

In the Matter of

BARBARA BRIDGES and Audio Unlimited, LLC

Case No. 18-02

Final Order of Commissioner Dan Gardner

Issued December 17, 2003

SYNOPSIS

Where the Agency failed to establish by a preponderance of evidence that Complainant, a male, had been subjected to an offensive and hostile work environment, had his pay and hours reduced because he complained of sexual harassment, or was constructively discharged because he opposed Respondent Bridges's alleged unlawful employment practices, the Commissioner dismissed the complaint and specific charges. *Former* ORS 659.030(1)(a), (b), & (f); *former* OAR 839-007-0550(1)&(3).

The above-entitled case came on regularly for hearing before Linda A. Lohr, designated as Administrative Law Judge ("ALJ") by Jack Roberts, former Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on December 17, 2002, in the Oregon Employment Department Seven Peaks Conference Room located at 1007 SW Emkay Drive, Bend, Oregon.

Peter McSwain, an employee of the Agency, represented the Bureau of Labor and Industries ("BOLI" or "the Agency"). Troy Fraley ("Complainant") was present throughout the hearing and was not represented by counsel. Anthony Albertazzi, Attorney at Law, represented Barbara Bridges and Audio Unlimited LLC ("Respondents"). Respondent Barbara Bridges was present for part of the hearing.

In addition to Complainant, the Agency called as witnesses: Jennifer Fraley, Complainant's wife; James Polley, Respondent Bridges's former employee and Complainant's brother-in-law; and Robert A. Smith, Complainant's friend.

In addition to Respondent Barbara Bridges, Respondents called as witnesses: Jamie Lewis, Respondent Bridges's former employee, and John Wilson, formerly known as John Casey, Bridges's former husband.¹

The forum received as evidence:

- a) Administrative exhibits X-1 through X-10 (submitted or generated prior to hearing);
- b) Agency exhibits A-1 through A-13 and A-20 (submitted prior to hearing).

Having fully considered the entire record in this matter, I, Dan Gardner, 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 1, 2000, Complainant filed a verified complaint with the Agency's Civil Rights Division ("CRD") alleging he was the victim of the unlawful employment practices of Respondent Bridges. On January 31, 2001, Complainant filed an amended complaint adding an additional respondent, Audio Unlimited LLC. On February 27, 2001, Complainant filed a second amended complaint alleging that Respondent Bridges aided and abetted Respondent Audio Unlimited LLC's harassment of Complainant. After investigation and review, the CRD issued a Notice of Substantial Evidence Determination finding substantial evidence supporting the allegations of the complaint.

2) On May 9, 2002, the Agency submitted to the forum Specific Charges alleging Respondents discriminated against Complainant by subjecting him to a course of conduct by Respondent Bridges designed to harass, embarrass, humiliate and intimidate him, which conduct was offensive and unwelcome, creating a hostile and intimidating work environment because he was male, in violation of *former* ORS

659.030(1)(b). The Agency further alleged that Complainant's pay and work hours were significantly reduced in violation of *former* ORS 659.030(f) because he objected to the offensive and unwelcome conduct and that he was compelled to quit his employment due to the intolerable working conditions created by Respondent Bridges, in violation of *former* ORS 659.030(1)(a). The Agency also requested a hearing.

3) On May 14, 2002, the forum served on Respondents the Specific Charges, accompanied by the following: a) a Notice of Hearing setting forth December 17, 2002, in Bend, 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 28, 2002, Respondents, through counsel, timely filed an answer to the Specific Charges and alleged certain affirmative defenses.

5) On October 3, 2002, the forum ordered the Agency and Respondents each to submit a case summary including: lists of all persons to be called as witnesses; identification and copies of all documents to be offered into evidence; a brief statement of the elements of the claim (for the Agency only); a brief statement of any defenses to the claim (for Respondents only); a statement of any agreed or stipulated facts; and any damage calculations (for the Agency only). The ALJ ordered the participants to submit case summaries by December 6, 2002, and notified them of the possible sanctions for failure to comply with the case summary order.

6) On November 7, 2002, Respondents filed their case summary.

7) On December 6, 2002, the Agency timely filed a request for an extension of time to file its case summary. On the same date, the forum granted the Agency's

request and extended the time for filing a case summary, or in Respondents' case, a supplemental, to December 12, 2002.

8) At the start of hearing, the Agency and Respondents stipulated to the following facts:

- a) Respondent Bridges conducted her principal business in Oregon from June 1999 through December 12, 1999, under the assumed business name of Audio Unlimited and employed one or more persons in Oregon;
- b) Complainant filed a verified complaint with the Civil Rights Division on March 1, 2000, alleging he was the victim of unlawful employment practices by Respondent Bridges. On or about January 31, 2001, the complaint was amended to include Audio Unlimited LLC as a respondent and amended again on February 27, 2001, to add Respondent Bridges as a co-respondent for aiding and abetting the unlawful practices;
- c) On March 1, 2001, the Civil Rights Division found substantial evidence of unlawful employment practices on the part of both Respondents relating to the original verified complaint;
- d) Respondent Bridges, as the sole organizer, registered with the Corporations Division as Audio Unlimited LLC, a domestic limited liability company, which company has since been the successor to Respondent Bridges's sole proprietorship operating under the assumed business name of Audio Unlimited; and
- e) Complainant began working for Respondent Bridges prior to the opening of her retail business in Bend, Oregon, in June 1999.

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

10) The ALJ issued a proposed order on November 17, 2003, that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. At the Agency's request, the ALJ extended the deadline for filing exceptions until December 17, 2003. Neither the Agency nor Respondents filed exceptions.

FINDINGS OF FACT – THE MERITS

1) At all times material herein, Respondent Bridges owned and operated a retail business that included the sale and installation of automobile accessories and sound equipment under the assumed business name of Audio Unlimited. In March 2001, Bridges registered her business with the Oregon Corporation Division as a Limited Liability Company (“LLC”), indicating that a single manager managed the company. After she formed the LLC, Bridges continued the same business in the same location using the same employees. In June 2001, Bridges liquidated the LLC because the business was not profitable and the company had continued to lose money.

2) Bridges’s business was located in a converted warehouse in Bend, Oregon. For several weeks before the business opened, Complainant, his brother-in-law, James Polley, and Paul Smith helped Bridges and her husband, John Casey, remodel the warehouse. Complainant helped build the “sound room” to display “high end products” and painted the concrete floors. He worked an average of 10 to 11 hours per day, six or seven days per week. Bridges provided lunch for everyone each day. Complainant was not on Bridges’s payroll during that time and he did not record the hours he worked. Complainant was enthusiastic about helping Bridges start up the business because he had a long time “dream” to manage a “car stereo shop.”

3) When Bridges opened for business on or about June 1, 1999, she hired Complainant, a male, as “install bay manager.” His duties included overseeing the day to day operation of the “install bay” and ordering product. In June or July 1999, Complainant hired his brother-in-law, James Polley, to work full time as an installer and salesperson. The store opened at 10 a.m. each day and closed at 7 p.m.

4) Bridges and Complainant agreed he would receive \$1,500 per month in salary, plus a 50% commission based on the store’s gross installations. When he began his employment, Complainant borrowed between \$2,000 and \$6,000 from

Bridges to buy a car and make a house trailer payment. Complainant's wife cleaned the store after hours to pay off some of the debt owed to Bridges and Complainant agreed to work off the remainder. Bridges's "payroll register," which begins in June 1999, shows that checks were issued to Complainant every two weeks in the following amounts during the months that he was on salary: \$1,043.98 on July 16; \$1,175.13 on July 30; \$860.33 on August 13; \$805.64 on August 27; \$983.23 on September 10; and \$767.04 on September 24.

5) Business was slow at the beginning, but picked up after the store's "Grand Opening" in early July 1999 and after Bridges began an advertising campaign at Complainant's suggestion. Since 1994, and before Bridges employed him, Complainant had worked for a local radio station as an "on air personality." Complainant used his contacts in the radio industry to obtain radio advertising for the business. Complainant prepared and produced the advertising with Bridges's endorsement. In exchange for the first month's advertising, Complainant installed mobile broadcast units in three vans belonging to local radio stations.

6) Complainant's experience with car audio equipment included working on cars as a teenager and working at Sounds on Wheels, an automobile sound accessory business, for about one and one half years.

7) During his employment, Complainant drove Bridges's truck "a time or two" and installed some of the store inventory in his own vehicle to promote the store's products.

8) Bridges maintained an informal work atmosphere. After the doors opened in June 1999, morale was "incredible" and "everyone was clicking" and focused "on the goal." Complainant thought Bridges was a "nice lady" and he and other employees

often referred to her as “mom.” Complainant thought the workplace at that time was “fun and friendly.”

9) On or about July 4, 1999, Bridges touched Complainant’s hair and told him she wished her husband would let his hair grow long because she thought it was “sexy.” Sometime during his employment, Complainant told Bridges that he liked the way her feet looked in sandals and that her “little feet were sexy.”

10) Sometime prior to July 4, 1999, Bridges approached Complainant as he was bent over installing an alarm in her truck and stated that she would “recognize that butt anywhere.”

11) Polley described Bridges as a “touchy feely” employer who expressed her feelings verbally and by “touching” or “patting” her employees. Polley also heard Bridges make a remark about Complainant’s “rear” and overheard Bridges comment on the “rears” of other male employees. One day, instead of his usual baggy shorts, Polley wore a pair of snug fitting shorts and Bridges remarked that she liked the shorts because she could see his “ass.” That was the only comment she made to Polley of that nature and he “let it roll off [his] back.” He didn’t “think anything” of the comments she made to anyone else.

12) Sometime after June 28, 1999, Bridges’s general manager, Paul Smith, quit working for Bridges. Around October or November 1999, Bridges hired Jamie Lewis as general manager. Bridges had heard “good reports of his ability” and decided to give him an opportunity to “turn the store around.” She told him that he could hire whomever he needed, including a “good installer.” Lewis hired at least two people after he became general manager.

13) From June through December 1999, Bridges’s husband, Casey, was the store’s fabrication manager. He constructed and sold stereo speaker “enclosures,”

handled shipping and receiving, and helped run the sales floor. Before Lewis was hired as general manager, Casey was the “jack of all trades” around the store. When Lewis began “phasing in” in November, Casey began “phasing out” and participating less in the store’s day to day operation. Eventually, Casey went to work as a manager for a former employer. Casey regularly observed Bridges and Complainant together and never saw them interacting in a sexually inappropriate manner. Complainant never complained to Casey about Bridges’s conduct and never told Casey to “keep an eye on [his] wife.” Casey never observed Bridges making physical contact with any of the employees and none of them ever complained to him about Bridges’s conduct in the workplace.

14) The employees listed on Bridges’s payroll register are all males. Paul Smith does not appear on the payroll after June 28, 1999. Jamie Lewis’s name appears on the payroll for the first time on November 5, 1999. John Casey appears on the payroll from July through December 1999. James Polley appears on the payroll from July until October 8, 1999. David Haxton appears on the payroll from July until September 10, 1999.

15) Sometime prior to September 30, 1999, Complainant, with Bridges’s consent, began working part time as a deejay for his previous employer. He worked for the radio station “on air” from 2 p.m. until 6 p.m. At first, Bridges had no problem with Complainant working a second job, but later she began to perceive that Complainant was not working many hours at the store and she discussed her concerns with him on several occasions. Complainant believed that other employees, particularly David Haxton, a salesperson who had a key to the store, could handle the store when Complainant was not there and that he could come in after his “air shift” and “tie up any loose ends.”

16) In or around early October 1999, Bridges's husband, Casey, arrived at work with two "envelopes." He gave one to Complainant that contained a note dated September 30, 1999, that stated:

"To: Troy Fraley

"Dated: 9-30-99

"This is a letter to inform you that effective admittedly [sic] that you will be an hourly employee at the rate of TEN DOLLARS per hour. And as of this time you will be required to fill out a time card.

"Signed

"Bobbee Bridges

"Owner LLC"

The other contained a lay-off letter, which he gave to Polley. Despite Bridges's signature at the bottom of the lay-off letter, Polley believed Casey had written it because it contained spelling errors and Bridges was in the hospital at the time. However, he believed she may have signed it. Polley doubted that lack of work was the real reason for his lay-off, because business was good at that time. He perceived that Casey had another motive to let him go and that it was related to Casey's concerns about his own job security.

17) After he became an hourly employee, Complainant continued to prepare and produce radio advertisements for Bridges while continuing to work part time for Bridges and the radio station. Bridges paid Complainant around \$600, in addition to his hourly wage, for the radio advertisements.

18) After Complainant became an hourly employee, Bridges's payroll register shows Complainant was issued checks every two weeks totaling \$1,466.23 in October 1999, \$909.43 in November, and \$255.59 in December 1999.

19) Complainant's employment ended on or about December 12, 1999. Immediately thereafter, he began working for the radio station full time. At the radio station he earned a base salary of \$1,600 per month, plus separate payments for

remote broadcasts. At most, he earned between \$2,600 and \$2,800 per month at the radio station.

20) On several key points, Complainant's testimony was evasive, internally inconsistent, and contrary to prior statements he made to the Agency during its investigation.

Duration of Sexual Harassment

Complainant first testified that Bridges sexually harassed him from the beginning of his employment until the day he left on December 12, 1999, despite his purported direct request to her two months prior that she stop the harassment immediately. He later testified that the work atmosphere was "fabulous, fun and friendly" during the first month of his employment and that it was July or August before Bridges began to make sexual overtures toward him and that after he objected to her conduct on September 29, 1999, she quit talking to him and avoided him completely until he left his employment over two months later. His later testimony also contradicted a document he filed previously with the Agency describing the "harm or employment action" about which he filed his complaint, in which he stated: "From almost my first day of employment on the first of June, Mrs. Bridges, the owner of Audio Unlimited, began speaking very sexual remarks to me and even became physical in the way of running her fingers through my hair and saying 'I wish John would grow his hair long (John Casey is her husband), it's just so sexy.'" Based on those inconsistencies, the forum cannot determine when the alleged harassment began or when it ended. Moreover, the inconsistencies weaken Complainant's allegations that the harassment actually occurred.

Wage Agreement

Complainant's testimony that Bridges agreed to pay him \$3,000 per month in salary, plus a commission on "whatever the install bay took in," conflicts with his prior

statement to the Agency that he and Bridges agreed to a salary of \$1,500 per month, plus commission. The forum accepts as fact that Complainant and Bridges agreed to the latter because Complainant's original statement to the Agency is consistent with Bridges's testimony and documentary evidence showing amounts Bridges paid to Complainant while he was employed. On a related issue, Complainant testified that when he started his employment, he borrowed \$2,000 from Bridges as an advance on his "would be" payroll. However, in an earlier statement to the Agency he said Bridges loaned him \$6,000 with the understanding that he would "pay it back in work on her vehicle as a demo" after he told her when she hired him that he "needed a loan to catch up." Complainant's self-serving testimony at hearing about his pay and the loans he received casts further doubt on his credibility.

Termination of Employment

Finally, Complainant's markedly diverse statements regarding the circumstances under which he left his employment cannot be resolved. He first testified that on December 13, 1999, he was returning to work at the store after finishing his radio station job when he was involved in an automobile accident around 6 or 6:30 p.m. He described the nature of the accident and his physical condition in great detail and later stated that because there were no injuries he proceeded to work only to find that he was "locked out." He stated that Lewis and Casey met him at the door with a message from Bridges that his services were no longer required and he was no longer employed. Complainant stated he was "obviously upset" after his dismissal because he believed he was one of "the major factors" in starting the business. He asserted that neither Bridges nor Casey had any prior experience in the business and he felt they "used" him to get the business started and then "discarded" him when he was no longer needed. On cross-examination he acknowledged a written statement he supplied to the Agency that

represented he had “resigned” his employment. During redirect, in an attempt to reconcile his conflicting statements, Complainant provided the following narrative:

“I was issued a check from Miss Bridges for the radio ads that I had produced to supplement the change. As I told her when I received that letter that I was an hourly employee that I would be charging her then for, uh, I actually spoke with Jamie Lewis first, and he recommended I speak to Miss Bridges about that pay plan in that she would be charged for the ads. She agreed and said that would be fine. And I said, well, I have two ads and I submitted a bill to her for those. She wrote me a check and I immediately took it to the bank, deposited it or tried to deposit it, and the check was cancelled, there was a stop payment. I drove back to the store and, um, was you know, going to resign at that point, but they would not let me in so I took that as terminated. * * * I went there with the intention of getting my toolbox, my tools, and leaving.”

Notably, the only mention of Complainant’s last day of work in the Agency’s written record of its investigative interview with Complainant is a brief note that states:

“Complainant left December 12th. Complainant had talked to an attorney early in December. She said Complainant should stay, but Complainant was physically ill and losing sleep.

“Complainant was just being ignored. The employees wouldn’t listen to him.

“Bobbi asked for Complainant’s key back on approximately December 7th. She said she just wanted management to have the keys.”

Since the Agency investigator was not called to testify, the forum infers from that record that the investigator recorded everything of significance that Complainant stated regarding the termination of his employment. Based on those irreconcilable inconsistencies, the forum finds there is no credible evidence upon which to determine how Complainant’s employment ended.

The forum concludes that Complainant’s testimony, at best, was unreliable and the forum gave it weight only where it was consistent with credible evidence in the record or was a statement against interest.

21) Jennifer Fraley was not an impartial witness because she is Complainant’s wife with a stake in the outcome of her husband’s case. Her brief testimony was stilted

and appeared rehearsed. Her purported observations were not specific and she gave no testimony about how she had the opportunity to make those observations. Additionally, when testifying about Complainant's pay reduction, she first testified that Complainant came home with a letter stating his wages were reduced immediately after he told Bridges he objected to her purported conduct. Shortly thereafter, in a different context, she stated that Complainant's pay was reduced two days after his meeting with Bridges. Because she was inconsistent and had reason to shade the truth, the forum gave little weight to her testimony. The forum did credit Fraley's statement that she cleaned the business premises in order to work off a debt she and Complainant owed Bridges because it is consistent with Bridges's and Complainant's testimony. The forum, however, believes Bridges's testimony that she never saw Fraley in the workplace because the cleaning was done after business hours when Bridges was not present. Bridges's testimony was more credible than Fraley's on that point because it was plausible and not refuted by any evidence in the record.

22) James Polley's testimony was generally credible. Although he was Complainant's brother-in-law, he did not overly exaggerate or embellish his testimony when he had the opportunity. However, his observations were somewhat vague. He opined that Bridges was "more than a boss," who was "definitely more of a hands on type of person - she would say what she was feeling, but would also touch." He described her "touching" by stating she occasionally "patted" employees, but did not specify where, when, or how she touched or patted employees. He also testified that he observed her touching "the hair" but "didn't think anything of it." He did not say whose hair she was touching, but, based on the context of his testimony, the forum infers it was Complainant's hair. His testimony that he heard Bridges make a comment about Complainant's "rear" and occasionally commented on the tight fit of some employees'

pants was straightforward and believable. Also credible was his testimony that Bridges commented to him, on one occasion only, that she liked Polley's snug fitting shorts because she could see his "ass." Other than his statement that he, personally, let her comment "roll off [his] back," Polley did not testify that Complainant complained to him or anyone else about Bridges's conduct in the workplace. Overall, Polley's testimony was reasonably reliable and the forum credited it in its entirety.

23) Robert Smith's testimony was generally reliable. As Complainant's high school friend he was not necessarily neutral, but he demonstrated no particular bias by his demeanor or testimony. His statement that he once saw Bridges "try to follow [Complainant] into the install bay" as Complainant was heading toward the restroom, which was located in the install bay, was believable, if not particularly significant. He readily acknowledged that he was too far away to hear any words exchanged between Complainant and Bridges, but he did notice Complainant closing the restroom door as Bridges stood outside the door. Overall, he did not exaggerate the extent of his personal observation and the forum credited his testimony in its entirety.

24) Jamie Lewis's testimony was credible. He did not appear biased toward Bridges and showed no particular animosity toward Complainant. His testimony was direct, consistent, and not impeached in any way. The forum credited his testimony in its entirety.

25) John Wilson's testimony was credible. Although he and Bridges had recently ended their marriage by contested divorce, he exhibited no bias toward or against her. He also displayed no animosity toward Complainant. His memory for specific dates was poor, but overall his testimony was straightforward and confined to his personal observations and knowledge. His testimony was not impeached and the forum has credited it in its entirety.

26) During the hearing, Barbara Bridges appeared fatigued and somewhat affected by the medication she was taking to offset the effects of chemotherapy. She had difficulty recalling specific dates and events and her testimony, at times, was vague. She was adamant, however, that she had not patted Complainant on the buttocks and that he had not told her that her behavior was inappropriate in a sexual way. Her testimony that she remembered only “patting him on the back – not on the butt, but on the back - to get his attention” when she needed information from him was believable. If Polley, who credibly testified that he observed Bridges touching or patting employees, had observed her patting any employees on the buttocks, including Complainant, he would have presumably attested to that observation since where she touched or patted Complainant is a key issue in this case. That he did not lends some credence to Bridges’s testimony. Additionally, Bridges’s statement that Complainant commented on her small feet in sandals and thought they looked “sexy” rang true and was not rebutted. The forum accepts her testimony on that point as fact. Although her testimony was affected by her obvious bias and interest in the outcome of this proceeding, the forum credited it where it was consistent with or not refuted by other credible evidence in the record.

ULTIMATE FINDINGS OF FACT

1) At all times material, Respondent Barbara Bridges (“Bridges”), a female, owned and operated a retail business under the assumed business name of Audio Unlimited and was an Oregon employer with one or more employees.

2) On March 28, 2001, Bridges organized and registered Respondent Audio Unlimited LLC as a limited liability company. Bridges liquidated the LLC in June 2001, because it was not profitable.

3) At all times material, Bridges employed Complainant, a male, and was his immediate supervisor.

4) Between June and October 1999, Bridges sometimes touched or patted her male employees while talking to them or to get their attention.

5) Between June and October 1999, Bridges occasionally made comments about how her male employees' "rears" looked in tight pants and on at least one occasion, commented on Complainant's "rear."

6) On or about July 4, 1999, Bridges touched Complainant's hair and remarked that she wished her husband would grow long hair because it is "sexy."

7) On at least one occasion, Complainant told Bridges that he liked her small feet and thought they were sexy.

8) There is no credible evidence to conclude Bridges's conduct was offensive and unwelcome to Complainant.

9) There is no credible evidence to conclude Complainant complained to Bridges about offensive conduct directed toward him because of his gender.

10) Bridges changed Complainant from a salaried to an hourly employee because he was working four hours per day for another employer and was not working sufficient hours to warrant a salaried position.

11) Complainant voluntarily left his employment on December 12, 1999.

CONCLUSIONS OF LAW

1) At times material herein, Bridges was an employer subject to the provisions of *former* ORS 659.010 to ORS 659.110. *Former* ORS 659.010(6).

2) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the subject matter herein and the authority to eliminate the effects of any unlawful employment practices found. ORS 659A.800.

3) Bridges did not subject Complainant to unwelcome sexual conduct directed toward him because of his sex, thereby creating a hostile, intimidating, and

offensive work environment and making that environment an explicit term or condition of Complainant's employment with Bridges, in violation of *former* ORS 659.030(1) (b).

(4) Bridges did not intentionally create or maintain discriminatory working conditions related to Complainant's gender that were so intolerable that he was compelled to resign because of them, in violation of *former* ORS 659.030(1) (a).

(5) Bridges did not reduce Complainant's pay or work hours because he opposed unlawful employment practices, in violation of *former* ORS 659.030(f).

(6) Pursuant to ORS 659A.850(3), the Commissioner of the Bureau of Labor and Industries shall issue an order dismissing the charge and the complaint against any respondent not found to have engaged in any unlawful practices charged.

OPINION

The Agency alleges Respondent Bridges ("Bridges") unlawfully discriminated against Complainant in the terms and conditions of his employment by subjecting him to a sexually hostile work environment and by using her authority as Complainant's supervisor to reduce Complainant's pay and number of work hours after he refused to submit to the harassment. The Agency further alleges that because of the sexually hostile work environment and Complainant's reduction in pay and work hours that resulted from Complainant's refusal to submit to the harassment, Complainant was forced to quit his employment. Additionally, the Agency alleges that the tangible employment action that resulted from Complainant's refusal to submit to sexual harassment also constitutes retaliation on the part of Bridges. The Agency seeks a judgment of \$25,290 in back wages and \$20,000 in mental suffering damages against Bridges, Audio Unlimited LLC, as Bridges' successor-in-interest, and Bridges, as an aider and abettor to the LLC. The forum determined that Complainant's testimony was not credible on key issues and the Agency failed to make a prima facie case of discrimination.

TERMS AND CONDITIONS OF EMPLOYMENT

Former ORS 659.030(1) stated, in pertinent part:

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

“ * * * * *

“(b) For an employer, because of an individual’s * * * sex * * * to discriminate against such individual in compensation or in terms, conditions or privileges of employment.

Former OAR 839-007-0550(1) provided:

“Sexual harassment is unlawful discrimination on the basis of gender. Sexual harassment includes the following types of conduct:

“(a) Unwelcome sexual advances, requests for sexual favors or other conduct of a sexual nature when such conduct is directed toward an individual because of the individual’s gender; and

“(A) Submission to such conduct is made either explicitly or implicitly a term or condition of employment; or

“(B) Submission to or rejection of such conduct is used as the basis for employment decisions affecting such individual.

“(b) Any unwelcome verbal or physical conduct that is sufficiently severe or pervasive to have the purpose or effect of * * * creating an intimidating, hostile, or offensive working environment.”

A. Tangible Employment Action – *Former* OAR 839-007-0550(1)(a)

Under *former* OAR 839-007-0550(3), “an employer is liable for sexual harassment by a supervisor with immediate or successively higher authority over an individual when the harassment results in a tangible employment action that the supervisor takes or causes to be taken against the individual.” Here, the Agency was required to show: (1) Bridges was an employer subject to *former* ORS 659.010 to 659.110; (2) Bridges employed Complainant; (3) Complainant is a male; (4) Bridges, as Complainant’s employer and direct supervisor, directed unwelcome sexual advances, requests, or conduct toward Complainant because he is male; (5) Bridges significantly changed Complainant’s employment status by reducing his pay and his work hours; and

(6) Bridges did so because Complainant rejected her unwelcome sexual advances. The first three elements are not in dispute.

There is also no dispute that Complainant received a written notice signed by Bridges, dated September 30, 1999, that changed his status from a salaried to an hourly employee at the rate of \$10 per hour. Complainant contends Bridges made the change because he objected to her sexual advances on September 29, 1999, and immediately thereafter Bridges significantly reduced his wages and the number of hours he worked, forcing him to take a second job at the radio station. Bridges, on the other hand, claims she converted his salary to hourly because Complainant had been working four hours per day at the radio station prior to the September 30 letter and was not working enough hours at the store to justify the salary she was paying him.

Complainant acknowledged he worked for the radio station from 2 until 6 p.m. each day during hours that Bridges's store was open for business. He also agreed that Bridges questioned the number of hours he was devoting to his second job, that she perceived he was not working enough hours for her, and that they had several discussions about her concerns. In a prior statement to the Agency, Complainant defended his absences from the store by stating he felt David Haxton, a sales person with a key to the store, could handle the store when he was not there and could "run things regarding the installers." Haxton does not appear on Bridges's payroll register after September 10, 1999. From that fact, the forum infers that Haxton left his employment with Bridges prior to September 30, 1999, and that Complainant's discussions with Bridges about his absences from work due to the hours he spent working at the radio station must also have occurred before that date. The forum concludes, therefore, that Complainant began working a second job at the radio station prior to Bridges's letter dated September 30, 1999, and that there is a correlation

between his absences from work due to an additional part time job and Bridges's decision to convert his employment status from a salaried to an hourly employee. Consequently, the Agency has the burden of proving that Bridges's legitimate, nondiscriminatory reason for the change in Complainant's pay status is not the true reason, but rather a pretext for retaliating against him because of his objection to sexual harassment.

There is no credible evidence from which the forum can infer or conclude that Complainant objected to or rejected Bridges's purported sexual advances on September 29, 1999, the day before he alleges Bridges's husband, John Casey, gave him the letter changing his pay status. Other than Complainant's wife, whose testimony was found to be not credible, no other witness corroborated Complainant's assertion that he complained to Bridges on that date or that he complained about her conduct to her or anyone else at any other time during his employment. In fact, based on Polley's credible testimony that Bridges was in the hospital when Casey delivered Polley's lay-off letter, the same day Complainant received his letter from Bridges, it is unlikely that Bridges was even present at the store on the date Complainant claims he confronted her. Because Complainant's credibility was substantially impaired by his internally inconsistent and contradictory testimony, his unsubstantiated assertion is not sufficient to overcome Bridges's reason for converting Complainant's salary to an hourly rate.

The Agency failed to prove that Bridges's asserted legitimate nondiscriminatory reason for changing Complainant's pay status was pretext for discrimination.

B. Intimidating, Hostile, or Offensive Work Environment - Former OAR 839-007-0550(1)(b)

In order to prevail on its hostile environment claim, the Agency must present evidence to show: (1) Bridges was an employer subject to *former* ORS 659.010 to 659.110; (2) Bridges employed Complainant; (3) Complainant is a member of a

protected class; (4) Bridges made unwelcome sexual advances, requests for sexual favors, or engaged in unwelcome conduct of a sexual nature directed toward Complainant because of his gender; (5) the unwelcome conduct was so severe or sufficiently pervasive to have the purpose or effect of creating a hostile, intimidating, or offensive work environment; and (6) Complainant suffered harm as a result of the unwelcome conduct. See *In the Matter of Western Stations Co.*, 18 BOLI 107 (1999). Respondents did not assert any of the affirmative defenses available under former OAR 839-007-0550(4).ⁱⁱ The first three elements are not disputed. The remaining elements are not supported by credible evidence.

In this case, there is sufficient evidence to support that Bridges touched or patted her employees on occasion, touched Complainant's hair on one occasion and remarked that she wished her husband had long hair because she thought it was "sexy," made occasional comments to male employees about the appearance of their "rears" in "tight pants," and made one comment to Complainant that she would "recognize that butt anywhere." While there is no evidence to support that Bridges's touching per se was based on gender, the forum infers by the nature of her comments to Complainant and others about their "rears" that her comments were directed to her employees, including Complainant, because they were male. However, the key element to any sexual harassment claim is whether the alleged conduct is unwelcome. Here, because Complainant's credibility is at issue, the forum must go beyond his allegation and evaluate his own conduct to determine if it was consistent with his claim that Bridges's conduct was unwelcome.

First, Complainant's conduct in the workplace may have given Bridges the impression that he welcomed or invited her attentions. Evidence shows Complainant was one of a small all-male group of employees that was closely involved with Bridges

and her business before it opened its doors in June 1999. Evidence also shows that the work atmosphere evolved from friendships that developed when Bridges, Wilson, Smith, Polley, and Complainant remodeled the warehouse together as a shared project. Moreover, Complainant's depiction of a "fun and friendly" workplace in which he was comfortable enough to call Bridges "mom," borrow a substantial sum of money from her, use store inventory for his personal enjoyment, and banter with Bridges about her "sexy" feet, implies a casual atmosphere conducive to mixed messages and misunderstanding.

Second, Complainant's claim that he made a contemporaneous complaint to Bridges on September 29, 1999, is not supported by credible evidence. Although they had the opportunity to observe Complainant's demeanor and actions in the workplace, neither Polley nor Smith testified that any employee, including themselves or Complainant, was offended by Bridges's conduct or complained to each other or to Bridges about the conduct. Casey, who worked full time in the store and regularly observed Complainant, Bridges, and other employees interact, credibly testified that he had not observed Bridges making inappropriate sexual contact with Complainant or other employees and that none of Bridges's employees had complained to him about her conduct in the workplace. Other than Complainant's wife, who has an obvious bias and pecuniary interest in her husband's complaint, no other witness corroborated Complainant's claim that he objected to Bridges's conduct.

Finally, even after he allegedly objected to her conduct in late September 1999, Complainant continued to work for Bridges until mid-December 1999. In the interim, and despite the alleged "hostile work environment," Complainant continued to prepare radio advertisements for Bridges and to divide his time between the store and the radio station as he did before the alleged complaint. His internally inconsistent and

contradictory testimony about when the harassment started and when it ended further negates his ability to convince this forum that he was offended by Bridges's conduct.

Based on the totality of the circumstances in this particular record, and in the absence of credible evidence that Bridges's conduct toward Complainant or any other employee was unwelcome, the forum concludes that Bridges did not create or maintain a sexually intimidating, hostile, or offensive work environment.

RETALIATION

Former ORS 659.030 stated, in pertinent part:

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

“ * * * * *

“(f) For any employer * * * to discharge, expel or otherwise discriminate against any person because the person has opposed any practices forbidden by this section * * *.”

In order to establish a prima facie case of retaliation, the Agency is required to prove that (1) Complainant opposed an unlawful employment practice; (2) Bridges made an employment decision that adversely affected Complainant; and (3) there is a causal connection between Complainant's opposition and Bridges's adverse employment action. In this case, there is no credible evidence to support any of those elements.

First, Complainant's uncorroborated testimony is insufficient to sustain a finding that Complainant complained to Bridges about her conduct in the workplace or that he requested her to stop particular conduct the day before her husband gave him a note changing him from a salaried to an hourly employee. Second, there is insufficient evidence to establish that Bridges significantly reduced Complainant's pay or work hours as the Agency alleged in its charging document. As discussed previously, evidence shows Bridges converted Complainant from a salaried to an hourly employee

at a \$10 per hour rate based upon Complainant's decision to work four hours per day at a local radio station during the store's regular hours. Bridges's payroll records show that Complainant's earnings decreased after October 8, 1999, only because he continued to work part time for the radio station and was paid for the hours he actually worked for Bridges. Complainant set his own schedule and determined how he divided his time between the store and the radio station. Bridges was not obliged to continue paying him on a salary basis if he changed the terms of their agreement by working fewer hours at the store. Notably, Complainant's pay would have exceeded his original salary had he worked a minimum 40 hour work week at the \$10 per hour rate (40 x \$10 per hour = \$400 per week x 4 weeks = \$1,600 per month). Absent a preponderance of evidence supporting the first two elements, the third also fails.

CONSTRUCTIVE DISCHARGE

Respondents are liable for a constructive discharge only if it is established that Bridges (1) intentionally created or maintained discriminatory working conditions related to Complainant's gender that were (2) so intolerable that a reasonable person in Complainant's circumstances would have resigned because of them, (3) Bridges desired to cause Complainant to leave his employment as a result, or knew or should have known that Complainant was certain, or substantially certain, to leave his employment as a result of the working conditions, and (4) Complainant left his employment as a result of the working conditions. *Former* OAR 839-005-0035. The Agency failed to establish those elements by a preponderance of credible evidence.

As previously stated, the Agency failed to establish that Bridges subjected Complainant to hostile working conditions because of his gender, or that the terms and conditions of his employment changed to his detriment because he complained about those conditions, or that Bridges intentionally created or maintained the conditions.

Moreover, Complainant's conflicting versions of his last day of employment significantly impaired his overall credibility and negated any possible finding that Complainant left his employment because of the alleged working conditions.

ORDER

NOW, THEREFORE, as Respondents **Barbara Bridges** and **Audio Unlimited LLC** have not been found to have engaged in any unlawful practice charged, the Complaint and the Specific Charges filed against Respondents are hereby dismissed under the provisions of ORS 659A.850.

ⁱ While married to Bridges, John Wilson used the name "John Casey." To avoid confusion, Wilson is referred to by the name he was using at all times material herein - John Casey.

ⁱⁱ "Where sexual harassment by a supervisor with immediate * * * authority over an individual is found to have occurred but no tangible employment action was taken * * * the employer is liable if the employer knew of the harassment unless the employer took immediate and appropriate corrective action [or] if the employer should have known of the harassment * * * unless the employer can demonstrate * * * that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior; and * * * that the complaining individual unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." *Id.*