

In the Matter of
ARG ENTERPRISES, INC., dba Stuart Anderson's Restaurants,
Case No. 41-99
December 17, 1999

SYNOPSIS

Complainant suffered an on-the-job injury and invoked and utilized the procedures in ORS chapter 656 while in Respondent's employ when he cut himself with a knife and sought medical treatment. Respondent discharged Complainant for violating Respondent's policy of using a knife without wearing a protective cut glove, but did not discharge other workers who violated the same policy but did not suffer on-the-job injuries. The Commissioner found that Respondent discharged Complainant because of his invocation and utilization of the procedures in ORS chapter 656 and awarded \$186 in back pay damages and \$12,500 for mental suffering damages. ORS 659.410.

The above-entitled case came on regularly for hearing before Alan McCullough, designated as Administrative Law Judge ("ALJ") by Jack Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on September 21, 1999, at the Eugene office of the Bureau of Labor and Industries, located at 165 E. 7th, Suite 220, Eugene, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by Linda Lohr, an employee of the Agency. Christopher Caires (Complainant) was present throughout the hearing and was not represented by counsel. Respondent was represented by Corbett Gordon, Attorney at Law. Randy Panek, Director of Human Resources for Stuart Anderson's Restaurants, was present throughout the hearing as Respondent's corporate representative.

The Agency called as witnesses, in addition to Complainant: Jennifer Peck, William Benson III, Paul Avers, Aaron Zweig, and Damon Egging, all former employees of Respondent; and Bernadette Yap-Sam, BOLI Senior Investigator.

Respondent called as witnesses: Randy Panek, Director of Human Resources and Risk Management for Stuart Anderson's; Daryl Bigley, former general manager for Respondent; Susan Martin, a vocational rehabilitation consultant; John Capaccio and Paul Landis, former employees of Respondent; Jennifer Bouman, a self-employed individual who assists law firms; and Complainant.

Administrative exhibits X-1 through X-38 were received into evidence. Agency exhibits A-1, A-3 through A-6, A-10 through A-35, and A-37 through A-41 were offered and received into evidence. Respondent exhibits R-8, and R-11 through R-20 were offered and received into evidence.

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

FINDINGS OF FACT – PROCEDURAL

1) On March 6, 1998, Complainant filed a verified complaint with CRD alleging that he was the victim of the unlawful employment practices of Respondent based on Respondent's termination of Complainant on November 4, 1997. After investigation and review, the Civil Rights Division issued an Administrative Determination finding substantial evidence supporting the allegations regarding Respondent's discharge of Complainant.

2) On April 27, 1999, the Agency submitted to the forum Specific Charges alleging that Respondent discriminated against Complainant by discharging him based on his invocation or utilization of the procedures provided for in ORS Chapter 656. The Agency also requested a hearing.

3) On May 5, 1999, the forum served on Respondent the Specific Charges, accompanied by the following: a) a Notice of Hearing setting forth July 13, 1999, in

Eugene, Oregon, as the time and place of the hearing in this matter; b) a notice of Contested Case Rights and Procedures containing the information required by ORS 183.413; c) a complete copy of the Agency's administrative rules regarding the contested case process; and d) a separate copy of the specific administrative rule regarding responsive pleadings.

4) On May 18, 1999, counsel for Respondent sent a letter to Ms. Lohr, the Agency case presenter, requesting a two week extension of time in which to file an answer and asking that the hearing be rescheduled from July 13, 1999, to a date of mutual convenience.

5) On May 18, 1999, Respondent filed a motion asking to take the deposition of Complainant.

6) On May 24, 1999, Respondent filed a motion for an extension of until time June 7 to file an answer.

7) On May 26, the ALJ granted Respondent's motion for an extension of time to file an answer. The ALJ also granted Respondent's motion to depose Complainant, contingent on filing a timely answer to the Specific Charges.

8) On June 7, 1999, Respondent filed an answer to the Specific Charges.

9) On June 10, 1999, Respondent moved for a postponement of the hearing on the basis that Respondent's counsel already had depositions scheduled for July 13-15, 1999. The Agency did not oppose Respondent's motion.

10) On May 14, 1999, the forum ordered the Agency and Respondent each to submit a case summary including: lists of all persons to be called as witnesses; identification and copies of all documents to be offered into evidence; a brief statement of the elements of the claim (for the Agency only); a brief statement of any defenses to the claim (for Respondent only); a statement of any agreed or stipulated facts; and any

damages calculations (for the Agency only). The ALJ ordered the participants to submit case summaries by July 2, 1999, and notified them of the possible sanctions for failure to comply with the case summary order.

11) On June 16, 1999, the ALJ granted Respondent's motion to postpone and tentatively reset the hearing to begin either on September 14 or September 21, depending on which week was free for Respondent's counsel.

12) On June 21, 1999, Respondent's counsel informed the forum that she was available for hearing on September 21, 1999, continuing to the next day if needed.

13) On June 23, 1999, the ALJ issued an amended notice of hearing resetting the hearing for September 21, 1999.

14) On June 23, 1999, the ALJ issued an amended case summary order making case summaries due on September 10, 1999.

15) On July 29, 1999, Respondent's counsel copied to the ALJ a letter addressed to the Agency case presenter requesting Complainant's medical records and records from the University of Oregon concerning Complainant's class performance.

16) On August 18, 1999, the Agency sent a letter to the ALJ objecting to Respondent's informal discovery request for Complainant's medical records.

17) On August 23, 1999, Respondent sent a letter to the ALJ containing argument in support of its request for Complainant's medical records.

18) On August 26, 1999, Respondent filed an amended answer to the Specific Charges adding two affirmative defenses to Respondent's original answer.

19) On September 10, 1999, the Agency requested an extension of time to file its case summary on September 13, 1999. Respondent did not object. On September 10, 1999, the ALJ granted the Agency's request.

20) On September 10, 1999, the ALJ scheduled a pre-hearing conference with Respondent's counsel and the Agency case presenter regarding the issue of discovery of Complainant's medical records sought by Respondent.

21) On September 10, 1999, Respondent filed a motion for a Discovery Order to obtain records of Complainant's psychological records generated by his visits to a psychologist and a psychiatrist. Respondent cited the Agency's earlier refusal to provide them.

22) On September 13, 1999, the ALJ conducted a pre-hearing conference with Respondent's counsel and the Agency case presenter regarding Respondent's September 10, 1999, motion for a discovery order. At the conclusion of the conference, the ALJ ordered the Agency to provide, for an *in camera* inspection, Complainant's psychological and psychiatric records as requested by Respondent. The ALJ also granted the Agency's motion for a Protective Order regarding all documents released to Respondent's counsel. The Agency provided the subject medical records to the ALJ on September 13, 1999.

23) On September 14, 1999, the ALJ issued an Interim Order summarizing the previous day's oral ruling. The ALJ also released to Respondent unredacted copies of all medical records provided by the Agency to the ALJ on September 13, 1999. In addition, the ALJ issued a Protective Order regarding the subject medical records.

24) On September 13, 1999, Respondent and the Agency timely filed case summaries.

25) On September 13, 1999, Respondent filed a Motion to Exclude Notice of Substantial Evidence Determination ("Notice") on the grounds that it was unreliable hearsay, that it contained repetitive evidence, and that the probative value of the Notice was substantially outweighed by the danger of unfair prejudice.

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

27) Prior to opening statements, Respondent renewed its motion to exclude Agency Exhibit A-4 (the Notice), and moved to exclude Agency Exhibits A-1 (Complainant's original complaint filed with BOLI) and A-3 (BOLI's cover letter to Respondent accompanying the Notice). The ALJ denied Respondent's motion.

28) At the conclusion of the Agency's case in chief, Respondent moved for a directed verdict on the basis that the Agency had failed to establish a prima facie case. The ALJ considered Respondent's motion a motion to dismiss the Specific Charges and denied it, finding there was sufficient evidence on the record from which to establish a prima facie case of an unlawful employment practice in violation of ORS 659.410.

29) The ALJ issued a proposed order on November 16, 1999, that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. Neither the Agency nor Respondent filed exceptions.

FINDINGS OF FACT – THE MERITS

1) At all times material herein, ARG Enterprises, Inc. was a foreign corporation operating eating and drinking places under the assumed business name of Stuart Anderson's Restaurants ("Respondent"), and was an Oregon employer utilizing the personal services of six or more persons.

2) Respondent is self-insured for purposes of workers' compensation insurance.

3) On September 9, 1997, Complainant completed an application for a dishwasher job with Respondent at Stuart Anderson's Black Angus restaurant located at 2123 Franklin Boulevard, Eugene, Oregon. Complainant learned of Respondent's job opening from a local newspaper ad.

4) On September 12, 1997, Respondent hired Complainant as a dishwasher and prep cook at its Franklin Blvd. location. Complainant's starting wage was \$6.00 per hour.

5) Complainant was a college student at the University of Oregon ("U of O") at the time he was hired by Respondent. His parents paid for his rent and tuition, but he was responsible for his other living expenses, including car payments, food, utilities, and credit card payments. He sought work with Respondent to earn money to pay for those expenses. He lived in a U of O fraternity when Respondent hired him.

6) Dishwashers and prep cooks employed by Respondent frequently have to use knives for cutting. During Complainant's employment, they were expected to clean the knives that they used for cutting and return them to the knife rack in the chef's office.

7) The kitchen knives¹ used by Respondent's kitchen staff are extremely sharp. Before 1995, Respondent's kitchen staff used a cloth mesh glove on their "non-dominant hand"² when cutting with knives. In 1995, Randy Panek, Respondent's Director of Human Resources and Risk Management, evaluated Respondent's current level of compensable injuries involving knife cuts and determined it was too high. In the same time period, he learned that a steel mesh glove was available that made it impossible for a knife user to suffer a cut wound³ on the user's non-dominant hand.

8) In 1995, Panek implemented a company-wide safety standard requiring all of Respondent's employees to use a stainless steel cutting glove ("cut glove") whenever using a kitchen knife. This policy was implemented because Panek believed it would reduce the number of injuries involving cuts from knives. Since Panek's implementation of this policy, supervisors at Respondent's Franklin Boulevard location have understood that employees are to wear cut gloves on their non-dominant hand

whenever cutting with a knife, cleaning a knife, carrying a knife, or using it in any other manner.

9) When Complainant was hired on September 12, 1997, he was provided with a number of documents to read. Included among those documents were the following:

- a) "Line/Prep Cook Safety Training – Job Duty Practices and Procedures;"
- b) "Stuart Anderson's Specific Safety Standards;"
- c) "Employee Safety Policy;"
- d) "Stuart Anderson's Safety Pledge;"
- e) "Knife Policy;"
- f) "Quiz: Line/Prep Cooks Safety;"
- g) "Quiz: Dishwasher Safety."

Complainant signed and dated documents "a" through "e" and dated on September 12, 1997.

10) The "Line/Prep Cook Safety Training – Job Duty Practices and Procedures" document that Complainant signed and dated lists a number of safety practices and procedures developed by Panek in 1995. Each was checked off by Complainant in the space provided, including items stating "I have been shown, and will use, the proper knife usage procedures when using a knife" and "All kitchen personnel *must use a stainless steel cutting glove* when using a kitchen knife." (emphasis in original) The following statement is printed immediately above Complainant's signature:

"BY SIGNING BELOW, I AM STATING THAT I HAVE BEEN TRAINED ON, READ, AND UNDERSTAND THE ITEMS LISTED ABOVE AND AGREE TO COMPLY WITH THEM AS A CONDITION OF MY EMPLOYMENT."

There is also a line for "Trainers Signature" that is left blank.

11) The "Stuart Anderson's Specific Safety Standards" document that was signed and dated by Complainant lists safety practices and procedures for bartenders,

bussers, and kitchen staff regarding the use of back braces and cut gloves and was developed by Panek in 1995. Complainant checked off three items in the space provided, including a statement that “I understand that I must wear a Company approved cutting glove whenever any cutting functions are performed. Furthermore, I understand that I must wear stainless steel gloves whenever working with the slicer or mixer accessories.” The following statement is printed immediately above

Complainant’s signature:

“By Signing, I am stating that I have read and understand the standards checked above and agree to comply with them as a condition of my employment.”

12) The “Employee Safety Policy” document that was signed and dated by Complainant lists work safety practices to follow. Listed among the safety practices is the following statement regarding knife usage;

“Use proper knife for the job. Cut away from body and other workers; store knife in proper location when not in use. Do not obscure the presence of a knife in a drawer sink or under a cloth. Cut-resistant gloves must be worn on the opposite hand at all times.”

13) The “Stuart Anderson’s Safety Pledge” that was signed and dated by Complainant contains the following statement printed immediately above Complainant’s signature:

“I have completed instruction and training of the safety policies, procedures, and practices for my assigned job by my Department Safety Trainer. In addition, I have read and understand the Safety Pledge above.”

There are also lines for the signatures of “Department Safety Trainer” and “GM or Safety Manager” that are left blank.

14) The “Knife Policy” signed and dated by Complainant lists the following policies:

- “1) Always wear a cut glove when using a knife.
- 2) Always clean and sanitize knife after use.

- 3) When walking with knife announce presence when going around corner.
- 4) After using knives return to knife rack in Chef's office.
- 5) Always walk with knives at your side and facing down.
- 6) Do not store knives on shelves above waist level.
- 7) No horseplay around anyone using a knife; always use caution."

The following is printed immediately above Complainant's signature :

"I have read the above knife policy and also understand that failure to adhere to will result in disciplinary action and can lead to termination."

15) The "Knife Policy" referred to in Finding of Fact – The Merits #14 was not a corporate policy promulgated and distributed by Panek. Rather, it was developed by the safety committee at Respondent's restaurant where Complainant was employed.

16) Complainant did not know what a cut glove was and had not received any actual training, other than reading the documents provided him by Respondent, when he signed and completed the documents cited in Finding of Fact – The Merits #9.

17) Respondent's kitchen supervisory chain of command in 1997 was: (1) Paul Landis, head chef; (2) Bob Raub, head chef; (3) Mark Johnson, sous chef. Johnson was in charge when Landis and Raub were absent.

18) Complainant was trained the first week of his employment by "shadowing" Damon Egging, Respondent's employee who worked the same shift as Complainant as a dishwasher/prep cook, and observing how Egging performed his jobs. During his training, he was taught always to wear a cut glove while cutting with a knife. Egging did not instruct him to wear a cut glove while cleaning knives and Egging did not wear a cut glove while cleaning knives.

19) Egging, who worked for Respondent from July through November 1997, did not wear a cut glove while cleaning knives when he trained Complainant or at any other time during his employment because no one told him he was required to wear a cut glove while cleaning knives.

20) Complainant worked as a dishwasher and prep cook throughout his employment with Respondent until his discharge.

21) On September 23, 1997, Complainant signed Respondent's "Knife Policy" form again.

22) On October 11, 1997, Complainant signed Respondent's "Knife Policy" form a third time.

23) On October 18, 1997, Complainant signed Respondent's "Line/Prep Cook Safety Training – Job Duty Practices and Procedures" form again.

24) On October 18, 1997, Complainant also signed Respondent's form entitled "Dishwasher Safety Training – Job Duty Practices and Procedures." This form does not contain any references to knives.

25) Part of Respondent's safety policy consisted of distributing safety procedure forms, such as the "Knife Policy," to kitchen employees on a regular basis and asking them to sign and date them.

26) After Complainant's hire, he was given the aforementioned safety procedure forms to sign as part of Respondent's safety program. He was not given the forms to sign as a disciplinary or corrective measure.

27) During his employment with Respondent, Complainant always wore a cut glove when doing prep work with a knife.

28) During his employment with Respondent, Complainant cleaned knives when he worked as a prep cook and as a dishwasher. He never wore a cut glove when cleaning a knife because he had not been taught that Respondent's cut glove policy required him to wear a cut glove when cleaning a knife.

29) On October 24, 1997, Complainant cut his thumb at work while cleaning a knife. Complainant was not wearing a cut glove at the time. Complainant completed

his work shift after Johnson, at Landis' instruction, bandaged his hand. Complainant was given the option of going to the hospital instead of completing his shift.

30) Complainant sought medical attention after work at a local hospital, where his cut was stitched. At the hospital, he signed a medical report indicating he had lacerated his thumb on 10/24/97 while working for Respondent. His treating doctor said Complainant could return to work if he could keep his finger clean and dry and gave him a medical statement to take to work. The statement did not indicate that Complainant was released to return to work.

31) Complainant returned to work the next day and gave the medical report to Daryl Bigley, general manager at Respondent's restaurant. Bigley had Complainant complete an occupational injury report form and told him to come back to work when his stitches were removed.

32) Complainant could not have kept his finger clean and dry while working as a dishwasher and line-prep cook.

33) While Complainant was off work recuperating from his injury, Bigley reviewed Complainant's personnel records and observed that Complainant had signed Respondent's "Knife Policy" on three occasions. Bigley telephoned Tom Taylor, his district manager, and Panek to report Complainant's injury, telling them both that Complainant had signed Respondent's various policies concerning knives several times during his short period of employment with Respondent. Bigley recommended that Complainant be discharged. Based on Bigley's recommendation, Respondent's knife policies, and the fact that Complainant would not have been cut if he had been wearing a cut glove while cleaning the knife, both Taylor and Panek agreed with Bigley's recommendation that Complainant be discharged for violating Respondent's knife safety policy.

34) Panek would not have agreed that Complainant be discharged if he had been informed that Complainant had not been trained to wear a cut glove while washing knives.

35) On November 3, 1997, Complainant received a written release to return to work without restrictions.

36) On November 3, 1997, Complainant rode his bicycle to work and presented his written release to Bigley. Bigley told Complainant that he was discharged and gave him a copy of an "Employee Separation Report" that Bigley had completed and signed. The Report stated that Complainant was discharged for "Failure to adhere to company policies/practices." On the Report, Bigley further explained the reason for the separation as follows:

"Chris [Complainant] has signed both cut glove policies & if he was wearing his glove he would have not cut his thumb."

37) All of Respondent's kitchen staff at Respondent's Franklin Blvd. location in Eugene were aware of Respondent's requirement that they wear a cut glove whenever they cut with a knife.

38) Egging, Complainant's co-worker and trainer, cut with a knife once or twice without wearing a cut glove and was reminded that he needed to wear a cut glove when cutting with a knife.

39) Paul Avers, who worked as a line cook for Respondent for 4-6 weeks around January 1997, was told during his training that he could use tongs instead of a cut glove when cutting with a knife. He understood that he was supposed to wear a cut glove when cleaning knives. Sometimes he did not wear a cut glove when cleaning knives and was "scolded" by Johnson. Avers cut himself a couple of times when not wearing a cut glove while cutting with a knife and was scolded for that. He did not file

workers compensation claims for these cuts. He was never written up for not wearing a cut glove when using a knife.

40) Aaron Zweig worked as a line cook for Respondent in September, October, and November 1997. He signed Respondent's "Knife Policy" on 9/16/97, 9/23/97, and 10/14/97. He signed Respondent's "Line/Prep Cook Safety Training-Job Duty Practices and Procedures" on 9/16/97 and 10/14/97. Sometimes he did not wear a cut glove when using a knife to cut prime rib. When observed, he was instructed to put the cut glove on. No one instructed him to wear a cut glove while cleaning knives. He was never written up for not wearing a cut glove when using a knife.

41) John Cappaccio worked for Respondent as a line/fry cook for three months in late 1997. On occasion, he did not wear a cut glove when cutting with a knife, and Landis and Johnson both corrected him, telling him he needed to wear a cut glove when cutting with a knife. Cappaccio was never written up for not wearing a cut glove when using a knife.

42) William "Beau" Benson worked for Respondent as a line/prep cook from March 1997 until September 14, 1997. On 6/13/97, he received a written warning signed by Landis that read as follows:

"After having been told to wear a cut glove on the line when cutting prime more than once by Daryl & myself you still continue to use a knife without a cut glove. This is a company policy. You signed a form when you were hired that you would wear a cut glove when using a knife, so please do."

Also on the written warning is a notation that "Daryl" was a "WITNESS TO INCIDENT."
"Daryl" was Daryl Bigley.

43) On 6/13/97, Johnson received a written warning signed by Landis that read as follows:

"As the 2nd cook it is your job to be sure employees follow company instructions. After Daryl asked that you be sure that Beau wear a cut glove when cutting prime more than once in one night, and he still

continued to cut prime without a cut glove. This is not acceptable especially from one who is to be in charge.”

Also on the written warning is a notation that “Daryl” was a “WITNESS TO INCIDENT.”

“Daryl” was Daryl Bigley.

44) Complainant worked the following hours and earned the following gross wages during Respondent’s two week payroll period while employed by Respondent:

9/12/97-9/15/97:	14.67 hours	\$ 91.02
9/16/97-9/29/97:	63.20 hours	\$ 303.05
9/30/97-10/13/97:	61.57 hours	\$ 381.42
10/14/97-10/24/97:	<u>36.43 hours</u>	<u>\$ 226.08</u>
TOTALS	175.87 hours	\$1,055.22

45) After Complainant was discharged, he looked for another job by checking the help wanted ads in the local newspaper for a job he was qualified for with hours compatible with his U of O class schedule.⁴ However, except for a work study job at the U of O, there was no evidence that Complainant contacted or made application any other employer after his discharge. Complainant was hired at a work study job at the U of O Behavioral Research & Training Division as a research assistant doing data entry at the start of December 1997 and earned \$210 in gross wages, working 10 hours a week for three weeks, at \$7 per hour.

46) Prior to coming to work for Respondent, Complainant had worked at a pizza parlor as a pizza maker, at a Burger King where he cooked, cleaned, prepped, and took orders, and as a security guard.

47) The Register-Guard is Eugene’s daily newspaper. Every day from November 3, 1997, to November 25, 1997, the Guard advertised between one and five job openings in the Eugene-Springfield metropolitan area that met the following specific criteria: (a) Complainant was qualified to perform them; (b) the job ad specified flexible or part-time hours; and (c) hours that applicants could apply were not specified or

included hours after 3 p.m. In that same time period, numerous other job ads appeared for restaurant jobs that Complainant was qualified for that did not limit application hours, but did not specifically state that hours were flexible or part-time. None of the job ads stated a rate of pay.⁵

48) Every day from December 2, 1997, to December 19, 1997, the Guard advertised between one and three job openings in the Eugene-Springfield metropolitan area that met the following specific criteria: (a) Complainant was qualified to perform them; (b) the job ad specified flexible or part-time hours; and (c) hours that applicants could apply were not specified or included hours after 3 p.m. In that same time period, numerous other job ads appeared for restaurant jobs that Complainant was qualified for that did not limit application hours, but did not specifically state that hours were flexible or part-time. None of the job ads stated a rate of pay.

49) In November 1997, the U of O Career Counseling Center listed and filled several part-time food service jobs and security jobs that involved working 20 hours per week and paid between \$5.50 and \$7.50 per hour. The shifts worked by the hired applicants are unknown.

50) In November, December, and January 1998, the Oregon Employment Department in Eugene had 22 job orders for cooks, 1 job order for a pizza cook, 3 job orders for fast food cooks, and 23 job orders for prep food workers (prep cooks and dishwashers).

52) The Eugene-Springfield metropolitan area has a public bus transportation system that goes to all major locations in the metropolitan area and has several stops around the U of O.

53) In November and December 1997, the Eugene-Springfield metropolitan area had a very positive labor market for persons seeking restaurant kitchen jobs. A

person with Complainant's job experience should have been able to find a job as a dishwasher within one week of initiating a job search.

54) At the time Complainant was discharged, he felt he was "building a life in Oregon" for the first time. Working at a job while going to school made him feel that Oregon was his home. His discharge and resulting unemployment caused him feel that his life was not integrated to the extent it had been before his discharge.

55) Complainant suffered financial distress as a result of his discharge. After his discharge, he couldn't afford to buy food and had to get food from a church while waiting to get food stamps. He was unable to pay his phone bill and lost his phone. He couldn't make his VISA credit card payments. He couldn't take his girlfriend out or call her on the phone. He experienced upset, humiliation, and feelings of degradation as a result.

56) At the time Complainant was discharged, he was on academic probation at the U of O based on having earned grade point averages of 1.10, 0.80, and 2.66 his previous three terms. To avoid disqualification from school, Complainant had to earn a minimum 2.0 grade point average in fall term 1997. Complainant completed fall term 1997 after his discharge from Respondent, earning a 1.34 grade point average. When Complainant went home to California for Christmas vacation, he learned on or about December 25 that he had been disqualified from the U of O as a result of his poor grades. At the beginning of January, he returned to Oregon to pick up his things, then immediately found a job in California at Safeway paying \$7.25 per hour.

57) Complainant did not earn enough money while employed by Respondent to pay all of his bills. Complainant's VISA card was already charged to its limit at the time of his discharge. Complainant voluntarily surrendered his car rather than have it repossessed after his discharge as a result of his inability to make his November 1997

car payment, but it is uncertain whether Complainant would have been able to make the payment even if he had not been discharged. Earlier, in September 1997, Complainant's car insurance policy had been cancelled as a result of his inability to make payments.

58) In September 1997, Complainant had a car wreck. Because Complainant was uninsured, he had to borrow \$700 from his father to purchase a new car door for his own car, and had to obtain another \$900 from his mother to reimburse the other car driver.

59) Complainant broke up with his girlfriend in September 1997, which caused him stress.

60) During Complainant's employment with Respondent, he made enemies at his fraternity house, in part because he was the only member of his fraternity who had a job, and was brought up before his fraternity standards board, had witnesses called against him, and ended up moving out of the fraternity in October 1997.

61) Complainant's parents were divorced in 1996. Complainant was upset over their divorce before and after his discharge from Respondent, which caused him continuing stress.

62) After Complainant learned he had been disqualified from the U of O, he stayed at his father's house, then moved to his mother's house. He felt humiliated to have to move back to California. He was the first member of his family to go off to college, and both of his parents were upset with him and no longer trusted him because he had wasted their money. It took Complainant a year to pay off all of the debt he had accrued in Eugene.

63) The cost incurred by Respondent from Complainant's workers' compensation claim was \$248.

64) Between January 1995 and December 1997, 64 workers' compensation claims, including Complainant's, were filed by 51 different employees at Respondent's five Oregon restaurants (Eugene, Beaverton, Salem, Milwaukie, Gresham). Respondent incurred a total of \$242,803 in costs related to those claims, which ranged from a low of \$0 to a high of \$153,735.

65) On September 14, 1997, "Beau" Benson suffered a compensable injury consisting of second-degree burns from exposure to hot butter. Benson was training a new employee at the time. He was terminated that same day for refusing to submit to a urinalysis when he went to the hospital for treatment of his burns. Benson was asked to submit to the urinalysis because his co-workers had observed him acting strangely earlier in his work shift. Benson would not have been discharged, had he taken and passed the urinalysis. After Benson's discharge, Respondent incurred \$4,179 in total expenses related to his injury.

66) In 1995, Alice Turner, Respondent's employee at the same restaurant Complainant worked at, suffered a compensable injury from falling consisting of a cut and back injury. Respondent incurred \$153,735 total expenses related to her injury. She voluntarily left Respondent's employ in August 1999 due to medical reasons unrelated to her compensable injury.

67) In 1996, Suzette Lovaro, Respondent's employee at the same restaurant Complainant worked at, suffered a compensable injury consisting of a laceration to her little finger from a broken glass. Respondent incurred \$276 total expenses related to her injury. She voluntarily left Respondent's employ.

68) In 1996, Dorothy Allbritton, Respondent's employee at the same restaurant Complainant worked at, suffered a compensable injury consisting of an injury

to her right arm when she slipped on a grease stain and fell. Respondent incurred \$2,457 total expenses related to her injury. She voluntarily left Respondent's employ.

69) In 1997, J. Klinger, Respondent's employee at their Salem, Oregon, restaurant, suffered a compensable injury consisting of a strained left knee as a result of a slip and fall injury. Respondent incurred \$8,753 total expenses related to his injury. He is still employed by Respondent and was recently promoted to chef.

70) Complainant and Benson are the Respondent's only Oregon employees who filed workers' compensation claims between January 1995 and December 1997 and were discharged based on circumstances related to their injuries.

71) Peck, Avers, Egging, Bigley, Martin, Cappaccio, Panek, Bouman, and Yap-Sam were credible witnesses.

72) Paul Landis still works for Respondent. His casual attire suggested he did not take the proceedings seriously. However, the forum found his testimony credible.

73) Although "Beau" Benson had reason to carry a grudge against Respondent based on the circumstances of his discharge, that event did not appear to color his testimony. His testimony regarding Respondent's knife/cut glove policy was consistent with other witnesses, and his testimony that Bigley, Johnson, and Landis were aware that he did not always use the cut glove while working on the line was corroborated by Exhibits R-40 and R-41. Consequently, the forum has found his testimony to be credible.

74) Aaron Zweig's testimony was not entirely credible. His testimony concerning the practical difficulties in wearing a cut glove was exaggerated. His testimony that dishwashers were supposed to clean knives used by the cooks was contrary to the testimony of every other witness. He also testified initially that he worked for Respondent in late August 1998, later correcting the date to September

1997 when he was handed Exhibit A-32 to identify. However, his testimony concerning Respondent's cut glove policy was consistent with that given by the other witnesses. He was not the only witness who testified that he did not use a cut glove when cutting prime rib with a knife, and that he received correction on those occasions where he was observed. Consequently, the forum has credited his testimony that he did not use a cut glove on occasion while using a knife and received verbal correction on those occasions where he was observed.

75) Complainant's testimony concerning his knowledge and understanding of Respondent's cut glove policy and the circumstances of his employment and discharge was credible. However, his testimony concerning the impact of his discharge on his life, which was in large part financial, tended to be exaggerated and unrealistic. The most obvious example was his testimony on direct that he was "living in the dark with no phone line and no TV" as a result of his discharge. On cross, he admitted that he did not own a television before his discharge and the "living in the dark" was a figurative reference to his state of mind, not the literal state of his life. He also attributed all of his financial distress to his discharge, when the evidence clearly showed that Complainant was in financial distress before his discharge. His testimony concerning his mitigation efforts also lacked sincerity when viewed in light of the large number of job openings in the local area he was qualified for and aware of subsequent to his discharge but did not pursue. In short, the forum has credited Complainant's testimony regarding his mental suffering and mitigation efforts only where it is supported by reason and not contradicted by other credible evidence.

ULTIMATE FINDINGS OF FACT

1) At all material times, Respondent ARG Enterprises, Inc. was a foreign corporation operating eating and drinking places under the assumed business name of

Stuart Anderson's Restaurants, and employed six or more persons in the state of Oregon.

2) At all material times, Complainant was employed by Respondent at Stuart Anderson's Black Angus restaurant in Eugene, Oregon.

3) Complainant cut his thumb with a knife at work on October 24, 1997, and invoked or utilized the procedures provided for in ORS Chapter 656 the next day.

4) On November 3, 1997, Complainant was released to return to work. Complainant reported to work and was discharged by Stuart Anderson's.

5) Complainant was informed that he was discharged for violating Stuart Anderson's policy requiring kitchen employees to wear a cut glove while using a knife.

6) Since 1995, Stuart Anderson's has had a policy that all kitchen employees must wear a cut glove when using a knife. All kitchen employees in Eugene in 1997, including Complainant, were aware that they were required to wear a cut glove when cutting with a knife, but not all were aware that they were required to wear a cut glove when cleaning a knife.

7) Complainant was cleaning a knife at the time he cut himself and was not wearing a cut glove. Complainant was not aware that he was required to wear a cut glove when cleaning a knife.

8) Other dishwashers and cooks employed by Stuart Anderson's in 1997 who did not file workers' compensation claims⁶ sometimes did not wear a cut glove while cutting with a knife and were verbally instructed by the kitchen supervisory staff to wear a cut glove whenever cutting with a knife. This includes one cook who cut himself twice, but did not file a workers' compensation claim. One cook was given a written warning for not using a cut glove when cutting with a knife after receiving prior verbal warnings from Bigley, the general manager, for the same violation.

9) Complainant is the only kitchen employee discharged by Stuart Anderson's for violating the cut glove policy.

10) Complainant was discharged because of his invocation and utilization of the procedures in ORS chapter 656.

11) Complainant suffered lost wages and experienced mental suffering as a result of his discharge.

CONCLUSIONS OF LAW

1) At all material times, Respondent was an employer who employed six or more persons in the state of Oregon and was subject to the provisions of ORS 659.010 to 659.110 and 659.400 to 659.435.

2) OAR 839-006-0120 provides:

“To be protected under ORS 659.410, a person must be a worker as defined in OAR 839-006-0105(4)(a).”

OAR 839-006-0105(4)(a) defines “worker” as follows:

“‘Worker’ means any person * * * who engages to furnish services for a remuneration, subject to the direction and control of an employer * * *.”

Complainant was a worker entitled to the protection of ORS 659.410.

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

4) The actions and inactions of Randy Panek, Daryl Bigley, Paul Landis, and Mark Johnson, described herein, are properly imputed to Respondent.

5) ORS 659.410(1) 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 chapter 656 or of ORS 659.400 to 659.460 or has given testimony under the provisions of such sections.”

Respondent discharged Complainant because of his invocation and utilization of ORS chapter 656 and, in doing so, violated ORS 659.410(1).

6) Pursuant to ORS 659.060(3) and by the terms of ORS 659.010(2), the Commissioner of the Bureau of Labor and Industries has the authority under the facts and circumstances of this case to award Complainant lost wages resulting from Respondents' unlawful employment practice and to award money damages for emotional distress sustained and to protect the rights of Complainant and others similarly situated. The sum of money awarded and the other actions required of Respondents in the Order below are appropriate exercises of that authority.

OPINION

INTRODUCTION

The Agency alleges that Complainant was discharged based on his invocation and utilization of ORS chapter 656 after he cut himself at work with a knife. The Agency further alleges that Complainant is entitled to \$2,304 in lost wages and \$20,000 in mental suffering damages to compensate him for Respondent's unlawful employment practice. In reply, Respondent contends that Complainant was discharged based on a legitimate, non-discriminatory reason ("LNDR"), namely, violation of Respondent's cut glove policy. Respondent further alleges that Complainant failed to mitigate his damages and that any mental suffering experienced by Complainant was attributable to issues unrelated to Complainant's discharge.

PRIMA FACIE CASE

The Agency's prima facie case consists of the following elements:

- "(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 protected class."

OAR 839-005-0010(1); see also *In the Matter of Dan Cyr Enterprises*, 11 BOLI 172, 178 (1993).

In this case, elements (a), (b), and (c) are undisputed. That leaves the forum to grapple with the issues of causation and the extent of harm suffered by Complainant that can be attributed to Respondent.

RESPONDENT'S ACTION WAS TAKEN BECAUSE OF COMPLAINANT'S PROTECTED CLASS.

The forum applies a different treatment analysis to determine if Respondent discharged Complainant because of his protected class. Different treatment occurs when:

“the Respondent treats members of a protected class differently than others who are not members of the protected class. When the Respondent makes this differentiation because of the individual's protected class and not because of legitimate, non-discriminatory factors, unlawful discrimination exists.” *OAR 839-005-0010(2)(b)*.

The Agency has the burden of proving that protected class membership was the reason for Respondent's alleged unlawful action. This burden can be met as follows:

“The Complainant begins this process [of proof] by showing harm because of an action of the Respondent which makes it appear that the Respondent treated Complainant differently than comparably situated individuals who were not members of the Complainant's protected class. The Respondent must then rebut this showing. If the Respondent fails to rebut this showing, the Division will conclude that substantial evidence of unlawful discrimination exists. If the Respondent does rebut the showing, the Complainant may then show that the Respondent's reasons are a pretext for discrimination.” *OAR 839-005-0010(5)*.

In this case, the Agency met its initial burden by producing evidence that Complainant invoked or utilized the procedures provided in ORS chapter 656, that Complainant was discharged when he was released to return to work and attempted to return to work, and that other kitchen staff who engaged in same behavior that resulted in Complainant's discharge were not discharged.

Respondent's rebuttal to the Agency's prima facie case consisted of undisputed evidence that Complainant's injury was a direct result of his violation of Respondent's cut glove policy, that the cut glove policy was a legitimate part of Respondent's safety policy, and that it that it was regularly promulgated among and known by all employees, including Complainant.

Where a Respondent successfully presents evidence of an LNDR, the Agency may still prevail by proving that the proffered justification was a pretext for discrimination. Pretext can be established through credible evidence that similarly situated employees outside of the Complainant's protected class received favored treatment or did not receive the same adverse treatment.⁷

The Agency presented credible, unrebutted evidence that in 1997 at least five kitchen staff employed as dishwashers or cooks at the same restaurant Complainant worked at sometimes failed to wear a cut glove when cutting with a knife, in direct violation of Respondent's cut glove policy. Of these five employees, Damon Egging and Aaron Zweig testified that they were "reminded" or "instructed" to put on a cut glove when they were observed violating the cut glove policy, but did not testify who "reminded" or "instructed" them.⁸ Paul Avers testified that Mark Johnson, the sous chef who was in charge of the kitchen in the head chef's absence, "scolded" him for not wearing a cut glove and that he was "scolded" for actually cutting himself a couple of times with a knife while cutting without a cut glove. John Cappacio, Respondent's witness, testified that both Paul Landis, the head chef, and Johnson observed him cutting with a knife while not wearing a cut glove and they merely corrected him. None of these four ever received a written warning for their violations. Last but not least, "Beau" Benson was observed cutting with a knife without a cut glove "more than once" by Landis and Daryl Bigley before he was finally given a written warning in June 1997.

Although Benson was discharged in September 1997, his discharge was unrelated to his documented violations of Respondent's cut glove policy.

In comparison, Complainant had received no warnings that he was in violation of Respondent's cut glove policy prior to his discharge, a fact that Bigley was aware of when he recommended that Complainant be discharged. For that matter, Complainant had never violated Respondent's cut glove policy, as he understood it, prior to cutting himself on October 24, 1997.⁹

Complainant and Benson are the most clear-cut comparators. They were both employed in a similar period of time and both violated Respondent's cut glove policy. Bigley, Respondent's general manager, was aware of the violations, as were Landis and Johnson. After violating the cut glove policy more than once, Bigley received a written warning. In contrast, Complainant violated the cut glove policy once, injuring himself in the process, and was discharged. Cappaccio was employed in the same time period as Complainant and was observed violating the cut glove policy by Landis and Johnson, Respondent's kitchen supervisory staff. However, they only instructed him to wear the cut glove and administered no other discipline. Avers, who was employed by Respondent in early 1997, was scolded by Johnson for cleaning knives without wearing a cut glove, as well as for actually cutting himself while not wearing a cut glove when cutting with a knife, but received no other discipline. Zweig and Egging, who were both employed in the same time period as Complainant, both violated the cut glove policy and only received verbal correction. Complainant, who was discharged, invoked or utilized ORS chapter 656 as a direct result of his violation, whereas Benson, Avers, Cappaccio, Zweig, and Egging did not.

This evidence shows that Respondent's kitchen staff who were similarly situated to Complainant received only verbal warnings for their first violation of Respondent's cut

glove policy, with the possibility of a written warning after the receipt of more than one verbal warning. In comparison, Complainant, the only employee who filed a worker's compensation claim for an injury he suffered as a result of his violation, was discharged based on his first violation of Respondent's cut glove policy. This comparative evidence is sufficient to establish that Respondent's LNDR is pretextual, leading the forum to conclude that Respondent discharged Complainant because of his invocation or utilization of procedures provided for in ORS chapter 656.

The forum notes Respondent also presented credible evidence that numerous other employees filed workers' compensation claims between January 1995 and December 1997.¹⁰ None of those employees except for Complainant and Benson were fired for circumstances related to their injuries.¹¹ These employees are comparators, and the forum has considered this evidence in evaluating the issue of causation. However, except for the statements contained in Findings of Fact – The Merits ##65-69, there was no other evidence presented concerning the circumstances of these employees' employment, whether any of these employees had ever violated Respondent's knife policy and, if so, to what extent, or whether they were injured as a result of violating Respondent's knife policy. Consequently, the forum concludes that, although these employees are comparators, they are not similarly situated comparators to the degree that Benson, Avers, Cappacio, Zweig, and Egging are, and has accordingly given this evidence lesser weight.¹²

DAMAGES

A. Back Pay.

Where a respondent commits an unlawful employment practice under ORS chapter 659 by discharging a complainant, the forum is authorized to award the complainant back pay, absent unusual circumstances.¹³ The purpose of a back pay

award is to compensate a complainant for the loss of wages and benefits that the complainant would have received but for the respondent's unlawful discrimination. *In the Matter of Salem Construction Company, Inc.*, 12 BOLI 78, 90 (1993). A complainant in an employment discrimination case who seeks back pay is required to mitigate damages by using "reasonable diligence in finding other suitable employment."¹⁴ *In the Matter of City of Portland*, 6 BOLI 203, 210-11(1987). Where the forum determines that a back pay award is appropriate, a respondent bears the burden of proof to show that a complainant failed to mitigate his or her damages. *In the Matter of Thomas Myers*, 15 BOLI 1, 16 (1996). To meet this burden, a respondent must prove that the complainant failed to use reasonable care and diligence in seeking employment and that jobs were available which, with reasonable diligence, the complainant could have discovered and for which the complainant was qualified.¹⁵

The Agency established Complainant's entitlement to back pay by proving that he was discharged in violation of ORS 659.410 and that he did not obtain substantially equivalent employment until January 1998. Therefore, the issue is not whether Complainant is entitled to back pay, but the amount of the award. While employed by Respondent, Complainant earned \$6.00 per hour and worked an average of 31 hours per week, for average gross weekly earnings of \$186.00.¹⁶ The forum will use this figure as a base in calculations of how much back pay Complainant should be awarded.

Complainant testified that he sought work after his discharge by looking through the local newspaper for a job he was qualified for with late afternoon and evening hours, but he was unable to find employment until approximately a month later at a job that paid \$70 per week. He testified that there were jobs available during his period of unemployment, but he couldn't qualify for them or there was some reason that he couldn't get to the job.¹⁷ He did not testify as to any specific places of employment that

he contacted or made application with after his discharge, with the exception of the job that he obtained a month later.

Respondent presented considerable evidence in an attempt to prove that Complainant failed to mitigate. To meet its burden of proof that Complainant failed to mitigate, Respondent's evidence must prove that Complainant failed to use reasonable care and diligence in seeking employment *and* that jobs were available which, with reasonable diligence, Complainant could have discovered and for which Complainant was qualified.¹⁸

Whether or not Complainant used reasonable care and diligence in seeking employment can be determined by a scrutiny of the steps Complainant took in seeking alternative employment. According to Complainant, he conducted his job search by looking through the local newspaper's want ads, the same way he located Respondent's job. He found jobs he was qualified for, but for one reason or another, none of the jobs were suitable. These reasons included his lack of an automobile,¹⁹ his difficulty in getting to a business to fill out an application during business hours, and hours that did not mesh with his classes, which concluded at 3-4 p.m. each day. The Agency presented no evidence that Complainant actually contacted any of the employers advertising in the help wanted ads or any other prospective employer during his period of unemployment. Exhibit R-16 clearly demonstrates that from November 3, 1997, onwards, a number of jobs were advertised in the local newspaper that Complainant was qualified to perform and that meshed with his school schedule. In addition, there were numerous jobs advertised that Complainant was qualified to perform that may have met Complainant's job requirements, had he bothered to make inquiry. Finally, the forum notes that the work-study job Complainant finally obtained involved data entry, a skill totally unrelated to any of Complainant's prior work

experience. The forum concludes that Complainant did not exercise reasonable diligence in seeking alternative employment by rejecting numerous advertised jobs that he was qualified to perform without making further inquiry.²⁰

The second question the forum must answer in determining whether or not Complainant failed to mitigate his back pay damages is whether jobs were available that, with reasonable diligence, Complainant could have discovered and for which Complainant was qualified. The forum has already discussed this subject in some detail in the preceding analysis concerning Complainant's failure to exercise reasonable care and diligence in seeking employment. The Register-Guard help wanted ads establish that jobs were available that Complainant was qualified to perform. Whether or not Complainant could have discovered them was answered by Complainant when he testified that he conducted his job search efforts by looking at those very newspaper ads. In short, undisputed evidence compels the conclusion that there were jobs available that, with reasonable diligence, Complainant could have discovered and for which he was qualified.

The forum concludes that Respondent has met its burden of proof in showing that Complainant failed to mitigate his back pay damages, and that Complainant's back pay award must be reduced as a result. The next step is determining the amount of the reduction.

The Agency sought back pay damages of \$2,034, which would have compensated Complainant for his lost wages from November 3, 1997, through early January 1998 when he began working at Safeway, less the \$210 he earned at his U of O work study job. Respondent's expert witness, Susan Martin, credibly testified that Complainant should have been able to find work as a dishwasher within one week after his discharge. The numerous help wanted ads, starting on the day of Complainant's

discharge, bolster this conclusion, and the forum has accepted it as fact.²¹ Where a complainant limits his job search to a scrutiny of help wanted ads in the local newspaper, and those ads list suitable jobs that match the complainant's qualifications, but the complainant makes no further inquiry into those jobs, the forum will not require a respondent to prove the dates those jobs were filled, their specific wage rates, and specific shift where the respondent has already met its burden of proof of showing that the complainant failed to mitigate his back pay damages. The forum awards Complainant one week of back pay damages, or \$186.00.

B. Mental Suffering.

In determining damages for mental suffering, the Commissioner considers "the type of discriminatory conduct, the duration, severity, frequency, and pervasiveness of that conduct, and the type, effects, and duration of the mental distress caused." *In the Matter of Vision Graphics and Publishing, Inc.*, 16 BOLI 21, 27 (1997). While prior cases serve as examples of the types of awards that are within the Commissioner's range of discretion, because damages for mental suffering are purely compensatory, the amount to be awarded in any given case is completely dependent upon the facts proved. *In the Matter of Tomkins Industries, Inc.*, 17 BOLI 192, 210 (1998), *appeal pending*.

On November 3, 1997, when Complainant was discharged, he felt he was "building a life in Oregon" for the first time, in that working at a job while going to school made him feel that Oregon was his home. His discharge and resulting unemployment caused him feel that his life was not integrated to the extent it had been before his discharge. He suffered financial stress after his discharge, some of which can be attributed to his unlawful discharge. Because of his financial stress, he was unable to meet his financial obligations and had to get food from a church before he was able to

get food stamps, lost his telephone, couldn't afford to take his girlfriend out, and incurred a number of debts that took him a year to pay off. These consequences caused him to experience upset, humiliation, and feelings of degradation. These are all types of mental suffering for which the forum has awarded mental suffering damages in the past.

In computing an award of mental suffering damages, the forum must also consider other factors in Complainant's life, unrelated to his discharge, that may have contributed to his mental suffering. In this case, there were a variety of circumstances and events unrelated to Complainant's discharge that may have contributed to his post-discharge mental suffering.

Complainant experienced various personal problems prior to his discharge. He broke up with his girlfriend in September 1997. He was evicted from his fraternity in October 1997 after being brought up before his fraternity's standards board and having testimony given against him. He was on academic probation at the U of O during the entire time he was employed by R. He also testified that he experienced ongoing stress from 1995 until sometime after his discharge from his parent's divorce. Clearly, this was a young man already carrying considerable emotional baggage at the time of his discharge. Despite this baggage, the weight of the evidence indicates that the post-discharge mental suffering experienced by Complainant was *in addition* to his pre-existing distress.

Complainant testified that the majority of his mental suffering stemmed from his post-discharge financial distress. The evidence showed he was already experiencing acute financial stress prior to his discharge. He was responsible for all his own expenses except for tuition and rent. By the time of his discharge, his VISA card was already charged to its limit and he was unable to pay all of his bills even with the income

he earned from Respondent. In addition, his car insurance had been cancelled in September 1997 because he couldn't afford it. He had a car wreck in September 1997 while driving as an uninsured driver and had to get \$1600 from his parents to fix his car and reimburse the other driver.

In fashioning an award of damages based on Complainant's financial distress, the forum must consider his pre-discharge financial difficulties as well as the fact that he could have reduced the mental suffering associated with his post-discharge financial hardships by exercising reasonable care and diligence to find another job. Therefore, Complainant's entitlement to mental suffering damages due to financial stress should be limited by his failure to mitigate his back pay loss. However, the forum has concluded that he would have been unemployed for one week, regardless of his mitigation efforts. Based on Complainant's tenuous financial standing at the time of his discharge, the forum infers that the absence of a paycheck for one week would have had a trickle-down effect for some time afterward, contributing financial stress.

In addition to emotional stress caused by finances, the added emotional distress caused by the discharge itself,²² though less tangible, is also compensable, and the forum finds Complainant is entitled to damages based on that emotional distress.

Seven weeks after his discharge (around December 25, 1997), Complainant was disqualified as a student at the U of O, which caused additional disruptions in his life. However, Complainant was already on academic probation at the U of O when he went to work for Respondent and remained on probation throughout his employment. The evidence is insufficient to allow the forum to determine the extent to which Respondent's discharge may have contributed to his disqualification. Consequently, any mental suffering resulting from his disqualification from school is not compensable.

The Agency prayed for an award of \$20,000 to compensate Complainant for his mental suffering. Based on the evidence presented in this case, the forum concludes that \$12,500 is an appropriate award of damages for mental suffering.

ORDER

NOW, THEREFORE, as authorized by ORS 060(3) and 659.010(2), and in order to eliminate the effects of the unlawful practices found in violation of ORS 659.410 and as payment of the damages awarded, Respondent ARG Enterprises, dba Stuart Anderson's Restaurants, is hereby ordered to:

1) Deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232-2162, a certified check payable to the Bureau of Labor and Industries, in trust for Complainant Christopher Caires, in the amount of:

a) ONE HUNDRED EIGHT SIX DOLLARS (\$186.00), less lawful deductions, representing wages lost by Complainant between November 3, 1997, and November 10, 1997, as a result of Respondent's unlawful practices found herein, plus

b) TWELVE THOUSAND FIVE HUNDRED DOLLARS (\$12,500.00), representing compensatory damages for mental suffering as a result of Respondent's unlawful practices found herein, plus

c) Interest at the legal rate from November 10, 1997, on the sum of \$186.00 until paid, and

d) Interest at the legal rate on the sum of \$12,500.00 from the date of the Final order until Respondent complies herewith.

2) Cease and desist from discriminating against any employee based on the employee's utilization or invocation of ORS chapter 656.

¹ The use of “knives” in this opinion refers to kitchen knives used by Respondent’s employees for cutting food items.

² Throughout the hearing, witnesses stated that Respondent’s policy regarding use of the steel cut glove was that the glove was required to be worn on the “non-dominant” hand, i.e., the hand that was not holding the knife.

³ However, an employee could suffer a puncture wound if the point of a sharp object penetrated the steel mesh between the links.

⁴ Complainant testified that he went to school every day until “3-4 p.m.”

⁵ The forum takes official notice that the state minimum wage in 1997 was \$5.50 per hour. ORS 653.025(1).

⁶ “Beau” Benson did file a workers’ compensation claim; however, his injury was unrelated to his violations of Respondent’s cut glove policy. See Finding of Fact – The Merits #65, *supra*.

⁷ See *In the Matter of Howard Lee*, 13 BOLI 281, 290-91 (1994); *In the Matter of Clackamas County Collection Bureau*, 12 BOLI 129, 138-40 (1994). See also Lindeman and Grossman, *Employment Discrimination Law* (Third Edition) at 30-31 (1996).

⁸ Neither Ms. Lohr, Ms. Gordon, nor the ALJ asked the witnesses to name the individual(s) who “reminded” or “instructed” them.

⁹ See Findings of Fact – The Merits, ##16, 18-19, 27, 28, *supra*.

¹⁰ See Finding of Fact – The Merits #64, *supra*.

¹¹ See Finding of Fact – The Merits #70, *supra*.

¹² See Lindeman and Grossman, *Employment Discrimination Law* (Third Edition) at 33 (1996)(“The critical issue when comparative evidence is offered is whether the comparisons are apt in light of all of the circumstances.”)

¹³ For example, where the complainant obtains a comparable or higher paying job the next working day after the discharge and suffers no loss of salary, wages, or fringe benefits.

¹⁴ The forum notes that a complainant's failure to exercise reasonable diligence in finding other suitable employment does not negate an entitlement to back pay, but may reduce a back pay award if the respondent proves the complainant's failure to mitigate.

¹⁵ See *In the Matter of Veneer Services, Inc.*, 2 BOLI 179, 186 (1981), *affirmed without opinion*, *Veneer Services, Inc. v. Bureau of Labor and Industries*, 58 Or App 76 (1982). See also *EEOC v. Farmer Bros. Co.*, 31 F.3d 891, 906 (9th Cir. 1994)(to prevail on a motion for summary judgment that plaintiff in a sex discrimination case failed to mitigate her damages, defendant had to prove that "during the time in question there were substantially equivalent jobs available, which [plaintiff] could have obtained, and that she failed to use reasonable diligence in seeking one.")

¹⁶ These calculations are derived from figures in Finding of Fact – The Merits #44. The forum has used the hours worked in the four week time period extending from 9/16/97 to 10/13/97 as representative of the average hours worked by Complainant.

¹⁷ He testified that having his car repossessed limited the geographical area in which he was able to work, and that he needed a job within walking distance.

¹⁸ See fn. 12, *supra*, and accompanying text.

¹⁹ The forum discounts Complainant's testimony that lack of an automobile hampered his geographical mobility, and takes official notice that, even if Complainant's car had not been repossessed, Complainant was not legally able to drive it, based on his lack of auto insurance. *ORS 806.010*. The forum also notes that Complainant had a bicycle, which he used to ride to work on the date of his discharge, and that the Eugene-Springfield area has a public bus system that goes to all major locations in the metropolitan area and has several stops around the U of O. See Finding of Fact – The Merits #53, *supra*.

²⁰ See *Booker v. Taylor Milk Co.*, 64 F.3d 860, 865 (3rd Cir.1995)(Plaintiff failed to exercise reasonable diligence in seeking alternative employment where it appeared he "did little more than register with the job Service and look through the help-wanted ads.") *Cf. EEOC v. Service News Co.*, 898 F.2d 958, 963 (4th

Cir. 1990)(“Looking through want ads for an unskilled position, without more, is insufficient to show mitigation, and the back pay award should accordingly be reduced.”)

²¹ See Finding of Fact – The Merits #54, *supra*.

²² See Finding of Fact – The Merits #54, *supra*.