb in and out of truck trailers, and lifting heavy objects has made him

extremely sore and unable to sleep at night throughout his employment with Respondent. In addition, Complainant credibly testified that by October 2010 his spondylolisthesis had intensified and made him uncomfortable if he had to sit for "periods for time," that standing also became "very uncomfortable at times," and bending down to pick up freight was "extremely painful." Complainant and Dr. Blatt both expect that Complainant's spondylolisthesis and associated lumbar radicular pain may be ameliorated by surgery at some future date.

Applying the law to these facts, the forum finds that Complainant's conditions are a "physiological disorder or condition" that affect his "neurological" and "musculoskeletal" body systems and, as such, constituted a "physical impairment" within the meaning of OAR 839-006-0205(9) between October 2010 and April 2011. The constant pain and discomfort experienced by Complainant in 2010 and 2011 in association with his conditions while sitting, standing, and bending constitute substantial limitations in major life activities under ORS 659.104(3) and OAR 839-006-0205(12). Taken together, the forum concludes that Complainant had, at all times material, a physical impairment that substantially limited one or more of his major life activities and was an "individual" with "a disability for the purposes of ORS 659A.103 to 659A.145." The forum also notes that his disability and his OFLA condition were one and the same.

A. <u>Failure to Reasonably Accommodate a Disability.</u>

The Formal Charges allege that Complainant is a "qualified individual with a disability," that Respondent knew of Complainant's "physical limitations" through Dr. Blatt's medical verification, and that Respondent violated ORS 659A.112(2)(e), OAR 839-006-0200(1)(e),[27] and OAR 839-006-0206(3) by failing to make "reasonable accommodation to Complainant's known physical limitations." Specifically, the Formal Charges allege that Respondent failed to reasonably accommodate Complainant's "occasional tardiness due to severe pain" between October 29, 2010, and April 21, 2011. At hearing, Complainant further clarified that he needed accommodation for tardies that resulted when he had to stop and vomit on his way to work as a side effect of the medication he took for his disability.[28] The reasonable accommodation sought by Complainant was to have his disability-related tardies excused and not counted as "occurrences" under Respondent's disciplinary policy.

The pertinent facts are brief. Respondent was placed on notice of Complainant's disability and the need to accommodate Complainant's occasional tardiness caused by his disability through Dr. Blatt's letter. In response, Cookson, Respondent's Human Resources manager, sent Complainant a letter that acknowledged receipt of Dr. Blatt's letter, told him he was eligible for FMLA leave, and stated that tardiness could not be

[27] The forum notes that OAR 839-006-0200(1)(e) does not exist and presumably the Agency meant to cite OAR 839-006-0200(3)(e), the parallel rule to ORS 659A.112(2)(e).

[28] *See, e.g. Vande Zande v. Wisconsin Dep't of Admin.,* 44 F3d 538 (7th Cir.1995) (An employer is required to accommodate an employee who experiences side effects as a result of her disability-related medications or treatment).

excused for any reason.[29] Between October 2010 and April 2011, Complainant had one disability-related tardy, on December 13, 2010, when he was eight minutes late to work. Respondent disciplined him for his tardy by assigning him a .5 occurrence. Respondent contends this refusal was justified because allowing Complainant to ignore Respondent's tardiness rule would have prevented Complainant from performing an essential function of his job, namely, being at the job, and also would have caused undue hardship to Respondent.

> ORS 659A.112(2) provides, in pertinent part:
>
> "(1) 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 on the basis of disability.
>
> "(2) An employer violates subsection (1) of this section if the employer does any of the following:
>
> "* * * * *
> "(e) The employer does not make reasonable accommodation to the known physical or mental limitations of a qualified individual with a disability who is a job applicant or employee, unless the employer can demonstrate that the accommodation would impose an undue hardship on the operation of the business of the employer."

As set forth in ORS 659A.112(2)(e), Respondent has an obligation to provide "reasonable accommodation" to a "qualified individual with a disability." Under OAR 839-006-0206, "reasonable accommodation" may include "[p]roviding a leave of absence." Having determined that that Complainant is a person with a disability, the forum must now determine if Complainant is a "qualified" employee with a disability. ORS 659A.115 defines "qualified individual" as follows:

> "For the purposes of ORS 659A.112, an individual is qualified for a position if the individual, with or without reasonable accommodation, can perform the essential functions of the position. For the purpose of determining the essential functions of the position, due consideration shall be given to the employer's determination as to the essential functions of a position. If an employer has prepared a written description before advertising or interviewing applicants for a job, the position description shall be considered evidence of the essential functions of the job."

There is no dispute that Complainant was able to and did perform all the essential functions of his job while he was at work. The question is whether being at work on time was an "essential function" of Complainant's job. The forum first gives "due consideration" to the written job description for Complainant's job that states that

[29] *See* Finding of Fact #20 – The Merits.

meeting Respondent's "attendance reliability standard" is "an essential element of this position" because of Respondent's need to meet delivery commitments to customers. Respondent's written "Driver Standards" further state:

> "Make a habit of reporting to work on time. The extent to which the company is able to provide on-time service to customers begins with you.
>
> "Unscheduled absenteeism is detrimental to the service of our customers and will not be tolerated. If unable to report for duty, you must notify your supervisor as early as possible prior to your anticipated start time. Unscheduled absenteeism places a hardship on fellow employees and efficient functions of operation."

Scudder, Respondent's terminal manager, credibly testified that Respondent is one of a number of businesses operating in a competitive, deregulated industry, and its success and ability to survive are predicated on its promise of "on-time" delivery. He further testified that predictable driver attendance at work is critical to Respondent's ability to meet this promise because Respondent schedules its drivers based on Respondent's past history of customer orders and deliveries.

OAR 839-006-0205(4) further defines "essential function" as:

> "(4) * * * the fundamental duties of a position an individual with a disability holds or desires.
>
> "(a) A job function may be essential for any of several reasons, including but not limited to, the following:
>
> "(A) The position exists to perform that function;
>
> "(B) A limited number of employees is available to carry out the essential function; or
>
> "(C) The function is highly specialized so that the position incumbent was hired for the expertise or ability required to perform the function.
>
> "(b) Evidence of whether a particular function is essential includes but is not limited to:
>
> "(A) The amount of time spent performing the function;
>
> "(B) The consequences of not performing the function;
>
> "(C) The terms of a collective bargaining agreement;
>
> "(D) The work experience of past incumbents in the job; and
>
> "(E) The current work experience of incumbents in similar jobs."

Sections (a) and (b) of the above rule indicate that "essential function" relates to a specific job duty. Attendance may be necessary to perform the job, but it is not an "essential function." The forum also recognizes that the majority of federal circuit courts have endorsed the proposition that in jobs where performance requires attendance at the job, irregular attendance compromises essential job functions. *Samper v. Providence St. Vincent Medical Center,* 675 F3d 1233, 1237 (9th Cir. 2012).

Although there is no question that Complainant could not perform his job unless he was physically present at the job site, it is equally true that his one tardy due to his disability can hardly be considered "irregular attendance." There is no evidence that Complainant was not able to perform his actual job duties when he was at work. Should the forum adopt Respondent's "essential function" argument, this would mean that no Oregon employer would be required to grant any employee time off from work because of their disability. This is not the law.

Finally, the forum must address Respondent's affirmative defense of "undue hardship." ORS 659A.121 defines "undue hardship" as follows:

> "(1) For the purposes of ORS 659A.112, an accommodation imposes an undue hardship on the operation of the business of the employer if the accommodation requires significant difficulty or expense.
>
> "(2) For the purpose of determining whether an accommodation requires significant difficulty or expense, the following factors shall be considered:
>
> "(a) The nature and the cost of the accommodation needed.
>
> "(b) The overall financial resources of the facility or facilities involved in the provision of the accommodation, the number of persons employed at the facility and the effect on expenses and resources or other impacts on the operation of the facility caused by the accommodation.
>
> "(c) The overall financial resources of the employer, the overall size of the business of the employer with respect to the number of its employees and the number, type and location of the employer's facilities.
>
> "(d) The type of operations conducted by the employer, including the composition, structure and functions of the workforce of the employer and the geographic separateness and administrative or fiscal relationship of the facility or facilities in question to the employer."

Although the reasonable accommodation sought in this case was for "occasional tardies due to severe pain," the actual accommodation required was an excused absence for one day when Complainant was eight minutes tardy to work. In evaluating Respondent's undue hardship defense, the forum focuses on that specific instance rather than viewing the accommodation sought as a free pass for unlimited,

unpredictable tardies. Although Respondent presented evidence that, as a general matter, a driver's tardiness could cause Respondent to have to pay overtime to another driver or make a guaranteed delivery for free, there was no evidence as to the specific impact of Complainant's eight minute tardy on December 13, 2010. Respondent has not carried its burden of proof and the forum finds that Respondent committed an unlawful employment practice in violation of ORS 659A.112(2)(e), and OAR 839-006-0206(3) by disciplining Complainant for his December 13, 2010, tardy.

B. Interactive Process.

The Formal Charges allege that Respondent violated OAR 839-006-0206(4),(5), and (6) by not performing "its duty to initiate a meaningful interactive process with Complainant" in relation to Complainant's disability. Those rules provide:

> "(4) Once a qualified employee or applicant with a disability has requested reasonable accommodation or otherwise disclosed to the employer a disability that may require reasonable accommodation, the employer has a duty to initiate a meaningful interactive process with the employee or applicant to determine whether reasonable accommodation would allow the employee or applicant to perform the essential functions of a position held or sought.
>
> "(5) A meaningful interactive process is an informal process between a qualified employee or applicant with a disability and an employer in an effort to identify potential reasonable accommodation.
>
> "(a) An interactive process between an employee or applicant with a disability and an employer, that readily identifies mutually agreeable reasonable accommodation, is a meaningful interactive process.
>
> "(b) When reasonable accommodation is not readily identifiable, a meaningful interactive process identifies the nature of the limitations resulting from the disability, relevant to potential reasonable accommodation that could allow the employee or applicant to perform the essential functions of the job.
>
> "(6) A meaningful interactive process is a mandatory step in the reasonable accommodation of a qualified employee or applicant with a disability. Failure of an employer to engage in a meaningful interactive process with a qualified employee or applicant with a disability who has requested reasonable accommodation or has otherwise disclosed to the employer a disability that may require reasonable accommodation is a failure to reasonably accommodate in violation of ORS 659A.112(2)(e) and:
>
> "(a) The employer may be found liable for remedies described in OAR 839-003-0090(5) regardless of whether reasonable accommodation would have been possible; and

"(b) The employer may also be found liable for any other remedies described in OAR 839-003-0090 if reasonable accommodation would have been possible."

The relevant facts follow. On or about November 2, 2010, Respondent learned from Dr. Blatt, Complainant's treating physician, that Complainant might be absent from work because of doctor visits related to his spondylolisthesis and lumbar radicular pain and occasionally late to work due to severe pain caused by those conditions. On November 2, 2010, Respondent's Human Resources manager Kim Cookson sent a letter to Dr. Blatt and Complainant in which she stated that "[b]eing at work on time is an essential job duty that all employees whether disabled or not must be able to comply with" and that Respondent was "not able to excuse [Complainant's] tardies based on his health condition." The letter further asked for "ideas for accommodations which will assist [Complainant] in meeting all essential job performance duties while preserving his health." Dr. Blatt made no attempt to contact Cookson. Complainant did call Cookson and explained that his tardies were not because he couldn't get up on time, but because he became ill on the way to work due to his medications that caused him to have to stop and vomit before he could continue on his way to work. Cookson directed Complainant to talk with Scudder, Respondent's Portland terminal manager, who in turn told Complainant that Respondent is a time sensitive business and Complainant's delivery route would have to be given to someone else so the truck could go out on time if Complainant was tardy.

Respondent fulfilled its duty of initiating an interactive process through Cookson's response to Dr. Blatt's letter. In that letter, Cookson foreclosed the accommodation sought by Complainant, which was to have his disability-related tardies not counted against him for disciplinary purposes. Complainant fulfilled his obligation of participating in the interactive process by telling Cookson specific information about his disability and how the medication he took for it could cause him to have an unplanned tardy. There was no discussion about other possible accommodations. There is also no evidence in the record that any other accommodation was available other than the one sought by Complainant.

Under OAR 839-006-0206(5)(a), an interactive process that "readily identifies mutually agreeable reasonable accommodation" is a meaningful interactive process. In this case, there was no mutually agreeable reasonable accommodation. Under OAR 839-006-0206(5)(b), when reasonable accommodation is "not readily identifiable, a meaningful interactive process identifies the nature of the limitations resulting from the disability, relevant to potential reasonable accommodation that could allow the employee or applicant to perform the essential functions of the job." In this case, although the interactive process and outcome may not have been agreeable to Complainant, the conditions of OAR 839-006-0206(5)(b) were satisfied, and Respondent's only violation was in its actual failure to reasonably accommodate Complainant with respect to his December 13, 2010, tardy.

C. Utilizing Standards, Criteria or Methods of Administration that have the effect of Discriminating on the Basis of Disability.

The Formal Charges allege that Respondent violated ORS 659A.112(1)(c) and OAR 839-006-0200(2)&(3)(c) by requiring Complainant to submit a medical note each time he was tardy based on his disability and disciplining him, "including suspending him from work for two days, for arriving late to work on some occasions that were due to Complainant's disability." As an initial matter, the forum notes that ORS chapter 659A does not contain a statute numbered ORS 659A.112(1)(c)[30] and Respondent cannot be found to have violated a statute that does not exist.

OAR 839-006-0200(2) provides that it is an unlawful employment practice for an employer to "discriminate in terms, conditions or privileges of employment because a qualified individual has a disability." OAR 839-006-0200(3)(c) provides that "prohibited discrimination" includes an employer's use of "standards, criteria or methods of administration that have the effect of discrimination against * * * employees with disabilities." The forum evaluates the Agency's allegation based on these two rules.

The standard in question is Respondent's tardy policy -- employees who are more than three minutes late to work have a .5 "occurrence" charged against them that can result in disciplinary action when sufficient occurrences have accrued.[31] The Formal Charges allege that, "as applied to Complainant," Respondent's standard discriminated in terms, conditions and privileges of employment based on disability.

The evidence in the record reveals no exceptions in Respondent's application of its tardy policy to show that Respondent did not apply it to non-disabled persons who were tardy or persons with disabilities who were tardy for reasons other than their disability. Complainant himself received numerous "occurrences" for tardies that were unrelated to his disability, along with one "occurrence" for his only tardy related to his disability, demonstrating Respondent's even-handed application of the policy. There is also no evidence that Respondent's facially neutral tardy policy had a greater impact on disabled employees in general.

In conclusion, the forum finds that Respondent did not unlawfully discriminate against Complainant in its application of its tardy policy with respect to Complainant's single tardy attributable to his disability.

III. Damages

The Agency seeks $400 in back pay and damages of "at least $50,000" for mental, emotional, and physical suffering.

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[30] It appears that the Agency intended to cite ORS 659A.112(2)(c).

[31] *See* Finding of Fact #7 -- The Merits.

A. Back Pay

The commissioner has the authority to fashion a remedy adequate to eliminate the effects of unlawful employment practices, including a back pay award. *In the Matter of From the Wilderness,* 30 BOLI 227, 290 (2009). The purpose of back pay awards in an employment discrimination case is to compensate a complainant for the loss of wages and benefits the he or she would have received but for the respondent's unlawful employment practices. Awards are calculated to make a complainant whole for injuries suffered as a result of the discrimination. *In the Matter of Trees, Inc.,* 28 BOLI 218, 251 (2007).

In this case, Complainant claims back pay for two days to compensate him for his April 20-21, 2011, suspension without pay. His claim rests on the assumption that he would not have been suspended but for Respondent's unlawful employment practices. Respondent's attendance policy provides for the suspension of an employee after the employee's "5th Occurrence" within a "rolling nine (9) month period." As of April 20, 2011, Complainant had accrued 6.5 occurrences. Of those occurrences, only his December 13, 2010, tardy, counted as a .5 occurrence, was attributable to an unlawful employment practice by Respondent. There is no evidence to show that Complainant would not have been suspended for the remaining 6 occurrences that were not protected by OFLA or Oregon's disability laws. Accordingly, the forum is unable to conclude that Complainant's two-day suspension was caused by his December 13, 2010, protected tardy, and finds Complainant is not entitled to any back pay.

B. Emotional, Mental, and Physical Suffering Damages

In determining an award for emotional and mental suffering, the forum considers the type of discriminatory conduct, and the duration, frequency, and severity of the conduct. It also considers the type and duration of the mental distress and the vulnerability of the complainant. The actual amount depends on the facts presented by each complainant. A complainant's testimony, if believed, is sufficient to support a claim for mental suffering damages. *From the Wilderness*, at 291-92.

In this case, the Agency contends that Complainant was still experiencing emotional and physical suffering from Respondent's unlawful employment practices at the time of the hearing. The evidence concerning Complainant's emotional and physical suffering caused by Respondent's alleged unlawful employment practice consisted exclusively of testimony by Complainant and Garza about the stress caused by his April 20-21, 2011, suspension. However, the record is devoid of any evidence of emotional and physical suffering specifically attributable to Complainant's December 13, 2010, unexcused tardy, the lone unlawful employment practice found by the forum. As the forum has no evidentiary basis from which to calculate an appropriate award for emotional and physical suffering damages, the forum does not award any damages.[32]

[32] *C.f. In the Matter of Washington County,* 10 BOLI 147, 155 (1992) (when complainant's mental distress "sprang from his general apprehension about using parental leave and his fear of retaliation," rather than

C. Mandatory Training On Recognizing And Preventing Discrimination In The Workplace Based On OFLA

In its Formal Charges, the Agency asked that Respondents be required to "provide training to its managers, professional staff and employees who work in Oregon or supervise or manage employees working in Oregon on the OFLA's requirements, provided by BOLI's Technical Assistance for Employers Unit or other training agreeable to the Agency." Since the forum has not found an OFLA violation, it does not order this training.

IV. Exceptions

The Agency makes three arguments in its exceptions. First, Respondent's requests for a "medical note" was an unlawful request for medical verification. Second, Respondent's requests for a "medical note" were unlawful because OFLA and FMLA only permit leave verification by an employer "through the certification and re-certification process." Third, "Respondent's practice of sending out a letter with a blanket requirement for a medical verification every time intermittent leave is used is a violation of OAR 839-009-0260(9)."

The Agency's first exception is granted for reasons discussed in the Opinion. However, the forum still finds that Respondent's medical note requests to Complainant were lawful for the detailed reasons set out in the Opinion.

The Agency's second exception is denied because the Agency did not allege this legal theory in its Formal Charges.

The Agency's third exception is not without merit. Respondent's utilization of a practice or policy that allows it to send out a letter with a blanket requirement for a medical verification every time intermittent leave is used violates OAR 839-009-0260(9) on its face, absent any of the (9) exceptions. In this case, however, the forum finds that because Complainant's use of intermittent leave occurred 30 or more days after his previous leave usage or because of his changed medical circumstances relative to Dr. Blatt's assessment in Complainant's medical verification, Respondent's requests were within the (9) exceptions and, therefore, lawful.

Respondent raises two issues in its exceptions. First, Respondent argues that the proposed order erroneously concluded that Respondent violated ORS 659A.112(2)(e) and OAR 839-006-0206(3)(b) by disciplining Complainant for his December 13, 2010, tardy. Second, Respondent contends that the proposed order should have determined whether Respondent's medical "note" procedure is not a request for "medical verification" under OFLA or FMLA and is permitted by law.

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respondent's unlawful employment practice, the forum did not award any damages for complainant's mental distress).

33 BOLI ORDERS

Respondent's first exception is based on the assumption that Respondent "had no basis for determining whether [Complainant's December 13, 2010] tard[y] * * * was connected or unconnected with Complainant's OFLA condition. This is incorrect. Although it is undisputed that Complainant did not provide a medical note to Respondent, the forum has concluded that Complainant did call Respondent on his way to work and state he would be tardy because of his "FMLA" condition.[33]

In granting the Agency's first exception, the forum also denies Respondent's second exception.

ORDER

A. NOW, THEREFORE, as authorized by ORS 659A.850(2) and ORS 659A.850(4), and to eliminate the effects of Respondent **Oak Harbor Freight Lines, Inc.'s** violation of ORS 659A.112(2)(e) and OAR 839-006-0206(3)(b), the Commissioner of the Bureau of Labor and Industries hereby orders Respondent **Oak Harbor Freight Lines, Inc.** to cease and desist from engaging in future unlawful employment practices in violation of ORS 659A.112(2)(e) and OAR 839-006-0206(3)(b).

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[33] *See* Finding of Fact #30 – The Merits.

33 BOLI ORDERS

In the Matter of

HIGH MOUNTAIN PLUMBING COMPANY
and DIANE MARIE CINA,

Case No. 40-13
Amended Final Order of Commissioner Brad Avakian
Issued March 4, 2014

SYNOPSIS

Respondent High Mountain Plumbing Company ("HMPC") failed to pay the prevailing wage rate to four workers on a public works and filed nine inaccurate certified payroll reports related to that work. HMPC's failure to pay the prevailing wage rate to one worker was intentional and Respondent Cina, HMPC's corporate president, was responsible for that failure. The Commissioner assessed $4,000 in civil penalties against HMPC for its failure to pay the prevailing wage rate and $6,000 in civil penalty against HMPC for its defective certified payroll reports. The Commissioner also placed HMPC and Cina on the list of ineligibles to received public works contracts for three years.

NOTE: *The original Final Order was issued on March 3, 2014, but was amended on March 4, 2014, for the sole purpose of deleting the reference to "Salem-Keizer Public Schools" in Finding of Fact #2 – The Merits.*

The above-entitled case came on regularly for hearing before Alan McCullough, designated as Administrative Law Judge ("ALJ") by Brad Avakian, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on January 22, 2014, at the Deschutes Services Building, 1300 NW Wall Street, Bend, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by administrative prosecutor Adriana Ortega, an employee of the Agency. Respondent Diana Marie Cina ("Cina") was present throughout the hearing, representing herself and acting as authorized representative for Respondent High Mountain Plumbing Company ("HMPC").

The Agency called Michael Kern, BOLI Prevailing Wage compliance specialist, as its only witness. Respondents called Respondent Cina as their only witness. The forum received into evidence:

a) Administrative exhibits X1 through X8;
b) Agency exhibits A1 through A12;
c) Respondents' exhibit R1.

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

FINDINGS OF FACT – PROCEDURAL

1) On June 13, 2013, the Agency issued a Notice of Intent ("NOI") to Place Respondents on the List of Ineligibles and Assess Civil Penalties in the amount of $13,000 against HMPC. Summarized, the NOI alleged:

- HMPC failed to pay $4,438.93 in prevailing wages to four of its employees on a public works project.
- HMPC intentionally failed to pay the prevailing wages.
- HMPC filed eight inaccurate and/or incomplete certified payroll statements for work performed on the same public works project.
- Cina was the corporate officer responsible for HMPC's intentional failure or refusal to pay the prevailing wage rate to its employees.

The Agency alleged aggravating factors with respect to its allegations of failure to pay the correct prevailing wage rate and the filing of inaccurate and/or incomplete certified payroll statements. (Ex. X1)

2) On July 1, 2013, Respondents filed an answer and request for hearing in which they denied the allegations in the Notice of Intent. (Ex. X1)

3) On December 19, 2013, BOLI's Hearings Unit issued a Notice of Hearing to Respondents and the Agency setting a hearing date of January 22, 2014. On the same day, the ALJ issued a case summary order that required submission of case summaries by January 10, 2014, and included a statement of the possible sanctions for failure to comply with the case summary order. (Exs. X2, X3)

4) The Agency timely filed a case summary. Respondents did not file a case summary. (Ex. X7)

5) At the outset of the hearing, the ALJ required Respondent Cina to write and sign a statement authorizing herself to act as authorized representative for Respondent HMPC. (Ex. X8)

6) At the outset of the hearing, 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. (Statement of ALJ)

7) During the hearing, both the Agency and Respondents moved to offer documents in evidence that should have been included with their case summaries. There being no objections, the ALJ received those documents. (Exs. A12, R1; Statement of ALJ)

8) On February 14, 2014, 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. No exceptions were filed.

FINDINGS OF FACT – THE MERITS

1) At all times material herein, Respondent HMPC was an Oregon business corporation and Respondent Cina was its corporate president. (Ex. A3; Testimony of Cina)

2) On March 7, 2011, Central Oregon Community College filed a Notice of Public Works[1] with BOLI for the "Science Building" project (the "Project"). The Notice identified "12/28/2010" as the date the contract was first advertised for bid. The Notice identified "2/18/2011" as the date the contract was awarded and specified the contract amount as "$12,545,000." The Notice listed Kirby Nagelhout Construction Co. as the prime contractor and "Superior Plumbing" as a "subcontractor" that would be performing "plumbing" work in the dollar value of $1,116,000. (Exs. A1, X1)

3) Oregon's June 2010 prevailing wage rates applied to the Project. The correct prevailing hourly wage rate for plumbers was $35.69, plus $20.39 an hour in fringe benefits. (Stipulation of Participants; Ex. X1)

4) Work began on the project in or around February 28, 2011. (Ex. A1)

5) When the contract was awarded, Superior Plumbing was a company owned by Greg Williamson. When work began on the Project, Cina owned a bookkeeping and tax consulting business and Williamson was one of her clients. (Testimony of Cina)

6) At some point after work on the Project began, Williamson asked Cina if she would take over his contract on Project and make him an employee. Cina agreed to do this and incorporated HMPC on June 23, 2011. Cina and Williamson also agreed that Williamson would work only 32 hours each week. Kirby Nagelhout Construction Co. then transferred the plumbing subcontract on the Project from Superior Plumbing to HMPC. (Testimony of Cina; Ex. R1)

7) Between August 7 and January 7, 2012, HMPC employed Greg Williamson, Justin Petersen, Jeremiah Murphy, and Kevin Gray as plumbers on the Project. (Exs. A5, A12)

[1] BOLI Form WH-81 (Rev 03-08)

8) During its work on the Project, HMPC's regular payday was six days after the end of each work week. (Ex. A2)

9) Cina completed and signed HMPC's certified payroll reports for each of these weeks and was responsible for paying HMPC's employees. (Exs. A5, A12)

10) While employed by HMPC, Greg Williamson worked the following dates and hours on the Project for which he was not paid:

Date[2]	Hours Worked
8/12/11	8
8/19/11	5
8/26/11	8
9/2/11	8
9/16/11	8
9/23/11	8

Cina did not report these hours on HMPC's certified payroll reports for the six corresponding weeks. In each of those weeks, HMPC's certified payroll reports showed Williamson only worked 32 hours. (Exs. A5, A6, A12)

11) Cina did not report the hours listed in Finding of Fact #10 on HMPC's certified payroll reports because of Cina and Williamson's agreement that Williamson would only work 32 hours per week and his contemporaneous reports to Cina that he only worked Monday through Thursday, eight hours a day, during each of those weeks. (Testimony of Cina)

12) Williamson's last day of work for HMPC was January 27, 2012. Cina was not aware that Williamson had worked the hours listed in Finding of Fact #10 until Williamson filed a wage claim with BOLI on April 19, 2012, in which he complained that HMPC had not paid him for all the hours he worked, and BOLI subsequently notified Cina of Williamson's complaint. (Testimony of Cina; Ex. A2)

13) On HMPC's certified payroll report for the week ending November 26, 2011, Cina noted that Williamson, Murphy, Gray, and Petersen each worked 10 hours on Saturday, November 26, 2011, and that they had been paid straight time for those hours. Williamson, Murphy, Gray, and Petersen were in fact paid straight time for working those hours on HMPC's regular payday corresponding to that week. (Ex. A5)

14) On HMPC's certified payroll report for the week ending December 31, 2011, Cina noted that Williamson, Petersen, and Murphy each worked eight hours on December 26, 2011, a Monday following a legal holiday, and that they had been paid straight time for those hours. Williamson, Petersen, and Murphy were in fact paid

[2] All dates are Fridays.

straight time for working those hours on HMPC's regular payday corresponding to that week. (Ex. A12)

15) On HMPC's certified payroll report for the week ending January 7, 2012, Cina noted that Williamson, Petersen, and Murphy each worked eight hours on January 2, 2012, a Monday following a legal holiday, and that they had been paid straight time for those hours. Williamson, Petersen, and Murphy were in fact paid straight time for working those hours on HMPC's regular payday corresponding to that week. (Ex. A12)

16) HMPC's failure to pay overtime to Williamson, Gray, Murphy, and Petersen on November 26, 2011, December 26, 2011, and January 2, 2011 was due to Cina's oversight. (Testimony of Cina)

17) On August 3, 2012, Kern sent a letter to Cina in which he detailed the findings of his investigation. His letter stated that Gray, Murphy, Petersen, and Williamson were all due unpaid prevailing wages in the following amounts: Gray - $215.52, Murphy - $361.04, Petersen - $375.04, and Williamson - $3,487.33, plus liquidated damages. His letter further stated that BOLI was not seeking payment of liquidated damages "at this time" and informed Cina that HMPC was "required to pay all straight wages due by the due date of Friday, August 17, 2013." (Testimony of Kern, Cina; Ex. A11)

18) The unpaid wages due to Gray, Murphy, and Petersen accrued because of HMPC's payment of straight time wages to them instead of overtime wages for their work on Saturday, November 26, 2011, December 26, 2011, and January 2, 2012. (Testimony of Kern; Exs. A5, A11)

19) On September 14, 2012, Cina sent BOLI a check for $951.60, an amount that covered all the gross, unpaid wages due to Gray, Murphy, and Petersen. Cina did not pay Williamson's wages because she did not believe he had worked the hours he reported in his wage claim. (Testimony of Kern, Cina; Exhibit A11)

20) Kern and Cina were both credible witnesses. (Testimony of Kern, Cina)

CONCLUSIONS OF LAW

1) HMPC employed workers on a public works (the "Project") and failed to pay all due and owing prevailing wages on HMPC's regular payday to four workers who performed manual labor on the Project, committing four violations of ORS 279C.840(1),ORS 279C.540, and OAR 839-025-0035(1).

2) HMPC submitted six certified payroll reports for work its employees performed on the Project for weeks ending August 13, 20, 27, and September 3, 17, and 26, 2011, that did not include hours worked by Greg Williamson, committing six violations of ORS 279C.845 and OAR 839-025-0010.

3) HMPC filed a certified payroll report for the week ending November 26, 2011, for work its employees performed on the Project that did not accurately set out

the gross wages earned by those employees on November 26, 2011, committing one violation of ORS 279C.845 and OAR 839-025-0010.

4) HMPC filed a certified payroll report for the week ending December 31, 2011, for work its employees performed on the Project that did not accurately set out the gross wages earned by those employees on December 26, 2011, committing one violation of ORS 279C.845 and OAR 839-025-0010.

5) HMPC filed a certified payroll report for the week ending January 7, 2012, for work its employees performed on the Project that did not accurately set out the gross wages earned by those employees on January 2, 2012, committing one violation of ORS 279C.845 and OAR 839-025-0010.

6) HMPC's failure to pay the prevailing rate of wage to its employees Gray, Murphy, and Petersen was unintentional. HMPC's failure to pay the prevailing rate of wage to its employee Williamson for work performed on August 12, 19, and 26, and September 2, 16 and 23, 2011, was intentional. Cina was HMPC's corporate officer responsible for the intentional failure to pay the prevailing wage rate. The Commissioner is required to place both Respondents on the list of those contractors and subcontractors ineligible to receive any contract or subcontract for public works for a period of three years from the date on which their names are published on the list. ORS 279C.860, OAR 839-025-0085.

7) The Commissioner has the authority to assess civil penalties for violations of ORS 279C.845, OAR 839-025-0010, ORS 279C.840(1), OAR 839-025-0035(1), and ORS 279C.540. The imposition of $9,000 in civil penalties on HMPC for its violations of these statutes and rules is an appropriate exercise of the Commissioner's authority. ORS 279C.865, OAR 839-025-0530, and OAR 839-025-0540.

OPINION

FAILURE TO PAY PREVAILING WAGE RATE

This case involves three different circumstances in which HMPC is alleged to have violated the law by failing to pay workers due and owing prevailing wages on their regular payday. First, HMPC's failure to pay Greg Williamson at all for his work on the dates listed in Finding of Fact #10. Second, HMPC's failure to pay overtime wages to Williamson, Murphy, Gray, and Petersen for their work on Saturday, November 26, 2011. Third, HMPC's failure to pay overtime wages to Williamson, Murphy, and Petersen for their work on December 26, 2011 and January 2, 2012. The Agency's Notice of Intent alleges that HMPC violated ORS 279C.540, ORS 279C.840(1), OAR 839-025-0035 and OAR 839-025-0050 by virtue of these failures.

ORS 279C.840(1) provides, in pertinent part:

> "The hourly rate of wage to be paid by any * * * 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 the labor is performed. * * * The * * * subcontractor shall pay all wages due and owing to the * * * subcontractor's workers upon public works on the regular payday established and maintained under ORS 652.120."

ORS 279C.540 provides, in pertinent part:

"(1) When labor is employed by a state or a county, school district, municipality, municipal corporation or subdivision thereof through a contractor, a person may not be required or permitted to labor more than 10 hours in any one day, or 40 hours in any one week, except in cases of necessity or emergency or when a public policy absolutely requires, in which event, the person so employed for excessive hours shall receive at least time and a half pay:

"* * * * *

"(b) For all Saturday and on the following legal holidays:

"* * * * *

(B) New Year's Day on January 1.

"* * * * *

(G) Christmas Day on December 25.

"* * * * *

(3) For the purpose of this section, each time a legal holiday, other than Sunday, listed in subsection (1) of this section follows on Sunday, the succeeding Monday shall be recognized as a legal holiday. * * *"

OAR 839-025-0035 provides, in pertinent part:

"(1) Every * * * subcontractor employing workers on a public works project must pay to such workers no less than the applicable prevailing rate of wage for each trade or occupation, as determined by the Commissioner, in which the workers are employed."

OAR 839-025-0050 provides, in pertinent part:

"(2) Contractors and subcontractors required by ORS 279C.540 to pay overtime wages shall pay such wages as follows:

"(a) Workers must be paid at least time and one-half the hourly rate of pay, excluding fringe benefits hours worked:

"(A) On Saturdays;

"(B) On the following legal holidays:

"* * * * *

"(ii) New Year's Day on January 1;

"* * * * *

"(vii) Christmas Day on this December 25[.]"

A. HMPC violated ORS 279C.840(1) and OAR 839-025-0035 by failing to pay Greg Williamson the applicable prevailing rate of wage for plumbers for his work on six occasions.

It is undisputed that the Project was a public works, that Williamson worked as a plumber for HMPC on the Project, and that HMPC did not pay and has not paid Williamson for any work he performed on August 12, 19, and 26, and September 2, 16 and 23, 2011. Respondents' defense is that Williamson did not work those days. Based on the daily reports maintained by Kirby Nagelhout, the prime contractor on the Project, the forum has concluded that Williamson did in fact perform work for HMPC on the Project on those days. By not paying Williamson for that work, HMPC violated ORS 279C.840(1) and OAR 839-025-0035.

B. HMPC violated ORS 279C.540, ORS 279C.840(1), OAR 839-025-0035 and OAR 839-025-0050 by failing to pay overtime wages to Williamson, Murphy, Gray, and Petersen for their work on November 26, 2011.

It is undisputed that Williamson, Murphy, Gray, and Petersen worked as plumbers on the Project for 10 hours on Saturday, November 26, 2011, and that HMPC did not pay them overtime wages for those hours until the Agency made demand for those wages in the fall of 2012. A contractor's or subcontractor's obligation to pay the prevailing rate of wage includes the obligation to pay overtime under the circumstances set out in ORS 279C.540 and OAR 839-025-0050. Unlike ORS 279C.840, which ties the requirement of payment of the prevailing wage rate to a "public works," ORS 279C.540 and OAR 839-025-0050 require payment of overtime when "labor is employed by a state or a county, school district, municipality, municipal corporation or subdivision thereof through a contractor." Community colleges are formed through the creation of a "community college district" that are funded by tax levies assessed in their respective districts and, as such, are "school districts" within the meaning of ORS 279C.540. *See* ORS chapter 341. Accordingly, HMPC was required to pay overtime wages under ORS 279C.540 and OAR 839-025-0050.

OAR 839-025-0050(2)(a)(A) provides that subcontractors required by ORS 279C.540 to pay overtime wages under ORS 279C.540 must pay overtime wages for all hours worked on Saturdays. ORS 279C.840(1) requires that those wages must be paid on the subcontractor's "regular payday." By not paying the overtime wages to its workers for their overtime work on November 26, 2011, until a year after it was due, HMPC violated ORS 279C.540, ORS 279C.840(1), OAR 839-025-0035 and OAR 839-025-0050.

C. HMPC violated ORS 279C.540, ORS 279C.840(1), OAR 839-025-0035 and OAR 839-025-0050 by failing to pay overtime wages to Williamson, Murphy, and Petersen for their work on December 26, 2011 and January 2, 2012.

OAR 839-025-0050 includes Christmas Day and New Year's Day as legal holidays on which overtime wages must be paid. ORS 279C.540(3) provides that when those days fall on a Sunday, the "succeeding Monday shall be recognized as a legal holiday." December 25, 2011, and January 1, 2012, both fell on Sunday, thereby requiring HMPC to pay its workers overtime for work performed on the succeeding Mondays of December 26, 2011, and January 2, 2012. HMPC failed to do so, thereby violating ORS 279C.540, ORS 279C.840(1), OAR 839-025-0035 and OAR 839-025-0050.

D. Conclusion

In its Notice of Intent, the Agency alleged that HMPC committed four violations of ORS 279C.540, ORS 279C.840(1), OAR 839-025-0035 and OAR 839-025-0050 by failing to pay four workers the prevailing rate of wage. Based on foregoing, the forum finds four violations of these statutes and rules.

CIVIL PENALTIES -- FAILURE TO PAY PREVAILING WAGE RATE

In its Notice of Intent, the Agency asks the forum to assess a civil penalty of $1,000 for each of HMPC's four violations. The Agency further alleges that the violations were aggravated by the ease of opportunity to comply with Oregon's prevailing wage rate laws, the fact that HMPC knew or should have known it was violating these laws, the seriousness of the violations, the fact that they were entirely preventable, and HMPC's complete disregard for the law. OAR 839-025-0540 provides, in pertinent part:

> "(1) The civil penalty for any one violation may not exceed $5,000. The actual amount of the civil penalty will depend on all the facts and on any mitigating and aggravating circumstances.
>
> "* * * * *
>
> "(3) Notwithstanding any other section of this rule, when the commissioner determines to assess a civil penalty for a violation of ORS 279C.840 regarding the payment of the prevailing rate of wage, the minimum civil penalty will be calculated as follows:
>
> "(a) An equal amount of the unpaid wages or $1,000, whichever is less, for the first violation[.]"

The amount of unpaid wages in this case for each of the four workers was $215.52 to Gray, $361.04 to Murphy, $375.04 to Petersen, and $3,487.33 to Williamson. Although

HMPC's failure to pay wages to Williamson on six Fridays in August and September 2011 are partially mitigated by undisputed evidence that Williamson did not disclose these hours until he filed his wage claim and HMPC's prompt payment of overtime wages to Gray, Murphy, and Petersen when BOLI made demand for the wages, this is overcome by HMPC's subsequent refusal to pay the due and owing wages to Williamson after being informed by BOLI that they were due. Under these circumstances, an appropriate civil penalty is $1,000 per violation, for a total of $4,000.

CERTIFIED PAYROLL VIOLATIONS

The Agency alleges that HMPC committed nine violations of ORS 279C.845 and OAR 839-025-0010(1) by filing "inaccurate and/or incomplete" certified payroll reports for the weeks ending August 13, 20, 27, September 3, 17, and 26, November 26, and December 31, 2011, and January 7, 2012.

ORS 279C.845 provides, in pertinent part:

> "(1) * * * every subcontractor * * * shall file certified statements with the public agency in writing, on a form prescribed by the Commissioner of the Bureau of Labor and Industries, certifying:
>
> "* * * * *
>
> "(3) The certified statements shall set out accurately and completely the * * * subcontractor's payroll records, including the name and address of each worker, the worker's correct classification, rate of pay, daily and weekly number of hours worked and the gross wages the worker earned upon the public works during each week identified in the certified statement."

OAR 839-025-0010(1) parrots the language of ORS 279C.845(3).

HMPC's certified payroll reports for the weeks ending August 13, 20, and 27, September 3, 17, and 26, 2011, all omit the hours Greg Williamson worked on August 12, 19, and 26, and September 2, 16 and 23. HMPC's omission of these hours constitutes six violations of ORS 279C.845 and OAR 839-025-0010(1). HMPC's certified payroll report for the week ending November 26, 2011, states that Williamson, Gray, Murphy, and Petersen were all paid straight time for the work on November 26, a Saturday. As discussed previously, HMPC was required to pay them overtime for that work. By reporting that these four workers were paid straight time, HMPC failed to report the gross wages these four workers actually earned, thereby violating ORS 279C.845 and OAR 839-025-0010(1). HMPC's certified payroll reports for the weeks ending December 31, 2011, and January 7, 2012, have the same problem as the November 26, 2011, certified payroll report. They report Williamson, Murphy, and Petersen being paid straight time for their work on December 26, 2011 and January 2, 2012. Under ORS 279C.540, those days are considered to be legal holidays, and workers must be paid overtime for any work performed on those days. By reporting that

three workers were paid straight time for their work on those two days, HMPC failed to report the gross wages these four workers actually earned, thereby committing two violations of ORS 279C.845 and OAR 839-025-0010(1).

CIVIL PENALTIES – CERTIFIED PAYROLL REPORT VIOLATIONS

In its Notice of Intent, the Agency asks the forum to assess a civil penalty of $1,000 for each of HMPC's nine certified payroll report violations. The Agency re-alleges that the same aggravating factors cited earlier to support the civil penalties requested for HMPC's prevailing wage rate violations. There are no mitigating factors to support a lesser penalty with regard to HMPC's violations in its November 26, 2011, December 31, 2011, and January 7, 2012, certified payroll reports. However, the forum finds that HMPC did not report Williamson's hours worked on the dates listed in Finding of Fact #10 because of Cina and Williamson's agreement that he would only work 32 hours a week, Cina's justifiable reliance on Williamson to report his hours worked, and Williamson's contemporaneous failure to report the hours he worked on those days. This conclusion is bolstered by the fact that HMPC apparently paid Williamson for working more than 32 hours a week when he reported working more than that number of hours.[3]

Based on the above, the forum finds that $1,000 is an appropriate civil penalty for HMPC's November 26, 2011, December 31, 2011, and January 7, 2012, violations, for a total of $3,000 in civil penalties. Although HMPC should have known all the hours Williamson was working, his contemporaneous misrepresentation of those hours and HMPC's justifiable reliance on those misrepresentations leads the forum to conclude that $500 is a more appropriate civil penalty for HMPC's certified payroll report violations for the weeks ending August 13, 20, and 27, September 3, 17, and 26, 2011, for a total of $3,000 in civil penalties. In conclusion, the forum assesses $6,000 for HMPC's nine certified payroll reports violations.

PLACEMENT ON THE LIST OF INELIGIBLES

The Agency seeks to debar[4] HMPC and Respondent Cina for three years based on HMPC's alleged intentional failure to pay the prevailing rate of wage to its workers on the Project and Cina's alleged responsibility for that failure.

ORS 279C.860 provides, in pertinent part, that:

[3] Williamson reported working more than 32 hours a week during the weeks ending December 3, 10, 17, 24, 31, 2011, and January 7, 14, and 21, 2012. The fact that the Agency did not allege that Williamson was not paid for all hours worked during those paid periods – only that he was not paid overtime – leads the forum to infer that Williamson was paid the correct prevailing wage rate for all straight time hours worked during those weeks

[4] In this Order, "debar" and "debarment" are synonymous with placement on the List of Ineligibles.

> (1) A * * * subcontractor or any firm, corporation, partnership or association in which the * * * subcontractor has a financial interest is ineligible to receive any contract or subcontract for public works for a period of three years from the date on which the Commissioner of the Bureau of Labor and Industries publishes the * * * or subcontractor's name on the list described in subsection (2) of this section. The commissioner shall add a * * * subcontractor's name to the list after determining, in accordance with ORS chapter 183, that:
>
> "(a) The * * * subcontractor has intentionally failed or refused to pay the prevailing rate of wage to workers employed upon public works[.]"

OAR 839-025-0085 provides, in pertinent part, that:

> "(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 * * * subcontractor or any firm, limited liability company, corporation, partnership or association in which the * * * subcontractor has a financial interest is ineligible to receive any contract or subcontract for a public works:
>
> "(a) The * * * subcontractor has intentionally failed or refused to pay the prevailing rate of wage to workers employed on a public works project as required by ORS 279C.840[.]"

The forum has already concluded that HMPC failed to pay the applicable prevailing wage rate to four workers on the Project and must now determine whether that failure was "intentional" and whether Cina was responsible for that failure. If so, the Commissioner is required to place HMPC and Cina on the List of Ineligibles for three years.

To "intentionally" fail to pay the prevailing rate of wage, "the employer must either consciously choose not to determine the prevailing wage or know the prevailing wage but consciously choose not to pay it." *In the Matter of Labor Ready Northwest, Inc.,* 22 BOLI 245, 287 (2001), *rev'd in part, Labor Ready Northwest, Inc. v. Bureau of Labor and Industries,* 188 Or App 346, 364, 71 P3d 559 (2003), *rev den* 336 Or 534, 88 P3d 280 (2004). "[A] negligent or otherwise inadvertent failure to pay the prevailing wage, while sufficient to require the repayment of the back wages and liquidated damages to the employee and to invoke civil penalties, is not sufficient to impose debarment." *Id.* Rather, a "culpable mental state" must be shown for the forum to conclude that HMPC "intentionally" failed to pay the prevailing wage rate.

In this case, Cina, HMPC's corporate president, incorporated HMPC for the specific reason of taking over Superior Plumbing's subcontract on the Project and bailing out Greg Williamson, a bookkeeping client of Cina's who owned Superior Plumbing. Cina knew the Project was a prevailing wage rate job, as shown by her filing of certified payroll reports on HMPC's behalf through HMPC's work on the Project. Cina also knew the correct straight time prevailing wage rate for plumbers on the Project and

paid that rate for all hours contemporaneously reported to her.[5] In addition, Cina was the person responsible for payment of wages to HMPC's employees.

Based on Cina's testimony, the forum concludes that Cina's failure to pay overtime wages to Williamson, Gray, Murphy, and Petersen on the regular payday on which they were due was an oversight based on her inexperience, and she initially did not pay Williamson anything for his work on August 12, 19, and 26, and September 2, 16 and 23, 2011, because he did not tell Cina he had worked those days. However, Cina's continuing failure to pay those wages after BOLI's notification that those wages were due and owing, based on her belief that Williamson did not work those hours, was a deliberate and conscious choice on her part and converts her inadvertent failure to pay into an intentional failure to pay. Based on that intentional failure, the Commissioner is required to place HMPC and Cina on BOLI's list of ineligibles to receive contracts or subcontracts for public works for a period of three years.

ORDER

A. NOW, THEREFORE, as authorized by ORS 279C.865, and as payment of the penalties assessed as a result of its violations of ORS 279C.540, ORS 279C.840(1), ORS 279C.845, OAR 839-025-0010(1), OAR 839-025-0035, and OAR 839-025-0050, the Commissioner of the Bureau of Labor and Industries hereby orders Respondent **High Mountain Plumbing Company** to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 1045 State Office Building, 800 NE Oregon Street, Portland, Oregon 97232-2180, the following:

> A certified check payable to the Bureau of Labor and Industries in the amount of **NINE THOUSAND DOLLARS ($9,000.00)**, plus interest at the legal rate on that sum between a date ten days after the issuance of the final order and the date Respondent **High Mountain Plumbing Company** complies with the Final Order.

B. NOW, THEREFORE, as authorized by ORS 279C.860, the Commissioner of the Bureau of Labor and Industries hereby orders that Respondents **High Mountain Plumbing Company** and **Diane Marie Cina** or any firm, corporation, partnership, or association in which either **High Mountain Plumbing Company** and **Diane Marie Cina** have a financial interest shall be ineligible to receive any contract or subcontract for public works for three years from the date of publication of their names on the list of those ineligible to receive such contracts maintained and published by the Commissioner of the Bureau of Labor and Industries.

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[5] It is undisputed that Williamson's hours for the work he performed on August 12, 19, and 26, and September 2, 16 and 23, 2011, were not contemporaneously reported to Cina.

33 BOLI ORDERS

In the Matter of

GIANTS, INC., GEORGE T. COMALLI,
HOLLYWOOD FITNESS, LLC, and HOLLYWOOD FITNESS CENTER, LLC

Case No. 23-14
Final Order of Commissioner Brad Avakian
Issued March 19, 2014

SYNOPSIS

A wage claimant worked for Respondents from September 5, 2012, through January 15, 2013, earning $6,804, and was only paid $3,178. The forum awarded the claimant $3,626 in unpaid wages. The forum found that Respondents' failure to pay claimant was willful and awarded claimant $2,160 in penalty wages.

The above-entitled case was assigned to Alan McCullough, designated as Administrative Law Judge ("ALJ") by Brad Avakian, 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 case presenter Cristin Casey, an employee of the Agency. After the Agency issued an Order of Determination ("OOD"), the Agency moved for and was granted summary judgment.

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

FINDINGS OF FACT – PROCEDURAL

1) Makhmud A. Turanov ("Claimant") filed a wage claim with the Agency's Wage and Hour Division alleging that Respondents owed him unpaid wages and assigned his claim to the Agency.

2) On August 20, 2013, Agency issued Order of Determination ("OOD") in which it alleged that Claimant was employed by Respondents, earned $6,804 in wages, and was only paid $3,178, leaving $3,626 in unpaid, due and owing wages.

3) On September 24, 2013, Respondents filed an answer and request for hearing through George Comalli, representing himself and acting as authorized representative for the other Respondents.

4) On January 10, 2014, the forum issued a Notice of Hearing to Respondent, the Agency, and Claimant setting the time and place of hearing for 9:00 a.m. on April 22, 2014, at the Portland office of the Bureau of Labor and Industries. Together with the Notice of Hearing, the forum sent a copy of the Order of Determination, a document entitled "Summary of Contested Case Rights and Procedures" containing the information required by ORS 183.413, a document entitled "Servicemembers Civil Relief Act (SCRA) Notification, and a copy of the forum's contested case hearings rules, OAR 839-050-000 to 839-050-0445.

5) On February 4, 2014, the Agency filed a motion for Summary Judgment, contending it was entitled to judgment as a matter of law. The same day, the ALJ issued an order setting a deadline for a written response by Respondents. Respondents did not file a response.

6) On February 24, 2014, the ALJ issued an interim order **GRANTING** the Agency's motion for summary judgment. The ALJ's interim order is reprinted below:

"**Introduction**

"On August 20, 2013, Agency issued Order of Determination #13-0634 ("OOD") in which it charged that Respondents owed $3,178[1] in earned, and unpaid wages to Makhmud A. Turanov ('Claimant') for work Claimant performed for Respondents from September 5, 2012, through January 15, 2013. The OOD alleged that Respondents owed Claimant $2,160 in penalty wages based on Respondents' willful failure to pay these wages, based on Claimant's hourly wage of $9 per hour. The OOD further alleged that it was based on the 'assigned wage claim' filed by Claimant.

"Respondents were served with the OOD. On September 24, 2013, George Comalli filed an answer and request for hearing on behalf of himself and as the authorized representative for the other three Respondents. Each answer was brief and identical. In pertinent part, it is reprinted below:

> 'In regards to paragraph 2 of alleged wages owing, it is correct, however, we were not able to start payments due to limitations placed upon the business by the Internal Revenue Department.'

"On February 4, 2014, the Agency filed a motion for Summary Judgment, contending it was entitled to judgment as a matter of law on all of the allegations in its OOD. In an interim order dated February 4, 2014, the undersigned ALJ gave Respondents until February 11, 2014, to file a response. The interim order included the following information:

[1] This figure is incorrect. The OOD charged that Respondents $3,626 in unpaid wages to Claimant.

> 'OAR 839-050-0150(4) provides that any participant may make a motion for summary judgment for an accelerated decision in favor of the participant as to all or part of the issues raised in the pleadings. In ruling on the Agency's motion, the forum will consider the existing record, the supporting documents provided by the Agency, and any documents provided by Respondents in response to the Agency's motion, in a manner most favorable to Respondents. Respondents' written response, including any opposing affidavits, if applicable, and supporting documents must be filed no later than **Tuesday, February 11, 2014**. OAR 839-050-0150. The forum will rule on the Agency's motion promptly thereafter.
>
> '**PLEASE NOTE:** Respondents have the burden of producing evidence on any issue raised in the motion as to which the Respondents have the burden of persuasion at hearing. *See* ORCP 47C.
>
> 'If Respondents fail to file a written response, the forum will grant the Agency's motion if the pleadings and all documents filed in support of the motion show that there is no genuine issue as to any material fact and that the Agency is entitled to judgment as a matter of law.'

Respondents did not file a response and the forum rules on the motion based on the OOD, Respondents' answer, and the exhibits accompanying the Agency's motion.

"**Summary Judgment Standard**

"A motion for summary judgment may be granted when 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 standard for determining if a genuine issue of material fact exists and the evidentiary burden on the participants is as follows:

> ' * * * No genuine issue as to a material fact exists if, based upon the record before the court viewed in a manner most favorable to the adverse party, no objectively reasonable juror could return a verdict for the adverse party on the matter that is the subject of the motion for summary judgment. The adverse party has the burden of producing evidence on any issue raised in the motion as to which the adverse party would have the burden of persuasion at [hearing].' ORCP 47C.

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).

"**Unpaid Wages**

"In this claim for unpaid wages, the Agency's prima facie case consists of the following elements: 1) Respondents employed Claimant; 2) The pay rate upon which Respondents and Claimant agreed, if other than the minimum wage; 3) The amount and extent of work Claimant performed for Respondent; and 4) Claimant performed work for which he was not properly compensated. *See, e.g., In the Matter of J & S Moving & Storage, Inc.,* 31 BOLI 286, 295 (2012).

"In paragraph 'II' of its OOD, the Agency alleged that (1) Claimant worked for Respondents between September 5, 2012, through January 15, 2013; (2) Claimant's agreed rate of pay was $9 per hour; (3) Claimant worked 756 hours for Respondents; and (4) Claimant earned $6,804 in wages, of which only $3,178 has been paid, leaving a balance due and owing of $3,626 in unpaid wages. As stated earlier, Respondents' entire answer consisted of the following response:

> 'In regards to paragraph 2 of alleged wages owing, it is correct, however, we were not able to start payments due to limitations placed upon the business by the Internal Revenue Department.'

OAR 839-050-0130 provides, in pertinent part:

> '(1) A party filing a written request for a hearing or a party served with Formal Charges must file a written response, referred to as an 'answer,' to the allegations in the charging document.
> '(2) The answer must include an admission or denial of each factual matter alleged in the charging document and a statement of each relevant defense to the allegations. A general denial is not sufficient to constitute an answer. * * *
> '(3) Except for good cause shown to the administrative law judge, factual matters alleged in the charging document and not denied in the answer will be deemed admitted by the party.'

The facts alleged in the second paragraph of the Agency's OOD incorporate all the elements of the Agency's prima facie case. Respondents' admission of those facts constitutes proof of those elements. The forum concludes that Respondents owe Claimant $3,626 in unpaid, due and owing wages.

"**Penalty Wages**

"In its OOD, the Agency alleges that Claimant is entitled to $2,160 in penalty wages pursuant to ORS 652.150 based on Respondents' willful failure to pay $3,626 in unpaid, due and owing wages to Claimant upon the termination of his employment. An employer is liable for penalty wages when it willfully fails to pay any wages or compensation of any employee whose employment ceases. Willfulness does not imply or require blame, malice, 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. *See, e.g., In the Matter of J & S Moving & Storage, Inc.,* 31 BOLI 286, 300 (2012).

"Respondents admitted in their answers that they owe Claimant wages alleged in the OOD. When coupled with the statement that 'we were not able to start payments * * * Department,' the forum infers that Respondents were aware that these wages were owed prior to the issuance of the OOD and finds that Respondents' failure to pay Claimant all wages owed at the time of his termination corresponded to Respondents' awareness that those wages were in fact owed. There is no evidence in the record that Respondents were not free agents in their decision not to pay Claimant those wages. The forum therefore concludes that Respondents' failure to pay Claimant all wages due to him at the time of his termination was willful.

"In their answers, Respondents allege 'we were not able to start payments due to limitations placed upon the business by the Internal Revenue Department.' Reading Respondents' answer in a light most favorable to Respondents, the forum finds that Respondents' statement raises the affirmative defense of financial inability to pay in ORS 652.150(5). That statute provides that '[t]he employer may avoid liability for the penalty described in section by showing financial inability to pay the wages or compensation at the time the wages or compensation accrued.' Respondents have the burden of proving this affirmative defense. *See, e.g., In the Matter of Tailor Made Fencing & Decking, Inc.,* 30 BOLI 151, 157 (2009). Respondents' answer alleges no facts from which the forum could infer that Respondents were financially unable to pay Claimant's wages **at the time the wages * * * accrued**. Accordingly, this affirmative defense fails.[2]

"When a written notice of nonpayment submitted on behalf of a wage claimant[3] and the proposed civil penalty does not exceed 100 percent of a claimant's unpaid wages, penalty wages are computed by multiplying a claimant's hourly wage x eight hours per day x 30 days. ORS 652.150(1) & (2); OAR 839-001-0470. Claimant's penalty wages equal $2,160 ($9 x 8 hours x 30 days).

"**Conclusion**

"The Agency's motion for summary judgment is **GRANTED** in its entirety. The hearing in this matter is hereby cancelled and the forum will issue a proposed order in the near future that incorporates this interim order. OAR 839-050-0150(4)."

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[2] *See In the Matter of Captain Hooks, LLP,* 27 BOLI 211, 230 (2006) (to meet its burden of proof, an employer must provide specific information as to the financial resources and expenses of both the business and the employer personally during the wage claim period, including submission of records from which that information came).

[3] The Agency did not submit a notice of wage claim that was sent to Respondents during its investigation as part of its motion for summary judgment. However, the OOD itself, issued on August 20, 2013, serves the same function. *See In the Matter of John Steensland,* 29 BOLI 235, 268 (2007).

The ALJ's ruling on the Agency's motion for summary judgment is hereby CONFIRMED.

7) The ALJ issued a proposed order on March 4, 2014, 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) Respondent engaged the personal services of Makhmud A.Turanov from September 5, 2012, through January 15, 2013, at the agreed rate of $9 per hour.

2) Claimant worked 756 straight time hours for Respondents, earning $6,804.

3) Claimant has only been paid $3,178, leaving $3,626 in unpaid, due and owing wages.

4) At the latest, Respondents became aware that these wages were due to Claimant in or around August 20, 2013 when the Agency issued its OOD notifying Respondents of Claimant's unpaid, due and owing wages and made demand for payment. More than 30 days have elapsed since that time.

5) ORS 652.150 penalty wages are computed as follows: $9 x 8 hours x 30 days = $2,160.

CONCLUSIONS OF LAW

1) At all times material herein, Respondents employed Claimant. ORS 652.310.

2) BOLI's Commissioner has jurisdiction over the subject matter and Respondents herein. ORS 652.330, 652.332.

3) Respondents owe Claimant $3,626 in unpaid, due and owing wages and more than five days have elapsed since Claimant left Respondents' employment. ORS 652.140.

4) Respondents' failure to pay Claimant all unpaid, due and owing wages after Claimant left Respondents' employment was willful and Claimant is entitled to $2,160 in penalty wages. ORS 652.150.

5) Under the facts and circumstances of this record, and according to the applicable law, BOLI's Commissioner has the authority to order Respondents to pay Claimant his earned, unpaid, due and payable wages and penalty wages, plus interest on all sums until paid. ORS 652.332.

OPINION

All allegations in the Agency's OOD were resolved in the ALJ's interim order granting the Agency's motion for summary judgment. No further discussion is required.

ORDER

NOW, THEREFORE, as authorized by ORS 652.332, the Commissioner of the Bureau of Labor and Industries hereby orders Respondents **Giants, Inc., an Oregon Corporation; George T. Comalli, Individually; Hollywood Fitness, LLC, an Oregon Limited Liability Company; and Hollywood Fitness Center, LLC, an Oregon Limited Liability Company,** to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 1045 State Office Building, 800 NE Oregon Street, Portland, Oregon 97232-2180, the following:

> A certified check payable to the Bureau of Labor and Industries in trust for Claimant Makhmud A. Turanov in the amount of FIVE THOUSAND SEVEN HUNDRED and EIGHT SIX DOLLARS ($5,786), less appropriate lawful deductions, representing $3,626 in gross earned, unpaid, due and payable wages and $2,160 in penalty wages, plus interest at the legal rate on the sum of $3,626 from February 1, 2013, until paid, and interest at the legal rate on the sum of $2,160 from March 1, 2013, until paid.

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33 BOLI ORDERS

In the Matter of

AARON ALEXANDER dba Currinsville Deli

Case No. 12-14
Final Order of Commissioner Brad Avakian
Issued March 19, 2014

SYNOPSIS

A wage claimant worked straight time and overtime hours for Respondent from January 23, 2012, through March 27, 2012, earning $4,906.25, and was paid nothing for her work. The forum awarded the claimant $4,906.25 in unpaid wages. The forum found that Respondent's failure to pay claimant was willful and awarded claimant $2,400.00 in penalty wages. The forum also awarded civil penalties of $2,400.00 to claimant based on Respondent's failure to pay her overtime wages.

The above-entitled case was assigned to Alan McCullough, designated as Administrative Law Judge ("ALJ") by Brad Avakian, 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 case presenter Adriana Ortega, an employee of the Agency. After the Agency issued an Order of Determination ("OOD"), the Agency moved for and was granted summary judgment.

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

FINDINGS OF FACT – PROCEDURAL

1) On July 5, 2012, Lesa Lea Rodden ("Claimant") filed a wage claim with the Agency's Wage and Hour Division alleging that Respondent owed her unpaid wages and assigned her claim to the Agency.

2) On July 18, 2013, Agency issued Order of Determination #13-0191 ("OOD") in which it alleged that Claimant was employed by Respondent from January 23, 2012, to March 27, 2012, at the pay rate of $10 per hour and worked a total of 451.75 hours, 77.75 which were overtime hours, earning a total of $4,906.25 in straight time and overtime wages. The OOD alleged that Claimant has been paid nothing for

her work and is owed $4,906.25 in unpaid wages, $2,400.00 in ORS 652.150 penalty wages, and $2,400.00 in ORS 653.055(1)(b) civil penalties, plus applicable interest.

3) On September 16, 2013, Respondent filed an answer and request for hearing.

4) On December 19, 2013, the forum issued a Notice of Hearing to Respondent, the Agency, and Claimant setting the time and place of hearing for 9 a.m. on March 4, 2014, at the Portland office of the Bureau of Labor and Industries. Together with the Notice of Hearing, the forum sent a copy of the Order of Determination, a document entitled "Summary of Contested Case Rights and Procedures" containing the information required by ORS 183.413, a document entitled "Servicemembers Civil Relief Act (SCRA) Notification, and a copy of the forum's contested case hearings rules, OAR 839-050-000 to 839-050-0445.

5) On February 12, 2014, the Agency filed a motion for Summary Judgment, contending it was entitled to judgment as a matter of law. The same day, the ALJ issued an order setting a deadline of February 21, 2014, for a written response by Respondent and mailed it to Respondent at two different addresses – 28424 S.E. Eagle Creek Road, Estacada, OR 97023, and 825 SW Lakeshore Drive, Estacada, OR 97023. Respondent did not file a response.

6) On February 25, 2014, the ALJ issued an interim order **GRANTING** the Agency's motion for summary judgment. Because the order was only mailed to Respondent's Eagle Creek Road address, the ALJ issued an amended interim order later that day that was also mailed to Respondent's Lakeshore Drive address. The ALJ's interim order is reprinted below:

"**INTRODUCTION**

"On July 18, 2013, Agency issued Order of Determination #13-0191 ('OOD') in which it charged that Respondent owed $4,906.25 in earned, and unpaid wages to Lesa Lea Rodden ('Claimant') for work Claimant performed for Respondent from January 23, 2012, to March 27, 2012; $2,400 in ORS 652.150 penalty wages based on Respondent's willful failure to pay these wages, based on Claimant's hourly wage of $10 per hour; and $2,400 in ORS 653.055(1)(b) civil penalties based on Respondent's failure to pay Claimant earned overtime wages.

"Respondent was served with the OOD and filed an answer and request for hearing on September 16, 2013. Respondent's answer is reprinted below:

> 'I am not contesting the wages owed and mentioned in paragraph II of the Order of Determination. I had previously agreed to make payments to satisfy this debt and have been waiting an agreement to be sent from the Bureau of Labor and Industries to this effect. The amout(sic) agreed upon was $400.00 per month until the total of $4906.25 was paid.

> ‘I am contesting the penalty wages of $2400.00 mentioned in paragraph III because I have alreardy(sic) agreed to pay the wages."
>
> ‘I am contesting the $2400.00 in Civil Penalties mentioned in paragraph III because I have alreardy(sic) agreed to pay the wages.’

“On February 12, 2014, the Agency filed a motion for Summary Judgment, contending it was entitled to judgment as a matter of law on all of the allegations in its OOD. In an interim order dated February 14, 2014, the undersigned ALJ gave Respondents until February 21, 2014, to file a response. The interim order included the following information:

> ‘OAR 839-050-0150(4) provides that any participant may make a motion for summary judgment for an accelerated decision in favor of the participant as to all or part of the issues raised in the pleadings. In ruling on the Agency’s motion, the forum will consider the existing record, the supporting documents provided by the Agency, and any documents provided by Respondent in response to the Agency’s motion, in a manner most favorable to Respondents. Respondent’s written response, including any opposing affidavits, if applicable, and supporting documents must be filed no later than **Friday, February 21, 2014**. OAR 839-050-0150. The forum will rule on the Agency’s motion promptly thereafter.
>
> ‘**PLEASE NOTE:** Respondent has the burden of producing evidence on any issue raised in the motion as to which the Respondent has the burden of persuasion at hearing. *See* ORCP 47C.
>
> ‘If Respondent fails to file a written response, the forum will grant the Agency’s motion if the pleadings and all documents filed in support of the motion show that there is no genuine issue as to any material fact and that the Agency is entitled to judgment as a matter of law.’

Respondent did not file a response and the forum rules on the motion based on the OOD, Respondent’s answer, and the exhibits accompanying the Agency’s motion.

“**Summary Judgment Standard**

“A motion for summary judgment may be granted when 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 standard for determining if a genuine issue of material fact exists and the evidentiary burden on the participants is as follows:

> ‘ * * * No genuine issue as to a material fact exists if, based upon the record before the court viewed in a manner most favorable to the adverse party, no objectively reasonable juror could return a verdict for the adverse party on

> the matter that is the subject of the motion for summary judgment. The adverse party has the burden of producing evidence on any issue raised in the motion as to which the adverse party would have the burden of persuasion at [hearing].' ORCP 47C.

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).

"**Unpaid Wages**

"In this claim for unpaid wages, the Agency's prima facie case consists of the following elements: 1) Respondent employed Claimant; 2) The pay rate upon which Respondent and Claimant agreed, if other than the minimum wage; 3) The amount and extent of work Claimant performed for Respondent; and 4) Claimant performed work for which he was not properly compensated. *See, e.g., In the Matter of J & S Moving & Storage, Inc.,* 31 BOLI 286, 295 (2012).

"In paragraph 'II' of its OOD, the Agency specifically alleges that (1) Claimant worked for Respondent from January 23, 2012, to March 27, 2012; (2) Claimant's agreed rate of pay was $10 per hour; (3) Claimant worked 451.75 hours for Respondents, of which 77.75 hours were hours worked over 40 hours in a given workweek; and (4) Claimant earned $4,906.25 in straight time and overtime wages, none of which has been paid. In support of its motion, the Agency also attached a copy [of] Claimant's wage claim, Claimant's assignment of wages to BOLI, and Claimant's contemporaneous written record of hours that she worked.

Respondent's answer, quoted earlier, states that Respondent does not 'contest[] the wages owed and mentioned in paragraph II of the Order of Determination.' OAR 839-050-0130 provides, in pertinent part:

> '(1) A party filing a written request for a hearing or a party served with Formal Charges must file a written response, referred to as an 'answer,' to the allegations in the charging document.
>
> '(2) The answer must include an admission or denial of each factual matter alleged in the charging document and a statement of each relevant defense to the allegations. A general denial is not sufficient to constitute an answer. * * *
>
> '(3) Except for good cause shown to the administrative law judge, factual matters alleged in the charging document and not denied in the answer will be deemed admitted by the party.'

The facts alleged in the second paragraph of the Agency's OOD incorporate all the elements of the Agency's prima facie case, and Claimant's assignment of wages confers jurisdiction on the forum. Respondent's admission of those facts constitutes proof of those elements. The forum concludes that Respondent owes Claimant $4,906.25 in unpaid, due and owing wages.

"**ORS 652.150 Penalty Wages**

"In its OOD, the Agency alleges that Claimant is entitled to $2,400 in penalty wages pursuant to ORS 652.150 based on Respondent's willful failure to pay $4,906.25 in unpaid, due and owing wages to Claimant upon the termination of her employment. An employer is liable for penalty wages when it willfully fails to pay any wages or compensation of any employee whose employment ceases. Willfulness does not imply or require blame, malice, 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. *See, e.g., In the Matter of J & S Moving & Storage, Inc.,* 31 BOLI 286, 300 (2012).

"Respondent admitted in his answers that he owes Claimant the unpaid wages alleged in paragraph II of the OOD. Respondent's argument that he should not be liable to pay penalty wages because he agreed to pay Claimant's unpaid, due and owing wages in monthly installments is not a defense, particularly since he has never paid those wages. Exhibit 2 accompanying the Agency's motion establishes that the Agency first made written demand for Claimant's unpaid wages on February 4, 2013, and followed it up with additional demand letters mailed on March 14 and March 27, 2013. Despite this notification, Respondent has failed to pay any wages due to Claimant. Respondent's continuing failure to pay wages that Respondent acknowledges are due is a willful failure to pay those wages. There is no evidence in the record that Respondent was not a free agent in his decision not to pay Claimant those wages. The forum therefore concludes that Respondent's failure to pay Claimant all wages due to her at the time of her termination was willful.

"When a written notice of nonpayment has been submitted on behalf of a wage claimant and the proposed civil penalty does not exceed 100 percent of a claimant's unpaid wages, penalty wages are computed by multiplying a claimant's hourly wage x eight hours per day x 30 days. ORS 652.150(1) & (2); OAR 839-001-0470. Claimant's penalty wages equal $2,400 ($10 x 8 hours x 30 days).

"**ORS 653.055(1)(b) Civil Penalties**

ORS 653.055 provides that the forum may award civil penalties to an employee when the employer pays less than the wages to which the employee is entitled under ORS 653.010 to 653.261, computed in the same fashion as ORS

652.150 penalty wages. This includes unpaid overtime wages. 'Willfulness' is not an element. *See, e.g., In the Matter of Letty Lee Sesher,* 31 BOLI 255, 264 (2011).

"The Agency's OOD alleges that Claimant worked 77.75 overtime hours and has been paid nothing for that work. Respondent does not dispute this but again argues he should not have to pay civil penalties because of his yet unfulfilled promise to pay back all of Claimant's unpaid wages. This promise is no defense to a claim for ORS 653.055(1)(b) civil penalties.

"Civil penalties awarded pursuant to ORS 653.055(1)(b) are computed as provided in ORS 652.150 (hourly rate x 8 hours per day x 30 days). *See, e.g., In the Matter of Pavel Bulubenchi,* 29 BOLI 222, 228 (2007). Accordingly, the forum assesses $2,400 in civil penalties ($10 x 8 hours x 30 days).

"**Conclusion**

"The Agency's motion for summary judgment is **GRANTED** in its entirety. The hearing in this matter is hereby cancelled and the forum will issue a proposed order in the near future that incorporates this interim order. OAR 839-050-0150(4)."

The ALJ's ruling on the Agency's motion for summary judgment is hereby CONFIRMED.

7) The ALJ issued a proposed order on March 4, 2014, 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) Respondent engaged Claimant's personal services from January 23, 2012, to March 27, 2012, at the agreed rate of $10 per hour.

2) Claimant's overtime rate was $15 per hour. (Official Notice)

3) Claimant worked for 451.75 hours for Respondent, including 77.75 overtime hours, earning a total of $4,906.25.

4) Claimant has been paid nothing for her work, leaving $4,906.25 in unpaid, due and owing wages.

5) The Agency mailed written notices to Respondent on February 4, March 14, and March 27, 2013, that notified Respondent of Claimant's wage claim, the amount of unpaid wages Claimant asserted was due to her, and made demand for payment of those wages. Respondent received those notices. More than 30 days have elapsed since that those notices were mailed to Respondent.

6) Respondent has not paid Claimant any wages since receiving the Agency's notices.

7) ORS 652.150 penalty wages are computed as follows: $10 x 8 hours x 30 days = $2,400.00.

8) ORS 653.055(1)(b) civil penalties are computed as follows: $10 x 8 hours x 30 days = $2,400.00.

CONCLUSIONS OF LAW

1) At all times material herein, Respondent was Claimant's employer. ORS 652.310.

2) BOLI's Commissioner has jurisdiction over the subject matter and Respondents herein. ORS 652.330, 652.332.

3) Respondent owes Claimant $4,906.25 in unpaid, due and owing wages and more than five days have elapsed since Claimant left Respondents' employment. ORS 652.140.

4) Respondent's failure to pay Claimant all unpaid, due and owing wages after Claimant left Respondent's employment was willful and Claimant is entitled to $2,400.00 in penalty wages. ORS 652.150.

5) Respondent's failure to pay overtime wages to Claimant entitles Claimant to $2,400.00 in civil penalties. ORS 653.055(1)(b).

6) Under the facts and circumstances of this record, and according to the applicable law, BOLI's Commissioner has the authority to order Respondent to pay Claimant (a) her earned, unpaid, due and owing wages; (b) penalty wages; and (c) civil penalties, plus interest on all sums until paid. ORS 652.332.

OPINION

All allegations in the Agency's OOD were resolved in the ALJ's interim order granting the Agency's motion for summary judgment. No further discussion is required.

ORDER

NOW, THEREFORE, as authorized by ORS 652.332, the Commissioner of the Bureau of Labor and Industries hereby orders Respondent **Aaron Alexander dba Currinsville Deli** to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 1045 State Office Building, 800 NE Oregon Street, Portland, Oregon 97232-2180, the following:

> A certified check payable to the Bureau of Labor and Industries in trust for Claimant Lesa Lea Rodden in the amount of NINE THOUSAND SEVEN HUNDRED SIX DOLLARS and TWENTY FIVE CENTS ($9,706.25), less

appropriate lawful deductions, representing $4,906.25 in gross earned, unpaid, due and payable wages, $2,400.00 in ORS 652.150 penalty wages, and $2,400.00.00 in ORS 653.055(1)(b) civil penalties, plus interest at the legal rate on the sum of $4,906.25 from May 1, 2012, until paid, interest at the legal rate on the sum of $2,400.00 from June 1, 2012, until paid, and interest at the legal rate on the sum of $2,400.00 from June 1, 2013, until paid.

In the Matter of

DIAMOND CONCRETE, INC., and ERIC JAMES O'MALLEY and MARNIE LEANNE O'MALLEY

Case No. 58-12
Final Order of Commissioner Brad Avakian
Issued April 3, 2014

SYNOPSIS

Respondent Diamond Concrete, Inc. employed workers on seven separate public works projects. It intentionally failed to pay prevailing wages to 17 workers on four of the projects, and it filed inaccurate and/or incomplete certified payroll statements on 122 different occasions. It failed to keep records and make them available to the Agency upon its request, and it failed to post the prevailing wage rate on each of the seven projects. Individual Respondent Eric James O'Malley was the president of the corporate respondent and the person responsible for payment of prevailing wages. Respondents Diamond Concrete, Inc. and Eric James O'Malley are placed on the List of Ineligibles for a period of three years. ORS 279C.860; OAR 839-025-0085. Civil penalties are assessed against the corporation as follows: $16,388.53 for failing to pay the prevailing wages; $122,000.00 for filing inaccurate or incomplete certified payroll; $1000.00 for failing to keep records and make them available; and $7,000.00 for failing to post the prevailing wage rates. ORS 279C.840 and OAR 839-025-0035 and -0040; ORS 279C.845 and OAR 839-025-0010; ORS 279C.850 and OAR 839-025-0025 and -0030; ORS 279C.840 and OAR 839-025-0033.

The above-entitled case came on regularly for hearing before Daniel Rosenhouse, designated as Administrative Law Judge ("ALJ") by Brad Avakian, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on January 14, 2014, at the Gregg Conference Room at the Portland, Oregon office of the Bureau of Labor and Industries (BOLI) at 800 NE Oregon Street. The Notice of Hearing set the hearing to begin at 9:00AM, but as set forth below, the proceedings did not commence until 9:30AM. They were concluded at approximately 10:15AM.

BOLI was represented by Administrative Prosecutor Cristin Casey, an employee of the Agency.

Debbie Sluyter, a former employee of the Agency, was the only witness.

Respondent Marnie Leanne O'Malley had previously been found to be in default and a Final Order on Default, resolving all issues as to her was issued on May 15, 2013.

Neither Respondent Eric James O'Malley nor any representative of Respondent Diamond Concrete, Inc., appeared at the hearing. The Forum delayed the commencement of the hearing from 9:00AM to 9:30AM in order to account for any unexpected event that may have delayed the Respondents' appearance. But no appearance was ever made by the two remaining Respondents or any other person on their behalf, nor was any notice given to the Forum explaining their failure to appear.

The Forum received into evidence Agency Exhibits A-1 through A-48. In addition to the audio record of the hearing, the official record also includes Administrative Exhibits X-1 through X-21. Exhibits X-22 and X-23, relating to returned mail from the US Postal Service are also in the record.

ALJ'S RULINGS AND RESOLUTIONS OF MOTIONS OR OBJECTIONS.

For the reasons set forth above, Respondents Diamond Concrete, Inc. and Eric James O'Malley were and are found to be in default for failing to appear at the hearing. OAR 839-050-0330(1)(d).

As set forth above, the Agency's proposed exhibits were admitted, upon its motion allowed by the ALJ.

Having fully considered the entire record in this matter, I, Brad Avakian, Commissioner of the Bureau of Labor and Industries, hereby make the following Findings of Fact, Conclusions of Law, Opinion, and Order.

FINDINGS OF FACT

1) The Agency served, on March 11, 2013, all Respondents with a notice of Intent to Place on List of Ineligibles and Assess Civil Penalties (NOI).

2) Respondent Marnie Leanne O'Malley never filed an Answer and the Agency issued a Final Order on Default against her on May 15, 2013.

3) Respondents Diamond Concrete, Inc. and Eric James O'Malley (Respondents, hereafter) did file an Answer to the NOI on April 14, 2013. The Answer did not deny the material facts alleged in the NOI, including the facts that: they employed workers on seven different prevailing wage projects; they intentionally failed to pay 17 workers on those projects the proper prevailing wage; they filed 122 inaccurate or incomplete certified payroll reports relating to those projects; they failed to keep required employment records; they failed to post the required prevailing wage rate at each of those projects; they failed to post prevailing fringe benefits; the prime contractor on one of the projects—the E. Burnside Project—had paid wages due to Respondents' employees on Respondents' behalf; and Respondents Eric James

O'Malley and Marnie James O'Malley were the corporate officers of Respondent Diamond Concrete, Inc. who were responsible for the intentional failure to pay prevailing wages, the failure to post the prevailing wage rates and fringe benefits, and the filing of inaccurate or incomplete certified payroll reports.

4) On September 20, 2013, the Forum issued and served on Respondents and the Agency its INTERIM ORDER—(1) Change of ALJ; (2) New Hearing Date; (3) New Case Summary Due Date which, *inter alia*, set the date for the hearing in this matter as January 14, 2014.

5) On November 15, 2013, Respondents were served with an Amended Notice of Intent to Place on List of Ineligibles and Assess Civil Penalties (Amended NOI) which, *inter alia*, advised Respondents they need not file an Answer to the Amended NOI.

6) The Amended NOI was not materially different in its allegations against Respondents, except that it did not seek penalties against Respondent Eric James O'Malley and it did not allege that he, as an individual, employed any of the workers.

7) Respondents did not file an Answer to the Amended NOI.

8) The Agency submitted AGENCY MOTIONS FOR DEFAULT; SUMMARY JUDGMENT on December 6, 2013, and the Forum issued its OPINION AND INTERIM ORDER DENYING MOTION FOR DEFAUT (sic) AND PARTIALLY ALLOWING MOTION FOR SUMMARY JUDGMENT (Summary Judgment Order) on December 23, 2013. This Final Order incorporates and adopts the factual findings, the legal conclusions, and the legal reasoning set forth in the Summary Judgment Order; those portions addressing and allowing the request for summary judgment, but not default (which was denied) are set forth below, as required by OAR 839-050-0150(4)(b). The excerpt is in the Opinion portion of this Order, under the heading ***Summary Judgment Order***.

9) All of the material facts alleged by the Agency as set forth in Finding of Fact #3, above, are true.

10) Of the 17 workers underpaid on four of the projects, 15 were underpaid more than $1000.00, including one employee who was underpaid $17,286.52. The average underpayment was $5,058.71 per employee.

11) Information on hours worked by employees that was provided to the Agency by the Respondents during the course of the Agency's investigation was inconsistent with employees' time cards; they purported to show that employees had been paid more than they were, in fact, paid. The information was not credible.

12) Documents provided by Respondents to the Agency during the course of its investigation that purported to be copies of certified payroll were different from

certified payroll they provided to the general contractor for filing by it with the public agency that had contracted for the construction.

13) The purported copies of certified payroll provided during the course of the investigation reported that employees worked straight time, when the original payroll reports given to the general contractor indicated they had worked overtime. The documents provided to the Agency were not credible.

14) Respondents demonstrated they had the skill and expertise needed to fill out accurate certified payroll, which skill and expertise was not as great as the skill and expertise they demonstrated when presenting the Agency, during its investigation, with falsified certified payroll.

15) The ALJ's ruling on the Agency's motion for summary judgment is confirmed.

16) The ALJ issued a proposed order on March 4, 2014, that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. No exceptions were filed.

CONCLUSIONS OF LAW

1) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the subject matter and Respondents herein. ORS 279C.860, ORS 279C.865.

2) The legal conclusions and the factual findings set forth in the ***Summary Judgment Order*** are hereby adopted into this Final Order.

3) Civil penalties of $146,388.53 are properly assessed against Respondent Diamond Concrete, as follows: $1,000.00 on account of each of the 15 employees underpaid by more than $1000.00 and penalties of $732.30 and $656.23 on account of each of the employees underpaid those amounts; $122,000.00 for filing inaccurate or incomplete certified payroll; $1000.00 for failing to keep records and make them available; and $7,000.00 for failing to post payable prevailing wages and fringe benefits.

4) Respondents must be placed on the List of Ineligibles for a period of three years.

OPINION

Summary Judgment Order

Summary Judgment—Legal Standards

Motions for summary judgment are specifically authorized by the Oregon Administrative Rules. OAR 839-050-0150(4)(a) provides that such a motion may be

made to obtain an accelerated decision as to all or part of the issues raised in the pleadings. Subsection (B) of -0150(4)(a) allows such a motion, *inter alia*, on the basis that "no genuine issue as to any material fact exists and the participant is entitled to a judgment as a matter of law, as to all or any part of the proceedings." If granted, the decision of the Administrative Law Judge is to be set forth in the Proposed Order." 839-050-150(4)(b).

While the administrative rules do specifically state the bases upon which a motion for summary judgment may be *made*, they do not specifically state the bases upon which the motion should be *granted*.

However, well-established precedent provides that 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. No genuine issue as to a material fact exists if, based upon the record before the court viewed in a manner most favorable to the adverse party, no objectively reasonable juror could return a verdict for the adverse party on the matter that is the subject of the motion for summary judgment. In reviewing a motion for summary judgment, the Forum draws all inferences of fact from the record against the participant filing it and in favor of the participant opposing the motion. However, the adverse party has the burden of producing evidence on any issue raised in the motion as to which the adverse party would have the burden of persuasion at hearing. *See, e.g.*, *Jones v. General Motors Corp.,* 325 Or 404, 408 (1997); ORCP 47; *In the Matter of KC Systems, Inc. fdba The Machine Shop, 32 BOLI 205, 206-07 (2013); In the Matter of Fraser's Restaurant & Lounge*, 31 BOLI 167, 169-70 (2011); *In the Matter of David W. Lewis*, 31 BOLI 160, 162 (2011).

In this case, another rule, relating to the effect of pleadings, is also germane: Factual matters alleged in a charging document and not denied in the answer are deemed admitted by the answering party. OAR 839-050-0130(3).

Material Facts in this Case

The only facts relied upon by the Agency are those facts set out in its NOI and Amended NOI. As pointed out above, Respondents filed no Answer to the Amended NOI. But they did file an Answer to the original NOI. The pertinent parts of that original Answer state, in their entirety:

> * Civil dollar amount of $154,000. – DENIED –
> Statement: This amount is not collectable.
>
> * Ineligibles List – DENIED –
>
> Statement: Already self Embarred for the term suggested. (*sic*)

This Answer has never been amended or withdrawn, and in the absence of amendment or withdrawal, it retains its character and effect under OAR 839-0130(3),—the *factual* matters alleged in the original NOI—the NOI to which it was directed—are deemed admitted. The Forum now turns to those particular facts.

In its original NOI, the Agency alleges that the "Respondents", from September 2009 through February 2011 performed several public works projects subject to prevailing wage laws, that on those projects they failed to pay correct prevailing wages and fringe benefits to 17 employees, they filed a total of 122 inaccurate and/or incomplete certified payroll statements, they failed to keep records and make them available to the Agency as required, and that they failed to post prevailing wages and prevailing fringe benefits, as required. The Agency also alleges that the failure to pay prevailing wages to its employees was intentional, and that Hard Rock Concrete's [*sic* Diamond Concrete] "prime contractor" paid the wages owed by the Respondent on its behalf. The Agency also alleges that Mr. O'Malley was the president of Diamond Concrete and that he was responsible for its intentional failure to or refusal to pay the prevailing wages.

All of the allegations set out in the immediately preceding paragraph are factual, and for summary judgment purposes, all will be deemed admitted by Respondents.

Violations of the Law-Civil Penalties

With respect to civil penalties, the existence of intent is irrelevant. *In the Matter of Green Thumb Landscape and Maintenance, Inc., et al, 32 BOLI 185, 204 (2013).*

The Forum finds that the admitted facts establish, as to Respondent Diamond Concrete:

- 17 violations of ORS 279C.840 and OAR 839-025-0035;
- 122 violations of ORS 279C.845 and OAR 839-025-0010;
- One violation of ORS 279C.850 and OAR 839-025-0025 and -0030;
- Seven violations of ORS 279C.840(4) and OAR 839-025-0033.

The Forum does not find a separate violation for failing to post prevailing wage fringe benefits. As a general rule, fringe benefits are considered to be a part of the prevailing wage. ORS 279C.800(4). In the absence of authority suggesting or mandating otherwise, and none has been presented, the Forum finds that failure to post the amount of fringe benefits is part and parcel of a failure to post the amount of the prevailing wage. It therefore does not constitute a separate violation. If Diamond Concrete had been a participant in a separate health and welfare or pension plan, it would have been required to post a notice describing the plan. ORS 279C.840(5); OAR 839-025-0033(3). But there were no allegations of the existence of such a plan.

Remedies—Placement on List of Ineligibles

The Forum must apply the admitted facts to the applicable law in order to determine the appropriate remedies.

Diamond Concrete's intentional failure to pay the prevailing wage to its employees working on a public works is adequate grounds for placing it on the List of Ineligibles. ORS 279C.860(1)(a). Facts establishing that violation were alleged in the NOI and admitted in the Answer.

The Agency suggests an alternative ground for placement on the List of Ineligibles. Although not necessary to the decision because of the ruling on intentional failure to pay prevailing wages, the Forum addresses that alternative ground. The Agency asserts that the same remedy is appropriate, regardless of intent, because the general contractor paid the wages to Diamond Concrete's employees. ORS 279C.860(1)(b) provides for such placement when—

> The subcontractor has failed to pay to the subcontractor's employees amounts required by ORS 279C.840 and the contractor has paid those amounts on the subcontractor's behalf;
> …

See also, OAR 839-025-0085(1)(b).

The NOI and the Answer do establish that Diamond Concrete failed to pay its employees and that a "prime" contractor paid them on its behalf. The NOI nowhere alleges, however, that Diamond Concrete was a subcontractor on the project. It merely alleges throughout that Diamond Concrete was a contractor, thereby leaving open the possibility that it was a general contractor, perhaps one of two or more. The requirements of ORS 279C.860(1)(b) were not established.

Nonetheless, as stated above, the Forum finds that Diamond Concrete must be placed on the List of Ineligibles on account of its intentional failure to pay prevailing wages, and the Agency's motion for summary judgment, as requested at III a.(1), at page 10 is granted. Its request at III a.(2) is denied.

The same analysis applies to Mr. O'Malley. As the corporate officer responsible for the intentional failure to pay the prevailing wage, Mr. O'Malley must likewise be placed on the list of ineligibles. ORS 279C.860(3).

Remedies—Penalties

As stated above, the Forum finds violations of the prevailing wage laws. The Commissioner may impose a penalty, not to exceed $5,000.00 for each violation of the prevailing wage laws. ORS 279C.865. OAR 839-025-0530. The intentional nature of the violations and the fact that the violations occurred over a

long period of time, more than two years, lead the Forum to conclude that penalties should be imposed for each violation.

****

At the hearing, the Agency did not present evidence that Diamond Concrete, Inc. was a subcontractor. The evidence to establish the alternative ground for placing Respondents on the List of Ineligibles is still not in the record.

Likewise, the Agency did not present evidence that Diamond Concrete participated in a pension or health and welfare plan. Therefore, Diamond Concrete's failure to post fringe benefits is not a violation separate from its failures to post prevailing wages.

The Agency presented evidence of the amounts by which various employees were underpaid, amounts ranging from $656.23 to $17,286.52. The average underpayment is calculated to be $5,058.71. The Agency also submitted evidence that Respondents submitted to the Agency during its investigation (but not to the contracting agency) certified payroll forms that contained false information regarding overtime hours worked. The latter fact is considered in setting the amount of the penalty, but not debarment. *See*, ORS279C.860 (1)(d) mandating debarment for filing false certified payroll under ORS 279C.845 (1), which requires filing with the contracting agency, not BOLI.

Given the factors and considerations identified above, civil penalties are imposed as follows: $16,388.53 for failing to pay the prevailing wages; $122,000.00 for filing inaccurate or incomplete certified payroll; $1000.00 for failing to keep records and make them available; and $7,000.00 for failing to post payable prevailing wages and fringe benefits.

ORDER

NOW, THEREFORE, as authorized by ORS 279C.865, and as payment of the penalties assessed as a result of its violations of ORS 279C.840, OAR 839-025-0035 and OAR 839-025-0040 and of ORS 279C.845 and OAR 839-025-0010, the Commissioner of the Bureau of Labor and Industries hereby orders—

Respondent Diamond Concrete, Inc. to pay, by delivering to the Fiscal Services Office of the Bureau of Labor and Industries, 1045 State Office Building, 800 NE Oregon Street, Portland, Oregon 97232-2180, a certified check payable to the Bureau of Labor and Industries in the amount of ONE HUNDRED FORTY-SIX THOUSAND THREE HUNDRED EIGHTY-EIGHT DOLLARS AND FIFTY-THREE CENTS($146,388.53); and

As authorized by ORS 279C.860(1)(a) and OAR 839-025-0085(1)(a), as a result of intentional violations of ORS 279C.840 and OAR 839-025-0035, the Commissioner of the Bureau of Labor and Industries further orders—

Respondent Diamond Concrete, Inc. shall be placed on the List of Ineligibles, as defined in OAR 839-025-0090, and shall thereafter be ineligible to receive any contract or subcontract for a public works for a period of three years from the date first published there; and

Respondent **Eric James O'Malley** shall be placed on the List of Ineligibles, as defined in OAR 839-025-0090, and shall thereafter be ineligible to receive any contract or subcontract for a public works for a period of three years from the date first published there.

In the Matter of

HARD ROCK CONCRETE, INC and ROCKY EVANS

Case No. 39-13
Final Order of Commissioner Brad Avakian
Issued April 10, 2014

SYNOPSIS

Respondent Hard Rock Concrete, Inc. was a sub-contractor installing concrete slabs, curbs, and sidewalks in 2011 in a public works project at the Hillside Elementary School in Jackson County. Respondent Rocky Evans was Respondent Hard Rock's president, and was responsible for its actions. Respondent Hard Rock failed to pay prevailing wages, sometimes intentionally, to seven of its employees on the project. Unpaid wages were ultimately paid to the workers by the general contractor. Respondent Hard Rock submitted 22 inaccurate certified payroll reports. Civil penalties are imposed on Respondent Hard Rock totaling $13,600. Respondent Hard Rock and Respondent Rocky Evans are placed on the list of contractors ineligible to receive contracts for public works for three years. ORS 279C.860; ORS 279C.865; OAR 839-025-0520 and -0540.

The above-entitled case came on regularly for hearing before Daniel Rosenhouse, designated as Administrative Law Judge ("ALJ") by Brad Avakian, Commissioner of the Bureau of Labor and Industries of the State of Oregon (BOLI, or the Agency). A hearing was held on November 5 and 6, 2013, in Bend, Oregon at the Deschutes County Service Building, at 1300 NW Wall Street.

Additional written materials from each party, not evidence, were timely supplied to the Forum after the hearing. Agency's submissions are designated X-13 and X-15; Respondents' are designated X-14 and X-17. On November 18, Agency submitted Exhibit X-16, AGENCY'S OBJECTION TO RESPONDENT'S SUPPLEMENTAL ARGUMENT.

The Agency was represented by Administrative Prosecutor Adriana Ortega. Respondents Hard Rock Concrete, Inc. (referred to herein as Hard Rock, or the corporate Respondent) and Rocky Evans (referred to herein as Respondent Evans) were represented by attorney Christopher Peterman.

In addition to Ms. Ortega and Mr. Peterman, Respondent Evans was present throughout the hearing. Mr. Rex Stansell, a former employee of the corporate

Respondent's, testified at the hearing by telephone, as did Agency Compliance Specialist Hannah Wood, both of whom were called by the Agency. Respondents called Respondent Evans, who testified in person. No other witnesses were called or testified; other than the Administrative Law Judge, no other persons were present at the hearing.

The Forum received into evidence all Agency Exhibits A-1 through A-69, except A-4, A-6, and A-9, which were withdrawn, and A-67, to which an objection was sustained. Exhibits A-2 and A-3, although admitted, were admitted solely to demonstrate how the agency initiated its investigation; they were not admitted for the purpose of showing the truth of any substantive facts contained in those exhibits. Exhibits A-57, A-65, and A-66, although admitted, were admitted solely to demonstrate notice, and, like A-2 and A-3, not for the substance of their contents. Respondents' objections to A-10 and A-69 were overruled. Respondents' Exhibits R-9 and R-14 were admitted. Respondent did not offer any other exhibits. And in addition to the audio record of the hearing, the official record also includes Administrative Exhibits X-1 through X-17.

The Proposed Order was issued on January 23, 2014. Respondents and the Agency filed timely exceptions.

Having fully considered the entire record in this matter, I, Brad Avakian, Commissioner of the Bureau of Labor and Industries, hereby make and submit the following Findings of Fact, Conclusions of Law, Opinion, and Order.

RULINGS ON OUTSTANDING MOTIONS OR OBJECTIONS

The Agency objected to the filing of Respondents' Supplemental Argument, Ex. X-14, as untimely. That objection is overruled; the document was not untimely. The Agency also objected to Exhibit R-11 because it contains unredacted Social Security numbers. Respondents ultimately determined not to offer Exhibit R-11, or any of their other proposed exhibits, except R-9 and R-14, which were received. All other objections were ruled upon at the hearing.

FINDINGS OF FACT

Procedural History

1) On April 29, 2013, the Agency filed and served on the Respondents its NOTICE OF INTENT TO PLACE ON LIST OF INELGIBLES AND ASSESS CIVIL PENALTIES (referred to herein as the NOI). It alleged, among other things, an intentional failure to pay prevailing wages of $8,911.02, the filing of inaccurate certified payroll reports. It seeks civil penalties under ORS 279C.865 and applicable administrative rules and placement of Respondents on the List of Ineligibles, those ineligible to receive and public contract for a period of three years, pursuant to ORS 279C.860 and applicable administrative. It does not specifically allege any failure to pay overtime wages.

2) Respondents timely filed and served REPONDENT'S (sic) ANSWER AND REQUEST FOR CONTESTED CASE HEARING on June 7, 2013.

3) A NOTICE OF HEARING was served on all participants on June 14, 2013.

4) In compliance with interim orders of the Forum, the participants filed case summaries and appeared, as noted above, at the time and place ultimately designated for the hearing, where they submitted and presented the evidence supporting the Findings set out below. At the start of the hearing, the ALJ orally advised the Agency and Respondents of the issues to be addressed, the matters to be proven, and the procedures governing the conduct of the hearing. Subsequent to the hearing, the participants timely submitted Exhibits X-14 through X-17.

Substantive Facts—General Background

5) Respondent Evans was and is the president of Hard Rock, and is its sole shareholder. He entered into the public works contracts on its behalf and he signed, and was responsible for filing the certified payroll reports, Exhibits A-11 through A-40.

6) The record of certified payroll in evidence is incomplete and flawed. Nevertheless, the certified payroll is generally reliable evidence of the number of hours worked by the corporate Respondent's employees for each work day recorded in those exhibits. One notable exception is with respect to Mr. Stansell and his work in August.[1]

7) In 2011, Hard Rock entered into a subcontract with the general contractor, Kirby Nagelhout, to perform concrete work on a public works project, construction of a public school in Jackson County, Oregon, referred to here as the Project, or Hillside Elementary.

8) Hard Rock has been in the concrete construction business since August 2002, working on houses, sidewalks and driveways in residential projects. Respondents have performed approximately 10-15 public works projects, starting in 2009. All of these projects were much smaller than Hillside Elementary. Most of Respondents' other jobs required that work be performed by Respondent Evans and no more than two other employees.

9) Neither Respondent has a history of previous violations of the prevailing wage laws.

10) When the recession hit in 2008, Respondents' business declined significantly. Respondent Evans took a seminar on prevailing wage law in 2008 and took classes at the community college in Bend to learn about how to obtain federally funded jobs.

11) Respondent Hard Rock did a very poor job of maintaining records for the Project. For instance, Respondent Evans testified to a loss or inability to provide a copy of the contract with Kirby Nagelhout, a copy of the contract with the company with which

[1] The year for each date in this Order is 2011 unless specifically stated otherwise.

Respondent Hard Rock subcontracted to build the curbs, and a copy of his workers' time cards.

12) Prior to and at the time the work on the Project commenced, Hard Rock already had three employees who performed manual labor: Respondent Evans; Gilbert de Los Rios; and Hermalindo Carillo-Cruz. Respondent Evans considered himself and these two other employees to be skilled. He considered them, for example, to be capable of operating a hand-screed, bull float, fresno, and trowel, all of which are hand tools used to make concrete smooth and level and of proper consistency. Mr. de Los Rios and Mr. Carillo-Cruz are referred to herein as the Permanent Employees.

13) Respondent Evans did not consider any of the other workers ultimately employed by Hard Rock on the Project to be skilled. This Order, when referring to them collectively, will call the other workers the Contested Wage Workers.[2]

14) The hourly prevailing wage rates, including fringe benefits, for the employee classifications at issue in this Proceeding are set forth as follows;

a. Cement Mason 1 (CM1): Straight time--$25.37; fringe--$13.11;
b. Laborer 2 (L2): Straight time--$24.25; fringe--$10.01;
c. Laborer 1 (L1): Straight time--$22.62; fringe—8.70.

(Ex. A-55)

15) With respect to the issues raised in this case, the Permanent Employees were always paid CM1 wages; the Contested Wage Workers were always paid L1 wages.

16) Over the course of the Project, Respondent Hard Rock's responsibilities increased. Initially, it only contracted to install about a half dozen concrete slabs within the Hillside school building structures; that part of the job is referred to here as the "big pours." That work took approximately 1½ to 2 months, starting May 19, 2011 (Ex. A-11), although some more minor aspects of the work on the slabs were not completed until the end of Respondents' time on the Project, which, for purposes of this proceeding, was December 14, 2011.[3]

17) Respondent Hard Rock made the big pours into forms that had been placed at the building site by a different contractor. The major work of the big pours was done by machines, which were transported to the site, assembled, cleaned-up, and operated by Respondent Hard Rock's employees. As the main portion of that work was nearing completion in early summer of 2011, Kirby Nagelhout contracted with Respondent Hard Rock to install curbs and sidewalks (referred to here as the sidewalk phase). Respondent Hard Rock subcontracted with yet another company to do the forms and

[2] The NOI asserts that Long-time Employee Carillo-Cruz was also not paid prevailing wages, and it seeks a penalty against Respondent Hard Rock for failing to pay him the prevailing wage.

[3] Respondent Evans testified about work done by Mr. Stansell in January 2012, and he notes it in Exhibits A-52 and A-64. Nothing in the NOI and no other evidence alluded to any work after December 2011.

pours for the curbs, but not the sidewalks. Hard Rock did finish-work on the curbs; it did the preparation work, the pours and the finish-work on the sidewalks.

18) Contested Wage Worker Rex Stansell—who provided the only first-hand testimony other than Respondent Evans about the work performed at the Project—did not work on the big pours, which were completed prior to his first day of work, August 25.[4]

19) Respondent Evans intended that only the Permanent Employees would use tools designed for use in finishing concrete, including hand screeds, trowels, bull floats, and fresnos.

20) Ms. Hannah Wood, the Agency Compliance Specialist, performed the investigation of the facts for the Agency.

21) Respondent Evans prepared Exhibit A-52 during the course of Ms. Wood's investigation, and he provided it to her. In it, he describes the work that was done by all of Respondent Hard Rock's workers on the Project. Later in the investigation he provided Ms. Wood with Exhibit A-64, which is identical to A-52, or nearly so.

Work Performed on the Project

22) Among the duties performed by all the Contested Wage Workers were tasks variously described in writing by Respondent Evans as:

a. *Muck concrete* When Respondent Evans used the terms "muck concrete during pour" or "muck concrete," his intended meaning can be explained as follows: as semi-liquid concrete was being poured into forms, workers would use a long rake with a flat bar 4" wide to "push back" concrete into "low spots" that formed as the concrete was being poured, and to "pull [the concrete] back" from high spots that formed. This was done prior to the screed, during both the big pours and the sidewalk phase.

b. *Screed* When Respondent Evans used the terms "set-up screed" or "set-up screed for pour," he was referring to a machine he used during the "big pour" portion of the Project. This is a huge machine, its size adjustable, that did the initial levelling of concrete as it was poured between the forms that set the boundary of a large space at the site of the Hillside school buildings themselves. By using the term "set-up", Respondent Evans was referring to the preparation of the machine for its

[4] Mr. Stansell's first appearance on certified payroll is on September 1, 2011. Ex. A-28, page 1. However, Respondent Evans' description of daily work at the Project has Mr. Stansell performing 8 hours of work on August 25 and 26. (Ex. A-52, p. 7; Ex. A-64, p.10)

operation during the pour. The "set-up" of the screed did not refer to its operation during the pour.

"Screeding" was done during the sidewalk phase of the Project, although Respondent Evans did not use that term in Exhibits A-52 or A-64 to describe it during that phase. He did use the term in his oral testimony, however, to describe initial leveling of the concrete with a hand-held screed after pouring and mucking.

c. *Laying out or setting out stakes and 2x4's* When Respondent Evans used these terms, he was referring to placement of stakes and 2x4 lumber in the general locations where forms—which hold the concrete in place when it is poured—would be built, and where stakes would be pounded to hold the forms in place, delineating the exact areas where the forms would be put in the soil. He was not referring to their precise placement in the exact spots that would form the exact boundaries of the forms, which might be "*setting*,*"* as opposed to "setting out."

d. *Pounding stakes or pounding stakes "to grade line" [or "to string line"]*[5] When using these terms, Respondent Evans was referring to the actual physical pounding of stakes in the ground. He differentiated that activity from the work of setting the stakes, or determining exactly where the stakes should be placed. However, when Permanent Employee Carillo-Cruz was described as doing this work, it was as a part of setting stakes, which he was qualified to do.

e. *Dig for grade* When using this term, Respondent Evans was referring to the use of hand-tools to dig into the ground where forms were or had been placed to achieve a depth and slope appropriate for the construction of sidewalk.

f. *Stripping or stripped* Respondent Evans used these terms to refer to cleaning concrete off of 2x4s and stakes.

g. *Jack Hammer* "Jack hammer" is a commonly used term, and Respondent Evans used it in its commonly used fashion as a verb and noun.

All of these descriptions appear in Exhibits A-52 and A-64, the descriptions of the Project by Respondent Evans created after the Agency's investigation began; most of them appear throughout. Sometimes, the terms are used to describe work done by the Permanent Employees

[5] In its submission on November 13, 2013, Ex. X-13, the Agency, except with respect to Permanent Employee Carillo-Cruz, does not list any tasks relating to "pounding stakes" or "pounding stakes to grade line".

23) Certified payrolls, Exhibits A-11 through A-40, contain reliable evidence of the hours and dates worked by each employee and the rate at which they were paid for the dates covered by those exhibits.

24) Certified payroll is some evidence of the work performed by each employee, but Exhibits A-52 and A-64, enhanced by Respondent Evans's oral testimony, are more reliable than certified payroll for that purpose; and for dates not covered by certified payroll, the exhibits are reliable for the amount of work performed on those dates. They are also as generally credible for the minimum number of hours worked, when work is shown there to have been done.

25) The certified payrolls in evidence for each week of the Project except weeks ending in November contain a certification by Respondent Evans, on behalf of Respondent Hard Rock Concrete, that "all persons employed on [the Project] have been paid the full weekly wages earned." (Exhibits A-11 through A-40, at page 2)

Substantive Facts - Particular Employees

Christopher Allmand-Abarca

26) For the week ending August 20, Mr. Allmand-Abarca worked 9.5 hours on August 17, 11.5 on August 18, 10.0 on August 19, and 10 on Saturday, August 20. (Ex. A-25, p. 1)

27) For the week ending September 3, he worked nine hours on August 30 and 9.5 hours on August 31. (Ex. A-28, p.1)

28) During the week ending October 22, he worked 9.5 hours on October 17, 8.5 on October 19, 9.75 on October 20, and 9.0 on October 22. (Ex. A-35, p. 1)

29) For the week ending October 29, he worked 8.5 hours on October 27. (Ex. A-36, p. 1)

30) For the week ending December 10, he worked 11 hours on December 8 and 9.5 hours on December 9; he received no pay at the overtime rate. (Ex. A-39, p.1)

31) For the week ending December 17, he worked 8.5 hours on December 13, and 10.5 hours on December 14. (Ex. A-40, p. 1)

32) He mucked concrete during the Sidewalk Phase of the Project, during the weeks ending July 30 (six hours on July 25), August 13 (four hours on the 10th, 11th, and 12th), August 20 (four hours, five hours, six hours and five hours on the 16th, 17th, 18th, and 19th) August 27 (4.5 hours, 3.5 hours and 5.5 hours on the 24th, 25th, and 26th), September 3 (three hours on September 1), September 10 (three hours on the 7th and 2 hours on the 9$^{th)}$, September 17 (3.5 hours each on the 12th and 15th), September 24 (3.5 hours each on the 19th and 20th), October 1 (3.5 hours each on the 28th and 29th), October 15 (3.5 hours each on the 11th and 13th), October 22 (3.5 hours each on the 20th and 21st), October 29 (3.5 hours each on the 27th and 28th), November 5 (3 hours

on October 31 and 3.5 hours each on November 1-4), November 12 (3.5 hours each on the 10th and 11th), November 19 (3.5 hours each on the 16th and 17th, and 2 hours on the 18th), November 26 (3.5 hours each on the 21st and 22nd, and 2 hours on the 23rd), December 3 (3.5 hours each on November 28, 29, and 30), and December 10 (3.5 hours on the 7th, five hours on the 8th, and three hours on the 9th).[6]

33) He used a bull float or a fresno or did other finish concrete work for two hours during the weeks ending August 27 and November 5; for 1.5 hours during the week ending December 10, and one hour each during the weeks ending September 17, September 24, October 1, October 15, October 22, October 29, November 12, November 19, November 26, and December 3.

34) He laid out stakes or set out 2x4's during the Sidewalk Phase of the Project. He did this work, or did it together with other work from which it was not differentiated by Respondent for a total of 131.5 hours during the weeks ending July 30 (four hours each on July 28 and 29), August 6 (four hours on August 1) August 13 (four hours each on August 11 and 12), August 20 (three hours on August 16, 4.5 hours on August 17, and for 5.5 hours on August 18), August 27 (eight hours each on August 23 and 25[7]), September 10 (6.5 hours on September 6, five hours on September 7, eight hours on September 8, and five hours on September 9), September 17 (four hours on September 12, and six hours on September 14), October 1 (four hours on September 28, and four hours on September 29), October 15 (four hours on October 13), November 12 (three hours on November 7, four hours each on November 8, 9 and 11), November 19 (four hours each on November 14, 15, 16, and 17), and November 26 (two hours on November 18, four hours each on November 21 and 22, and three hours on November 23. (Ex. A-64, pages 7-19)

35) He also did "digging for grade" during all the weeks he mucked concrete.

36) He "pounded stakes" in the week ending September 24.

37) He was ultimately paid $2996.69, on account of alleged underpayment on the Project, via funds supplied by Kirby Nagelhout. (Ex. A-69)

Antonio Anaya

38) For the week ending June 18, Antonio Anaya worked 8 hours on Sunday, June 12. (Ex. A-16, p. 1)

[6] There is no certified payroll for the weeks ending November 12, November 19 and November 26. However, the attachments to Respondent Evans's re-creation of the work performed, Exhibits A-52 and A-64, state that Mr. Allmand-Abarca mucked concrete during these months.

[7] The description for the time on August 25 also includes "jack hammer", an independent basis upon which to pay him L2 wages.

39) He mucked concrete during the Sidewalk Phase of the Project, as follows, for the weeks ending: May 14 (six hours); May 21 (eight hours); May 28 (16 hours); June 4 (14 hours); June 11 (12 hours); June 25 (eight hours); September 3 (three hours); and September 10 (three) hours.

40) He set up the screed machine during the weeks ending May 21, May 28, June 4, and June 25.

41) He laid out stakes or set out 2x4's during the Sidewalk Phase of the Project. He did this work, or did it together with other work from which it was not differentiated by Respondent for a total of 42 hours during the weeks ending July 3 (eight hours on June 28), September 3 (five hours on September 1 and eight hours on September 2, September 10 (five hours on September 7, three hours on September 8, and five hours on September 9, and September 17 (eight hours on September 12). (Ex. A-64, pages 6, 10, and 11)

42) He did digging for grade during the weeks ending September 3, September 10, and September 17.

43) He was ultimately paid $798.89, on account of alleged underpayment on the Project, via funds supplied by Kirby Nagelhout. (Ex. A-69)

Hermalindo Carillo-Cruz

44) Hermalindo Carillo-Cruz is the only one of the eight employees identified in the Agency's NOI who is a Permanent Employee.

45) For the week ending August 20, he worked seven hours on August 16, 9.5 hours on August 17, 11.5 hours on August 18, and 10 hours on August 19, for a total of 38 hours, half of which was mucking concrete and half was doing finish- concrete work.

46) For the week ending August 20, he was paid for wages at the CM1 rate for 32 hours of straight time and six hours of overtime.

47) For the weeks ending August 27, December 10, and December 17 he performed work as follows:

a. On August 25, mucked concrete for 6 hours and finished concrete for 6 hours for a total of 12 total hours worked; on August 26, mucked concrete for 5 hours and finished concrete for 5.5 hours for a total of 10.5 hours worked. (Ex. A-64, p. 10)

b. On December 8, set and pounded stakes to grade line for 7 hours and finished concrete for 5 hours; and on December 9, set and pounded stakes to grade line for 5 hours and finished concrete for 4.5 hours. (Ex. A-64, p. 20)

c. On December 12, set and pounded stakes to grade line for 5 hours and finished concrete for 3 hours; on December 13, set and pounded stakes to grade

line for 4 hours and finished concrete for 3.5 hours; and on December 14, set and pounded stakes to grade line for 4 hours, helped set ballard for 3 hours, and finished concrete for 3.5 hours. (Ex. A-64, p. 21)
(Ex. A-26, p.1; Ex. A-39, p.1; Ex. A-40, p.1)

48) He was ultimately paid $272.37, on account of alleged underpayment on the Project, via funds supplied by Kirby Nagelhout. (Ex. A-69)

Larry Freeman

49) Larry Freeman mucked concrete for four hours during the week ending May 21.

50) He was ultimately paid $11.83, on account of alleged underpayment on the Project, via funds supplied by Kirby Nagelhout. (Ex. A-69)

Justin Graves

51) During the week ending December 10, Mr. Graves worked 12 hours on December 8 and 9.5 hours on December 9. (Ex. A-39, p. 1)

52) During the week ending December 17, Mr. Graves worked 8.5 hours on December 13 and 10.5 hours on December 14. (Ex. A-40, p.1)

53) He mucked concrete during the weeks ending November 19 (two hours each on the 14th and 18th, and 3.5 hours each on the 15th, 16th, and 17th); November 26 (two hours each on the 21st, 22nd, and 23rd), December 3 (two hours each on the 28th, 29th, and 30th of November); December 10 (five hours on the 8th and three hours on the 9th); and December 17 (3.5 hours each on the 13th and 14th).

54) He laid out stakes or set out 2x4's during the Sidewalk Phase of the Project. He did this work, or did it together with other work from which it was not differentiated by Respondent for a total of 55.5 hours during the weeks ending November 26 (six hours each on November 21 and 22, and one hour on November 23), December 3 (six hours each on November 28 and 29, four hours on November 30), December 10 (four hours on December 7, three hours on December 8, and 5.5 hours on December 9), and December 17 (four hours on December 12, three hours on December 13, and 7 hours on December 14). (Ex. A-64, pages 18-21)

55) Mr. Graves used a fresno and/or a bull float or trowel for 1 hour during the weeks ending November 19 and December 10.

56) Mr. Graves did digging for grade and laid out 2x4s and stakes during the same weeks he mucked concrete.

57) Mr. Graves was ultimately paid $694.13 on account of alleged underpayment on the Project, via funds supplied by Kirby Nagelhout. (Ex. A-69)

33 BOLI ORDERS

Rex Stansell

58) During the week ending October 1, Mr. Stansell worked 10 hours on September 29. (Ex. A-32, p. 1)

59) During the week ending October 22, Mr. Stansell worked 10 hours on October 20. (Ex. A-35, p. 1)

60) During the week ending December 10, Mr. Stansell worked 8.5 hours on December 8 and 9.5 hours on December 9. (Ex. A-39, p. 1)

61) During the week ending December 17, Mr. Stansell worked 10.5 hours on December 14. (Ex. A-40, p. 1)

62) On his first day of work at the Project, Mr. Stansell set out string line and set and laid in stakes and 2x4's, setting the forms for approximately 100 feet of sidewalk. This work was done during the week ending August 27, during the two of the eight hours of work performed by Mr. Stansell on August 25, when he also used a jack-hammer, stripped forms, and laid out 2x4s and stakes. In the records provided by the Respondent, Exhibits A-52 and A-64, there was no differentiation among those hours separating those different types of work.

63) The setting out of the string line and setting out of the forms was not performed with the quality Respondent Evans required, as the grade was wrong and the width of the sidewalk varied from 8 ½ or 9 feet to 10 feet, instead of maintaining the 10' width required. Consequently, Respondent Evans had to do the work a second time. Mr. Stansell did not perform this type of work again on the Project.

64) Mr. Stansell mucked concrete during the weeks ending August 27 (three hours on the 26th); September 3 (three hours on the 1st); September 10 (three hours on the 7th); September 24 (3.5 hours on the 20th); October 1 (3.5 hours on each of the 28th and 29th of September); October 8 (3.5 hours on the 4th and three hours each on the 6th and 7th); October 15 (3.5 hours each on the 10th and 11th); October 22 (3.5 hours each on the 20th and 21st); October 29 (3.5 hours each on the 27th and 28th); November 5 (3.5 hours each on the 1st, 2nd, and 3rd); November 12 (two hours on the 9th and 3.5 hours each on the 10th and 11th); November 19 (two hours each on the 14th, 15th, 16th, and 17th); November 26 (3.5 hours each on the 21st and 22nd); December 3 (1.25 hours on the 28th and 3.5 hours on the 29th of November); and December 17 (two hours on the 13$^{th)}$.

65) Mr. Stansell performed work with a fresno and/or a bull float and/or a trowel during the weeks ending September 24 (1/2 hour on the 20th); October 1 (1/2 hour each on the 28th and 29th); October 8 (1/2 hour on the 4th); October 15 (1/2 hour each on the 10th and 11th); October 22 (1/2 hour each on the 20th and 21st); October 29 (1/2 hour each on the 27th and 28th); November 5 (1/2 hour each on the 1st, 2nd, and 3rd); November 12 (1/2 hour each on the 10th and 11th); November 26 (1/2 hour each on the 21st and 22nd); and December 3 (½ hour on the 29th).

66) Mr. Stansell jack hammered concrete during the weeks ending August 27 (six hours on August 25) and October 8 (eight hours on October 3).

67) He laid out stakes or set out 2x4's during the Sidewalk Phase of the Project. He did this work, or did it together with other work from which it was not differentiated by Respondent for a total of 142.75 hours during the weeks ending. September 3 (five hours on September 1), September 10 (6.5 hours on September 6, five hours on September 7, eight hours on September 8, six hours on September 9), September 17 (six hours on September 12, four hours on September 13) October 1 (four hours on September 29), October 8 (four hours on October 4 and eight hours on October 5), October 22 (5.75 hours on October 20), November 12 (three hours on November 7, four hours each on November 8 and 9, 10, and 11), November 19 (four hours each on November 14, 15, 16, and 17, and 2.5 hours on November 18), November 26 (four hours each on November 21, 22, and two hours on November 23), December 3 (four hours each on November 28 and 29), December 10 (three hours on December 7, 4.5 hours on December 8, and 5.5 hours on December 9), December 17 (four hours on December 12, three hours on December 13, 5 hours on December 14).

68) Mr. Stansell was ultimately paid $2,712.26 on account of alleged underpayment on the Project, via funds supplied by Kirby Nagelhout. (Ex. A-69.)

Abel Tovar-Hernandez

69) During the week ending June 18, Mr. Tovar-Hernandez worked eight hours on Sunday, June 12. (Ex. A-16, p.1)

70) He set up the screed machine for pouring during the weeks ending May 21, May 28, and June 4.

71) He mucked concrete, as follows, during the weeks ending May 14 (6 hours); May 21 (8 hours); May 28 (8 hours); and June 4 (8 hours).

72) He was ultimately paid $421.26 on account of alleged underpayment on the Project, via funds supplied by Kirby Nagelhout. (Ex. A-69.)

Quinn Weaver

73) During the week ending August 20, Mr. Weaver worked 9.5 hours on August 17, 11.5 hours on August 18, 10 hours on August 19 and 10 hours on Saturday, August 20. (Ex. A-25, p.1.)

74) During the week ending September 3, he worked nine hours on August 30 and 9.5 hours on August 31. (Ex. A-26, p. 1.)

75) He mucked concrete, as follows, during the weeks ending August 13 (20 hours); August 20 (20 hours), August 27 (4.5 hours on the 24th, 3.5 hours on the 25th, and 5 hours on the 26th); September 3 (3 hours); and September 10 (3 hours).

76) He performed two hours of work with a bull float and/or a fresno during the week ending August 27, as follows: ½ hour each on the 24th and 25th, and one hour on the 26th.

77) He laid out stakes or set out 2x4's during the Sidewalk Phase of the Project. He did this work, or did it together with other work from which it was not differentiated by Respondent for a total of 55.5 during the weeks ending August 13 (four hours each on August 10, 11, and 12), August 20 (three hours on August 16, 4.5 hours on August 17, 5.5 hours on August 18 and five hours on August 19), August 27 (9.5 hours on August 22, eight hours each on August 23 and 25[8]), September 10 (6.5 hours on September 6, five hours on September 7, and eight hours on September 8).

78) He did digging for grade during the weeks ending September 3 and September 10.

79) He was ultimately paid $1,003.66 on account of alleged underpayment on the Project, via funds supplied by Kirby Nagelhout. (Ex. A-69.)

Substantive Fact - Payment of the Contested Wage Workers

80) Ms. Wood found that the Contested Wage Workers and Permanent Employee Carillo-Cruz were not paid $8911.02 in wages to which they were entitled under the Prevailing Wage laws. Her findings were that the vast majority of those wage underpayments were due to misclassification; a part was due to failure to pay overtime in the manner required by the prevailing wage laws. (See, Exhibit A-58.)

81) On August 3, 2012, Ms. Wood made demand on Respondents to pay the wages, which Respondents did not immediately pay. (Exhibit A-57, A-58.)

82) On October 29, 2012, having received no payment, Ms. Wood demanded payment of the wages from the general contractor, Kirby Nagelhout Construction Co.

83) On November 8, 2012, the Agency received payment from Kirby Nagelhout of the wages the Agency had determined to be due, in the amounts set forth in Findings of Fact 37, 43, 48, 50, 57, 68, 72, and 79. Ex. A-68.

84) The failures to pay CM1 wages to Mr. Allmand-Abarca, Mr. Graves, Mr. Stansell, and Mr. Weaver were intentional with knowledge that they performed CM1 work and with knowledge that the work should have been paid at the CM1 rate.

[8] The description for the time on August 25 also includes "jack hammer", an independent basis upon which to pay him L2 wages.

Substantive Facts - Credibility of the Witnesses

85) Ms. Wood's testimony was credible. However, she was not always consistent or knowledgeable on exactly which work falls within certain job classifications, particularly cement mason.

86) Mr. Stansell's testimony was generally credible. But he exaggerated the amount of time he and other Contested Wage Workers performed finish-work duties on the Project.

87) Respondent Evans's testimony was generally credible. But he minimized the amount of the higher finish work performed by the Contested Wage Workers.

CONCLUSIONS OF LAW

1) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the subject matter and Respondents herein. ORS 279C.860, ORS 279C.865.

2) The same fringe benefit portion of the hourly prevailing wage rate is payable for all hours worked, whether they are straight time, or overtime. OAR 839-025-0050(2)(c).

3) Mr. Allmand-Abarca was not paid wages due to him as follows: week ending July 30--$14.70 for five hours L2 + $64.44 for nine hours CM1 = **$79.14**; August 13--$30.87 for 10.5 hours L2 + $39.38 for 5.5.5 hours CM1 **=$70.35**; August 20--$51.45 for 17.5 hours L2 + $110.98 for 15.5.5 hours at CM1 = **$162.43**; August 27--$38.22 for 13 hours L2 + $128.88 for 18 hours at CM1 = **$167.10**; September 3--**$8.82** for 3 hours L2; September 10**--**$14.70 for 5 hours L2 + $175.42 for 24.5 hours CM1 **=190.12**; September 17--$20.58 for 7 hours L2 + $78.76 for 11 hours CM1 **=$99.34**; September 24--$20.58 for 7 hours L2 + $7.16 for 1 hour CM1 **=$27.74**; October 1--$20.58 for 7 hours L2 + $64.44 for 9 hours CM1 **=$85.02**; October 15--$20.58 for 7 hours L2 + $35.80 for 5 hours CM1 **=$56.38**; October 22--$20.58 for 7 hours L2 + $7.16 for 1 hour CM1 **=$27.74**; October 29$20.58 for 7 hours L2 + $7.16 for 1 hour CM1 **=$27.51**; November 5----$49.98 for 17 hours L2 + $14.32 for 2 hours CM1 **=$64.30**; November 12----$20.58 for 7 hours L2 + $114.56 for 16 hours CM1 **=$135.14**; November 19--$26.46 for 9 hours L2 + $121.72 for 17 hours CM1 **=$148.18**; November 26--$26.46 for 9 hours L2 + $100.24 for 14 hours CM1 **=$126.70**; December 3--$30.87 for 10.5 hours L2 + $10.74 for 1 hour CM1 **=$41.61**; December 10$33.81 for 11.5 hours L2 + $10.74 for 1.5 hours CM1 **=$44.55**. Total unpaid wages for Mr. Allmand-Abarca is **$1,664.35**.

4) Because wages due him were not paid to Mr. Allmand-Abarca, a penalty of $1,000.00 is due for failing to pay him the prevailing wage.

5) Mr. Anaya was not paid wages due to him for weeks ending as follows: May 14**--$17.64** for 6 hours L2; May 21**--$23.52** for eight hours L2; May 28**--$47.04** for 16 hours L2; June 4**--$41.16** for 14 hours L2; June 11**--$35.28** for 12 hours L2; June 25**--$23.52** for eight hours L2; July 3**--$57.28** for eight hours CM1; September 3**--**$8.82 for three hours L2 + $93.08 for 13 hours CM1 = **101.90**; and September 10**--**$8.82 for three

hours L2 + $93.08 for 13 hours CM1 = **$101.90**; September 17 **=$57.28** for eight hours CM1. Total unpaid wages for Mr. Anaya is **$506.52**.

6) Because wages due him were not paid to Mr. Anaya, a penalty of $700 is due for failing to pay him the prevailing wage.

7) Mr. Freeman was not paid $11.76 in wages due to him for four hours work at L2.

8) Because wages due him were not paid to Mr. Freeman, a penalty of $5**0.**00 is due for failing to pay him the prevailing wage.

9) Mr. Graves was underpaid wages due to him for weeks ending as follows: November 19--$39.69 for 13.5 hours L2 + $7.16 for 1 hour CM1 = **$46.85**; November 26**--**$17.64 for six hours L2 + $93.08 for 13 hours CM1 **= $110.72**; December 3**--**$17.64 for six hours L2 + $114.56 **= $132.20**; December 10--$23.52 for eight hours L2 + $96.66 for 13.5 hours CM1` = **$120.18**; and December 17--$20.58 for seven hours L2 + 100.24 for 14 hours CM1 = **$120.82**. Total unpaid wages for Mr. Graves is **$530.77.**

10) Because wages due him were not paid to Mr. Graves, a penalty of $800.00 is due for failing to pay him the prevailing wage.

11) Mr. Stansell was underpaid wages due him for the weeks ending as follows: August 27--$26.46 for nine hours L2 + $57.28 for eight hours CM1 = **$83.74**; September 3-- $8.82 for three hours L2 + $35.80 for 5 hours CM1 **=$44.62** ; September 10--$8.82 for three hours L2 + 182.58 for 25.5 hours CM1 **= $191.40**; September 17--**$71.60** for 10 hours CM1; September 24--$10.29 for 3.5 hours L2 + $3.58 for ½ hour CM1 **=$13.87**; October 1--$20.58 for seven hours L2 + $35.80 for 5 hours CM1 **= $56.38**; October 8--$51.45 for 17.5 hours L2 + $89.50 for 12.5 hours CM1 = **$135.07**; October 15--$20.58 for seven hours L2 + $7.16 for 1 hour CM1 **= $27.74**; October 22--$20.58 for seven hours L2 + $48.33 for 6.75 hours CM1 = **$ 68.91**; October 29--$20.58 for seven hours L2 +$7.16 for one hour CM1 = **$27.74**; November 5--$30.87 for 10.5 hours L2 + $10.74 for CM1 = **$41.61**; November 12--$26.46 for nine hours L2 + $143.20 for 20 hours CM1 = **$169.66**; November 19--$23.52 for eight hours L2 + $132.46 for 18.5 hours CM1 **= $155.98**; November 26--$20.58 for seven hours L2 + $78.76 for 11 hours CM1 = **$99.34**; December 3--$13.97 for 4.75 hours L2 + $60.86 for 8.5 hours CM1 = **$74.83**; December 10--**$93.08 for 13 hours CM1;** and December 17-- $5.88 for two hours L2 +$85.92 for 12 hours CM1 **= $91.80**. Total unpaid wages for Mr. Stansell is **$1447.37**.

12) Because wages due him were not paid to Mr. Stansell, a penalty of $1000.00 is due for failing to pay him the prevailing wage.

13) Mr. Tovar-Hernandez was underpaid wages due him for the weeks ending, as follows: May 14**--$17.64** for L2; May 21**--$23.52** for L2; May 28**--$23.52** for L2; June 4**--$23.52** for L2. Total unpaid wages for Mr. Tovar-Hernandez is $**88.20**.

14) Because wages due him were not paid to Mr. Tovar-Hernandez, a penalty of $350.00 is due for failing to pay him the prevailing wage.

15) Mr. Weaver was underpaid wages due him for the weeks ending, as follows: August 13--$58.80 for L2 + $85.92 for CM1 = **$144.72**; August 20--$58.80 for L2 + $128.88 for CM1 = **$187.68**; August 27--$38.22 for 13 hours L2 + $196.90 for 27.5 hours CM1 = **$235.12**; September 3-- **$8.82** for three hours L2; and September 10--$8.82 for three hours L2 + $139.62 for CM1 = **$148.44**. Total unpaid wages for Mr. Weaver is $**724.78**.

16) Because wages due him were not paid to Mr. Weaver, a penalty of $900.00 is due for failing to pay him the prevailing wage.

17) The Agency's DEFINITIONS OF COVERED OCCUPATIONS, Revised January 2010, provides the standards by which the type of work that should be paid at the rates for Laborer 1, Laborer 2, and Cement Mason 1, which are all the occupations at issue in this case, is ascertained.

18) The Agency has carried is burden of proof that mucking concrete, as used in Findings of Fact 22a, 32, 39, 53, 64, 71 and 75 is work within the classification of Laborer 2, as it is either placing or spreading concrete.

19) The agency has not carried its burden of proof to establish that "setting up screed," as used in Finding of Fact 22b, fits within the classification of Cement Mason 1 or that it was improperly paid by Respondent at the rate for Laborer1.

20) The agency did carry its burden of proof to establish that "laying out" or "setting out" stakes, as used in Findings of Fact 22c, 34, 41, 54, 67, and 67 fits within the classification of Cement Mason 1 and that it was improperly paid by Respondent at the rate for Laborer 1.

21) The agency has not carried its burden of proof to establish that "pounding stakes" or "pounding stakes to grade line", as used in Finding of Fact 22d, fits within the classification of Cement Mason 1 or that it was improperly paid by Respondent at the rate for Laborer 1.

22) The agency has not carried its burden of proof to establish that "to dig for grade," as used in Finding of Fact 22e, fits within the classification of Cement Mason 1 or that it was improperly paid by Respondent at the rate for Laborer 1.

23) The agency has not carried its burden of proof to establish that "stripping", as used in Finding of Fact 22f, fits within the classification of Cement Mason 1 or that it was improperly paid by Respondent at the rate for Laborer 1.

24) The Agency did carry its burden of proof to establish that use of a jack hammer, as used in Findings of Fact 22g, 62 and 66, is within the classification of Laborer 2, as it

constitutes the operation of power tools, as described in the penultimate bullet point in the Definition of Covered Occupations.

25) The Agency did carry its burden of proof to establish that setting out string line and setting and laying in stakes and 2x4's, in the course of setting the forms for sidewalk, as used in Finding of Fact 62, is within the classification of Cement Mason 1, as it is described in the final bullet point in the Definitions of Covered Occupations (A-53.)

26) The Agency did carry its burden of proof that doing finish-work or using a bull float, a fresno or trowel in connection with building concrete sidewalks, as set out in Findings of Fact 12, 19, 33, 55, 65, and 76 is within the classification of Cement Mason 1, as it is described in the first bullet point in the Definitions of Covered Occupations. (Ex. A-53.)

27) Certified payroll reported by Respondent is inaccurate for the weeks ending, and for the reasons stated, and penalties are imposed of $400.00 each, as follows:

a. May 14, for failure to pay Mr. Anaya for any time at the L2 rate or higher;
b. May 21, for failure to pay Mr. Anaya and Mr. Freeman for any time at the L2 rate or higher;
c. May 28, for failure to pay Mr. Anaya for any time at the L2 rate or higher;
d. June 4, for failure to pay Mr. Anaya for any time at the L2 rate or higher;
e. June 11, for failure to pay Mr. Anaya for any time at the L2 rate or higher;
f. June 25, for failure to pay Mr. Anaya for any time at the L2 rate or higher;
g. July 11, for failure to pay Mr. Allmand-Abarca for any time at the L2 rate, or higher;
h. July 3, for failure to pay Mr. Anaya for any time at the CM1 rate or higher;
i. August 13, for
   i. Failure to pay Mr. Allmand-Abarca for any time at the L2 rate or higher; and
   ii. Failure to pay Mr. Weaver for any time at the CM1 rate or higher;
j. Week ending August 20, for
   i. Failure to pay Mr. Allmand-Abarca for any time at the L2 rate, or higher;
   ii. Failure to pay Mr. Weaver at the appropriate rate for his time doing the work of a L2 and CM1;
k. Week ending August 27, for
   i. i. Failure to pay Mr. Stansell at the appropriate rate for his time doing the work of a CM1; and
   ii. Failure to pay Mr. Weaver at the appropriate rate of his time doing the work of a CM1.
l. September 3, for
   i. Failure to pay Mr. Allmand-Abarca for any time at the L2 rate or higher;
   ii. Failure to pay Mr. Anaya at the appropriate rates for his time doing the work of a L2 and CM1;
   iii. Failure to pay Mr. Stansell at the appropriate rates for his time doing the work of a L2 and CM1;

iv. Failure to pay Mr. Weaver at the appropriate rates for his time doing the work of a L2 and CM1;

m. September 10, for
   i. Failure to pay Mr. Allmand-Abarca at the appropriate rates for his time doing the work of a L2 and CM1;
   ii. Failure to pay Mr. Anaya at the appropriate rates for his time doing the work of a L2 and CM1;
   iii. Failure to pay Mr. Stansell at the appropriate rates for his time doing the work of a L2 and CM1;
   iv. Failure to pay Mr. Weaver at the appropriate rates for his time doing the work of a L2 and CM1;

n. September 17, for
   i. Failure to pay Mr. Allmand-Abarca at the appropriate rates for his time doing the work of a L2 and CM1;
   ii. Failure to pay Mr. Anaya at the appropriate rate for his time doing the work of a CM1;

   Failure to pay Mr. Stansell at the appropriate rate for his time doing the work of a CM1;

o. September 24, for
   i. Failure to pay Mr. Allmand-Abarca at the appropriate rates for his time doing the work of a L2 and CM1;
   ii. Failure to pay Mr. Stansell at the appropriate rates for his time doing the work of a L2 and CM1;

p. October 1, for
   i. Failure to pay Mr. Allmand-Abarca at the appropriate rates for his time doing the work of a L2 and CM1;
   ii. Failure to pay Mr. Stansell at the appropriate rates for his time doing the work of a L2 and CM1;

q. October 8, for failure to pay Mr. Stansell at the appropriate rates for his time doing the work of a L2 and CM1

r. October 15, for
   i. Failure to pay Mr. Allmand-Abarca at the appropriate rates for his time doing the work of a L2 and CM1;
   ii. Failure to pay Mr. Stansell at the appropriate rates for his time doing the work of a L2 and CM1;

s. October 22, for
   i. Failure to pay Mr. Allmand-Abarca at the appropriate rates for his time doing the work of a L2 and CM1;
   ii. Failure to pay Mr. Stansell at the appropriate rates for his time doing the work of a L2 and CM1;

t. October 29, for
   i. Failure to pay Mr. Allmand-Abarca at the appropriate rates for his time doing the work of a L2 and CM1;
   ii. Failure to pay Mr. Stansell at the appropriate rates for his time doing the work of a L2;

u. December 10, for

i. Failure to pay Mr. Allmand-Abarca at the appropriate rates for his time doing the work of a L2 and CM1;
ii. Failure to pay Mr. Graves at the appropriate rates for his time doing the work of a L2 and CM1;

v. Week ending December 17, for
i. Failure to pay Mr. Graves at the appropriate rate for his time doing the work of a L2 and CM1;
ii. Failure to pay Mr. Stansell at the appropriate rates for his time doing the work of a L2 and CM1.

28) Respondent Hard Rock Concrete, Inc. must be placed on the List of Ineligibles for a period of three years from the date of first publication on account of the failure of Respondent Hard Rock to pay prevailing wages to its employees and the payment on its behalf of prevailing wages to its employees by the general contractor, Kirby Nagelhout.

29) Respondent Hard Rock Concrete, Inc. must be placed on the List of Ineligibles for a period of three years from the date of first publication on that list on account of its intentional failure to pay the prevailing wage to those Contested Wage Workers who performed Cement Mason 1 work.

30) Respondent Rocky Evans must be placed on the List of Ineligibles for a period of three years from the date of first publication because he was a corporate officer of Respondent Hard Rock Concrete, Inc. which failed to pay prevailing wages to its workers that were paid by Kirby Nagelhout on Respondent Hard Rock's behalf.

31) Rocky Evans must be placed on the List of Ineligibles for a period of three years from the date of first publication because he was a corporate officer of Hard Rock Concrete, Inc. who was responsible for the failure to pay prevailing wages that were paid by Kirby Nagelhout on Hard Rock's behalf.

OPINION

Overview

In this proceeding brought under the Prevailing Wage laws, ORS 279C.840 *et seq*, the Agency seeks civil penalties against Hard Rock and it seeks to place Respondent Hard Rock and its president on the List of Ineligibles, i.e., debar them from receiving any contract for public works projects for a period of three years after first publication on that list. ORS 279C.860.

Many of the ultimate facts needed to make findings necessary to support the results sought by the Agency are not in dispute. There is no dispute that the Project was a public works as defined in the law, ORS 279C.805(6), that Respondent Hard Rock was a subcontractor on the Project, that Respondent Evans was the corporate officer responsible for the failure, if there was one, to pay the wages due, and that the wages

alleged by the Agency to be due were ultimately paid by the general contractor, Kirby Nagelhout.

The bulk of the hearing was spent contesting whether Respondent Hard Rock had properly classified the work done by the Contested Wage Workers.[9] Respondent Evans determined that all the Contested Wage Workers should be paid at the rate of Laborer Group 1, referred to in this document as L1 or Laborer 1. The Agency asserts that the proper classification for much of their work should be at the higher prevailing wage of Laborer Group 2 (L2 or Laborer 2), or at the even higher wage of Cement Mason Group 1 (CM 1 or Cement Mason 1).[10]

Upon review of the exhibits, there are some instances of Respondent Hard Rock's failure to pay prevailing wage even when there was no dispute as to misclassification. The ultimate remedies ordered are founded upon the determination of whether the Agency carried its burden of proof that Respondents improperly paid employees at a rate lower than required by the Prevailing Wage laws. Undisputed misclassifications play a role, but a more minor role.

Work Classification

Addressed first are the disputes regarding whether the Agency carried its burden of proof that the work performed by the Contested Wage Workers should have been paid at a classification higher than L1. Resolving these disputes requires resolving some issues of fact and some issues of law.

It is the responsibility of the Commissioner of the Bureau of Labor and Industries to "determine the prevailing rate of wage for workers in each trade or occupation in each locality." (ORS 279C.815.) It would be impossible to determine the correct prevailing wage without determining which work falls into which "trade or occupation." In other words, the statutory obligation to determine the amount of the prevailing rate of wage is, inextricably, a function of the proper classification of the work. *Northwest Permastore Systems, Inc. v. BOLI*, 172 Or App 427, 18 P3d 496, 498 (2001), citing and quoting from the Order in *In the Matter of Northwest Permastore,* 20 BOLI 37, 55 (2000) ("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.")

In this case, the description of the classifications is in the Agency's Definitions of Covered Occupations. The definitions at issue in this case are for Cement Mason 1 (Exhibit A-53), and for Laborer 1 and Laborer 2 (Ex. A-54).

[9] Although their names were rarely mentioned, except for Mr. Stansell, the Forum finds it useful to set forth their names, and does so throughout the Findings of Fact, and they are also identified below.

[10] The dispute at hearing and the Agency's testimony regarding Cement Mason work focused on the final bullet in the Cement Mason Group 1 definition.

The Agency contends that the work described by Mr. Evans as "set up screed," "pounding stakes," "digging for grade" and "stripping" should all be classified as Cement Mason 1. The Agency did not carry its burden of proof with respect to these contentions.

As discussed immediately below, however, the Agency did carry its burden of proof that both jack hammering and mucking concrete were misclassified and should have been paid at L2, and that "laying out stakes" and "laying out stakes and 2x4s" should have been paid at CM1.

A "jack hammer" is a word of common usage. It is a power tool that can be used to break up hard surfaces, such as concrete. Its meaning is discussed at Finding of Fact 22g. A worker in the L2 classification "[O]perates power tools to perform such work as breaking old pavement or large rocks or loosening or digging hard earth (dry pack machine, jackhammer, chipping guns, paving breakers)." (Ex. A-54, p.2.) In her demand letter to Respondent, Ms. Wood pointed out that jack hammering is L2 work. (Ex. A-57, p.2). On page 3 of Exhibit A-64, which is his letter attachment to an email to Ms. Wood, Respondent Evans states, "As far as jack hammering I admit I over looked this pay rate."

Ms. Wood classified the jack hammering work as Cement Mason, (See, Exhibit A-58, page 2 for Mr. Allmand-Abarca, page 20 for Mr. Stansell, and page 27 for Mr. Weaver). Presumably, she made that determination because the jack hammering was listed by Respondent Evans in conjunction with—and he did not differentiate the work from—other work she had determined should be classified as Cement Mason, *e.g.*, "8 hours jack hammer, dig, lay out 2x4 and stakes, stripping."[11] (Ex. A-52, page 7) Regardless of whether the work should have been classified as L2 or CM1, it was unquestionably improperly paid by Respondents at the L1 rate.

Ms. Wood stated she did not know what "mucking concrete" was. Respondent Evans did, and was able to describe it. From his testimony, it appears that mucking concrete is the process by which workers would use a long rake with a flat bar 4" wide to "push back" concrete into "low spots" and "pull [the concrete] back" from high spots that form as it is poured. Pouring concrete, placing it and spreading it are all part of the description of L2 in its seventh bullet. (Ex. A-54, page 2)

Respondents argue that the seventh bullet is not applicable because it applies only when a portable mixer is being used.[12] Ms. Wood's testimony on the subject was inconsistent. The wording of the definition is ambiguous. As written, it is impossible to know whether L2 work consists of using a portable mixer in mixing concrete, or of using a portable mixer in mixing, placing and spreading concrete. Respondent believes that

[11] See, *Matter of Design N Mind, Inc.*, 27 BOLI 32, 37 (2005), applying the rule that if an employer fails to properly track the correct classifications for each hour worked on a public works project, the employer may be charged to pay the highest prevailing wage rate for all hours worked.

[12] The applicable bullet point in the Laborer 2 definition provides: "Mixes concrete, using portable mixer, pours, places, and spreads concrete, and mixes cement products used in the…." Ex. A-54, p. 2.

"using portable mixer" must modify one of the phrases or the other, but not both—that it makes no sense as a stand-alone. (Respondent's Exceptions, page 5) A semi-colon, either before or after the phrase "using portable mixer" would resolve the ambiguity; as would changing the phrase "using portable mixer", to "uses portable mixer."

Given the definition in the book, it is more logical that "using portable mixer" modifies the phrase that precedes it—that mixing concrete with a portable mixer is the work of a Laborer 2;[13] thereby leaving the acts of pouring, placing and spreading concrete, *i.e.,* mucking, as the work of a L2. The phrase, "using portable mixer," only modifies "mixes concrete"; it does not modify the phrases that follow.

This Agency's interpretation of the definition is at least as plausible as the interpretation advanced by Respondent; in fact, it is more plausible. *Papas v. OLCC, 213 Or. App. 369, 377, 161 P.3d 948 (2007)* ("We defer to the agency's plausible interpretation of its own rule—including an interpretation made in the course of applying the rule—if that interpretation is not inconsistent with the wording of the rule, its context, or any other source of law."). Respondents' appeal to the principle that ambiguous documents are construed against the drafter is of no avail. The Definitions, like rules or statutes, are not drafted for the Agency's benefit; they are drafted for the guidance of building contractors and the benefit of workers. In that commercial context, a greater burden is placed on Respondent to resolve possible vagueness or ambiguity. *Oak Harbor Freight Lines, Inc., v. Antti (Dist. Or. 2/19/2014), slip. Op. at 20 (citing Village of Hoffman Estates v. Flipside, 455 US 489,498 (1982))*. Similarly, a greater burden is placed on an employer, such as Respondents here, when there is "the ability to clarify the meaning of the regulation by its own inquiry, or by resort to an administrative process." *Id. See, Ex. A-54 (footer to each page of Definitions book states: If you have questions about work classifications or definitions, contact BOLI at (971) 673-0839)*

In summary, the Agency carried its burden to prove that work described by Respondent Evans as jack hammer or mucking concrete should have been paid at the L2 rate. For those weeks when those jobs were misclassified by Respondents and for those workers who were underpaid on account of the misclassifications, violations of the prevailing wage laws occurred, both with respect to underpayment and by filing inaccurate WH-38s stating that the workers had been "paid the full weekly wages earned." (*See*, *e.g.*, page 2 of Exhibit A-40.)

A second issue relating to misclassification remains to be addressed—whether the Agency carried its burden to prove that Contested Wage Workers actually performed finish-concrete work by the use of a hand screed, trowel, fresno, or bull float that should have been paid at the CM1 rate. This is a factual question based on credibility. Respondent Evans acknowledges this work is CM1 work, but he says the Contested Wage Workers did not do it. Mr. Stansell says they routinely did perform that work.

[13] This interpretation leaves mixing concrete with hand-tools as work done by a Laborer 1, just as other mixing, as with asphalt, is work of a Laborer 1, under its 14th bullet.

According to Mr. Evans's testimony on the subject, which there is no reason to doubt, a trowel, fresno and bull float are all hand tools used after concrete is poured and mucked and screeded. The bull float and fresno help achieve the correct concrete consistency and help finish it to a smooth surface. The trowel smooths more finely and is also used to do the final finish work on the sidewalk. Determining whether Contested Wage Workers performed this work, and how much of it, requires an assessment of the credibility of Respondent Evans and Mr. Stansell.

Testimony of Respondent Evans and Mr. Stansell

Mr. Stansell's complaint started the investigation. When he first went to the Agency, he had a financial self-interest because a favorable outcome would win him more wages. By the time he testified, even though he had already received his wages, he may have felt some obligation to maintain the positions he had asserted from the beginning. Also, pride in his abilities and skills could have influenced him to exaggerate his skills, or the amount of time he spent using those skills to do finish work on sidewalks.

Mr. Stansell was not asked to speak, and did not speak, at as great a length and with as much detail about the work at Hillside as did Respondent Evans. His testimony about when the building inspectors came to the work site and approved the sidewalk was difficult to follow, and was internally inconsistent. This inconsistency cast doubt on the entirety of his description that all the workers were performing all the jobs needed to prepare the site for pouring—the creation of the forms and setting the grade lines—as well as the process of pouring concrete and the finish work. His demeanor was difficult to assess because he testified by telephone and he could not be observed. In addition, he did not speak clearly, making him difficult to understand.

The key point of Mr. Stansell's testimony, and the point at which it most significantly veers from that of Respondent Evans, was that he and all the other employees worked as a team in which virtually all the different types of work done on the sidewalks was done by everyone on the team, including the Contested Wage Workers who worked on the Project at the same time he did.

Respondent Evans, on the other hand, claims that the jobs requiring the finish-work skills payable at CM1 rates were performed exclusively by his Permanent Employees. As set out in the Findings of Fact, these are all the workers other than himself, and Permanent Employees Carillo-Cruz, and De Los Rios. The other workers are referred to throughout as the Contested Wage Workers.

Respondent Evans's credibility was hampered by his poor record-keeping, causing him to testify from memory about details that he might have more easily communicated if he had had access to proper records. Mr. Evans's testimony about his financial situation is a prime example—his testimony on the first afternoon of the hearing about his debts and finances was confusing, and then he greatly modified that testimony the next morning. Unfortunately, it was still confusing and unconvincing.

Respondent Evans's poor record-keeping is also apparent from his most important submissions. For example, he testified to spending a great deal of time, staying up all night, to prepare his written description for Ms. Wood's investigation of the work performed on the Project, which is Exhibit A-52. He then worked on it again to present a revised version, which is Exhibit A-64. Yet, in both exhibits, he reports Mr. Stansell's first day on the job was August 25. (Ex. A-52, p.7; Ex. A-64, p. 10.) His certified payroll, on the other hand, shows Mr. Stansell's first day of work to be September 1 (Ex. A-26, p. 1; Ex. A-28, p. 1). Exhibit A-64, at page 9, is another example; here, he submits that Mr. Weaver and Mr. Allmand-Abarca worked 10 hours on August 20, but also states, "(Time is messed up—No work this day)." Another example comes from the last three days of August. Certified payroll for those days (Ex. A-27) shows overtime worked by Mr. Weaver and Mr. Allmand-Abarca, but the descriptions provided by Respondent Evans in Exhibits A-52 and A-64 indicate that no work was performed on those days.

But the lack of credibility from his poor record-keeping does not extend to Respondent Evans's oral descriptions of the work done on the Project and how it was done with various tools and machines. These descriptions were thorough and very credible, especially as he was able to use his lengthy time as a witness to draw out the facts.

There is no reason to doubt his story of how the screed machine was used during the part of the Project that, by and large, preceded the sidewalk phase. According to his testimony, he and the other Permanent Employees operated the screed machine, while Contested Wage Workers only cleaned it, and broke it down and had some minor role in putting it together. Likewise, his testimony of how Mr. Stansell did Cement Mason work a couple hours on his first day on the job, although done badly, was rich in detail and very credible.[14] The associated testimony—that he would never again allow Mr. Stansell to set grade and prepare the space for forms—was also credible.

There is also no reason to doubt his testimony that he was on the job site 95% of the time and that his workers performed their work at a very high rate of speed, demanded by the job. And there is no reason to doubt his other descriptions of the various jobs performed by Respondent Evans and his employees. There is, however, as discussed immediately below, some reason to doubt his statements about who, exactly, performed the various jobs.

[14] Respondent Evans's descriptions in Exhibits A-52 and A-64 of the work done by Mr. Stansell on that first day do not differentiate how many hours he spent doing the cement mason work of setting out the stakes, the L2 work of operating a jack hammer, and the L1 work of digging and stripping forms, and perhaps unloading or "laying out" the stakes. For purposes of determining wages owed—as a factor in setting the amount of penalties—all eight hours should be treated as CM1. See, *Matter of Design N Mind, Inc.*, 27 BOLI 32, 37 (2005), applying the rule that if an employer fails to properly track the correct classifications for each hour worked on a public works project, the employer may be charged to pay the highest prevailing wage rate for all hours worked.

The forum does not entirely credit Respondent Evans's descriptions of how his employees worked together when installing the sidewalk. Initial questions on the subject of who did exactly which work elicited the response that employees other than the Contested Wage Workers were "responsible" for various duties, skirting the question of who actually *performed* those duties. Later in his testimony, Respondent Evans asserted that those workers did not perform what he considered to be the higher-level skills—for example, using the "bull float" or the "fresno" or cutting joints.

On the other hand, even though he would like the forum to accept the proposition that the Contested Wage Workers never performed finish work, Respondent Evans also testified, from his own personal experience, that less-skilled workers in his industry commonly took it upon themselves to perform those jobs, even when not authorized. He testified that when he found that someone with whom he was working was performing those higher level jobs, he would direct him to stop. And he testified that when he saw someone performing those jobs, and that person was working with one of his other Permanent Employees, he would ask him to stop.

Of course, whether the Contested Wage Workers performed cement mason work could have a very significant impact on Respondent's liability for wages, as well as for penalties. Like Mr. Stansell, by the time of the hearing, he was already on record with his claim that they did not perform that work. Like Mr. Stansell, he can be expected to want to show consistency with his prior written submissions. And just it was in Mr. Stansell's economic self-interest to provide the story of how the workers all performed such work, it was likewise in Mr. Evans' interest to deny that story.

Unfortunately, neither participant presented any testimony from any other eyewitness concerning the work performed by Respondent Hard Rock's employees, even though there were at least the nine others employed by Respondent Hard Rock.

But the fact-finder must play the hand as it is dealt. The forum found, and for the reasons outlined above those findings are adopted, that the credibility of both Mr. Stansell and Respondent Evans is suspect, and that the truth is somewhere in the middle—between Respondent Evans's testimony suggesting that the Contested Wage Workers never performed higher skilled jobs, and Mr. Stansell's testimony suggesting that they performed finish work as a matter of course.

Had the forum believed Mr. Stansell that concrete finish work was done by every employee every time there was mucking or digging, it would have been appropriate to find that all those hours should have been paid at the rate for Cement Mason 1. See, *Matter of Design N Mind, Inc.*, 27 BOLI 32, 37 (2005), *supra*.

The forum finds instead that Mr. Stansell and other Contested Wage Workers who worked on the Project at the same time as Mr. Stansell, did, on occasion, use the bull float and/or the fresno, or even a trowel to do finish work. Given the lack in confidence that Respondents' records of work performed are proper and accurate, the forum draws the reasonable inference that they did that higher level work when they

mucked concrete. (*Compare, Anderson v. Mt. Clemens Pottery Co.*, 328 US 680, 687 (1946). *See also*, *Thiebes v. Wal-Mart Stores, Inc.* (D. Or., July 26, 2004); *Nash v. Resources, Inc.*, 982 F. Supp. 1427, at 1435 (D. Or. 1997)). That inference is consistent with Mr. Stansell's testimony about how the people who worked for Respondent actually worked as teams, and how his most detailed description of this work as a team was connected with pouring the concrete in the sidewalk forms. Also, Mr. Stansell's testimony was most cogent when he talked about finishing and smoothing concrete during the pouring process.

But the evidence is not convincing enough to find that they did that work every hour of every day, or even every day they did any mucking. Rather, the forum finds that finish-work payable at CM1 rates—including the use of the fresno and bull float—was overwhelmingly done by the Permanent Employees, as Respondent Evans testified. On the other hand, the forum finds, consistent with Respondent Evans's testimony that those who he considered lesser-skilled workers often attempted and did perform higher-skilled jobs. This is in line with Mr. Stansell's testimony that he and the other workers would step in and do the finish work when it needed to be done.

The forum therefore finds that for the days Mr. Stansell was on the Project, one-half hour of finish-work—use of a hand-screed, fresno, bull float, or trowel, or cutting joints in the sidewalk—would have been done by each employee who was reported by Respondent Evans to have mucked concrete for at least four hours in a single day. And for those times when Respondent Evans reports an employee mucked concrete for six or more hours in a day, the forum finds that employee spent one of those six hours doing finish work. The forum finds CM1 wages due accordingly. The particulars for each worker are set out in the Findings of Fact and Conclusions of Law. They are not repeated here.

As for weeks prior to Mr. Stansell's employment, the forum finds that the Agency did not carry its burden to prove by a preponderance of evidence that any worker performed work other than as described by Respondent Evans.

Finally, a classification issue arises as to whether the Agency carried its burden of proof that laying out stakes and 2x4s should have been paid at CM1 rates, rather than the L1 rate. The forum concludes that it did so. Such work is an essential part of the CM1 work in forming sidewalks and is a part the work described in the final bullet of the CM1 definition.

Civil Penalties

The forum now addresses the imposition of penalties for the violations discussed above. The Agency seeks a variety of penalties against Respondent Hard Rock, pursuant to ORS 279C.865.

The Agency asks the forum to impose eight penalties at $1,000 each on account of Respondent Hard Rock's failure to pay eight different employees the wages to which

they were entitled (NOI, Par. 3, Ex. B). Paying wages at a rate less than the prevailing wage is a violation of ORS 279C.840(1) and OAR 839-025-0035(1). Penalties can be imposed for the violation pursuant to ORS 279C.865.

ORS 279C.865 also allows imposition of a penalty for each filing of an inaccurate or incomplete payroll record, which are required to be filed by ORS 279C.845 and OAR 839-025-0010. The Agency asks for the imposition of 27 penalties of $1,000 each for Hard Rock's filing of 27 such certified payroll statements—WH-38 forms. (NOI, par. 4, and Ex. A.)

The imposition of a penalty up to $5000 for each violation is authorized by ORS 279C.865(1). OAR 839-025-0530 (3)(a) and (3)(k) authorize a civil penalty for the particular violations alleged in this case. The Commissioner is not required to assess a penalty for any violation at issue in this case. If he does assess a penalty, the amount of the penalty is circumscribed by certain criteria, discussed below.

Criteria used generally to determine the amount of the penalties, both for failing to pay the prevailing wage and for filing inaccurate WH-38s, are found in OAR 839-025-0520. Those criteria are the actions of the employer in responding to previous violations, prior violations, opportunity and degree of difficulty to comply, magnitude and seriousness of the violation, and whether the employer knew or should have known of the violation. The amount of the underpayment of wages is to be considered in imposing penalties generally, *id.,* but it also specifically sets a floor for penalties imposed for failing to pay the minimum prevailing wage. OAR 839-025-0540.[15] Mitigating circumstances presented by the employer must also be considered. OAR 839-025-0520(4).

With respect to the violations that occurred, there is a mixed bag. There were no previous violations of the prevailing wage or any other law, and the first two criteria, which would form a basis for increasing the penalty above the minimum are of no consequence here.

However, underpayment of any kind is serious. Even though the amount for one worker was only $11.76, it is an aggravating factor with respect to the violations based upon inaccurate certified payroll.

Likewise, operating a jack hammer is, as Respondent Evans implicitly acknowledges in Exhibit A-64, clearly an L2 task, but he paid it at L1, at least for the Contested Wage Workers. Respondent Evans's failure to pay Mr. Stansell Cement Mason 1 wages for his work setting sidewalk forms and grade on his first day was also clearly improper. Respondent Evans seemed to think that the low quality of the work justified a refusal to pay. But the quality of the work is not the issue; it is the character—or type—of work that is legally significant for purposes of paying the minimum prevailing wage. ORS 279C.840. Misclassifying the jack hammer work and underpaying Mr.

[15] The floor is the lesser of $1,000 or the amount of the underpayment.

Stansell for his first day on the job constitute two more aggravating circumstances based on knowledge that these classifications were improper, moderated by the relatively low amounts of money involved and the fact that they seem to derive, as do other violations, from a knowledge arising from incorrigible inattention, rather than malevolent intent.

Determining whether "mucking concrete" is covered by L2 might be more difficult, and that difficulty prevents a finding of knowledge that would aggravate the penalty. It is notable that initially in her testimony, Ms. Wood was ready to acknowledge that spreading concrete without using a portable mixer would place the work outside the seventh bullet of the L2 definition, which is the bullet point she initially used and that the forum finds, does, in fact, describe mucking concrete. But then, on follow-up testimony, Ms. Wood insisted that using a portable mixer was *not* necessary in order to describe the work in the applicable portion of the bullet point, thereby fitting such work neatly into the L2 classification. Ms. Wood's difficulty in describing how mucking concrete fits within L2 demonstrates the difficulty an employer, such as Respondents, might have figuring out the proper classification. This difficulty mitigates the amount of the penalty for violations arising solely from misclassifying mucking concrete.

A somewhat similar analysis applies to the finding that the Agency carried its burden of proof to demonstrate that laying out or setting out stakes, as it was done by the Contested Wage workers in this case, qualifies as CM1 work. Determining the proper classification for this work could have been confusing and difficult, and is a mitigating factor.

Respondent Hard Rock is a small company, Respondent Evans is relatively inexperienced with having to determine proper classifications, and Respondent Hard Rock has poor administrative capacity. Although Respondent Hard Rock had performed some public works projects, Respondent Evans had never previously had to concern himself about classification issues, because he was utilizing the services of only a few employees and because he was paying those employees at the higher CM1 rate. He also relied on Kirby Nagelhout employees who, he says, confirmed his classification decisions. However, inexperience is not a mitigating factor in itself, *See, In the Matter of Emmert Industrial* Corporation, 26 BOLI 284, 289 (2005).

Credit is not given, however, to Respondent Evans's testimony, or his writing in his letter to Ms. Wood (Ex. A-64, pp. 2-3), that his classification decision was based on the fact that an Agency "PWR worksheet" was absolutely clear that the disputed tasks were L1 tasks. His letter purports to quote from the worksheet that "set stakes, set grade stakes, spreads concrete w/hand tools" are L1 tasks. This would be a strong point in mitigation but for the fact that Respondent Evans never produced a copy of the "PWR worksheet" or introduced it into evidence. And the Definition for L1 (Exhibit A-54), the closest thing to the "worksheet" that is in evidence, does not contain those words.

Respondents also ask that their dire financial circumstances be a mitigating factor. As discussed above, the evidence on financial inability was inconsistent. It was

also unconvincing. If anything can be fairly convincingly demonstrated by documentary evidence, it would be financial circumstances. But Respondents presented none. Assuming, without deciding, that financial circumstances can be a mitigating factor, the evidence on that point failed.

A final aggravating factor is the knowing failure to pay CM1 wages to those Contested Wage Workers who earned them by doing finish work during the sidewalk phase.

All seven Contested Wage Workers were underpaid prevailing wages; penalties are imposed for the underpayments in the total amount of $4,800.00 as follows:

Worker	Underpayment	Penalty
Allmand-Abarca	$1,664.35	$1,000.00
Anaya	$506.52	$ 700.00
INTENTIONALLY	*LEFT*	*BLANK*
Freeman	$11.76	$ 50.00
Graves	$530.77	$ 800.00
Stansell	$1447.37	$ 1000.00
Tovar-Hernandez	$88.20	$ 350.00
Weaver	$724.78	$ 900.00

In this case, even though there is no minimum penalty for filing inaccurate certified payroll, as there is for underpayment, the same factors are used here to determine the penalties for those violations.

The Agency seeks $1,000.00 penalties for each of 27 separate inaccurate WH-38's. Twenty-two inaccurate WH-38s were filed. Given the nature of the violations and the aggravating and mitigating criteria discussed above, a penalty of $400.00 for each inaccurate WH-38 filed is appropriate resulting in a total penalty for filing inaccurate or certified payroll of $8,800.

Placement on List of Ineligibles--Debarment

ORS 279C.860(1) states that the Commissioner "shall add" the contractor or subcontractor to the List of Ineligibles "for a period of three years" if, on a public works—

(a) The Contractor or subcontractor has intentionally failed or refused to pay the prevailing rate of wage to workers employed upon public works; [or]

(b) The subcontractor has failed to pay to the subcontractor's employees amounts required by ORS 279C.840 and the contractor has paid those amounts on the subcontractor's behalf;

…

Under previous versions of this statute, providing for debarment for "a period not to exceed three years," the Commissioner considered mitigating circumstances to determine whether the debarment should last the entire three years. *See, e.g., In the Matter of Labor Ready Northwest, Inc.*, 27 BOLI 83, 152 (2005), aff'd *Labor Ready Northwest, Inc. v. Bureau of Labor and Industries*, 208 Or App 195, 145 P3d 232 (2006), *rev denied, 342 Or 473 (2007)* . However, the statute now provides for debarment "for a period of three years." See, 2009 Or Laws Ch 107, Sec. 1. Even though the rule in effect at the time of the violations in this case, OAR 839-025-0085, had not been amended to conform to the statute,[16] and still referred to debarment for a "period not to exceed three years," if debarment must be imposed, it cannot be imposed for any period less than three years.[17]

Under subsection (3) of ORS 279C.860, a corporate officer responsible for a subcontractor's failure to pay is also personally placed on the List if the failure or refusal to pay prevailing wages was intentional or if the wages are ultimately paid by a contractor, presumably the general or prime contractor on the project.

As explained above, Respondent Hard Rock, the corporate respondent, was a subcontractor, it failed to pay all the wages due its employees, and the general contractor, Kirby Nagelhout, ultimately paid the wages in dispute. Moreover, it was undisputed that Respondent Evans was the corporate officer responsible for failing to pay the wages owed by Respondent Hard Rock. Accordingly, under ORS 279C.860 (1)(b), Respondent Hard Rock must be debarred from contracting on public works. And under ORS 279C.860(3), Respondent Evans must also be debarred.

An alternative ground for debarment, under (1)(a) of ORS 279C.860 is also applicable here. That section calls for debarment if "The contractor or the subcontractor has intentionally failed or refused to pay the prevailing rate of wage to workers employed upon public works."

A good-faith failure to pay, even if negligent and even if based on a legal mistake, is not sufficient to establish intent under this statute. *Labor Ready Northwest, Inc. v. BOLI*, 188 Or App 346, 71 P3d 559 (2003), *rev den* 336 Or 534, 88 P3d 280 (2004). See, also, *In the Matter of Green Thumb Landscape and Maintenance, Inc.*, 32 BOLI 185, 204 (2013). Here, evidence of intent was lacking with respect to the classification decision by Respondent Evans regarding mucking concrete, as well as the decision regarding CM1 wages for laying out or setting out stakes. And although it may have been a closer question, evidence was insufficient to establish the "culpable mental

[16] An amendment conforming the rule to the statute did become effective January 1, 2014.

[17] Once placed on the List of Ineligibles, Respondents may request removal. OAR 839-025-0095.

state", *Labor Ready, supra,* required to establish intent on account of his failure to pay Laborer 2 wages for jack-hammering.

But the evidence is sufficient to establish that Respondent Evans intentionally failed to pay Cement Mason 1 wages to those Contested Wage Workers who earned it by performing finish work during the sidewalk phase. Respondent Evans testified that he was on the job site every day and was nearly always doing the work with them. It is simply not credible to believe that he never saw any Contested Wage Worker perform the finish concrete work. And he admits he knew that finish concrete work, including the use of a bull float or fresno, qualified the work to be paid at the Cement Mason 1 rate. He likewise acted intentionally in failing to pay Mr. Stansell at the Cement Mason 1 rate for his first day on the job, when he set the forms for pouring sidewalk.

Exceptions filed by Agency

The Agency objected to the Conclusions of Law that are now numbered 19-22. The objection to all conclusions was that "the forum erred in classifying the work rather than determining whether the Agency met its burden of proof in showing that the Agency had appropriately classified the work." (Agency Exceptions, page 2). Modifications to the Conclusions of Law and the Opinion have been made to clarify that classification of any work is not being changed; the issue is whether the Agency did, or did not, carry its burden that the work performed, as described in the evidence, falls within the Definitions relied upon by the Agency.

The specific arguments of the Agency are now addressed.

The Agency objected that the forum was relying on the classification propounded by the Respondents. However, the conclusions set out do not rely on Respondents' classification of the work. Rather, reliance is on the factual description of the work, and the application of the Definitions to that factual description.

The Agency is correct that hand-held screeding is classified as Cement Mason 1 work; there was never any dispute on that point. The Agency did not present sufficient evidence to carry its burden that preparation of a machine for screeding is either Cement Mason 1 work or Laborer 2 work.

The Agency presented sufficient evidence to establish that actually setting stakes in exact and specific locations in preparation for forming sidewalks is properly classified as CM1 work. Where such work was performed, it should be paid at CM1 rates. (Finding of Fact – 62 and Conclusion of Law 25)

The Agency also asserted in its Exceptions that it did carry its burden to demonstrate that other similar work, not requiring such exacting location must be paid at CM1 rates. Specifically, in Exception B, it asserts that "laying out or setting out stakes," and in Exception C it asserts that "laying out or setting out stakes and 2x4s" (as described in Findings of Fact 22c) should be paid at that rate. That exception is

accepted. The Agency carried its burden to establish that such work, essential for forming sidewalks, is best described in the CM1 definition.

Exceptions filed by Respondent

Overtime

Respondents filed exceptions to the Forum's findings that overtime pay was not properly paid.

The Agency did not specifically allege in its Notice of Intent that overtime pay was not properly paid and the Notice of Intent does not cite any statutes or rules, particularly ORS 279C.540 or OAR 839-025-0050, which mandate overtime pay on public contracts. For that reason and because of the requirements of OAR 839-050-0060 (1)(a) and ORS 183.415(3)(c), this Order (including the Opinion, Findings of Fact, and Conclusions of Law) has been revised to eliminate overtime violations from consideration in determining the amount of wages due (which influences the amount of the penalties) and as an aggravating factor in determining the amount of penalties imposed.

Mucking Concrete

Respondents also take exception to the finding that "mucking concrete" is described in the Definition of Laborer 2. That exception is addressed in the Opinion portion of the Order. In summary, the Agency's interpretation of the Definitions is plausible and not inconsistent with the wording of the Definition or other law.

Cement Mason

Finally, Respondents take exception to the finding that Cement Mason work was performed by the Contested Wage Workers. This exception is based first, on a disagreement with the forum's findings as to credibility of the witnesses' testimony about the work performed, as related by Mr. Stansell and Mr. Evans. For the reasons stated in the Opinion, those findings are upheld.

General Objections

The balance of Respondents' objections to the findings that Cement Mason work was performed by Contested Wage Workers relies upon Respondents' assertion that the evidence in the record is not "specific enough to identify with sufficient particularity that any of these employees (other than Stansell) performed any task within those descriptions for an identified period of time." (Respondent's Exceptions, page 6). This objection is also addressed in the Opinion section of the Order. In summary, where the law imposes on the employer the burden of keeping track of what work was performed for what periods of time and by which employees, *see, OAR 839-025-0025,* and when the evidence is that the employer has not met this obligation, the fact-finder can draw

reasonable inferences about the work performed, including the hours spent performing various tasks. Making such an inference is not, as Respondent asserts, pure speculation. This has long been the law. *See, e.g., Anderson v. Mt. Clemens Pottery Co.*, 328 US 680, 687 (1946). That law is applied in this case.

Respondents' objection to reliance on *Matter of Design N Mind, Inc., 27 BOLI 32 (2005)* is answered in a similar vein. That order announced that, "When a worker performs tasks within multiple classifications on a public work, BOLI requires employers to either track the actual hours worked in each classification and pay prevailing wages accordingly or pay the worker for the classification with the highest prevailing wage rate for all hours worked." *Id., at 36-37*. Again, the principle in play is that when the employer fails to keep records of sufficient accuracy and specificity as required by law, the employee will not suffer the consequences, and the employer will not reap the benefits.

Finally, Respondents appeal to notions of fairness and equity in assessing the amounts of the penalties against the corporate Respondent, and in placing both Respondents on the List of Ineligibles. As for the penalties, those notions have been applied; the penalties imposed are, in fact, significantly less than the amount sought by the Agency. As for debarment, the law is clear: Failure to pay wages, followed by payment of the wages by the general contractor is mandatory grounds for placement on the List of Ineligibles, even in the absence of intent. ORS 279C.860(1)(b). Alternatively, there was intent with respect to the failure to pay CM1 wages for the finish work on the sidewalk.

ORDER

NOW, THEREFORE, as authorized by ORS 279C.865, and as payment of the penalties assessed as a result of its violations of ORS 279C.840, OAR 839-025-0035 and OAR 839-025-0049, and of ORS 279C.845 and OAR 839-025-0010, the Commissioner of the Bureau of Labor and Industries hereby orders—

Respondent Hard Rock Concrete, Inc. to pay, by delivering to the Fiscal Services Office of the Bureau of Labor and Industries, 1045 State Office Building, 800 NE Oregon Street, Portland, Oregon 97232-2180, a certified check payable to the Bureau of Labor and Industries in the amount of THIRTEEN THOUSAND SIX HUNDRED DOLLARS ($13,600.00); and

As authorized by ORS 279.860 and OAR 839-025-0085, the Commissioner of the Bureau of Labor and Industries further orders—

> Respondent Hard Rock Concrete, Inc. shall be placed on the List of Ineligibles, as defined in OAR 839-025-0090, and shall thereafter be ineligible to receive any contract or subcontract for a public works for a period of three years from the date first published there; and

33 BOLI ORDERS

Respondent Rocky Evans shall be placed on the List of Ineligibles, as defined in OAR 839-025-0090, and shall thereafter be ineligible to receive any contract or subcontract for a public works for a period of three years from the date first published there.

In the Matter of

ZOOM CONTRACTING, LLC dba ZOOM GARAGE DOOR, INC.

Case No. 52-13
Final Order of Commissioner Brad Avakian
Issued April 16, 2014

SYNOPSIS

A business operating under the name Zoom Garage Door was a subcontractor on a public works contract. The records of the Oregon Secretary of State listed it as an assumed business name of Respondent Zoom Contracting, LLC. In fact, the business had been purchased by an individual not named as a respondent. It was owned by that individual at the time the subcontract was entered into and performed, and at the time the wage claimants were hired and performed their work. Registration of an assumed business name by a limited liability company is not sufficient to establish liability for prevailing wage and other wage-related violations when the business, prior to and at the time of the violations, had been sold to a third-party, the wage claimants believed the third-party to be the owner of the business, and the Respondent had no relationship with, and was entirely unaware of the employment of the wage claimants and the existence of the public works project. The Commissioner has jurisdiction over the allegations under ORS 279C.865, ORS 279C.840, ORS 279C.845, ORS 279C.836, and ORS 653.045, but there is no liability as to the Respondent.

The above-entitled case came on regularly for hearing before Daniel Rosenhouse, designated as Administrative Law Judge ("ALJ") by Brad Avakian, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on February 25, 2014, at the Gregg Conference Room at the Portland, Oregon office of the Bureau of Labor and Industries (BOLI) at 800 NE Oregon Street. It began at 9:00 AM and concluded at approximately 11:00 AM.

BOLI was represented by Administrative Prosecutor Cristin Casey, an employee of the Agency. The Respondent limited liability company (hereafter, Respondent, or Respondent Zoom Contracting) was represented by its registered agent and member, Nathan Moore.

Witnesses were Agency employees Selena Schryvers and Mike Kern, as well as Genesis Clary and Spencer Harris, the two workers whose wages were not paid, who testified by telephone. Mr. Moore was present and also gave a statement under oath.

The forum received into evidence Agency Exhibits A-1 through A-27. In addition to the audio record of the hearing, the official record also includes Administrative Exhibits X-1 through X-4.

The Proposed Order was issued on March 27, 2014. No exceptions were filed.

Having fully considered the entire record in this matter, I Brad Avakian, Commissioner of the Bureau of Labor and Industries, hereby make the following Findings of Fact, Conclusions of Law, Opinion, and Order.

RULINGS AND RESOLUTIONS OF MOTIONS OR OBJECTIONS

At the hearing, Respondent's representative, Mr. Moore, asked to make a statement, including sworn testimonial evidence. Respondent had not submitted a Case Summary designating Mr. Moore as a witness. The Forum allowed Mr. Moore to make his statement, reserving its ruling on whether the statement would be allowed as evidence. Mr. Moore stated that he is not a lawyer, did not understand that he needed to disclose himself as a witness in the Case Summary and that he had experienced personal problems during the past week. After his statement, the Agency's Administrative Prosecutor did not choose to ask him any questions and did not voice any objection to allowing his testimony. The forum exercised its discretion under OAR 839-050-0210 (5) to rule that his statement shall be admitted into evidence.

FINDINGS OF FACT

1. On September 16, 2013, the Agency served a Notice of Intent to Place on List of Ineligibles and Assess Civil Penalties, Ex. X-1a (NOI). The NOI was served on Respondent Zoom Contracting, LLC, through Mr. Moore, as registered agent; it also named as a respondent and was served on Roger Champ, individually. Both Zoom Contracting, LLC and Mr. Champ were identified in the caption as "dba Zoom Garage Door."

2. On October 8, 2013, the Agency received a letter from Mr. Moore, on behalf of Respondent Zoom Contracting, LLC dba Zoom Garage Door. Ex. X-1j. The letter, which the forum considers to be Respondent's Answer, sets out, in pertinent part, that Respondent Zoom Contracting had been under the control of Mr. Champ during the time at issue in the NOI, and that it was Mr. Champ who was responsible for the alleged unlawful acts. The letter does not deny that the alleged unlawful acts occurred or that they occurred under the auspices of an entity called Zoom Garage Door, which, according to Mr. Moore's letter, was a "division" of Respondent Zoom Contracting.

3. On December 23, 2013, Gerhard Taeubel, in his capacity as Administrator of the Agency's Wage and Hour Division, signed an AMENDED – NOTICE OF INTENT TO PLACE ON LIST OF INELIGIBLES AND ASSESS CIVIL PENALTIES, Ex. X-1b

(Amended NOI). It named as Respondent only Zoom Contracting, LLC dba Zoom Garage Door and was served only on Mr. Moore, as its registered agent.

4. The NOI and Amended NOI are identical in all material respects, except that the Amended NOI, unlike the NOI, does not name Mr. Champ dba Zoom Garage Door as a respondent and does not contain the allegation that Mr. Champ purchased Zoom Garage Door from Mr. Moore on June 7, 2012.

5. No separate answer was filed by Respondent in response to the Amended NOI.

6. The Agency alleged in the Amended NOI, the following facts:

    a. Respondent is now an inactive Oregon limited liability company, but was registered and active during 2012 at the times material to the allegations in the NOI.

    b. P & C Construction Company was the general contractor and Respondent acted as its subcontractor on a public works project conducted by Newberg School District 29J during July and August of 2012 (the Project).

    c. Respondent failed to pay a total of $11,051.12 in prevailing wages to two workers on the Project.

    d. Respondent failed to post the applicable prevailing wage rates in a conspicuous and accessible location at the work site of the Project.

    e. Respondent failed to file certified payroll statements for the five weeks its employees performed work on the Project.

    f. Respondent failed to obtain and file with the Construction Contractors Board the $30,000 bond required by law.

    g. Respondent failed to keep and maintain the payroll records for the work performed at the Project.

    h. Respondent failed to make the payroll records available for inspection by the Agency.

    i. After Respondent was made aware of its failure to pay prevailing wages and given an opportunity to pay them, it failed to do so, and P & C Construction Company, the prime contractor, paid them.

    j. Respondent intentionally failed or refused to post the prevailing wages, even though Respondent knew or should have known that its workers were employed at the Project.

7. Pursuant to a sale agreement dated June 7, 2012, which on its face is signed individually, and not in any representative capacity, by Roger Champ and Nathan Moore, Zoom Garage Door, identified as a "Division of Zoom Contracting LLC," was sold by Mr. Moore to Mr. Champ, for $41,000.00, payable over 28 months (Ex. A-20, pages 3-4). The two-page contract provides:

    a. Monthly payments were to start July 15, 2012;

    b. Monthly payments are not to be made to Mr. Moore, but to Zoom Garage, LLC;

    c. If payments are not made within a 90-day grace period, "then Roger Champ forfeits ownership of Zoom Garage Door back to Nathan Moore of Zoom Contracting LLC. Roger is still responsible for liabilities and responsibilities of payment of the duration as operating Zoom Garage Door, including taxes, expenses and liability costs;"

    d. Mr. Champ is to "get a CCB number, license and Bonding after $41,000 is received from Zoom Garage Door;"

    e. As of June 7 2012 Roger Champ is responsible for all legal and Zoom Garage Door Liabilities.

8. Mr. Champ never paid any money to Mr. Moore for the Zoom Garage Door business and Mr. Champ never did obtain a new Construction Contractors' Board license number, his own license, or bonding.

9. Mr. Moore is and was, at all times, the member of Zoom Contracting, LLC.

10. Mr. Moore is not a lawyer and did not understand, at any material time, the ramifications of the distinctions between ownership of a business, particularly Zoom Garage Door, by himself as an individual, and ownership of the business by the limited liability company of which he was the member, Zoom Contracting, LLC.

11. The subcontract on the Project at issue identifies, on its first page, Zoom Garage Door as the subcontractor to P&C Construction Company, the Contractor. It is dated June 19, 2012. There is no name or signature written or typed in on behalf of the Subcontractor on the pages of the contract where a signature is called for. (Ex. A-16)

12. A Master Subcontract Agreement between P&C Construction Company and Zoom Garage Door, dated June 20, 2012, is signed on behalf of Zoom Garage Door not by Mr. Moore, but by Spencer Harris, as General Manager of Zoom Garage Door. (Ex. A-18)

13. During June, July and August 2012, when the subcontract became effective and when the work on the subcontract was being performed, Mr. Moore, the sole member of Respondent, had no knowledge of the Zoom Garage Door subcontract with P&C Construction.

14. As of September 6, 2012, the Construction Contractors Board listed Zoom Garage Door and Zoom Restoration as assumed business names for Zoom Contracting, LLC. (Ex. A-6)

15. At all material times, the official records of the Construction Contractors Board showed that the CCB license for Zoom Garage Door was owned by Respondent. (*Id.*)

16. At all material times, the registration records of the Oregon Secretary of State indicated that Zoom Garage Door was an assumed business name of Respondent. (Ex. A-5)

17. At all material times, the registration records of the Oregon Secretary of State indicated that Nathan Moore was the member of Zoom Contracting, LLC and its registered agent. (Ex. A-4)

18. Mr. Nathan Moore undertook no activity on behalf of Zoom Garage Door to obtain or implement the subcontract with P&C Construction Company.

19. Neither of the claimants, Genesis Clary and Spencer Harris, who was also the general manager for Zoom Garage Door, had any contact with Mr. Moore indicating that he was in any way connected with Zoom Garage Door, the company that employed them.

20. Mr. Clary was interviewed for his job with Zoom Garage Door by Mr. Harris and was hired by Roger Champ. He believed that Mr. Champ had bought the Zoom Garage Door business. (Clary Testimony)
21. On his wage claim form filed with the Agency, Mr. Clary identified “Zoom Garage Doors” as his employer, and he listed the business owner’s name as “Roger Champ.” (Ex. A-3)

22. Mr. Harris believed the owner of the business was Roger Champ and that Mr. Champ was his boss. (Harris Testimony)

23. Mr. Harris was directed by Mr. Champ to have no contact with Mr. Moore. (*Id.*)

24. The claim form filed with the Agency by Mr. Harris identifies “Zoom Garage Door/Zoom Contracting” as Mr. Harris’s employer, and it refers to “Roger” as “the owner,” and the person who lied to Mr. Harris about his wages. (Ex. A-14)

25. Mr. Harris learned from Agency personnel that Zoom Contracting was his employer; he had no independent knowledge of that fact. (Harris Testimony)

26. Respondent is now an inactive Oregon limited liability company, but was registered and active during 2012 at the times material to the allegations in the NOI and Amended NOI.

27. P & C Construction Company was the general contractor and Zoom Garage Door acted as its subcontractor on a public works project conducted by Newberg School District 29J during July and August of 2012 (the Project).

28. At the time the subcontract between Zoom Garage Door and P&C Construction was signed and performed, Respondent and its sole member, Nathan Moore, had no ability to affect the actions of Zoom Garage Door as it worked on the subcontract with P&C Construction.

29. Two workers on the Project, Spencer Harris and Genesis Clary, were not paid a total of $11,051.12 in prevailing wages to which they were entitled.

30. At the time the Claimants Genesis Clary and Spencer Harris performed the work on the Project for Zoom Garage Door, that business was owned by Roger Champ, not by Respondent Zoom Contracting, LLC.

31. Applicable prevailing wage rates were not posted in a conspicuous and accessible location at the work site of the Project.

32. Certified payroll statements were not filed with Newberg School District 29J for the five weeks employees of Zoom Garage Door performed work on the Project.

33. Respondent did not obtain or file with the Construction Contractors Board the $30,000 bond required by law to be filed by a subcontractor on the Project.

34. Respondent did not keep or maintain payroll records for the work performed at the Project.

35. Respondent, not having kept or maintained payroll records did not and could not make the payroll records available for inspection by the Agency.

36. After Respondent was made aware of the workers' failure to receive prevailing wages and it was given an opportunity to pay them, it failed to do so.

37. P & C Construction Company, the prime contractor, paid the prevailing wages found by the Agency to be owed to the workers on the Project.

CONCLUSIONS OF LAW

1. The Commissioner of the Bureau of Labor and Industries has jurisdiction over the subject matter. ORS 279C.860, ORS 279C.865.

2. Respondent did not violate the prevailing wage laws as alleged in the Amended NOI.

3. Respondent did not own Zoom Garage Door during the time the subcontract between Zoom Garage Door and P&C Construction was signed and performed.

4. Respondent did not assume the liabilities incurred by Zoom Garage Door during the time it was owned by Roger Champ.

5. Respondent cannot be placed on the List of Ineligibles, and cannot have penalties assessed against it on account of the actions and failures of Zoom Garage Door during the time it was owned by Roger Champ.

OPINION

The question presented is whether the Respondent, Zoom Contracting, LLC is responsible for the alleged failures of the business known as Zoom Garage Door to pay prevailing wages to its employees and to otherwise comply with the prevailing wage laws, ORS 279C.600 *et seq.* The question is answered in the negative, for the reasons set forth below.

It is useful to begin by looking at the difference between the Agency's NOI and its Amended NOI. In the original NOI, the agency alleged that Roger Champ purchased Zoom Garage Door from Nathan Moore on June 7, 2012, which is prior to the time of the alleged unlawful activities with respect to the prevailing wage laws, and it alleged that Zoom Garage Door was an unregistered assumed business name of Mr. Champ's. As for Respondent Zoom Contracting LLC, the NOI alleges its connection to Zoom Garage Door is that Zoom Garage Door was registered with the Oregon Corporation Division as the assumed business name of Zoom Contracting LLC and that Zoom Contracting, LLC was Zoom Garage Door's registrant. The Amended NOI makes the same allegations respecting registration, but it makes no allegation about the purchase of Zoom Garage Door by Mr. Champ. In fact, all the allegations in the NOI and Amended NOI regarding registration and regarding purchase by Mr. Champ are true.

The NOI alleges that "Respondents," i.e., Zoom Contracting, LLC *and* Roger Champ, both doing business as Zoom Garage Door, were the "subcontractor." The Amended NOI, the document at issue now, alleges that "Respondent", i.e., Zoom Contracting, LLC, dba Zoom Garage Door, was the "subcontractor." It says nothing about Mr. Champ.

The subcontract giving rise to the unpaid wages and other obligations that are at issue here is in the name of Zoom Garage Door. Ex. A-16. The amendment to the subcontract is also in the name of Zoom Garage Door. Ex. A-20, pages 3-4. Neither

document refers to Zoom Contracting, LLC, to Mr. Champ, or to Mr. Moore, the member of Zoom Contracting, LLC.

The evidence, consistent with the Agency's allegations, is that Zoom Garage Door was listed with the Oregon Secretary of State, at all material times, as the assumed business name of Zoom Contracting, LLC, and Zoom Contracting, LLC was the registrant of Zoom Garage Door. These facts were established, not only by the records of the Oregon Secretary of State,[1] Exhibits A-4 and A-5, but also by the records of the Construction Contractors Board, Exhibit A-6.

But the applicable statutes require compliance, not by the registrant, but by the "contractor" or "subcontractor," in matters regulated by the prevailing wage laws, and they require compliance by the "employer" for matters regulated by general wage and hour laws. *See*, ORS 279C.840(1) and (4), relating to payment of the prevailing wage and posting of the rates, respectively; ORS 279C.845(1), relating to filing certified statements of wages paid with the agency that let the public contract; ORS 279C.850(2) and 653.045, relating to maintaining and making payroll records available to the Commissioner; and ORS 279C.836(1), relating to filing a public works bond with the Construction Contractors Board.

The Secretary of State's records are, of course, evidence of the facts contained in those records. And it is those records, stating that the Respondent is the registrant of Zoom Garage Door and that Zoom Garage Door is its assumed business name, that constitute the evidence that Respondent was in fact, the employer and the subcontractor. It is evidence of those facts because the registrations reflect a legal status whereby Zoom Garage Door is, if not identical with, then at least, a sub-part of Respondent—anything done by Zoom Garage Door can be attributed to Respondent. And since there is a contract in evidence demonstrating that Zoom Garage Door was a subcontractor to P&C Construction on the Project, the circle is completed—evidence exists that Respondent is a subcontractor on the Project.

In fact, the records of the Secretary of State can even have a status somewhat greater than mere evidence. Had those records been offered into evidence by way of a certification from the Secretary of State, ORS 56.110 would require the Forum to find them to constitute prima facie evidence of the fact that anything done by Zoom Garage Door can be attributed to Respondent. And as prima facie evidence, that fact would be entitled to a presumption that it is true. ORS 40.135(2). And here, where no evidence was produced casting any doubt whatsoever on the authenticity of the records from the Secretary of State' office, the Forum accepts those records as establishing the prima facie case—the presumption—that Zoom Garage Door was, at the times material to this case, the business name of Zoom Contracting, LLC, and that Zoom Contracting, LLC was therefore legally responsible for any violations of the prevailing wage laws by Zoom Garage Door.

[1] The Oregon Secretary of State is the official repository of registration records for Oregon business entities, including limited liability companies, such as Respondent. ORS 56.014.

However, establishing that prima facie case does not end the inquiry. Even with the attributes of a presumption, it merely imposes on the Respondent "the burden of proving that the nonexistence of the presumed fact is more probable than its existence." ORS 40.120. Or, in the words of the Administrative Procedures Act, ORS 183.450, the Respondent now must "bear the burden of presenting the evidence to support the fact" that Zoom Garage Door was not identical to, or a sub-part of, Respondent Zoom Contracting, LLC, and that Respondent is therefore not responsible for the unlawful acts of Zoom Garage Door.

The Forum finds the evidence sufficient to overcome the presumption, and sufficient to carry Respondent's burden. That evidence is summarized below.

First, there is a countervailing presumption. That presumption is in ORS 40.135(1)(g), and provides that, "A person is the owner of property from exercising acts of ownership over it or from common reputation of the ownership of the person." Here, Mr. Champ exercised acts of ownership over Zoom Garage Door by entering into the subcontract with P&C Construction, the general contractor. Although there is no signature for Zoom Garage Door on the original subcontract in evidence, the amendment to the contract is signed by Mr. Harris, in the capacity of general manager of Zoom Garage Door. And Mr. Harris, by his own testimony, was hired by Mr. Champ.

There is also the testimony and documentary evidence on the wage claim forms of both Mr. Harris and Mr. Clary that Mr. Champ acted as their boss and as their employer on the prevailing wage project at issue in this case. On his wage claim, Mr. Harris referred to Mr. Champ as the person who lied to him about when he would receive his wages. Ex. A-14, page 2. Both Mr. Clary and Mr. Harris looked to Mr. Champ to pay their wages. Mr. Clary listed Zoom Garage Door as his employer on his claim forms filed with the Agency. And Mr. Harris also listed Zoom Garage Door as his employer, stating that it was only after the Agency told him that Respondent was his employer (implicitly, at the time he filed his wage claim) that he became aware that Respondent Zoom Contracting, LLC was his employer. In sum, the evidence from the two wage claimants, Mr. Harris and Mr. Clary, is that Mr. Champ both exercised acts of ownership over Zoom Garage Door and that his ownership was the subject of common reputation among them. That evidence is sufficient to establish the countervailing presumption. And the existence of the countervailing presumption could be sufficient to negate the presumption flowing from the registration with the Secretary of State.[2] But with or without the presumption, the weight of the evidence lies with the finding that Zoom Garage Door was not owned by Respondent at the times material in this case.

This evidence lies in the fact that the contract for the purchase of Zoom Garage Door, Exhibit A-20, pages 3-4, specifically states that Zoom Garage Door is being purchased by Mr. Champ from Mr. Moore, and that Mr. Champ is responsible for all

[2] ORS 40.130 provides: If presumptions are conflicting, the presumption applies that is founded upon weightier considerations of policy and logic. If considerations of policy and logic are of equal weight, neither presumption applies.

Zoom Garage Door liabilities. The contract specifically mentions the physical assets and it also refers to assets commonly considered to be the "good will" of the business, its phone number and "branding." The contract is signed and appears by its terms to be effective as of June 7, 2012, prior to the subcontract and prevailing wage law violations at issue. No evidence was presented suggesting this contract was not authentic or that it was a sham.

There are only two minor blemishes in the contract by which Mr. Champ purchased Zoom Garage Door, and they are both easily dispensed with. One is that the contract was signed by Mr. Moore individually, rather than in his capacity as member of Zoom Contracting, LLC, which is the entity that the Secretary of State's records indicate had been the true owner prior to the sale to Mr. Champ. But Mr. Moore's signature in his individual capacity is not dispositive on the intent of the parties and therefore, the effect of the contract. The forum can look at the evidence as a whole. *See, e.g., Judson v. Terry Morgan Const., Inc.,* 273 Or 666, 542 P2d 1010 (1975). And the evidence here is that the parties intended to transfer the entirety of the Zoom Garage Door business to Mr. Champ. That conclusion is bolstered by the fact that Mr. Champ's payments are to be made to Zoom Contracting, LLC, the true owner. Mr. Moore's lack of legal knowledge accounts for the fact that his signature is placed on the contract as an individual, rather than as an authorized representative of his limited liability company, Respondent Zoom Contracting, LLC.

The other minor blemish is that the contract contemplates the return of Zoom Garage Door—"Roger Champ forfeits ownership of Zoom Garage Door, back to Nathan Moore of Zoom Contracting LLC" (Ex. A-20, page 3)—if Mr. Champ should fail to make his payments within a 90-day grace period. But the return of the business did not occur until after the obligations under the prevailing wage laws and the general employment laws had fully accrued. And return of a business does not normally imply assumption of the liabilities by the acquiring owner unless those liabilities are expressly assumed, the transaction is entered for the purpose of fraudulently avoiding debts, or other exceptions apply. *Erickson v. Grande Ronde Lbr. Co.,* 162 Or 556, 568, 92 P2d 170 (1939). *Compare,* ORS 652.310 *and Blachana LLC v. Bureau of Labor and Industries*, 354 Or 676, 690 (2014) (imposing liability on successor employers, under a different standard, in wage cases). Here, the contract does not expressly provide for the assumption of Zoom Garage Door's liabilities if ownership is re-assumed, and no other exceptions to the general rule apply.

On the whole, the evidence—from the contract of sale, from Mr. Champ's exercise of ownership of the assets, and from the understanding of the claimants who engaged in business with Mr. Champ—establishes that the subcontractor on the public works contract was not Respondent, but was Mr. Champ.

ORDER

NOW, THEREFORE, as authorized by ORS 279C.860 and ORS 279C.865, the Commissioner of the Bureau of Labor and Industries hereby orders this matter is dismissed.

In the Matter of

MALTBY BIOCONTROL, INC. dba BIOTACTICS,
HOWARD MALTBY individually, and
LOUIS M. BASSETT, Sr.[1], and JAMES BASSETT, individually,

Case Nos. 31-13 & 34-13
Final Order of Commissioner Brad Avakian
Issued April 22, 2014

SYNOPSIS

The Agency alleged in its Formal Charges that (1) Respondent Maltby Biocontrol, Inc. ("MBI") subjected six Guatemalan and Hispanic employees, including Erix Guevara and Robinson Calderon, to a hostile working environment in violation of ORS 659A.030(1)(b) because of their race and national origin through the actions of James Bassett, a coworker; (2) MBI, through Respondent Howard Maltby, discharged Guevara based on his cooperation with a law enforcement agency in a criminal investigation and his race/national origin in violation of ORS 659A.230(1) and ORS 659A.030(1)(a); and (3) Respondents Howard Maltby, James Bassett, and Louis Bassett, Sr., individually aided and abetted Respondent MBI in the commission of the alleged unlawful practices and were jointly and severally liable for the practices. The forum held that: (1) MBI is not liable for James Bassett's racial epithets and other harassment on the job that occurred before August 2010 because MBI took immediate and appropriate corrective action upon learning of Bassett's behavior; (2) MBI is liable for J. Bassett's participation in a physical assault on Guevara and Calderon in January 2011 and for the subsequent hostile work environment experienced by Guevara and Calderon because MBI failed to take immediate and appropriate corrective action; (3) James Bassett and Howard Maltby are individually liable as aiders and abettors for MBI's violation of ORS 659A.030(1)(b); (4) MBI discharged Guevara based on his national origin and his cooperation in a criminal investigation being conducted by the Klamath County Sheriff; and (5) Howard Maltby is liable as an aider and abettor for MBI's discharge of Guevara. The forum awarded $100,000 each in damages to Guevara and Calderon for their physical, emotional and mental suffering.

The above-entitled case came on regularly for hearing before Alan McCullough, designated as Administrative Law Judge ("ALJ") by Brad Avakian, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on

[1] Louis M. Bassett, Sr., is a Respondent in case #31-13 only.

September 24-27, 2013, and November 18-20, 2013, at the offices of the Oregon Self-Sufficiency Programs, located at 700 Klamath Avenue, Klamath Falls, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by administrative prosecutor Adriana Ortega, an employee of the Agency. Erix Guevara Ramirez, was present throughout the hearing, and was represented by Adam Jeffries, Attorney at Law. Respondents Howard Maltby ("H. Maltby") and Maltby Biocontrol, Inc. ("MBI") were represented by James Baldock, attorney at law, and H. Maltby was present throughout the hearing. Respondents Louis Bassett, Sr. ("L. Bassett") and James Bassett ("J. Bassett") were present throughout the hearing and were represented by Timothy Bernasek, attorney at law, who did not appear at the hearing. Betzabé Turner and Lillian Belsky, Oregon court-certified interpreters in Spanish, translated the entire proceeding to Complainant, as well as the testimony of Spanish-speaking witnesses.

The Agency called the following witnesses: Erix Guevara Ramirez; Robinson Guillermo Calderon (by phone); Darren Frank, Klamath County Deputy Sheriff; Nick Kennedy, detective, Klamath County Sheriff's office; Katija Roberts, Guevara's friend (by phone); Cristina Guevara, Complainant's wife (by phone); and Mimi Perdue, Civil Rights Division senior investigator (by phone).

Respondents MBI and H. Maltby called the following witnesses: H. Maltby; Jose Dominguez, MBI's employee (by phone); Marvin Alberto Quinoñez Herrera, MBI's employee (by phone); Barbara Maltby, H. Maltby's wife (by phone); and Leah Maltby, H. Maltby's daughter (by phone). Respondents L. Bassett and J. Bassett chose not to testify and called no witnesses.

The forum received into evidence:

a) Administrative exhibits X1 through X48;
b) Agency exhibits A1 through A27;
c) Respondent MBI's and H. Maltby's exhibits R3, R8, and R11.

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

FINDINGS OF FACT – PROCEDURAL

1) On November 23, 2011, Oregon's Attorney General filed verified complaint no. EEEMRC111123-61666 with BOLI's Civil Rights Division ("CRD") alleging that Howard Maltby, Barbara Maltby, Liskey Farms, Inc., Louis Bassett, Sr., Louis Bassett, Jr., and James Bassett discriminated against Guevara and Calderon "and potentially other Hispanic employees" in terms and conditions of employment and discharge because of their race and national origin. The complaint also alleged that Respondents retaliated against Guevara and Calderon for reporting criminal activity. The complaint

further alleged that Respondents had violated ORS 659A.030(1)(a), (b), (f) and (g), ORS 659A.194(1), ORS 659A.199(1), and ORS 659A.230(1). (Ex. A1)

2) On January 9, 2012, Erix Guevara filed verified complaint no. STEMRC120104-60046 with BOLI's CRD alleging that Howard Maltby, Maltby Biocontrol, Inc. dba Biotactics, Barbara Maltby, Liskey Farms, Inc., Louis Bassett, Sr., and James Bassett discriminated against him in terms and conditions of employment because of his race and national origin and discharged him because of his race and national origin and because he "in good faith reported criminal activity, took leave to attend a criminal proceeding and/or aided in a criminal investigation." The complaint further alleged that Respondents had violated ORS 659A.030, ORS 659A.194, ORS 659A.199(1), and ORS 659A.230(1). (Ex. A3)

3) On November 21, 2012, BOLI's CRD issued a Notice of Substantial Evidence Determination regarding complaint no. EEEMRC111123-61666. (Ex. A23)

4) On December 17, 2012, BOLI's CRD issued an amended Notice of Substantial Evidence Determination regarding complaint no. STEMRC120104-60046. (Ex. A24)

5) On May 14, 2013, the Agency issued Formal Charges in Case No. 34-13 related to complaint no. STEMRC120104-60046. On the same day, the Agency issued a Notice of Hearing for case no. 34-13, setting the time and place of the hearing for July 30, 2013, beginning at 9:00 a.m. in Klamath Falls, Oregon. (Ex. X2)

6) On June 5, 2013, the Agency issued Formal Charges in Case No. 31-13 related to complaint no. EEEMRC111123-61666.[2] On the same day, the Agency issued a Notice of Hearing for case no. 31-13, setting the time and place of the hearing for July 31, 2013, beginning at 9:00 a.m. in Klamath Falls, Oregon. (Ex. X4)

7) On July 3, 2013, the ALJ reset the hearing to begin on September 24, 2013, at 9:00 a.m. (Ex. X9)

8) On July 8, 2013, Respondents J. and L. Bassett filed answers to the Formal Charges. On July 16, 2013, H. Maltby filed an answer on behalf of himself and MBI. (Exs. X11, X12, X13)

9) On July 18, 2013, the ALJ issued a case summary order requiring the participants to submit a case summary with witness names and copies of exhibits. (Ex. X14)

10) On August 28, 2013, the Agency filed motions for the default of Respondents J. and L. Bassett. (Exs. X18, X19)

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[2] Although the Agency identified the complaint as "Case Number STEMRC-120104-60046" in its Formal Charges, the Charges referenced the date of filing as November 23, 2011, the date that complaint no. EEEMRC111123-61666 was filed.

11) On September 5, 2013, the Agency filed motions to consolidate case nos. 31-13 and 34-13 for hearing and for the forum to appoint a Spanish language interpreter for the hearing. On September 13, 2013, the ALJ issued an interim order consolidating case nos. 31-13 and 34-13 for hearing. (Exs. X20, X31)

12) On September 5, 2013, Timothy Bernasek, attorney at law, filed a notice of appearance on behalf of Respondents J. and L. Bassett. (Ex. X22)

13) On September 11, 2013, Bernasek filed a response to the Agency's motions for default against Respondents Bassett. (Exs. X28, X29)

14) The Agency and Respondents Maltby timely filed case summaries. (Exs. X30, X34, X40)

15) On September 13, 2013, the ALJ issued interim orders denying the Agency's motions to hold Respondents Bassett in default. In pertinent part, those interim orders are reprinted below:

"***Louis Bassett***

"On August 28, 2013, the Agency filed a motion for default against Respondent Louis M. Bassett ('L. Bassett') with respect to case no. 31-13. The Agency seeks default in the grounds that that L. Bassett's answer, filed on July 5, 2013, is insufficient under OAR 839-050-0130.

"OAR 839-050-0130 provides, in pertinent part:

"* * * * *

"The Agency's motion includes the following statement in support of their argument:

> 'On July 8, 2013, Agency received Respondent's Answer. The Answer contained a copy of the June 14, 2013 Notice of Hearing for this case highlighting Respondent's name and the case number. This sheet was accompanied by a typed document titled 'Rebuttal' which listed numbers which appear to correlate with the numbers of the Formal Charges. The statements neither admit nor deny the factual matters alleged nor do they state a relevant defense. These documents are also accompanied by other typed and handwritten or typed with handwritten notes with various dates. Also included are documents pertaining to Respondent James Bassett or signed by him, with no clear indication as to their purpose. Some documents lack dates or signatures at all. There also appear to be personal reference letters, police reports with handwritten notations and other miscellaneous documents. Respondent's Answer did not, however, include an admission or denial of the factual matters alleged nor did it state a relevant defense to the allegations.'

"Although L. Bassett's answer may not appear in 'pleading format,' it is clear that a number of his responses, whether denial of the facts, denial of knowledge of the circumstances described by the allegation, or explanation, are tailored to specific paragraphs in the Formal Charges and are intended as a response to the specific allegations in those paragraphs. Other statements included in his narrative response respond specifically or generally to allegations in the Formal Charges without numeric reference to a specific paragraph in the Formal Charges. Although L. Bassett's answer may not have responded to all the allegations in the Formal Charges, OAR 839-050-0130(2) & (3), when read together, make it clear that an answer may be adequate to avoid default even if it does not respond to all the allegations in the charging document, with the caveat that 'factual matters alleged in the charging document and not denied in the answer will be deemed admitted.'

"Based on the above, I conclude that L. Bassett's July 5, 2013, response constitutes an 'answer' for the purpose of avoiding default to the Agency's Formal Charges in case no. 31-13.

"In conclusion, the Agency's motion for default against L. Bassett in case 31-13 is **DENIED**.

"Option to Amend Answer

"Pursuant to OAR 839-0500140(2), Respondent L. Bassett is granted permission to amend his answer, should he choose to do so, subject to the restriction regarding affirmative defenses contained in that rule. * * *"

"***James Bassett***

"On August 28, 2013,[] the Agency filed a motion for default against Respondent James Bassett ('J. Bassett') with respect to case nos. 31-13 and 34-13. The Agency argued that J. Bassett should be held in default with respect to case no. 34-13 because of his failure to file a timely answer. The Agency argued that J. Bassett should be held in default with respect to case no. 31-13 because he failed to file a timely answer and because his answer was insufficient. The Agency supported its motion with an affidavit by Rebekah Taylor-Failor, BOLI's contested case coordinator, and exhibits accompanying that affidavit.

"On September 11, 2013, J. Bassett, through counsel, timely filed a response to the Agency's motion.

"This interim order rules on the Agency's motion with respect to both cases.

"***Case No. 34-13***

"The Formal Charges and accompanying Notice of Hearing were mailed to J. Bassett at '4020 Lower Klamath Lake Rd, Klamath Falls, OR 97603,' on May 14, 2013, by regular and certified mail.[] On May 16, 2013, Louis Bassett ('L. Bassett') signed the certified receipt slip.

"On June 5, 2013, the Formal Charges and accompanying Notice of Hearing for case no. 31-13 were mailed to J. Bassett at '4020 Lower Klamath Lake Rd, Klamath Falls, OR 97603' and returned by the U.S. Post Office with the notation 'Return to Sender/Unclaimed/Unable to Forward/Returned to Sender' imprinted on BOLI's envelope.

"On July 8, 2013, the Agency received a response from J. Bassett that contained the cover sheet to the Notice of Hearing for case no. 31-13, along with statements and documents responding to the Agency's allegations. The return address that J. Bassett wrote on his envelope in which the paperwork was enclosed was 'J. Bassett, 4210 Lwr. Klamath Lk. Rd., Klamath Falls, Or. 97603.'

"Finally, none of the mail sent by regular mail by the Agency to J. Bassett at 4020 Lower Klamath Lake Rd, Klamath Falls, OR 97603, was returned.

"Under OAR 839-050-0330(1)(a), default may occur when 'a party fails to file a required response, including a request for hearing or an answer, within the time specified in the charging document [.]' In this case, the time specified was '20 days *after service* of the Notice of Hearing.' OAR 839-050-0030(1) provides:

> '(1) Except as otherwise provided in ORS 652.332(1) the charging document will be served on the party or the party's representative by personal service or by registered or certified mail. Service of a charging document is complete upon the earlier of:
>
> '(a) Receipt by the party or the party's representative; or
>
> '(b) Mailing when sent by registered or certified mail to the *correct address* of the party or the party's representative.' (emphasis added)

"The Agency argues that J. Bassett was served when Louis Bassett signed the certified mail receipt that was addressed to J. Bassett. The Agency is mistaken. First, there is no evidence in the record to establish that L. Bassett was J. Bassett's 'representative' as contemplated by OAR 839-050-0030(1)(a). Second, there is no evidence in the record to establish that the Formal Charges and accompanying Notice of Hearing were mailed to J. Bassett's correct address. On the contrary, the return address on J. Bassett's July 5, 2013, correspondence to the Agency is '4210 Lwr. Klamath Lk. Rd.' – not '4020 Lower Klamath Lake Rd.' Without proof that L. Bassett was authorized to act as J. Bassett's

'representative' or that '4020 Lower Klamath Lake Rd' was J. Bassett's correct address, the Agency has failed to prove, for the purposes of this motion, the date that J. Bassett was served by the charging document. With no evidence of the date J. Bassett was actually served, I cannot conclude that J. Bassett failed to file a timely answer.

"In conclusion, the Agency's motion for default against J. Bassett in case 34-13 is **DENIED**.

"***Option to File Answer in Case No. 34-13***

"Although J. Bassett's attorney argues that J. Bassett's answer in case no. 31-13 should also be considered an answer to case no. 34-13, I do not agree and **find that J. Bassett has not yet filed an answer with respect to the charges in case no. 34-13**. Should he choose to do so, his answer must be filed by 5 p.m., Wednesday, September 18, 2013. * * *

"***Case No. 31-13***

A. Timeliness

"The Agency contends that the Formal Charges and accompanying Notice of Hearing in case no. 31-13 were mailed to J. Bassett at '4020 Lower Klamath Lake Rd, Klamath Falls, OR 97603,' on June 5, 2013. Taylor-Failor's affidavit further avers the same, and the forum concludes the same, despite the fact that the certificate of service for case no. 31-13 refers to 'case no. 34-13.'

"On July 8, 2013, the Agency received a response from J. Bassett that contained the cover sheet to the Notice of Hearing for case no. 31-13, along with statements and documents responding to the Agency's allegations. The return address that J. Bassett wrote on his envelope in which the paperwork was enclosed was 'J. Bassett, 4210 Lwr. Klamath Lk. Rd., Klamath Falls, Or. 97603.' The certified copy of the charging documents were returned to the Agency on July 10, 2013, stamped 'Return to Sender/Unclaimed/Unable to Forward,' but the copy sent by regular mail was not returned. The Agency argues that this proves that J. Bassett 'received the regular mail copy of the charging documents' and that the charging documents were mailed to J. Bassett's correct address.

"Based on J. Bassett's response dated July 8, 2013, the forum concludes that he in fact received the Formal Charges and Notice of Hearing in case no. 31-13. However, for the reasons stated in my evaluation of the Agency's motion related to case no. 34-13, the Agency has failed to establish the actual date of service. Without that date as a baseline, I cannot conclude that J. Bassett failed to file a timely answer in case no. 31-13.

B. "Insufficiency of Answer

"The Agency also contends that J. Bassett should be held in default because his answer in case no. 31-13 is insufficient. The Agency relies on OAR 839-050-0130, which provides, in pertinent part:

> '(2) The answer must include an admission or denial of each factual matter alleged in the charging document and a statement of each relevant defense to the allegations. A general denial is not sufficient to constitute an answer. An answer not including the information required by this rule may be disregarded and a notice of default may be issued in accordance with OAR 839-050-0330, as if no answer had been filed.'
>
> '(3) Except for good cause shown to the administrative law judge, factual matters alleged in the charging document and not denied in the answer will be deemed admitted by the party. * * *'

"The Agency's motion includes the following statement in support of their argument:

> 'On July 8, 2013, Agency received Respondent's Answer. The Answer contained a copy of the June 5, 2013 Notice of Hearing for this case highlighting Respondent's name and the case number. This sheet was accompanied by a typed document titled "Rebuttal-James Bassett," and what appeared to be personal reference letters, police reports with handwritten notation and other miscellaneous documents. Respondent's Answer did not, however, include an admission or denial of the factual matters alleged nor did it state a relevant defense to the allegations.'

"Although J. Bassett's answer may not appear in 'pleading format,' it is clear that a number of his responses, whether denial of the facts, denial of knowledge of the circumstances described by the allegation, or explanation, are tailored to specific paragraphs in the Formal Charges and are intended as a response to the specific allegations in those paragraphs. Although J. Bassett's answer may not have responded to all the allegations in the Formal Charges, OAR 839-050-0130(2) & (3), when read together, make it clear that an answer may be adequate even if it does not respond to all the allegations in the charging document, with the caveat that 'factual matters alleged in the charging document and not denied in the answer will be deemed admitted.'

"Option to Amend Answer in Case No. 31-13

"Pursuant to OAR 839-0500140(2), Respondent J. Bassett is granted permission to amend his answer in case no. 31-13, should he choose to do so, subject to the restriction regarding affirmative defenses contained in that rule. Any amended answer must be filed by 5 p.m., Wednesday, September 18, 2013."

(Exs. X31, X32)

16) On September 18, 2013, the Agency filed a motion objecting to the admission of any evidence offered by Respondents MBI and H. Maltby because Respondents Bassett did not file case summaries and because Respondents MBI and Maltby untimely filed their case summary. The same day, the ALJ issued an interim order that stated, in pertinent part:

"***Ruling on Agency's Motion***

"Respondents L. Bassett & J. Bassett

"If Respondents L. Bassett or J. Bassett have in fact not filed a case summary or if they do file a case summary but it is untimely filed, ***except for the circumstances noted in the next paragraph*** L. Bassett and J. Bassett will not be able to call any witnesses to testify at the hearing except for themselves and witnesses who will give testimony solely for the purpose of impeachment. In addition, L. Bassett and J. Bassett will not be able to offer any exhibits except for exhibits offered solely for the purpose of impeachment.

"If Respondents L. Bassett or J. Bassett have in fact not filed a case summary or if they do file a case summary but it is untimely filed, L. Bassett and J. Bassett may be able to call witnesses to testify at hearing or offer exhibits if they can offer a satisfactory reason for failing to submit case summary or excluding evidence would violate the forum's statutory duty to conduct a full and fair inquiry. Under these circumstances, the other participants may request a continuance to have an opportunity to respond.

"***Respondents Howard Maltby and Maltby Biocontrol, Inc.***

"In the September 13, 2013, cover letter to their case summary, Respondents Maltby refer to a 'case summary that was sent UPS was the wrong package.' If Respondents Maltby can provide documentary evidence that another case summary was actually sent on or before September 12, 2013, along with a copy of that case summary, none of the sanctions for failure to submit a timely case summary will apply to Respondents Maltby. If Respondents Maltby cannot provide this evidence, Respondents Maltby will face the same potential sanctions as L. Bassett and J. Bassett, with the same potential exceptions."

At hearing, the ALJ found that Respondents MBI and H. Maltby provided a satisfactory reason for filing a case summary one day late and ruled that copies of exhibits filed with their case summary could be offered as evidence at hearing. (Ex. X36; Statements of Howard Maltby, ALJ)

17) On September 18, 2013, Respondent L. Bassett, through counsel Bernasek, filed an amended answer to case no. 31-13. Respondent J. Bassett, also through counsel Bernasek, filed an answer to case no. 34-13 and an amended answer to case no. 31-13. (Exs. X37, X38, X39)

18) On September 19, 2013, Bernasek notified ALJ that Respondents Bassett would not be represented by counsel at the hearing. (Ex. X41)

19) On September 20, 2013, James Baldock, attorney at law, filed a notice of appearance on behalf of Respondents Maltby. (Ex. X43)

20) The hearing convened at 9 a.m. on September 24 and adjourned at noon on September 27, 2013. At the request of the Agency, officers from the Oregon State Police were present throughout the hearing to provide security. (Ex. X48; Statement of ALJ)

21) At the start of the hearing, the ALJ orally 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. (Statement of ALJ)

22) At hearing and prior to any witness testimony, the ALJ asked Ms. Ortega, the Agency's administrative prosecutor to state the names of the "Hispanic employees" for whom the Agency sought damages in case no. 31-13. Ms. Ortega gave the following names: Erix Guevara ("Guevara"), Robinson Guillermo Calderon ("Calderon"), Esteban Yoc ("Yoc"), Edwin Antonio Osorio ("Osorio"), Rolando Herrerra ("R. Herrerra"), and Jose Salvador Dormes Herrerra ("J. Herrerra"). (Statements of ALJ, Ortega)

23) The hearing adjourned on September 27, 2018. On October 1, 2013, the hearing was scheduled to reconvene on November 18, 2013, at 1 p.m. The hearing reconvened at 1 p.m. on November 18, 2013, at which time the Agency rested its case-in-chief after Ms. Ortega stated that the Agency had intended to call Yoc, Osorio, R. Herrera, and J. Herrera as witnesses but they were unavailable. In response to the ALJ's question, Ms. Ortega stated that the Agency was still seeking damages on behalf of those individuals. (Statements of ALJ, Ortega)

24) At 2:30 p.m. on November 18, 2013, the ALJ, in the company of all Respondents, Mr. Baldock, Ms. Ortega, Mr. Jeffries, the Oregon State trooper assigned to provide security at the hearing, and the forum's two interpreters, visited the Liskey Ranch where Guevara, Calderon, Yoc, Osorio, R. Herrera, and J. Herrera had been employed and where the alleged discrimination had occurred.

25) The hearing concluded and the record closed on November 20, 2013.

26) On February 24, 2014, 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.

27) The Agency, H. Maltby, and MBI filed exceptions to the Proposed Order. The exceptions are addressed in Finding of Fact #16 – The Merits and in the Opinion section of this Final Order.

FINDINGS OF FACT – THE MERITS

1) At all times material herein, Respondent MBI was a California business corporation with its primary places of business in Romoland, California, near San Diego, and Klamath Falls, Oregon. H. Maltby, who is Caucasian, purchased the business in 2005, and is MBI's president. (Testimony of H. Maltby; Ex. A18)

2) At all times material herein, MBI's business was raising and selling beneficial predator mites, primarily persimilis, that farmers use to control spider mites, a common microscopic arachnid that is resistant to chemical pesticides, multiplies extremely rapidly, and damages plants by feeding on their leaves. MBI also raised spider mites and used their eggs to feed the predator mites. (Testimony of H. Maltby, Guevara)

3) Between 2005 and early 2008, MBI operated its business in two California locations that MBI referred to as "Briggs" and "Mountain," raising predator mites at Briggs and spider mites at Mountain. (Testimony of H. Maltby)

4) Between 2005 and 2011, MBI raised and sold five different types of predator mites. Each type had to be raised in a different temperature and humidity corresponding to the climate in which it would be used. At all times material, H. Maltby and Jose Dominguez ("J. Dominguez") were the only persons working for MBI with the training and skills to raise all five types of predator mites. (Testimony of H. Maltby)

5) Spider mites have to be raised in greenhouses with consistently warm temperatures. By 2007, rising utility costs caused H. Maltby to explore less expensive options for raising spider mites. Late that year, he moved MBI's spider mite operation to the Liskey Ranch, a rural property that had pre-existing greenhouses heated by free geothermal heat. The Liskey Ranch is located about 15 miles southeast of Klamath Falls, Oregon, and a few miles north of the California border. MBI closed its Mountain operation in early 2008, and from that time on raised spider mites in its Klamath Falls operation and predator mites at Briggs. MBI transferred some of its employees to Klamath Falls and hired L. Bassett, a person H. Maltby had previously known, as its manager in Klamath Falls. (Testimony of H. Maltby)

6) In 2009-2010, H. Maltby spent approximately 10% of his time in Klamath Falls. (Testimony of H. Maltby)

7) L. Bassett is Caucasian and speaks no Spanish. L. Bassett hired his son, J. Bassett, also Caucasian, to work for MBI and operate a "bobcat" and perform needed repairs to the greenhouse electrical and plumbing systems in Klamath Falls. Throughout his employment with MBI, J. Bassett never had any immediate or

successively higher authority over any other employee at MBI's Klamath Falls operation. (Testimony of H. Maltby, Guevara)

8) Erix Guevara ("Guevara"), who was born in Guatemala, worked for MBI's predecessor starting in 1999 and was hired by MBI when H. Maltby purchased the business. Guevara's primary language is Spanish. From 1999 until his termination, Guevara raised and harvested spider mites. He never raised predator mites and did not know how to raise or harvest predator mites. (Testimony of Dominguez, Guevara)

9) During Guevara's employment, H. Maltby believed that he and Guevara were "good friends." (Testimony of H. Maltby)

10) In or around late 2007, Guevara transferred from Mountain to Klamath Falls. At that time, he understood that it was a permanent transfer. He moved to Klamath Falls without his wife, but planned to eventually bring her to Oregon. In Klamath Falls, he was head washer[3] and lead worker and acted as H. Maltby's liaison between H. Maltby, L. Bassett, and MBI's employees in Klamath Falls who spoke only Spanish. Although not fluent in English, Guevara spoke English well enough to interpret work-related communications. After Guevara transferred to Klamath Falls, Maltby was "grooming" Guevara to eventually replace L. Bassett. (Testimony of H. Maltby, Guevara)

11) While working in Klamath Falls, Guevara had no supervisory authority over J. Bassett or Justin Baldwin, the two Caucasian workers in Klamath Falls besides L. Bassett. (Testimony of Guevara, H. Maltby)

12) The Liskey Ranch is located on the west side of Lower Klamath Lake Road. While Guevara was employed in Klamath Falls, L. Bassett lived in a house just off the turnoff from Lower Klamath Lake Road to the Liskey Ranch. From L. Bassett's house, it is about a mile away by dirt road to the greenhouses where Guevara and his co-workers worked. J. Bassett lived in a shack located on the east side of that dirt road and approximately 55 feet away from the entrance side of one set of greenhouses in which Guevara and his co-workers worked. (Testimony of Guevara, H. Maltby; Observation of ALJ)

13) In Klamath Falls, MBI had two sets of adjacent greenhouses in which it grew lima beans to feed spider mites, grew spider mites, and harvested spider mite eggs by washing them off the lima bean plants. After eggs were harvested, they were shipped to MBI's Briggs facility and fed to predator mites being raised there. (Testimony of Guevara, H. Maltby)

14) Guevara was paid $13 per hour while he worked in Klamath Falls and worked an average of 50 hours per week. (Testimony of Guevara)

[3] In K. Falls, "washer" was MBI's most skilled job. A "washer" harvested the spider mite eggs by washing them off lima bean plants on which the spider mites were raised and laid eggs.

15) When Guevara moved to Klamath Falls, his wife and child remained in California. During his employment in Klamath Falls, Guevara was involved in an ongoing immigration action with the I.N.S. that could have resulted in his deportation. H. Maltby was aware of Guevara's immigration problems and loaned money to Guevara to pay Guevara's immigration attorney. Guevara repaid H. Maltby's loan through payroll deductions. (Testimony of Guevara, H. Maltby)

16) While Guevara worked for MBI in Klamath Falls, his coworkers included J. Bassett, Justin Baldwin, Calderon, Yoc, Osorio, R. Herrera, and J. Herrera. Calderon, Yoc, and R. Herrera are also Guatemalan. Osorio and J. Herrerra are Hispanic.[4] Calderon, Yoc, R. and J. Herrerra, and Osorio only spoke and understand Spanish during the time period encompassed by the Formal Charges. Calderon was hired by MBI in 2008 and worked for MBI in Klamath Falls until October 2011, when he was fired. (Testimony of Guevara, Calderon, Perdue; Exs. A14, A15)

17) One day,[5] R. Herrerra told Guevara that he was on his way back from cleaning a greenhouse when J. Bassett bumped into him and said he wanted to fight. (Testimony of Guevara)

18) Around April 2010, Osorio told Guevara that he touched J. Bassett with a broom while he was working in a greenhouse and J. Bassett responded by hitting him in the chest. Guevara reported this incident to L. Bassett, who said he would talk to J. Bassett and get him under control. Around the same time, J. Bassett picked up a load of dirt with the bobcat and dumped it so close to Osorio that Osorio's feet were covered with dirt. Guevara and L. Bassett both reported these incidents to H. Maltby. L. Bassett gave Osorio and J. Bassett both a written warning stating that they would be fired if either caused another problem. (Testimony of Guevara, H. Maltby)

19) Guevara, J. Herrerra, R. Herrerra, Calderon and Osorio started work at 5:00 a.m., but J. Bassett did not start until 7:00 a.m. Sometime in August 2010, shortly after Guevara, Calderon, Yoc, Osorio, R. Herrera, and J. Herrera arrived at work at 5 a.m., J. Bassett awoke, reached his hand out the window of the shack that he lived in, fired his .45 caliber pistol,[6] and yelled out "Spanish motherfuckers." This scared Guevara and his Hispanic coworkers, who were working nearby, and Guevara telephoned H. Maltby and reported the gunshot and racial epithet. H. Maltby told Guevara to wake up L. Bassett and tell him about the incident. Guevara drove to L.

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[4] There is no evidence in the record as to the national origin of J. Herrerra or Osorio, but it is undisputed that they are "Hispanic."

[5] There was no testimony or other evidence presented to show the date of this alleged occurrence.

[6] There is no sworn testimony in the record about where J. Bassett's .45 caliber pistol was aimed when he fired it and no evidence that anyone observed him actually fire the shot.. At the time of his arrest, J. Bassett told Deputy Sheriff Kennedy that he fired "straight up into the air." Guevara and R. Herrera told Kennedy that J. Bassett "was trying to scare them" by firing his gun. In a November 10, 2012, interview, Osorio told Perdue that "Jimmy fired a gun at them. When asked why he felt he had shot at the workers and not in another direction, [Osorio] stated that the bullet landed on the top of the bodega [and] they heard the bullet hit the roof." (Osorio's statement does not appear in quotes in Perdue's interview notes.)

Bassett's house and unsuccessfully tried to wake him up, then told H. Maltby that he was going to report the incident to the police. In response, H. Maltby promised that J. Bassett would no longer be involved with them. Based on H. Maltby's promise, Guevara did not report the gunshot incident to the police. (Testimony of Guevara, Calderon, H. Maltby)

20) Based on Guevara's statements to him about the shooting incident, H. Maltby ordered J. Bassett to stay away from the other workers,[7] denied him a scheduled pay raise, and reassigned him to work in another set of MBI's greenhouses located adjacent to L. Bassett's house. Each morning thereafter, J. Bassett was required to go to L. Bassett's house before Guevara and his co-workers arrived at work at 5 a.m. He was also instructed not to go home until Guevara and his co-workers had left work for the day. Despite this instruction, J. Bassett visited Justin Baldwin, a Caucasian employee who worked with Guevara and MBI's other Hispanic employees, a couple times a week for a month sometime between August 2010 and January 2011.[8] During these visits, J. Bassett looked at Calderon and MBI's Guatemalan workers "in an unusual way." There was no evidence presented that L. Bassett or H. Maltby was aware of these visits. (Testimony of Calderon, H. Maltby)

21) Prior to August 2010, Calderon heard J. Bassett talking at work, but did not understand anything J. Bassett said.[9] Except for the shooting incident, Calderon had no problems with J. Bassett until January 10, 2011. (Testimony of Calderon)

22) After the gunshot incident, and prior to January 10, 2011, Guevara and his Hispanic coworkers felt comfortable when J. Bassett was not present on the worksite.[10] (Testimony of Calderon)

23) On September 9, 2010, Osorio, speaking through a translator, reported to Klamath County Sheriff's Deputy Darren Frank that, at approximately 3:50 p.m. that day, J. Bassett had pulled in front of his car and tried to hit him twice through the window while telling him "I'm going to kick your fucking ass." Osorio told the deputy that, during the same incident, J. Bassett had also tried to hit J. Herrerra's pickup with his pickup. Osorio also told the deputy that J. Bassett "shot a gun in the green house over everyone's head" where they worked at the Liskey Ranch.

Frank wrote a one-page report requesting that the case be reassigned "to local unit to identify and locate Jimmie and obtain a statement from him." That report was

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[7] H. Maltby testified he told L. Bassett to "get your son under control or get him off the property" and he told J. Bassett not to "look at or speak to any other employees."

[8] Calderon, who gave the only testimony about these visits, did not testify as to the specific month in which they occurred.

[9] On direct examination, Ms. Ortega asked Calderon if he ever heard James Bassett call him or his co-workers names. Calderon answered that he doesn't know what J. Bassett said because he did not understand English while he worked for MBI.

[10] Calderon testified that when J. Bassett was not at the worksite "we didn't feel bad or anything."

printed on December 23, 2010, and reviewed by Frank's supervisor on January 20, 2011. However, for reasons that are unclear, the Sheriff's department took no action with respect to the report until January 30, 2011. (Testimony of Guevara, Kennedy, Frank; Ex. A5)

24) Osorio also told Guevara about the September 9, 2010, incident, but Guevara did not report the incident to L. Bassett or H. Maltby.[11] (Testimony of Guevara)

25) Osorio left MBI's employment and returned to Guatemala sometime prior to February 6, 2011. (Ex. A5)

26) There is no evidence in the record to show where the September 9, 2010, incident occurred. (Entire Record)

27) From the time Guevara and J. Bassett began working together in Klamath Falls until August 2010, J. Bassett called Guevara and his co-workers "Hispanic motherfuckers" when he was upset at them.[12] Except for Guevara's report of J. Bassett's August 2010 gunshot and racial epithet, Guevara did not tell H. Maltby or L. Bassett about any other occasions that J. Bassett called Guevara and his co-workers "Hispanic motherfuckers." There is no evidence in the record that H. Maltby or L. Bassett were otherwise aware that this was occurring. Sometime after the August 2010 gunshot incident, H. Maltby asked Guevara if he and his coworkers "were okay" with how incident was handled and if they felt comfortable at work. Guevara responded "yes." (Testimony of Guevara, H. Maltby)

28) In or around October 2010, Guevara told H. Maltby that, based on the advice of his immigration attorney, he needed to attend "removal proceedings" in immigration court in California and live in California for an indeterminate amount of time with his wife and daughter. Guevara asked Maltby if he could work for MBI in Romoland while he lived in California. Maltby told Guevara he could help J. Dominguez keep "the ranch clean" but there would not be as many hours of work for Guevara as in

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[11] Guevara testified that he could not recall if he told H. Maltby about the September 9, 2010, incident and H. Maltby credibly testified that he was unaware of the incident until he obtained a copy of the police report sometime after February 2011.

[12] Guevara's testimony on this issue was the following:
Q. "Did [J. Bassett] use any terms to refer to you and the other workers?
A. "Yes.
Q. "And what were those words?
A. "When he was upset, you know, he will always call us, you know, like "Hispanic motherfuckers." [NOTE: quoted words are the interpreter's translation of Guevara's answer in Spanish]
Q. "Do you know the English word that he was using?
A. "That's the first thing that you learn, you know, in this country, when you come for the first time to this country, you know, that's the first word that you learn * * *.
* * * * *
Q. "What were the exact English words that Jimmy said?
A. "Hispanic motherfuckers." [NOTE: quoted words are Guevara's untranslated answer]

Klamath Falls. Maltby also told Guevara that he could work in California for up to six months, starting when Guevara moved to California. There was no discussion of Guevara's wage rate, starting date, or the number of hours he would work while in California. (Testimony of Guevara, Maltby; Ex. A16)

29) Sometime in the latter half of 2010, Marvin Alberto Quinoñez Herrerra ("M. Herrerra"), Guevara's cousin, began working for MBI as a volunteer at MBI's Briggs location. M. Herrerra had previous experience raising persimilis, MBI's best-selling predator mite, and worked on an unpaid "trial basis" to see if he could do the work. In May 2011, MBI began paying M. Herrerra for raising persimilis. M. Herrerra also worked at a Ross store while volunteering at MBI. After Guevara told H. Maltby that he had to move back to California, H. Maltby asked M. Herrerra to ask his Ross employer if Guevara could be hired to work there. M. Herrerra subsequently inquired at Ross about work for Guevara. At the time of hearing, M. Herrerra still worked for MBI at Briggs. (Testimony of Guevara, M. Herrerra, H. Maltby)

30) On January 10, 2011, Guevara left the Liskey Ranch and was driving home after work with Calderon on Lower Klamath Lake Road, a public road,[13] when he encountered two parked cars that partially blocked the road. Guevara stopped his car to see if there was a problem. After Guevara stopped, J. Bassett, his brother Louis Bassett, Jr., and an as-yet unidentified third person[14] approached Guevara's car. Louis Bassett, Jr. accused Guevara of talking bad about his mother, while J. Bassett tried to open the car door to get Guevara out of the car. The third person said "you guys are talking about my aunt, motherfuckers!" While Guevara held the door shut, Louis Bassett, Jr. hit Guevara in the left eye with his fist, causing Guevara to have swelling under that eye and a black eye. The third person punched Calderon in the right eye and hit Calderon on the elbow with a small wooden fish bat. Guevara then drove away to the home of Katija Roberts, his girlfriend, who called the police. When the police arrived, the sheriff's deputy advised Calderon to visit a doctor and noted:

> "There was a slight swelling to the right eye of Robinson CALDERON as documented in the photographs...I encouraged Robinson CALDERON to go to Sky Lakes Medical Center as he was obviously in a great deal of pain with his elbow injury and it was swelling significantly by the (sic) this time."

Calderon went to the hospital, where he was given pain pills, Subsequently, Calderon had to take a week off work after the incident because of his injury The night of the assault, J. Bassett and L. Bassett, Jr. were both arrested and taken to jail and charged with Assault III, Criminal Conspiracy, and Disorderly Conduct. The next day, J. Bassett was released from jail and placed under a restraining order that prohibited him for having contact with Guevara or Calderon at work or at their residences and or being within 100 feet of them. The same restraining order was entered against L. Bassett, Jr.

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[13] The ALJ observed that this was a public road while driving to and from his onsite visit to the Liskey Ranch on November 18, 2013.

[14] According to the police reports in evidence, the third person has never been identified.

On January 14, 2011, J. Bassett's restraining order was amended to allow him to "be at victim employment but not w/in 100 yrds of victims." (Testimony of Guevara, Calderon; Exs. A6, A7, A12; Observation of ALJ)

31) Guevara never made any derogatory comments about J. Bassett's mother. (Testimony of Guevara)

32) The initial police incident report for the January 10, 2011, incident was completed by Sheriff's Deputy Nick Kennedy on January 11, 2011. Kennedy wrote the following:

> "On Monday, January 10, 2011, at 1600 hours Louis BASSETT and his brother James BASSETT blocked both lanes of Lower Klamath Lake Road stopping the vehicle driven by Erix GUEVARA along with his passenger Robinson CALDERON. Louis and James BASSETT confronted Erix GUEVARA and Louis punched GUEVARA in the left cheekbone area causing injury. An unknown male subject struck Robinson CALDERON in the right elbow causing injury."

(Testimony of Kennedy; Ex. A6)

33) The January 10, 2011, incident caused Guevara and Calderon to lose sleep and made them afraid that they would be attacked again. (Testimony of Guevara, Calderon)

34) On January 11, 2011, Guevara talked to L. Bassett about the previous day's attack. L. Bassett, who appeared upset, said he already knew about it from the police. (Testimony of Guevara)

35) Guevara also called H. Maltby and left a message about the January 10, 2011, incident. Sometime in the next few days, Maltby returned Guevara's call, and Guevara described the incident. Maltby told Guevara that said he was already aware of it, that he was upset that Complainant had called the police, and if someone was arrested he would be very upset because he "knew how to control Jimmy." (Testimony of Guevara)

36) H. Maltby took no action related to the January 10, 2011, incident for several reasons: (a) the incident occurred after work hours; (b) the incident did not take place on MBI's worksite; (c) a police report had been filed and Maltby believed it was the responsibility of the police to take appropriate action; and (4) because of the restraining order issued to J. Bassett on January 11, 2011. (Testimony of H. Maltby; Ex. A7)

37) Guevara's last day of work for MBI in Klamath Falls was January 21, 2011. He returned to California on January 22 or 23, 2011. Upon his arrival in California, he called H. Maltby to inquire about work. Maltby told Guevara that there was no work available for him at that time. About that time, H. Maltby told J. Dominguez that

Guevara would be moving to California and would be spending one or two days cleaning the greenhouses at Briggs. (Testimony of Guevara, J. Dominguez; Ex. R8)

38) Leah Maltby, H. Maltby's daughter and an employee who ships orders and does billing, mistakenly sent Guevara's paycheck for his work through January 21, 2011, to Klamath Falls. After not receiving his paycheck, Guevara visited MBI's Romoland facility on or about February 3, 2011, to get his check. Upon learning that Guevara was not at Klamath Falls any longer, L. Maltby cancelled the check she had mailed and wrote out a replacement check for Guevara on February 3, 2011. Immediately afterward, Guevara and H. Maltby had a conversation in which H. Maltby offered to drive Guevara and his wife and kids to Klamath Falls so Guevara could continue working there. Guevara told H. Maltby that his wife did not want to go to Klamath Falls. H. Maltby also told Guevara that he had a couple of days of work for Guevara in California cleaning out greenhouses. (Testimony of H. Maltby, L. Maltby)

39) Guevara intended to return to work for MBI in Klamath Falls after his immigration problems were resolved. (Testimony of Guevara)

40) There is no evidence in the record to show whether or not Guevara's immigration problems have ever been resolved so that he could move back to Oregon. (Entire Record)

41) Before Guevara's January 2011 return to California, H. Maltby had occasionally used J. Dominguez's parents to do weeding and odd jobs at Briggs until they became physically unable to do that work. (Testimony of H. Maltby)

42) After Guevara returned to California, H. Maltby replaced Guevara in Klamath Falls and promoted R. Herrerra and Yoc to be washers in Klamath Falls. (Testimony of H. Maltby)

43) On January 30, 2011, Klamath County deputy sheriff Nick Kennedy was assigned to follow up on deputy sheriff Frank's December 23, 2010, report. Kennedy conducted an investigation, focusing solely on the shot that J. Bassett had allegedly fired in August 2010. On January 30, 2011, he contacted and interviewed Calderon, using K. Roberts as an interpreter. Calderon told him that he did not see J. Bassett fire the gun, but he did hear the shot. On February 2, 2011, Kennedy contacted and interviewed Guevara. Kennedy's report memorializing his conversation with Guevara includes the following:

> "Erix Guevara stated in substance that early in the morning when he arrived for work he heard a shot from a gun. He said that he turned to look at Jimmy's house and saw the gun out the window on the front of the residence. He said that Jimmy yelled that they were making too much noise. He said that there was one shot out the window of the house and Jimmy was trying to scare them. He said that it did indeed scare him very much as that all of them stopped working for about an hour. He said that they contacted Skip Maltby at the main office in

> California and notified him of the situation. He said that they then contacted Louis Bassett, Sr., who is the boss for this facility and told them to go back to work [and] that it would never happen again. He said that everyone went to work at that time."

On February 6, 2011, Kennedy contacted Guevara again to ask him for information about J. Herrera, T. and J. Sanbrano, and Osorio. That same day, Kennedy contacted and interviewed R. Herrera and Yoc, again using Roberts as an interpreter. R. Herrerra told him that one morning in August or September when they came to work at MBI, J. Bassett shot a gun into the air to scare them and cursed them afterwards. R. Herrera also told Kennedy that "he did not actually see the shot or the gun but he did hear it." Yoc agreed with the statements made by Guevara and R. Herrera and said he had nothing to add. (Testimony of Kennedy, H. Maltby; Ex. A5)

44) J. Bassett and L. Bassett, Jr., were both indicted by a grand jury on February 7, 2011. That evening, Kennedy went to J. Bassett's residence at 4210 Lower Klamath Lake Road, the same address at which L. Bassett lived on the Liskey Ranch. Kennedy told J. Bassett that he was there because of a complaint made on September 9, 2010, "regarding him trying to fight with another subject" and another complaint made at the same time that J. Bassett "had fired a firearm over the heads of the guys that were trying to work" in August 2010. After listening to J. Bassett's explanation of why he had fired his pistol, Kennedy seized four firearms in J. Bassett's residence, arrested him, and took him to the Klamath County jail where J. Bassett "was lodged" for "Unlawful Use of a Weapon in Menacing." Later that night, Kennedy also arrested L. Bassett, Jr.

After Kennedy arrived at the jail, he telephoned L. Bassett, Sr., and asked him "if he could tell me about the incident where James Bassett had fired the gun over the heads of the workers that morning." L. Bassett gave his version of the event, and then Kennedy telephoned H. Maltby. Kennedy's report memorializing his conversation with H. Maltby includes the following:

> "I asked Skip Maltby what had occurred regarding the incident where James Bassett had fired the gun over the heads of the crew. Skip Maltby said that the foreman Louis Bassett was very hard on Jim Bassett. I asked him if he knew whether or not this incident had been documented. He said that he did not know if Louis Bassett documented the incident or not. He said that he did not document it in California.
>
> "Skip Maltby said that the crew called him and reported the incident to him and he told them to go down to Louie's house which is not far away and get Louie on the telephone. He said they went down and handed the telephone to Louie and he talked to Louie Bassett and told him to straighten this out or to get him (James Bassett) off of the property.

> "Skip Maltby said that one of his employees that was there at that time Felix went back to Guatemala and he knows this for sure as he had to send the last paycheck down there.
>
> "Skip Maltby then stated once again they were very hard on James Bassett and pretty much gave him a 'Final warning' at that time. Maltby said anymore [sic] problems and Jim would be fired."

(Testimony of Kennedy, H. Maltby; Ex. A5, A7, A8)

45) Guevara, Calderon, and R. Herrerra were all subpoenaed to testify as witnesses before the Klamath Falls grand jury proceeding scheduled for February 7, 2011, that involved their allegations of assault against J. Bassett and L. Bassett, Jr. Guevara traveled from California to Klamath Falls, leaving a day or two earlier, to attend the proceeding. H. Maltby was unaware that Guevara had been subpoenaed to testify at the grand jury proceeding and first became aware of the proceeding on February 6, 2011, when L. Bassett telephoned him and told him that R. Herrerra had been subpoenaed to attend a grand jury proceeding the next day. Calderon also told L. Bassett that he had been subpoenaed to attend the grand jury proceeding. (Testimony of Guevara, Calderon, H. Maltby)

46) At H. Maltby's request, J. Dominguez called Guevara from Romoland over the weekend of February 4-5, 2011, and told him to report to work on Monday, February 6, 2011. This call came as Guevara was on his way to Oregon to testify before the grand jury. Dominguez told Guevara that Guevara was needed to work on that day, or H. Maltby would find someone else. Guevara told Dominguez that he was on his way to Oregon but would be back in California on Wednesday or Thursday. (Testimony of Guevara)

47) Guevara showed up for the February 7, 2011, grand jury proceeding but was told after his arrival that he did not need to testify. (Testimony of Guevara)

48) At 12:16 a.m. on February 8, 2011, H. Maltby called Dominguez and asked him to call Guevara and ask Guevara to call him.[15] Dominguez called Guevara

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[15] During cross examination, H. Maltby explained his reasons for calling for Guevara in the following exchange:

Q: "At that time, did you call Erix or did he call you?
A: "I called Jose, asked him to call Erix and have him call me.
Q: "And why did you need Erix to call you?
A: "Cuz I was mad at him.
Q: "And why were you mad at him?
A: "Cuz we had um. That gun shooting incident I was never comfortable with how things were handled. I wasn't comfortable with it, but um it was done, we had an agreement, and like I said he said everybody was happy, everybody was fine with it. The sheriff told me that Erix had signed that police report. I thought he had lied to me and signed it way back when we already had an agreement. And came to find out that he didn't sign it until relatively recent. I didn't have anything to look at; I didn't even know about it.
Q: "Okay.

and said that H. Maltby wanted to talk to him. Guevara called Maltby at 12:21 a.m. and they spoke for four minutes. During that conversation, H. Maltby told Guevara: "My favorite friend, Erix, you preferred to give me your back and to give your back to the people who were feeding you and put a roof over your head. * * * You prefer to stay with your own kind, like the Guatemalan you are. You are fired. Stay away from my properties." (Testimony of Guevara, H. Maltby, Roberts; Ex. R3)

49) After Guevara was fired, he had a hard time finding another job. He lost his housing and his two-bedroom apartment and had to move into a smaller apartment. His family suffered. He also lost his health insurance that MBI had provided and had to pay unspecified doctor bills that otherwise would have been covered by insurance. Being fired caused him to feel stress. (Testimony of Guevara)

50) From the last quarter of 2010 through the end of 2011, MBI had only two paid employees at Briggs besides H. Maltby -- J. Dominguez and Leah Maltby, H. Maltby's daughter -- plus M. Herrerra who worked as an unpaid "volunteer" raising persimilis. MBI began paying M. Herrerra in May 2011 for his work. In that time period, MBI experienced extreme financial problems and was sometimes unable to pay its employees in a timely manner. MBI raised no spider mites in California in that time period. (Testimony of Dominguez, L. Maltby, H. Maltby, M. Herrerra)

51) Calderon worked for MBI in Klamath Falls until October 2011, when he was fired. J. Bassett was still working for MBI in Klamath Falls when Calderon was fired. (Testimony of Calderon, Perdue)

52) MBI continued to operate in Klamath Falls until March 2013, when it closed its operation there. Sometime after that, R. Herrerra transferred to MBI's Briggs operation, where he still worked at the time of the hearing. Since his transfer, R. Herrerra's job at Briggs has been raising spider mites. (Testimony of Dominguez)

53) At the time of hearing, MBI had five workers at Briggs – J. Dominguez, R. Herrera, M. Herrerra, Carlos Herrerra, and Julio Lopez -- who were either raising predator mites or spider mites. (Testimony of Dominguez)

A: "He kind of betrayed a trust, betrayed a friend.
Q: "By filing a police report?
A: "What we had, we settled it; we made that agreement of how things were handled a long time before that. Seven months before that.
Q: "What agreement was that?
A: "We sent Jimmy off to the other thing, the other greenhouse and, uh, Erix was happy with that and I asked him if his employees were 'happy with that?' and he said 'yes.' I asked if 'everybody feel safe?' and he said 'yes.' I said 'are there any other problems?' and he said 'no, we're fine with this.' Then the sheriff calls me at midnight after he had (unintelligible) and said that, um, Erix had signed a police report about a gun incident."

Credibility Findings

54) Robinson Calderon did not attend the hearing because of his fears related to the January 10, 2011, assault and his fear that something worse might happen. Calderon was a credible witness and the forum has credited his testimony in its entirety. (Testimony of Calderon)

55) Cristina Guevara, Guevara's wife, gave testimony on three key issues that was not credible. First, she testified that Guevara told her that Dominguez had called him, on behalf of H. Maltby, and told Guevara he was fired. This is inconsistent with Guevara's own statement that H. Maltby told him he was fired. Second, she testified that she telephoned H. Maltby on the "company phone number" or about January 19, 2011, asked him if Guevara could work in California until his immigration problem was solved, and that H. Maltby told her it "would not be a problem" and that Guevara could work in California until whenever his problem was solved. Exhibit R3, an exhibit offered by the Agency, is a record of calls made to or by H. Maltby on the "company phone" in January and February 2011. There is no record of any call made by Cristina Guevara to H. Maltby. Third, she testified that she was with Guevara when he telephoned H. Maltby on January 26, 2011. Once again, there is no record in Exhibit R3 that this call was ever made. For these reasons, the forum has only credited C. Guevara's testimony when it was undisputed or corroborated by other credible evidence. (Testimony of C. Guevara)

56) Erix Guevara had a poor recollection of dates. For the most part, his memory of specific incidents was good and was consistent with prior statements he made to sheriff's deputies and the Agency investigator. The forum did not believe his testimony that H. Maltby told him he would be working eight hours a day in California after his January 2011 return to California because of undisputed evidence that there was no regular work available. The forum has credited the remainder of Guevara's testimony. (Testimony of Guevara)

57) Katija Roberts lived with Guevara during part of the time he worked in Klamath Falls and is the mother of their two and a half year old daughter. She is also a friend of all the aggrieved persons and acted as an interpreter for them while they worked for MBI in Klamath Falls. Her eagerness to testify[16] and emotional involvement with Guevara and the aggrieved persons was apparent. She also stood to gain financially if Guevara prevails. Aside from these obvious biases, her credibility was further undermined by her testimony on several key issues. First, she testified that Guevara told her that J. Bassett punched him in the eye, whereas Guevara testified and told the police that L. Bassett, Jr. punched him in the eye. Second, she testified that J. Bassett "beat up" Osorio in September 2010, whereas there is no evidence in the police report made by Osorio that J. Bassett beat him up. Third, she testified that she overheard the conversation between Guevara and H. Maltby in which H. Maltby fired

[16] At times, she seemed almost frantically eager to testify about the injustices she believed had been perpetrated on Guevara and the aggrieved persons by Respondents and had to be instructed by the ALJ to stop volunteering information that was nonresponsive to the questions she was asked to answer.

Guevara. The forum has credited Guevara's recollection of H. Maltby's statements during the conversation, and Roberts' version of H. Maltby's statements differs considerably from Guevara's. Fourth, she testified that she overheard a conversation between Guevara and H. Maltby in which H. Maltby told Guevara that his number of work hours in California would be no problem, whereas Guevara testified he was told he would work fewer hours. For the above reasons, the forum has only credited Roberts' testimony when it was undisputed or supported by other credible evidence. (Testimony of Roberts)

58) Jose Dominguez was a credible witness except for his testimony that it was H. Maltby, not Dominguez, who called Guevara from California in February 2011 to tell him there was work at Briggs for one or two days. (Testimony of Dominguez)

59) H. Maltby's testimony was credible for the most part. However, the forum did not believe his testimony regarding the events of early morning February 8, 2011, for several reasons. First, although H. Maltby testified that he has never known Calderon's phone number and never "knowingly" telephoned that number, Maltby's own phone records show that he made two consecutive phone calls to Calderon's number at 12:02 a.m. and 12:03 a.m. on February 8, 2011. Second, the forum believed Guevara's testimony that H. Maltby called him shortly after H. Maltby made the calls to Calderon and told Guevara that he was fired, in contrast to H. Maltby's testimony that he did not fire Guevara, and could not have, as Guevara had already left MBI's employment in January 2011. The forum draws this conclusion because: (1) H. Maltby's undisputed offer of work, made through Dominguez, to Guevara on or about February 6, 2011, demonstrates that Guevara was still considered to be an employee as of that date; and (2) H. Maltby acquired knowledge only hours before he fired Guevara that led him to believe Guevara had "betrayed" him[17] and gave him a retaliatory motivation for firing Guevara. (Testimony of H. Maltby)

60) Barbara Maltby gave no relevant testimony and her testimony has been given no weight. (Testimony of B. Maltby)

61) Mimi Perdue, Darren Frank, Nick Kennedy, Marvin Alberto Quinoñez Herrera, and Leah Maltby were credible witnesses and the forum credits their testimony in its entirety. (Testimony of Perdue, Frank, Kennedy, M. Herrera, L. Maltby)

CONCLUSIONS OF LAW

1) At all times material herein, Respondent Maltby Biocontrol, Inc. ("MBI") dba Biotactics was a California corporation that engaged or used the personal service of one or more employees in Klamath Falls, Oregon, and was an "employer" under ORS 659A.001(4).

2) The actions, statements and motivations of H. Maltby, MBI's president, are properly imputed to Respondent MBI.

[17] *See* fn. 15.

3) Erix Guevara and Robinson Guillermo Calderon were subjected to unlawful harassment based on their race and national origin in violation of ORS 659A.030(1)(b) and OAR 839-005-0030(4)(a)(A) through J. Bassett's role in the January 10, 2011, assault on them, Respondent MBI's failure to take any appropriate and corrective action in response to the assault, and the resulting hostile work environment experienced by Guevara and Calderon.

4) Esteban Yoc, Edwin Antonio Osorio, Rolando Herrerra, and Jose Salvador Dormes Herrerra were not subjected to unlawful harassment based on their race or national origin in violation of ORS 659A.030(1)(b) or OAR 839-005-0030(4)(a)(A) by Respondent MBI or the actions and inactions of Respondents MBI, H. Maltby, L. Bassett Sr., and J Bassett.

5) Respondent MBI, acting through Respondent H. Maltby, discharged Erix Guevara for cooperating with law enforcement conducting a criminal investigation, and based on his national origin, thereby violating ORS 659A.230(1) and ORS 659A.030(1)(a).

6) Respondent H. Maltby is liable as an aider and abettor for Respondent MBI's violations of ORS 659A.030(1)(a), ORS 659A.030(1)(b), and ORS 659A.230(1). ORS 659A.030(1)(g).

7) Respondent J. Bassett is liable as an aider and abettor for Respondent MBI's violation of ORS 659A.030(1)(b). ORS 659A.030(1)(g).

8) Respondent L. Bassett, Sr. is not liable as an aider and abettor for Respondent MBI's violations. ORS 659A.030(1)(g).

9) 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 practices found. The sums of money awarded and the other actions required of Respondents MBI, H. Maltby, and J. Bassett in the Order below are an appropriate exercise of that authority. ORS 659A.800 to ORS 659A.865.

10) Under ORS 659A.850(3), the Commissioner of the Bureau of Labor and Industries shall issue an order dismissing the charge and complaint against any respondent not found to have engaged in any unlawful practice charged. Accordingly, the Formal Charges and complaints against Respondent L. Bassett, Sr. are hereby dismissed.

OPINION

DISCRIMINATION IN TERMS AND CONDITIONS OF EMPLOYMENT BASED UPON RACE AND NATIONAL ORIGIN

In its Formal Charges, the Agency alleged that Respondents subjected Erix Guevara, Antonio Osorio, and Robinson Calderon to discriminatory terms and conditions of employment based on their race and national origin through ongoing

behavior by Respondent J. Bassett, their coworker, that was sufficiently severe or pervasive to have the effect of unreasonably interfering with their work performance or creating a hostile, intimidating or offensive working environment in violation of ORS 659A.030(1)(b) and OAR 839-005-0030(4)(a)(A). The Agency also sought damages for other unnamed Hispanic employees. At hearing, the Agency identified those employees as Yoc, R. Herrera, and J. Herrerra. The alleged discriminatory behavior consisted of racial epithets and physical assaults by J. Bassett upon Guevara and his Hispanic coworkers, coupled with L. Bassett's and H. Maltby's knowledge of and failure to stop this behavior.

The following facts were undisputed: (1) Guevara, Calderon, Yoc, R. and J. Herrera, and Osorio were all employed by MBI in Klamath Falls, Oregon during the time period encompassed by the Formal Charges; (2) Guevara, Calderon, Yoc, and R. Herrera are Guatemalan; J. Herrera and Osorio are Hispanic; (3) Guevara spoke limited English, and the other five workers spoke limited or no English; (4) L. Bassett, Sr., was the immediate supervisor of Guevara, Calderon, Yoc, R. Herrera, J. Herrera, and Osorio; and (5) J. Bassett, L. Bassett, Sr.'s son, was a co-worker of these six Hispanic workers and had no immediate or successively higher authority over them.

A. <u>J. Bassett's Racial Epithets And Physical Confrontations With Osorio</u>

Of the Hispanic employees, only Guevara and Calderon testified at the hearing. Their testimony and police records included some information about incidents involving Osorio, Yoc, R. Herrera and J. Herrera. The record also included investigative interviews conducted by Perdue with Osorio, Yoc, R. Herrera and J. Herrera, who were listed as witnesses on the Agency's case summary, but did not testify at the hearing. When the hearing reconvened on November 18, 2013, Ms. Ortega stated that she had been unable to contact Osorio, Yoc, R. Herrera and J. Herrera to arrange for their testimony at the hearing.

Guevara's credible testimony established that J. Bassett repeatedly called Guevara and his Hispanic coworkers "Hispanic motherfuckers" whenever he was upset at them as they worked at the same set of greenhouses on the Liskey Ranch. Guevara's credible testimony also established that in August 2010, shortly after Guevara, Calderon, Yoc, Osorio, R. Herrera, and J. Herrera arrived at work at 5 a.m., J. Bassett awoke, reached his hand out the window of the shack that he lived in, fired his .45 caliber pistol, and yelled out "Spanish motherfuckers."

A prima facie case of co-worker harassment based on race or national origin consists of the following elements: (1) respondent is a respondent as defined by statute; (2) complainant is a member of a protected class; (3) complainant was harmed by harassment directed at complainant by co-workers; (4) complainant's race or national origin was a reason for the co-worker harassment; and (5) the harassment was sufficiently severe or pervasive to have the purpose or effect of unreasonably interfering with the complainant's work performance or creating an intimidating, hostile or offensive working environment. OAR 839-005-0010(4)(a). 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 complaining individual would so perceive it. OAR 839-005-0010(4)(b).

With respect to Guevara, elements (1) and (2) of Agency's prima facie case are undisputed. Element (3) is satisfied by Guevara's credible testimony that J. Bassett's frequent racial epithets offended him. As J. Bassett's epithet of choice -- "motherfucker"-- was always prefaced by the word "Spanish" or "Hispanic," there can be no question that his comments were regarding or directed at Guevara and his coworkers because of their race, thereby satisfying element (4).[18] Element (5) is satisfied by Guevara's credible testimony that J. Bassett's epithets created a hostile and offensive working environment for him prior to J. Bassett's "transfer" in August 2010 after the gunshot incident. The forum further finds that a reasonable Hispanic person in the circumstances of Guevara would perceive that J. Bassett's repeated "Hispanic motherfucker" comments were sufficiently severe and pervasive to create a hostile, offensive or intimidating work environment.

In contrast, there is no evidence in the record that Calderon, Yoc, Osorio, R. Herrera, or J. Herrera were offended by Bassett's epithets. Calderon, the only other Hispanic employee who testified, stated that he did not understand anything that J. Bassett said and further testified that, except for the gunshot incident, he had no problems with J. Bassett until J. Bassett participated in the January 10, 2011, assault. There is no evidence that any of MBI's Klamath Falls Hispanic workers except Guevara spoke or understood English and no evidence in the record that Guevara explained the meaning of J. Bassett's epithets to his coworkers. The forum recognizes that comments made about or to a person regarding their protected class that cannot be understood by the person may still create an intimidating, hostile or offensive working environment if the context in which the comments are made or the body language, demeanor, and tone of the person making the comments make it apparent that the comments are offensive and related to the person's protected class. However, in this case there was no testimony by any of the non-English speaking Hispanic workers that they understood or were offended by J. Bassett's racial epithets and the forum concludes that the Agency has failed to meet elements (3) and (5) of its prima facie case with respect to Calderon, Yoc, Osorio, R. Herrera, and J. Herrera.

An employer is liable for harassment by the employer's employees or agents who do not have immediate or successively higher authority over the complaining individual when the employer knew or should have known of the conduct, unless the employer

[18] In his closing argument, J. Bassett argued that this epithet had nothing to do with the race or national origin of Guevara and his coworkers. The forum finds this argument to be totally disingenuous, given his equally improbable explanation of the event given to Deputy Kennedy on February 6, 2011, quoted below as recorded by Kennedy:

> "He said that he did not say anything to anyone [and] that he opened up the window on the front of his house and shot his .45 Colt straight up into the air. He said he was trying to get the owner of the ranch's attention as well as the work crews['] attention that they were making too much noise. James Bassett then said that when he shoots his gun it makes his ears ring and that he would be able to go back to sleep because he wouldn't be able to hear the guys talking loudly."

took immediate and appropriate corrective action. OAR 839-005-0010(4)(f). *See also In the Matter of Servend International, Inc.,* 21 BOLI 1, 23 (2000), *aff'd without opinion, Servend International, Inc. v. Bureau of Labor and Industries,* 183 Or App 533, 53 P3d 471 (2002).

There was no testimony that J. Bassett's racial epithets made prior to the gunshot incident were reported to H. Maltby or L. Bassett or any other reliable evidence that H. Maltby or L. Bassett knew or should have known of those epithets.[19]

The evidence is undisputed that, immediately after Guevara reported the gunshot incident and accompanying racial epithet to H. Maltby, H. Maltby immediately transferred J. Bassett to another set of greenhouses a mile away, instructed J. Bassett to have nothing to do with Guevara and his Hispanic coworkers, and denied him an expected pay raise. After that, there is no evidence that J. Bassett made any racial epithets or otherwise harassed Guevara or his Hispanic coworkers on MBI's work site or during work hours, other than to look at them "in an unusual way"[20] during J. Bassett's undated visits sometime between August 2010 and January 2011. There is no evidence that H. Maltby or L. Bassett knew or should have known of these undated visits. Additionally, H. Maltby credibly testified that, sometime after the August 2010 gunshot incident, he asked Guevara if Guevara and his coworkers "were okay" with how the August 2010 incident was handled and if they felt comfortable at work and Guevara responded "yes." Under these circumstances, the forum concludes that H. Maltby, acting as MBI's agent, took "immediate and appropriate corrective action" in response to J. Bassett's discriminatory actions, thereby relieving respondents of any liability for those actions.

The Agency proved that at least two confrontations took place in the workplace between J. Bassett and Osorio.[21] As Osorio and J. Bassett did not testify and there were no eyewitnesses to the encounters described in Finding of Fact #18 – The Merits, there is insufficient evidence for the forum to determine whether or not J. Bassett's actions in those encounters were motivated by Osorio's race or national origin.

B. <u>J. Bassett's Involvement in the Assaults On Osorio, Calderon, and Guevara</u>

On September 9, 2010, Osorio reported to the Klamath County Sheriff, through a translator, that J. Bassett had pulled in front of his car and tried to hit him twice through the window while telling him "I'm going to kick your fucking ass." Osorio also reported that J. Bassett had tried to hit J. Herrerra's pickup with his pickup. There is no evidence that the incident occurred during work hours, and no one with any firsthand knowledge

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[19] Exhibit A-22, p.2, contains an unsworn statement made by Guevara to Perdue in a November 18, 2012, interview, that he "reported [J. Bassett's] comments to Maltby and also reported that they were treating them badly." However, the forum gives no weight to this unworn statement because Guevara did not testify at hearing to having made these reports.

[20] *See* Finding of Fact #20 – The Merits.

[21] *See* Finding of Fact #18 – The Merits.

of the incident testified at the hearing. There is also no evidence in the record to establish exactly where this incident occurred. The incident was reported to the police, but not to H. Maltby or L. Bassett, Sr. H. Maltby credibly testified that he first learned of the incident sometime after Guevara's discharge when he obtained and read a copy of the police report. With J. Bassett, a co-worker, being the alleged perpetrator of the incident, no evidence of the incident in the record except for second-hand hearsay, and no evidence that it occurred either on MBI's worksite or during work hours or that H. Maltby or L. Bassett, Sr. knew or should have known of the incident during Osorio's employment with MBI,[22] the forum cannot hold MBI liable for the incident.

Guevara and Calderon's undisputed testimony established that J. Bassett, his brother Louis Bassett, Jr., and an unidentified third person assaulted Guevara and Calderon after work and off MBI's work site on a public road on January 10, 2011, while Guevara was driving home from work with Calderon as a passenger. The assault occurred after Guevara stopped his car to see if there was a problem after J. Bassett, his brother, and the unidentified third person partially blocked the road with their cars and approached Guevara's car. Immediately prior to assaulting Guevara, L. Bassett, Jr. accused Guevara of "talking bad about his mother." At the same time, the unidentified third person made the accusation "you guys are talking about my aunt, motherfuckers." The forum infers from this comment that the third person was J. Bassett's cousin. J. Bassett tried to pull open the driver's side door, and L. Bassett, Jr. hit Guevara in the eye. The unidentified assailant hit Calderon in the face with his fist and on his elbow with a small bat. As a result, Calderon required treatment at a local hospital and was off work for a week due to his injuries. Guevara's girlfriend called the police, who arrested J. Bassett and charged him with Assault III, Criminal Conspiracy, and Disorderly Conduct. L. Bassett, Jr., was also placed under arrest and charged with the same offenses. H. Maltby and L. Bassett, Sr. were informed of the incident shortly after it occurred. Guevara himself reported the incident to H. Maltby, who told Guevara that he "knew how to control Jimmy."

After the incident, H. Maltby elected to take no action against J. Bassett because it occurred after work hours and off the worksite and he believed, under the circumstances, that it was the responsibility of the police, not MBI, to take appropriate action. The forum disagrees.

In the gunshot incident in August 2010, J. Bassett engaged in behavior that put H. Maltby and L. Bassett, Sr. on notice of: (1) J. Bassett's racial animus, as demonstrated by his comment "Spanish motherfuckers," and (2) of the fact that J. Bassett's Hispanic coworkers reasonably viewed him as a threat to their physical safety because of his ownership of firearms and his demonstrated willingness to fire his .45 caliber pistol when he was displeased with them. In response to the gunshot incident, H. Maltby took immediate and appropriate corrective action as described in Finding of Fact #20 – The Merits. Based on that action, the forum has concluded that MBI was not liable for the August 2010 incident. However, that incident, coupled with H. Maltby's

[22] *See* Finding of Fact #25 – The Merits.

comment to Guevara that he "knew how to control Jimmy," creates an inference that H. Maltby knew and believed that J. Bassett needed control. The January 10, 2011, incident put H. Maltby on notice that the problem was not solved.

The January 10, 2011, incident occurred off MBI's worksite and outside work hours and Guevara and Calderon were assaulted by two persons who were not employed by MBI. However, a preponderance of the evidence leads the forum to conclude that the assaults would not have taken place without J. Bassett's direct involvement. Specifically, there is no evidence that Guevara or Calderon had ever met the unidentified other assailant before the assault. Based on the facts that J. Bassett was a long-time coworker of Guevara and Calderon, the brother of L. Bassett, Jr., and a likely cousin of the unidentified third assailant, the forum also infers that J. Bassett provided the information about the time Guevara drove home each day from work and the route he took. Furthermore, although J. Bassett did not hit Guevara or Calderon, he participated in the assault by getting Guevara to stop his car, then attempting to pull Guevara's car door open during the assault, presumably so Guevara could be pulled out of the car.

Under these circumstances, the forum finds that MBI had a responsibility to take "immediate and appropriate" corrective action in response to the January 10, 2011, assault, even though it was perpetrated by a coworker and occurred outside work hours and off the worksite.

H. Maltby's own testimony confirms that he considered firing J. Bassett in response to the January 10, 2011, assault, but did not. He testified that he believed if he fired J. Bassett because of J. Bassett's involvement in the January 10, 2011, assault that J. Bassett would sue him. Maltby cited a civil rights complaint that J. Bassett had filed against him with BOLI's Civil Rights Division as evidence of this likelihood. In his initial response to the original complaint, Maltby stated "I am not trying to protect James, I'm just stuck with him. If he would have pled guilty or convicted of assault I would have fired him." *See* Ex. A4, p.4. Prior to the hearing, on April 20, 2012, he told Perdue, the Agency's investigator, that he "could have" fired J. Bassett if the court had convicted him of the January 10, 2011, assault and that he was still worried that J. Bassett would file another BOLI complaint regarding "whistleblowing retaliation" against MBI if Maltby fired J. Bassett. Maltby's "between a rock and a hard place" defense has two major holes: (1) Exhibit A26, p.13, shows that J. Bassett filed complaint #OSEMOS11110961634 with BOLI's CRD on November 9, 2011, and there is no evidence of any earlier filing by J. Bassett;[23] and (2) Perdue's notes from April 20, 2012, interview with Maltby, which she testified were accurate, show that Maltby told her:

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[23] On direct examination in MBI and Maltby's case-in-chief, Maltby testified as follows:

Q: "When did you find out about [the January 10, 2011, assault]?

A. "The next morning.

Q: "Who did the incident involve?

A: "Going by the police report, Jimmy, his brother, somebody else – I don't know who – Robinson, Erix. I believe that's it.

> "Guevara told [me] that he had worked it all out, that it was a personal thing between those guys. * * * Bassett Sr. sat down with all of them and they discussed it and they had resolved it between themselves. They all continued to work after the incident."[24]

Considering the August 2010 gunshot incident, the severe discipline imposed on J. Bassett at the time by H. Maltby, and the serious nature of the January 10, 2011, assault, the forum concludes that the appropriate action for H. Maltby under OAR 839-005-0010(4)(f) would have been to fire J. Bassett and bar him from Liskey Ranch property that was leased by MBI, as it should have been apparent that no lesser action would act as an effective deterrent. Instead, Maltby took no action, electing to wait until the criminal justice system resolved the charges brought against J. Bassett.[25] As a result, Guevara had to continue work from January 11 to January 21, 2011, on a worksite that J. Bassett continued to live and work on. Calderon was off work for a week after the January 10, 2011, assault because of his injuries, but had to continue working under the same conditions until his termination in October 2011.

Q: "Is your knowledge pretty much from the police reports then?

A: "Yeah, I didn't believe either story, and I figured it was in the hands of the judicial system and I'd let them figure it out.

Q: "Did that occur during employment hours?

A: "No.

Q: "Did it occur on the property?

A: "No.

Q: "So then the last time you heard a complaint about Jimmy would have been in August 2010?

A: "Yes.

Q: "Did you feel that it was appropriate to terminate Jimmy after the January 2011 incident?

A: "I got two different stories and they both sounded reasonable. It was very hard to determine, you know, exactly what happened. I didn't have the benefit of seeing the police report; I could just talk to Erix and Louie and so I was, I mean; Jimmy was released. He was put on restraining order and between * * * I guess his lawyer and the judge, they determined that he could still work down there and I didn't think; I figure if I fired him at that time, I'd be sued. 'Cause if he was innocent, which he ended up.

Q: "Continue. What were you worried about?

A: "'Cause he also filed a civil rights violation against me. It just seems like nobody's ever in sight when any of this stuff happens and there's no evidence [unintelligible]. And with the restraining order, that kept Jimmy completely away from the employees. He had to get up at 4:30 in the morning and drive down to go back to sleep at his dad's house and he couldn't come back until they all left. That was a six month restraining order.

Q: "After the restraining order was put in place and the justice system had kind of acted, were there any other incidents at all reported to you between Jimmy and the other employees?

A: "An argument with Justin."

[24] This statement does not appear in quotes in Perdue's interview notes.

[25] According to court records received as Exhibit A7, p.5, the criminal charges were not resolved until August 31, 2011.

Both Guevara and Calderon credibly testified as to their fear that they would be attacked again after the January 10 assault. Coupled with J. Bassett's continued residence in the shack immediately across the road from the greenhouses Guevara and Calderon worked in, J. Bassett's continued employment with MBI, and Maltby's failure to take any disciplinary action against J. Bassett, the forum finds that Guevara and Calderon were subjected to a hostile work environment based on their race and national origin after January 10, 2011, and that Maltby should have known this. The forum further finds that, under these circumstances, a reasonable employer would know *per se* that a hostile environment exists that requires immediate and appropriate corrective action.

In conclusion, based on J. Bassett's above-described actions, Maltby's knowledge of those actions, and Maltby's failure to take any immediate and appropriate corrective action after the January 10, 2011, incident, MBI is liable under ORS 659A.030(1)(b) and OAR 839-005-0010(4)(f) for J. Bassett's role in the January 10, 2011, assault on Guevara and Calderon and the resulting hostile environment created for Guevara and Calderon. For reasons described below, H. Maltby and J. Bassett are also jointly and severally liable as aiders and abettors.

H. MALTBY AND J. BASSETT ARE LIABLE AS AIDERS & ABETTORS TO MBI'S ORS 659.030(1)(B) VIOLATION

ORS 659A.030(1)(g) provides that it is an unlawful employment practice "[f]or any person, whether an employer or an employee, to aid, abet * * * the doing of any of the acts forbidden under this chapter or to attempt to do so." "Person" includes "individuals." ORS 659A.001(9)(a). Aiding and abetting, in the context of an unlawful employment practice, means "to help, assist, or facilitate the commission of an unlawful employment practice, promote the accomplishment thereof, help in advancing or bring it about, or encourage, counsel or incite as to its commission." *In the Matter of Crystal Springs Landscapes, Inc.,* 32 BOLI 144, 166 (2012). *See also In the Matter of Dr. Andrew Engel, DMD, PC,* 32 BOLI 94,137 (2012); *In the Matter of Cyber Center, Inc.,* 32 BOLI 11, 35 (2012). In this case, J. Bassett aided and abetted MBI's violation of ORS 659A.030(1)(b) by participating in the assault on Guevara and Calderon on January 10, 2011. As MBI's corporate president, H. Maltby aided and abetted MBI's violation of ORS 659A.030(1)(b) by failing to take immediate and appropriate corrective action in response to that assault. As a consequence, H. Maltby and J. Bassett are jointly and severally liable for MBI's violation of ORS 659A.030(1)(b). ORS 659A.030(1)(g).

CONTINUING VIOLATION

In the Proposed Order, the ALJ found that the statute of limitations that H. Maltby plead as an affirmative defense "stands as a fatal impediment to the Agency's allegations related to J. Bassett's racial epithets," reasoning as follows:

> ”The Attorney General’s complaint that forms the basis of the Formal Charges in case no. 31-13 was filed on November 23, 2011, and the complaint filed by Guevara that forms the basis of the Formal Charges in case no. 34-13 was filed on January 9, 2012. ORS 659A.820(2) provides:
>
> > ‘Any person claiming to be aggrieved by an unlawful practice may file with the Commissioner of the Bureau of Labor and Industries a verified written complaint states the name and address of the person alleged to have committed the unlawful practice. * * * Except as provided in ORS 654.062, a complaint under this section must be filed no later than one year after the alleged unlawful practice.’
>
> “J. Bassett’s last alleged racial slurs occurred sometime in August 2010. Under ORS 659A.820(2), the subject complaints needed to have been filed no later than the end of August 2011 in order for the Commissioner to have jurisdiction over those slurs. This did not happen. Consequently, the Commissioner lacks jurisdiction over the allegations related to J. Bassett’s racial slurs. This applies to the charges filed by the Agency on behalf of Guevara, Calderon, Yoc, Osorio, R. Herrera, and J. Herrera.”

The Agency filed exceptions to this conclusion, arguing that the Commissioner retained jurisdiction under a “continuing violation” theory. The Agency cited *In the Matter of Kenneth Williams*, 14 BOLI 16, 25 (1995) and *In the Matter of Gardner Cleaners*, 14 BOLI 240, 253-54 (1995) as support for its contention that the forum had jurisdiction over all of Respondents’ discriminatory actions based on a “continuing violation” theory and has the corresponding authority to award damages for all those actions. In both cases, the Commissioner held that:

> “When there is an ongoing, continuous series of discriminatory acts, they may be challenged in their entirety so long as one of those discriminatory acts falls within the limitations period. Whether discriminatory acts are ‘continuing’ can be shown by ‘demonstrating a series of related acts against a single individual.’”

In *Williams*, a female complainant was employed by respondent on September 14, 1992 and resigned effective March 31, 1993. Except for two weeks in February 1993, respondent subjected complainant to “hostile environment” verbal sexual harassment on a daily basis. The complainant filed a complaint with the Agency on November 15, 1993. In *Gardner*, an African-American male was employed by respondent from April 1992 until April 6, 1994. Beginning in mid-summer 1992, the respondent made “denigrating remarks" to the complainant 2-3 times per week on the average throughout the remainder of complainant's employment that created a “hostile environment.” The complainant filed a complaint with the Agency on May 12, 1994. In both these cases, the forum awarded damages to the complainants for the unlawful discrimination experienced over the entire course of their employment.

ORS 659A.820(2) provides "[e]xcept as provided in ORS 654.062, a complaint under this section must be filed no later than one year after the alleged unlawful practice." OAR 839-003-0025(3) interprets this statute as follows:

> "[e]xcept as provided in OAR 839-003-0031 [relating to OR-OSEA], a person must file a complaint with the division no later than one year after the alleged unlawful practice. If the alleged unlawful practice is of a continuing nature, the right to file a complaint exists so long as the person files the complaint within one year of the most recent date the unlawful practice occurred."

Neither the statute nor the rule provide any guidance as to respondent liability when the "alleged unlawful practice is of a continuing nature," as alleged in this case.

In 2002, the U.S. Supreme Court issued a decision in a Title VII case that clarified a respondent's liability in a "continuing violation" case.[26] In *National Railroad Passenger Corporation* v. *Morgan*, 536 U.S. 101 (2002), the plaintiff brought claims for race discrimination, retaliation, and hostile work environment that were based on events dating back to the beginning of his employment, nearly four and one-half years before he filed a charge of discrimination. The issue before the Court was "whether, and under what circumstances, a Title VII plaintiff may file suit on events that fall outside this statutory time period." *Id.,* at 105. In its analysis, the Court identified two types of discrimination in the case -- "discrete" acts and "hostile environment." The Court identified "termination, failure to promote, denial of transfer, or refusal to hire" as examples of "discrete" acts that constituted "a separate actionable 'unlawful employment practice.'" *Id.* at 114. The Court distinguished "hostile environment" discrimination from discrimination involving "discrete acts" by stating that "very nature" of hostile environment discrimination involves "repeated conduct" that "cannot be said to occur on any particular day. It occurs over a series of days or perhaps years and, in direct contrast to discrete acts, a single act of harassment may not be actionable on its own." *Id.* at 115.

The Court held that in cases involving discrete acts of discrimination, only acts occurring "within the timely filing" are actionable. In contrast, in cases involving hostile environment claims, an employer faces potential liability for all related discriminatory acts, regardless of their date of occurrence:

> "A hostile environment claim is composed of a series of separate acts that collectively constitute one 'unlawful employment practice.' * * * The timely filing provision only requires that a Title VII plaintiff file a charge within a certain number of days after the unlawful practice happened. It does not matter, for purposes of the statute, that some of the component acts of the hostile work environment fall outside the statutory time period. Provided that an act contributing to the claim occurs within the filing period, the entire time period of

[26] The forum has repeatedly held that, although analogous federal case law is not binding on the forum, the forum may rely on it for guidance.

> the hostile environment may be considered by a court for purposes of determining liability." *Id.* at 117.

The forum adopts this standard and applies it in this case.[27]

The Agency's hostile environment claim is based on the incidents detailed in Findings of Fact – The Merits ##17-20, 23, 27, and 30 and the resulting hostile environment experienced by Guevara until he left Klamath Falls on January 21, 2011, and by Calderon until he was fired in October 2011. Relying on *Morgan's* "continuing violation" analysis, Respondents are potentially liable for all of J. Bassett's actions based on Guevara and Calderon's race or national origin found to be unlawful employment practices and any resulting hostile environment experienced by Guevara and Calderon.

The forum has already found that J. Bassett's pre-January 10, 2011, actions were not unlawful employment practices, based on its conclusions that (1) Respondent MBI, through H. Maltby and L. Bassett, Sr. did not know or should not have known of J. Bassett's pre-gunshot incident and racial epithets; and (2) Respondent MBI took immediate and appropriate corrective action in response to the gunshot incident and racial epithets perpetrated by J. Bassett, a coworker of Guevara and Calderon, thereby relieving MBI of liability under OAR 839-005-0010(4)(f). Even under a continuing violation theory, MBI's subsequent unlawful employment practices cannot reel in prior discriminatory acts that have not been found to be unlawful employment practices.

In conclusion, MBI's only liability under the Agency's hostile environment claim is for J. Bassett's role in the January 10, 2011, assault on Guevara and Calderon, H. Maltby's failure to take immediate and appropriate corrective action on MBI's behalf, and the resulting hostile environment experienced by Guevara and Calderon.

GUEVARA WAS DISCHARGED BECAUSE OF HIS COOPERATION WITH LAW ENFORCEMENT CONDUCTING A CRIMINAL INVESTIGATION

In its Formal Charges, the Agency alleges that Respondent MBI, through Respondent H. Maltby, terminated Erix Guevara "based on his cooperation with law enforcement conducting a criminal investigation of Respondent James Bassett and because of his testimony in the criminal trial of Respondent James Bassett, in violation of ORS 659A.230(1)." The Agency further alleges that H. Maltby told Guevara that he was discharged in a phone call "[l]ate in the evening on February 7, 2011."

ORS 659A.230(1) provides, in pertinent part:

> "It is an unlawful employment practice for an employer to discharge * * * an employee * * * for the reason that the employee * * * has in good faith cooperated with any law enforcement agency conducting a criminal investigation [or] has testified in good faith at a civil proceeding or criminal trial."

[27] *See also Porter v. California Dept. of Corrections,* 419 F. 3d, 885, 892-93 (9th Cir. 2005).

A. Discharge for cooperation with law enforcement conducting a criminal investigation.

The Agency's prima facie case with respect to this allegation consists of the following elements: (1) MBI was an employer as defined by statute; (2) MBI employed Guevara; (3) Guevara, in good faith, cooperated with any law enforcement agency conducting a criminal investigation; (4) MBI discharged Guevara; (5) MBI discharged Guevara because he, in good faith, cooperated with any law enforcement agency conducting a criminal investigation. *See, e.g., In the Matter of Cleopatra's, Inc.,* 26 BOLI 125, 132 (2005).

Elements (1) and (2) are undisputed. Element (3) requires a finding that Guevara cooperated with a law enforcement agency conducting a criminal investigation and that his cooperation was in "good faith." The evidence is undisputed that Klamath County Deputy Sheriff Kennedy initiated a criminal investigation of J. Bassett's August 2010 "gunshot incident" on January 30, 2011. His investigation appears to have been instigated by the resurrection of Deputy Frank's December 23, 2010, incident report describing Frank's contact with Osorio and his coworkers on September 9, 2010.[28] On February 2, 2011, Kennedy contacted and interviewed Guevara for the purpose of obtaining a statement from Guevara about the "gunshot incident." Guevara told Kennedy that J. Bassett had fired a gun and described the incident in detail that is consistent with the accounts given by other eyewitnesses and J. Bassett's own admissions to Kennedy concerning the incident. After listening to J. Bassett's explanation of why he had fired his pistol, Kennedy seized four firearms in J. Bassett's residence, arrested him, and took him to the Klamath County jail where J. Bassett "was lodged" for "Unlawful Use of a Weapon in Menacing." These facts establish the third element of the Agency's prima facie case.

Element (4) requires a finding that MBI discharged Guevara. Respondents MBI and H. Maltby dispute this claim and assert that Guevara was not discharged and could not have been because his employment had ended on January 21, 2011, when Guevara left Klamath Falls and moved back to California. The facts show that Guevara and H. Maltby discussed Guevara's move to California before January 21, 2011, Guevara's last day of work in Klamath Falls, and that H. Maltby told Guevara that there would be some work available for him at MBI's Briggs location, albeit on a limited basis. Since Guevara did not have the qualifications to raise predator mites, the only regular type of work performed at Briggs at that time, the forum infers that the work available for Guevara would have been cleaning greenhouses and performing other unskilled odd jobs, work previously performed by J. Dominguez's parents. After not receiving his paycheck for the work he performed through January 21, 2011, Guevara visited MBI's Briggs location on or about February 3, 2011, and collected his paycheck. Immediately afterward, Guevara and H. Maltby had a conversation in which H. Maltby offered to drive Guevara, with his wife and kids, to Klamath Falls so Guevara could continue

[28] *See* Finding of Fact #23 – The Merits.

working there, and Guevara declined. A day or two later, acting at H. Maltby's request, J. Dominguez called Guevara and told him to report to work on Monday, February 6, 2011. Guevara, who was on his way to Oregon to testify at the grand jury proceeding, told Dominguez he was not available that day. This offer of work, along with the absence of any evidence to show that Guevara had said he was quitting his employment with MBI, shows that Guevara was still considered an employee after January 21, 2011, including on the morning of February 8, 2011, when H. Maltby told Guevara that he was fired. This satisfies the fourth element of the Agency's prima facie case.

The fifth element of the Agency's prima facie case requires proof of a causal connection between Guevara's discharge and his good faith cooperation with the Klamath County Sheriff's investigation of J. Bassett's gunshot. It is undisputed that the phone call in which H. Maltby discharged Guevara occurred at 12:21 a.m. on the morning of February 8, 2011. Only an hour or so earlier, Deputy Kennedy telephoned H. Maltby and told him that J. Bassett had been arrested because of the gunshot incident, and that Guevara "had signed that police report." It is undisputed[29] that H. Maltby believed this issue had been resolved months earlier and that H. Maltby became angry at Guevara, whom he considered a good friend, for what he perceived as a betrayal. In H. Maltby's own words, "[Guevara] kind of betrayed a trust, betrayed a friend." At hearing, H. Maltby displayed this same resentment while giving the testimony quoted in footnote 15. H. Maltby's expressed anger over Guevara's cooperation with the police, coupled with the fact that he called Guevara and fired him only an hour or so after speaking with Deputy Kennedy, establishes the necessary causal connection between Guevara's protected activity and his discharge.

In conclusion, the forum finds that MBI, acting through H. Maltby, discharged Guevara because Guevara, acting in good faith, cooperated with a law enforcement agency conducting a criminal investigation, thereby violating ORS 659A.230(1).

B. <u>Discharge for testifying in a criminal trial.</u>

The second prong of the Agency's allegation – that Guevara was discharged because of "his testimony in the criminal trial of Respondent James Bassett" – fails because there is no evidence that Guevara ever gave testimony before a grand jury or in an actual criminal trial in any proceeding regarding J. Bassett.

GUEVARA WAS ALSO DISCHARGED BECAUSE OF HIS NATIONAL ORIGIN

When H. Maltby fired Guevara, he told him: "My favorite friend, Erix, you preferred to give me your back and to give your back to the people who were feeding you and put a roof over your head. * * * You prefer to stay with your own kind, like the Guatemalan you are. You are fired. Stay away from my properties." H. Maltby's reference to Guevara as a "Guatemalan" in this conversation reflects a discriminatory

[29] *See* Finding of Fact #48 -- The Merits.

animus and is sufficient to establish a nexus between Guevara's Guatemalan national origin and Guevara's discharge. Acting through H. Maltby, MBI violated ORS 659A.030(1)(a). ORS 659A.030(1)(g).

H. MALTBY IS LIABLE AS AN AIDER & ABETTOR TO MBI'S ORS 659.030(1)(A) AND ORS 659A.230(1) VIOLATIONS

As MBI's corporate president, H. Maltby aided and abetted MBI's violations of ORS 659A.030(1)(a) and ORS 659A.230(1) by discharging Guevara based on his national origin and for cooperating with law enforcement conducting a criminal investigation and is jointly and severally liable with MBI for those violations. ORS 659A.030(1)(g).

DAMAGES

A. Case no. 31-13.

In case no. 31-13, the Agency asked for monetary damages in the amount of "at least $100,000" for Guevara, Calderon, Yoc, Osorio, R. Herrera, and J. Herrera based on discrimination and harassment in terms and conditions of employment against those employees based on their race and national origin. The Agency also asked for other nonmonetary remedies, including required training, follow-up monitoring by the Agency, and an agreement to comply with "ORS 659A." In this case, the forum finds that the nonmonetary remedies sought by the Agency would be a futile exercise of the forum's authority, given that Respondent MBI is no longer doing business in Oregon and that there is no indication in the record that MBI has any intention of resuming business in Oregon in the future.

B. Case no. 34-13.

Case no. 34-13 relates only to Respondents' alleged harassment and discharge of Erix Guevara. The Agency asked for monetary damages for Erix Guevara consisting of lost wages "at least $42,698," out-of-pocket expenses "of at least $200," and damages for emotional, mental, and physical suffering in the amount of at least $200,000."

Erix Guevara

Lost wages

Guevara is eligible for a back pay award because he was discharged in violation of ORS 659A.030(1)(a) and ORS 659A.230(1). The purpose of a back pay award in employment discrimination cases is to compensate a complainant for the loss of wages and benefits the complainant would have received but for the respondent's unlawful employment practices. *See, e.g., In the Matter of Crystal Springs Landscapes, Inc.,* 32 BOLI 144, 168 (2012). Back pay awards are calculated to make a complainant whole

for injuries suffered as a result of the discrimination. *In the Matter of Dr. Andrew Engel, DMD, PC,* 32 BOLI 94, 138 (2012). A complainant who seeks back pay is required to mitigate damages by using reasonable diligence to find other suitable employment. *Crystal Springs,* at 168-69.

The forum must have a basis for calculating back pay before it can make an award. Guevara testified that he was earning $13 per hour on January 21, 2011, his last day working in Klamath Falls. However, the forum is unable to calculate a back pay award solely from this figure for two reasons:

- Although there appears to have been work for Guevara in California involving cleaning greenhouses, there is no reliable evidence of the hours that Guevara would have worked for MBI in California[30] or the wage he would have been paid for that work, had he not been fired.[31]
- Although R. Herrerra transferred to MBI's Briggs location after MBI closed its Klamath Falls operation and has been raising spider mites at Briggs, the same job Guevara had done in Klamath Falls, the only evidence of the date of his transfer is that it happened sometime after March 2013. There is no other evidence of the date when MBI actually began raising spider mites in Briggs.

In conclusion, the forum does not award Guevara any back pay because of the lack of specific evidence from which to calculate an award.

Out of Pocket Expenses

Economic loss that is directly attributable to unlawful employment practice is recoverable from a respondent as a means to eliminate the effects of any unlawful practice found, including actual expenses. *In the Matter of From the Wilderness, Inc.,* 30 BOLI 227, 290 (2009). Here, the forum awards no damages for out-of-pocket expenses because no evidence was presented at hearing that would give the forum a basis for calculating such an award. *Id.,* at 291. Guevara did testify that MBI provided him with health insurance, which he lost when he was fired, and that he had to pay for doctor's expenses out-of-pocket after he was fired, but he did not testify as to the amount he had to spend, and there was no other testimony about Guevara's post-discharge out-of-pocket expenses.

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[30] Respondents proved that there was no regular job available for Guevara in California because of his lack of skills required to raise predator mites and there is no evidence of any comparators who cleaned greenhouses for MBI after Guevara's discharge. *See, e.g., In the Matter of Rogue Valley Fire Protection, LLC,* 26 BOLI 172, 184 (2005) (when a respondent commits an unlawful employment practice by discharging a complainant, the forum is authorized to award the complainant back pay for the hours the employee would have worked absent the discrimination).

[31] Guevara was MBI's most skilled worker in K. Falls, and there was no evidence concerning the wage that MBI would have paid him for the unskilled work of cleaning greenhouses in California.

Damages for Emotional, Mental, and Physical Suffering

This forum has long held that in determining an award for emotional and mental suffering, the forum considers the type of discriminatory conduct, and the duration, frequency, and severity of the conduct. It also considers the type and duration of the mental distress and the vulnerability of the complainant. The actual award amount depends on the facts presented by each complainant. A complainant's testimony, if believed, is sufficient to support a claim for mental suffering damages. *See, e.g., Crystal Springs,* at 170.

In this case, Guevara's claim for emotional and mental suffering damages rests on his own testimony, as his wife and Katija Roberts, the only witnesses at hearing who were in a position to observe Guevara's responses to the January 10, 2011, assault, the resulting hostile work environment, and his discharge, were not questioned about those responses. In response to questions about his emotional and mental suffering, most of Guevara's testimony was about his response to J. Bassett's racial epithets, the August 2010 gunshot incident, and the January 10, 2011, assault on himself and Calderon and his resulting feelings.

The forum first addresses the assault. J. Bassett and his companions attacked Guevara and Calderon without any provocation on a public road while Guevara and Calderon were on their way home from work. J. Bassett tried to pull Guevara's door open and Guevara was hit in the face by J. Bassett's brother, causing swelling under his left eye and giving him a black eye. Calderon was assaulted by the Bassett brothers' companion, who hit him in the face with his face and on the elbow with a small wooden fish bat. There is no evidence that Guevara and Calderon did anything except try to escape, which they eventually did. Calderon had to go to the hospital, where he was given pain pills and his injuries were treated. J. Bassett and L. Bassett, Jr. were arrested that same night. When Guevara spoke with H. Maltby on a following day, Maltby told him that he was aware of the attack, that he was upset Guevara had called the police, and that "he knew how to control Jimmy." Maltby subsequently took no disciplinary action against Jimmy, whom Guevara knew possessed and used firearms and who continued to work for Respondent and live in the shack directly across the dirt road from the greenhouses in which Guevara and Calderon worked. As a result of these events, Guevara experienced fear and sleeplessness until he left MBI's employment in Klamath Falls on January 21, 2011. Based on the above, the forum concludes that $50,000 is an appropriate award for Guevara's physical, emotional, and mental suffering related to the January 10, 2011, assault and the *per se* hostile work environment he experienced during the remainder of his employment.

With respect to Guevara's discharge, Guevara credibly testified that it caused him considerable stress as he experienced a hard time finding another job, lost his two-bedroom apartment, and had to move his family into a smaller apartment. As stated earlier, there is no evidence in the record as to the number of hours that Guevara would have worked for MBI, had he not been fired. However, Guevara reasonably believed, based on the assurance H. Maltby gave him in or around October 2010, that work was

available for him at MBI's Briggs operation for at least six months after his discharge that would have helped him support his family.

Based on the above, the forum concludes that $50,000 is an appropriate award for Guevara's physical, emotional, and mental suffering related to his discharge from MBI's employment.

Robinson Guillermo Calderon

Calderon is entitled to damages related to the January 10, 2011, assault and the *per se* hostile work environment he experienced from that date until his discharge in October 2011, knowing the whole time that H. Maltby had taken no action against J. Bassett because of the assault. The details of the assault are set out in the previous section. Calderon, like Guevara experienced fear and sleeplessness because of the assault. He was injured more seriously than Guevara and had to miss a weeks' work because of his injury. Like Guevara, he had to work with the knowledge that Jimmy, the person who had participated in his assault and whom he knew possessed and used firearms, continued to work for MBI and live in the shack directly across the dirt road from the greenhouses in which Calderon worked. Based on the above, the forum concludes that $100,000 is an appropriate award for Calderon's physical, emotional, and mental suffering related to the January 10, 2011, assault and the hostile work environment he experienced thereafter.

Osorio, Yoc, R. Herrera and J. Herrera

The forum awards no damages to Osorio, Yoc, R. Herrera and J. Herrera because the Agency failed to prove that MBI engaged in any unlawful employment practice against them.

AGENCY EXCEPTIONS

The Agency filed exceptions ordered in paragraphs "A" through "E." The forum addresses them in the same order, with the exceptions highlighted in bold text.

A. "**Calderon is from Guatemala**." In Finding of Fact #16 -- The Merits, the ALJ found that Calderon was "Hispanic." A review of the record shows that Calderon testified that he is from Guatemala. Finding of Fact #16 -- The Merits has been revised to reflect that fact.

B. "**Oregon law does not require unlawful discriminatory conduct to take place during work hours or on a worksite."** This exception is addressed in the body of the Opinion.

C. "**The forum places too much emphasis on the aggrieved persons understanding of the English language."** The Agency "disagrees with the Forum's conclusion that most of the Hispanic workers did not understand English and therefore

were not offended by J. Bassett's racial slurs" and asserts that "there is little doubt that the other workers (other than Guevara), whether they understood English or not, understood J. Bassett's meaning when he used racial slurs." The Agency's assertion assumes too much. Calderon's testimony that J. Bassett was "very angry" when he attacked Guevara and Calderon only proves that Calderon knew J. Bassett was angry and nothing more. The Agency had ample opportunity at hearing to ask Guevara if he explained the meaning of J. Bassett's racial epithets to his Hispanic coworkers or to ask Calderon if Guevara or someone else explained the meaning of J. Bassett's racial epithets to him or the other workers. The Agency did not do so. As noted earlier, the forum acknowledges the validity of the Agency's point that "[b]ody language, demeanor and tone are important parts of communication," but in this case there is no corroborating evidence that any of the aggrieved persons except for Guevara understood that J. Bassett's comments were related to their race.

D. "**All incidents are evidence of the continuing nature of Respondents' unlawful conduct.**" This exception is addressed in the Opinion.

E. **The Agency's Failure to Cite ORS 659A.030(1)(g) is a Mere Scrivener's Error**. In the Proposed Order, the ALJ concluded that H. Maltby and J. Bassett could not be held liable as aiders and abettors because the Agency failed to cite ORS 659A.030(1)(g) in its Formal Charges as the basis for their liability as aiders and abettors. The Agency's exception is GRANTED for reasons cited in the Opinion.

F. "**The Damages Awarded are an Insufficient Response to the Unlawful Conduct in this Case."** The Agency asserts that the "damages in this case do not reflect the seriousness of Respondents' discriminatory actions in this case." In response, the forum has increased the award to Guevara and also awarded damages to Calderon. However, the forum awards no damages to Yoc, Osorio, R. Herrera, and J. Herrera because they were not found to be the victims of an unlawful employment practice by Respondents.[32]

EXCEPTIONS BY RESPONDENTS MALTBY BIOCONTROL, INC. AND HOWARD MALTBY

Respondents MBI and H. Maltby also filed exceptions. Their exceptions focus on two points: (1) Guevara was not discharged by MBI; and (2) the award in the Proposed Order of $50,000 to Guevara for emotional damages is not supported by the evidence and should be reduced to nothing. The forum addresses these issues separately.

[32] Even if the forum had found that Respondents had committed unlawful employment practices against the aggrieved persons who did not testify, the forum would have been hard-pressed to award emotional distress damages to those persons because there was no testimony as to the particulars of their emotional distress, and this forum has long held that the amount of an award for emotional distress damages depends on the "facts presented by each complainant."

Discharge

Respondents advance a number of arguments in support of their discharge theory.

First, Respondents contend that Exhibit A13, a chart of MBI's employees provided to the Agency's investigator that includes a notation that Guevara's employment relationship with MBI ended on January 21, 2011, viewed in the context of Guevara's "final" paycheck being mailed to him that same day, is "strong evidence" that Guevara was terminated on January 21, 2011. The forum acknowledges that this evidence is probative of the conclusion that Respondents seek. However, it is no more than that. Unlike Respondents, the forum did not conclude that the check in question was Guevara's "final" paycheck, but merely his paycheck for his work performed through January 21, 2011. Regarding Exhibit A13, there was no testimony that this exhibit was anything other than a document created in response to Guevara's complaint. As such, it is entitled to no more evidentiary weight than information contained in an unsworn position statement.

Respondents take exception to the ALJ's finding that there was an absence of evidence showing that Guevara quit his job at MBI. Respondents' point that Guevara left MBI's employment in Klamath Falls on January 21, 2011, is valid. However, this fact alone does not establish that Guevara quit MBI's employment. MBI had two locations, and testimony by both H. Maltby and Guevara established that they both expected that Guevara would continue performing work for MBI after that date, albeit on a limited basis, at MBI's California location. There was no suggestion that Guevara would have to reapply for employment with MBI in California and no evidence that Guevara ever stated that he was quitting MBI's employment. *Bonnivier v. Dairy Coop Ass'n,* 361 P2d 262 (1961), the case relied upon by Respondents to support their exception, is not on point.

Respondents argue that "[u]nder the ALJ's definition of employment, a company that discharges a worker could still technically employ that worker if they ever offer the discharged employee a job again." Respondents stretch the facts to make their point, as the forum has concluded that Guevara was not discharged. The forum likewise rejects Respondents' urging that it import and adopt the definition of "employment relationship" used by the Oregon Employment Department.

Emotional Distress Damages

Respondents contend that the ALJ's proposed award of $50,000 of emotional distress damages to Guevara is excessive, unsupported by evidence in the record, and that Guevara be awarded $0. The forum disagrees for reasons set out in the Opinion.

33 BOLI ORDERS

ORDER

A. NOW, THEREFORE, as authorized by ORS 659A.850(2) and ORS 659A.850(4), and to eliminate the effects of Respondent Maltby Biocontrol, Inc.'s violation of ORS 659A.030(1)(b) and Howard Maltby's and James Bassett's corresponding violations of ORS 659A.030(1)(g) with respect to Erix Guevara, and as payment of the damages awarded, the Commissioner of the Bureau of Labor and Industries hereby orders **Maltby Biocontrol, Inc.**, **Howard Maltby,** and **James Bassett** to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 1045 State Office Building, 800 NE Oregon Street, Portland, Oregon 97232-2180, a certified check payable to the Bureau of Labor and Industries **in trust for Erix Guevara** in the amount of FIFTY THOUSAND DOLLARS ($50,000.00), representing compensatory damages for physical, emotional, and mental suffering Erix Guevara experienced as a result of these violations; plus interest at the legal rate on the sum of FIFTY THOUSAND DOLLARS ($50,000.00) from the date of the Final Order until Respondents Maltby Biocontrol, Inc., Howard Maltby, and James Bassett comply herein, until paid.

B. NOW, THEREFORE, as authorized by ORS 659A.850(2) and ORS 659A.850(4), and to eliminate the effects of Respondent Maltby Biocontrol, Inc.'s violations of ORS 659A.030(1)(a) and ORS 659A.230(1) and Howard Maltby's corresponding violations of ORS 659A.030(1)(g) with respect to Erix Guevara, and as payment of the damages awarded, the Commissioner of the Bureau of Labor and Industries hereby orders **Maltby Biocontrol, Inc.** and **Howard Maltby** to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 1045 State Office Building, 800 NE Oregon Street, Portland, Oregon 97232-2180, a certified check payable to the Bureau of Labor and Industries **in trust for Erix Guevara** in the amount of FIFTY THOUSAND DOLLARS ($50,000.00), representing compensatory damages for physical, emotional, and mental suffering Erix Guevara experienced as a result of these violations; plus interest at the legal rate on the sum of FIFTY THOUSAND DOLLARS ($50,000.00) from the date of the Final Order until Respondents Maltby Biocontrol, Inc. and Howard Maltby comply herein, until paid.

C. NOW, THEREFORE, as authorized by ORS 659A.850(2) and ORS 659A.850(4), and to eliminate the effects of Respondent Maltby Biocontrol, Inc.'s violation of ORS 659A.030(1)(b) with respect to Robinson Guillermo Calderon and Howard Maltby's and James Bassett's corresponding violations of ORS 659A.030(1)(g), and as payment of the damages awarded, the Commissioner of the Bureau of Labor and Industries hereby orders **Maltby Biocontrol, Inc.**, **Howard Maltby,** and **James Bassett** to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 1045 State Office Building, 800 NE Oregon Street, Portland, Oregon 97232-2180, a certified check payable to the Bureau of Labor and Industries **in trust for Robinson Guillermo Calderon** in the amount of ONE HUNDRED THOUSAND DOLLARS ($100,000.00), representing compensatory damages for physical, emotional, and mental suffering Robinson Guillermo Calderon experienced as a result of the violations; plus interest at the legal rate on the sum of ONE HUNDRED THOUSAND DOLLARS ($100,000.00) from the date of the Final Order Respondents Maltby Biocontrol, Inc., Howard Maltby, and James Bassett comply herein, until paid.

In the Matter of

NW HOUSING ALTERNATIVES, INC.

Case No. 05-14
Final Order of Commissioner Brad Avakian
Issued April 28, 2014

SYNOPSIS

Requester Northwest Housing Alternatives, Inc., a non-profit corporation, intends to redevelop its Milwaukie, Oregon campus to replace the buildings that provide affordable housing, office space, and a homeless shelter. Upon Requester's request for a determination, the Commissioner determined that the proposed redevelopment is a single "project" under the prevailing wage laws and that it should not be divided into separate projects. Consequently, prevailing wages must be paid to the workers on the entire redevelopment. ORS 279C.817 and OAR 839-025-0005; ORS 279C.827(2); ORS 279C.840.

The above-entitled case came on regularly for hearing before Daniel Rosenhouse, designated as Administrative Law Judge ("ALJ") by Brad Avakian, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on the morning of January 28, 2014, commencing at 9:00 AM, in the Gregg Conference Room at the Portland, Oregon office of the Bureau of Labor and Industries (BOLI) at 800 NE Oregon Street.

The Agency was represented by Administrative Prosecutor Adriana Ortega, an employee of the Agency. Requester was represented by its Housing Director and authorized representative, Jonathan Trutt.

At the hearing, Agency Exhibits A-1 through A-8 were admitted, as were Requester's Exhibits R-1 through R-11. Exhibits X-1 through X-7 were also in the record. At the conclusion of the hearing the ALJ requested additional material from Requester and both the Agency and Requester were invited to supply additional legal argument. Accordingly, two documents were received from the Requester on February 4, 2014, and have been marked as Exhibits X-8 and X-9. The Agency's Legal Brief was also received that date and has been marked as Exhibit X-10. The Agency's Comments on Exhibits X-8 and X-9 were received the following day, and marked Exhibit X-11. And Requester's Response to Agency's Legal Brief, was received on February 14, 2014 and is marked Exhibit X-12. The only witnesses who testified at the hearing

were Requester's Executive Director, Martha McLennan, and the Agency's, former investigator of prevailing wage inquiries, Cristin Casey.

The Proposed Order was issued on April 1, 2014. No exceptions have been filed.

Having fully considered the entire record in this matter, I Brad Avakian, Commissioner of the Bureau of Labor and Industries, hereby make the following Findings of Fact, Conclusions of Law, Opinion, and Order.

FINDINGS OF FACT

Procedural Background and Jurisdictional Facts

1. On June 24, 2013, Requester Northwest Housing Alternatives, Inc. submitted its written Request to the Prevailing Wage Rate Unit of the Agency's Wage and Hour Division (the Division). (Ex. A-1) The Request sought a determination of whether its proposed Project to redevelop its campus in Milwaukie, Oregon would be a public works on which payment of the prevailing rate of wage is or would be required under ORS 279C.840. The Request, supplemented by additional material, describes all relevant details of the proposed Project. No public agencies were known to be associated with the Project at the time, although funding from Clackamas County was, and is, anticipated.

2. The Request outlines a proposed Project by which existing buildings on the campus are to be demolished, and replaced with three components: an office building; a homeless shelter for families; and 40 units of affordable rental housing.

3. By June 27, 2013, the Requester had submitted all documents, records, and other information it deemed necessary, or which the Prevailing Wage Rate Unit of the Division had requested, in order to make the Determination.

4. On June 28, 2013, Ms. Casey wrote and the Administrator of the Division, acting on behalf of the Commissioner, signed its Determination, finding that the Prevailing Wage Rate laws, ORS 279C.800 to ORS 279C.870, and the associated administrative rules would apply to the Project. The Determination was issued and mailed to the Requester; there is no evidence it was mailed to Clackamas County. It cites ORS 279C.800(6)(a)(B) and the fact that the Project, although privately owned, will use $750,000 or more in funds of a public agency; that the exemption for certain residential projects does not apply under ORS 279C.810(2)(d) because the project also includes commercial space; and that the project does not meet the criteria for division into separate projects in ORS 279C.800(6)(a). (Ex. A-4; Casey Testimony)

5. The Determination includes a notice that the Requester may request reconsideration of the Determination and of its right to a hearing under the Administrative Procedures Act.

6. The Requester timely requested a hearing on July 15, 2013. (Ex. A-5)

7. On November 29, 2013, the ALJ issued a Notice of Hearing, setting the time and place of the hearing. (Ex. X-2) The Notice of Hearing includes a copy of the Determination, along with information regarding representation at the hearing by counsel or an authorized representative, a summary of rights and procedures at the hearing, citations to the legal authority under which the hearing would be held, and other notices and information required by law.

8. On January 8, 2014, pursuant to an Interim Order issued by the ALJ, the Agency submitted a copy of the Determination, the name of its proposed witness, and materials provided by the Requester and material relied upon by the Agency in reaching the Determination. (Ex. X-5)

9. On January 8, 2014, also pursuant to the Interim Order, the Requester designated its witness, Martha McLennan, and it submitted a pre-hearing statement identifying its reasons for contesting the Determination. (Exhibits X-6 and X-7)

10. At the start of the hearing, the ALJ orally advised the Agency and Requester of the issues to be addressed, the matters to be proven, and the procedures governing the conduct of the hearing.

Substantive Facts

11. Requester is a domestic non-profit corporation overseen by a Board of Directors. Its chief executive officer is Martha McLennan. Requester has developed affordable housing projects throughout Oregon. It currently has a managing limited partnership interest in 28 such affordable housing projects. It has 32 employees. (Exhibit R-1; McLennan Testimony)

12. Requester has a “campus” in Milwaukie near a recently constructed light-rail transit station. It maintains office facilities there, a homeless shelter, and housing for low-income residents. (McLennan Testimony)

13. Requester also provides social work services to the residents of the homeless shelter, and to other persons in Clackamas County to help prevent them from being evicted from their homes, or to achieve rapid re-housing for those who have lost their homes. (McLennan Testimony)

14. Starting in May 2010, Requester’s Board has envisioned a single redevelopment of its campus that would meet three basic needs: Replacing the homeless shelter, replacing the transitional housing, and replacing its office space. The agenda of the May 2010 meeting of its Board refers to the project as “campus redevelopment.” The agenda for the May 2011 Board meeting has attached to it a “Strategic Plan,” containing as its only subject, the Final Report of the Campus Re-Development Team, which explains its exploration of “the possibilities for re-development of the

site" and which recommends as a Goal for 2011, "Design a plan for re-development of the NHA [*i.e.,* Requester Northwest Housing Alternatives, Inc.] campus to provide quality office space, homeless service programs and affordable housing at this transit oriented location." (Ex. X-8)

15. The minutes from Requester's Board meeting in February 2013 refer to finding a new land use consultant for the "NHA campus." (*Id.*)

16. Beginning in 2016, on a 1.75 acre parcel it owns in Milwaukie, Oregon, Requester intends to accomplish the redevelopment. It intends to demolish all the buildings currently on its site—a shelter for homeless families, two office buildings and nine units of rental housing. It intends to replace those buildings with three components having the same general purposes as their predecessors—a new "homeless shelter/community building," with eight units; one office building; and three buildings with a total of 30-40 units of affordable rental housing. None of the buildings will be more than four stories tall. Housing in the affordable housing units will be restricted to those whose household income is 60% or less of area median income. (Exhibits X-6 and R-3)

17. All buildings will be designed by the same architect, but with a separate contract for each component. Construction of all three components will occur over 18 months, under three separate contracts, with a single general contractor, in part to facilitate "sequencing and staging" of the construction. (Ex. X-6; Testimony of McLennan)

18. The office building and homeless shelter will be owned by Requester. Requester will indirectly own only 0.01% of the affordable housing, but it will, through a limited liability company that it solely controls, act as the managing general partner of the limited partnership that will build and own the affordable housing. In the event of conflicts between the private investor owners and Requester, the interests of Requester will control. (McLennan Testimony; Exhibits X-6 and X-9)

19. Approximately $2.56 million will be needed to build the new office building, all of which will be raised privately by Requester. (*Id.*)

20. Of the $586,331 needed to build the homeless shelter/community building, $300,000 is expected to come from a Community Development Block Grant from Clackamas County, and the remainder from Requester's privately raised funds. (*Id.*)

21. Of the approximately $9.6 million needed to build the affordable housing, $800,000 will be public financing from Clackamas County, and another $300,000 is expected to come from other public sources; the vast majority of the balance will come from equity from federal tax credits and from private financing made possible at reduced interest rates by state tax credits. (*Id.*)

22. The various funding sources require strict accounting to show that the money supplied is being used for the purpose intended by the funders, *i.e.,* money for the

homeless shelter must be used for the shelter; money for the affordable housing must be used for the affordable housing; money for the office building must be used for the office building. (McLennan Testimony)

23. The public agencies supplying financial assistance—Clackamas County and the state and federal governments—will not operate the various facilities to be built; operation will be solely by Requester. (*Id*.)

24. The proposed configuration of the buildings on the campus is shown on Exhibit R-3.

25. The parking lot on the campus will be available for use by the office workers, the residents of the affordable housing units and the residents of the homeless shelter. (*Id*.)

26. Requester's employees will be based in the office building. Their work will include management of the affordable housing. The work of some employees will also include management of the homeless shelter and the programs by which employees provide social services to residents of the shelter, as well as Clackamas County residents receiving home-based assistance. (*Id*.)

27. Staff assistance to residents of the homeless shelter will include weekly meetings at the shelter with each household. Those meetings are each expected to last between 30 and 60 minutes. (*Id*.)

CONCLUSIONS OF LAW

1. The Commissioner has jurisdiction over this matter. ORS 279C.817(4).

2. Requester has an interest in whether its proposed Project to redevelop its campus in Milwaukie, Oregon would be a public works on which payment of the prevailing rate of wage is or would be required under ORS 279C.840, and it requested a Determination of that question by the Commissioner of the Bureau of Labor and Industries in the manner required by, and in compliance with, OAR 839-025-0005.

3. A Determination was issued, and the Requester properly sought, pursuant to OAR 839-025-0005 (7) and ORS 279C.817 (4), a hearing under ORS 183.415 in order to challenge the Determination.

4. A copy of the Determination was not required to be mailed to Clackamas County or any other public agency.

5. The Requester's proposed Project is a public works.

6. The Requester's proposed Project should not be divided into separate projects pursuant to ORS 279C.827.

7. Payment of the prevailing rate of wage to workers on the Project would be required under ORS 279C.840.

8. Pursuant to ORS 279C.817(1), the Commissioner of the Bureau of Labor and Industries has the authority under the facts and circumstances of this case to make the determination about whether Requester's proposed redevelopment of its campus would be a public works on which payment of the prevailing rate of wage would be required under ORS 279C.840.

OPINION

Requester Northwest Housing Alternatives, Inc. is a private non-profit corporation that develops and manages affordable housing for low-income Oregonians in Clackamas County and on more than a score of other sites throughout the state. It also owns and operates a homeless shelter in Clackamas County at its Milwaukie, Oregon site, and it provides associated social services to the residents of that shelter and to other individuals in Clackamas County who are in danger of losing their homes. It also currently maintains an office building and it maintains residential housing at its Milwaukie site, which qualifies as "affordable housing" under ORS 279C.810(2)(d)(A).

Requester intends to tear down the buildings at its Milwaukie site and replace those buildings there with a new office building, a new homeless shelter/community building, and three new buildings that will provide affordable housing to low-income households.

The question presented is whether prevailing wages must be paid to the workers who will perform the labor in the demolition of the old buildings and the construction of the new ones—will that construction fit within the definition of a "public works" and therefore be subject to the prevailing wage requirements of ORS 279C.800 *et seq*? The Commissioner is authorized and directed to answer that question via a "determination," if certain procedural pre-requisites are met, including the obligation to provide all the needed documents, records or other information. ORS 279C.817(1). OAR 839-025-005(1). Those pre-requisites are met in this case. A Determination was issued, finding that the prevailing wage rates must be paid to the workers. Requester exercised its right to challenge that determination. ORS 279C.817(4). A hearing has been held. That hearing has led to this Final Order.

The first issue is whether the Requester's proposed Project is a single public works project, as that term is defined at ORS 279C.800(6)(a)(B). The subsidiary question is, if the redevelopment is a single project, should it be divided into three separate projects, under the provisions of ORS 279C.827(2)? If it is a single public works project and is not divided, there is no question but that prevailing wages must be paid, because, even though the Requester is a private entity and private funds are being used, the total public funds in the project exceed $750,000, and it is therefore a "public works," with no applicable exemption. ORS 279C.800(6)(a)(B).

If the campus redevelopment consists of separate public works, or if it should be divided into three separate projects, then each project will need to be evaluated on its own individual characteristics to determine whether prevailing wages need to be paid; payment of prevailing wages could conceivably be avoided because one or more of the

separate projects is not, in and of itself a public works, or it might be avoided because an exemption might apply. *See, e.g.,* ORS 279C.810(2)(d)(A), relating to affordable housing.

Because the Forum finds that Requester's Project is one single public works project, and that it should not be divided, the Forum need not and does not address the latter questions.

Requester's Planned Redevelopment of its Campus is a Single Project.

The definition of "public works" under Oregon's prevailing wage laws is in ORS 279C.800(6)(a). It provides—

> (a) "Public works" includes, but is not limited to:
>
> (A) 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;
>
> (B) A project that uses funds of a private entity and $750,000 or more of funds of a public agency for constructing, reconstructing, painting or performing a major renovation on a privately owned road, highway, building, structure or improvement of any type;
>
> …

In interpreting a statute, the forum looks first to the text and context of the statute; pertinent legislative history may also be consulted. *State v. Gaines, 346 Or 160, 206 P3d 1042 (2009)* modifying *PGE v. BOLI, 317 Or 606, 859 P2d 1143 (1993).* Turning first to the text of the statute, the Forum tries to determine the meaning of the term "project;" it is defined neither in the statute, nor in appellate case law interpreting the statute. In the context of an earlier version of the prevailing wage statutes, the Commissioner has found that a "project" would include "a multi-phase endeavor that may encompass more than one contract." *In the Matter of Klamath Falls, 19 BOLI 266, 282 (2000).*

"Project" is also a word of common meaning, however, and generally, one turns to dictionary definitions to determine the ordinary meaning of undefined statutory terms. *See, e.g., Barkers Five, LLC v. LCDC,* 261 Or App 259, 298-99 (2014). The Forum finds instructive the following definitions from Webster's Third New International Dictionary (Unabridged) 1813 (2002):

> **1 :** a specific plan or design as …
>
> …
>
> **b.** a devised or proposed plan
>
> …
>
> **3 :** a planned undertaking: as

…

b (1): an undertaking devised to effect the reclamation or improvement of a particular area of land …

(2): the area of land involved

c : a systematically built group of houses or apartment buildings; *esp* **:** one that includes community facilities and has been socially planned with government support to serve low-income families

d : a vast enterprise usu. sponsored and financed by a government …

The definition under **3 b**(1) best fits the facts in this case. Notwithstanding Requester's claims that each of the three proposed buildings serves a separate purpose, it is clear from the history of the board's consideration, as reflected in its minutes, that the reclamation of the entire parcel has been considered as a unitary project from the beginning. While Requester's Board or staff may have considered the possibility of siting one or more of the buildings separately, the reality is that a plan to reclaim the entire parcel together has dominated consideration. The first mention of the plan in an agenda of Requester's Board, in May 2010, refers to "campus re-development." The same term is used in the plan's next mention in a Board agenda, one year later. And it is clear that the final reality will be a single redevelopment of the Requester's campus, with all three components—office building, homeless shelter/community building, and affordable housing—designed by the same architect and built by the same general contractor at the same time.

Requester argues that *State ex rel Gardner v. City of Salem,* 231 Or App 127, 219 P3d 32 (2009) dictates a different result. Requester argues that *City of Salem* is instructive because it analyzed issues similar to those at stake in this case, and that using various factors that are present both here and in *City of Salem*, the Court determined that a non-public works construction adjacent to construction that is a public work, is not in and of itself a public works project. (Requester's Response, page 2, Ex. X-12) The various factors there consisted, in essence, of a very close physical connection and physical inter-relationship between a publicly funded conference center and a privately funded hotel, as well as reciprocal leases and easements between the owners; similar to this case, the conference center and hotel were jointly designed and developed, and built simultaneously by the same contractor. *City of Salem, 231 Or App, 131-32.*

But Requester is mistaken in its reliance on *City of Salem*. In that case, the Court of Appeals was confronted with a very different question. Perhaps most importantly, it was analyzing a factual situation that arose in 2003 and the court relied only on statutes in effect between 2003 and 2005, *City of Salem at 130, fn.1*. The provisions of ORS 279C.800(6)(a)(B), which is the definition of "public works" at issue here, and which defines a "public works" as a "project," was not considered by the Court of Appeals in *City of Salem*; that provision was not enacted until 2007. *2007 Or Laws Chapter 764, Section 35*.

Accordingly the Court of Appeals did not consider whether the conference center and hotel were a single "project," which is the question here, under subsection (B) of ORS 279C.800(6)(a). The Court of Appeals considered only whether the conference center and hotel were a single "building," per the statutory definition now at subsection (A) of ORS 279C.800(6)(a).[1] *City of Salem, at 136* ("The question before us is whether, viewing the facts in the light most favorable to BOLI, there exists a genuine issue of material fact as to whether the hotel and conference center are a single building (*i.e.*, a single public work) or separate buildings—one private and one public.") (Parenthetical in original.)

While it is certainly true that the construction of a single building may constitute a "public works," *see Portland Development Comm. v. BOLI*, 216 Or. App. 72, 78, 171 P.3d 1012 (Or. App., 2007), it is equally true, as seen from the dictionary definition quoted above, that a "project"—which is now a completely separate statutory sub-set of "public works"—may be much more all-encompassing than a single building. The factors relied upon by the Court of Appeals in *City of Salem* to determine that the hotel and conference center were two separate buildings is, at best, of only very modest assistance when determining what constitutes a "project." The forum concludes that notwithstanding the presence of several different buildings in Requester's campus redevelopment, and even though those buildings serve various interests in the over-all mission of Requester, the over-all redevelopment constitutes a single project.

The Requester's Project should not be Divided into Two or Three Projects.

Having determined that the Requester's campus redevelopment is a single "project," the Forum now addresses whether that project should be separated into two or more separate projects pursuant to ORS 279C.827(2).

ORS 279C.827(2) provides:

> If a project is a public works of the type described in ORS 279C.800(6)(a)(B) or (C), the commissioner shall divide the project, if appropriate, after applying the considerations set forth in subsection (1)(c) of this section to separate the parts of the project that include funds of a public agency … from the parts of the project that do not include funds of a public agency.

Each statutorily-mandated consideration under ORS 279C.827(1)(c) is considered in turn.

(A) The physical separation of the project structures.

The buildings are all on the same contiguous 1.75 acre parcel of land. They are physically separate, but all within a short walking distance of one another. Moreover, Exhibit R-3 shows that the rectangular homeless shelter is to be built among the

[1] At the time at issue, the provision was codified at ORS 279.348(3).

affordable housing buildings. It is flanked on its two long sides by two of those three buildings. One short side faces the office building and the third affordable housing building. The other short side faces the parking lot that will be used by all the users of the full campus site. This factor weighs toward not dividing the project.

(B) *The timing of the work on the project phases or structures.*

The design and construction work on all the structures will occur at the same time. This factor weighs heavily toward not dividing the project.

(C) *The continuity of project contractors and subcontractors working on the project parts or phases.*

Nothing is known about the subcontractors. The general contractor will be the same for all the structures. This factor weighs heavily in favor of not dividing the project.

(D) *The manner in which the public agency and the contractors administer and implement the project.*

Here, of course, there is no "public agency" administering the project; it will be the Requester, or its designee who will have the responsibility to work with the general contractor throughout the entirety of its campus redevelopment.

This responsibility applies to all the structures, including the affordable housing, which it will not own, but over which it has nearly plenary authority. Requester's executive director testified that a single general contractor was chosen to facilitate "sequencing" and "staging." This suggests the entire project will be administered and implemented in a single coordinated fashion. This factor weighs in favor of not dividing the project.

(E) Whether a single public works project includes several types of improvements or structures.

All of the improvements are buildings designed for occupancy by people. None of them are, for example, warehouses or bare infrastructure. None of them will be more than three stories in height. The homeless shelter and the three affordable housing buildings will serve as residences, one for permanent residency and the other for temporary residency. The office building, of course, is designed for commercial occupancy. This factor, because of the significant difference between the commercial office space and the residential buildings, weighs slightly in favor of dividing the project.

(F) Whether the combined improvements or structures have an overall purpose or function.

There is no question but that the entire campus redevelopment serves—in the words of the template that will serve as the limited partnership agreement between

Requester's solely controlled LLC and the future private investor—the Requester's broad general purpose or function of "providing decent, safe, sanitary and affordable housing for low income persons and families." Ex. X-9, page 20. But Requester objects vigorously that reliance on its general mission is a brush that sweeps too broadly. Its objection, however, is not convincing.

First, Requester's broad over-all purpose as described in its limited partnership agreements, is not significantly less specific or discrete than other projects previously treated by the Commissioner as one project. *Compare, e.g.,* the improvement of the single municipal water system in *In the Matter of City of Klamath Falls*, 19 BOLI 266, 285-86 (2000), which purpose the Commissioner found to weigh heavily toward the finding of a single project, despite several different undertakings at different locations.

Moreover, the ownership, intended usage, and management plans also point to a single project with a common purpose. Requester itself will own both the office building and homeless shelter. Staff stationed at the office building will provide social services to the residents of the homeless shelter at the shelter, conveniently located just a short walk away from their offices. And parking facilities on the site will serve the needs of the users of all three components of the campus. A smaller benefit derives from co-placement of the office and the affordable housing units. But placement of the homeless shelter on the same campus with the affordable housing also provides some social benefit contributing to the common purpose; in the words of Requester's executive director, she hopes it will make for a "more welcoming" community.

And while it is true that the affordable housing component will be 99.99% owned by a private investor, the difference in ownership does not represent a significant variance between Requester and the private investor in the common purpose, function, or interests served by the affordable housing. This is because Requester's wholly owned and controlled limited liability company will have, as the general partner in the limited partnership that owns the affordable housing, broad over-all management rights and responsibilities for the affordable housing units. Generally, it will have "full, complete and exclusive discretion to manage and control the business of the Partnership for the purposes stated in Article III." (Ex. X-9, page 20)

And those purposes extend not just to operation of the housing units, but to construction, as well.

The Purposes section of the Partnership Agreement also explains that in the event of a conflict between the obligation to operate the affordable housing in a manner consistent with Requester's charitable purposes and the duty to maximize profits for the investor, the latter must yield to the former. Article III, Section 3.01 of the template partnership agreement, Exhibit X-9, at page 20, produced by Requester provides:

> <u>Purpose of the Partnership.</u> The Partnership has been organized exclusively to own the Land and to develop, finance, Construct, own, maintain, operate and sell or otherwise dispose of the Project, in order to obtain for the Partners long-term

appreciation, cash income, and tax benefits consisting of Tax Credit and tax losses over the term hereof.

The Investor Limited Partner acknowledges that the Guarantor[2] (which is also the sole member of the General Partner) is an exempt organization under Section 501(c)(3) of the Internal Revenue Code engaged in providing low-income housing. The Investor Limited Partner acknowledges that the Partnership will operate housing that it owns in a manner that furthers the charitable purpose of the Guarantor and members of the General Partner by providing decent, safe, sanitary and affordable housing for low income persons and families. *In the event of a conflict between (i) the obligations of the General Partner under this Agreement to operate the Partnership in a manner consistent with the charitable purpose set forth above, and (ii) any duty to maximize profits for the Investor Limited Partner, the conflict shall be resolved in a manner consistent with the charitable purpose of the Guarantor and member of the General Partner's purpose as set forth above.*
(Emphasis supplied.)

For all these reasons, the various components of the Requester's campus redevelopment project serve a common purpose and the facts relevant to this issue point to a decision to not divide the project.

ORDER

NOW, THEREFORE, as authorized by ORS 279C.817 (1), and to carry out the purposes of ORS Chapter 279C, the Commissioner of the Bureau of Labor and Industries hereby orders and determines that the entirety of Requester's proposed Project, as described in its Determination Request dated June 17, 2013, supplemented by the evidence and exhibits produced in connection with the hearing on this matter, is a public works under Oregon's prevailing wage laws on which the workers must be paid the prevailing wage, as required by ORS 279C.840.

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[2] In the template, the Guarantor is the Requester and its limited liability company. Ex. X-9, page 9.

In the Matter of

FARWEST HATCHERY LLC

Case Nos. 31-14 & 37-14
Final Order of Commissioner Brad Avakian
Issued May 2, 2014

SYNOPSIS

Two wage claimants worked for Respondent and were not paid their earned wages. After filing their wage claims, one claimant's wages were paid in full the other wage claimant's wages were paid in part from BOLI's Wage Security Fund ("WSF"). The Agency moved for and was granted summary judgment as to the remaining wages owed by Respondent, the wages paid out from the WSF, and the 25 percent WSF penalty sought by the Agency. The forum found that Respondent's failure to pay the wages was willful and assessed penalty wages. The forum also ordered Respondent to pay a 25 percent penalty on the wages paid to each claimant from the WSF.

The above-entitled cases were assigned to Alan McCullough, designated as Administrative Law Judge ("ALJ") by Brad Avakian, 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 administrative prosecutor Cristin Casey, an employee of the Agency. After the Agency issued an Order of Determination ("OOD"), the Agency moved for and was granted summary judgment with respect to both cases.

FINDINGS OF FACT – PROCEDURAL

1) On or about July 5, 2013, Everardo Calderon ("Claimant Calderon") filed a wage claim with the Agency's Wage and Hour Division alleging that Respondent owed him unpaid wages. Calderon assigned his wage claim to the Agency.

2) On or about September 3, 2013, Jan McMain ("Claimant McMain") filed a wage claim with the Agency's Wage and Hour Division alleging that Respondent owed her unpaid wages. McMain assigned her wage claim to the Agency.

3) On August 29, 2013, Agency issued OOD #13-1743 in which it alleged that Claimant Calderon was employed by Respondent from March 26 through April 9, 2013, at the pay rate of $500.00 per week, equaling $50.00 per hour. The OOD alleged that Claimant Calderon was only paid $250.00 for his work, leaving a balance due and owing of $1,250.00 in unpaid wages, which was paid to him from the Wage Security

Fund ("WSF") pursuant to ORS 652.414. The OOD further alleged that Claimant Calderon is owed $12,000.00 in ORS 652.150 penalty wages, and that Respondent is liable to reimburse the WSF for the $1,250.00 paid to Claimant Calderon.

4) On September 27, 2013, Agency issued OOD #13-2080 in which it alleged that Claimant McMain was employed by Respondent from February 1 through March 13, 2013, at the pay rate of $14.00 per hour, that she worked a total of 194.75 hours, 7.75 of which were overtime hours, and earned a total of $2,780.75. The OOD alleged that Claimant McMain is owed $2,780.75 in unpaid wages, of which $2,058.00 was paid to her from the WSF pursuant to ORS 652.414, leaving $772.75 in unpaid, due and owing wages. The OOD further alleged that Claimant McMain is owed $3,360.00 in ORS 652.150 penalty wages, and that Respondent is liable to reimburse the WSF for the $2,058.00 paid to Claimant McMain.

5) On October 3, 2013, Respondent filed an answer and request for hearing.

6) On February 27, 2014, the forum issued a Notice of Hearing to Respondent, the Agency, and Claimants setting the time and place of hearing for 9 a.m. on April 8, 2014, at the Portland office of the Bureau of Labor and Industries. Together with the Notice of Hearing, the forum sent a copy of the OODs, a document entitled "Summary of Contested Case Rights and Procedures" containing the information required by ORS 183.413, a document entitled "Servicemembers Civil Relief Act (SCRA) Notification," and a copy of the forum's contested case hearings rules, OAR 839-050-000 to 839-050-0445.

7) On March 4, 2014, the Agency filed a motion for summary judgment with respect to both cases, contending it was entitled to judgment as a matter of law. The same day, the ALJ issued an interim order setting a deadline of March 11, 2014, for a written response by Respondent. Respondent did not file a response.

8) On March 18, 2014, the ALJ issued interim orders **GRANTING** the Agency's motions for summary judgment. The ALJ's interim orders are reprinted below:

Everardo Calderon

"**INTRODUCTION**

"On August 29, 2013, Agency issued Order of Determination #13-1743 ('OOD') in which it charged that Respondent owes $1,250.00 in earned and unpaid wages to Everardo Calderon ('Claimant') for work Claimant performed for Respondent from March 26 through April 9, 2013, and $12,000.00 in ORS 652.150 penalty wages based on Claimant's hourly wage rate of $50.00 per hour. The OOD further alleges that the Agency paid Claimant $1,250.00 out of the Wage Security Fund ('WSF') after Claimant filed a wage claim with the Agency and assigned the claim to the Agency, and that the Commissioner is entitled to recover from Respondent the sum of $1,250.00 paid out of the WSF and a 25 percent penalty on that sum of $312.50.

"Respondent was served with the OOD and filed an answer and request for hearing on October 3, 2013. Respondent's answer is reprinted below:

> 'In response to paragraph II, there is no immediate denial of the wages owed in the amount of $1250. If company records are found which would indicate otherwise, these wages will be disputed.
>
> 'In response to paragraph III, Penalty Wages, company denies the claimant of $12,000 in penalty wages as the company intends to pay the wages of paragraph II.'

"On March 4, 2014, the Agency filed a motion for Summary Judgment, contending it was entitled to judgment as a matter of law on all of the allegations in its OOD. Among other things, the motion included a copy of the OOD, Claimant's assignment of his wage claim to WSF, and documentation of the WSF payout of $1,250.00 in gross wages to Claimant.

"In an interim order dated March 4, 2014, the undersigned ALJ gave Respondent until March 11, 2014, to file a response to the Agency's motion. The interim order included the following information:

> 'OAR 839-050-0150(4) provides that any participant may make a motion for summary judgment for an accelerated decision in favor of the participant as to all or part of the issues raised in the pleadings. In ruling on the Agency's motion, the forum will consider the existing record, the supporting documents provided by the Agency, and any documents provided by Respondent in response to the Agency's motion, in a manner most favorable to Respondents. Respondent's written response, including any opposing affidavits, if applicable, and supporting documents must be filed no later than **Tuesday, March 11, 2014**. OAR 839-050-0150. The forum will rule on the Agency's motion promptly thereafter.
>
> '**PLEASE NOTE:** <u>Respondent has the burden of producing evidence on any issue raised in the motion as to which the Respondent has the burden of persuasion at hearing.</u> *See* ORCP 47C.
>
> 'If Respondent fails to file a written response, the forum will grant the Agency's motion if the pleadings and all documents filed in support of the motion show that there is no genuine issue as to any material fact and that the Agency is entitled to judgment as a matter of law.'

"Respondent did not file a response and the forum rules on the motion based on the OOD, Respondent's answer, and the exhibits accompanying the Agency's motion.

"SUMMARY JUDGMENT STANDARD

A motion for summary judgment may be granted when 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 standard for determining if a genuine issue of material fact exists and the evidentiary burden on the participants is as follows:

> ' * * * No genuine issue as to a material fact exists if, based upon the record before the court viewed in a manner most favorable to the adverse party, no objectively reasonable juror could return a verdict for the adverse party on the matter that is the subject of the motion for summary judgment. The adverse party has the burden of producing evidence on any issue raised in the motion as to which the adverse party would have the burden of persuasion at [hearing].' ORCP 47C.

"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).

"LIABILITY FOR UNPAID WAGES

"With respect to Claimant's unpaid wages and the WSF payout, paragraph II of the OOD alleges all the elements of the Agency's prima facie case, and the exhibits submitted with the Agency's motion corroborate those allegations. Respondent's answer, quoted earlier, merely states '[i]n response to paragraph II, there is no immediate denial of the wages owed in the amount of $1250. If company records are found which would indicate otherwise, these wages will be disputed.'

OAR 839-050-0130 provides, in pertinent part:

> '(1) A party filing a written request for a hearing or a party served with Formal Charges must file a written response, referred to as an "answer," to the allegations in the charging document.
>
> '(2) The answer must include an admission or denial of each factual matter alleged in the charging document and a statement of each relevant defense to the allegations. A general denial is not sufficient to constitute an answer. * * *
>
> '(3) Except for good cause shown to the administrative law judge, factual matters alleged in the charging document and not denied in the answer will be deemed admitted by the party.'

Pursuant to OAR 839-050-0130(3), Respondent's failure to deny the allegations in paragraph II of the OOD or to contest the exhibits submitted in support of the Agency's motion constitutes an admission of the allegations in the OOD. Accordingly, the forum concludes that Respondent owes Claimant $1,250.00 in unpaid, due and owing wages, and that the Agency has already paid that sum to Claimant from the WSF.

"LIABILITY FOR 25 PERCENT PENALTY

"In paragraph IV of its OOD, the Agency seeks a penalty in the amount of $312.50, or 25 percent of the amount paid from the WSF to Claimant. ORS 652.414(3) provides:

> 'The commissioner may commence an appropriate action, suit or proceeding to recover from the employer, or other persons or property liable for the unpaid wages, amounts paid from the Wage Security Fund under subsection (1) of this section. In addition to costs and disbursements, the commissioner is entitled to recover reasonable attorney fees at trial and on appeal, together with a penalty of 25 percent of the amount of wages paid from the Wage Security Fund or $200, whichever amount is the greater.'

Under this statute, the Commissioner is automatically entitled to recover a penalty amounting to 25 percent of the amount of the wages paid out from WSF or $200, whichever is greater. 25 percent of $1,250.00 is $312.50, which is a greater amount than $200, entitling the Commissioner to recoup $312.50 from Respondent to reimburse the WSF.

"ORS 652.150 PENALTY WAGES

"In paragraph III of its OOD, the Agency alleges that Claimant is entitled to $12,000.00 in penalty wages pursuant to ORS 652.150 based on Respondent's willful failure to pay $1,250.00 in unpaid, due and owing wages to Claimant upon the termination of his employment, and that more than thirty days have elapsed since the wages became due and owing and since a written notice was sent to Respondent pursuant to ORS 652.140 and ORS 652.150. The Agency further alleges that the sum of $12,000.00 was calculated based on Claimant's 'hourly wage rate of $50.00 per hour worked.'

"An employer is liable for penalty wages when it willfully fails to pay any wages or compensation of any employee whose employment ceases as required by ORS 652.140. ORS 652.150(1). In this case, Respondent was required to pay all wages due to Claimant no later than 'five days, excluding Saturdays,

Sundays and holidays' after April 9, 2013, his last day of employment. ORS 652.140(2)(b).[1]

"Willfulness does not imply or require blame, malice, 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. *See, e.g., In the Matter of J & S Moving & Storage, Inc.,* 31 BOLI 286, 300 (2012).

"When the employee or a person on behalf of the employee submits a written notice of nonpayment and payment is not made, penalty wages continue for 30 days. ORS 652.150(1)(a).

"In its answer, Respondent denied it owed Claimant penalty wages 'as the company intends to pay the wages of paragraph II.' Respondent's stated 'intent' to pay Claimant's wages at a future time is no defense to the Agency's allegation that Respondent willfully failed to pay those wages. Respondent's failure to deny the allegation that Claimant's hourly wage was $50.00 per hour constitutes an admission of that fact. Respondent's failure to address the written notice component in paragraph III likewise constitutes an admission that the written notice referenced in paragraph III was in fact submitted as alleged. There is no evidence in the record that Respondent was not a free agent in its decision not to pay Claimant those wages. The forum therefore concludes that Respondent's failure to pay Claimant all wages due to him as required by ORS 652.140(2)(b) was willful.

"In this case, the Agency correctly computed Claimant's penalty wages as $12,000.00 ($50.00/hr. x 8 hours = $400.00 x 30 days = $12,000.00). ORS 652.150(1) & (2); OAR 839-001-0470.

"CONCLUSION

"The Agency's motion for summary judgment is **GRANTED** in its entirety. The hearing in this matter is hereby cancelled and the forum will issue a proposed order in the near future that incorporates this interim order. OAR 839-050-0150(4)."

Jan McCain

"INTRODUCTION

"On September 27, 2013, Agency issued Order of Determination #13-2080 ('OOD') in which it charged that Jan McMain ('Claimant') is owed $2,722.75

[1] Because the record does not reflect circumstances of Claimant's termination, the forum relies on ORS 652.140(2)(b) instead of 652.140(1) or (2)(a).

in earned and unpaid wages for work performed for Respondent from February 1 through March 13, 2013, at the regular rate of $14.00 per hour. The OOD further alleges that Claimant filed a wage claim with the Agency and assigned that claim to the Agency, and that the Agency paid out $2,058.00 out to Claimant from the Wage Security Fund ('WSF), leaving $722.75 in unpaid wages that Respondent owes to Claimant and $2,058.00 that it owes to the Agency to reimburse the WSF. The OOD alleges that Respondent owes Claimant $3,360.00 in ORS 652.150 penalty wages. Finally, the OOD alleges that Respondent is liable for a 25 percent penalty, amounting to $514.50, on the Agency's WSF payout to Claimant.

"Respondent was served with the OOD and filed an answer and request for hearing on October 3, 2013. Respondent's answer is reprinted below:

> 'In response to paragraph II, there is no denial of the wages owed in the amount of $2,780.75.
>
> 'In response to paragraph III, Penalty Wages, company denies the claimant of $3,360 in penalty wages as the company intends to pay the wages of paragraph II.'

"On March 4, 2014, the Agency filed a motion for Summary Judgment, contending it was entitled to judgment as a matter of law on all of the allegations in its OOD. Among other things, the motion included a copy of the OOD, Claimant's assignment of his wage claim to WSF, and documentation of the WSF payout of $2,058.00 in gross wages to Claimant.

"In an interim order dated March 4, 2014, the undersigned ALJ gave Respondent until March 11, 2014, to file a response to the Agency's motion. The interim order included the following information:

> 'OAR 839-050-0150(4) provides that any participant may make a motion for summary judgment for an accelerated decision in favor of the participant as to all or part of the issues raised in the pleadings. In ruling on the Agency's motion, the forum will consider the existing record, the supporting documents provided by the Agency, and any documents provided by Respondent in response to the Agency's motion, in a manner most favorable to Respondents. Respondent's written response, including any opposing affidavits, if applicable, and supporting documents must be filed no later than **Tuesday, March 11, 2014**. OAR 839-050-0150. The forum will rule on the Agency's motion promptly thereafter.
>
> '**PLEASE NOTE:** <u>Respondent has the burden of producing evidence on any issue raised in the motion as to which the Respondent has the burden of persuasion at hearing.</u> *See* ORCP 47C.

> 'If Respondent fails to file a written response, the forum will grant the Agency's motion if the pleadings and all documents filed in support of the motion show that there is no genuine issue as to any material fact and that the Agency is entitled to judgment as a matter of law.'

Respondent did not file a response and the forum rules on the motion based on the OOD, Respondent's answer, and the exhibits accompanying the Agency's motion.

"SUMMARY JUDGMENT STANDARD

"A motion for summary judgment may be granted when 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 standard for determining if a genuine issue of material fact exists and the evidentiary burden on the participants is as follows:

> ' * * * No genuine issue as to a material fact exists if, based upon the record before the court viewed in a manner most favorable to the adverse party, no objectively reasonable juror could return a verdict for the adverse party on the matter that is the subject of the motion for summary judgment. The adverse party has the burden of producing evidence on any issue raised in the motion as to which the adverse party would have the burden of persuasion at [hearing].' ORCP 47C.

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).

"LIABILITY FOR UNPAID WAGES

"With respect to Claimant's unpaid wages and the WSF payout, paragraph II of the OOD alleges all the elements of the Agency's prima facie case, and the exhibits submitted with the Agency's motion corroborate those allegations. Respondent's answer, quoted earlier, merely states '[i]n response to paragraph II, there is no denial of the wages owed in the amount of $2,780.75.'

"OAR 839-050-0130 provides, in pertinent part:

> '(1) A party filing a written request for a hearing or a party served with Formal Charges must file a written response, referred to as an "answer," to the allegations in the charging document.
>
> '(2) The answer must include an admission or denial of each factual matter alleged in the charging document and a statement of each relevant

> defense to the allegations. A general denial is not sufficient to constitute an answer. * * *
>
> '(3) Except for good cause shown to the administrative law judge, factual matters alleged in the charging document and not denied in the answer will be deemed admitted by the party.'

Pursuant to OAR 839-050-0130(3), Respondent's failure to deny the allegations in paragraph II of the OOD or to contest the exhibits submitted in support of the Agency's motion constitutes an admission of the allegations in the OOD. Accordingly, the forum concludes that Respondent owes Claimant $2,780.75 in unpaid, due and owing wages, and that the Agency has already paid $2,058.00 of that sum to Claimant from the WSF. Accordingly, Respondent is liable to reimburse the WSF in the amount of $2,058.00 and liable to Claimant for unpaid wages in the amount of $722.75.

"LIABILITY FOR 25 PERCENT PENALTY

"In paragraph IV of its OOD, the Agency seeks a penalty in the amount of $514.50, or 25 percent of the amount paid from the WSF to Claimant. ORS 652.414(3) provides:

> 'The commissioner may commence an appropriate action, suit or proceeding to recover from the employer, or other persons or property liable for the unpaid wages, amounts paid from the Wage Security Fund under subsection (1) of this section. In addition to costs and disbursements, the commissioner is entitled to recover reasonable attorney fees at trial and on appeal, together with a penalty of 25 percent of the amount of wages paid from the Wage Security Fund or $200, whichever amount is the greater.'

Under this statute, the Commissioner is automatically entitled to recover a penalty amounting to 25 percent of the amount of the wages paid out from WSF or $200, whichever is greater. 25 percent of $2,058.00 is $514.50, which is a greater amount than $200, entitling the Commissioner to recoup $514.50 from Respondent to reimburse the WSF.

"ORS 652.150 PENALTY WAGES

"In paragraph III of its OOD, the Agency alleges that Claimant is entitled to $3,360.00 in penalty wages pursuant to ORS 652.150 based on Respondent's willful failure to pay $2,780.75 in unpaid, due and owing wages to Claimant upon the termination of her employment, and that more than thirty days have elapsed since the wages became due and owing and since a written notice was sent to Respondent pursuant to ORS 652.140 and ORS 652.150. The Agency further alleges that the sum of $3,360.00 was calculated based on Claimant's 'hourly wage rate of $14.00 per hour worked.'

"An employer is liable for penalty wages when it willfully fails to pay any wages or compensation of any employee whose employment ceases as required by ORS 652.140. ORS 652.150(1). In this case, Respondent was required to pay all wages due to Claimant no later than 'five days, excluding Saturdays, Sundays and holidays' after March 13, 2013, her last day of employment. ORS 652.140(2)(b).[2]

"Willfulness does not imply or require blame, malice, 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. *See, e.g., In the Matter of J & S Moving & Storage, Inc.,* 31 BOLI 286, 300 (2012).

"When the employee or a person on behalf of the employee submits a written notice of nonpayment and payment is not made, penalty wages continue for 30 days. ORS 652.150(1)(a).

"In its answer, Respondent denied it owed Claimant penalty wages 'as the company intends to pay the wages of paragraph II.' Respondent's stated 'intent' to pay Claimant's wages at a future time is no defense to the Agency's allegation that Respondent willfully failed to pay those wages. Respondent's failure to deny the allegation that Claimant's hourly wage was $14.00 per hour constitutes an admission of that fact. Respondent's failure to address the written notice component in paragraph III likewise constitutes an admission that the written notice referenced in paragraph III was in fact submitted as alleged. There is no evidence in the record that Respondent was not a free agent in its decision not to pay Claimant those wages. The forum therefore concludes that Respondent's failure to pay Claimant all wages due to her as required by ORS 652.140(2)(b) was willful.

"In this case, the Agency correctly computed Claimant's penalty wages as $3,360.00 ($14.00/hr. x 8 hours = $112.00 x 30 days = $3,360.00). ORS 652.150(1) & (2); OAR 839-001-0470.

"CONCLUSION

"The Agency's motion for summary judgment is **GRANTED** in its entirety. The hearing in this matter is hereby cancelled and the forum will issue a proposed order in the near future that incorporates this interim order. OAR 839-050-0150(4)."

[2] Because the record does not reflect circumstances of Claimant's termination, the forum relies on ORS 652.140(2)(b) instead of 652.140(1) or (2)(a).

9) The ALJ's rulings on the Agency's motions for summary judgment are hereby **CONFIRMED**.

10) On April 14, 2014, Respondent filed timely exceptions to the Proposed Order. Those exceptions are discussed in the Opinion section of this Final Order.

FINDINGS OF FACT – THE MERITS

1) Claimant Calderon performed work, labor and services for Respondent from March 26 through April 9, 2013, at the rate of $500.00 per week worked. Reduced to an hourly rate, Claimant Calderon's hourly wage rate was $50.00 per hour.

2) Claimant Calderon worked three weeks for Respondent, earning $1,500.00, and was only paid $250.00 for his work, leaving $1,250.00 in unpaid, due and owing wages.

3) Claimant McMain performed work, labor and services for Respondent from February 1 through March 13, 2013, at the regular rate of $14.00 per hour and overtime rate of $21.00 per hour. She worked a total of 194.75 hours, 7.75 of which were overtime hours, earning a total of $2,780.75, and was paid nothing for her work.

4) After Calderon and McMain filed their wage claims, BOLI's Wage and Hour Division determined that Calderon's and McMain's wage claims were valid and issued a check for $1,250.00 in gross wages from the WSF to Calderon and for $2,058.00 in gross wages from the WSF to McMain, leaving no wages owed to Calderon and $722.75 in unpaid wages owed to McMain.

5) ORS 652.414(3) WSF penalties are computed as follows: (a) McMain - $2,058 x .25 = $514.50; (b) Calderon - $1,250 x .25 = $312.50.

6) The Agency mailed a written notice of McMain's wage claim to Respondent on or before August 27, 2013. The Agency mailed a written notice of Calderon's wage claim to Respondent on or before July 30, 2013.

7) Respondent has not paid any wages to Claimants since receiving the Agency's written notices.

8) ORS 652.150 penalty wages for Claimant McMain are computed as follows: $14.00 x 8 hours x 30 days = $3,360.00. ORS 652.150 penalty wages for Claimant Calderon are computed as follows: $50.00 x 8 hours x 30 days = $12,000.00.

CONCLUSIONS OF LAW

1) At all times material herein, Respondent employed Claimants Calderon and McMain. ORS 652.310.

2) BOLI's Commissioner has jurisdiction over the subject matter and Respondent herein. ORS 652.330, 652.332.

3) Respondent owes Claimant McMain $722.75 in unpaid, due and owing wages and more than five days have elapsed since Claimant McMain left Respondent's employment. ORS 652.140.

4) Respondent owes the WSF $2,058.00 as repayment of the wages paid out to Claimant McMain from the WSF, plus a 25 percent penalty on that sum of $514.50. ORS 652.414.

5) Respondent owes the WSF $1,250.00 as repayment of the wages paid out to Claimant Calderon from the WSF, plus a 25 percent penalty on that sum of $312.50. ORS 652.414.

6) Respondent's failure to pay Claimant McMain all unpaid, due and owing wages after Claimant McMain left Respondent's employment was willful and Claimant McMain is entitled to $3,360.00 in penalty wages. ORS 652.150.

7) Respondent's failure to pay Claimant Calderon all unpaid, due and owing wages after Claimant Calderon left Respondent's employment was willful and Claimant Calderon is entitled to $12,000.00 in penalty wages. ORS 652.150.

8) Under the facts and circumstances of this record, and according to the applicable law, BOLI's Commissioner has the authority to order Respondent to: (a) Pay Claimant McMain her earned, unpaid, due and owing wages; (b) Pay penalty wages to Claimants McMain and Calderon; and (c) Pay a 25 penalty on the sums paid out from the WSF, plus interest on all sums included in (a-c) until paid. ORS 652.332.

OPINION

All allegations in the Agency's OODs were resolved in the ALJ's interim orders granting the Agency's motions for summary judgment, which have been confirmed in this Final Order. No further discussion is required as to the merits.

Respondent's Exceptions

Respondent's exceptions describe the brief history and decline of Respondent's business after Respondent purchased a flock of diseased chickens in the spring of 2013 that infected the rest of Respondent's flock and stopped all egg production for upwards of 90 days. Respondent does not deny that the wages are due, stating that the wage claimants were not paid because "there simply were no funds available at [the time the wages were due]." Respondent further asks BOLI to work with Respondent on a payment plan to pay the wages and states an inability to pay the penalties.

Inability to pay wages at the time the wages accrued is an affirmative defense under ORS 652.150(5) that, if proven, relieves an employer of all liability for ORS

652.150 penalty wages. However, OAR 839-050-0130(3) provides that affirmative defenses are waived if not plead in a Respondent's answer. In this case, Respondent did not raise this defense in its answer, thereby waiving it.[3]

Negotiating a payment plan with respect to a wage claim is not the function of a Final Order. Respondent has not pointed out any errors in the Proposed Order that change the outcome of this case. Respondent's exceptions are DENIED.

ORDER

NOW, THEREFORE, as authorized by ORS 652.332, the Commissioner of the Bureau of Labor and Industries hereby orders Respondent **Farwest Hatchery LLC** to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 1045 State Office Building, 800 NE Oregon Street, Portland, Oregon 97232-2180, the following:

A. A certified check payable to the Bureau of Labor and Industries in trust for Claimant Jan McMain in the amount of FOUR THOUSAND THREE HUNDRED TWENTY-TWO DOLLARS and SEVENTY FIVE CENTS ($4,322.75), less appropriate lawful deductions, representing $722.75 in gross earned, unpaid, due and payable wages, plus interest at the legal rate on the sum of $722.75 from April 1, 2013, until paid, and $3,360.00 in ORS 652.150 penalty wages, plus interest at the legal rate on the sum of $3,360.00 from May 1, 2013, until paid.

B. A certified check payable to the Bureau of Labor and Industries in trust for Claimant Everardo Calderon in the amount of TWELVE THOUSAND DOLLARS ($12,000.00), less appropriate lawful deductions, representing $12,000.00 in ORS 652.150 penalty wages, plus interest at the legal rate on the sum of $12,000.00 from May 1, 2013, until paid.

C. A certified check payable to the Bureau of Labor and Industries in the amount of FOUR THOUSAND ONE HUNDRED FORTY-FIVE DOLLARS ($4,135.00), representing the amounts paid from the Wage Security Fund to Jan McMain and Everardo Calderon, plus a 25 percent penalty on those amounts, plus interest at the legal rate on that sum from the date of judgment until paid.

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[3] Respondents have the burden of proof with respect to all affirmative defenses. To prove the affirmative defense of financial inability to pay, a respondent must provide specific information as to the financial resources and expenses of both the business and the employer personally during the wage claim period, including submission of records from which that information came. *See In the Matter of Captain Hooks, LLP,* 27 BOLI 211, 230 (2006).

33 BOLI ORDERS

In the Matter of

HEY BEAUTIFUL ENTERPRISES, LTD.

Case Nos. 16-14 & 19-14
Amended Final Order of Commissioner Brad Avakian
Issued May 9, 2014

SYNOPSIS

Respondent employed four wage claimants in 2012 and 2013 in Oregon at the agreed wage rates of $9.00 and $11.00 per hour. All four performed work on clients and also performed other work at Respondent's direction, for Respondent's benefit. Three claimants were only paid for part of their work and the fourth claimant was paid nothing. Respondent asserted it had paid the claimants in full based on employment contracts in which they agreed to be paid only for work performed on clients. The forum rejected this defense and ordered Respondent to pay claimants a total of $5,828.57 in unpaid, due, and owing wages. Respondent's failure to pay the wages was willful, and Respondent was ordered to pay claimants a total of $9,120.00 in ORS 652.150 penalty wages. Based on Respondent's failure to pay at least the minimum wage to all four claimants and overtime wages to two of the claimants, Respondent was also ordered to pay claimants a total of $6,456.00 in ORS 653.055(1)(b) civil penalties.

The above-entitled case came on regularly for hearing before Alan McCullough, designated as Administrative Law Judge ("ALJ") by Brad Avakian, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on March 25, 2014, in the W. W. Gregg Hearing Room of the Oregon Bureau of Labor and Industries, located at 800 NE Oregon Street, Portland, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by Administrative Prosecutor Cristin Casey, an employee of the Agency. Wage claimants Kara C. Thiringer, Amber R. Walker, Savana S. Wilson, and Amber L. Wharton were present at the hearing only during their testimony and were not represented by counsel. Hey Beautiful Enterprises, Ltd. ("Respondent" or "Hey Beautiful") was represented at the hearing by Kymberley Schoene, its authorized representative.

The Agency called the following witnesses: Claimants Thiringer, Walker, Wilson, Wharton, and Wage and Hour Division ("WHD") Compliance Specialist Margaret Pargeter. Respondent called no witnesses.

The forum received into evidence:

a) Administrative exhibits X-1 through X-27;
b) Agency exhibits A1 through A38; and

c) Respondent exhibits R1, R4, and R14.

Having fully considered the entire record in this matter, I, Brad Avakian, Commissioner of the Bureau of Labor and Industries, hereby make the following Findings of Fact (Procedural, On the Merits, and Ultimate[1]), Conclusions of Law, Opinion, and Order.

FINDINGS OF FACT – PROCEDURAL

1) On February 27, 2013, Kara Thiringer filed a wage claim with the Agency alleging that Respondent had employed her and failed to pay wages earned and due to her. At the same time, Thiringer assigned to the Commissioner of the Bureau of Labor and Industries, in trust for herself, all wages due from Respondent. (Testimony of Pargeter, Thiringer; Ex. A8)

2) On January 30, 2013, Amber Walker filed a wage claim with the Agency alleging that Respondent had employed her and failed to pay wages earned and due to her. At the same time, Walker assigned to the Commissioner of the Bureau of Labor and Industries, in trust for herself, all wages due from Respondent. (Testimony of Pargeter, Walker; Ex. A10)

3) On May 2, 2013, Amber Wharton filed a wage claim with the Agency alleging that Respondent had employed her and failed to pay wages earned and due to her. At the same time, Walker assigned to the Commissioner of the Bureau of Labor and Industries, in trust for herself, all wages due from Respondent. (Testimony of Pargeter, Wharton; Ex. A22)

4) On June 18, 2013, Savana Wilson filed a wage claim with the Agency alleging that Respondent had employed her and failed to pay wages earned and due to her. At the same time, Wilson assigned to the Commissioner of the Bureau of Labor and Industries, in trust for herself, all wages due from Respondent. (Testimony of Pargeter, Wilson; Ex. A31)

5) On April 16, 2013, the Agency issued Order of Determination ("OOD") No. 13-0115 based on the wage claims filed by Thiringer, Walker, and the Agency's investigation of those claims. In pertinent part, the OOD alleged that:

- Thiringer performed work for Respondent from June 1 to October 31, 2012, at the agreed rate of $9.00 per hour. She worked a total of 625 hours, 12 of which were hours worked over 40 hours at a given workweek. In total, she earned $5,679 and was only paid $3,644.04, leaving unpaid wages in the amount of $2,034.96.
- Walker performed work for Respondent from December 6-27, 2012, at the agreed rate of $9.00 per hour. She worked a total of 129 straight time hours. In

[1] The Ultimate Findings of Fact required by OAR 839-050-0370(1)(b)(B) are subsumed within the Findings of Fact – The Merits.

total, she earned $1,161.00, and was only paid $360.85, leaving unpaid wages in the amount of $800.15.

- Respondent willfully failed to pay these wages and owes Thiringer and Walker each $2,160.00 in ORS 652.150 penalty wages.
- Respondent paid Thiringer less than the wages to which she was entitled under ORS 653.010 to 653.261 and is liable to Thiringer for civil penalties in the amount of $2,160.00, pursuant to ORS 653.055(1)(b). (Ex. X3)

6) On May 22, 2013, Respondent, through corporate president and authorized representative, Kimberly Schoene, filed an answer and request for hearing in response to OOD #13-0115. (Ex. X3)

7) On August 22, 2013, the Agency issued OOD No. 13-0909 based on the wage claims filed by Wharton, Wilson, and the Agency's investigation of those claims. In pertinent part, the OOD alleged that:

- Wharton performed work for Respondent from March 13 to April 12, 2013, at the rate of $8.95 per hour. She worked a total of 53 straight time hours. In total, she earned $474.35 and was paid nothing, leaving unpaid wages in the amount of $474.35.
- Wilson performed work for Respondent from April 25 to June 12, 2013, at rate of $8.95 per hour. She worked a total of 213 hours, three of which were hours worked over 40 hours at a given workweek. In total, she earned $1,919.79 and was only paid $442.13, leaving unpaid wages in the amount of $1,447.66.
- Respondent willfully failed to pay these wages and owes Wharton and Wilson each $2,148.00 in ORS 652.150 penalty wages.
- Respondent paid Wharton and Wilson than the wages to which they were entitled under ORS 653.010 to 653.261 and is liable to each for civil penalties in the amount of $2,148.00, pursuant to ORS 653.055(1)(b). (Ex. X1)

8) On January 9, 2014, the Hearings Unit issued Notices of Hearing with respect to both OODs to Respondent, the Agency, and Claimants setting the time and place of hearing for 9:00 a.m. on February 11, 2014, at the office of the Oregon Bureau of Labor and Industries, W. W. Gregg Hearing Room, 1045 State Office Building, 800 NE Oregon St., Portland, Oregon. Together with the Notices of Hearing, the forum sent a copy of the Order of Determination, a document entitled "Summary of Contested Case Rights and Procedures" containing the information required by ORS 183.413, a document entitled "Servicemembers Civil Relief Act (SCRA) Notification, and a copy of the forum's contested case hearings rules, OAR 839-050-000 to 839-050-0445. (Exs. X2, X4)

9) On January 9, 2014, the Agency filed a motion to consolidate both cases for hearing. (Exs. X5, X10)

10) On January 10, 2014, the ALJ issued an interim order requiring the submission of case summaries no later than January 31, 2014. Among other things, the

ALJ's case summary order required the Agency and Respondent to provide a list of all witnesses and identification of any exhibits to be offered as evidence at hearing, together with copies of those exhibits, except for exhibits offered solely for the purpose of impeachment or Agency rebuttal. The ALJ mailed the case summary order to Respondent at two addresses: 805 NW Glisan, Portland, OR 97209 and 210 NW 17th Ave., Suite 100, Portland, OR 97209. The NW Glisan address is the address on file with the Oregon Secretary of State Corporation Division as the mailing address for Hey Beautiful Enterprises, Ltd. The NW 17th Ave. address is the most recent address on file with the Oregon Secretary of State Corporation Division for the assumed business name of "Hey Beautiful" that registered with the Oregon Secretary of State Corporation Division on May 6, 2013, with Kim Schoene as its authorized representative and registrant. As of the date of hearing, the ALJ's mail to these addresses had not been returned by the U. S. Postal Service. (Exs. X6, A1, A2, A3; Statement of ALJ)

11) On January 22, 2014, BOLI's Contested Case Coordinator ("CCC") received information from the U.S. Postal Service that Respondent's new address was 5412 N. Syracuse, Portland, OR 97203-5238. (Exs. X8, X9)

12) On January 24, 2014, the ALJ issued an interim order granting the Agency's motion to consolidate case nos. 16-14 and 19-14 for hearing. In the same order, the ALJ noted the forum's receipt of Respondent's new address on N. Syracuse Street and mailed his order to that address. The ALJ also included a copy of his case summary order. (Ex. X10)

13) At hearing, Schoene stated that 5412 N. Syracuse, Portland, OR 97203 is her correct mailing address. (Statement of Schoene)

14) The Agency timely filed a case summary. (Ex. X11)

15) On February 10, 2014, a state holiday, Schoene telephoned BOLI's CCC and left a message requesting a postponement due to inclement weather and her sickness. The ALJ did not learn of this phone call to 6:30 a.m. on February 11, 2014. That same day, at the time set for hearing, the ALJ held a telephone conference with Schoene and Casey. At the conclusion of the conference, the ALJ granted the postponement based on Schoene's sickness and rescheduled the hearing to begin on March 18, 2014. (Ex. X12)

16) On March 5, 2014, Michael Owens, attorney at law, filed a notice of appearance on behalf of Respondent and requested a postponement of the hearing based on a previously scheduled conflict consisting of a conciliation meeting with BOLI's Civil Rights Division involving himself, his client, and an out-of-state attorney. That same day, BOLI's CCC e-mailed a copy of the ALJ's case summary order to Owens. (Exs. X14, X15)

17) On March 7, 2014, the ALJ held a telephone conference with Owens and Casey, at which time the ALJ orally granted Respondent's motion for postponement and reset the hearing to begin on March 25, 2014. (Ex. X16)

18) On March 12, 2014, Owens filed a letter with the forum stating that he no longer represented Respondent. (Ex. X19)

19) On March 13, 2014, the ALJ sent a letter to Schoene advising her that Respondent's retention of Owens as its attorney had nullified Schoene's status as Respondent's authorized representative and that Schoene would have to file new letter authorizing her to act as Respondent's authorized representative or hire another attorney if she wished Respondent to avoid being held in default at the hearing. (Ex. X20)

20) On March 18, 2014, the forum received a letter in which Schoene authorized herself to the authorized representative of Hey Beautiful. Schoene accompanied the letter with the case summary listing one witness and 21 exhibits and enclosing copies of the exhibits. That same day, the Agency filed a motion to exclude evidence "untimely filed in Respondent's case summary." (Ex. X22)

21) On March 20, 2014, Schoene sent an email to BOLI's CCC in which she explained in detail the reasons that Respondent had not file a case summary until March 18. The ALJ instructed BOLI's CCC to contact Schoene and tell her that she would need to ask permission to file a response to the Agency's motion by email. Schoene filed such a request, and the ALJ granted her request and retroactively received her March 18, 2014, e-mailed explanation. (Statement of ALJ; Ex. X25)

22) On March 21, 2014, the ALJ held a prehearing conference with Casey and Schoene and informed them both that he would rule on the admissibility of Respondent's case summary at the start of the hearing. (Statement of ALJ)

23) At the outset of the hearing, the ALJ explained the issues involved in the hearing, the matters to be proved, and the procedures governing the conduct of the hearing. (Statement of ALJ)

24) Before opening statements, the ALJ gave Schoene an opportunity to explain why Respondent had not timely filed a case summary. After listening to Schoene's numerous excuses, the ALJ determined that Schoene had not provided a satisfactory reason for not timely filing a case summary and that excluding the testimony of Mike Allen, the single witness she listed in her case summary, as well as the 21 exhibits provided with her case summary, would not violate the ALJ's duty to conduct the full and fair inquiry required by OAR 839-050-0210(5). The ALJ ruled that Respondent's case summary would not be received, noting that Respondent's exhibits, although not admissible in her case in chief, could be offered as impeachment exhibits. The ALJ also informed Schoene that she would not be allowed to testify as a witness

because she was not a named Respondent and, even if Respondent's case summary had been admitted, she was not listed on it as a witness. (Statement of ALJ)

25) The ALJ issued a proposed order on April 23, 2014, 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 times material, Respondent Hey Beautiful Enterprises, Ltd. was an active Oregon business corporation doing business in Portland, Oregon, and K. Schoene was its corporate president. Schoene was also in charge of Respondent's payroll. (Ex. A2)

2) Claimant Thiringer worked for Respondent from June 1, 2012, through October 31, 2012, as an esthetician. She was hired at the agreed rate of $9.00 per hour. During her employment, she was given an "Employee Manual." Included among its provisions were the following statements:

> "4. **DOWN TIME -** If you are clocked in and have a gap between clients keep yourself busy by doing laundry, cleaning, or anything else that will benefit the salon and spa. If you don't know what to do refer (sic) as a front desk supervisors. If you are doing nothing on the clock and you don't have a client you will be clocked out for that time.
>
> "* * * * *
>
> "7. **SCHEDULED SHIFT -** * * * Coming in and waiting for clients is highly recommended as we have a high volume of walk-ins. * * *
>
> "* * * * *
>
> "18. **STAFF MEETINGS:** Kalista Salon as staff meetings every third Wednesday 10am. And Spa and Salon Meetings Monthly. These are considered mandatory since we will be discussing matters that concern each one of us.
>
> a. One on ones are done every two weeks. You will sit down with your manager and talk about your numbers, your concerns and anything you may need from the manager or job easier. * * *
>
> "* * * * *
>
> "Our first obligation is to report for work 15 minutes before you are scheduled, in a fit condition to perform your responsibilities. This allows preparation time and reduces stress.
>
> "* * * * *
>
> "12. How your commissions and pay structure works. You were paid for services you do and you will be given an hourly rate when you have a client in your chair. If you have no clients then you are not paid. Being in the salon is

strictly voluntary. You cannot have to be here or clean or do anything other than what you are allowed time to do after a client is left. You do need to show up for your client at the time you have been scheduled with a client. If you have no clients all day and you hang out to wait for a walk-in. You are not paid for the day. With that said it is beneficial to wait for clients as is the best way to build your clientele. The receptionist will be more willing to give you clients if you are a team player."

"* * * * *

"1. **Cleaning -** at the end of your shift you are required to clean your entire area, take towels to the laundry room, clean surfaces, restock your area, and put all clean supplies away by removing them from the employee area and putting them back where they belong.

"2. **SANITIZERS** - Sanitizers need to be changed once a week. High level and low-level sanitizers need to be changed in the break area and at the employee stations.

"3. **LAUNDRY** - * * * Everyone meets to help with making sure laundry is constantly being washed, dry, folded and put away in its appropriate home.

"* * * * *

"5. **GARBAGE** - Garbage needs to be changed at the end of shifts or when full and the can needs to be relined with a garbage liner. Glass does stay separate. It goes in designated glass container.

"6. **VACCUUM** - the spine needs to be vacuumed at the end of the day, lock the doors and do a quick vacuum and dust of all the areas."

(Testimony of Thiringer; Ex. A9)

3) On June 4, 2012, Thiringer was required to sign a printed document titled "Contracting Statement agreement for employees of Kalista salon" that included the following language:

"The employee Kara Thiringer acknowledges that he/she will only be compensated for services performed by the employee on an hourly and commission scale of services paid by client, If the technician has a client she will be paid for that client within the time she is given to perform the service, unless otherwise agreed in writing.[2] Hourly rate 9 commissions of service 10 commissions of retail 10"[3]

[2] "Kalista Hair Salon" was an assumed business name that Respondent registered with the Sec. of State Corporation Division on August 27, 2008.

[3] Underlined text is handwritten on the original document.

(Testimony of Thiringer; Ex. A28)

4) From June 1, 2012, through October 31, 2012, Thiringer worked 652 straight time hours and 12 overtime hours for Respondent. She earned a total of $6,030.00 (652 hours x $9.00 = $5,808.00, 12 hours x $13.50 = $162.00, $5,808.00 + $162 = $6,030.00). During some of the hours she was not working with a client, she performed other work as directed by Schoene, including attending mandatory staff meetings, handing out promotional flyers, and cleaning Respondent's shop. Her last day of work was October 31, 2012. As of the date of hearing, Respondent had only paid her $4,011.95 for that work and still owes her $2,018.05 in unpaid, due, and owing wages. (Testimony of Thiringer; Exs. A7, A8)

5) Agency compliance specialist Margaret Pargeter was assigned to investigate Thiringer's wage claim. On March 4, 2013, Pargeter mailed a letter to Respondent that stated:

> "The wage claim of Kara Thiringer has been assigned to me for resolution. * * *
>
> "Kara Thiringer alleges working 625 hours at the regular rate of $9.00 per hour worked during the period June 1, 2012 to October 4, 2012, earning $5,679.00 of which she was paid $3,644.04, leaving $2,034.96 due and owing. * * *
>
> "Please take one of the following actions by March 14, 2013:
>
> "1. Submit a check payable to Kara Thiringer in the gross amount of $2,034.96 along with itemized statement of lawful deductions (if any).
>
> "2. Submit to me evidence Ms. Thiringer did not work the hours claimed, or that she has been paid.
>
> "3. Submit evidence my computations are incorrect."

(Testimony of Pargeter; Ex. A19)

6) Claimant Walker worked for Respondent from December 6 through December 27, 2012, as an esthetician and nail technician. She was hired at the agreed wage rate of $9.00 per hour. (Testimony of Walker; Ex. A10)

7) On December 3, 2012, Claimant Walker was required to sign a "Contracting Statement agreement for employees of Kalista salon" that included the following language:

> "The employee <u>Amber</u> acknowledges that he/she will only be compensated for services performed by the employee on an hourly and commission scale of services paid by client[.] If the technician has a client she will be paid for that client within the time she is given to perform the service, unless otherwise agreed in writing. Hourly rate <u>9</u> commissions of service <u>15%</u> commissions of retail <u>10%</u>"[4]

[4] *See* fn. 3.

(Testimony of Walker; Ex. A11)

8) From December 6 through December 27, 2012, Walker worked 129 straight time hours for Respondent, earning a total of $1,161.00 (129 hours x $9 = $1,191.00). As of the date of hearing, Respondent had only paid her $360.85 for her work and still owes her $800.15 in unpaid, due, and owing wages. (Testimony of Walker; Ex. A10)

9) On February 1, 2013, the Agency mailed a letter entitled "Notice of Wage Claim" to Respondent that stated:

> "You are hereby notified that AMBER R. WALKER has filed a wage claim with the Bureau of Labor and Industries alleging:
>
> "Unpaid wages of $815.15 at the rate of $9.00 per hour from December 6, 2012 to December 27, 2012.
>
> "IF THE CLAIM IS CORRECT, you are required to IMMEDIATELY make a negotiable check or money order payable to the claimant for the amount of wages claimed, less deductions required by law, and send it to the Bureau of Labor and Industries at the above address.
>
> "IF YOU DISPUTE THE CLAIM, complete the enclosed 'Employer Response' form and return it together with the documentation which supports your position, as well as payment of any amount which you concede is owed the claimant to the BUREAU OF LABOR AND INDUSTRIES by the date indicated below.
>
> "If your response to the claim is not received on or before **FEBRUARY 15, 2013**, the Bureau may initiate action to collect these wages in addition to penalty wages, plus costs and attorney fees."

(Testimony of Pargeter; Ex. A14)

10) Claimant Wharton worked for Respondent from March 13, 2013, through April 12, 2013, as an esthetician and hair stylist. She was hired at the agreed wage rate of $9.00 per hour. (Testimony of Wharton; Ex. A22)

11) On March 25, 2013, Respondent required Wharton to sign a printed document titled "Contracting Statement agreement for employees of Kalista salon"[5] that included the following language:

> "The employee AW acknowledges that he/she will only be compensated for services performed by the employee on an hourly and commission scale of services paid by client[.] If the technician has a client she will be paid for that

[5] This "agreement" differed slightly from the one signed by Thiringer and Walker.

client within the time she is given to perform the service, unless otherwise agreed in writing. Hourly rate 9 commissions of service 15 commissions of retail 10"[6]

"* * * [Employee] [a]lso acknowledges they are only paid when they have a client."

(Testimony of Wharton; Ex. A24)

12) Between March 31 and April 12, 2013, Wharton worked 53 straight time hours for Respondent, earning $477.00. During some of the hours she was not working with a client, Schoene directed her to perform work that included handing out flyers around town that promoted Respondent's business. Wharton voluntarily quit her job on April 12, 2013. As of the date of hearing, Respondent had not paid her anything for her work and still owed her $477.00. (Testimony of Wharton; Ex. A22)

13) On March 4, 2013, Agency compliance specialist Pargeter mailed a letter to Respondent that stated:

"The wage claim of Amber Wharton has been assigned to me for investigation. * * *

"Amber Lynn Wharton alleges working 53 regular hours and was required by the provisions of ORS 653.025 to be paid the minimum wage of $8.95 per hour per hour worked, since her pay agreement for $9.00 per hour while working on clients and commission agreement paid her nothing, earning $474.35 during the period March 31, 2013, April 12, 2013, earning $474.35 of which nothing was paid, leaving $474.35 due and owing.

"Please take one of the following actions by March 14, 2013:

"1. Submit a check payable to Amber Wharton in the gross amount of $474.35 along with itemized statement of lawful deductions (if any).

"2. Submit to the evidence Ms. Wharton did not work the hours claimed, or that she has been paid.

"3. Submit evidence my computations are incorrect."

(Testimony of Pargeter; Ex. A29)

14) Claimant Wilson worked for Respondent from April 25, 2013, through June 12, 2013, as an esthetician. She was hired at the agreed wage rate of $11.00 per hour. (Testimony of Wilson; Exs. A31, A38)

15) On April 28, 2013, Respondent required Wilson to sign a "Contracting Statement agreement for employees of Kalista salon" that was identical to Wharton's agreement except for the amount of pay and included the following language:

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[6] *See* fn. 3.

> "The employee SSW acknowledges that he/she will only be compensated for services performed by the employee on an hourly and commission scale of services paid by client[.] If the technician has a client she will be paid for that client within the time she is given to perform the service, unless otherwise agreed in writing. Hourly rate 11 commissions of service 7% commissions of retail 10%"[7]

(Testimony of Wilson; Ex. A38)

16) From April 25 through June 12, 2013, Wilson worked 266 straight time hours and three overtime hours for Respondent, earning $2,975.50.00 (266 hours x $11.00 = $2,926, 3 hours x $16.50 = $49.50, $2,926 + $49.50 = $2,975.50). During some of the hours she was not working with a client, she performed work for Respondent that included cleaning, changing sanitizers, washing towels, and picking up and laying paving stones. Wilson's last day of work was June 12, 2013. As of the date of hearing, Respondent had only paid Wilson $442.13 for her work and still owes her $2,533.37 in unpaid, due, and owing wages. (Testimony of Wilson; Ex. A31)

17) On June 26, 2013, Agency compliance specialist Pargeter mailed a letter to Respondent that stated, in pertinent part:

> "The wage claim of Savana S. Wilson has been assigned to me for investigation. * * *
>
> "* * * * *
>
> "Savana S. Wilson alleges working 213 regular hours and was required by the provisions of ORS 653.025 to be paid the minimum wage of $8.95 per hour per hour worked, since her pay agreement for $11.00 per hour while working on clients and commission agreement paid her only $442.13 during the period April 25, 2013, to June 12, 2013, leaving $1,477.65 due and owing
>
> "Please take one of the following actions by July 8, 2013:
>
> "1. Submit a check payable to Savana S. Wilson in the gross amount of $1,477.65 along with itemized statement of lawful deductions (if any).
>
> "2. Submit to the evidence Ms. Wilson did not work the hours claimed, or that she has been paid.
>
> "3. Submit evidence my computations are incorrect."

(Testimony of Pargeter; Ex. A36)

18) In 2012, Oregon's minimum wage was $8.80 per hour. In 2013, Oregon's minimum wage was $8.95 per hour. (Official Notice)

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[7] *See* fn. 3.

19) Respondent paid no additional wages to Claimants after receiving the Agency's demand letters for Claimants' unpaid wages. (Testimony of Pargeter)

20) ORS 652.150 penalty wages for Claimants Thiringer, Walker, and Wharton are computed as follows: $9.00 per hour x 8 hours x 30 days = $2,160.00. (Calculation of ALJ)

21) ORS 652.150 penalty wages for Claimant Wilson are computed as follows: $11.00 per hour x 8 hours x 30 days = $2,640.00. (Calculation of ALJ)

22) ORS 653.055(1)(b) civil penalties for Claimants Wharton and Wilson are computed as follows: $8.95 per hour x 8 hours x 30 days = $2,148.00. (Calculation of ALJ)

23) ORS 653.055(1)(b) civil penalties for Claimant Thiringer are computed as follows: $9.00 per hour x 8 hours x 30 days = $2,160.00. (Calculation of ALJ)

24) Margaret Pargeter, Kara Thiringer, Amber Walker, Amber Wharton, and Savana Wilson were all credible witnesses and the forum has credited the entirety of their testimony. (Testimony of Pargeter, Thiringer, Walker, Wharton, Wilson)

CONCLUSIONS OF LAW

1) At all times material herein, Respondent was an Oregon employer that suffered or permitted Claimants Thiringer, Walker, Wharton, and Wilson to work for Respondent and was subject to the provisions of ORS 652.110 to 652.200, ORS 652.310 to 652.405, and ORS 653.010 to ORS 653.261.

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

3) Respondent violated ORS 652.140(2) by failing to pay all wages earned and unpaid to Claimants Thiringer, Walker, Wharton, and Wilson not later than five days, excluding Saturdays, Sundays and holidays, after Claimants left Respondent's employment.

4) Respondent owes unpaid, due, and owing wages to Claimants in the following amounts: Thiringer: $2,018.05; Walker: $800.15; Wharton: $477.00; and Wilson: $2,533.37. ORS 652.140(2).

5) Respondent willfully failed to pay Claimants Thiringer, Walker, Wharton, and Wilson all wages due and owing and owes penalty wages to Claimants in the following amounts: Thiringer, Walker, Wharton: $2,160.00 each; Wilson: $2,640.00. ORS 652.150.

6) Respondent paid Claimants Thiringer, Wharton, and Wilson less than the wages to which they were entitled under ORS 653.010 to 653.261 and is liable to pay civil penalties to them in the following amounts: Thiringer: $2,160.00; Walker & Wilson: $2,148.00 each. ORS 653.055(1)(b).

7) Under the facts and circumstances of this record, and according to the applicable law, BOLI's Commissioner has the authority to order Respondent to pay Claimants their earned, unpaid, due and owing wages, penalty wages, and civil penalties, plus interest on all sums until paid. ORS 652.332.

OPINION

INTRODUCTION

This case involves the wage claims of four Claimants who worked for Respondent at different times in 2012 and 2013. To prevail on the wage claims, the Agency must prove the following elements in each claim by a preponderance of the evidence: 1) Respondent employed Claimant; 2) The pay rate upon which Respondent and Claimant agreed, if other than the minimum wage; 3) The amount and extent of work Claimant performed for Respondent; and 4) Claimant performed work for which she was not properly compensated. *See, e.g., In the Matter of Dan Thomas Construction, Inc.,* 32 BOLI 174, 180 (2013).

CLAIMANTS WERE EMPLOYED BY RESPONDENT

This element is undisputed, as Respondent, through Schoene, admitted in its answers and requests for hearing that it employed all four Claimants.

CLAIMANTS WERE EACH ENTITLED TO AN AGREED WAGE RATE

Claimants Thiringer, Walker, and Wharton all testified that Respondent agreed to pay them $9.00 per hour, plus commission, for their work with clients. Claimant Wilson testified that Respondent agreed to pay her $11.00 per hour, plus commission, for her work with clients. These pay rates are corroborated by handwritten entries in the "Contracting Statement agreement" signed by each Claimant setting out those pay rates.[8]

In its answers and requests for hearing, Respondent did not contest the accuracy of these agreed rates. Instead, Respondent contended that these agreed rates only applied to Claimants' actual work associated with clients and that, based on Respondent's employment agreement with Claimants, Claimants had agreed to be paid nothing for any "non-client" work they performed for Respondent's benefit. The forum addresses this defense in the next section of this Opinion.

[8] *See* Findings of Fact ## 3, 7, 11, and 15.

Based on the above, the forum concludes that Claimants Thiringer, Walker, and Wharton were employed by Respondent at the agreed wage rate of $9.00 per hour and Claimant Wilson was employed by Respondent at the weekly wage rate of $11.00 per hour.

The forum notes the discrepancy between its conclusion that Wharton and Wilson were employed at the respective agreed rates of $9.00 and $11.00 per hour and the Agency's allegation in its OOD that they were employed at the 2013 minimum wage rate of $8.95 per hour. At hearing, the Agency's compliance specialist explained that she had computed their wages at $8.95 per hour because their agreed rate applied only to work done with clients and there was no record of the number of hours Wharton and Wilson worked with clients, leaving no basis from which to calculate the number of hours for which they should have been paid the agreed rate. The forum disagrees with this method of calculation for two primary reasons. First, Respondent argued that Claimants were not entitled to any pay for "non-client" work hours, not that they were only entitled to the minimum wage for that work. Second, it was Respondent's statutory obligation to maintain a record of the actual hours of work performed by its employees. ORS 653.045. If Respondent intended to use two different pay scales to reimburse Claimants based on the type of work they performed, it was Respondent's responsibility to maintain an accurate record of the "client" and "non-client" work Claimants performed. Calculating all of Wharton and Wilson's earnings, including client hours, at the minimum wage would reward Respondent for its failure to fulfill its statutory obligation.

THE AMOUNT AND EXTENT OF WORK CLAIMANTS PERFORMED FOR RESPONDENT

Claimants Thiringer, Walker, and Wharton each kept a contemporaneous record of the dates and hours that they worked that was offered and received as evidence by the forum. Each of these three Claimants credibly testified as to the accuracy of their record. Claimant Wilson did not testify that she maintained a similar record. However, she did testify that the calendar of hours worked she provided to the Agency with her wage claim was accurate and also provided undisputed photographic evidence of herself installing paving stones, at Respondent's direction, in front of Respondent's business premises on May 28, 29, and 30, 2013. Wilson's testimony regarding her hours worked was not impeached during cross-examination or by any other evidence in the record.

Respondent produced no records, either during the Agency's investigation or at during this contested case proceeding, to show the actual hours worked by any of the four Claimants. The forum rejects Respondent's defense that Claimants' "non-client" work hours should not be counted as hours worked because of employment contracts in which they purportedly signed away their rights to payment for any "non-client" work.[9] Under Oregon law, employees are entitled to be paid for all work that an employer

[9] *Id.*

suffers or permits them to perform for the employer's behalf, regardless of contrary terms in an employment contract.[10] Accordingly, Claimants were entitled to be paid for all work they performed for Respondent's benefit.

This forum has consistently held that if an employer disputes the number of hours claimed by a wage claimant, then "it is the employer's burden to produce all appropriate records to prove the precise hours and wages involved." *In the Matter of John M. Sanford, Inc.,* 26 BOLI 72, 81 (2004), *amended* 26 BOLI 110 (2004). A claimant's credible testimony may be sufficient evidence to show the amount of hours worked by the claimant and amount owed. *In the Matter of Kilmore Enterprises,* 26 BOLI 111,123 (2004).

Based on the credible testimony of the Claimants and their supporting documentation, the forum concludes that Claimants worked the following hours for Respondent: **Thiringer**: 664 hours, including 12 overtime hours; **Walker**: 129 hours; **Wharton**: 53 hours; **Wilson**: 269 hours, including 3 overtime hours.

CLAIMANTS EACH PERFORMED WORK FOR WHICH THEY WERE NOT PROPERLY COMPENSATED

Kara Thiringer

Thiringer worked 664 hours for Respondent, including 12 overtime hours, and earned $6,030.00, based on a straight time hourly wage of $9.00 per hour and overtime wage of $13.50 per hour. Based on the paystubs in Exhibit A8,[11] the forum concludes that she was only paid $4,011.95 for her work. $6,030.00 *minus* $4,011.95 is $2,018.05. Dividing $2,018.05 by $9.00 yields a figure of approximately 224 hours of work for which Thiringer was not paid.

Amber Walker

Walker worked 129 straight time hours for Respondent and earned $1,161.00, based on a straight time hourly wage of $9.00 per hour. Based on her single paystub in Ex. A10, the forum concludes that she was only paid $360.85 for her work. $1,161.00

[10] *See, e.g., In the Matter of Scott Miller,* 23 BOLI 243, 250 (2000) (This forum has consistently held that an employer may not avoid the mandate to pay overtime by entering into an agreement with an employee and an employee may not on his or her own behalf waive the employer's statutory duty to pay overtime); *In the Matter of Toni Kuchar,* 23 BOLI 265, 274 (2002) (An employer's agreement with an employee to pay the employee less than the minimum wage is not a defense to a wage collection proceeding based on the minimum wage); *In the Matter of Mary Stewart-Davis,* 13 BOLI 188, 194-95 (1994), *affirmed without opinion, Stewart-Davis v. Bureau of Labor and Industries,* 136 Or App 212, 901 P2d 268 (1995) (An agreement between the employer and the claimant, a hairdresser, that claimant would work for commissions only was no defense to the employer's failure to pay claimant minimum wage and overtime, in violation of ORS 653.025(3) and 653.261); *In the Matter of Sheila Wood,* 5 BOLI 240, 251 (1986) (any agreement between an employer and employee for compensation at less than the minimum wage rate is unlawful when the employer is subject to the provisions of ORS 653.025).

[11] According to those paystubs, Thiringer received gross paychecks for $475.81 on 6/22/12, $308.12 on 7/6/12, $409.95 on 7/20/12, $839.96 on 8/7/12, $475.96 on 8/22/12, $765.05 on 9/7/12, $647.65 on 9/21/12, and $89.95 on 10/7/12.

minus $360.85 is $800.15. Dividing $800.15 by $9.00 yields a figure of approximately 89 hours of work for which Walker was not paid.

Amber Wharton

Wharton worked 53 straight time hours for Respondent and earned $477.00,[12] based on a straight time hourly wage of $9.00 per hour. Based on her credible testimony and Respondent's failure to provide any contrary evidence, the forum concludes that she was paid nothing for those 53 hours of work.

Savana Wilson

In its OOD, the Agency alleged that Wilson worked 210 straight time hours and three overtime hours, earning a total of $1,919.79. Based on the record at hearing, the forum has concluded that Wilson worked 266 straight time hours and three overtime hours for Respondent and should have been paid a total of $2,975.50,[13] based on a straight time hourly wage of $11.00 per hour and overtime rate of $16.50 per hour. Based on her acknowledgment that she was paid $442.13 and Respondent's failure to provide any evidence of additional payment, the forum concludes that she was only paid $442.13 for her work. $2,975.50 minus $442.13 is $2,533.37. Dividing $2,533.37 by $11.00 yields a figure of approximately 230 hours of work for which Wilson was not paid.

CONCLUSION

The Agency met its burden of proof with respect to each Claimant, and Respondent owes Claimants the following amounts in unpaid, due, and owing wages: **Thiringer**: $2,018.05; **Walker**: $800.15; **Wharton**: $477.00; and **Wilson**: $2,533.37.

CLAIMANTS ARE ALL OWED ORS 652.150 PENALTY WAGES

The forum may award penalty wages when a 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).

Respondent agreed to pay Claimants Thiringer, Walker, and Wharton a wage rate of $9.00 per hour and Claimant Wilson $11.00 per hour. The Agency established by a preponderance of the evidence that Schoene, Respondent's president and

[12] Although the Agency only alleged $474.35 in unpaid wages to Wharton in its OOD and did not move to amend its OOD at hearing, BOLI's Commissioner has the authority to award unpaid wages exceeding those alleged in the OOD when credible evidence establishes that a wage claimant is owed wages exceeding those alleged in Agency's OOD. *In the Matter of John M. Sanford, Inc.,* 26 BOLI 72, 86 (2004), *amended* 26 BOLI 110 (2004).

[13] *See Id.*

Claimants' supervisor, was in charge of Respondent's payroll and aware of the work that Claimants performed. Schoene's stated excuse for not paying Claimants for all hours worked is that they signed employment contracts in which they agreed they would only be paid for work associated with clients. This excuse is not a defense to the Agency's claim for penalty wages. There is no evidence that Respondent, through its agent Schoene, acted other than voluntarily and as a free agent in not paying Claimants for all hours worked. The forum therefore concludes that Respondent acted willfully in failing to pay Claimants their wages and is liable for penalty wages under ORS 652.150.

ORS 652.150(1) and (2) provide, in pertinent part:

> "(1) Except as provided in subsections (2) and (3) of this section, if an employer willfully fails to pay any wages or compensation of any employee whose employment ceases, as provided in ORS 652.140 * * *, then, as a penalty for the nonpayment, the wages or compensation of the 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.
>
> "(2) If the employee or a person on behalf of the employee sends a written notice of nonpayment, the penalty may not exceed 100 percent of the employee's unpaid wages or compensation unless the employer fails to pay the full amount of the employee's unpaid wages or compensation within 12 days after receiving the written notice. If the employee or a person on behalf of the employee fails to send the written notice, the penalty may not exceed 100 percent of the employee's unpaid wages or compensation. * * *"

The Agency provided documentary and testimonial evidence that its investigative staff made written demands for Claimants' wages as contemplated by ORS 652.150(2) between February and June 2013. The Agency's OODs, issued on April 16 and August 22, 2013, repeated this demand.[14] Respondent failed to pay the full amount of Claimants' unpaid wages within 12 days after receiving the written notices and has still not paid them. Consequently, the forum assesses penalty wages at the maximum rate set out in ORS 652.150(1) (hourly rate x eight hours per day x 30 days = penalty wages). Penalty wages for Claimants Thiringer, Walker, and Wharton equal $2,160.00 ($9.00 per hour x eight hours x 30 days). Penalty wages for Claimant Wilson equal $2,640.00 ($11.00 per hour x eight hours x 30 days).

CLAIMANTS THIRINGER, WHARTON, AND WILSON ARE OWED AN ORS 653.055(1)(B) CIVIL PENALTY

In its OODs, the Agency alleges that Claimants Thiringer, Wharton, and Wilson are each owed an ORS 653.055(1)(b) civil penalty. ORS 653.055(1)(b) provides that the "[a]ny 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 for civil

[14] *See In the Matter of MAM Properties, LLC,* 28 BOLI 172, 190 fn. 7 (2007) (the Agency's Order of Determination constitutes a written notice of nonpayment of wages).

penalties provided in ORS 652.150." ORS 653.025, which establishes Oregon's minimum wage rate, and ORS 653.261, which authorizes BOLI's Commissioner to adopt rules regarding payment of overtime wages, apply in this case.

ORS 653.025 provides, in pertinent part:

> "(1) Except as provided by ORS 652.020 and the rules of the Commissioner of the Bureau of Labor and Industries issued under ORS 653.030 and 653.261, for each hour of work time that the employee is gainfully employed, no employer shall employ or agree to employ any employee at wages computed at a rate lower than:
>
> "(a) For calendar year 1997, $5.50.
>
> "* * * * *
>
> "(e) For calendar years after 2003, a rate adjusted for inflation.
>
> "(2)(a) The Oregon minimum wage shall be adjusted annually for inflation, as provided in paragraph (b) of this subsection."

ORS 653.261 and OAR 839-020-0030, BOLI's administrative rules interpreting ORS 653.261, require employers to pay employees time and a half pay for all hours worked over 40 in a given workweek.

ORS 653.025 prohibits two specific practices. First, the phrase "no employer shall employ any employee * * * at wages computed at a rate lower than [the minimum wage]" prohibits employers from paying employees less than the minimum wage, regardless of any agreed wage rate. Second, the phrase "no employer shall * * * agree to employ any employee * * * at wages computed at a rate lower than [the minimum wage]" prohibits employers from making an agreement with employees to pay them at a rate less than the minimum wage.

In 2012, Oregon's minimum wage rate was $8.80 per hour. In 2013, it was increased to $8.95 per hour. None of the exclusions set out in ORS 653.020 or in the corresponding interpretative rules adopted by the Commissioner apply to Thiringer, Wharton, or Wilson.

Thiringer

Thiringer worked 664 hours, including 12 overtime hours, and was paid $4,011.95. Based on the 2012 minimum wage of $8.80 per hour,[15] Respondent was required to pay Thiringer $5,843.20 for those hours in order to comply with ORS 653.025. By paying Thiringer only $4,011.95, Respondent paid her less than "the wages to which she was entitled under ORS 653.010." Thiringer's pay stubs also show

[15] The forum does not include overtime pay for her 12 overtime hours in this computation.

that Respondent did not pay Thiringer time and a half for the 12 overtime hours that she worked, in violation of ORS 653.261 and OAR 839-020-0030. Either violation entitles her to a civil penalty that the forum computes as follows: $9.00 per hour x 8 hours = $72.00 x 30 days = $2,160.00.

Wharton

Wharton worked 53 straight time hours and was paid nothing. Based on the 2013 minimum wage of $8.95 an hour, Respondent was required to pay Wharton $474.35 for those hours in order to comply with ORS 653.025. By paying Wharton nothing, Respondent paid Wharton less than "the wages to which she was entitled under ORS 653.010," entitling her to an ORS 653.055(1)(b) civil penalty. Her civil penalty is computed as follows: $8.95 per hour x 8 hours = $72.00 x 30 days = $2,148.00.[16]

Wilson

Wilson worked 269 straight time hours, including three overtime hours, and was paid $442.13. Based on the 2013 minimum wage of $8.95 an hour, Respondent was required to pay Wilson $2,407.55[17] for those hours in order to comply with ORS 653.025. By paying Wilson only $442.13, Respondent paid Wilson less than "the wages to which she was entitled under ORS 653.010." Wilson's single paystub also show that Respondent did not pay Wilson time and a half for the three overtime hours that she worked, in violation of ORS 653.261 and OAR 839-020-0030. Either violation entitles her to a civil penalty that the forum computes as follows: $8.95 per hour x 8 hours = $71.60 x 30 days = $2,148.00.[18]

ORDER

NOW, THEREFORE, as authorized by ORS 652.140(2), ORS 652.150, ORS 653.055, ORS 653.261, and ORS 652.332, and as payment of the unpaid wages, penalty wages, and civil penalties, the Commissioner of the Bureau of Labor and Industries hereby orders Respondent **HEY BEAUTIFUL ENTERPRISES, LTD.** to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 1045 State Office Building, 800 NE Oregon Street, Portland, Oregon 97232-2180, the following:

(1) A certified check payable to the Bureau of Labor and Industries in trust for Claimant Kara C. Thiringer in the amount of **SIX THOUSAND THREE**

[16] Although this figure seems anomalous based on the forum's conclusion that Wharton's agreed wage rate was $9.00 per hour and the forum's computation of her unpaid, due and owing wages at that rate, it is because the OOD alleged Wilson was entitled to an ORS 653.055(1)(b) civil penalty based on the wage rate of $8.95 per hour. As noted earlier, the forum may award wages and penalty wages in excess of those plead in the OOD. However, that authority does not extend to ORS 653.055(1)(b) civil penalties.

[17] The forum does not include overtime pay for her three overtime hours in this computation

[18] *See* fn. 17, noting that the forum's conclusion that Wilson's agreed wage rate was $11.00 per hour.

HUNDRED THIRTY EIGHT DOLLARS AND FIVE CENTS ($6,338.05), less appropriate lawful deductions, representing $2,018.05 in gross earned, unpaid, due and payable wages, plus interest at the legal rate on that sum from December 1, 2012, until paid; $2,160.00 in ORS 652.150 penalty wages, plus interest at the legal rate on that sum from January 1, 2013, until paid; and an ORS 653.055(1)(b) civil penalty of $2,160.00, plus interest at the legal rate on that sum from January 1, 2013, until paid.

(2) A certified check payable to the Bureau of Labor and Industries in trust for Claimant Amber R. Walker in the amount of **TWO THOUSAND NINE HUNDRED SIXTY DOLLARS AND FIFTEEN CENTS** (**$2,960.15**), less appropriate lawful deductions, representing $800.15 in gross earned, unpaid, due and payable wages, plus interest at the legal rate on that sum from February 1, 2013, until paid; and $2,160.00 in ORS 652.150 penalty wages, plus interest at the legal rate on that sum from March 1, 2013, until paid.

(3) A certified check payable to the Bureau of Labor and Industries in trust for Claimant Amber Lynn Wharton in the amount of **FOUR THOUSAND SEVEN HUNDRED EIGHTY FIVE DOLLARS** (**$4,785.00**), less appropriate lawful deductions, representing $477.00 in gross earned, unpaid, due and payable wages, plus interest at the legal rate on that sum from May 1, 2013, until paid; $2,160.00 in ORS 652.150 penalty wages, plus interest at the legal rate on that sum from June 1, 2013, until paid; and an ORS 653.055(1)(b) civil penalty of $2,148.00, plus interest at the legal rate on that sum from June 1, 2013, until paid.

(4) A certified check payable to the Bureau of Labor and Industries in trust for Claimant Savana Summer Wilson in the amount of **SEVEN THOUSAND THREE HUNDRED TWENTY ONE DOLLARS AND THIRTY SEVEN CENTS** (**$7,321.37**), less appropriate lawful deductions, representing $2,533.37 in gross earned, unpaid, due and payable wages, plus interest at the legal rate on that sum from July 1, 2013, until paid; $2,640.00 in ORS 652.150 penalty wages, plus interest at the legal rate on that sum from August 1, 2013, until paid; and an ORS 653.055(1)(b) civil penalty of $2,148.00, plus interest at the legal rate on that sum from August 1, 2013, until paid.

In the Matter of

GRANT and LESLIE HAMILTON dba MACGREGORS

Case No. 26-14
Final Order of Commissioner Brad Avakian
Issued May 9, 2014

SYNOPSIS

Respondents failed to pay wages to six Claimants they employed, and continued to fail to pay the wages, after they were served with notice of the non-payment. The Agency ultimately paid the unpaid wages from the Wage Security Fund. Respondents are liable for 30 days of penalty wages at the daily rate earned by each Claimant in an 8-hour day, and are ordered to pay that total amount of $13,392.00. Respondents are also ordered to reimburse the Wage Security Fund in the amount of the unpaid wages it paid, which is $3,698.33. Respondents are also ordered to pay a penalty to the Fund of $923.83, which is one-quarter of the unpaid wages paid by the Fund. ORS 652.330(1)(b) and ORS 652.332; ORS 652.150(1); ORS 652.414(3).

The above-entitled case was assigned to Daniel Rosenhouse, designated as Administrative Law Judge ("ALJ") by Brad Avakian, 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 Administrative Prosecutor Cristin Casey, an employee of the Agency.

After the Agency issued an Order of Determination, the Agency moved for summary judgment. The motion was granted, with certain modifications, by the ALJ.

The Proposed Order was issued on April 7, 2014. Exceptions were filed by the Agency and are addressed below. No exceptions were filed by either Respondent.

Having fully considered the entire record in this matter, I Brad Avakian, Commissioner of the Bureau of Labor and Industries, hereby make the following Findings of Fact, Conclusions of Law, Opinion, and Order.

33 BOLI ORDERS

FINDINGS OF FACT

1) The Agency issued, on June 20, 2013 its Order of Determination (OOD), pursuant to ORS 652.310 to 652.405.

2) The OOD was served on each of the Respondents on June 27, 2013.

3) The OOD finds the Respondents failed to pay wages owed to wage claimants in the amount of $3698.33, that said wages were paid by the Wage Security Fund pursuant to ORS 652.414; that the Respondents are liable for the wages; that Respondents are liable for penalty wages in the amount of $13,392.00 for wilfully failing to pay the wages within 30 days after termination of employment and after written notice, pursuant to ORS 652.140 and 652.150; that Respondents are liable for reimbursement to the Wage Security Fund (the Fund) of the wages it paid; that Respondents are liable for a penalty in the amount of $200.00 or 25% of the amount paid from the Fund, whichever is greater; and that Respondents are ordered to pay the amounts found to be owed or may, pursuant to ORS 652.332, request a hearing.

4) On July 29, 2013, Respondents each filed an Answer and requested a hearing.

5) On February 4, 2014, the forum issued a Notice of Hearing to Respondents setting the time and place of hearing for 10:00 A.M. on April 3, 2014 at the offices of BOLI at 3865 Wolverine Street NE, Building E-1, in Salem, Oregon. Together with the Notice of Hearing, the forum sent a copy of the Order of Determination, a document entitled “Summary of Contested Case Rights and Procedures” containing the information required by ORS 183.413, a document titled “Servicemembers Civil Relief Act (SCRA Notification, and a copy of the forum’s contested case hearings rules, OAR 839-050 to 839-050-0445.

6) On February 5, 2014, the forum issued an Interim Order to the participants, which included a notice that participants have seven days after service of any motion to file a written response.

7) On February 20, 2014, the Agency filed a motion for Summary Judgment.

8) Respondents have not filed any response to the motion.

9) On March 11, 2014, the forum issued its OPINION and INTERIM ORDER GRANTING IN PART AND DENYING IN PART MOTION FOR SUMMARY JUDGMENT (Summary Judgment Order). The Summary Judgment Order, slightly modified, as explained below, is reproduced in the Opinion portion of this Proposed Order.

CONCLUSIONS OF LAW

1) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the subject matter and Respondents herein. ORS 652.330; 652.332; 652.414(3).

2) The legal conclusions and factual findings set forth below under the ***Summary Judgment Order*** are hereby adopted into this Proposed Order; modifications to the originally issued Summary Judgment Order have been made, as noted in the Opinion portion of this Final Order.

3) Respondents are jointly and severally liable for and shall pay, as reimbursement to the Wage Security Fund, $3,698.33.

4) Under ORS 652.140 and 652.150, respondents are jointly and severally liable for and shall pay, as penalty wages to the Agency, ultimately payable to the wage claimants, $13,392.00.

5) Respondents are jointly and severally liable for and shall pay, as a penalty to the Agency, $923.83.

OPINION

The Agency filed Exceptions to the Proposed Opinion. It takes exception to the Proposed Opinion's characterization of the allegations regarding the Agency's receipt of assignments of wages from the Wage Claimants as "indirect." And although the Agency has no objection to the forum's ultimate conclusion that wage assignments were received by the Agency, it does appear to object to the forum's reliance, for that conclusion, upon the precept that the law was followed, rather than the actual allegation in the Order of Determination. The Agency points out that Paragraph II of the Order of Determination states, "This Order is based upon the assigned wage claims filed by those wage claimants whose information is set out in Exhibit A, attached hereto and incorporated herein by this reference." The forum agrees that the quoted language, although not a direct declarative statement, is adequate to directly undergird the factual assertion that the Agency took assignments of wages from the Wage Claimants. The portion of the Summary Judgment Order suggesting otherwise has been redacted below to accord with this determination.

The Agency's second and final exception raises the question of collection of interest. The Agency notes the forum's determination that "interest accruing prior to the entry of the Final Order is not allowed." It then asks for consideration of Exhibits A and C of the Order of Determination, pointing out that they both state "with interest thereon at the legal rate per annum from the date of the judgment until paid." From these statements—and the fact that the "date of the judgment" is not, and cannot possibly be, earlier than "the entry of the Final Order"—the forum infers that the Agency has no objection to the forum's ultimate conclusion that interest is recoverable only from the date of judgment.

To clarify, and as pointed out in what is now the final footnote in the Summary Judgment Order, interest on judgments is recoverable as allowed by ORS 82.010(2).

There is no need to plead any entitlement *to post-judgment interest* in an Order of Determination. Such interest, unlike pre-judgment interest, is recoverable on all judgments. *In the Matter of Chase and Chase*, 354 Or 776, 783-84, (2014) (citing *Highway Comm. v. DeLong Corp.*, 275 Or 351, 357-58 (1976)).

Pre-judgment Interest, on the other hand, may only be recovered in certain circumstances. One of those circumstances is, for example, that interest is recoverable on all money after it becomes due. ORS 82.010(1)(a). This is a circumstance, the forum notes, which can generally be ascertained in the case of wages and in the case of payment from the Wage Security Fund. However, in this case, the Agency did not claim or request pre-judgment interest as part of the remedy it sought.[1] OAR 839-050-0060(1)(c). Without any specific claim for pre-judgment interest and the statutory basis therefore, without notice of the same to the Respondent, and without a specific date from which pre-judgment interest can be calculated, the forum is unable to award pre-judgment interest.

Summary Judgment Order

****

INTRODUCTION

On June 20, 2013, Agency issued Order of Determination #13-1174 ('OOD'). The OOD charges that Respondents owe $3,693.33 to the Wage Security Fund, see ORS 652.409 *et seq*, for wages it paid to six different wage claimants ('Claimants') for work they performed for Respondents between March 1 and April 5, 2013; $13,392 in ORS 652.150 penalty wages for Respondents' willful failure to pay the wages to the Claimants, calculated on the basis of Claimants' hourly wages ranging from $9.00 to $10.05 per hour; and $1,694 as a penalty under ORS 652.414 (3).

The OOD advises the Respondents of their right to a contested case hearing, of the time requirement and place for requesting a hearing, the applicability of statutes allowing recovery of wages, including ORS 652.330, and the requirement to file an Answer and the consequences of failing to do so. Also served with the OOD are attachments including information about the Agency's contested case hearing process, a multi-language warning about the importance of responding to the OOD, a notice about using an authorized representative, and a special notification under the Servicemembers Civil Relief Act.

Both Respondents were served with the OOD and filed answers and requests for a hearing on July 22, 2013. Their answers are identical, and except for the name of the individual Respondent, are set out exactly, below:

[1] In its Exceptions, at page 2, the Agency points out that Exhibits A and C of the OOD request interest "from the date of judgment until paid."

> I [answering Respondent] request a hearing in response to Order of Determination 13-1174.
> In regards to paragraph II, exhibit A, I agree all hours in the amount of 392.12 and entitled wages in the amount of $3698.33 are correct.
> In regards to paragraph III, exhibit B, I disagree that penalty wages are owed.
>
> /s/ [Answering Respondent]

On February 20, 2014, the Agency filed a motion for Summary Judgment, contending it was entitled to judgment as a matter of law on all of the allegations in its OOD, and requesting partial summary judgment in the alternative. Pursuant to OAR 839-050-0150, Respondents had seven days to file a written response to the motion. Notice of the timeline for responding to motions had been specifically provided to Respondents in the Forum's Interim Order, dated and served upon them on February 5, 2014. Respondents have filed no response.

Summary Judgment—Legal Standards

Motions for summary judgment are specifically authorized by the Oregon Administrative Rules. OAR 839-050-0150(4)(a) provides that such a motion may be made to obtain an accelerated decision as to all or part of the issues raised in the pleadings. If granted, the decision of the Administrative Law Judge is to be set forth in the Proposed Order. 839-050-150(4)(b).

OAR 839-050-0150(4) sets forth the circumstances in which a motion for summary judgment may be made. Precedent establishes when it may be granted. 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. No genuine issue as to a material fact exists if, based upon the record before the court viewed in a manner most favorable to the adverse party, no objectively reasonable juror could return a verdict for the adverse party on the matter that is the subject of the motion for summary judgment. In reviewing a motion for summary judgment, the Forum draws all inferences of fact from the record against the participant filing it and in favor of the participant opposing the motion. However, the adverse party has the burden of producing evidence on any issue raised in the motion as to which the adverse party would have the burden of persuasion at hearing. *See, e.g.*, *Jones v. General Motors Corp.,* 325 Or 404, 408 (1997); ORCP 47; *In the Matter of KC Systems, Inc. fdba The Machine Shop, 32 BOLI 205, 206-07 (2013); In the Matter of Fraser's Restaurant & Lounge*, 31

BOLI 167, 169-70 (2011); *In the Matter of David W. Lewis*, 31 BOLI 160, 162 (2011).

In this case, another rule, relating to the effect of pleadings is also germane. OAR 839-050-0130(2) requires the answer to include an admission or denial of each fact alleged in the charging document and that a general denial is insufficient. Subsection (3) of the same rule provides that factual matters alleged in a charging document and not denied in the answer are deemed admitted by the answering party.

Unpaid Wages

In the claim to establish liability for unpaid wages, the Agency's prima facie case consists of the following elements: 1) Respondents employed the Claimants; 2) The pay rates upon which Respondents and Claimants agreed, if other than the minimum wage; 3) The amount and extent of work Claimants performed for Respondents; and 4) Claimants performed work for which they were not properly compensated. *See, e.g., In the Matter of J & S Moving & Storage, Inc.,* 31 BOLI 286, 295 (2012).

In Paragraph II and Exhibit A, referenced in Paragraph II, of the OOD, the Agency specifically alleges that (1) Claimants worked for Respondents between March 1 and terminated work no later than April 5, 2013; (2) Claimants' agreed rate of pay were at specifically alleged amounts varying between $8.95 and $10.05 per hour; (3) Each Claimant worked for Respondents a specified number of hours at specified rates; and (4) Claimants earned a total of $3,698.33 in wages, all of which has been paid by the Wage Security Fund and none of which has been paid by Respondents. In their answers, as set forth above, the Respondents acknowledge and admit that wages are due and the amounts alleged. Respondents' admissions establish that the wages were unpaid and that they were due.

Penalty Wages

Penalty wages are due when an employer willfully fails to pay wages to an employee whose employment has ceased. ORS 652.150(1). Penalty wages are recoverable by the Commissioner when liability is established and the Commissioner has an assignment of wages from the wage claimant. ORS 652.330(1)(b). Wages in those circumstances are due no more than five business days after the termination. ORS 652.140. The daily penalty, which is the wages or compensation of the employee at the same hourly rate of eight hours per day, accrues until the earlier of payment or 30 days from termination. ORS 652.150(1). If a written notice of nonpayment, including the amount estimated to be owed, is not given to the employer on behalf of the employee, or if the employer does pay the

wages due within 12 days after receiving the notice, the penalty can be no more than 100% of the unpaid wages.[2] ORS 652.150(2). *See generally,* OAR 839-001-0470.

In this case, the OOD alleges, in Paragraph III, that $13,392 is owed in penalty wages and it seeks to collect those wages. The exact amount for each worker is set out in Exhibit C to the OOD and is reproduced at the end of this Opinion and Order. The termination date for each employee, in addition to being set out in Exhibit A, is also set out in Exhibit B to the OOD, referenced in Paragraph III. As mentioned above, in regard to the wages earned, the latest termination date was April 5, 2013. By their admissions in their Answers, the Respondents admit the termination dates, the hourly rates, and that the wages have still not been paid by them. Clearly, more than 30 days have elapsed since the wages were due.

Exhibit 2 to the Motion for Summary Judgment consists of the two Affidavits of Service of the OOD and associated documents on the two Respondents. Both Respondents were served on June 27, 2013. The OOD, as a whole, contains written notice of nonpayment of the wages, including the amounts of wages owed for each Claimant. The OOD also contains in Exhibit B, the hourly pay due, and the calculations demonstrating the amount of penalty accrued for the 30-day period. The fact of written notice, required by ORS 652.150 to create liability for 30 days' of wages is therefore established, as is the amount of the penalty, if penalties are ultimately found to be due.

No penalty wages are due, however, unless the failure to pay was "willful." ORS 652.150. The OOD, in Section III, alleges, "The employers have willfully failed to pay the wages referred to in Paragraph II and set forth in Exhibit A, entitling the wage claimants to $13,392.00 in penalty wages."

Willfulness does not imply or require blame, malice, 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. *See, e.g., In the Matter of E. H. Glaab, General Contractor, Inc.,* 32 BOLI 60, 65 (2012).

As a general rule, an employer is charged with knowing the hours worked by employees and their rates of pay. *In the Matter of Country Auction, 5 BOLI 256, 267 (1986).* Moreover, as set forth above, Respondents have unquestionably known, at least since they were served with the OOD on June 27, 2013, that wages are owed to the Claimants.

[2] Other conditions, not relevant here, may also apply. *See generally, ORS 652.150.*

They have continued to fail to pay those wages. There is no reason to suspect that they are not acting as free agents. Their continuing failure to pay wages known and acknowledged to be due is a willful failure to pay those wages. The forum therefore concludes that Respondents' failure to pay Claimants all wages due to them at and after the time termination was willful.

….

In summary, liability for, and the amount of, penalty wages is established at $13,392, as is the Commissioner's right to collect them.

Wage Security Fund Reimbursement and Penalty

The Commissioner is authorized and directed to pay wages to an employee from the Wage Security Fund only if the conditions in ORS 652.414(1) are met. Under ORS 652.414(2), the Commissioner may commence a proceeding, such as this one, to recover from the persons "liable for the unpaid wages, amounts paid from the Wage Security Fund under subsection (1) of this section." As set out above, the fact that payment was made, the amount paid, and Respondents' liability are all admitted in Paragraph II. Likewise, the fact that the requirements of ORS 652.414(1) are met is also established. *In the Matter of David W. Lewis, 31 BOLI 160, 163 (2011); In the Matter of Hickox Enterprises, Inc., 22 BOLI 10, 14 (2001).* See also, ORS 40.135(1)(j), stating the evidentiary presumption that "Official duty has been regularly performed."

If wages are paid from the Wage Security Fund, the Commissioner is authorized to collect them from the employer who failed to pay them, along with a penalty. Thus, the Commissioner may collect the $3,698.33 in wages paid from the Fund.

The remaining question is the amount of the penalty. In a proceeding under ORS 652.414, the Commissioner may also recover a "penalty of 25 percent of the amount of wages paid from the Wage Security Fund, or $200, whichever amount is the greater." ORS 652.414(3).

The OOD requests, as set out in Paragraph IV and Exhibit C, that the penalty be awarded in the amount of $1,694.40. This is more than 25% of the total wage payout of $3,698.33. The higher amount is calculated by applying the minimum $200 penalty to each of five workers, none of whom is owed as much as $800, individually. Paragraph IV cites ORS 652.414(3) as the Commissioner's authority to impose the requested penalty. The OOD cites no supporting administrative rule.

But while ORS 652.414(3) does, by itself, authorize the imposition of a penalty, it does not authorize a penalty in the amount sought in the OOD. Until the 2012 amendment to OAR 839-001-0560,[3] the statute had been found to prohibit the use of the minimum $200 penalty on a per/worker basis when the total amount paid from the Fund on account of a single employer exceeded $800, even if one of two or more employees earned less than $800. *See, In the Matter of David W. Lewis*, 31 BOLI 160, 162 (2011); *In the Matter of Carl Odoms*, 27 BOLI 232 (2006).

Thus, to impose a penalty of $200 on account of each of the five Claimants who earned less than $800, the Agency relies here, not on the statute, but on the new OAR 839-001-0560(2). But the Agency did not give notice of its reliance on that rule in the OOD. Under OAR 839-050-0060(1)(a) and ORS 183.415(3)(c), the OOD must contain a "reference to the particular statutes or administrative rules involved in the violation." Without reference to the appropriate rule, where the requested relief depends entirely on that rule, the Agency may not rely upon it to calculate the higher penalty. *See, In the Matter of Petworks, LLC, 30 BOLI 35, 46 (2008)* (overtime wages not awarded because order of determination lacked a citation to the overtime statute and rule allegedly violated). *See also, Villanueva v. Board of Psychologist Examiners, 175 Or App 345, 27P3d 1100, 1106 (2001), adh'd to on recons 179 Or App 124, 39 P3d 238 (2002)* (finding that the statutory obligation is effective, even if it does not affect a party's substantial rights).

The OOD does cite ORS 652.414, which allows imposition of a penalty of 25% of the total paid the Fund in satisfaction of an employer's obligation to pay wages. The penalty is allowed in the amount of 25% of the total wages paid from the Wage Security Fund. The penalty is allowed in the amount of $923.83.

The final issue raised by the OOD is liability for interest on the amount paid from the Wage Security Fund. Interest is requested in Paragraph IV. The OOD cites ORS 652.414(3) for the proposition that interest is recoverable. The Forum is unable to find such authorization in the statute. Moreover, the OOD does not state the date from which interest should accrue. Finally, the Agency's Motion, while it does specifically request penalties and the 25% penalty, does not specifically request interest. For all these reasons, interest accruing prior to the entry of the Final Order is not allowed.[4]

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[3] OAR 839-001-0560(2), effective January 1, 2012, provides: The penalty provided in ORS 652.414(3) of 25 percent of the amount of wages paid from the Wage Security Fund or $200, whichever amount is greater, shall be calculated based on the amount paid to each employee from the Wage Security Fund.

[4] If and when a Final Order is registered as a judgment, entitlement to interest would then be determined according to the provisions in ORS 82.010 (2).

In summary, the Agency's Motion for Summary Judgment is granted, as follows:

1. Respondents are liable for the wages they failed to pay to the Claimants;

2. Respondents are liable to the Agency for penalty wages of $13,392.00, ultimately payable to the Claimants as follows:

    a. $2,160.00 for Benjamin P. Avilla'
    b. $2,412.00 for Christopher D. Boorman;
    c. $2,160.00 for Kelsey L. Huber;
    d. $2,220.00 for David J. Miller;
    e. $2,220.00 for Redgal M. Rawlins; and
    f. $2,220.00 for Nathan R. Tenney.

3. Respondents are liable to the Agency for $3,698.33 as reimbursement to the Wage Security Fund.

4. Respondents are liable to the Agency for $923.83 as a penalty to the Wage Security Fund.

Except as set forth above, the Agency's Motion for Summary Judgment is denied.

As no evidentiary issues remain to be resolved, the hearing scheduled for April 2, 2014 is cancelled. Consequently, the portion of the Interim Order dated February 5, 2014 requiring participants to file a case summary by March 21, 2014 is also cancelled. The Forum will issue a Proposed Order in due course.

IT IS SO ORDERED.

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All issues having been resolved by the Summary Judgment Order or the discussion immediately preceding it, no further discussion is required.

ORDER

NOW, THEREFORE, as authorized by ORS 652.330 (1)(d), 652.332, and 652.414; as payment of the penalties assessed as a result of its violations of ORS 652.140; as reimbursement to the Wage Security Fund of the wages found to be valid and paid by that Fund under ORS 652.414; and as payment of the penalty due under ORS 652.414 for failing to pay the valid wages, the Commissioner of the Bureau of Labor and Industries hereby orders—

Respondents Grant Bernard Hamilton and Leslie Linn Hein Hamilton, jointly and severally, to pay, by delivering to the Fiscal Services Office of the Bureau of Labor and Industries, 1045 State Office Building, 800 NE Oregon Street, Portland, Oregon 97232-2180, a certified check payable to the Bureau of Labor and Industries in the amount of EIGHTEEN THOUSAND FOURTEEN DOLLARS AND SIXTEEN CENTS ($18,014.16).

In the Matter of

MULTNOMAH COUNTY SHERIFF'S OFFICE

Case No. 01-14
Final Order of Commissioner Brad Avakian
Issued May 19, 2014

SYNOPSIS

Complainant, who qualified as a disabled veteran under Oregon's Veterans' Preference Law, ORS 408.225 through 408.237, was one of three applicants, all sergeants with Respondent's office, who applied for a promotion to Law Enforcement Lieutenant. Complainant was not hired. Respondent did not comply with the Law in that it failed to devise and apply methods to give special consideration in the hiring decision to veterans and disabled veterans. Damages for emotional distress are granted in the amount of $50,000, and Respondent is ordered to comply with the law and train its staff. ORS 408.225 and 408.230. OAR 839-006-0450. ORS 659A.820 and 659A.850. OAR 839-006-0470.

The above-entitled case came on regularly for hearing before Daniel Rosenhouse, designated as Administrative Law Judge ("ALJ") by Brad Avakian, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on December 17 and 18, 2013 at the Portland, Oregon office of the Bureau of Labor and Industries, at 800 NE Oregon Street, Suite 1045.

The Agency was represented by Administrative Prosecutor Cristin Casey, an employee of the Agency. Respondent Multnomah County Sheriff's Office (sometimes referred to here as the Sheriff's Office or MCSO) was represented by Assistant County Attorneys Kathryn A. Short and Katharine von Ter Stegge.

Witnesses called by the Agency were Senior Civil Rights Investigator Jessica Ponaman; the Complainant, Sgt. Rod Edwards; County Human Resources Manager Jennifer Ott; and Respondent's Assistant County Attorney Kathryn Short. Witnesses called by Respondent were Chief Deputy Jason Gates, Ms. Ott, and Undersheriff Timothy Moore. On rebuttal, the Agency called former Sheriff's Office Captain Brett Elliott, Ms. Ott again, and Complainant's attorney, Sean Riddell.

The forum received into evidence Agency Exhibits A-1 through A-23 and A-26 and it received Respondent Exhibits R-1 through R-32. Admission of Agency Exhibit A-27 was denied. In addition to the audio record of the hearing, the official record also included, at the time of the Hearing, Administrative Exhibits X-1 through X-22. Since the

conclusion of the hearing, additional documents have been entered into the record: Agency Request for Two Copies of Audio Recording of Hearing, dated January 31, 2014, now X-23; Notice from the forum, dated February 3, 2014, now X-24; Respondent's Request for a Copy of Audio Recording of Hearing, now X-25; Interim Order – Limited Reopening of the Record, now X-26; and Agency's Response to ALJ's Interim Order dated February 10, 2014, now X-27.

After the Administrative Law Judge issued his Proposed Order, both the Agency and Respondent filed Exceptions. Those Exceptions are addressed in the Opinion.

Having fully considered the entire record in this matter, I Brad Avakian, Commissioner of the Bureau of Labor and Industries, hereby make the following Findings of Fact, Conclusions of Law, Opinion, and Order.

RULINGS AND RESOLUTIONS OF MOTIONS OR OBJECTIONS

All motions raised prior to or at the hearing were resolved prior to the hearing or on the record at the hearing.

FINDINGS OF FACT

1) On January 24, 2013, the Agency's Civil Rights Division received a written complaint verified by Sgt. Rod A. Edwards against his employer. The complaint identifies Multnomah County Sheriff's Office (MCSO) as the entity that committed the alleged unlawful practice, and provides its address. (Ex. A-2)

2) The complaint alleges, among other things, that MCSO, in violation of ORS 408.230, ignored Complainant's disabled veteran preference points during a recent promotion process.

3) On January 30, 2013, the Agency notified Respondent of Sgt. Edwards's complaint, including the date, place and circumstances of the alleged unlawful practice, and that a written response to each allegation was expected, including supporting documentation or other evidence. (Ex. A-3)

4) MCSO responded with an eight page letter plus enclosures, dated February 27, 2013 (referred to here as the Position Statement). (Ex. A-5).

5) On June 19, 2013, the Commissioner's designee signed and the Agency issued, a finding of substantial evidence. (Ex. A-22) The finding was sent to the Respondent and the Complainant; it states the names of the Complainant and Respondent. It also states the allegations contained in the complaint, the facts found by the Agency that are related to the allegations of the complaint and that the Agency's investigation discloses substantial evidence supporting those allegations of the complaint relating to a failure to devise a plan for applying the veterans' preference.

6) On October 3, 2013, Exhibit X-2, including a Notice of Hearing and Formal Charges were issued against Respondent MCSO, and served upon it by mail. Among the items alleged in the Formal Charges are —

a. The alleged violations are within the jurisdiction of the Agency pursuant to ORS 408.225 through ORS 408.237 and the applicable administrative rules relating to veterans' preference in hiring and promotion.
b. MCSO is subject to the veterans' preference laws, including the procedures under ORS 659A.820 through 659A.865 and the applicable administrative rules.
c. Sgt. Edwards filed a complaint and the Agency found substantial evidence that MCSO violated the veterans' preference statutes.
d. Sgt. Edwards was a disabled veteran, along with particular facts relating to his time of military service and disability.
e. Respondent MCSO is a public employer.
f. Sgt. Edwards was hired by Respondent in 1994 and promoted to sergeant in 2005.
g. MCSO announced and publicized an opening for a lieutenant position in its Law Enforcement Division on September 5, 2012.
h. Sgt. Edwards was the only applicant among the three persons who applied for the lieutenant position to submit documentation of his entitlement to a veterans' preference.
i. Sgt. Edwards submitted all the appropriate material required by the job announcement, but did not receive the promotion.
j. MCSO had no articulated plan on how it would award preference to veterans and disabled veterans.
k. MCSO failed to grant a veterans' preference to Sgt. Edwards, generally and at each stage of the application process.
l. MCSO failed to devise and apply methods by which special consideration is given to veterans and disabled veterans in its hiring decisions.
m. Sgt. Edwards suffered damages from physical, mental and emotional distress, estimated at $50,000.00, and he also suffered loss of future wages and benefits estimated at $460,212.00; both were to be proven at the hearing.
n. MCSO should be required to train its staff on veterans' preference, and create and implement a new policy pertaining to veterans' preference, both of which should be submitted to the Agency, or an entity approved by the Agency.

7) On or about October 23, Respondent timely filed an Answer and Affirmative Defenses. MCSO's Answer admitted the facts alleged above, in 6) f., g., h. and i., that Sgt. Edwards was eligible for promotion, and that its method of evaluating applicants for the lieutenant position did not result in a score. MCSO denied the other allegations stated above. MCSO also raised various affirmative defenses.

8) At the start of the hearing, the ALJ orally advised the Agency and Respondent of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

9) MCSO is a part of Multnomah County and is a local public body in the State of Oregon.

10) Complainant Rod Edwards was, in 2012, a sergeant in the Civil Department of the Sheriff's Office. He had served as a sergeant with MCSO since 2005, and with the Law Enforcement Division for more than three years.

11) On September 5, 2012, the MCSO published an announcement that it was seeking applicants for the position of lieutenant in its Law Enforcement Department, which includes the Civil Department. The announcement was an internal one within MCSO; the position was not advertised outside the MCSO. (Ex. A-6) The announcement indicated that the position was "open to any enforcement member who has completed at least three years in the LE [Law Enforcement] sergeant classification." It indicated no other minimum requirements for applicants.

12) The lieutenant position was a civil service position. It was a higher level position than a sergeant position with a higher top salary range (Ex. R-30 and R-31); it would have been a promotion for Sgt. Edwards and the other two applicants. It was a management-level position requiring significant leadership skills.

13) The lieutenant position was held "at-will", meaning that the head of the MCSO, the Sheriff, could remove that person at his discretion, virtually unfettered by usual civil service restraints. Although lieutenants frequently worked more than 40 hours per week, they do not receive overtime pay, as sergeants do.

14) Sgt. Edwards and two other sergeants who had completed at least three years in the Law Enforcement Department, Sgt. Tim Lichatowich and Sgt. Travis Gullberg, each applied for the lieutenant position by timely submitting a letter of interest/resumé; they were the only applicants. All three met the minimum qualifications, as set forth in the job announcement. All three satisfied initial application screening for the position.

15) Sgt. Edwards is and was a veteran of the US Military and a disabled veteran, and he submitted documentation to that effect with his application. Neither of the other two applicants submitted such documentation.

16) MCSO did not promote Sgt. Edwards to the job; it promoted Sgt. Gullberg.

17) In response to the Civil Rights Division's inquiry regarding Sgt. Edwards, MCSO in its Position Statement admitted its system for promotion is not documented in its Agency Manual; it pointed out that instead, its system is described in materials

MCSO provides to job applicants, including the Job Announcement, Candidate Orientation to the Exam Process and Candidate Bulletins. (Ex. A-5, p. 6)

18) The job announcement for the Lieutenant position states that selection for the position will be based on a letter of interest/resumé, 360 degree review and internal command staff interview. It makes no mention of a veterans' preference or disabled veterans' preference. (Ex. A-6.)

19) The Candidate Orientation to the Exam Process submitted to the Civil Rights Division by MCSO as part of its Position Statement makes no mention of a veterans' preference or disabled veterans' preference. (Ex. A-11)

20) Nothing identified by MCSO as a Candidate Bulletin was submitted into evidence. Multnomah County's website states that disabled veterans are afforded 10 preference points in job application. It describes no other manner in which a disabled veteran might benefit from veterans' preference. (Ex. A-9 and Ex. R-23)

21) MCSO used an application examination for the hiring of the lieutenant that consisted of an evaluation method of ranking an applicant that did not result in a score.

22) There was no numerically scored portion of the application process, and there is nothing in the process by which 10, or any specific quantity of "points" could be applied, although each of the three applicants was interviewed and each Interviewer ranked the applicants against each other.

23) All three applicants submitted the requisite written letter of interest and resumé and submitted to an interview. These were the only "components" of the process for the promotion in which the applicants actively participated. By the time of their interviews, they had also been the subject of a "360 review" survey to which some of their co-workers had responded.

24) The written letter of interest and resumé submitted by Sgt. Edwards showed evidence of carelessness not evident in those of the other applicants.

25) The "360 review" was a survey distributed by Multnomah County's Human Resources Department to civilian and sworn staff at MCSO who had worked with the applicant within the prior three years. For Sgt. Edwards, this consisted of approximately 120 people; nine responded, including Interviewer Reiser and Sgt. Gullberg, who was one of his competitors for the Lieutenant position. This return rate was slightly below the typical response rate of 10%.

26) The comments for Sgt. Edwards on the 360 reviews were much less positive than for the other two applicants. The 360 reviews for Sgt. Edwards contained more and stronger negative comments than did those for the other two applicants.

27) The interview of each applicant was conducted jointly by Undersheriff Timothy Moore, Chief Deputy Jason Gates, and Captain Monte Reiser, who was and is Sgt. Edwards' immediate supervisor (referred to here as the Interviewers, or the Command Staff). (Edwards Testimony)

28) The Interviewers each independently wrote their recommendations for the promotion, based on the written application materials, the "360-review," and the interview. Chief Deputy Gates and Undersheriff Moore also drew upon their personal experiences with the applicants. (Ex. R-18, page 2, and Testimony of Gates and Moore.)

29) In each independently produced written recommendation to Sheriff Staton (Ex. R-17 from Reiser, Ex. 18 from Gates, and Ex. 19 from Moore), each Interviewer ranked Sgt. Gullberg first, Sgt. Lichatowich second, and the Complainant, Sgt. Edwards, third. All three written recommendations found Sgt. Gullberg to be much more qualified than Sgt. Edwards. There were sound, job-related reasons for their findings and the written recommendations.

30) The Interviewers' written recommendations were provided to the head of the Sheriff's Office, Sheriff Staton. Sheriff Staton made the final hiring decision.

31) As he considered his hiring decision, Sheriff Staton met with Human Resources Manager Jennifer Ott; he did not meet with Chief Deputy Gates and there is no evidence he met with either Undersheriff Moore or with Captain Reiser. (Testimony of Ott and Gates)

32) Chief Deputy Gates, acting upon advice given to him by Ms. Ott, applied a veterans' preference in favor of Sgt. Edwards by considering him to be, initially, "the top candidate at each stage of the process." By Chief Deputy Gates's understanding, Sgt. Edwards would "move up" if he were equal to all other candidates. Chief Gates believed he needed a reason not to keep Sgt. Edwards at the number one position. When asked how he applied the veterans' preference with reference to the initial application/resumé, he responded by saying that "we applied veterans' preference by always putting Sgt. Edwards at the top, as far as the consideration with respect to that and any area that he wasn't considered on the top, we need to provide a reason why." (Gates Testimony)

33) Chief Deputy Gates understood the components of the process to be the letter of interest/resumé, the 360 reviews, and the interview. *Id.*

34) Chief Deputy Gates did not apply veterans' preference in his consideration of each of the applicants' "components". Rather, he evaluated each component on its own merits. He found that Sgt. Edwards was not equal or superior to the other two candidates in any of the three "components." (*Id.)* There is objective support in the record for Chief Gates' finding.

35) He also stated that he knew there might be further application of the preference at a later stage. *Id.*

36) Chief Deputy Gates was unable to say whether each "component" was also a separate "stage". *Id.*

37) Chief Deputy Gates made no mention of veterans' preference or disabled veterans' preference in his written recommendation to Sheriff Staton. Ex. R-18.

38) Chief Deputy Gates is a veteran. (Testimony of Ott)

39) Ms. Ott is the Human Resources Manager at MCSO.

40) Ms. Ott testified that she was "not a part of the hiring process." She also testified that it was her responsibility, and not the Interviewers', to apply the veterans' preference. Her application of the preference was based on the discussion she had with the Interviewers, her review of the 360's and written submissions by the applicants, and the Interviewers' written summaries. She said that it was her responsibility to make sure the Sheriff applied the veterans' preference when he made the final decision. (Ott Testimony)

41) Ms. Ott testified that under Respondent's personnel rules, the Sheriff could have simply appointed whomever he wanted without any process, but that route was rejected because it was not transparent and might have suggested the "good ol' boy" methods that Sheriff Staton did not want to practice.

42) Ms. Ott testified that the veterans' preference was applied by looking at where Sgt. Edwards "fell in the process and did he still have the job as he did when he went in through the process." (*Id.*)

43) Ms. Ott described the existence and application of the veterans' preference in various ways. She stated that the veterans' preference would apply "at the beginning of the process". She said she told the Interviewers that, at the beginning of the process "the job was [Sgt. Edwards'] to lose." She also stated that Sgt. Edwards was the "number 1 candidate going into all three components," that he was the "top candidate" at the interview step, and that the job "was his to lose at each stage". (*Id.*)

44) By the end of the process, when Sheriff Staton made the final decision, Ms. Ott stated that the veterans' preference was provided to Sgt. Edwards, but it was not sufficient to "get him up to being the number 1 candidate", and that the preference was not sufficient to move him above the other two candidates. (*Id.*)

45) She also stated that if Sgt. Edwards had been "marginally close to the top two candidates, my responsibility was to say to the Sheriff that, 'Rod gets the job. Rod is to be promoted.' And that could not occur because he was not competitive; he was not ready for promotion based on the process." (*Id.*)

46) In her letter to Sgt. Edwards, written approximately four weeks after the decision was announced to hire Sgt. Gullberg and approximately three weeks after Sgt. Edwards asked for a written explanation of why he was not appointed to the lieutenant position, Ex. A-17, Ms. Ott's only reference to application of the veterans' preference was, "Because there were no numerical tests involved in which to apply your veteran preference points, we applied your points as you went into this process, and you were the number one candidate at the top of the list of three potential candidates for promotion."

47) Ms. Ott also said she told the Interviewers that if "he [Sgt. Edwards] scored first, second, or even a competitive third [of the three applicants] the job was his and that was the direction given to them." But later in her testimony, she said that "competitive third is my words" and "No, it's not part of the process" and that competitive third was "not my direction to anybody." (*Id.*)

48) According to her letter to Sgt. Edwards, "once the process had been completed", Ms. Ott advised the Interviewers that he was "to be considered the top candidate for promotion." According to her letter the "three components of the process" were the letter of interest and resumé, the command staff interview, and the 360 reviews. Ex. A-17.

49) According to her testimony, prior to the interviews, Ms. Ott advised the Interviewers that Sgt. Edwards was the "top candidate going into the process." (Ott Testimony)

50) Ms. Ott also stated there was "no way job was [Sgt. Edwards's] after the 360's", that "[B]ased on the 360's, I don't think he could've been promoted", that "he [Sgt. Edwards] was not even competitively still in the process on that piece [the 360 review] alone." And she also explained the process of Sgt. Edwards's failure to get the job as a situation where, "Even with a Veterans' Preference, he was not ready for promotion", that he "could not immediately take over in a leadership position." And she testified that, "If he had been competitive, the job would have been his and that's what I would have told the Sheriff." Similarly, she testified that had Sgt. Edwards been "marginally close to the top two candidates, my responsibility was to say to the sheriff, 'Rod gets the job. Rod is to be promoted.' And that could not occur because he was not competitive; he was not ready for promotion based on the process." (*Id.*)

51) Ms. Ott testified that she told Sheriff Staton that "[G]oing into this process, [Sgt. Edwards] is his number one candidate; he needs to read the summaries that panelists put together and apply preference." (*Id.*)

52) Undersheriff Moore summarized his understanding of the preference to be applied, which he learned from Ms. Ott: Sgt. Edwards's veterans' preference was that he would be considered the number one prospect going into the process. He did not

have other discussions with Ms. Ott that informed him about the veterans' preference after the interview. (Moore Testimony)

53) Undersheriff Moore did not view the veterans' preference as applying individually to the three components of the applications from each applicant. In answer to the question of whether he applied the veterans' preference at each of the three components, he answered that he "jelled up my kind of beliefs around this and made one set of recommendations, so they were applied to all." (*Id.*)

54) Undersheriff Moore did not consider, and he did not use as the standard for his consideration of Sgt. Edwards' promotion, whether he was a "competitive third." Rather, he evaluated whether Sgt. Edwards was "ready to be promoted or not ready to be promoted," whether Sgt. Edwards was "prepared to be a lieutenant, whether he had the requisite skill set and whether [he] could be successful on that job." Undersheriff Moore's understanding was that if Sgt. Edwards had been ready to be a lieutenant—"if he had the requisite skill set"—he would have the job, regardless of the qualifications of the other candidates, because "he was entitled to it as a disabled veteran." Undersheriff Moore's understanding of the veterans' preference was that "short of something fairly substantial, like failing pieces of the process, he [Sgt. Edwards] was going to be a lieutenant." This standard, which he applied, was not one he had discussed with others beforehand. And in discussing the preference, he said that if "the written work would have been there, if the 360's would have been even moderate, and the oral work was there, it would be Lt. Edwards today, not Sgt. Edwards." (*Id.*)

55) Undersheriff Moore found that Sgt. Edwards failed to establish he had the requisite skill set to succeed as a lieutenant and that this failure was demonstrated in each of the three components that he reviewed—the written application and resumé, the "360" reviews, and the interview. His personal experience with Sgt. Edwards at the Sheriff's Office was consistent with his evaluation of the components of the job application. (*Id.*) There is objective support in the record for Undersheriff Moore's finding.

56) Undersheriff Moore made no mention of veterans' preference in his final written recommendation to Sheriff Staton. He understood that it was only Sheriff Staton who actually would "technically" apply the veterans' preference, along with Ms. Ott, after the interview. (*Id.*)

57) Undersheriff Moore further believed that applying the veterans' preference after the interview was not his role, that his "role was to write the recommendations, to sit with the Chief and the Captain and the Sheriff to talk about my recommendations." (*Id.*)

58) There was no evidence that Sheriff Staton ever met with Undersheriff Moore, Chief Gates, or Captain Reiser to talk about their recommendations.

59) Captain Reiser did not testify. On the whole, Captain Reiser's written recommendation to Sheriff Staton contained observations and comments that were much less positive regarding Sgt. Edwards than they were with respect to the other two applicants. (Ex. R-17) There is substantial evidence in the record that would support the more generally positive statements about the other two candidates, and the negative statements about Sgt. Edwards.

60) Captain Reiser made no mention of veterans' preference in his final written recommendation to Sheriff Staton.

61) Sheriff Staton is a military veteran.

62) Twenty-two military veterans at MCSO occupy positions to which they were promoted. (Ott Testimony)

63) Sgt. Edwards's annual income for the 12-month period ending in November 2012 was $97,395.34, including overtime, for which sergeants receive compensation. For the same period ending in 2013 it was $102,645.19. His base pay for the fiscal year ending June 30, 2012 was $91,412.71 and his base pay for the fiscal year ending June 30, 2013 was $96,153.70. (Exhibits R-24 through R-28)

64) Sgt. Edwards's annualized pay from July 1, 2013 through November 15, 2013, was approximately $104,677.00. (Ex. R-29)

65) Sgt. Gullberg's pay upon promotion to lieutenant was significantly higher than Sgt. Edwards's pay would have been because Sgt. Gullberg, due to having worked significantly more overtime, had a much higher rate of pay as a sergeant than had Sgt. Edwards. (Ex. R-27 and R-28).

66) A typical pay increase from sergeant to lieutenant at MCSO was 5% over total pay (Ott Testimony), but that increase can be limited, or eliminated entirely if the increase would put the newly promoted sergeant over the upper salary limit for lieutenant. That limitation applied to the salary granted to Lt. Gullberg.

67) Had Sgt. Edwards been promoted to lieutenant effective in November 2012, Sgt. Edwards's salary would have increased to approximately $102,265.00, making his pay for the year after he was denied promotion, less than his actual pay received as a sergeant.

68) Average annualized pay among MCSO lieutenants for the period from July 1, 2013 through November 15, 2013, was $110,918.00. Ex. R-29.

69) On average, from the 12-month period ending June 30, 2012 to the 12-month period ending June 30, 2013, pay for MCSO lieutenants increased approximately 5.25% and pay for MCSO sergeants increased approximately 6.4%. (Exhibits R-27 and R-28)

70) Sgt. Edwards had a previous experience with the Sheriff's Office, when he applied for a sergeant position, where he brought litigation because he felt he had been denied a veterans' preference to which he was entitled. That litigation was eventually settled. Sgt. Edwards received a "financial settlement." Sgt. Edwards continued to experience unease on account of that experience.

71) Sgt. Edwards testified that the experience with respect to his promotion makes him angry, is frustrating to him, is stressful, and that he feels his military service is "being discarded and overlooked." He also lost 20 pounds and is irritated more easily. (Edwards Testimony)

72) Sgt. Edwards has suffered emotionally as a result of his failure to get the promotion to Lieutenant, his perception that he was denied the veterans' preference to which he was entitled, and his understanding that he has had to "come to work and having to fight for my rights in front of my bosses." (*Id.*)

73) Credibility of the Witnesses: The testimony of all the witnesses was entirely credible, with one exception. Ms. Ott's testimony about the process of applying the veterans' preference at the stage of the final hiring decision by Sheriff Staton was not entirely credible, for the reasons stated in the Opinion.

CONCLUSIONS OF LAW

1) The Commissioner of the Bureau of Labor and Industries has jurisdiction over this matter pursuant to ORS 408.230(6) and (7), and ORS 659A.820 and OAR 839-006-0470.

2) Respondent Multnomah County Sheriff's Office is and was at all material times a public body subject to the requirement to provide a veterans' preference under ORS 408.225 to 408.237 (sometimes referred to here as the Veterans' Preference Law).

3) Sgt. Edwards is and at all material times was a disabled veteran under the Veterans' Preference Law.

4) The position for which Sgt. Edwards applied and which is at issue in this case, the position of lieutenant, has a higher base salary rate than the sergeant position he held.

5) Sgt. Edwards successfully completed the initial application screening for the lieutenant's position.

6) Sgt. Edwards, being eligible for promotion, met the minimum qualifications and any special qualifications for the lieutenant position under the Veterans' Preference Law.

7) Sgt. Edwards was entitled to have the statutory veterans' preference applied for his benefit.

8) Respondent did not grant Sgt. Edwards a veterans' preference in the process by which he applied for a job as lieutenant because it did not devise and apply methods to afford Sgt. Edwards special consideration as a disabled veteran, as required by ORS 408.230(2)(c).

9) To the extent MCSO's method of granting a veterans' preference was to consider Sgt. Edwards the number one candidate going into the promotion process, that method was insufficient, under ORS 408.230 for that stage of the promotion process.

10) MCSO did not have a method of granting a veterans' preference at the final stage of the promotion process, when the final hiring decision was made.

11) There is not sufficient evidence for the forum to determine that Sgt. Edwards would necessarily have received the promotion to lieutenant, if MCSO had devised and applied legally sufficient methods of applying veterans' preference.

12) There is not sufficient evidence for the forum to determine that Sgt. Edwards would not necessarily have received the promotion to lieutenant, if MCSO had devised and applied legally sufficient methods of applying veterans' preference.

13) There is not sufficient evidence for the forum to determine that Sgt. Edwards suffered a loss of future income or benefits on account of his failure to win the promotion to lieutenant.

14) Respondent's affirmative defenses are not sufficient to excuse or avoid the violations of law found herein, and the damages awarded.

15) Pursuant to ORS 659A.850, the Commissioner of the Bureau of Labor and Industries has the authority under the facts and circumstances of this case to issue an appropriate cease and desist order and to award Complainant money damages for emotional and mental suffering sustained and to protect the rights of Complainant and others similarly situated. Ordering the payment of the sum of money awarded and the other actions required of Respondents in the Order below are an appropriate exercise of that authority.

OPINION

Complainant Rod Edwards, a sergeant in the Multnomah County Sheriff's Office, applied in September 2012, along with two other sergeants, for a promotion to lieutenant. Sgt. Edwards is the only one of the three who is a disabled veteran under ORS 408.225[1] and who therefore qualifies for special preference in the promotion

[1] ORS 408.225 (1)(c) provides: "Disabled veteran means a person who has a disability rating from the United States Department of Veterans Affairs, a person whose discharge or release from active duty was

decision under ORS 408.230. One of the two other applicants received the promotion. Sgt. Edwards, believing he had not been afforded the preference in promotion by a public employer to which he is entitled under ORS 408.225 *et seq*, filed a complaint with the Commissioner. That complaint led to the present proceeding.

Overview of Veterans' Preference in Oregon

The Oregon Legislature has provided for a preference in the hiring of military veterans since 1929. (1929 Or Laws Ch 151) The law has since been expanded, amended, and revised numerous times.

Two relatively recent amendments are germane to the issues raised in this case. Prior to 1995, the law directed that a preference be afforded by adding "points" to the score received by a veteran on a civil service test—10 points for a disabled veteran, and five points for a veteran not disabled. In 1995, the statute was amended to make clear that a preference of some kind was to be afforded, even if the hiring process did not utilize a score. The amendment did not specify the method by which such a preference would be afforded, but did state that the preference would "provide a uniform method by which special consideration is given to eligible veterans and disabled veterans seeking public employment." 1999 Or Laws Ch 792. Legislative history indicated that the legislature expected the state's Executive Department to establish a method to provide the preference. *Senate General Government Committee, Testimony of Jon Mangis, Director of Oregon Department of Veterans' Affairs, and statement of Senator Shields, April 8, 1999, Tape 53B. See also, OAR 105-040-0030 (1)(f) (2008 Compilation)* ("if the selection process includes ranking applicants using a numerical score or any other method of ranking applicants that does not result in a score, veterans' preference points shall be added, where applicable, at the time of ranking.")

The second major revision to the law occurred in 2007. At that time, the Legislature responded to the Governor's admonition that the State must do more than repay veterans' "real service with lip service" (*Governor's speech on Memorial Day 2006, as quoted in testimony of Robert H. Thornhill on Senate Bill 822 before Senate Education and General Government Committee, April 10, 2007, Ex. A*).

The 2007 amendments require that when an employer uses an application examination that does not result in a score, the employer "shall devise and apply methods by which the employer gives special consideration in the employer's hiring decision to veterans and disabled veterans."

The 2007 amendments also require a public employer to actually appoint a veteran or disabled veteran to a position if the results of the veteran's application examination, when combined with the preference, are equal to or higher than the results for an applicant who is not a veteran. 2007 Or Laws Ch 525 Sections 2(1) (c), (3), and (7), now codified at ORS 408.230(4). The forum pauses here to respond to

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for a disability incurred or aggravated in the line of duty or a person who was awarded the Purple Heart for wounds received in combat."

Respondent's argument, in its Exceptions, at pages 6-7, that "application examination" in ORS 408.230(4) should be interpreted narrowly, with the result that the obligation to hire a veteran who is equally or more qualified than a non-veteran applies only in a certain set of circumstances.

It is important to address this argument because Respondent uses it, and some of its component parts, as a foundation for several others.[2] Respondent states,

> Rather, the more reasonable interpretation is that ORS 408.230(4) requires the employer to hire an otherwise qualified veteran or disabled veteran who scores equal to or higher than others when (1) the employer uses an application examination to screen candidates and (2) is basing the hiring decision solely on the results of that initial application examination.
>
> Respondent's Exceptions, page 7.

Respondent thus suggests that the statutory term "application examination" should be read with a very particular and restrictive meaning: "application examination" refers only to an *initial* application examination and that initial application examination *is the sole basis* on which a hiring decision is made.

Addressing Respondent's argument requires the forum to determine the meaning of the statute. The paramount goal in such an endeavor is to pursue the intention of the legislature. ORS 174.020. *State v. Gaines*, 346 Or 160, 165, 206 P3d 1042 (2009). The task begins by examining the text and context of the statute and any legislative history. *Id.*, at 171-72. Rules of construction that bear directly on the interpretation of the statutory provision in context are employed. ORS 174.010; *PGE v. Bureau of Labor and Industries*, 317 Or 606, 611, 859 P2d 1143 (1993).

The forum finds no basis to insert these two restrictions into the statutory language. The statute says nothing of providing the preference only in those limited circumstances suggested by Respondent. So, to begin the analysis, adoption of Respondent's interpretation would result in the violation of the rule of construction that language omitted from a statute should not be inserted. ORS 174.010.

Moreover, the Veterans' Preference Law also uses the term "application examination" in other sections of the statute, sections where its use clearly demonstrates that the term is not universally limited to initial screening and to circumstances where its use is the sole basis on which a hiring decision is made. In subsections (b) and (c) of ORS 408.230(2), the term is used in a manner entirely inconsistent with the interpretation urged by Respondent. In subsection (2)(b), the statute specifically refers to an "application examination, given after the initial screening." Thus, in (2)(b), "application examination" refers to an examination that may

[2] Those particular arguments are addressed later in this Opinion.

be used to initially screen candidates, as well as one that is not restricted to initial screening.

Respondent's construction—that "application examination," when used without qualification, must refer to an initial screening, and a screening that is the sole basis for hiring—is contrary to the proposition that the use of the same term throughout a statute indicates that the term has the same meaning throughout the statute. *Oregon Racing Com. v. Multnomah Kennel Club*, 242 Or 572, 587, 411 P2d 63 (1966).

Then, in subsection (2)(c)—the section that specifically requires an employer to "devise and apply methods"—the statute specifically refers to an "application examination" that may consist of several tools. These tools—an interview; an evaluation of performance, experience, or training; a supervisor's rating; and "any other method of ranking an applicant that does not result in a score"—may frequently be used in the latter stages of a hiring or promotion decision. If "application examination" were to mean an examination used only at the initial job screening—and one where it is the sole basis for a hiring decision, as Respondent urges for subsection (4), that meaning would essentially obliterate subsection (2)(c) in its entirety—there would virtually never be a requirement to "devise and apply methods" to provide a preference when hiring or promotion is based on a non-scored methodology. Such an interpretation is contrary to the statutory mandate that in construing a statute "where there are several provisions or particulars such construction is, if possible, to be adopted as will give effect to all." ORS 174.010.

In summary, Respondent's argument is rejected. It is contrary to the meaning overwhelmingly suggested by the text and context of the statute, at the first level of statutory analysis. *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-612, 859 P2d 1143, 1146 (1993).[3] It is contrary to the general rule of statutory construction that language omitted from a statute should not be inserted. ORS 174.010. It is contrary to the other propositions cited above. And finally, it is contrary to the proposition that a remedial statute, such as the veterans' preference statute, is to be construed broadly to effectuate the purposes of the statute. *In the Matter of Vision Graphics and Publishing, Inc.*, 16 BOLI 21, 26 (1997). *See also, In the Matter of Earth Science Technology, Inc.,* 14 BOLI 115, 125 (1995); affirmed without opinion, *Earth Science Technology, Inc. v. Bureau of Labor and Industries*, 141 Or App 439, 917 P2d 1077 (1996).

Returning now to the features of the 2007 amendments, the Legislature also specifically provided there an aggrieved veteran a right to relief that is enforceable

[3] Neither party has submitted any legislative history, which may also be considered at this first level of statutory analysis. *State v. Gaines*, 346 Or 160, 206 P3d 1042 (2009). The forum's independent review suggests the history is not dispositive, but is suggestive. The forum notes the emotional testimony of one veteran supporting the legislation, who described how he was denied hiring after an interview, despite his claim to have been the best-qualified candidate. Testimony of Mac McDonald before Senate Education and General Government Committee, April 10, 2007, Tape 53B. *See also*, the testimony of Paula Brown, *id.*, indicating her support of the legislation because it would provide additional benefits, at the interview stage, beyond the "points" granted under then-current law.

through a contested case hearing before the Bureau of Labor and Industries to be conducted pursuant to ORS 659A.820.[4] This case is the first contested case hearing undertaken after the 2007 amendments.

In order to be entitled to the veterans' preference, various foundational qualifications must be met: The employer must be a "public employer," the position for which the applicant applies must be a "civil service position," and the applicant must be a "veteran" or "disabled veteran". ORS 408.225. All of these requirements are met in this case; there is no dispute as to any of them.

The preference is generally identified in ORS 408.230 (1). It provides:

> A public employer shall grant a preference to a veteran or disabled veteran who applies for a vacant civil service position or seeks promotion to a higher civil service position with a higher maximum salary rate and who:
>
> (a) (A) Successfully completes an initial application screening or an application examination for the position; or
>
> (B) Successfully completes a civil service test the employer administers to establish eligibility for the position; and
>
> (b) Meets the minimum qualifications and any special qualifications for the position.

The statute goes on to provide the method by which that preference is to be applied by the public employer. Where numerical scores are used, five preference points must be provided to a veteran and 10 preference points must be provided to a disabled veteran at the stage of screening initial applications and at the stage of the application examination.[5] ORS 408.230 (2)(a) and(b).

If no numerical scoring system is used, as in the case of the complainant here, a different type of preference must be given. ORS 438.230(2)(c) provides:

> For an application examination that consists of an interview, an evaluation of the veteran's performance, experience or training, a supervisor's rating or any other method of ranking an applicant that does not result in a score, the employer shall give a preference to the veteran or disabled veteran. An employer that uses an application examination of the type described in this paragraph *shall devise and apply methods by which the employer gives special consideration in the employer's hiring decision to veterans and disabled veterans*. (Emphasis supplied.)

[4] Under the amendment, an individual may alternatively bring a claim in circuit court. 2007 Or Laws Ch 525 Section 4(2).

[5] Formerly, the addition of five and ten points was specifically addressed to a 100-point scale. The relationship to a 100-point scale was eliminated in 1999. 1999 Or Laws Ch. 792, Section 1.

The statute also specifically, and independently, addresses interviews for veterans. When a veteran meets preliminary qualifications and an interview is part of the process for selection, a veteran must be afforded an interview. ORS 408.237(2). Sgt. Edwards, the complainant, met the preliminary qualifications and was interviewed.

Notwithstanding the requirement to afford a preference, a public employer is not required to appoint a veteran or disabled veteran to a position, ORS 408.237 (3), unless application of the preference results in a conclusion that a veteran (including a disabled veteran) is more qualified than the competing non-veteran, or is equally qualified; then the veteran must be hired. ORS 408.237(4). As discussed above, Respondent takes exception to this interpretation of the statute—arguing it should only apply "when (1) the employer uses an application examination to screen candidates and (2) is basing the hiring decision solely on the results of that initial application examination." For the reasons stated above, Respondent's exception is not sustained.

In addition to the statutes and the legislative history cited above, the forum also applies the administrative rules promulgated by the Agency under the authority of ORS 659A.805. With respect to this case, two subsections of one of the administrative rules are germane. OAR 839-006-0450 provides:

> (2) At each stage of the application process a public employer will grant a preference to a veteran or disabled veteran who successfully completes an initial application screening or an application examination or a civil service test the public employer administers to establish eligibility for a vacant civil service position.
> …
> (5) If a public employer uses an application examination that consists of an evaluation method of ranking an applicant that does not result in a score, the public employer will devise and apply methods by which the public employer gives special consideration in the public employer's hiring decision to veterans and disabled veterans.

Again, Respondent takes exception to the finding of a violation of this rule. The basis of its exception is that the rule "exceeds the scope of the veteran's preference statute." Exceptions, page 4. Respondent apparently relies upon its interpretation, discussed at length above, that the statute calls for no application of the preference after the initial screening. Exceptions, pages 5-6. If Respondent is correct and the statute does not countenance a requirement that the preference must be applied beyond the initial stage of the hiring or promotion process, the rule would need to fall; the Commissioner has no power to adopt a rule inconsistent with a statute. *In the Matter of Hermiston Assisted Living, Inc.*, 23 BOLI 96, 123 (2002). *Schoen v. Univ. of Oregon*, 21 Or App 494, 499 (1975).

On the other hand, in the absence of such a prohibition, "Agencies generally may express their interpretation of the laws they are charged with administering either by adjudication or by rulemaking or both." *Blachana, LLC v. Bureau of Labor and*

Industries, 354 Or 676, 686, *quoting Trebesch v. Employment Division*, 300 Or 264, 273, 710 P2d 136 (1985).

As discussed above when first addressing Respondent's interpretation of the statute, the rule requiring application of the preference at more than just the initial stage of hiring or promotion fits within the statutory meaning; Respondent's interpretation is at odds with accepted rules of statutory construction. And to the extent the statute may be delegating responsibility to the Commissioner to determine whether a preference should be applied at multiple stages in the hiring or promotion process, *see, Springfield Educ. Ass'n v. Springfield School Dist. No. 19*, 290 Or 217, 621 P2d 547, 552-53 (1980) (laying out the exact term/inexact term/delegative term template used to assign responsibility to courts and agencies to interpret disputed statutory terms), the forum confirms that OAR 839-006-0450(2) is an accurate expression of the Commissioner's policy.

Application of the Veterans' Preference to Complainant Sgt. Edwards

As set forth above, there is no question that, under the statute, Multnomah County is a public employer, the lieutenant's position is a civil service position, and that Sgt. Edwards is a disabled veteran. There is also no question that Sgt. Edwards successfully completed the initial application screening and meets the minimum and special qualifications required by ORS 408.230(1), and OAR 839-006-0450(2). Similarly, although sergeants can and do sometimes make more money than lieutenants because of seniority or because of overtime pay—overtime pay is not earned by lieutenants, who are in management—there is no question that the maximum salary rate for lieutenants is higher than for sergeants. In summary, Sgt. Edwards was entitled to a veterans' preference in his application for promotion. The first issue addressed by the forum is whether the Respondent provided it to him in the manner the law requires.

The method by which MCSO chose the person to fill the open lieutenant's position did not involve a method of ranking applicants that resulted in a score. Consequently, the statute requires, apparently as a substitute for the application of the "points" that would be used in a scored system, that MCSO needed to "devise and apply methods" by which it would "give special consideration in [its] decision to hire veterans and disabled veterans." ORS 408.230(2)(c); OAR 839-006-0450(5). Aside from the specific requirement to provide the interview required by ORS 408.237(2), the only other requirement imposed upon Respondent during the hiring process[6] was, as discussed above, to grant the veterans' preference *at each stage* of the application process. (OAR 839-006-0450(2)).

MCSO had, and still has, no written policy describing the methods it applies to give special consideration in its decisions to hire veterans and disabled veterans. The

[6] After completing the hiring process and failing to hire a qualifying veteran, a public employer is also subject to the requirement that, if requested, it provide, in writing, its reasons for its decision not to hire the veteran. ORS 408.230(5). MCSO did that in this case.

job announcement made no mention of the policy. The County's website discusses "points," but says nothing about affording a preference in the absence of a scored examination. The evidence of the policy, assuming it has one, must therefore come from the pleadings, testimony, and documents.

Veterans' Preference at the Beginning of the Process was not Devised

That evidence points to a single expression: At the beginning of the process, Sgt. Edwards was to be considered the "top candidate" or "the number one candidate" going into the process.

Thus, when in November 2012, Sgt. Edwards requested a written explanation of why he was not appointed to the lieutenant position, Ms. Ott's only reference to application of the veterans' preference was, "Because there were no numerical tests involved in which to apply your veteran preference points, we applied your points as you went into this process, and you were the number one candidate at the top of the list of three potential candidates for promotion." Her letter goes on to state that the three Interviewers were advised, after they had conducted the interviews and reviewed the application materials from all candidates, that he "was to be considered the top candidate for promotion but that their recommendation for promotion should be based on your and the other candidate's merits and qualifications as they relate to the lieutenants (sic) position." The remainder of her letter quotes from the comments of the Interviewers on the relative merits of the applicants; there is no reference to veterans' preference in any of those comments. (Ex. A-17)

Then, on January 30, 2013, Agency Civil Rights Division Administrator Amy Klare wrote to MCSO, enclosing a copy of Sgt. Edwards's complaint, and asked for a "complete response to the allegations." MCSO's response was signed by a Senior Assistant County Attorney. And in response to Sgt. Edwards' Allegation No. 25, that "MCSO's promotion process, and disregard of veteran preference points, is in violation of ORS 408.230 and OAR 839-006-100 [relating to discrimination]," the attorney cited Ms. Ott's earlier letter, Ex. A-17, stating that Ms. Ott "explained to Edwards the County's process for considering his veteran status." Ex. A-5.

Respondent's explanation—that the preference was only at the beginning of the process, as explained in Ms. Ott's letter to Sgt. Edwards and in its attorney's response to Ms. Klare—continued into the pleadings. Among the Agency's allegations in its Formal Charges is allegation 17. See, Ex. X-2-a, Section IV, page 7. There, the Agency alleges that the County's attorney had stated that Respondent had devised a plan to create veterans' preference, but that "the plan is not demonstrated in any of the documents that Respondent produced to the Agency." In its Answer, Ex. X-4, page 2, although MCSO does generally deny that it failed to grant a veterans' preference at each stage of its hiring process, it also goes so far as to *deny* that "the plan [to apply veterans' preferences] is not demonstrated in any of the documents that Respondent produced to the Agency," *Id.* The meaning of the Answer is therefore that the plan for

applying veterans' preference is demonstrated in the documents Respondents had already produced.

But then, at the hearing, the evidence was that, in fact, no documentation had been submitted to the Agency demonstrating any plan or policy at MCSO other than Ms. Ott's written statements referenced above. Thus, up until the hearing, MCSO's consistent position was that its plan to provide a veterans' preference was that points would be applied for Sgt. Edwards's benefit at the beginning of the process; it did not contend there was anything more.

At the hearing, the main thrust of Respondent's testimony continued to be that the veterans' preference was applied at the beginning of the process. In response to a direct and overarching question asking how preference would be applied—how there would be compliance with the law—Ms. Ott talked about the letter of interest and application and "360" and stated that, in consultation with Undersheriff Moore, a decision was made that the veterans' preference would be applied "going into the process." Her testimony suggested that obligation was voluntarily undertaken by Respondent because, under Respondent's personnel rules, the Sheriff could have simply appointed whomever he wanted without any process; but that route was rejected because it was not transparent and might have suggested the "good ol' boy" methods that Sheriff Staton did not want to practice.

Undersheriff Moore knew from Ms. Ott that Sgt. Edwards's veterans' preference was that he would be considered the number one prospect going into the process.

Similarly, Chief Deputy Gates testified that Sgt. Edwards would have his veterans' preference applied at each stage of the application process that he reviewed—the application/resumé, the 360, and the interview, all of which together, or course, constitute the beginning of the process.

Respondent's evidence about how the preference was actually applied at the beginning of the process, however, was confusing and inconsistent. First, there was confusion about *when* the preference was applied. In Ms. Ott's initial letter, Ex. A-17, she wrote that his preference—effected by Sgt. Edwards's "points" so that he would be considered "the number one candidate at the top of the list"—was applied at the beginning of the process. Throughout her testimony, she also repeatedly said how this aspect of the preference was to be applied at the beginning of the hiring process. But during her cross-examination, Ms. Ott stated she applied that criterion, not at the beginning of the process, but at the end, when they had finished the process.

Then, there are questions about who would actually apply the preference. Ms. Ott's letter states that although the instruction to apply the preference was not given to the Interviewers until after they had completed their reviews of the application materials and interviews, that they—the persons involved in the hiring process—were to write their evaluations based on merit, apparently without reference to the preference. This is

confusing because the letter says nothing about who would actually make sure the preference would be applied at this beginning stage of the hiring process.

Attempting to clear up the confusion in her letter about who would actually make sure the preference would be applied, Ms. Ott and Undersheriff Moore both testified that she, Ms. Ott, was the one who would apply the preference, that it was not to be applied by the Command Staff. But in contrast to this testimony is Ms. Ott's unequivocal statement that she "was not involved in the hiring process." The forum might be able to understand how the person actually applying the hiring preference for a veteran might not be involved in the hiring process if the application of the preference were a mere ministerial addition of "points" to a test score. But in this case, there is no such simple objective methodology.

Moreover, one of the members of the Command Staff interview team, Chief Deputy Gates said he *did* apply the preference by considering Sgt. Edwards to be the top candidate at each stage, and that he needed a reason not to keep Sgt. Edwards as the number one candidate. On the other hand, he also testified that he himself did not apply the veterans' preference; rather he evaluated each component (again apparently referring to the written application/resumé, the 360 review, and the interview) on its own merits. It is difficult to reconcile these two statements—why would Chief Deputy Gates have Sgt. Edwards as the top candidate, and why would he need a reason not to keep him as the top candidate, if he was not applying a veterans' preference?

Also, there is confusion about when the Interviewers were advised about the preference and how it would be applied. According to Ms. Ott's letter to Sgt. Edwards, Command Staff was "advised" about the fact that Sgt. Edwards would be considered the "top candidate" only "once the process had been completed." And by the "process," she was referring to the application and resumé, the 360 reviews, and the interview. But in her direct testimony, Ms. Ott testified that she told the Interviewers "prior to the interview" that he was the "top candidate."

These inconsistencies and anomalies are compounded by the fact that the written materials promulgated by MCSO, the documents in which MCSO claims the preference is described—the Job Announcement, the Candidate Orientation to the Exam Process and Candidate Bulletins—either do not address veterans' preference at all, or they only address the preference by discussing "points," which were not used in this process. See, Exhibits A-5, A-6, A-9, and A-11.

Also, the various formulations of the preference are not consistent. Being the "number 1 candidate going into the process," perhaps the description most used by Respondent, carries one meaning. That meaning, discussed in more detail below, suggests that the preference can be overcome as soon as there is evidence that the preferred candidate is not, in fact, the best qualified.

But another description, used by Ms. Ott and Undersheriff Moore, was that it was "his [Sgt. Edwards's] job to lose." This second description suggests that the preferred

candidate has the job, and can only lose it if he shows himself to not be qualified, regardless of the qualifications of the other candidates. This second description might be the same as whether he was "ready for promotion," another term used by Undersheriff Moore in his testimony and by Ms. Ott.

And then, all of these formulations are different from Ms. Ott's statement that Sgt. Edwards would get the job if he was "first, second, or a competitive [or close] third." This was the formulation she first stated, quite emphatically, had been given to the Interviewers and to Sheriff Staton. But she later stated that these were her terms alone, and had not been communicated to anyone.

In summary, the inconsistencies in the evidence prevent the forum from finding that Respondent actually devised and applied a method or methods by which to apply veterans' preference during, or as a result of, the stage of the process when the application materials were evaluated by Undersheriff Moore, Chief Deputy Gates, and Captain Reiser.

"Devise" is a term of ordinary meaning not defined in the Veterans' Preference statute, and its ordinary meaning is therefore used in determining how it should be interpreted in the statute. *In the Matter of Hermiston Assisted Living, Inc., 23 BOLI 96, 122-23 (2002).*The first definition in Webster's Third New International Dictionary, at 619 (2002) fits in this context. It is "to form in the mind by new combinations of ideas, new applications of principles, or new applications of parts; formulate by thought."

In this case, the forum is not convinced that a policy for veterans' preference was formed in the mind of Respondent or its manager responsible for its implementation. In order to actually be devised, or "formed in the mind," the policy must be coherent and it must be stable. Moreover, the forum would expect that if the plan had actually been devised, that it would have been similarly understood by the persons who were implementing it. At least, the people involved in the hiring would understand their own roles in implementing it. Here, Chief Deputy Gates's understanding of his role was not the same as Ms. Ott's understanding of his role. And in this case, the description of the plan, and when it was implemented, and when it was communicated, all varied from person to person and from time to time.

Before proceeding to a discussion of whether Respondent's most oft-used description of the preference could have been sufficient, the forum briefly addresses Respondent's exceptions to the discussion above and implied exception to Legal Conclusion #8,[7] the conclusion that Respondent did not "devise and apply" any method for applying the preference. Respondent's Exception I.A.1., pages 2-4; Exception I.A.4., pages 7-8.

[7] Respondent did not specifically identify by number any conclusions of law (or findings of fact) to which it took exception.

First, citing the Agency's training materials—which were referred to by a witness, but which were not offered or admitted into evidence—Respondent points to the acknowledgement in those materials that employers might be better off using a scored system, and to the materials' alleged lack of useful information on non-scored hiring processes. From that premise, Respondent states there is "nothing for the ALJ to rely on for the conclusion that the County's stated method violated the statute." Exceptions, page 3. This argument is a *non sequitur*. Respondent and the forum must look to the statutes to determine whether a violation has occurred—not to Agency training materials.

Respondent's other argument on this topic is that the preference required only an interview and the complainant's placement in first position. Exceptions, page 6. This argument, once again, is based on Respondent's interpretation of the statute, already rejected, that preference is not required at each stage of the process.

Respondent also raises the independent argument that, looking at the first stage alone, granting the interview and placing the Complainant first was sufficient to devise and apply a method in that first stage of the process. Exception I.A.4., pages 7-8. First, the forum does not abide Respondent's claim that granting an interview was part of any method that it "devised and applied" as part of granting the preference. The testimony was that once Respondent found itself with only three applicants for the promotion, it decided to give all three an interview. It did not claim that granting the interview to Complainant was part of any method by which a veterans' preference would be given.[8] Respondent's suggestion now that it was part of the method it had devised only reinforces the evidence that it had not devised any system whatsoever; propounding the argument now makes it appear that Respondent is, to this day, still devising a system to grant a preference.

Second, as the discussion above of the testimony of Respondent's witnesses makes clear, those witnesses did not have a consistent or coherent understanding of what it meant to be the number one candidate. Making a veteran the number one candidate might well qualify as a sufficient preference, but that preference must have a meaning, understood and applied by the employer in the real world. It must, to borrow Governor Kulongoski's phrase from the legislative history, be more than mere lip service. The inconsistency and contradictions in Respondent's evidence—about exactly what it meant to be number one, how it would apply, and who would apply it—all lead to the conclusion that, in fact, there was no method by which the preference was applied.

Preference as "number one candidate" is insufficient.

The preference most consistently advanced by Respondent—the simple policy that Sgt. Edwards was to be considered the "top candidate" or "the number one

[8] The granting of an interview to a veteran applying for a civil service position is required by ORS 408.237(2). The forum expresses no opinion as to whether compliance with that statutory mandate would have been sufficient as a "method" to give special consideration to veterans under ORS 408.230(2)(c), if the employer had, in fact, devised that as its method.

candidate" as he went into the process—is substantively inadequate to provide the preference required by the statute.

Chief Deputy Gates, in describing this preference, testified how he understood that Sgt. Edwards would move forward in the process "if he was equal to or greater than" the other candidates.[9] But this formulation means that if another candidate was at all superior, Sgt. Edwards would not necessarily move forward. In other words, the merest puff of superiority can blow away the entire preference. This is insufficient. Respondent takes exception to this conclusion (Conclusion of Law #9). Respondent's Exception I.A.2., at page 4.

The text of ORS 408.230 (2)(c) merely requires that the public employer devise and apply methods by which "special consideration" is given to veterans and disabled veterans in the employer's hiring decision. No explanatory guidance is given as to what is sufficient to constitute "special consideration."

But the context of the entire statute demonstrates that this special consideration is to be a substitute for the five point (for non-disabled veterans), or ten point (for disabled veterans), preference given to scored exams. *See, ORS 408.230(2)(b).* The mere fact that the preference in an unscored examination process substitutes for preferences with different weights leads to the conclusion that the preference must have some weight itself. The conclusion is buttressed by the fact that the statutory history of that section demonstrates those points were originally applied in a context of a 100 point standard. *See,* 1999 Or Laws Ch 792, Section 1, amending ORS 408.230 (1997). The addition of points in a scored examination, and the substituted "devised and applied" preference required here, requires the conclusion that the preference must have some substance. It must certainly be more than the scintilla that Respondent's formulation seems to allow.

For these reasons, the forum concludes that a veterans' preference, even when applied in a hiring process that does not involve a scored test or exam, must provide something more than simply being the top candidate going into the process, a formulation that can be characterized as a barely measurable head start. Respondent also offers another reason that the forum's conclusion that making the complainant the number one candidate going into the promotion process was insufficient. Respondent's Exception I.A.2., page 4. As it did with its Exception I.A.1., Respondent complains of a lack of clear guidance from BOLI.

To repeat, it is Respondent's responsibility to comply with the statute, even when the statute might be ambiguous. *See, e.g., Village of Hoffman Estates v. Flipside*, 455 US 489, 498 (1982).

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[9] Chief Deputy Gates's testimony was actually unclear on whether Sgt. Edwards needed to be just "equal to" the other candidates or "greater than" the other candidates, in order to move forward. For purposes of this discussion, the forum will assume he meant that Sgt. Edwards would move forward in the hiring process if his qualifications were deemed equal to or superior to those of the other candidates.

In sum, the veterans' preference described by Respondent was not devised and applied, as required by the statute. To the extent that it may be said to have been devised and applied, it was inadequate to meet the statutory requirements. Respondent may not avoid responsibility because it had difficulty interpreting the statute.

Veterans' Preference at the Final Hiring Stage

The forum now looks to the preference that Respondent MCSO may have applied at the second stage of the process, when the final hiring decision was made. As discussed above, the veterans' preference must be applied at "each stage of the process." OAR 839-006-0450.

First, it is important to recall that when Respondent was first called upon, by Sgt. Edwards, to describe how it applied its veterans' preference to him, it said nothing about applying a preference at the end of the process, when the hiring decision was made. Ex. A-17. Similarly, when the Agency called upon it to describe how it had complied with the veterans' preference requirement, it said nothing about applying the preference at the end of the process. Ex. A-20. And in its Answer to the Formal Charges in this proceeding, MCSO alleged that the plan it had devised to provide veterans' preference was demonstrated in the documents that it had produced to the Agency; but those documents do not discuss any method of applying veterans' preference at the final hiring stage of its process. Par. 17.[10]

This leaves MCSO with the evidence it provided at the hearing. At the hearing, it did not call Sheriff Staton, the person who actually made the decision. It did call its Human Resources Manager, Ms. Ott. Ms. Ott's testimony about how the veterans' preference was applied at the end of the process, when she made a recommendation to Sheriff Staton was, however, just as confusing as the evidence about applying the preference at the beginning of the process.

At first, during her testimony about her "direction" to the Interviewers, she stated emphatically that her "direction" was that the job belonged to Sgt. Edwards "if he scored first, second, or a competitive third." And she went on to state that this standard was the "consideration" going into her meeting with Sheriff Staton.

She later stated she did not use these terms with Sheriff Staton, and that she could not remember the exact terms she employed; she thought she might have said a "close third." At another point in her testimony, she described the standard as one in which Sgt. Edwards would be hired if he was "marginally close," or if he was "ready to be promoted." And at the end of her direct testimony, she even gave an answer suggesting that she did not give guidance to Sheriff Staton because *she* had determined (regardless of the evidence that Sheriff Staton could hire whomever he

[10] The material supplied by Respondent might demonstrate that a preference would have been inadequate to make Sgt. Edwards a candidate whose qualifications were equal or superior to those of the other candidates. But that is different from actually having a preference that can be articulated, and having a method by which to apply it.

wished) that Sgt. Edwards was not close enough to the top candidate or qualified enough to have earned a preference.[11] That answer, if it was her meaning, implies that she, who had previously said she was not involved in the hiring process, performed the independent evaluation of the candidates, and that her application of the preference was simply to find that it was not strong enough to make any difference.

Whether it was Ms. Ott or Sheriff Staton who applied the preference, the evidence is insufficient that any plan to apply preference at the end of the promotion process was actually devised.

Moreover, the various formulations of the preference are not consistent with each other. The forum looks first at "first, second, or a competitive third [or close third]." Under this standard, an applicant receiving the preference who was seen as second would get the job, regardless of how far ahead the top candidate might be. On the other hand, "marginally close" suggests that even the second-ranking candidate, in order to benefit from the preference, must be not too far behind the first candidate.

"Ready to be promoted", on the other hand, is not a standard that entails a comparison to the other candidates at all. It suggests that the veteran or disabled veteran applying for the job will get it, if he is fully qualified, regardless of whether the other two candidates are better qualified, and regardless of whether or not he is "competitive" or "marginally close" to those other candidates.

For the same reasons stated above with respect to the preference supposedly applied at the "beginning of the process," the forum finds that the variety of formulations propounded at the hearing, together with the earlier explanations made prior to the hearing, demonstrate that no method and means of applying the veterans' preference at the end of the process was really devised by Respondent by the time the promotion decision was made.

Respondent's exception to the finding that it did not apply a preference at the final stage of the hiring process (Conclusion of Law # 10) is that it was not required to do so. Exception # I.A.3., at pages 4-7. Its argument, once again, is that OAR 839-006-0450, which requires application of the preference at each stage of the hiring or promotion process, exceeds the scope of the statute. That argument, together with its answer, appear above; they are not repeated here.

MCSO violated the veterans' preference statute; it did not devise and apply a method, either in the first stage or in the final stage of the hiring process, to apply

[11] MCSO's attorney asked Ms. Ott directly how she explained to Sheriff Staton that he should apply the preference. Ms. Ott began her answer by repeating the familiar theme about how Sgt. Edwards was the top candidate going into the process. Beyond that, she said that "preference was provided, but it still did not get him up to being the number one candidate", "not sufficient preference to move him above the other two candidates." She continued that if Sgt. Edwards was "marginally close", that it "was my responsibility to say to the sheriff, 'Rod gets the job. Rod is to be promoted.'" And she continued, "That could not occur because he was not competitive, he was not ready for promotion based on the process."

veterans' preference in the decision to promote Sgt. Gullberg, rather than Sgt. Edwards. The forum now turns to the question of the appropriate remedy.

Remedies

In the Formal Charges, the Agency requested damages of at least $50,000.00 for physical, mental and emotional distress, and for at least $460,212.00 for loss of future wages and benefits. There is no request for back pay or lost past wages. There is no request that the Complainant be granted the promotion for which he applied.

The Formal Charges also request that Respondent, at its expense, be required to create and implement a new policy pertaining to veterans' preference to be submitted to the Agency or another trainer agreeable to the Agency, that it comply with that policy, and that its staff be appropriately trained. See, Ex. X-2a, Sections VIII, IX, and X, and the WHEREFORE clause of the Formal Charges.

The Veterans' Preference statute itself, ORS 408.225, *et seq* provides for no remedy. It does, however, provide that a violation of the statute is an unlawful employment practice under ORS 659A, and it directs a person claiming to be aggrieved to file a complaint under ORS 659A.820. A complaint filed under ORS 659A.820 can, as it has in this case, lead to formal charges and a contested case hearing. The forum turns to that statute.

Ultimately, an order is issued after a contested case hearing. ORS 659A.850. If a violation is found, "the commissioner shall issue an appropriate cease and desist order against any respondent found to have engaged in any unlawful practice alleged in the complaint." The order "must take into account the need to supervise compliance with the terms of [the] order." It may require a respondent to "perform an act or series of acts designated in the order that are reasonably calculated to "carry out the purposes" of the law and to "eliminate the effects of the unlawful practice", including payment of actual damages suffered by the complainant. Actual damages have long been held, in the context of ORS 659A.850, to include damages for physical, mental, and emotional distress. And those damages can be awarded on the basis of a complainant's testimony alone. *See generally, e.g., In the Matter of Crystal Springs Landscapes, Inc., 32 BOLI 144, 170 (2012).*

Back pay is awarded to compensate for loss of past wages and benefits. *In the Matter of Spud Cellar Deli, Inc., 31 BOLI 106, 239 (2010).*

Front pay can be awarded to represent continued accrual of damages after the record of the case closes. *In the Matter of Mini-Mart Food Stores, Inc., 3 BOLI 262, 283-84 (1983). See also, Brusco v. United Airlines, Inc., 239 F.3d 848, 862 (7th Cir. 2001); Cassino v. Reichhold Chems., Inc., 817 F2d 1338 ,1346 (9th Cir. 1987); Maxfield v. Sinclair International, 766 F.2d 788, 795-97 (3d Cir.1985).*

In awarding front pay, care must be taken to limit the speculative nature of the award. *Mini-Mart, supra.* The amount of speculation is necessarily determined by the facts of each case. *Compare, e.g., Goss v. Exxon Office Sys. Co., 747 F2d 885, 891 (3d Cir. 1984)* (limiting award of front pay to two years), *with Pierce v. Atchison, Topeka and Santa Fe Railway Co., 65 F3d 562, 574 (7th Cir. 1995)* (upholding front pay based on 10 years estimated future lost earnings).

In fashioning its remedy, the forum is mindful that while Respondent has violated the Veterans' Preference Law by failing to devise and apply methods by which to provide the preference, the forum has not found that Respondent has violated the law by failing to hire Sgt. Edwards. The law only requires that Sgt. Edwards be hired if, including application of the preference, the results of his application examination are equal to or higher than the results for the other applicants. ORS 408.230(4). Other than that requirement, application of the veterans' preferences is "not a requirement that a public employer appoint a veteran or disabled veteran to a civil service position." OAR 839-006-0460 (2).

On this record, the forum cannot find that Sgt. Edwards's qualifications, without the preference, are equal to or higher than those of the other applicants. And since the Respondent has great latitude in devising methods to apply the preference, but did not do so, it is impossible for the forum to determine whether, under a preference that Respondent might theoretically devise, Sgt. Edwards would be equally, or more, qualified.

But an employer who has violated the Veterans' Preference Law will not escape liability where it is the employer's own actions that prevent the forum from determining the full extent of the harm that may have been caused. Such a result would provide far too much encouragement to employers to abuse the lack of specificity in an unscored hiring or promotion process and ignore the requirement to "devise and apply methods by which the employer gives special consideration in the employer's hiring decision." By analogy, the forum notes that when employees cannot prove the hours they worked because the employer has failed to keep records of wages and hours that the law requires it to keep, those employees are still awarded compensation based on a reasonable inference that can be drawn from the evidence. *Anderson v. Mt. Clemens Pottery Co.*, 328 US 680, 687 (1946). The forum here applies a *per se* rule that where a veterans' preference is not given, on account of a failure to devise a method to apply the veterans' preference under ORS 408.230(2)(c), a veteran's failure to obtain the job or promotion is deemed to flow from the failure to abide by the law.

Respondent objects to the application of the *per se* rule announced above. Respondent's Exception II.C., pages 14-15, presumably directed at Conclusion of Law #15. Respondent points out, correctly, that *Mt. Clemens* is distinguishable; however, *Mt. Clemens* is cited by way of analogy. The analogy is that when a defendant has violated the law and by its violation has made it impossible to determine the extent of damages, the burden of proof imposed on the victim will be greatly reduced, and a way to discourage the unlawful practice must be applied. Just as that principle applies in wage

cases, it also applies to complainants in discrimination cases. *See, e.g., Stewart v. General Motors Corp.*, 542 F2d 445, 452 (7th Cir. 1976) (Because "the subjectivity of defendant's method of filling job vacancies renders impossible anything like a precise calculation of the pecuniary effects of discrimination," and the employer had "no objective standards by which to measure whether a given employee deserved a promotion," damages are still awarded, even though it "may generate a windfall for some employees who would have never been promoted…") That analogy applies under the facts here.

The damages awarded here include damages for suffering that is the inevitable consequence of Respondent's failure to devise and apply a method for applying the veterans' preference. Because it is impossible to determine, either by the forum or by Sgt. Edwards, whether that failure to devise and apply the preference also resulted in the failure to award him the job, one could perceive the forum would award him damages that might have flowed from the failure to get the job.

However, as explained more fully below, the only monetary damages actually awarded in this case are damages for emotional distress. The forum notes that had Respondent devised and applied a method for providing the preference, and had it disclosed that method to Sgt. Edwards when it had the opportunity to do so—either upon his initial inquiry or upon investigation by the Civil Rights Division—common sense would dictate that Sgt. Edwards's distress would have been very significantly reduced or eliminated, especially that distress to which he most poignantly testified. Indeed, he would have suffered the disappointment that any unsuccessful job seeker can be expected to suffer, but he would not have suffered the distress he actually described to the forum—distress focused, not on the fact that he did not get the job, but on the fact that his employer had failed to honor his military service. His distress arose from his justifiable perception that he was not being treated in accordance with the law and in accordance with the underlying sentiment of gratitude for his military service that the law exemplifies. Had Respondent devised and applied a method to apply the veterans' preference, that emotional damage would not have occurred.

With this principle in place, the forum turns to the various remedies. In doing so, it is mindful that generally speaking, the laws enforced pursuant to ORS 659A.820 are laws prohibiting discrimination in one form or another, and are often similar to federal statutes. ORS 659A.003 states that the purpose of the chapter "is to encourage the fullest utilization of the available workforce by removing arbitrary standards of race, color, religion, sex, sexual orientation, national origin, marital status age or disability as a barrier to employment…." Moreover, as pointed out above, the Legislature looked to federal law in enacting the Veterans' Preference Law, although they are not identical. *See generally, 5 USC Sections 2108(3)(C), 3318, 3320.*[12] Federal law and precedent

[12] Federal and state veterans' preference laws have notable differences. For example, the federal statute, as compared to ORS 408.230(4), nowhere requires the veteran be hired, even if the veteran is equally or more qualified than an applicant not entitled to the preference. Also, while 5 USC Sections 3309, 3318, 3320 mandate granting a preference when a score is not used in the hiring or promotion decision, the

are therefore instructive, though not binding. *In the Matter of Kenneth Wallstrom, 32 BOLI 63, 79 (2012).*

Injunctive Relief

The forum agrees that imposing the injunctive relief requested in the Charging Document is an appropriate remedy, except that the training and development of a policy need be undertaken only for hiring or promotion based on ranking of applicants that does not result in a score, which was the only policy shown to be deficient. The particulars of this relief are set out at Paragraphs 1 and 3 of the Order, below.

Monetary Damages

As mentioned above, the Formal Charges do not specifically request any back pay or lost past wages. Back pay is not awarded.

The forum also declines to award future wages and benefits, or "front pay." As noted above, at page 45, front pay may be awarded to represent continued accrual of damages after the record of the case closes; on the other hand, it may not be speculative. Here, determining any amount of lost front pay would be too speculative because there is not sufficient evidence to determine that Sgt. Edwards would have made more money had he been promoted.

Sgt. Edwards's pay during his first year after failing to receive the promotion was, because of overtime, actually higher than what he would have received had he received the promotion. Moreover, average pay for sergeants was higher than for lieutenants, and for at least one year-over-year comparison, the average increase in pay for sergeants, again because of overtime, was higher than for lieutenants. And despite the fact that lieutenants are exempt from overtime pay, the evidence established that lieutenants frequently work overtime. Based on the evidence presented, the forum cannot find, in the absence of considerable speculation, that Sgt. Edwards will suffer any loss of income on account of his failure to receive the promotion to lieutenant.

The Agency filed an exception to the failure to grant front pay. It relies on cases where front pay damages are calculated based on the wages of a "comparator" employee, and suggests Sgt. Gullberg, the person actually appointed to the job, is the appropriate comparator. Agency Exceptions, page 5.

The forum chooses not to adopt the Agency's exception for two reasons. First, there is no need for a comparator; there was credible evidence of what Sgt. Edwards's pay would have been had he been promoted, and it was less than what he actually earned. The statutory goal of pay awards, whether they be for front pay or back pay, is to place the victim of discrimination in as good a position as the victim would have been

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federal statute has no requirement, as compared to ORS 408.230(2)(c) that a government agency "devise and apply methods" for applying a preference.

in had the victim not been subject to discrimination—or, in this case had the victim not received the preference to which he was entitled. *See Albemarle Paper Co. v. Moody*, 422 US 405, 418 (1975). Using a comparator, when there is better evidence of the pay that would have been earned by the complainant does not serve that statutory goal.

Second, Sgt. Gullberg is not a good comparator. Because his final pay as a sergeant was significantly higher than Sgt. Edwards's, his starting pay as a lieutenant would have been significantly higher; it therefore is not a fair substitute for the pay that Sgt. Edwards would have received.

Emotional Distress Damages

Emotional distress damages are recoverable if they result from the harm caused by the unlawful conduct. *See, e.g., In the Matter of Andrew Engel, DMD, PC,* 32 BOLI 94, 123 (2012) (in a religious harassment case, the complainant's anxiety and stress were suffered as a result of the employer's unlawful conduct). Here the proven unlawful conduct was the failure to devise and apply a method to apply the veterans' preference. And the forum has found that violation to carry with it the necessary conclusion that Sgt. Edwards was not hired on account of that unlawful conduct.

Sgt. Edwards had substantial reason to believe, based on the confusing and inconsistent information given him about the application of the preference, that Respondent violated the law because it had not devised and applied a method to give special consideration to his veteran status in its hiring decision. At the very least, he was aware from Exhibit A-17, Ms. Ott's letter to him of November 21, 2012, of facts indicating or suggesting that, regardless of the failure to hire him, Respondent had not granted him—or had not devised and applied methods by which he might be granted—the preference to which he was entitled. As noted at Finding of Fact 46, that letter, responding after three weeks to his request for a written explanation, addresses his veterans' preference only by stating that he was the "number one candidate at the top of the list", and then by quoting from the memoranda written by the Interviewers to Sheriff Staton. The letter concludes that "Sergeant Gullberg was most suitable for promotion at this time." There is no description of a meaningful standard by which veterans' preference was applied.

This knowledge alone, even without the *per se* conclusion that he was not hired on account of that violation, is sufficient to support his emotional distress damages. The amount of his damages would not be diluted even if some of his suffering had arisen from circumstances for which Respondent was not legally responsible. *In the Matter of Kenneth Wallstrom, 32 BOLI 63, 90 (2012).* Respondent, as it states in its Exception II.B., at page 12, takes Sgt. Edwards as it finds him. Respondent finds him as a victim of its failure to follow the statutory mandate to devise and apply a method to provide a veterans' preference; he also suffers from the failure to have been awarded a promotion.

Sgt. Edwards testified that his damages were related to "having to stand up for my rights and having to come to work," "having to fight for my rights against my bosses who I've worked with is just…it's not the career path that I wanted to take, but it's something that I'm forced to have to do for my rights." He testified that the experience "makes me angry," is frustrating and that he feels his military service is "being discarded and overlooked." Respondent suggested that these damages are not compensable, because they derive from the litigation, rather than the unlawful practice. The forum finds that this stress is more than just the stress derived from going through litigation. *Compare, In the Matter of Washington County, 10 BOLI 147, 155 (1992).* It arises from the fact that his co-workers, who were his superiors, and in some cases his supervisors, were parties to the unlawful practices; and he had to work with them as part of his duties.

Sgt. Edwards brought in no medical expert evidence or any evidence from co-workers or family. He did testify that he has been affected emotionally, that he lost 20 pounds in weight, that he is more easily irritated, and that it has affected his relationship with his family. The forum was particularly affected by his testimony that he feels his military service to his country is being "discarded and overlooked." The forum finds that $50,000.00 is an appropriate amount to award as damages.

Respondent objects to the award of any emotional distress damages because, it says, the evidence was not "substantial." Respondent's Exception II.A., at page 10. "Substantial evidence" supports a finding when a reasonable person could make that finding, based upon the record as a whole. *Cole/Dinsmore v. DMV*, 336 Or 565, 584 87 P3d 1120 (2004). That exception is not sustained. As pointed out above, the complainant's testimony can be sufficient. *In the Matter of Crystal Springs Landscapes, Inc., 32 BOLI 144, 170 (2012). In the Matter of From the Wilderness*, 30 BOLI 227, 291-92 (2009). In this case, Sgt. Edwards's testimony of his emotional distress was both substantial and convincing.

Both Respondent and the Agency take exception to the amount of the damages. The Agency points to prior cases where the award of emotional distress damages based on discrimination was higher, suggesting that the type of distress suffered was comparable to that of Sgt. Edwards. *See, In the Matter of Blachana, LLC et al*, 32 BOLI 220 (2013); *In the Matter of Crystal Springs Landscapes, Inc.,* 32 BOLI 144 (2012).

Respondent claims the damages are too high. Exception II.B.1., pages 13-14. In addition to its assertions that the Complainant's distress is minor, it points out that emotional distress damages are affected by the duration, frequency, and severity of the conduct.

The forum is persuaded by the agency's exception. Damages for emotional distress are granted in the amount of $50,000.00.

ORDER

NOW, THEREFORE, as authorized by ORS 659.850 (4), and to carry out the purposes of ORS chapter 659A and ORS 408.230, and to eliminate the unlawful effects of Respondent's violation of ORS 408.230, and to protect the rights of the Complainant Sgt. Edwards and others similarly situated, the Commissioner of the Bureau of Labor and Industries hereby orders **Respondent Multnomah County Sheriff's Office** to—

1. Devise, in concert with the Technical Assistance Unit of the Oregon Bureau of Labor and Industries (TA) a coherent, consistent, written and reasonable method by which to apply veterans' preference at each stage of any hiring or promotion decisions that must meet the criteria of ORS 408.230 (2)(c). TA staff shall, if requested, work with Respondent to help formulate, revise, and finalize a written statement of that method, which shall be published and transmitted to the Agency and the Complainant, and made available to the public. The requirements in this Paragraph shall all be completed within 60 days of the date the Final Order is issued. Respondent shall pay TA's reasonable costs incurred in helping Respondent meet the obligations of this Paragraph.

2. Cease and desist from, along with its agents and employees, violating Oregon's Veterans' Preference law, ORS 408.225 – 408.237.

3. Train its managers and staff, at Respondent's expense, on the correct interpretation and application of the Oregon Veterans' Preference law, specifically ORS 408.230(2)(c), with the assistance of TA or another trainer agreeable to the Agency.

4. As payment of the damages awarded, to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 1045 State Office Building, 800 NE Oregon Street, Portland, Oregon 97232-2180, Fifty Thousand Dollars ($50,000.00) plus interest at 9% per annum from the date this Order becomes final, which amount may be paid in the form of a check or draft drawn on Respondent's account to the order of the above-named office, in trust for Rod A. Edwards.

In the Matter of
CHARLENE MARIE ANDERSON dba Domestic Rescue

Case No. 41-14
Final Order of Commissioner Brad Avakian
Issued June 27, 2014

SYNOPSIS

Respondent, who operated a house-cleaning business, employed Claimant as a house cleaner. During the weeks at issue, Respondent failed to pay Claimant any of the wages owing to her. Claimant terminated her employment. Notice was sent to the Respondent, who did not dispute that she owed wages, but did object to the hourly rate claimed. The amount of unpaid wages totals $380.00. The failure to pay was willful. Penalty wages in the amount of $2,400.00 are therefore due for failure to pay at termination. ORS 652.310 to 652.405; 652.140(2), ORS 652.150, OAR 839-001-0470.

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The above-entitled case came on regularly for hearing before Daniel Rosenhouse, designated as Administrative Law Judge ("ALJ") by Brad Avakian, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on May 14, 2014, at the office of the Port of Tillamook Bay, 4000 Blimp Blvd., Tillamook, Oregon. The hearing began at approximately 10:15 A.M., and ended at approximately 11:15 A.M.

The Agency was represented by Administrative Prosecutor Adriana Ortega, an employee of the Agency.

Wage claimant Nora Jean Socia was present throughout the hearing. Margaret Pargeter, a Compliance Specialist with the Agency testified by telephone. Ms. Socia and Ms. Pargeter, both called by the Agency, were the only witnesses. Claimant's husband, Steve Socia, was present for part of the hearing.

The hearing had been scheduled to begin at 10:00 A.M., but was delayed until 10:15 AM in order to account for any unexpected event that may have delayed the

Respondent's appearance. No appearance was ever made by the Respondent or any other person on her behalf, nor was any notice given to the forum explaining her failure to appear.

The Agency presented its prima facie case, as required by OAR 839-050-0330(2). In addition to the audio record of the hearing, the official record includes Administrative Exhibits X1 through X6. The only other items received into evidence were Agency Exhibits A1 through A13, except that page 4 of Exhibit A11 was excluded after it was discovered that it was identical to Exhibit A12, and that it had been submitted into the record in error.

Prior to the hearing, the Agency had submitted a motion for partial summary judgment. The forum had allowed that motion in part in an Interim Order (referred to herein as the Summary Judgment Order), insofar as it sought a ruling that Respondent owed wages to Claimant. The part of the Summary Judgment Order allowing the motion is set forth immediately prior to the Opinion portion of this Order. The Interim Order, in its entirety, is in the record as Exhibit X10. To the extent not inconsistent with this Order, the Summary Judgment Order is adopted by the forum.

The forum has taken official notice of a calendar for 2013.

The ALJ issued a proposed order on May 28, 2014, that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. No exceptions were filed.

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

RULINGS AND RESOLUTIONS OF MOTIONS OR OBJECTIONS

At the hearing, the Agency moved for an order finding Respondent to be in default. Because Respondent never appeared at the hearing, she was and is found to be in default. OAR 839-050-0330(1)(d).[1]

[1] Two days after the hearing, the forum received an email from the Administrative Prosecutor indicating she had received two phone messages from the Respondent raising questions about her ability to appear at the hearing. One of the messages was left prior to the scheduled hearing. More than one week after the hearing, the prosecutor filed a Notice, accompanied by an audio recording of the phone messages from the Respondent. The phone messages indicate Respondent would be unable to attend the hearing for various reasons, but they also suggest the Respondent's substantive objection to the Agency's claim concerns the Claimant's hourly rate of pay, an issue ultimately resolved by the forum in Respondent's favor. In response, the ALJ included the following statement in the Proposed Order: "If, within 10 days of the issuance of this Proposed Order, Respondent files a motion to extend the time within which to file exceptions and a motion to be relieved of the default, or for other relief, the forum will consider such a motion."

33 BOLI ORDERS

FINDINGS OF FACT – THE MERITS

1) The Claimant, Ms. Nora Jean Socia, submitted a wage claim to the Agency's Wage and Hour Division. (Exhibit A1)

2) Ms. Socia assigned her wage claim to the Agency. (*Id.*)

3) Ms. Socia was employed by Respondent to do house-cleaning work at the agreed rate of pay of $10 per hour. (Socia Testimony)

4) Respondent did not pay Ms. Socia for any work she performed during 2013, which was a total of 38 hours. (*Id.*)

5) Ms. Socia terminated her employment with Respondent immediately after completing her housecleaning work on February 15, 2013. (*Id.*)

6) On June 25, 2013, the Agency mailed to Respondent a NOTICE OF WAGE CLAIM, advising her that Ms. Socia had filed a wage claim, asserting that Respondent Ms. Socia $418.00 in wages. This NOTICE OF WAGE CLAIM WAS MAILED to an address on Poplar Street in Manzanita, Oregon listed by the Oregon Secretary of State, Corporation Division, as the address of an inactive business, *viz.,* Domestic Rescue and of Ms. Anderson, as authorized representative of that business. (Exs. A2, A3)

7) On December 10, 2013, the Agency issued an Order of Determination (OOD). (Ex. X1)

8) The OOD alleges Respondent owes $418.00 in wages to Ms. Socia. *Id.*

9) The OOD was personally served on Respondent on December 18, 2013 at 125 Warner Parrot Road in Oregon City 97045 (the Warner Parrot address). (Ex. X1f)

10) Respondent filed an Answer to the OOD on January 27, 2014. (Ex. X-1g)

11) On March 27, 2014, the OOD was served again, by mail also at the Warner Parrot address, along with a Notice of Hearing, setting the hearing in this matter to start at 9:30 A.M. on Tuesday, May 13, 2014 at the Agency's office on the 10th Floor, at 800 NE Oregon Street, in Portland, Oregon. (Ex. X2)

12) In response to a motion by the Agency, the forum issued an Interim Order changing the place, time, and date of the hearing to 10:00 AM on May 14, 2014 at the office of the Port of Tillamook Bay, 4000 Blimp Boulevard in Tillamook, Oregon. Said Interim Order was issued on April 24, 2014 and served on the Respondent by mail at the Warner Parrot address on the same day. (Ex. X10)

13) The record contains no indication, and the forum is otherwise unaware, that Respondent has ever advised the forum that the Warner Parrot address is

incorrect. The record contains no indication from the US Postal Service or otherwise that any mail sent to the Respondent at the Warner Parrot address has been returned, or not received.

14) The forum is not aware of any information suggesting that Respondent appeared for the hearing in Portland on May 13, 2014.

15) Respondent agreed to pay Claimant wages at the rate of $10 per hour.

16) Respondent had not established a regularly scheduled payday.

17) Ms. Socia worked a total of 38 hours for which she was not paid.

18) The testimony of the two witnesses was credible.

CONCLUSIONS OF LAW

1) Claimant Nora Jean Socia was suffered or permitted to work by the Respondent and was, in fact, knowingly and intentionally employed by the Respondent during January and February 2013. Claimant's work for Respondent terminated on February 15, 2013. Accordingly, Claimant is entitled to unpaid wages from the Respondent in the amount of $380.00 plus interest at the legal rate from February 19, 2013, which is the first business day after Claimant's work terminated. ORS 652.140.

2) Claimant is entitled to penalty wages from Respondent on account of the failure to receive all wages due at termination of her employment in the amount of her hourly rate ($10) multiplied by 240, plus interest at the legal rate on that amount from March 22, 2013, which is 35 days after the last day of employment. ORS 652.150.

3) Interest on the wages due runs from the date the evidence shows the wages to be due, rather than from the date alleged in the Order of Determination.

4) As assignee of Claimant's claims, the Agency is the proper party to which an award should be made.

5) Under the facts and circumstances of this record, and according to the applicable law, 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 penalty wages, plus interest, on all sums until paid. ORS 652.332.

OPINION

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EXCERPT OF SUMMARY JUDGMENT ORDER

INTRODUCTION

On August 22, 2013, Agency issued Order of Determination #13-1115 (OOD). The OOD charges that Respondent owes $418.00 in wages to wage claimant Nora Jean Socia (Claimant) for work she performed as Respondent's employee from January 4 through February 15, 2013. The OOD also seeks penalty wages of $2,640.00 on account of Respondent's willful failure to pay the wages to the Claimant within 30 days after the Agency sent her written notice that the wages were due. The amount of the wages and the penalty were calculated on the basis that Claimant's hourly wage was $11.00 per hour.

On January 27, 2014, the Agency received a response from the Respondent requesting a hearing. In her response, Respondent states that she disagrees with the amount of wages owed because she was paying Claimant hourly wages of $10.00, not $11.00. Her response also denies she owes the penalty wages because she did not receive the "first order to pay the wages and that the penalty is being added because I did not respond in a timely fashion."

On April 21, 2014, Agency filed a Motion for Partial Summary Judgment seeking a determination, in advance of the hearing, that Respondent is liable for wages and is liable for penalty wages. For the reasons stated below, the Forum grants the motion with respect to the issue of wages due; it denies the motion insofar as it requests an order finding that penalty wages are due. A hearing will still be necessary at the scheduled time and place to determine the amount of the wages, whether penalty wages are due, and the amount of penalty wages, if any, that are due.

Summary Judgment—Legal Standards

Motions for summary judgment are specifically authorized by the Oregon Administrative Rules. OAR 839-050-0150(4)(a) provides that such a motion may be made to obtain an accelerated decision as to all or part of the issues raised in the pleadings. To the extent granted, the order doing so is to be set forth in the Proposed Order. 839-050-150(4)(b).

OAR 839-050-0150(4) sets forth the circumstances in which a motion for summary judgment may be made. Precedent establishes when it may be granted.

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. No genuine issue as to a material fact exists if, based upon the record before the court viewed in a manner most favorable to the adverse party, no objectively reasonable juror could return a verdict for the adverse party on the matter that is the subject of the motion for summary judgment. In reviewing a motion for summary judgment, the Forum draws all inferences of fact from the record against the participant filing it and in favor of the participant opposing the motion. However, the adverse party has the burden of producing evidence on any issue raised in the motion as to which the adverse party would have the burden of persuasion at hearing. *See, e.g.*, *Jones v. General Motors Corp.,* 325 Or 404, 408 (1997); ORCP 47; *In the Matter of KC Systems, Inc. fdba The Machine Shop, 32 BOLI 205, 206-07 (2013); In the Matter of Fraser's Restaurant & Lounge*, 31 BOLI 167, 169-70 (2011); *In the Matter of David W. Lewis*, 31 BOLI 160, 162 (2011).

In this case, another rule, relating to the effect of pleadings is also germane. OAR 839-050-0130(2) requires the answer to include an admission or denial of each fact alleged in the charging document and that a general denial is insufficient. Subsection (3) of the same rule provides that factual matters alleged in a charging document and not denied in the answer are deemed admitted by the answering party.

Factual Findings

Applying the principles set forth immediately above, the following facts are not disputed and are found to be true.

1. On December 10, 2013, the Agency issued its Order of Determination (OOD), pursuant to ORS 652.310 to 652.405.
2. The Agency attempted to serve the OOD on the Respondent and it was received by her, sometime prior to January 27, 2014.
3. The OOD finds that Claimant performed work for the employer from January 4 through February 15, 2013 and that Respondent failed to pay and is liable for wages owed to the Claimant in the amount of $418.00 for that work, together with penalty wages in the amount of $2,640.00 for wilfully failing to pay the wages within 30 days after written notice, pursuant to ORS 652.140 and 652.150.
4. The OOD further finds that interest on the wages is owed from March 1, 2013.
5. Respondent filed an answer, received by the Forum on January 27, 2014. In her answer, she admits she owes wages, saying, "I do however want to pay what I owe." She also specifically denies she owes the amount of $418.00. Respondent's answer also denies that penalty wages are owed, although her reason is based on the fact that she had not

received the "first order to pay the wages" and on her understanding that penalty wages are owed only because she did not respond in a timely fashion. Other than as set forth in this Finding #5, Respondent's answer does not deny any of the facts set forth in the OOD.

6. On March 27, 2014, the Forum issued a Notice of Hearing to Respondent. The Notice of Hearing set a time and place for hearing. Together with the Notice of Hearing, the forum sent to Respondent a copy of the Order of Determination. The OOD advises the Respondent of her right to a contested case hearing, of the time requirement and place for requesting a hearing, the applicability of statutes allowing recovery of wages, including ORS 652.330, and the requirement to file an answer and the consequences of failing to do so. Also served with the OOD and Notice of Hearing are attachments including information about the Agency's contested case hearing process (including a document titled "Summary of Contested Case Rights and Procedures"), a multi-language warning about the importance of responding to the OOD, a notice about using an authorized representative, a special notification under the Servicemembers Civil Relief Act (SCRA Notification), and a copy of the forum's contested case hearings rules, OAR 839-050-0000 to 839-050-0445.

7. The time and place for hearing were modified by an Interim Order dated April 24, 2014. Pursuant to the Interim Order, the time, date, and location of the hearing were changed to 10:00 A.M. on May 14, 2014 at 4000 Blimp Blvd, Suite 100, Tillamook, Oregon.

8. On April 21, 2014, Agency filed its Motion for Partial Summary Judgment, which is the subject of this Interim Order.

9. On April 22, 2014, the Forum issued and mailed to Respondent an Interim order notifying her that if she failed to file a written response to the Motion for Partial Summary Judgment by April 28, 2014, or if the response were insufficient to raise a material issue of fact or law, the Forum might grant the Agency's Motion.

10. Respondent has filed no response to the Motion.

Legal Conclusions

Based on the above Factual Findings, the Forum concludes that Respondent owes wages to Claimant.

Opinion

Unpaid Wages

In Paragraph II of the OOD, the Agency specifically alleges that (1) Claimant worked for Respondent between January 4 and February 13, 2013; (2) Claimant's rate of pay was $11.00 per hour; (3) Claimant was not paid for any of her work and that a balance of $418.00 for wages

owing is due. In her answer, as set forth above, the Respondent acknowledges and admits that wages are due. But she does not admit the amount owing. Respondent's admissions establish that wages were unpaid and due.

The exact *amount* of wages owed will be determined at the hearing.

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OPINION

CLAIMANT'S WAGE CLAIM

The Respondent did not appear at the hearing and did not contest the allegations that she employed the Wage Claimant. The Agency's responsibility is to establish a prima facie case. OAR 839-050-0330. To do this, the Agency must prove the following elements: 1) That the Respondent employed the Claimant; 2) The pay rate upon which Respondent and Claimant agreed; 3) The amount and extent of work Claimant performed for Respondent; and 4) Claimant performed work for which he was not properly compensated. *See, In the Matter of Letty Lee Sesher,* 31 BOLI 255, 261 (2011); *In the Matter of E.H. Glaab*, 32 BOLI 60, 66 (2012).

Ms. Socia testified that she was employed by the Respondent. The Respondent's Answer also acknowledges the employment. Thus, a prima facie case is established as to the first element—employment by the Respondent.

The second element is rate of pay. The Wage Claimant's Wage Claim, (Ex. A-1) asserts the rate of pay was $11 per hour, as does the OOD. In her testimony, however, Ms. Socia said that when she first started working for Respondent, she was told that her wages would start at $10 per hour and would increase to $11 at some unspecified future time. Nothing further was ever said by Respondent affirming that the time for the pay rate increase had arrived. The Respondent's Answer claims the rate of pay was $10 per hour, and there was no evidence that Respondent ever stated or otherwise acknowledged that the rate of pay had increased. Under these facts, rate of pay remained at $10 per hour.

The unchallenged testimony of Ms. Socia was that she worked 38 hours for which she was not compensated. The final two elements of the claim for unpaid wages are therefore met. The Wage Claimant is owed $380.00 for 38 hours of uncompensated time.

Penalty Wages

Penalty wages are awarded when a respondent's failure to pay wages at termination of employment was willful. ORS 652.150. 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).

Respondent was an experienced employer. In her Answer, the Respondent acknowledged that she needed to pay Ms. Socia. She also states in her Answer, "I further state that I have been in business for 25 years and I have never failed to pay any of my employees." It is difficult to imagine how Respondent could have failed to pay wages without having met the standards set out in *Sabin*. Respondent never claimed otherwise.

Penalties may not accrue, however, unless notice is given to the employer that the wages are due. ORS 652.150(2). If notice is given and the employer does not pay at any time after receiving the notice, the penalty equals the product of the amount of the hourly wage, 8 hours per day, and the number of days that pass until payment, with a cap of 30 days. ORS 652.150(1) and (2). Notice of nonpayment of the wages was given to the Respondent on at least three occasions: It was mailed on June 25, 2013 and March 27, 2014; it was personally served with the OOD on December 18, 2013. Respondent undoubtedly received the notice sometime prior to January 27, 2014 when she filed her Answer.

In this case, with an hourly wage of $10, the penalty is $2,400.00.

Interest

The OOD claims interest on the wages from March 1, 2013. Ex. X-1a, Par. II. It claims interest on the penalties from April 1, 2013. *Id.*, Par. III. However, damages flowing from statutory wage violations are awarded by the forum based on the actual evidence produced at the hearing, regardless of the allegations in the OOD. *In the Matter of Francisco Cisneros*, 21 BOLI 190, 213 (2001), *aff'd without opinion*, *Cisneros v. Bureau of Labor and Industries*, 187 Or App 114, 66 P3d 1030 (2003). That principle is applied here to the determination of the date from which interest runs.

Pre-judgment interest accrues on obligations from the date they become due, at the rate of 9% per annum. ORS 82.010(1)(a). The same rate, on open accounts, accrues from the last item on the account. *Id.*

Unless notice of termination is given at least 48 hours ahead of the termination (in which case the wages are due at the time of termination), wages are due at the earlier of five business days after the termination, or at the next regularly scheduled payday. In this case, termination occurred on February 15. There was no regularly scheduled payday. With the intervening Presidents' Day holiday, wages were due on February 23, 2013, and interest on the wages runs from that date.

Penalty wages, such as those imposed in this case, can accrue for up to 30 days after wages are due if notice is given and the wages are not paid for that full 30 days.

ORS 652.150. As explained above, the wages were due on February 23, notice was given, and the wages were not paid. Interest runs from the imposition of the penalty on the 30th day; that day is March 25, 2013.

ORDER

NOW, THEREFORE, as authorized by ORS 652.140(2), ORS 652.150, and ORS 652.332, and as payment of the unpaid wages and penalty wages, the Commissioner of the Bureau of Labor and Industries hereby orders **Respondent Charlene Marie Anderson** to pay, by delivering to the Fiscal Services Office of the Bureau of Labor and Industries, 1045 State Office Building, 800 NE Oregon Street, Portland, Oregon 97232-2180, a certified check or bank cashier's check payable to the Bureau of Labor and Industries, which is to hold said funds in trust for the Wage Claimant Nora Jean Socia, in the principal amount of TWO THOUSAND SEVEN HUNDRED EIGHTY DOLLARS ($2,780.00) plus interest at the rate of 9% per annum on $380.00 from February 23, 2013 and additional interest at 9% per annum on $2,400.00 from March 25, 2013.

The principal amounts set forth immediately above are gross amounts of wages due and the principal amounts only shall be reduced by the legally required deductions for state and federal taxes and other legal deductions that are appropriate for the Claimant, insofar as they are known to the Respondent. Respondent, at the time of submitting her payment, shall provide a written record, as would generally be required on a paycheck, of the amounts of deductions taken, and shall designate the reasons therefor. Respondent shall forward such deducted taxes and other deductions, to the appropriate governmental agencies to the extent otherwise required by law.

In the Matter of
C.S.R.T., LLC, and ROBERT P. SABO
Case No. 38-14
Final Order of Commissioner Brad Avakian
Issued August 28, 2014

SYNOPSIS

Respondent C.S.R.T., LLC ("CSRT") employed Claimant from November 15, 2012, through May 15, 2013, at the agreed rate of $20 per hour. Claimant earned a total of $10,400.00 and was paid nothing for her work. Respondents CSRT and Robert P. Sabo were ordered to pay Claimant $10,400.00 in unpaid, due and owing wages. CSRT and Sabo, as a successor in interest to CSRT, willfully failed to pay these wages and were ordered to pay Claimant $4,800.00 in ORS 652.150 penalty wages.

The above-entitled case came on regularly for hearing before Alan McCullough, designated as Administrative Law Judge ("ALJ") by Brad Avakian, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on June 4, 2014, in the W. W. Gregg Hearing Room of the Oregon Bureau of Labor and Industries, located at 800 NE Oregon Street, Portland, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by administrative prosecutor Adriana Ortega, an employee of the Agency. Wage claimant Cristina Cortez ("Claimant") was present throughout the hearing and was not represented by counsel. No one appeared at the hearing on behalf of Respondents CSRT or Robert Sabo ("Sabo") and CSRT was held in default.

The Agency called the following witnesses: Claimant; BOLI Wage and Hour Compliance Specialist Margaret Pargeter; Jennifer Doyle and Charles Montgomery, Claimant's coworkers; and Elizabeth Cox, CSRT's bookkeeper.

The forum received into evidence:

a) Administrative exhibits X-1 through X-9; and
b) Agency exhibits A-1 through A-47.

Having fully considered the entire record in this matter, I, Brad Avakian, Commissioner of the Bureau of Labor and Industries, hereby make the following

Findings of Fact (Procedural and on the Merits), Ultimate Findings of Fact,[1] Conclusions of Law, Opinion, and Order.

FINDINGS OF FACT – PROCEDURAL

1) On May 28, 2013, Claimant filled out and signed a wage claim and assignment of wages with the Agency. Claimant actually filed her wage claim and assignment of wages on June 6 or June 20, 2013.[2] On her wage clam form, she wrote "6051 SE Malden Street, Portland 97206" as Respondent's address. (Testimony of Claimant, Ex. A1)

2) On October 15, 2013, the Agency issued Order of Determination ("OOD") No. 13-1116 based on the wage claim filed by Claimant and the Agency's investigation. The OOD was personally served on Robert Sabo, CSRT's registered agent, at 6051 SE Malden St., Portland, Oregon. In pertinent part, the OOD alleged that:

- Claimant was employed by and performed work for CSRT from November 15, 2012, through May 15, 2013, at the agreed rate of $1,500.00 per month.
- Claimant earned a total of $9,000.00 and was paid nothing for her work and is owed $9,000.00 in unpaid, due and owing wages.
- CSRT willfully failed to pay these wages and owes Claimant $4,154.40 in ORS 652.150 penalty wages.

(Ex. X1)

3) On December 16, 2013, Robert Sabo filed an answer and request for hearing on behalf of CSRT in which he identified himself as CSRT's "CEO" and authorized representative. The answer and request for hearing was printed on CSRT's letterhead, with an address of "PO Box 86350, Portland, OR 97286." Sabo denied that any wages or penalty wages were owed "because CSRT LLC has no employees." (Ex. X1)

4) On April 9, 2014, BOLI's Contested Case Coordinator issued a Notice of Hearing to CSRT, the Agency, and Claimant setting the time and place of hearing for 9:30 a.m. on May 20, 2014, at BOLI's Portland office. Together with the Notice of Hearing, the forum sent a copy of the OOD, a document entitled "Summary of Contested Case Rights and Procedures" containing the information required by ORS 183.413, a document entitled "Servicemembers Civil Relief Act (SCRA) Notification, and a copy of the forum's contested case hearings rules, OAR 839-050-0000 to 839-050-0445. (Ex. X2)

5) On April 7, 2014, the Agency issued an Amended OOD that added the following allegations to its original OOD.

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[1] The Ultimate Findings of Fact required by OAR 839-050-0370(1)(b)(B) are subsumed within the Findings of Fact – The Merits.

[2] The Agency date-stamped Claimant's wage claim form twice, once on June 6 and once on June 20, 2013.

- CSRT issued dishonored checks to Claimant on November 2, 2012, in the amount of $900.18 and on December 31, 2012, in the amount of $2,250.00.
- Pursuant to ORS 652.195 and OAR 839-001-0300, CSRT is liable to Claimant in the amount of $2,730.54 for the first returned check and $6,750.00 for the second returned check.

The Amended OOD stated that the Agency would consider CSRT's original request for hearing as valid for the Amended OOD unless CSRT notified that Agency otherwise. (Ex. X6)

6) On April 30, 2014, the Agency issued a Second Amended OOD in which the case caption was amended to read "C.S.R.T. LLC, an Oregon domestic limited liability company, and Robert P. Sabo, individually" instead of "C.S.R.T. LLC, an Oregon domestic limited liability company."[3] The Agency mailed its Second Amended OOD to CSRT and Sabo by regular and certified mail at 6051 SE Malden St., Portland, OR 97206" and PO Box 86350, Portland, OR 97286. Both certified mailings were returned on May 27, 2014, marked "UNCLAIMED." (Ex. X5)

7) The Agency designated the Agency file as the record in its OOD, the Amended OOD, and the Second Amended OOD. (Exs. X1, X5, X6)

8) At the time set for hearing, neither Respondent CSRT nor Respondent Sabo had made an appearance. The ALJ went on the record and stated that Respondents would be held in default if they did not make an appearance within 30 minutes. By 10 a.m., neither Respondent CSRT nor Respondent Sabo had appeared, and the ALJ commenced the hearing by declaring CSRT in default[4] and explaining the issues involved in the hearing, the matters to be proved, and the procedures governing the conduct of the hearing. (Statement of ALJ)

9) The ALJ issued a proposed order on June 25, 2014, that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. On July 7, 2014, the Agency filed exceptions. Those exceptions, which challenged the ALJ's conclusion that Sabo was not properly served and, as such, cannot be held personally liable for the unpaid wages and penalty wages, are addressed in the Opinion section of this Final Order in the discussion of Respondent Sabo's liability.

RULING ON AGENCY MOTION

After the ALJ's opening statements and after the ALJ declared CSRT to be in default, the Agency's administrative prosecutor asked the ALJ to apply the provisions of OAR 839-005-0330(1) & (2) by accepting the pleadings and the Agency's case

[3] There were no other changes from the Amended OOD.

[4] The ALJ did not declare Respondent Sabo in default.

summary as the record of the case and issuing a Final Order on Default. In pertinent part, that rule reads as follows:

> "(1) Default may occur when:
> "* * * * *
> "(b) A party withdraws a request for hearing;
> "(c) The Forum has scheduled a hearing and a party notifies the Agency or the administrative law judge that the party will not appear at the specified time and place; or
> "(d) Notice regarding the time and place of the hearing was sent to the party and the party fails to appear at the scheduled hearing.
> "(2) Under the circumstances described in (1)(b)–(d) of this rule, the administrative law judge will take evidence to establish a prima facie case in support of the charging document. If the Agency designated the Agency file as the record in its charging document and no further testimony or evidence is necessary to establish a prima facie case, the Agency file, including all materials submitted by a party, shall constitute the record. No hearing shall be conducted and the administrative law judge shall issue a final order by default. * * *"

This is the first case in which the Agency has asked the forum to apply this rule. After the ALJ explained the problems he saw in interpreting the rule, the Agency elected to withdraw its request and proceeded to call witnesses listed in its case summary and offer the Agency exhibits filed with its case summary.

FINDINGS OF FACT – THE MERITS

1) At all times material herein, CSRT was an Oregon limited liability company that engaged the personal services of one or more employees. (Testimony of Claimant, Doyle, Montgomery, Pargeter; Exs. X1, X5, X6)

2) CSRT registered as a domestic limited liability company with the Oregon Secretary of State Corporation Division on September 30, 2011, with a renewal date of September 30, 2013. Sabo is listed as CSRT's registered agent and an LLC member in the Corporation Division's registry. On the same registry, Sabo's address is listed as "711 Monroe Street, #1, Oregon City, OR 97045" and his mailing address as "PO Box 86350, Portland, OR 97286." (Testimony of Pargeter; Ex. A30)

3) In October 2012, Sabo hired Claimant to work as a website graphic designer for CSRT. Sabo and Claimant agreed that Claimant would work 20 hours per week and be paid $20 per hour, with $100 a month deducted for taxes. They also agreed that Claimant would work from her home. (Testimony of Claimant; Ex. A1)

4) Claimant completed a W-4 form and began work on October 1, 2012. After that, she worked 20 hours a week for CSRT throughout her employment. Her last day of work was May 15, 2013. Claimant quit CSRT's employment on that day because she had not been paid since November 2012. (Testimony of Claimant; Ex. A28)

5) CSRT's regular paydays were the 15th and last day of each month. (Testimony of Claimant)

6) Initially, CSRT paid Claimant for her work, but Claimant was not paid anything for any work she performed after November 14, 2012. (Testimony of Claimant; Ex. A27)

7) Sabo assigned work to Claimant and monitored her work throughout her employment via a computer program he installed on her computer called "Shockey Monkey." Claimant had to "clock in" in each morning on this program and sign out when she ended her work each day. All the work Claimant performed for CSRT required the creation of a work ticket on the computer. Sabo also installed Outlook Express and virus protection on Claimant's computer. There is no evidence that Claimant worked for anyone else during her employment with CSRT. (Testimony of Claimant; Exs. A2 through A27)

8) On November 2, 2012, CSRT issued a paycheck to Claimant in the amount of $910.18 for "Payroll Oct. #2." On December 31, 2012, CSRT issued a check to Claimant in the amount of $2,250.00 for "Nov & Dec Pay." Sabo signed both checks. Both checks were returned by Claimant's bank as "NSF."[5] (Testimony of Claimant; Ex. A29)

9) Claimant worked a total of 520 hours for CSRT between November 15, 2012, and May 15, 2013, earning $10,400 (520 x $20 per hour = $10,400). As of the date of hearing, Claimant had not been paid for any of that work. (Testimony of Claimant, Pargeter; Ex. A37)

10) During the wage claim period, Claimant made several futile requests to Sabo for her pay. (Testimony of Claimant)

11) Agency compliance specialist Margaret Pargeter was assigned to investigate Claimant's wage claim. On June 27, 2013, Pargeter mailed a letter to Sabo that stated:

> "The wage claim of Cristina Cortez has been assigned to me for resolution. * * *
>
> "Cristina Cortez alleges working 6 months at the rate of $1600 per month during the period of November 15, 2012, through May 15, 2013, earning $9,600, of which she was paid nothing, leaving a balance due and owing of $9,600.00.
>
> "Please take one of the following actions by July 29, 2013:
>
> "1. Submit a check payable to Cristina Cortez in the gross amount of $9,600.00, along with itemized statement of lawful deductions (if any).
>
> "2. Submit to me evidence the claimant did not work the hours claimed, or that she has been paid.

[5] The returned checks were stamped "RETURN REASON – NOT SUFFICIENT FUNDS."

"3. Submit evidence my computations are incorrect."

(Testimony of Pargeter; Ex. A32)

12) Claimant's penalty wages are calculated as follows: $20 per hour x 8 hours = $160.00 x 30 days = $4,800.00. (Calculation of ALJ)

13) All the witnesses were credible. (Entire Record)

CONCLUSIONS OF LAW

1) At all times material herein, Respondent CSRT was an Oregon employer that employed Claimant and was subject to the provisions of ORS 652.110 to 652.332.

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

3) CSRT and Sabo violated ORS 652.140(2) by failing to pay all wages earned and unpaid to Claimant not later than five days, excluding Saturdays, Sundays and holidays, after Claimant left CSRT's employment.

4) CSRT and Sabo owe $10,400.00 in unpaid, due, and owing wages to Claimant. ORS 652.140(2).

5) CSRT and Sabo willfully failed to pay Claimant all wages due and owing and owe $4,800.00 in penalty wages to Claimant. ORS 652.150.

6) Although the Commissioner has jurisdiction over the Agency's allegations that CSRT and Sabo violated ORS 652.195 and OAR 839-001-0300 by issuing two dishonored checks to Claimant, those charges are dismissed because OAR 839-050-0440(4) precludes the Agency from amending its original OOD to add those allegations.

7) Under the facts and circumstances of this record, and according to the applicable law, BOLI's Commissioner has the authority to order CSRT and Sabo to pay Claimant her earned, unpaid, due and owing wages and penalty wages. ORS 652.332.

OPINION

INTRODUCTION

In a wage claim default case, the Agency needs only to establish a prima facie case supporting the allegations of its OOD in order to prevail. *In the Matter of Letty Lee Sesher,* 31 BOLI 255, 261 (2011). In this case, the elements of the Agency's prima facie case are: 1) CSRT employed Claimant; 2) The pay rate upon which CSRT and Claimant agreed, if other than the minimum wage; 3) The amount and extent of work Claimant performed for CSRT; and 4) Claimant performed work for which she was not properly compensated. *See, e.g., In the Matter of Dan Thomas Construction, Inc.,* 32 BOLI 174, 180 (2013).

CLAIMANT WAS EMPLOYED BY RESPONDENT

In its answer, CSRT denied owing wages to Claimant "because CSRT has no employees." Assuming, arguendo, that CSRT has raised an independent contractor defense by this answer,[6] CSRT has the burden of proving that defense by a preponderance of the evidence in order to prevail.[7]

This forum applies an "economic reality" test to distinguish an employee from an independent contractor under Oregon's minimum wage and wage collection laws. The degree of economic dependency in any given case is determined by analyzing the facts presented in light of the following five factors, with no one factor being dispositive: (1) The degree of control exercised by the alleged employer; (2) The extent of the relative investments of the worker and alleged employer; (3) The degree to which the worker's opportunity for profit and loss is determined by the alleged employer; (4) The skill and initiative required in performing the job; and (5) The permanency of the relationship. *See, e.g., In the Matter of Horizon Technologies, LLC,* 31 BOLI 229, 245 (2011).

Aside from its answer, CSRT provided no evidence whatsoever to support its defense. In contrast, the Agency proved the following facts through the credible testimony of Agency witnesses and the Agency's exhibits:

- Sabo assigned and directed Claimant's work for CSRT;
- Claimant used a computerized time clock set up by Sabo to sign in and out of work each day;
- Claimant invested no money in CSRT's business and the software she required to perform her job was provided and installed by Sabo, acting as CSRT's agent;
- CSRT was the only entity for whom Claimant performed work during the wage claim period;
- Claimant was paid by the hour and had no opportunity to earn a profit or suffer a loss;
- CSRT gave Claimant a W-2 form for 2012;
- Claimant performed computer graphic design projects for CSRT with minimal supervision from Sabo;
- There was no fixed time period for Claimant's employment.

These facts are indicia of an employment relationship, not an independent contractor relationship, and the forum concludes that Claimant was CSRT's employee.

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[6] *Cf. In the Matter of Horizon Technologies, LLC,* 31 BOLI 229, 241 (2011) (respondent raised the affirmative defense of independent contractor when respondent did not use the specific term "independent contractor" in its answer but affirmatively alleged that claimant was an "Independent Business Owner selling our GPS devices" and that claimant "bought an independent business distributorship" and "was his own business owner").

[7] *See, e.g., In the Matter of Laura M. Jaap,* 30 BOLI 110, 121-22 (2009).

THE PAY RATE TO WHICH RESPONDENT AND CLAIMANT AGREED

Through Claimant's credible testimony, the Agency proved that Claimant's agreed rate of pay was $20 per hour.

AMOUNT AND EXTENT OF WORK CLAIMANT PERFORMED FOR RESPONDENT

Claimant testified that she worked 20 hours a week for CSRT between November 15, 2012, and May 15, 2013. Her testimony was corroborated by the handwritten calendar of hours worked that she completed for the Agency at the time she filed her wage claim and by computer records she provided to the Agency that document specific dates and times she worked for CSRT. Based on this evidence, the forum concludes that Claimant worked a total of 520 hours for CSRT (20 hours x 26 weeks = 520 hours).

CLAIMANT PERFORMED WORK FOR WHICH SHE WAS NOT PROPERLY COMPENSATED

Claimant was paid nothing for her 520 hours of work and is owed $10,400.00 in gross, unpaid wages (520 hours x $20 = $10,400.00), an amount greater than the $9,000.00 in unpaid wages sought in the OOD. This forum has previously held that the Commissioner has the authority to award unpaid wages exceeding those sought in the OOD when, as in this case, they are awarded as compensation for statutory wage violations alleged in the charging document.[8] The forum follows its precedent in this case and awards Claimant $10,400.00 in unpaid wages.

CLAIMANT IS OWED ORS 652.150 PENALTY WAGES

The forum may award penalty wages when a 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).

The Agency proved that Claimant and CSRT, through its member Sabo, agreed on a wage rate of $20 per hour and that CSRT, through Sabo, was aware that Claimant worked 20 hours a week throughout her employment with CSRT and that Claimant has not been paid for any of her work performed after November 15, 2012. There is no evidence that CSRT, through its member Sabo, acted other than voluntarily and as a free agent in not paying Claimant for six months' work. The forum therefore concludes that CSRT and Sabo acted willfully in failing to pay Claimant her wages and is liable for ORS 652.150 penalty wages.

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[8] *See, e.g., In the Matter of Letty Lee Sesher,* 31 BOLI 255, 263 (2011).

ORS 652.150(1) and (2) provide, in pertinent part:

> "(1) Except as provided in subsections (2) and (3) of this section, if an employer willfully fails to pay any wages or compensation of any employee whose employment ceases, as provided in ORS 652.140 * * *, then, as a penalty for the nonpayment, the wages or compensation of the 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.
>
> "(2) If the employee or a person on behalf of the employee sends a written notice of nonpayment, the penalty may not exceed 100 percent of the employee's unpaid wages or compensation unless the employer fails to pay the full amount of the employee's unpaid wages or compensation within 12 days after receiving the written notice. If the employee or a person on behalf of the employee fails to send the written notice, the penalty may not exceed 100 percent of the employee's unpaid wages or compensation. * * *"

The Agency provided documentary and testimonial evidence that, on June 27, 2013, its investigative staff made the written demand contemplated by ORS 652.150(2) for Claimant's wages. The Agency's OOD, issued on October 15, 2013, repeated this demand. Because CSRT and Sabo failed to pay Claimant her unpaid wages after receiving the notices, the forum computes penalty wages at the maximum rate set out in ORS 652.150(1) ($20 hourly rate x eight hours per day x 30 days = $4,800.00 penalty wages).

Although $4,800.00 is a greater amount than the $4,154.40 in penalty wages sought in the OOD, this forum has previously held that the Commissioner has the authority to award penalty wages exceeding those sought in the OOD when, as in this case, they are awarded as compensation for statutory wage violations alleged in the charging document.[9] The forum follows its precedent in this case and awards Claimant $4,800.00 in penalty wages.

LIABILITY OF ROBERT SABO

On April 30, 2014, the Agency issued its Second Amended OOD. The only difference between the Amended OOD and the Second Amended OOD was the change in the caption from "C.S.R.T. LLC, an Oregon domestic limited liability company, Employer" to "C.S.R.T. LLC, an Oregon domestic limited liability company, and Robert P. Sabo, individually, Employer." The certificate of service accompanying the Second Amended OOD states it was mailed by regular and certified mail to Sabo at 6051 Malden St., Portland, Oregon 97286, the same address at which Sabo was personally served with the original OOD naming CSRT as the sole Respondent.

In the Proposed Order, the ALJ dismissed the Second Amended OOD as to Sabo because of the Agency's failure to complete service of that document on Sabo. In

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[9] *See, e.g., In the Matter of Petworks LLC, 30 BOLI 35, 44 (2008).*

its Exceptions, the Agency argues that service was completed under ORS 839-050-0030 because the Second Amended OOD was mailed by certified mail to Sabo at an address that the Agency, under ORS 839-050-0030(4), was entitled to presume was correct. In support of this argument, the Agency enclosed an affidavit by BOLI's contested case coordinator stating that the Second Amended OOD, in addition to being mailed to Sabo at his Malden St. address, was also mailed to CSRT, ORS at PO Box 86350, Portland, Oregon 97286, CRST's correct address, and that this information was inadvertently omitted from the certificate of service accompanying the Second Amended OOD because of a clerical error. The Agency included documentation of this additional mailing. ORS 839-050-0030, the administrative rule on which the Agency relies, provides, in pertinent part:

> "(1) *Except as otherwise provided in ORS 652.332(1)* the charging document will be served on the party or the party's representative by personal service or by registered or certified mail. Service of a charging document is complete upon the earlier of:
>
> "(a) Receipt by the party or the party's representative; or
>
> "(b) Mailing when sent by registered or certified mail to the correct address of the party or the party's representative.
>
> "(2) All other documents may be served on the party or the party's representative by personal service or by mailing to the last known address in the Agency file for the case to be heard. Service of a document other than the charging document is complete upon personal service or mailing, whichever occurs earlier.
>
> "(3) Any participant to a contested case proceeding filing a document with the Forum will serve a copy of such document upon all other participants or their representatives.
>
> "(4) Each party must notify the Forum and the Administrative Prosecution Unit of the party's change of address. Such notice must be in writing and served on the Forum and the Administrative Prosecution Unit within 10 days of the party's change of address. Unless the Forum and the Administrative Prosecution Unit have been so notified, they will presume that the party's address on file with the Agency is correct."

(Emphasis added). ORS 652.332(1) establishes an "administrative proceeding for wage claim collection" and covers all cases in which wage claims have been filed with BOLI. Relative to service of an OOD, ORS 652.332(1) requires that service of an OOD "shall be made in the same manner as service of summons **or** by certified mail, return receipt requested." (Emphasis added). Accordingly, sending an OOD by registered or certified mail to the correct address of the party, as provided in OAR 839-050-0030(1)(b), as the Agency did in this case, is sufficient to accomplish service of an

OOD. The Agency's exception is accepted and the forum finds that Sabo was properly served.

The Agency argues that Sabo be held liable as a successor in interest to CSRT. According to records of the Oregon Secretary of State, CSRT became an inactive corporation on November 29, 2013. (Ex. A47). To decide if an employer is a "successor," "the test is whether it conducts essentially the same business that the predecessor did." *Blachana v. Bureau of Labor and Industries*, 354 OR 676, 686 (2014), citing to *In re Anita's Flowers & Boutique*, 6 BOLI 258, 267-68 (1987). Sabo is a successor if he conducted essentially the same business as CSRT did before it became inactive on November 29, 2013. "The elements to look for include: the name or identity of the business; its location; the lapse of time between the previous operation and the new operation; the same or substantially the same workforce employed; the same product is manufactured or the same service is offered; and, the same machinery, equipment, or methods of production are used. Not every element needs to be present to find an employer to be a successor; the facts must be considered together to reach a decision." *Id*.

In the present case, even though CSRT claims to have dissolved on November 29, 2013, Sabo continued to represent himself as CEO and representative of CSRT as soon as December 16, 2013 when he requested a hearing in this matter on CSRT letterhead using the same address and phone number as CSRT used prior to its dissolution. (Ex. A43) In this request it is notable that Sabo both refers to his representative status in the present tense as well as the defense that the company "has" no employees. (Ex. A43).

Further, Margaret Pargeter, the Agency's Compliance Specialist, testified credibly at hearing that CSRT maintained an active website after its dissolution and that the Agency's wage security fund could not be used to pay complainant her lost wages because CSRT was still in operation. (Pargeter testimony, see also Ex. A47-7). The website said that "Since 2006, C.S.R.T. specializes in providing cloud computer and cloud network support…." (Ex. A47-7) These are not only the same services provided by CSRT prior to its dissolution but the company has expressly portrayed itself as having continuously provided these services since 2006. Pargeter also called CSRT on April 9, 2014 and the phone was answered "CSRT, how can I help you." (Ex. A47-1). CSRT has, therefore, continued to use the same name, same contact information, provide the same services and employ the same CEO after its dissolution as it did before. Sabo continued to refer to himself as CSRT's CEO and representative in the month following the apparent dissolution. The agency has met its burden that Sabo is a successor in interest.

ORS 652.195 CIVIL PENALTY

The Agency amended its original OOD to allege that, based on CSRT's issuance of dishonored checks to Claimant on November 2 and December 31, 2012, Claimant is entitled to a civil penalty in the amount of $9,500.54 under ORS 652.195 and OAR 839-

001-0300. The forum dismisses this claim without reaching the merits for the reason explained below.

OAR 839-050-0440 provides, in pertinent part:

> "(1) Contested case proceedings based on Orders of Determination under ORS 652.332, Notices of Intent to assess civil penalties under 652.710 or 653.256, or consolidated proceedings based on both types of charging documents are governed by the procedures set forth in OAR chapter 839, division 50, except to the extent those procedures are modified by this rule.
>
> "* * * * *
>
> "(4) No amendments will be allowed in contested case proceedings based on Orders of Determination under ORS 652.332, Notices of Intent to assess civil penalties under ORS 652.710 or 653.256, or consolidated proceedings based on both types of charging documents, except that the agency may amend an Order of Determination or Notice of Intent once to correct names of respondents or to add respondents."

This contested case proceeding was initiated by the Agency's issuance of an Order of Determination based on ORS 652.332. Under section (4), the Agency was foreclosed from amending its OOD except "to correct names of respondents or to add respondents." The Agency exceeded its authority in amending its OOD to seek civil penalties under ORS 652.195 and OAR 839-001-0300. Since the Agency had no authority to amend its OOD to seek ORS 652.195 and OAR 839-001-0300 civil penalties, the forum has no authority to impose such penalties and dismisses the Agency's claim.

ORDER

NOW, THEREFORE, as authorized by ORS 652.140(2), ORS 652.150, and ORS 652.332, and as payment of the unpaid wages and penalty wages, the Commissioner of the Bureau of Labor and Industries hereby orders Respondents **C.S.R.T., LLC and Robert P. Sabo** to deliver to the Administrative Prosecution Unit of the Bureau of Labor and Industries, 1045 State Office Building, 800 NE Oregon Street, Portland, Oregon 97232-2180, the following:

> (1) A certified check payable to the Bureau of Labor and Industries in trust for Claimant **Cristina Cortez** in the amount of **FIFTEEN THOUSAND TWO HUNDRED DOLLARS ($15,200.00)**, less appropriate lawful deductions, representing **$10,400.00** in gross earned, unpaid, due and payable wages, plus interest at the legal rate on that sum from June 1, 2013, until paid; and **$4,800.00** in ORS 652.150 penalty wages, plus interest at the legal rate on that sum from July 1, 2013, until paid.