

BOLI ORDERS

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

VOLUME 9

Cited: 9 BOLI

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EDITORS
DOUGLAS MCKEAN
W. W. GREGG

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BOLI ORDERS

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INTRODUCTORY NOTE

This ninth volume of BOLI ORDERS contains all of the Final Orders of the Commissioner of the Oregon Bureau of Labor and Industries that were issued between August 21, 1990, and August 6, 1991.

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

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

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

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In the Matter of
**Josette R. Whitney, dba
COMMUNITY FIRST
BUILDING MAINTENANCE,
Respondent.**

Case Number 25-90
Final Order of the Commissioner
Mary Wendy Roberts
Issued August 21, 1990.

SYNOPSIS

Where Complainant suffered an on-the-job injury and notified his immediate supervisor that he intended to file a workers' compensation claim, and where the supervisor attempted to discourage the claim because Respondent had no workers' compensation insurance, and later discharged the Complainant, the Commissioner held that Respondent, through the supervisor, unlawfully discharged Complainant for his intention to file the claim. The Commissioner awarded Complainant \$8,500 in lost wages and \$1,000 for emotional distress. ORS 659.410; OAR 839-06-105.

The above-entitled contested case came on regularly for hearing before Warner W. Gregg, designated as Hearings Referee by Mary Wendy Roberts, the Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was conducted on April 10, 1990, in Room 311, State Office Building, 1400 SW 5th Avenue, Portland, Oregon. Linda Lohr, Case Presenter with the Quality Assurance Unit of the Civil Rights

Division of the Bureau of Labor and Industries (the Agency), presented a Summary of the Case for the Agency, argued Agency policy and the facts, examined the witnesses, and introduced documents. Josette R. Whitney (Respondent) was previously in default and did not appear. Carl G. Mathnay (Complainant) was present throughout the hearing and not represented by counsel.

The Agency called as witnesses Complainant and David Wright, Senior Investigator with the Agency.

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

**FINDINGS OF FACT -
PROCEDURAL**

1) On March 17, 1988, Complainant filed a verified complaint with the Civil Rights Division of the Agency alleging that he was the victim of the unlawful employment practice of Respondent.

2) After investigation and review, the Civil Rights Division issued an Administrative Determination finding substantial evidence supporting the allegations of the complaint and finding Respondent in violation of ORS 659.410.

3) Efforts to resolve the case by conciliation failed.

4) On January 16, 1990, the Agency prepared and the Forum mailed to Respondent at 8625 SW Cascade Blvd. 1220, Beaverton, Oregon 97005, by certified mail, return

receipt, Specific Charges which alleged that Respondent had discharged Complainant from employment because Complainant suffered an on-the-job injury and utilized the Oregon workers' compensation procedures. The Specific Charges alleged that Respondent's action violated ORS 659.410. This mailing was returned by the United States Postal Service, marked "Return to Sender - Attempted Not Known."

5) On January 19, 1990, the Agency prepared and the Forum mailed to Respondent at 8320 SE 144th Drive, Portland, Oregon 97236, by certified mail, return receipt, Specific Charges identical in form to those sent on January 16, 1990. That mailing was returned by the United States Postal Service on February 12, 1990, marked "Return to Sender - Unclaimed."

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

7) A copy of those charges, together with items a through d of Procedural Finding 6 above, were served personally on Respondent by the Multnomah County Sheriff's Office on February 26, 1990, at 4062 SE 112th Avenue, Portland.

8) On March 26, 1990, the Forum mailed to Respondent at 4062 SE 112th Avenue, Portland, Oregon 97266, a Notice of Intent to Default.

9) On March 29, 1990, Respondent filed a letter addressed to the Hearings Referee requesting relief from default.

10) On April 2, 1990, the Hearings Referee issued a ruling, mailed to 4062 SE 112th Avenue, Portland, Oregon 97266, denying Respondent's Request for Relief from Default.

11) Pursuant to OAR 839-30-071, on March 30, 1990, the Agency timely filed a Summary of the Case.

12) At the commencement of the hearing on April 10, 1990, pursuant to ORS 183.415(7), the Hearings Referee recited the issues to be addressed, the matters to be proved, the procedures governing the conduct of the hearing, and formally found Respondent in default.

13) At the conclusion of the hearing, the Agency made an oral motion to amend the pleadings to conform to the evidence presented. That motion was granted.

14) At the conclusion of the hearing the Agency made an oral motion to add Scott Whitney as an additional respondent. Due to failure of service, notice, and due process, that motion was denied.

15) Following the hearing, the Hearings Referee on his own motion reopened the record to accept information from Complainant's workers' compensation file, an official file kept in the regular course of business. The record herein was closed on May 31, 1990.

16) The Proposed Order, which included an Exceptions Notice, was issued on July 13, 1990. Exceptions, if any, were to be filed by July 23, 1990. No exceptions were received.

FINDINGS OF FACT - THE MERITS

1) At all times material, Respondent was an individual using the assumed business name Community First Building Maintenance.

2) At all times material, Respondent was an employer in Oregon utilizing the personal services of six or more employees.

3) Complainant was a worker employed by Respondent from November 7, 1987, to January 11, 1988. Complainant performed services for Respondent as a janitor for Respondent's client, Riverside Golf and Country Club, 8105 NE 33rd Avenue, Portland, Oregon.

4) Complainant earned \$6.00 per hour, eight hours per day, five to six days a week.

5) Scott Whitney, Respondent's spouse, acted as Complainant's immediate supervisor with the knowledge and approval of Respondent.

6) Complainant sustained an on-the-job injury while in the employ of Respondent by developing carpal tunnel syndrome in his right wrist.

7) During December 1987 and January 1988, Complainant informed Scott Whitney that he intended to file a workers' compensation claim for his injury.

8) On each occasion, Scott Whitney attempted to discourage the filing of a claim, offering to attempt to cover the condition on Respondent's personal disability policy.

9) On January 11, 1988, Scott Whitney discharged Complainant from Respondent's employment.

10) Complainant's workers' compensation claim was accepted. His medical bills were paid and he received \$1,500 in time loss benefits.

11) During the entire period of Complainant's employment with Respondent, Respondent did not have workers' compensation insurance coverage as required by statute.

12) Complainant's performance as an employee of Respondent was satisfactory. His lack of an Oregon driver's license during part of this employment was not relevant to Respondent's decision to discharge him.

13) Complainant's injury required surgery, which was performed in the early spring of 1988. He was next able to work 30 days following his surgery, or approximately April 1, 1988.

14) When able to resume work, Complainant made reasonable efforts to find suitable employment. He first found employment with Eastern Oregon Fast Freight, for whom he worked for two days, earning \$40.00. He next worked for N. B. Truck Lines, for whom he made two trips, earning gross wages of \$1,000.

15) Complainant next worked for Media Services/Rose City, where he drove advertising mail to the Post Office. He was paid \$5.25 per hour and earned \$300 during 30 days of employment. He lost that job because that employer's business was slow.

16) Complainant first found full-time employment at a rate of pay equal to that paid by Respondent on or about January 15, 1989, at Holman Building

Maintenance. He earned \$6.00 per hour as a floor man.

17) Between April 1, 1988 (when he was able to resume work following his discharge by Respondent), and January 15, 1989 (when he first found employment at a rate of pay equal to that earned at Respondent), Complainant would have earned \$9,840 had he remained employed by Respondent (\$6.00 per hour times 40 hours per week = \$240 per week; \$240 times 41 weeks = \$9,840). He earned \$1,340 (\$40 + \$1,000 + \$300) from interim employment. His lost wages attributable to the discharge were \$8,500.

18) As a result of the discharge Complainant suffered anguish, humiliation, sleeplessness, lack of self-esteem, and emotional upset. The discharge came at a time when Complainant was worried about providing care and support to his growing family. He was emotionally upset by the loss of income and difficulties associated with finding new employment and with relating the circumstances of his discharge to prospective employers.

ULTIMATE FINDINGS OF FACT

1) At all times material, Respondent did business as Community First Building Maintenance, and employed six or more persons in Oregon, including Complainant.

2) Scott Whitney, Respondent's spouse, was Complainant's immediate supervisor.

3) Complainant suffered an on-the-job injury and notified Scott Whitney of the injury and of his intent to file a workers' compensation claim.

4) Scott Whitney discharged Complainant from Respondent's employ

because Complainant intended to file a workers' compensation claim.

5) As a result of the discharge, Complainant lost wages of \$8,500.

6) As a result of the discharge, Complainant suffered emotional distress.

CONCLUSIONS OF LAW

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

2) Between November 7, 1987, and January 11, 1988, Complainant was a "worker" within the meaning of ORS 659.410 and OAR 839-06-105(4).

3) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the persons and subject matter herein under ORS 659.010 to 659.110 and ORS 659.400 to 659.435.

4) The actions, inactions, statements, and motivations of Scott Whitney are properly imputed to the Respondent herein.

5) ORS 659.410 provides:

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

OAR 839-06-105(2) provides:

"Invoke' for the purposes of ORS 659.410 includes a worker's

reporting of an on-the-job injury to his/her employer."

Respondent committed an unlawful employment practice in violation of ORS 659.410 in discharging Complainant for reporting an on-the-job injury.

6) Pursuant to ORS 659.060 and 659.010, the Commissioner of the Bureau of Labor and Industries has the authority to issue a Cease and Desist Order requiring Respondent to refrain from any action that would jeopardize the rights of individuals protected by ORS 659.010 to 659.110 and 659.400 to 659.435, to perform any act or series of acts reasonably calculated to carry out the purposes of said statutes, to eliminate the effects of any unlawful practice found, and to protect the rights of others similarly situated to the Complainant.

OPINION

In order to prevail in this matter, the Agency must prove these four elements:

- (1) The Respondent is a respondent as defined by statute;
- (2) The Complainant is a member of a protected class;
- (3) The Complainant was harmed by an action of the Respondent;
- (4) The Respondent's action was taken because of the Complainant's membership in the protected class. OAR 839-05-010(1).

Regarding the first three elements, credible evidence showed that:

- (1) Respondent was an employer which employed six or more persons in Oregon (See ORS

659.010(11) and (12), 659.400(1) and OAR 839-06-115).

(2) Complainant was a worker employed by Respondent (See OAR 839-06-105 (4)(a)). He became a member of a protected class as soon as he reported his on-the-job injury to Respondent and thereby invoked the procedures provided in the Oregon workers' compensation law (See OAR 839-06-105 (2)). In addition, Complainant applied for and received benefits for the injury.

(3) Respondent terminated Complainant on January 11, 1988.

The investigator's testimony regarding interviews with Complainant's co-workers and the testimony of Complainant established that Complainant had performed his janitorial duties in a satisfactory manner. Respondent had no workers' compensation coverage and attempted to dissuade Complainant from asserting his claim. These facts lead to the inference that Respondent's employment decision - to discharge Complainant - was caused by Complainant's protected class membership.

Damages

In assessing the wage loss, the Forum has recognized Complainant's inability to work due to his injury and subsequent surgery, and has recognized that he was compensated for the period of disability. Interest on the wage loss is computed to run from the end of the underemployed period, there being no evidence on frequency of paydays from which to compute interest on each paycheck due.

The award for emotional distress is a proper exercise of the Commissioner's authority to eliminate the effects of the unlawful practice.

ORDER

NOW, THEREFORE, as authorized by ORS 659.060(3) and 659.010(2), and in order to eliminate the effects of the unlawful practice found, Respondent, JOSETTE R. WHITNEY, dba COMMUNITY FIRST BUILDING MAINTENANCE, is hereby ordered to:

1) Deliver to the Business Office of the Portland office of the Bureau of Labor and Industries a certified check, payable to the Bureau of Labor and Industries in trust for CARL G. MATH-NAY, in the amount of:

a) EIGHT THOUSAND FIVE HUNDRED DOLLARS (\$8,500), representing wages Complainant lost as a result of Respondent's unlawful practice found herein; PLUS

b) ONE THOUSAND ONE HUNDRED TWENTY-FIVE DOLLARS AND NINETY-FIVE CENTS (\$1,125.95), representing interest on the lost wages at the annual rate of nine percent accrued between January 15, 1989, and July 12, 1990, computed and compounded annually; PLUS,

c) Interest on the foregoing, at the legal rate, accrued between July 13, 1990, and the date Respondent complies with the Final Order herein, to be computed and compounded annually; PLUS,

d) ONE THOUSAND DOLLARS (\$1,000), representing compensatory damages for the mental distress Complainant suffered as a result of Re-

spondent's unlawful practice found herein; PLUS,

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

2) Cease and desist from discriminating against any worker who applies for benefits under, gives testimony in connection with, invokes, or uses the Oregon workers' compensation procedures or who gives testimony in connection with or uses the Civil Rights procedures in ORS 659.410 to 659.435.

(3) Provide to each current employee and, for a period of three years from the date of the Final Order herein, to each new person hired a copy of ORS 659.410 together with a notice that anyone who believes he or she has been discriminated against thereunder may notify the Oregon Bureau of Labor and Industries.

(4) Adopt a non-discriminatory policy and practice regarding employee discipline and termination procedures.

In the Matter of
OREGON STATE CORRECTIONAL
INSTITUTION,
Corrections Division, Department of
Human Resources, State of Oregon,
Respondent.

Case Number 19-84
Final Order of the Commissioner
Mary Wendy Roberts
On Remand from the Oregon
Court of Appeals
Issued October 15, 1990.

SYNOPSIS

Respondent regarded Complainant, who was overweight and applied for a job as a corrections officer, as having a physical impairment that substantially limited a major life activity (employment), when in fact he had no such impairment. The Commissioner held that Complainant was a handicapped person, as defined by statute. By refusing to hire Complainant because Respondent regarded him as having a physical impairment, Respondent violated ORS 659.425(1)(c). Respondent's defense that it acted on the advice of its agent (the examining doctor) failed. Because Respondent failed to show by a preponderance of evidence that Complainant would not have been retained because of information it would have learned after Complainant's hire, Complainant was entitled to back pay, which the Commissioner awarded together with damages for mental suffering. ORS 659.400(2), (3)(c)(C); 659.425(1)(c).

The above-entitled contested case came on regularly for hearing before Leslie Sorensen-Jolink, designated as Presiding Officer by Mary Roberts, the Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was conducted on October 16, 1985, May 28, 1986, and September 10, 1986, in the Conference Room of Suite E-1 at 3865 Wolverine Street NE, Salem, Oregon. The Bureau of Labor and Industries (hereinafter the Agency) was represented in this matter by Paul J. DeMuniz, Attorney at Law. The Oregon State Correctional Institution, Corrections Division, Department of Human Resources, State of Oregon (hereinafter Respondent) was represented by Josephine Hawthorne, Assistant Attorney General of the Department of Justice of the State of Oregon. Keith R. Green (hereinafter Complainant) was present throughout the hearing.

The Agency called Complainant as its witness, and Respondent called Daniel P. Johnson, its security manager, as its witness. The Forum also received deposition testimony from Jerry Becker, M.D., Respondent's medical director and Richard S. Peterson, Respondent's superintendent, and received affidavit testimony by Sandra Peters, who worked with Complainant as a security guard; Joseph Tribby, Complainant's friend; Robert Patton, a former supervisor of Complainant; Daniel Tschida, a friend of Complainant who worked with him as a security guard; and Pete Rose, who supervised Complainant when he was a security guard.

The Proposed Order of the Presiding Officer was issued on July 31,

1987. The Final Order of the Commissioner was issued on July 13, 1988. Respondent appealed the Final Order to the Oregon Court of Appeals, and on September 27, 1989, the court reversed and remanded the Final Order for further proceedings in accordance with its opinion. *OSCI v. Bureau of Labor and Industries*, 98 Or App 548, 780 P2d 743 (1989). The Oregon Supreme Court denied the Commissioner's petition for review on December 28, 1989.

Having fully considered the entire record in this matter, including the Commissioner's Final Order of July 13, 1988, and the opinion of the Court of Appeals cited above, the Commissioner hereby makes the following Findings of Fact (Procedural and on the Merits), Ultimate Findings of Fact, Conclusions of Law, Opinion, and Order.

FINDINGS OF FACT – PROCEDURAL

1) On or about August 26, 1983, Complainant filed a verified complaint with the Civil Rights Division of the Agency alleging that Respondent had discriminated against him because of his physical handicap of "perceived overweight," in connection with his employment.

2) Following the filing of the aforementioned complaint, the Civil Rights Division investigated the allegations contained in it and determined that there was substantial evidence to support those allegations.

3) Thereafter, the Civil Rights Division made some attempt to resolve the complaint through conference, conciliation, or persuasion, but was not successful in these efforts.

4) Accordingly, the Agency caused to be prepared and duly served on Respondent Specific Charges, dated April 25, 1985. At the first convenement of hearing, in response to Respondent's assertion of certain flaws in the Specific Charges, the Agency sought and was granted leave to amend the Specific Charges. Accordingly, the Agency prepared and duly served on Respondent the First Amended Specific Charges, dated November 6, 1985. They alleged that:

a) Respondent has violated ORS 659.425(1)(a) by refusing to hire Complainant because he has a physical impairment which, with reasonable accommodation by Respondent, would not prevent the performance of the work involved, or

b) Respondent has violated ORS 659.425(1)(c) by refusing to hire Complainant because Respondent regarded and treated Complainant as having a physical impairment when he did not.

5) The Forum duly served on Respondent and the Agency notices of the time and place of the hearing of this matter.

6) On or about May 21, 1985, Respondent duly served on the Forum its answer to the Specific Charges, and on or about November 27, 1985, and March 31, 1986, Respondent duly served on the Forum answers to the First Amended Specific Charges. By stipulation, the March 31, 1986, answer, as amended at hearing, is Respondent's answer herein. It denies all allegations contained in the First Amended Specific Charges and alleges as a defense that at all times

Respondent acted on the advice of its physician.

7) On January 24, 1986, the Presiding Officer held a telephone pre-hearing conference with counsel for the Agency and Respondent in order to resolve the requests and motions concerning discovery. By agreement of counsel, this is the record of that conference. After the Agency withdrew its request for admissions, Respondent agreed to allow the Agency to depose Richard Peterson and to inspect certain documents described in the Agency's civil subpoena duces tecum, from which the Agency had withdrawn an item. Respondent's motion to quash subpoena was denied. These actions mooted the Agency's motion to compel Respondent to reply to the Agency's request for production, but the Presiding Officer directed the Agency to notify her if discovery did not proceed as agreed upon. Thereafter, the Agency gave no such notice.

8) Before the commencement of the hearing, Complainant and Respondent received from this forum a document entitled "Information Relating to Civil Rights and Wage and Hour Contested Case Hearings," which had been sent to each of them as part of each of the above-cited notices of hearing. Before the commencement of the hearing, Complainant and Respondent (through its counsel) stated that each had read that document and had no questions about it.

9) At the commencement of the hearing, counsel for the Agency and

Respondent waived the Presiding Officer's explanation of the issues involved and the matters that had to be proved and disproved herein.

FINDINGS OF FACT – THE MERITS

1) During all times material herein, Respondent was a correctional institution which was part of the Division of Corrections of the Department of Human Resources of the State of Oregon. As such, during all times material, Respondent was an agency of the State of Oregon which employed approximately 230 people in Oregon.

2) At some time before July 15, 1983, Complainant notified Respondent that he was interested in applying for work as a correctional officer at Respondent. On or about July 20, 1983, at Respondent's request, Complainant completed an application form, and was interviewed by B. Singh, an employee of Respondent, for one of the entry level correctional officer positions then available at Respondent. A few days later, Mr. Singh asked Complainant, by telephone, to report to Respondent at 8 a.m. on August 2, 1983, prepared to go to work as a correctional officer subject to passing Respondent's physical examination.

3) During times material herein, Respondent's correctional officers were responsible for carrying out security activities at Respondent. These activities included supervising inmates; patrolling and conducting surveillance of inmates in cellblocks, the recreation yard, and certain other areas; monitoring inmate movement; conducting cell

* On the record this position or classification is called both "correctional officer" and "Corrections Officer." The Forum has decided to use "correctional officer" to signify this position herein, because it is the title used by Respondent's management on the record.

area and person-to-person searches; breaking up disturbances; maintaining perimeter security by working in the towers on the prison wall; and making disciplinary reports as needed. These duties varied somewhat with the post assignment.

4) When Complainant reported to Respondent on August 2, 1983, he and a group of other applicants were given physical examinations by Jerry Becker, M.D., Respondent's medical director, and his assistant in the prison's Medical Services area.

5) The policy and procedure governing the physical examination which Complainant was given was enunciated in "Procedural Statement governing Employee and Volunteer Health Questionnaires," which had been in effect throughout the Corrections Division since October 31, 1979. Respondent was not able to produce this document for the record, but Respondent's superintendent has indicated, and this forum finds, that it contained language which was "very similar" to the Corrections Division policy statement which succeeded it. That exhibit includes this general statement:

"The purpose of this procedural statement is to standardize the usage of health questionnaires to ensure that persons receiving appointments, job assignments or providing services are physically capable of performing all tasks required by the nature of the work * * *. This procedural statement applies to all employees * * * of the Corrections Division * * *. It is the policy of the Corrections Division that discrimination based on

physical or mental condition is prohibited. However, to ensure all employees and volunteers are protected from performing any task which could be detrimental to either their own health and safety or that of other persons, no individual shall receive an appointment, job assignment or provide services which he/she is physically incapable of performing. A physical examination by a physician or medical person legally authorized to conduct a physical examination will be required at the time of employment."

This policy statement also directs each "functional unit manager" in the division to catalog each position or classification under his or her supervision into the "health classifications" which best describe the physical requirements of the work to be performed. This cataloging is to be used in completing position descriptions and in recruiting and interviewing to fill positions, and it is to be provided to the physician when any physical examination is required by Respondent. Group 1, the first of the three health classifications, includes "[j]obs requiring the physical capability to perform instant and/or sustained arduous physical activity," (Examples given on a report form to be used by the examining physician are state police, correctional officer, highway maintenance, park laborers, etc.) Group 2 includes: "[j]obs which require occasional lifting and exertion for short periods." (Examples from the physician report form are food service workers, custodians, psychiatric aids, nurses, painters who work inside exclusively, cabinet makers, stock clerks, etc.)

Group 3 includes: "(o)ffice jobs which demand very limited physical exertion." (Examples are supervisors, managers, engineers, draftsmen, clerks, etc.)

The policy makes each functional unit manager responsible for matching the health of his or her employees to the physical requirements of their jobs. It provides that prior to final appointment of new employees, the manager will arrange for the prospective employee to receive the required physical examination and that all new employees will be required to complete an applicant form, "Health and Working Condition Questionnaire" and deliver it, with a second form, "Physician's Report of Physical Condition," to the physician conducting the physical examination.

An applicant questionnaire in the record asks the subject to state whether he or she would have no problems, have limited or minimal performance problems, or absolutely could not perform any of a long list of physical activities or working conditions which are deemed requirements essential for the performance of the position for which the subject has applied. The questionnaire closes by asking the "Agency Management Representative" to check one of the following statements:

"IN MY JUDGMENT:

"This person does not indicate that disabilities, physical activities or working conditions will present barriers to performance of work for the position indicated by this agency.

"The duties of this job require physical activities or working

conditions which are beyond the capabilities of this person. Accommodations have been discussed with the applicant/employee and are not practical."

The applicant questionnaire also asks the Agency management representative to provide reasons for declining to employ the person and for an acknowledgment signature by the applicant or employee.

The Physician's Report of Physical Condition is a questionnaire on which the examining physician is to indicate whether the subject is restricted (permanently or temporarily) or not restricted in 17 types of physical exertion, 6 types of chemical and sensitivity conditions, 6 types of optical conditions, 3 types of audio conditions, and 14 types of other restrictive conditions. On the report, the physician is to recommend classification of the subject into Group 1, 2, or 3. This form advises the physician that his or her medical evaluation will be used to inform the agency of any health condition which could be detrimental during work activity and, therefore, to place individuals in a safe environment. It states that the health classification recommendation is specifically intended to obtain the physician's opinion of the individual's current physical condition so that the Agency can know which group can be matched with the individual's capability to perform the job. As neither this form nor any other evidence on the record indicates that Respondent directs the examining physician to use certain tests or criteria to ascertain the above-mentioned physical capabilities of the individuals examined, and Respondent's superintendent does not know

what tests or criteria are used, this Forum finds Respondent allows the physician to determine those tests or criteria.

In light of testimony so indicating by Respondent's superintendent, this Forum finds that the policy and procedure enunciated regarding employee health questionnaires and otherwise described above were in effect during all times material herein.

6) During all times material herein, Dr. Becker knew and agreed with the above-described purpose of the pre-employment physical examinations he conducted for Respondent. Dr. Becker testified that during times material herein, he and his assistant used the described procedures and forms, and a questionnaire providing emergency medical information which each new Corrections Division appointee was to complete, a job description for the position being applied for, and their own medical expertise to assign applicants to one of the three health classifications. Although this assignment was technically just advice to assist Respondent's security manager (the "functional unit manager" for Respondent's correctional officers) in making a hiring recommendation, Respondent did not review or alter Dr. Becker's assignments.

7) During all times material herein, as mentioned above, the correctional officer position at Respondent was classified as a Group 1 position; i.e., a job requiring the capability to perform instant and/or sustained arduous physical activity. During all times material herein, the physical activities and working conditions which Respondent deemed requirements essential to the

performance of the correctional officer position were:

"Walking-Lateral Mobility; Walking Rough Terrain; Bending; Standing-Long Periods; Running; Lifting and Carrying 35-60 Pounds; Sense of Touch; Reaching; Gripping-Hands and Fingers; Climbing Stairs; Hearing Alarms; Hearing Voice Conversation; Color Identification; Close Vision; Far Vision; Side Vision-Depth Perception; Maintaining Balance; Operating Passenger Vehicles; Operating Bus or Similar Vehicle; Speaking; Exposure to Sun; Work at Heights; Work in Confined Space; Work in Crowded Areas; Working Alone; Work with Inmates (prison); Work on High Ladders; Work in Remote Locations; Wearing Safety Glasses; Wearing Ear Plugs (Muffs); Air Travel; Working Long Hours; Working Night Shifts; Working Day Shifts; Working Week Ends; Exposure to Tobacco Smoke."

Respondent's current security manager, Daniel Johnson, indicated, and this Forum finds that during times material herein Respondent's correctional officers had to be able to restrain and subdue inmates. The frequency of situations in which a correctional officer had to do this depended in great part on the officer's post assignment; an officer working in a housing unit had a far greater probability of restraining an inmate than an officer working elsewhere. Generally, the need to restrain and subdue occurred in the course of handling inmate-on-inmate assaults. Such assaults occur "somewhat regularly" at present, because Respondent's facility has an average daily

population roughly twice as large as its designed capacity. The Forum finds that such assaults also occurred "somewhat regularly" during times material herein, as the average daily population then was approximately the same as now.

Dr. Becker testified, and this Forum finds, that a correctional officer had to be able to come to the aid of a fellow officer and to participate in a physical restraint class requiring a fair amount of physical exertion. Dr. Becker also indicated that a correctional officer had to be able to do such things as run the length of the hall, out-wrestle an inmate and pull a door shut to try to isolate a riot or semi-riotous condition.

8) During Complainant's physical examination, Dr. Becker checked Complainant's eyes, ears, nose, and mouth and palpated his abdomen. After Dr. Becker had taken Complainant's resting pulse, he had Complainant do 15 sit-ups. Two minutes after Complainant had finished those sit-ups, Dr. Becker again took his pulse. Dr. Becker also had Complainant do some deep knee bends, to check Complainant's spine, and had Complainant grasp his fingers, to check Complainant's dexterity, and Dr. Becker tested Complainant's vision through reading tests.

9) Dr. Becker does not specifically remember Complainant's physical examination. However, according to Dr. Becker's interpretation of his written report of that examination, Dr. Becker found that Complainant's shoulders, arms, etc., were "OK"; his range of motion was "OK"; his neurologic examination "looked good"; his knees, etc., were "OK"; and he was able to do a

deep knee bend. Dr. Becker concluded that there were no limitations to the "physical capabilities" listed on the chart form he used in Complainant's exam: walking, pulling, standing, pushing, stooping, kneeling, lifting, or reaching.

Dr. Becker testified that Complainant's resting pulse of 84 indicated to him that Complainant probably had not been doing routine physical exercise, because a person of Complainant's height and age who was doing regular exercise would have a resting pulse of between 50 and 70. Complainant's pulse elevated to 96 immediately after doing 15 sit-ups, which Dr. Becker said would simulate physical exertion such as a "take-down" in a fight or wrestling an inmate, and was acceptable as far as Dr. Becker was concerned. However, Complainant's two-minute recovery pulse was 96, and Dr. Becker testified that the pulse rate of a person "in any semblance of physical condition" should have returned to or close to the resting pulse. Although he did not continue checking Complainant's rate to ascertain when it did return to the resting pulse rate, Dr. Becker decided that since Complainant's two-minute rate was not near his resting rate, Complainant was not handling his weight in at least an average manner. Dr. Becker testified that this slow recovery pulse told him that Complainant's weight was a burden for him; that the bulk of it was fat tissue mass rather than muscle mass; and it was compromising Complainant's heart and lung function. Accordingly, Dr. Becker testified, he consulted a height/weight chart, and concluded, based on it, that Complainant weighed 50 to 60 pounds

more than what even a large-framed man of Complainant's height should weigh.

The diagnosis Dr. Becker noted on Complainant's charge form was "obesity, carious teeth."

10) On August 2, 1983, Complainant weighed 213 pounds and was 5'6" tall.

11) Dr. Becker knew that Complainant was applying for work as a correctional officer, a Group 1 classification. As a result of Complainant's weight and his slow pulse recovery, and given the research in obesity as a main cause of early retirement and loss of usage of law enforcement employees, Dr. Becker recommended that Complainant be approved for employment in Group 2 rather than Group 1. (Dr. Becker thought that Complainant also could perform safely in Group 3.) Dr. Becker testified that he did not approve Complainant for Group 1 because he viewed Complainant as incapable of performing the "instant and/or sustained arduous physical activity" required of Group 1 employees. Had Respondent specifically asked Dr. Becker, he would not have recommended that Complainant be allowed to proceed further in the hiring process for Group 1 applicants (apparently onto a physical exertion training course) before a final decision was made as to his capability of performing at a Group 1 level.

After the examination was over, Dr. Becker told Complainant that he was recommending him for Group 2 and that he might consider Complainant for Group 1 if he lost about 50 pounds. (Dr. Becker wrote on Complainant's

charge: "Could go to Group 1 with weight loss more probable than not.")

Complainant was not applying for, nor was he qualified or hired for, any Group 2 job.

12) Thereafter on August 2, 1983, a Lieutenant Kay, who was acting as Respondent's security manager, took Complainant into his office and informed him that he had been denied an available correctional officer position based on Dr. Becker's evaluation that he was overweight.

13) Complainant disagreed with Dr. Becker's conclusion that he was 50 pounds overweight. Complainant testified that he considered even his weight of 226 pounds at the time of the September 1986 hearing a normal weight for him, and that he felt healthy at and above that weight. However, he did admit that in the 10 years preceding September 1986, he had tried to lose a significant amount of weight.

14) Dr. Becker is an orthopedic surgeon who has been in private practice in Salem, Oregon, since 1968. He has contracted with Respondent since 1981 or 1982 to be its medical director, and he also did orthopedic surgery for both Respondent and Oregon State Penitentiary (hereinafter OSP) during times material herein. As Respondent's medical director, he has operated as Respondent's agent under contract during all time material herein. One of his duties in that capacity has been to review and participate in the physical screening of Respondent's employment applicants.

15) Dr. Becker has an independent business through which he has provided physical screening services for

many private and some public sector employers since about 1976. He has spent considerable time discussing physical screening with the medical director for the Oregon Workers' Compensation Board and with industrial insurers, and he clearly is oriented toward the use of such screening to prevent industrial disease or injury claims by preventing individuals from "jumping in (to jobs) over their head(s)."

16) In his independent business, Dr. Becker works with many different law enforcement and correction agencies, and in his private practice Dr. Becker has treated people who are classified as obese. Dr. Becker has attended meetings and read extensively on the subject of obesity and physical capabilities in law enforcement and corrections employment settings, especially in the context of premature retirement. The general context of Dr. Becker's testimony indicated, and this Forum finds, that correctional and law enforcement officer positions generally require a capability of instant and/or sustained arduous physical activity or a substantially similar capability.

Dr. Becker views excessive weight as a factor in how one tolerates added stress and how much one can do physically; he believes that it "takes its toll" over time, in high blood pressure, coronary artery disease and excessive wear on knees and hips. He testified that the overweight "get in trouble" earlier and more frequently than other law enforcement employees; they are "at much greater risk than other people * * *." Dr. Becker referred to an overweight employee as a "fat boy" in his deposition.

17) Dr. Becker testified that there are several definitions of obesity, such as not liking what you see in the mirror, being above the norms or averages on actuarial height/weight tables, not being able to have a ruler balancing on your reclining abdomen touch the pubis and ribs at the same time, or having more than a given percentage of total body fat. As part of his physical screening procedures for Respondent in August 1983, Dr. Becker used (and continues to use currently) a chart clipped from a newspaper which, Dr. Becker testified, matches "actuarial tables" of the Metropolitan Life Insurance Company. Dr. Becker has used this chart (hereinafter MetLife chart) throughout his private practice. It is titled "Height and Weight" and lists weight ranges for small-, medium-, and large-framed men 5'2", 5'4", 5'6", 5'8", and 6'0" in height, and small-, medium-, and large-framed women between 5'2" and 5'10" in height.

18) Dr. Becker termed Complainant's weight of 213 pounds a "gross deviation" from the MetLife chart, which lists 146 to 164 pounds as the weight for men of Complainant's height. Dr. Becker could not state how much a person with Complainant's pulse recovery rate could have deviated from this weight range and still have been recommended for Group 1. However, Dr. Becker did indicate that if Complainant had been the same except 15 pounds overweight by the newspaper chart, Dr. Becker probably would have counseled him to lose the weight and would have given him probationary status in Group 1.

* In the absence of any other explanation, the Forum finds that "probation-

19) When he testified, Dr. Becker had no personal recollection of Complainant. He agreed with Agency counsel's statement that he did not know with any reasonable degree of certainty whether Complainant, specifically, could perform instant and/or sustained arduous physical activity, and that he did not know "to a medical certainty" that Complainant was incapable of that activity. However, Dr. Becker believes that because of his weight and slow pulse recovery, Complainant had the characteristics of a person who fit in a class of persons which Dr. Becker believes to a medical certainty could not perform safely in Group 1 employment. Dr. Becker testified that he felt it was more probable than not that Complainant could not so perform and would be an added risk to himself and others in a Group 1 job. Dr. Becker testified that he thought Complainant could do 90 to 95 percent of the Group 1 job requirements, but that he could not do all of them in a manner safe to himself, his fellow officers, and others in his work area. He did not feel it was in anyone's interest for an applicant to "start out in trouble."

20) Dr. Becker testified that he knew at that time of his January 14, 1986, deposition that there were "some" people working at that time as correctional officers for Respondent who were "seriously overweight" and whose weight exceeded the weight limitations stated for their height on the MetLife chart. He also stated that there were then correctional officers for Respondent who had "physical

any status in Group 1" simply means assignment to Group 1, since all new correctional officers were placed in trial (i.e., probationary) service for the first six months of employment.

profiles" similar to that of Complainant. Dr. Becker testified that this has caused him to be concerned about their ability to perform and that he has tried his best to correct this situation; he believes "they're at greater risk of needing CPR."

Respondent's current security manager Johnson testified that he considered roughly six out of Respondent's 127 current correctional officers, and several of its correctional corporals (whose function, but not type of post, is primarily the same as that of a correctional officer), to be overweight.

21) Corrections Division policy during times material herein provided that in carrying out their responsibility for matching the health of employees with the physical requirements of their jobs, Respondent's functional unit managers could require any employee to complete the employee health questionnaire annually and could require any such employee to report to a physician with these forms for evaluation and physical examination. That policy also stated during times material that one example of the use of the Physician's Report of Physical Condition, was

"[t]o make certain that an individual is not placed or permitted to continue in work situations which could be detrimental to the health of the individual, his/her co-workers, or the functional unit."

Superintendent Peterson testified that he does not know if, during his one-year tenure, any employee has been asked or required to have a physical examination or otherwise be

evaluated to ascertain whether he or she was fit to carry out Group 1 duties or required to take a physical or do anything because of "a weight problem." Dr. Becker referred to having moved "people" to less physically demanding positions, but it was unclear whether this occurred at Respondent and if so under what circumstances.

There is no system or process in place at Respondent to monitor or control the physical health or weight of Respondent's correctional officers during their employment or to have employees physically evaluated and re-qualified for Group 1. The only weight screening of Respondent's correctional officers occurs at hiring, with the physical examination. Once a correctional officer is on the job there is no termination on the basis of weight. Respondent's efforts to encourage its correctional officers to remain in good shape consist of making the gym available and having a salad bar on the premises.

22) Complainant had worked as a correctional officer at OSP, another Oregon correctional institution, from about November 1975 to June 1979. Complainant weighed about 190 pounds when he started working for OSP. Pursuant to Complainant's physical examination for OSP in November 1975, the examining physician placed no restrictions on Complainant and recommended that he be classified in Group 1. At some point during his employment at OSP, Complainant's weight rose to "pretty close to 210 to 215 pounds."

23) During times material herein, both Respondent and OSP housed adult male felons. Generally, OSP

housed older, more sophisticated prisoners, and Respondent more youthful, first-time offenders, but the prison to which an inmate was assigned was sometimes dictated by which had bed space at the time. The description of Complainant's job duties at OSP was the same as or very similar to the description of the job duties of a correctional officer at Respondent during times material, and both jobs involved work in direct contact with inmates. Complainant was involved in breaking up one physical fight in his nearly four years at OSP.

24) During Complainant's employment as an OSP correctional officer, he satisfactorily performed the duties required of him. An OSP annual performance appraisal report for Complainant's work from June 1, 1977, through May 31, 1978, rated his work performance satisfactory and included the comment that he was an experienced officer who could work most positions with little or no problem.

Complainant was counseled for absenteeism while employed at OSP because there was some concern that he was using what OSP considered an excessive amount of sick leave. There is no evidence or allegation herein that this had anything to do with Complainant's weight. Robert Patton, a supervisor of Complainant and current employee at OSP, stated by affidavit that Complainant's attendance problem was serious enough that it would have prevented him, if he had been asked, from recommending Complainant either for rehire at OSP or for hire at any other correctional institution despite Complainant's satisfactory performance of all requisite functions.

25) During his employment at OSP, Complainant observed other OSP correctional officers performing the same duties as he and who would be described commonly by people as overweight. For example, one correctional officer was what Complainant would term "grossly overweight;" at approximately Complainant's height, he wore clothes of a "much bigger" size than Complainant's.

26) Since completing high school in 1965, Complainant has completed CPR training (in 1981 and 1982) and reserve police training in observation, public contacts, diagram drawing, citation writing, and chemical protectors (in 1981).

27) At the time of his application to Respondent, Complainant had since high school graduation worked for short periods of time (in chronological order) as a light-duty laborer, as a bridge painter, on a line assembling vacuum suction pump motors, and in a machine shop. Thereafter, for longer periods, he had done delivery, shipping and receiving, order desk and counter work (filling orders), and worked in warehouses. (In two of these jobs, he had loaded and unloaded "quite heavy" oxygen, acetylene, and ammonia bottles, and in one he had handled 50-pound cases of welding rod.) Complainant also had done some outside sales work and had been the "office manager" at an automotive battery wholesale business, taking care of the books and filling orders in a small warehouse and dealing with gasoline at a service station.

28) Complainant's security work started with his employment as a

correctional officer at OSP from 1975 to 1979. After that, from October 1979 until June 30, 1982, Complainant was a security guard for the City of Salem. His duties in that job were to patrol public parking facilities in downtown Salem for the purpose of safeguarding persons, vehicles, buildings, and grounds by observation and reports to police; while patrolling, to observe vehicles parked in violation of ordinances and issue parking tickets; to do light maintenance and custodial duties; and perform courtesy functions with the public. This job required the physical ability to walk long hours alone both indoors and out under varying work and climatic conditions, and the ability to stay awake at night. Complainant had performed this job in a satisfactory manner and had been highly praised in annual performance evaluations in 1981 and 1982, particularly for his reliability and good attendance record. He also had helped apprehend a shoplifter, chasing the suspect for about two or three blocks and holding the suspect until police officers arrived.

29) Thereafter, Complainant had been unemployed for about six months until, in January 1983, he obtained six months of work as a temporary parking enforcement officer for the City of Salem. In that job, he had patrolled a given area every half hour, issuing citations for violations of parking ordinances. This work had required Complainant to walk approximately 12 to 15 miles per day and had afforded him "high public contact."

30) Complainant had not been employed between June 30, 1983, when his parking enforcement officer job ended, and his application at

Respondent. In October 1983, he obtained employment as a bus driver transporting students for the Salem School District. Throughout this employment, Complainant also worked in carting and hauling, moving whatever the District needed moved, on a between-routes basis as much as he could. Complainant performed this job satisfactorily and was praised for his attendance record.

Thereafter, and continually since about August 28, 1985, Complainant has worked as a shipping and receiving clerk in the Salem School District warehouse. In this job, he fills orders for requisitions and prepares them for shipping.

31) At the time of his application at Respondent, Complainant was involved in various physical activities. At that time (and during every summer but one or two since 1975), Complainant was active in church league softball, playing seven-inning games or practicing three times per week. He played on the defensive field regularly, often as pitcher or catcher. He was a good hitter and was required to circle the bases many times. He also hunted, doing a lot of walking in the mountains and chasing deer out of brush. A current hunting partner testified by affidavit that on their frequent hunting trips, he and Complainant usually hike about four miles in three or four hours and that during their trips Complainant had never shown any indication of weakness.

32) The Agency offered evidence that Complainant has twice

passed physical examinations required for school bus drivers which included, among else, a pulse recovery rate test and dragging a weighted bag. However, as there is no evidence stating what was his two-minute pulse recovery rate or the specific physical capabilities which the examinations were evaluating, this evidence is not probative of any issue herein.

33) During the 10 years preceding September 1986, Complainant tried to lose a significant amount of weight, through diet and exercise without the guidance of a physician. Although the record does not reveal how much weight he may have lost, it is clear that at the time of hearing, he weighed about 36 pounds more than he did in latter 1975 and 11 to 16 pounds more than the most he weighed between then and 1979. Accordingly, despite his efforts, Complainant had not achieved any permanent or long-term weight loss in the 10 years preceding hearing.

34) Dr. Becker testified unequivocally that Complainant's weight condition is correctable (and that his recovery pulse probably would correct with some weight loss). He testified that "everybody can lose weight, even those who have endocrine disorders." Dr. Becker stated that being 60 pounds overweight is correctable by changing lifestyle to eat fewer and burn more calories (through education, diet, and exercise). The fact that most of the members of Complainant's birth family exceed the weights for their heights listed on the MetLife chart by

* The Forum notes that there is no evidence that Complainant has an endocrine disorder, and Dr. Becker has testified that Complainant does not appear to have an obvious endocrine disorder.

40 to 100 pounds raises the possibility of a hereditary factor influencing Complainant's weight. Dr. Becker testified, however, that although heredity causes some people to have to work harder at controlling weight than others, being overweight is a "voluntary lifestyle problem that can be controlled."

35) Findings of Fact 36 through 44 concern the question of whether Respondent's actions described above have caused Complainant to be damaged.

36) Much of Mr. Johnson's testimony concerning the relevant aspects of Respondent's correctional officer hiring process, the factors Respondent considers in correctional officer hiring decisions, and the effects of those factors in those decisions concerned times present rather than times material. The testimony of Mr. Johnson, while credible, is often ambiguous with regard to its application to times material.

Mr. Johnson did not assume his duties as security manager until 1984, subsequent to times material herein. The security manager's position was Mr. Johnson's first experience with the hiring process for correctional officers in the security section. Mr. Johnson testified that the security section hiring process had changed since times material, and that at the time of hearing it was much more formal than prior to 1984. Since 1983, personnel functions had been centralized outside the agency and, unlike times material herein, there was a specific person assigned to Mr. Johnson's office responsible for conducting background investigations of applicants. Other

changes in the composition and inquiries of interviewing panels were made as well, all apparently for the purpose of lending greater uniformity to the hiring process. In short, there are strong indications in the record that Mr. Johnson's experience with the security section's hiring process since 1984 is of limited value in constructing a reliable picture of what sort of background investigation and what sort of inquiries would have been made in 1983.

These considerations undermine the persuasiveness of Mr. Johnson's testimony at other points in his appearance where he expresses his "beliefs" about the hiring process in 1983. Although Mr. Johnson was a very credible witness, he was clear in his testimony concerning the limits of his experience with the hiring process in the security section during times material and about the changes in that system since 1984. Indeed, Mr. Johnson's credibility is bolstered by his candor on these points.

The Forum's perspective on Mr. Johnson's testimony is strengthened by the Respondent's lack of specific, direct evidence of routine or habitual procedures in 1983. Respondent's large pool of applicants during times material — a thousand persons according to Mr. Johnson's testimony — should provide numerous and documented examples of investigatory procedure in 1983. Given Respondent's reliance on the hypothetical product of its investigatory process in 1983, the Forum believes the routinization and predictability of that process is central to Respondent's claim that certain background information would have

been sought, uncovered, and acted upon.

Thus, the Forum finds that in 1983 Respondent performed background investigations of some sort on correctional officer applicants, but that these investigations lacked the formality and uniformity of investigations conducted subsequent to 1984. Respondent made clear to Complainant, and Complainant fully understood, that Respondent's background investigation of him was "a condition of employment" at Respondent, and that unsatisfactory results could lead to termination.

The evidence indicates that during times material, Respondent did not do, or complete, background investigations on correctional officer applicants before they passed the physical examination. In the absence of any information or allegation to the contrary, the Forum concludes that Respondent had not yet done, or completed in parts pertinent below, Complainant's background investigation when it rejected him for correctional officer employment.

37) In 1979, in applying for unemployment insurance benefits after he left his employment at OSP, Complainant had told the State of Oregon Employment Division, and that division subsequently had found, that Complainant had left his employment at OSP because he felt physically threatened and intimidated by the inmates. A document containing this assertion and finding was contained in Complainant's official Corrections Division personnel file when Complainant applied for work at Respondent. If Respondent had investigated Complainant's background, Respondent would

have known that Complainant had worked as a correctional officer at OSP and could have investigated that employment. In the course of that investigation, Respondent could have accessed and reviewed Complainant's Corrections Division file, and thereby discovered this assertion and finding as to why Complainant left OSP.

38) Respondent's current security manager testified that, if discovered, Complainant's assertion and the finding that Complainant had left his employment at OSP because he felt physically threatened and intimidated by the inmates would have caused Respondent's security manager, who made the hiring and firing recommendations concerning Respondent's correctional officers to Respondent's superintendent, not to recommend Complainant for hire as a correctional officer. The very nature of the work performed by correctional officers at Respondent (and OSP) is such that they cannot have a fear of working with inmates. When they are working in an area where there are inmates, correctional officers are generally in direct physical contact with those inmates, and any correctional officer (or member of Respondent's staff) must be able and willing to confront inmates who are not complying with the rules of conduct.

39) At the September 1986 hearing before this Forum, Complainant asserted that his 1979 statement to the Employment Division was not truthful, and that he did not leave OSP because he felt physically threatened and intimidated by the inmates. On his application to Respondent on July 20, 1983, Complainant asserted that he

was willing to deal with threats of physical harm and harassment toward him and/or his family, to work unarmed, and sometimes alone in the midst of groups of inmates.

Complainant testified that he voluntarily left OSP because he "had an insecure feeling with staff" (not inmates) and because he was offered another job. Complainant stated that this insecure feeling arose because a hearings officer at a rules violation hearing took the unusual step of believing an inmate rather than Complainant. Complainant testified that he was willing in 1983 to work what he viewed as "basically the same job" at Respondent because people who worked at Respondent had told him that it had a "fairly decent bunch of people to work with."

40) It was important to the operation of Respondent that its correctional officers possess a high degree of integrity and credibility. It was most common for the credibility of a correctional officer to be at issue in investigations of and hearings resulting from inmate grievances, particularly in inmate officer disputes where it was the word of an inmate against that of the correctional officer. It was also important that Respondent's correctional officers be able to believe each other's word.

41) Respondent's current security manager testified that if the former manager had discovered and accepted the assertion and the finding that Complainant had left his OSP employment because he felt physically threatened and intimidated by inmates,

and Respondent's former manager had discovered and believed Complainant's later assertion that he had lied in offering that reason for leaving, that lie could have cast doubt on Complainant's credibility and, thereby, adversely affected the security manager's decision as to whether to recommend Complainant for hire at Respondent.

42) Respondent's current security manager testified that he believed Respondent also would have checked recommendations from former employers, including OSP, about Complainant's work history. As indicated in paragraph 24, above, if he had been asked, an OSP supervisor of Complainant who was still working for OSP at the time Complainant applied to Respondent testified by affidavit that he would not have recommended Complainant for rehire at OSP or for employment at any other correctional institution because of Complainant's attendance problems. Respondent's current security manager testified that if OSP had informed Respondent that OSP would not rehire, or that one of Complainant's former OSP supervisors would not recommend rehiring Complainant due to attendance problems, that in all likelihood it would have weighed against a decision by Respondent's former manager to hire Complainant.

43) Respondent's current security manager testified that if, pursuant to a background investigation of Complainant, Respondent had learned that Complainant was not recommended for rehire by OSP and that

Complainant had been untruthful in making representations to another state agency such as the Employment Division, those two facts by themselves would have caused the former manager not to recommend Complainant for hire.

44) As there is no indication or assertion on the record that Respondent would have altered, or even reviewed, a decision by its security manager not to recommend Complainant for hire as a correctional officer, the Forum concludes that Respondent would have adhered to it.

45) When Complainant left Respondent on August 2, 1983, after being denied employment in Group 1, he felt that "everybody was laughing" at him. Emotionally, he was "very low, depressed, humiliated." This is the only evidence on the record describing Complainant's pain specifically caused by his rejection because of his obese or overweight condition, as opposed to his pain at not obtaining the job of correctional officer at Respondent.

46) In respects pertinent herein, the meaning of much of Dr. Becker's deposition testimony was indefinite, and Dr. Becker was not produced at hearing for clarification of that testimony. Accordingly, despite his perhaps considerable experience concerning physical screening, and obesity and physical fitness, in the context of law enforcement employment, this Forum was not able to consider a great deal of Dr. Becker's testimony on particularly those, as well as other topics, because the meaning of much of it was either unascertainable or so vague as to be general in the extreme and therefore not useful herein.

47) Complainant's credibility before this Forum has been damaged somewhat by his 1979 lie to the Employment Division, as it demonstrated a willingness to prevaricate for, presumably, economic reasons. That damage has not rendered Complainant's uncontroverted testimony not credible, although it has diminished the weight the Forum has given Complainant's testimony in the rare instances in which that testimony was controverted by evidence from other sources.

48) Because Daniel Johnson appeared to be very careful to be accurate and unbiased in testifying, the Forum found him highly credible.

49) The parties have stipulated to lost wages in the sum of \$17,656.60, such sum representing the net loss suffered by Complainant as a result of his rejection by Respondent.

ULTIMATE FINDINGS OF FACT

1) During all times material herein, Respondent was a correctional institution, which was an agency of the State of Oregon employing six or more persons in Oregon.

2) In July 1983, Complainant applied for employment as a correctional officer at Respondent. After interviewing Complainant, Respondent instructed him to report to Respondent on August 2, 1983, prepared to go to work as a correctional officer subject to passing Respondent's physical examination.

3) During all times material herein, as the persons responsible for carrying out security activities at Respondent, Respondent's correctional officers supervised and monitored inmates, patrolling inmate areas,

* There is no evidence on the record that Complainant listed OSP or anyone employed there as a "recommendation." OSP was listed among former employers on Complainant's application.

searching them and their cells, breaking up somewhat regular disturbances between inmates, and maintaining security at the prison's perimeter. Respondent's correctional officers had to be able, for example, to restrain and subdue inmates, especially in the event of inmate-on-inmate assaults, and to come to the aid of fellow correctional officers. Specifically, Respondent's correctional officers had to be capable of the following actions related to instant and/or sustained arduous physical activity: walking with lateral mobility and over rough terrain, bending, standing for long periods, running, lifting, and carrying 35 to 60 pounds, reaching, climbing stairs, maintaining balance, and working on high ladders.

4) During all times material herein, as part of the Oregon Corrections Division, Respondent was governed by that division's policy prohibiting any person from doing work which he or she was physically incapable of performing. Toward ensuring its workers' physical capability to do all tasks required by their work, and in order to prevent them from performing any task which could be detrimental to their health and safety or that of others, Respondent endeavored to match worker health to the physical job requirements by mandating standard use of health questionnaires and physical reports concerning the job requirements and a physical examination at the time of employment. Toward the same end, Respondent had catalogued its job classifications, by times material herein, in terms of the physical requirements of the work to be performed by persons working in those classifications. Correctional officers (along with,

for example, state police, highway maintenance and park laborers) were in Group 1, the grouping for classifications requiring the capability to perform instant and/or sustained arduous physical activity. The other groups were Group 2, for classifications requiring occasional lifting and exertion for short periods, and Group 3, for classifications including office jobs which demanded very limited physical exertion.

5) Pursuant to Corrections Division policy during times material herein, Respondent's medical director, Jerry Becker, M.D., conducted a physical examination of applicants for employment. Dr. Becker was to consider the results of that examination, along with the applicant's information concerning his or her physical capabilities to do the specific activities and work in the specific conditions required by the job for which the applicant was applying, in determining those physical capabilities. Based on those capabilities, Dr. Becker was to ascertain the applicant's physical restrictions and assign the applicant to one of the above three groups which best matched his or her physical capabilities. Because Respondent did not review or alter those assignments, Dr. Becker thereby was to conclude for Respondent whether the applicant was capable of performing the physical requirements of the job for which he or she was applying.

6) Pursuant to the above-cited policies, Dr. Becker gave Complainant a physical examination on August 2, 1983, and assigned him to Group 2 rather than Group 1. (Dr. Becker knew that Complainant was applying for a Group 1 position.) This assignment was based on Dr. Becker's findings

that Complainant was 50 pounds overweight and on Complainant's slow two-minute recovery pulse, which indicated to Dr. Becker that the bulk of Complainant's weight was fat rather than muscle mass, which was compromising Complainant's heart and lung function, and his conclusion, based thereon, that Complainant was incapable of instant and/or sustained arduous physical activity. That is, Dr. Becker believed that Complainant had the characteristics of a person who fit in a class which Dr. Becker believed to a medical certainty was incapable of instant and or sustained arduous physical activity as required in Group 1 and, in fact, incapable of meeting the demands of other, similar positions, i.e., correctional or law enforcement officer positions requiring, as most did, a capability of instant and/or sustained physical activity or its substantial equivalent. However, Dr. Becker did not know with any reasonable degree of certainty whether Complainant himself was capable of instant and/or sustained arduous physical activity, although he felt it was more probable than not that Complainant was not. That is, Dr. Becker felt it was more probable than not that Complainant would be an added risk to himself and others in a Group 1 job; he believed that Complainant could do 90 to 95 percent of the correctional officer job requirements, but could not do all of them in a manner safe to himself, other correctional officers, and persons in his area at Respondent. Dr. Becker believed that if Complainant lost 50 pounds, he "more probably than not" could move into Group 1. If Complainant had weighed 15, instead of 50, pounds over what Dr. Becker

considered an acceptable weight, Dr. Becker probably would have assigned him to Group 1 (even with the same pulse recovery rate).

Dr. Becker offered as support for his above conclusions only very vague references to authority concerning overweight or obese condition in the law enforcement employment setting.

7) In sum, Dr. Becker's assignment of Complainant to a health classification other than that required of Respondent's correctional officers was caused by his regarding Complainant's weight as an apparent or medically detectable condition which diminished Complainant's health and, accordingly, regarding Complainant as having a physical or mental impairment.

Because of Dr. Becker's assignment, Respondent denied Complainant's application for an available correctional officer position on August 2, 1983. In so doing, Respondent adopted Dr. Becker's above-cited reasons and perceptions concerning Complainant's physical capability and, thereby, likewise regarded Complainant as having a physical impairment.

Dr. Becker's determination regarding Complainant's physical capabilities extended to all Group 1 job classifications and, as such, constituted an opinion that Complainant was unfit for an entire category of employment, and not simply the specific position for which Complainant was applying. More generally, Dr. Becker determined that Complainant could not safely perform job duties requiring instant and/or sustained arduous physical activity. In adopting Dr. Becker's opinion concerning Complainant's physical limitations, Respondent regarded Complainant as

being substantially limited in the major life activity of employment.

8) When he examined Complainant, Dr. Becker had been Respondent's contracting medical director for one to two years. He also had a private practice as an orthopedic surgeon, and another business providing physical screenings of applicants for employers which included many law enforcement and at least several corrections agencies. Dr. Becker believed that because of the physical toll of their weight, law enforcement and correctional officers had employment problems earlier and more frequently than other officers.

9) Although Dr. Becker admits that there are several definitions of obesity, or overweight, Dr. Becker's belief that Complainant was 50 pounds overweight was based simply upon a height-weight chart which Dr. Becker had clipped from a newspaper. Although the source of the information on the chart is not noted on it, Dr. Becker stated that its information matches the "actuarial tables" of an insurance company. Although the meaning of the information on that chart is not stated on it, Dr. Becker regarded the weights noted on the chart as the acceptable weight ranges for people of given heights, and he has used the chart as such throughout his practice. The chart includes weights for small-, medium-, and large-framed men whose height falls at the two inch intervals between 5'2" and 6'0" (except 5'10", which the chart unaccountably omits) and for small-, medium-, and large-framed women whose height falls at the two-inch intervals between 5'2" and 5'10". When examined by Dr.

Becker, Complainant weighed 213 pounds, which is between 49 and 77 pounds above the weight ranges the chart lists for his 5'6" height. Dr. Becker considered this a gross deviation from an acceptable weight for Complainant.

Dr. Becker's perception that Complainant had an unacceptably slow recovery pulse rate arose when his pulse rate taken after two minutes of rest following 15 sit-ups was the same as his pulse rate immediately after he had finished those sit-ups. Dr. Becker offered no reason or authority (other than very vague reference to his experience, reading, or hearing) for his presumption that 15 sit-ups simulated instant and/or arduous sustained physical activity required of a correctional officer, or that Complainant's two-minute pulse rate indicated heart and lung compromise which would render him incapable of instant and/or sustained arduous physical activity. Dr. Becker's failure to ascertain when Complainant's pulse had returned to an acceptable rate, and his willingness to put Complainant in Group 1 with his pulse rate if Complainant weighed about 35 pounds less, lead the Forum to conclude that Dr. Becker did not regard Complainant's recovery rate as a critical indicator. Dr. Becker offered no reason for not testing Complainant's ability to perform the type of instant and/or sustained arduous physical activity required of a correctional officer (i.e., walking, bending, running, lifting and carrying, climbing stairs, maintaining balance, and walking on high ladders), by simply having Complainant perform such activity.

10) As reflected on his application to Respondent, Complainant had satisfactorily performed the Group 1 job of correctional officer at the OSP, another correctional facility of the Oregon Corrections Division, for about three and one-half years ending about four years before he applied for work at Respondent. As correctional officer at OSP, Complainant had worked in the same classification as he would have worked at Respondent, with job duties the same as or very similar to those of Respondent's correctional officers during times material herein. If there was any general difference between the jobs of correctional officers at Respondent and OSP during times material herein, it was that the OSP correctional officers dealt with inmates potentially more challenging or dangerous than those at Respondent. During his employment at OSP, Complainant was involved in breaking up one physical fight, and he was not regarded as posing any safety risk. During Complainant's employment at OSP, his hiring weight of 190 pounds had risen to 210 to 215 pounds. There is no indication that Complainant's one apparent shortcoming in his OSP employment, excessive use of sick leave, had anything to do with his weight.

Given the pertinent similarities between Complainant's OSP employment and Respondent's correctional officer employment, and between Complainant during his OSP employment and when he applied for work at Respondent, Complainant's OSP employment is an indication that Complainant could perform the job of correctional officer safely and satisfactorily during times material herein.

12) Respondent has not produced any records of the weights and heights, or pulse recovery rates, of its correctional officers in 1983, and apparently no such records have ever existed. In January 1986 and September 1986 (times of deposition and hearing herein), Respondent employed some correctional officers who had "physical profiles" similar to that of Complainant, correctional officers whose weights exceeded the weight limitations shown on Dr. Becker's height/weight chart, and correctional officers who were "seriously" overweight as far as Dr. Becker was concerned. There was no evidence or assertion that these correctional officers were any more physically capable of performing instant and/or sustained arduous physical activity than Complainant was at the time of his application. There was no evidence or assertion that any of these correctional officers were not performing, or had not performed, their job with Respondent safely.

13) Although during all times material herein Correctional Division policy allowed Respondent to require an employee to provide health and working condition information and submit to a physical examination annually, to ensure that that individual was not permitted to continue in work situations which could be detrimental to the health of the individual, his or her co-workers, or the functional unit, there is no evidence or assertion that Respondent or its security unit has ever imposed such a requirement because of an employee's weight. Moreover, Respondent had during times material (and at the time of hearing) no system for monitoring the physical health or weight of its

employees or for having all correctional officers physically evaluated and re-qualified periodically for Group 1. Respondent's only weight screening of employees occurred at hiring. (It is this failure by Respondent to monitor physical condition after hire which has caused Dr. Becker to be particularly anxious to appoint people who are physically fit.) Accordingly, this Forum has concluded that Respondent itself apparently did not, during times material, regard weight as an indication that a correctional officer was or probably was incapable of performing his or her duties safely. (A contrary conclusion would indicate that Respondent allowed individuals to work as correctional officers who it viewed as, or as probably, incapable of performing the job duties safely.)

14) During Complainant's employment at OSP, that institution employed some correctional officers who performed the same duties as Complainant and who commonly would have been described by people as overweight, in Complainant's opinion, and at least one correctional officer of about Complainant's height appeared to weigh substantially more than Complainant.

15) Although Complainant has worked in jobs requiring lifting and long hours of walking at times before and since his application for correctional officer work with Respondent, with the exception of his employment with OSP, there is no evidence on the record that any of them required Complainant to be capable of instant and/or sustained arduous physical activity, or

that the employment setting of any of them imposed safety requirements comparable to those of Respondent. However, Complainant did demonstrate the capability for instant and/or sustained arduous physical activity when, as a parking facility security guard during 1981 or 1982, he chased a shoplifter for about two or three blocks and held that shoplifter until the police arrived. Complainant's recreational pursuits during times material herein demonstrated his capability for instant and/or sustained physical activity which could be arduous through his "circling the bases" in softball league play each summer and by prolonged mountain hiking and instant activity to chase deer out of brush.

16) Under the circumstances and for the reasons recited in Ultimate Findings of Fact 3 through 15 above, and as explained in Section 4 of the Opinion below, the Forum has concluded, first, that Complainant's weight did not constitute a physical impairment and, second, that Respondent has not demonstrated a factual basis for believing, to a reasonable probability under all the circumstances, that Complainant's weight during times material herein (including its manifestation in his pulse rate) rendered him incapable of instant and/or sustained arduous physical activity and, therefore, incapable of safely performing the job of correctional officer at Respondent.

17) If Complainant was 50 pounds overweight when he applied at Respondent, and if the condition was a condition which was correctable, the Forum concludes, in light of

Complainant's past experience with self-treatment of his weight condition and Dr. Becker's testimony, that it was correctable only upon long-term treatment changing Complainant's lifestyle as to diet and exercise.

18) At hearing, Complainant admitted that he lied to the Oregon Employment Division in 1979, when he was seeking unemployment insurance benefits, as to why he left his employment at OSP. As Complainant offered no explanation for this lie, the Forum must view it as demonstrating a capability of prevaricating for economic gain. The weight given to Complainant's testimony was diminished, although not rendered incredible *per se*, by Complainant's prevarication to the Employment Division.

19) Because the meaning of much of Dr. Becker's testimony, particularly on his experience concerning physical screenings and obesity and physical fitness in law enforcement employees, was not ascertainable in respects pertinent herein, or was so vague as to be general in the extreme, the Forum was not able to consider, or found of minimal value herein, a great deal of Dr. Becker's testimony, particularly on the latter topics.

The same is true of much of Mr. Johnson's testimony concerning the hiring process and its procedures in 1983. The foundation for many of Mr. Johnson's assertions is unclear, given his candid admission to a lack of experience with the process as conducted in 1983. When combined with the admission that significant changes had been made in that process after 1984, and the strong indications that the process was much less formal and

uniform in 1983 than at the time of hearing, the Forum found Mr. Johnson's testimony on hiring procedures in 1983 to be less than persuasive that an investigation conducted in 1983 would be the same as conducted in 1986, or that the process in 1983 was sufficiently routinized to persuade the Forum that the information relied upon by Respondent would have been sought and uncovered.

20) If Complainant had attained assignment to Group 1, Respondent would have conducted some sort of background investigation of him. Satisfactory results of that investigation would have been a condition of his employment. If Respondent had appointed Complainant as a correctional officer in August 1983, Complainant, like all entry level correctional officers, would have commenced a six-month trial service period. The background investigation of Complainant would have been completed during his trial service.

21) During times material herein, Respondent's security manager made the hiring recommendations concerning Respondent's correctional officers to Respondent's superintendent, its hiring authority.

22) Although a background check could have been performed which might have uncovered the adverse information relied upon by Respondent, the evidence is not persuasive that such investigation would have extended to the specific sources cited by Respondent. The testimony of Mr. Johnson on this point is often ambiguous in its connection to times material and also indicates that the investigatory process in 1983 was not

* The Forum does not separately consider Complainant's slow recovery pulse rate, as Dr. Becker believed that it would correct with some weight loss.

sufficiently routinized or formal to provide the Forum with the assurance that this information would have been sought and uncovered as a matter of course.

23) Even if the information relied upon by Respondent had come to light, the evidence is not persuasive that Respondent would have terminated Complainant on this basis. The absence of any evidence of Respondent's actual conduct in similar situations undermines Respondent's assertion that Complainant's attendance problem while employed at OSP and his prevarication to the Employment Division would have necessarily led to his termination, particularly given that Complainant's evaluations while with the City of Salem make specific reference to an excellent attendance record and reliability.

24) The record establishes, and this Forum finds, that Respondent's refusal to employ Complainant because it regarded him as having the physical impairment of obesity caused Complainant to feel humiliated and depressed as he left Respondent on August 2, 1983. The record further establishes, and the Forum finds, that Complainant lost wages in the amount stipulated to by the parties.

CONCLUSIONS OF LAW

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

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

3) The Forum complied with ORS 183.413 by timely informing Respondent and Complainant of the matters described in ORS 183.413(2)(a)-(i).

4) The actions of Jerry Becker, M.D., Respondent's medical director and agent, and of Lieutenant Kay, Respondent's employee and acting security manager, described herein, and their perceptions underlying those actions, are properly imputed to Respondent.

5) Because Complainant was regarded by Respondent as having a physical impairment when, in fact, he was not impaired, and because Respondent regarded Complainant's supposed impairment as substantially limiting the major life activity of employment, Complainant was at all times material a "handicapped person" as defined in ORS 659.400(2) and 659.400(3)(c)(C).

6) By refusing to hire Complainant because Respondent regarded Complainant as a handicapped person, when Respondent did not have a factual basis for believing, to a reasonable probability under all the circumstances, that Complainant's weight rendered Complainant unable to perform safely the job for which he had applied as of the time he applied, Respondent engaged in an unlawful employment practice in violation of ORS 659.425(1)(c), as charged.

7) Respondent's defense that it acted on the advice of its agent Dr. Becker at all times fails. See Section 5 of the Opinion below.

8) Under the facts and circumstances of this record, the Commissioner of the Bureau of Labor and

Industries has the authority to award money damages to Complainant for his mental distress caused by Respondent's above-described unlawful employment practice, and to order Respondent to cease and desist from discriminating against other similarly situated individuals. As Respondent herein has failed to prove by a preponderance of the evidence that Complainant would not have been retained because of factors which Respondent did not know when it placed Complainant in Group 2 but would have learned had it further investigated him, Complainant is entitled to back pay. The sum of money awarded and the cease and desist mandate contained in the Order below are appropriate exercises of that authority.

OPINION

1. Overview

The Forum examines below the central issues of class membership which are presented by this case. Before that discussion, however, the Forum takes this opportunity to highlight three aspects of its opinion.

First and foremost, the Forum desires to clarify difficult issues of class definition. Particularly as regards so-called "perceived handicaps," the question of class membership is discussed at length. In accordance with the opinion of the Court of Appeals in *OSCI v. Bureau of Labor and Industries*, 98 Or App 548, 780 P2d 743 (1989), the Forum adds to its original analysis a consideration of whether Respondent perceived Complainant's

supposed obesity as substantially limiting a major life activity.

Second, the Forum wishes to stress that it does not intend to limit the ability of Respondent, or any employer, reasonably to require appropriate physical qualifications of employees. Failure to meet such standards is not an automatic basis for membership in the protected class of "handicapped persons." Rather, where physical qualifications are reasonably required, the significant questions generally will concern the validity of the testing mechanism, its relationship to job demands, and the actual use of such qualifications.

Third, in accordance with *OSCI v. Bureau of Labor and Industries, supra*, (hereinafter *OSCI*) the Forum adopts a preponderance of the evidence standard to evaluate Respondent's defense that it would not have retained Complainant anyway for reasons other than impairment.

2. Definitions and Proscriptions

This matter is brought under Oregon's Handicapped Persons' Civil Rights Act (ORS 659.400 *et seq.*) (the Act). In its parts relevant herein, the definitional portion of that Act provides:

"As used in ORS 659.400 to 659.435, unless the context requires otherwise:

"(2) 'Handicapped person' means a person who has a physical or mental impairment which substantially limits one or more

* The term "handicapped" has been replaced throughout the Oregon Revised Statutes with the term "disabled." Chapter 224, Oregon Laws 1989. However, since the instant case arose prior to such amendments, the references herein shall be to the statute as written during times material.

major life activities, has a record of such an impairment or is regarded as having such an impairment.

"(3) As used in subsection (2) of this section:

"(a) 'Major life activity' includes, but is not limited to self-care, ambulation, communication, transportation, education, socialization, employment and ability to acquire, rent or maintain property.

"(b) 'Has a record of such an impairment' means has a history of, or has been misclassified as having such an impairment.

"(c) 'Is regarded as having an impairment' means the individual:

"(A) Has a physical or mental impairment that does not substantially limit major life activities but is treated by an employer or supervisor as having such a limitation;

"(B) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitude of others toward such impairment; or

"(C) Has no physical or mental impairment but is treated by an employer or supervisor as having an impairment." ORS 659.400.

The relevant proscriptive portion of the Act provides:

"(1) For the purpose of ORS 659.400 to 659.435, it is an

It is apparent that, even after being presented argument to the contrary, Oregon appellate courts regard the definition of "handicapped person" in ORS 659.400(2) (and, therefore, the definitions relating to it in ORS 659.400(3)) as defining or describing the classes of people protected by ORS 659.425(1). See *Quinn v. Southern Pacific Transportation Co.*, 76 Or App 617, 626, 711 P2d 139 (1985), *rev den*, 300 Or 546, 715 P2d 93 (1986) (hereinafter *Quinn*); and, in that matter, Respondent's Brief to the Court of Appeals and Respondent's Response to the Petition for Review to the Supreme Court.

unlawful employment practice for any employer to refuse to hire, employ or promote, to bar or discharge from employment or to discriminate in compensation or in terms, conditions or privileges of employment because:

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

"(b) An individual has a record of a physical or mental impairment; or

"(c) An individual is regarded as having a physical or mental impairment." ORS 659.425(1).

3. Class Membership

Although the term "handicapped person" is not used in ORS 659.425(1), it has been held that the class protected by ORS 659.425(1) is defined by ORS 659.400(2) and (3).¹ *Quinn v Southern Pacific Transportation Co.*, 76 Or App 617, 626 (1985), *rev den* 300 Or 546, 715 P2d 93 (1986). The Specific Charges allege class membership under two alternative, and mutually exclusive, theories. The first, brought under ORS 659.425(1)(a), alleges Complainant has an impairment which, with reasonable accommodation, does not prevent his performing the duties of a

correctional officer. Class membership requires that Complainant have an impairment which either substantially limits major life activities or is perceived as so limiting. ORS 659.400(2); 659.400(3)(c)(A) and (B). As the Agency introduced little or no evidence tending to establish his impairment, its degree of severity or what accommodation by Respondent might be needed or reasonable, the Agency apparently abandoned, or could not support, this first theory at hearing.

The second theory, brought under ORS 659.425(1)(c), alleges that Complainant was regarded as having an impairment when, in fact, he had no impairment. Class membership under this theory must be established under ORS 659.400(3)(c)(C), the only "regarded as" definition which extends protection to persons without impairments:

"(C) Has no physical or mental impairment but is treated by an employer or supervisor as having an impairment."

It is a case of "mistaken identity." *OSCI, supra*, at 554. Thus, the employer must erroneously perceive the existence of an impairment and then compound this misperception by regarding the impairment as substantially limiting a major life activity. This may be done in one of two ways, by regarding

"the unimpaired person as having an impairment that, if actually present, would substantially limit a major life activity (for example, erroneously believing that the person is blind) or regard the unimpaired person as having a non-substantial impairment that, in turn,

the employer erroneously believes is substantial ***." *Id.* at 553 (emphasis in original).

It is important to note, however, that although how an employer regards or treats a person may form the basis of the person's inclusion in the protected class, *Quinn, supra*, at 626, ORS 659.400(3)(c), not just any employer perception which leads to an adverse employment decision bestows class membership. It is the nature of the employer's perception which bestows protected class status: The perception must be of an impairment, not merely a characteristic disliked by the employer, and the employer must regard the impairment as substantially limiting a major life activity. Accordingly, in the next section the Forum proceeds, first, to define "impairment" and to apply that definition to the circumstances of this case, and second, to consider whether Respondent perceived Complainant's supposed impairment as substantially limiting a major life activity.

A. Definition of "Impairment"

The Forum adopts the definition of "impairment" imparted by *E. E. Black, Ltd v Marshall*, 479 F Supp 1088, 23 FEP 1253 (D Hawaii 1980):

"[A]ny apparent or medically detectable condition which weakens, diminishes, restricts or otherwise damages an individual's health or physical or mental activity." *Id.* at 1098.

While it is possible to argue that this definition encompasses any physical or mental state which is less than optimal, and thus that poor physical conditioning may be said to "weaken" or "restrict" health or physical activity, the

Forum believes, and finds in this case, that the failure to maintain ideal levels of physical health, or for that matter intellectual acuity or emotional well-being, is not an "impairment" for purposes of the Act. Rather, the emphasis should be placed on the phrase "apparent or medically detectable condition," a usage which implies pathological or abnormal deficits in health or capacity.

B. Definition Applied in Present Case

The Forum begins its application of the definition of "impairment" by distinguishing two issues: The first is whether Respondent's determination that Complainant failed to meet the Group 1 standard in and of itself constitutes a perception of impairment or the treatment of Complainant as impaired. The Forum holds that it does not. The second issue concerns the basis for Respondent's determination that Complainant failed to meet the Group 1 standard: Did Respondent regard Complainant as impaired? The Forum holds that it did.

1) Group 1 Standard

The physical qualification for Group 1 employment is the capacity for "instant and/or sustained arduous physical activity." Correctional officers are placed in this category for the reason that they must be able to work among, pursue, and, if necessary, subdue prison inmates. Complainant has not contested this qualification for Group 1 employees in general or correctional officers in particular.

As discussed in the next section, the Forum finds that the examination conducted by Respondent is not a rational test of Group 1 capacity. But for

purposes of the present discussion, the Forum presumes *in arguendo* that it is. The Forum's purpose is to make clear that Respondent's determination that Complainant failed to meet the articulated fitness standard for Group 1 employees does not, in itself, establish that the Complainant was physically impaired or that Respondent regarded him as such.

While "impairment" denotes a condition which damages or restricts health or activity, as already indicated, the Forum rejects a standard for the unimpaired which requires optimal or ideal health. Rather, the Forum recognizes that there is a range of normal or acceptable variation in physical or mental function which falls below the ideal but stops short of impairment. This range is not susceptible to precise definition, but for purposes of physical conditioning, the Forum finds that this range of normal or acceptable variation includes the "out of shape" as well as the physically fit. Thus, the Forum finds that the failure to demonstrate a capacity for instant and/or sustained arduous physical activity does not make one impaired, at least not for that reason alone: Given certain interpretations of the words "arduous" and "instant and/or sustained," it is arguable that the Group 1 standard would exclude most individuals, even those of average conditioning. Falling short of the Group 1 standard simply does not establish a physical impairment. Therefore, the Forum holds that Respondent did not regard Complainant as impaired for the reason that it determined him to be unfit for Group 1 employment.

2) Respondent's Determination

Respondent does not dispute that it refused to employ Complainant as a correctional officer because of Dr. Becker's conclusion that Complainant was obese. (The Forum includes Complainant's slow pulse recovery rate within its references to Complainant's weight or obesity in this discussion, because it is clear that Dr. Becker treated Complainant's slow pulse recovery rate as a manifestation and function of his weight.) The question, therefore, is whether this conclusion establishes that Respondent regarded Complainant as physically impaired. The Forum holds that it does.

It is clear from Dr. Becker's testimony that he regarded Complainant's weight as outside medically acceptable bounds. The notes of Dr. Becker's examination contain the doctor's finding that Complainant suffered from "obesity." This is a term of art which denotes a medically detectable condition damaging to health. Although often used interchangeably, "overweight" is not synonymous with "obese." Several pounds of excess weight may make a person "overweight," but they would not constitute obesity as the Forum understands the word. Rather, obesity describes an impairment of health of serious medical dimensions.

It is clear, therefore, that Respondent regarded Complainant as physically impaired. Under the interpretation of ORS 659.400(3)(c)(C) set forth in *OSCI*, *supra*, this is sufficient to bring Complainant under the protection of the Act if, first, Complainant was not in fact impaired, and second, if Respondent considered the Complainant to be substantially limited in a major life

activity by the characteristic it erroneously perceived to be an impairment.

As to the first issue, the Forum finds that Complainant was not physically impaired. The record contains a preponderance of evidence supportive of Complainant's unimpaired physical condition, including accounts of strenuous recreational activity, satisfactory prior performance at OSP, and Complainant's pursuit and capture of a suspect while employed by the City of Salem. The meager medical information assembled by Respondent is simply insufficient to establish Complainant's obesity or any other impairment.

As to the second issue, the Forum finds that Respondent did perceive a substantial limitation on the major life activity of employment on the basis of Complainant's supposed obesity. This finding is based on Dr. Becker's determination that Complainant was unfit for not only the specific position for which he applied, but all employment falling within the Group 1 category. This category included the sort of employment which Complainant had for years pursued, and Respondent's determination clearly expresses the belief that he was unable to perform such employment safely. The Forum believes that,

"[a] person who is disqualified from employment in his chosen field has a substantial handicap to employment, and is substantially limited in one of his major life activities * * *. It is the impaired individual that must be examined, and not just the impairment in the abstract." *E. E. Black, Ltd., supra*, at 1099.

4. Did Respondent's Refusal to Hire Complainant as a Correctional Officer Because of His Overweight/Obese Condition Constitute a Violation of ORS 659.425?

As Complainant is, therefore, a member of the class protected by ORS 659.425(1)(c), the question becomes whether Respondent's termination of Complainant was a violation of ORS 659.425. To determine the answer, we apply the principle enunciated in *Quinn* as appropriate to an employment setting in which the employer "owes an extraordinarily high degree of care in its operation" and in which "safety is an essential part of its business." That principle involves whether, given all the circumstances, Respondent has

"demonstrated a factual basis for believing, to a reasonable probability, that * * * (Complainant), because of his * * * (weight), could not safely perform the job of * * * (correctional officer)," i.e., in a manner which would not endanger

himself or others." *Quinn, supra*, at 631-32.

In enunciating this as the standard for application in an employment context in which safety is essential, the *Quinn* court explicitly declined to adopt in handicap discrimination cases the standard adopted in *Usery v. Tamiami Trail Tours, Inc.*, 531 F2d 224 (5th Cir 1979), for determining, under the Federal Age Discrimination in Employment Act, 29 USC 621 *et seq*, whether a particular requirement of a job involving public safety was a bona fide occupational qualification reasonably necessary to the normal operation of the particular business. If applied herein, the *Tamiami* standard would allow Respondent to impose a weight/pulse rate standard on Complainant if Respondent had a factual basis for believing that all or substantially all persons of Complainant's physical condition would be unable to perform safely and efficiently the duties of the job involved, or if it was impossible or impractical for Respondent to deal with such persons on an individualized basis. Under *Tamiami*, in a public safety setting, an

* The Forum does not comment on whether this constitutes imposition of an ORS 659.030(1)(a) "bona fide occupational requirement" test in a ORS 659.425(1)(c) context, as apparently assumed by the *Quinn* court, or simply a translation of the ORS 659.425(1)(a) condition that the physical impairment does not prevent, with reasonable accommodation by the employer, the performance of the work involved into the ORS 659.425(1)(c) "perceived" physical impairment context. Rather, this Forum views this test as an enunciation of the presumption, implicit in the definition of "is regarded as having an impairment" in ORS 659.400(3)(c), that the Complainant's physical condition, in addition to being erroneously viewed as an impairment, does not, with reasonable accommodation by the employer if necessary, prevent the performance of the work involved.

** The Forum notes that although Respondent's correctional officer job may be a position which by its very nature includes an inherent risk of injury to co-workers, a preponderance of the evidence does not establish that this inherent risk would be materially enhanced because of Complainant's weight. See *In the Matter of Burlington Northern Railroad Company*, 3 BOLI 215, 236 (1983).

increase in the possibility or likelihood of injury or death would satisfy the "unable to perform safely" component.

The *Quinn* court specifically declined to adopt this standard in the ORS 659.425 setting because of what the court labeled "its potential for blanket disqualification of a class of person with a given handicap." *Quinn, supra*, at 631.

The court went on to state emphatically that

"(i)f the Handicapped Persons' Civil Rights Act is to have any substance, the emphasis must remain on whether the individual applicant is capable of fulfilling the job requirements * * * whether an applicant's own personal safety or that of others is in question, the Act requires an individual assessment of the safety risk." *Id.*

The court then enunciated the above-cited "reasonable probability" standard derived from *Montgomery Ward v. Bureau of Labor*, 280 Or 163, 570 P2d 76 (1977), as the test applicable to this setting.

No one has disputed that a correctional officer of Respondent had to be capable of instant and/or sustained arduous physical activity during times material herein. However, for the reasons explained below, Respondent has not demonstrated a factual basis for believing, to a reasonable probability under all circumstances, that Complainant's weight affects his capability for instant or sustained arduous physical activity in a way which would prevent him from being able to safely perform the job of correctional officer.

Respondent has offered Dr. Becker's opinion that Complainant's two-minute recovery pulse rate after doing 15 sit-ups, and the fact that his weight exceeds the weight range listed on Dr. Becker's weight chart by some 50 pounds, established that Complainant was obese and that his heart and lung function were being compromised by his weight. From this Dr. Becker concluded that Complainant fit in a class of persons who with a reasonable certainty would not safely perform the job of correctional officer because they would be incapable of instant and/or sustained arduous physical activity. Dr. Becker agreed, however, that he did not know with any reasonable degree of certainty whether Complainant himself, the individual applicant, would be incapable of that activity, although he felt it was more probable than not that Complainant would be an "added" risk to himself and others. Moreover, Respondent offered no evidence whatsoever, apart from Dr. Becker's very vague references to his experience and to literature concerning excessive weight or obesity in law enforcement employees, that support Dr. Becker's presumption that Complainant's weight and two-minute pulse recovery rate establish that he falls in a class of people incapable of instant and/or sustained arduous physical activity. Respondent has established at best that Dr. Becker believed that there was a general relationship between overweight or obese status (as demonstrated in Complainant's case by weight and slow pulse recovery) and an incapacity for instant and/or sustained arduous physical activity. As Dr. Becker himself testified that there are many definitions of overweight or

obesity, weight alone appears to be a crude measure of the physical condition of a particular individual. This seems particularly true herein, where Dr. Becker's conclusion is based merely upon the fact that Complainant's weight exceeds the ranges noted on an old newspaper clipping, which is incomplete and not self-identifying, but which Dr. Becker believes matches an insurance company's actuarial tables. This is indefinite evidence at best. The Forum agrees with the Agency's argument that the procedure Dr. Becker used herein, particularly its heavy reliance on a standardized height-weight chart, permitted Dr. Becker to make precisely the "excessively broad" general conclusion about Complainant's capabilities with regard to its correctional officer position which allows, in the words of the *Quinn* court, just "the kind of invidious discrimination based on unfounded stereotyping" that the Act is designed to prevent. *Quinn, supra*, at 631.

However, Dr. Becker did not base his decision that Complainant's weight rendered him incapable of instant and/or sustained arduous physical activity on the chart alone. He also based it on his conclusion that Complainant's pulse recovery rate was unacceptable, as his rate two minutes after doing 15 sit-ups had not acceptably recovered from, and remained the same as right after, that exertion. Dr. Becker offered no authority (other than, again, vague references to his experience or what he had read or heard at conferences) for his conclusion that doing 15 sit-ups simulated a "take-down" in a fight or wrestling an inmate, or that Complainant's two-minute pulse

recovery rate indicated heart and lung compromise which would render him incapable of instant and/or sustained arduous physical activity. The Forum notes that nowhere on Respondent's detailed description of the types of physical activity required of its correctional officers is wrestling or "taking down" mentioned or alluded to. The Forum also notes that there is no evidence that it would have been medically or economically unfeasible to test Complainant for his ability to perform the physical activities in that description (i.e., different types of walking, bending, running, lifting, carrying, climbing stairs, maintaining balance, or working on high ladders) by simply having Complainant perform them. Furthermore, the Forum notes that Dr. Becker did not even mention a pulse rate problem in his diagnosis of Complainant. The Forum assumes, moreover, that if Dr. Becker felt that pulse recovery was such an important indicator, he would have further documented it by checking Complainant's pulse at later intervals to ascertain when it did return to an acceptable rate. Finally, if Dr. Becker regarded Complainant's pulse recovery rate as a critical indicator, he would not have been willing to give Complainant Group 1 status if Complainant had had the same recovery rate, but had been 15 pounds overweight by the chart.

Up to about four years before he applied at Respondent, Complainant had worked as a correctional officer at OSP, which if anything was a more dangerous job setting than at Respondent. Nonetheless, and even though at times he weighed at least as much as when he applied at Respondent,

Complainant performed these duties satisfactorily and was not regarded as posing any safety risk. Because of the similarities between the OSP employment setting and Complainant at OSP, on the one hand, and Respondent's employment setting and Complainant during times material, on the other hand, Complainant's OSP employment is an indication that Complainant could have safely performed the job of correctional officer during times material. Moreover, when it rejected Complainant, Respondent knew or should have known of this indication, as Complainant had described his OSP employment on his application to Respondent.

Finally, Respondent itself disproves an assumption that weight alone can establish to a reasonable probability that a person is incapable of the instant and/or sustained arduous physical activity required of a correctional officer. Respondent has employed and continues to employ people of Complainant's weight and physical "profile." There is not one scintilla of cognizable evidence on this record that even one such person has failed to perform his or her duties as a correctional officer safely. (There is only Dr. Becker's unexplained reference to one "fat boy out there" having a heart attack.) Despite Dr. Becker's opinion, Respondent itself apparently does not regard excess weight or obesity as indicators that a correctional officer is or may be incapable of performing his or her duties safely, for Respondent has not instituted any process for checking weight or obesity, or pulse recovery rate, or any other indicator of physical condition of its correctional officers on a regular basis. The evidence on the

record does not establish, in fact, that Respondent has ever checked the weight, obesity or pulse recovery rate of any already-employed correctional officer.

The facts cited above make it impossible for the Forum to accept the weight and pulse recovery tests employed by Respondent as a factual basis for believing, to a reasonable probability, that a person is incapable of instant and/or sustained arduous physical activity or of safely working a correctional officer job at Respondent. Accordingly, for all the reasons stated above, this Forum has concluded that Respondent has not demonstrated a factual basis for believing to a reasonable probability, under all the above-cited circumstances, that Complainant was incapable of instant and/or sustained arduous physical activity or could not safely perform the job of correctional officer at Respondent at the time he applied to do so. In other words, Complainant did not receive the sort of "individual assessment" required by ORS 659.425(1)(c). *Quinn, supra*, at 631.

5. Defenses

A. Liability

Respondent's defense that at all times it acted on the advice of Dr. Becker may be intended to be a defense that it acted in good faith or on reasonable grounds. Even if adequately alleged and accurate, that defense would go only to the propriety of a sanction, or remedy. *Quinn, supra*, at 628-29, quoting *Montgomery Ward, supra*, at 163. However, as the Forum has not found that Respondent acted on reasonable grounds, the defense would fail even as to that point.

B. Damages

The purpose of back pay is to help accomplish the statutory goal of eliminating the effects of unlawful discrimination by monetarily compensating the victim of that discrimination in the same manner in which she or he would have been compensated had there been no discrimination, so that the victim will neither suffer loss nor receive a windfall. ORS 659.010(2). Therefore, in this case even if Complainant has been discriminatorily rejected, if Respondent proves that, if considered further during the probationary period, the Complainant would not have been retained for legitimate reasons, the Complainant is not entitled to back pay.

The Forum is not convinced on the evidence before it that Complainant would not have been retained "but for" Respondent's discriminatory action. Respondent's evidence on this point is directed principally to the sort of investigation and evaluation which would be expected under Respondent's hiring system at the time of hearing, a system admitted to be substantially changed since 1984. There is no evidence documenting the Respondent's actual conduct in similar cases or the existence of standard or habitual investigative procedures during times material. The Forum refuses to presume facts favoring Respondent when Respondent bears the burden of proving them, particularly when there is a substantial volume of evidence relevant to Respondent's defense which would presumably be within the Respondent's possession if it existed.

Respondent contends that a background check would have revealed adverse information about Complainant

and that Respondent would have taken certain action on the basis of that information. In Finding of Fact 36, this Forum finds that a background check of some sort would have been made. What the record fails to establish by a preponderance of the evidence, however, is that the investigation would have extended to the sources of information cited by Respondent: the Complainant's personnel file at OSP and Complainant's former supervisor at OSP. There is not a single specific instance relied upon by Respondent of investigations of applicants prior to 1984 where a background check extended to the examination of personnel files at OSP or any other former employer. Similarly, no documentation was introduced that Respondent requested and reviewed work history information from former supervisors at OSP or any other former employer prior to 1984. No evidence was introduced that the former supervisor involved in this case had or has ever been contacted for such information. And there was no evidence produced that such inquiries were routinely made by the then acting security manager or, for that matter, that Respondent employed any routine or standard procedure for such investigations in 1983. To the contrary, the evidence indicates that the process lacked regularity and uniformity during times material, and that subsequent steps were taken to add greater rigor and routinization to hiring procedures.

This last observation may be the most telling, for it casts Respondent's evidence in sharp relief. The only evidence on this crucial point is the testimony of Respondent's current security

manager, Mr. Johnson, as to the sort of investigation which would have been conducted at the time of hearing and which Mr. Johnson believes would have occurred in 1983. However, Mr. Johnson also testified of his lack of experience with the relevant hiring process during times material and of changes made in that process since 1984, changes meant to address a lack of uniformity and formality in the process. Respondent, in essence, invites this Forum to assume that the acting manager in 1983 would have shared Mr. Johnson's judgment and acted upon it.

The Forum hastens to add that Mr. Johnson was found to be highly credible, and no criticism is intended either of the candor of his testimony or his judgment as to the inquiries appropriate to Complainant's application. The steps Mr. Johnson outlines strike the Forum as entirely reasonable.

But Respondent bears the burden of proving what would have been done, not what should have been done. Evidence of a standard investigative procedure including the sorts of inquiries cited here would be such evidence. Specific instances of prior inquiries of this nature would be such evidence. And more persuasive still would be evidence that the then acting security manager, Mr. Kay, routinely made such inquiries. But Respondent introduced no such evidence. Rather, the evidence indicates that the investigative process in 1983 lacked exactly this sort of rigor as well as the assignment of personnel specifically responsible for its execution.

Even assuming for the purposes of argument that the adverse information

about Complainant had reached Respondent, what evidence does the Respondent offer to establish what it would have done as a result? Respondent introduced evidence that termination of Complainant would have been justified given the need of the institution for reliable, credible, and un intimidated officers. While these needs are no doubt real, such evidence is indirect at best. Again, this Forum finds itself asking why there is no evidence of Respondent's actions in similar cases, of terminations based on the reasons involved here. The record is devoid of any such instances, and is generally lacking in any evidence of Respondent's actual conduct in similar cases.

Rather than proving what Respondent would have done on the basis of what it had done in the past, Respondent instead introduced evidence to validate the reasons it claims it would have relied upon in terminating Complainant. This Forum has no difficulty with the reasons cited; all are legitimate concerns of Respondent. But such proof largely begs the question of whether and how these concerns would have been brought to bear on Complainant.

It is plausible to the Forum that, viewed as a whole, Complainant's generally good employment history could have outweighed the negative aspects of his background, and that the high praise of employers subsequent to OSP, some of which concerned his reliability and excellent attendance record, as well as the absence of any indication of the problems cited by Respondent, could have tipped the scales in his favor.

Respondent argues essentially that the problems it cites would have disqualified Complainant outright and that no balancing would have been necessary. Why then are there no examples in the record of Respondent's quick and certain action in similar cases? Why are there no examples of information such as is involved here serving as the basis for adverse actions of any kind?

Demanding evidence of specific actions in similar circumstances, documentation of standard or habitual procedures, even of the usual procedure of individuals, is not unduly burdensome and is well within the power of Respondent to produce if it exists. It should not be forgotten that Respondent's defense is one of admission and avoidance — illegal discrimination is presumed by this point in the analysis — and it is precisely because of Respondent's illegal conduct that the fact at issue — whether Complainant would have been retained — can never be determined with certainty. Respondent properly bears the burden of persuasion in these hypothetical circumstances and should not be allowed to escape liability without establishing by a preponderance of the evidence those intervening factors upon which it relies.

STIPULATED DAMAGES

The stipulated damages represent Complainant's wage loss between August 1983 and the date of initial convenement of the hearing herein. It is the practice of the Forum where, as in the stipulated exhibit, lost wages are organized by calendar year, to compute and compound interest as of each December 31 between the commencement of the loss and the date

Respondent complies with an order for payment. Since the record does not reveal when Complainant earned the off-setting wages, the first December 31 interest computation is December 31, 1984, because interest on wages lost in 1983 cannot begin to accrue until January 1, 1984. Similarly, the interest on the 1984 wage loss begins on January 1, 1985, and that on the 1985 wage loss begins on January 1, 1986. Thereafter, since no evidence of record shows further loss, interest is compounded annually on December 31, or on the date of compliance, whichever occurs earliest. Accordingly, interest on the award of lost wages herein has been and shall be calculated in the manner shown in the Table at the end of this Order.

Total interest accrued between August 1983 and October 15, 1990, is \$11,937.39. Interest accruing between January 1, 1988, and the date of compliance with this Order shall be computed and compounded at the legal rate as of each December 31, occurring during that period and/or the date of compliance, as applicable.

ORDER

NOW, THEREFORE, as authorized by ORS 659.060(3) and 659.010(2) and in order to eliminate the effects of the unlawful practices found as well as to protect the lawful interest of others similarly situated, Respondent is hereby ordered to:

1) Deliver to the Business Office of the Portland office of the Bureau of Labor and Industries a certified check, payable to the Bureau of Labor and Industries in trust for KEITH R. GREEN, in the amount of:

a) SEVENTEEN THOUSAND SIX HUNDRED FIFTY-SIX DOLLARS AND FIFTY CENTS (\$17,656.50), representing wages Complainant lost as a result of Respondent's unlawful practice found herein; PLUS,

b) ELEVEN THOUSAND NINE HUNDRED THIRTY-SEVEN DOLLARS AND THIRTY-NINE CENTS (\$11,937.39), representing interest on the lost wages at the annual rate of nine percent accrued between January 1, 1984, and October 15, 1990, computed and compounded annually; PLUS,

c) Interest on the foregoing, at the legal rate, accrued between October 16, 1990, and the date Respondent complies with the Final Order herein, to be computed and compounded annually; PLUS,

d) TWO HUNDRED FIFTY DOLLARS (\$250.00), representing compensatory damages for the mental distress Complainant suffered as a result of Respondent's unlawful practice found herein; PLUS,

e) Interest on the compensatory damages for mental distress, at the legal rate, accrued between the date of the Final Order herein and the date

TABLE

Accrual Period	Principal at Start of Period	Annual Interest Rate	Interest Accruing During Period	Principal Accruing During Period	Total Principal and Interest at End of Period
Aug. 1983 to Dec. 31, 1983	0.00	0 %	0.00	\$6,547.62	\$6,547.62
Jan. 1 to Dec. 31, 1984	\$6,547.62	9 %	\$589.29	\$7,631.78	\$14,768.59
Jan. 1 to Dec. 31, 1985	\$14,768.59	9 %	\$1,329.18	\$3,477.10	\$19,574.97
Jan. 1 to Dec. 31, 1986	\$19,574.97	9 %	\$1,761.75	0.00	\$21,336.72
Jan. 1 to Dec. 31, 1987	\$21,336.72	9 %	\$1,920.30	0.00	\$23,257.02
Jan. 1 to Dec. 31, 1988	\$23,257.02	9 %	\$2,093.13	0.00	\$25,350.15
Jan. 1 to Dec. 31, 1989	\$25,350.15	9 %	\$2,281.51	0.00	\$27,631.66
Jan. 1 to Dec. 31, 1990	\$27,631.66	9 %	\$1,962.23	0.00	\$29,593.89

Respondent complies therewith, to be computed and compounded annually.

2) Cease and desist from discriminating against any similarly situated individual because that individual is regarded as having a physical or mental impairment.

**In the Matter of
ALVARO LINAN,
dba Jose and Jesus Forestry,
Respondent.**

Case Number 46-90
Final Order of the Commissioner
Mary Wendy Roberts
Issued October 26, 1990.

SYNOPSIS

Respondent, a farm labor contractor, defaulted by failing to appear at hearing. Even after warnings from the Agency, Respondent repeatedly failed to file certified payroll records on three forestation contracts. The Commissioner ruled that such failures demonstrated Respondent's unreliability, and refused to renew Respondent's farm labor contractor license. ORS 658.417(3); 658.445(3); OAR 839-06-140; 839-15-145(1)(b), (g); 839-15-300(1), (2); 839-15-520(2), (3)(a), (f), and (4).

The above-entitled case came on regularly for hearing before Warner W. Gregg, designated as Hearings

Referee by Mary Wendy Roberts, the Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was conducted on August 28, 1990, in the Conference Room of the Bureau of Labor and Industries Building, 3865 Wolverine Street NE, Salem, Oregon. Lee Bercot, Case Presenter for the Wage and Hour Division of the Bureau of Labor and Industries (hereinafter the Agency), presented a Summary of the Case for the Agency. Alvaro Linan, dba Jose and Jesus Forestry (hereinafter the Contractor), did not appear in person or by counsel.

The Agency called as witnesses Sandra Sterling, manager of the Licensing Unit for the Agency, and William Pick, Farm Labor Unit manager for the Agency.

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

**FINDINGS OF FACT --
PROCEDURAL**

1) By a document entitled "Notice of Proposed Denial of Farm Labor Contractor License," the Agency informed the Contractor under date of March 9, 1990, that the Agency intended to deny his application for a farm labor contractor's license. In accordance with ORS 658.445(3), the notice cited as the basis for this denial the Contractor's failure to comply with OAR 839-15-520(3)(f) by repeatedly failing to provide certified true copies of all payroll records to the Commissioner. Said notice was sent by

certified mail to the Contractor on March 9, 1990, and received by him on March 16, 1990.

2) By letter received May 2, 1990, the Contractor requested a hearing on the Agency's intended action.

3) Thereafter, on June 19, 1990, the Forum issued to the Contractor and the Agency a notice of the time and place of the requested hearing and of the designated Hearings Referee.

4) With this notice of hearing time and place, the Contractor received a document consisting of 15 pages and containing the text of OAR 839-30-020 to 839-30-200, the administrative rules governing this Forum, and a Notice of Contested Case Rights and Procedures.

5) On August 13, 1990, the Agency submitted its Summary of the Case.

6) On August 16, 1990, the Agency Case Presenter notified the Hearings Referee that he had been contacted by attorney Robert Gunn, who advised that he would be representing the Contractor at the hearing. This information was confirmed by Mr. Gunn in a letter dated August 15, 1990.

7) On August 21, 1990, the Hearings Referee issued a notice of a new hearing date for August 28, 1990, based upon agreement between counsel and the Agency.

8) On or about August 27, the Hearings Referee was notified by the Agency that Mr. Gunn had telephoned to say that neither he nor the Contractor would attend the hearing on August 28.

9) The Hearings Referee convened the hearing at 9:08 a.m., August 28, 1990. Neither the Contractor nor his counsel were in attendance.

10) The Hearings Referee found the Contractor in default and instructed the Agency to present a prima facie case for license denial, as required by OAR 839-30-185(2).

11) The Proposed Order, which included an Exceptions Notice, was issued on September 19, 1990. Exceptions, if any, were to be filed by October 1, 1990. No exceptions were received.

FINDINGS OF FACT -- THE MERITS

1) The Contractor is a natural person, who was previously licensed as a Farm Labor Contractor in license years 1985 through 1989, employing persons for the purposes of forestation and reforestation, whom he paid directly.

2) The Agency sent the Contractor a license renewal application for 1990 and documents including a copy of the rules regulating the Contractor's obligations. The Contractor applied for a license renewal for license year 1990 on February 1, 1990.

3) On his 1989 license application, the Contractor agreed to abide by the applicable statutes and the Commissioner's rules.

4) On January 19, 1990, Martin Jack Desmond of the Northwest Reforestation Contractors Association filed a protest with the Wage and Hour Division of the Agency in accordance with OAR 839-15-260. The association alleged that the Contractor had failed to file certified payroll records on two US Forest Service contracts: No.

52-0467-9-01854 (hereinafter No. 1854) and No. 52-0467-9-01863 (hereinafter No. 1863).

5) In or around January 1990, Pick caused there to be a search of the Agency's records on three contracts for which the Contractor had received an award in 1989. This included contract No. 52-0467-9-01102 (hereinafter No. 1102). The Agency's search revealed that the Contractor had failed to submit certified payroll records on any of the three contracts.

6) Work commenced on each of the three contracts as follows:

a) Contract No. 1863 – September 21, 1989;

b) Contract No. 1102 – May 10, 1989;

c) Contract No. 1854 – September 11, 1989.

7) On January 26, 1990, Pick wrote to the Contractor to advise him that he had failed to timely submit certified payroll records, and that failure to contact the agency by February 9, 1990, might result in the issuance of a citation and possible loss of license.

8) On January 29, 1990, the Contractor telephoned Pick and advised him that he would submit the certified payroll records no later than February 6, 1990.

9) On February 15, 1990, Pick noted that no records had been received, so he decided to issue a citation.

10) On March 9, 1990, the Agency issued a Notice of Proposed Denial of a Farm Labor Contracting License by certified mail to the Contractor, which was received by Alvaro Linan on March 16, 1990.

11) On August 8, 1990, Leslie Lang, the administrative assistant for the Agency's Farm Labor Contract Unit, searched the Agency's records to verify whether the Contractor had submitted any certified payroll records. Lang verified that the Contractor had failed to submit any payroll records on contract Nos. 1102 and 1863. Her search revealed, however, that the Contractor had submitted certified payroll records on contract No. 1854 on March 16, 1990.

12) A comparison of the payroll records submitted on contract No. 1854 and the diaries completed by the US Forest Service establish that the payroll records submitted on Contract No. 1854 predated the actual contract. The records also show that the Contractor had reported significantly fewer numbers of employees on the job than had the Forest Service inspector.

ULTIMATE FINDINGS OF FACT

1) Contractor was a licensed farm labor contractor during 1989.

2) In his 1989 license renewal application, Contractor agreed to abide by the statutes and rules governing farm labor contracts.

3) During 1989 and 1990, Contractor paid employees directly and repeatedly failed to submit certified payroll records on three separate contracts within 35 days from when work first began on each.

CONCLUSIONS OF LAW

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

2) As a person applying to be licensed as a farm/forest labor contractor with regard to the forestation or reforestation of lands in the State of Oregon during times material herein, the Contractor was and is subject to the provisions of ORS 658.405 to 658.503 and of Division 15 of the Agency's rules.

3) ORS 658.417 provides, in pertinent part:

"In addition to the regulation otherwise imposed upon farm labor contractors pursuant to ORS 658.405 to 658.503 and 658.830, a person who acts as a farm labor contractor with regard to the forestation or reforestation of lands shall:

"(3) Provide to the Commissioner of the Bureau of Labor and Industries a certified true copy of all payroll records for work done as a farm labor contractor when the contractor pays employees directly. The records shall be submitted in such form and at such times and shall contain such information as the commissioner, by rule, may prescribe."

OAR 839-15-300 provides, in pertinent part:

"[(1)] Forest Labor Contractors engaged in the forestation or reforestation of lands must *** submit a certified true copy of all payroll records to the Wage and Hour Division when the contractor *** pays employees directly.

"(2) The certified true copy of payroll records shall be submitted at least once every 35 days

starting from the time work first began on the forestation or reforestation of lands. ****"

The Contractor's repeated failure to file certified payroll records with the Agency on three contracts at times material herein violated ORS 658.417(3) and OAR 839-15-300.

4) ORS 658.445 provides, in pertinent part:

"The Commissioner of the Bureau of Labor and Industries may *** refuse to renew a license to act as a labor contractor upon *** complaint by any individual, if:

"(1) The licensee or agent has violated or failed to comply with any provision of ORS 658.405 to 658.503 and 658.830 and ORS 658.991(2) and (3); or

"(2) ***

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

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

"The following actions of a *** Forest Labor Contractor *** licensee *** demonstrate that the *** licensee's character, reliability or competence make the *** licensee unfit to act as a *** Forest Labor Contractor.

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

"(f) Repeated failure to file or furnish all forms and other information required by ORS 658.405 to 658.485 and these rules;"

The Contractor's repeated failure to file certified payroll records with the Agency were violations of ORS 658.417 and demonstrated his unfitness to act as a farm/forest labor contractor under ORS 658.445 and OAR 839-15-520(3).

5) OAR 839-15-520(2) provides, in pertinent part:

"When *** a licensee demonstrates that the *** licensee's character, reliability or competence makes the licensee unfit to act as a *** Forest Labor Contractor, the Commissioner shall propose that the *** license of the licensee be *** not renewed."

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

OPINION

As a licensed contractor for five years, Contractor should have been well aware of the requirement to file certified payroll records with the Agency within 35 days of when work commences, as required by ORS 658.417(3) and OAR 839-15-300(2). The evidence is uncontradicted that Contractor failed to submit any payroll records on two 1989 contracts, and very belatedly submitted records on a third contract. However, even these payroll records were inaccurate. Therefore, Contractor has clearly violated OAR 839-15-300.

This particular violation also demonstrates Contractor's unreliability. One of the grounds for issuance of a

farm labor contract is that the contractor be competent, of good moral character, and reliable. OAR 839-15-140. The contractor's reliability can be measured by the contractor's adherence to the terms and conditions of contracts or agreements made, and by whether the contractor has violated any provision of ORS 658.405 to 658.485. OAR 839-15-145(1)(b) and (g). Repeated failure to comply with the agreement between himself and the Agency, which non-compliance also violated ORS 658.417, demonstrates Contractor's unreliability. See: *In the Matter of Demetrio Ivanov*, 7 BOLI 126 (1988).

ORDER

NOW, THEREFORE, as authorized by ORS 658.005 to 658.485, I, Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries, deny Contractor a license to act as a farm or forest labor contractor, and he is prevented from reapplying for a license for a period of three years from the date of denial in accordance with OAR 839-15-520(4).

In the Matter of
RUSS BERRIE & CO., INC.,
Respondent.

Case Number 49-89
Final Order of the Commissioner
Mary Wendy Roberts
Issued November 6, 1990.

SYNOPSIS

Respondent's stated reason for Complainant's discharge, lack of acceptable sales production, was a pretext for discrimination based on sex, where one manager suggested that Complainant take a leave and was concerned that Complainant's pregnancy would adversely affect her sales, and another manager was concerned about her future absence due to pregnancy, and where the production against which complainant was supposedly measured was inconsistently evaluated. The Commissioner awarded Complainant \$10,274 in lost wages and \$3,500 for mental distress. ORS 659.029; 659.030(1)(a); OAR 839-07-510(1); 839-07-525(1)(c); 839-07-530(1) and (2).

The above-entitled contested case came on regularly for hearing before Warner W. Gregg, designated as Hearings Referee by Mary Wendy Roberts, the Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was conducted on October 18, 19, 20, and 23, 1989, in the State Office Building, 1400 SW Fifth Avenue, Portland,

Oregon. Linda Lohr, Case Presenter with the Quality Assurance Unit of the Civil Rights Division (CRD) of the Bureau of Labor and Industries (the Agency), presented a Summary of the Case for the Agency, argued Agency policy and the facts, examined the witnesses, and introduced documents. Russ Berrie & Co., Inc. (Respondent), was represented by Stephen J. Doyle, Attorney at Law, Portland. Respondent's counsel presented a Summary of the Case, argued the law and the facts, interposed objections and motions, examined the witnesses, and introduced documents. Elizabeth Bishop (Complainant) was present throughout the hearing. Al Svendsen, Respondent's regional sales manager, was present October 18 and 19, and Galen Peterson, Respondent's director of sales, was present October 20. The participants presented only oral argument on October 23.

The Agency called as witnesses the following: the Complainant, Robert Bishop (Complainant's husband), Arlene Kelley, and (by telephone) Mark Nelson, former employees of Respondent. Respondent called as witnesses: Al Svendsen, Regional Sales Manager; Galen Peterson, Director of Sales; Lon Chrisman, a former employee; and the Complainant.

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

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

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

RULING ON MOTIONS TO DISMISS

During the hearing, the Agency rested following its case in chief and Respondent moved to dismiss the Specific Charges, stating that the Agency had failed to present a prima facie case of unlawful sex discrimination based on pregnancy. After hearing argument, the Hearings Referee found that there was evidence that the fact of Complainant's pregnancy was known to management, that she had lost four sick days, that the regional manager suggested leave when discussing her health, and that the director of sales had told another salesperson that the Complainant was let go due to "her condition." The Referee found that it could be inferred that pregnancy may have been a factor and denied the motion.

Following the presentation of Respondent's case, Respondent again moved to dismiss on the basis that the Agency had failed to present a prima facie case. The Hearings Referee at that time delayed a final ruling on Respondent's motion until the Proposed Order. On the basis of the entire record, the Forum again finds that there was sufficient evidence presented from which a finder of fact could infer that the Complainant's pregnancy was a factor in the termination of her employment. Specific comment on that evidence is contained in the Opinion section of this Order. Respondent's motion to dismiss is again denied.

RULING ON AGENCY OBJECTION TO EVIDENCE

During the Respondent's case, counsel for Respondent called the Complainant as a witness and attempted to elicit information regarding Complainant's claim for unemployment compensation following her termination of employment with Respondent. The Agency objected based on the Forum's prior orders holding that unemployment compensation benefits are not considered an offset against a wage loss caused by an unlawfully discriminatory employment decision. The Hearings Referee sustained the objection. Respondent's counsel conceded that he was aware of the Forum's prior holdings, but stated that he was seeking to offset a portion of such benefits as being unlawfully obtained. He sought to establish that the Complainant had accepted employment with a successor employer and had thereafter continued to draw benefits "fraudulently." The Hearings Referee ruled that eligibility for such benefits was a determination made by the Employment Division under its rules, and that determination was not subject to collateral attack in this Forum. A proper showing of ineligibility for unemployment benefits could be made in this Forum only by evidence of a final determination of the Employment Division to that effect. Respondent's avenue for obtaining such a determination was in that forum and not before the Commissioner. The evidence was properly disregarded.

FINDINGS OF FACT – PROCEDURAL

1) On August 10, 1987, the Complainant filed a verified complaint with

the Civil Rights Division alleging that she was the victim of the unlawful employment practices of Respondent.

2) After investigation and review, and reconsideration of an initial Administrative Determination, the Civil Rights Division issued an Administrative Determination finding substantial evidence supporting the allegations of the complaint and finding Respondent in violation of ORS 659.030(1)(a).

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

4) On June 30, 1989, the Agency prepared and served on Respondent Specific Charges alleging that Respondent terminated the Complainant's employment due to her pregnancy, in violation of ORS 659.029 and 659.030(1)(a).

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

6) On July 20, 1989, Respondent through counsel timely filed an answer to the Specific Charges.

7) By telephone conference on September 11, 1989, the Hearings Referee extended the time for filing of case summaries by the participants to September 15, 1989, and thereafter by telephone conference on September 17, 1989, the Referee granted Respondent's oral motion for postponement, with the agreement of the Agency, to October 18, 1989.

8) On September 15, 1989, the Agency timely filed its Summary of the Case pursuant to OAR 839-30-071.

9) On October 6, 1989, Respondent timely filed its Summary of the Case pursuant to OAR 839-30-071 and at hearing on October 18, 1989, Respondent filed a supplemented case summary.

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

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

12) During the hearing, the participants stipulated that should Agency staff responsible be called to testify, they would testify that the summaries of the respective interviews of the Complainant and Mark Nelson were compiled by the interviewer from notes taken at the time of the interview and were part of the regularly kept Agency file, and that the Notice of Administrative Determination of Substantial Evidence was approved for issuance.

13) The Proposed Order, which included an Exceptions Notice, was issued on August 31, 1990. Exceptions, if any, were to be filed by September 10, 1990. No exceptions were received.

FINDINGS OF FACT – THE MERITS

1) Respondent Russ Berrie & Co., Inc., was a New Jersey corporation engaged in sales of gift oriented items to retailers, utilizing the personal service of one or more employees and controlling the means by which such service was performed at all times material herein.

2) Respondent's sales force was divided into three divisions: Plush N' Stuff (Plush), Expression Center (Expression), and Gift. At times material, each salesperson worked within one of these divisions, selling that particular line of product, and "partnered" with salespersons selling for one or both of the other two divisions.

3) Regardless of the division, each salesperson received a weekly guarantee as base salary against commission. The salesperson received additional compensation if sales exceeded the commission base or qualified for the partnership bonus plan, in accordance with a written contract.

4) In addition to the field salespersons, each division had regional account executives. The promotion path for salespeople was to regional account executive (RAE). Generally, the RAE had larger and more lucrative accounts. An RAE also was "partnered" with RAE's from the other divisions. From RAE, the path upward was to

regional sales manager. A director of sales supervised several regional managers.

5) Al Svendsen began with Respondent in 1981 as a sales representative in Portland. He eventually was an RAE, and in January 1987 became regional sales manager (RSM) for Oregon. As RSM, Svendsen retained his Plush division RAE accounts and was "partnered" with RAE's in each of the other two divisions.

6) Galen Peterson began with Respondent in 1979 as a sales representative in Seattle. He worked as an RSM in both Seattle and San Diego. In January 1987, he became director of sales in Seattle, responsible for three RSM's, eight RAE's, and 18 sales representatives.

7) Respondent is result oriented, the acceptable result being sales. All personnel, including sales representatives, RAE's, and managers are expected to sell product and have sales goals set on an annual basis. Failure by a sales employee to achieve a weekly sales average equivalent to a weekly projection based on the assigned annual goal can result in termination.

8) Respondent has a reputation as a high turnover, dollar-oriented, cut-throat sales operation. Of approximately 700 sales positions nationwide in Respondent's organization, 500 were vacated and refilled annually.

9) RAE's had the larger, more lucrative accounts in their division, and overlapped the geographic territory of the division field salespersons. They

made sales to the field salesperson's accounts. In that sense, they competed with the field salespersons for sales.

10) The Complainant is a female who was employed by Respondent as a sales representative between August 1, 1984, and May 11, 1987, on which date she was discharged. Her job was to call on stores and shops such as pharmacies, gift shops, and florists to sell Respondent's Plush products. She worked an average of 9 to 9½ hours per day.

11) The Complainant's duties included calling on and servicing existing accounts, as well as opening new accounts. She worked in the Portland or northern Oregon area, and had around 400 active accounts at times material. She was required to mail to Respondent's Seattle office a daily itinerary (Daily Analysis Sheet) showing which locations she had contacted, what the result was, and listing sales made and orders taken. She also sent in each order written.

12) Sales and orders reported by a salesperson on the Daily Analysis Sheet (DAS) could differ from the actual orders accepted and shipped. Generally, Respondent was of the opinion that salesperson error accounted for the differences, which included delay in receipt of order (order not mailed promptly), unavailability of product ("in stock" not noted), poor customer credit (failure to use information on late paying customers), and writing wrong account (another's account). All salespersons experienced some of these. The most frequent were mail delays and product unavail-

ability. The salesperson was held accountable for order cancellations.

13) There was no regional sales manager or director of sales to whom the Complainant could report in 1986. The DAS and orders were monitored by Robert Simmons, who at the time initiated correspondence as "General Manager, Russ Berrie and Co., Northwest"

14) Lon Chrisman worked for Respondent as an Expression division sales representative and then as a Gift division sales representative from 1983 to 1985 in Eugene. His initial salary, by contract, was \$500 per week. He considered Respondent a tough and demanding employer, totally sales dollar oriented.

15) Robert Bishop, the Complainant's husband, worked for Respondent as both Expression and Gift division sales representative from June 1985 through January 1986. His initial salary or guarantee was \$500 per month. His salary was reduced to \$400 per month by Simmons in November 1985, until he could "increase [his] direct personal bookings to an average of \$5,000 per week over the next six consecutive weeks" at which time his "salary will be increased to \$500 per week again." Robert Bishop quit to take other employment without achieving the stated goal for six consecutive weeks.

16) Arlene Kelley worked for Respondent as a Gift division sales representative from April 1986 to February 1987. She was the Complainant's Gift division partner in Portland. In approximately 10 months, she averaged \$4,775 in sales per week. She resigned because she believed the job

* The Complainant's name appeared on some Respondent records as "Withers-Bishop," reflecting her pre-marriage name.

was too demanding (i.e., "stressful"). Kelley left in good standing.

17) Mark Nelson worked for Respondent as a Plush division sales representative from April 1986 to late June 1987, when he was discharged by Respondent. He originally worked the southern Oregon region, from Salem into northern California, out of Eugene. He replaced the Complainant in Portland following her discharge.

18) Beginning about 1986, some sales representatives started work with a \$400 per week draw or salary. If the sales representative remained past a brief probationary period, the weekly salary was increased to \$500.

19) Conventional wisdom among sales representatives at times material was that average direct sales of \$5,000 per week or more would allow the salesperson to remain employed. At \$5,000 or more per week, he or she would stay "out of hot water," and would be "fairly safe."

20) Chrisman gathered the \$5,000 a week standard from Ted Norman, his former manager. Nelson and Robert Bishop were each told by Simmons that it was a minimum standard.

21) There were six sales representative positions in the Oregon region at times material. Between April 1986 and March 1987, 12 sales representatives in Oregon terminated employment. None of the 12 were pregnant females; none had achieved an average sales volume of \$5,000 per week. At least six, only one of which was above \$4,000 per week, were discharged for low sales volume.

22) Svendsen and Peterson never told any salesperson after January

1987 that there was a \$5,000 per week minimum or that there was any other minimum sales standard. Neither used salary reduction or the threat of salary reduction as an incentive to increase sales production. Both considered negative feedback to be a disincentive for a productive salesperson. As a result, each stressed a salesperson's positive accomplishments. A portion of their respective incomes was based on the success of their salespeople.

23) Other than the instances where salespeople were told, prior to January 1987, that \$5,000 was a minimum standard, the Oregon salespeople were never advised of any weekly sales figure they had to meet to stay employed. They were never told that \$5,000 was not acceptable. They were consistently urged to sell more than last week, last month, or last year.

24) Respondent's policy required that the RSM contact each salesperson weekly, usually on Sunday evening, to go over the prior week's work and plans for the coming week. Salespersons sometimes called Svendsen and spoke with him at other times.

25) Svendsen did not always contact the salespeople every Sunday.

26) The Complainant's co-workers regarded her as successful, experienced, and usually more productive than themselves. None were aware of any management dissatisfaction with the Complainant's performance prior to her discharge.

27) The eight-week booking report was a computerized summary of sales activity for a particular employee over the eight consecutive weeks

immediately before its printing date. It contained sales performance information for the current period as well as year-to-date totals and comparison data with the previous year. For each week in the period, it listed such things as direct order dollar amount, seasonal order dollar amount, number of direct orders, average dollar amount per order, direct sales average for the eight-week period, shipments by the month resulting from the employee's orders, shipments for prior years, and other data deemed relevant by Respondent.

28) Respondent's managers used the term "work ethic" to describe their interpretation of the level of work effort. As an example, calling on fewer than 50 to 80 stores per week showed a lack of "work ethic," as did a decline in direct orders or sales.

29) The figures used in the eight-week booking report represented orders accepted for shipment; they were not identical with the salesperson's DAS or with orders written.

30) Respondent's managers used the DAS as a time card, showing hours worked, and thought it a good pre-planning tool for a salesperson. It could also show a manager an employee's time management problems and customer sales resistance.

31) The eight-week booking report included the projection for that employee for the current year, that is, the annual sales goal set by management. In January 1987, the Oregon sales force met with Svendsen and Peterson at Svendsen's home. The purpose was for the salespeople to meet Peterson, to acknowledge Svendsen's new role as RSM, and to set sales goals for 1987.

32) At the January meeting, annual dollar goals for each salesperson and RAE were set. The Complainant's goal for 1987 was \$325,000. Nelson's 1987 goal was also \$325,000. The annual goals were discussed by the group. It was possible to determine the weekly expectation by dividing the annual projection by 50.

33) Individual weekly or daily goals were not discussed at the January meeting. Nelson and the Complainant were not told definite individual weekly numbers they were expected to meet or that failure to meet them would lead to discharge.

34) At times material, Respondent published a weekly newsletter entitled "The Russ Journal." The "Russ Northwest Edition" was a compilation of sales data from that geographical area, gathered from the eight-week booking report and from individual DAS forms. It was a totally positive motivational tool. It mentioned individual high sales days or weeks and regional and team (office) sales accomplishments. It listed "Stars" (over \$8,000 in a week) and "Super Stars" (over \$10,000 in a week), and also recognized leaders in numbers of orders. It sometimes included articles on sales techniques, and invariably included exhortations to sell more than before.

35) At times material, the number two person in Respondent's organization nationally was Jim Madonna. Periodically, Madonna would direct comments by way of letter or memorandum to the northwest office and/or to the area managers. Portions of his comments regarding an individual were inserted on that person's eight-week booking report on a selective

basis by Simmons in Seattle (Kent), identified by "J. Madonna" or the initials "JM." Russ Berrie also periodically wrote to his managers, and portions of his comments might be included on the report. The comment section also included personal data such as the employee's birth date, marital status and name of spouse, and the names and birth dates of children.

36) In 1985 and before, the individual salesperson received a copy of the eight-week report. Because some of the comments inserted were negative, and in order to encourage manager-to-salesperson communication, field salespersons no longer received the eight-week report after 1985. Few field salespersons had seen their own eight-week report after that time, except perhaps at a regional sales meeting.

37) Mike Wolfington, male, was hired in August 1985. He was a sales partner in Portland with the Complainant and Kelley. His weekly average for the calendar year 1986 was \$4,873, based on his 1986 total divided by 50. He was promoted to RAE in late 1986.

38) In February 1986, Russ Berrie wrote a memo to Simmons in which he commented on various employees. He suggested that a six-month sales employee (referring to Wolfington) should average better than \$5,000 per week or be replaced. He suggested that an employee who had been there a year and a half (referring to the Complainant) should book better than \$6,000 per week or be replaced. Then he said

"I am not necessarily suggesting this at this time, but certainly we

have to get to a point where these people must continue to improve."

39) The Complainant was never advised of Berrie's comments. The contents of Berrie's memo were not inserted in the comment section of either the Complainant's or Wolfington's eight-week report.

40) The comment section of Mike Wolfington's eight-week report included the following:

"Memo J. Madonna 3/3/86 -
Terminate

"Memo J. Madonna 3/31/86 -
Terminate

"* * *

"11/24/86 Fr J. Madonna - to be
RAE partner to B. Plasker."

41) The comment section of the Complainant's eight-week report contained no negative comment.

42) In addition to direct sales, the eight-week report also listed seasonal sales. These resulted from specific promotions such as Halloween, Easter, or Christmas. Respondent expected all sales, and particularly seasonal sales, to increase following the "release" of such a promotion, but did not want the long-term ratio of seasonal to regular sales to exceed 30 to 40 percent.

43) At times material, Respondent had pregnant female employees in the northwest area who had worked during their pregnancies and were then granted medical leave. None were field salespersons comparable to the Complainant except Melinda Wolfe, whose pregnancy and leave occurred after the Complainant's employment.

44) At times material, Respondent allowed sales employees a limited number of paid sick days annually. If the employee was to be absent due to illness or injury, the employee could be taken off payroll until recovery. Unless on leave, the employee was expected to produce at "100%" despite any disability.

45) With the exception of Wolfe, sales employees listed as on medical leave between June 1986 and June 1988 were on leave due to an accidental disabling injury.

46) The Complainant informed Svendsen of her pregnancy on March 3 or 4, 1987. He did not question her about her doctor's evaluation of her working or about any plans for maternity leave. The information about her pregnancy appeared in the comments section of the eight-week report:

"4/9 Baby due in November."

47) On March 27, 1987, Svendsen rode along with the Complainant on her sales calls for that date. It was the only time he did so, and the only time since 1985 that any manager had done so.

48) Svendsen made no negative comments to the Complainant about her production numbers, and did not mention that he or higher management were concerned about her numbers. He did not complete all portions of the "Field Contact Report." Under "Goals and Directions" he entered "Build orders by selling promo's, advertising and close out competition." The Complainant watched him fill out the form and thought the check marks appeared positive.

49) Svendsen did not like the "Field Contact Report" form. His own style did not include written negative feedback. He did not give written warnings to salespersons. Peterson did not favor ultimatums or warnings, either written or oral. Both believed that a salesperson was less likely to project a positive sales image resulting in optimum sales if concerned about being fired. These views reflected company policy.

50) Also in March, Svendsen twice filled out a "Personal Sales Performance Recap" on the Complainant. One was dated March 2 and covered February 2 to February 27. The second was dated March 31 and covered March 2 to March 31. The March 2 form showed \$6,190 weekly average and the comment "Beth - your bookings are up 12% over last year. Keep reaching to achieve your goal!" It also suggested that she pick up payments and reduce cancellations, plan to close four sales a day, focus on new accounts, and sell extra product.

51) The March 31 "Recap" showed \$6,510 weekly average and the advice to "ask for the 'moon' in every account," using her relationship and credibility level with her customers. It urged her to preplan account needs, "think big," pre-write orders, and plan to close four sales a day.

52) The Complainant considered the "Recaps" to be encouragement and not negative.

53) In early April 1987, the Oregon sales force met in California for the "Christmas release," a promotion of seasonal product intended to encourage increased sales and orders.

54) Nelson acknowledged a discussion with Svendsen on the return flight from the April "Christmas release" meeting in California about the strategy of "creaming accounts." He was not told his job was on the line and did not get that impression. He did not know if Svendsen had a similar conversation with the Complainant.

55) The Complainant did not recall discussing "creaming" accounts with Svendsen on the plane, and definitely did not recall any suggestion from Svendsen that her job was on the line.

56) The Complainant believed that her DAS showed her effort and performance, and that it differed only slightly from the eight-week report. Based on her years with Respondent, on what she was told by her first manager, and on the experience of her husband and others, she believed she was performing satisfactorily if she averaged \$5,000 or above per week. The emphasis to her was on daily sales and on number of sales per week.

57) On the evening of Sunday, May 3, 1987, the Complainant received a telephone call from Svendsen. He wanted to arrange for a trainee to ride with her the following day. The Complainant told him she was planning to work on the coast the next day and not in the local Portland area. She had used two sick days in March and two in April. When he asked how she was feeling, she admitted she had been sick all that day and expressed concern about having missed four days.

58) On May 3, Svendsen suggested that she might want to consider looking into taking a leave. "We were

discussing my morning sickness when he said it."

59) The condition referred to as "morning sickness" is a common though not universal symptom of early pregnancy.

60) On May 3, Svendsen suggested that the Complainant call Laurie Dahl in the Seattle personnel office in regard to leave. He knew she was working sick. He did not tell her to let him know the result. He did not tell her that her job was in jeopardy or that taking leave was a way to save her job.

61) The Complainant telephoned Seattle personnel at her next opportunity and found that she could take up to six months without pay. She did not thereafter arrange leave. Svendsen was not available later in the week.

62) A meeting of company managers was held in Palm Springs, California, in early May. It was a semi-annual event at which salespersons were evaluated for retention. It was attended by, among others, Svendsen, Peterson, and the sales vice president, Ken King. The final decision to terminate the Complainant was made by these three individuals between May 8 and 10, 1987, at that meeting.

63) Immediately prior to the semi-annual May manager meeting, Svendsen received a letter from Madonna regarding all of the salespeople and RAE's in his region. The letter contained Madonna's evaluations of each person's production and future with Respondent. Svendsen did not retain the letter and did not recall Madonna's comments regarding the Complainant.

64) Comments from "JM" (Madonna) to Svendsen, dated April 7,

1987, appeared on the eight-week reports of most northwest salespeople except McMahon (on leave) and the Complainant.

65) After May 3, the next conversation the Complainant had with Svendsen was on Monday, May 11, when he called and told her Respondent had to let her go, that this came from the top. She was immediately upset and crying and asked why. Svendsen replied something about "a couple of bad weeks."

66) Svendsen telephoned Nelson on or about Tuesday, May 12, to offer him the Complainant's territory in Portland. Nelson was given two days to decide. Accepting involved moving his household from Eugene to Portland.

67) The Complainant's discharge surprised Nelson. He believed her to be highly successful. She was in her third year with Respondent, was the top salesperson in Oregon over a year's time, had received awards in regional sales meetings, and was mentioned often in the Russ Journal Stars list. Other salespersons looked to her for advice. He had never been told that her production was low, and he believed it to be higher than his own.

68) When Nelson asked Svendsen why the Complainant was discharged, he was told that Svendsen felt that the Complainant was no longer up to the job, that she had had some sick days. Svendsen told him the Portland opportunity was good for him, and that time was of the essence as to his acceptance because management wanted to charge through the territory.

69) Nelson was concerned and surprised and wanted specifics as to

expectations and responsibilities before moving his family. He asked for and received permission to call Peterson.

70) Nelson called Peterson regarding the Portland position. In discussing the Complainant, Peterson told him:

"Let's face it, Mark; due to her present condition, she's going to have down time, anyway. We decided to make the move now."

71) Within a week, Nelson called the Complainant to tell her he had accepted her old territory. He described her as in total shock, disappointed, and hurt about being fired, but she offered to help him. He reported Peterson's remark to her.

72) Nelson didn't agree with Respondent's management style; he believed he was first placed in a bad territory, then was not given good accounts or enough time when transferred. He worked about six weeks in Portland and was discharged for low sales. Svendsen had ridden with Nelson four days before and thought Nelson had more time; Svendsen was not consulted about the date of discharge.

73) Until May 11, 1987, the Complainant had never been told that her sales were not satisfactory or that she was in any danger of being fired. She was shocked, surprised, and upset by the termination. She was disappointed, frustrated, and depressed. She was embarrassed and upset by having to cancel previously arranged sales appointments. She had never been fired before and was embarrassed to tell family and friends. She had extreme difficulty just doing her housework for two to three weeks.

She did not seek counseling or medical attention.

74) Following her discharge, the Complainant began seeking other employment by sending out résumés and answering newspaper ads. Between May 11 and June 29, 1987, she submitted applications to Pepsi, Hershey, Kellogg's, Cellular One, and several blind ads in the Portland Oregonian. She was hired on a straight commission basis on or about June 29 by Jacob E. Buerk, Seattle, a sales organization selling calendars, T-shirts, cards, sweatshirts, and other items to retailers. She began learning Buerk's product lines immediately, and started on accounts for that job on August 4. She did not seek employment during the month of July. She received her first paycheck for earned commissions on November 15. She received unemployment compensation of \$200 per week following her discharge until sometime in late October. She could not find her unemployment benefits registration booklet at time of hearing, and did not recall when or what she reported to the benefits office regarding her employment status.

75) The Complainant's baby was born November 17 and she was off work on maternity leave until January 1, 1988. She earned \$3,424.83 with Buerk in 1987. She received \$1,161.19 in January 1988, and \$1,039.04 in February 1988. In March, when she received about \$2,400, and thereafter, her earnings equaled or exceeded her monthly expectation with Respondent. Had the Complainant remained employed with Respondent, she would have earned \$13,900 between her discharge and the birth of her child (27

and 4/5 weeks times \$500), and \$4,000 between January 1 and February 29 (8 weeks times \$500). Her lost wages attributable to the discharge were \$10,274.94 ($\$13,900 + \$4,000 = \$17,900$; $\$17,900 - \$3,424.83 - \$1,161.19 - \$1,039.04 = \$12,274.94 - \$2,000 = \$10,274.94$)

76) The Complainant's contract of employment with Respondent provided, in pertinent part:

"You are entitled to two (2) weeks paid vacation scheduled as nearly as possible to the last two weeks of December. The Company will determine the specific two weeks of vacation for each year and notify you in writing as to the pertinent dates of vacation.

"Vacation is considered earned only if you are employed as a Company employee at time of designated vacation period."

77) Al Svendsen was a high producing, dollar oriented individual who believed that sales representatives wrote their own terminations based on their effort and success. He disliked written feedback and absolute goals, and believed that the "hard things" should be communicated orally. Even then, he avoided specifics and negatives. He testified that the March recaps were intended to show the Complainant her deficiencies and were actually negative, although positively worded in keeping with his habit and company policy. He testified that after the "Christmas release" meeting in California, on the flight home, he spoke to both Nelson and the Complainant about their low production. He stated

that he suggested to both a short-term strategy of "creaming" their largest accounts in order to build up their numbers. He said he meant to communicate the urgency of doing so before the semi-annual May managers meeting, and that their jobs were on the line. He testified that sales employees wanting leave had to request it; the company did not grant leave out of hand. He testified that he suggested the leave to the Complainant as a means of saving her job, that if she were on leave, she wouldn't be evaluated at the manager meeting in early May. He did not communicate this to the Complainant, and stated he wasn't very specific. He claimed to have mentioned the subject of a leave to her before, in early April, but did not describe the context. He stated that his concern was with her production numbers and not with the sick days she had used, and denied that her pregnancy prompted his suggestion, despite the concurrent discussion of her morning sickness. He denied that the Palm Springs decision about the Complainant involved her pregnancy, and stated it was based on the most recent (May 8, 1987) eight-week report. He stated that, among other considerations, the number of her orders for an eight-week period had dropped from 193 in March to 139 on the recent report, at a time when the regional average for each salesperson was 185. His calculations at hearing are on an exhibit, the copy of the May 8 summary page. Despite his claimed familiarity with the figures, the number into which he divided by eight is a total of all orders written by the regional sales force in that eight weeks (1,486) and includes those written by the six sales

representatives, two RAE's, and himself, thus, the quotient is the average orders per week for the combined sales force, and not the average number of orders per sales representative for the eight-week period.

Svendsen testified that when he informed the Complainant of her termination he mentioned that it was based on production, but was deliberately vague because it was not open to negotiation or argument. He denied attributing the discharge to "a couple of bad weeks." Due to inconsistencies and vagueness within the testimony itself, and for reasons described in the Opinion section of this Order, which are by reference incorporated herein, his testimony was given less weight whenever it conflicted with other credible evidence or inference on the record.

78) Galen Peterson appeared to be a motivated, high energy individual who loved the challenge of sales. He appeared to thrive on Respondent's particular style of sales activity:

"It is cutthroat, I love it. We don't accept mediocrity, that's why we're the leaders of our industry: it's the numbers."

His policy was "go write business." He was at times less certain about individual personnel considerations, even when they were oriented around production. He stated that he had earlier thought that the Complainant should be let go on the basis of productivity, perhaps in late March. He was "not really clear on it," "really vague;" he was not certain of which booking report was involved at the time, "probably week 13 or 14." Peterson testified that he "vaguely" remembered that

Svendsen had discussed Svendsen's suggestion of leave for the Complainant. He testified that Svendsen's concern about her was with her current production, while his own opinion was that overall she had not produced the business she should have for her time with the company, particularly after the "Christmas release" meeting. He said that there was an attempt at such meetings to "get everybody fired up," that Christmas was "a pivotal time" for people to "really start producing, really a lot of fun, people come back excited and the numbers skyrocket." He stated that after the Christmas release meeting, the eight-week weekly average should be higher than the year-to-date weekly average, reflecting "that you're on fire, writing business, having fun." He denied that the Palm Springs decision about the Complainant involved her pregnancy, and stated it was based on the most recent (May 8, 1987) eight-week report. He stated that the Complainant's eight-week average was lower than her year-to-date, her most recent week was under \$4,000, four of the eight weeks were under \$4,000 (but four were above \$6,000, three of them over \$7,000), there were a small number of orders (but she had more year-to-date than any Oregon sales representative), she didn't appear to be covering the territory completely, there was a lack of new accounts (but she was third in Oregon for the period and year-to-date), her seasonal sales were higher than her direct (but that was an expectation after a "release"), the average direct sale size was low (but second in Oregon for the period), and the trend of her yearly shippings was downward. He stated that he had believed that her

termination was inevitable, and acknowledged that Svendsen's suggestion of leave was probably intended by Svendsen to avoid evaluation and save her job. Peterson testified that he favored discharge until she could come back and "give 100%," but that he allowed his managers to manage and did not oppose the leave, which he characterized as "medical leave."

He knew at the time that she was pregnant, but denied considering her pregnancy as a factor or making any statement regarding her anticipated "down time." He stated that Wolfington's promotion was due in part to his availability: Wolfington was working in the Expression division when an Expression RAE vacancy occurred. He testified from an exhibit that Wolfington was promoted at a \$5,243 average, but at that rate his annual for 1986 would be \$262,150 instead of \$243,672. Due to inconsistencies and vagueness within the testimony itself, and for reasons described in the Opinion section of this Order, which are by reference incorporated herein, his testimony was given less weight whenever it conflicted with other credible evidence or inference on the record.

ULTIMATE FINDINGS OF FACT

1) Respondent Russ Berrie & Co., Inc., a New Jersey corporation, employed the Complainant in Oregon as a salesperson between August 1, 1984, and May 11, 1987.

2) The Complainant is a female, who became pregnant in early 1987. She reported her pregnancy to her sales manager, Al Svendsen in March 1987.

3) The Complainant's pregnancy became known to all managers, including northwest director of sales Galen Peterson, through a notation on a weekly sales report form dated April 9, 1987.

4) The Complainant lost two sick days in March and two in April due to her pregnancy.

5) Svendsen suggested that she look into taking leave.

6) Peterson did not oppose the suggestion of medical leave.

7) Svendsen and Peterson participated in the decision to discharge the Complainant.

8) Svendsen was concerned that her pregnancy would adversely affect her sales production. Peterson was concerned about her future absence due to pregnancy.

9) The Complainant was discharged due to her pregnancy.

10) Respondent's legitimate non-discriminatory reason for discharge, lack of acceptable sales production, was pretextual.

11) The Complainant was paid a \$500 per week salary against commissions. She lost \$10,274.94 as the result of the discharge.

12) The Complainant suffered sudden and severe mental and emotional distress as the result of the discharge.

CONCLUSIONS OF LAW

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

2) Respondent employed the Complainant in Oregon between August 1, 1984, and May 11, 1987.

3) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the persons and subject matter herein under ORS 659.010 to 659.110.

4) The actions, inactions, statements, and motivations of Al Svendsen and Galen Peterson are properly imputed to the Respondent herein.

5) ORS 659.030 provides:

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

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

ORS 659.029 provides:

"For the purposes of ORS 659.030, the phrase 'because of sex' includes, but is not limited to, because of pregnancy, childbirth and related medical conditions or occurrences. Women affected by pregnancy, childbirth or related medical conditions or occurrences shall be treated the same for all employment-related purposes * * * as other persons not so affected but similar in their ability or inability to work by reason of physical condition, and nothing in this section shall be interpreted to permit otherwise."

OAR 839-07-510(1) provides:

"The statutes protect pregnant women from sex discrimination in employment; pregnant women must be treated the same as males and non-pregnant females regarding their ability or inability to work by reason of physical condition."

OAR 839-07-525(1) (c) provides:

"An employer may not be-
cause of pregnancy * * * discharge
* * * a woman who is qualified and
able to perform the duties required
where such * * * discharge * * *
has the purpose or result of treat-
ing the woman differently from
males and non-pregnant females."

OAR 839-07-530 provides:

"(1) A pregnant woman is enti-
tled to the same usage of medical
or sick leave for pregnancy as is
granted employees for other medi-
cal conditions.

"(2) A pregnant woman is enti-
tled to the same usage of personal
or other leave as is granted to
other employees."

Respondent, in discharging Complain-
ant because of her pregnancy, com-
mitted an unlawful employment
practice in violation of ORS 659.030.

6) Pursuant to ORS 659.010(2)
and 659.060(3), the Commissioner of
the Bureau of Labor and Industries has
the authority under the facts and cir-
cumstances of this record to award
money damages to the Complainant
for wage loss and emotional distress
sustained, and the sum of money
awarded in the Order below is an ap-
propriate exercise of that authority.

OPINION

The Agency's burden in this case
was to establish that this Complainant
was the victim of an adverse employ-
ment decision on the part of Respon-
dent based on the Complainant's
pregnancy. If the Agency has estab-
lished this by a preponderance of the
evidence, the Complainant is entitled
to remedial relief. If the Agency case

does not preponderate, the Complain-
ant takes nothing.

Employer liability in this situation
may be established by evidence to the
effect that the Complainant, a pregnant
female, was treated differently from
non-pregnant persons. Proof of such
an accusation necessitates exploration
of the specific employment in detail in
order to ascertain how other incum-
bents of positions like the Complain-
ant's were treated. The inquiry is
focused on whether persons within the
Complainant's protected class status
(i.e., pregnant females) were treated
disadvantageously compared to males
and to non-pregnant females. If the
greater weight of the evidence shows
that pregnant females were treated ad-
versely as a class and that the Com-
plainant was so treated, the Agency
prevails.

In this case, the evidence did not
establish Respondent's practice re-
garding pregnant sales representa-
tives. Neither did it establish to the
Forum's satisfaction that Respondent
had an articulated policy regarding
pregnancy. The evidence did estab-
lish that Respondent had an expecta-
tion of all salespeople "giving 100%" in
their sales efforts. This translated into
40 or more hours per week of sus-
tained sales effort, the most reliable in-
dicator of which, to Respondent, was
dollar volume of sales and orders.

The Forum found that the two re-
sponsible managers involved had
never told the Complainant, or any
other sales representative, that an av-
erage of \$5,000 in "bookings" per
week, as reflected by the eight-week
booking report, was a safe level, that
is, would allow the salesperson to

continue working. However, there was
no evidence that staff was cautioned
that \$5,000 was not safe, despite infor-
mation which was known to both staff
and management that recent past
practice seemed to confirm that figure
as safe.

The cognizant managers testified
that it was contrary to their individual
practice to warn employees when they
were courting termination due to sub-
standard performance. Their motto
was "onward and upward," with no
negative feedback. Such a standard
did not necessarily lead to consistent
results. For instance, Woffington, who
was apparently the subject of some
doubt on the part of Russ Berrie him-
self, and whose termination was twice
suggested by Madonna, was pro-
moted with a weekly production aver-
age that was less at the time than was
the Complainant's when she was fired.
The rationale was that Woffington was
in the right place at the right time. This
might appear to qualify as different
treatment except that another male,
Nelson, was also discharged with pro-
duction roughly comparable to
Woffington.

A more demonstrable case of dif-
ferent treatment arises in the area of
disability leave. Non-pregnant persons
who were disabled from working by ac-
cidental injury were placed on leave.
Respondent's managers suggested
that this happened in each instance as
the result of the employee's specific re-
quest, but there was no direct evi-
dence to this effect. Similarly, there
appeared to be no articulated proce-
dure for obtaining leave. The Com-
plainant was advised to check into its
availability during a conversation about

her morning sickness problem, but
whether she was to arrange leave with
Seattle or discuss it further with Svend-
sen is not clear, nor was it clear to her.
Time ran out before she could deter-
mine her next step.

Whatever Respondent's "mini-
mum" production may have been, the
testimony of Peterson and Svendsen,
in justifying termination in general and
that of the Complainant in particular,
suggested that once a salesperson ap-
proached or went below a certain level,
other factors on the computerized re-
port became important. Among these
were the number of lower weeks, the
number of orders per week or per day,
comparison with prior performance,
number of new accounts, average size
of individual sales, and any other quan-
tifiable factors which the managers de-
termined indicated a "trend."

But the discussion of standards or
criteria for retention is not necessary.
The two managers who admittedly
participated in the three-person deci-
sion to discharge the Complainant
were aware of her pregnancy, and
were influenced by that knowledge in
their evaluation. Svendsen knew she
was "working sick" and was concerned
she would lose more time. Peterson
told another employee of his view that
the Complainant would eventually lose
time (in childbirth). The Forum infers
that each thought that the Complain-
ant's pregnancy would make her
claimed borderline performance worse,
or at least prevent it from improving.
That was an impermissible standard.

Peterson denied the remark attrib-
uted to him by Nelson about the Com-
plainant having future "down time."
Nelson admitted that he thought

Respondent had treated him shabbily. But he reported Peterson's words to the Complainant within a week of her discharge, while Nelson was still employed. It is illogical to suppose that his motivation at the time was retaliatory and that he concocted the reported conversation. It is not illogical to conclude that Peterson was concerned with "down time."

The Complainant's pregnancy played a key role in her discharge by Respondent. Not only was a prima facie case established, but there was proof to overcome the proffered legitimate, non-discriminatory reason of unacceptable performance.

Damages

The Forum has calculated the Complainant's wage loss at \$10,274.94 over the period from her discharge until she again achieved an income which equaled or exceeded her basic earnings with Respondent. This amount was calculated by assuming earnings of \$500 per week from the date of discharge to the date of the birth of the Complainant's child, and from her return from maternity to a time when her earnings matched or exceeded what she would have received with Respondent. From this amount, the Forum deducted her actual earnings for the two periods. Because the Complainant testified that she did not seek work in July 1988, the Forum has also deducted \$2,000 for that month. Wage loss occasioned by an unlawful employment practice is recoverable to compensate a complainant for what she would have received but for a respondent's unlawful discrimination. The award is calculated to make a complainant whole for injury caused by

the discrimination. But where a complainant excludes herself from the job market other than for the reason of accepting alternative employment, she fails for the period of that exclusion to mitigate her loss. *In the Matter of Casa Toltec*, 8 BOLI 149 (1989) (citing *In the Matter of Lee's Cafe*, 8 BOLI 1 (1989)); *In the Matter of City of Portland*, 6 BOLI 203 (1987); *In the Matter of K-Mart Corporation*, 3 BOLI 194 (1982). Prejudgment interest is awarded on the net amount from the dates when the two separate portions would have been paid, since there was no defined evidence of pay period or paydays. See *In the Matter of Lucille's Hair Care*, 3 BOLI 286 (1983), *aff'd*, *Ogden v. Bureau of Labor and Industries*, 299 Or 98, 699 P2d 189 (1985).

The Commissioner is authorized to award damages for mental distress where the evidence shows that a complainant has suffered humiliation, distress, and embarrassment due to a respondent's unlawful practice. *Fred Meyer v. Bureau of Labor*, 39 Or App 253, 592 P2d 564, *rev den* 287 Or 129 (1979). The Complainant, her spouse, and Nelson all testified credibly to the effect the discharge had on the Complainant. This testimony was undisputed. It was sudden and severe, if not long-lasting. The Forum has awarded Complainant \$3,500 to help compensate her for the distress and depression she suffered as a direct result of the discharge.

ORDER

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

found, Respondent is hereby ordered to:

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

a) TEN THOUSAND TWO HUNDRED SEVENTY-FOUR DOLLARS AND NINETY-FOUR CENTS (\$10,274.94), representing wages Complainant lost as a result of Respondent's unlawful practice found herein; PLUS,

b) TWO THOUSAND THREE HUNDRED NINE DOLLARS AND TWENTY-FOUR CENTS (\$2,309.24), representing interest on \$8,475.17 of the lost wages at the annual rate of nine percent accrued between November 17, 1987, and August 31, 1990, computed and compounded annually; PLUS,

c) FOUR HUNDRED THIRTY-FIVE DOLLARS AND THREE CENTS (\$435.03), representing interest on \$1,799.77 of the lost wages at the annual rate of nine percent accrued between March 1, 1988, and August 31, 1990, computed and compounded annually; PLUS,

d) Interest on the foregoing, at the legal rate, accrued between August 31, 1990, and the date Respondent complies with the Final Order herein, to be computed and compounded annually; PLUS,

e) THREE THOUSAND FIVE HUNDRED DOLLARS (\$3,500), representing compensatory damages for the mental distress Complainant suffered as a result of Respondent's

unlawful practice found herein; PLUS,

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

2) Cease and desist from discriminating against any female on the basis of sex and particularly because of pregnancy, childbirth, and related medical conditions or occurrences contrary to ORS 659.030 and 659.029.

3) Develop for and disseminate to all Oregon employees a written pregnancy policy consistent with Oregon statutes regarding pregnancy, childbirth, and related medical conditions or occurrences.

**In the Matter of
Trudy Kalmbach, dba
G & T Flagging, and
G & T FLAGGING SERVICE, INC.,
Respondents.**

Case Number 39-90
Final Order of the Commissioner
Mary Wendy Roberts
Issued November 13, 1990.

SYNOPSIS

Female Complainant was subjected to unwelcome and offensive verbal conduct of a sexual nature by her male supervisor, and reported the

sexual harassment to a government agency. Thereafter, in retaliation, Respondent issued a memo threatening to discharge employees for filing complaints with the state, and a warning letter placing Complainant on probation for her work performance. Finding that Complainant suffered mental distress in connection with the retaliation, the Commissioner awarded Complainant \$7,000 in compensation for her distress. ORS 659.030(1)(b) and (f); OAR 839-07-550; 839-07-555.

The above-entitled matter came on regularly for hearing before Jeanne Kincaid, designated as Hearings Referee by Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on September 11 and 12, 1990, at the Employment Division Office and basement of the jail in La Grande, Oregon. Linda Lohr, Case Presenter with the Quality Assurance Unit of the Civil Rights Division of the Bureau of Labor and Industries (the Agency), appeared on behalf of the Agency. Patricia Dooley (Complainant) was present throughout the hearing and was not represented by counsel. D. Dale Mammen, Attorney at Law, appeared on behalf of Trudy Kalmbach, dba G & T Flagging Service, and G & T Flagging Service, Inc. (Respondents).

The Agency called the following witnesses (in alphabetical order): Complainant Patricia Dooley and Belinda Powers, former employee of Respondents. Respondents called the following witnesses (in alphabetical order): Randy Carr, former foreman of Respondents; John Fincher, father of

Respondent Kalmbach and former foreman of Respondents; and Respondent Trudy Kalmbach.

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

FINDINGS OF FACT – PROCEDURAL

1) On October 7, 1988, Complainant filed a verified complaint with the Civil Rights Division of the Agency. She alleged that Respondents had discriminated against her on the basis of sex, in that Respondents had sexually harassed her and retaliated against her for having filed a sexual harassment charge, such that she was forced to take a constructive discharge.

2) After investigation and review, the Agency issued an Administrative Determination and an Amended Administrative Determination finding substantial evidence of an unlawful employment practice by Respondents under ORS 659.030(1)(b).

3) The Agency's attempt to resolve the complaint by conference, conciliation, and persuasion was unsuccessful.

4) On May 22, 1990, the Agency prepared and duly served on Respondents Specific Charges which alleged that Respondents had discriminated against Complainant on the basis of sex in that John Fincher, a supervisory employee of Respondents, engaged in conduct over a period of three months which constituted sexual harassment

of Complainant. Fincher's conduct was unwelcome and offensive to Complainant, and created a hostile and abusive work environment. The Specific Charges further alleged that after Complainant had filed a formal complaint of sexual discrimination with the state, Respondents, having knowledge of the complaint, retaliated against Complainant by issuing a memo to all employees which threatened to fire anyone who filed any further complaints with the state.

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

6) On May 25, 1990, Respondent Kalmbach filed an answer. She admitted that Complainant was a female, and was employed by Respondent G & T Flagging Service from December 14, 1987, until June 17, 1988. Respondent denied the rest of the allegations contained in the Specific Charges, and stated that Fincher was immediately removed from the job site when Respondents learned of the sexual harassment charge. Respondent Kalmbach also alleged that Complainant repeatedly came to Fincher's room and entered his bedroom, and that Complainant convinced another employee to make up these charges.

7) On June 4, 1990, W. W. Gregg, Hearings Unit Manager, sent Respondents a Notice of Default because Respondent G & T Flagging Service, Inc. had failed to file an answer. Mr. Gregg advised Respondents that an Oregon corporation must be represented by a member of the Oregon State Bar. Respondents' May 25, 1990, answer is treated as an answer only for Respondent Kalmbach. Mr. Gregg gave Respondent G & T Flagging Service, Inc. 10 days within which to file an answer.

8) On June 13, 1990, D. Dale Mammen, Attorney for Respondent G & T Flagging Service, Inc., confirmed that he was representing the corporation and that he would file an answer by June 28, and that Linda Lohr had no objection to a continuance.

9) On June 29, 1990, Mr. Mammen notified Hearings Referee Gregg that he had mailed G & T Flagging Service, Inc.'s answer. The Agency received the answer on July 2, 1990.

10) On July 24, 1990, Linda Lohr requested a postponement of the hearing, which was granted by Hearings Referee Gregg on July 25, 1990. The hearing was reset for September 11, 1990.

11) Pursuant to OAR 839-30-071, Respondents and the Agency each filed a Summary of the Case.

12) On September 4, 1990, Hearings Referee Gregg notified Ms. Lohr and Mr. Mammen that the Hearings Referee was changed from himself to Jeanne Kincaid.

13) A pre-hearing conference was held on September 11, 1990, at which time the Agency and Respondents stipulated to facts that were admitted

by the pleadings. Those facts were read into the record by the Hearings Referee at the beginning of the hearing.

14) At the commencement of the hearing, Mr. Mammen stated that he had read the Notice of Contested Case Rights and Procedures and had no questions about it.

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

16) During the hearing, Respondents submitted additional pages to an exhibit which Respondents had inadvertently failed to submit to the Agency.

17) During the hearing and pursuant to OAR 839-30-075(2)(b), the Agency moved to amend the Specific Charges to conform the damages requested therein to the evidence presented at the hearing. The motion to increase the prayer for damages to \$20,000 was granted. The Hearings Referee also agreed to consider the Agency's suggestion for an equitable remedy for ensuring that the employees are adequately apprised of their rights in light of the mobile nature of the work force.

18) The Proposed Order, which included an Exceptions Notice, was issued on October 3, 1990. Exceptions, if any, were to be filed by October 13, 1990. Exceptions were timely received and I have considered them

and made modifications where necessary.

FINDINGS OF FACT - THE MERITS

1) Between January 1, 1985, and April 16, 1988, Respondent Trudy Kalmbach and her husband, Gary Kalmbach, owned and operated a business with an assumed business name of G & T Flagging Service.

2) Respondent Kalmbach incorporated the business as G & T Flagging Service, Inc. on April 18, 1988.

3) Respondent G & T Flagging Service, Inc.'s main office is located in the same locale as G & T Flagging Service's office was located.

4) Respondent G & T Flagging Service, Inc. conducts the same type of employment, direction of traffic on highway and street construction, uses the same equipment, and employs substantially the same work force as Respondent Kalmbach did when she was doing business as G & T Flagging Service.

5) The corporate management structure of Respondent G & T Flagging Service, Inc. is the same as when the business was known as G & T Flagging Service.

6) There was no break in service between the time Respondent Kalmbach discontinued operating her business as G & T Flagging Service and incorporated it as G & T Flagging Service, Inc.

7) During the winter of 1988, Respondents conducted flagging operations in approximately eight locations and employed approximately 35 to 40 employees.

8) Respondents typically subcontract with a prime contractor.

9) Respondents train and supervise employees known as flaggers, who direct traffic in and around areas of highway construction.

10) Respondent Kalmbach operates the main office of the company out of Elgin, Oregon. However, she has contracts for flagging services throughout the western United States.

11) At each job site, Respondents employ a foreman, whose responsibilities include the hiring, training, and supervision of flaggers.

12) In December 1987, John Fincher, the father of Respondent Kalmbach, was the foreman of a job site in Florence, Oregon.

13) On December 5, 1987, Complainant took a test administered by John Fincher and his wife. The test is given to all applicants for Respondents' employment.

14) Complainant failed to score the minimum score of 85 percent required by Respondents in order to be considered for hire.

15) Approximately one week later, Mr. Fincher telephoned Complainant requesting that she retake the test, as permitted by company rules.

16) On December 13, 1987, Complainant retook the test in Mr. Fincher's mobile home in Florence. There were no other persons present. Fincher placed the answers to the test alongside Complainant and encouraged her to use them in order to pass the test. Complainant passed the test, and Mr. Fincher agreed to hire her with employment to begin the next day.

17) After going over the test with her, Fincher asked Complainant to sleep with him. She refused. Complainant believed that Fincher assumed he had the right to ask for sexual favors since he "helped" her pass the test.

18) Complainant rented a trailer from Fincher that was located two lots away from his mobile home in a mobile home park located in Florence, Oregon.

19) Between Complainant's hire and the time that Fincher was transferred to another job in Bend, Oregon, on February 8, 1990, Fincher frequently stopped by Complainant's trailer inquiring as to where she had been, with whom she had been, and what she did. Complainant consistently told Fincher that it was none of his business. Fincher also repeatedly made overtures of a sexual nature, encouraging Complainant to sleep with him. Fincher only made these overtures when his wife was not in town, and he never made such overtures in the presence of others.

20) During this period, as a result of Fincher's actions, Complainant did not feel good about herself and felt her privacy was being invaded.

21) Prior to the holiday break in 1987, Fincher approached Complainant and asked her to come to his home to watch "dirty movies." When Complainant declined, Fincher advised her that he would leave his door unlocked so in case she changed her mind she could come by.

22) Sometime during the week of January 25, 1988, Complainant complained about Fincher's sexual

* Unless specifically noted otherwise, the term "Respondents" refers to Trudy Kalmbach, G & T Flagging Service, and G & T Flagging Service, Inc.

overtures to another flagger named Belinda Powers. Powers had been hired by Fincher on or about January 22, 1988. Powers in turn told the Complainant that she had also been sexually harassed by Fincher when she took the flagger test.

23) Powers told the Complainant that Fincher had served her two alcoholic drinks while taking the test. Fincher did not provide Powers with the answers to the test. After passing the test and offering her employment, Fincher put his arm around Powers, asked her for a kiss, and pushed her towards the rear of the trailer. Powers pushed Fincher out of the way and ran out.

24) Powers worked for Respondent for approximately one year. She did not reside at the mobile home court where Fincher and Complainant were living. She avoided being alone with Fincher.

25) On or about January 27, 1988, Powers and the Complainant filed a complaint with the prime contractor, L & T Contractors, alleging that Fincher had sexually harassed them. Both women were fearful of losing their jobs.

26) Because L & T Contractors had a contract with the state, L & T Contractors referred the women's complaint to the Oregon Department of Transportation (ODOT).

27) On January 30, 1988, Kalmbach learned of the filing of the complaint from another flagger named Carolyn Gibbs. Gibbs advised Kalmbach that Powers had filed the complaint. On that same day, Kalmbach called her father and inquired about the charges. Fincher admitted that he had

told one of the women that if she did not have the money to pay for the flagger's test "she could take it out in trade."

28) Kalmbach also called Powers, questioning her why she had filed a complaint with the state rather than coming to her. Powers was surprised because she did not know who Kalmbach was. Powers was offended, fearful, and angry because she believed she had the right to complain. Powers was concerned about losing her job so she agreed to drop the charges, but she never recanted her allegations.

29) Powers advised Complainant of the telephone call, which caused Complainant to be very fearful about losing her job.

30) Kalmbach was very upset with Powers and Complainant for having filed the complaint. Kalmbach remains upset and views the incidents as a "little" sexual harassment.

31) On or about January 30, 1988, and after learning about the filing of sexual harassment charges, Kalmbach issued a memo to all the employees which stated:

"It has been brought to my attention that certain employee's [sic] have been going to the state with complaints. This will not be tolerated. The rules that you signed at beginning [sic] of employment state

"#4 If you have a problem or any discrepancies, the foreman will handle it.

"#14 There is no seniority!!!! G & T Flagging Service reserves the right to employ, and use according to your ability.

"If one more complaint is made to the state this person will be immediately discharged.

"If you feel that the problem cannot be solved by your foreman, you may call Gary or Trudy Kalmbach the owners of G & T Flagging Service at 437-3372 or 437-3970.

"Trudy Kalmbach" (Emphasis in original.)

32) This memo was attached to all the employees' paychecks at the Florence site, which they received on or about February 5, 1988.

33) Powers and the Complainant were very embarrassed and humiliated when they received this memo because they felt that it was directly aimed at them. Powers believed that the other employees knew that she and the Complainant had filed the complaint because of the way the employees had been looking at them.

34) At some point after receiving the memos threatening to fire employees who complained to the state, Respondents held a meeting to notify the flaggers that the memo was being withdrawn.

35) One day while Complainant was on the road flagging, Kalmbach asked her why she failed to come to her first before filing a complaint with the state.

36) Kalmbach eventually apologized to Complainant and Powers for her father's behavior.

37) Kalmbach transferred Fincher to a job site in Bend and demoted him to a flagger position. His last day of work was on February 5, 1988.

38) Fincher became very upset with Complainant when he learned that

she had filed a complaint with ODOT, and told her she had no right to file such a charge.

39) Kalmbach appointed Randy Carr to replace Fincher as foreman. For approximately one week Carr received training while Fincher remained on the job.

40) On occasion, Fincher's orders conflicted with Carr's orders. When Complainant followed Carr's orders, Fincher became upset with Complainant and insisted that she follow his orders, since he was still officially the foreman. Fincher's behavior was intimidating to Complainant. She became very upset and went to Terry Fields of L & T Contractors.

41) After Fincher was transferred to Bend, neither Complainant nor Powers had any further contact with Fincher.

42) In or around early February 1988, Carr spoke with Kalmbach regarding problems he was having with some of the flaggers and their radio communications. He was particularly disturbed about vulgar language over the radios and inappropriate discussions regarding the flaggers' personal lives.

43) On February 5, 1988, Kalmbach issued a warning notice, which she sent to Carr, putting Complainant on probation. As a matter of policy, Kalmbach leaves it up to the foreman to determine whether or not to issue the warning or to verbally reprimand the employee instead.

44) Soon after receiving the warning letter, Carr met with the Complainant and reluctantly showed her a warning memo that was to be issued

to Powers. He advised her that there was a warning memo directed to her as well, but refused to show it to her. He told her that she would receive it with her next paycheck.

45) The Complainant advised Powers about the warning letters they would be receiving. Both women were very upset and viewed the issuance of warning letters as retaliatory. They complained to Terry Fields of L & T Contractors.

46) The warning letters were never issued to either Powers or Complainant.

47) Prior to Carr's discussion with Complainant on or about February 10, 1988, there is no evidence that anyone within Respondents' employ had concerns about Powers's or Complainant's work performance or had criticized their performance.

48) It became known on the job site that Complainant had pressed charges against Respondents. Employees distanced themselves from Complainant because they perceived that she was receiving special treatment. Even Powers avoided Complainant because she feared associating with Complainant would jeopardize her job.

49) Carr tried to erase what had occurred, but admitted that he was concerned that Complainant would file charges against him. Carr viewed the situation as a personal issue between Complainant and Fincher; it had nothing to do with the workplace.

50) Complainant felt like an outcast at work. She was embarrassed and humiliated, and feared she would lose her job. She distrusted her fellow

employees. She experienced serious headaches, stomach pain, and distress.

51) In or around May 1988, some workers, including Powers, believed that Complainant's ability to perform safely on the job was in jeopardy. It was apparent that Complainant was under tremendous stress, which was affecting her job performance.

52) Respondent Kalmbach requested some of the flaggers to write letters to document that Complainant was an unsafe flagger.

53) There is no other evidence that once the two memos were withdrawn that Respondent directed employees to treat the Complainant any differently because she had filed a complaint.

54) Kalmbach videotaped Complainant without her knowledge while she was flagging. Although Complainant believed that she was being singled out for harassment, Kalmbach had videotaped many of the flaggers in order to develop a training tape. Her videotaping of Complainant was not retaliatory or used for the purpose of harassing her.

55) Complainant terminated her employment with Respondents on June 17, 1988.

56) I gave the testimony of Kalmbach little weight because in a number of key areas her testimony was inconsistent with documents.

57) I found Powers to be a forthright witness, who testified without hesitation and, on occasion, against her own interest. In areas of disputed testimony, I gave more credibility to the statements of Powers over Carr and Kalmbach.

58) Although Complainant's memory often failed and it was difficult to pin her down on specifics, I generally gave weight to her testimony as to facts and events which occurred, but I did not always agree with her perceptions of what the facts or events meant.

59) I found the testimony of Fincher not credible. I believe that Fincher sexually harassed Powers and Complainant. He denied harassing either woman, so I gave no weight to any of his testimony.

60) Although I generally found Carr's testimony credible, I disbelieved his testimony on a number of critical issues because it conflicted with other more credible and reliable evidence.

ULTIMATE FINDINGS OF FACT

1) Between January 1, 1985, and April 18, 1988, Trudy Kalmbach owned and operated a business under an assumed business name of G & T Flagging Service in Elgin, Oregon, with one or more employees, and was subject to the provisions of ORS 659.010 to 659.435.

2) G & T Flagging Service incorporated on April 18, 1988, as G & T Flagging Services, Inc.

3) Respondent G & T Flagging Service, Inc. performed the same functions, used substantially the same work force, operated the same equipment, and was controlled by the same persons as G & T Flagging Service.

4) Respondent G & T Flagging Service Inc.'s headquarters is in the same locale as was G & T Flagging Service.

5) Complainant was employed by G & T Flagging Service and G & T Flagging Service, Inc.

6) Complainant is a female.

7) John Fincher held a supervisory position over Complainant while in the employ of Respondent G & T Flagging Service.

8) Fincher engaged in a course of verbal conduct of a sexual nature toward Complainant while she worked at G & T Flagging Service.

9) Fincher's conduct was directed toward Complainant because of her gender.

10) Fincher's conduct was offensive and unwelcome to Complainant.

11) Complainant rejected Fincher's sexual overtures and expressed dissatisfaction with his invasion of her privacy.

12) Fincher's conduct created an intimidating, hostile, and offensive working environment for Complainant.

13) Complainant filed a complaint with the Oregon Department of Transportation alleging that Fincher had sexually harassed her.

14) After learning that a complaint of sexual harassment had been filed against Fincher, Respondent Kalmbach issued a retaliatory memo, which Complainant received, threatening to discharge any employee who filed complaints with the state.

15) Shortly after issuing the retaliatory memo, Respondent Kalmbach issued a warning letter placing Complainant on probation for her work performance. Although the memo was never received by Complainant, she knew that Respondent Kalmbach had issued it.

16) Both memos were issued in retaliation for Complainant's filing of a

sexual harassment charge with L & T Contractors against Fincher.

17) Fincher retaliated against Complainant for filing a sexual harassment charge by being hostile to her.

18) Complainant suffered embarrassment, humiliation, fear, distress, and loss of self-esteem as a result of Fincher's and Kalmbach's conduct.

CONCLUSIONS OF LAW

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

2) At all material times herein, Respondents were employers as defined by ORS 659.010 and subject to the provisions of ORS 659.010 to 659.110.

3) Respondent G & T Flagging Service, Inc. is a successor in interest to Respondent Trudy Kalmbach, dba G & T Flagging Service. *In the Matter of The Palomino Cafe and Lounge, Inc.*, 8 BOLI 32 (1989).

4) The actions of John Fincher of repeatedly asking Complainant to sleep with him and inquiring about her personal life amounted to sexual harassment of Complainant, directed at her because of her gender, in violation of ORS 659.030(1)(b) and OAR 839-07-550.

5) The actions of John Fincher, a supervisory employee over Complainant, are imputed to Respondents. OAR 839-07-555.

6) The actions of Respondent Kalmbach in issuing a memo threatening to fire employees who filed complaints with the state and issuing a warning letter putting Complainant on probation were taken in retaliation for Complainant's filing of a sexual

harassment complaint with the Oregon Department of Transportation, in violation of ORS 659.030(1)(f).

7) Pursuant to ORS 659.060 and by the terms of ORS 659.010, the Commissioner of the Bureau of Labor and Industries has the authority to issue a Cease and Desist Order requiring Respondents: to refrain from any action that would jeopardize the rights of individuals protected by ORS 659.010 to 659.110, to perform any act or series of acts reasonably calculated to carry out the purposes of said statutes, to eliminate the effects of an unlawful practice found, and to protect the rights of others similarly situated.

OPINION

In its case summary, Respondent G & T Flagging Service, Inc. asserts that it is not liable for the actions of John Fincher because he was an employee of G & T Flagging Service and not G & T Flagging Service, Inc. or Trudy Kalmbach. G & T Flagging Service, Inc. incorporated after Fincher was removed from the job site in Florence. Respondent's position is without merit.

For the purpose of Oregon's civil rights laws, an employer is defined as:

"any person * * * who in this state, directly or through an agent, engages or utilizes the personal service of one or more employees reserving the right to control the means by which such service is or will be performed." ORS 659.010(6).

All three named Respondents, Kalmbach, G & T Flagging Service, and G & T Flagging Service, Inc., meet this definition of employer. However,

Respondent G & T Flagging Service, Inc. contends that it cannot be held liable for the actions of the predecessor employers.

This Forum first resolved the issue of successor liability in the wage and hour context in the case of *In the Matter of Anita's Flowers & Boutique*, 6 BOLI 258 (1987). The Commissioner extended this reasoning to the discrimination arena in the case of *In the Matter of The Palomino Cafe and Lounge, Inc.*, 8 BOLI 32 (1989). The test for determining whether or not an employer is considered a "successor" is an individualized determination, linked to the similarities between the predecessor and successor entities.

The elements to consider are the similarities of: the name or identity of the business; its location; the lapse of time between the previous operation and the new operation; the work force employed; the product or service which is provided; and the machinery, equipment, or methods of production used.

In this instance, the names of the businesses are virtually identical, the business headquarters remained in Elgin, the nature of the work remained the same, and the same equipment was used; the work force did not substantially change, there was apparently no break in employment with the change, and the corporate management structure remained the same. One would be hard pressed to find a clearer example of appropriate successor liability.

With respect to the Specific Charges filed in this case, the Agency alleged that Respondents had engaged in two unlawful employment

practices. First, the Agency alleged that Respondents violated ORS 659.030(1)(b) by engaging in unwelcome conduct because of Complainant's sex. It alleged that this conduct created a hostile and abusive environment, which discriminated against Complainant in the terms and conditions of her employment. Second, the Agency alleged that Respondents violated ORS 659.030(1)(f) by retaliating against Complainant for filing a discrimination complaint with the state.

A. Violation of ORS 659.030(1)(b)

The Agency alleges that Respondents discriminated against Complainant on the basis of her sex. ORS 659.030(1)(b) makes it an unlawful employment practice:

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

By administrative rule, the Commissioner of the Bureau of Labor and Industries has defined sexual discrimination to include sexual harassment. OAR 839-07-550 provides as follows:

"Harassment on the basis of sex is a violation of ORS 659.030. It is discrimination related to or because of an individual's gender. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when such conduct is directed toward an individual because of that individual's gender and:

"* * *

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

Based on the great weight of credible evidence in the whole record, it is clear to the Forum that John Fincher, Complainant's supervisor, engaged in a course of sexually offensive conduct directed at Complainant based upon her gender, which created an intimidating, hostile, and offensive working environment. Although Fincher denied sexually harassing either Complainant or Powers, I found their testimony on the harassment more credible.

Both women were sexually harassed when taking the flagger test for employment. One can reasonably infer that Fincher used his supervisory role in a manner to intimidate the workers into giving in to his sexual demands.

Fincher took advantage of his close proximity to Complainant's residence to repeatedly make unwelcome sexual overtures and ask Complainant personal questions that were none of his business. Fincher's questions intimidated that he had a right to know Complainant's comings and goings, and were intimidating to Complainant.

There is no question that an employer's off-the-job actions can create a

hostile, offensive, and intimidating environment at the workplace and violate ORS 659.030. See *In the Matter of Colonial Motor Inn*, 8 BOLI 45 (1989). It is equally clear that in sexual discrimination cases the employer is strictly liable for the actions of its supervisory employees. OAR 839-07-555 (1).*

Thus, Respondent Kalmbach's lack of knowledge of Fincher's actions is not a defense to the charges. Respondents also contend that they should not be held responsible for a supervisor's unlawful employment practices when the supervisor is employed by a company such as Respondents', which is not in the position of providing day-to-day oversight of its supervisors. OAR 839-07-555 imposes strict liability on the employer regardless of where the supervisor is located. The very nature of Respondents' work, which requires mobile locations, emphasizes the need for the employer to ensure that its supervisory employees are of a good moral character and are well-versed in civil rights laws.

Rather disturbing was the attitude of both Kalmbach and Randy Carr, who replaced Fincher. Kalmbach's reference to Complainant's "little" sexual harassment complaint is an attempt to diminish the seriousness of the charges. Carr's attitude that Fincher's actions are a personal matter and not related to the work setting displays a

* In pertinent part, OAR 839-07-555(1) provides that:

"An employer * * * is responsible for its acts and those of its agents and supervisory employees with respect to sexual harassment regardless of whether:

"(a) The specific acts complained of were authorized by the employer; or

"(b) The specific acts complained of were forbidden by the employer; or

"(c) The employer knew or should have known of the occurrence of the specific acts complained of."

lack of understanding about discrimination at the work place. This is particularly disturbing since Carr ultimately became a supervisor.

On the other hand, Respondent Kalmbach should be credited for taking immediate action in removing Fincher from the Newport job site. The Forum is not insensitive to the difficulties Kalmbach faced in light of the fact that Fincher is her father.

B. Violation of ORS 659.030(1)(f)

More difficult questions are presented with respect to the charge that Respondents retaliated against Complainant for filing a sexual harassment complaint with the state. It is an unlawful employment practice for an employer to "discharge, expel or otherwise discriminate against any person because the person has opposed any practices forbidden" by Oregon's civil rights laws. ORS 659.030(1)(f). Since sexual harassment is prohibited by ORS 659.030, it is an unlawful employment practice for any employer to discriminate against an employee who takes action opposing sexual harassment.

The three areas of retaliation in dispute are as follows: (1) the issuance of a memo on January 30, 1988, threatening to discharge any employee who filed a complaint with the state; (2) the issuance of a warning/probationary letter to Complainant on or about February 5, 1988; and (3) ongoing treatment of Complainant by other flaggers and Carr after she filed her complaint until she left employment on June 17, 1988.

(1) Issuance of the January 30, 1988, memo

Complainant and Powers filed their charges of sexual discrimination with ODOT on or about January 27, 1988. Kalmbach wrote a memo dated January 30, 1988, threatening to fire any employee who filed any more complaints with the state. Employees were expected to resolve their problems with their foreman or contact Trudy or Gary Kalmbach.

Dates for all the witnesses were troublesome due to the length of time between filing this complaint and having the matter come to hearing. Based on all the testimony, I conclude that the memo was written on January 30, 1988, and issued with employee paychecks on February 8, 1988.

Respondent Kalmbach repeatedly insisted that she wrote this memo before she learned that Complainant and Powers had filed their sexual harassment complaint. She insisted that she routinely postdates memos because they frequently take time to be received by the employees, due to the distance between job sites and the main office. She also insisted that the memo was intended only to prohibit the filing of "petty" complaints. Further, she contended that the memos had never been distributed.

Kalmbach testified that she sent the memos to her foremen at all job sites. She said that when Carr received the memos he thought they might be viewed as retaliatory. He asked L & T Contractors to review the memo and they advised him not to issue them. Therefore, Carr and Kalmbach insisted that the memos were never distributed to the employees. According to

Kalmbach, Carr returned them to Kalmbach, who threw them away.

Kalmbach's position throughout the hearing was that this memo had nothing to do with the filing of the sexual harassment charges. She did not know that the charges had been filed, so it was merely coincidental. She testified that she only learned about the complaint filing when she received a letter from ODOT on February 3, 1988.

Under cross-examination, Kalmbach admitted that she had sent a letter to Fincher, also dated January 30, 1988, indicating that she had been notified this same day by another employee that a sexual harassment charge had been filed against him. Apparently this letter was not postdated.

Because this critical issue, which Respondent Kalmbach testified so stridently about under direct examination, was repudiated by the introduction of the letter to Fincher, all of Kalmbach's testimony must be called into question. Even if Kalmbach had written the memo prior to receiving notice of the filing of charges, she had plenty of time to withdraw the memo before it was given to employees with their paychecks on February 8, 1988.

Although both she and Carr testified that the memos were not given to the employees, I accept the testimony of Powers and Complainant on this point. Neither Carr nor Kalmbach

could offer any explanation as to how the employees would otherwise have known about the memo, or how ODOT happened to have a copy of the memo in its files. This finding also comports with Complainant's testimony that Respondents held a meeting formally withdrawing the memo.

(2) Issuance of February 5, 1988, warning letter

Respondents introduced an original memo dated February 5, 1988, directed to Complainant. It was labeled a warning/probationary letter. It placed Complainant on one month's probation for violation of company rules. Kalmbach testified that she had the original memo because it had never been delivered to Complainant.

Carr testified that he had verbally warned Complainant of her inappropriate behavior on the job, e.g., swearing and engaging in personal conversations on the radio. He could not recall if he had ever issued the memo to Complainant. Kalmbach testified that, even though she may write up a warning letter to an employee, a foreman is not required to issue it to an employee so long as the foreman verbally warns the employee.

Complainant testified that on a Wednesday before Friday's payday (presumably February 10, 1988), Carr advised her that both she and Powers were going to receive warning letters with their paychecks on Friday.

Although not a subject covered in this hearing, it must be pointed out that a number of employee rules contained in the exhibit showing Respondents' company rules violate Oregon wage and hour laws, which are enforced by the Agency's Wage and Hour Division (e.g., Rule #8, which only permits breaks "without pay," violates OAR 839-20-050, and Rules #10 and #12, which threaten to deduct the cost for damaged or lost supplies from the employee's paycheck, violate OAR 839-20-020).

Complainant was upset and insisted on seeing her warning letter. Carr refused to show her her own warning letter, but allowed her to see Powers's.

Complainant then went over to Powers's house and told her that they were both going to be put on probation. Complainant's testimony was supported by Powers. Neither woman actually received the written warnings, but both were upset by the threat of them and complained again to L & T Contractors and ODOT.

In light of the fact that heretofore neither woman had received any verbal or written warnings about their work performance, I conclude that the verbal warning and proposed issuance of the probationary letter to Complainant was made in retaliation against her for having filed a sexual harassment charge against Respondents with L & T Contractors.

(3) Ongoing Harassment by Respondents

I conclude that Complainant was treated differently by her co-employees. However, I find no evidence linking Respondents with any direction to the employees to treat Complainant differently. Nor do I find any credible, reliable evidence to support that Complainant notified Respondents that she was being harassed by her fellow employees because she had filed a complaint. Moreover, I find insufficient evidence to support the contention that Carr, a supervisory employee, treated Complainant differently than he did other employees because she had filed a sexual harassment complaint against Respondents.

Nonetheless, Respondents retaliated against Complainant as a direct result of her opposition to an unlawful employment practice. Complainant was humiliated and justifiably feared for her job. As this Forum has previously stated in *In the Matter of Richard Niquette*, 5 BOLI 53 (1986), retaliation is a particularly insidious form of discrimination. The public interest is furthered, at least in part, by having employees come forward with complaints of violations of the law without fear of retribution.

Although Respondents mitigated the damage by ultimately withdrawing the retaliatory memos, I conclude that a reasonable person standing in Complainant's shoes, who had received two retaliatory memos shortly after reporting a discrimination complaint, would continue to justifiably be concerned about loss of employment or other forms of retribution for a period of time, even though the "official threat" was withdrawn.

I therefore concluded that Complainant suffered ongoing mental distress connected with Respondent's retaliatory actions until she left Respondents' employ, and award mental distress damages accordingly. The damage award also reflects the mental distress suffered by Complainant during the period that Fincher was foreman.

ORDER

NOW, THEREFORE, as authorized by ORS 659.060(3) and 659.010(2), and in order to eliminate the effects of the unlawful practice found, Respondents are hereby ordered to:

1) Deliver to the Business Office of the Bureau of Labor and Industries, 305 State Office Building, 1400 SW Fifth Avenue, Portland, Oregon 97201, a certified check, payable to the Bureau of Labor and Industries in trust for Patricia Dooley, in the amount of:

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

b) Interest on the compensatory damages for mental distress, at the legal rate, accrued between the date of the Final Order and the date Respondents comply herewith, to be computed and compounded annually.

2) Cease and desist from discriminating against any current or future employee because of the employee's sex.

3) Post in a conspicuous place on the premises of each of Respondents' job sites in Oregon a copy of ORS 659.030, together with a notice that anyone who believes that he or she has been discriminated against may notify the Oregon Bureau of Labor and Industries.

4) Within six months of the date of the Final Order, enroll Trudy and Gary Kalmbach and all Respondents' supervisory employees employed in Oregon in a civil rights seminar presented by the Oregon Bureau of Labor and Industries.

5) Within 30 days of the date of the Final Order, provide a copy of the Oregon administrative rules defining sexual harassment attached to this Or-

der to all of its employees employed in Oregon.

**In the Matter of
EFIM ZYRYANOFF,
dba Northwest Forestry,
Respondent.**

Case Number 47-90
Final Order of the Commissioner
Mary Wendy Roberts
Issued November 13, 1990.

SYNOPSIS

Respondent, an applicant for a farm labor contractor license, bid or submitted prices on three contract offers to supply forestation workers when he was not licensed as a forest labor contractor, and he used as his agent a previously debarred contractor. The Commissioner held that Respondent's character and reliability made him unfit to act as a forest labor contractor, and denied his license application. ORS 658.405(1); 658.410(1); 658.415(1); 658.420(1) and (2); former OAR 839-15-125; 839-15-142(1); 839-15-520(1)(k), (2), and (3)(a) and (k); 839-15-145(1)(g) and (h); former 839-15-165.

The above-entitled contested case came on regularly for hearing before Douglas A. McKean, designated as Hearings Referee by Mary Wendy Roberts, Commissioner of the Bureau

of Labor and Industries of the State of Oregon. The hearing was conducted on September 25, 1990, at the Bureau of Labor and Industries' office, 3865 Wolverine Street NE, #E-1, Salem, Oregon. Lee Bercot, Case Presenter for the Wage and Hour Division of the Bureau of Labor and Industries (the Agency), appeared on behalf of the Agency. Janice D. Zyryanoff, Attorney at Law, appeared on behalf of Efim Zyryanoff (the Applicant). Mr. Zyryanoff was present throughout the hearing.

The Agency called the following witnesses (in alphabetical order): James Ott, inspector for the United States Forest Service; William Pick, manager of the Farm Labor Unit of the Agency; Sandra Sterling, manager of the Licensing Unit of the Agency; Debbie Weisgerber, procurement assistant for the United States Forest Service; and Efim Zyryanoff, the Applicant. The Applicant called himself as a witness.

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

**FINDINGS OF FACT –
PROCEDURAL**

1) On March 6, 1990, the Agency issued a "Notice of Proposed Denial of Farm Labor Contractor License" to the Applicant. The notice informed him that the Agency intended to deny his application for a farm labor contractor license, and cited the following bases for the denial: acting as a farm labor contractor without a license, in violation

of ORS 658.410(1) and 658.415(1), and the Applicant's character, reliability, and competence made him unfit to act as a farm labor contractor, pursuant to ORS 658.420(1). The notice was served on the Applicant on March 7, 1990.

2) On May 4, 1990, the Agency received the Applicant's request for a hearing and his answer to the notice. In his answer, the Applicant admitted that he had bid on three United States Forest Service (USFS) contracts without a license. He asserted an affirmative defense based on representations made to him by Agency personnel regarding the application process. He denied the allegation regarding his character, reliability, and competence.

3) On June 19, 1990, the Forum issued to the Applicant and the Agency a "Notice of Hearing," which set forth the time and place of the requested hearing and the designated Hearing Referee. With the hearing notice, the Forum sent to the Applicant a "Notice of Contested Case Rights and Procedures" containing the information required by ORS 183.413, and a complete copy of the Agency's administrative rules regarding the contested case process – OAR 839-30-020 through 839-30-200.

4) Pursuant to OAR 839-30-071, the Agency and the Applicant each filed a Summary of the Case.

5) At the start of the hearing the Applicant's attorney said that she had received and read the Notice of Contested Case Rights and Procedures and had no questions about it.

6) Pursuant to ORS 183.415(7), the Agency and the Applicant were

verbally advised by the Hearings Referee of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

7) During the hearing, the Agency made a motion to amend the Notice of Proposed Denial of Farm Labor Contractor License to substitute references to ORS 658.445 with ORS 658.420. The Hearings Referee granted the motion because ORS 658.420 concerns the issuance of licenses, whereas ORS 658.445 concerns revocations, suspensions, or refusals to renew existing licenses.

7) The Proposed Order, which included an Exceptions Notice, was issued on October 16, 1990. Exceptions, if any, were to be filed by October 26, 1990. No exceptions were received.

FINDINGS OF FACT – THE MERITS

1) The Applicant is also known as Jim Zyryanoff. He was a licensed farm/forest labor contractor in 1984 and 1985.

2) The Applicant is the half brother of Demetrio Ivanov. Ivanov, doing business as Northwest Brushing, operates a farm labor contractor business out of Mt. Angel, Oregon. Applicant worked with Ivanov on forest labor contracts during 1984 and 1985. Ivanov was denied an Oregon farm/forest labor contractor license by the Commissioner on April 11, 1988. The Applicant knew Ivanov had been denied a license.

3) In May 1989, Ivanov was awarded a USFS contract, number 53-9JGA-9-1K015 (hereinafter No. 15), for grubbing in the Plumas National

Forest, California. No license was necessary in California to be a farm labor contractor. Ivanov gave 930698807 as his taxpayer identification number. On a number of the contract documents, the Applicant appeared as a person representing Northwest Brushing. On one document, the Applicant signed for Northwest Brushing, designating Enrique Viallobos as the contractor's representative. The contract work was performed in July 1989.

4) Jim Ott was the USFS inspector on contract No. 15. At a "pre-work meeting," Ivanov and the Applicant represented Northwest Brushing. Ott's primary contact person on the project was the Applicant. Based upon his contacts with the Applicant, including frequent inspections at the worksite, Ott believed the Applicant was a co-owner of Northwest Brushing with Ivanov. Ott always listed the Applicant and Ivanov as owners on his Contract Daily Diary forms, and listed Viallobos as the foreman. Ott believed that Applicant had "full authority" for Northwest Brushing on the contract. At hearing, the Applicant testified that he was Ivanov's employee and had no authority to sign documents. Applicant testified that "if they [USFS] assumed something, that's their problem I guess."

5) The Applicant and Ivanov discussed the Applicant getting into the farm labor contractor business. They discussed the bidding process.

6) In August 1989, the Applicant, doing business as Northwest Forestry, submitted an offer on USFS Solicitation number R5-11-89-117 (hereinafter No. 117), which was a tree thinning project in the Plumas National Forest,

California. On an "Experience Questionnaire," the Applicant listed contract No. 15 as a project his business had completed. He listed Ivanov and Ramon Loa as foremen and "principal individuals" in his business. Applicant gave 930698807 as his taxpayer identification number. He got the contract offer forms from Ivanov. Ivanov gave Applicant help in preparing the offer, such as estimating the amount of time necessary to complete the job. Applicant's offer was mailed to the USFS in a Northwest Brushing envelope.

7) In August 1989, the Applicant made an offer on Request No. RFQ-11-89-0104 (hereinafter No. 104), a project in the Plumas National Forest, California. He got the contract offer forms from Ivanov, who also helped him prepare the bid. Applicant listed Ramon Loa as the foreman. The offer was mailed in an envelope with a return address of "N W Forestry, J. Zyryanoff, 950 Gatch St., Woodburn, OR 97071."

8) During September 1989, Antonia Ivanov signed an offer for "N W Forestry, 950 Gatch St., Woodburn, OR 97071" on Solicitation number R5-11-89-116 (hereinafter No. 116), a thinning and grubbing project in the Plumas National Forest, California. Antonia Ivanov is Demetrio Ivanov's wife. Applicant could not explain why Ms. Ivanov had filled out and submitted the application for him. He testified that he had not given her authority to do so; "she got nothing to do with me." On the "Experience Questionnaire," contract No. 15 was listed as a project completed by the Applicant's business. D. Ivanov and Ramon Loa were listed as "principal individuals" of the

business, in the position of foremen. The offer was mailed to the USFS in a Northwest Brushing envelope.

9) During September 1989, the Applicant contacted the Agency regarding a farm labor contractor license. When he got a license application packet from the Agency, he "skimmed through" the statutes and rules regarding farm labor contractors, including the sections that define what a contractor is. He was planning to use Ivanov as his foreman. He decided not to apply for a 1989 license, which would have expired on January 31, 1990. He decided to wait and apply for a 1990 license. He borrowed \$25,000 from Ivanov to get bonds for contracting work in Oregon and Washington.

10) On December 27, 1989, Applicant submitted an offer on Solicitation number R6-1-90-0401 (hereinafter No. 401), a forest labor project in the Deschutes National Forest, Oregon.

11) On January 18, 1990, the Agency received Applicant's application, which did not include payment of the license fee. An application is not complete if it does not contain the license fee, or if all answers on the form are not complete.

12) On January 19, 1990, Applicant submitted an offer on Solicitation number R6-6-90-27 (hereinafter No. 27), a forest labor project in the Mt. Hood National Forest, Oregon.

13) At some time before January 22, 1990, Applicant submitted an offer on Solicitation number R6-12-90-202 (hereinafter No. 202), a forest labor project in the Siuslaw National Forest, Oregon. Bids were opened on January 22, 1990.

14) On January 26, 1990, the Applicant contacted the Agency to check on his application. The Agency took information from the Applicant in order to complete a question on the application, and told him that he needed to send in the license fee. He sent a check for the fee, which the Agency received on January 29, 1990. Agency personnel told the Applicant that the application would take a few days to process. No one from the Agency gave him a specific date on which he would be issued a license.

15) Applicant knew he was bidding without a license for project Nos. 401, 27, and 202. He felt he

"had to bid. The jobs have closing dates. * * * If you miss that date, you lost your chance to bid on that job."

He made a business choice to bid before he was licensed. He expected to have a license before starting work in February 1990 on any of the Oregon contracts he had bid for.

16) When Applicant learned that his application had been referred to the Farm Labor Unit for investigation, he notified the three national forests in Oregon where he had submitted bids that there was a problem with obtaining a farm/forest labor contractor license.

17) In May 1990, the Applicant was awarded a contract, number 53-9JGA-0-1K011 (hereinafter No. 11), by the Plumas National Forest in California. On the "Experience Questionnaire," the Applicant listed contract No. 15 as a project completed by his business. Ivanov accompanied the Applicant and Ott during the first site visit, and Ott saw Ivanov on the site on one

other occasion. The Applicant testified that Ivanov was not his employee on the job. The Applicant performed the contract between July and September 1990. A crew of workers quit the job over a dispute about wages. The Applicant paid off the crew at the correct hourly rate including benefits. Applicant completed the contract in a satisfactory manner.

18) At the time of hearing, the Applicant saw Ivanov "all the time," usually around twice per week. They saw each other on a social basis. Applicant and Ivanov jointly owned some rental properties, and together they managed and maintained those properties. Applicant owned a farm, but Ivanov had no connection with it.

19) The Hearings Referee observed the Applicant's demeanor and carefully reviewed his testimony, along with other evidence in the record. Based on that, the Hearings Referee found Applicant's testimony not credible where it was contradicted by other credible evidence and where it was inconsistent. In addition, based on the foregoing, and based on Applicant's family relationship and past close working relationship (on farm/forest labor contractor projects) with his brother Demetrio Ivanov, the Forum found Applicant's testimony about having no future working relationship with Ivanov not credible.

ULTIMATE FINDINGS OF FACT

1) During times material herein, Applicant was not licensed by the Commissioner of the Bureau of Labor and Industries as a farm/forest labor contractor.

2) The Applicant bid or submitted prices on three contract offers to supply workers to perform labor for another in forestation or reforestation of lands in Oregon.

3) The Applicant proposed to or did use Demetrio Ivanov as his agent for the performance of farm labor contractor activities, as defined in ORS 658.405(1).

4) Within the preceding three years, Demetrio Ivanov violated sections of ORS 658.405 to 658.485 and had a farm/forest labor contractor license denied.

CONCLUSIONS OF LAW

1) As a person applying to be licensed as a farm/forest labor contractor with regard to the forestation or reforestation of lands in the State of Oregon, the Applicant was and is subject to the provisions of ORS 658.405 to 658.503.

2) ORS 648.405 to 658.503 provide that the Commissioner of the Bureau of Labor and Industries shall administer and enforce those sections. The Commissioner has jurisdiction over the person and subject matter herein.

3) By bidding or submitting prices on contract offers for forestation or reforestation projects in Oregon without a valid license issued by the Commissioner, the Applicant violated ORS 658.410(1) and 658.415(1), and former OAR 839-15-125.*

4) The following actions demonstrate that the Applicant's character, reliability, or competence make him unfit to act as a forest labor contractor: violations of ORS 658.410 and 658.415, and employing or using an agent, Demetrio Ivanov, who has had a forest labor contractor license denied. ORS 658.420(1); OAR 839-15-520 (3)(a) and (k), 839-15-145(1)(g) and (h).

5) Under the facts and circumstances of this record, and according to the law applicable in this matter, the Commissioner of the Bureau of Labor and Industries has the authority to and may deny a license to the Contractor to act as a farm/forest labor contractor. ORS 658.420(1) and (2); OAR 839-15-142(1), 839-15-520(1)(k) and (2).

OPINION

The Applicant was charged with acting as a farm/forest labor contractor without a license and with being unfit to act as a contractor because he used as his agent Demetrio Ivanov, who had been denied a farm/forest labor contractor license within the previous three years. The Agency proposed to deny the Applicant a license.

Acting as a Farm/Forest Labor Contractor Without a License

The Applicant admitted the charge of acting as a contractor without a license. He bid on three USFS contracts in Oregon before he was licensed. ORS 658.405 provides in part:

* OAR 839-15-125 was amended effective March 1, 1990. Former OAR 839-15-125 provided:

"No person may perform the activities of a Farm or Forest Labor Contractor without first obtaining a temporary permit or license issued by the Bureau. No person may perform the activities of a Forest Labor Contractor without first obtaining a special indorsement from the Bureau authorizing such performance."

"As used in ORS 658.405 to 658.485 and 658.991(2) and (3), unless the context requires otherwise:

"(1) 'Farm labor contractor' means any person * * * who bids or submits prices on contract offers for those activities; * * *"

ORS 658.415(1) provides in part:

"No person shall act as a farm labor contractor unless the person has first been licensed by the commissioner pursuant to ORS 658.405 to 658.485 * * *"

As an affirmative defense to the charge, the Applicant alleged that

"he had his application on file with the Bureau of Labor and Industries and had been advised by said Bureau that the application process would proceed quickly. Since applicant had no previous experience in Oregon as a farm labor contractor and had fulfilled all the requirements for application; [sic] he knew of no reasonable basis for a denial of his license and felt assured by his numerous contacts with the Wage and Hour Board that his license application would be reviewed in an expeditious manner and he would have a license to provide to the US Forest Service in the event he was awarded any Jobs."

The Applicant's defense fails for two reasons. First, the facts do not support the Applicant's allegations. Project No. 401 was bid before he submitted his license application, and No. 27 was bid two days after he sent his application to the Bureau. Bids for No. 202 were opened by the USFS on

January 22, five days after the Applicant submitted his application for a license. It is reasonable to infer that he bid on No. 202 before he had applied for the license. Thus, at least one, and probably two, of his bids were made before he had submitted his license application. The other bid was sent just two days after he had sent the application. The evidence also showed that he had bid before his application was complete, since he had not completed all of the questions on the form and had not sent in his license fee. Even if his application had been complete, a license would not have been effective until February 1, 1990. Former OAR 839-15-165. Regarding his past experience with the Bureau, the evidence showed that the Applicant was previously licensed. Based upon that experience and the fact that he had received and "skimmed through" the farm labor contractor statutes and rules, the Applicant cannot be heard now to plead ignorance of the law. To the contrary, he should have known that his "business choice" of bidding without a license was unlawful and could jeopardize his application.

Second, even if the Applicant did have a reasonable expectation of receiving his license expeditiously, based on statements made by Bureau personnel, this is not a defense to acting without a license. Nothing in the Applicant's allegations, even if true, would give rise to equitable estoppel, because nothing in the law permits a person to bid while an application is pending. Nothing in the law says that everything will be all right if a person receives a license before being awarded a contract. At best, such

allegations would be relevant to the appropriate sanction for the violations.

Applicant's Character, Reliability, or Competence Make Him Unfit to Act as a Farm/Forest Labor Contractor

The evidence was persuasive that the Applicant and Ivanov worked as apparent partners on contract No. 15. The evidence is uncontroverted that the Applicant proposed to use Ivanov on project No. 117. It is notable that the Applicant's bid on No. 117 was mailed in Ivanov's company's envelope, and the Applicant used the same taxpayer identification number on the bid that Ivanov had used on contract No. 15. On project No. 116, the Applicant himself testified that it was "pretty incredible" that Ivanov's wife submitted a bid on the Applicant's behalf, but without his authority. The Hearings Referee also found that to be incredible, and on that bid the Applicant proposed to use Ivanov on project No. 116. The evidence was insufficient to establish whether the Applicant used Ivanov on contract No. 11. On the three Oregon projects that he bid, the Applicant expected to use Ivanov until he learned from the Agency that that could cause him trouble.

ORS 658.420 provides in part:

"(1) The Commissioner of the Bureau of Labor and Industries shall conduct an investigation of each applicant's character, competence and reliability, and of any other matter relating to the manner and method by which the applicant proposes to conduct and has conducted operations as a farm labor contractor.

"(2) The commissioner shall issue a license within 15 days after the day on which the application therefor was received in the office of the commissioner if the commissioner is satisfied as to the applicant's character, competence and reliability."

OAR 839-15-145(1) provides in part:

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

"* * *

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

"(h) Whether a person has employed an agent who has had a farm or forest labor contractor license denied * * * or who has otherwise violated any provision of ORS 658.405 to 658.485."

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

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

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

"* * *

"(k) Employ or use an agent who has had a farm labor contractor license denied * * * or who has otherwise violated ORS 658.405 to 658.485."

Reading the above statutes and rules together, it is clear that using or

employing a person who has had a license denied or who has violated the farm labor contractor statutes within the preceding three years

"demonstrate[s] that the applicant's *** character, reliability or competence make the applicant *** unfit to act as a Farm or Forest Labor Contractor."

Here, the Applicant was an apparent partner with Ivanov on one contract, and the Applicant proposed to use him on several others. In his answer, the Applicant admitted that he "had dealings in California with Demetrio Ivanov," but knew that Ivanov was permitted to do business in California. He believed he had violated no law by associating with Ivanov, and claimed he had no knowledge of any Oregon administrative rule prohibiting such association. He claimed that his association with Ivanov occurred before he decided to apply for an Oregon farm labor contractor license. He denied that such dealings with Ivanov in California make him unfit to be a contractor in Oregon.

The fact that the Applicant worked with Ivanov outside of Oregon does not insulate him from the application of the laws and rules set out above. ORS 658.415, which describes the license application requirements, asks in two paragraphs whether an applicant or other persons financially interested in the applicant's operation have had farm labor contractor licenses denied, revoked, or suspended "in this or any other jurisdiction." Certainly, evidence that an applicant had failed to pay workers in another jurisdiction would be relevant to the Commissioner when investigating the applicant's

character, competence, and reliability. Oregon law does not prohibit the Applicant from using Ivanov on forest labor projects in California. It does, however, provide that the Commissioner may consider, as she determines the Applicant's fitness to be licensed, the Applicant's association with a person who has previously violated the farm labor contractor law and has had a license denied as a result. Accordingly, evidence of an applicant's activities outside of Oregon shall be considered when deciding the applicant's fitness for an Oregon farm or forest labor contractor license.

The Applicant's use of Ivanov, together with his three violations of ORS 658.410 and 658.415, demonstrate that the Applicant's character and reliability make him unfit to act as a farm or forest labor contractor.

OAR 839-15-142(1) provides:

"The Bureau may refuse to license or renew the license of any person who proposes to use any individual, partnership, association, corporation or other entity as such person's agent for the performance of any activity specified in ORS 658.405(1), when the proposed agent has, within the preceding 3 years, violated any section of ORS 658.405 to 658.485."

OAR 839-15-520 provides in part:

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

"* * *

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

"(2) When the applicant for a license * * * demonstrates that the applicant's * * * character, reliability or competence makes the applicant * * * unfit to act as a Farm or Forest Labor Contractor, the Commissioner shall propose that the license application be denied * * *"

Based on the facts of this case and the applicable law, the Order below is a proper disposition of Efim Zyryanoff's license application.

ORDER

NOW, THEREFORE, as authorized by ORS 658.405 to 658.503, the Commissioner of the Bureau of Labor and Industries hereby denies Efim Zyryanoff a license to act as a farm or forest labor contractor, effective on the date of issuance of this Final Order.

In the Matter of CITY OF UMATILLA, a municipality, Respondent.

Case Number 42-89
Final Order of the Commissioner
Mary Wendy Roberts
Issued November 23, 1990.

SYNOPSIS

Respondent failed to file a timely answer, and was held in default. The Forum denied Respondent's motion for

relief from default because it failed to state a circumstance over which it had no control or an excusable mistake. The Forum refused to allow Respondent to examine witnesses or present evidence at hearing. On the merits, Respondent subjected the female Complainant to discriminatory conditions in duties and in consideration for training and promotion because of her sex, creating intolerable working conditions from which complainant resigned. Finding a constructive discharge, the Commissioner ordered Respondent to pay Complainant \$19,504.68 in lost wages and \$3,500 for mental suffering. ORS 659.030(1)(a) and (b).

The above-entitled contested case came on regularly for hearing before Warner W. Gregg, designated as Hearings Referee by Mary Wendy Roberts, the Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was conducted on June 27, 1989, in Suite 240, State Office Building, 700 SE Emigrant, Pendleton, Oregon. Linda Lohr, Case Presenter with the Civil Rights Division of the Bureau of Labor and Industries (the Agency), presented a Summary of the Case, argued Agency policy, and examined the witnesses. The City of Umatilla (Respondent), after being duly notified of the time and place of the hearing and of its obligation to file an answer within 20 days of the issuance of the Specific Charges, failed to file an answer as required. The Hearings Referee previously found Respondent in default and ruled that Respondent was thereby precluded from presenting evidence or argument at the hearing. John Witty,

Attorney at Law, as counsel for Respondent, and Eve Foote, City Administrator for Respondent, were present throughout the hearing. Brenda Sawyer (the Complainant) was present throughout the hearing and not represented by counsel.

The Agency called as witnesses the following: the Complainant; Mack Abel, Estella Griffin, Hartley Seeger (by telephone), Leonard Zinda (by telephone), all former employees of Respondent; Bill Ceams and Bruce Nobles, current employees of Respondent; and Agency Senior Investigator Susan Moxley.

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

RULING ON MOTIONS

After the commencement of the hearing, John Witty, Attorney at Law, on behalf of Respondent City of Umatilla, hand-delivered to the Hearings Referee a document entitled "Objection, Motion for Dismissal, and Motion for Reconsideration of Default," dated June 27, 1989.

There is no specific provision in the Forum's rules allowing a motion to the Hearings Referee for reconsideration of a pre-hearing ruling; referee rulings are always subject to ratification or rejection by the Commissioner, *Metco Manufacturing, Inc. v. Bureau of Labor and Industries*, 93 Or App 317, 761 P2d 1362 (1988). The Hearings Referee has on occasion reserved ruling

where a non-defaulting party has renewed or restated its prior motion, and made a disposition of the renewed motion in the Proposed Order, after the taking of evidence. *In the Matter of Dunkin' Donuts, Inc.*, 8 BOLI 175 (1989). That is not the case here. Respondent was found in default based on its failure to timely respond to the Specific Charges. The Referee's ruling in this regard was based on service of charges on Respondent and on an attorney acting on Respondent's behalf, a subsequent notice to both of a change of referee, and a failure by either to respond. The Hearings Referee then ruled that Respondent had failed to show good cause for the untimeliness, based on the failure to clarify the role of the attorney's associate, who has since handled the case, and on the failure to explain the disposition of the referee change notice, which should have alerted someone to an ongoing proceeding. The ruling which denied Respondent's request for relief from default was not reconsidered. Accordingly, Respondent's Objection and Motion For Dismissal and Motion(s) For Reconsideration were not appropriate and were not considered, nor were the Agency's responses thereto.

FINDINGS OF FACT – PROCEDURAL

1) On December 22, 1987, the Complainant filed a verified complaint with the Civil Rights Division of the Agency alleging that she was the victim of the unlawful employment practice of Respondent.

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

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

3) The Civil Rights Division Investigative Supervisor Pat Clark approved the Administrative Determination prepared by Senior Investigator Susan Moxley, and subsequently initiated conciliation efforts between the Complainant and Respondent. She concluded that conciliation had failed and referred the case to the Agency's Quality Assurance Unit for further action. Respondent's representative during investigation and conciliation was Bruce Bischof, Attorney at Law.

4) On May 3, 1989, the Agency prepared and served on Respondent Specific Charges alleging that Respondent had treated the Complainant differently and adversely from similarly situated male employees based on her female sex, constituting discrimination based on sex in the terms, conditions, and privileges of employment, in violation of ORS 659.030(1)(b), and thereby created and maintained a sexually discriminatory and intolerable work atmosphere forcing the Complainant's involuntary resignation, in violation of ORS 659.030(1)(a).

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

istrative rule regarding responsive pleadings.

6) A copy of those charges, together with items a through d of Procedural Finding 5 above, were sent by certified mail, postage prepaid, to the last known address (supplied by the Agency) of the following pursuant to OAR 839-30-030(1):

City of Umatilla, City Administrator,
P.O. Box 130, Umatilla, Oregon
97882

Bruce Bischoff [sic], Attorney at
Law, P.O. Box 3215, Sunriver,
Oregon 97707

6) Both the Notice of Contested Case Rights and Procedures (item b in Finding 5) and the Bureau of Labor and Industries Contested Case Hearings Rules (item d in Finding 5), at OAR 839-30-060(1), provide that an answer must be filed within 20 days of the issuance of the charging document.

7) US Post Office Domestic Return Receipts, Certified Mail, have since been received showing delivery to the following addressees on the date indicated per the signature listed:

City of Umatilla, City Administrator,
May 4, 1989, Agent – Rena Cant

Bruce Bischoff [sic], Attorney at
Law, May 8, 1989, Agent – D. Bell

8) On May 8, 1989, the Forum sent a letter entitled "Notice of Change of Referee" by first-class mail with postage prepaid thereon to the following:

City of Umatilla, City Administrator,
P.O. Box 130, Umatilla, Oregon
97882

Bruce Bischoff [sic], Attorney at Law, P.O. Box 3215, Sunriver, Oregon 97707

Neither letter was returned.

9) On May 31, 1989, the Forum sent a letter entitled "Notice of Intent to Default" by first-class mail with postage prepaid thereon to the following:

City of Umatilla, City Administrator, P.O. Box 130, Umatilla, Oregon 97882

Bruce Bischoff [sic], Attorney at Law, P.O. Box 3215, Sunriver, Oregon 97707

The purpose of the letter was to assure that no late-delivered, but otherwise timely, answer to the Specific Charges existed. Neither letter was returned.

10) On June 5, 1989, the Hearings Referee received a telephone call from Attorney John Witty to the effect that he and Mr. Bischoff represented the City of Umatilla. The Hearings Referee advised him to follow the rules of the Forum regarding requesting relief from default. Mr. Witty stated that the request would be in the mail by June 6, 1989.

11) On June 12, 1989, the Forum issued a Notice of Default under OAR 839-30-185. This notice, including a copy of OAR 839-30-185, DEFAULT, and a copy of OAR 839-30-190, RELIEF FROM DEFAULT, was transmitted by telephone facsimile and also sent by first-class mail with postage prepaid thereon to the following:

Bruce Bischoff [sic] and John Witty, Attorneys at Law, P.O. Box 3215, Sunriver, Oregon 97707. FAX # 503-593-6134

The notice recited that pursuant to OAR 839-30-190, a party found in

default had 10 days from the notice to request relief from default.

12) Also on June 12, 1989, the Hearings Unit received by certified mail from attorney Bruce P. Bischoff a Motion For Relief From Default postmarked June 8, 1989, which the Forum finds was timely under the Forum's rules.

13) On June 13, 1989, the Agency Case Presenter submitted a letter opposing Respondent's Motion For Relief From Default; it recited the Case Presenter's impression, based on a June 7, 1989, telephone conversation that Mr. Witty was involved in the case prior to the due date for answer.

14) The Motion For Relief was supported by the affidavit of Mr. Bischoff, which recited circumstances intended to account for the Respondent's failure to file an answer herein: a death in Mr. Bischoff's family leading to an out-of-state funeral, and a vacation replacement for the regular secretary; these combined to allow the hearing notice and charges to be filed away without timely action.

16) On June 16, 1989, finding that both Respondent's attorney's office and Respondent received copies of the Specific Charges and of the Notice of Change of Referee prior to the due date for answer herein, and noting that the motion and affidavit did not clarify Mr. Witty's role or account for the disposition of the Notice of Change of Referee, the Hearings Referee found that the "good cause" standard of the Forum's rules had not been met and denied the Motion for Relief, citing *Metco Manufacturing, Inc. v. Bureau of Labor and Industries*, 93 Or App 317, 761 P2d 1362 (1988). This ruling was

transmitted by telephone facsimile and also sent by first-class mail to Respondent and to both Mr. Bischoff and Mr. Witty.

17) Pursuant to OAR 839-30-071, on June 19, 1989, the Agency timely filed a Summary of the Case.

18) John Witty, Attorney at Law, and Eve Foote, City Administrator, City of Umatilla, attended and were present throughout the hearing of June 27, 1989.

19) At the beginning of the hearing, the Hearings Referee noted that the Respondent would be precluded from presenting evidence, examining the Agency's witnesses, or otherwise participating in the hearing due to the failure to file a timely answer.

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

21) At the beginning of the hearing, the Hearings Referee did not admit into evidence certain portions of the Forum's administrative file, stating that they were nonetheless part of the record:

a) A document entitled "Answer to Specific Charges in the Case of Sawyer/City of Umatilla," dated June 12, 1989, and received by the Hearings Unit on June 14, 1989, from Mr. Bischoff's office over the signature of Mr. Witty;

b) A copy of a letter from Mr. Witty challenging the Agency's understanding of his involvement with this case, a copy of Mr. Witty's affidavit reciting the circumstances of Respondent's

notification to his office of "another hearing on Brenda Sawyer scheduled for June 27th" and his unfamiliarity with this Forum, and copy of a document entitled "Respondent's Case Summary," all received by the Hearings Unit on June 16, 1989, by telephone facsimile;

c) The original of "Respondent's Case Summary," postmarked June 16, 1989, and received by certified mail on June 19, 1989;

d) The original of Witty letter and affidavit of June 16, postmarked June 16, 1989, and received by certified mail on June 19, 1989.

22) After the beginning of the hearing on June 27, 1989, Mr. Witty hand-delivered to the Hearings Referee and the Agency a document entitled "Objection, Motion for Dismissal, and Motion for Reconsideration of Default," dated June 27, 1989.

23) On June 28, 1989, the original of a separate Motion for Reconsideration with cover letter dated June 22, 1989, and postmarked June 22, 1989, was received by the Hearings Unit in Portland by certified mail.

24) On June 29, 1989, the Agency submitted a response to the Motion for Reconsideration and, separately, a response to the Objection, Motion for Dismissal, and Motion for Reconsideration of Default.

25) For clarity in the record, the Hearings Referee admitted the documents described in Procedural Findings 16 through 24, but did not rely on any of said documents in formulating the Proposed Findings of Fact, Proposed Conclusions of Law, Proposed Opinion, and Proposed Order herein.

26) The Proposed Order, which included an Exceptions Notice, was issued on September 26, 1989. Exceptions, if any, were to be filed by October 6, 1989. Respondent's exceptions to the Proposed Order, post-marked October 6, 1989, were timely submitted and are dealt with in the Opinion section of this Order.

FINDINGS OF FACT – THE MERITS

1) Respondent City of Umatilla is a municipality in the State of Oregon which utilizes the personal service of one or more employees, controlling the means by which such service is performed at times material herein.

2) The Complainant Brenda Lee Sawyer is a female who first worked with Respondent's Police Department from April to September 1984, and was again hired in Respondent's Public Works Department on February 20, 1985, by Leonard Zinda, Public Works Director, on the recommendation of Hartley Seeger, City Administrator.

3) In mid-1986, Seeger left and was replaced by Eve Foote, who was appointed City Administrator.

4) The City Administrator is the chief administrative officer of the city. Other department heads, such as police and public works, report to the City Administrator. The position of the personnel officer hires and fires line staff on recommendation of department heads, and hires and fires department heads with approval of the City Council.

5) Respondent had a personnel system which used job classifications with pay steps based on time in grade; written evaluation of performance was by the immediate supervisor and

signed by the City Administrator. The Complainant's evaluations were good. She was never told to improve and never received a negative evaluation. Discipline was also through the supervisor. She received no written reprimands.

6) Employee grievances went first through the supervisor, then to the City Administrator, and then, if appealed, to the City Council. Line employees were forbidden from contacting individual council members or the mayor with work or personnel problems.

7) The Complainant worked as a public works crew member until August 31, 1987. Her initial salary was \$1,058 per month; her final salary was \$1,271 per month, plus \$54 per week one week a month for being on call. She received medical and dental insurance for herself and her spouse, and was a member of the Public Employees Retirement System (PERS).

8) The Complainant was hired to work at the wastewater treatment plant as an operator and also to "help out" in the parks and the cemeteries. She never received a written job description.

9) The Complainant's parks duties included watering, mowing, weeding, and picking up garbage. As time passed, her duties, like the duties of the other public works crew members, were shifted around and she was cross-trained, "kind of doing a little bit of everything." She went into manholes, dug graves, worked in water distribution, wastewater collection, and streets.

10) The Complainant was an extremely competent, qualified,

exceptional, and willing employee. She learned quickly and well, and she outworked her male co-workers. She worked well with others. She never shirked.

11) During Complainant's tenure from February 1985 through August 1987, the Respondent's public works department employed at various times Leonard Zinda, Chris Stensrud, "Junior" Marker, Jess Terry, Gary Brady, Steve Smith, Bill Cearns, Bruce Nobles, and Mack Able, all males. The Complainant was the only female.

12) Zinda was the public works supervisor. When he left, his duties were performed by Nobles.

13) Marker, Terry, Brady, and Smith were all terminated during this period for inappropriate behavior. Terry's termination involved sexual remarks directed at the Complainant. He was reported by Zinda and fired by Seeger.

14) The Complainant's actual job duties while Seeger was City Administrator included work at the wastewater treatment plant, work in the wastewater collection system, work in the parks and the cemetery, and work in the street department. These were substantially the same duties as the male public works employees. Due to the limited size of the crew, each employee had a primary assignment and helped in the other departments. The Complainant's primary assignment was at the wastewater treatment plant.

15) While Seeger was City Administrator, the wastewater treatment operator duties were shared by the Complainant and Stensrud, both of whom were qualified operators.

Neither was chief operator. The Complainant's application of her knowledge and qualifications was the better of the two.

16) The Complainant's actual job duties after Foote became City Administrator included work in the areas to which she was previously assigned, plus mopping the City Hall floors each Saturday.

17) Janitor work such as mopping the floors was at one time done by a contractor. It was eventually assigned to staff when that contract expired. Zinda initially assigned the Complainant because she was the only one he trusted with the key to the building on a weekend. She drove a city vehicle to City Hall each Saturday for this duty.

18) The Complainant objected to this extra duty to Zinda, who removed her from it based on her workload. He then was directed by Foote, without explanation, to reassign the City Hall mopping to the Complainant. There was no rotation of the job among the other public works crew. No male crew member ever mopped City Hall.

19) The Complainant mopped and cleaned the lab, control room, and rest-room at the wastewater treatment plant. Stensrud was also assigned there to share operator duties, but he wouldn't share "women's work" of mopping floors and cleaning toilets. Zinda directed Stensrud to help, and believed he would, but Stensrud did not do so.

20) The Complainant also climbed down manholes to take grease off float switches, clean filth into buckets, and plug or unplug the lines. Stensrud would laugh and say "get in the hole."

She did the job because it had to be done, whether she was on the crew or not.

21) Digging graves generally required two persons, one of whom was a backhoe operator. The initial hole was dug by the backhoe. The hole was then deepened by hand to the required depth and the sides were squared. Both of the assigned crew were expected to complete this finishing process. The Complainant was not a backhoe operator.

22) The Complainant believed that she had dug more graves than "the other guys." When Stensrud shared this assignment with her, she was commonly the one in the hole; he remained with the backhoe, and she did the hand digging.

23) Training courses in several phases of public works were available from various sources, such as community colleges. Initially, all public works employees except Zinda needed certification in various areas such as water distribution, wastewater treatment and collection, pumps, and electrical. Employee assignment to a training course depended on the needs of the department and of the employee, but basically those who had been to training would wait for those who had not.

24) The Complainant applied for a correspondence course out of Sacramento in wastewater collection and water distribution. She needed the course to formalize the certification, which she had been granted on the basis of job experience. She and Cearns were next in line in May 1987, and Nobles recommended her. Foote denied the training on the basis of a lack of funds.

25) During his performance review with Foote, Cearns requested a book to study, and she offered him the Sacramento course, which he completed, enabling him to complete his certification. This occurred about four weeks after the Complainant had been refused, which Cearns learned about later.

26) Bruce Nobles was hired as a public works crew member in May 1986. In six months, Zinda made him lead worker, which put him in charge when Zinda was absent. When Zinda resigned April 1, 1987, Nobles replaced him, subject to obtaining necessary certification by November.

27) The Complainant was "grandfathered in" (qualified) by the state as a wastewater treatment collections systems operator. She applied on her own for other certifications through her work experience with the city. She completed an active sludge process control course in March 1987 from Linn-Benton Community College. She completed a water works course from Clackamas Community College in September 1985.

28) Respondent's recruitment for positions in Public Works varied from word-of-mouth to newspaper advertisements. Sometimes an opening was posted within the department, sometimes it was not.

29) Sometime prior to Zinda's resignation, Stensrud was named chief operator at the wastewater treatment plant. None of the public works crew, including the Complainant who worked there with Stensrud, was aware of the promotion, nor were any of them aware that there had been an opportunity for promotion.

30) Stensrud was qualified by certification for the position. The other qualified operator was the Complainant. Zinda said Stensrud was senior, but had reprimanded Stensrud for drinking on the job several months earlier. All promotions were approved by Foote, who advised Nobles of Stensrud's status on April 1, 1987.

31) On April 1, 1987, prior to any announcement that Nobles had officially replaced the departed Zinda, Stensrud ordered the Complainant to haul some sludge away from the plant. The sludge was in a "septic" condition; that is, the microbes were dead and unable to digest the waste. When he said to haul it, she suggested calling DEQ, as she believed it was not legal. He told her to haul it or else he would fire her. She was not certain of his authority, but she didn't want to take a chance.

32) The stress of the confrontation with Stensrud and the hauling of the illegal sludge upset the Complainant terribly. She collapsed and fell from a platform at the plant while loading the truck. She was taken to Good Shepherd Community Hospital, Hermiston, by ambulance. Her blood pressure was elevated dramatically and she was hyperventilating.

33) Nobles reported the wastewater treatment plant problem to Foote, and first learned of Stensrud's chief operator status.

34) Zinda had the Complainant and Stensrud share the running of the wastewater treatment plant. They alternated between lab work and plant operation. The Complainant was the more aggressive of the two and did the most work. As a result of the sludge

truck incident and to separate the Complainant and Stensrud, Nobles determined to remove the Complainant from the plant, put her in charge of wastewater collections, and hired another operator. Foote approved.

35) It was also at this time that Nobles took the Complainant off the City Hall mopping detail. There were no objections to this removal of duties.

36) John Kleve was hired as the second operator, replacing the Complainant's position at the plant. Again, the position was filled without a known announcement or advertisement.

37) Kleve had Grade II qualifications on paper. He did not prove to be capable, although better qualified than Stensrud.

38) Around April 26, 1987, while Kleve was an operator and Stensrud was the chief operator, the Complainant was called in to troubleshoot a problem while Kleve was at the plant. She fixed the problem. While she was working, Kleve said "What does she know, she's just a female."

39) This upset the Complainant and crew member Mack Abel, who was a witness. Abel told Nobles about the remark and Nobles reported it to Foote, who said she would check into it. Foote later reported to Nobles that it was a misunderstanding, a joke. Kleve told Nobles that Abel lied.

40) John Kleve became chief operator, and in approximately July, Stensrud was demoted. The crew was unaware that the chief operator position was open. Nobles was instructed to keep his hands off the treatment plant. Kleve later was also in

charge of wastewater collections, and the Complainant reported to him.

41) On June 18, 1987, the Complainant was at City Hall in connection with her duties. She was confronted by Foote regarding the use of Armorall, a commercial cleaning preparation for motor vehicles, which Foote had discovered in a city vehicle. The Complainant explained that she used soap and water on her pick-up and that the Armorall had been purchased by another employee. When the Complainant stated she didn't know whether the other employee, Cearns, had used the product, Foote told her not to use Armorall, that Foote was boss, and the Complainant was not to use Armorall. "She just yelled at me," "confronted me, said she was boss, * * * (said) 'listen to me.'" Foote had never yelled at or publicly reprimanded a male worker, and her actions distressed the Complainant.

42) Foote had told Nobles to find out who purchased the Armorall. He did so and told Foote that it was Cearns, adding that he thought it was positive that the employee had followed his suggestion of taking better care of the equipment. She told him that no such purchase was to be made without the supervisor's approval.

43) Cearns had purchased the Armorall, charging it to the city, after Nobles had instructed the crew to clean and maintain vehicles better. Nobles then got it back, telling Cearns not to make any more purchases like that and that Nobles was in trouble because Cearns had bought it. Foote never mentioned the Armorall to Cearns, who saw her every day. She never reprimanded Cearns or talked

loudly to or yelled at him in front of other employees.

44) Foote stated to Nobles that she had explained to the Complainant about the Armorall and that soap and water would work.

45) When Nobles had occasion to discuss the progress of the work crew with Foote, he emphasized that they were a good crew. She responded that Cearns had the capability of becoming a good water man, that Abel was well-liked by the public, that she was amazed at Stensrud's accomplishments. She did not discuss the Complainant. When Nobles mentioned the Complainant, Foote abruptly walked away.

46) On August 17, 1987, in a meeting with the Complainant, Nobles, and Kleve, Foote told the Complainant that Kleve was to be head of collections systems and that the Complainant was to report to him. She became "loud and abusive" and ordered the Complainant to cooperate fully. Foote never spoke to males in that manner.

47) The Complainant knew that Kleve and Stensrud had met with Foote on weekends. Foote's approach on August 17 shocked her because she thought she was doing "okay." However, she just took it and reported to Kleve as instructed.

48) On August 31, 1987, there was a further meeting of a similar nature. The Complainant wrote her letter of resignation because she again felt singled out. She had worked one year with Foote as administrator, and believed that she had been treated differently because of her sex, that her duties differed from those of males

although her job description did not, that because she was female she got the dirty work, and that less qualified males got the promotions and training. She felt she had nowhere to turn.

49) Other members of the public works crew knew of the Complainant's dissatisfaction with the mopping assignment, of her unfair treatment "as opposed to the rest of us," and of the refusal of training, and sensed that she and Foote didn't get along.

50) Following termination, the Complainant sought employment with municipalities such as Irigon, Pendleton, Hermiston, and Umatilla, and with Simplot, Lamb-Weston, and other corporate employers. She found some temporary or part-time work with Wild Electric, ACI Typesetting, Smith Construction, H Bar H Western World, and United Hay. Jobs were difficult to find, and she was not successful in finding permanent employment at a rate comparable to what she earned with Respondent.

51) Had the Complainant remained employed by Respondent past August 31, 1987, she would have continued to earn at least \$1,325.00 per month (\$1,271.00 + \$54.00) between that date and the date of hearing, or \$29,150 (\$1,325.00 x 22 months). She actually earned \$2,261.00 during the remainder of 1987, \$6,738.12 in 1988, and \$741.20 to the end of June 1989. Her net lost wages were \$19,409.68 (\$29,150 - \$2,261 - \$6,738.12 - \$741.20 = \$19,409.68).

52) The Complainant loved her job and was saddened and disappointed by the loss of it. The treatment she experienced on the job caused extreme stress. Toward the end of her

employment she felt she couldn't talk to anyone. She was embarrassed by being "jumped on" by Foote. After her resignation, she saw her regular doctor for stress, and experienced many sleepless nights. Unemployment caused her to be on edge about finances and a reduced scale of living. It interfered with her personal life and necessitated the replacement of family vehicles and a change in plans about housing.

ULTIMATE FINDINGS OF FACT

1) Respondent City of Umatilla was a municipality in the State of Oregon, which utilized the personal service of one or more employees, controlling the means by which such service was performed at times material herein.

2) The Complainant, female, was hired in Respondent's Public Works Department on February 20, 1985, on the recommendation of the City Administrator, who was replaced by Eve Foote in mid-1986.

3) The City Administrator was the chief administrative officer of the city, who supervised department heads, administered a classified personnel system, hired and fired staff, and reviewed performance evaluations and employee grievances.

4) The Complainant worked as a public works crew member until August 31, 1987. Her final salary was \$1,271 per month, plus \$54 per week one week a month for being on call, plus medical and dental insurance and a PERS account.

5) She originally shared wastewater treatment plant operator duties with a male operator. She was cross-trained in all other public works duties.

She was the only female; all of her coworkers were male. Her evaluations were good, and she was never told to improve or received a negative evaluation. Discipline was also through the supervisor, and she received no written reprimands. She was considered an extremely competent, qualified, exceptional, and willing employee by her coworkers and supervisors.

6) After Foote became City Administrator, the Complainant's actual job duties included duties to which males were not assigned. She got more than her share of dirty assignments and of errands not assigned to males. She was refused a training course on the basis of insufficient funds, which a male later was authorized to attend. Promotions approved by Foote went to males with poorer or no performance history. Her job was threatened by her former coworker, who had been promoted over her. The stress of that caused her substantial physical distress. She was removed from a job she did well and placed under a person whom she had trained, and from whom she had endured prior insult. She was confronted and yelled at publicly and was devalued as a crew member by Foote, who told her loudly and repeatedly that she was to cooperate fully. Foote never treated males in the manner she treated the Complainant.

7) Feeling that she could no longer endure the treatment she received, and that she had no alternative to leaving, the Complainant resigned. She suffered emotional and mental distress from the undeserved loss of employment and from her treatment on the job. She diligently but unsuccessfully

sought replacement employment, and suffered economic loss through unemployment totaling \$19,409.68 in lost wages.

CONCLUSIONS OF LAW

1) ORS 659.010 provides, in pertinent part:

"(6) 'Employer' means any person, including *** municipalities, who in this state, directly or through an agent, engages or utilizes the personal service of one or more employees reserving the right to control the means by which such service is or will be performed.

"(12) 'Respondent' includes any person or entity against whom a complaint or charge of unlawful practices is filed with the commissioner or whose name has been added to such complaint or charge pursuant to ORS 659.050(1)."

At all times material herein the Respondent City of Umatilla was an employer subject to the pertinent provisions of ORS 659.010 to 659.435.

2) ORS 659.040 provides, in pertinent part:

"(1) Any person claiming to be aggrieved by an alleged unlawful employment practice, may *** make, sign and file with the commissioner a verified complaint in writing which shall state the name and address of the *** employer *** alleged to have committed the unlawful employment practice complained of and which complaint shall set forth the particulars thereof. ***"

OAR 839-07-515 provides:

"A person who claims to be aggrieved under laws prohibiting discrimination because of sex may file a complaint with the [Civil Rights] Division. (See OAR 839-03-025 and ORS 659.040.)"

ORS 659.050 provides, in pertinent part:

"(1) After the filing of any complaint under ORS 659.040 ***, the commissioner shall cause prompt investigation to be made in connection therewith. *** If the investigation discloses any substantial evidence supporting the allegations of the complaint the commissioner may cause immediate steps to be taken through conference, conciliation and persuasion to effect a settlement of the complaint and eliminate the effects of the unlawful practice and to otherwise carry out the purpose of ORS 659.010 to 659.110 ***"

The Commissioner of the Bureau of Labor and Industries has jurisdiction of the persons and of the subject matter herein, and the authority to eliminate the effects of any unlawful employment practice found.

3) ORS 659.030 provides, in pertinent part:

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

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

"(b) For an employer, because of an individual's *** sex *** to discriminate against such

individual in compensation or in terms, conditions or privileges of employment"

The conduct of Respondent City of Umatilla in treating Complainant differently from males in the terms, conditions, and privileges of employment to the extent that she was caused to involuntarily resign her employment with the Respondent was a violation of ORS 659.030(1)(a).

The conduct of Respondent City of Umatilla in treating Complainant differently from males in the terms, conditions, and privileges of employment was a violation of ORS 659.030(1)(b).

4) The actions, inactions, statements, and motivations of Eve Foote as City Administrator are properly imputed to the Respondent herein.

5) Pursuant to ORS 659.010(2) and 659.060(3), the Commissioner of the Bureau of Labor and Industries has the authority under the facts and circumstances of this record to award money damages to the Complainant for wage loss and emotional distress sustained, and the sum of money awarded in the Order below is an appropriate exercise of that authority.

OPINION

The named Respondent City of Umatilla, a municipality, was found in default, pursuant to OAR 839-30-185 (1)(a), for failure to file a timely answer to the Specific Charges. In default situations, the Agency must present a prima facie case in support of the Specific Charges and to establish damages. ORS 183.415(6), OAR 839-30-185(2). This Forum has previously held that a prima facie case of intentional unlawful discrimination exists

when there is proof of the elements outlined in OAR 839-05-010(1):

- (1) The Respondent is a Respondent as defined by statute.
- (2) The Complainant is a member of a protected class.
- (3) The Complainant was harmed by an action of the Respondent.
- (4) The Respondent's action was taken because of the Complainant's membership in the protected class.

In the Matter of Dillard Hass Contractor, Inc., 7 BOLI 244 (1988); *In the Matter of Peggy's Cafe*, 7 BOLI 281 (1989); *In the Matter of The Palomino Cafe and Lounge, Inc.*, 8 BOLI 32 (1989); *In the Matter of Colonial Motor Inn*, 8 BOLI 45 (1989); *In the Matter of Courtesy Express, Inc.*, 8 BOLI 139 (1989); *In the Matter of 60 Minute Tune*, #23-90 (1990); *In the Matter of Community First Building Maintenance*, 9 BOLI 1 (1990).

As to these elements:

(1) The evidence established that the Complainant was employed by the Respondent municipality, which reserved to itself the control of her work effort, and that of her fellow workers, and the means by which their personal services on behalf of the city were to be performed. It was the entity against which the Complainant's administrative complaint was filed and against which the Agency filed its Specific Charges.

(2) The Complainant is a female and is protected under the employment discrimination statutes on the basis of her sex.

(3) The evidence established that other public works crew members were selected over the Complainant

for promotion, that the Respondent's agent publicly berated only the Complainant, and that the Complainant was otherwise treated adversely and differently from the other public works crew members.

(4) The evidence also established that the Complainant was the only female public works crew member. This leads to the inference that the basis of her adverse treatment was her gender. The "proof" alluded to in the cited rule includes both facts and inferences. "An inferential fact * * * is an inference or conclusion from evidence," *Maeder Steel Products Co. v. Zanella*, 109 Or 562, 573, 220 P 155 (1923) (quoting from *Louisville etc. Ry. Co. v. Miller*, 141 Ind 533, 550).

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

ORS 659.030(1)(b) makes discrimination in the terms, conditions, and privileges of employment on the basis of sex unlawful. Where, as here, duty assignments, training opportunities, promotional opportunities, and daily civil treatment by an employer differ depending only upon the sex of the employee, the employer is guilty of unlawful discrimination based on sex. Despite her best efforts and demonstrated competence, the Complainant was devalued. She was berated for actions not her own or for actions that had not occurred. She was assigned the mopping of City Hall, and reassigned that duty after her immediate supervisor had relieved her of it based on her workload. She was told that a training course was unavailable due to

a lack of funds, yet saw a male assigned to the course shortly thereafter. She was placed under the secret supervision of a coworker whose performance, disciplinary record, and demonstrated professionalism were markedly less than her own, and who seized the opportunity to threaten her job. She eventually had to report to another male, whose demonstrated proficiency was less than her own and whom she had trained. Each of these slights is traceable to her gender, since males were not accorded such treatment, and each had its origin with Eve Foote, the Respondent's administrator.

Where unlawful different treatment has made the employee's working conditions so intolerable that the employee is forced into an involuntary resignation, the employer has encompassed a constructive discharge. *In the Matter of West Coast Truck Lines, Inc.*, 2 BOLI 192 (1981), *aff'd without opinion, West Coast Truck Lines, Inc. v. Bureau of Labor & Industries*, 63 Or App 383, 665 P2d 882 (1983).

The evidence is that the Complainant protested or challenged adverse actions, which she correctly perceived as due to her sex, and that her supervisor at times passed her concerns along to the administrator, but the adverse treatment continued. She saw males getting trained and promoted, while she was given undesirable duties not given to males and was subjected to treatment and remarks which the employer failed to correct. She was embarrassed by Foote's continued display of disrespect and distrust. When she was very seriously upset by her coworker/supervisor's threat to her employment, the employer's approved

solution was to compound its poor choice by removing the Complainant from a job she liked. Even when a witness confirmed Kleve's denigrating remark and disrespectful attitude, Kleve was believed and eventually placed in a supervisory position over her. It is understandable, but not justifiable, that Foote would be apprehensive about the Complainant's possible reaction to Kleve's supervision. In this situation, Complainant's resignation is both understandable and justifiable. The grievance process offered no hope, and she was foreclosed from approaching the Council. The Complainant's resignation was a constructive discharge, and a violation of ORS 659.030(1)(a), brought on by the Respondent's unlawful sex discrimination, which was a violation of ORS 659.030(1)(b).

Where an employer has discharged an employee for an unlawfully discriminatory reason, the employer is liable for any ensuing wage loss until the employee obtains subsequent employment paying at least as much as the position lost. *In the Matter of Richard Niquette*, 5 BOLI 53 (1986); *In the Matter of Lucille's Hair Care*, 3 BOLI 286 (1983), *rev'd on other grounds, Ogden v. Bureau of Labor and Industries*, 299 Or 98, 699 P2d 189 (1985), *on remand*, 5 BOLI 13 (1985). Interim earnings that do not meet this standard are deductible from what the employee would have made but for the discrimination. Where the evidence of these earnings are on an annual basis, pre-hearing interest can only accrue on amounts after they are indisputably due; that is, at the end of the annual

period. *Ogden, supra*. The lost wages awarded herein are so computed.

Awards for mental suffering depend on the facts presented. Respondents must take complainants as they find them. Here, the Forum found that Complainant experienced mental suffering due to the deliberate devaluation of her services and abilities, the failure to promote her, the assignment of demeaning duties, the sex-based denial of training, the allowance of a sexually demeaning work atmosphere, and the resulting unemployment occasioned by a constructive discharge, as described in Findings of Fact numbers 32, 39, 41, 47, 48, and 52. She suffered mentally and emotionally from that conduct, for which Respondent is directly liable.

In a timely manner, Respondent through counsel filed exceptions to the Proposed Order pursuant to OAR 839-30-165. Respondent asserted that the Hearings Referee erred in denying Respondent's motion for relief from default.

The Forum's rules, OAR 839-30-020 *et seq*, impose certain duties on persons or entities served with a "Charging Document" thereunder. The applicable rules may be summarized as follows: "Charging Document" includes a document called "Specific Charges" alleging that a respondent has violated the Oregon civil rights statutes. A "party" is any person or government agency or entity upon whom Specific Charges are served. Specific Charges may be served on a party or representative by personal service or by certified mail. OAR 839-30-025(2) and (15), and 839-30-030(1).

"Issuance" means sending out a document from the Hearings Unit, and the date of issuance is the date sent, noted on the document. A party served with Specific Charges must file an answer thereto within 20 days of the date of issuance. Where a party served with Specific Charges fails to file an answer within the time specified, the party is in default. OAR 839-30-025(14), 839-30-060(1), 839-30-185 (1).

Once default occurs, certain standards apply to establishing entitlement to relief from default. They are, specifically:

OAR 839-30-190:

"(1) Relief from default may be granted where good cause is established within 10 days of any of the following:

"(a) ***

"(b) A Notice of Default has been issued; ***

"(c) ***

"(2) The request for relief from default shall be in writing directed to the Hearings Referee through the Hearings Unit and shall be accompanied by a written statement, together with appropriate documentation, setting forth the facts supporting the claim of good cause."

OAR 839-30-025(11):

"'Good cause' means *** that a party failed to perform a required act due to an excusable mistake or circumstances over which the party had no control. Good cause does not include lack of knowledge of the law including these rules. The Hearings Referee will

determine what constitutes good cause."

There is no doubt that the Specific Charges were served on the Respondent, and upon Respondent's initial attorney, by certified mail after issuance under the above rules. The charges were issued May 3, 1989, and an answer was due 20 days thereafter, or on May 23, 1989. The record shows, and Respondent admits, that Respondent received its copy May 4, 1989, and that Respondent's attorney received a copy on May 8, 1989. The record further reflects that the Forum sent a Notice of Change of Referee to both Respondent and its attorney on May 8, 1989. Receipt of that document was not contested and is acknowledged in Respondent's exceptions.

Nevertheless, it was not until June 5, 1989, that an attorney for Respondent contacted the Hearings Referee. This was apparently in response to the Forum's Notice of Intent to Default, which was issued eight days after the due date for Respondent's answer. On June 5, Respondent's representative stated that its request for relief from default would be mailed on June 6. On June 12, the request, post-marked June 8 and including an affidavit subscribed on June 8, was received. On June 12, the Forum issued its Notice of Default.

The recitation of these dates and occurrences is important when evaluating Respondent's exceptions, as well as to a final ruling on Respondent's request and status herein when juxtaposed against the averments contained in Respondent's original request for relief. A careful reading of counsel's affidavit in support of the

original request for relief results in the conclusion that the request fails to establish good cause under the Forum's rules.

In regard to OAR 839-30-025(11), Respondent's exceptions argue that "[t]he Commissioner has exercised her discretion under this rule to set aside a default if a party establishes 'good cause' for its error", citing *In the Matter of Colonial Motor Inn*, 8 BOLI 45 (1989) and *In the Matter of Palomino Cafe and Lounge, Inc.*, 8 BOLI 32 (1989). Neither case stands for the proposition as stated; in each instance, I confirmed the ruling of the Hearings Referee in finding the Respondent(s) in default.

I have in recent years established a "bright line" in cases involving requests for relief from default for want of a timely answer to the Specific Charges. Where the Hearings Referee has found respondents in default and has refused to relieve the default upon request, I have confirmed the referee's ruling: *In the Matter of Richard Niquette*, 5 BOLI 53 (1986) (in which the Respondent attempted to file an answer after default); *In the Matter of Associated Oil Company*, 6 BOLI 240 (1987) (an unsupported request for relief was submitted on Respondent's behalf and denied); *In the Matter of Metco Manufacturing, Inc.*, 7 BOLI 55 (1987), *aff'd, Metco Manufacturing, Inc. v. Bureau of Labor and Industries*, 93 Or App 317, 761 P2d 1362 (1988) (request for relief based on corporate officer's claim of unfamiliarity with the process and of mistake was denied, and a corporate officer and the corporation's attorney attended the hearing and were denied participation); *In the*

Matter of Peggy's Cafe, 7 BOLI 281 (1989) (request for relief denied and exception to Proposed Order based on the denial of relief was overruled); *In the Matter of Palomino Cafe and Lounge, Inc.*, 8 BOLI 32 (1989) (request for relief based on corporate officer's unexplained missing of appointment with attorney prior to answer deadline was denied); *In the Matter of Colonial Motor Inn*, 8 BOLI 45 (1989) (request for relief based on failure of post office to deliver correctly addressed copy of Specific Charges and Hearing Notice to adjuster, who had dealt with Agency during investigation, denied where the record showed certified mail receipt of copies of the documents by a corporate vice president, by the registered agent, and by the business location).

There are instances, however, in which I have relieved a defaulting party, as recommended in the Proposed Order of the Hearings Referee: *In the Matter of The Pub*, 6 BOLI 270 (1987) (the original default ruling was based on certified mail service, the post office thereafter returned the documents undelivered, and Respondent then filed an answer within a week after personal service); *In the Matter of Stop Inn Drive In*, 7 BOLI 97 (1988) (Respondent established a mailing of an otherwise timely answer which was lost in the mail); *In the Matter of Dunkin' Donuts, Inc.*, 8 BOLI 175 (1989) (corporate respondent's counsel had previously noted an appearance, and, when no answer was received by the Forum, was able to establish timely preparation of an answer and transmittal by messenger, who failed to properly deliver it).

Clearly, the "good cause" standard enunciated throughout these cases is that the "excusable mistake or circumstances over which the party had no control" means that there must be a superseding or intervening event which prevents timely compliance.

Turning to the affidavit in support of this Respondent's request for relief, it may be seen that the established standard is not met. Counsel was unexpectedly absent from the state for an extended period of eight (business?) days, from April 23, 1989, to May 3, 1989. It is understandable that this could disrupt his efforts and make his "normally busy work schedule * * * even more hectic." But this was before the Specific Charges were received. The affidavit is silent as to particulars, other than the assertions that counsel's practice is regional in nature and that he spent only three hours at his office between May 8 and May 23. The document implies that he was away from his office location handling other matters, perhaps traveling throughout the region, but there are no specifics as to his actual location during the period, as to whether he was in attendance upon some other forum, or as to what arrangements he made, if any, for alternate coverage of items that would most surely arise in the interim. Without some particularity describing his activities and contact with his office other than his actual presence for three hours on May 15, I cannot infer or conclude that he or the Respondent were subjected to "circumstances over which the party had no control." Neither is it possible to categorize so lengthy an absence as an "excusable mistake."

The absence of the regular secretary between May 3 and May 18 (and thus on May 8, when the charges were received), and the failure of the substitute to bring a document received by certified mail and plainly entitled "Notice of Hearing" to counsel's attention when he was again available do not rise to the level of "excusable mistake." Counsel's affidavit is silent regarding the second document received from the Forum, entitled "Notice of Change of Referee." So, too, is a subsequent affidavit by counsel's associate protesting the Agency's allegation of the associate's pre-default involvement in the case. It is only from the argument of successor counsel that it is postulated that

"[t]his document went the way of the Notice of Hearing and * * * was filed with the Notice of Hearing and Specific Charges by the inexperienced secretary."

Respondent argues that the Hearings Referee based his ruling on the Agency's allegation of the pre-default involvement of counsel's associate, when in fact the associate was not so involved. The exact wording of the Hearings Referee's ruling in this regard is

"[t]he attempted showing of good cause by the Respondent's counsel is silent as to the role, if any, played by [counsel's associate]." (Emphasis supplied.)

Counsel's affidavit in support of the motion for relief reads as if counsel was a sole practitioner with a lone secretary in May 1989; there was ample reason to believe otherwise without reference to the Agency's allegation.

Respondent argues that neither the Agency nor the Forum would have been prejudiced by the Referee allowing the answer to be received and allowing the Respondent and counsel to participate in the hearing. A showing of prejudice to the Agency and/or the Forum is not an element in determining that a party is in default.

"[Respondent employer] defaulted when it failed to answer timely." fn 4, *Metco Manufacturing, Inc. v. Bureau of Labor and Industries*, 93 Or App 317, 761 P2d 1362 (1988).

Neither is such a showing an element in evaluating the sufficiency of a request for relief from default.

In this instance, according to the request, a mistake was made. It was not an excusable mistake. Neither was it attributable to any circumstance beyond Respondent's or counsel's control. The denial of Respondent's motion for relief from default is confirmed, and Respondent's exceptions to the Proposed Order are overruled.

ORDER

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

1) Deliver to the Business Office of the Portland Office of the Bureau of Labor and Industries a certified check, payable to the Bureau of Labor and Industries in trust for Brenda Lee Sawyer, in the amount of:

a) NINETEEN THOUSAND FIVE HUNDRED FOUR DOLLARS AND SIXTY-EIGHT CENTS (\$19,504.68), representing wages Complainant lost

as a result of Respondent's unlawful practice found herein; PLUS,

b) EIGHT HUNDRED THIRTY-FIVE DOLLARS AND THIRTY-SEVEN CENTS (\$835.37), representing interest on the lost wages at the annual rate of nine percent accrued between January 1, 1988, and June 30, 1989, computed and compounded annually; PLUS,

c) Interest on the foregoing, at the legal rate, accrued between June 30, 1989, and the date Respondent complies herewith, to be computed and compounded annually; PLUS,

d) THREE THOUSAND FIVE HUNDRED DOLLARS (\$ 3,500), representing compensatory damages for the mental distress Complainant suffered as a result of Respondent's unlawful practice found herein; PLUS,

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

2) Cease and desist from discriminating against any current or future employee because of the employee's sex.

**In the Matter of
GERMAN AUTO PARTS, INC.,
Respondent.**

Case Number 20-90
Final Order of the Commissioner
Mary Wendy Roberts
Issued December 3, 1990.

SYNOPSIS

Respondent discharged Complainant in retaliation for Complainant's causing a safety inspection by the Accident Prevention Division. The Commissioner found that Respondent's stated reason for the discharge - deficient performance - was pretextual, and awarded Complainant \$10,208 in lost wages and \$1,000 for mental distress. The Commissioner ruled that unemployment compensation benefits could not be offset from the lost wage award. ORS 654.062(5)(a) and (b).

The above-entitled contested case came on regularly for hearing before Warner W. Gregg, designated as Hearings Referee by Mary Wendy Roberts, the Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was conducted on March 6, 1990, in Room 26, State Office Building, 1400 SW Fifth Avenue, Portland, Oregon, and on March 7 and 8, 1990, in Room 311, of the same building. Linda Lohr, Case Presenter with the Quality Assurance Unit of the Civil Rights Division, Bureau of Labor and Industries (the Agency), presented a Summary of the Case, argued Agency policy and the facts, interposed motions and objections,

examined the witnesses, and introduced documents. German Auto Parts, Inc. (Respondent) was represented by Alan M. Lee, Attorney at Law, Portland, Oregon. Counsel for Respondent presented a Summary of the Case, argued the law and facts, interposed motions and objections, examined the witnesses, and introduced documents. John L. Day, Jr., (the Complainant) was present throughout the hearing. Michael Reese, president and chief executive officer of Respondent corporation, was present throughout the hearing.

The Agency called as witnesses the following: the Complainant; John D. Hess, former co-worker of the Complainant; Victoria Pratt, Senior Investigator with the Agency; and John Van Raalte, Senior Industrial Hygienist with the State of Oregon Department of Insurance and Finance, Occupational Safety and Health Division (OR-OSHA).

The Respondent called as witnesses Ilona Crass, a customer; Scott Griffith, former service manager; Frank Langley, general manager; Douglas Jacobsen, retail manager; and Aleric J. Huppenen and Ronald E. Parker, auto shop mechanics.

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

RULINGS ON OBJECTIONS

During the presentation of evidence, counsel for Respondent requested inspection of the notes to which the Complainant referred at times during his testimony. The Complainant stated that they were notes of events occurring during his employment with Respondent, which he wrote down after the filing of the administrative complaint to refresh his memory. He also stated that some of them may have been compiled from other notes in his possession. The Hearings Referee allowed counsel to inspect the notes to which the Complainant referred while testifying. Respondent's counsel then sought inspection of the other notes, and admitted he did not know the contents of the sought-after material and that he was seeking any inaccuracy he could cite to the Forum. The Agency objected. The Hearings Referee observed that the Complainant had referred to his notes most frequently when recalling specific dates and that the dates at issue were either agreed on in the pleadings or by stipulation. The Hearings Referee sustained the Agency's objection to inspection of the underlying background material. That ruling is confirmed. Counsel was merely "fishing," without timely, prior discovery with which to bait the hook.

During the presentation of evidence, Respondent's counsel introduced a printout from the State of Oregon Employment Division Benefits section listing unemployment benefits paid to the Complainant at times material. The evidence was offered for the

* At times material, OR-OSHA was known as the Accident Prevention Division (APD).

purpose of off-setting any wage loss which the Forum might find to have resulted from the alleged wrongful act of Respondent in discharging the Complainant. The Agency objected to any such reduction in possible remedy, pointing out that such reduction of wage loss was not recognized in this Forum, the Commissioner having adopted the collateral source rule in such matters. The Hearings Referee admitted the document, there being an apparent agreement as to its authenticity and accuracy, but only for the limited purpose of showing a diligent search for alternate employment following the discharge. That ruling is affirmed, both as to denial of the off-set and as to evidence of job search, for reasons discussed more fully in the Opinion section.

During the presentation of evidence, the Agency objected to the offer of Scott Griffith's notes regarding the Complainant's performance, and to the December 16, 1987, "Productivity Percentage" letter on the basis that neither was included with the Respondent's case summary, contrary to OAR 839-30-071, and neither was submitted during the investigation when the investigator asked for documents. The Agency claimed to be prejudiced by the late submission. The Hearings Referee received the documents, ruling that their relevance outweighed any claimed prejudice. That ruling is confirmed.

FINDINGS OF FACT – PROCEDURAL

1) On March 9, 1988, the Complainant filed a verified complaint with the Agency alleging that he was the victim of the unlawful employment

practice of the Respondent based upon his opposition to an unsafe place of employment.

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

3) The Agency initiated conciliation efforts between the Complainant and the Respondent, conciliation failed, and on December 26, 1989, the Agency prepared and served on the Respondent Specific Charges, alleging that the Respondent had discharged the Complainant from employment in violation of ORS 654.062(5)(a) for opposing unsafe practices and working conditions.

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

5) On January 17, 1990, Respondent timely filed its answer, dated January 16, 1990.

6) Pursuant to OAR 839-30-071, on January 26, 1990, the Agency timely filed a Summary of the Case, and on February 5, 1990, the Respondent timely filed a Summary of the Case, post-marked February 2, 1990.

7) On February 12, 1990, after telephone consultation with the participants, the Hearings Referee reset the hearing to March 6, 1990, because of inclement weather conditions.

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

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

10) Prior to closing arguments, the Agency and the Respondent each moved to amend their respective pleadings to conform to the evidence and to reflect the issues presented as permitted by OAR 839-30-075(2). The Hearings Referee allowed the respective motions.

11) At the close of hearing on March 8, 1990, the Hearings Referee allowed one week for the Agency to submit a copy of the Complainant's 1987 VW-2 form from Gateway Porsche Audi, after which the record herein would close. The document was timely received by the Forum, and the record herein closed on March 15, 1990.

12) The Proposed Order herein, which included an Exceptions Notice, was issued on July 11, 1990.

Exceptions, if any, were to be filed by July 21, 1990. Respondent's exception to the Proposed Order was timely submitted and is dealt with in the Opinion section of this Order.

FINDINGS OF FACT – THE MERITS

1) At all times material herein, Respondent German Auto Parts, Inc., an Oregon corporation, operated a foreign car parts and repair facility in Portland, Oregon, utilizing the personal service of one or more employees and controlling the means by which such service was performed.

2) Michael Reese was the president and chief executive officer of Respondent corporation, which specialized in repair of Volkswagen, Porsche, and Audi automobiles.

3) The Complainant was employed by Respondent as a mechanic (service technician) between July 15, 1987, and March 1, 1988, at which time he was discharged.

4) John D. Hess, Aleric Huppenen, and Ronald E. Parker were also employed by Respondent as mechanics at times material.

5) Scott Griffith was Respondent's service manager, Douglas Jacobsen was parts manager, and Frank Langley was Respondent's general manager at times material.

6) At times material, Respondent dealt in new and used parts and had a service department where the Complainant and other mechanics, who were described as "service

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

** Prior to hearing, the business name was changed to "German and Japanese Auto Parts."

technicians," worked. The parts department was in the same building as the service area. There was also a unit room or machine shop, which did automotive rebuilding. Mechanics in the machine shop were not line mechanics or "service technicians." A second building housed business services and the corporate offices. Ron Parker was moved into the unit room in late 1987, and was not at times material in the service department.

7) At times material, Frank Langley's office was across from the new parts counter, which was some 50 to 75 feet from the service area, behind a wall. The service area was not visible from the new parts counter or from Langley's office.

8) At times material, Scott Griffith's office was in the service or shop area, connected to customer reception by a door. The reception area was in turn connected to a hallway running past the restroom and Langley's office, separating them from the parts counter area. The most direct route from the shop to the parts counter area was through the restroom, rather than through Griffith's office and reception.

9) The Complainant was factory trained and nationally certified in Audi and Volkswagen products, including Porsche. He had worked at the dealership level since 1976 for several Porsche dealers. No other mechanic in Respondent's shop had as much training or experience with Porsche automobiles. His duties, like those of the other line mechanics, included diagnosis and repair of customers' vehicles. He was hired when Michael Plummer was service manager. Plummer was succeeded by Griffith on October 12,

1987. The service manager was the Complainant's direct supervisor from whom he received work assignments.

10) Generally, the work hours were 8 a.m. to 5 p.m., five days per week. The mechanics were expected at work at 8 a.m. The Complainant was sometimes tardy. John Hess was also sometimes tardy. Parker was late most often, and was the subject of humor concerning when or whether he would arrive.

11) Generally, work was assigned by the service manager. Assignment took into account the type of vehicle, the availability of a mechanic, and the expertise of the available mechanic. If all the mechanics were busy, the first one finished would get the next job, unless a specialty was necessary. If the service manager was not in, Aleric Huppenen assigned the work. He sometimes went through the work orders and chose one to work on, even when the service manager was there.

12) As service manager, Griffith handled telephone calls to and from shop customers, assigned repair orders to the mechanics, and sometimes obtained the parts listed by the mechanic. He did not deal with disciplining the mechanics and did not evaluate their productivity. He did not determine the productivity percentage figures and could not hire or fire.

13) Respondent charged its customers according to the "flat rate" for the repair operation completed. The "flat rate" is a pre-determined time, in hours and parts of hours, that a competent mechanic should take to complete a listed repair. The flat rate times for specific repairs are listed in automotive reference manuals, such as

"Chilton's Repair Manual." Respondent charged by multiplying the flat rate by \$30.00 per hour for Porsche, or by \$28.00 per hour for other vehicles.

14) A mechanic with expertise with a particular make and model or type of vehicle can accomplish repairs on it more quickly than on other vehicles. A mechanic working on an unfamiliar vehicle will usually lose time, that is, will take longer than the flat rate.

15) At times material, when a customer car came in for service, the customer authorized repair of a particular condition, or the evaluation and diagnosis of a particular condition. The mechanic then diagnosed the problem and put down the recommended repair and informed the service manager. The service manager might or might not inform the customer, depending on the original authorization.

16) The service manager determined the flat rate allowance for the recommended repair from the manual and entered that on the repair order along with the price of the parts involved. The service manager sometimes obtained the necessary parts from the Parts Department. Many times the mechanic had to obtain the parts. This involved some waiting time, which was not computed into the recommended flat rate.

17) Neither Frank Langley nor Michael Reese assigned work to the shop mechanics.

18) Each mechanic was paid according to the flat rate for the repair accomplished. The mechanic received half of the flat rate charge. This was the shop mechanic's source of wages, and varied according to the number of

customers, the size of the repair job, the individual mechanic's familiarity with the subject vehicle, the condition and age of the subject vehicle, and the mechanic's diligence in completing the repair.

19) Under this system, the Complainant kept his own list of flat rate time for each job he did. He found he was sometimes shorted, but that would be corrected if he brought it to the service manager's attention.

20) The Complainant had previously been discharged by another employer over what he described as a wage dispute involving credit given a co-worker for work performed by the Complainant.

21) When the line mechanics ran out of work, and none was scheduled, they were free to leave. There were no incidental duties. Sometimes on slow days they went fishing.

22) From the beginning of his employment with Respondent, the Complainant expressed his concerns with safety and health issues in the workplace. He was particularly concerned about the use of compressed air to blow particles and dust off brake shoes and with the temperature and ventilation of the workshop. Out of concern about heat in the shop, the Complainant kept a thermometer on his tool box. He asked for space heaters.

23) The Complainant's safety-oriented complaints were frequent and vocal. The other employees considered him a complainer. Some considered him a good worker, but not a good co-worker. He was described as "picky."

24) Asbestos is an ingredient in automobile brake shoes. The Complainant believed that the hazard of asbestos particulate ("brake dust") had been known for years and should be known to anyone working in the auto repair business.

25) The Complainant complained to Griffith about the other mechanics blowing brake dust with compressed air. He also complained to Huppenen, Hess, and Parker when each of them blew brake dust.

26) A single page folder entitled: "Controlling Brake Dust to Protect Your Health . . . What Every Auto Mechanic Should Know" (described by witnesses as a "bulletin") was made available to the auto shop work force by Griffith after the Complainant had spoken to him about brake dust.

27) The Complainant also made known his brake dust concerns to Langley. When he voiced his safety concerns to Langley, the response was "stop whining."

28) Most of the mechanics cooperated in using less hazardous methods of cleaning brake shoes because they did not want to be confronted again by the Complainant on the subject.

29) The general subject of production was mentioned at an all company meeting in late November, but no description or calculation of productivity was discussed.

30) On December 16, 1987, General Manager Frank Langley issued a letter regarding "Productivity Percentage." Its purpose was to notify the shop employees of the establishment of a minimum acceptable productivity

percentage (70 percent) for all mechanics.

31) None of the line mechanics recalled any meeting of the service department in December regarding productivity, productivity percentage, or the manner of computation of productivity percentage. The Complainant and Hess did not recall the December 16 letter. Only Huppenen remembered receiving the letter.

32) Langley initiated the productivity percentage concept after consulting with other auto repair service firms. It was derived by multiplying the work hours per day by the number of days available for work by the shop flat rate in dollars and dividing the result into the actual flat rate dollars billed or charged through the individual mechanic.

33) At the time of hearing, the Complainant understood the productivity percentage to mean the percentage of time that a shop mechanic met the flat rate, but also acknowledged that the hours billed or charged to a customer was part of the computation.

34) At the time of hearing, Hess did not have an understanding of the manner in which the productivity percentage was computed.

35) At the time of hearing, Griffith's understanding of the productivity percentage was that it was a simple ratio of available work hours divided into hours charged.

36) On January 4, 1988, while home with a cold which he believed was due to uneven shop temperature, the Complainant called the Accident Prevention Division (APD) to report his safety concerns, including the

"blowing" of brake dust, the use of starting fluid to clean parts, and the running of cars inside the shop without proper ventilation.

37) The day after the Complainant called APD, space heaters appeared in the shop. The Complainant, in response to questions about whether his complaints to management about shop temperature were responsible for the heaters, responded to Hess and another employee, separately, that it was "too late" because OSHA had been notified.

38) On January 15, 1988, the auto shop mechanics were notified that as of January 18, they would be required "to follow normal Company Policy with regard to time cards." Line mechanics were thereafter required to punch in on arrival in the morning, to punch out and back in at lunch, and to punch out at the end of the day.

39) In order to show whether employees were showing up on time or not, the time clock system was instituted for mechanics in the service department.

40) When he received the time card letter and time card from Griffith on January 15, 1988, the Complainant discussed them briefly with Langley, who told him that he was keeping an eye on the Complainant.

41) Some of the mechanics were unhappy about punching in and out. The Complainant was not. He believed that the time clock requirement was due to late arrivals by himself, Hess, and Parker. His late arrival had been called to his attention without any threat or mention of sanction. He had no problem with timely arrival when on

the time clock. The punching of the time clock upon arrival and departure was seen by the Complainant as an attendance record device because it was not presented as a productivity issue. He had received no real complaints about being late and believed that the institution of the time clock was to address his occasional tardiness and that of the other employees.

42) Langley interviewed John Lewerenz on or about February 6, 1988, for a position as auto shop mechanic (service technician). Lewerenz began working later that month, about February 12, 1988.

43) Generally, the auto service shop was slow in winter.

44) The Complainant was of the opinion that there was not enough work for an additional line mechanic when Langley hired Lewerenz. He believed there was then not enough work to keep all four mechanics working all day.

45) In early 1988, Respondent's management believed that another line mechanic was needed because the shop was behind in completing customer orders. In addition, Lewerenz had Japanese auto experience and Respondent planned to add an inventory of Japanese parts in May 1988.

46) Ilona Crass was the owner of Gateway Body Shop and the owner of a 1981 Porsche 928. She was also a personal friend of Reese. The 1981 Porsche 928 is an extremely difficult vehicle to work on and to keep operating properly. The Crass Porsche had needed much repair.

47) Crass asked Reese if his shop could correct a hard starting problem

with her 928. Reese told her it needed injectors. It was brought in to the service department on February 8, 1988.

48) The Complainant could not locate Griffith immediately when the Crass Porsche appeared, so he began filling in the work order before working on the vehicle. He filled in the color and license plate number of the vehicle on RO number 20234, which Crass had signed.

49) The Complainant tested the vehicle and diagnosed the starting problem as low voltage caused by a faulty alternator. He recommended replacing the alternator. He went to Griffith's office and told Griffith of his diagnosis. He then returned to his work station.

50) Griffith came to the hoist where the Complainant was working and asked whether a re-built alternator would be adequate. The Complainant replied that it was up to the customer, but that he had no faith in such alternators.

51) Griffith told the Complainant that Reese had said that the car needed injectors to correct the problem. The Complainant did not agree that injectors were needed and suggested that Griffith call the customer in order for her to determine what repair she wanted. Griffith did so.

52) Crass was told that the alternator needed repair. She didn't want the alternator done and refused that work. Her refusal of the work was noted on an "estimate of repairs" sheet prepared by Griffith. Crass did not deal directly with the Complainant.

53) Crass refused to have the alternator replacement recommended

by the Complainant done at that time because she had recently had an alternator installed. She eventually had the 928 repaired by another garage. That repair consisted of replacing the alternator. The injectors were not replaced by either garage.

54) Griffith reported to Langley that the Complainant had refused to work on the Crass Porsche and had said, when told of Reese's repair recommendation, "Reese can go fuck himself."

55) At the time, Langley had not seen a work order on the Crass vehicle and didn't know what was wrong with the car. He later repeated to Reese the words attributed to the Complainant by Griffith.

56) Crass was told by Reese that the mechanic had refused to work on the car, and that he would fire the mechanic because he cursed Reese. She repeated the mechanic's language as telling Reese "to go fuck himself."

57) A complaint to OR-OSHA (APD) may come by phone or in writing from a variety of sources. Many times, the complaint is made by an employee of the firm to be inspected. In such instances, the inspector and other staff of OR-OSHA are charged by law to keep the identity of the person initiating the complaint confidential. A written report is generated to the person initiating the complaint after completion of the inspection and citation process.

58) In conducting an OSHA inspection, the inspector addresses the specifics of the initiating complaint. The inspector also makes certain

routine mandatory compliance checks, such as "hazard communication" and required posters. Finally, the inspector will investigate areas of health and safety peculiar to the type of business being inspected.

59) Following a walk around inspection, the inspector routinely briefly discusses the findings of the walk around with a management representative of the firm inspected. It is at this point that the inspected business is initially notified of probable violations and possible areas of penalty. Some days later, a closing conference is held by the inspector with the inspected firm's management. At the conference, the inspector advises the owner or manager of recommended formal findings of violation and of recommended penalties, and may check progress on compliance efforts initiated after the walk around.

60) The complaint involving Respondent listed improper cleaning procedure for brake repair (compressed air to blow asbestos dust), using starting fluid containing ether to clean parts near heat, and no ventilation for car exhaust, thereby exposing employees to carbon monoxide. At 2:30 p.m. on February 9, 1988, John Van Raalte, an employee of APD, began his inspection of Respondent's shop.

61) When the inspector arrived on February 9, Griffith went to inform Langley. Shortly thereafter, Reese entered the shop with Langley.

62) At the time of the February 9 inspection, Hess said to the Complainant, "You're the one who called them, aren't you?" and the Complainant admitted that he was.

63) Van Raalte talked to all of the mechanics, but talked the longest with the Complainant. Hess and Huppenen agreed at the time that the Complainant's "days are numbered."

64) Van Raalte did not confirm the starting fluid use. There were no vehicles running or being tuned in the shop during the inspection, and readings of carbon monoxide levels were acceptable. However, he concluded that employees could be exposed to higher levels during tune-ups with the shop doors closed and sent a letter urging installation of local exhaust ventilation in the shop. This was of an advisory nature and was not termed a violation. He did confirm the blowing brakes allegation and found a number of other discrepancies.

65) Van Raalte discussed his preliminary findings after the walk around on February 9 with Langley, who had accompanied him. He stressed the findings regarding the blowing of brake dust, characterizing them as serious. He also mentioned other violations and indicated that penalties were to be expected.

66) Following the walk around inspection on February 9, the Complainant passed by Langley's office which was around the corner and through the restroom from the service shop. He heard voices and as he passed the doorway saw Langley standing facing the door and Reese with his back to the door. He overheard Reese tell Langley "Get rid of that son of a bitch." Then both saw the Complainant and the door was closed.

67) The auto shop work force shared the opinion that the

Complainant had called APD, causing the inspection.

68) On February 12, the Complainant and Hess met with Langley concerning their productivity percentage. Langley showed them the individual percentages he had developed from repair orders dating back to August 1987.

69) Langley informed both mechanics that he wanted improvement. Beginning immediately, the mechanics were to clock repair orders in and out with the time clock. They were to clock the repair order in when they received it and clock it out when the repair was completed. If the job was interrupted by lunch or some other requirement, the mechanic was to clock the repair order out and then back in again when returning to the job.

70) Langley confirmed the meeting and the clocking ("monitoring") requirements in identical letters to Hess and the Complainant dated February 13, a Saturday. As a practical matter, the clocking began Monday, February 15. Each letter recited that the monitoring would last through February 29, when the productivity was to be re-evaluated. Each letter also stated "Monitoring may be extended beyond that date at that time."

71) Both the Complainant and Hess understood that the overall evaluation period for improvement would be 30 to 60 days. Langley did not explain in detail how the productivity figures were computed. The Complainant did not curse during the meeting.

72) The Complainant and Hess did not recall any in-depth discussion of

"Productivity Percentage" with Langley before February 12, 1988. The meeting of February 12 was the only meeting with Langley regarding productivity in which individual productivity percentages were discussed.

73) In the six months ending in January 1988, Langley's computations showed the Complainant's monthly average at 44.43 percent and Hess's monthly average at 36.38 percent.

74) The Complainant suffered an on-the-job injury on or about February 12, 1988, which resulted in medical treatment and some absence, about two days in all, from work.

75) At the closing conference on February 16, both Langley and Reese were present. Van Raalte informed them of his recommended formal findings of violation, and that there would be a fine or penalty of at least \$300 imposed. Reese expressed the opinion that the asbestos issue was not serious and was not currently a problem, and stated that APD was harassing the Respondent and that the proposed penalty was excessive.

76) Reese appeared extremely upset. He is very excitable and was on that day "very excited."

77) The written report submitted by Van Raalte was evaluated by his supervisor before a formal citation was prepared. The supervisor pointed out several additional areas of violation, and the final written notice of citation of violation imposed total fines of \$1,125. It was dated February 29. An amendment acknowledging a typographical error in the "SIC" code was issued a day or so later. Both were mailed to Reese as president of Respondent.

78) On or about February 29, Langley ran the productivity figures for February. They showed that both the Complainant and Hess had each improved over the respective January figures and over the respective six-month average, according to Langley's calculations. By his computation, the Complainant's percentage was 58.29 percent, and Hess's percentage was 58.13 percent.

79) On the morning of March 1, Griffith told the Complainant to report to Langley. He did so, and Langley handed him a letter which advised that he was terminated that date because his services were no longer needed by Respondent.

80) The Complainant did not receive and was not aware of any complaints from customers regarding his work. His co-workers were not aware of any complaints about his work. The Complainant denied receiving or being made aware of any complaints from co-workers or management about his work. He strongly denied the use of foul language toward Reese or Langley.

81) On or about May 1, 1988, Hess was discharged. The reason given was that his productivity percentage had "been below the established acceptable level for over 4 months." His percentages for March and April were less than that for February, according to Langley's computation.

82) During his period of unemployment, the Complainant sought and received unemployment insurance benefits of \$5,550.

83) In Oregon, in order to remain eligible for unemployment benefits,

claimants of unemployment compensation are required to periodically attest to the number and identity of employers with whom they have sought employment.

84) The Complainant obtained employment with M & M Automotive beginning November 2, 1988, at a rate comparable to what he earned with Respondent. It was his first job since his discharge by Respondent. Had he remained employed with Respondent after March 1, 1988, his earnings based on his past earnings there would have been \$10,208. (August 1987 through February 1988 = \$8,932.50 in 7 months; $\$8,932.50 \div 7 = \$1,276.07$; March 1 to November 1, 1988 = 8 months; $\$1,276.07 \times 8 \text{ months} = \$10,208.$)

85) The discharge from employment with Respondent caused the Complainant to be moody, and adversely affected his relationship with his fiancée. He was upset by the difficulties in finding other employment. He had no savings, and had to borrow money from friends and to live otherwise on unemployment compensation, all of which created financial hardship. He became suspicious when he listed Respondent as his prior employer on job applications and then was not called for interviews. He was upset over having to file a complaint with the Agency and over participating in the complaint process.

86) Reese and Langley told the Agency investigator that the APD inspection had exonerated Respondent.

87) Dividing the productivity percentage into the total labor in dollars should produce a figure representing $\$28 \times 8 \text{ hours} \times \text{days at work}$,

according to the formula. In this manner, the days used in the formula may be found. The formula works in this manner for all months supplied from August 1987 through January 1988.

Examples, November 1987:

Huppenen: total labor = \$4153.20
 $\$4153.20 + 77.25\% = \5376.310 ;
 (rounding off) $\$5376 + \$28 = \$192$
 $192 + 8 = 24$ days.

Hess: total labor = \$1732.80
 $\$1732.80 + 32.23\% = \5376 .
 $\$5376 + \$28 = \$192$
 $192 + 8 = 24$ days.

Complainant: total labor = \$2607.20.
 $\$2607.20 + 48.50\% = \5375.67
 (rounding off) $\$5376 + \$28 = \$192$
 $192 + 8 = 24$ days.

The formula does not yield similar results for any of the mechanics for the month of February 1988. Applying the formula for that month the results are: Huppenen, 22.75 days; Hess, 19.75 days; the Complainant, 14.34 days; and Lewerenz, 9 days. The production statistics packet lists the Complainant's February 1988 total labor as \$1,872.80. The payroll summary lists his gross pay for that month as \$1,027.40. Using the formula:

Total Labor = \$2054.80
 (i.e., 2 x \$1027.40);
 $\$2054.80 + 58.29\% = \3525.133
 $\$3525 + \$28 = \$125.89$.
 $126 + 8 = 15.75$ days

The Complainant's payroll summary shows 21 work days for the month of February. Applying Langley's formula, $21 \times 8 \times \$28 = \$4,704$. Dividing \$4,704 into "total labor" for the Complainant (\$1,872.80) produces a figure of 39.8 percent. Dividing \$4,704 into \$2,054.80 (the Complainant's

gross pay for February on the payroll summary multiplied by 2) produces a figure of 43.68 percent.

88) The January 1988 percentage is computed on the basis of 25 work days for each mechanic. The Complainant's payroll summary shows 20 work days. There were 21 work days, Monday through Friday, in January 1988.

89) Griffith testified that he compiled a narrative note or memorandum about the Complainant at Langley's request about five or six months after Griffith became service manager. The upper right-hand corner of the document is noted "Scott Griffith 10-12-87 Hire Date," a notation he could not attribute or explain. By five months after that date, March 12, 1988, or six months after that date, April 12, 1988, the Complainant had already been discharged. He stated that he compiled the memorandum from separate notes of incidents of the Complainant's tardiness or customer service problems. The note recites one instance in which Griffith called the Complainant, who was late, at home. It also recites that the Complainant refused to work on a customer car when it was returned for re-diagnosis. Griffith was unable to testify to a date of either incident or to support his view that the re-diagnosis was not the Crass car. He testified that Langley may have had productivity meetings with the mechanics without him, and did not recall a meeting to discuss the December 16, 1987, letter. After a break in the hearing for lunch, he testified to recalling a meeting in which productivity was discussed. He also then recalled that his memorandum, contrary to his earlier testimony,

had been begun in November 1987. Due to the inconsistencies and vagueness within the testimony itself and his apparent suggestibility, his testimony was given less weight whenever it conflicted with other credible evidence on the record.

90) Langley testified that when he handed the Complainant the termination letter, the Complainant was mad and wadded it up and shoved it in his pocket, but when the termination letter was produced at hearing it showed no creases or folds other than those similar to folds for insertion in an envelope. Langley testified that he chose to keep Hess because his improvement over January was greater (from 39.16 percent to 58.13 percent) than that of the Complainant (from 55.01 percent to 58.29 percent). He stated that between December 16 and the end of December he sat down with Griffith and all three mechanics and went over the December 16 letter explaining the use of the productivity percentage and why it was being implemented, but none of the employees named could recall such a meeting. He said that the employees' only concern was that there was no allowance for a mechanic's sick time. In response to counsel's specific question, he stated that, at the time, hours off because of injury would not be included in the total hours present for work and that the Complainant's absence due to injury was not counted against him in February. Despite the great weight he put on the productivity percentage, he stated that February 12 was the first time he had discussed the individual production percentages with either the Complainant or Hess. He said that,

when he asked whether there was anything he could do to assist them in bettering their percentages, the Complainant said "not a fucking thing" and left, while Hess stayed longer to discuss solutions. He said he gave both the Complainant and Hess until the end of February to show improvement.

He testified after viewing the exhibit that he received Griffith's note about the Complainant in November 1987, after Griffith had completed one month as service manager. He said that when he told Reese of the Complainant's alleged remark over the Crass Porsche, Reese "blurted out" in a "boisterous" manner "get the hell rid of him" or words to that effect, and that the conversation occurred in Langley's office. He denied basing the discharge on any knowledge of the Complainant calling APD. He further denied any knowledge of the Complainant's safety and health concerns other than the thermometer on the tool box, reported to him by Griffith. He stated that any conversation with Reese after the APD walk around inspection on February 9 occurred in Reese's office in the other building. He testified that he could observe the shop area from his office through a window, but other evidence established that, at times material, Langley's office was an inside room across from the new parts counter without a view of the shop. He said that he had ultimate authority in hiring and firing, and did not follow Reese's ultimatum to discharge the Complainant because the shop was extremely busy and needed all the mechanics, and Reese was not aware that Lewerenz was coming on board. He said that he considered other factors, once he had the

February figures, such as the Complainant's general reliability and willingness, his tardiness, and his failure to show concern about the implementation of the percentages as an evaluation factor. He stated he did not know about any other mechanic's attendance problems, that Griffith was supposed to take care of such things. For the above reasons, and those described in the Opinion section of this Order, which are by reference incorporated herein, his testimony was given little weight whenever it conflicted with any other credible evidence or inference on the record.

91) Parker, who was again employed by Respondent at the time of hearing, was a confusing and unconvincing witness. He admitted to inconsistent attendance in early 1988, stating he was late quite a bit due to a domestic problem, but always got to work. He insisted that he overheard the Complainant's remark to Griffith about Reese. On direct examination, he stated that he walked up to the service office, saw the Complainant talking to Griffith, and quoted the Complainant's words as telling Reese "to go fuck off." Although the Crass car and APD incidents were one day apart, he testified that he left about a month after the Crass car situation and was not working for Respondent at the time of the APD inspection, but that he didn't really remember. He testified that there were jokes about the Complainant's attendance. He testified to knowledge of the December 16 productivity letter, despite not receiving a copy and not being a line mechanic affected by it in December 1987. For the above reasons, and those described in the

Opinion section of this Order, which are by reference incorporated herein, his testimony was untrustworthy and was given less weight whenever it conflicted with credible evidence on the record. In some cases, due to inconsistencies his testimony was not believed even when it was not directly controverted by other evidence.

92) Michael Reese did not testify during the course of the hearing.

ULTIMATE FINDINGS OF FACT

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

2) The Complainant was employed as an automobile mechanic by Respondent from July 1987 to March 1, 1988.

3) On January 4, 1988, the Complainant telephoned the Accident Prevention Division (APD) and reported safety and health hazards in Respondent's auto repair shop.

4) As a result of Complainant's phone call, an APD inspection occurred at the auto shop on February 9, 1988. The inspection resulted in citations being issued on February 29 against Respondent and penalties of \$1,125.

5) The service manager knew that the Complainant had called APD. The General Manager and the Chief Executive Officer had reason to know he had done so. On March 1, the General Manager told the Complainant he was fired.

6) Respondent's stated reasons for firing the Complainant were pretextual.

7) Respondent discharged the Complainant because he caused an inspection by the Accident Prevention Division of the State of Oregon.

8) The Complainant suffered emotional upset, embarrassment, and financial distress as a result of the discharge.

9) The Complainant lost wages amounting to \$10,208 as a result of the discharge.

CONCLUSIONS OF LAW

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

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

"It is an unlawful employment practice for any person to bar or discharge from employment * * * any employee * * * because such employee has opposed any practice forbidden by [the Oregon Safe Employment Act], [or] made any complaint or instituted or caused to be instituted any proceeding under or related to [the Oregon Safe Employment Act] * * *."

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

"Any employee * * * who believes that the employee has been barred or discharged from employment * * * by any person in violation of this subsection may * * * file a complaint with the Commissioner of the Bureau of Labor and Industries alleging such discrimination under the provisions of ORS

659.040. Upon receipt of such complaint the commissioner shall process the complaint and case under the procedures, policies and remedies established by the ORS 659.010 to 659.110 and the policies established by ORS 654.001 to 654.295 and 654.750 to 654.780 in the same way and to the same extent that the complaint would be processed by the commissioner if the complaint involved allegations of unlawful employment practices based upon race, religion, color, national origin, sex or age under ORS 659.030(1)(f).
* * *

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

3) The conduct of Respondent German Auto Parts, Inc. in discharging the Complainant was a violation of ORS 654.062(5).

4) The actions, inactions, statements, and motivations of Michael Reese, Frank Langley, and Scott Griffith are properly imputed to Respondent herein.

5) Pursuant to ORS 654.062, 659.010(2), and 659.060(3), the Commissioner of the Bureau of Labor and Industries has the authority under the facts and circumstances of this record to award money damages to the Complainant for wage loss and emotional distress sustained, and the sum of money awarded in the Order below is an appropriate exercise of that authority.

OPINION

There can be no doubt that the governing statute prohibits adverse employment actions or decisions affecting an employee based on that employee's exercise of rights afforded by the Oregon Safe Employment Act (the Act), ORS 654.001 to 654.295, 654.750 to 654.780, and 654.991. Included among the rights protected is the right to "notify the employer of any violation of law, regulation or standard pertaining to safety and health in the place of employment * * *" (ORS 654.062(1)), as well as the right to complain to the Director of the Department of Insurance and Finance, or to the Director's authorized representative, about "any violation of law, regulation or standard pertaining to safety and health in the place of employment * * *" (ORS 654.062(2)).

The Act is intended to ensure safe and healthful working conditions, and sets up a regulatory scheme designed to further that end. As a portion of that scheme, the Act declares it to be an unlawful employment practice for "any person" to retaliate against an employee for opposing unsafe practices or for causing an (OSHA) investigation, and invokes the assistance of this Forum in its anti-retaliation enforcement.

The Complainant was discharged by Respondent. He filed a complaint with the Civil Rights Division alleging that the discharge was based on his having complained to the employer about unsafe and unhealthy conditions in the workplace, and upon his having caused the initiation of an OSHA investigation. The Civil Rights Division's investigation found substantial evidence supporting his allegations, and

this proceeding followed, with the Agency's Specific Charges echoing the Complainant's basic allegations.

Respondent's answer denied any unlawfully discriminatory act or motive and further set forth the defense that the Complainant was terminated for "continuous low productivity," "failure to meet or maintain established acceptable productivity," "failure to and refusal to work on a customer's car," and "refusal to participate in counseling to increase his productivity."

The Forum has found as fact that the Complainant repeatedly voiced his concerns on safety issues and that all who worked around him knew of his focus on the subject. The vehemence of his objection to the unsafe use of compressed air on brake shoes was remarked upon by each co-worker, was known to the service manager, and was known to the general manager as well. The Forum finds that Respondent's management reasoned that a complaint concerning that very activity, which resulted in a citation and penalty, originated with the only vocal opponent of the practice.

Among Respondent's defenses, a number of reasons involving the Complainant's productivity are asserted: "continuous low productivity," "failure to meet or maintain established acceptable productivity," and "refusal to participate in counseling to increase his productivity." Respondent was establishing a productivity program. It had merely been touched upon with the employees it affected, and despite Langley's claims to the contrary, it had not been explained or implemented. It was not actually put in place as a means of evaluation known to the

employees until after the APD inspection. On February 12, Langley told Hess and the Complainant that they were henceforth subject to the 70 percent standard. Both understood that it could affect their continued employment, but both also understood that each had one to two months to reach that level, with progress checks along the way. In the case of Hess, that was a correct assessment. The Complainant, however, was given two weeks.

Respondent attempted to establish that the 70 percent standard was known to the work force as early as December 1987, but the affected employees did not confirm that as a starting date. The term "low productivity" could have little meaning without a benchmark or standard from which to measure. An employer certainly may judge an employee's production by subjective means, but it cannot thereby insulate itself from an accusation of unlawful motive. Thus, the "failure to meet or maintain" defense could only refer to the period beginning February 12, 1988, after the APD inspection, and extending to February 29, in the Complainant's case and to May 1, in the case of Hess. The facts show no opportunity for "counseling," other than the open-ended inquiry by Langley on February 12. Respondent failed to establish that the Complainant's productivity or lack of it was the reason for discharge.

Langley stated that he determined to keep Hess and fire the Complainant, even though their February productivity percentages were almost identical, because the Complainant failed to make any improvement while Hess seemed to be trying to reach the announced

standard. But it seems more likely to the Forum that these figures represent a rush to judgment to justify an already decided employment action, the discharge of the Complainant. Even if the February data produced the figures upon which Langley said he based his decision, the short trial period afforded the Complainant is suspect, coming so closely after the APD inspection he initiated.

The Complainant was treated differently from his similarly situated co-worker. Two things distinguished the Complainant from Hess:

1. He started the APD process and
2. He allegedly was indirectly insubordinate to, or at least disrespectful of, Reese.

Respondent attempted to elevate the latter into a refusal to do assigned work in giving "failure to and refusal to work on a customer's car" as a factor in the discharge. The facts do not confirm that the Complainant refused any direct assignment on the Crass car. He acknowledged that he was informed that Reese thought the vehicle had fuel injector problems, but he did not agree with that diagnosis after making his own. Ordinarily, neither Reese nor Langley assigned work, and Griffith quite obviously did not insist on the installation of injectors. Griffith even created an estimate accepting the Complainant's suggested repair and communicated that to the customer. The evidence does not reflect that Griffith told the Complainant to replace the injectors. At the most, by his own account, he repeated to the Complainant the substance of Reese's diagnosis. Also by that account, the Complainant allegedly

dismissed the Reese suggestion in a profane manner, which was communicated by Griffith to Langley and by Langley to Reese. By the time it reached Crass through Reese, it had become a refusal on the part of the mechanic to work on the car. Crass did not deal with the Complainant; it was Griffith who communicated the suggestion of the alternator repair, which she refused. At no time did she order the injectors replaced.

In any event, Langley stated he did not follow Reese's ultimatum to fire the Complainant over the Crass car or over the Complainant's language as reported by Griffith. It is difficult to credit why it became a factor two weeks later, unless the intervening APD inspection caused management to reassess the Complainant's value as an employee.

Reese did not testify. His reaction to the report about the Complainant and the Crass car, and his reaction to the APD inspection, appear in evidence only through witnesses. Van Raalte and Langley agree that at the time of the closing on the inspection, Reese was agitated. According to the Complainant, Reese's annoyance began on the date of the inspection, because of the inspection, and was directed toward him. According to Langley, Complainant's opportunity to overhear Reese expressing annoyance toward the Complainant was confined to February 8, concerned the Crass car and the remark attributed to the Complainant, and took place in Langley's office. Langley said that any discussion of the APD inspection with Reese on February 9 was in Reese's office, which was not in the shop

building, suggesting that the Complainant could not have overheard it in the manner that the Complainant described. Respondent seems to further suggest that it may have been the February 8 conversation in Langley's office that the Complainant described. Reese's testimony may have confirmed or clarified one version or the other.

"The unexplained failure of a named respondent to take the witness stand to rebut evidence supporting allegations against him, when he is the only person who could possibly do so thoroughly, suggests to this forum that [that respondent's] testimony would have contributed nothing to his defense." *In the Matter of Sapp's Realty, Inc.*, 4 BOLI 232 (1985).

Thus, this Forum has previously determined that failure of a named respondent to testify allows the conclusion that such testimony would not contribute to that respondent's defense. By similar reasoning, the Forum finds that the absence of the testimony of a corporate respondent's principal officer, who is available and whose actions appear from other evidence to have been pivotal in the occurrences under scrutiny, allows a similar conclusion.

The Forum concludes from the available credible evidence that the discharge of the Complainant was based on his voicing safety and health concerns and causing an APD inspection to be initiated, all in violation of ORS 654.062.

Damages

Respondent's unlawful practice resulted in the Complainant being unemployed for a period of six months. At his prior rate of earnings with Respondent, the Complainant would have earned \$10,208 during this period, had he remained with Respondent. This direct wage loss is Respondent's responsibility. Evidence was admitted showing that during his period of unemployment, the Complainant drew over \$5,000 in unemployment compensation. Respondent introduced this evidence for the purpose of offsetting any wage loss the Forum might find. The evidence was admitted to establish diligence on the part of the Complainant in seeking replacement employment in mitigation. The statute governing eligibility for benefits requires that the claimant actively seek work. ORS 657.155.

In this Forum, unemployment compensation benefits are not available as an offset to a wage loss caused by an employer's unlawful employment practice. *In the Matter of St. Vincent De Paul Salvage Bureau*, 8 BOLI 293 (1990); *In the Matter of Metco Manufacturing, Inc.*, 7 BOLI 55 (1987), *aff'd*, *Metco Manufacturing, Inc. v. Bureau of Labor and Industries*, 93 Or App 317, 761 P2d 1362 (1988); *In the Matter of K-MART Corporation*, 3 BOLI 194 (1982). As outlined in *St. Vincent De Paul*, this Forum has adopted the collateral source reasoning of the US Supreme Court in *National Labor Relations Board v. Gullett Gin Co.*, 340 US 361, 27 LRRM 2230 (1951), that where the employer merely helped to create the benefits fund through the payment of taxes, and the payment of

benefits to an employee was in order to carry out a policy of social betterment for all of the state and not to discharge any obligation of the employer, the benefits are collateral. Private employers in Oregon pay a small percentage of total payroll, based on claim experience, as unemployment tax. The experience factor may be affected by the number of employers drawn against in a base year, by whether the accused employer or other base year employers have been relieved of charges, or by whether the accused employer is included in the base year for benefits at all. ORS 657.405, *et seq.* Thus, to deduct unemployment benefits as an offset would allow a wrongdoing employer to recoup a portion of the wage loss inflicted through its violation. That portion would be far greater than the actual amount paid by the employer on the victim's account, and would effectively subsidize the unlawful practice.

Respondent's Exception

Respondent timely filed an exception to the Proposed Order in which it argues that Complainant's back pay award should be reduced by the amount he received in unemployment compensation, asserting that otherwise the Complainant would recognize a windfall. In a public employment situation, the Oregon Court of Appeals ruled that unemployment benefits should be offset from an employee's claim for wage loss. *Filter v. City of Vernonia*, 95 Or App 550, 552-53, 770 P2d 83 (1989). The court in *City of Vernonia* relied on the Oregon Supreme Court ruling in *Seibel v. Liberty Homes, Inc.*, 305 Or 362, 752 P2d 291 (1988).

In *Seibel*, the court disallowed the offsetting of social security disability payments from a damage award. The court reasoned that if an employer were allowed to offset benefits from a social program, the employer might calculate that it is more profitable to breach an employment contract and pay only the difference between the worker's wages and the social benefits. *Id.* at 367. Although the court expressly reserved its ruling on other social benefit programs, its reasoning supports the Forum's determination that, at least in a private employment context, unemployment benefits will not offset an employee's back pay award. The court ruled that whether a statutory benefit to a discharged worker should offset a back pay award is a "matter of interpretation of the statutory policy." *Id.* An offset of social benefits intended to replace income should not be allowed "unless that program is funded only by the employer or there is evidence of a contrary legislative policy." *Id.* at 368 (emphasis added).

City of Vernonia, supra, is not inapposite. The employer in *City of Vernonia* is a political subdivision and as such, in lieu of paying unemployment taxes, pays into a fund an amount equivalent to the amount of all regular benefits and all extended benefits paid out to claimants. See ORS 657.505(6).

Thus, the city paid into the fund the amount that the employee received in unemployment benefits. In other words, the benefits received by the employee were funded only by the employer.

In the instant case, Respondent would have paid unemployment taxes

somewhere within the broadest statutory range of 0.9 to 5.4 percent of its total payroll. ORS 657.462. Complainant's unemployment benefits were not funded only by the employer. He was paid from a collateral source (state funds derived from taxes), and thus the reasoning of the US Supreme Court in *Gullett Gin* is persuasive.

In upholding the National Labor Relations Board's refusal to deduct unemployment benefits from an employee's back pay award for discriminatory discharge, the US Supreme Court said:

"To decline to deduct state unemployment compensation benefits in computing back pay is not to make the employees more than whole, as contended by respondent. Since no consideration has been given or should be given to collateral losses in framing an order to reimburse employees for their lost earnings, manifestly no consideration need be given to collateral benefits which employees may have received.

"But respondent argues that the benefits paid from the Louisiana Unemployment Compensation Fund were not collateral but direct benefits. With this theory we are unable to agree. Payments of unemployment compensation were not made to the employees by respondent but by the state out of state funds derived from taxation. True, these taxes were paid by employers, and thus to some extent respondent helped to create the fund. However, the payments to the employees were not made to discharge any liability or obligation to respondent, but to carry out

a policy of social betterment for the benefit of the entire state * * *. We think these facts plainly show the benefits to be collateral." *National Labor Relations Board v. Gullett Gin Co.*, 340 US 361, 364, 27 LRRM 2230 (1951) (citations omitted).

An additional reason for disallowing the offset of unemployment benefits by a private employer is to ensure that a previous employer is not penalized for the discriminatory practices of another employer. In many discrimination cases, a worker is not hired by a discriminating employer or is discharged by a discriminating employer after a very short period of employment. See, e.g., *In the Matter of Franko Oil Company*, 8 BOLI 279 (1990) (the worker was discharged because of her race after working only 11 days). In such cases, the proportion of the unemployment compensation benefits charged to the discriminating employer's account is minuscule or none. Employers previous to the discriminating employer are charged for the major portion or all of the worker's benefits. This is the kind of exigent circumstance discussed in *Seibel* that the Supreme Court said should play no role in an employer's liability. *Seibel*, at 368-69.

It is not the public policy of the State of Oregon to encourage or reward the weighing of the costs and benefits of discrimination. See ORS 659.015 and 659.020. The Commissioner has previously quoted from Judge Burns, writing for the US District Court for the District of Oregon in the *Kauffman v. Sidereal Corp.* case, Civil No. 79-142 (D Or 1980), that

"it is clear that those (unemployment compensation) programs are meant for the benefit of employees and the community at large, not employers, and especially not employers who violate the rights of employees." *In the Matter of K-MART Corporation*, 3 BOLI 194, 204 (1982).

Citing *Gullett Gin*, the Ninth Circuit affirmed *Kauffman*, 695 F2d 343, 346, 32 FEP Cases 1710, 1712-13 (9th Cir 1982). See also *In the Matter of Metco Manufacturing, Inc.*, 7 BOLI 55 (1987), *aff'd*, *Metco Manufacturing Inc. v. Bureau of Labor and Industries*, 93 Or App 317, 761 P2d 1362 (1988).

Respondent contends that the offset should be allowed to prevent a potential windfall to the Complainant. However, this position was expressly rejected by the court in *Seibel*:

"[W]hether to save or recapture those [social benefit] costs is properly an issue between the provider of the benefits and its beneficiaries. Absence of a recoupment provision does not help the employer who causes the costs by improperly terminating the employee's regular source of compensation." *Seibel*, at 369 (citations omitted).

The Bureau of Labor and Industries is charged with eliminating and preventing discrimination in employment. ORS 659.100. To allow private employers to offset unemployment compensation benefits in cases of employment discrimination would encourage and subsidize their unlawful practices.

Mental Suffering

The Complainant demonstrated some mental suffering flowing from the discharge in the form of financial distress, prolonged unemployment and upset in finding subsequent work, moodiness, and adverse effects on his personal life and relationships. The inconvenience and frustration caused by filing an administrative complaint and participating in the complaint process is experienced by all litigants and is not compensable. *In the Matter of Portland General Electric*, 7 BOLI 253 (1988); *School District No. 1 v. Nilsen*, 271 Or 461, 534 P2d 1135 (1975). This Forum has consistently recognized that the anxiety and uncertainty connected with the loss of employment income is compensable, together with the specter and uncertainties of unemployment, when attributable to an unlawful practice. *St. Vincent De Paul, supra*; *In the Matter of Spear Beverage Company*, 2 BOLI 248 (1982); *In the Matter of the City of Portland*, 2 BOLI 41 (1980). To help compensate the Complainant for the mental distress attributable to Respondent's unlawful employment practice, the Forum is awarding the Complainant \$1,000.

ORDER

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

1) Deliver to the Business Office of the Portland office of the Bureau of Labor and Industries a certified check, payable to the Bureau of Labor and Industries in trust for JOHN L. DAY, JR., in the amount of:

a) TEN THOUSAND TWO HUNDRED EIGHT DOLLARS (\$10,208), representing wages Complainant lost as a result of Respondent's unlawful practice found herein; PLUS,

b) ONE THOUSAND SIX HUNDRED THIRTEEN DOLLARS AND SEVENTEEN CENTS (\$1,613.17), representing interest on the lost wages at the annual rate of nine percent accrued between November 2, 1988, and July 9, 1990, computed and compounded annually; PLUS,

c) Interest on the foregoing, at the legal rate, accrued between July 9, 1990, and the date Respondent complies with the Final Order herein, to be computed and compounded annually; PLUS,

d) ONE THOUSAND DOLLARS (\$1,000), representing compensatory damages for the mental distress Complainant suffered as a result of Respondent's unlawful practice found herein; PLUS,

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

2) Cease and desist from discriminating against any worker who opposes any practice forbidden by ORS 654.001 to 654.295 and ORS 654.750 to 654.780, makes any complaint, or institutes or causes to be instituted any proceeding under or related to ORS 654.001 to 654.295 and ORS 654.750 to 654.780, or has testified or is about to testify in any such proceeding, or because of the exercise by such employee on behalf of the employee or

others of any right afforded by ORS 654.001 to 654.295 and ORS 654.750 to 654.780.

3) Post in a conspicuous place on the premises of Respondent a copy of ORS 654.001 to 654.295, and a separate copy of ORS 654.062, together with a notice that any person believing that an employee has been subjected to unsafe or unhealthy working conditions may contact OR-OSHA, and any person believing that an employee has been discriminated against for opposing an unsafe or unhealthy practice may contact the Oregon Bureau of Labor and Industries.

**In the Matter of
Teresa E. Stewart and
Roland Stewart, Partners, dba
MEGA MARKETING,
Respondents.**

Case Number 02-91
Final Order of the Commissioner
Mary Wendy Roberts
Issued December 3, 1990.

SYNOPSIS

Wage Claimants were owed \$312 and \$636, respectively, when Respondents terminated their employment. The Commissioner found that Respondents' failure to pay final wages due was willful, and assessed civil penalty wages of \$599 and \$659 for the

respective Claimants because Respondents, who failed to appear at hearing, presented no evidence of their financial inability to pay the wages when due. ORS 652.140(1); 652.150.

The above-entitled matter came on regularly for hearing before Jeanne Kincaid, designated as Hearings Referee by Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on October 9, 1990, in the Bureau of Labor and Industries Office in Eugene, Oregon. The Bureau of Labor and Industries (hereinafter the Agency) was represented by Lee Bercot, Case Presenter for the Agency. Shonna L. Stephens and Juanita A. Wolford (hereinafter Claimants) were present throughout the hearing. After being duly notified of the time and place of this hearing, neither Teresa E. Stewart nor Roland L. Stewart (hereinafter Employers) appeared in person or through a representative.

The Agency called the following witnesses: Claimants Shonna L. Stephens and Juanita A. Wolford; Eduardo Sifuentez, Compliance Specialist for the Agency; and Mary Erikson, the Judgment Unit Clerk for the Agency.

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

FINDINGS OF FACT – PROCEDURAL

1) On March 2 and 6, 1989, Claimants Wolford and Stephens respectively filed wage claims with the Agency. They alleged that they had been employed by Employers and that Employers had failed to pay wages earned and due them.

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

3) On May 17, 1989, the Commissioner of the Bureau of Labor and Industries served on Employers an Order of Determination based upon the wage claims filed by Claimants and the Agency's investigation. The Order of Determination found that Employers owed a total of \$1,644.78 in wages and \$2,475 in civil penalty wages.* The Order of Determination required that, within 20 days, Employers either pay these sums in trust to the Agency, or request an administrative hearing and submit an answer to the charges.

4) Along with the Order of Determination, Employers received an information sheet about contested case rights and procedures. This notice indicates that it is the Employers' responsibility to notify the Agency if the Employers relocate.

5) On June 9, 1990, Employers, through their attorney, requested a hearing and an extension of time within

which to file an answer to the Order of Determination.

6) On June 12, 1989, the Employers were granted an extension until June 22, 1989, for filing an answer.

7) On June 19, 1989, Employers, through their attorney, filed an answer to the Order of Determination. Employers' answer denied that Employers owed Claimants \$1,644.78 in unpaid wages. Employers further set forth the affirmative defenses that the wages incorrectly reflect gross wages rather than net wages, and that Employers were financially unable to pay such wages.

8) On July 31, 1990, this Forum issued a Notice of Hearing to the Employers, the Agency, and the Claimants indicating the time and place of the hearing. Together with the Notice of Hearing, the Forum sent a document entitled "Notice of Contested Case Rights and Procedures" containing the information required by ORS 183.413, and a copy of the Forum's contested case hearings rules, OAR 839-30-020 to 839-30-200.

9) On August 7, 1990, the Hearings Unit notified Lee Bercot that the Notice of Hearing package that had been sent to Roland L. Stewart was returned with the notation that the addressee had moved and left no forwarding address. Mr. Stewart did not notify the Agency that he had moved nor provide the Agency with his new address.

* The Order of Determination cited the Employers for failing to pay the wages of four employees. The figures quoted above reflect wages and penalties for all four employees. However, at hearing the Agency only pursued charges involving two employees.

FINDINGS OF FACT – THE MERITS

1) During all times material herein, the Employers, a partnership, were doing business as Mega Marketing, a coupon sales business located in Eugene, Oregon. The Employers employed one or more persons in the State of Oregon.

Claimant Stephens

2) From on or about January 23, 1989, to on or about February 23, 1989, Employers employed Claimant Stephens as a telephone solicitor.*

3) On or about January 23, 1989, Employers and Claimant Stephens entered into an oral agreement that Claimant would perform work for \$3.45 per hour.

4) From January 23 through February 6, 1989, Claimant Stephens's work hours were from 9 a.m. until 3 p.m. Beginning February 7, 1989, Employers changed her work hours to 9 a.m. until 2:30 p.m. Paydays were on the first and fifteenth of the month.

5) Employers laid off Claimant Stephens on February 23, 1989.

6) Claimant Stephens's records reveal the following information, which is accepted as fact: between January 23 and February 23, 1989, Claimant worked a total of 110 hours at the agreed rate of \$3.45 per hour; she earned \$379.50 in wages (110 hours x \$3.45 = \$379.50). Claimant was paid \$67.28. The balance of earned, unpaid wages due and owing equals \$312.22.

7) In accordance with Agency policy, civil penalty wages were computed

10) On August 13, 1990, Employers' attorney notified the Forum that he would no longer be representing the Employers.

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

12) At the time and place set forth in the Notice of Hearing for this matter, the Employers did not appear nor contact the Agency or the Hearings Unit. Pursuant to OAR 839-30-185(2), the Hearings Referee waited 15 minutes before commencing the hearing. At that time, Employers had still not appeared or contacted the Agency or the Hearings Unit. The Hearings Referee then found Employers in default as to the Order of Determination and proceeded with the hearing.

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

14) The Proposed Order, which included an Exceptions Notice, was issued on November 6, 1990. Employers were served at their last known address. The Proposed Order was returned because Employers had moved; they left no forwarding address as required by Agency policy.

* Both Claimants had been employed by a previous owner, who sold the business to Employer. There is no suggestion that the prior owner had failed to pay Claimants their wages.

on the Wage Transcription and Computation Sheet as follows: \$379.50 (the total wages earned) divided by 19 (the number of days worked during the claim period) equals \$19.97 (the average daily rate of pay). This figure of \$19.97 is multiplied by 30 (the number of days for which civil penalty wages continued to accrue) for a total of \$599. This figure is set forth in the Order of Determination.

Claimant Wolford

8) From on or about January 23, 1989, to on or about February 28, 1989, Employers employed Claimant Wolford as a telephone solicitor/supervisor.

9) On or about January 23, 1989, Employers and Claimant Wolford entered into an oral agreement that Claimant would perform work for \$3.50 per hour.

10) Claimant Wolford's hours varied from week to week. Paydays were on the first and fifteenth of the month.

11) Claimant Wolford's records reveal the following information, which is accepted as fact: between January 23 and February 28, 1989, she worked a total of 201 hours at Claimant's agreed rate of \$3.50 per hour, she earned \$703.50 in wages (201 hours x \$3.50 = \$703.50). Claimant was paid \$67.28. The balance of earned, unpaid wages due and owing equals \$636.22.

12) In accordance with Agency policy, civil penalty wages were computed on the Wage Transcription and Computation Sheet as follows: \$703.50 (the total wages earned) divided by 22 (the number of days worked during the claim period) equals \$21.98 (the

average daily rate of pay). This figure of \$21.98 is multiplied by 30 (the number of days for which civil penalty wages continued to accrue) for a total of \$659. This figure is set forth in the Order of Determination.

13) Testimony of both Claimants was found to be credible. They had the facts readily at their command, and their statements were supported by documentary records. There is no reason to determine the testimony of the Claimants to be anything except reliable and credible.

ULTIMATE FINDINGS OF FACT

1) During all times material herein, Employers were a partnership doing business as Mega Marketing in the State of Oregon and employed one or more persons in the operation of its business.

2) Employers employed Claimants at all material times herein.

3) Employers laid off Claimant Stephens on February 23, 1989, and Claimant Wolford on February 28, 1989.

4) At the time that Employers laid off Claimant Stephens, they owed her \$379.50. Employers paid Claimant Stephens \$67.28 on March 1, 1989, leaving a balance of \$312.22.

5) At the time that Employers laid off Claimant Wolford, they owed her \$703.50. Employers paid Claimant Wolford \$67.28 on March 2, 1989, leaving a balance of \$636.22.

6) Employers willfully failed to pay Claimants all wages earned and unpaid immediately upon their being laid off. More than 30 days have elapsed from the due date of those wages.

7) Civil penalty wages, computed pursuant to ORS 652.150 and Agency policy, equal \$599 for Claimant Stephens and \$659 for Claimant Wolford.

8) Employers made no showing that they were financially unable to pay Claimants' wages at the time the wages accrued.

CONCLUSIONS OF LAW

1) During all times material herein, Employers were employers and Claimants were employees, subject to the provisions of ORS 652.110 to 652.200 and ORS 652.310 to 652.405.

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

3) Employers violated ORS 652.140(1) by failing to pay Claimants all wages earned and unpaid immediately upon terminating them from employment.

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

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

OPINION

The Employers failed to appear at the hearing, and thus have defaulted as to the charges set forth in the Order of Determination. In a default situation, pursuant to ORS 183.415(5) and (6),

the task of this Forum is to determine if a prima facie case supporting the Agency's Order of Determination has been made on the record. See *In the Matter of Judith Wilson*, 5 BOLI 219, 226 (1986); *In the Matter of Art Farbee*, 5 BOLI 268, 276 (1986); *In the Matter of John Cowdrey*, 5 BOLI 291, 298 (1986). See also OAR 839-30-185. Where a charged party submits an answer to a charging document, the Agency need not produce any evidence regarding facts admitted in the party's answer.

Unpaid Wages

ORS 652.140(1) provides:

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

The Agency has established a prima facie case. A preponderance of the credible evidence on the whole record showed that Employers employed Claimants during the period of the wage claim and willfully failed to pay them all wages, earned and payable, when due. That evidence, which established that Employers owe Claimant Stephens \$312.22 and Claimant Wolford \$636.22, was credible, persuasive, and the best evidence available, given Employers' failure to appear at the hearing.

Civil Penalty

ORS 652.150 provides:

"If an employer willfully fails to pay any wages or compensation of any employee who is discharged or who quits employment,

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

The record establishes that Employers have violated ORS 652.140 as alleged and that they owe Claimants civil penalty wages pursuant to ORS 652.150. Awarding a civil penalty turns on the issue of willfulness. Willfulness does not imply or require blame, malice, wrong, perversion, or moral delinquency, but only requires that that which is done or omitted is intentionally done with knowledge of what is being done and that the actor or omittor be a free agent. *Sabin v. Willamette Western Corp.*, 279 Or 1083, 557 P2d 1344 (1976).

In the instant case, the evidence establishes that Employers knew they owed Claimants wages and intentionally failed to pay those wages. There is no evidence that Employers were not free agents. Thus, Employers' action or inaction was willful under ORS 652.150.

In their answer, Employers alleged that if wages were found to be due, no penalty should be assessed because Employers were financially unable to pay Claimants. This Forum has repeatedly held that it is an employer's

burden to show the employer's financial inability to pay a claimant's wages. See ORS 652.150 and 183.450(2), and OAR 839-30-105(10). See also *In the Matter of Jorion Belinsky*, 5 BOLI 1, 10 (1985). Employers have failed to show that they were financially unable to pay Claimants' wages at the time the wages accrued.

ORDER

NOW, THEREFORE, as authorized by ORS 652.332, the Commissioner of the Bureau of Labor and Industries hereby orders TERESA E. STEWART and ROLAND L. STEWART to deliver to the Business Office of the Bureau of Labor and Industries, 305 State Office Building, 1400 SW Fifth Avenue, PO Box 800, Portland, Oregon 97207-0800, the following:

A certified check payable to the Bureau of Labor and Industries IN TRUST FOR SHONNA L. STEPHENS in the amount of NINE HUNDRED ELEVEN DOLLARS AND TWENTY-TWO CENTS (\$911.22), representing \$312.22 in gross earned, unpaid, due, and payable wages, and \$599 in civil penalty wages; PLUS,

Interest at the annual rate of nine percent on the unpaid wages of \$312.22 from March 1, 1989, until paid, and interest at the annual rate of nine percent on the civil penalty wages of \$599 from April 1, 1989, until paid; PLUS

A certified check payable to the Bureau of Labor and Industries IN TRUST FOR JUANITA A. WOLFORD in the amount of ONE THOUSAND TWO HUNDRED NINETY-FIVE DOLLARS AND TWENTY-TWO CENTS

(\$1,295.22), representing \$636.22 in gross earned, unpaid, due, and payable wages, and \$659 in civil penalty wages; PLUS

Interest at the rate of nine percent per year on the unpaid wages of \$636.22 from March 1, 1989, until paid, and interest at the rate of nine percent per year on the civil penalty wages of \$659 from April 1, 1989, until paid.

**In the Matter of
ROGELIO LOA,
dba J & J Forestry,
Respondent.**

Case Number 05-91
Final Order of the Commissioner
Mary Wendy Roberts
Issued December 3, 1990.

SYNOPSIS

The Forum granted partial summary judgment to the Agency based on Respondent's admission that he twice acted as a farm labor contractor without a license. From evidence received at hearing, the Commissioner found that Respondent made false statements on his license application and to an Agency representative. Finding that all of the violations demonstrated that Respondent's character, competence, and reliability made him unfit to act as a forest labor contractor the Commissioner denied his license

application. ORS 658.410(1); 658.415 (1); 658.420; 658.440(3)(a); OAR 839-15-125; 839-15-140(1)(a), (d) and (i); 839-15-145(1)(g); 839-15-520(1)(a) and (k), (2), (3)(a) and (h).

The above-entitled contested case came on regularly for hearing before Douglas A. McKean, designated as Hearings Referee by Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was conducted on October 23, 1990, in Room 311 of the Portland State Office Building, 1400 SW Fifth Avenue, Portland, Oregon. Lee Bercot, Case Presenter for the Wage and Hour Division of the Bureau of Labor and Industries (the Agency), appeared on behalf of the Agency. Rogelio Loa (the Applicant) did not appear at the hearing in person or through a representative.

The Agency called the following witnesses (in alphabetical order): Lee Bercot, Case Presenter for the Agency; Maria Cazares, Public Service Representative with the Agency; William Pick, Manager of the Farm Labor Unit of the Agency; Luis Ramirez, Project Inspector, US Bureau of Land Management; Sandra Sterling, Manager of the Licensing Unit of the Agency; and K'Lynne West, Bookkeeper.

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

RULING

On October 4, 1990, the Agency moved for a partial summary judgment on two of its allegations that the Applicant had acted as a farm labor contractor without a license. The Agency's motion, made pursuant to OAR 839-30-070(6), was based on the Applicant's answer, in which he admitted those two allegations.

OAR 839-30-070(6) provides that a participant may move for

"an accelerated decision in favor of the Agency * * * as to all or part of the issues raised in the Charging Document. The motion may be based on any of the following conditions: * * * No issue of genuine fact exists and a party is entitled to judgment as a matter of law, as to all or any part of the proceedings. * * * In cases where the Hearings Referee recommends that such motion be granted, the recommendation shall be in the form of a Proposed Order and the procedure established for issuing Proposed Orders shall be followed."

The Hearings Referee granted the Agency's motion. Since the Applicant admitted the allegations, there was "no issue of genuine fact," and the Agency was entitled to judgment as a matter of law that the Applicant twice violated ORS 658.410 and 658.415. Although the Applicant stated in his answer that his license application was pending at the time he acted as a contractor without a license, those assertions, even if true, are irrelevant to the issue of whether he violated the statutes.

The Agency asked the Commissioner to deny the Applicant a license

based on the two admitted violations, citing OAR 839-15-520(1)(k), which says that the Commissioner considers acting as a contractor without a license to be of such magnitude and seriousness that the Commissioner may deny a license application. The Hearings Referee did not grant that request, but instead ruled that evidence would be taken at hearing on the two remaining allegations in the notice and on the appropriate sanction.

The Forum hereby confirms the Hearings Referee's ruling granting partial summary judgment and concludes as a matter of law that the Applicant twice violated ORS 658.410(1) and 658.415(1).

**FINDINGS OF FACT --
PROCEDURAL**

1) On June 8, 1990, the Agency issued a "Notice of Proposed Denial of a Farm Labor Contractor License" to the Applicant. The notice informed him that the Agency intended to deny his application for a farm labor contractor's license, citing two allegations of acting as a farm labor contractor without a license, in violation of ORS 658.410(1) and 658.415(1), and two allegations of making a misrepresentation, false statement, and/or willful concealment in his application for a license, in violation of ORS 658.440(3)(a). The notice was served on the Applicant on June 11, 1990.

2) On August 8, 1990, the Agency received the Applicant's request for a hearing and his answer to the notice. In his answer, the Applicant admitted the two allegations that he had acted as a farm labor contractor without a license. He denied the two allegations of making a misrepresentation, false

statement, and/or willful concealment in his application for a license.

3) On September 10, 1990, the Forum issued to the Applicant and the Agency a "Notice of Hearing," which set forth the time and place of the requested hearing and identified the designated Hearings Referee. With the hearing notice, the Forum sent to the Applicant a "Notice of Contested Case Rights and Procedures," containing the information required by ORS 183.413, and a complete copy of the Agency's administrative rules regarding the contested case process - OAR 839-30-020 through 839-30-200.

4) On October 4, 1990, the Agency moved for partial summary judgment, pursuant to OAR 839-30-070(6), on the two allegations that the Applicant acted as a farm labor contractor without a license.

5) On October 5, 1990, the Hearings Referee granted the motion for partial summary judgment.

6) Pursuant to OAR 839-30-071, the Agency filed a Summary of the Case. Although permitted to do so under the provisions of OAR 839-30-071, the Applicant did not submit a Summary of the Case.

7) At the time and place set forth in the Notice of Hearing for this matter, the Applicant did not appear or contact the Agency or the Hearings Unit. Pursuant to OAR 839-30-185(2), the Hearings Referee waited 30 minutes before commencing the hearing. At that time, the Applicant had still not appeared or contacted the Agency or the Hearings Unit. The Hearings Referee then found the Applicant in default as

to the charging document and proceeded with the hearing.

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

9) On October 24, 1990, the Hearings Referee sent the Applicant a notice that he was in default because of his failure to appear at the hearing on October 23, 1990. The notice advised the Applicant that he had 10 days from the date of the hearing to request relief from default, pursuant to OAR 839-30-185 and 839-30-190, and that if he failed to file such a request he would have no further opportunity to seek relief from default.

10) No request for relief from default was received from the Applicant.

11) The Proposed Order, which included an Exception's Notice, was issued on November 15, 1990. Exceptions, if any, were to be filed by November 26, 1990. No exceptions were received.

FINDINGS OF FACTS - THE MERITS

1) On March 7, 1990, the Applicant, who is also known as Leo Loa, registered an assumed business name, J & J Forestry, with the Corporation Division. Registrants for the name included the Applicant and Al Rangel. Rangel's address was listed as 3521 Silverpark Place, Salem, Oregon 97305.

2) Al Rangel is also known as Alvaro Linan Rangel, or Alvaro Linan. Linan was a licensed farm/forest labor contractor in Oregon from 1985 to 1989 and did business as Jose and

Jesus Forestry. The Applicant had worked for Linan.

3) In January or February 1990, the Agency began an investigation of Linan. On February 1, 1990, Linan submitted an application to renew his farm labor contractor license. He listed his home and business telephone number as 585-3281. His workers' compensation policy binder was addressed to Jose and Jesus Forestry, 3521 Silverpark Place, Salem, Oregon 97305.

4) On March 9, 1990, the Agency notified Linan that it proposed to deny his license renewal application for repeatedly failing to provide certified true copies of all payroll records to the Commissioner, in violation of ORS 658.417 and OAR 839-15-300. After a hearing, Linan was found to have repeatedly violated that statute and rule, and was refused a license on October 26, 1990.

5) On March 9, 1990, the Applicant bid on a Bureau of Land Management (hereinafter BLM) solicitation for a scalping and grubbing forest labor project in the Ashland Resource District. He listed his telephone number as 585-3281. He was awarded that contract, number OR952-CTO-2107, on March 29, 1990. J & J Forestry performed the contract during April, May, and June 1990 with a crew of up to 16 workers. The Applicant used three vehicles, including a green van, to transport workers.

6) Between March 9 and 23, 1990, the Applicant employed nine workers on a Forest Service contract in the Siuslaw National Forest, contract number 52-04T0-0-10325.

7) Also during the period of March 9 to 23, 1990, the Applicant had a sub-contract with Linan, dba Jose and Jesus Forestry, to do tree planting and tubing. He employed 31 workers on that contract.

8) On March 14, 1990, the Applicant filled out an application for workers' compensation insurance. On that application, he described the duties of his employees as "Reforestation - Incl. Drivers."

9) On March 15, 1990, the Applicant submitted to the Agency an application for a farm and forest labor contractor's license. Within the application packet the Applicant received copies of the farm labor contractor law and administrative rules.

10) On his application the Applicant answered "none" to the question "If applicant uses vehicle(s) in the operation of farm/forest labor contracting business list EACH below." In response to the question, "Transport Workers?" the Applicant answered "no."

11) The Applicant was required by ORS 658.415(1)(b) to provide

"[i]nformation on all motor vehicles to be used by the applicant in operations as a farm labor contractor including license number and state of licensor, vehicle number and the name and address of vehicle owner for all vehicles used."

In addition, ORS 658.415(2) required the Applicant to

"furnish satisfactory proof with the application of the existence of a policy of insurance in an amount adequate under the rules issued by the Bureau of Labor and

Industries for vehicles to be used to transport workers. * * *

The Agency's rule, OAR 839-15-140 (1), provides that to

"be eligible for a license, an applicant therefore must, * * * (i) Certify on the application that there is insurance on vehicles used to transport workers in an amount sufficient to comply with the Oregon Financial Responsibility Law. (ORS 486.011 to 486.680)"

Compliance with these requirements is a substantive matter that is influential in the Agency's decision to grant or deny a license.

12) On the application, the Applicant checked "Sole Proprietor" in the area of the application asking about his "type of business entity." He showed that his "percentage of the applicant's share in the proposed labor contractor operation" was 100 percent. In a section of the application where he was to list the names and information about "all persons financially interested, whether as partners, shareholders, associates or profit-sharers, in the applicant's proposed operations as a labor contractor," the Applicant listed only his own name and address, and showed that he held 100 percent interest in the operation.

13) The Applicant was required by ORS 658.415(1)(d) to provide the

"names and addresses of all persons financially interested, whether as partners, shareholders, associates or profit-sharers, in the applicant's proposed operations as a farm labor contractor, together with the amount of their respective interests, and whether or not, to

the best of the applicant's knowledge, any of these persons was ever denied a license under ORS 658.405 to 658.503 and 658.830 within the preceding three years, or had such a license denied, revoked or suspended within the preceding three years in this or any other jurisdiction."

The Agency's rule, OAR 839-15-140 (1), provides that to

"be eligible for a license, an applicant therefore must, * * * (d) Not have persons financially interested in any capacity in the applicant's business as a Farm or Forest Labor Contractor who were denied an Oregon Farm or Forest Labor Contractor's license within the preceding 3 years or who had such license denied, revoked, or suspended within the preceding 3 years in Oregon or any other jurisdiction. * * *"

Compliance with these requirements is a substantive matter that is influential in the Agency's decision to grant or deny a license.

14) The Applicant swore on the application that, among other things,

"I will at all times conduct the business of a farm and/or forest labor contractor in accordance with ORS 658 and the rules of the Commissioner of the Oregon Bureau of Labor and Industries,"

and that

"the information I have supplied on or with this application is true and correct to the best of my knowledge."

15) The Agency started an investigation of the Applicant's character,

competence, and reliability. On April 6, 1990, Lee Beroot asked the Applicant who Al Rangel was and showed him a copy of his Assumed Business Name Registration, where Al Rangel signed as a registrant. The Applicant denied knowing Al Rangel and said he went down alone to register the assumed business name. He admitted making two bids for forestation work, one for scalping work for the BLM near Ashland (contract number OR952-CTO-2107), and one for fertilization work near Mt. Hood.

16) On April 6, 1990, Maria Cazares called the telephone number listed for J & J Forestry. An answering machine answered the call saying J & J Forestry, and Cazares left a message. Alvaro Linan called Cazares back.

17) On April 12, 1990, the Applicant bid on BLM Solicitation No. OR952-IFBO-1102, a forest maintenance and precommercial tree thinning project. He listed his telephone number as 585-3281.

18) During the periods of April 17 to 21, and May 23 to June 6, 1990, the Applicant had a subcontract with Linan to work on a BLM project in the Medford district, contract number CTO-2109. The Applicant employed at least 14 workers on that project.

19) On April 27, 1990, the Applicant bid on BLM Solicitation No. OR952-IFBO-1097, a forest precommercial tree thinning project near Mt. Hood. He listed his telephone number as 585-3281.

20) On July 29, 1990, the Applicant filed an Oregon Quarterly Combined Tax Report for J & J Forestry showing wages paid to 40 employees during

June 1990. He listed his telephone number as 585-3281.

21) On August 27, 1990, the Applicant signed a subcontract with Husky Reforestation to perform precommercial tree thinning in the Chemult Ranger District, Forest Service contract number 52-04U3-0-0002. The subcontracting document was dated June 26, 1990, and the starting date for work was June 22, 1990.

22) Joann West Accounting Services performed bookkeeping services for J & J Forestry and for Jose and Jesus Forestry. Alvaro Linan usually brought in the payroll records for J & J Forestry. The Applicant was, "for the most part," using the same employees as those used by Jose and Jesus Forestry. K'Lynne West, a bookkeeper for Joann West Accounting Services, filled out certified payroll forms for J & J Forestry for the period of April 9 to 16, 1990. Linan told West not to send those forms to the Agency because the Applicant's license application was pending. West believed that Linan filled out payroll documents for J & J Forestry and believed that Linan was using the Applicant as a front for Linan's farm labor contracting business.

ULTIMATE FINDINGS OF FACT

1) During times material herein, Applicant was not licensed by the Commissioner of the Bureau of Labor and Industries as a farm/forest labor contractor.

2) The Applicant employed or supplied workers to perform labor for another in forestation or reforestation of lands in Oregon, bid or submitted prices on contract offers for those

activities, and entered into subcontracts with others to perform those activities.

3) The Applicant made incorrect statements on his application regarding his use of vehicles in the operation of his farm/forest labor contracting business and regarding the transportation of workers. The Applicant made those statements with knowledge of the incorrectness, and with the intention to mislead or deceive the Agency.

4) Whether a license applicant will use vehicles in the operation of a farm/forest labor contracting business and whether the applicant will transport workers are substantive matters that are influential in the Commissioner's or the Commissioner's designee's decision to grant or deny a license.

5) The Applicant made incorrect statements during the application process regarding knowing who Al Rangel was and regarding his (the Applicant's) financial interest in the operation. The Applicant made those statements with knowledge of the incorrectness and with the intention to mislead or deceive the Agency.

6) The names and addresses of all persons financially interested in an applicant's proposed operation as a farm/forest labor contractor is a substantive matter that is influential in the Commissioner's or the Commissioner's designee's decision to grant or deny a license.

CONCLUSIONS OF LAW

1) As a person applying to be licensed as a farm/forest labor contractor with regard to the forestation or reforestation of lands in the State of Oregon, the Applicant was and is

subject to the provisions of ORS 658.405 to 658.503.

2) ORS 658.405 to 658.503 provide that the Commissioner of the Bureau of Labor and Industries shall administer and enforce those sections. The Commissioner has jurisdiction over the person and subject matter herein.

3) By acting as a farm/forest labor contractor without a valid license issued by the Commissioner, the Applicant violated ORS 658.410(1) and 658.415(1) and OAR 839-15-125.

4) By making false statements on his application and during an interview with a representative of the Agency, the Applicant violated ORS 658.440 (3)(a).

5) The following actions demonstrate that the Applicant's character, reliability, or competence make him unfit to act as a forest labor contractor: violations of ORS 658.410 and 658.415; and making false statements on the license application and to an Agency representative. ORS 658.420(1); OAR 839-15-520(1)(a) and (k), and (3)(a) and (h); OAR 839-15-140(1)(a), (d) and (i); and OAR 839-15-145(1)(g).

6) Under the facts and circumstances of this record, and according to the law applicable in this matter, the Commissioner of the Bureau of Labor and Industries has the authority to and may deny a license to the Applicant to act as a farm/forest labor contractor. ORS 658.420(1) and (2); OAR 839-15-520(1)(a), (k), and (2).

OPINION

Neither the Applicant nor his representative appeared at the hearing in this matter, and the Forum found the

Applicant in default. His only contribution to the record was his answer and a request for a hearing. In default cases, the Forum's responsibility is to determine if the Agency has made a prima facie case on the record that the Applicant violated the law. ORS 183.415(6); *In the Matter of Michael Burke*, 5 BOLI 47, 52 (1985). As described below, the Agency has made a prima facie case on all of its allegations.

The Applicant admitted and the Forum found that he twice acted as a contractor without a license in violation of ORS 658.410 and 658.415. Uncontroverted evidence was introduced on four other instances when the Applicant acted as a contractor without a license. Some of those instances occurred after he had been notified that the Agency proposed to deny him a license. Such facts, while outside of the allegations in the charging document, are aggravating circumstances that may be, and in this case are, weighed when determining an appropriate sanction for the violations.

The Agency alleged that the Applicant made misrepresentations, false statements, or willful concealments in his license application. The Department of Justice advised the Agency in a letter dated October 8, 1990, that:

"state agencies conducting administrative proceedings, including licensing actions, should generally apply preponderance of the evidence as the standard of proof. In the case of a license disciplinary action premised upon fraud or misrepresentation, however, agencies should apply clear and convincing evidence as the standard of proof."

The Department cited 44 Op Atty Gen 61, 65 (1984), which cites *Van Gordon v. Bd. of Dental Examiners*, 52 Or App 749, 629 P2d 848 (1981), and *Bernard v. Bd. of Dental Examiners*, 2 Or App 22, 465 P2d 917 (1970).

The clear and convincing evidence standard was "defined as evidence which is free from confusion, fully intelligible and distinct and for which the truth of the facts asserted is highly probable," citing *Riley Hill General Contractor v. Tandy Corp.*, 303 Or 390, 737 P2d 595 (1987), and *Cook v. Michael*, 214 Or 513, 330 P2d 1026 (1958).

Accordingly, the Forum applied the clear and convincing evidence standard to the two allegations that the Applicant made a misrepresentation, false statement, and/or willful concealment in his application. Based on the uncontroverted evidence produced at hearing, the Forum found that the Agency made a prima facie case on each allegation. The evidence was

"free from confusion, fully intelligible and distinct and for which the truth of the facts asserted is highly probable."

A "false statement," for purposes of ORS 658.440(3)(a) and OAR 839-15-520(1)(a), means an incorrect statement made with knowledge of the incorrectness or with reckless indifference to the actual facts and with the intention to mislead or deceive. The false statement must be about a substantive matter which is influential in the Commissioner's or the Commissioner's designee's decision to grant or deny a license. See *In the Matter of Raul Mendoza*, 7 BOLI 77, 83 (1988).

Regarding the use of motor vehicles to transport workers, the evidence showed that the Applicant knew his statements on the application were false at the time he made them. He intended to and did use vehicles to transport workers, and did so at the time he filed his application. He indicated on his application for workers' compensation insurance, which was filled out one day before he filled out his application for a farm labor contractor license, that his employees would be drivers. In addition, evidence showed that the Applicant was awarded a contract on March 29, 1990, and performed it during April, May, and June 1990, on which he used three vehicles to transport workers. Such facts permit the reasonable inference that the Applicant intended to mislead or deceive the Agency with false statements on his application. The legislature, in passing ORS 658.415(1)(b) and (2), indicated that information about all motor vehicles to be used by an applicant to transport workers, and about sufficient insurance on those vehicles, is necessary in an application for a license. As found in Finding of Fact 11, such information concerns a substantive matter that is influential in a decision to grant or deny a license.

Regarding his statements on the application that he was the sole owner of J & J Forestry, the evidence proved that he knew those statements were incorrect. Just eight days before he filled out his application, he and Alvaro Linan, also known as Al Rangel, filed to be joint registrants of the assumed business name of J & J Forestry. The Applicant had worked for Linan, and it

is reasonable to conclude that he knew Linan was being investigated by the Agency. Just six days before the Applicant filed his farm labor contractor application, the Agency notified Linan, dba Jose and Jesus Forestry, that the Agency proposed to deny him a license. The abundant, uncontradicted evidence is clear and convincing that the Applicant and Linan worked closely together and permits the inference that Jose and Jesus Forestry and J & J Forestry were effectively one operation. The evidence is equally clear and convincing that the Applicant flatly lied, with the intent to deceive the Agency, when he said he did not know who Al Rangel was.

In order to properly administer and enforce the farm labor contractors law, the Commissioner must know whom she is licensing. Accordingly, the disclosure of whom is financially interested in an applicant's proposed operations as a farm labor contractor is a substantive matter, influential in the decision to grant or deny a license. ORS 658.415(1)(d) makes that information a necessary part of the application.

False statements on an application and during the investigation process violate ORS 658.440(3). Such violations, and acting as a contractor without a license, are considered to be of such magnitude and seriousness that the Commissioner may propose to deny a license. OAR 839-15-520(1)(a) and (k). These violations also demonstrate that the Applicant's character, reliability, and competence make him unfit to act as a farm labor contractor. OAR 839-15-520(3)(a) and (h).

It is also relevant to the determination of the appropriate sanction for his violations of the law that, after his application was filed, he continued to act as a contractor without a license and continued to make false statements to the Agency with the intent of deceiving it. The Applicant swore on the application that, among other things,

"I will at all times conduct the business of a farm and/or forest labor contractor in accordance with ORS 658 and the rules of the Commissioner of the Oregon Bureau of Labor and Industries,"

and that "the information I have supplied on or with this application is true and correct to the best of my knowledge."

Clearly, the evidence shows that neither one of the Applicant's sworn statements was true.

This Applicant's character and reliability make him unfit to act as a farm or forest labor contractor, and the Order below is a proper disposition of his application for a license.

ORDER

NOW, THEREFORE, as authorized by ORS 658.405 to 658.503, the Commissioner of the Bureau of Labor and Industries hereby denies Rogelio Loa a license to act as a farm or forest labor contractor, effective on the date of this Final Order.

In the Matter of KENNETH VANDERWALL, Respondent.

Case Number 31-90
Final Order of the Commissioner
Mary Wendy Roberts
Issued December 20, 1990

SYNOPSIS

Respondent, who was not a licensed forest labor contractor, assisted a licensee, who held a partially exempt license, in bidding on and supervising work on a BLM forestation contract. Respondent advanced wages to workers; provided and paid for equipment, equipment repair, fuel, and transportation; and dealt with the BLM in connection with completing the contract. The Commissioner held that Respondent acted as a labor contractor without a license, and imposed a civil penalty of \$1,000. ORS 658.405; 658.410; 658.415; 658.417; 658.453.

The above-entitled contested case came on regularly for hearing before Warner W. Gregg, designated as Hearings Referee by Mary Wendy Roberts, the Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was conducted on April 17, 1990, in Room 311, State Office Building, 1400 SW Fifth Avenue, Portland, Oregon. Lee Bercot, Case Presenter with the Wage and Hour Division of the Bureau of Labor and Industries (the Agency), presented a Summary of the Case for the Agency, argued Agency policy and the facts, examined the witnesses, and

introduced documents. Kenneth Vanderwall (sometimes spelled "Van Derwall") (Respondent), appearing without counsel, was present throughout the hearing, argued the law and the facts, examined witnesses, and introduced documents.

The Agency called as witnesses the following (in alphabetical order): William F. Pick, Compliance Supervisor for the Agency; Emily Rice, Alternate Contracting Officer Representative (COR), Eugene District Office, US Department of Interior, Bureau of Land Management (BLM) (by telephone); Pamela M. Schiele, Contracting Officer, Eugene District Office, BLM (by affidavit); the Respondent; Robert Wiggett; and Don Wilbur, Field Management Specialist and COR, Eugene District Office, BLM (by telephone).

Respondent called as a witness Robert Wiggett.

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

FINDINGS OF FACT -- PROCEDURAL

1) On December 22, 1989, the Agency issued a "Notice of Intent to Assess Civil Penalty" to the Respondent. The notice informed him that the Agency intended to assess a civil penalty in the amount of \$1,000 for acting as a farm labor contractor without a farm labor contractor's license in that from on or about October 25, 1988, through on or about March 3, 1989,

Respondent bid upon and recruited, solicited, supplied, and/or employed workers in Oregon through Mark L. Wiggett to perform on BLM contract number OR-090-P49-501 (No. 501), a site preparation contract, when Respondent knew he was not licensed as a farm labor contractor and did not possess the required forestation endorsement, in violation of ORS 658.410(1), 658.415(1), and 658.417(1). The notice was personally served on Respondent on January 6, 1990.

2) On January 29, 1990, the Agency received Respondent's request through counsel for a contested case hearing "as soon as possible," together with his answer to the Notice of Intent, postmarked January 26, 1990. In his answer, Respondent denied that he had acted as a farm labor contractor without a license, denied the allegations involving bidding, soliciting, supplying, recruiting, or employing, and admitted that he was not a licensed farm labor contractor.

3) On February 14, 1990, the Forum issued to Respondent and Agency a "Notice of Hearing" which set forth the time and place of the requested hearing and identified the designated Hearings Referee. With the hearing notice, the Forum sent to the Applicant a "Notice of Contested Case Rights and Procedure" containing the information required by ORS 183.413 and a complete copy of the Agency's administrative rules regarding the contested case process — OAR 839-30-020 through 839-30-200.

4) On February 20, 1990, the Forum received a letter from Respondent wherein he advised that he was no longer represented by counsel, he

reiterated his denial of the charges, and he expressed surprise that the hearing was set so soon after the answer. He requested postponement of the hearing set for April 17, 1990, to June 1990, setting forth the inconvenience to a witness and to his own plans for a three-month vacation.

5) On February 22, 1990, the Hearings Referee denied the requested postponement in accordance with the Forum's rules regarding postponement for good cause.

6) Pursuant to OAR 839-30-071, the Agency on April 9, 1990, timely filed a Summary of the Case. Although permitted to do so under the provision of OAR 839-30-071, Respondent did not submit a Summary of the Case.

7) At the commencement of the hearing on April 17, 1990, pursuant to ORS 183.415(7), the participants were advised by the Hearings Referee of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

8) In the course of the hearing, each of the attachments to the Agency case summary were identified and offered without objection and are hereby admitted as substantive evidence.

9) The Proposed Order herein, which included an Exceptions Notice, was issued on November 26, 1990. Exceptions, if any, were to be filed on December 6, 1990. Respondent timely submitted a letter postmarked December 5, 1990, which the Forum has considered as exceptions to the Proposed Order, and which is dealt

with in the Opinion section of this Order.

FINDINGS OF FACT – THE MERITS

1) Respondent was not licensed as a farm and forest labor contractor at times material. Respondent had worked for the BLM over 20 years, had retired, and then worked in the forestry field as an employee of Guistina Lumber, where he had access to both BLM and US Forest Service forestation bid proposals.

2) On or about October 11, 1988, Mark L. Wiggett, using an address of 730 Barrett, Eugene, Oregon 97404, made application to the Agency for a partial exempt farm and forest labor contractor license. His application showed that he was a sole proprietor of, and that no other person had any financial interest in, the licensed enterprise.

3) Respondent assisted Mark Wiggett in completing the application and in obtaining workers' compensation coverage, and guided him through the application process. Respondent also paid the license fee. The address of 730 Barrett, Eugene, Oregon, was Respondent's address.

4) In October 1988, BLM contract No. 501 was awarded to Mark L. Wiggett, who had signed the Request for Quotation form. Respondent's pre-printed address form appeared on the Requested for Quotation. This address was the only location for Mark L. Wiggett known to BLM; Respondent's telephone number was the only telephone for Mark L. Wiggett known to BLM.

5) Respondent advised Mark L. Wiggett throughout the bidding process. The BLM Contracting Office and the BLM Contracting Officer Representatives (CORs) dealt with both Respondent and Mark Wiggett, with the understanding on their part that Respondent was Wiggett's "mentor."

6) Contract No. 501 was for site preparation. This involved cutting, piling, and disposal of brush and slash (for later burning) preparatory to planting on a 10-acre parcel of land and a 2.5-acre parcel of land in the South Valley Resource area of the Eugene District near Crow, Oregon.

7) The contract price was \$5,606.26, and the services were to be performed in 15 calendar days from October 19, 1988. The Contractor was to furnish power saws and/or brush cutters, labor, gas, oil, and plastics covering for the brush piles. BLM had the right to inspect for satisfactory and timely performance.

8) BLM contract No. 501 was subject to the federal Service Contract Act, 41 USC section 351 *et seq* (the Act), which fixes and assures payment of minimum wages and benefits for forest workers by making contractors and sub-contractors responsible for them, and allows BLM to withhold contract proceeds if a forest worker on a contract files a wage claim under the Act with the US Department of Labor. The minimum wage for the type of services described in Contract No. 501 was \$6.00 per hour at times material.

9) The partial exempt license for which Mark Wiggett applied is limited to a sole proprietorship which may have no more than two workers in addition to the proprietor. There is no

requirement for a bond to cover worker wages, but the proprietor must procure and carry workers' compensation insurance.

10) Mark Wiggett's brother, Robert Wiggett, was one of the workers on contract No. 501. On October 18, 1988, Robert Wiggett was home in Venita when his brother and Respondent came by. Respondent asked Robert Wiggett if he would like to go to work "thinning." Robert Wiggett accepted. The only pay he had received to date of hearing was a check from Respondent for \$600 in late November 1988.

11) Respondent furnished the saws, gasoline, plastic to cover slash piles, equipment repair, and incidental expense money to the workers. Respondent frequently provided transportation for the workers to and from the job site.

12) Respondent paid part of the wages for each crew member, including Mark L. Wiggett.

13) Respondent showed the other members of the crew how to cut, stack, and cover piles.

14) Respondent determined what to do and where; the crew took orders from him on the job site when he was present. Respondent kept notes on crew members' hours and worked with the crew. Mark L. Wiggett did not assign work or actively supervise the crew members.

15) BLM exercised its right of inspection on contract No. 501, as on all forestation contracts, through visits to the job site by the COR (or alternate COR). The COR verified on a contract diary form such things as workmanship, the progress of the work and

* "Participant" or "participants" includes the charges party and the agency. OAR 839-30-025(17).

contract time elapsed, the number of workers and adequacy of crew, and the presence of the contractor or the contractor's representative.

16) The two parcels subject to contract No. 501 had been the subject of an earlier site preparation contract on which another contractor had defaulted. As a result of the default, the prior contractor had been charged reprocurement costs (i.e., the costs of re-soliciting and again awarding bids).

17) Respondent was at times on the job site when BLM inspected. COR Wilbur explained the limits of a three-person crew (two plus the proprietor) to Mark Wiggett and Respondent during the course of the contract. He saw more than three persons working on occasion, including Respondent, and chose to treat Respondent as a volunteer, as it was his understanding that Respondent was helping Mark Wiggett get into contracting. Wilbur's interest, and that of BLM, was in getting the work done without the necessity of again defaulting and re-bidding because planting was to begin in January or early February.

18) The number of persons working on contract No. 501 varied from two to five.

19) When the CORs needed to discuss progress and plans for completion of the contract work, they called Respondent's telephone number as the only one available for Mark Wiggett; often they spoke instead to Respondent, and in some instances Respondent initiated contact with BLM concerning contract completion. In other instances Respondent accompanied Mark Wiggett in discussing completion options.

20) Contract No. 501 was due to be completed on or about November 3, 1988. It was not. Following the partial payment approval on November 22, the work was not completed and approved for final payment until March 3, 1989.

21) On November 3, 1988, Respondent suggested to Alternate COR Rice that BLM default the contract because it was not completed and would not be for several weeks. Rice responded that BLM needed the work done and that "reprocuring" could be a greater "hassle" than late completion. Respondent told her at that time that he was fronting Mark Wiggett financially and that Mark was his employee.

22) BLM authorized partial payment on contract No. 501 in the amount of \$3,139.50 on November 22, 1988.

23) A BLM check for Mark Wiggett, pursuant to the authorization, was deposited to Respondent's bank account on January 3, 1989.

24) Mark Wiggett was not always at the job site; he did not always keep appointments with the BLM CORs. In December, he spent some time in jail.

25) Respondent told Contract Officer Schiele on December 16, 1988, that Robert Wiggett was taking Mark Wiggett's place while the latter was in jail. He again suggested termination, but then assured Schiele that he would make sure the remaining work got completed.

26) After Mark Wiggett was released from jail, COR Wilbur dealt increasingly with Respondent or with Mark Wiggett and Respondent together.

27) On December 27, 1988, Robert Wiggett inquired of Schiele about payment for his services. He was told that BLM's check would go to Mark Wiggett at Respondent's address and was advised to contact the US Department of Labor (USDOL) if he needed to file a wage claim.

28) Respondent and Mark Wiggett consistently promised contract completion to the BLM CORs from November 10, 1988, through March 2, 1989. Although he approved final payment at 100 percent, COR Wilbur strongly recommended that "BLM, if at all possible, refrain from authorizing such individuals from bidding (sic) on government contracts."

29) Prior to approval of final payment by BLM, Robert Wiggett filed a wage claim with USDOL, naming both Mark Wiggett and Respondent as the responsible employers under the Act. This filing caused BLM to hold up final payment on contract No. 501. In August 1980, USDOL, through its regional solicitor, filed a federal administrative proceeding alleging violation of the Act by Mark Wiggett and Respondent in failing to pay Robert Wiggett's wages.

30) On or about August 30, 1989, Respondent sent an answer in the federal administrative proceeding to the Office of the Solicitor in which he denied responsibility under the contract, denied that he controlled wages or hours worked under the contract, or otherwise supervised under the contract, and stated that his interest was in furnishing transportation and in furnishing equipment and paying the employees subject to reimbursement by Mark Wiggett.

31) In his letter to the solicitor, Respondent denied that Robert Wiggett had the authority to work on the contract while Mark Wiggett was in jail. He also asserted that there was money due him for services performed under the contract as well as for the expenses paid. Respondent stated that the total owed to him approximated the amount still to be paid by BLM to Mark Wiggett as contractor.

32) In pursuit of his wages, Robert Wiggett also filed a wage claim with the Agency in January 1989, in which he named Respondent as the person for whom he had worked from October 17, 1988, to January 1989.

33) Respondent testified that he became acquainted with Mark Wiggett when Respondent picked him up as a hitch-hiker. He said he thereafter assisted Mark in obtaining the partial exempt license and in formulating the bid for contract No. 501. He stated that he was to back Mark financially and that Mark was to be responsible for hiring and operation. He knew Mark was without funds. Respondent testified that he expected to be repaid from the proceeds of the contract, and that he really hadn't expected any profit; he was just helping Mark out. Respondent also testified that his labor was volunteer (despite his claim to USDOL that he himself had wages coming) and that he often provided transportation to Mark and the crew. He denied that he acted as supervisor, but acknowledged that he had to show the inexperienced crew, including Mark, what to do. Respondent testified that Mark had fired Robert Wiggett, unknown to Respondent, and that he did not recall suggesting that BLM default

or terminate the contract. Because of these and other inconsistencies with other evidence in the record or within his own statements, Respondent's testimony was given little weight whenever it conflicted with any other credible evidence or inference on the record.

34) Robert Wiggett testified that he was owed over \$2,000 in wages on contract No. 501 and was looking to Respondent as the primary person responsible for payment of his wages. At the time of hearing, the whereabouts of Mark Wiggett were unknown.

ULTIMATE FINDINGS OF FACT

1) At times material herein, Respondent was not licensed as a farm labor contractor possessing a forestation endorsement.

2) Mark L. Wiggett obtained a partial exempt farm labor contractor license with forestation endorsement through the assistance and advice and at the suggestion and expense of Respondent in October 1988.

3) A bid on what became BLM contract number OR-090-P49-501, signed by Mark L. Wiggett, was submitted to BLM through the assistance and advice and at the suggestion of Respondent in early October 1988.

4) BLM contract No. 501 was awarded in the name of and signed as accepted by Mark L. Wiggett with start date of October 18, 1988, to run for 15 calendar days.

5) Thereafter, Respondent solicited Robert Wiggett to work on the contract and paid a portion of his earnings.

6) In addition to advancing wages to Mark Wiggett, Robert Wiggett, and

Jeff Senter, all of whom performed labor on BLM contract No. 501, Respondent also provided and paid for equipment, equipment repair, fuel, and transportation in connection with the contract.

7) Respondent provided his own labor in connection with the contract, advised and supervised the other workers, and determined the daily work location.

8) Respondent dealt with BLM, and pursued the approval of and payment for work accomplished.

9) Up to the time of hearing, Respondent had received all proceeds from BLM contract No. 501, and asserted an interest which he represented as superior to that of Mark L. Wiggett or the wage claimant Robert Wiggett in the as yet unpaid portion of the contract.

CONCLUSIONS OF LAW

1) ORS 658.405 to 658.503 provide that the Commissioner of the Bureau of Labor and Industries shall administer and enforce those sections and require that a person engaged in the forestation or reforestation of land should be licensed thereunder.

2) The following actions demonstrate that Respondent acted as a farm labor contractor as defined in ORS 658.405 in connection with BLM contract No. 501: Respondent recruited and paid workers in connection with the forestation or reforestation of land; had a financial interest in the business of the putative contractor on BLM contract No. 501, involving the forestation or reforestation of land; and participated in the management of the putative contractor's enterprise on BLM

contract No. 501, involving the forestation or reforestation of land.

3) The Commissioner has jurisdiction over the person and subject matter herein.

4) Having no farm labor contractor license, Respondent by his described actions was in violation of ORS 658.410, 658.415(1) and 658.417(1).

5) Under the facts and circumstances of this record, and according to the law applicable in this matter, and particularly in accordance with ORS 658.453, the Commissioner of the Bureau of Labor and Industries has the authority to impose a civil penalty for the violations cited herein.

OPINION

Respondent assisted Mark Wiggett in obtaining a partial exempt farm labor contractor license with forestation endorsement, and in submitting a bid for a "brushing" contract with BLM. The type of license issued to Wiggett is only for a sole proprietorship with a maximum of two employees. No one other than the proprietor may have a financial interest in the enterprise, which is limited contracts under \$25,000. Because of the limited size of the entity licensed and the business it can handle, such a licensee is exempt from the bond otherwise required of a farm labor contractor to ensure the prompt payment of wages, but is not exempt from obtaining and maintaining workers' compensation coverage. Hence, the term used by the Agency, "partial exempt." ORS 658.417, 658.418.

It is clear from the evidence that Respondent was a real party in interest as to Mark Wiggett's license. He did not merely loan money to an individual

with an assignment or other security device being his only assurance of repayment. He actively managed the enterprise, obtained the necessary equipment and supplies, and paid the crew, all on a piece-meal, as-needed basis. The named contractor had no control over what was purchased, how it was used, or who used it. Mark Wiggett lent his name and labor, but managing the work resided in Respondent. Respondent was not licensed to perform as a farm labor contractor. Under the facts he should have been.

Respondent attempted to deal through a "straw man" in such a way that the expense and qualifications for a bond could be avoided. The actual operation was inconsistent with the license obtained. More than three persons, including the licensee, worked on the contract. Respondent knew from his years of experience, if the licensee did not, that this violated the license. It seems a strange way to "help" an individual get started as a contractor.

Experience should also have told Respondent, as it did the BLM after the first inspection, that the legal size of the crew under the license was inadequate to complete the contract in the time allowed. Respondent took advantage of his knowledge of BLM procedures and personnel. He had BLM's agents convinced that he was merely helping the named contractor. But when he discovered that his choice of protégé was possibly a mistake and sought to have the contract terminated while he could still recoup his investment, BLM surprised him by waiving the completion time and insisting on full completion of the work.

The project went forward while Mark was in jail, using Robert's efforts with Respondent's knowledge. His attempt to claim that Robert was unauthorized merely serves to undercut his assertions that he did not manage the work.

ORS 658.453 authorizes a civil penalty of up to \$2,000 for each violation of ORS 658.405 to 658.503. OAR 839-15-510 and 839-15-512 provide that the Commissioner may consider both mitigating and aggravating circumstances in imposing a civil penalty, and suggest minimums for the offense found herein. The Agency has alleged and in the Forum's opinion has established aggravation. This Respondent knew his activities, or those he proposed for Mark Wiggett, required a regular farm labor contractor's license with forestation endorsement, but he deliberately attempted to avoid the expense of a bond through obtaining a partial exempt license. He did not merely bid or operate without any license; his attempted subterfuge subverted the license process. For that reason the Forum is imposing a civil penalty of \$1,000.

Respondent's Exceptions

Respondent by letter took issue with the Proposed Order. In the letter, which the Forum treats as exceptions to the Proposed Order, he denied being the contractor and supervising the crew, and stated there were "more men on the contract than allowed because it took some time for Mark and Robert to get a crew that would work." He further denied any knowledge of the hours worked beyond what Mark Wiggett told him, repeated that he only provided transportation, and stated that

BLM "lined up the way for Mark to get the contract without bond, not me." He further stated that the Forum was "doing an odd interpretation of helping a friend do his job over managing a contract." He again denied it was his contract or that he had control.

All of the issues raised in Respondent's exceptions were considered in the Proposed Order. The exceptions are without merit.

ORDER

NOW, THEREFORE, as authorized by ORS 658.453, the Respondent, KENNETH VANDERWALL, is hereby ordered to deliver to the Business Office of the Portland Office of the Bureau of Labor and Industries, Room 305, 1400 SW Fifth Avenue, Portland, a certified check payable to the Bureau of Labor and Industries in the amount of ONE THOUSAND DOLLARS (\$1,000) plus any interest thereon which accrues, computed and compounded annually at the rate of nine percent, between a date 10 days after the issuance of the Final Order herein and the date Respondent complies with such order. This assessment is a civil penalty against Respondent for the violations of ORS 658.410, 658.415(1), and 658.417(1) found above.

In the Matter of FRED MEYER, INC. Respondent.

Case Number 37-90
Final Order of the Commissioner
Mary Wendy Roberts
Issued December 20, 1990.

SYNOPSIS

Finding from medical evidence that Complainant had a physical disability, the Commissioner also found that there was a present risk of probable incapacitation if Complainant went to work for Respondent employer as a truck driver, and that no reasonable accommodation was possible due to the requirements of a valid collective bargaining agreement. The Commissioner held that Respondent did not violate Oregon's disability statute or the Bureau's rules in rejecting Complainant for employment as a truck driver, and dismissed the Specific Charges. ORS 659.400(3); 659.425(1)(a), (b) and (c); 659.435; OAR 839-06-225(1)(a) and (b); 839-06-235(3)(a) and (b).

The above-entitled matter came on regularly for hearing before Douglas A. McKean, designated as Hearings Referee by Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on July 10, 11, and 12, 1990, in Room 311 of the Portland State Office Building, 1400 SW Fifth Avenue, Portland, Oregon. Linda Lohr, Case Presenter with the Quality Assurance Unit of the Civil Rights Division of the Bureau of Labor and

Industries (the Agency), presented a Summary of the Case for the Agency, argued Agency policy and the facts, examined witnesses, and introduced documents. Billy Gene Brown (Complainant) was present throughout the hearing and was not represented by counsel. Alan M. Lee, Attorney at Law, appeared on behalf of Fred Meyer, Inc. (Respondent), presented a Summary of the Case, argued the law and facts, made objections and motions, examined witnesses, and introduced documents.

The Agency called the following witnesses (in alphabetical order): Complainant; Gary Cain, Complainant's supervisor at Sealy Mattress Company; William Frank Ward, employee of Respondent; and Warner Zeller, M.D., Complainant's family physician. Respondent called the following witnesses (in alphabetical order): Craig Hicks, Driver Supervisor for Respondent; Richard K. Howell, D.O.; Ella Stone, Driver Resource Assistant for Respondent; and Richard A. Tuscher, D.O., the doctor who examined Complainant for Respondent.

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

FINDINGS OF FACT – PROCEDURAL

1) On or about February 10, 1988, Complainant Billy G. Brown filed a verified complaint with the Civil Rights Division. The division found substantial evidence of discrimination, and efforts

to conciliate on the part of the division were unsuccessful.

2) On April 10, 1990, the Agency prepared and duly served on Respondent Specific Charges that alleged that Respondent refused to hire Complainant because Complainant was regarded by Respondent as having a physical impairment. The Specific Charges alleged that Respondent's action violated ORS 659.425.

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

4) As of May 2, 1990, the Forum had not received a responsive pleading from Respondent as required by OAR 839-30-060. The Hearings Referee issued a Notice of Intent to Default to Respondent.

5) On May 4, 1990, Respondent's attorney hand delivered to the Hearings Unit a copy of Respondent's answer, which copy he had gotten from the Agency's file. In the answer Respondent denied the allegation mentioned above in the Specific Charges and stated affirmative defenses. Respondent's attorney and his staff were attempting to discover what had happened to the original answer.

6) On May 7, 1990, Respondent filed another answer, a letter, and three

affidavits in response to the Notice of Intent to Default, and requested relief from default.

7) On May 8, 1990, the Forum issued to Respondent a "Notice of Default" and a ruling granting Respondent's request for relief from default. Respondent showed that it had prepared and mailed its answer to the Agency and Complainant on April 19, 1990. The Agency and Complainant were timely served with the answer. Respondent had intended to and believed it had filed a copy with the Hearings Unit.

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

9) On July 6, 1990, the Hearings Unit received Respondent's amended answer and affirmative defenses.

10) A pre-hearing conference was held on July 10, 1990, at which time the Agency and Respondent stipulated to facts that were admitted by the pleadings. Those facts were read into the record by the Hearings Referee at the beginning of the hearing.

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

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

13) During the hearing, Respondent abandoned its first affirmative defense, which alleged that the Specific Charges were not filed within the time

allowed by law or within a reasonable time.

14) During the hearing, the Hearings Referee requested and received a three-page document prepared by Respondent concerning damages.

15) During the hearing, the Hearings Referee requested original copies of Complainant's W-2 tax forms because some copies of those forms in other exhibits were unreadable. The Agency submitted those records, and they are hereby received.

16) During the hearing, the Hearings Referee allowed Respondent to submit a post-hearing affidavit from witness Jay Ross; it was received and admitted to the record.

17) Pursuant to OAR 839-30-155, the Hearings Referee requested post-hearing briefs from Respondent and the Agency. The record of the hearing was left open until July 23, 1990, for those briefs. Respondent submitted a timely brief, which was admitted to the record. The Agency waived submitting a Statement of Agency Policy.

18) The Proposed Order, which included an Exceptions Notice, was issued August 22, 1990. Exceptions were required to be filed by September 4, 1990. On September 4, 1990, the Agency requested an extension of time until September 6 to file exceptions; that request was granted. On September 6, 1990, the Agency requested another extension of time until September 20, citing the assigned Case Presenter's illness and workload as reasons for the request. Respondent did not oppose the extension, and it was granted. No exceptions were filed on Thursday, September 20, 1990, and

no additional extension of time was requested. On Monday, September 24, 1990, the Agency filed its exceptions to the Proposed Order and acknowledged that they were late. The Agency cited as reasons for its failure to submit timely exceptions: (1) a computer failure on September 20, and (2) the assigned Case Presenter was out of the office on Friday, September 21 to undergo a previously scheduled medical procedure. On September 20, 1990, the computer was unavailable to word processing users for less than two hours. No damaged word processing documents were reported to the Agency's Information Services Unit from the Civil Rights Division as a result of the computer failure. I find that the Agency's exceptions to the Proposed Order were not filed by the due date, and therefore were not considered in this Order. OAR 839-30-165(3), 839-30-040(1), (2); *In the Matter of Dan Stoller*, 7 BOLI 116, 118-19 (1988). The documents requesting and granting the extensions of time and the exceptions have been marked and are hereby received into the record.

FINDINGS OF FACT – THE MERITS

1) At all times material, Respondent Fred Meyer, Inc. was a Delaware corporation registered to do business in Oregon with a chain of retail stores, and an employer in this state utilizing the personal services of six or more employees subject to the provisions of ORS 659.010 to 659.435.

2) Distribution Trucking Co. (DTC) was a wholly owned subsidiary of Respondent. It was Respondent's "trucking arm."

3) Complainant was 54 years old at the time of hearing. He had been a truck driver since the age of 21.

4) From 1969 to 1986, Complainant worked for Crown Zellerbach Company as both a pick up and delivery and a long haul truck driver. Before he was hired, Complainant took a required physical, which revealed a curvature of his spine. The doctor said Complainant had the type of spine that will "go out." The doctor said she would not mention it to Crown Zellerbach and Complainant was hired.

5) At Crown Zellerbach, Complainant's job duties included driving a truck, putting chains on the tires when necessary, moving converter dollies to hook up trailers, loading and unloading trucks with a hyster, and some hand loading of paper products. The heaviest packages weighed 150 pounds.

6) While employed by Crown Zellerbach in the early 1970s, Complainant fell off of a trailer and landed "flat" on his back. He was examined by a doctor and had x-rays taken, but no injury was found. He filed a workers' compensation claim for the medical expenses, but lost no time from work.

7) Sometime between 1971 and 1973, Complainant applied for a truck driver job with Santry Trucking. Santry's doctor took an x-ray of Complainant's back and disqualified him from driving its trucks because of his back.

8) On November 8, 1978, Complainant suffered a low back strain while lifting a 125-pound carton on the job. A radiology report showed "Lumbosacral spine: The interspaces and

vertebral bodies are within normal limits showing no fracture or other bony abnormalities." He was off work from November 11 to 27, 1978, and was paid time loss benefits from November 14 to 22, 1978. Dr. Warren Hale was Complainant's attending physician. Complainant's treatment included daily physical therapy and taking a muscle relaxer called norgesic.

9) In 1978, Complainant learned from Dr. Hale that he had high blood pressure and began taking medication to keep it under control.

10) In 1985, an x-ray was taken of Complainant's kidneys (a pyelogram). The consulting doctor noted: "skeletal structures unremarkable, with old developmental changes and degenerative changes noted at the lower lumbar spine."

11) In 1986, Crown Zellerbach was taken over by another company, which eliminated Complainant's job.

12) On June 16, 1986, about one week after he lost his job with Crown Zellerbach, Complainant applied for a truck driver job with Respondent. Chuck Wyatt, a driver supervisor for Respondent, told Complainant that Respondent would be calling extra drivers. No one told Complainant he was hired. Respondent used drivers on a casual (on-call) basis until they had worked for 480 hours. Then, drivers obtained seniority and a full-time, permanent position.

13) The job duties of a truck driver for Respondent included: frequent, long, irregular hours (local drivers - 8 to 10 hours per day; longhaul or "line drivers" - up to a maximum of 15 hours per day); sitting in an air seat

75 percent of the time; hooking and unhooking double and triple combinations of trailers; pushing and pulling converter dollies - which weighed between 1,500 and 2,200 pounds, some of which had inadequate counter weights and which had a tongue weight of from 50 to 75 pounds - up to eight times per day over sometimes sloping and graveled surfaces; infrequent re-stacking of pallets of product weighing up to 100 pounds that became dislodged during transport, requiring lifting, twisting, and bending from the waist and knees (pallets alone weighed between 25 and 50 pounds); loading the truck with products before "back haul" trips from suppliers; some unloading at Respondent's stores; climbing in and out of tractor driver compartments at shoulder to head levels - five to six feet, with the first step being one foot to 18 inches from the ground - in inclement weather such as ice, sleet, rain, and snow, which increased the risk of slipping and falling; climbing four-foot-high vertical ladders on loading docks; installing 45- to 90-pound tire chains in the winter; operating a pallet jack; and driving a forklift.

14) From June 1986 to September 1986, Complainant drove trucks for Blue Bell Potato Chips (Sunshine Biscuit Inc.).

15) In September 1986, Complainant took a long haul truck driving job with Payless (Electric Transport Inc.). After he had driven around 100 hours, Complainant became a permanent driver for Payless. His job included driving, unloading fixtures for new stores, and moving converter dollies. He was paid \$13 per hour while he

was loading or unloading a truck, and around 30 cents per mile while he was driving. The mileage rate was split with another driver when there were two drivers on a trip. Complainant worked for Payless until March 1987, when his job was eliminated.

16) While Complainant was employed by Payless, Respondent called him to drive a truck to Seattle. He was unable to take the trip because he had to drive to Texas the next day for Payless.

17) On January 14, 1987, Complainant began driving on a "casual," or on-call, basis for Zellerbach Paper Company. March 17, 1988, was Complainant's last day of work for Zellerbach Paper Company. He made local deliveries, and the job included lifting packages of printing paper weighing 150 pounds.

18) In early April 1987, Complainant again talked to Chuck Wyatt about a job with Respondent. Respondent's application process for truck drivers included a physical examination. Wyatt told Complainant to schedule a physical examination with the company's doctor.

19) Dr. Werner Zeller was, since 1984, Complainant's family doctor. On April 13, 1987, Complainant went to see Dr. Zeller because he was worried about his blood pressure, which Dr. Zeller was treating with Dyazide. In addition, Complainant needed to renew his Department of Transportation (DOT) certification, which required a physical examination in accordance with the Federal Motor Carrier Safety Regulations. Dr. Zeller had given Complainant a DOT examination in 1985, and had certified that

Complainant was qualified to operate a commercial motor vehicle. Dr. Zeller had never treated Complainant for back problems. Complainant had never complained about or reported any history of back problems to Dr. Zeller.

20) Dr. Zeller received his Doctor of Medicine degree in 1937 from the University of Oregon Health Sciences Center. He specialized in general surgery. He was a clinical professor of surgery from 1946 to 1959 at the University of Oregon Health Sciences Center. He was "versed" in orthopedics. He had been practicing medicine in Portland since 1946. From 15 to 20 percent of his practice involved injured workers.

21) On April 13, 1987, Dr. Zeller gave Complainant a physical examination. He checked Complainant's vision, hearing, blood pressure, hernia, reflexes, and the range of motion in his back. In his examination of Complainant's back, he looked

"for the presence of any deformities. A slight scoliosis or a slight twisting I don't regard as abnormal, because most people do not have a perfectly straight spine in the first place."

Complainant showed no external indications of an abnormal spine that Dr. Zeller "thought were disqualifying." He saw no muscle spasms, lordosis, kyphosis, or scoliosis in Complainant's back. He found Complainant's spine "normal." Dr. Zeller was not concerned about Complainant's weight or blood pressure. Dr. Zeller believed that Complainant was in good shape, and found him qualified under the Federal Motor Carrier Safety Regulations

(49 CFR 391.41 to 391.49) to drive a commercial motor vehicle.

22) The instructions for performing and recording the DOT physical exam stated:

"SPINE. Note deformities, limitation of motion, or any history of pain, injuries, or disease, past or presently experienced in the cervical or lumbar spine region. If findings so dictate, radiologic and other examinations should be used to diagnose congenital or acquired defects, or spondylolisthesis or scoliosis."

Complainant did not report any history of back problems to Dr. Zeller. Dr. Zeller took no x-rays of Complainant. He would "probably" take x-rays if a person were complaining about back problems and "was unable to carry on a job as a result of his back aches." The minimum requirements of 49 CFR section 391.41 (b) provided in pertinent part

"A person is physically qualified to drive a motor vehicle if he: * * * (2) Has no * * * structural defect or limitation, which is likely to interfere with his ability to control and safely drive a motor vehicle, or has been granted a waiver * * * upon a determination that the impairment will not interfere with his ability to control and safely drive a motor vehicle."

23) Dr. Richard A. Tuscher was an osteopathic physician and surgeon, and had training in the role of the musculo-skeletal system for both diagnosis and treatment. Such training is not part of the regular training in medical schools. At the time of hearing, he

had been in practice for about 21 years and was board certified in the specialty of occupational medicine. He had been the director of an emergency department for about 18 years. He had 15 years of experience and training in occupational medicine, which included epidemiology and assessing the risk of reinjury. He had been in private practice for 11 years. Forty to 45 percent of his practice was devoted to treating the occupational injuries and illnesses of private patients. Occupational medicine was the focus of his practice. He was the part-time medical director at Pacific Crest Rehabilitation and Specialty Care Center for head and spinal cord injuries. The center treated injured workers with head, neck, and spine injuries. He taught physicians occupational medicine skills. He had been the executive director of the Occu-Med Network from 1984 to 1987, and the medical director of Occupational Health Service at Eastmoreland Hospital from 1979 to 1984.

24) During 1987, Dr. Tuscher performed between 10 and 12 preemployment physicals per day. Dr. Tuscher performed both DOT and preemployment examinations in his practice. He believed that the two exams were different in their scope and purpose, and in the extent to which the patient was examined. The purpose of the DOT exam was to ensure the safety of interstate drivers. The DOT exam was not concerned with present risk of probable injury, because that may or may not effect the safety of the interstate driver. The preemployment examination was more detailed and precise, and it evaluated different factors than the DOT exam. The purpose of

Respondent's preemployment physical examination was to ensure that people with identifiable conditions could work and were placed appropriately, and to prevent people with conditions from being placed in situations where they would be at too high of a risk of injury.

25) On April 14, 1987, Complainant took a preemployment physical for a truck driver job with Respondent. He filled out a medical history form and answered the question "Do you now have or have you ever had any of the following:" "Disease of the back (spine)," in box 41 with "no," and "Backaches" in box 43 with "no." Dr. Tuscher reviewed the medical history with him, and he did not complain of a back problem or report a history of back problems or injuries. Dr. Tuscher performed a physical examination, which took about 30 minutes. X-rays were taken and reviewed. Dr. Tuscher knew that Complainant was a truck driver and understood the job duties of a truck driver for Respondent to be those described in Finding of Fact 13.

26) Dr. Tuscher found that Complainant had slightly reduced thoracolumbar forward flexion of 80 degrees in his back (90 degrees or greater is normal). Complainant's fingers were 12 inches from the floor when he bent over. Dr. Tuscher found an increased thoracic kyphosis, that is, an increased curve forward of the spine, with its apex at T-6 (the sixth thoracic vertebra). He found moderately chronic segmental muscle spasm at L-2 to L-5 (the second to fifth lumbar vertebra). X-rays showed spina bifida occulta at L-5, and 30 percent anterior compression of T-12 (the twelfth thoracic vertebra). Such a compression could be

caused by a fall on the back. The x-rays also showed moderate anterior lipping of L-1 to L-2. Based on the physical examination and the x-ray findings, Dr. Tuscher concluded that Complainant was

"[n]ot qualified at this time. Present risk of probable incapacitation, due to presence of moderate degenerative joint disease of lumbar spine, compression [fracture] of 12th thoracic vertebra (30%) associated with clinically moderate chronic muscle spasm in the lumbar area. Blood pressure is under borderline control (138/90). Also has poor muscle tone with 31% body fat."

Dr. Tuscher understood "probable injury" to mean "that the likelihood of injury is greater than a 51% chance, or more likely to occur than not." He understood "present risk" to mean "that an event would likely occur in the present, or within the immediate future, often within the first year." The primary factors in Dr. Tuscher's determination were the presence of the moderately chronic muscular spasm and the limited range of motion of the spine. The x-rays confirmed his physical findings and showed evidence of chronic degenerative processes. He would have found it difficult to reach his determination without seeing the x-rays.

27) Dr. Tuscher did not tell Complainant that he was not qualified for Respondent's job; "that's not my role." Someone from Dr. Tuscher's office called Respondent, reported the results of Complainant's examination, and returned the examination report to Ella Stone, Driver Resource Assistant for Respondent, who put the report in

Complainant's file. Wyatt relied exclusively on Dr. Tuscher's finding that Complainant was not physically qualified to drive for Respondent.

28) If Complainant had been his patient, Dr. Tuscher would have advised Complainant to find other work than driving a truck, or, if Complainant was going to drive a truck, Dr. Tuscher would have put physical limitations on Complainant's activities. The limitations -- involving lifting weight, bending and stooping, and avoiding "environmental conditions" that create risks, such as icy and slippery conditions -- were necessary because the clinical findings indicated that Complainant's back was "unstable." Complainant had less resiliency in protecting himself against injury. In the event of an injury, he would be more likely to have a prolonged recovery or no recovery.

29) Dr. Zeller reviewed Dr. Tuscher's physical examination report of Complainant and believed no finding in the report would disqualify Complainant from performing the truck driver job tasks at Fred Meyer. He had never visited the Fred Meyer truck distribution center, but was aware of the duties of truck drivers from experience. He did not believe there was such a thing as "chronic muscle spasm"; "it's either acute or it's not acute." "If you get real muscle spasms, you know it's there." In his opinion, tenderness would result from muscle spasm. The patient would have to complain of back aches in order to diagnose muscle spasms. Dr. Zeller did not believe that muscle spasm and a limited range of motion (80 degrees) together were indicative of degenerative joint disease. Dr. Zeller believed that degenerative

joint disease was "one of the processes of getting older." He believed that most people, as they get older, will have moderate degenerative joint disease.

"Even if I suspected a degenerative disease and the man has been working and doing it for 20 years, and he's had no difficulty, there's no reason why I should suspect anything is going to go wrong."

He believed that the rate of degeneration had nothing to do with a worker's "proneness" to accidents, "as long as he's working." He did not think Complainant was less resilient to injury. He believed that none of the following would disqualify a person from employment: 80 degrees flexion in the back, a 30 percent compression fracture of the twelfth thoracic vertebra, blood pressure that was under borderline control, and poor muscle tone with 31 percent body fat. He thought that the compression fracture was "past history, it's taken care of, the body has healed it, and it's not bothering him." He did not think that lipping of the lumbar vertebra was debilitating. Dr. Zeller did not believe that, at the time of the examination, Complainant was at risk of probable incapacitation. Dr. Zeller found it very difficult to enter into the realm of prediction of a person's risk of injury, "because I don't think anybody knows, and I don't think anybody can tell with any type of certainty." Dr. Zeller knew of no criteria or standards or guidelines that he would use to show that a person was predisposed to back injury. He would evaluate the patient's general condition, history,

type of work, amount of time doing that work, and record of injuries.

"[Complainant's] been working for 17 years as a truck driver doing heavy work and heavy labor and has not missed one single day during that time. Now if that isn't a pretty good indication of what his general status is, I don't know what else you could get. ***

"If a fella's been doing that type of work for 17 years, I don't see where I have much business sticking my nose into what he should be doing, when he's been doing it all the time. ***

"My only reason for telling somebody not to do something is that they have been injured and they have problems, and then they try to go back and do that work again and they still have problems, then I say 'get out of that business, do something else.'"

Dr. Zeller did not believe that he or anyone else could determine that a worker would be injured just by looking at an x-ray. Dr. Zeller was not aware of any of Complainant's workers' compensation claims concerning his back. He believed an accurate medical history was "a major part of" making his opinion. The x-ray results in Dr. Tuscher's report did not change Dr. Zeller's opinion of Complainant's medical status, because "what you'll see as far as the x-ray is concerned gives you no idea of a man's ability to carry on the type of work he was doing." Dr. Zeller acknowledged that

"a preplacement examination is far different in its connotations than an ordinary examination for interstate

driving safety, and that the employer has the right to avoid hiring an individual who may be prone to injury, even though they are not showing any evidence of injury or inability at the time of the examination. It is impossible to say that Mr. Brown would be more probable to sustain incapacitation, but the possibility exists."

30) Richard Keith Howell, D.O., was a specialist in occupational medicine and was a consultant, lecturer, and trainer in the field. His practice included preplacement medical assessments; fitness for duty assessments; job analysis; training physicians about basis diagnostic skills focused on the spine, neck, and joints; and consultations regarding what medical conditions prohibit which workers from performing which jobs. He had been a medical consultant to Occu-Med, Inc., an organization which provides medical consultation and rehabilitative services to employers and employees, and Medical Director of Eastmoreland Hospital's Occupational Medicine Program. The bulk of his practice involved treating injured workers. Part of the practice of occupational medicine involves risk assessment.

31) In evaluating a job applicant, Dr. Howell had to: know what the physical demands and environmental conditions of the job were; take a detailed medical and work history of the applicant; know, if the applicant had physical conditions, whether those conditions created limitations or, by themselves, created risks of injuries; and correlate those conditions, with their risks, with the specific demands of the job. Dr. Howell also performed

DOT physical examinations and believed there were differences between a DOT physical and a preemployment physical. The criteria for being qualified were quite different. The DOT criteria, set up by the Department of Transportation, did not give any consideration to the risk of injury to a person; the determining criterion was whether or not a person could operate a vehicle safely.

32) Dr. Howell visited the Respondent's distribution truck center on more than one occasion. He learned about the tasks that were physically demanding for truck drivers, including maneuvering the converter dollies used to connect trailers. He maneuvered the dollies and inspected the slope and surface of the yard where the dollies were used. He had treated a number of drivers with back strains due to converter dolly use. He looked at the heights of the truck cabs and methods for climbing in and out of the trucks. He learned about the installation of the 90 pound tire chains. He observed drivers doing their jobs. In Dr. Howell's opinion, the truck driver job for Respondent was a "heavy" job, because it required lifting more than 50 pounds.

33) Between 1983 and 1988, Dr. Howell did many of Respondent's preemployment physicals, including "a hundred and perhaps substantially more than a hundred" truck driver applicants, as well as seeing many of Respondent's employees for health and injury care. He treated 25 to 35 of Respondent's truck drivers for back problems. Dr. Howell was in practice with Dr. Tuscher during 1987, at the time of Dr. Tuscher's physical examination of Complainant. They discussed their

cases and patients, and shared information about the job requirements of their patients or clients. They often conferred before one of them reached an opinion about a patient. They used the same evaluation process in all of their preemployment physicals.

34) Dr. Howell reviewed the medical records and documents concerning Dr. Tuscher's physical examination of Complainant. In giving his opinions, Dr. Howell relied upon his knowledge of Occu-Med, Inc. medical standards, which identify which conditions would be disqualifying for which jobs. Those standards were first developed in the 1970s in response to federal laws that prohibited handicap discrimination. He believed that the presence of moderate chronic segmental muscular spasm, as in Complainant's case, was predictive of an increased risk of back strain in jobs that required lifting of more than 50 pounds. He believed the spasm was the product of degenerative changes in the lumbar spine. He believed that the x-ray findings, the kyphosis, the blood pressure, the 31 percent body fat, and the reduced flexion in the back were predictive of an increased risk of back strain. He thought a compression fracture, as well as chronic degenerative joint disease such as Complainant had, make a person predisposed to back injuries. He understood "present risk" to mean "today, now." He understood "probable" to mean a 51 percent or greater chance. Based on Dr. Tuscher's findings, Dr. Howell opined that Complainant was, at the time of the examination, at an increased risk of low back injury if he did Respondent's truck driver job. He opined that Complainant risked a

"substantially greater than 51 percent likelihood or probability of having low back injury soon after he began work in this job, because of multiple conditions."

He agreed with Dr. Tuscher's conclusion from the examination that Complainant had a "present risk of probable incapacitation." He believed that the muscle spasms, the decreased range of motion, and the facts shown by the x-rays were enough to indicate a risk, at that time, of probable incapacitation. Because Complainant had a progressive, degenerative condition, Dr. Howell believed that Complainant's long history of truck driving would not override that conclusion.

35) After reviewing the three descriptions of Complainant's spine in the x-rays noted in Findings of Fact 8, 10, and 26, Dr. Tuscher and Dr. Howell opined that between 1978 and 1985, and continuing into 1987, Complainant developed a progressive degenerative joint disease "process." The process had progressed "fairly rapidly" and was significant in the predisposition for injury. Dr. Tuscher believed that the x-ray findings "confirmed" what he had found in 1987.

36) About two weeks after Complainant's physical examination, Frank Ward, a truck driver for Respondent, asked Respondent's dispatcher if the company was going to hire Complainant as a casual driver. The dispatcher checked the seniority list, then "pulled out another piece of paper that had about four or five names on it" and said "we can't use him." That piece of paper was never posted on a board where drivers could see it. Ward later asked Chuck Wyatt, who was

deceased at the time of hearing, why Complainant was not hired. Wyatt would not tell him. Ward told Complainant that his name was on a list of drivers who would not be called for work. Complainant thought the list was posted on a board in the dispatch office, and he had been "blacklisted." He thought that other drivers would see the list.

37) Soon after that time, Complainant saw Chuck Wyatt on two occasions. Complainant asked Wyatt why he was not hired and asked if there was anyone from Respondent he could talk with to explain that he could do the job. Complainant never heard from Respondent after that time.

38) Respondent hired no applicant that did not pass the physical examination.

39) Respondent's truck drivers worked under a contract between Respondent and the Teamsters Union, Local 162. Under the contract, each job was bid for by seniority. It was "hard" to alter job duties without altering the seniority provisions. If job duties were altered, the job had to be opened for bid to the drivers, based on seniority. Injured workers that were released for light duty work were given temporary work in Respondent's office.

40) Complainant's demeanor during the hearing appeared to be sincere and forthright. However, he had significant loss of memory regarding, among other things, important events in his medical history. In addition, he did not understand the process of filing workers' compensation claims. That misunderstanding and particularly his memory problems made Complainant's testimony unreliable. As a result,

his testimony was given less weight whenever it conflicted with other credible evidence on the record. In some cases, his testimony was not believed even when it was not controverted by other evidence.

ULTIMATE FINDINGS OF FACT

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

2) Complainant applied for employment with Respondent.

3) Complainant was a handicapped individual.

4) Respondent required a medical evaluation of Complainant as a condition of hire.

5) The medical evaluation verified that, if Complainant performed Respondent's truck driver job, he had a present risk of probable incapacitation.

6) No reasonable accommodation of Complainant's physical impairment was possible due to the requirements of a valid collective bargaining agreement, including requirements governing and defining job descriptions, seniority, and job bidding.

7) Respondent refused to hire Complainant.

CONCLUSIONS OF LAW

1) At all times material, Respondent was an employer subject to the provisions of ORS 659.010 to 659.110, and ORS 659.400 to 659.460. ORS 659.010(6) and 659.400(3).

2) The Commissioner of the Bureau of Labor and Industries has jurisdiction of the persons and of the subject matter herein and the authority to eliminate the effects of any unlawful

employment practice found. ORS 659.040, 659.050, and 659.435.

3) In 1987, ORS 659.425(1) provided, in relevant part:

"For the purposes of ORS 659.400 to 659.435, it is an unlawful employment practice for any employer to refuse to hire * * * because:

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

"(b) An individual has a record of a physical or mental impairment; or

"(c) An individual is regarded as having a physical or mental impairment."

Respondent did not violate ORS 659.425.

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

OPINION

The main issue in this case is whether Complainant could perform the duties of Respondent's truck driver position without present risk of probable incapacitation.

OAR 839-06-225(1) provides, in relevant part:

"To come within the protection of ORS 659.425, a handicapped individual must be able to perform the duties of the position occupied or

sought. 'Able to perform' shall mean * * *:

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

"(b) Possessing the ability to perform the job safely and efficiently, with reasonable accommodation and without present risk of probable incapacitation to him/herself. * * *"

OAR 839-06-235(3) provides, in relevant part:

"An employer may require a medical evaluation of an individual's physical or mental ability to perform the work involved in a position:

"(a) The individual seeking or occupying a position must cooperate in any medical inquiry or evaluation, including production of medical records and history relating to the individual's ability to perform the work involved;

"(b) If the employer requires a medical evaluation as a condition of hire or job placement and the evaluation verifies a physical or mental impairment affecting the ability to perform the work involved, or verifies a present risk of probable incapacitation, the employer may not refuse hire or job placement based on the individual's impairment unless no reasonable accommodation is possible * * *"

The "present risk of probable incapacitation" standard required by OAR

839-06-225 and 839-06-235 must be interpreted so that it is consistent with the standards stated in *Montgomery Ward v. Bureau of Labor*, 280 Or 163, 570 P2d 76, 79 (1977), and *Pacific Motor Trucking Co. v. Bureau of Labor and Industries*, 64 Or App 361, 668 P2d 446, 450 (1983), *rev den*, 295 Or 772, 670 P2d 1036 (1983).

It must be noted that the statutory language of ORS 659.425(1) (1973), which the courts interpreted in those cases, stated in relevant part:

"It is an unlawful employment practice for any employer to refuse to hire *** because an individual has a physical or mental handicap, unless it can be shown that the particular handicap prevents the performance of the work involved."

In 1979, the Legislature amended ORS 658.425 to provide as shown in Conclusion of Law 3:

"[I]t is an unlawful employment practice for any employer to refuse to hire *** because:

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

The Forum finds that, for purposes of this case, the operative language of the 1979 statute, which is applicable here, has the same meaning as the language of the 1973 statute.

In 1977, the Oregon Supreme Court interpreted ORS 659.425(1):

"It is our conclusion that the legislature intended by the statutory language to impose upon an employer the obligation not to reject a

prospective employee because of a physical or mental handicap unless there is, because of the defect, a probability either that the employee cannot do the job in a satisfactory manner or that he can do so only at the risk of incapacitating himself." *Montgomery Ward*, 280 Or at 168-69, 570 P2d at 79.

The Court of Appeals, in *Pacific Motor Trucking*, interpreted the *Montgomery Ward* standard to be a "probability of incapacitation," and not a "probability of risk" as the employer urged in that case. The court also held that the employee's risk of probable incapacitation should be considered "at the time of rejection." The court said that to "refuse to allow a discharge to be based on an employee's risk of injury in the future is consistent with the statute's policy." 668 P2d at 450.

Thus, the two cases, OAR 839-06-225, and 839-06-235 read together provide that an employer may not refuse to hire an individual unless the medical evaluation verifies either: (1) a physical or mental impairment affecting the ability to perform the work involved safely and efficiently; or (2) a present ("at the time of rejection") risk of probable incapacitation; and, in either case, no reasonable accommodation is possible.

The evidence in this case showed that Complainant had the ability to perform the work of truck driver safely and efficiently. He had successfully performed such duties for many years prior to the physical examination for Respondent. However, as the Court of Appeals observed in *Pacific Motor Trucking*, "the fact he may not have

experienced problems is not necessarily probative of the medical risk of injury." 668 P2d at 450 n. 9. That leaves the question of whether Complainant could perform the work of Respondent's truck driver, on April 14, 1987, without a risk of probable incapacitation to himself.

The Commissioner has previously observed that "the determination of probability appears to be left to the testimony of experts." *In the Matter of Pacific Motor Trucking Company*, 3 BOLI 100, 112 (1982), *aff'd*, *Pacific Motor Trucking Co. v. Bureau of Labor and Industries*, 64 Or App 361, 668 P2d 446 (1983), *rev den*, 295 Or 772, 670 P2d 1036 (1983).

The testimony of Dr. Tuscher, the examining physician for Respondent, was given more weight than that of Dr. Zeller, Complainant's family doctor, for a number of reasons. First, Dr. Tuscher had specialized training and experience in occupational medicine, specifically concerning head, neck, and spine injuries. Dr. Zeller had no such specialized training or experience, and he had never treated Complainant for back problems. He had

treated Complainant primarily for high blood pressure. Neither doctor had the benefit of Complainant's true medical history concerning his back.* Second, Dr. Tuscher's training and experience included assessing risks of injury. Such an assessment is what the law expects. Dr. Zeller had no such training or experience, and he expressed a distrust or disbelief in anyone's ability to accurately predict risk of injury. Third, Dr. Howell, who possessed specialized training and experience in occupational medicine, including the spine, neck, and joints, concurred with Dr. Tuscher's conclusions. Fourth, other medical evidence, although not available to Dr. Tuscher at the time of Complainant's examination, agreed with his findings. Fifth, the scope and purpose of Dr. Tuscher's preemployment examination were different and more relevant here than those of Dr. Zeller's DOT examination; specifically, the preemployment examination focused on issues such as the physical ability to perform the duties of Respondent's particular job, and the present risk of probable incapacitation from performing the job.

* Compare *Montgomery Ward v. Bureau of Labor*, 42 Or App 159, 600 P2d 452 (1979) (employer's company physician, after examining complainant for approximately one-half hour, concluded the job was incompatible with complainant's physical condition; complainant's personal physician, a cardiologist who had treated him and monitored his heart condition for approximately eight years, testified that complainant could perform the duties required without a substantial risk of incapacitation; the Commissioner resolved the conflict by according greater weight to the opinion of complainant's physician); and also *In the Matter of Pacific Motor Trucking Company*, 3 BOLI 100 (1982), *aff'd*, *Pacific Motor Trucking Co. v. Bureau of Labor and Industries*, 64 Or App 361, 668 P2d 446 (1983), *rev den*, 295 Or 772, 670 P2d 1036 (1983) (the testimony of two orthopedists -- one was complainant's witness and one was respondent's witness -- was given greater weight regarding complainant's back condition than the testimony of respondent's doctor who was a specialist in occupational medicine).

The preponderance of credible evidence supports Dr. Tuscher's conclusion that Complainant was at present risk of probable incapacitation if he performed Respondent's job. Dr. Tuscher applied the correct legal standard. However, it should be noted that some of his testimony regarding "present risk" – namely, that an event would likely occur "within the immediate future, often within the first year" – was confusing. The word "present" refers to when the risk of probable incapacitation occurs. "Present" does not refer to when an "event" might occur. A rejection based upon a risk "in the future" is inconsistent with the statute's policy. *Pacific Motor Trucking*, 668 P2d at 450. Thus, if the risk (of probable incapacitation) does not arise for a year, or a month, or some other time after "the time of rejection," then the applicant is not at "present risk of probable incapacitation."

Both Dr. Tuscher and Dr. Howell understood the "probable incapacitation" standard to mean a 51 percent or greater chance, or "more likely to occur than not." The Commissioner has previously relied on testimony that "the medical probability was in excess of 50% that [the complainant] could perform the duties of a heavy-duty truck driver without experiencing back problems" to find that the employee was not at risk of probable incapacitation. *In the Matter of Pacific Motor Trucking Co.*, 3 BOLI 100, 112 (1982) (emphasis in original). The "51 percent or greater chance" or "more likely to occur than not" standard is the correct interpretation of "probable."

The "probable incapacitation" standard does not require that

incapacitation be certain. Thus, evidence that Complainant successfully performed truck driver duties after his rejection by Respondent does not detract from Dr. Tuscher's conclusion.

With regard to Respondent's duty to reasonably accommodate an applicant that has a "physical or mental impairment affecting the ability to perform the work involved" or has "a present risk of probable incapacitation," OAR 839-06-245(2) provides in relevant part:

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

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

The evidence here was undisputed that the requirements of the collective bargaining agreement between Respondent and the Teamsters Union governed and defined job descriptions, seniority, and job bidding. Testimony that Respondent could not reasonably accommodate Complainant due to the agreement was likewise undisputed. No evidence suggested that Complainant lost his statutory rights through collective bargaining. Instead, the evidence proved that to accommodate Complainant would impose an undue hardship on Respondent due to its

collective bargaining agreement with the union. Accordingly, Respondent was not required to accommodate Complainant.

ORDER

NOW, THEREFORE, as Respondent has not been found to have engaged in any unlawful practice charged, the complaint and the specific charges filed against Respondent are hereby dismissed according to the provisions of ORS 659.060(3).

In the Matter of
JEROME D. DUSENBERRY,
dba Jerry's Satellite TV RO Systems,
and Jerome D. Dusenberry, dba
Westgate Center, Respondent

Case Number 34-90
 Final Order of the Commissioner
 Mary Wendy Roberts
 Issued January 24, 1991.

SYNOPSIS

Male Respondent subjected 19-year-old female Complainant to unwelcome sexually explicit and demeaning remarks. Finding that Complainant suffered ongoing distress from Respondent's sexual harassment and that the authority to award damages for mental distress was constitutional, the Commissioner awarded Complainant \$3,500 for her mental suffering. ORS 659.030(1); OAR

839-07-550(1) and (3); 839-07-555(1); 839-07-565.

The above-entitled contested case came on regularly for hearing before Warner W. Gregg, designated as Hearings Referee by Mary Wendy Roberts, the Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was conducted on June 5 and 6, 1990, in the conference room of the office of the Bureau of Labor and Industries, Room 240, State Office Building, 700 S.E. Emigrant Street, Pendleton, Oregon. Linda Lohr, Case Presenter with the Quality Assurance Unit of the Civil Rights Division (CRD) of the Bureau of Labor and Industries (the Agency), presented a Summary of the Case for the Agency, argued Agency policy and the facts, examined the witnesses and introduced documents. Jerome D. Dusenberry (Respondent) was present throughout the hearing and was represented by Robert N. Ehmann, Attorney at Law, Pendleton, who presented a Summary of the Case, argued the law and the facts, interposed objections and motions, examined the witnesses, and introduced documents. Robin J. Robertson (Complainant) was present throughout the hearing and was not represented by counsel.

The Agency called as witnesses the following: the Complainant; the Complainant's sister Susan Bernard; Respondent's former employee Linda Chandler; Respondent's wife Carolyn Dusenberry; Agency Senior Investigator Susan Moxley; by telephone, Agency Investigative Supervisor Pat Blank; Respondent's former employee David Chamberlain; the Complainant's

former roommate Stewart Nichols; and Union-Wallowa County Community Corrections Parole and Probation Officer Tim Waller.

Respondent called as witnesses the Respondent, Respondent's son Raymond E. Dusenberry, and, by telephone, the Complainant's former roommate Stewart Nichols.

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

RULINGS ON MOTIONS AND OBJECTIONS

1. Respondent's Motion To Dismiss The Specific Charges

During hearing, after the Complainant had testified, Respondent moved to dismiss the Specific Charges. In particular, counsel argued that the Complainant testified that she earned more subsequent to terminating employment with Respondent than she would have earned had she remained. Counsel further argued that there was no evidence of emotional distress, and that any offensive activity on the part of Respondent occurred off the job and not as part of any employment relationship. The Hearings Referee pointed out that time and place do not necessarily control whether there is an offense when there is an ongoing employer-employee relationship. The Hearings Referee denied the motion because, in any event, it was premature. That ruling is confirmed.

2. Agency Motion To Amend Specific Charges

At the close of the Agency's case in chief, the Agency moved to amend the Specific Charges to conform to the evidence. In particular, the Agency moved to eliminate the issue of constructive discharge, and to eliminate the claim for wage loss resulting from an unlawful discharge. Respondent did not object and the Hearings Referee granted the Agency's motion. That ruling is confirmed.

3. Respondent Motion To Dismiss Remaining Charges

Following the ruling granting amendment of the Specific Charges, Respondent moved to dismiss the remaining allegations. Respondent moved against the allegation which accused Respondent of creating a hostile, abusive, and sexually discriminatory work environment on the ground that the two alleged comments described occurred off the job and were thus not employment connected, and that their content was "vague," having been described in four separate ways, only two of which might be termed sexual. Respondent moved against the allegation which sought remedy for mental suffering caused by Respondent's unlawful sexual harassment, on the basis that, other than the Complainant's own general comment, there was no evidence of harm or damage to her such as trauma necessitating professional counseling or medical consultation and treatment. Counsel argued that the Complainant testified to fear and apprehension about Respondent based upon rumors she had heard and not upon any comments he had made to her. The Hearings

Referee denied the motion at hearing, reserving final ruling until this Order.

In deciding a motion to dismiss the Agency's charges at the close of the Agency case, the Forum must determine whether the Agency has met its initial burden of proof by offering evidence on each element of the violation alleged. *In the Matter of PAPCO, Inc.*, 3 BOLI 243 (1983). In this instance the Agency offered evidence of unwelcome and offensive verbal conduct, evidence that such conduct was sexual in nature and directed toward the Complainant due to her gender, and evidence that such conduct had the effect of creating an intimidating, hostile, or offensive work atmosphere. This evidence, if preponderant, proves a violation of ORS 659.030. OAR 839-07-550. The mere fact that the offensive remarks to an employee were made other than during duty hours does not serve to insulate the employer from liability for harassment based on the employment relationship. *In the Matter of Colonial Motor Inn*, 8 BOLI 45 (1989). Time and place were part of the total factual context from which the issue of liability was to be decided. Respondent's overt actions and the employer-employee relationship were involved. It was more likely due to the employment relationship that Respondent felt justified in commenting on the Complainant's presence on or near the counter and on her financial concerns. That portion of Respondent's motion is denied.

As to evidence of harm, the Complainant's testimony as to the effect of Respondent's offensive conduct, if believed, was sufficient. Any consequent need for medical treatment or

counseling service goes to the severity of the damage caused by such conduct and not to whether the damage occurred. That portion of Respondent's motion is also denied.

4. Ruling on Objection

Respondent objected to the witness Chandler, a female employee, testifying to remarks of a sexual nature allegedly made to her at times material by Respondent. Where the inquiry involves the employer's treatment of an employee based on the employee's protected class, comparative evidence bearing on the employer's treatment of other employees of that protected class, whether direct or circumstantial, is both relevant and admissible, and is common in employment discrimination cases. *In the Matter of Dunkin' Donuts, Inc.*, 8 BOLI 175 (1989). The Hearings Referee correctly overruled the objection.

FINDINGS OF FACT – PROCEDURAL

1) On September 19, 1988, Complainant filed a verified complaint with the Civil Rights Division alleging that she was the victim of the unlawful employment practice of Respondent.

2) After investigation and review, the Civil Rights Division issued an Administrative Determination finding substantial evidence supporting the allegations of the complaint and finding Respondent in violation of ORS 659.030 (1)(a) and (1)(b).

3) Subsequent to the issuance of the Administrative Determination, the Civil Rights Division initiated conciliation efforts between the Complainant and Respondent. That conciliation failed and the case was referred to the

Civil Rights Division's Quality Assurance Unit for further action.

4) On March 30, 1990, the Agency prepared and served on Respondent Specific Charges alleging that Respondent sexually harassed his employee, the Complainant, creating a hostile and intimidating work environment which she found intolerable, causing her to resign, all in violation of ORS 659.030 (1)(a) and (1)(b).

5) With the Specific Charges, the following were served on Respondent: a) a Notice of Hearing setting forth the time and place of the hearing in this matter; b) a Notice of Contested Case Rights and Procedures containing the OAR 839-30-025(17) information required by ORS 183.413; c) a complete copy of the Agency's administrative rules regarding the contested case process; and d) a separate copy of the specific administrative rule regarding responsive pleadings.

6) On April 18, 1990, Respondent timely filed an answer to the Specific Charges.

7) Pursuant to OAR 839-30-071 the Agency on May 25, 1990, timely filed its Summary of the Case, and Respondent on May 24, 1990, (postmark date) timely filed his Summary of the Case.

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

9) Pursuant to ORS 183.415(7), the participants were orally advised by the Hearings Referee of the issues to

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

10) During the course of the hearing, the Hearings Referee ruled that the record herein would be left open, pending receipt of the return of service form from the Umatilla County Sheriff's office regarding the Agency's subpoena for J. D. Dusenberry. That document, together with other return of service forms for witnesses in this case, was received by the Hearings Unit on June 25, 1990, at which time the record herein was closed.

11) The Proposed Order herein, which included an Exceptions Notice, was issued on October 16, 1990. Exceptions to the Proposed Order, if any, were to be filed by October 26, 1990. Respondent retained new counsel and on October 24, 1990, timely requested an extension of time in which to file exceptions, and was granted an extension until November 1, 1990. Respondent's exceptions were received timely on October 29, 1990, and are dealt with in the Opinion portion of this Order.

FINDINGS OF FACT – THE MERITS

1) At all times material herein, Respondent Jerome D. Dusenberry was an individual proprietor doing business in Pendleton, Oregon, as Jerry's Satellite TV Systems, which dealt with television satellite antenna sales, and as Westgate Center, a mini-mart and gas station, and utilizing the personal service of one or more employees, controlling the means by which such service was performed.

2) The Complainant is a female who on April 29, 1988, submitted an application for employment to Respondent. She was employed at Valley View Care Center, La Grande, as a certified nursing assistant at the time. She was 19 years of age and a single parent of a child just over one year old.

3) David Chamberlain was Respondent's employee for about six months beginning in January 1988. He worked as a gas station attendant, and also did some work on the computer setting up programs, as well as some other labor.

4) At times material, the Complainant's sister Susan Bernard lived with Chamberlain in an apartment they rented from Respondent near the Westgate Center. The Complainant stayed with them when she was in Pendleton.

5) At times material, Respondent's sons Raymond E. Dusenberry and J. D. Dusenberry were employed by Respondent. For clarity, they are referred to herein as "Ray" and "Jaydee," respectively.

6) Respondent's wife Carolyn Dusenberry had a financial interest in Respondent's business. She only occasionally procured supplies or cashiered, and did not hire, fire, or supervise employees. She assisted in keeping employee time records. She was employed outside the home and outside Respondent's business as a registered nurse.

7) Respondent determined from the application and a brief conversation with the Complainant that she was not qualified by experience to work as a cashier in the mini-mart and gas

station. Respondent was also looking for a part-time bookkeeper and secretary. He needed a person to cover the office, who could operate a computer, type, file, and do some bookkeeping and occasional dictation. He had put an ad in the paper. There had been no previous bookkeeper-secretary. Jaydee did the store bookkeeping.

8) About two weeks after the Complainant's application, on the recommendation of Jaydee, Respondent interviewed her for the bookkeeper-secretary position. She wanted to get a job in bookkeeping, and had taken accounting and computer courses in high school. She had no relevant work experience in either field.

9) The Complainant told Respondent that she could type, but not fast, and that she'd had two years of computer in high school. She did not claim actual experience as a secretary or as a bookkeeper. Respondent offered to bring in a technician who was familiar with the software for the accounting system in use for the purpose of training her. He offered her the job.

10) The Complainant had learned about the position from her sister and Chamberlain, and from Jaydee, who worked for Respondent as a cashier with no management duties or authority. During the interview, Respondent did not ask her anything about Jaydee.

11) Chamberlain spoke with the Complainant regarding the job prior to her hire. He told her that Respondent was hard to work for. He did not believe that she was ready for a job as Respondent's secretary-bookkeeper, and he told her so. He knew she could type, but not as a secretary. She was

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

not familiar with the computer accounting program in use.

12) When Respondent asked Chamberlain about the Complainant in connection with hiring her, Chamberlain merely said that she was a good person; he did not evaluate her skills.

13) Respondent hired the Complainant in mid-May 1988. She worked for him part time while also working at Valley View through May 25. She first worked for Respondent on May 16 for four hours and began working full days for him on May 31, 1988.

14) The duties described to the Complainant included bookkeeping input on the computer, current filing, answering the phone, and covering the office in Respondent's absence. Her actual duties included filing of 1987 and 1988 records, answering the phone, and setting up accounts on the computer for the bookkeeping system. When she sought assistance with the computer from Respondent, she was told to read the manual; she did not understand the manual. He was her only supervisor. He was there daily, but was often in and out.

15) Ray was assigned by Respondent to work with the Complainant on the computer for about one week. He showed the Complainant some of the functions of the computer. He observed that she didn't appear able to handle all of her job. She keyed the wrong function on the computer, wiping out some of its files, which he was able to restore. She typed with a lot of mistakes and lost paper files through improper filing. She seemed to become upset and withdrawn and didn't respond to his training assistance.

16) The Complainant had some difficulties with the job and asked Chamberlain to help her with the computer. He attempted to do so on his own computer.

17) Chamberlain was not a manager for Respondent. Respondent complained to Chamberlain about problems with most of the employees, including Chamberlain himself.

18) A couple of days after the Complainant started working, Respondent complained in Chamberlain's presence that the Complainant's claimed qualifications were not the same as her performance in that her typing and bookkeeping skills were not adequate.

19) Respondent always did the payroll, and said that no one else would do it. With Chamberlain's assistance, the Complainant began to gain an understanding of the computer accounting program being used. Respondent himself did not completely understand the program, and had to hire a specialist to come in and assist him with it.

20) When Respondent determined that the Complainant's typing skills were not what he had expected, he asked if she was willing to take some typing training. She said she would consider it. He originally offered her the loan of a typewriter, but he wouldn't allow her to take it home. She had no time to practice during work hours.

21) On or about June 11, Respondent was very upset with the Complainant's lack of progress on the computer. He told her she needed to go to school. There was a conversation about courses. He had previously

become upset each time she asked for information on the computer accounting system. She left the office and went to Blue Mountain Community College to look for a manual about the Cougar Mountain accounting program she was using, but it was not available. She also got information about computer courses. She returned to work the following day. Respondent did not provide an expert to help her learn the accounting program.

22) The convenience store had a small kitchen, a small office, a rest room, several shelves for grocery items, and the service counters. There was no customer seating provided in the store. The gasoline pumps were in front of the store. The television satellite antenna business, where the main office and the computer were located, was next to the convenience store, in the same building.

23) Food items prepared on the premises were served in containers, usually at the front counter; it was unusual to serve food at the side counter near the window.

24) In early June, a week or so after she began working full time for Respondent, the Complainant was in the mini-mart after her work hours. She and Bernard, together with Chamberlain, had gone there to get something to drink. The Complainant was sitting on the counter located closest to the window, talking with Jaydee, when Respondent walked in the front door.

25) Respondent saw the Complainant sitting on the counter and said "If you're going to put your pussy on the counter you have to sell it. You won't get much for it because it's used." He had been drinking.

26) The Complainant got down off the counter. She thought that the remark was really "uncalled for." She was embarrassed and humiliated. She said only "O.K.," because he was her boss, and she didn't know what she could say. She did not like the comment at all.

27) At the time, Respondent said to Bernard that the Complainant should put a red light outside her door. Bernard did not tell the Complainant, who was talking to Jaydee at the time, about the comment. Bernard believed that Chamberlain heard the comment.

28) The Complainant laughed at the time of the counter remark, but she was angry immediately afterward. After she left the store, she referred to Respondent as "that son of a bitch" and stated she could "wring his neck."

29) Chamberlain remembered the counter-sitting comment by Respondent as being to the effect that the Complainant would be better off on her back because she could make more money that way. There were other sexual comments to the Complainant while she worked for Respondent, including one suggesting that the Complainant install a red light outside her door. Respondent frequently used the term "pussy" in reference to females while Chamberlain worked for him.

30) After Respondent's remark about the Complainant sitting on the counter, the Complainant asked Jaydee why his father felt that she was a "slut," because that was the impression the Complainant got from Respondent's remark. Jaydee told the Complainant that because Respondent thought all of the women in

Jaydee's life were "sluts", Respondent thought the Complainant was also.

31) The day following the counter incident, the Complainant told Carolyn Dusenberry about Respondent's use of the word "pussy" in connection with the Complainant sitting on the counter. She told the Complainant that if he said something like that, he must have been kidding.

32) Carolyn Dusenberry also said that Respondent had been drinking.

33) About one and one half weeks after the incident in which the Complainant was sitting on the counter, she and Chamberlain were discussing her finances, standing in front of the satellite system store. Respondent was present. The Complainant had recently bought a car and the conversation involved how she would pay all her bills and the car payment when Respondent made another comment. "He told me I should put a little red light outside my door and make a little extra money on the side."

34) The Complainant considered the red light comment really shocking. It made her "feel bad." The comment made her feel like she was being degraded because she was female.

35) When Respondent suggested that the Complainant put a red light outside her door, she was again angry. She did not say anything to Respondent, but appeared very tense and clenched her fists.

36) The Complainant was not on duty at the time of Respondent's remark about sitting on the counter. She was not on duty at the time of his comment regarding her finances.

37) The Complainant discussed Respondent's remarks to her with Chamberlain and Bernard. On the weekend before she quit working for Respondent, she spoke with some of her friends in La Grande about Respondent's remarks to her. She was exploring what she could do. She did not like the comments.

38) On Monday evening, June 20, the Complainant telephoned her previous employer in La Grande and asked for her old job back. She was accepted.

39) The Complainant had worked for Respondent on June 20. She took Tuesday, June 21, off. She told Respondent she needed to take her daughter to the doctor, but she used the day to take Stewart Nichols back to La Grande to meet his probation officer.

40) Stewart Nichols became acquainted with the Complainant in 1984. He dated her frequently while she worked for Respondent. He was not acquainted with Respondent. He and the Complainant moved in together on June 30, the day they went after her final check. He ceased living with the Complainant in late summer 1988.

41) While the Complainant was working for Respondent, she told Nichols that she was being harassed at Respondent's business. She frequently mentioned being upset and frustrated with Respondent. She was upset about the comments at work. He gathered that she couldn't do the work, perhaps as a result of the comments. She seemed most upset by sexual comments and harassment. He didn't really know at the time who

was harassing her, but she complained each time he saw her.

42) Nichols kept his appointment with his probation officer on June 21, 1988. The Complainant took him to the appointment. She did not work for Respondent on that date.

43) The Complainant was scheduled to work for Respondent on June 22, but "I never showed up." She went there on June 30 to obtain her final pay check.

44) The Complainant feared Respondent because of what Jaydee told her about his father's temper. Respondent yelled at her. She felt that the comments coming to her were because she was a single parent and the "used" comment referred to that. She was sensitive about being a single parent. She never complained to Respondent about the work atmosphere because it was the only job she had, and as a single parent she couldn't afford to just walk out without having something else lined up.

45) The Complainant did not tell the Respondent that she was not returning because she did not want to talk to him. The man scared her; he had a "hot" temper. He yelled at employees. She was afraid of him when she worked there and when she went to pick up her check, she took Nichols with her.

46) On June 30, the Complainant spoke with Respondent. Ray, who had previously learned from Chamberlain that she was employed elsewhere, was also present. Respondent was mad because the Complainant never came back to work. She asked for her paycheck and he asked her if she

really deserved it. He stated she had not done the job she was hired for and he was unhappy with her work. He said she would have to train someone as a replacement before she could have her check because he did not know where she was on the filing. She refused, because she didn't want to work there further.

47) Respondent claimed he had to do some paperwork in order to prepare the Complainant's check. She did not get her check that day. There was an argument among Respondent, the Complainant, and Nichols. Nichols said she could go to the Agency for collection. Respondent told Nichols he had been taken to the "Board of Labor" before and "they still haven't gotten any money out of me."

48) Respondent did not mention a termination letter dated June 21 when the Complainant attempted to pick up her check on June 30. She first saw the letter after she filed her administrative complaint. Respondent had never told her he was discharging her.

49) The letter dated June 21 purported to notify the Complainant of immediate termination. Its text was as follows:

"Robin Robertson 6-21-88

"You are hereby notified that your employment with Westgate center is terminated effective immediately for the following reasons. Your skills as a secretary are seriously lacking to wit, typing, filing, computer keyboard operation and computer bookkeeping. Your work in filing shows that many files were tossed in the trash rather than filed. You have spent time

disturbing other employees such as the argument you had with your brother in law while you were both on duty. You have been verbally reprimanded for female enticement of a male employee to recommend you for the job then coming to me for intervention in this affair. You have been verbally reprimanded for loitering in the mini-mart and disturbing employees there from their jobs. You have been informed that you must pay rent if you intend to live with your brother in law yet you claim to have an apartment however your brother in law claims you don't live in it except for occasional one nites (sic). You have been verbally notified of this termination and this is written confirmation (sic) of that notice.

"J. D. Dusenberry"

50) Jaydee was "making passes" at the Complainant before she was hired. He never said anything sexual to her at work. He was a friend who wanted a mother for his daughter. She stayed overnight at his apartment on one occasion after she was hired. She told Chamberlain she did not sleep with Jaydee. She was not having an affair with Jaydee. Ray accused her of using Jaydee to get the job with Respondent.

51) Ray only knew what he heard from Chamberlain, Jaydee, and others about the Complainant's relationship with Jaydee, who told Ray that he and the Complainant talked all night when she stayed at his house.

52) Following the Complainant's filing of the administrative complaint, the Agency investigator conducted an

investigation of its allegations. She interviewed witnesses, noting down the responses of each and reducing each interview to a summary for the Agency's file. The summary was not a verbatim record of the interview; it was the investigator's notation of the subjects covered in the interview.

53) The investigator interviewed Jaydee by telephone at 8:10 a.m., March 16, 1989. Jaydee remembered that Respondent said some things that the Complainant might misconstrue as harassment. The investigator repeated the "counter sitting" comment and the "red light" comment to Jaydee, who acknowledged hearing the first in company with Chamberlain.

54) Jaydee also told the investigator that he had a romantic relationship going with the Complainant, that he asked Respondent to give her a job, and that her sister told him that the Complainant was always using people.

55) Linda Chandler, female, worked for Respondent at the convenience store from August 1987 to February 1989. She did not work directly with the Complainant, who worked next door. Through a sexually demeaning comment about the Complainant, Respondent expressed to Chandler his dissatisfaction with the Complainant's work. He made negative comments about the Complainant's work abilities, such as typing and filing. The Complainant used to come into the store crying and upset because she was being "harassed" about her work, and she was having trouble with Jaydee because he wanted to be more than a friend with her.

56) There were daily sexually oriented comments by Respondent to

Chandler implying that Chandler would be better off selling her body rather than working behind the counter. Chandler told Chamberlain that she feared Respondent.

57) Chandler was not aware at first that Respondent's remarks of a sexual nature might be unlawful. When she had made a mistake, Respondent said to her that she should put out her red light and "sell pussy 'cause you sure as shit can't cashier." She was shocked by the comment.

58) At a later time when she made a mistake, Respondent told her in the presence of Carolyn Dusenberry "if you'd get your mind off your cunt, you'd make a better cashier." By then Chandler was aware that sexual remarks might be unlawful and commented to Carolyn Dusenberry that the statement could be construed as sexual harassment.

59) Respondent used to say jokingly that it was too bad he wasn't born a "pussy," he could make more money. At one time he implied that migrants came to the store to "get a little Linda."

60) Chandler complained to Respondent about Jaydee calling her sexually offensive names, a daily occurrence. Respondent said not to worry about it, that Jaydee liked her. She did not complain about Respondent's comments to her because he wrote her paycheck.

61) Chandler did not discuss Respondent's remarks to her with the Complainant either before or after the Complainant filed her complaint with the Agency.

62) Respondent's remarks to the Complainant negatively affected her self-esteem and self image, and adversely affected her ability to communicate with males. She felt threatened, demeaned, embarrassed, and humiliated. She felt as if she were not considered to be worthy of holding a good job, and as if her vocational abilities were totally sexual in nature. These adverse effects lasted until early 1989. She did not seek counseling or medical help.

63) The Complainant did not recall any conversation with Respondent about her relationship with Jaydee or a current boyfriend in which Respondent asked her if what she was doing was like putting a red light outside her door.

64) Carolyn Dusenberry testified that when the Complainant told her about Respondent's use of the word "pussy" in connection with the Complainant sitting on the counter, she told the Complainant that Respondent "doesn't talk that way." She stated that in order to make the Complainant leave her alone with "this stupid story," she told the Complainant that Respondent must have been kidding. She testified that Respondent did not appreciate, tell, or listen to "off color" or "slightly risqué" jokes. Because her testimony in this regard was wholly divergent from the overwhelming weight of the evidence, it was disregarded.

65) The testimony of Stewart Nichols was not altogether reliable. He described the Complainant's truthfulness as unpredictable, but that assessment was based on a dispute over personal property and bills when they ceased living together rather than on any purported community reputation.

He initially stated that the Complainant had told him she was being asked for sexual favors at Respondent's business, but then acknowledged that what she complained about were sexual comments, which he mistakenly attributed to Chamberlain. For these reasons, his testimony was given weight only when it was corroborated by other credible evidence on the record.

66) Much of Respondent's testimony simply was not credible. He admitted making a comment to Chamberlain outside the Complainant's presence about the Complainant being on her back with a red light, based on her supposed borrowing of money from a boyfriend with whom she spent the night. He alleged that Chamberlain must have told her what Respondent had said. Respondent testified that the Complainant came to him between June 5 and June 11 claiming that Jaydee was bothering her, and stating that she already had a boyfriend in the military whom she planned to marry. Respondent said that he then learned that the Complainant had yet another boyfriend and wasn't marrying the one in the service. He stated he then asked her about whether she used Jaydee to get the job, and about the military boyfriend and her current relationship, all in connection with her mis-representing her qualifications to him. He stated he thought she had lied to him and to Jaydee, and that it was at this point he asked her if that were not like putting a red light out in front of her door, prostituting herself.

Respondent said he didn't want her to take his typewriter home because there were three small children in the

household. He assumed she did not want to take typing and he then said he would have to let her go. He testified that he told the Complainant on June 17 or 18, or perhaps June 20, that he would be letting her go, and that she took the day off to look for work a day or so later and never returned. He stated that he drafted the termination letter dated June 21 which contained his reasons for discharging the Complainant from earlier notes and mailed it, but it was returned undelivered. There was no return envelope or other credible corroboration.

Respondent testified that when he found the Complainant sitting on the counter, it was after she had previously been told to stay out of the food service area, before she worked there. He said he told her "Get your ass off the counter." He then thought he had been too harsh and attempted to joke about it, saying he had "a little pussy next door," meaning his cat, that he doesn't allow on the food service counter. He said he told the Agency investigator about the cat as "a little pussy that sleeps on the counter," meaning the counter in the office above the computer. He denied making any of the remarks attributed to him by Chandler, stating that Chandler wanted the secretary job and that her testimony was retaliatory.

Respondent testified that he told the Complainant on June 30 that he had mailed her paycheck to her and would not issue another until he knew what had happened to the first one. None of the other persons present on June 30 testified to any claim of payment, and there was no other evidence that a check had been mailed. He

testified that he was upset at the time about her leaving without notice and about poor work and lost files, but he also tried to establish that she worked on June 21, the day he intended, according to his letter, that she be terminated immediately. He said his inquiries about the Complainant had convinced him that she played "coy girl games" to borrow money, and he believed it possible that she "played such games" in relation to Jaydee. He said she used "female technology" to get the job. At times, his demeanor as well as the content of his testimony detracted from his credibility.

For the above reasons, and those described in the Opinion section of this Order, which are by this reference incorporated herein, Respondent's testimony was given little weight whenever it conflicted with any other credible evidence or inference on the record. In some cases, due to internal inconsistencies, his testimony was not believed even when it was not directly controverted by other evidence.

67) Portions of the testimony of Ray Dusenberry were not credible. He attempted to confirm his father's testimony about the Complainant being given a day off to check on employment and not returning, about her always having excuses not to accept or seek training, about her boyfriend in the military service, and about the preparation of the dismissal letter. He testified that he was aware that the Complainant had only high school computer training, but then said she lied about being able to handle computers. He stated that he never heard Respondent use "pussy" except in reference to his cat, and never heard

Respondent use language of the nature described by the Complainant. For the above reasons his testimony was untrustworthy and was given less weight whenever it conflicted with credible evidence on the record.

ULTIMATE FINDINGS OF FACT

1) At all times material, Respondent did business in Pendleton, Oregon, as Jerry's Satellite TV RO Systems and as Westgate Center, a mini-mart and gas station, and utilized the personal service of one or more employees.

2) The Complainant, female, was hired by Respondent for a bookkeeper - secretary position in mid-May 1988.

3) Respondent complained to other employees in sexually demeaning terms about the Complainant's job performance.

4) In early June, Respondent made a sexually oriented comment to the Complainant about her selling herself. He frequently used the term "pussy" in reference to females. He told another employee and later the Complainant that the Complainant should put a red light outside her door and make a little extra money on the side.

5) The Complainant quit without notice after working June 20.

6) She did not get her paycheck on June 30 when she asked Respondent for it. He did not mention a termination letter dated June 21 and had never told her she was fired.

7) Respondent subjected another female working for him at times material to repeated sexually oriented comments. Fearing Respondent, she did not complain to him about his

comments, and did not discuss his remarks to her with the Complainant.

8) The Complainant, female, was 19 and the single parent of a one year old child at times material. The Complainant told others about Respondent's remarks to her and of her upset and frustration about the sexual comments and harassment. She believed that Respondent's comments referred to her being a single parent, about which she was sensitive. She feared Respondent. She did not complain to him about the work atmosphere. Respondent's remarks to the Complainant made her angry and frustrated. They negatively affected her self-esteem and self image, and adversely affected her ability to communicate with males. She felt shocked, degraded, demeaned, embarrassed, and humiliated. She felt as if she were not considered to be worthy of holding a good job, and as if her vocational abilities were totally sexual in nature. These adverse effects lasted until early 1989. She did not seek counseling or medical help.

CONCLUSIONS OF LAW

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

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

3) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the persons and subject matter herein under ORS 659.010 to 659.110.

4) ORS 659.030 provides, in pertinent part:

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

"(a) * * *

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

OAR 839-07-550 provides, in pertinent part:

"Harassment on the basis of sex is a violation of ORS 659.030. It is discrimination related to or because of an individual's gender. Unwelcome * * * verbal or physical conduct of a sexual nature constitute[s] sexual harassment when such conduct is directed toward an individual because of that individual's gender and:

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

"(2) * * *

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

OAR 839-07-555 provides, in pertinent part:

"(1) An employer * * * is responsible for its acts * * * with respect to sexual harassment * * *"

OAR 839-07-565 provides:

"Generally an employee subjected to sexual harassment should report the offense to the employer. Failure to do so, however, will not absolve the employer if the employer otherwise knew * * * of the offensive conduct."

Respondent directed unwelcome, sexually abusive and intimidating language toward the Complainant because of her gender, creating an intimidating, hostile, and offensive working environment and thus committed an unlawful employment practice in violation of ORS 659.030.

5) Pursuant to ORS 659.010(2) and 659.060(3), the Commissioner of the Bureau of Labor and Industries has the authority under the facts and circumstances of this record to award money damages to the Complainant for emotional distress sustained as a result of the unlawful practice found, and the sum of money awarded in the Order below is an appropriate exercise of that authority.

OPINION

The Agency accused the Respondent of sexual harassment of the Complainant, his employee. Sexual harassment of an employee by an employer is a form of discrimination based on the employee's sex, and is thus a violation of ORS 659.030.

Sexual harassment in employment has more than one form. It is sometimes manifested by the classic "quid pro quo," this for that, form. An example is the direct assurance of employment in exchange for sexual favors. In other instances, sexual harassment comes in the form of an unwelcome and "hostile environment." It may be

characterized by "touches," "pats" and "feels", or by suggestive, lewd, and offensive speech. It may consist of a combination of any or all of these, but, singly or in combination, it is unlawful.

In any of its forms, sexual harassment has a universal theme: the use of the power of the harasser's position over the victim's job as a shield against protest or rejection. This Forum has repeatedly held that an owner's or manager's unwelcome, offensive speech of a sexual nature, directed toward an employee because of the employee's sex, and which results in an intimidating and hostile work atmosphere, is sexual harassment. *In the Matter of Colonial Motor Inn*, 8 BOLI 45 (1989); *In the Matter of the Palomino Cafe and Lounge, Inc.*, 8 BOLI 32 (1989); *In the Matter of Lee's Cafe*, 8 BOLI 1 (1989); *In the Matter of Stop Inn Drive In*, 7 BOLI 97 (1988); *In the Matter of Tim's Top Shop*, 6 BOLI 166 (1987). As this Forum has observed before, the inherent imbalance of power between owner and employee makes it difficult for an employee to repulse an owner's inappropriate sexual remarks without fear of damaging the employee's employment status. *Stop Inn Drive In, supra*.

In this case, the Agency established that at least twice in approximately three weeks, Respondent directed comments to the Complainant that tended to brand her as a common prostitute. Had she been only a social or business acquaintance, she might have had the choice of striking back at him or of disassociating herself from him. But as an employee she saw neither of these options because she needed her job. Respondent's

comments made her angry, hurt, frustrated, and afraid.

Evidence from the whole record established that the subject remarks were not isolated or accidental. Rather they were part of an overall pattern of continuing, deliberate behavior by Respondent. Respondent attempted to deny the comments attributed to him, or to put them in another context. For example, concerning the counter-sitting incident, Respondent denied using the term "pussy." He said he told the Complainant to "get your ass off the counter." That did not comport with his further explanation, involving his cat. If he had employed the term "pussy," such an explanation might have been credible. As it was, his explanation was a non sequitur.

Respondent denied that the Complainant was present when he suggested to Chamberlain that the Complainant should put a red light outside her door. He testified, however, that after the Complainant complained to him about Jaydee's attentions he made substantially the same comment directly to her.

As recited in the rulings on motions, Respondent's counsel raised the point that both of the comments which Respondent was accused of making to the Complainant occurred while the Complainant was off duty. His argument was that the comments did not occur as part of the employment relationship. The Forum rejects that argument because an employment relationship does not stop at the end of a shift, particularly if the employer's acts with regard to the employee are grounded in that relationship. Because of the continuing employment

relationship, the behavior of the owner or manager toward an employee off the job can affect the on-the-job environment. See *In the Matter of Colonial Motor Inn, supra*, and *In the Matter of G & T Flagging Service, Inc.*, 9 BOLI 67 (1990).

Much of Respondent's evidence, even after the Agency withdrew the allegation of constructive discharge, referred to the Complainant's unsatisfactory job performance and lack of job skills. The evidence also alluded to the Complainant's life style and associations. This Forum has previously ruled that a complainant's life outside of work has no bearing on whether or not a respondent discriminated against her in the terms and conditions of employment by subjecting her to sexual harassment. *Stop Inn Drive In, supra*.

Regarding the Complainant's job performance, Respondent accused her of "female enticement," arguing on duty, and loitering on the premises when off duty. None of the alleged problems justify or excuse the sexually oriented and harassing remarks Respondent made to the Complainant. The employment relationship must be free from such harassment.

The Complainant testified credibly to the effects of Respondent's comments. Those effects remained with her for over half a year. Her mental distress was no less real because she did not seek counseling or medical help. The sum awarded in this Order is intended to compensate her for this distress.

Respondent's Exceptions

1. Respondent's Argument That Sex Discrimination Was Not Established

Respondent, in his exceptions, argued that the "crude, inappropriate and unwarranted" remarks attributed to Respondent did not constitute sex discrimination in that they did not have the purpose or effect of interfering with the Complainant's work performance or of creating an intimidating, hostile, or offensive working environment. Respondent argued that such remarks were directed to the Complainant out of frustration, anger, and lack of tact, and because of her performance; the remarks were not directed to her because of her gender. Respondent argued that the Complainant's reaction was from being yelled at for breaking Respondent's rules, and from the realization that she was not qualified to do a job for which she was hired; Complainant's reaction was not from any sexual content in Respondent's remarks. Respondent further pointed out that the complained of comments did not occur during hours of employment.

All of these arguments were made at hearing and all were considered. The Forum did not give credit to that reasoning because the content of Respondent's comments were clearly derogatory to females in general and to the Complainant in particular. The Complainant testified to being fearful of Respondent, and to being angry with him over his comments. She was upset and felt degraded, devalued, and humiliated. She felt as if her gender, and not her efforts, was all that Respondent evaluated. Credible evidence revealed an atmosphere that was both intimidating and offensive to females in

general and to the Complainant in particular based on sex. To follow Respondent's reasoning would allow if not condone the most scurrilous and demeaning terminology, undeniably sexual and gender-based, because it occurred out of an employer's disappointment with an employee, or because it occurred after work hours. That would frustrate the purpose of the statute. Employers have control over and responsibility for working conditions, including conditions created by their own attitudes and responses. The law allows the termination of a worker who will not or cannot perform the duties of the job. It does not allow sexual harassment of a worker because of alleged performance problems.

2. Respondent's Argument Regarding Relevance and Lack of Evidence

Respondent excepted to fifteen of the Proposed Findings of Fact and to five of the Proposed Ultimate Findings of Fact in the Proposed Order. Basically, Respondent's exceptions alleged either that the subject Finding was unsupported by credible evidence (Findings 26, 29, 30, 33, 34, 44, 45, 55, and 62, Ultimate Findings 3, 4, 7, and 8), or that the subject Finding was irrelevant (Findings 27, 46, 47, 48, and 49, Ultimate Finding 6), or both (Finding 25).

Among those Findings that Respondent challenged for lack of credible evidence, Respondent offered alternative interpretations of the evidence for several (Findings 26, 44, 45, 55, and 62). The Forum has carefully weighed the evidence against the Proposed Findings and Proposed Ultimate Findings and, where a contrary Finding was suggested, weighed any evidence

which might support the alternative. Most of these Findings relied on the testimony of the Complainant, whom the Forum found credible, and on permissible inferences therefrom. In each instance, the Forum found a preponderance of credible evidence in the record to support the Finding made. Those Findings not dependent upon the Complainant's testimony were supported by other credible evidence in the record.

Respondent's arguments concerning the relevance of certain Findings are hereby rejected. Each challenged Finding was either relevant in establishing the offensive work environment or in discrediting Respondent's testimony or purported defenses. The Forum has modified Findings 30, 34, 40, 41, and 42 in order that they more clearly reflect the evidence in the whole record.

3. Respondent's Argument Regarding Constitutionality

Respondent excepted to Proposed Conclusion of Law Number 5 in the Proposed Order, asserting that the Commissioner lacked authority to award damages for emotional distress. Respondent also asserted that the award in reality represented punitive damages, and as such was outside the Commissioner's authority. Finally, Respondent argued that the statutes and administrative rules, if they were held to support the Commissioner's authority to award emotional distress damages, were unconstitutional under the Fourteenth Amendment to the Federal Constitution and under Article I, Sections 10 and 16 of the Constitution of the State of Oregon, allegedly

because of a lack of standards upon which to base such an award.

This line of argument has been repeatedly rejected by this Forum and by the Oregon appellate courts. ORS 659.010(2) authorizes the Commissioner to "eliminate the effects of an unlawful practice found." Emotional distress damages will lie in a case of unlawful practice where emotional distress is established by a preponderance of the evidence. *Williams v. Joyce*, 4 Or App 482, 479 P2d 513 (1971); *School District No. 1 v. Nilsen*, 271 Or 461, 534 P2d 1135 (1975); *Fred Meyer, Inc. v. Bureau of Labor*, 39 Or App 253, 592 P2d 564 (1979), *rev den* 287 Or 129 (1979) (*In the Matter of Fred Meyer, Inc. (On Remand)* 1 BOLI 179 (1979)); *Schipporeit v. Roberts*, 93 Or App 12, 760 P2d 1339 (1988), *affirmed*, 308 Or 199, 778 P2d 953 (1989). The award of emotional distress damages by the Commissioner under ORS chapter 659 is constitutional. *Williams, supra*; *Fred Meyer, supra*; and *In the Matter of Dunkin' Donuts, Inc.*, 8 BOLI 175 (1989).

ORDER

NOW, THEREFORE, as authorized by ORS 659.060(3) and 659.010(2), and in order to eliminate the effects of the unlawful practice found, Respondent, JEROME D. DUSENBERRY, dba Jerry's Satellite TV RO Systems, JEROME D. DUSENBERRY, dba Westgate Center, is hereby ordered to:

1) Deliver to the Business Office of the Bureau of Labor and Industries, 1400 SW Fifth Avenue, PO Box 800, Portland, Oregon 97207-0800, a certified check, payable to the Bureau of

Labor and Industries in trust for ROBIN ROBERTSON, in the amount of:

a) THREE THOUSAND FIVE HUNDRED DOLLARS (\$3,500), representing compensatory damages for the mental distress Complainant suffered as a result of Respondent's unlawful practice found herein; PLUS,

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

2) Cease and desist from discriminating against any female employee on the basis of sex in violation of ORS 659.030.

**In the Matter of
Neal M. and Cheryl A. Nida, dba
60 MINUTE TUNE,
Respondents.**

Case Number 23-90
Amended Final Order of
the Commissioner
Mary Wendy Roberts
Issued March 8, 1991.

SYNOPSIS

Respondents failed to file a timely answer and were found in default. The Forum ruled that none of the reasons offered by Respondents for their failure to answer constituted good cause for

relief from default under the Forum's rules, and, at hearing, denied Respondents' motion through counsel for reconsideration of the refusal to grant relief from default, and ruled that the attorney would not be allowed to question witnesses or present evidence. The Commissioner found that Respondents unlawfully discharged Complainant because he requested information from and furnished information to the State of Oregon Accident Prevention Division, in connection with the Oregon Safe Employment Act. The Commissioner awarded Complainant \$6,000 in lost wages and \$1,000 for his mental distress. ORS 654.062(5)(a) and (b); OAR 839-05-010(1); 839-06-025(11); 839-30-030(1) and (2); 839-30-060(1); 839-30-185(1)(a); 839-30-190.

The above-entitled contested case came on regularly for hearing before Warner W. Gregg, designated as Hearings Referee by Mary Wendy Roberts, the Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was conducted on February 27, 1990, in Room 311, State Office Building, 1400 SW 5th Avenue, Portland, Oregon. Linda Lohr, Case Presenter with the Quality Assurance Unit of the Civil Rights Division of the Bureau of Labor and Industries (the Agency), presented a Summary of the Case for the Agency, argued Agency policy and the facts, examined the witnesses, and introduced documents. Neal M. Nida and Cheryl Nida, dba 60 Minute Tune (Respondents, but references to "Respondent" in the singular are to Neal M. Nida), after being duly notified of the time and place of this hearing and of

the obligation to file an answer within twenty (20) days of the issuance of the Specific Charges, failed to file an answer as required. The Hearings Referee previously found the Respondents in default, and ruled that Respondents were thereby precluded from presenting evidence or argument at the hearing. Deborah Sather, Attorney at Law, as counsel for Respondents, and Respondent Neal M. Nida were present throughout the hearing. William Melton (the Complainant) was present throughout the hearing, and was not represented by counsel.

The Agency called as witnesses the following: the Complainant; Joseph Tam, an Investigative Supervisor with the Agency; and Ahmad Muhammad, a Senior Investigator with the Agency.

The Respondents through counsel filed a motion and memorandum at hearing, and also suggested that the Agency and/or the Referee question a witness who was present.

On May 14, 1990, the Commissioner of the Bureau of Labor and Industries issued Findings of Fact, Ultimate Findings of Fact, Conclusions of Law, Opinion, and Order in this matter. Thereafter, Respondents herein petitioned the Court of Appeals for judicial review of the Commissioner's May 14, 1990, decision. Subsequent to Respondents' filing of the petition for review and prior to the date set for hearing thereon, the Commissioner filed with the Court of Appeals a withdrawal of the original decision in this matter for the purpose of reconsideration pursuant to ORS 183.482(6), and was granted a period of time within which to affirm, modify, or reverse said decision. It was the Commissioner's

intent to more specifically address the issue of Respondents' default.

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

FINDINGS OF FACT – PROCEDURAL

1) On December 22, 1988, the Complainant filed a verified complaint with the Civil Rights Division (CRD) of the Agency alleging that he was the victim of the unlawful employment practice of the Respondents.

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

3) Joseph Tam, an investigative supervisor for the Agency, approved the Administrative Determination prepared by the investigator, Ahmad Muhammad, and subsequently initiated conciliation efforts between the Complainant and the Respondents on May 9, 1989. On May 17, 1989, Tam concluded that conciliation had failed and referred the case to the Agency's Quality Assurance Unit for further action. The Respondents' representative during investigation and conciliation was Neal Nida.

4) On December 29, 1989, the Agency prepared and served on the Respondents Specific Charges herein, alleging that Respondent Neal M. Nida

had discharged the Complainant from his employment as a technician/mechanic on December 6, 1988, for opposing unsafe practices and working conditions, in violation of ORS 654.062(5)(a).

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

6) A copy of those charges, together with items a through d of Procedural Finding 5 above, were sent by US Post Office certified mail, postage prepaid, as Article Number P 467 959 900, to the last known address (supplied by the Agency) of the following pursuant to OAR 839-30-030(1):

Neal A. [sic] Nida and Cheryl A. Nida
60 Minute Tune
13203 S.W. Canyon Rd.
Beaverton, Oregon 97005

7) Both the Notice of Contested Case Rights and Procedures (item b) in Finding 5 and the Bureau of Labor and Industries Contested Case Hearings Rules (item d) in Finding 5, at OAR 839-30-060(1), provide that an answer must be filed within 20 days of the issuance of the charging document.

8) A US Post Office Domestic Return Receipt, Certified Mail, PS Form 3811, Apr 1989, Article Number P 467 959 900, was received by the Hearings

Unit showing delivery to the following addressee on the date indicated per the signature listed:

Neal A [sic] and Cheryl A Nida
60 Minute Tune
13203 SW Canyon Rd
Beaverton OR 97005
Debi Kennett 12-30-89

9) On January 19, 1990, the Forum sent a letter entitled "Notice of Intent to Default" by first-class mail with postage prepaid to the following:

Neil A. [sic] and Cheryl A. Nida
60 Minute Tune
13203 S.W. Canyon Rd.
Beaverton, Oregon 97005

The purpose of the letter was to assure that no late-delivered, but otherwise timely, answer to the Specific Charges existed.

10) On January 25, 1990, the Forum received a letter, with enclosures, signed "Neal M. Nida, Owner" and reciting that the letter was to request relief from default.

11) Pursuant to OAR 839-30-071, on January 29, 1990, the Agency timely filed a Summary of the Case.

12) On February 7, 1990, the Forum issued its formal Notice of Default, noting that Specific Charges were issued on December 29, 1989, that Respondents were required to file an answer within twenty (20) days and had failed to do so, and that they were in default under OAR 839-30-185.

13) Also on February 7, the Forum issued its Ruling On Request For Relief From Default. Noting that Respondent Neal Nida's letter listed alternate reasons for his failure to answer, the Hearings Referee found that none of the reasons advanced constituted

good cause under the Forum's rules, and denied Respondents' request for relief from default.

14) On February 26, 1990, the Hearings Referee received a telephone call from Deborah Sather, Attorney at Law, as counsel for Respondents. Counsel stated her intention to attend the hearing of February 27 and to request that the Hearings Referee reconsider his denial of relief from default.

15) At the commencement of the hearing, counsel for Respondents submitted a motion for reconsideration of the February 7 ruling, supported by the affidavit of Respondent Neal Nida and other attachments. Counsel also submitted a document entitled "Respondent's Hearing Memorandum on Judicial Notice and Collateral Estoppel."

16) The Hearings Referee summarily denied the motion, there being no provision in the Forum's rules for reconsideration of rulings, and no provision allowing the participation at hearing of charged parties in default.

17) Pursuant to ORS 183.415(7), the Hearings Referee recited the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing

18) At the close of the hearing on February 27, the Hearings Referee allowed the Agency ten days in which to respond to Respondent's submissions in order to assist the Commissioner in evaluating the Hearings Referee's rulings denying relief from default. On March 9, 1990, the Agency's letter memorandum was received by the Forum and the record was closed herein.

19) At the close of the hearing, after the Agency had rested, counsel for Respondents suggested that the Agency and/or the Hearings Referee interrogate Theresa Kanisio (phonetic), described as an independent witness, who was present. The Hearings Referee refused this and all other offers of proof as being inconsistent with the Respondents' default status. The Hearings Referee reiterated that Respondents had been found in default and were thereby precluded from presenting evidence or defenses, including offers of proof, and declared the hearing adjourned.

20) The Proposed Order, which included an Exceptions Notice, was issued on April 10, 1990. Exceptions, if any, were to be filed by April 20, 1990. No exceptions were received.

FINDINGS OF FACT – THE MERITS

1) At all times material herein, the Respondents Neal M. and Cheryl A. Nida did business as 60 Minute Tune, repairing motor vehicles in Beaverton, Oregon, utilizing the personal service of one or more employees, and controlling the means by which such service was performed in said state. Respondents were the franchisees of National 60 Minute Tune, Inc., a Washington corporation.

2) The Complainant worked for Respondents as a tune-up technician from May 1988 until his termination on December 6, 1988. He started at \$6.50 an hour, and was earning \$6.75 an hour by December 6, 1988.

3) The Complainant first worked in a 60 Minute Tune shop in Vancouver, Washington, beginning in January 1987. He began working at

Respondents' 60 Minute Tune as a tune-up technician on May 1, 1988. He had taken automotive vocational courses in high school and in junior college, and had worked in other tune-up shops.

4) In the junior college automotive course, which he completed, he received instruction from representatives of the federal Occupational Safety and Health Administration (OSHA). The instruction included information on reporting health and safety hazards in the workplace to OSHA without fear of employer retaliation. He was taught safety habits as part of the automotive technology course.

5) Safety subjects at community college included the use of eye protection with grinders, keeping shop floors clean, safe use of jacks and jackstands, locating first aid kits and keeping them stocked, locating fire extinguishers and keeping them charged, fire hazards of gasoline engines, and other things that were "just common sense."

6) The Forum officially notes that at times material the Accident Prevention Division (APD) of the State of Oregon Department of Insurance and Finance was the State of Oregon representative of federal OSHA, and that calls and complaints regarding workplace health and safety issues were accepted and acted upon by APD.

7) At all times material, the Complainant lived in Vancouver, Washington, and commuted a minimum of 15 miles one way to the Beaverton job site during peak morning traffic hours by automobile.

8) The Complainant had difficulty arriving at Respondents' Beaverton shop on a regular basis by 8 a.m. because of the unpredictability of his commute.

9) The subject of the Complainant's late arrival was discussed between the Complainant and Respondent with the result that the Complainant was allowed to arrive at 8:30 a.m..

10) The other shop employees were allowed to arrive at work later, at times as late as 9 or 10 a.m., depending on the amount of work scheduled. Respondent expected the Complainant to be there because of his knowledge, training, and experience.

11) By September 1988, the time of one of the Complainant's discussions with Respondent of the Complainant's attendance, the Complainant had been working both as manager and lead technician from 8 or 8:30 a.m. to 7:30 or 8 p.m., without breaks for lunch, six days per week, Monday through Saturday. As a result, the Complainant began getting Wednesdays off on a fairly regular basis.

12) While discussing the Complainant's arrival difficulties and shop operations, Respondent would ask the Complainant about ways to improve the safety of the shop and what other shops did about certain situations. The Complainant told Respondent that there was oil on the wooden floor of the grease pits which became a "slippery mess" when combined with rain-water blown in under the shop door. The Complainant, among others, had slipped on it.

13) Respondent installed metal skid plates to catch the oil. The

Complainant considered these ineffective, and suggested grates which would allow the oil to pass through. Grates were not installed during his employment.

14) Another condition considered unsafe by the Complainant involved a metal bar at the stairway between the two pits. Employees, including the Complainant, periodically struck their heads on the bar when entering or leaving the pit. The Complainant suggested foam padding the bar in a manner similar to a roll bar on a racing car. No padding was installed during his employment.

15) The shop was considered cold by the employees when the shop doors were open. It was uncomfortable doing bare handed mechanical work under those conditions.

16) The four shop employees met on December 1, 1988, to discuss a solution for the heat problem. One employee was quitting, one had just started working, and two had children to support. The Complainant was chosen by the other employees to call "OSHA" (APD) "because I had the least to lose."

17) The Complainant called APD about whether there were regulations or rules regarding the shop temperature. He was told that there were not. In response to the APD representative's questions, the Complainant identified the business and its location. The APD representative then asked the Complainant questions about other safety and health aspects of Respondents' shop, such as fire extinguishers, first aid certification, and first aid kits. All of the employees were present when the Complainant made the

phone call. They were watching for Respondent, who was out of the shop at the time.

18) The Complainant responded that the one fire extinguisher was empty. The APD spokesman said there was not much they could do about the fire extinguisher except to initiate a letter to Respondents and advise them that APD was concerned about it. The Complainant also told the APD representative that there was a first aid kit, and that he knew some first aid but was not certified.

19) The Complainant's birthday was on December 2. He had previously mentioned to Respondent that he wanted to take a day off for his birthday. He had taken his birthday as a paid holiday at another 60 Minute Tune shop, had knowledge that both company run shops and other independently owned franchise shops gave employee birthdays as paid holidays, and understood this to be "company policy." He wanted to take Saturday, December 3. Respondent did not approve.

20) Other employees had been allowed a Saturday off for such things as concerts. The Complainant had a regular day off on Wednesday, November 30, 1988. The Complainant did not work on Saturday, December 3, 1988.

21) On Monday, December 5, 1988, the Complainant was late arriving at work due to a truck accident blocking Interstate 5, part of his regular commuting route. Respondent mentioned the late arrival to the Complainant on December 5, cautioning him that there might be disciplinary action if he were late again. Respondent also

mentioned that the Complainant had not come in on Saturday, December 3, but he seemed the most concerned about the Complainant being late on December 5.

22) The discussion of December 5 then turned into a "shop improvement meeting," including operational matters, as it had on other occasions when the Complainant's attendance was discussed. Respondent did not mention OSHA on December 5.

23) On December 6, the Complainant arrived at work on time. At that time, Respondent was on the telephone in his office and the Complainant went in back to change clothes. In about five minutes, Respondent came in and asked if the Complainant was the one who called "OSHA." The Complainant said that he was. Respondent said "you're fired; pack your tools," or words to that effect. He then proceeded to curse at the Complainant, threaten him with bodily harm, and with calling the police if the Complainant didn't leave. Respondent did not mention the Complainant's attendance on December 6, 1988.

24) During the Agency investigation of the Complainant's allegations, Ahmad Muhammad interviewed Respondent. Respondent told him that the Complainant was late on December 6, 1989. He further stated that he was concerned about whether the Complainant would lie about calling OSHA about the fire extinguisher. He said he asked if the Complainant had called OSHA and the Complainant responded that he had. Respondent then discharged the Complainant. Respondent told the investigator that he

considered the Complainant a trouble maker.

25) The Complainant sought work following his discharge. Among the places he applied were other 60 Minute Tune shops, C-Tran Bus in Vancouver, the City of Vancouver, and several privately owned auto shops in Vancouver. He filled out applications listing Respondents' shop as his last employer, and stating that he had been discharged.

26) At the time of his discharge, the Complainant was working at least 40 hours per week on a five day week basis.

27) Following his discharge by Respondent, the Complainant was employed between January 25 and February 28, 1989, at Gresham AMC Jeep-Eagle, where he earned \$800; between April 3 and June 5, 1989, at Fisher Auto, where he earned \$1,500; between July 15 and October 12, 1989, at Gunderson's, where he earned \$5.50 per hour for 60 calendar days, and \$6.55 per hour for the next 30 calendar days. After October 12, 1989, his hourly wage, \$7.30, exceeded his rate of pay at the time of discharge. He left the Jeep-Eagle and Fisher Auto jobs due to no-fault lay-offs.

28) Prior to Respondent discharging him, the Complainant had never been fired before. It made him feel "pretty bad." Having to list the fact of his discharge on subsequent job applications was embarrassing and made him anxious and apprehensive, as he didn't know what Respondent would say if contacted. He was told at Fisher that Respondent gave him a negative recommendation. He had to borrow

money to keep his bills paid. He began having problems with his girlfriend because of his lack of employment and eventually "broke up" with her.

AMENDED ULTIMATE FINDINGS OF FACT

1) At all times material herein, Respondents were doing business as 60 Minute Tune and were persons having one or more employees in Oregon. Respondent Neal M. Nida supervised the daily operation of the shop.

2) The Complainant was employed by Respondents from May 1 to December 6, 1988. He worked as a tune-up technician and was earning \$6.75 an hour for a five day, 40 hour week.

3) During his employment, the Complainant called Respondent's attention to safety concerns, some of which were not corrected.

4) On December 1, 1988, on his own behalf and as representative of his co-workers, the Complainant called APD to inquire about shop temperature regulations, identified the employer and location, and answered questions about the business regarding health and safety subjects.

5) On December 6, 1988, Respondent asked the Complainant if he had called OSHA. When the Complainant said he had, Respondent told him that he was fired.

6) The Respondent discharged the Complainant for requesting information from and furnishing information to an agent of the Accident Prevention Division of the State of Oregon.

7) The Complainant suffered emotional upset, embarrassment, and fi-

ancial distress as a result of the discharge.

8) The Complainant lost wages amounting to \$6,527 as a result of the discharge. At the time of his discharge, the Complainant was earning at least \$270 per week (8 hours x 5 days x \$6.75). Thereafter, he made a diligent search for replacement employment. Had he continued working for Respondents, he would have earned at least \$11,745 between December 8, 1988, and October 12, 1989, a period of 44 weeks. Following his discharge by Respondent the Complainant's earnings were:

January 25 to February 28, 1989,
Gresham Jeep-Eagle, \$800;

April 3 to June 5, 1989,
Fisher Auto, \$1,500;

July 15 to October 12, 1989,
Gunderson's, \$2918 (8½ weeks (60
calendar days) at \$5.50 per hour x 40
= \$1,870; 4 weeks (30 calendar days)
at \$6.55 per hour x 40 = \$1,048;
\$1,870 + \$1,048 = \$2,918).

(\$11,745 - \$800 - \$1,500 - \$2918
= \$6,527).

CONCLUSIONS OF LAW

1) At all times material herein, Respondents were employers subject to the provisions of ORS 659.010 to 659.110, and 659.400 to 659.435.

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

"Any employee * * * who believes that the employee has been barred or discharged from employment or otherwise discriminated against in compensation, or in terms, conditions or privileges of employment, by any person in violation of this subsection may * * * file a complaint with the

Commissioner of the Bureau of Labor and Industries alleging such discrimination under the provisions of ORS 659.040. Upon receipt of such complaint the commissioner shall process the complaint and case under the procedures, policies and remedies established by the ORS 659.010 to 659.110 and the policies established by ORS 654.001 to 654.295 and 654.750 to 654.780 in the same way and to the same extent that the complaint would be processed by the commissioner if the complaint involved allegations of unlawful employment practices based upon race, religion, color, national origin, sex or age under ORS 659.030(1)(f).

* * *

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

3) OAR 839-06-040 provides:

"In addition to protecting employees or prospective employees who oppose practices, file complaints, institute proceedings, or testify in proceedings, ORS 654.062(5) also protects employees or prospective employees from discrimination because they have exercised "any right afforded by" the Act. Certain rights are directly provided by the act. * * * Certain other rights exist by necessary implication. For example: employees may request information from the Accident Prevention Division and not be discriminated against because of their request;

employees interviewed by agents of APD in the course of inspections or investigations cannot subsequently be discriminated against because of their cooperation."

An employee requesting information from, and furnishing information to, an agent of the Accident Prevention Division is exercising an employee right afforded by ORS 654.001 to 654.295 and 654.750 to 654.780. The Complainant exercised rights afforded by the Oregon Safe Employment Act.

4) ORS 654.062(5)(a) provides:

"It is an unlawful employment practice for any person to bar or discharge from employment or otherwise discriminate against any employee or prospective employee * * * because of the exercise of such employee * * * of any right afforded by ORS 654.001 to 654.295 and 654.750 to 654.780."

The conduct of Respondent Neal M. Nida in discharging the Complainant was a violation of ORS 654.062(5).

5) The actions, inaction's, statements, and motivations of Neal M. Nida are properly imputed to Cheryl M. Nida as co-proprietor herein.

6) Pursuant to ORS 654.062, 659.010(2), and 659.060(3), the Commissioner of the Bureau of Labor and Industries has the authority under the facts and circumstances of this record to award money damages to the Complainant for wage loss and emotional distress sustained, and the sum of money awarded in the Order below is an appropriate exercise of that authority.

AMENDED OPINION**Respondents' Default Status**

At hearing, the Hearings Referee refused to reconsider his earlier ruling denying Respondents relief from default. The refusal of reconsideration was based, in part, on the absence of any rule allowing reconsideration of rulings. But there is also no rule prohibiting such a procedure. It is inherent in the Commissioner's authority, where a hearings examiner (referee) is appointed to "hear and determine matters of fact, make conclusions of law and formulate an order appropriate to the facts as found", that the Commissioner, by "reserving to [herself] the decision to affirm, reverse, modify or supplement the determinations, conclusions or order of the [Hearings Referee]," may give consideration to any ruling prior to, during, or following the hearing. ORS 659.060(4). As a hearings examiner formulating findings, conclusions, and an order under that statute, the Hearings Referee in this forum does have the authority, albeit discretionary, to reconsider his or her own rulings.

The Hearings Referee accepted the Respondents' filing and requested the Agency's response thereto "in order to assist the Commissioner in evaluating [his] rulings denying relief from default." Thus, the Hearings Referee properly recognized the ultimate ability of the Commissioner to affirm or deny the default holding. In turn, I now rule on that issue.

The Procedural Findings herein recite that Respondents, who received the Specific Charges at their business location on December 30, 1989, one day after the charges were issued,

failed to answer within 20 days of the issuance date, or by January 19, 1990. Thereafter, by letter dated January 19, 1990, Respondents were advised by mail that they were in default unless a response had been timely filed. Next, on January 25, 1990, the Forum received Neal Nida's letter requesting relief from default.

In this letter, Respondent Neal Nida acknowledged receiving the Notice of Hearing scheduled for February 27, 1990, at 9 a.m., and alleged that he had obtained the Complainant's file:

"in preparation for the February hearing. The need to respond to this Schedule was somehow misread or very possibly misunderstood. The legal documentation and readings are very difficult to read and understand. At this time we still have not located the paperwork requesting a response to Feb's hearing, was it included in the paperwork sent? The possibility that it was misplaced is also possible with the amount of paperwork going thru this small office. A concern of this type of mistake being made is scary with the conversion from 60 min Tune to Precision Tune making it tough to keep up with paperwork."

The Specific Charges and Notice of Hearing were accompanied by a Notice of Contested Case Rights and Procedures, a two page document which generally informs a party to a hearing about the hearings process, pursuant to ORS 183.413. In a box in the left upper corner of the first page of this two page document, underlined and in capitals was the following statement:

"AN ANSWER MUST BE FILED WITHIN 20 DAYS OF THE ISSUANCE OF THE CHARGING DOCUMENT (See No. 3 Below)"

The referred to paragraph provided that a written answer must be filed within twenty days of the issuance of the charging document, that failure to file the answer constituted a default, and referred the reader to OAR 839-30-060 for a further description of the answer. The cited rule, OAR 839-30-060, reproduced separately, was served with the Hearing Notice and Specific Charges. Finally, a copy of the entire division of the Bureau's administrative rules governing contested case hearings, OAR 839-30-000, *et seq.*, was also served with the Hearing Notice and Specific Charges. These rules contained specific definitions of such terms as "issuance" and "charging document."

Thus, Respondent was served with at least three documents that informed him of the need to file a written answer within twenty days of the mailing of the Hearings Notice and Specific Charges. No such answer was filed and Respondent was in default. OAR 839-30-185(1)(a). The Hearings Referee so ruled on February 7, 1990. The Hearings Referee also found:

"Respondent Neal Nida's letter speculates that either the documents he received with the Notice of Hearing were misread or misunderstood, or that they were misplaced. The Forum is unable to determine which of these possible reasons Respondent relies upon. In any event, no one of the reasons advanced by Mr. Nida constitutes good cause as above

defined. All were clearly within Respondents' control."

The Hearings Referee then denied relief.

OAR 839-30-190 provides:

"(1) Relief from default may be granted where good cause is established within 10 days of any of the following:

"(a) A Charging Document becomes final by failure to file a required response;

"(b) A Notice of Default has been issued; or

"(c) A party has failed to appear at hearing.

"(2) The request for relief from default shall be in writing directed to the Hearings Referee through the Hearings Unit and shall be accompanied by a written statement, together with appropriate documentation, setting forth the facts supporting the claim of good cause."

OAR 839-30-025(11) provides:

"'Good cause' means, unless otherwise specifically stated, that a party failed to perform a required act due to an excusable mistake or circumstances over which the party had no control. Good cause does not include a lack of knowledge of the law including these rules. The Hearings Referee will determine what constitutes good cause."

In ruling as he did, the Hearings Referee obviously addressed the "control" aspect of the relief from default rule. Implicit in the result, however, though not stated specifically, was the

finding that the reasons advanced also failed to illustrate "excusable mistake." In previous rulings, I have noted that neither the mistaken belief that the claim was resolved and an answer was unnecessary, nor the respondent's failure to become fully aware of the default provision of the rules was an excusable mistake. *In the Matter of Metco Manufacturing, Inc.*, 7 BOLI 55, *aff'd*, *Metco Manufacturing, Inc. v. Bureau of Labor and Industries*, 93 Or App 317, 761 P2d 1362 (1988). The mistaken belief that a contract employee of respondent had received service of the Specific Charges and would respond was not an excusable mistake. *In the Matter of Colonial Motor Inn*, 8 BOLI 45 (1989), and the misreading of the Notice of Hearing was also not excusable. *In the Matter of Community First Building Maintenance*, 9 BOLI 1 (1990). Unilateral carelessness does not constitute excusable mistake or a circumstance beyond an employer's control. *In the Matter of Jack Mongeon*, 6 BOLI 194 (1987). To be excusable, a mistake leading to default would have to be based on facts or circumstances actually inviting the mistaken behavior. For instance, if the Notice of Hearing showed that an answer was not due for 30 days, or if the respondent had received written notice that the charges were dismissed, in short, if the party was misled by facts or circumstances which would also mislead a reasonable person in like or similar circumstances, a resulting mistake would be excusable.

A contested case hearing involving unlawful practices in connection with ORS chapter 659 does not occur in a

vacuum. It is preceded by administrative complaint, investigation, administrative determination, and usually conciliation. Respondents should be well aware, following an administrative determination finding substantial evidence of violation, and certainly following a failure of conciliation, that a hearing is a distinct possibility. See OAR 839-03-000 to 839-03-095, specifically 839-03-075. A party's neglect of or inattention concerning process such as was received by Respondents is difficult to justify. I cannot find that it was justified here. Relief from default was properly denied, and I confirm the Hearings Referee's original ruling.

The Agency's Prima Facie Case

Respondents Nida, dba 60 Minute Tune, were found in default, pursuant to OAR 839-30-185(1)(a), for failure to file an answer to the Specific Charges. Respondent Neal Nida and his attorney attended the scheduled hearing, but were not allowed to present evidence or otherwise participate, in accordance with established precedent. *Metco Manufacturing, supra*.

In default situations, the Agency must present a prima facie case in support of the Specific Charges and to establish damages. ORS 183.415(6), OAR 839-30-185(2). To present a prima facie case in this matter, the Agency must prove the following four elements:

- (1) The Respondent is a Respondent as defined by statute.
- (2) The Complainant is a member of a protected class.
- (3) The Complainant was harmed by an action of the Respondent.

(4) The Respondent's action was taken because of the Complainant's membership in the protected class. OAR 839-05-010(1).

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

(1) The evidence established that Neal M. and Cheryl A. Nida did business under the assumed name of 60 Minute Tune in Beaverton, Oregon. The Complainant worked there, and Respondents reserved the control of his work efforts, and that of his fellow workers, and of the means by which his personal services were performed. They hired, fired, set pay rates, paid, assigned and directed work, controlled the hours of work, set policies, procedures and standards for accomplishing work, and thus were employers under the applicable statute. While the Complainant's administrative complaint was filed against a corporate name, it was Neal Nida who dealt with the investigation and confirmed his employment of and discharge of the Complainant, and it was the Nidas against whom the Agency filed its Specific Charges, and who are "respondents" under the applicable statutes.

(2) The evidence leads to the conclusion that the Complainant was a worker who exercised rights under the Oregon Safe Employment Act, and who was protected against employment discrimination on that basis.

(3) The evidence clearly established that the Complainant was discharged from his employment with Respondents, causing economic and emotional harm.

(4) The evidence also established that the Complainant's call to APD, i.e., the exercise of the above mentioned rights, played a key role in Respondents' discharge of the Complainant.

ORS 654.062(5)(a) makes such a retaliatory discharge an unlawful employment practice. OAR 839-06-025, 839-06-030(2), *In the Matter of Scottie's Auto Body Repair, Inc.*, 4 BOLI 283 (1985). The evidence showed that the Complainant had been counseled regarding tardiness, but that reason did not appear to guide Respondents' discharge action. Even if it had been a factor, however, it would not form a defense as long as Complainant's call to APD was a key factor in the decision.

"Frequently, the evidence indicates that several factors contribute to causing a respondent's action, of which only one factor is a complainant's protected class. In such cases, the Forum uses the key role test. OAR 839-05-015. Under that test, the crucial question is whether or not the harmful action — here, the discharge — would have occurred had the Complainant not been a member of the protected class." *In the Matter of Peggy's Cafe*, 7 BOLI 281 (1989); *see also In the Matter of LeeBo Line Construction, Inc.*, 1 BOLI 210 (1979).

The Forum has found by a preponderance of the evidence that Respondent discharged Complainant because he exercised rights afforded by the Oregon Safe Employment Act. Respondent's description of the discharge to the investigator does not vary materially from that of the Complainant.

The issue discussed was not tardiness or attendance, neither of which were mentioned. The issue was whether the Complainant had called "OSHA," or APD, and Respondent's resulting characterization of the Complainant as a trouble maker. Indeed, Respondent's possible reaction to knowledge that APD was being consulted appears to have concerned his employees to the extent that they discussed who should call, and kept a lookout for him while the call was made. Such facts permit the inference that Complainant's exercise of the rights afforded by statute gave him protected class membership and was the cause of Respondent's action.

Remedy

The Complainant lost wages for a significant period after the discharge. He found other employment that was temporary and at an earning rate below what he earned with Respondents. In such circumstances, his claim for wage loss continued until he obtained employment equaling or surpassing in earnings the position from which he was unlawfully eliminated. *Scottie's Auto Body, supra.*; *In the Matter of Richard Niquette*, 5 BOLI 53 (1986). Interim earnings are deducted from what the Complainant would have earned but for the unlawful act. By these standards, the Forum has computed the Complainant's wage loss at \$6,527.

Respondents were in default, and could not contest the wage loss evidence. The Agency's Specific Charges alleged a wage loss of \$6,000. Because the figures in the charging document are the only ones of which Respondents had notice prior to

default, the Complainant's recovery is limited to that amount even if the evidence at hearing and resulting calculation therefrom shows a higher figure. *In the Matter of Kevin McGrew*, 8 BOLI 251 (1990). The lost wages herein are thus limited to \$6,000. Pre-order interest, however, may be calculated for those portions of the lost wages which should have been paid up to that limit but for the unlawful act. *In the Matter of Lucille's Hair Care*, 5 BOLI 13 (1985), *on remand from Ogden v. Bureau of Labor*, 299 Or 98, 699 P2d 189 (1985). The interest calculation in the Order below reflects this, and includes calculations made for deficiencies during periods of interim employment.

Awards for mental suffering depend on the facts presented by each complainant. Here, the Complainant testified credibly to embarrassment and upset from being fired, and the Forum found that the Complainant experienced some mental suffering. This Forum has previously recognized that the anxiety and uncertainty connected with loss of employment income is compensable. *In the Matter of Spear Beverage Company*, 2 BOLI 240 (1982). The effect of an unexpected termination and the resulting specter of unemployment and its uncertainties are also compensable when attributable to an unlawful practice. *In the Matter of Arkad Enterprises, Inc.*, 8 BOLI 263 (1990); *In the Matter of the City of Portland*, 2 BOLI 41 (1980). This Complainant established some economic stress and repeated embarrassment from listing his discharge while seeking other employment. In addition, at the time of the discharge, he was subjected to threats of physical

harm and of police involvement (Finding of Fact 23). Finally, there was evidence to indicate that important personal relationships were affected (Finding of Fact 28). The Forum is therefore awarding the sum of \$1000 to compensate for his mental distress.

ORDER

NOW, THEREFORE, as authorized by ORS 659.060(3) and 659.010(2), and in order to eliminate the effects of the unlawful practice found, NEAL M. and CHERYL A. NIDA, dba 60 MINUTE TUNE are hereby ordered to:

1) Deliver to the Business Office of the Portland office of the Bureau of Labor and Industries a certified check, payable to the Bureau of Labor and Industries in trust for WILLIAM A. MELTON, in the amount of:

a) ONE THOUSAND EIGHT HUNDRED NINETY DOLLARS (\$1,890), representing wages Complainant lost between December 7, 1988, and January 24, 1989, (7 weeks) as a result of Respondents' unlawful practice found herein; PLUS,

b) TWO HUNDRED EIGHT DOLLARS AND SEVENTY-ONE CENTS (\$208.71), representing interest on said lost wages at the annual rate of nine percent accrued between January 24, 1989, and April 10, 1990, computed and compounded annually; PLUS,

c) ONE THOUSAND SEVEN HUNDRED SIXTY-FIVE DOLLARS (\$1,765), representing wages Complainant lost between January 25, 1989, and April 2, 1989, (9½ weeks) as a result of Respondents' unlawful practice found herein; PLUS,

d) ONE HUNDRED SIXTY-TWO DOLLARS AND THIRTY-THREE CENTS (\$162.33), representing interest on said lost wages at the annual rate of nine percent accrued between April 2, 1989, and April 10, 1990, computed and compounded annually; PLUS,

e) TWO THOUSAND THREE HUNDRED FORTY-FIVE DOLLARS (\$2,345), representing wages Complainant lost between April 3, 1989, and July 13, 1989, (14.24 weeks) as a result of Respondents' unlawful practice found herein; PLUS,

f) ONE HUNDRED FIFTY-SIX DOLLARS AND SEVENTY CENTS (\$156.70), representing interest on said lost wages at the annual rate of nine percent accrued between July 13, 1989, and April 10, 1990, computed and compounded annually; PLUS,

g) Interest on the foregoing, at the legal rate, accrued between April 11, 1990, and the date Respondent complies with the Final Order herein, to be computed and compounded annually; PLUS,

h) ONE THOUSAND DOLLARS (\$1000), representing compensatory damages for the mental distress Complainant suffered as a result of Respondent's unlawful practice found herein; PLUS,

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

2) Cease and desist from discriminating against any worker who opposes any practice forbidden by ORS

654.001 to 654.295 and 654.750 to 654.780, makes any complaint or institutes or causes to be instituted any proceeding under or related to ORS 654.001 to 654.295 and 654.750 to 654.780, or has testified or is about to testify in any such proceeding, or because of the exercise of such employee on behalf of the employee or others of any right afforded by ORS 654.001 to 654.295 and 654.750 to 654.780.

**In the Matter of
ALLIED COMPUTERIZED CREDIT
& COLLECTIONS, INC.,
and Johnny B. Ardery, aka John
Autry, Respondents.**

Case Number 48-90
Final Order of the Commissioner
Mary Wendy Roberts
Issued March 11, 1991.

SYNOPSIS

Respondent corporation defaulted by failing to file an answer to the Specific Charges. Respondent corporation's president and sole owner, Respondent Ardery, appeared at hearing and subjected himself to the jurisdiction of the Forum. On the merits, the Commissioner found that Respondent Ardery subjected female Complainant to sexual harassment, which caused an intolerable work environment and her resignation, and caused

her extreme emotional distress. Ruling that Respondent Ardery aided and abetted the corporate employer in causing Complainant's constructive discharge, the Commissioner awarded Complainant \$1,304 in lost wages and \$15,000 for mental suffering. ORS 9.320; 60.121(1), (2); 659.030(1)(a), (b), (g); OAR 839-07-555(1); 839-30-057; 839-30-185.

The above-entitled matter came on regularly for hearing before Jeanne Kincaid, designated as Hearings Referee by Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on November 20 and 21, 1990, in Room 311 at the Bureau of Labor and Industries in Portland, Oregon. Alan McCullough, Case Presenter with the Quality Assurance Unit of the Civil Rights Division of the Bureau of Labor and Industries (the Agency), appeared on behalf of the Agency. Judediah C. Edwards (Complainant) was present throughout the hearing, and was not represented by counsel.

Johnny B. Ardery (Respondent Ardery) appeared on his own behalf without representation of an attorney. Allied Computerized Credit & Collections, Inc. (Respondent Allied) did not appear at the hearing.

The Agency called the following witnesses (in alphabetical order): Complainant Judediah Edwards; Sarah Edwards, Complainant's mother; Gerri Ross, employee of the Private Industry Council (PIC); Beverly Russell, Investigative Supervisor, Civil Rights Division, Bureau of Labor and

Industries; and Robert H. Steeves, employee of PIC.

Respondent Ardery called the following witnesses (in alphabetical order): Respondent Johnny B. Ardery and Tanya Jones, former employee of PIC.

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

**FINDINGS OF FACT –
PROCEDURAL**

1) On March 7, 1989, Complainant filed a verified complaint with the Civil Rights Division of the Agency. She alleged that Respondent Allied had discriminated against her on the basis of sex, in that Respondent Allied had sexually harassed her to such an extent that she was forced to take a constructive discharge.

2) After investigation and review, the Agency issued an Administrative Determination finding substantial evidence of an unlawful employment practice by Respondent Allied in violation of ORS 659.030(1)(a) and (b).

3) The Agency subsequently initiated conciliation efforts between the Complainant and Respondent Allied. Conciliation failed and the case was referred to the Agency's Quality Assurance Unit for further action.

4) On June 21, 1990, the Agency issued Specific Charges which alleged that Respondent Allied had discriminated against Complainant on the basis of sex in that Johnny B. Ardery, owner and president of Respondent

Allied and Complainant's supervisor, engaged in a course of sexual conduct designed to harass, intimidate, humiliate, and embarrass Complainant. The Specific Charges alleged that Respondent Allied's conduct was unwelcome and offensive to Complainant, and created a hostile and abusive work environment such that Complainant was forced to resign.

5) Respondent Ardery is the registered agent and president for Respondent Allied.

6) Respondent Allied's addresses listed with the Corporation Division for purposes of service are 1308 SE 122nd Suite A, Portland, OR 97233, and 1308 SE 122nd Suite B, Portland, OR 97233.

7) On June 21, 1990, the Forum attempted to serve Respondent Allied by certified mail by addressing the envelopes to Johnny B. Ardery, Registered Agent, 1308 SE 122nd Avenue, Suite B, P.O. Box 16761, Portland, OR 97233, and Allied Computerized Credit Collections, Inc., 1308 SE 122nd Avenue, Suite B, Portland, OR 97233. Both envelopes were returned. The post office markings indicate that the PO Box was closed and the envelope addressed to the business office went unclaimed.

8) On July 26, 1990, the Agency moved and the Forum granted a request to amend the pleadings to name Johnny B. Ardery as a party to the proceedings.

9) Continued efforts to serve the Respondents were futile.

10) On August 28, 1990, in accordance with ORS 60.121, the Forum served Respondent Allied by serving

the Corporation Division of the Secretary of State's office with the Specific Charges.

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

12) Respondent Allied never filed a responsive pleading as required by OAR 839-30-060.

13) On August 22, 1990, someone at 726 NE Roselawn in Portland, Oregon 97211 signed a receipt for Johnny Ardery for the documents listed in Finding 11. Respondent Ardery testified that Mary Johnson, who lives at the Roselawn address, had telephoned him in California regarding the papers.

14) On November 8, 1990, pursuant to OAR 839-30-071, the Agency filed a Summary of the Case including documents from the Agency's file.

15) The Agency served Respondent Ardery by certified mail at 1111 NE Ainsworth in Portland. The return of service indicates that Crystina Ardery signed for the documents on November 9, 1990.

16) On November 14, 1990, Respondent Ardery called the Hearings Unit and spoke with Hearings Referee

Gregg. Respondent Ardery advised Mr. Gregg that he had learned that a process server had been attempting to serve him with papers. He stated that he was living in California and had not received any papers. Mr. Gregg advised Respondent Ardery that a hearing was set on this matter for November 20, 1990.

17) The Forum sent Respondent Ardery a copy of the service packet referred to in Finding 11 and advised the Agency's Case Presenter to forward a copy of his case summary to Respondent Ardery.

18) Respondent Ardery appeared at the hearing on November 20, 1990, and voluntarily submitted himself to the jurisdiction of the Forum.

19) Respondent Ardery advised the Forum that he had still not received a copy of the Specific Charges. He advised the Forum that the address cited in Hearings Referee Gregg's memo was inaccurate. The Forum recessed the hearing to allow Respondent Ardery to review the charges, hearing rules, and the Agency's evidence.

20) Respondent Ardery intended to appear for Respondent Allied, but the Hearings Referee advised him that Respondent Allied was in default because, as a corporation, it must be represented by an attorney.

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

22) During the hearing, pursuant to OAR 839-30-075, the Agency twice moved to amend the Specific Charges to conform to the evidence and to reflect issues presented at the hearing. The first amendment was to charge Respondent Ardery as an aider and abettor under ORS 659.030(1)(g); the second amendment was to amend the caption to add the name John Autry. The Hearings Referee granted the motions because the amendments reflected issues and evidence which had been previously introduced into the record without objection from Respondents.

23) The Hearings Referee left the record open until Monday, December 3, 1990, to allow Respondent Ardery an opportunity to supplement the record with additional written documentation and supply the Forum with the names, addresses, and phone numbers of additional witnesses he intended to call.

24) The Hearings Referee granted two additional extensions to Respondent Ardery to produce documentation and/or witness information. The record was officially closed on December 6, 1990, having received nothing from Respondent Ardery.

25) The Proposed Order, which included an Exceptions Notice, was issued on December 21, 1990. Exceptions, if any, were to be filed by December 31, 1990. No exceptions were received.

FINDINGS OF FACT – THE MERITS

1) At all times material herein, Respondent Allied was an Oregon corporation engaged in the business of debt collection, and an employer utilizing the

personal services of one or more employees subject to the provisions of ORS 659.010 to 659.435. The corporation is now dissolved.

2) At all times material herein, Respondent Ardery, who also goes by the name of John Autry, was president and sole owner of Respondent Allied.

3) Beginning in approximately October 1988, Complainant, a 19 year old female, was a trainee with PIC. PIC is a non-profit organization funded by the government and private donations. Its purpose is to assist disadvantaged youth, ages 16-21, in acquiring vocational skills and placing such trainees in the work force. Employers participating in the PIC program pay only half of the employee's wages; PIC pays the other half.

4) Respondents participated in the PIC program and Respondent Ardery requested that PIC send job applicants to him.

5) On January 30, 1989, Respondents interviewed Complainant and another young woman referred by Tanya Jones of PIC.

6) Respondents offered Complainant a position as a debt collector beginning February 1, 1989. Complainant's salary was \$4.00 per hour and she was scheduled to work a 35 hour week. The other woman declined a job offer.

7) Complainant was very excited about working for Respondents because she perceived that she would learn good vocational skills and perform work which was not as labor intensive as her previous positions. Complainant was also attempting to

support herself in an apartment and was paying off a car.

8) Complainant was naive. She was trusting of others and very enthusiastic. She found it easy to talk with people and had a good self image.

9) Complainant was in a stable relationship with a young man whom she had been dating for four years.

10) Mrs. Edwards raised her daughter to be proud and walk tall. She taught her that words cannot hurt people, but never to let anyone touch her.

11) Although Complainant had her own apartment, she generally spoke to her mother on the phone or visited her everyday. Complainant and her mother are extremely close.

12) Complainant worked for Respondents for two weeks. During most of that time, exclusive of Respondent Ardery, Complainant was Respondents' sole employee.

13) Although Complainant's first few days on the job were uneventful, soon thereafter Respondent Ardery began making sexual comments to Complainant. He told her stories of his past, saying that he used to be a pimp; that as a young boy, he and his brother had sexual relations with a friend of his mother's; that he and a friend enjoyed going up to women in Fred Meyer's asking them to "sit on their faces"; and that a previous female employee had jumped on the desk, pulled up her dress and revealed herself without underpants.

14) Respondent Ardery also began making sexual overtures to Complainant. He walked by her, stared at her breasts and stated "MMMM, MMMM,

MMMM. If only I was young." He knew that she had a boyfriend and asked her if she "sat on her boyfriend's face." Complainant did not know what he meant, and Respondent Ardery told her that his wife refused oral sex and that he would enjoy it if Complainant would give him oral sex. He told her that on one occasion he had attempted to hire a young woman who was reputed to be "good at sucking penis" but his wife would not let him hire her. All Respondents Ardery's sexual overtures were done when no one else was present.

15) During her two week period of employment, Complainant spoke with her case manager at PIC, Gerri Ross, on several occasions. Complainant told Ross that she did not like the work because it required her to lie to people. She also stated that Respondent Ardery was "strange." Prior to resigning, Complainant never advised anyone at PIC about the sexual harassment she was experiencing. She was very embarrassed and did not want PIC to think she was not serious about her desire to work.

16) Although Complainant appeared pleased with her job to her mother after the first day of employment, by the second week of employment, Mrs. Edwards saw a complete change in her daughter's personality. Mrs. Edwards's questioning of her daughter never revealed that Complainant was experiencing sexual harassment. All Complainant said was that Respondent Ardery was "weird."

17) Complainant became upset with Respondent Ardery's behavior but she never mentioned the sexual harassment to her mother or her PIC

caseworker because she was terribly embarrassed. She did not think people would believe her and she began to doubt her perceptions about his behavior: perhaps he was not serious. She also remembered what her mother had told her about words not hurting people.

18) When Complainant first began working for Respondents, she dressed up wearing skirts, dresses, and high heels. As Respondents' sexual behavior escalated, Complainant began changing into jeans and sneakers in the restroom so she could run away if need be. Mrs. Edwards noticed this change in her daughter's appearance. Out of fear, Complainant had her boyfriend pick her up at work.

19) On February 13, 1989, Respondent Ardery walked by Complainant when she was standing by the copier and touched her buttocks and breast. Complainant was very upset and told Respondent Ardery never to touch her. On that same day, Respondent suggested to Complainant that he was going to go buy a couch for the office for them so that she could "sit on his face."

20) Complainant was extremely upset with Respondent Ardery's behavior on February 13, 1990, and that evening decided to resign. Complainant was fearful that Respondent Ardery was going to attack her.

21) Complainant went to work on February 14, 1990. Respondent Ardery was not there, so Complainant left him a note saying that she was quitting because "you have said things I didn't like and you touch [sic] me where you shouldn't have."

22) From Respondents' office, Complainant telephoned caseworker Ross and told her she was resigning and why. Complainant made a copy of her resignation letter and brought it over to Ross that day. Complainant was very upset when she arrived at PIC. Ross did not doubt Complainant's allegations, as she had worked with her for a period of months, seeing her two to three times per week. She had never seen Complainant so upset. Tanya Jones of PIC also spoke with Complainant and verified that Complainant was extremely upset. Jones concurred that Complainant did the right thing in quitting if she was sexually harassed.

23) Complainant's resignation letter also advised Respondent Ardery to direct any further questions he might have to PIC. It was Complainant's intention to have nothing further to do with Respondents.

24) On February 14, 1990, Complainant visited her mother and told her the full story of her employment with Respondents. Complainant was extremely upset and crying. Mrs. Edwards was outraged. Even after Complainant decided to tell her mother what occurred, it was very difficult for Mrs. Edwards to get all the details from her daughter. Complainant was very embarrassed.

25) On February 14, 1990, Respondent Ardery called Mrs. Edwards looking for Complainant. Mrs. Edwards advised Respondent Ardery that Complainant had resigned and he should look on his desk for her resignation letter. Respondent Ardery totally denied the allegations and said he wanted to be heard. Mrs. Edwards

was very upset and did not want anything to do with him. She told him to mail Complainant's paycheck.

26) On February 16, when Complainant was not home, Respondent Ardery went to Mrs. Edwards's home. She allowed him in. He had Complainant's paycheck. He wanted to explain his position. Mrs. Edwards kept asking him to leave. Respondent Ardery refused. Then Complainant and her boyfriend arrived. Both Complainant and her boyfriend became very upset. Complainant was trembling and crying. She was fearful because she did not want Respondent Ardery to know her whereabouts. Eventually Respondent Ardery was forced from the home by Complainant's boyfriend.

27) On one more occasion, Respondent Ardery called Mrs. Edwards when Complainant was present. They both were upset by his call.

28) Complainant suffered serious emotional distress from Respondent Ardery's verbal and physical actions. Complainant felt mentally raped by Respondent Ardery. She felt dirty and shameful, like she was a "whore." For a period of time, Complainant did not want her boyfriend to touch her. She thought that maybe he only wanted her for sexual purposes. She began to distrust all men, especially older men. She now only seeks employment in which she will be primarily around women. An inability to relate to men had never been a problem for her previously.

29) Complainant moved back into her mother's house and began sleeping in her mother's bed out of fear. She had nightmares. She was and continues to be afraid of being alone.

Complainant suffered a tremendous loss of self-esteem. Her ability to relate to people was affected. Her enthusiasm waned. It has taken Complainant nearly two years to recover from her employment with Respondents, yet she still experiences lingering effects. For example, for several nights before the hearing, she crawled into her mother's bed.

30) After resigning from Respondent Allied's employ, Complainant immediately began looking for work. She was hired by 99 Motel and began working on April 20, 1989. She was paid \$4.00 per hour. She resigned 99 Motel on June 17, 1989, due to a robbery. The Agency does not claim a right to back pay during the period Complainant was working for 99 Motel.

31) On July 11, 1989, Complainant was hired by Albertson's at \$4.35 hour.

32) Complainant's wage loss attributable to Respondents extends from 1 p.m. February 14, 1989, until April 20, 1989, based upon a 35 hour work week at \$4.00 per hour.

33) Respondent Ardery's testimony was not credible. He denied deliberately touching Complainant in an offensive way, although he conceded that he may have inadvertently touched her in passing. Respondent Ardery completely denied making any sexual comments to Complainant or relaying stories of a sexual nature. Respondent Ardery's testimony was contradicted and so greatly outweighed by other credible evidence on the whole record that it was not believable. Accordingly, Respondent's testimony was given little weight whenever it conflicted with other credible evidence on the record, and the Forum declined to

believe much of his uncontradicted testimony.

34) Complainant's testimony was credible. Although she had some problems with memory, especially with respect to the number of hours in her work week and her rate of pay, the Hearings Referee observed her demeanor and found it to be forthright and direct. Her answers were consistent with the testimony of the other credible witnesses as well as the documentary evidence. There was no credible evidence that cast doubt on the veracity of her comments. Gerri Ross had worked with Complainant over a period of several months, seeing her several days each week and found her to be reliable and responsible. She had never seen Complainant in the emotional state she exhibited on February 14, 1989.

35) The testimony of Sarah Edwards was entirely credible. She spoke forthrightly and was careful to admit when she could not recall all the specifics of an incident. She spoke at length and with emotion about the pain her daughter experienced while working for Respondents.

ULTIMATE FINDINGS OF FACT

1) At all times material herein, Respondent Allied was a corporation and an employer in the State of Oregon with one or more employees subject to the provisions of ORS 659.010 to 659.435.

2) At all times material herein, Respondent Ardery was the president and sole owner of Respondent Allied.

3) Complainant was employed by Respondent Allied.

4) Complainant is a female.

5) Respondent Ardery engaged in a course of deliberate verbal and physical conduct of a sexual nature toward Complainant while she worked for Respondents.

6) Respondent Ardery's conduct was directed toward Complainant because of her gender.

7) Respondent Ardery's conduct was offensive and unwelcome to Complainant.

8) Respondent Ardery's conduct had the effect of unreasonably interfering with Complainant's work performance, and of creating an intimidating, hostile, and offensive working environment.

9) Complainant was forced to involuntarily resign her employment with Respondent Allied because of the intolerable working environment created by Respondent Ardery's conduct.

10) In terms of wages and hours, Complainant's job with 99 Motel was an equivalent or superior job to her job with Respondent Allied.

11) Complainant would have earned \$1,304 in wages from Respondent Allied had she not been constructively discharged.

12) Complainant suffered embarrassment, distress, and renewed fear and stress as a result of Respondent Ardery's conduct and her involuntary resignation of employment. In addition, she acquired a revulsion to being around and working for men, and became uncomfortable when her boyfriend of many years touched her.

CONCLUSIONS OF LAW

1) At all times material herein, Respondent Allied was an employer as defined by ORS 659.010(6) and

subject to the provisions of ORS 659.010 to 659.110.

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

3) The actions, inaction's, and knowledge of Respondent Ardery, a supervisory employee of Respondent Allied, are properly imputed to Respondent Allied. OAR 839-07-055(1).

4) Respondent Allied is in default for having failed to file an answer and for failing to appear at the hearing represented by counsel. ORS 9.320; OAR 839-30-060; 839-30-185.

5) Respondent Allied violated ORS 659.030(1)(a) and (b).

6) Respondent Ardery aided and abetted the corporation in discriminating against Complainant. ORS 659.030(1)(g).

7) Pursuant to ORS 659.060 and by the terms of ORS 659.010, the Commissioner of the Bureau of Labor and Industries has the authority to issue a Cease and Desist Order requiring Respondents: to refrain from any action that would jeopardize the rights of individuals protected by ORS 659.010 to 659.110, to perform any act or series of acts reasonably calculated to carry out the purposes of said statutes, to eliminate the effects of an unlawful practice found, and to protect the rights of others similarly situated.

OPINION

A. Default of Respondent Allied

At all times material, Respondent Allied was a registered Oregon corporation. Respondent Ardery was the corporation's registered agent. Serving the registered agent effectively

serves the corporation. ORS 60.121(1). If a corporation dissolves or the registered agent cannot be found, serving the Secretary of State is effective service on the corporation. ORS 60.121(2).

In this instance, since Respondent Allied had dissolved and its registered agent, Respondent Ardery, had moved to California, the Forum effectively served Respondent Allied by serving the Secretary of State's office. The Forum's rules require a respondent to file an answer within 20 days of issuance of the charges. OAR 839-30-060. Respondent Allied never filed an answer.

At hearing, Respondent Ardery attempted to represent the corporation's interests but the corporation was not represented by an attorney as required by ORS 9.320 and OAR 839-30-057. The Hearings Referee refused to allow Respondent Ardery to represent the corporation and found Respondent Allied in default.

B. Jurisdiction over Respondent Ardery

The Forum mailed the Specific Charges and accompanying documents described in Procedural Finding 11 to Respondent Ardery at five different addresses in the Portland area. Respondent Ardery had actual notice of the proceedings, although he denied ever having received the Specific Charges until arriving at the hearing. Even when proper service has not been made or attempted on an individual, the Forum acquires jurisdiction when a respondent makes an appearance. *Mutzig v. Hope*, 176 Or 368, 394-95, 158 P2d 110 (1945). Respondent Ardery appeared at the hearing

and voluntarily submitted himself to the jurisdiction of the Forum.

The Forum recessed the hearing to allow Respondent Ardery an opportunity to review the Specific Charges, evidence, and hearing rules. The Forum located and arranged for the telephone testimony of Tanya Jones, a PIC employee, whom Respondent Ardery believed was a key witness. The Forum also granted Respondent Ardery three continuances to allow him the opportunity to supplement the record.

C. Violation of ORS 659.030(1)(b) (Sex Discrimination)

The Agency alleges that Respondents discriminated against Complainant on the basis of her sex. ORS 659.030(1)(b) makes it an unlawful employment practice:

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

Sexual harassment is discrimination based upon sex. OAR 839-07-550 defines sexual harassment as:

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

"* * *

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

The Forum finds Complainant's testimony credible. The conduct of Respondent Ardery described by Complainant was clearly sexually offensive and was directed at Complainant based upon her gender. Without question, such conduct created an intimidating, hostile, and offensive working environment.

Respondent Ardery's contention that Complainant would have left immediately had she been subjected to sexual harassment is without merit. Often times a victim of sexual harassment is incapable of taking action for a period of time. See e.g., *In the Matter of Colonial Motor Inn*, 8 BOLI 45 (1989) (complainant worked for nearly a year for an employer who daily sexually harassed her).

Respondent Ardery's sexual behavior escalated over the two week period, and Complainant became truly concerned about her safety. Being young and inexperienced, Complainant did not know what to make of his behavior. She was committed to finding and keeping a job. She did not want to let PIC down. However, when Respondent Ardery touched her, the situation became intolerable.

D. Violation of ORS 659.030(1)(a) (Constructive Discharge)

This Forum set forth the standard for constructive discharge in *In the Matter of West Coast Truck Lines, Inc.*, 2 BOLI 192, 214-15 (1981), *aff'd without opinion*, 63 Or App 383, 665 P2d 882 (1983), wherein the Forum stated:

"The general rule, which this forum adopts, is that "if an employer deliberately makes an employee's working conditions so intolerable

that the employee is forced into an involuntary resignation, then the employer has encompassed a constructive discharge. . . . *Young v. Southwestern Savings and Loan Association*, 509 F2d 140, 144 (5th Cir 1975)."

In *In the Matter of Tim's Top Shop*, 6 BOLI 166, 187 (1987) this Forum stated that:

"'deliberately' does not mean that the employer's imposition of 'intolerable' working conditions need be done with the intention of either forcing the employee to resign or relieving himself of that employee. The term 'deliberately' refers to the imposition of the working conditions; that is, it means the working conditions were imposed by the deliberate or intentional actions of the employer." (Emphasis in the original.)

In *West Coast Truck Lines*, *supra* the Forum ruled that:

"To find a constructive discharge, this forum must be satisfied that 'working conditions . . . so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign' caused the employee to resign and that the conditions were imposed by the deliberate, or intentional, actions or policies of the employer. *Alicea Rosado v. Garcia Santiago*, 562 F2d 114, 119 (1st Cir 1977); *Calcote v. Texas Educational Foundation*, 578 F2d 95, 97-98; and EEOC Decision #72-2062 (June 22, 1972). ***

"The final rule concerning constructive discharge is that if there

has been a constructive discharge, an employer is liable for any unlawful conduct involved therein as if the employer had formally discharged the employee. *Young*, *supra*, 509 F2d at 144."

The record establishes that Respondent Ardery's verbal and physical conduct was deliberate. That conduct created hostile, intimidating, and offensive working conditions for Complainant. The Forum is satisfied that the working conditions were so difficult or unpleasant that a reasonable person in Complainant's shoes would have felt compelled to resign. Tanya Jones, a PIC employee who had referred Complainant to Respondents' employ, testified that she would have recommended that Complainant quit if she knew that Respondents were sexually harassing her.

Respondent Ardery's suggestion that Complainant resigned for other reasons, namely, dislike of the job duties, is belied by the evidence. Although Complainant had complained to PIC about having to lie on the phone, she consistently remarked to PIC and her mother about Respondent Ardery's strangeness. Her resignation letter clearly states that she was resigning because of Respondent Ardery's sexual harassment.

Therefore, Respondents' deliberate imposition of intolerable working conditions on Complainant and her resulting resignation, as described in the Findings of Fact, constitute a constructive discharge, in violation of ORS 659.030(1)(a).

E. Damages

The purpose of back pay awards in employment discrimination matters is to compensate a complainant for the loss of wages and benefits which the complainant would have received but for the respondent's unlawful discrimination. Such awards are calculated to make the complainant whole for injuries suffered because of the discrimination. In *In the Matter of K-Mart Corporation*, 3 BOLI 194, 202 (1982).

In determining back pay awards, the equitable principle of setoff applies. This Forum has previously applied this principle as codified in federal law:

"Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. Title VII of the Civil Rights Act of 1964, as amended, Section 706(g)." In *In the Matter of the City of Portland*, 6 BOLI 203, 210 (1987).

This principle of law denies a complainant a recovery for harm he or she might reasonably have avoided. In other words, it relieves the respondent of liability for any losses that the complainant could reasonably have avoided. *City of Portland*, *supra*, at 210.

Pursuant to OAR 839-30-105(10), a respondent has the burden of showing that a complainant failed to mitigate his/her damages. See also *In the Matter of Lucille's Hair Care*, 5 BOLI 13, 28 (1985), on remand from *Ogden v. Bureau of Labor*, 299 Or 98, 699 P2d 189 (1985).

The period for measuring back pay terminates when a complainant obtains a job with comparable or higher pay, and it does not resume when the complainant voluntarily quits the new job. In *In the Matter of Pacific Motor Trucking Company*, 3 BOLI 100, 115 (1982), *aff'd*, 64 Or App 361, 668 P2d 446 (1983), *rev den* 295 Or 773 (1983).

There is no evidence that Complainant failed to mitigate her damages by failing to find work sooner than April 20, 1989. However, Complainant's right to back wages ceased when she found equivalent work. Thus, she is not entitled to wages between her resignation at 99 Motel and her hire at Albertson's.

Therefore, Complainant is entitled to \$1,304 in back wages. This figure is arrived at by calculating her hourly rate (\$4.00) times her work day (seven hours) times the number of work days lost (46) plus four hours on February 14, 1989.

Awards for mental suffering depend on the facts presented by each Complainant. Respondents must take complainants as they find them. In this instance, there is no doubt that Respondents' actions were particularly harmful due to Complainant's youth. Complainant's distress has been long-lasting and she continues to suffer ill-effects.

As Mrs. Edwards stated, Respondent Ardery was "no match" for her daughter. He used the unequal balance of power between himself and Complainant to his advantage. Respondent Ardery's behavior is particularly egregious because he sought out applicants from the PIC program;

applicants who are disadvantaged; young applicants with little or no experience. The damage caused by Respondent Ardery's conduct was compounded by the captive nature of the employment setting: most of the time Complainant was alone with Respondent Ardery.

Respondents' actions soured Complainant's attitude about work and have truly affected her ability to work in other environments. The terror Complainant felt working alone with Respondent Ardery was very real. Respondent Ardery's behavior after Complainant resigned was inexcusable. The legislature has vested the Commissioner with the power to attempt to make her whole.

ORDER

NOW, THEREFORE, as authorized by ORS 659.060(3) and 659.010(2), and in order to eliminate the effects of the unlawful practice found; Respondent Allied Computerized Credit & Collections, Inc. and Johnny B. Ardery, aka John Autry, are jointly and severally hereby ordered to:

1) Deliver to the Business Office of the Portland Office of the Bureau of Labor and Industries a certified check, payable to the Bureau of Labor and Industries in trust for Judediah C. Edwards, in the amount of:

a) THIRTEEN HUNDRED AND FOUR DOLLARS (\$1,304), representing wages Complainant lost as a result of Respondents' unlawful practices found herein; PLUS,

b) ONE HUNDRED TWENTY FOUR DOLLARS AND SEVENTY FOUR CENTS (\$124.74), representing interest on the lost wages at the annual

rate of nine percent accrued between April 20, 1989, and December 31, 1990, computed and compounded annually; PLUS,

c) Interest on the foregoing, at the legal rate, accrued between January 1, 1991, and the date Respondents comply herewith, to be computed and compounded annually; PLUS,

d) FIFTEEN THOUSAND DOLLARS (\$15,000), representing compensatory damages for the mental distress Complainant suffered as a result of Respondents' unlawful practices found herein; PLUS,

e) Interest on the compensatory damages for mental distress, at the legal rate, accrued between the date of the Final Order and the date Respondents comply herewith, to be computed and compounded annually.

2) Cease and desist from discriminating against any current or future employee because of the employee's sex.

**In the Matter of
CHRIS W. JENSEN,
dba Auto-Trans,
Respondent.**

Case Number 10-91

Final Order of the Commissioner

Mary Wendy Roberts

Issued March 12, 1991.

SYNOPSIS

In settlement of a wage claim, the Agency agreed to Respondent's stipulation that he owed wages to Claimant. Respondent agreed to pay the wages within ten days, and the scheduled hearing was canceled. When and Respondent thereafter failed to pay, the Commissioner entered an order based on the settlement in the amount of the stipulated wages owed. ORS 652.140; OAR 839-30-200(4) and (5).

The above-entitled contested case was scheduled for hearing before Warner W. Gregg, designated as Hearings Referee by Mary Wendy Roberts, the Commissioner of the Bureau of Labor and Industries for the State of Oregon, on February 5, 1991, in the offices of the Bureau of Labor and Industries, 1250 Third Street, Bend, Oregon. Lee Bercot, Case Presenter with the Wage and Hour Division of the Bureau of Labor and Industries (the Agency) represented the Agency, and Michael Seidel, attorney at law, Bend, Oregon, represented Chris W. Jensen, dba Auto-Trans (Employer), in this Forum and in correspondence with the Hearings Referee.

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

FINDINGS OF FACT

1) On February 28, 1990, through the Sheriff of Deschutes County, Oregon, the Agency served on Employer its Order of Determination finding that Employer owed to Wage Claimant and former employee Troy M. Humphreys unpaid wages from employment from May 22 to August 10, 1989, together with interest thereon, plus an additional sum as penalty wages for failure to make timely payment thereof.

2) The Agency's Order of Determination provided that Employer could, within 20 days, file an answer to the Order and request a contested case hearing in connection therewith. On March 16, 1990, Employer through other counsel filed an answer to the Order of Determination.

3) The Agency thereafter extended the time to March 30, 1990, for Employer to request a hearing or a court trial on the issues raised by the Order and answer. On March 26, 1990, the Agency received Employer's demand, through his former counsel, for contested case hearing.

4) On August 10, 1990, the Agency received a letter from Employer's former counsel notifying the Agency that said counsel had withdrawn as attorney for Employer. Thereafter, on or about November 15, 1990, Employer through current counsel filed a petition for judicial review with the Oregon Court of Appeals

based on a purported Final Order of Determination (Default) entered by the Agency dated September 15, 1990.

5) On November 26, 1990, the Agency requested that the Forum set a date for the contested case hearing, and advised the Forum of the identity of Employer's current counsel.

6) On December 6, 1990, the Hearings Referee advised the Agency Case Presenter of the matters contained in Findings 1 through 5, and directed that an explanation and clarification be submitted to the Hearings Referee by December 10, 1990.

7) It already appearing to the Agency Case Presenter that the Order of September 18, 1990, was erroneous, the Agency withdrew the Order of September 18, 1990, on or about November 26, 1990.

8) On or about December 7, 1990, Employer through counsel withdrew his petition in the Oregon Court of Appeals, resulting in dismissal of said appeal, and the Forum issued its Notice of Hearing in this matter setting February 5, 1991 as the hearing date.

9) On January 8, 1991, the Agency confirmed by letter to Employer's counsel, with copy to the Hearings Referee, a pending settlement in this matter, anticipating that all documentation of said settlement would be filed by February 1, 1991. Absent completion of settlement by that date, the terms of the settlement were to be placed on the record herein on or near the date of hearing, pursuant to the Forum's rules, as an alternative to convening the hearing.

10) On February 4, 1991, Employer through counsel stipulated that

Employer is indebted to the Agency in the amount of \$287.50 for back wages owed to the Wage Claimant herein. Counsel's stipulation further recites the understanding that Employer has ten days thereafter "to pay the debt before it becomes a judgment of record."

11) On February 5, 1991, the Hearings Referee entered his Ruling on Stipulation for Settlement, wherein the Hearings Referee approved the settlement outlined in Findings 9 and 10, and allowed Employer ten days from February 5, 1991, to fully execute the settlement by payment of the stipulated amount to the Agency as assignee of the Wage Claimant. The Hearings Referee's ruling further provided that if Employer did not make the payment as stipulated, the Hearings Referee would recommend a Final Order herein against Employer in the stipulated amount.

12) The Hearings Referee admitted as exhibits all of the described pleadings and correspondence, which constitute the entire record herein.

13) Employer did not make the stipulated payment on February 15, 1991, or at any time thereafter up to the date of the Proposed Order.

14) The Proposed Order, which included an Exceptions Notice, was issued on February 25, 1991. Exceptions, if any, were to be filed by March 7, 1991. No exceptions were received.

CONCLUSIONS OF LAW

1) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the subject matter and the Employer herein, pursuant to ORS chapter 652 dealing with payment,

collection, and enforcement of wage claims.

2) The Commissioner of the Bureau of Labor and Industries may undertake enforcement of a wage claim in an Employer requested contested case proceeding in accordance with ORS 183.415 to 183.500 and OAR 839-30-020 to 839-30-200.

3) OAR 839-30-200 provides, in pertinent part:

"(4) Where a case is settled within ten (10) days before or on the date set for hearing, the terms of the settlement shall be placed on the record, unless fully executed settlement documents are submitted on or before the date set for hearing.

"(5) Where settlement terms are placed on the record because settlement documents are incomplete as described in * * * section (4) of this rule, fully executed settlement documents must be submitted to the Hearings Unit within ten (10) days after the date set for hearing. Where a party fails to submit the settlement documentation within ten (10) days after the date set for hearing, the terms of the settlement set forth on the record shall constitute the basis for a Final Order." (Emphasis supplied.)

4) The entire record herein, together with the terms of Employer's stipulation of February 4, 1991, constitute the basis for the Order below.

ORDER

NOW, THEREFORE, as authorized by ORS 652.332, the Commissioner of the Bureau of Labor and Industries hereby orders CHRIS W.

JENSEN, dba AUTO-TRANS, to deliver to the Business Office of the Bureau of Labor and Industries, PO Box 800, Portland, Oregon 97207-0800, the following:

A certified check payable to the Bureau of Labor and Industries IN TRUST FOR TROY M. HUMPHREYS in the amount of TWO HUNDRED EIGHTY SEVEN DOLLARS AND FIFTY CENTS (\$287.50), plus interest thereon at the rate of nine percent per year from February 5, 1991, until paid.

**In the Matter of
COOS-BEND, INC.,
dba The Sawmill Restaurant
and Lounge, Respondent.**

Case Number 06-91
Final Order of the Commissioner
Mary Wendy Roberts
Issued May 7, 1991.

SYNOPSIS

The Commissioner held Respondent corporation in default after it failed to answer the Specific Charges through an attorney. On the merits, the Commissioner found that Respondent paid female Complainant less than her male co-workers because of her sex, and discharged her when she protested the practice. The Commissioner awarded Complainant \$182.19 for the wage differential, \$2,362.45 in

lost wages following the discharge, and \$4,000 for emotional distress. ORS 9.160; 9.320; 659.030(1)(b), (f); OAR 839-30-057; 839-30-185; 839-30-190.

The above-entitled matter came on regularly for hearing before Douglas A. McKean, designated as Hearings Referee by Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on March 26, 1991, in Room 311 of the Portland State Office Building, 1400 SW Fifth Avenue, Portland, Oregon. Judith Bracanovich, Case Presenter for the Civil Rights Division of the Bureau of Labor and Industries (the Agency) appeared on behalf of the Agency. Deborah Lee Sexton (Complainant) was present throughout the hearing. Coos-Bend, Inc. (Respondent) was in default and did not appear at hearing.

The Agency called the following witnesses (in alphabetical order): Harold Rogers, Senior Investigator, Civil Rights Division of the Agency; Beverly Russell, Investigative Supervisor, Civil Rights Division of the Agency; Allen Sellers, President/Business Representative, Hotel Employees and Restaurant Employees Union Local 9; Dave Sexton, Complainant's husband and former employee of Respondent; and Deborah Lee Sexton, Complainant.

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

FINDINGS OF FACT – PROCEDURAL

1) On November 8, 1989, Complainant filed a verified complaint with the Civil Rights Division of the Agency. She alleged that Respondent had discriminated against her on the basis of sex, in that Respondent had paid union scale wage rates to males and not to females.

2) On April 13, 1990, Complainant filed an amended verified complaint alleging that she was discriminated against on the basis of sex, in that male probationary employees were paid full union scale wages, while female probationary employees were paid 85 percent of union scale wages. She also alleged that she was discharged by Respondent in retaliation for having objected to the sex-based difference in wages paid to male and female employees.

3) After investigation and review, the Agency issued an Administrative Determination finding substantial evidence of an unlawful employment practice under ORS 659.030(1)(b) by Respondent.

4) The Agency attempted to resolve the complaint by conference, conciliation, and persuasion, but was unsuccessful.

5) On November 28, 1990, the Forum served on Respondent Specific Charges which alleged: Respondent treated Complainant differently than males in its application of union wage scales, in violation of ORS 659.030(1)(b), and Respondent discharged Complainant because she opposed Respondent's unlawful employment

practice in violation of ORS 659.030(1)(f).

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

7) Due to delays in serving the Specific Charges on Respondent, on December 4, 1990, the Hearings Referee granted Respondent 20 days from November 28 to file an answer to the charges. The Hearings Referee reminded Respondent's president, Bruce Brandt, by telephone and by letter, that Respondent had to be represented by an attorney because it was a corporation. In addition, the Hearings Referee rescheduled the hearing from December 11, 1990, to January 29, 1991, in order to give Respondent sufficient time to prepare.

8) As of December 20, 1990, the Forum had not received a responsive pleading from Respondent.

9) On December 20, 1990, the Forum issued to Respondent a "Notice of Default," which notified Respondent that its failure to file a responsive pleading within the required time constituted a default to the Specific Charges, pursuant to OAR 839-30-185. The notice advised Respondent that it had 10 days in which to request relief from the default.

10) Thereafter, the Hearings Unit received an answer, postmarked December 18, 1990, from Bruce Brandt.

11) Thereafter, the Hearings Unit received a request for relief from default, dated December 21, 1990, from Bruce Brandt. He stated that he believed his answer had been timely filed because it was postmarked December 18, 1990. He stated that the Forum's timelines were difficult to comply with because he was no longer living in the Coos Bay/North Bend area full time.

12) On January 3, 1991, the Hearings Referee denied Respondent's request for relief from default. The Hearings Referee found that Respondent had been advised by telephone and letter, and by the Agency's contested case hearing rules, that it had to be represented by an attorney, pursuant to Agency rule and ORS 9.160 and 9.320. Bruce Brandt's letter admitted that he was aware of that requirement, but stated that the corporation was without funds to hire an attorney. The Hearings Referee stated that

"[a]lthough the Forum is mindful of the expense involved in being represented by an attorney, ORS 9.320 leaves the Forum with no discretion on the issue of attorney representation."

The Hearings Referee found that Respondent had failed to establish good cause for failing to file an answer through an attorney.

13) On January 7, 1991, the Forum changed the Hearings Referee assigned to hear the case from Jeanne Kincaid to Douglas A. McKean, and changed the time and place of hearing

to March 26, 1991, in Portland, Oregon.

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

15) Pursuant to OAR 839-30-071, the Agency filed a Summary of the Case including documents from the Agency's file.

16) A pre-hearing conference was held on March 26, 1991, at which time the Agency waived the Hearings Referee's explanation, pursuant to ORS 183.415(7), of the issues involved in the hearing and the matters to be proved or disproved.

17) During the hearing, the Agency made a motion to amend the Specific Charges to conform to the evidence presented at the hearing. The motion was made pursuant to OAR 839-30-075. The Hearings Referee granted the motion because the amendments reflected evidence that had been introduced into the record, namely correcting the date of Complainant's first day of work, striking certain paragraphs as superfluous, and amending a paragraph to show that 78.2 percent of Respondent's female probationary employees were paid 85 percent of the minimum union scale for their work, while 69.2 percent of Respondent's male probationary employees were paid 100 percent or more of the minimum union scale under the collective bargaining agreement.

18) The Proposed Order, which included an Exceptions Notice, was issued on March 29, 1991. Exceptions, if any, were to be filed by April 8, 1991. No exceptions were received.

FINDINGS OF FACT – THE MERITS

1) At all times material herein, Respondent operated an eating and drinking establishment in North Bend, Oregon, under the assumed business name of The Sawmill Restaurant and Lounge, and was an employer in the State of Oregon with one or more employees.

2) Complainant is a female.

3) Complainant was employed by Respondent as a bartender and waitress between August 4 and September 11, 1989. She was hired to be primarily a bartender. She had 12 years' experience in the restaurant-lounge business as a waitress, and five years' experience as a bartender. She had received good recommendations from previous employers about her work performance.

4) When she was hired, Bruce Brandt, Respondent's president, told Complainant that she would make \$4.50 per hour, and later would make \$5.17 per hour if she joined the union.

5) Waitresses and bartenders at Respondent's business received tips. Cooks, dishwashers, and janitors did not receive tips.

6) During the period of Complainant's employment with Respondent, Respondent was operating under a collective bargaining agreement with the Hotel Employees and Restaurant Employees Union Local 9. Under Article 11 of that agreement, bartenders were to be paid \$4.89 per hour and waitresses were to be paid \$3.78 per hour. The contract permitted Respondent to pay each probationary employee 85 percent of the employee's

wage rate during the employee's 90 day probationary period.

7) After working for about two weeks, Complainant became concerned that she would not be paid \$4.50 per hour. She talked to Judith Tucker, a coworker, about her pay rate. Tucker told Complainant that Respondent called the women employees food waiters, and paid them \$3.35. Complainant heard that Respondent gave the men employees 100 percent of the union scale wage, and gave them better hours and jobs. Complainant talked to Ninna Moore, the bar supervisor, about her pay. Moore told Complainant that she (Moore) had nothing to do with Complainant's pay, and that Complainant needed to talk with Respondent's bookkeeper, Janet De Soto, or to Bruce Brandt.

8) Moore told Complainant that she was doing an excellent job, and that Moore would try to get a pay raise for Complainant. Complainant knew of no complaints about her work. She missed one day of work during her employment with Respondent, but Respondent had authorized her to take that day off.

9) Complainant talked with Union Representative Bruce Logan about her rate of pay. Logan advised Complainant to wait until she received a pay check to see what rate Respondent paid her. Complainant believed she should receive at least \$4.16 per hour as a bartender, which rate was 85 percent of the bartender union scale rate of \$4.89.

10) For her work during August 1989, Complainant was paid \$3.35 per hour, the state minimum wage. Complainant's records showed she worked

as a bartender for 81 hours, and as a waitress for 40.5 hours.

11) Complainant's August paycheck was dated September 5, 1989. On Monday September 11, which turned out to be her last day of work, Complainant talked to Respondent's bookkeeper about her rate of pay. The bookkeeper said she would talk with Brandt and then get back to Complainant.

12) On Tuesday, September 12, 1989, Complainant talked with Bruce Brandt by telephone and said there was an error in her rate of pay. Brandt told Complainant she was wrong, that she was a food waitress and not a bartender. Brandt told her that her services were no longer needed.

13) For her work during September 1989, Complainant was paid \$3.85 per hour, the state minimum wage effective September 1, 1989. Complainant's records showed she worked as a bartender for 38.5 hours, and as a waitress for 12.25 hours.

14) On Wednesday, September 13, Complainant went into the restaurant with her fiancé, Dave Mijewski (who was her husband, Dave Sexton, at the time of hearing). Mijewski had been hired by Respondent on September 7, 1989, as a fry cook, and was going to work. Complainant asked Brandt why she was fired. Brandt told her it was because she had not performed well and was not a team player. Complainant was embarrassed by Brandt's statement.

15) Mijewski had between seven and eight months of experience as a fry cook when he was hired by Respondent. He was hired at a pay rate

of \$4.72 per hour, which was the full union wage scale rate for fry cooks.

16) Johnnie Collatt, a female, was a dinner cook for Respondent. She had been employed by Respondent for around four years. Her rate of pay in August 1989 was \$4.75 per hour. The union scale wage rate for dinner cook was \$5.05 per hour.

17) Dave Mijewski observed that Brandt treated males and females differently. Males were usually paid 100 percent of the union scale even when they were on probation, while women were paid less, often minimum wage, for doing the same jobs. Mijewski observed that Brandt would listen to what the male employees had to say about the business, but Brandt would not listen to the females, including Complainant.

18) On Wednesday, September 13, Complainant filed a grievance with the union about her pay and being fired. The union representative advised her to contact the Agency about filing a complaint. At the time of hearing, Complainant's union grievance was pending along with other grievances against Respondent before the National Labor Relations Board.

19) About two weeks later, Mijewski was fired by Respondent. Respondent's restaurant manager, Gene, told Mijewski that Bruce Brandt wanted Mijewski fired. Before he was fired, Mijewski had trained a new cook, Floyd Burlington. Burlington received \$5.05 per hour, the union scale wage rate for both dinner cooks and broiler cooks.

20) After an Agency investigator visited Respondent's business regarding Complainant's complaint,

Complainant and Mijewski were not allowed into the restaurant or lounge.

21) After she was fired by Respondent, Complainant searched for work in restaurants and bars in the Coos Bay and North Bend area, which is a small community. Complainant had been in the restaurant/lounge business all of her working life. She applied at between 10 and 15 places. She started her next job on January 17, 1990, at Gussie's (phonetic) Dine and Dance.

22) During the period of her unemployment – that is between September 12, 1989, and January 17, 1990 – Complainant had no income. She was very upset by losing her job and by being unemployed. She lost 20 pounds. She lost sleep. She had to move, and she sold her car for far less than she thought it was worth because she needed the money. Because Mijewski had also lost his job, they had no income. The stress from that time nearly caused Complainant and Mijewski to break up. They got food from a food bank. She applied for unemployment benefits, but Respondent disputed her claim. The dispute was later resolved without a hearing, but Complainant did not receive her back benefits until four months after her discharge. She was upset because she heard that Bruce Brandt had said untrue, negative things about her and Mijewski at a Chamber of Commerce meeting, and Brandt's statements had hurt her ability to find work in that community.

23) During the period of February through August 1989, Respondent employed 21 probationary females and 13 probationary males.

24) Of the 21 females, five (or 23.8 percent) were paid at union scale, and 16 (or 76.2 percent) were paid below union scale.

25) Of the 21 females, 10 worked in the bar and 11 worked in the restaurant.

26) Of the 10 females that worked in the bar, two (or 20 percent) were paid at union scale, and eight (or 80 percent) were paid below union scale.

27) Of the 11 females that worked in the restaurant, three (or 27.3 percent) were paid at union scale, and eight (or 72.7 percent) were paid below union scale.

28) Of the 13 probationary males, nine (or 69.2 percent) were paid at union scale, and 4 (or 30.8 percent) were paid below union scale.

29) Of the 13 males, two worked in the bar and 11 worked in the restaurant.

30) Of the two males that worked in the bar, one (or 50 percent) was paid at union scale, and one (or 50 percent) was paid below union scale. The male bar employee that was paid below union scale, Rodney Stalcup, was paid \$4.75 per hour, or 97.1 percent of the union scale. Stalcup's pay rate was higher than any of the 10 female bar employees, eight of whom were paid the minimum wage of \$3.35 per hour, and two of whom were paid \$3.78 per hour.

31) Of the 11 males that worked in the restaurant, eight (or 72.7 percent) were paid at the union scale, and three (or 27.3 percent) were paid below the union scale.

ULTIMATE FINDINGS OF FACT

1) At all times material herein, Respondent was an employer in the State of Oregon with one or more employees.

2) Respondent employed Complainant.

3) Complainant is a female.

4) Respondent paid Complainant, as a probationary employee, a lower wage rate than male probationary employees doing the same work.

5) Respondent paid Complainant less than her male counterparts because of her sex.

6) Complainant opposed Respondent's practice of paying her at a lower rate than her male counterpart probationary employees.

7) Respondent terminated Complainant's employment because she opposed Respondent's practice of paying her less than her male counterpart probationary employees.

8) The difference between the wages Complainant received and the wages she would have received if she had been paid full union scale for her jobs of bartending and waitressing equals \$182.19. (Wage computations in the Opinion are incorporated herein by this reference)

9) Between September 12, 1989, and January 17, 1990, Complainant lost wages equaling \$2,362.45 due to her termination of employment by Respondent. (Wage computations in the Opinion are incorporated herein by this reference)

10) Complainant suffered embarrassment, upset, and distress because of Respondent's conduct, its

termination of her employment, and the resultant unemployment and financial hardship.

CONCLUSIONS OF LAW

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

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

3) The actions, inactions, and knowledge of Bruce Brandt, an employee or agent of Respondent, are properly imputed to Respondent.

4) Respondent defaulted by failing to timely file, by an attorney, an answer to the Specific Charges. ORS 9.320, OAR 839-30-060, 839-30-185.

5) By compensating Complainant less than her comparator male employees because of her sex, Respondent violated ORS 659.030(1)(b).

6) By discharging Complainant because she opposed the unlawful employment practice described in Conclusion of Law 5, Respondent violated ORS 659.030(1)(f).

7) Pursuant to ORS 659.060 and by the terms of ORS 659.010, the Commissioner of the Bureau of Labor and Industries has the authority to issue a Cease and Desist Order requiring Respondent to refrain from any action that would jeopardize the rights of individuals protected by ORS 659.010 to 659.110, to perform any act or series of acts reasonably calculated to carry out the purposes of said statutes, to eliminate the effects of an unlawful practice found, and to protect the rights of others similarly situated.

OPINION

A. Default of Respondent

The Hearings Referee found Respondent in default because of failure to file an answer through counsel to the Specific Charges. Respondent was a corporation, and as such it had to be represented by an attorney in this contested case proceeding.

"All *** corporations *** must be represented by counsel in accordance with ORS 9.160 and 9.320." OAR 839-30-057. *In the Matter of Allied Computerized Credit & Collections, Inc.*, 9 BOLI 206, 214 (1991).

Oregon law provides in pertinent part that:

"Any action, suit, or proceeding may be prosecuted or defended by a party in person, or by attorney, except that the state or a corporation appears by attorney in all cases, unless otherwise specifically provided by law. Where a party appears by attorney, the written proceedings must be in the name of the attorney, who is the sole representative of the client of the attorney as between the client and the adverse party * * * ORS 9.320.

Bruce Brandt, Respondent's president, was advised twice by the Hearings Referee that Respondent needed to be represented by an attorney in this matter. In addition, Respondent received a copy of the Forum's contested case hearing rules and a copy of the Notice of Contested Case Rights and Procedures, which gave notice of that requirement. Mr. Brandt's bare assertion in his letter postmarked

December 18, 1989, that Respondent did not have the assets to hire an attorney cannot justify Respondent's failure to answer. As the Hearings Referee found, ORS 9.320 leaves the Forum with no discretion on the issue of attorney representation.

The Commissioner has previously defaulted corporate respondents that failed to file answers through counsel, as required by statute and rule, where the corporate respondents argued they could not afford counsel. *In the Matter of Strategic Investments of Oregon, Inc.*, 8 BOLI 227, 231, 233 (1990). Respondent did not establish good cause for obtaining relief from the default because its failure to file an answer was neither an excusable mistake nor a circumstance over which it had no control. OAR 839-30-025(11), 839-30-190. The Commissioner expressly adopts the Hearings Referee's ruling denying Respondent's request for relief from default.

B. Violation of ORS 653.030(1)(b) – Sex Discrimination

In default cases, the Agency must present a prima facie case in support of the Specific Charges and to establish damages. ORS 183.415(6), OAR 839-30-185(2). *In the Matter of Courtesy Express, Inc.*, 8 BOLI 139, 147 (1989).

In the Specific Charges, the Agency alleged that Respondent violated ORS 659.030(1)(b), which provides in pertinent part:

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

"(b) For an employer, because of an individual's *** sex, *** to discriminate against such individual in compensation ***"

The Agency's evidence established: that Respondent was an employer of one or more employees in this state; that it employed Complainant; that Complainant was female; that Respondent, because of Complainant's sex, discriminated against her in compensation; and that Complainant was damaged thereby. Thus, the Agency presented a prima facie case that Respondent violated ORS 659.030(1)(b).

Regarding the causation element of the case, the Agency's evidence showed that Complainant was not paid what Respondent promised her when she was hired. Nor was she paid the union wage scale rate for the jobs she was performing. Although arguably she was receiving the probationary rate for a waitress (since the minimum wage of \$3.35, and later \$3.85, was more than 85 percent of \$3.78), she never received even the probationary rate for her duties as a bartender. That rate would have been \$4.16 per hour.

The evidence showed that the large majority of male probationary employees were paid at the full union scale rates for their jobs, and that the large majority of female employees were paid less than the full union rate (and usually the state minimum wage) for their jobs. Respondent suggested during the investigation and in Brandt's answer that the wage differences were due to the different departments that employees worked in (the bar or the restaurant), or because some jobs were tipped and others were not. The evidence did not support either of

those contentions. Both males and females worked in both tipped and untipped jobs, such as bartenders and cooks. Whether employees received tips does not explain Respondent's different application of the probationary wage rates to employees. Similarly, an analysis of the evidence shows that the disparity between wages paid to males and females employees (see Findings of Fact 23 to 31) cannot be attributed to any difference in the departments the employees worked in. Accordingly, the Forum finds Respondent's asserted reasons for the different pay rates for males and females to be pretextual.

The Agency's evidence, including this statistical evidence, permits the reasonable inference that Respondent used probationary wage rates in a discriminatory fashion based on sex. The Forum is persuaded that Respondent discriminated in compensation against Complainant because of her sex.

C. Violation of ORS 659.030(1)(f) – Retaliatory Discharge

In the Specific Charges, the Agency alleged that Respondent discharged Complainant in retaliation for her opposition to Respondent's unlawful employment practice of discriminating, because of sex, against Complainant in compensation, in violation of ORS 659.030(1)(f). That statute provides, in part

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

"(f) For any employer * * * to discharge, expel or otherwise discriminate against any person

because the person has opposed any practices forbidden by this section * * *"

The Agency's evidence established: that Respondent was an employer of one or more employees in this state; that it employed Complainant; that Complainant was female; that Respondent, because of Complainant's sex, discriminated against her in compensation; that Complainant opposed that practice; that Respondent immediately discharged Complainant because of that opposition; and that Complainant was damaged thereby. Thus, the Agency presented a prima facie case that Respondent violated ORS 659.030(1)(f).

Regarding causation, the evidence showed that Complainant inquired about her pay rate to her coworker, and heard that female employees were treated differently from male employees in compensation. Complainant then talked with her supervisor, Respondent's bookkeeper, and finally Respondent's president about her compensation. During the conversation with Brandt, Complainant said that her pay rate was wrong; it was not what she had been promised or what the union pay scale was for bartenders or waitresses. Respondent's president fired Complainant during that conversation. From those facts it is reasonable to infer that Complainant was opposing the unlawful practice of compensating her less than male employees due to her sex, and that Respondent fired her because of her opposition. Brandt's assertions in his letter that Complainant was terminated due to poor performance were unsupported by any evidence.

Complainant's sworn testimony was that she was experienced, had performed well, was complimented by her supervisor, and had no complaints against her. Thus, the Forum finds Brandt's unsworn, unsubstantiated assertions pretextual.

D. Damages

1. Wage Differential = \$182.19

For the period of August 4 and September 11, 1989, Complainant is entitled to the difference in pay between what she earned for her duties and what she would have earned but for Respondent's discrimination in compensation.

(a) For her bartender duties, Complainant is owed \$164.78, calculated as follows:

(i) During August Complainant worked as a bartender for 81 hours. The difference between the union scale wage rate for bartenders (\$4.89 per hour) and her paid wage rate (\$3.35 per hour) is \$1.54 per hour. 81 hours times \$1.54 per hour equals \$124.74.

(ii) During September Complainant worked as a bartender for 38.5 hours. The difference between the union scale wage rate for bartenders (\$4.89 per hour) and her paid wage rate (\$3.85 per hour) is \$1.04 per hour. 38.5 hours times \$1.04 per hour equals \$40.04.

(iii) The total amount owing equals \$164.78, which is the sum of \$124.74 (from August) and \$40.04 (from September).

(b) For her waitress duties, Complainant is owed \$17.41, calculated as follows:

(i) During August Complainant worked as a waitress for 40.5 hours. The difference between the union scale wage rate for waitresses (\$3.78 per hour) and her paid wage rate (\$3.35 per hour) is \$.43 per hour. 40.5 hours times \$.43 per hour equals \$17.41.

(ii) During September Complainant worked as a waitress for 12.25 hours. In September the Complainant's wage rate (\$3.85 per hour, imposed by the state minimum wage law) exceeded the union scale wage rate (\$3.78) by \$.07, so no difference is due.

(iii) The total amount owing equals \$17.41, which is the amount owing from August.

(c) TOTAL WAGE DIFFERENTIAL OWING = \$182.19, which is the sum of \$164.78 (from bartending) and \$17.41 (from waitressing).

2. Back Wages = \$2,362.45

Complainant is entitled to back wages for the period of September 12, 1989, to January 17, 1990. That sum is calculated to be \$2,362.45 as follows:

(a) Average number of hours per week equals 28.7083 (Complainant worked 172.25 hours over 6 weeks).

(b) Number of weeks unemployed equals 18 (between September 12, 1989, and January 17, 1990).

(c) Number of hours Complainant would have worked between September 12, 1989, and January 17, 1990, equals 516.75 (28.7083 hours per week times 18 weeks).

(d) Proportion of hours Complainant worked as a bartender equals 69.4

percent (119.5 hours as a bartender divided by 172.25 total hours).

(e) Number of hours lost as a bartender between September 12, 1989, and January 17, 1990, equals 358.62 hours (516.75 total hours times 69.4 percent).

(f) Number of hours lost as a waitress between September 12, 1989, and January 17, 1990, equals 158.13 hours (516.75 total hours minus 358.62 hours as a bartender).

(g) TOTAL BACK PAY OWING = \$2,362.45, which is the sum of 362.62 hours of bartending times \$4.89 per hour, plus 158.13 hours of waitressing times \$3.85 per hour.

3. Mental Suffering Damages = \$4,000

In a proper case, with proof of emotional distress, an unlawful disparity in pay based upon sex will support an award for mental suffering. *In the Matter of City of Portland*, 2 BOLI 110 (1981), *aff'd*, *City of Portland v. Bureau of Labor and Industries*, 298 Or 104, 690 P2d 475 (1984); OAR 839-03-090 (1). In addition, this Forum has consistently recognized that the anxiety and uncertainty connected with the loss of employment income, together with the specter and uncertainties of unemployment, is compensable when attributable to an unlawful employment practice. See *In the Matter of German Auto Parts, Inc.*, 9 BOLI 110, 132 (1990), and the cases cited therein.

Here, as described in Finding of Fact 22, Complainant suffered emotionally and physically from Respondent's sudden discharge of her and from the financial hardships caused by the resulting unemployment. The source of Complainant's emotional

distress was Respondent's discriminatory practice, based on sex, of paying probationary females (and particularly Complainant) at a lower rate than probationary males doing the same job, and its retaliatory discharge of Complainant when she opposed that unlawful practice. Respondent is directly responsible and liable for Complainant's mental suffering damages, and the Forum has awarded Complainant \$4,000 to help compensate her for the distress she has suffered due to Respondent's unlawful actions.

ORDER

NOW, THEREFORE, as authorized by ORS 659.060(3) and 659.010(2), and in order to eliminate the effects of the unlawful practice found, COOS-BEND, INC. is hereby ordered to:

1) Deliver to the Business Office of the Bureau of Labor and Industries, PO Box 800, Portland, OR 97207-0800, a certified check, payable to the Bureau of Labor and Industries in trust for DEBORAH LEE SEXTON, in the amount of:

a) ONE HUNDRED EIGHTY TWO DOLLARS AND NINETEEN CENTS (\$182.19) representing the wage differential due for the period of August 4 to September 11, 1989, that was caused by Respondent's unlawful practices found herein; PLUS,

b) TWENTY FIVE DOLLARS AND THIRTY SEVEN CENTS (\$25.37), representing interest on the wage differential at the annual rate of nine percent accrued between October 1, 1989, and March 31, 1991, computed and compounded annually; PLUS,

c) TWO THOUSAND THREE HUNDRED SIXTY TWO DOLLARS AND FORTY FIVE CENTS (\$2,362.45), representing wages Complainant lost as a result of Respondent's unlawful practices found herein; PLUS,

d) TWO HUNDRED FIFTY ONE DOLLARS AND THIRTY CENTS (\$251.30), representing interest on the lost wages at the annual rate of nine percent accrued between February 1, 1990, and March 31, 1991, computed and compounded annually; PLUS,

e) Interest on the foregoing, at the legal rate, accrued between April 1, 1991, and the date Respondent complies herewith, to be computed and compounded annually; PLUS,

f) FOUR THOUSAND DOLLARS (\$4,000), representing compensatory damages for the mental distress Complainant suffered as a result of Respondent's unlawful practices found herein; PLUS,

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

2) Cease and desist from discriminating against any current or future employee because of the employee's sex.

3) Cease and desist from retaliating against any person who opposes any unlawful employment practice.

4) Post in a conspicuous place on the premises of any and all eating or drinking establishments operated within this state by Respondent a copy of ORS 659.030, together with a notice

that anyone who believes he or she has been discriminated against may notify the Oregon Bureau of Labor and Industries.

**In the Matter of
STANCIL JONES,
dba Stancil G. Jones Reforestation,
Respondent.**

Case Number 22-91
Final Order of the Commissioner
Mary Wendy Roberts
Issued May 17, 1991.

SYNOPSIS

Where Respondent, a previously licensed forest labor contractor, applied for a forest labor contractor license, the Commissioner found that his character, competence, and reliability rendered him unfit to be licensed and denied the application because Respondent assisted two unlicensed persons to act as forest labor contractors, failed to comply with a legal and valid contract with a payroll service, and failed to provide to employees written forms explaining workers' rights and explaining their working agreement. ORS 658.405(1); 658.420(2); 658.440(1)(d) and (f), (3)(e).

The above-entitled contested case came on regularly for hearing before Warner W. Gregg, designated as

Hearings Referee by Mary Wendy Roberts, the Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was conducted on April 3, 1991, at the Bureau of Labor and Industries Office, 3865 Wolverine Street NE, Salem, Oregon. Lee Bercot, Case Presenter for the Wage and Hour Division of the Bureau of Labor and Industries (the Agency), presented a Summary of the Case for the Agency, argued Agency policy and the facts, examined the witnesses, and introduced documents. Stancil Jones (Respondent) did not appear at the hearing in person or by a representative.

The Agency called the following witnesses (in alphabetical order): Sheryl Alderson, former personnel supervisor for Express Temporary Services; Florence Blake, Agency Compliance Specialist; and Sandra Sterling, Agency Licensing Unit Manager. The Respondent, having failed to attend the hearing, was found in default, and called no witnesses.

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

FINDINGS OF FACT – PROCEDURAL

1) On November 9, 1990, the Agency issued a "Notice of Proposed Denial of Farm Labor Contractor License" to Respondent. The notice informed Respondent that the Agency intended to deny his application for a farm labor contractor's license.

2) The notice cited the following bases for the denial:

a) Respondent assisted an unlicensed person to recruit, solicit, supply, and/or employ workers to perform labor for Respondent in the forestation or reforestation of lands in June 1990 in violation of ORS 658.440(3)(e);

b) Respondent assisted an unlicensed person to recruit, solicit, supply, and/or employ workers to perform labor for Respondent in the forestation or reforestation of lands in May 1990 in violation of ORS 658.440(3)(e);

c) Respondent failed to comply with the terms and provisions of a legal and valid contract or agreement with Express Temporary Services by failing to timely submit time records, to timely submit employment forms on new workers, to timely make payment of invoices, and to properly document recruitment from September 1989 through approximately June 1990 in violation of ORS 658.440(1)(d).

The notice was served on Respondent by certified mail.

3) By letter dated January 23, 1991, Respondent requested a hearing on the Agency's intended action. On February 11, 1991, the Agency received Respondent's answer to the Notice of Proposed Denial of Farm Labor Contractor License. In his answer, Respondent denied the Agency's allegations and asserted various defenses.

4) On March 4, 1991, the Forum issued to Respondent and the Agency a Notice of Hearing which set forth the time and place of the requested hearing and designated the Hearings Referee. With the hearing notice, the

Forum sent to Respondent a "Notice of Contested Case Rights and Procedures" containing the information required by ORS 183.413, and a complete copy of the Agency's administrative rules (OAR) regarding the contested case process, OAR 839-30-020 through 839-30-200.

5) On March 12, 1991, the Agency filed a motion to amend the Notice of Proposed Denial. A copy was served on Respondent by regular mail. On March 14, 1991, the Hearings Referee granted the Agency's motion, making the first two counts of the notice more definite and certain, making no change in the third count, and adding a fourth count alleging that Respondent had failed during times material to furnish to the workers alleged to have been recruited in the first two counts certain forms, in English and Spanish, explaining their rights and obligations under their employment agreement with Respondent, in violation of ORS 658.440(1)(f). The Hearings Referee's ruling was served on Respondent by regular mail and allowed time for Respondent to answer the amended notice. In the alternative, the Hearings Referee would consider that Respondent had denied the new matter for purposes of hearing.

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

7) A pre-hearing letter of instructions regarding the hearing procedures was served by the Hearings Referee

on both the Agency and Respondent by regular mail on March 27, 1991.

8) At the start of the hearing at 10 a.m. on April 3, 1991, Respondent was not in attendance. Noting that the Notice of Hearing of March 4, 1991, the ruling on the Agency's motion of March 14, 1991, and the pre-hearing instruction letter of March 27, 1991, had all been addressed to Respondent at PO Box 348, Grants Pass, Oregon, 97526, and that none were returned by the Postal Service, and further noting that address to be the address from which Respondent's request for hearing of January 23 and answer of February 11 were sent, the Hearings Referee ruled that Respondent was in default under OAR 839-30-185.

9) Pursuant to ORS 183.415(7), the Hearings Referee stated for the record the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

10) After the hearing, the Hearings Referee sent a "Notice of Default" to Respondent. That notice advised Respondent that his failure to appear at the hearing on April 3, 1991, constituted a default, and that he had 10 days from April 5, 1991, in which to request relief from the default, pursuant to OAR 839-30-185 and 839-30-190. In addition, the notice advised Respondent that upon failure to file such a request Respondent would have no further opportunity to seek relief from default.

11) The Proposed Order including an Exceptions Notice was issued on April 8, 1991. Exceptions, if any, were to be filed by April 18, 1991. None were received. Notice of Default was

issued following the hearing and the Forum receive no response to that notice.

FINDINGS OF FACT – THE MERITS

1) On or about April 5, 1990, Respondent, a natural person, applied for a farm labor contractor license with forest contractor endorsement (farm/forest labor contractor license), which would allow him to employ workers to perform labor for another in Oregon in the forestation or reforestation of lands, including those activities enumerated in ORS 658.405(1).

2) Pursuant to ORS chapter 658, Respondent was previously licensed as a farm/forest labor contractor by the State of Oregon. His previous license had expired prior to April 1990.

3) Respondent signed Agency form FF-137 as part of the licensing process. FF-137 attested to his understanding of and intention to comply with the requirement that he furnish Agency forms WH-151, Rights of Workers, and WH-153, Agreement between Contractor and Workers, to all workers employed by him.

4) Among the requirements for having the requested license issued was proof of workers' compensation coverage for workers hired by Respondent. Evidence of such coverage was not furnished by Respondent with the application. Purported evidence of coverage was received by the Agency licensing unit in October 1990. By that date, the holder of the policy, Express Temporary Services (Express), had

terminated its agreement with Respondent.

5) In June 1990 several workers who had been employed by Respondent complained to the Agency's Medford office that they had not been paid. The work was on federal land and Agency Compliance Specialist Blake referred them to the U. S. Department of Labor after obtaining wage claim information. Some of them received some pay after Blake spoke with the temporary service handling Respondent's payroll.*

6) In May 1990 in Medford, Oregon, four workers were recruited by Victor Cortez to work for Respondent. Cortez met them at a service station and transported them to Respondent's job site.

7) In June 1990 in Medford, Oregon, seven workers were recruited by Hilarino H. "Danny" Trejo to work for Respondent. Trejo met them at a service station and transported them to Respondent's job site.

8) Victor Cortez did not have a farm/forest labor contractor license and was not an applicant for such a license during 1990. Hilarino H. "Danny" Trejo did not have a farm/forest labor contractor license and was not an applicant for such a license during 1990.

9) Blake interviewed Trejo and Respondent on June 26, 1990.

10) Both Cortez and Trejo were employed by Respondent.

11) All of the workers referred to in Findings numbered 6 and 7 above

spoke Spanish as their primary language.

12) None of the workers referred to in Findings numbered 6 and 7 above were furnished with Agency form WH-151 or WH-151S (Rights of Workers in Spanish). None of them were furnished with Agency form WH-153 or WH-153S.

13) All of the workers referred to in Findings numbered 6 and 7 above had worked for Respondent in the reforestation of land, mulching, planting, and scalping, on Bureau of Land Management (BLM) contract number OR 952 CTO 2117 (2117).

14) Some of the workers referred to in Findings 6 and 7 above were not asked for work permits by Respondent or his agent; at least one of those workers did not have a work permit or a valid social security card.

15) In 1989, Respondent entered into an agreement for payroll and related services to be performed for him by Express. As the "Client," Respondent was to recruit workers over age 18; to submit promptly employment forms, W-4 forms, I-9 forms*, and medical questionnaires on new hires; to submit approved worker time records promptly; and to pay Express's bills for payment within 15 days.

16) As the "Contractor," Express was to issue payroll checks weekly to Respondent's employees; to provide workers' compensation and disability insurance; to make the employer's social security contribution; to provide bonding and liability insurance; and to

handle claims and inquiries such as unemployment claims.

17) Respondent was consistently late under the agreement with new employee forms, weekly employee time records, and payment or reimbursement for Express's services under the agreement.

18) Express received a commission or percentage based on the payroll, in addition to premiums and expenses chargeable to Respondent, as its fee for services to Respondent.

19) In spite of Respondent's delays in complying with the 1989 agreement, Express again contracted with Respondent for 1990.

20) Respondent again was late in providing necessary information to Express. He was also late in paying invoices from Express for services and expenditures. From June to October 1990, he owed to Express over \$7,900 under the agreement.

21) Learning that Respondent had not completed his license application, and because of Respondent's consistent tardiness under the contract, Express terminated its agreement for payroll and related services with Respondent.

22) Citing Respondent's failure to make satisfactory progress on the planting portion of BLM 2117, BLM terminated that portion of BLM 2117 in May 1990, allowing him to continue as of that time with the Mulch and Tube Installation portions.

* Reference in the Agency's investigative material to "Kelly Services" is taken by the Forum to be generic in nature, and to refer to Express Temporary Services, the only temporary service in this record.

* I-9 forms are required under the federal Immigration Reform and Control Act of 1986 to be obtained by an employer from any and all new hires to document the worker's right to work in the United States.

ULTIMATE FINDINGS OF FACT

1) At all times material, Respondent performed the activities of a farm/forest labor contractor, as defined by ORS 658.405, doing business in the State of Oregon. These activities were pursuant to a contract between Respondent and BLM.

2) Respondent was previously licensed as a farm/forest labor contractor, as required by ORS 658.410. In April 1990 he made application for a farm/forest labor contractor license.

3) From the time of application to the time of the issuance of the Agency Notice of Proposed Denial of Application, Respondent failed to provide the required documents and information needed to qualify for a farm/forest labor contractor license.

4) During May 1990 Respondent used Victor Cortez, an unlicensed person, to recruit workers for Respondent's farm/forest labor contractor activities.

5) During June 1990 Respondent used Hilarino H. "Danny" Trejo, an unlicensed person, to recruit workers for Respondent's farm/forest labor contractor activities.

6) During 1990, Respondent failed to comply with the terms and provisions of a legal and valid contract or agreement with Express Temporary Services by failing to provide agreed upon information and payments under the agreement.

7) During 1990, Respondent failed to provide to employees Agency forms WH-151 (Rights of Workers) and WH-153 (Agreement Between Contractor and Workers), or comparable written forms, in English or in Spanish,

the language in which Respondent or his agents communicated with those employees.

CONCLUSIONS OF LAW

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

2) As a person applying to be licensed as a farm/forest labor contractor with regard to the forestation or reforestation of lands in the State of Oregon, Respondent was and is subject to the provisions of ORS 658.405 to 658.475.

3) The actions, inactions, and statements of Victor Cortez and Hilarino H. "Danny" Trejo are properly imputed to Respondent, as each was Respondent's employee or agent during all times material herein, and the actions, inactions, and statements of each were made in the course and within the scope of that employment or agency.

4) By using an unlicensed person to recruit, solicit, supply, and/or employ workers to perform labor for Respondent in the forestation or reforestation of lands in May 1990, Respondent violated ORS 658.440(3)(e).

5) By using an unlicensed person to recruit, solicit, supply, and/or employ workers to perform labor for Respondent in the forestation or reforestation of lands in June 1990, Respondent violated ORS 658.440(3)(e).

6) By failing to promptly supply information required by his legal and valid agreement with Express Temporary Services and by failing to pay promptly when due under his legal and

valid agreement with Express Temporary Services all sums due to Express Temporary Services during 1990, Respondent violated ORS 658.440(1)(d).

7) By failing to provide to employees Agency forms WH-151 (Rights of Workers) and WH-153 (Agreement Between Contractor and Workers), or comparable written forms, in English or in Spanish, the language in which Respondent or his agents communicated with those employees, Respondent violated ORS 658.440(1)(f).

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

OPINION

Respondent, after requesting a contested case hearing on the Agency's Notice of Proposed Denial of a Farm Labor Contractor License, failed to attend the hearing, of which he was informed. The Forum found him in default under its rules and duty notified him thereafter, affording him an opportunity to request relief from the default.

Under the Oregon Administrative Procedures Act, in default situations, it is incumbent on the Agency to present a prima facie case in order to prevail. ORS 183.415(6). In this case, the Agency has done so through the credible testimony of and documents presented by the Agency witnesses.

The evidence established that Respondent applied for a farm/forest labor contractor license, but never fully completed the application process. He

nonetheless obtained a forestation /reforestation contract with BLM and recruited workers to work on the contract. He used at least two individuals in his employ to contact and solicit potential workers. This constituted recruitment. *In the Matter of Leonard Williams*, 8 BOLI 57 (1989). Neither of those individuals had a farm/forest labor contractor license. The statute prohibits an applicant for such a license from assisting an unlicensed person in acting as a farm/forest labor contractor. ORS 658.440(3)(e). This prohibition includes recruiting or soliciting workers to perform forestation or reforestation activities, as defined in ORS 658.405(1).

The evidence further established that Respondent failed to comply with the terms and provisions of his contract with Express Temporary Services. By statute, when acting as a farm/forest labor contractor as Respondent was, Respondent was obligated to comply with that contract. ORS 658.440(1)(d); *In the Matter of Francis Kau*, 7 BOLI 45 (1987); *In the Matter of Jose Solis*, 5 BOLI 180 (1986).

Finally, the Forum found that Respondent had repeatedly, contrary to statute, failed to furnish workers recruited or hired by himself or his agents with the required written statements describing the working agreement and their rights and responsibilities. ORS 658.440(1)(f). Such failure, either at recruitment or hire, whichever occurs first, is a violation as to each worker involved. *Francis Kau, supra*; *Jose Solis, supra*; *In the Matter of Highland Reforestation, Inc.*, 4 BOLI 184 (1984).

The Commissioner of the Bureau of Labor and Industries will issue a farm/forest labor contractor license and endorsement if satisfied as to the applicant's character, competence, and reliability. ORS 658.420(2). This Forum has previously found that assisting an unlicensed person to act as a farm/forest labor contractor, failure to provide workers with written descriptions of working conditions and of rights and responsibilities, or failure to comply with the terms and provisions of a legal contract, are serious infractions reflecting on an applicant's character, reliability, and competence, so as to make such applicant unfit to act as a licensed contractor. *In the Matter of Xavier Carbajal*, 8 BOLI 206 (1990); *In the Matter of Demetrio Ivanov*, 7 BOLI 126 (1988); *Francis Kau, supra*.

The Agency has established that Respondent's character, competence, and reliability were such as to render Respondent unfit to be licensed as a farm/forest labor contractor. Respondent's application of April 1990 will be denied. This Forum considers that application to have been pending since it was filed, and the denial thereof shall take effect as of the date of this Final Order, with the result that Respondent may not reapply for three years thereafter. OAR 839-15-520(4); *Carbajal, supra*; *In the Matter of Raul Mendoza*, 7 BOLI 77 (1988); *Ivanov, supra*.

ORDER

NOW, THEREFORE, as authorized by ORS 658.005 to 658.485, the Commissioner of the Bureau of Labor and Industries hereby denies Stencil Jones a license to act as a farm or forest labor contractor, effective on the date of issuance of this Final Order.

**In the Matter of
Marlene P. Wasson, dba
PZAZZ HAIR DESIGNS,
and Image Group, Incorporated, dba
More Pzazz Hair Designs,
Respondents.**

Case Number 35-90
Final Order of the Commissioner
Mary Wendy Roberts
Issued July 25, 1991.

SYNOPSIS

Respondent discriminated against Complainant because of her absence from work for alcohol treatment. The Commissioner held that alcoholism is a disability, and found that Respondent discharged Complainant for opposing Respondent's discriminatory practice. The Commissioner awarded Complainant \$912 in lost wages and \$4,000 for mental suffering. ORS 183.450(1); 659.030(1)(f); 659.095(1); 659.400(1); 659.425(1)(b); OAR 839-06-245.

The above-entitled matter came on regularly for hearing before Jeanne Kincaid, designated as Hearings Referee by Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on January 8 through 11, 1991, at the Bureau of Labor and Industries office in Eugene, Oregon. Linda Lohr, Case Presenter with the Quality Assurance Unit of the Civil Rights Division of the Bureau of Labor and Industries (the Agency), appeared

on behalf of the Agency. Jane Doe (Complainant) was present throughout the hearing, and was not represented by counsel. Martha Evans, Attorney at Law, appeared on behalf of Marlene P. Wasson (Respondent Wasson) and Image Group, Inc. (Respondent Image Group). Respondent Wasson was present throughout the hearing on her own behalf and as Respondent Image Group's representative.

The Agency called the following witnesses (in alphabetical order): Melissa Burns, former employee of Respondents; Jane Doe, Complainant; Mrs. Doe, Complainant's mother; Anita Fraser (formerly Schweppe), former manager of Respondents; Rachel Gamroth, Support Services Supervisor, Corporations Commission; Diana Lakin (formerly Hancock), former employee of Respondents; David Munz, Investigator with the Agency; and Tawny Thornton (formerly Burnham), former employee of Respondents.

Respondents called the following witnesses (in alphabetical order): Sharon Burnette, current employee of Respondents; Carol Glines, current employee of Respondents; Edward Hill, attorney for Respondent Image Group; Alan McCullough, Investigator with the Agency; and Respondent Marlene Wasson.

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

FINDINGS OF FACT – PROCEDURAL

1) On October 4, 1988, Complainant filed a verified complaint with the Civil Rights Division of the Agency. She alleged that Respondent Wasson discriminated against her because of her disability in that, on or about September 26, 1988, Respondent Wasson placed her on probation for absenteeism related to her disabling condition. Complainant further alleged that on September 27, 1988, after Complainant asserted her rights to be free from discrimination, Respondent Wasson terminated her.

2) On October 3, 1989, after investigation and review, the Agency issued an Administrative Determination finding substantial evidence of unlawful employment practices by Respondent Wasson in violation of ORS 659.425(1)(b) and 659.030(1)(f).

3) The Agency attempted to resolve the Complaint by conference,

* Due to the sensitive nature of the Complainant's disability, by stipulation the participants agreed to refer to Complainant as Jane Doe throughout this proceeding.

** To protect the Complainant's confidentiality, her mother will be referred to as Mrs. Doe in this proceeding.

*** At the time this action arose, Oregon law protected "handicapped" persons. The 1989 Legislative Assembly amended ORS 659.425 and 659.400 and substituted the term "disabled" for "handicapped." No other substantive changes to the law were made. The Forum uses the term "disability" rather than "handicap" whenever appropriate herein.

conciliation, and persuasion, but was unsuccessful.

4) On March 30, 1990, the Agency prepared and duly served Specific Charges on Respondents which alleged that Respondents had discriminated against Complainant by placing her on probation for absenteeism related to her disability and by terminating Complainant after she resisted an unlawful unemployment practice. The Specific Charges alleged that Respondents' actions violated ORS 659.425 (1)(b) and 659.030(1)(f).

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

6) On April 19, 1990, Respondents filed an answer denying the allegations mentioned above in the Specific Charges, and stated numerous affirmative defenses.

7) Pursuant to OAR 839-30-071, the participants* each filed a Summary of the Case.

8) Edward Hill, acting then as attorney for Respondent Image Group, filed a motion for summary judgment

contending that Respondent Image Group was not a successor in interest to Respondent Wasson, dba Pzazz Hair Designs. The Hearings Referee denied the motion on the basis that deciding whether or not an entity was a successor in interest was a determination based on facts that would necessarily need to be developed at hearing.

9) A prehearing conference was held on January 8, 1991, at which the Agency and Respondents stipulated to certain facts. Those facts were read into the record by the Hearings Referee at the beginning of the hearing.

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

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

12) After the hearing, the Hearings Referee notified the Agency and Respondents that, in accordance with OAR 839-30-195, the Hearings Referee was reopening the record to take evidence on alcoholism. Respondents objected to reopening the record, stating that such a procedure would violate the Administrative Procedures Act, and that such testimony would be irrelevant. After reviewing Respondents' objections, the Hearings Referee withdrew her order to reopen the record.

The documents related to the facts in

this Finding of Fact are hereby marked and received into the record.

13) The Proposed Order herein, which included an Exceptions Notice, was issued January 30, 1991. Respondents' exceptions to the Proposed Order were timely mailed and received, and are dealt with throughout this Final Order.

FINDINGS OF FACT - THE MERITS

1) Complainant was employed as a hairstylist by Respondent Wasson from December 1986 until September 27, 1988.

2) During Complainant's period of employment with Respondent Wasson, Respondent Wasson operated a hair salon with six or more employees under assumed business names of Pzazz Hair Designs and More Pzazz Hair Designs.

3) Respondent Wasson continued to own and operate the hair salon with assumed business names of Pzazz Hair Designs and More Pzazz Hair Designs in Eugene, Oregon, until she incorporated the business as Image Group, Inc. on March 30, 1989.

4) Upon incorporation, there was no interruption in service, nor change in the name or the management of the salon, location of the salon, employment of personnel, or equipment.

5) Respondent Image Group is an Oregon corporation engaged in the business of hair styling and is an employer utilizing the personal services of six or more employees subject to the provisions of ORS 659.010 to 659.435.

6) In August 1986, prior to her employment with Respondent Wasson, Complainant admitted herself into treatment for alcoholism at Serenity

Lane. Prior to seeking treatment, Complainant's alcoholism was "affecting every aspect" of her life. Complainant's alcoholism caused problems in her work performance at the hair salon where she was then employed. The treatment was inpatient for 28 days, with follow up outpatient care once a week for nine weeks. Complainant also attended Alcoholics Anonymous (AA) meetings. Complainant continued to attend AA meetings during the period of her employment with Respondents.

7) Complainant's alcoholism was arrested for approximately two years, wherein Complainant abstained from drinking.

8) In July 1988, while on vacation from the salon, Complainant relapsed and began drinking again.

9) Complainant acted promptly in seeking treatment. After notifying the salon's manager, Anita Fraser, Complainant placed herself back into Serenity Lane for twelve days (ten work days).

10) There is no credible evidence that Complainant's relapse, other than necessitating a leave of absence from work, affected her life in any material way. Complainant's alcoholism did not affect her performance at work.

11) Prior to seeking treatment from Serenity Lane in July 1988, Complainant was under tremendous stress at work. In June 1988, Respondent Wasson had to go to trial involving the sale of another hair salon she had sold in 1986. This was an extremely stressful time for Respondent Wasson and all the employees. There were allegations that some of the hair stylists had

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

copied client cards from the previous salon, in violation of the sale agreement between Respondent Wasson and the buyer. Some of the stylists were required to testify at the trial, although Complainant was not one of them. Several employees were so nervous about losing their jobs, they felt compelled to lie to benefit Respondent Wasson.

12) Respondent Wasson is a hard-driving employer who sets high standards for her employees. She is subject to mood swings that set the atmosphere of the salon on a given day.

13) Complainant was an excellent hairstylist and one of the salon's top producers. She was generally the first one to arrive at work and often worked over time. Complainant worked very hard when she was there. Although she loved her work, the atmosphere was very abusive.

14) Complainant was petrified about telling Respondent Wasson that she needed to go to treatment on the day she decided to admit herself, for she feared that she would lose her job at the salon. Mrs. Doe promised to call Respondent Wasson and tell her about Complainant's treatment in order to get Complainant to admit herself. Mrs. Doe had no intention of telling Respondent Wasson and did not do so as she felt it was necessary for Complainant to take the responsibility for dealing with her employer.

15) Complainant called Respondent Wasson on her first day of treatment, July 12, 1988. Complainant was very surprised that Respondent Wasson was supportive of her decision to seek treatment and Complainant

expressed her gratitude to Respondent Wasson.

16) During the course of her stay at Serenity Lane, Complainant telephoned Respondent Wasson on two more occasions. Although Respondent Wasson remained supportive of Complainant's treatment, she was anxious for Complainant to return to work, especially in time for business on Saturday, July 23, 1988. Saturdays were the salon's busiest days.

17) Extremely hesitant to return to work immediately upon leaving Serenity Lane, Complainant worked out an arrangement with her counselor to prolong her stay so she did not have to return to work that Saturday.

18) Within one week of returning to work, both Fraser and Respondent Wasson separately met with Complainant and advised her that she could have no more absences.

19) After Complainant returned to work from Serenity Lane, Fraser and Respondent Wasson closely scrutinized Complainant's down time. They continually assigned her jobs, such as cleaning, whenever she was not busy. The treatment of Complainant by Fraser and Respondent Wasson was different than the treatment Complainant had received prior to entering Serenity Lane, and was markedly different than their treatment of the other employees regarding down time. Respondent's treatment was stressful to Complainant.

20) Complainant missed no more work until Saturday, September 24, 1988. Complainant was ill both Saturday and Sunday and called her employer. Tawny Thornton advised her

to bring in a doctor's note, which she did.

21) Complainant had been planning to have a garage sale on Saturday, September 24, 1988, which she discussed at the salon. She had made arrangements with her sister in Prineville to run the sale on Saturday, with Complainant running it on Sunday. Both Respondent Wasson and Fraser believed that Complainant was not really sick but instead was holding the garage sale. There is no evidence that the garage sale ever occurred.

22) When Complainant returned to work on Monday, September 26, 1988, Fraser took her aside and put her on probation for six months for excessive absenteeism. Probation meant that Complainant lost all privileges such as free tanning, nails and hair, discount on products, loss of time off for her birthday and anniversary, and no accumulation of vacation time. Complainant was told that if she missed any more time she would be terminated.

23) The decision to place Complainant on probation was made by Respondent Wasson with input from Fraser.

24) In determining how much time Complainant missed, Fraser considered the ten days Complainant was in Serenity Lane. According to Fraser, excluding the time spent in Serenity Lane, Complainant missed four days and six hours since January 1, 1988. This figure included the September 24, 1988, sick day.

25) Tawny Thornton missed far more days from work during 1988 but was not put on probation, although she had received verbal warnings.

26) When another employee, Diana Lakin, had a serious back problem, Respondent Wasson gave her a leave of absence and did not put her on probation.

27) Respondent Wasson had a personnel policy manual. The manual contained provisions regarding absenteeism. The policy was never followed and there was clearly confusion among most of the employees, including management, as to how the policy was to be enforced. Respondent Wasson did not consistently enforce the absentee policy.

28) Absenteeism at the salon was burdensome because it necessitated rescheduling clients, or adding clients to the other stylists' schedules.

29) On September 26, 1988 Complainant telephoned Serenity Lane and her mother. She was upset because she believed that Respondent Wasson had counted her time at Serenity Lane when putting her on probation. They advised her to contact the Agency because they considered alcoholism a disability, which prevented the employer from taking adverse action against her due to her disability.

30) Complainant telephoned the Agency and spoke with David Munz, a senior investigator with the Civil Rights Division. Munz advised Complainant that she could file a complaint with the Agency or try to reason with her employer to see if the employer would revoke the probation. Munz recommended that Complainant put something in writing to her employer.

31) Complainant reported to work on September 27, 1988. She asked to speak with Respondent Wasson.

Complainant was nervous but determined as she believed that she was being discriminated against. When she entered Respondent's office, she was not angry or hostile.

32) Complainant attempted to explain to Respondent Wasson that it was improper for Respondent Wasson to count Complainant's time spent in Serenity Lane against her because she had a disability. Respondent Wasson did not understand that alcoholism is a disability and did not believe that she had discriminated against Complainant. After several minutes, Respondent Wasson began yelling at Complainant, who in turn also yelled. Complainant told Respondent Wasson that if she did not revoke the probation, Complainant intended to file a complaint with the Agency. Complainant handed Respondent Wasson a letter to that effect. At that point, Respondent Wasson became extremely upset and fired Complainant. Fraser helped Complainant retrieve her belongings, took her keys, and escorted her out.

33) Immediately after she was terminated, Complainant felt a sense of relief from no longer having to face the day-to-day stresses of working with Respondent Wasson. However, after a few days, the reality hit of being without an income. Complainant ultimately had to relocate to Newport and live with her parents due to lack of income and to her belief that she would be unable to get a new job in Eugene since she was fired. In view of her alcoholism, Complainant knew she needed counseling, but she could not afford to continue her health insurance.

34) Within several weeks, Complainant began working part time for

her old employer, Ted Roseland. Complainant's lost wages due to Respondent Wasson's termination were \$912.41.

35) Complainant suffered the emotional distress of being wrongfully terminated. Her self-confidence and self-esteem were greatly diminished. She felt totally defeated and humiliated. She did not want to return to Newport because this was the setting where her alcoholism originally manifested itself. She lost the daily support of her colleagues. Complainant, who suffers with manic-depression, became very depressed, sleeping excessively. Within a month of her termination, Complainant was diagnosed as having an ulcer. Complainant and Mrs. Doe noticed an improvement in Complainant's emotional state after Complainant became involved with her current husband in late November 1988. At the time of hearing, Complainant's enthusiasm for styling hair had never been the same as before her termination.

36) Respondent Wasson's testimony was not credible. The evidence was overwhelming that Complainant was an excellent hairstylist, who worked very hard and frequently worked over her hours for Respondent Wasson's benefit. Respondent Wasson's insistence that she discharged Complainant for isolated incidents of bad judgment or even dishonesty was simply not credible. There was no evidence that Respondent Wasson took any actions against Complainant at the times these incidents arose, all of which were long before Complainant's probation. Moreover, at hearing, Respondent Wasson singled out

Complainant for such things as talking about her personal problems, when the evidence showed that most of the employees at one time or another had personal problems that they discussed at work. Finally, Respondent Wasson insisted that she did not know that Complainant had gone to the Agency or that Complainant was threatening to file a complaint for an unlawful employment action. This assertion was simply not credible. Complainant had spoken with the Agency the day before and had asked to meet with Respondent Wasson for the specific purpose of asking that her probation be revoked because it was discriminatory. Complainant gave Respondent Wasson a note that stated that she would be filing a complaint with the Agency. It was not credible that Complainant failed to mention the Agency in her meeting with Respondent Wasson or that Respondent Wasson did not read this assertion in the note.

37) Overall, Complainant's testimony was credible. Although she and virtually every witness had trouble with exact dates and times, given that it had been more than two years since these incidents occurred, the Forum did not give weight to these minor inconsistencies. Complainant's testimony was very consistent with her deposition testimony and in accord with other documentary evidence, such as her medical records, attendance records, and other reliable witness testimony.

38) Although Fraser was a critical witness, any evidence pertaining to dates and times that could not be supported by other written evidence was disregarded or overcome by more reliable evidence. Fraser admitted that

she had little memory for dates and times, and this was borne out by the evidence. On the other hand, Fraser testified against her own interest, for instance, admitting that she lied under oath at a previous trial, and that she did things as a manager that she now regrets. Therefore, on critical issues such as the reasons given to Complainant for her probation, the Forum finds her testimony credible. However, on the issue of what absences Fraser counted in determining that Complainant had excessive absenteeism, the Forum does not find Fraser credible for the reason that the documentary evidence that contradicted her testimony was more reliable, since it was written at the time of the incidents.

39) Lakin was completely credible. Even though she no longer works for Respondents, she testified positively about some aspects of working there and admitted her personal failings. Lakin was the only witness who testified that she was certain that Respondent Wasson initiated the yelling when Complainant confronted her about her probation. This issue was critical since it was disputed and allegedly formed the basis as to why Respondent Wasson discharged Complainant.

ULTIMATE FINDINGS OF FACT

1) At all times material, Respondent Wasson owned and operated a hair salon business in Oregon employing six or more persons.

2) At all times material, Respondent Wasson's hair salon business was registered under the assumed business names of Pzazz Hair Designs and More Pzazz Hair Designs.

3) Respondent Image Group is a registered Oregon corporation doing business as More Pzazz Hair Designs, operated by Respondent Wasson and employing six or more employees.

4) Complainant was employed by Respondent Wasson between December 1986 and September 27, 1988.

5) Complainant is an alcoholic whose illness in the past affected all aspects of her life and necessitated her admission for inpatient treatment in the summer of 1986.

6) Complainant again admitted herself to Serenity Lane for inpatient treatment associated with her alcoholism on July 12, 1988, for a period of twelve days.

7) Respondent Wasson applied a personnel policy regarding absenteeism in an inconsistent manner, without regard to Complainant's disability.

8) Respondent Wasson counted Complainant's leave of absence against her and placed her on probation for excessive absenteeism.

9) Complainant voiced her opposition to Respondent Wasson about the probationary measure and threatened to file a complaint with the Agency.

10) Respondent Wasson discharged Complainant for opposing the probationary measure.

11) Complainant's wage loss as a result of Respondent Wasson's action was \$912.41.

12) Complainant suffered emotional distress as a result of Respondent Wasson's discriminatory and retaliatory actions.

CONCLUSIONS OF LAW

1) At all times material, Respondent Wasson was an employer subject to the provisions of ORS 659.010 to 659.110. ORS 659.010(6).

2) Respondent Image Group is a successor in interest to Respondent Wasson, doing business as Pzazz Hair Designs and More Pzazz Hair Designs. *In the Matter of the Palomino Cafe and Lounge, Inc.*, 8 BOLI 32 (1989).

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

4) Alcoholism is a disability for purposes of ORS 659.400 to 659.460. *Fuller v. Frank*, 54 FEP Cases 723 (CA 9 1990); *Crewe v. US Office of Personnel Management*, 834 F2d 140, 45 FEP Cases 555 (CA 8 1987).

5) During all material times, Complainant had a record of having a disability. ORS 659.425(1)(b).

6) Respondent Wasson is responsible for the actions of Fraser, a supervisory employee. *In the Matter of Roderick Enterprises, Inc.*, 2 BOLI 14 (1980); *In the Matter of KBOY Radio Station*, 5 BOLI 94 (1986).

7) Respondent Wasson discriminated against Complainant because of her disability when Respondent Wasson placed Complainant on probation for excessive absenteeism associated with her disability, in violation of ORS 659.425. OAR 839-05-010(2)(b).

8) Respondent Wasson discriminated against Complainant by

terminating her in retaliation for Complainant's efforts to oppose an unlawful employment practice, in violation of ORS 659.030(1)(f).

9) Respondents have not proved any of their affirmative defenses.

10) Pursuant to ORS 659.060 and by the terms of ORS 659.010, the Commissioner of the Bureau of Labor and Industries has the authority to issue a Cease and Desist Order requiring Respondents: to refrain from any action that would jeopardize the rights of individuals protected by ORS 659.010 to 659.110, to perform any act or series of acts reasonably calculated to carry out the purposes of said statutes, to eliminate the effects of an unlawful practice found, and to protect the rights of others similarly situated.

OPINION

A. The Bureau of Labor and Industries' Jurisdiction

In their answer, Respondents contended that the Agency had no jurisdiction in this matter. In their closing argument, Respondents contended that the Agency was required to issue an administrative determination and Specific Charges within one year of the Complainant's filing of a complaint.

ORS 659.095(1) provides as follows:

"Within one year following the filing of the complaint, the commissioner may issue or cause to be issued, an administrative determination. If no administrative determination has been issued at the end of the one-year period, the commissioner has no further authority to continue proceedings to resolve the complaint, except as

provided in ORS 659.070 and 659.085. ****"

The evidence established that Complainant filed a complaint with the Agency on October 4, 1988. The Agency investigated the matter and issued an administrative determination on October 3, 1989, finding substantial evidence that Respondents had engaged in unlawful employment practices. Thus, the Agency complied with the one year statute of limitations requirement of ORS 659.095(1).

With respect to Respondents' argument that Specific Charges must be filed within one year of the Complainant's filing of a complaint, ORS chapter 659 contains no statutory requirement as to when the Agency must file Specific Charges against an employer. The Agency filed Specific Charges against Respondents on March 30, 1990, about five months after issuing an administrative determination. *In Clackamas Co. Fire Protection v. Bureau of Labor and Industries*, 50 Or App 337, 342, 624 P2d 141 (1981), in which the Agency did not file Specific Charges until five years after the complainants had filed their complaints with the Agency, the court held that

"More than a prolonged delay in initiating the litigation must be shown, however, before the doctrine of laches comes into play. *** The established rule is, in fact, that the plaintiff against whom the defense is asserted must have had full knowledge of all the facts during the period of delay, and that the delay must have resulted in prejudicing the defendant to the extent that it would be inequitable to afford the relief sought by the

delaying party." (Citations omitted.)

The Forum concludes that a five month period between issuance of an administrative determination and filing of Specific Charges is not a "prolonged delay." *Id.* This is particularly true in light of the fact that Respondents requested reconsideration of the administrative determination. Finally, there was no evidence that Respondents were prejudiced by the time lapse in issuing the Specific Charges. Like the respondent in *Clackamas Co.*, there was no claim that any of Respondents' witnesses or any critical documentary evidence was unavailable as a result of the delay.

B. Respondents' Liability

In their answer, Respondents contended that Complainant was not an employee of Respondents during the periods alleged. The Specific Charges alleged that Respondent Wasson owned and operated a beauty shop with an assumed business name of Pzazz Hair Designs. The evidence established this to be the case. The evidence established that when Complainant was terminated, she was working for Respondent Wasson doing business as Pzazz Hair Designs and More Pzazz Hair Designs.

The Specific Charges also alleged that Respondent Image Group was a corporation with an assumed business name of More Pzazz Hair Designs. The evidence established this fact. Respondent Image Group contended that it could not be held responsible because the Complainant was never employed by it. Respondent Image Group did not incorporate until six months after Complainant was

terminated. The Specific Charges alleged that Respondent Image Group was a successor in interest to Respondent Wasson. The Commissioner has previously set forth the criteria for determining whether an employer is a successor in interest to a predecessor employer. See *In the Matter of the Palomino Cafe and Lounge, Inc.*, 8 BOLI 32 (1989); *In the Matter of G & T Flagging Service, Inc.*, 9 BOLI 67 (1990).

The Forum must consider the similarities of: the name or identity of the business; its location; the lapse of time between the previous operation and the new operation; the work force employed; the product or service that is provided; and the machinery, equipment, or methods of production used. *Id.* This Forum finds that Respondent Image Group is a successor in interest to Respondent Wasson because in every respect it operated the business as Respondent Wasson had. The salon was in the same location operating as More Pzazz Hair Designs, one of the assumed business names of Respondent Wasson. There was no evidence that personnel or equipment changed upon incorporation, or that there was any lapse of time between the previous operation and the new operation due to the change in ownership.

C. Discrimination Based on Disability

The Agency alleged that Respondent Wasson discriminated against Complainant based upon disability. ORS 659.400(1) defines a person with a disability as one who:

"has a physical or mental impairment which substantially limits one

or more major life activities, has a record of such an impairment or is regarded as having such an impairment."

The evidence established that Complainant had a record of alcoholism. Oregon's law protecting the rights of persons with disabilities is modeled after the federal Rehabilitation Act of 1973. *OSCI v. Bureau of Labor and Industries*, 98 Or App 548, 780 P2d 743, 746 n. 6 (1989). Courts interpreting the federal Rehabilitation Act, which prohibits employers who receive federal funds from discriminating against persons with disabilities, have consistently found alcoholism to be a physical or mental impairment that substantially limits major life activities. See *e.g.*, *Fuller v. Frank*, 54 FEP Cases 723 (9th Cir 1990); *Crewe v. US Office of Personnel Management*, 834 F2d 140, 45 FEP Cases 555 (8th Cir 1987); *Whitlock v. Donovan*, 598 F Supp 126, 129, 36 FEP Cases 425, 427 (DDC 1984), *aff'd without opinion*, 790 F2d 964, 45 FEP Cases 520 (1986); *Simpson v. Reynolds Metals Co.*, 23 FEP Cases 868 (7th Cir 1980). The court in *Crewe* said:

"At the outset there can be little doubt that alcoholism is a handicap for the purposes of the [Rehabilitation] Act. The Attorney General of the United States has so concluded, 43 Op Atty Gen 12 (1977); the federal agency charged with implementing the Act (the Merit Systems Protection Board) has agreed, *Ruzek v. General Services Administration*, 7 MSPB 307 (1981); *Rison v. Department of the Navy*, 23 MSPB 118 (1984). Commentators also

agree, Richards, *Handicap Discrimination in Employment: The Rehabilitation Act of 1973*, 39 Ark L Rev 1, 9-10 (1985); Comment, *Hidden Handicaps: Protection of Alcoholics, Drug Addicts, and the Mentally Ill Against Employment Discrimination Under the Rehabilitation Act of 1973 and the Wisconsin Fair Employment Act*, 1983 Wisc L Rev 725 (1983); and the federal courts have concurred. *Whitlock v. Donovan*, 598 F Supp 126, 129, 36 FEP Cases 425, 427 (DDC 1984), *aff'd without opinion*, 790 F2d 964, 45 FEP Cases 520 (1986)." 45 FEP Cases at 556 (footnote omitted).

In addition, state courts construing their own statutes that bar discrimination against persons with disabilities have found alcoholism to be a disability. See, *e.g.*, *Hazlett v. Martin Chevrolet*, 51 FEP Cases 1588, 1590 (Ohio Sup Ct 1986); *Consolidated Freightways v. Cedar Rapids Civil Rights Commission*, 48 FEP Cases 1563, 1566 (Iowa Sup Ct 1985). This Forum concludes that alcoholism is a disability for purposes of ORS 659.400 to 659.460. See Conclusion of Law 4.

ORS 659.425(1) states, in part:

"For the purpose of ORS 659.400 to 659.460, it is an unlawful employment practice for any employer * * * to discriminate in compensation or in terms, conditions or privileges of employment because:

"* * *

"(b) An individual has a record of a physical or mental impairment * * *"

The evidence was uncontested that Complainant suffered from alcoholism, and sought inpatient treatment for it in 1986. Subsequent to treatment, Complainant remained alcohol free for nearly two years. While Complainant's alcoholism was arrested it did not materially affect any major life activities. Complainant was one of the salon's top producers and an excellent hairstylist. The evidence established that Complainant's relapse occurred while she was on vacation. Although the evidence showed that Complainant's alcoholism did not affect her job performance for Respondents, her relapse was so serious that inpatient treatment was warranted. The treatment necessarily affected her ability at that time to return to work. The Forum has no doubt that Complainant, by admitting herself for treatment, did the prudent thing in order to arrest her alcoholism. Complainant was a recovering alcoholic and was protected by ORS 659.425(1)(b) from discrimination.

In their exceptions to the Proposed Order, Respondents' argued that the order should be set aside in its entirety due to the Hearings Referee's consideration of matters not in the record. Respondents' objection is without merit. This order is based on facts on the record and on judicially cognizable facts. The referee stated in her opinion that courts have recognized that alcoholism is a disabling impairment. In addition, there was evidence on the record that Complainant's alcoholism

had affected every aspect of her life before she sought treatment. Evidence was undisputed that Complainant's alcoholism required additional inpatient treatment during the period of her employment with Respondent. Respondents' state:

"There is nothing in the record indicating that Claimant's treatment in 1988 was caused by a history of a handicap substantially affecting major life activity * * *. The Referee cannot use assumptions outside the record to make this necessary link."

Having recognized that alcoholism is a disability, and the uncontested facts that Complainant suffered from alcoholism in 1986, successfully completed in and outpatient treatment, and attended AA meetings thereafter (including during her employment with Respondents), it is a reasonable inference that Complainant's treatment for alcoholism in July 1988 was caused by her disability. While her alcoholism was under control, the evidence showed that it had little affect on her life activities. But that fact does not remove her from the protection of ORS 659.425. Nothing suggests that the Hearings Referee considered facts outside the record.

Respondent Wasson made a reasonable accommodation of Complainant's disability by granting her a leave of absence to receive treatment without threat of discharge. Respondents' contention that they could not reasonably accommodate Complainant's

* Granting an employee leave in order to seek treatment is one form of accommodation recognized by the Agency to support the employment of persons with disabilities. See OAR 839-06-245(1)(d)(A). See also *Kimbrow v. Atlantic Richfield Co.*, 889 F2d 869, 878-79 (9th Cir 1989).

disability was belied by that evidence. Although absenteeism was a hardship on Respondents, Respondent Wasson granted the leave. An employer cannot argue after the fact that an accommodation it has already made for an employee is unreasonable. Moreover, even though absenteeism was a burden, the Forum was not convinced that it was unduly burdensome in view of the fact that Respondent Wasson failed to consistently implement her absenteeism policy.

Respondent Wasson's treatment of Complainant's absence was where the discrimination occurred. ORS 659.425 (1) makes it an unlawful employment practice for an employer to "to discriminate in compensation or in terms, conditions or privileges of employment" because of a person's disability. (Emphasis added.) Although Fraser and Respondent Wasson denied counting the ten days of work loss during Complainant's treatment in establishing her absentee record, Fraser's tabulation of work loss, which she went over with Respondent Wasson and Complainant, included this period.

Fraser testified that only Complainant's absentee rate during 1988 was considered in deciding to place Complainant on probation. Deducting the

period in treatment, Complainant only missed four days and six hours from January through September. Not only did this not appear to be excessive on its face, Thornton clearly had a more serious absentee problem and she was not placed on probation. Indeed, no other employee was ever placed on probation solely on the basis of absenteeism.

Although Respondent Wasson attempted to show that there were other reasons for placing Complainant on probation, the Forum found these reasons to be pretextual. Some of the reasons cited by Respondent Wasson such as making long distance phone calls and spilling chemicals on a customer's coat, were isolated instances that had occurred long before the probation. Even if Respondent Wasson were to be believed, the Forum has concluded that Complainant's absence for treatment played a key role in Respondent Wasson's decision to place Complainant on probation.

If Complainant's alcoholism had required repeated and prolonged periods of absence for treatment, at some point, of course, those absences would have become an undue hardship for Respondent Wasson. Respondent Wasson's duty to reasonably

* When several factors contribute to causing an employer's action, the Forum applies the "key role test," which requires the Forum to determine "whether the Complainant's protected class membership played a sufficient part in the Respondent's action to be said to have 'caused' that action. Under this test, the Complainant's protected class membership does not have to be the sole cause of the Respondent's action. If it played a key role in causing Respondent's action, substantial evidence of unlawful discrimination exists. The test requires that the Complainant's protected class be more than a minimal, but not the only, cause of the Respondent's action. The crucial question is whether or not the harmful action would have occurred had the Complainant not been a member of the protected class." OAR 839-05-015. (Emphasis in original.)

accommodate Complainant's disability is not unlimited. The factors that bear on what is reasonable in the way of accommodation are enumerated at OAR 839-06-245(2).

It is clear in the actual circumstances of this case, however, that the single absence for treatment was not an undue hardship. The Forum finds that the ten working days taken by Complainant for treatment was a reasonable accommodation of Complainant's disability. Thus, in granting Complainant time off for treatment, Respondent Wasson was merely complying with the requirements of Oregon's disability discrimination law. It would be a strange result indeed if Complainant could be placed on probation for exercising her rights under that law. And in counting Complainant's period of treatment towards the absences forming the basis for Complainant's probation, Respondent did exactly that. This constitutes discrimination on the basis of disability.

Although the Forum concluded that Respondent Wasson treated Complainant differently after she returned from Serenity Lane – by closely scrutinizing her down time and excessively keeping her busy – the Forum has awarded no damages for this treatment because the Agency did not allege this different treatment as a basis of discrimination in its Specific Charges.

D. Retaliation

The Agency alleged that Respondent Wasson terminated Complainant for opposing an unlawful employment practice. ORS 659.030(1)(f) makes it an unlawful employment practice:

"For any employer * * * to discharge, expel or otherwise discriminate against any person because the person has opposed any practices forbidden by this section * * * or because the person has filed a complaint, testified or assisted in any proceeding under ORS 659.010 to 659.110, 659.400 to 659.460 and 659.505 to 659.545 or has attempted to do so." (Emphasis added.)

Respondent Wasson placed Complainant on probation on September 26, 1988. Complainant believed that she was being discriminated against based on disability. She contacted the Agency and spoke with an investigator who informed her of her rights and made suggestions as to how to handle it.

The next day, Complainant approached Respondent Wasson and insisted that the probation be revoked because she believed that it was based on her taking a leave of absence for treatment of a disability. Respondent Wasson refused to revoke the probation. Both parties became angry and Respondent Wasson terminated Complainant on the spot. This evidence was undisputed.

Although there was no dispute that Respondent Wasson knew that Complainant was a recovering alcoholic, it appeared as if Respondent Wasson was not aware that alcoholism is a disability and that alcoholics are protected from unlawful discrimination. Indeed, when Complainant met with Respondent Wasson to demand that her probation be revoked because she was handicapped, Respondent Wasson

exclaimed: "Handicapped? What do you mean 'handicapped'?"

The record showed that when Respondent Wasson refused to revoke Complainant's probation, Complainant handed Respondent Wasson a note stating that if Respondent Wasson refused to revoke her probation, "I will have no other choice than to file a complaint with the state labor board." Respondent Wasson testified that she only scanned the note and did not know that Complainant had either already spoken with the Agency or that she threatened to file a complaint with the Agency.

Although the Forum has concluded that Respondent Wasson knew that Complainant intended to file a complaint with the Agency, the dispute in the evidence makes no legal difference. Complainant opposed what she perceived to be an unlawful employment practice: her employer putting her on probation for seeking treatment to arrest her alcoholism. Complainant felt singled out when no other employee had been put on probation solely for absenteeism, and when another employee had missed far more work than Complainant and had not been placed on probation. Making her opposition known protected the Complainant. The statute does not require that the Complainant file or threaten to file a complaint in order to be protected.

ORS 659.030(1)(f) gave Complainant the right to oppose what she reasonably believed to be an unlawful employment practice. Even if this Forum should conclude that Respondent Wasson's decision to place Complainant on probation was not discrim-

inatory, Complainant would still prevail in this proceeding. See *In the Matter of the City of Portland*, 2 BOLI 110 (1981), *reversed on back pay, affirmed on retaliation*, *City of Portland v. Bureau of Labor and Industries*, 61 Or App 182, 656 P2d 353 (1982), *Commissioner's Order reinstated*, *City of Portland v. Bureau of Labor and Industries*, 298 Or 104, 690 P2d 475 (1984). That is because ORS 659.030(1)(f) protects an employee from retaliation for asserting his or her rights, even if the Agency should conclude that no discrimination occurred, so long as the employee's belief was reasonable.

The Commissioner has consistently supported the right of an employee to be free from retaliation. The public welfare is served by the reporting of unlawful employment practices. The Agency's mission would be thwarted if employers were permitted to punish employees who speak out. Without protection from retaliation, reporting of unlawful employment practices – and hence their elimination – would be jeopardized.

Respondent Wasson's assertion that she did not discharge Complainant for expressing her opposition to an unlawful employment practice, but rather because Complainant yelled at her, was pretextual. OAR 839-05-010 (2)(b). First of all, the Forum has concluded that Respondent Wasson initiated the yelling. Moreover, even if Complainant's yelling at Respondent Wasson were a factor in Respondent's decision to discharge Complainant, the Forum has concluded that Respondent would not have terminated Complainant had she not opposed Respon-

dent Wasson's unlawful employment practice. OAR 839-05-015.

E. Exceptions

Respondents' first exception, alleging the Hearings Referee considered matters not in the record, was discussed above in Part C of this Opinion.

In their next exception, Respondents argued that it was reversible error for the Hearings Referee to admit evidence regarding the previous trial of Respondent Wasson, the effect of that trial on the employees, the allegations that some employees felt compelled to lie during the trial, and the results of the trial. Respondents charged that this evidence was irrelevant and prejudicial. They correctly note that the applicable law is ORS 183.450(1), which provides:

"Irrelevant, immaterial or unduly repetitious evidence shall be excluded but erroneous rulings on evidence shall not preclude agency action on the record unless shown to have substantially prejudiced the rights of a party. All other evidence of a type commonly relied upon by reasonably prudent persons in the conduct of their serious affairs shall be admissible."

First, the Forum finds that evidence regarding the trial and its affects on the employees was relevant because of the trial's affect on the atmosphere in the salon. The resulting stress it caused Complainant bears on her claim for mental distress damages. Testimony that some employees felt compelled to lie during their sworn testimony at trial is naturally relevant to the assessment of witnesses'

credibility. Although evidence about the results of the trial might have some relevance in regard to the atmosphere at the salon, it was not considered for purposes of this Final Order. Accordingly, the Forum finds no error in having admitted evidence about the trial. Even if the Referee's ruling was erroneous, none of the evidence complained of appears to have substantially prejudiced Respondents' rights. In Finding of Fact 37 (in which Respondent Wasson's credibility was assessed by the Hearings Referee), nothing suggests that evidence about the trial was considered when evaluating her credibility.

Respondents also asserted in their exceptions that Complainant's mental distress damages should be reduced to \$250 because there was insufficient evidence to support any greater award. Respondents based their position on Complainant's deposition testimony, which was made part of the record. Finding of Fact 35 is based upon the testimony of both Complainant and Mrs. Doe, her mother. That testimony was persuasive that Complainant suffered emotional distress attributable to the illegal discrimination and termination by Respondent.

However, for several reasons, the Forum has adjusted the compensatory damages for mental distress from \$7,500 to \$4,000. In determining mental distress awards, the Commissioner considers a number of things including the type of discriminatory conduct, and the duration, severity, frequency, and persuasiveness of that conduct. The Commissioner considers the type of mental distress caused by the discriminatory conduct, and the effects and

duration of that distress. The Commissioner also considers complainants' vulnerability, due to such factors as age and work experience. See *Fred Meyer Inc. v. Bureau of Labor*, 39 Or App 253, 592 P2d 564, 571-72 (1979); *rev den* 287 Or 129 (1979).

The primary reason for adjusting the award here is that some of the relevant testimony did not distinguish between the distress Complainant experienced due to the normal environment at the salon (which is not compensable) and the distress she suffered due to the discrimination and retaliatory discharge (which is compensable).

In addition, the discriminatory conduct occurred on one day and resulted in the retaliatory discharge the next day. Thus the duration and frequency of the conduct are not significant factors here. And while any discriminatory conduct is serious, the facts of this case do not show aggravated or pervasive discriminatory conduct.

Here, Complainant's self confidence and self-esteem were diminished, and she felt defeated and humiliated by Respondents' conduct. The unemployment she experienced, and the resulting financial hardship, caused her to return to Newport, a setting where her alcoholism originally manifested itself. She lost the daily support of her colleagues and became very depressed, sleeping excessively. Within a month of her termination, Complainant was diagnosed as having an ulcer. Up to the time of hearing, Complainant's enthusiasm for styling hair had never been the same as before her termination. These types of mental distress are compensable. The

Commissioner has recognized that the trauma of a sudden and unexpected termination, coupled with the anxiety and uncertainty connected with loss of employment income is compensable. *In the Matter of Spear Beverage Company*, 2 BOLI 240 (1982); *In the Matter of the City of Portland*, 2 BOLI 4 (1980). Although it cannot be proved that Complainant's ulcer was caused solely by Respondents' unlawful acts, it is reasonable to infer that those acts and the subsequent mental distress contributed to it. Much of Complainant's mental distress attributable to Respondents' unlawful acts apparently did not last over two months.

Based upon the foregoing, the Forum is awarding the Complainant \$4,000 to help compensate her for the mental distress she suffered as a result of Respondents' unlawful employment practices.

ORDER

NOW, THEREFORE, as authorized by ORS 659.060(3) and 659.010(2) and in order to eliminate the effects of the unlawful practices found as well as to protect the lawful interest of others similarly situated, Marlene P. Wasson and Image Group, Inc., are hereby ORDERED to:

1) Deliver to the Business Office of the Bureau of Labor and Industries, 305 State Office Building, 1400 SW Fifth Avenue, PO Box 800, Portland, Oregon 97207-0800, a certified check, payable to the Bureau of Labor and Industries to be held in trust for Jane Doe, in the amount of:

a) NINE HUNDRED TWELVE DOLLARS AND FORTY ONE CENTS (\$912.41), representing wages

Complainant lost as a result of Respondents' unlawful practices found herein; PLUS,

b) TWO HUNDRED FIFTY FOUR DOLLARS AND SEVENTEEN CENTS (\$254.17), representing interest on the lost wages at the annual rate of nine percent accrued between October 1, 1988, and July 31, 1991, computed and compounded annually; PLUS,

c) Interest on the foregoing, at the legal rate, accrued between August 1, 1991, and the date Respondents comply herewith, to be computed and compounded annually; PLUS,

d) FOUR THOUSAND DOLLARS (\$4,000), representing compensatory damages for the mental distress Complainant suffered as a result of Respondents' unlawful practices found herein; PLUS,

e) Interest on the compensatory damages for mental distress, at the legal rate, accrued between the date of the Final Order and the date Respondents comply herewith, to be computed and compounded annually.

2) Cease and desist from discriminating against any current or future employees on the basis of disability or for asserting their right to oppose unlawful employment practices.

**In the Matter of
WILLIAM R. KIRBY,
Respondent.**

Case Number 51-90

Final Order of the Commissioner

Mary Wendy Roberts

Issued July 25, 1991.

SYNOPSIS

Respondent subjected female Complainant to lewd and demeaning comments, gestures, and remarks of a sexual nature, both at the work site and by telephone to Complainant's home after work hours. Such behavior was because of Complainant's sex, was unwelcome, and created a hostile, offensive, and intimidating work environment. Finding that Complainant resigned due to intolerable working conditions, the Commissioner ruled that she was constructively discharged and awarded her \$3,025 in lost wages and \$6,000 for mental distress. ORS 659.030(1)(a) and (b); OAR 839-07-550(1) and (3).

The above-entitled contested case came on regularly for hearing before Warner W. Gregg, designated as Hearings Referee by Mary Wendy Roberts, the Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was conducted on October 23 and 24, 1990, in a conference room of the State of Oregon Employment Division, 1901 Adams Street, LaGrande, Oregon. Linda Lohr, Case Presenter with the Quality Assurance Unit of the Civil Rights Division of the Bureau of Labor

and Industries (the Agency), presented a Summary of the Case for the Agency, argued Agency policy and the facts, examined the witnesses, and introduced documents. Elaine Sanchez Hendricks (Complainant) was present throughout the hearing.

William R. Kirby (Respondent) was represented by Sam H. Ledridge, Attorney at Law, LaGrande, Oregon. Counsel for Respondent presented a Summary of the Case, argued the law and facts, interposed motions and objections, examined the witnesses, and introduced documents. Respondent was present throughout the hearing.

The Agency called as witnesses in addition to Complainant: Complainant's ex-employer Barbara Blake, Wallowa County Juvenile Department Director Stephen Hays, Agency Senior Investigator Susan Moxley, Wallowa County District Attorney William Reynolds, Complainant's son Joseph Sanchez, and City of Enterprise Police Chief Robert L. Stone.

Respondent called as witnesses in addition to Respondent: Respondent's friend Shirley Brock, Respondent's former employees Delores Herrera and Patty Knight, Respondent's former and current employee Ginger Miller, and Enterprise Volunteer Firefighter Rick Tippet.

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

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

**RULINGS ON MOTIONS AND
OBJECTIONS**

Respondent's Case Summary and "Supplemental Memorandum of Law," filed shortly before the hearing, expanded upon Respondent's stated defenses by phrasing the legal issues as follows:

1. Should complaint of constructive discharge, in violation of ORS 659.030(1)(a) be dismissed?
2. Should claim for mental suffering be dismissed?
3. Should complaint for violation of ORS 659.030(1)(b) be dismissed?

The Hearings Referee, pointing out that he was a designee appointed to hear the evidence and make recommendations to the Commissioner, treated these issues collectively as motions to dismiss and took them under advisement to be dealt with in the Proposed Order. As a practical matter, the hearings presentation then proceeded as if the motions had been denied. For reasons set out at more length in the Opinion section, Respondent's motions to dismiss are each denied.

At the commencement of the hearing, the Agency objected to any evidence bearing on certain of the defenses and issues outlined in Respondent's case summary, said defenses and issues being untimely because they were not included in Respondent's answer to the Specific Charges. Respondent countered by moving to amend the answer to

* For convenience, Complainant was referred to throughout the testimony as "Sanchez" or "Complainant."

conform to the proffered evidence and defenses. The Agency did not cite any prejudice to its presentation flowing from allowing the particular evidence and defenses, except to point out that they were untimely. Included were the question of whether Complainant's allegations were unjustified interpretations of events based on the sexual nature of cases dealt with in Respondent's law office, the question of whether Complainant's resignation reflected her recognition of her lack of skills and background necessary to perform the job, the question of whether Complainant was predisposed to perceive sexual acts where none occurred, the question of whether her motive for this proceeding arose from Respondent's earlier prosecution of her for driving under the influence of intoxicants, and the question of her alleged propensity for drinking, for claims of sexual improprieties, and for being barred from a local drinking establishment. The Hearings Referee ruled that Respondent's answer might be amended to conform to the issues and defenses in Respondent's case summary.

During the first day of hearing, following the testimony of Respondent's witness Tippett, taken out of order during the Agency's case, the Agency moved that the Hearings Referee reconsider the ruling, claiming prejudice from the introduction in Respondent's Case Summary of matters beyond the scope of the answer and the resulting inability of the Agency to timely meet the new matter. Tippett's testimony involved Complainant's alleged propensity for claiming sexual improprieties, and the Agency claimed no opportunity

to interview police personnel who were present during the incidents related by Tippett. The record reflected that both officers were still with Wallowa County, and the Hearings Referee stated that the Agency might present them if it wished. The Agency's motion to reconsider the Hearings Referee's ruling allowing Respondent to amend the answer was denied.

FINDINGS OF FACT – PROCEDURAL

1) On February 6, 1989, Complainant filed a verified complaint with the Civil Rights Division (CRD) of the Agency alleging that she was the victim of an unlawful employment practice of Respondent.

2) After investigation and review, the Civil Rights Division issued an Administrative Determination finding substantial evidence supporting the allegations of the complaint that Respondent had engaged in sexual harassment of Complainant, his employee, in violation of ORS 659.030.

3) Efforts to resolve the case by conciliation failed. On July 17, 1990, the Agency prepared and the Forum served on Respondent by certified mail Specific Charges which alleged that Respondent, as Complainant's employer, subjected her to unwelcome and offensive conduct of a sexual nature because of her female gender resulting in a hostile and offensive working environment, in violation of ORS 659.030(1)(b). The charges further alleged that the hostile and offensive discriminatory environment thus created caused Complainant's involuntary resignation, a constructive discharge, in violation of ORS 659.030(1)(a), and that Complainant

as a result lost earnings estimated at \$9,000 and suffered damages from mental distress and impairment of personal dignity in the amount of \$40,000.

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

5) Respondent timely filed his answer, together with his letter notifying the Forum of representation by counsel Ledridge for all future proceedings.

6) Pursuant to OAR 839-30-071, the participants' each timely filed a Summary of the Case on or about October 15, 1990.

7) At the commencement of the hearing, counsel for Respondent filed "Respondent's Supplemental Memorandum Of Law" addressing issues in the case as viewed by Respondent.

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

9) Pursuant to ORS 183.415(7), the participants were orally advised by the Hearings Referee of the issues to be addressed, the matters to be

proved, and the procedures governing the conduct of the hearing.

10) The Proposed Order, which included an Exceptions Notice, was issued on May 17, 1991. Exceptions, if any, were to be filed by June 17, 1991. No exceptions were received.

11) On June 18, 1991, Respondent tendered to the Forum the sum of \$9,583.69, representing Complainant's wage loss as found in the Proposed Order (\$3,024.50), with interest thereon through June 18 (\$559.19), together with the mental distress damages awarded in the Proposed Order (\$6,000).

FINDINGS OF FACT – THE MERITS

1) At times material, Respondent had been a sole practitioner engaged in the general practice of law in Enterprise, Oregon, since 1983, generally utilizing the personal service of at least one individual, reserving the right to control the means by which such service was performed. At the time of hearing, he had practiced with two other attorneys in Enterprise since October 1989.

2) At times material Complainant, female, had over 20 years secretarial experience, but last worked in that field in 1980. She moved to Joseph, Oregon, from Clarkston, Washington, in 1980 and began working in a Joseph pharmacy. In 1985, the pharmacy acquired the OLCC agency in which she also worked. She resided in Joseph, a community which she found was close knit and insular. She was comfortable there after three or four years. She quit the pharmacy job in July 1987 due

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

to a disabling injury. She then applied for secretarial positions with several employers. Secretarial jobs were scarce in the area and Complainant had no recent experience. In answering a newspaper advertisement through the Oregon State Employment Service, she called Respondent, who at the time stated he had just hired a secretary. Among others to whom she applied were the Wallowa County Juvenile Department and the Wallowa County District Attorney. In August 1988, she began working at "Our Little Store," a convenience grocery in Enterprise. She moved to Enterprise. In December 1988, Respondent contacted her and asked if she were still interested in secretarial work. She started working for Respondent on December 26, 1988.

3) Complainant was employed in Respondent's office from December 26, 1988, to January 19, 1989. Respondent was her direct supervisor. District Attorney Reynolds had recommended that Respondent hire her.

4) During the week she worked for Respondent in December 1988, in addition to what became her regular duties, Complainant did some practice typing from samples and familiarized herself with Respondent's topical filing system. She never understood it to be an exploratory week. She had quit her job at the store. Respondent commented that he thought she would work out well.

5) Complainant's duties included being a people mover, taking care of Respondent's public relations with clients by scheduling appointments and answering the office phone, as well as filing, handling accounts receivable,

and doing legal and correspondence typing. She typed Respondent's work from his handwritten drafts and used the computer. Respondent did some of his own typing. He had no complaints about her typing.

6) Complainant had no prior law office experience. None of Respondent's former secretaries who appeared at hearing had legal secretary experience when hired.

7) Respondent did much of his own secretarial work, sometimes at night or in the early morning hours. During times material he had as many as five to seven court dates each week.

8) A paycheck from Respondent to Complainant covering December 1988 was marked for "cleaning." She had done only secretarial duties and understood that the notation had something to do with the end of the tax year. She did not know at what hourly rate that check or the final one she received in January were computed. She worked less than 40 hours a week.

9) Early in January, Respondent called Complainant into his office to discuss an upcoming case in which his female client was accused of assault on a police officer. The client was alleging that a male police officer had grabbed her breast, and Respondent was explaining the case to Complainant. It was obvious to her that Respondent had been drinking. He told her that women give signals if they want to be touched; he said he would like to fondle Complainant's breasts but she was not giving him any signals; he gestured his intent with his hands. She told him that she knew she was not

giving signals because their relationship was strictly business. Respondent giggled in response.

10) Later that day, Respondent called Complainant into his office about her failure to turn out his office light the previous evening. She reminded him that he had told her she did not need to worry about that light, which was a ceiling fixture with a pull chain, because it was so high. He responded by telling her to get up on the desk and turn it off, she refused. He said "God-dammit, get up and turn the light off." There followed a discussion between them of how she was to get there, whether to climb up or to use a chair as she wanted to do. She got a chair, got up on the desk and turned off the light with him holding her legs and commenting, "Now, you're cooking." Then, he demanded that she turn it back on, which she did. He took her hand and helped her off the desk. She was upset and believed that Respondent knew it; he later said to her, "Honey, I love you."

11) Early in Complainant's employment, she thought Respondent had been inconsistent, asking her to bring in her steno notebook, and later berating her for doing so. Respondent knew that she was upset by the inconsistency and told her "Honey, I love you." She heard that comment on a twice daily basis while she worked for Respondent.

12) Respondent had an inner office fronted by a separate smaller reception area containing the computer, the use of which Complainant did not learn completely, and her work station with typewriter.

13) On an occasion in mid-January, Respondent was discussing

a will with a client who was very deaf. Respondent appeared drunk to Complainant, and was "just screaming" at the client, who became upset. Complainant calmed the client, who then left. Respondent asked her if she knew how to get a will out of the computer and said he would show her. He sat in her chair and worked at the computer. Respondent then asked her "Do you know what 'et' means?" She said she did not and he said "That's when a man eats a woman and a woman eats a man."

14) Following his remark, Respondent looked at Complainant "up and down, up and down with his eyes." She clutched a legal file folder in front of her and he laughed. He scooted his chair toward her and said "Tell me, Elaine, has any man ever really beat the hell out of you?" She was caught between her desk and the other furniture. She answered "yes," and was afraid she would be hit. He did not raise his hand: there was a mean, cold, squinting look in his eyes that made her afraid. Then he scooted back, finished his work and broke for lunch.

15) Complainant had seen that look before. About ten days into her employment, she'd gone into Respondent's office and told him that his 1:30 appointment had arrived. He had looked her up and down and said she was "a beautiful, desirable woman." At that time she told him she didn't like the way he talked to her or the way he looked at her, and that she didn't like being called "honey". She returned to the reception area. Respondent followed and seemed surprised that a client was in the reception area, saying

"Why didn't you tell me somebody was here?" He had the mean, cold, squinting look in his eye when he asked that.

16) At that time, the client went in, then left about ten to fifteen minutes later, asking Complainant "Do I have to pay for this?" There was no charge on an initial consultation, but the client was frowning. Complainant went in and found Respondent passed out at his desk.

17) Respondent telephoned Complainant at home after work hours and on weekends, and said he loved and wanted and needed her. She suspected he was drunk on the phone.

18) One evening when he became insistent upon talking, Complainant stated she was preparing dinner, told him she would see him at work, and hung up. It was after that she received a call from Ginger Miller, a former secretary for Respondent.

19) Miller had received a telephone call from Respondent asking her to call Complainant. Miller told her that Respondent had asked her to call to smooth things over for him. He had said things were "not going well" and that Complainant seemed upset.

20) When Miller telephoned, Complainant said it was hard handling the job, that the work was hard and that she'd had no training and no time to learn to do it right. Complainant told Miller that she wouldn't have discussed her situation, but since Respondent had involved Miller, she felt free to tell her what was happening. She told Miller that no matter what she did it was wrong, that Respondent kept telling her to "think," "think, God-dammit."

21) Miller's call was in January. It was the first of at least three telephone conversations that Complainant had with Miller. Complainant expressed concern to Miller about Respondent's temper, stating she was afraid. Miller related her own experiences with Respondent in this regard. Complainant also expressed concern about Respondent's alcohol use.

22) Complainant told Miller about the situation with Respondent involving the female criminal defendant who claimed the police had fondled her. She did not recall what other incidents with sexual connotations she discussed.

23) Miller told Complainant that Respondent hated women. Miller said it had gotten so bad for her that once her mother had to come and get her. By the time her mother arrived, all was calmed down. Miller told Complainant "I know exactly what you're going through." Complainant felt isolated and alone until Miller's call gave her the impression that her experiences weren't unique.

24) Miller invited Complainant to call her again, and suggested that she call Miller's mother, Sharon McAuliffe, who was knowledgeable about life if not secretarial work, for advice.

25) Around the second weekend of Complainant's employment with Respondent, she stopped answering the telephone at home and asked her son to answer.

26) On January 18, Respondent had not had an opportunity to rough draft a motion and order before asking Complainant to prepare it. He was in a hurry; she knew he had an 11 a.m.

court appearance. He told her to put the motion and order on the same page. She questioned whether that was correct. Respondent acknowledged that he had "shown some temper." He needed to get it to the court house in a hurry, and "we had words."

27) Respondent stated he was in a hurry: the judge was waiting, his client was waiting, everybody's waiting. He then sat and watched as Complainant prepared the document. He commented: "You are the weirdest woman I've ever met, you're not only weird, you are odd." She tried to complete the document because she was told everyone was waiting. Respondent then told her to stop. He called her "ornery" and told her to get out. As she prepared to leave in tears, he raced out of the office ahead of her, laughing. He then returned, stating "Honey, I love you." The situation made her feel as if "my brain is being sucked out of my head." She felt that she just couldn't handle the situation.

28) Respondent was a gentle, kind person when sober. When drinking he was rude, obnoxious, and humiliated others. He was drunk "more often than not," "even going to court." He would stagger, his speech was slurred, and he became very self-centered.

29) When Complainant felt she could not salvage the job, she decided to do something about it. When she had talked to Respondent about his actions, he was not sober and took it lightly. She did not consider Respondent's frequent statements of "I love you" to be a form of apology. He never apologized to her for his behavior. His statements that he needed her and not to leave him did not sound to her as if

he meant in the office as a secretary. On January 18, she called the state employment office in La Grande from Respondent's office.

30) By January 19, Complainant felt she had to get out of there, regardless of her financial circumstance. She had to leave because she felt she was losing her mind, she was suffocating. She felt someone was pulling the brains out of her head. She felt she was abused every single day, and she felt stupid for staying that long. Humiliated was too mild a term for what she felt.

31) Stephen Hays had been Wal-lowa County Juvenile Director over 10 years, and had lived in Enterprise about 13 years at the time of hearing. He had known Respondent at least 10 years. He knew Complainant through her son and also knew that she had applied for secretarial work in his office in the Court House in Enterprise. Hays was a recovering alcoholic in a small community, and as a result got referrals about alcohol problems.

32) Complainant did not go into the office on January 19. Around 10 a.m., following McAuliffe's suggestion, Complainant telephoned Hays. She told Hays about Respondent's "love-hate mood swings," about Respondent's drinking, and about how Respondent treated her and his clients. She told him of the way Respondent looked at her and that she feared seduction.

33) Respondent had a reputation as a good attorney. He also had a reputation as a drinker. Hays was not surprised by Complainant's call.

34) Respondent received inpatient treatment for alcoholism in 1986.

Since that time, as a recovering alcoholic, he had attended support groups based on the precepts of Alcoholics Anonymous. He "relapsed" in late 1987 and again received inpatient treatment in early 1988.

35) When Complainant talked to Hays, she was upset and concerned, and questioned what to do. She was concerned about the Respondent's use of liquor and about what she considered to be Respondent's frightening behavior. She needed the job, but was afraid of Respondent, who was coming to work drunk and had done some crazy things. When Hays asked her to be specific, she said that Respondent had told her to climb onto a desk to change a light bulb and then looked up her dress as she did. Respondent had asked her if she had ever been beat up by a man.

36) Hays told Complainant to leave when these things happened and to try to talk to Respondent when he was sober. She seemed upset and very concerned because jobs were tough to get in Wallowa County, especially in the wintertime. Hays thought she intended to talk to Respondent as he had suggested.

37) Hays said that an alcoholic out of control needed to help himself by seeking help. Hays told Complainant that if it can't work out, it can't work out, and in that event to protect herself through removing herself from the situation by quitting.

38) Sometime prior to Complainant's call, Hays had been asked to assist Respondent concerning Respondent's alcohol problem. He did so until Respondent requested that he stop.

39) On an occasion after Complainant had talked to him, Hays witnessed Respondent appearing drunk during the trial of a game case, and saw Respondent drinking during a trial recess. Hays attended a meeting with Respondent, the judge, and the District Attorney a few days later. Respondent said he didn't have trouble with liquor, only with women. When Hays suggested that alcohol was involved, Respondent became angry with Hays, cautioning him to stay out of Respondent's life.

40) About 1 p.m. on January 19 Complainant saw District Attorney William Reynolds in his office. Reynolds was elected District Attorney of Wallowa County in 1988. Prior to that he had practiced law in Wallowa County from 1972 to 1981 and then worked for the Oregon State Bar Professional Liability Fund. Complainant discussed her fears of being hit or hurt. Reynolds had thought that Respondent was "on the wagon," but had heard otherwise. She was quite upset about her employment with Respondent and about the way Respondent treated her. Reynolds asked her what her plans were. After her call to Hays, she had determined to resign and had written a letter of resignation. Because she did not wish to confront Respondent, Reynolds allowed his secretary to type the resignation letter for her. He suggested that Complainant deliver it when Respondent was out.

41) Complainant asked Reynolds what she could do. He told her that she could make a claim for sexual harassment or she could file a civil suit.

42) At the time of hearing, Reynolds had known Respondent for 18

years. He had no specific recollection of intoxication on the part of Respondent in December 1988 and January 1989. He did recall other times in early 1989 when Respondent was "a little out of order," but could not place the number or exact dates of such occurrences. In April 1989, at the trial of a game case, it had appeared to him and to the judge that Respondent was intoxicated.

43) Later on January 19 Complainant left her letter of resignation and the office keys at Respondent's office, in his absence, between 2:30 and 3 p.m. She did not otherwise go to the office that day, or any day thereafter.

44) Respondent paid Complainant after her resignation by leaving her check at the Little Store. It was in the amount of \$396.89, based on gross earnings of \$487.50 at the rate of \$650 per month for the hours of 9 a.m. to 4 p.m., less a lunch hour, 5 days a week.

45) Following her meeting with Reynolds and the delivery of her letter of resignation, Complainant spoke with Robert L. Stone, the Chief of Police of Enterprise in his office. She told him she had just quit and that Reynolds had suggested she talk to him.

46) Stone was an acquaintance of both Complainant ("10 years, casual friends") and Respondent ("18 years, always friends"). He knew that Complainant had worked at "Our Little Store." She had told him when she was going to work for Respondent about a month before. On January 19 she told him that she had been harassed by Respondent in Respondent's office, that the harassment was sexual in nature and that she no longer worked for Respondent. She told

Stone that Respondent had been driving by her house. She was concerned, agitated and fearful. She feared physical harm.

47) Stone told Complainant that there was no law against Respondent driving by but that if it went further, such as involving trespass on her property, she could file a police complaint.

48) When Stone offered to talk to Respondent, Complainant declined. Stone did not talk to Respondent about Complainant's allegations and made no official police record of the incident.

49) At time of hearing, Barbara Blake, an Enterprise resident, had been an owner of "Our Little Store" for 10 to 12 years. She was a friend of Complainant and had employed her up to December 1988. She was acquainted with Respondent.

50) While Complainant was working for Respondent, Blake saw her almost daily. Shortly after Complainant began to work there, she told Blake about difficulties with Respondent: that she couldn't make mistakes, that everything must be letter perfect. She told Blake that Respondent was verbally abusive, harsh and erratic, was subject to violent outbursts, and was sometimes drunk at work.

51) Complainant expressed other concerns to Blake. She told Blake that she was not being treated properly, and told her about Respondent having her stand on his desk to change a light bulb and that he made a suggestive comment at that time. Blake observed that Complainant was nervous and shaking daily. She suggested to Complainant that she find another job and

discussed her quitting. They had many conversations in this regard, and Complainant repeatedly expressed a reluctance to leave because she needed the job and had no other prospects. Complainant was extremely nervous about Respondent and thought she would be forced out by his behavior.

52) Joseph (Joe) Sanchez, Complainant's son, lived with his mother at times material until February 1989. About two weeks after she began working for Respondent, Joe Sanchez noticed she began appearing very upset. One evening Complainant came home upset, sick, and shaken. He asked the cause of her condition. She told him that Respondent had been sexually harassing her, swearing at her, and had yelled at her when she made mistakes.

53) Complainant's moods became worse. She was often crying, pale, and sick, and was easily frustrated and irritable. Joe Sanchez was concerned about her high blood pressure. She was nervous, "frantic," every night after the second week of work with Respondent. She told him about being made to stand on Respondent's desk to turn off the light and about Respondent's remark regarding "et ux." She told him about an instance when Respondent passed out at the office and she left him there sleeping.

54) Joe Sanchez was very upset, and wanted to retaliate physically against Respondent. Complainant cautioned him not to do anything, because "if we take this to court someday, that could blow it." He advised her to quit; he was concerned about the ef-

fect of her employment situation on her health.

55) Respondent's schedule for January through the 18th showed several court appearances, which he described in detail, including pre-trial preparation for some of them. He described various filings and correspondence noted on the schedule. He prepared some of the documents for filing and gave others in draft form to Complainant to prepare. Although neither of the matters scheduled for January 10 and 11 actually necessitated a trial, he said that because of his busy schedule and a fire at his home, it was probably January 12 or 13 before he could check on Complainant's progress in the office.

56) January 16, 1989, was a legal holiday.

57) There was "some sort of tension" between Respondent and Complainant. Respondent believed that she acted in a "weird" way toward him. Her actions impressed him as "a ploy, *** a game." When he spoke to her, "it would be a reaction of anything you want: fear, awe, disregard, anything else." She typed what was given her, but he felt that she was not telling him about appointments and telephone calls. Complainant was not arguing or disagreeing or refusing to work, but Respondent's impression was that she did not want him around her, that he made her uncomfortable. He did not have time to figure it out, to "psycho-analyze" it, he had work to do and wanted it resolved. This prompted his call to Miller.

58) Respondent often used the term "I love you" in dealing with his secretaries. It was intended as a form

of "thank you," and occasionally as a type of apology.

59) Respondent drank in 1989 because of "deep physical pain" from what eventually was diagnosed as a severe intestinal disorder, requiring surgery. Realizing that alcohol did not make the pain go away, he terminated its use on his own and was alcohol free thereafter. The intestinal symptoms appeared first in the fall of 1988. Respondent was emphatic in pointing out that he was reciting a sequence of events and that there was no real excuse for an alcoholic relapse.

60) Patty Knight worked as a legal secretary for Respondent from June 1987 to February 15, 1988. At the time of hearing, she ran a cattle ranch. She left Respondent's employ to take care of her ranch. She had formerly been Respondent's client. She was not acquainted with Complainant. Respondent did not swear at or make lewd comments to her while she worked for him. There were no sexual actions or innuendoes; he conducted himself professionally. She typed, did a little book work and a lot of computer work, helped clients with estates, and worked with Respondent on research. She noticed liquor on his breath once or twice on mornings when he came to the office to pick up messages but did not stay to work. Respondent experienced mood swings, which she attributed to work load and to family pressure with his children and trouble with his ex-wife. There was no violence in his speech and she was not fearful. Respondent did not tell her sexual jokes and did not touch her in a way that she considered to be sexual.

61) At the time of hearing, Delores Herrera worked as a legal secretary and was also an insurance agent. She had known Respondent for about two years, having met him through Knight. She had worked for Respondent during February, March, April, and early May 1989. She left in May 1989 when she moved to Arizona. She did not know Complainant. While she worked for Respondent, he made no lewd or sexual comments or sexual overtures toward her, and he did not swear. She worked from 9 a.m. to 4 p.m. with a half hour for lunch, five days a week. She typed, filed, and did computer work. The work atmosphere was pleasant. She never saw him come to work drunk. She never heard him talk of violence and never saw anything to make her think that he was a violent person.

62) Ginger E. Miller was working for Respondent at the time of hearing. She was a resident of Lostine. She had previously worked for Respondent for several months before Complainant's employment, and had quit because of pregnancy.

63) Miller had known Respondent personally for over two years, and knew of him as she grew up in the area. They worked well together. He was very focused about work and tolerated no interference. He was tense and verbal, and occasionally said "shit" or "dammit." He had high expectations and became upset and yelled about Miller's work; he ranted under pressure. He sometimes told Miller "I love you," which she evaluated as non-sexual and not romantic.

64) From about September 1988, Respondent and Shirley Brock, who

worked at the Wallowa County Nursing Home in Enterprise, carried on a close and exclusive social relationship, including dinner and entertainment out or entertaining in each other's homes, on weeknights and weekends. In January 1989, they were together for portions of every evening up to January 18, as well as portions of some weekend days, and at least one weekday when she attended a trial on her day off. She worked from 6 a.m. to 2:30 p.m., five days a week. She did not drink and did not see Respondent drink during this time. In March and April 1989 she saw him use alcohol. She did not hear Respondent swear, except to say "damn" or "shit" and then not excessively. She thought he was a peaceful personality. Respondent told Brock that he knew it was going to be a mistake, but he was going to hire Complainant anyway because the District Attorney had recommended her.

65) Rick Tippett, a lifelong Wallowa County resident, worked in commercial refrigeration at the time of hearing. He was an Enterprise Volunteer Fireman in 1982 or 1983, when he attended the "Firemen's Ball" in Joseph, which Complainant also attended. Several firemen, including Tippett, served drinks or cooked at the party, which ended around 2 a.m. They stayed to clean up and began drinking. Complainant also stayed. She appeared to be "inebriated." No one present was sober. Complainant claimed a man named Peterson had raped her. The Wallowa County Sheriff's Office investigated. No charges were filed. The

liquor for the party had been supplied by the "Gold Room," a bar in Joseph. Following the date of the party, the "Gold Room" barred Complainant.

66) Blake worked at the Gold Room, also known as the "Cowboy Bar," in Joseph in about 1982 or 1983. She confirmed that Complainant had been forbidden to frequent the place as a result of an incident at the "Firemen's Ball." She had seen Complainant in an upset and tearful condition on the day following the party, when Complainant told Blake that she thought she might have been raped.

67) Complainant entered into a diversion agreement in 1981 resulting from a Driving Under the Influence (DUI) citation. She did not recall until the day of the hearing that Respondent was the District Attorney at the time. In June 1983, Complainant was a defendant in a criminal trespass complaint brought by Ronald Schenck, an Enterprise attorney, as proprietor of the "Gold Room." That matter was also resolved by a diversion agreement. These prosecutions were never mentioned during her employment with Respondent.

68) Following her employment with Respondent, Complainant again looked for work; there were no jobs. She applied at various places in Enterprise and Joseph, including the bank, Valley Bronze, and Dr. Solerman's office. The owner of the house she rented in Enterprise allowed her to live rent free until the house sold about May.

69) Complainant didn't seek counseling because she had no funds. Toward the end of January, she called Women in Crisis in Portland. Altogether, she called three helping agencies in Portland, but she had no minor children to make her eligible for service from two of them, and no money for transportation to Portland in the case of the third.

70) Complainant did not want to leave the area and her friends. She did want to obtain employment and avoid further contact with Respondent. Her son did not make enough to support them both. She applied for food stamps. The economic situation had an adverse effect on her emotional state. In April, her children helped her store her things and she lived at the home of a married daughter near Beaverton. She resented and was depressed by having to call on them.

71) Complainant began working on July 3, 1989, for the US Department of Agriculture, Portland, as an executive secretary. Between January and July she worked for temporary agencies, earning \$250 with Kelly Services and \$38 with Personnel Pool. She also worked for Blake occasionally while she was still in Enterprise, but there was no longer a regular position available there. She owed Blake a bill and paid it off with her labor. The bill was not over \$100.

72) Had Complainant remained employed with Respondent between January 20 and July 2, 1989, she would have earned \$3,412.50, based on her earning \$650 per month. Deducting the \$388 she actually earned, Complainant's wage loss for her period

of unemployment after working for Respondent was \$3,024.50.

73) Miller was a reluctant witness. Her demeanor in testifying was hesitant and uncertain. She characterized Respondent's request that she call Complainant as coming from a "personality conflict or problem." She was testy and argumentative when asked to be more specific in describing the problem related to her. She paused for a noticeably long time when asked to relate what Complainant told her about having a hard time handling the job. She stated she had difficulty recalling the exact content of her initial call to Complainant because it was "two years ago." She confirmed that there were two later telephone conversations with Complainant, but did not remember who had initiated those calls, what their content was, or when they were made. Despite this lack of memory, and contrary to other credible testimony, Miller testified that Complainant made no allegations of a sexual nature about Respondent in their telephone conversations. She was very unclear about the dates of her initial employment with Respondent. She quoted Respondent as referring to the "God damn telephone," but then recanted, saying she meant he used only "damn." Despite having told Complainant that she had sought help from her mother due to Respondent's actions, Miller denied that any sexual advances, lewd remarks, or vulgarities were directed toward her by Respondent, and denied that he threatened physical action or that she felt threatened while she worked for him. For these reasons, the Forum accepted as credible only those portions of her testi-

* Initially, Tippett testified in accordance with the questions of Respondent's counsel that the described events occurred in 1985. He subsequently acknowledged that it may have been as early as March 1982.

mony that were not controverted by other credible evidence on the record.

74) Much of Respondent's testimony sought to discredit Complainant's assertions of mistreatment by establishing that Respondent was absent from the office and therefore not in a position to harass or otherwise interact with her, and that outside business hours he was in the company of others or dealing with the aftermath of a house fire at times he was accused of attempting to communicate with her. He asserted that Complainant's December 1988 employment with him was a form of trial or test, to see if she could handle and wanted the job. He paid her at a different rate in December (\$4.00 an hour) as contract labor, and stated that he did not intend that she quit her other job. He said that he coded that check as "cleaning" although she did not do any "mop and bucket" cleaning, but that she certainly wasn't there as a secretary. He could not recall whether she did any legal work that week, but her duties were substantially the same as they were in January. Contrary to Complainant's testimony, he denied using alcohol during the period of her employment, denied swearing or using lewd or suggestive language toward her, denied sleeping in his office, and denied specific incidents which involved the light in his office, his asking whether Complainant had ever been beaten, his expressing a desire to fondle her, and his lewd definition of a Latin term. He denied telephoning her at her home, except possibly to notify her in December of job availability, and denied having any conversation with her son. He did admit a discussion of the assault case

with Complainant, and that breasts were involved. He stated that she asked him the definition of "et ux" and that he gave a correct one. He acknowledged a disagreement with a client in her presence, but described a client and circumstances wholly different from Complainant's version. He testified that he wouldn't have hired her had he recalled the DUI or known about the "Joseph fire department" incident. He said further that had time gone on, he would have terminated her, but that he didn't have that inclination or intent at the time she resigned. On the other hand, he said he "operated a boiler factory" and in explaining why he may have told Complainant he needed her, he said "I needed a secretary, period. Legal secretaries not only don't grow on trees, there aren't any in Wallowa County. It's a small, rural area. I needed help." Despite his own testimony and that of several witnesses that he often used "I love you" in dealing with his secretaries, he did not recall using it toward Complainant. His responses were at times indirect, incomplete, vague or argumentative, without being deliberately evasive. For instance, when asked if he had discussed with Complainant who should turn out the office lights in the evening, he responded: "I'm sure, probably I did or did not. I don't know." As a result, the Forum found Respondent's testimony credible where it was not controverted by other credible evidence on the record.

75) Overall, Complainant was a credible witness. Her account of events was consistent and very detailed. Her emotional upset over the actions she attributed to Respondent

was genuine. She acknowledged that she was initially inaccurate as to her hours and pay. She denied making any prior accusations of sexual misconduct, but she had made such an accusation. However, it was far removed in time, was uncertain and not pursued, and was not in an employment setting. These discrepancies did not detract significantly from the sincerity and credibility of her other testimony.

ULTIMATE FINDINGS OF FACT

1) At times material, Respondent operated a law office in Enterprise, Oregon, and utilized the personal service of one or more employees.

2) Complainant, female, was hired by Respondent to perform secretarial work on December 26, 1988.

3) Between December 26, 1988, and January 18, 1989, Respondent subjected Complainant to comment of a sexual nature about her body, to expressions of love and need for her, to lewd and demeaning comments of a sexual nature, and to intimidating gestures and remarks.

4) Respondent's comments, expressions, gestures, and remarks were intentionally directed toward Complainant because of her sex, and occurred both at the work site during working hours and by telephone to Complainant's home after working hours.

5) Respondent's comments, expressions, gestures, and remarks, wherever occurring, were offensive and unwelcome to Complainant, and created a hostile, offensive, and intimidating work atmosphere.

6) Other than a suspicion not voiced to Complainant that she might

not be communicating messages and appointments, Respondent's only dissatisfaction with her as an employee was that her reactions to him seemed "weird." His dissatisfaction did not cause him to consider discharging her.

7) Respondent's conduct toward Complainant caused her severe mental and emotional distress.

8) Complainant found the working conditions created by Respondent's behavior intolerable, and resigned on January 19, 1989. A reasonable person in the same circumstances would have found the same working conditions intolerable and would have resigned.

9) After resignation, the economic situation had an adverse effect on Complainant's emotional state. She called three helping agencies in Portland, but could not obtain counseling because she had no funds. She did not want to leave the area and her friends. She applied for food stamps. She resented and was depressed by having to call on her children.

10) Complainant diligently sought other employment without success until July 1989, when she began work for a federal agency at a rate above her earnings with Respondent.

11) Complainant lost wages in the amount of \$3,024.50.

CONCLUSIONS OF LAW

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

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

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

4) ORS 659.030 provides, in pertinent part:

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

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

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

OAR 839-07-550 provides, in pertinent part:

"Harassment on the basis of sex is a violation of ORS 659.030. It is discrimination related to or because of an individual's gender. Unwelcome * * * verbal or physical conduct of a sexual nature constitute[s] sexual harassment when such conduct is directed toward an individual because of that individual's gender and:

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

"(2) * * *

"(3) Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an

intimidating, hostile, or offensive working environment."

Respondent directed unwelcome, sexually abusive and intimidating language and gestures toward Complainant because of her gender, creating an intimidating, hostile, and offensive working environment, and thereby committed an unlawful employment practice in violation of ORS 659.030(1)(b).

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

OPINION

Respondent's Legal Defenses

As an affirmative defense to the Specific Charges, Respondent's answer alleged that the portion of those charges – relating to violation of ORS 659.030(1)(a) by the creation of an intolerable, intimidating, and offensive work environment, which resulted in a constructive discharge – failed to state a claim for which relief might be granted. Respondent's answer also asserted as affirmative defenses that the charges failed to state a claim for what Respondent characterized as "punitive damages." Respondent's Case Summary and "Supplemental Memorandum of Law," filed shortly before the hearing, expanded upon the

stated defenses by phrasing the legal issues as follows:

1. Should complaint of constructive discharge, in violation of ORS 659.030(1)(a) be dismissed?
2. Should claim for mental suffering be dismissed?
3. Should complaint for violation of ORS 659.030(1)(b) be dismissed?

In arguing for the Forum's affirmative response to each of these questions, counsel pointed to the following, respectively:

- 1) That the holding in *Bratcher v. Sky Chefs, Inc.*, 308 Or 501, 783 P2d 4 (1989) defined "constructive discharge" in Oregon as including the element that the employer created the intolerable conditions leading to the employee's resignation with the purpose and intent that the employee resign, and that the Agency had failed to plead this element;
- 2) That the emotional distress damages sought by the Agency was a claim for intentional infliction of severe emotional distress and that the Agency failed to allege Respondent's intent to inflict severe emotional distress as required by *Sheets v. Knight*, 308 Or 220, 779 P2d 1000 (1989);
- 3) That it is statutorily an unlawful employment practice for an employer to discriminate on the basis of sex, that discrimination means "a failure to treat all equally," and that because there was but one employee there could be no discrimination in terms and conditions since there were no other employees treated differently.

1. Constructive Discharge

Respondent relies on *Bratcher v. Sky Chefs, Inc.*, 308 Or 501, 783 P2d 4 (1989), wherein the Oregon Supreme Court held that in order to establish a wrongful discharge stemming from unacceptable working conditions, an employee must prove that the employer deliberately created or maintained the working conditions with the intention of forcing the employee to resign, and that the employee in fact did resign because of the working conditions. Respondent asserts that this forum is bound by *Bratcher* under the doctrine of "stare decisis."

There is no doubt that an Oregon Supreme Court decision is binding on the Commissioner "where the very point is again in controversy," as quoted by Respondent's memorandum from *State v. Mellenberger*, 163 Or 233, 95 P2d 709. However, *Bratcher* is not on point. *Bratcher* was not addressed to statutory civil rights theories. *Bratcher* announced a common law tort standard for the wrongful discharge of an at-will employee.

Bratcher answered specific questions about state tort law certified to the court by the US District Court for the District of Oregon. The questions asked were: "(1) Does Oregon recognize the tort of wrongful constructive discharge? (2) If so, what are the elements of the tort?" *Bratcher* at 503. The court found, as it had in *Sheets v. Knight*, 308 Or 220, 779 P2d 1000 (1989), that there was in Oregon a common law tort of wrongful discharge. The court further found that there was not a separate tort of constructive discharge. Rather, developing the reasoning of *Sheets*, *Bratcher*

recognized a tortious discharge where the employee is forced to resign by intolerable working conditions. *Carlson v. Crater Lake Lumber Co.*, 105 Or App 314, 804 P2d 511 (1991). The *Bratcher* court emphasized that the intent of the employer to force the resignation was a necessary element of such a discharge. Thus, whether the employer tells the employee "quit or be fired," or makes the employee's working conditions intolerable with the intent that the employee quit, it is the intent of the employer, combined with the employee's actual resignation, that defines the tort.

Unlawful employment discrimination, as prohibited by Oregon's Fair Employment Practices Act, is not an intentional tort. Interference by the employer with the assertion of rights against unlawful discrimination may be the basis for a common law tort claim as an employment related right of important public interest, which is protected similarly to an employee's fulfillment of important societal obligations. *Nees v. Hocks*, 272 Or 210, 536 P2d 512 (1975) (jury duty); *Walsh v. Consolidated Freightways*, 278 Or 347, 563 P2d 1205 (1977) (OSHA retaliation); *Brown v. Transcon Lines*, 284 Or 597, 588 P2d 1087 (1978) (injured worker retaliation); *Delaney v. Taco Time Int'l*, 297 Or 10, 681 P2d 114 (1984) (fired for resisting societally condemned act); *Holien v. Sears, Roebuck & Co.*, 298 Or 76, 689 P2d 1292 (1984) (protesting sex harassment). But a claim of statutory unlawful employment practices will not always form

the basis for a common law claim. *Kofoed v. Woodard Hotels, Inc.*, 78 Or App 283, 716 P2d 771 (1986) (sex based discharge); *Cross v. Eastlund*, 103 Or App 138, 796 P2d 1214, *rev den* 310 Or 612, 801 P2d 840 (1990) (pregnancy based discharge).

The purpose of the unlawful employment practices law is to eliminate discrimination, and not merely through the compensation of its victims. ORS 659.010(2), for example, empowers the Commissioner "to eliminate the effects" of discrimination and to order action or restraint furthering the purposes of the statute. The Commissioner may act not only in response to employment discrimination, she is empowered to prevent its occurrence and to protect other similarly situated employees. *Id.*

The subjective intent standard of *Bratcher* is entirely reasonable when applied to an intentional tort, but it is wholly unsuited to the employment discrimination context. Applied to unlawful employment practices, the *Bratcher* standard would produce results totally at odds with the purpose of our civil rights laws.

The best example of such a result is undoubtedly that of sexual harassment, and the facts of the present case are illustrative. Respondent herein denied any intention to force Complainant to quit her job, and the Forum has accepted that as fact. Indeed, in the typical sexual harassment case, whether of the *quid pro quo* or hostile environment variety, the harasser's purpose and intent is not to force the employee to quit. To the contrary, the

* For a discussion of the elements of hostile or offensive environment sexual harassment, see *Henson v. City of Dundee*, 682 F2d 897, 29 FEP 787 (11th Cir 1982), quoted extensively with apparent approval in *Holien, supra*.

employer's purpose in these cases is generally to exact gratification from the employee's continued presence in the workplace, whether in the form of sexual favors or the domination or degradation of others on the basis of sex. For this Forum to apply the *Bratcher* test in these circumstances would produce a result totally inconsistent with the remedial purpose of Oregon's civil rights statutes, and totally inconsistent with the Commissioner's statutory charge. That result would be to impose on employees the Hobson's choice of tolerating such conditions or of relinquishing their employment without the possibility of recourse. The Legislative Assembly could not have intended to authorize both injunctive and monetary relief for prohibited discrimination under ORS 659.030(1)(b), except when that discrimination becomes so intolerable that any reasonable individual would feel compelled to remove herself (or himself) from it. To the contrary, an involuntary resignation based on intolerable working

conditions created by an employer's unlawful employment practice is one of the effects of that unlawful practice, and the Commissioner is empowered to eliminate it. ORS 659.010(2), 659.060(3); OAR 839-03-090.

While most obvious in a sex harassment case, the *Bratcher* test is unsuited to harassment cases generally; e.g., racial or religious or national origin harassment. These cases also often involve an element of perverse gratification in the degradation or domination of employees, which precludes proof of an intent to force a voluntary resignation.

Even in straightforward cases of different treatment on some prohibited basis, the object of the discriminating employer is usually not to force a resignation; the object is usually some other benefit, economic or otherwise, that is realized by means of the discrimination. The choice of submission or resignation without remedy is equally inappropriate to these cases.

* Prior appellate cases establish that the Commissioner may remedy both unlawfully discriminatory treatment and unlawfully discriminatory discharge, including compensatory damages, *School Dist. No. 1 v. Nilsen*, 271 Or 461, 534 P2d 1135 (1975); *Fred Meyer, Inc. v. Bureau of Labor*, 39 Or App 253, 592 P2d 564 (1979) *rev den* 287 Or 129 (1979), and that this authority of the Commissioner to remedy unlawful employment practices was unaffected by the 1977 enactment of ORS 659.121, allowing a "private right of action," since the object of that statute was to supplement, and not diminish, the existing administrative remedy. *Holien v. Sears, Roebuck & Co.*, 298 Or 76, 689 P2d 1292 (1984). See ORS 659.121, about which the *Holien* court said, concerning its enactment in 1977:

"In essence, the legislature, by its final action, said to aggrieved employees that under state statute:

"(1) You may continue to obtain such relief, including general damages, as is provided under administrative remedies.

"(2) You may obtain equitable relief as we provide by this statute.

"(3) You are deprived of a jury trial under the statute.

"(4) You may not recover general or punitive damages under the statute."

The Forum is aware of the language of the Court of Appeals in *Bell v. First Interstate Bank*, 103 Or App 165, 796 P2d 1226, wherein the court appears to apply *Bratcher* to ORS 659.030(1)(a). Because that court's *de novo* review found no unlawfully discriminatory policies or treatment, deliberate or otherwise, the use of *Bratcher* appears to be dicta. That this may be the case appears supported by *Swanson v. Eagle Crest Partners, Ltd.*, 105 Or App 506, 805 P2d 727 (1991), decided six months later, wherein the plaintiff was awarded back pay as a portion of her statutory remedy under ORS 659.121(1) for violation of ORS 659.030(1) by her supervisor who sexually harassed her.

This forum has consistently held, with some apparent approval, that the test for constructive discharge is an objective one based on intolerable working conditions that leave no reasonable alternative to resignation, rather than a subjective one involving a finding of the employer's intent to cause the employee to quit. *In the Matter of West Coast Truck Lines, Inc.*, 2 BOLI 192 (1981), *aff'd without opinion*, *West Coast Truck Lines, Inc. v. Bureau of Labor and Industries*, 63 Or App 383, 665 P2d 882 (1983); *In the Matter of Rich Manufacturing Company*, 3 BOLI 137 (1982), *aff'd without opinion*, *Rich Mfg. Co. v. Bureau of Labor and Industries*, 64 Or App 855, 669 P2d 843 (1983); *In the Matter of Tim's Top Shop*, 6 BOLI 166 (1987); *In the Matter of Lee's Cafe*, 8 BOLI 1 (1989); *In the Matter of City of Umatilla*, 9 BOLI 91 (1990); *In the Matter of Allied Computerized Credit & Collections, Inc.*, 9 BOLI 206 (1991).

The Commissioner's standard was adopted from *Young v. Southwestern Savings and Loan Association*, 509 F2d 140, 10 FEP 522 (5th Cir 1975) in *West Coast Truck Lines, supra*, where the Commissioner said:

"To find a constructive discharge, this forum must be satisfied that 'working conditions . . . so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign' caused the employee to resign and that the conditions were imposed by the deliberate, or intentional, actions or policies of the employer. [citations omitted] * * * [I]f there has been a constructive discharge, an employer is liable for any unlawful conduct involved therein as if the employer had formally discharged the employee. *Young, supra*, 509 F2d at 144."

The issue of the objective versus subjective standard was examined in *Tim's Top Shop, supra*, where the Commissioner stated:

"'deliberately' does not mean that the employer's imposition of 'intolerable' working conditions need be done with the intention of either forcing the employee to resign or relieving [the employer] of that employee. The term 'deliberately' refers to the imposition of the working conditions; that is, it means the working conditions were imposed by the deliberate or intentional actions of the employer." *Ibid.* at 38. (Emphasis original.)

ORS 659.010 to 659.990 (Oregon's Fair Employment Practices Act) is the state analog to a federal statute,

Title VII of the Civil Rights Act of 1964, 42 USC sec 2000e *et seq* (Title VII), *Sheets, supra*; *City of Portland v. Bureau of Labor and Industries*, 64 Or App 341, 668 P2d 433, *aff'd in part, rev'd in part* 298 Or 104, 690 P2d 475 (1984). The Commissioner has repeatedly held that while federal opinions are not binding on this Forum, the Oregon Fair Employment Practices Act and Title VII further the same policies, and the Commissioner has used federal decisions under Title VII as a framework for resolution of similar matters. *In the Matter of Pioneer Building Specialties Co.*, 3 BOLI 123 (1982), *aff'd without opinion*, *Pioneer Building Specialties Co. v. Bureau of Labor and Industries*, 63 Or App 871, 667 P2d 583 (1983); *In the Matter of Union Pacific Railroad Company*, 2 BOLI 234 (1982); *In the Matter of C & V, Inc.*, 3 BOLI 152 (1982); *In the Matter of Sapp's Realty, Inc.*, 4 BOLI 232 (1985); *In the Matter of United Grocers, Inc.*, 7 BOLI 1 (1987); *In the Matter of Albertson's, Inc.*, 7 BOLI 227 (1988). The *Holien* court discussed the similarities in the two statutory schemes, 298 Or at 86. It is apparent that Oregon courts find federal precedent under Title VII persuasive in affording interpretive guidance for ORS 659.010, *et seq.* *Hillesland v. Paccar, Inc.*, 80 Or App 286, 722 P2d 1239 (1986); *Henderson v. Jantzen, Inc.*, 79 Or App 654, 719 P2d 1322 (1986); *Holien, supra*; *Payne*

v. American-Strevell, Inc., 64 Or App 339, 668 P2d 491 (1983); *School District No. 1 v. Nilsen*, 271 Or 461, 534 P2d 1135 (1975).

The Ninth Circuit, in interpreting Title VII, has evaluated constructive discharge allegations under the objective standard of resignation as a reasonable reaction to intolerable conditions. "The Equal Employment Opportunity Commission, the administrative agency charged with Title VII enforcement, requires that a reasonable person in the aggrieved employee's position would find the working conditions intolerable, that the conditions were made intolerable by the employer's violation of Title VII as to the aggrieved employee, and that the employee resigned involuntarily as a result. *Schlei and Grossman, Employment Discrimination Law, Five-Year Cumulative Supplement* 267 (2nd ed 1989).

The Forum therefore does not consider *Bratcher* controlling on the issue of constructive discharge in employment discrimination cases, and, further, considers its application in later cases as limited to their facts.

2. Emotional distress damages

Many of the cases cited in rejection of Respondent's first issue apply to rejection of this argument. *See Holien, supra*; *School District No. 1, supra*; *Fred Meyer, Inc., supra*. This forum

* "The federal [counterpart] to ORS 659.030 * * * [is] Title VII * * *. Because Oregon's civil rights laws are patterned on federal law, federal precedent is helpful to identify discriminatory employment practices." Newman, J., concurring and dissenting, 64 Or App at 344.

** *Satterwhite v. Smith*, 744 F2d 1380, 36 FEP 148 (9th Cir 1984); *Noland v. Cleland*, 686 F2d 806, 29 FEP 1732 (9th Cir 1982); *Sutton v. Atlantic Richfield Co.*, 646 F2d 407, 25 FEP 1619 (9th Cir 1981); *Hoagney v. University of Washington*, 642 F2d 1157, 26 FEP 438 (9th Cir 1981).

has authority to award a "make whole" remedy, including damages for emotional distress flowing from an unlawful employment practice. Such damages are designed to "eliminate the effects of any unlawful practice found." ORS 659.010(2)(a).

3. No Different Treatment Of Single Employee

Respondent's position is without merit. Sex harassment is clearly sex discrimination, *Holien, supra*, quoting *Henson v. City of Dundee, supra*, and is "because of * * * sex * * *" ORS 659.030 (1)(b), OAR 839-07-550.

4. Respondent's Factual Defenses

The Hearings Referee allowed Respondent to amend his answer to state certain further defenses. Included among Respondent's defenses was the question of whether Complainant's allegations were unjustified interpretations of events based on the sexual nature of cases dealt with in Respondent's law office. The Forum is not persuaded that Complainant misinterpreted Respondent's statements or actions.

Another question was whether Complainant's resignation reflected her recognition of her lack of skills and background necessary to perform the job. There was no persuasive evidence that Complainant lacked the secretarial skills needed, or that her lack of law office experience adversely affected her performance.

The only evidence regarding whether Complainant was predisposed to perceive sexual acts where none occurred was an isolated instance some seven or eight years prior to hearing which may or may not have

actually occurred, and which was too remote in time to be persuasive to the Forum as to such a defense. The question of whether Complainant's motive for this proceeding arose from Respondent's earlier prosecution of her for driving under the influence of intoxicants was similarly remote, and was not recalled by either person prior to hearing. Complainant's alleged propensity for drinking and for claiming sexual improprieties, together with her having been barred from a local drinking establishment, attempted proof of which all dated back to 1982 or 1983, had nothing to do with what happened in December 1988 and January 1989.

None of the persons who testified actually witnessed Respondent's interaction with Complainant. Even Complainant's son dealt with Respondent only by telephone in regard to her, and knew only what she had said as to her reasons for upset. Those who had worked for Respondent, or who had been around him socially, with the exception of professional acquaintances, painted a different picture than did Complainant. But only Brock's association spanned the time of Complainant's employment, and Brock's association was not oriented toward Respondent's business day. The Forum was persuaded that Complainant's allegations, supported as they were by consistent contemporaneous accounts to others, preponderated over Respondent's sometimes vague and incomplete denials and attempts to place himself elsewhere.

Complainant's emotional distress during employment was severe. It was less intense, but prolonged, due to the consequences of the discharge. The

anxiety and uncertainty connected with the loss of employment income, together with the specter and uncertainties of unemployment when attributable to an unlawful practice, are compensable. *In the Matter of German Auto Parts, Inc.*, 9 BOLI 110 (1990); *In the Matter of Spear Beverage Company*, 2 BOLI 240 (1982); *In the Matter of the City of Portland*, 2 BOLI 41 (1980). All of her mental distress was attributable to Respondent's unlawful employment practice. The Forum is awarding \$6,000 to compensate Complainant for the mental suffering imposed.

ORDER

NOW, THEREFORE, as authorized by ORS 659.060(3) and 659.010(2), and in order to eliminate the effects of the unlawful practice found, Respondent, WILLIAM R. KIRBY is hereby ordered to and has:

Delivered to the Business Office of the Portland office of the Bureau of Labor and Industries a certified check, payable to the Bureau of Labor and Industries in trust for ELAINE SANCHEZ HENDRICKS, in the amount of:

a) THREE THOUSAND TWENTY FOUR DOLLARS AND FIFTY CENTS (\$3,024.50), representing wages Complainant lost as a result of Respondent's unlawful practice found herein; PLUS,

b) FIVE HUNDRED FIFTY NINE DOLLARS AND NINETEEN CENTS (\$559.19), representing interest on the lost wages at the annual rate of nine percent accrued between June 30, 1989, and June 18, 1991; PLUS,

c) SIX THOUSAND DOLLARS (\$6,000), representing compensatory

damages for the mental distress Complainant suffered as a result of Respondent's unlawful practice found herein.

AND Respondent WILLIAM R. KIRBY is further ordered to cease and desist from discriminating against any female employee contrary to ORS 659.030.

**In the Matter of
William E. Colson, dba
SIERRA VISTA CARE CENTER,
Respondent.**

Case Number 02-90
Amended Final Order of
the Commissioner
Mary Wendy Roberts
Issued August 6, 1991.

SYNOPSIS

Following Complainant's on-the-job injury, Respondent discharged her in retaliation for her filing a workers' compensation claim. The Commissioner found that Respondent's reasons for the discharge (poor performance) were pretextual. The Commissioner denied Respondent's motion to dismiss, in which Respondent contended that the notice of hearing was his first notice of the claim, because, following Complainant's filing of her administrative complaint with the Agency, the Agency notified the Care Center of the

complaint, and dealt with Respondent's agents; this gave Respondent adequate notice of the claim and the investigation. The Commissioner awarded Complainant \$1,600 in lost wages and \$2,000 for mental distress. ORS 659.010(12) and (13); 659.095(1) and (2); 659.410(1); OAR 839-05-010; 839-06-105(2) and (4)(b); 839-06-120.

The above-entitled matter came on regularly for hearing before John W. Burgess, designated as Hearings Referee by Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon (the Agency). The hearing was held on December 12, 13, and 14, 1989, and on January 5, 1990, in the State Office Building, 1400 SW 5th Avenue, Portland, Oregon. The Agency was represented by Linda Lohr, Case Presenter and employee of the Agency. Ruth L. Swetland (Complainant) was present throughout the hearing. William E. Colson, dba Sierra Vista Care Center (Respondent), was represented by Mark A. Loomis and Lee A. Knotnerus, Attorneys at Law.

The Agency called the following witnesses: Robert Browning, Investigative Supervisor with the Civil Rights Division of the Agency (by telephone); Jeanette Counterman, a former employee of Respondent; Victoria Pratt, Senior Investigator with the Civil Rights Division of the Agency; and Complainant.

Respondent called the following witnesses: Mr. Colson (by telephone); Susan Fenderson, a former employee of Respondent (by telephone); Betty Hefler, Certified Nurses Aide employed by Respondent; Joan Marti,

Restorative Aide employed by Respondent; and Kathleen Pearce, bookkeeper employed by Respondent.

On June 21, 1990, the Commissioner of the Bureau of Labor and Industries issued Rulings, Findings of Fact, Ultimate Findings of Fact, Conclusions of Law, Opinion, and Order in this matter. Thereafter, Respondent herein petitioned the Court of Appeals for judicial review of the Commissioner's June 21, 1990, decision. Subsequent to Respondent's filing of the petition for review and prior to the date set for hearing thereof, the Commissioner filed with the Court of Appeals a withdrawal of the original decision in this matter for the purpose of reconsideration pursuant to ORS 183.482(6), and was granted a period of time within which to affirm, modify, or reverse said decision. It was the Commissioner's intent to more specifically address the issue of Respondent's liability.

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

RULINGS ON MOTIONS AND OBJECTIONS

Rulings were reserved on motions and objections made at the hearing until issuance of this Order.

A. Ruling On Motion To Dismiss (Second Affirmative Defense)

At the commencement of the hearing, Respondent moved to dismiss the Amended Specific Charges on the ground that the Agency lacked

authority to act because it had issued the Administrative Determination to Sierra Vista Care Center as respondent, rather than to Mr. Colson. Specifically, Respondent contends that because Sierra Vista Care Center was not the "appropriate" respondent to which to direct the Administrative Determination, the Determination was not issued within one year after the filing of the complaint as required by statute.

In aid of a ruling on the motion, the Forum supplements the Findings of Fact - Procedural (see pages 285-86, *infra*) as follows:

a) Following the filing of the complaint, the Agency sent a "notification letter" together with a copy of the complaint to Loretta Androes, Administrator of Sierra Vista Care Center. The letter notified Ms. Androes that Complainant had filed the complaint, and requested that she submit a written response to the complaint.

b) The Agency's practice is to request a report on the status of a respondent named in a complaint from the State Corporation Division within 30 days after a complaint is filed. The report received in this case identified Sierra Vista Care Center as the assumed business name of William E. Colson, naming him as registrant and as the authorized representative.

c) About December 7, 1987, a letter to the Agency in response to the allegations in the complaint was submitted by Susan Fenderson as Director of Nursing at Sierra Vista. Ms. Fenderson did not object to the complaint being directed to Sierra Vista, either in her letter or in her subsequent dealings with Agency personnel.

d) In June 1988 the Agency investigator attempted to deal with Ms. Fenderson, who referred her to Ms. Van Gent, the new Administrator. Ms. Van Gent did not direct the investigator to Mr. Colson or any other person in his business organization. She made Sierra Vista's records available and discussed settlement of the complaint with the investigator. The matter was not settled, but Ms. Van Gent did not indicate that she had no authority to settle. The Agency relied on the apparent authority of Sierra Vista personnel.

e) Mr. Colson testified that he had not given Ms. Van Gent express authority to receive documents in legal matters, and that when she received the Determination, she should have forwarded it on to his Regional Manager for resolution or forwarding to Mr. Colson. Mr. Colson first became aware of the Administrative Determination during the summer of 1989 when the Agency issued its Specific Charges naming Sierra Vista as respondent.

ORS 659.095(1) provides that:

"* * * Within one year following the filing of the complaint, the commissioner may issue, or cause to be issued, an administrative determination. If no administrative determination has been issued at the end of the one-year period, the commissioner has no further authority to continue proceedings to resolve the complaint * * *"

An "administrative determination" is defined as "a written notice to the respondent * * * which includes * * * [t]he name of the respondent * * *". ORS 659.095(2). Finding of Fact 2 of the Administrative Determination clearly

satisfies this statutory definitional requirement that the name of the respondent be included. (See Finding of Fact – Procedural 3.)

"Sierra Vista Care Center" is an assumed business name, and is the entity filed against, or a "respondent." ORS 659.010(13). Sierra Vista was the Complainant's place of employment, was the entity named in the administrative complaint, and was the entity with which the Agency dealt throughout its initial investigation. During that investigation, the Agency had communicated with Sierra Vista through at least three persons who acted for that entity with apparent authority to do so. They were the original administrator, her successor, and the director of nursing. All were Mr. Colson's agents and none had objected on the ground that the Agency's actions were misdirected. From the standpoint of "notice," the Agency's directing of the Determination to Sierra Vista was notice to Respondent of the Agency's determination regarding the complaint. The Determination was "issued" within the meaning of ORS 659.095 when it was mailed to Sierra Vista.

It is the Specific Charges, and not the Administrative Determination or the administrative complaint, which frame the issues for the contested case hearing. The Charges allege the ultimate violations charged and the persons responsible therefore, and these need only be reasonably related to the complaint. *In the Matter of Sapp's Realty, Inc.*, 4 BOLI 232 (1985), citing *School District No. 1 v. Nilsen*, 271 Or 461, 534 P2d 1135 (1975). The timely issuance of the Administrative

Determination allows the Agency (Commissioner) to retain authority beyond one year from the filing of the administrative complaint, and to further attempt to resolve the complaint. So long as the Administrative Determination is issued within one year, it is the Specific Charges that articulate the allegations to be adjudicated through the contested case hearing process, and it is the filing of the Specific Charges, not the issuance of an Administrative Determination, which triggers the contested case hearing. ORS 659.050, 659.060, and 659.095; *Sapp's, supra*.

Prior to hearing, the Agency requested, and was granted, permission to name Mr. Colson, dba Sierra Vista, as the Respondent in the Amended Specific Charges. The request was unopposed (Finding of Fact – Procedural 6). Respondent has not claimed or shown any prejudice due to the time he learned of the Determination or to the time he was named as Respondent in the Amended Specific Charges. It is improbable that he could do so, since it was the failure of his own agents to advise him of the complaint and subsequent investigation that caused his late participation. It would be contrary to the overall statutory scheme and to good sense to allow such an accidental or intentional non-disclosure to insulate Respondent.

Respondent's motion to dismiss is denied and Respondent's second affirmative defense is not proved.

B. Ruling on Motion for Sanctions

Respondent seeks to have an inference drawn that Complainant failed to mitigate her damages because she did not produce certain documents in response to a subpoena duces tecum.

The documents related to her looking for employment after her termination. Because of the reasoning in support of this Order, Respondent's motion for sanctions is denied.

C. Ruling on Admission of Deposition as Evidence

During the hearing, Respondent's counsel used Complainant's prior deposition to point out alleged inconsistencies between her testimony at the hearing and in her deposition. The deposition was admitted as an exhibit "for impeachment purposes." Counsel also offered the deposition as substantive evidence. The deposition is so admitted. However, because Complainant's testimony in her deposition is confusing at times, little weight is given to that testimony in this Order.

D. Rulings on Objections

Respondent's counsel objected to evidence related to Complainant's return to work for "light duty" after her injury. The objection is denied because the evidence has some relevance, although no weight is given to the evidence in this Order.

The Case Presenter for the Agency objected to Ms. Heffer's testimony about statements made to her by Complainant. The objection is overruled because the evidence has some relevance, although no weight is given to the testimony in this Order.

FINDING OF FACTS – PROCEDURAL

1) On October 22, 1987, the Complainant filed a verified complaint with the Civil Rights Division of the Agency alleging that she was the victim of an unlawful employment practice on the

part of her employer, Sierra Vista Care Center.

2) On September 12, 1988, after investigation and review, the Agency issued a Notice of Administrative Determination. The Administrative Determination, which found that there was substantial evidence of an unlawful employment practice under ORS 659.410, was sent to Sierra Vista Care Center.

3) Finding of Fact 2 of the Administrative Determination stated:

"Respondent [Sierra Vista Care Center] is an assumed business name whose principal is William E. Colson, doing business as a nursing home."

4) Efforts to resolve the case by conciliation failed.

5) On August 7, 1989, Specific Charges were sent to Sierra Vista by certified mail. A copy was also sent to Mr. Colson, as the authorized representative for Sierra Vista Care Center, by certified mail. The respective mailings were received by Sierra Vista on August 9, 1989, and by Mr. Colson on August 16, 1989. In the Specific Charges, the Agency alleged a violation of ORS 659.410 by Sierra Vista Care Center, Respondent.

6) On August 24, 1989, Sierra Vista filed a timely answer in which it denied that it had violated ORS 659.410.

7) On October 30, 1989, the Agency moved for leave to amend the Specific Charges, submitting a proposed amendment naming William E. Colson, dba Sierra Vista Care Center, as Respondent. The motion was unopposed and was granted on

November 20, 1989. The Amended Specific Charges were thereafter served on Mr. Colson and his counsel, as well as on Sierra Vista.

8) The amended charges alleged that Respondent's termination of Complainant's employment violated ORS 659.410. Respondent relied upon the answer previously filed on behalf of Sierra Vista.

9) The Agency also served on Respondent the following: a) a Notice of Contested Case Rights and Procedures containing the information required by ORS 183.413; b) a complete copy of the Agency's administrative rules regarding the contested case process; and c) a separate copy of the specific administrative rule regarding responsive pleadings.

10) A pre-hearing conference was held on December 7, 1989, and the Agency and Respondent each filed a Summary of the Case pursuant to OAR 839-30-071.

11) At the commencement of the hearing, the Hearings Referee advised the Agency and Respondent of the issues and the matters to be proved pursuant to ORS 183.415(7).

12) On March 19, 1990, the Hearings Unit of the Bureau of Labor and Industries mailed copies of the Proposed Order in this matter to all persons listed on the certificate of mailing. Pursuant to OAR 839-30-165, the Agency and Respondent had 10 days to file exceptions to the Proposed Order. On March 29, 1990, the Hearings Unit received Respondent's exceptions, which are addressed throughout this Final Order.

AMENDED FINDINGS OF FACT – THE MERITS

1) Complainant worked for about three months at Gladstone Nursing Home. Complainant worked as a certified nurse's aide ("CNA"). Complainant resigned either in March or April 1986, when she understood that she had the choice to resign or be terminated.

2) On May 10, 1986, Complainant then went to work at Sierra Vista as a CNA. Respondent employed more than six persons at the nursing home. At the time, Complainant was 67 or 68 years old. At the beginning of her employment, Complainant worked about four hours a day. She gradually increased the number of hours that she worked until August 1986, when she began working full-time on the swing shift (2:30 p.m. to 10:30 p.m.). Complainant was paid at the rate of \$4.00 per hour.

3) During the time that Complainant worked at Sierra Vista, there were often times when there was an insufficient number of CNAs to provide services. The CNAs were very busy, and the work was very demanding.

4) Sierra Vista's policy was to evaluate new employees after the first three months, but in practice the first evaluation was not made until more than three months after hire because the supervising or charge nurse was so busy. On October 8, 1986, after about five months work, Complainant received her first and only written evaluation.

5) Complainant's evaluation was made by charge nurse Vera Waldron. The evaluation was made on a form

that listed various "traits, abilities and characteristics." The form included a rating scale for each, which ranged, in effect, from unsatisfactory to excellent. In general, Complainant's performance was found to be satisfactory.

6) On the evaluation form was a section for "comments", and the charge nurse wrote in two criticisms of Complainant's performance: that she did not complete all of her assigned tasks and that she was untidy. Complainant disagreed with the criticisms. The evaluation did not identify the times when her tasks were found to be incomplete. When she worked less than full time, Complainant was unable to complete all of her tasks because she had insufficient time. In fact, it was not uncommon for other CNAs, even full-time ones, not to complete their tasks because they were so busy.

7) During the time that Complainant worked for Sierra Vista, the nursing home had adopted written personnel policies. The personnel policies provided for disciplinary warning notices when an employee violated any of Sierra Vista's rules. An employee who received three warning notices was subject to discharge upon receipt of the third notice. At the time, Ms. Fenderson, the Director of Nursing with authority to terminate employees, followed the policy of three warnings before termination.

8) About December 30, 1986, Ms. Fenderson gave Complainant a memorandum in which she criticized Complainant's lifting of two patients. During each of the liftings, Complainant and the other CNA who assisted her had to ease the patient to the floor.

The patient was not injured in either case.

9) Complainant was trained in the proper lifting of patients, as were the other CNAs who worked at Sierra Vista. Strength is not as important as technique. The lifting of a patient is used to move a patient (e.g., from the bed to a wheelchair). Even when an acceptable technique is followed, it may be necessary and appropriate to ease a patient to the floor. At times, a patient may resist being moved, and may hit, kick, or grab the CNA.

10) In the memorandum, Ms. Fenderson directed Complainant to attend a Safety Committee meeting on January 9, 1987. The Safety Committee was composed of employees from each of the staff positions, and the committee met monthly to review safety matters as well as the actions of employees. Complainant did not attend the meeting of the Safety Committee.

11) Complainant testified that she did attend the meeting. However, her testimony about the meeting was in general terms, and Ms. Fenderson denied that Complainant was there. Complainant's testimony is not credible on this point. In any event, between January 9 and March 17, 1987, Ms. Fenderson did not criticize Complainant for not attending, and did not require Complainant to attend another meeting of the Safety Committee.

12) On March 17, 1987, Complainant injured her back while she and Betty Hefler (Bell) were lifting a patient, Geraldine Gilchrist. Complainant and Ms. Hefler moved Ms. Gilchrist from her wheelchair to her bed without injury to the patient. Complainant's back

injury was not apparent at first, and she finished her shift. However, about 2 a.m. or 3 a.m. Complainant began to suffer pain in her back, and she decided to go to the emergency room of the hospital. Complainant was treated, and the doctor gave her a note that stated that she should perform only "light duty." Complainant gave the note to the charge nurse.

13) On March 18, Complainant went to work, and obtained a claim form from a representative of Respondent, which form was furnished by the insurance company that provided workers' compensation coverage to Respondent. Either that same day or within the next few days, Complainant described the way in which she was injured to a representative of Respondent, who typed the information on the form. Ms. Androes, the administrator, signed the claim form on March 23. A representative of Respondent then submitted the form to the insurance company, and Complainant's claim was paid.

14) It was Sierra Vista's practice to require that the involved employee fill out an incident report any time either a patient or an employee was injured. On March 19, Complainant prepared an incident report in which she described the way in which she was injured while lifting Ms. Gilchrist with Betty Hefler. In the incident report, Complainant stated that:

"Betty Bell and I (Ruth) lifted Mrs. Gilchrist into bed & I felt a slight pull on left side but no great pain until I relaxed at home - about 2 AM when I had to seek help at the Hospital. Betty is wearing a back brace & is on light duty & we

should have gotten someone else to help me but just thought we could do it."

On the line "name of physician," she listed "Dr. John Hazel/Dr. David Lindquist, Hosp."

15) Complainant's statement about Betty Bell (Hefler) as to physical limitation is incorrect. Although Betty Hefler did wear a back brace at the time, the brace enabled her to lift patients, and she was capable of lifting patients. She was not, in fact, on light duty.

16) Complainant gave the incident report to the charge nurse, who in turn gave it to Ms. Fenderson, who acknowledged her receipt on March 19 by signing her initials. Thereafter, Ms. Fenderson gave the report to Ms. Androes, who maintained the reports.

17) After receipt of the incident report, between March 19 and March 23, Ms. Fenderson prepared a second memorandum, dated March 20, 1987, in which she made two criticisms of Complainant. The first criticism was that Complainant walked on a newly waxed floor, which was "a major violation of safety rules." Complainant denied that she had walked on the waxed floor. The second criticism was that Complainant "again violated safety rules" in lifting Ms. Gilchrist because Complainant "knew [she] should have gotten help." Ms. Fenderson did not also criticize Ms. Hefler in lifting Ms. Gilchrist, although she acknowledged that there was a basis for criticism. In the memorandum, Ms. Fenderson advised Complainant that "this is your second warning." However, Ms. Fenderson did not give the memorandum to Complainant until March 24.

18) On March 22, Ms. Fenderson directed the charge nurse to prepare a form, entitled "Disciplinary Warning Notice". In the notice, the charge nurse criticized Complainant for having made a request for a change of assignment on that date and in the past. In addition, the charge nurse criticized Complainant for other instances of past behavior (e.g., "sporadic attendance," "not cooperating with her co-workers" and being "argumentative"). The dates of Complainant's past behavior were not stated, and the notice represents the first written criticism of such behavior. By contrast, in her evaluation, she was described as "Warm; friendly; sociable" and her attendance was considered satisfactory.

19) The notice of March 22 contains three boxes under "OFFENSES." The boxes are labeled "First Warning", "Second Warning" and "Final Warning". Each of the boxes is checked, and the words "Verbal warning" are written below the first two boxes. Complainant was never given the notice. The first time that she saw the notice was at her deposition, when one of Respondent's attorneys showed it to her.

20) On March 23, Ms. Fenderson met with Ms. Androes, the administrator, and talked about the termination of Complainant. By that date, Ms. Fenderson had decided to terminate Complainant. On that date, Ms. Fenderson prepared a third memorandum, in which she made three criticisms of Complainant. Her first criticism is based upon Complainant's unidentified repeated ("often") requests for changes in assignment. Her second criticism is about Complainant's past

behavior of calling in ill to avoid working with certain other CNAs. Her third criticism is also about Complainant's past behavior ("complaints from your co-workers"). The criticisms are the first written criticisms of the behaviors described.

21) On March 24, when Complainant was to begin her shift, Ms. Fenderson met with her. Ms. Fenderson told Complainant that her employment was terminated effective at that time, and gave Complainant the two memoranda dated March 20 and March 23, respectively. Neither memorandum refers to termination, and Ms. Fenderson did not give Complainant a written statement of the reasons for termination, although it was her practice to do so. Sierra Vista did furnish a statement of the reasons for Complainant's termination to the agent that represented Sierra Vista before the State Employment Division with regard to Complainant's claim for unemployment compensation. Sierra Vista gave as reasons that she would not work where assigned, that she failed to attend the Safety Committee meeting, and that she violated a safety rule in lifting Ms. Gilchrist. Ms. Fenderson's testimony regarding her knowledge of Complainant's injured worker claim was inconsistent. She stated that she was not aware of it at the time of termination, although she also testified she was aware of Complainant's back injury through the March 19 incident report. She testified that a worker's compensation claim wasn't filed until the worker goes to a doctor, but later, when confronted with the information on the incident report that Complainant had sought medical attention, stated

that even if the worker went to a doctor, it didn't mean that a claim would be made. She acknowledged that she may have advised Complainant to file a claim. She stated that she discussed Complainant's discharge with the administrator on March 23, four days after initialing the incident report. To the extent that Ms. Fenderson's testimony indicates that there were only performance-related reasons for Complainant's termination, her testimony is not credible, as explained in the Opinion portion of this Final Order, which explanation is incorporated herein.

22) Within one week, Complainant filed for unemployment compensation. Respondent contested her claim. During April 1987, the Employment Division determined that Complainant was entitled to compensation. The rate of her compensation was \$29 each week, and she received three weeks of compensation.

23) During the time that resolution of Complainant's claim was pending before the Employment Division, the Division did not direct her to potential employers. During about the next seven weeks after resolution, Complainant made application for a CNA position at two nursing homes and a foster care home (Mt. View Nursing Home, Golden Age Nursing Home, and Mt. View foster care home). In the beginning of June 1987, the Mt. View Nursing Home offered her full-time work as a CNA at the same rate of pay that she had received from Respondent. Complainant did not accept the position, having decided that she no longer wanted to work in a nursing home because of her experiences at Sierra Vista and at Gladstone Nursing

Home. Complainant determined that she wanted to work in a private home in which she could care for a member of the family.

24) A representative of the Employment Division informed her that work in a private home was virtually never listed with the Employment Division, and that she probably would have to find such work on her own. Because she did not believe that the Employment Division would assist her in finding a position in a private home and because she did not believe that for \$29 a week it was worth her keeping an open file with the Employment Division, she stopped going to the Employment Division.

25) At about the same time, the beginning of June 1987, Complainant obtained work in a private home caring for an elderly woman. She worked for about two weeks for six hours each day at \$5 per hour. Thereafter, she made little effort to find work. During the remainder of 1987, she went to three or four other employers at most, but left no applications. During 1988, she made no applications for employment.

26) After Respondent terminated Complainant's employment, she became depressed. Respondent's action made her aware that she was a 69-year old woman and that she might not find another position. She lost her self confidence.

27) As time passed, Complainant's condition worsened. In late spring or early summer 1988, she began going to a counselor for assistance. As soon as she started to visit the counselor, her mental condition began to improve. Her counselor recommended that she

return to work as a way to improve her mental condition.

28) In August 1988, her counselor told her about an opportunity to care for an elderly woman in a private home. Complainant secured the position. Once she began working again, her mental condition improved to the extent that she did not feel the need to return to her counselor, and she did not return.

ULTIMATE FINDINGS OF FACT

1) At all times material, Respondent William E. Colson, dba Sierra Vista Care Center, employed more than six persons at said facility.

2) Complainant was a worker employed by Respondent.

3) On March 17, 1987, Complainant injured her back while performing work for Respondent. On March 18, she received medical treatment for her injury. On March 19, she notified representatives of Respondent of her injury. She applied for and received benefits under Oregon's workers' compensation law.

4) On March 24, 1987, a representative of Respondent discharged Complainant from Sierra Vista because she had reported an on-the-job injury.

5) Complainant lost wages of \$1600 (\$4.00 per hour x 40 hours per week = \$160 per week x 10 weeks from March 24 to June 2, 1987) because of her discharge.

6) Complainant suffered mental distress as a result of her discharge.

CONCLUSIONS OF LAW

1) The Commissioner of the Bureau of Labor and Industries of the

State of Oregon has jurisdiction in this matter.

2) At all material times, Respondent was an employer subject to the provisions of ORS 659.010(6), 659.010 to 659.110, and 659.400 to 659.435.

3) At all material times, Respondent was a "respondent" as defined in ORS 659.010(13); see also, 659.400(3); OAR 839-06-115.

4) At the time of Complainant's injury, she was a "worker" under ORS 659.410(1) and OAR 839-06-105 (4)(b).

5) At the time of Complainant's termination, she was a worker who had invoked or utilized the procedures provided for in ORS 656.001 to 656.794 and 656.802 to 656.807, Oregon's workers' compensation law, and was a member of a class protected by the civil rights statutes. ORS 659.410(1); OAR 839-06-120.

6) Complainant's termination caused her financial harm and mental distress.

7) The conduct and knowledge of Ms. Fenderson, as well as that of the other supervisory employees at Sierra Vista, are properly imputed to Respondent.

8) Respondent committed an unlawful employment practice in the termination of Complainant because she invoked the procedures of the Oregon workers' compensation law. ORS 659.410(1).

9) As authorized by ORS 659.060 (3) and 659.010(2), the Commissioner of the Bureau of Labor and Industries of the State of Oregon may issue a Cease and Desist Order requiring

Respondent to refrain from any action that would jeopardize the rights of individuals protected by ORS 659.010 to 659.110 and 659.400 to 659.435, to perform an act or series of acts reasonably calculated to carry out the purposes of those statutes, and to eliminate the effects of the unlawful practice found. The Order below is a proper exercise of that authority.

AMENDED OPINION

1. Respondent Terminated Complainant Because She Invoked the Workers' Compensation Procedure

In the Amended Specific Charges, the Agency alleged that Respondent's termination of Complainant was in violation of ORS 659.410. ORS 659.410 (1) makes it an unlawful employment practice for an employer:

"to discriminate against a worker with respect to hire or tenure or any term or condition of employment because the worker has applied for benefits or invoked or utilized the procedures provided for in [the Oregon workers' compensation law] * * *"

To implement and interpret the above statute, the Agency has adopted a rule on Intentional Discrimination (OAR 839-05-010). The rule provides that there is substantial evidence of intentional unlawful discrimination if:

"(a) The Respondent is a respondent as defined by statute;

"(b) The Complainant is a member of a protected class;

"(c) The Complainant was harmed by an action of the Respondent;

"(d) The Respondent's action was taken because of the

Complainant's membership in the protected class."

It follows that where these elements are established by a preponderance of evidence at hearing in conformity with ORS 183.310 to 183.550, the Commissioner may issue an appropriate order under ORS 659.060(3).

Based upon the facts found, the first three elements of the rule are satisfied. (Conclusions of Law 3, 5, and 6). Therefore, the issue is whether Respondent terminated Complainant's employment "because" she invoked the procedure in the workers' compensation law.

The Agency has defined the term "invoke" as used in ORS 659.410(1) to include the "worker's reporting of an on-the-job injury" to her employer. OAR 839-06-105(2). Respondent contends that the Agency has defined "invoke" too broadly and, therefore, beyond the intention of the legislature in using that term in ORS 659.410(1). Such a contention is without merit. The Agency's interpretation properly and logically identifies the first step by which an employee "invokes" the procedures of the workers' compensation law.

Respondent contends that there is insufficient evidence that Complainant was terminated "because" she invoked the workers' compensation procedure; that is, that the Agency did not show that there was a causal connection between Complainant's reporting her injury and the termination.

It is undisputed that Complainant was injured on March 17, 1987, that she prepared the incident report regarding her injury on March 19 and

provided information on her injury for the insurance claim form within a few days, and that Respondent terminated her on March 24, less than one week after she had reported her injury. Respondent argues that the necessary causal connection is not established by the Agency's showing only that the termination followed closely in time after Complainant reported her injury, citing *In the Matter of KBOY Radio Station*, 5 BOLI 94 (1986). Respondent misconstrues the rationale of *KBOY*. In that case there was no evidence found that the employer was aware of that complainant's injured worker claim when the decision to terminate her was made. In this case, Ms. Fenderson knew as of the March 19 incident report, upon which she allegedly relied to establish Complainant's unsafe practice, that Complainant may have injured herself and had sought medical assistance. Unlike the *KBOY* case, there is more here than just a temporal relationship between Complainant's report of her injury and Respondent's discharging her. There is documentary evidence.

Respondent relies upon this documentary evidence as proof that there were performance-related reasons for the termination of Complainant. Taken at face value, except for the evaluation, the documents could indicate this basis for termination. But when the documents are analyzed, it becomes clear that the documents, prepared after the report of injury, are a sham. Ms. Fenderson created those documents in order to adhere to Respondent's personnel policy of three disciplinary warnings before termination. Whether Ms. Fenderson was legally bound to

provide three warnings is immaterial, because she decided to follow the policy.

A. Evaluation

The evaluation shows that as of October 5, 1986, Complainant was performing satisfactorily. In fact, she was considered to be "[w]arm; friendly; [and] sociable" to her co-workers and supervisors, and her attendance was average. There are two points for which she was criticized: incomplete tasks and untidy rooms. However, neither point was referred to in the subsequent memoranda given to Complainant, perhaps because it was recognized that the CNAs were so busy and that it was not uncommon for them to have insufficient time to complete their work.

B. Memorandum, dated December 30, 1986

The memorandum refers to two incidents in which Complainant eased patients to the floor while lifting them. Ms. Fenderson wrote the memorandum, but it is reasonable to infer that she really was not seriously concerned about Complainant's lifting ability. When Complainant did not attend the Safety Committee meeting as Ms. Fenderson directed in the memorandum, Ms. Fenderson did not criticize her for not attending or direct her to attend another meeting so that Complainant's lifting technique could be reviewed. Ms. Fenderson simply allowed Complainant to continue lifting patients according to her technique. Therefore, Respondent's statement to The Gibbens Company that Complainant's non-attendance at the Safety Committee meeting was a reason for her termination was not credible. Also

not credible is Ms. Fenderson's excuse that she did not confront Complainant about her absence because it was not her responsibility to do so, even though Complainant had disregarded her express directive to attend the meeting.

In addition, the inference that Ms. Fenderson was not seriously concerned about Complainant's lifting ability is supported by the fact that the patients involved were not injured in the incidents, and that easing a patient to the floor may be an appropriate response to an uncooperative patient, and thus not involve fault on the part of the CNA.

In conclusion, Ms. Fenderson's reliance upon the memorandum as the first of three warnings gave the memorandum a significance that it would not otherwise have had.

C. Memorandum, dated March 20, 1987

Ms. Fenderson followed Respondent's personnel policy that ordinarily an employee should receive three disciplinary warning notices before termination. She intended this memorandum as the second warning. In the memorandum, Ms. Fenderson made two criticisms of Complainant, that she walked on the newly waxed floor and that she lifted Ms. Gilchrist without adequate help. With regard to each incident, Ms. Fenderson found that Complainant had violated safety rules, but Ms. Fenderson's analysis of the incidents is inconsistent.

In the waxed-floor incident, Ms. Fenderson used the risk of Complainant's injury by "falling" in support of violation of the safety rules, yet she did not use Complainant's actual injury

sustained as a result of lifting Ms. Gilchrist in support of the violation of the safety rules. With regard to the waxed-floor incident, the Forum infers that Ms. Fenderson used the risk of injury as a nexus because she was looking for a basis to find a violation of the safety rules. If Ms. Fenderson had merely criticized Complainant for scuffing the waxed floor, which presumably was the housekeeper's complaint, Ms. Fenderson could not have reasonably relied upon such a criticism as a second warning.

With regard to the lifting incident, Ms. Fenderson used the statement made by Complainant in the incident report as an admission that she "should have gotten help." But Complainant's statement was incorrect and Ms. Hefler was capable of lifting Ms. Gilchrist, as Ms. Fenderson should have determined. The Forum infers that Ms. Fenderson was looking for another basis to find that Complainant had violated the safety rules. This inference is supported by the fact that Ms. Fenderson did not also criticize Ms. Hefler for lifting Ms. Gilchrist, although Ms. Fenderson stated that there was a basis for such criticism. Clearly, if Ms. Hefler were incapable of making the lift as Ms. Fenderson believed, she should have also criticized Ms. Hefler for agreeing to do the lift, especially since Complainant was injured thereby. Ms. Fenderson singled out Complainant alone for criticism with regard to the lifting of Ms. Gilchrist.

Moreover, the Forum infers that Ms. Fenderson did not write the memorandum dated March 20 on that date. Ms. Fenderson did not give the memorandum to Complainant until

March 24, when she terminated Complainant. Because it appears that the Disciplinary Warning Notice, which was dated March 22, was originally intended as a record of the three warnings before termination, it also appears that Ms. Fenderson wrote the "March 20" memorandum only after she decided that the notice should not be given to Complainant and that Complainant should be terminated.

Ms. Fenderson relied on the waxed-floor and the lifting incidents in order to find that Complainant committed violations of safety rules so that she could use the memorandum to ostensibly comply with Respondent's personnel policy on three warnings before termination. Had she not been motivated to create a "second warning", she would not have relied on those incidents as bases for disciplinary action. The memorandum represents only "ostensible" compliance with Respondent's policy because the implicit purpose of a warning notice is to notify the employee of a problem so that the employee may have an opportunity to improve. Clearly, Ms. Fenderson's giving Complainant the memorandum at the time of her termination does not comply with that purpose.

D. Disciplinary Warning Notice, dated March 22, 1987

Ms. Fenderson directed the charge nurse to prepare the notice. The notice states without explanation that there were two prior verbal warnings, and that the notice is intended as the "Final Warning." Therefore, it is reasonable to infer that the notice was originally intended as a record of the three warnings referred to in Respondent's personnel policy. The notice

contains criticism of Complainant's past behavior, except for the criticism about Complainant's request for a change of assignment made that same day. The criticism in the notice is inconsistent with Complainant's evaluation, and represents the first written criticism of the behavior to which it refers.

Because Ms. Fenderson directed that the notice be prepared and yet she placed no reliance upon it, it appears that she decided that the notice should not be given to Complainant, and that she recognized a need for two more warnings in addition to the memorandum that she had previously given to Complainant. The two additional warnings, which she prepared, are the memorandum just discussed, and the memorandum dated March 23, 1987.

E. Memorandum, dated March 23, 1987

The memorandum contains three criticisms of Complainant's past behavior, and represents the first written criticisms of the behavior. In addition, in each instance the criticism is of repetitive behavior, as, requests for changes in assignment, calling in ill to avoid assignments, and "numerous" complaints from other employees.

The Forum infers from the memorandum that Ms. Fenderson was aware of Complainant's behavior referred to therein for some time. Ms. Fenderson gives no reason in the memorandum for making the criticisms at that time, and identifies no recent example of the behavior to suggest why she waited in making the criticisms, although she testified that she did rely upon Complainant's request for

change in assignment referred to in the March 22 notice. Ms. Fenderson chose March 23 as the date on which to make a written criticism of Complainant's past behavior because she had decided to terminate Complainant and needed to create a third warning according to Respondent's policy.

In summary, Ms. Fenderson would not have given significance to the first memorandum if she had not decided to terminate Complainant and, therefore, believed that there was a need to use the memorandum as the first warning. Ms. Fenderson prepared both of the other memoranda after she had decided to terminate Complainant and because of Respondent's policy on three warnings before termination. In the case of the "March 20" memorandum, she would not have relied upon the incidents referred to therein as bases for disciplinary action if she had not been motivated to create a warning so that she could terminate Complainant. Similarly, in the case of the March 23 memorandum she would not have chosen at that time to make a written statement of criticism of Complainant's behavior if she had not been motivated to create another warning.

Since Ms. Fenderson created the sham memoranda in order to terminate Complainant, the "crucial question" is whether or not Ms. Fenderson would have terminated Complainant had Complainant not invoked the workers' compensation procedure. Complainant's invoking of the procedure, that is, her report to the employer of the injury incident, played more than a "key role" in her discharge and the answer to the question is that Ms. Fenderson did terminate Complainant

because she invoked the procedure. OAR 839-05-015.

Ms. Fenderson knew of Complainant's report of her injury on the same day it was reported. Within three or four days thereafter, Ms. Fenderson decided to terminate Complainant. She then created the sham memoranda to create the appearance that there were performance-related reasons for her decision. It follows that the termination was because of the reporting of the injury. There is no other credible explanation of events in the record. The fact that Ms. Fenderson may have properly treated other CNAs who make workers' compensation claims is not persuasive in this case. To the extent that Ms. Fenderson's testimony is inconsistent with the inferences and conclusions herein, her testimony is not credible.

The Forum concludes that Ms. Fenderson knowingly and purposefully terminated Complainant because she had reported her injury. OAR 839-05-010(2) describes two methods of determining whether there is a causal connection between a Respondent's adverse action and a Complainant's protected class status. The Specific Intent Test is one; the other is the Different or Unequal Treatment Test.

At the beginning of the hearing, the Agency's position was that the "causal connection [between Complainant's report of her injury and her termination] may be proven through the use of either" test. (Agency's Summary of the Case) At the time of closing argument, the Agency stated that there was no evidence of Ms. Fenderson's specific intent. More accurately, there was no

direct evidence of her specific intent. However, evidence includes inferences. There may be more than one inference to be drawn from the basic fact found; it is this Forum's task to decide which inference to draw. *Arkad Enterprises, Inc. v. Bureau of Labor and Industries*, 107 Or App 384, 812 P2d 427 (1991), citing *City of Portland v. Bureau of Labor and Industries*, 298 Or 104, 118, 690 P2d 475 (1984) and *City of Roseburg v. Roseburg City Firefighters*, 292 Or 266, 271, 639 P2d 90 (1981). Thus, the absence of direct evidence of Ms. Fenderson's specific intent is not determinative because such intent may be shown by the circumstantial evidence referred to herein. Neither the absence of direct evidence of specific intent nor the Agency's comment made at closing argument necessarily requires that the different treatment test must be used.

2. Respondent's Termination of Complainant's Employment Caused Her Damages

A. Lost Wages

The purpose of an award for back pay is to compensate a complainant for the loss of that which the complainant would have received but for the respondent's unlawful employment practice. *In the Matter of K-Mart Corporation*, 3 BOLI 194 (1982). Complainant claims lost wages from the date of termination, March 24, 1987, to August 12, 1988, in the amount of \$11,520.

Respondent argues that she is not entitled to that amount of lost wages because she did not actively seek other employment after her termination, and thus did not exercise reasonable diligence to mitigate her damages.

The facts show that Complainant is entitled to damages for lost wages, but not the full amount that she claims.

Respondent terminated Complainant on March 24, 1987, and within one week thereafter she opened a file with the Employment Division. Although she did not seek employment immediately, there is a reasonable explanation for her not doing so. Respondent contested her claim for unemployment compensation, and the Employment Division did not direct her to possible employers until after her eligibility for benefits was resolved sometime during April. In addition, she was depressed because of the manner in which Respondent had treated her. In any event, Complainant's delay in looking for employment was short because she did begin looking for employment in April. She made applications at two nursing homes and a foster care home during April and May. Her job seeking efforts were adequate. Complainant's testimony at her deposition about her applications for employment made during April and May is confusing. For example, at her deposition Complainant differentiated between applications for work made on her own and those made at the direction of the Employment Division, and it was not clear from her deposition testimony when she was making the distinction. Therefore, it cannot be found that her deposition testimony is inconsistent with her testimony at hearing.

During May, Complainant decided that she did not want to work again in a nursing home. Her decision was based upon the manner in which she perceived her treatment at Sierra Vista and at Gladstone Nursing Home.

Complainant decided that she would rather work in a private home in which she could care for a member of the family. Because in all likelihood the Employment Division would not be able to assist her in finding employment in a private home and because she did not consider that it was worth her time, she also decided about the same time to no longer maintain an open file with the Employment Division. Therefore, when Mt. View Nursing Home offered her a full-time CNA position at the same rate of pay she had earned at Sierra Vista, she did not accept the position.

Complainant became depressed and lost her self confidence immediately after Respondent terminated her, but she did not give her mental condition at that time as a reason for her refusal to accept a position at Mt. View Nursing Home. Complainant was still capable of performing the work of a CNA, as evidenced by her caring for the elderly woman in the private home at the beginning of June. She just did not want to work in a nursing home again.

Complainant was free to make choices about her employment, but she must bear the consequences of her choices. Her refusal to accept the Mt. View position, which was substantially equivalent employment, concluded the period for measuring her lost wages. See *In the Matter of Pacific Motor Trucking Company*, 3 BOLI 100 (1982), *aff'd*, *Pacific Motor Trucking Co. v. Bureau of Labor and Industries*, 64 Or App 361, 668 P2d 446 (1983), *rev den* 295 Or 773 (1983). Although the exact date of Complainant's refusal to accept the Mt. View position

is not known, it was placed approximately at the beginning of June. Complainant is entitled to lost wages from March 24 to June 2, 1987, a period of 10 weeks. Therefore, Complainant is entitled to \$1,600 in lost wages.

B. Mental Distress

Complainant seeks \$3,000 in damages for the mental distress which she suffered as a result of Respondent's unlawful employment practice. Respondent's termination of Complainant's employment caused her to become depressed and lose her self-confidence and self-esteem. She testified that her depression increased to the point that in late spring or early summer 1988 she began to visit a counselor. Her counselor recommended that she return to work as a way in which to relieve her depression, and when Complainant did begin working again in August 1988, her mental condition improved to the extent that she no longer believed that she needed counseling.

An award of damages is intended to compensate Complainant for the mental distress which she suffered as a result of Respondent's termination of her employment. It is clear that Respondent's termination of her employment caused her mental distress. Her termination was sudden, and it is reasonable to infer that she was emotionally shocked by its suddenness. However, it is also recognized that this is not a case of protracted harassment. For these reasons, an award of \$2,000 in damages is reasonable compensation for Complainant's mental distress suffered as a result of Respondent's termination of her employment.

3. Affirmative Defenses

A. First Affirmative Defense

Respondent contends that the Amended Specific Charges do not state a claim. Respondent has not proven the defense. (See Part 1 of this Opinion.)

B. Second Affirmative Defense

At the hearing, Respondent indicated that this defense was the basis for the contention that the Agency lacked jurisdiction because the Administrative Determination was not properly issued. Respondent has not proven the defense. (See Ruling On Motion To Dismiss, *supra*.)

C. Third Affirmative Defense

Respondent contends that the personnel actions taken against Complainant were for legitimate, non-discriminatory reasons. The evidence shows that Respondent terminated Complainant because she invoked the procedures in the workers' compensation law.

D. Fourth Affirmative Defense

Respondent contends that Complainant failed to mitigate her damages. Respondent has proved a partial failure to mitigate. (See Part 2 of this Opinion.)

E. Fifth Affirmative Defense

Respondent withdrew this defense at the hearing.

4. Exceptions

Respondent filed many exceptions to the Proposed Order. Rulings on the various exceptions are stated below.

A. Proposed Rulings on Motion to Dismiss and Motion for Sanctions

(Exception 1) Respondent pointed out that the year in which the Agency's request for a report from the State Corporation Division should be 1987, not 1989. Finding of Fact 3 has been revised.

(Exceptions 1 - 3) Respondent argued that Findings of Fact 3, 4, and 5 omit certain facts. The claimed omissions are irrelevant, and the essential facts are now restated either in supplemental findings (a) through (e) or in the Findings of Fact - Procedural.

(Exception 2) Respondent argued that Finding of Fact 4 is incorrect. The finding is restated in supplemental findings (a) through (e) and shows actual reliance on Sierra Vista's response.

(Exceptions 3 - 4) In effect, Respondent requested reconsideration of the proposed rulings on the motion to dismiss and the motion for sanctions. The conclusions reached in the proposed rulings are correct. Some language has been clarified. Respondent also claimed that there were no findings of fact or conclusions of law in support of the proposed denial of his motion for sanctions. Respondent's claim has no merit. The denial of his motion was based upon the "reasoning in support of this Order," which reasoning acknowledges a partial failure to mitigate. (See Part 2 of this Opinion.)

B. Proposed Findings of Fact - The Merits

Respondent took exception to the following proposed findings of fact.

Finding of Fact 5

(Exception 5) This finding relates to Complainant's evaluation. This finding

states that "In general, Complainant's performance was found to be satisfactory." (Emphasis added.) Respondent claimed that this finding does not address two of the 16 areas of evaluation in which Complainant was found to be unsatisfactory. Respondent's claim disregards that the finding is "In general" (not in every instance), her work was satisfactory. Respondent also disregards that the evaluation itself contains a similar general finding under the final heading ("Overall Evaluation * * *") where it is stated that Complainant is "Doing an average job."

Finding of Fact 6

(Exception 5) This finding relates to the criticism in Complainant's evaluation that she did not complete all of her tasks during some unspecified time period. The finding points out that while she worked part-time for several months she did not have sufficient time to do everything. Respondent argues that because she also worked full-time during the evaluation period she "had difficulty completing tasks while she worked full time." Such conclusion does not necessarily follow.

(Exception 6) Respondent objected to the statement that "it was not uncommon for CNAs, even full-time ones, not to complete their tasks", although Respondent acknowledges that there "may have been testimony that CNAs occasionally fail to complete their tasks." Respondent's objection has no merit.

Finding of Fact 16

(Exception 6) This finding relates to Complainant's submission of the incident report and Ms. Fenderson's receipt of it. Respondent stated that this

finding does not address Ms. Fenderson's testimony that she did not know when she received the report. At the time of hearing, she may not have recalled when she received the report, but her initials below the handwritten date "3-19-87" appear on the face of the report. Therefore, the finding does not have to address her testimony.

This finding has been revised to express the point that Ms. Fenderson received the report on March 19, 1987. Ms. Fenderson's testimony that she did not know that Complainant would file a workers' compensation claim is irrelevant because she became aware that Complainant had "invoked" the workers' compensation procedures when she received the report. OAR 839-06-105(2).

Finding of Fact 17

(Exception 7) This finding relates to Ms. Fenderson's preparation of the second memorandum "between March 19 and March 23." Respondent argued that there is "no evidence to indicate that Ms. Fenderson did not prepare the second memorandum on or before March 20." As noted in the Opinion, there is inferential evidence. See Part 2 of this Opinion.

(Exception 7) This finding also states that Ms. Fenderson criticized Complainant in lifting a patient, but did not also criticize Ms. Hefler, who assisted her in making the lift. Respondent claimed that Ms. Hefler testified that she "may have been verbally reprimanded." Respondent is incorrect. Ms. Hefler testified that she was never reprimanded.

Finding of Fact 20

(Exception 7) This finding relates to Ms. Fenderson's criticisms of Complainant made in the third memorandum. Respondent stated that the finding does not address the evidence that the criticisms were true. Assuming the criticisms were true, however, Ms. Fenderson only made them at that time because she needed a third warning before she could terminate Complainant.

Finding of Fact 21

(Exception 8) This finding relates to Ms. Fenderson's lack of credibility, and states that "her testimony is not believable as explained in the Opinion herein." The Opinion identifies (in sections 1 B through 1 E) the facts and inferences drawn from the facts which support this finding. Nothing more is required. For clarity, however, the term "credible" has been substituted, examples cited, and the explanation in the Opinion has been specifically incorporated. Therefore, there is no merit to Respondent's exception that there are no findings to support the conclusion that Ms. Fenderson was not credible.

C. Proposed Ultimate Findings of Fact

Respondent took exception to the below-listed Ultimate Findings of Fact.

Ultimate Finding of Fact 4 (Conclusion of Law 8)

This finding (and similar conclusion of law) is that Complainant was terminated because she had invoked the workers' compensation procedures. Respondent made the following arguments in support of his contention that the finding and conclusion are in error.

1. Referee failed to comply with administrative rules.

The finding is based upon facts related to the Specific Intent Test in OAR 839-05-010(2)(a). The Opinion (section 1) makes this point clear. In its Summary of the Case, the Agency relied upon both the Specific Intent Test and the Different or Unequal Treatment Test. Therefore, Respondent was on notice of the Agency's alternative theories of the case from the beginning of the hearing. The Opinion has been revised to show that it is proper to base the decision herein on the Specific Intent Test regardless of the Agency's comment on the evidence made at closing argument.

2. Agency failed to make a prima facie case.

(Exception 11) Respondent's claim that the present case is "similar" to the *KBOY Radio Station* case is incorrect. The present case is distinguishable because here the termination not only followed a few days after the report of the injury but was shown to be pretextual.

(Exceptions 12 - 14) Respondent's criticism of the inferences drawn in the Opinion are without merit.

(Exception 12) Respondent's claim that there is no "articulated basis" to disbelieve Ms. Fenderson's testimony is incorrect. (See Opinion section 1.)

Respondent argued that incidents described in the memoranda prepared by Ms. Fenderson did occur and that these incidents plus other testimony formed a proper basis to terminate Complainant. But the real reason for termination was that Complainant invoked the workers' compensation procedures. Ms. Fenderson's testimony that she was terminated for

performance-related reasons was not credible.

(Exception 14) Respondent's statement that Ms. Fenderson "incorporated the complaints on the [Disciplinary Warning] Notice into her third warning letter" is not supported by her statements made in that memorandum. The significance of the third memorandum is that Ms. Fenderson chose to criticize Complainant's past behavior at that time in order to terminate her.

3. Referee failed to make findings of fact.

(Exceptions 14 - 15) Respondent claimed Complainant's lack of credibility is not addressed. Respondent's claim is without merit. Many findings of fact are based upon Complainant's testimony, but in each instance her testimony is not contradicted. In two instances (Findings of Fact 11 and 13), her testimony was contradicted. In Finding of Fact 11 her testimony is disbelieved. In Finding of Fact 13 the conflict in testimony over whether Ms. Fenderson typed the workers' compensation claim form is immaterial because Ms. Fenderson already knew that Complainant had reported her injury. There is no need to resolve any conflict in No. 13. Complainant's testimony is not relied upon to show the real reason for her termination. Her testimony is relied upon and findings are made thereon on the question of her job seeking after termination.

(Exception 14) Respondent is incorrect when he states that the Referee found that she was "confused" in her testimony. The Referee found that her testimony at her deposition was "confusing" and, therefore, refused to

find such testimony inconsistent with her hearing testimony for impeachment. This Order has been revised to illustrate the confusing nature of her testimony at her deposition.

(Exception 15) Respondent also claimed that certain testimony was ignored. Such testimony was irrelevant with one exception. This Order has been revised to show that Ms. Fenderson's record in treating other CNAs is not persuasive in Complainant's case.

4. Findings of Fact do not support conclusions.

(Exception 16) Respondent objected to certain inferences which are drawn. The inferences are reasonable. Respondent also objected to the inference that there are no recent examples of Complainant's past behavior in the third memorandum. Finding of Fact 20 has been revised to make clear that her acts were "unidentified" in the memorandum and the Opinion was revised to make clear that the memorandum "identifies" no recent example of her behavior.

Ultimate Finding of Fact 5

(Exception 17) Respondent made four objections to this finding on the amount of Complainant's lost wages.

The first objection was that she failed to mitigate. This Order has been revised to show a partial failure.

The second objection was that the findings do not support the conclusion that the Employment Division did not direct Complainant to employers. Finding of Fact 23 has been revised to support the conclusion.

The third objection was that the act of not maintaining an open file at the Employment Division terminates any

award for lost wages from that date. That act alone is not determinative. The case relied upon by Respondent does not stand for that proposition.

The fourth objection is that Respondent is entitled to the \$87 in unemployment compensation received as an off-set from the award of lost wages. The case relied upon by Respondent in support of his objection is distinguishable because the present case is an unlawful employment practice case under ORS chapter 659.

Ultimate Finding of Fact 6

(Exception 18) Respondent objected to the finding that Complainant suffered mental distress as a result of her termination. He argued that discriminatory termination alone is not sufficient to support an award for mental distress. The demonstrated effects of a discriminatory termination do support such an award. *In the Matter of Arkad Enterprises, Inc.*, 8 BOLI 263 (1990), *aff'd*, *Arkad Enterprises, Inc. v. Bureau of Labor and Industries*, 107 Or App 384, 812 P2d 427 (1991); *In the Matter of the City of Portland*, 2 BOLI 41 (1980). The cases cited by Respondent do not support his position.

ORDER

NOW, THEREFORE, as authorized by ORS 659.060(3) and 659.010(2), and in order to eliminate the effects of the unlawful practice found, William E. Colson, dba Sierra Vista Care Center, is hereby ordered to:

1) Deliver to the Business Office of the Portland office of the Bureau of Labor and Industries a certified check, payable to the Bureau of Labor and In-

dustries in trust for RUTH L. SWETLAND, in the amount of:

a) SIXTEEN HUNDRED DOLLARS (\$1,600), representing wages Complainant lost between March 24, 1987, and June 2, 1987, (10 weeks) as a result of Respondent's unlawful practice found herein; PLUS,

b) FOUR HUNDRED FIFTY SEVEN DOLLARS and SEVENTY-NINE CENTS (\$457.79), representing interest on the lost wages at the annual rate of nine percent accrued between June 3, 1987, and May 3, 1990, computed and compounded annually; PLUS,

c) Interest on the foregoing, at the legal rate, accrued between May 3, 1990, and the date Respondent complies herewith, to be computed and compounded annually; PLUS,

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

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

2) Cease and desist from discriminating against any worker who applies for benefits under, gives testimony in connection with, invokes, or uses the Oregon workers' compensation procedures or who gives testimony in connection with or uses the civil rights procedures provided in ORS 659.410 - 659.435.

3) Post in a conspicuous place on the premises of Sierra Vista Care

Center a copy of ORS 659.410, together with a notice that anyone who believes that he or she has been discriminated against may notify the Oregon Bureau of Labor and Industries.

4) Adopt a non-discriminatory policy and practice regarding employee discipline and termination procedures.
