

In the Matter of
JAMES H. BRESLIN,
dba Garden Valley Texaco, Respondent.

Case Number 42-97
Final Order of the Commissioner
Jack Roberts
Issued December 10, 1997.

SYNOPSIS

Complainant, a disabled person (epilepsy), asked respondent to remove him from scheduled graveyard shifts because changes in complainant's daily schedule and lack of sleep could trigger seizures. Respondent refused to accommodate this request because he doubted the legitimacy of complainant's medical reasons. He refused complainant's offer to provide a note from his doctor and the doctor's telephone number. Respondent discharged complainant when he failed to work the graveyard shifts. Because the requested shift change would not have caused respondent undue hardship, the commissioner held that respondent's refusal to reasonably accommodate complainant's physical impairment and respondent's discharge of complainant violated ORS 659.425. The commissioner ordered respondent to pay complainant \$336 in back wages and \$30,000 for mental distress. ORS 659.400(1), (2)(a); 659.425 (1)(a); *former* OAR 839-06-205, 839-06-225, 839-06-240(3), 839-06-245.

The above-entitled contested case came on regularly for hearing before Douglas A. McKean, 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 August 12 and 28, 1997, in Suite 220 of the State Office Building,

165 E. Seventh Avenue, Eugene, Oregon.

The Bureau of Labor and Industries (the Agency) was represented by Linda Lohr, an employee of the Agency. Greg Christian, Jr. (Complainant) was present throughout the hearing. James Breslin (Respondent) was present and represented by James Farrell, Attorney at Law.

The Agency called the following witnesses: Carol Beamer, adjudicator, Employment Department; Erika Christian, Complainant's wife; Greg Christian, Complainant; Joel Daven, M.D., Complainant's doctor; and Eileen Langlois, former Employment Specialist, Employment Department.

Respondent called the following witnesses: James Breslin, Respondent; Shannon Breslin, Respondent's wife and bookkeeper; Julie Donart and Jeromy Smith, employees of Respondent; and Jack Salberg, Teresa Schmeichel, Stacy Sorrenson, and Ira Sweet, former employees of Respondent.

Administrative exhibits X-1 to X-13, Agency exhibits A-1 to A-8 and A-13 to A-17, and Respondent exhibits R-1 to R-3 and R-5 to R-8 were offered and received into evidence. Respondent withdrew exhibit R-4. The record closed on August 28, 1997.

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 April 18, 1996, Complainant filed a verified complaint with the Civil Rights Division of the Agency. He alleged that Respondent discriminated against him because of his physical disability (epilepsy) in that, on January 24, 1996, Respondent did not reasonably accommodate his disability and terminated him.

2) After investigation and review, the Agency issued an Administrative Determination finding substantial evidence of an unlawful employment practice by Respondent in violation of ORS 659.425.

3) On March 27, 1997, the Agency prepared and duly served on Respondent Specific Charges that alleged that Respondent failed to reasonably accommodate Complainant's disability and terminated him, in violation of ORS 659.425(1)(a). The Specific Charges also alleged that Respondent's failure to reasonably accommodate Complainant's disability created working conditions so intolerable that a reasonable person in Complainant's position would have resigned because of it, and that Complainant's resignation due to the intolerable working conditions constituted a constructive discharge, in violation of ORS 659.425(1)(a). Complainant claimed damages for back pay and mental suffering.

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

5) On March 28, 1997, the Agency requested a postponement of the hearing because the assigned Case Presenter had a previously scheduled out-of-state vacation and had nonrefundable airline tickets. Respondent did not respond. The ALJ found that the Agency had shown good cause for a postponement, granted the motion, and issued an amended Notice of Hearing.

6) On April 17, 1997, Respondent mailed an answer in which he denied the allegation mentioned above in the Specific Charges and alleged an affirmative defense.

The Hearings Unit received the answer on April 21, 1997.

7) On April 18, 1997, the Agency moved for an order of default, alleging that Respondent had failed to file a responsive pleading within the required time, pursuant to OAR 839-050-0330.

8) On April 21, 1997, the ALJ denied the motion for default because Respondent's answer was timely filed.

9) Pursuant to OAR 839-050-0210 and the ALJ's discovery order, the Agency and Respondent each filed a Summary of the Case.

10) On July 21, 1997, the Agency notified the forum and Respondent that this case had been reassigned from case presenter Judith Bracanovich to case presenter Linda Lohr.

11) At the beginning of the hearing on August 12, 1997, the attorney for Respondent stated that he had read the Notice of Contested Case Rights and Procedures and had no questions about it. The Agency and Respondent stipulated to facts that were admitted in Respondent's answer.

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

13) On November 21, 1997, the ALJ issued a Proposed Order in this matter. Included in the Proposed Order was an Exceptions Notice that allowed ten days for filing exceptions. On November 28, 1997, the Hearings Unit received Respondent's timely exceptions, which are addressed in the Opinion section of this Final Order.

FINDINGS OF FACT -- THE MERITS

1) At all times material herein, Garden Valley Texaco was the assumed business name for a gasoline service station in Roseberg, Oregon, owned and operated

by James H. Breslin, an employer in this state utilizing the personal services of six or more persons, subject to the provisions of ORS 659.010 to 659.435.

2) At all times material, Complainant suffered from epilepsy.

3) Complainant first developed seizures at age 15. In April 1992, when he was 24 years old, Complainant began treating with Dr. Daven, a neurologist. At all times material, Dr. Daven was Complainant's treating physician. Dr. Daven's assessment was that Complainant suffered from "juvenile myoclonic epilepsy." Complainant experienced episodes of "grand mal seizures" and "tonic-clonic seizures," which involved losses of consciousness and tongue biting, and "petit mal seizures," which "are manifested by brief twitches of his arms or legs during which time he seems to blank out for a second or two." The doctor noted that as long as Complainant "takes his medicines regularly * * * and lives an appropriate lifestyle, he has absolutely no seizures. The seizures tend to occur when he forgets the medicine, stays up late at night, or when he has been drinking and partying. On one occasion he had 15 or 20 grand mal seizures the day after a drinking binge." Complainant reported to Dr. Daven that he had given up alcohol in January 1992. Dr. Daven opined that Complainant's epilepsy was "quite brittle" and could be "exacerbated by lack of sleep. He * * * should not be altering his schedule to any significant degree or working late night shifts." Dr. Daven counseled Complainant numerous times about this during their visits. A day shift was the best shift for Complainant. Complainant continued experiencing seizures during 1992 and 1993. In February 1994, Complainant had a seizure while driving a truck and was treated in an emergency room following an accident. This occurred after he missed the noon dosages of his anti-convulsant medicines; he took the medicines three times per day. Dr. Daven recommended to the Driver and Motor Vehicles Services Branch (DMV) that Complainant should not drive until he had been seizure-free for three full months.

In June 1994, after Complainant had been seizure-free since February, Dr. Daven filled out a DMV form that apparently would permit Complainant to drive. Complainant had additional seizures in November 1994, and again Dr. Daven permitted him to drive only after he had been seizure-free for three months. Dr. Daven apparently filled out another DMV form on July 19, 1995, permitting Complainant to drive; Complainant had had no seizures since November 1994. In late July 1995, Complainant had one or two additional seizures, one of which caused him to fall and injure his head. He had been taking his medications regularly, but had been working long hours "and was extremely tired."

4) Respondent employed Complainant around November 1993 as a gas station attendant.

5) Respondent hired Complainant to work the swing shift, from 1 to 9 p.m. Complainant worked on the swing shift for several months as an attendant. He worked full time at minimum wage. Beginning around September 1994, Complainant became a cashier.

6) Complainant was able to perform the essential functions of attendant and cashier with work shift accommodations.

7) Respondent's gas station was open 24 hours per day. Complainant was aware of this when he was hired. When employees were hired, Respondent told them they had to be available for all shifts. Respondent tried to accommodate Complainant's and other employees' schedule requests.

8) Four or five months after Complainant starting working for him, Respondent learned that Complainant had epilepsy after Complainant had a motor vehicle accident due to a seizure. Respondent was aware that Complainant had had other motor vehicle accidents. Complainant told his coworkers that he had epilepsy, so

in case he had a seizure they would know what to do. He never had a seizure at work. On one occasion, Complainant called in sick after a seizure and Respondent gave him the day off.

9) Respondent encouraged Complainant to further his education. In the summer of 1994, Complainant began going to school part time at Umpqua Community College in Roseburg. During that summer, he continued to work at the station around 40 hours per week.

10) Between November 1993 and January 1996, Respondent never scheduled Complainant to work graveyard shifts. However, Complainant worked two graveyard shifts for Respondent. The first shift occurred on Saturday night and Sunday, August 13-14, 1994, when Complainant worked a back-to-back schedule of a graveyard shift and then a day shift. He had already been scheduled for the Sunday day shift (from 5 a.m. to 1 p.m.) and volunteered to work the additional graveyard shift on Saturday night. He did this to help Respondent because someone had quit. Complainant thought he could do this because he was taking only two classes in school and thought he could sleep other times. The second graveyard shift occurred on Friday night to Saturday, December 2-3, 1994. Complainant worked these two graveyard shifts to "make points" with Respondent. Afterwards, however, he felt these were bad decisions.

11) Beginning in the spring of 1995, Complainant attended school full time at Rogue Community College in Grants Pass in a diesel technology (mechanic) program. He got a room in Grants Pass and returned to Roseburg on weekends, so that he did not have to drive back and forth every day. Respondent adjusted Complainant's work schedule so that he worked only on weekend day shifts from 5 a.m. to 1 p.m., or occasionally swing shifts from 1 to 9 p.m.

12) On Sunday, January 21, 1996, Complainant wrote a note to Respondent

about the upcoming week's schedule. He wrote,

"Jim, I cannot work 1-9s this weekend. I have midterms Monday and Tuesday and other plans. Sorry. If you can't accomodate [sic] me then just take me off the schedual [sic] for this week. Thanx [sic], Greg." ¹

13) Around January 22, 1996, Respondent released a schedule that assigned Complainant to graveyard shifts.

14) Respondent scheduled Complainant to work graveyard shifts (9 p.m. to 5 a.m.) on Friday and Saturday nights, January 26 and 27, 1996. An employee who was scheduled to work these shifts had recently quit. Respondent expected all employees, including himself, to fill in on a rotating basis to cover the graveyard shifts during the slow winter period.² Respondent employed between 12 and 20 employees, depending on the season and the stability of the crew. Some employees had earlier complained to Respondent that Complainant had not been scheduled for any graveyard shifts. Respondent was not at the station when Complainant saw the schedule. When he saw it, Complainant was upset and told coworkers he could not work the graveyard shifts because of his epilepsy and possible seizures; he said his doctor told him he should not work graveyard shifts. He said his wife did not want him to work graveyard shifts. Complainant's wife did not want him to work at night because of his epilepsy. She worked full time at a Taco Bell, and she feared that he would have a seizure while he was alone with their child or while driving.

15) At that time, Complainant was going to school full time in Grants Pass, attending classes on Mondays, Tuesdays, Thursdays, and Fridays, and driving 150 miles per day to and from school. On Fridays, he got up around 5 or 6 a.m. to make it to his first class at 8 a.m. He finished school at 4 p.m. on Fridays, and then drove for about an hour to return home.

16) At 3:30 p.m. on Wednesday, January 24, 1996 (his day off from school),

Complainant went to Dr. Daven's office. He was concerned that, because he was scheduled to work the graveyard shift that Friday and Saturday, staying up all night would throw off his schedule and cause him to have seizures. Complainant spoke with Dr. Daven's nurse because the doctor was unavailable. Complainant asked whether Respondent could call Dr. Daven. Dr. Daven later said he would write a letter to Respondent or do whatever Complainant needed, because he agreed that it would not be good for Complainant to work the graveyard shift. The nurse called Complainant and left this message for him.

17) Around 4 p.m. on Wednesday, January 24, 1996, Complainant talked to Respondent about being scheduled for the graveyard shifts. Complainant told Respondent he (Complainant) could not work the graveyard shifts because of his medical condition. He said he needed to stay on a day schedule and that his doctor told him he could not change shifts if it upset his sleep pattern. He told Respondent that he could not work the graveyard shifts because the lack of sleep could cause a seizure. This was the first time Complainant had asked Respondent not to schedule him for graveyard shifts. Complainant offered to bring Respondent a note from his doctor and to give Respondent the doctor's telephone number. Respondent shook his head and said, "no." Respondent had previously heard rumors from the employees that Complainant was not going to work the graveyard shifts and that he was going to use a doctor's excuse as the reason. Respondent said Complainant could work the graveyard shifts if he wanted to, but he just didn't want to. He accused Complainant of thinking he was better than everyone else. Respondent told Complainant he had to work two graveyard shifts per month like the other employees or suffer the consequences, meaning termination. Respondent did not think Complainant's medical reasons were legitimate. He thought a person could get a doctor to write a note saying anything the person

wanted. Respondent did not tell Complainant he was fired. Complainant said he would not work the shifts. He was upset, but did not want Respondent to have hard feelings. He thanked Respondent for the employment and his help getting into school. The conversation was amiable and they shook hands. Complainant left believing he no longer had a job.

18) On January 24, 1996, after he met with Respondent, Complainant talked with Eileen Langlois at the State of Oregon Employment Department. She worked in the Dislocated Workers Unit, and had been Complainant's counselor for several years. He reported to her about his conversation with Respondent and said he would be fired if he did not work the scheduled graveyard shift. Complainant was very upset, because if a worker was fired, the worker could lose dislocated worker benefits. He was afraid he would lose his ability to complete his diesel technology training. Langlois advised Complainant to get a note from his doctor immediately and take it to Respondent. She made an appointment for Complainant with the Umpqua Valley Disabilities Network.

19) At 3:45 p.m. on Thursday, January 25, 1996, Complainant went to the Umpqua Valley Abilities Center and requested help paying his medication expenses. He reported that he did not want to return to work for Respondent "because of harrassment [sic] and bad shift assignments." The director of the center, Tricia Hoelscher, asked Complainant to get a note from his doctor about his condition.

20) On January 25, 1996, Dr. Daven wrote a note stating, "Mr. Greg Christian has epilepsy that is exacerbated by lack of sleep and changes in his schedule. I believe he is at risk of seizure recurrence if he were requested to work graveyard shift. /s/ J Daven, MD." Dr. Daven gave the note to Complainant on January 25, 1996. Complainant did not give the note to Respondent because he thought he had been discharged the day before.

21) On January 25, 1996, Complainant filed a claim for unemployment benefits with the Employment Department. He reported that he had been terminated by Respondent on Wednesday, January 24, 1996

22) On February 16, 1996, Complainant had a motor vehicle accident when he lost control of his vehicle due to a seizure.

23) When Complainant's employment with Respondent terminated, he was making \$5.25 per hour, or about \$80 per week, which he used to pay bills. After the termination, he could not pay the apartment rent (\$335 per month) and his family moved three times. Before his employment with Respondent, Complainant had been a logger. Thus, he qualified for a dislocated worker program that allowed him to collect unemployment benefits while he was training to be a mechanic. He collected these benefits even while he worked weekends for Respondent; however, the benefits were reduced while he was employed part time.

24) About a month after the termination, Complainant got a weekend job at a mini-storage warehouse. He and his family (his wife and two-year-old son) lived in a trailer at the warehouse. Complainant could not afford the rent, so for three months he traded his work at the warehouse for the rent. During this time he received no pay and looked for other employment. His work at the warehouse still did not cover the rent, so he could not afford to live there. He and his family then moved to a trailer on the family farm, where his aunt charged them reduced rent.

25) Occasionally, Complainant worked on his family's farm. This was usually during summers, when more work was available. He received \$5.00 per hour. After he stopped working for Respondent, Complainant worked on the farm periodically (as he had time and the farm had work) until January 1997. During this time, Complainant was also attending school. About six months after the termination, Complainant started

making the same income at the farm as he had made while employed by Respondent.

26) In December 1996, Complainant completed his training. In June 1997, he received an associates degree in diesel technology from Rogue Community College.

27) In January 1997, Complainant started to work for Jim Thorpe Lumber Company at \$8.00 per hour. He worked there for three months. He then went to work for Eugene Forklift for higher pay.

28) The loss of employment and income and the need to move his family caused Complainant stress. It caused stress between Complainant and his wife and they bickered. Complainant felt angry, upset, "pushed out and betrayed" by Respondent. He had to take time to find new places to live and to move. His school grades dropped that term.

29) Complainant's testimony was generally credible.

30) Respondent's testimony regarding the conversation between him and Complainant on January 24, 1996, was not credible. Likewise, his claim that he would have changed Complainant's schedule had Complainant brought him a note from Dr. Daven was not believable.

ULTIMATE FINDINGS OF FACT

1) At all times material, Respondent employed six or more persons in Oregon.

2) At all times material, Respondent employed Complainant.

3) Complainant has epilepsy, a physical impairment that substantially limits one or more of his major life activities, including transportation and employment.

4) Complainant possessed the training, experience, education, and skill necessary to perform the duties of the island attendant and cashier positions with Respondent. He possessed the ability to perform the job safely and efficiently, with

reasonable accommodation and without present risk of probable incapacitation to himself. With reasonable shift accommodations by Respondent, Complainant's disability did not prevent the performance of the work involved.

5) Complainant requested an accommodation from Respondent of no graveyard shifts. This accommodation would not have imposed an undue hardship on Respondent. Respondent did not accommodate Complainant's disability. Respondent discharged Complainant because, due to his disability, Complainant was unable to work graveyard shifts.

6) Complainant lost wages and suffered mental distress because of Respondent's action.

CONCLUSIONS OF LAW

1) At all times material, Respondent was an employer subject to the provisions of ORS 659.010 to 659.110 and 659.400 to 659.460. ORS 659.010(6) and 659.400(3); *former* OAR 839-06-210(1) (BL 2-1984).

2) The Commissioner of the Bureau of Labor and Industries has jurisdiction of the persons and of the subject matter herein and has the authority to eliminate the effects of any unlawful employment practice found. ORS 659.040, 659.050, and 659.435.

3) ORS 659.400 (1995) provided, in part:
"As used in ORS 659.400 to 659.460, unless the context requires otherwise:

"(1) 'Disabled person' means a person who has a physical or mental impairment which substantially limits one or more major life activities, has a record of such an impairment or is regarded as having such an impairment.

"(2) As used in subsection (1) of this section:

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

Former OAR 839-06-205 (BL 15-1990) provided, in part:

"As used in these rules unless the context requires otherwise:

" * * * * *

"(7) 'Physical or mental impairment' means an apparent or medically detectable condition which weakens, diminishes, restricts or otherwise damages an individual's health or physical or mental activity."

Former OAR 839-06-240 (BL 15-1990) provided:

"(1) Some impairments may be temporary or mutable in nature. Short-term physical or mental impairments leaving no residual disability or impairment are not handicaps within the meaning of the statute and these rules, except where they are erroneously perceived by the employer as disabling or impairing. Examples include but are not limited to flu, common cold, or sunburn.

"(2) Conditions which are mutable only upon long-term treatment, and which either do not impair the individual's ability to perform the work involved as defined in OAR 839-06-225 or with reasonable accommodation would not impair the individual's ability to perform the work involved as defined in OAR 839-06-225 may not form the basis for rejection of the individual for a position. Obesity is an example of such an impairment.

"(3) Conditions which are controllable by diet, drug therapy, psychotherapy, or other medical means may not form a basis for rejection of the individual for a position so long as the individual is able to perform the work involved as defined in OAR 839-06-225 in the position occupied or sought. An individual with a controlled condition as described who abandons or ignores the controlling therapy loses the protection of ORS 659.425 if the absence of the control removes the ability to perform, as defined. Examples include but are not limited to arrested alcoholism, controlled diabetes mellitus, or controlled epilepsy." (Emphasis added.)³

Complainant was a disabled person at all times material herein.

4) Former OAR 839-06-225 (BL 2-1984) provided:

"(1) To come within the protection of ORS 659.425, a handicapped individual must be able to perform the duties of the position occupied or sought. 'Able to perform' shall mean, subject to the provisions of OAR 839-06-230:

"(a) Possessing the training, experience, education, and skill necessary to perform the duties of the position and normally required by the employer of other candidates for the position;

"(b) Possessing the ability to perform the job safely and efficiently, with reasonable accommodation and without present risk of probable

incapacitation to him/ herself. An individual occupying a particular position may at any time be evaluated to determine if there is a present risk of probable incapacitation to him/herself.

"(2) An employer may not use the provisions of this section as a subterfuge to avoid the employer's duty under ORS 659.425."

Complainant was able to perform the duties of the positions he occupied with reasonable accommodation.

5) ORS 659.425(1) (1995) provided, in relevant part:

"For the purpose of ORS 659.400 to 659.460, it is an unlawful employment practice for any employer to refuse to hire, employ or promote, or bar or discharge from employment or to discriminate in compensation or in terms, conditions or privileges of employment because:

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

Former OAR 839-06-205 (BL 15-1990) provided, in part:

"As used in these rules unless the context requires otherwise:

"(1) 'Accommodation' means a modification by the employer of the work site, job duties, or other requirements of a position for the purpose of enabling a handicapped person to perform the work involved. See OAR 839-06- 240 [*sic* OAR 839-06-245].

" * * * * *

"(8) 'Reasonable Accommodation' means a modification as defined in section (1) of this rule, which can be made without undue hardship to the employer. See OAR 839-06-240 [*sic* OAR 839- 06-245]."

Former OAR 839-06-245 (BL 2-1984) provided:

"ORS 659.425 imposes an affirmative duty upon an employer to make reasonable accommodation for an individual's physical or mental impairment where the accommodation will enable that individual to perform the work involved in the position occupied or sought:

"(1) Accommodation is a modification or change in one or more of the aspects or characteristics of a position including but not limited to:

"(a) Location and physical surroundings;

"(b) Job duties;

"(c) Equipment used;

"(d) Hours, including but not limited to:

"(A) Continuity (extended breaks, split shifts, medically essential rest periods, treatment periods, etc.); and

"(B) Total time required (part-time, job-sharing).

"(e) Method or procedure by which the work is performed.

"(2) Accommodation is required where it does not impose an undue hardship on the employer. Whether an accommodation is reasonable will be determined by one or more of the following factors:

"(a) The nature of the employer, including:

"(A) The total number in and the composition of the work force; and

"(B) The type of business or enterprise and the number and type of facilities.

"(b) The cost to the employer of potential accommodation and whether there is a resource available to the employer which would limit or reduce the cost. Example: funding through a public or private agency assisting handicapped persons;

"(c) The effect or impact of the potential accommodation on:

"(A) Production;

"(B) The duties and/or responsibilities of other employees; and

"(C) Safety:

"(i) Of the individual in performing the duties of the position without present risk of probable incapacity to him/herself; and

"(ii) Of co-workers and the general public if the individual's performance, with accommodation, does not present a materially enhanced risk to co-workers or the general public (See OAR 839-06-230).

"(d) Medical approval of the accommodation; and

"(e) Requirements of a valid collective bargaining agreement including but not limited to those governing and defining job or craft descriptions, seniority, and job bidding, but this rule shall not be interpreted to permit the loss of an individual's statutory right through collective bargaining.

"(3) A handicapped person who is an employee or candidate for employment must cooperate with an employer's efforts to reasonably accommodate the person's impairment. A handicapped person may propose specific accommodations to the employer, but an employer is not required to accept any proposal which poses an undue hardship. Nor is the employer required to offer the accommodation most desirable to the handicapped person, except that the employer's choice between two or more possible methods of reasonable accommodation cannot be intended to discourage or to attempt to discourage a handicapped person from seeking or continuing employment."

Respondent failed to reasonably accommodate Complainant's physical impairment. Shift accommodation was possible without undue hardship to Respondent. Respondent violated ORS 659.425(1)(a).

6) Pursuant to ORS 659.435 and 659.060, and by the terms of ORS 659.010, the Commissioner of the Bureau of Labor and Industries has the authority to issue a Cease and Desist Order requiring Respondent: to refrain from any action that would jeopardize the rights of individuals protected by ORS 659.400 to 659.460, to perform any act or series of acts reasonably calculated to carry out the purposes of said statutes, to eliminate the effects of an unlawful practice found, and to protect the rights of others similarly situated.

OPINION

1. COMPLAINANT IS A DISABLED PERSON

As in all disability cases, the threshold issue here is whether Complainant is a disabled person. The Agency contends that he is. Respondent stipulated that Complainant has epilepsy and was able to perform the essential functions of an attendant and cashier with work shift accommodations. However, Respondent denies that Complainant is disabled.

As noted above, "'Disabled person' means a person who has a physical or mental impairment which substantially limits one or more major life activities, has a record of such an impairment or is regarded as having such an impairment." ORS 659.400(1).

Physical Impairment

There is no dispute that Complainant has epilepsy. This is a medically detectable condition that weakens, diminishes, restricts or otherwise damages an individual's health or physical activity. It is a physical impairment. *Former* OAR 839-06-205(7), 839-

06- 240(3); Finding of Fact -- The Merits, 3.

Substantially Limits One or More Major Life Activities

"Major life activity' includes, but is not limited to self-care, ambulation, communication, transportation, education, socialization, employment and ability to acquire, rent or maintain property." ORS 659.400(2)(a).

The evidence is undisputed that Complainant has had several motor vehicle accidents due to epileptic seizures. Several times Dr. Daven caused Complainant's driver's license to be suspended following seizures. One suspension lasted around eight months. Complainant's ability to drive was constantly in peril due to his epilepsy. The forum concludes that Complainant's epilepsy substantially limited his major life activity of transportation.

Given Complainant's history of seizures resulting in motor vehicle accidents, the inherent risks to himself and others when he operated a vehicle, and his training and education was as a diesel mechanic (which the forum infers involves diesel vehicles and heavy equipment), the forum concludes that Complainant may be unable to perform or significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes that involve operating a motor vehicle. *OSCI v. Bureau of Labor and Industries*, 98 Or App 548, 554, 780 P2d 743, 747 (1989); *In the Matter of Parker-Hannifin Corporation*, 15 BOLI 245, 265, 271-73 (1997). This is not only apparent when Complainant's epilepsy is medically controlled, but would be more apparent if Complainant were unable to control his epilepsy. Thus, the forum concludes that Complainant is substantially limited in the major life activity of employment.

Ability to Perform the Duties of the Position Occupied

To come within the protection of ORS 659.425, a disabled individual must be able to perform the duties of the position occupied or sought. "Able to perform" means:

"(a) Possessing the training, experience, education, and skill necessary to perform the duties of the position and normally required by the employer of other candidates for the position;

"(b) Possessing the ability to perform the job safely and efficiently, with reasonable accommodation and without present risk of probable incapacitation to him/ herself. An individual occupying a particular position may at any time be evaluated to determine if there is a present risk of probable incapacitation to him/herself." *Former* OAR 839-06-225(1) (BL 2-1984).

Respondent stipulated that Complainant was able to perform the essential job functions of an attendant or cashier with work shift accommodations. There was no evidence to the contrary. Complainant satisfactorily performed the duties of the two positions for over two years.

Former OAR 839-06-240(3) provided:

"(3) Conditions which are controllable by diet, drug therapy, psychotherapy, or other medical means may not form a basis for rejection of the individual for a position so long as the individual is able to perform the work involved as defined in OAR 839-06-225 in the position occupied or sought. An individual with a controlled condition as described who abandons or ignores the controlling therapy loses the protection of ORS 659.425 if the absence of the control removes the ability to perform, as defined. Examples include but are not limited to arrested alcoholism, controlled diabetes mellitus, or controlled epilepsy." (Emphasis added.)

Dr. Daven advised Complainant not to drink alcohol. There was conflicting evidence in the record that Complainant bought alcohol and at times told coworkers he had been drinking the night before. However, there was no persuasive evidence in the record that Complainant abandoned or ignored his controlling therapy or that the absence of control removed his ability to perform the work involved.

The forum has found that Complainant possessed the necessary training, experience, education, and skill necessary to perform the duties of the attendant and cashier positions. He possessed the abilities normally required by Respondent of other candidates for these positions. The forum found further that he possessed the ability to perform the job safely and efficiently, with reasonable accommodation and without

present risk of probable incapacitation to himself. Accordingly, the forum concludes that Complainant had the ability to perform the duties of the positions occupied with reasonable accommodation. *Former* OAR 839-06-225. Put another way, Complainant's physical impairment, with reasonable shift accommodations by Respondent, did not prevent the performance of the work involved. ORS 659.425(1)(a).

2. REASONABLE ACCOMMODATION

The Agency contends that Respondent could have reasonably accommodated Complainant's disability by changing his graveyard shift on the weekend of January 26 and 27, 1996. In his answer, Respondent denied this allegation.

Oregon's law on the civil rights of disabled persons⁴ requires reasonable accommodation as a way of overcoming unnecessary barriers that prevent or restrict employment opportunities for otherwise qualified individuals with disabilities. Respondent had an affirmative duty to reasonably accommodate Complainant's disability so that he could perform the work involved in the position occupied. ORS 659.425(1)(a); *former* OAR 839-06-245; *Braun v. American Intern. Health*, 315 Or 460, 846 P2d 1151, 1157 (1993). Accommodation was required unless it imposed an undue hardship on Respondent. *Former* OAR 839-06-205 (8), 839-06-245(2); *Blumhagen v. Clackamas County*, 91 Or App 510, 756 P2d 650, 655 (1988).

The preponderance of credible evidence on the whole record establishes that Respondent tried to and often did accommodate employees' shift requests. The evidence is unrebutted that he did this many times for Complainant. The evidence is also unrebutted that Respondent failed to accommodate Complainant's request for a shift change on January 24, 1996. His reason why is at the heart of the dispute.

Complainant's testimony was generally credible. He had some trouble with memory. However, the forum was impressed by his demeanor and sincerity and found

Complainant truthful. He testified credibly that, when they met on January 24, he advised Respondent he could not work graveyard shifts because of his epilepsy. He offered to give Respondent a note from his doctor and offered the doctor's phone number so Respondent could verify this. He testified that Respondent refused and made it clear that if Complainant did not show up for the scheduled graveyard shifts, he would suffer the consequences. Again, Complainant's credible testimony was that the consequences were clear -- Respondent would terminate him. Complainant said he would not work the required shifts, he thanked Respondent for the employment and his help getting into school, they shook hands, and Complainant left. He never returned to work for Respondent.

Respondent's testimony about the conversation with Complainant was not credible. In short, he denied that Complainant ever mentioned his epilepsy or requested accommodation of his physical impairment. His testimony was controverted by Complainant's credible testimony, by testimony that other employees knew Complainant would ask to be relieved of the graveyard shifts because of his epilepsy, by evidence that Respondent knew from other employees that Complainant would request accommodation of his physical impairment, and by the inconsistent statement Respondent made to Carol Beamer of the Employment Department just six days after his conversation with Complainant. Respondent told Beamer on January 30 that, in his conversation with Complainant on January 24, Complainant mentioned medical reasons and possible seizures as reasons why he could not work graveyard shifts. Respondent told Beamer that he didn't think the medical reasons were legitimate and that you can get a doctor to write a note for you saying anything you want. Accordingly, Respondent's testimony concerning his conversation with Complainant on January 24 and his reasons for not accommodating Complainant's request for different shifts was

unreliable and unbelievable.

The preponderance of credible evidence on the whole record establishes that Respondent did not believe Complainant's reason for requesting accommodation. He made it clear to Complainant that bolstering the request with a doctor's note or by calling Complainant's doctor was not going to change his mind. He believed Complainant was simply coming up with a medical excuse because he didn't want to work that weekend.

At hearing, Respondent made much of the fact that Complainant never gave Respondent the doctor's note Complainant got on January 25. He testified that, had Complainant given him the note, he would have accommodated Complainant. That testimony was not credible because it was controverted by and inconsistent with other credible evidence. In addition, a witness false in one part of his or her testimony is to be distrusted in other parts. *In the Matter of Sheila Wood*, 5 BOLI 240, 252 (1986) (quoting ORS 10.095(3), concerning the duties of jurors). Respondent believed a person could get a doctor to write a note saying anything the person wanted. He did not believe Complainant's medical reasons were legitimate. Under the circumstances, it would have been futile for Complainant to take his doctor's note to Respondent. The forum declines to require disabled persons to take futile actions to get reasonable accommodation. Given the facts found, the forum concludes that, even if Complainant had presented the doctor's note to him, Respondent would not have accommodated Complainant's physical impairment.

Respondent argued that it was not common knowledge that epilepsy can require a certain amount of sleep. He contended it was unreasonable to expect him to know this, and apparently felt he had good reason to doubt Complainant's medical claims, since Complainant had previously worked grave- yard shifts.

These arguments raise no defense. When an employee requests accommodation of a physical or mental impairment, the employer may inquire into the ability of the employee to perform job related functions. *In the Matter of WS, Inc.*, 13 BOLI 64, 87 (1994); *former* OAR 839-06-235. The employer may require a medical examination to determine if the employee meets the definition of an individual with a disability, to determine if the employee can perform the essential functions of the job (with or without reasonable accommodation), and to identify an effective accommodation that would enable the employee to perform the essential functions of the job.

Since each employer has an affirmative duty to accommodate an employee's physical impairment, the employer cannot rely on ignorance or doubts about the nature or legitimacy of the impairment as the basis for denying accommodation. Respondent's doubt about Complainant's need for accommodation was not a sufficient basis for denying accommodation. He had a duty to determine Complainant's abilities and identify an effective accommodation. He did neither.

Respondent also argued that Complainant's impairment didn't need accommodation, but that his schooling did. In other words, Respondent suggested that Complainant needed only a regular sleep schedule and could, therefore, regularly work graveyard shifts and regularly sleep other times of the day. He argued that, by restricting Complainant from working graveyard, Respondent was accommodating Complainant's school schedule, not his epilepsy.

This argument is unpersuasive. Complainant's weekend job with Respondent was only one part of his life activities. Other activities included family obligations, child care, school, medical appointments, and, the forum infers, normal activities such as entertainment and shopping. Dr. Daven testified that a day shift was the best shift for

Complainant and that he should not change his schedule around. A regular graveyard schedule would not be compatible with the doctor's medical opinion or Complainant's epilepsy. Further, Respondent did not schedule Complainant for a regular graveyard shift. He advised Complainant that he would work graveyard shifts around one weekend per month. Thus it was Respondent's irregular work schedule that needed to be changed to accommodate Complainant's disability.

Undue Hardship

In his answer, Respondent alleged as an affirmative defense that "[p]ermitting the complainant [*sic*] to work every shift but the graveyard shift had a detrimental impact on the duties of [Respondent's] other employees."

The burden of proving inability to accommodate is upon the employer. *In the Matter of WS, Inc.*, 13 BOLI at 86-87. In determining whether an accommodation is reasonable, one of the factors the forum considers is the effect of the potential accommodation on the duties and/or responsibilities of other employees. *Former OAR 839-06245(2)(c)(B)*. However, this forum will examine the totality of the circumstances surrounding the potential accommodation for purposes of determining whether it is reasonable.

Respondent presented vague evidence that some employees had complained to him because Complainant was not scheduled to work any graveyard shifts. Evidence also showed that some of these employees disbelieved Complainant's need for accommodation and thought he just didn't want to work that shift. Respondent presented no evidence of the economic effects or disruption of his operation from the proposed accommodation.

The preponderance of the evidence shows that Respondent often accommodated Complainant's and other employees' shift requests, that Complainant

worked for Respondent for over two years and only worked two graveyard shifts (which he volunteered for), that Complainant was second in seniority, and that the employee with top seniority worked no graveyard shifts in 1996. Respondent presented no evidence of a "detrimental impact" to other employees that occurred because he permitted Complainant to work every shift but graveyard. Coworkers grumbling about shift assignments is not the sort of hardship envisioned by Oregon's disability law.

Respondent failed to prove his defense. The forum concludes that accommodating Complainant's epilepsy by assigning him to shifts other than graveyard would not have imposed an undue hardship on Respondent. Accordingly, that was a reasonable accommodation. *Former* OAR 839-06- 205(8).

3. VIOLATION OF ORS 659.425(1)

The Agency alleged that Respondent unlawfully failed to provide reasonable accommodation and discharged Complainant. In the alternative, it alleged that Respondent failed to provide reasonable accommodation and thereby intentionally created intolerable working conditions that he knew or was substantially certain would cause Complainant to leave employment, constituting a constructive discharge. Respondent denied these allegations and claimed that Complainant quit.

ORS 659.425(1) makes it an unlawful employment practice to discharge an individual because the individual has a physical impairment that, with reasonable accommodation, does not prevent the performance of the work involved. Thus, failing to provide a reasonable accommodation to a disabled employee, requiring the employee to work without the accommodation, and discharging a disabled individual who needs the accommodation to perform the work are unlawful employment practices, in violation of ORS 659.425(1).

The evidence is un rebutted that Respondent never expressly told Complainant

he was fired during the conversation on Wednesday, January 24, 1996. However, Respondent told Complainant that if he did not show up for his shift, he knew the consequences. Complainant knew the consequences were termination and told Respondent he couldn't work the graveyard shifts due to his epilepsy. Complainant thanked Respondent for the employment and they shook hands. Complainant left and never returned to work. He perceived that he was fired when his conversation with Respondent concluded.

Respondent argued that he did not fire Complainant that day. The record demonstrates, though, that Complainant's employment was terminated. Evidence suggests that after their conversation Respondent arranged to cover the graveyard shifts previously assigned to Complainant. Thus, both parties to the conversation perceived that Complainant's employment was terminated. This was because Respondent refused Complainant's request for accommodation. Even if Respondent did not technically discharge Complainant on Wednesday, January 24, he certainly terminated Complainant's employment when Complainant did not show up for the graveyard shift on Friday, January 26.

When an employer refuses to reasonably accommodate an employee's physical impairment and the accommodation is required in order to perform the work involved, the employer has barred the employee from working. Here, Respondent discharged Complainant when he would not and did not work the scheduled graveyard shifts. Complainant did not quit. He requested accommodation to work and his employer refused. Respondent prevented Complainant from performing the work by not reasonably accommodating Complainant's physical impairment.

Even if Respondent were correct that Complainant resigned, the forum would hold that Respondent constructively discharged him. The elements of a constructive

discharge are:

"(1) The Respondent must have intentionally created or intentionally maintained discriminatory working condition(s) related to the Complainant's protected class status;

"(2) Those working conditions were so intolerable that a reasonable person in the Complainant's position would have resigned because of them;

"(3) The Respondent desired to cause the Complainant to leave employment as a result of those working conditions or knew that Complainant was certain, or substantially certain, to leave employment as a result of those working conditions; and

"(4) The Complainant did leave the employment as a result of those working conditions." *In the Matter of Thomas Myers*, 15 BOLI 1, 14-15 (1996) (citing *McGanty v. Staudenraus*, 321 Or 532, 557, 901 P2d 841, 856 (1995)).

By refusing to reasonably accommodate Complainant's physical impairment, Respondent intentionally created discriminatory working conditions related to Complainant's protected class status. By requiring Complainant to work without reasonable accommodation, Respondent created working conditions that were so intolerable a reasonable person in Complainant's position would have resigned because of them. No disabled person who needs a particular reasonable accommodation to perform the work involved should be required to work without it. That's intolerable, and a reasonable disabled person would resign because of it. Respondent knew that Complainant was substantially certain to leave employment as a result of those working conditions. After Respondent had told him that if he failed to work the graveyard shifts he would suffer the consequences, Complainant told Respondent he would not work those shifts. Complainant left employment as a result of those working conditions. He never showed up for work again. With the forgoing facts, the Agency proved that Respondent constructively discharged Complainant in violation of ORS 659.425(1).

4. DAMAGES

Back Wages

The Agency alleged that Complainant lost wages estimated at \$1,008, less earnings from any interim employment. The Agency calculated back wages based on an hourly rate of \$5.25 for approximately 16 hours per week, or \$84 per week for approximately 12 weeks. Respondent denied any wage loss and claimed that he should not be liable for lost wages that resulted from Complainant's poor job choices after the termination.

Complainant's and his wife's testimony was vague about his employment and income following his discharge by Respondent. He took a job at a mini-storage warehouse around a month after the discharge. He had no records of earnings there. He exchanged his labor on the weekends for rent on the trailer they lived in. He was not specific how many hours he worked each weekend. There is no evidence of the amount of the monthly rent. He lived in the trailer for around three months, then moved to the family farm. He worked at the farm as his school schedule allowed and as work was available, but did not remember what his income was or how much he worked. He worked on the farm until he finished school and took a job in January 1997 with Jim Thorpe Lumber Company at \$8.00 per hour.

The period for measuring back pay damages terminates when a complainant obtains a job with comparable or higher pay and it does not resume when he voluntarily quits the new job. *In the Matter of Pacific Motor Trucking Company*, 3 BOLI 100, 115 (1982), *aff'd*, 64 Or App 361, 668 P2d 446 (1983), *rev den* 295 Or 773 (1983). Because the evidence regarding Complainant's earnings at the warehouse is so vague, the forum has terminated the period for measuring back pay with that employment. To award more would be speculative and unfair to Respondent. *In the Matter of C & V, Inc.*, 3

BOLI 152, 159-60 (1982).

Accordingly, the forum calculated Complainant's damages for lost wages as follows: \$5.25 for 16 hours per week, or \$84 per week, for four weeks, which equals \$336.

In his exceptions to the Proposed Order, Respondent argued that there was no basis for awarding back wages to Complainant because his testimony was so vague and there was no other evidence to support the award.

Credible testimony supports the award. Complainant testified that he was unemployed for around a month after Respondent terminated his employment. His wife testified credibly that he was unemployed from one to two months. On further cross-examination, she said she was unsure and that it could have been less than a month. Thus, while her estimate of how long Complainant was unemployed was not wholly reliable, she did corroborate Complainant's testimony that he was unemployed for some period of time, which she thought might have been up to two months. Complainant and his wife testified that he was looking for work during this time.

The forum concludes that Complainant was unemployed and that he searched for work during that time. Although the testimony was not exact, the forum believes it was sufficiently reliable to conclude that Complainant was unemployed for around a month. Accordingly, the forum has awarded him back pay for one month.

Mental Distress

"In determining mental distress awards, the Commissioner considers a number of things including the type of discriminatory conduct, and the duration, severity, frequency, and [pervasiveness] of that conduct. The Commissioner considers the type of mental distress caused by the discriminatory conduct, and the effects and duration of that distress. The Commissioner also considers complainants' vulnerability, due to such factors as age and work experience. *See Fred Meyer Inc. v. Bureau of Labor*, 39 Or App 253, 592 P2d 564, 571-72 (1979); *rev den* 287 Or 129 (1979)." *In the Matter of Pzazz Hair Design*, 9 BOLI 240, 256-57 (1991).

Respondent's unlawful conduct -- his refusal to reasonably accommodate Complainant's impairment and the discharge -- occurred, from Complainant's viewpoint, during a short conversation on January 24, 1996. Thus, the duration, frequency, and pervasiveness of Respondent's conduct were minimal. It would not cause the kind of mental suffering as, for example, a case of ubiquitous, continual, and long-lasting sexual harassment.

However, the severity of the conduct is high and it is precisely the type of conduct the law is designed to prohibit. People of this state have the right to lawful employment without discrimination because of disability where the reasonable demands of the position do not require such a distinction. ORS 659.405(2). It's the public policy of the state to guarantee disabled persons the fullest possible participation in the social and economic life of the state and to encourage remunerative employment without discrimination. ORS 659.405(1). Respondent's refusal to accommodate Complainant's disability and his termination of Complainant's employment are very severe types of discrimination against a disabled person.

Evidence shows that Complainant experienced mental distress due to Respondent's unlawful conduct. He felt angry, shaken, upset, "pushed out and betrayed" by Respondent. For a month, Complainant and his family lived with stress from Complainant's unemployment. They moved from their apartment because they could no longer afford the rent. They later had to move again because they could not afford the rent. Complainant felt the fear of losing his dislocated worker benefits and his ability to complete his education. The loss of employment caused stress between Complainant and his wife and they bickered. He suffered the trauma of a sudden and unexpected discharge, coupled with the anxiety and uncertainty connected with unemployment. This is compensable. *In the Matter of WS, Inc.*, 13 BOLI 64 (1994); *In*

the Matter of 60 Minute Tune, 9 BOLI 240 (1991), *aff'd without opinion*, *Nida v. Bureau of Labor and Industries*, 119 Or App 508, 852 P2d 974 (1993).

The forum is awarding the Complainant \$30,000 to help compensate him for the mental distress he suffered as a result of Respondent's unlawful employment practices.

In his exceptions, Respondent contended that the proposed award for mental distress was excessive and unsupported by the evidence. Respondent also argued that the order ignored his testimony that if he had been presented with a doctor's note, he would have felt compelled to change Complainant's hours.

Evidence supporting the award for mental distress is described above and included credible testimony from Complainant, his wife, and Eileen Langlois. On the basis of the facts found, the award is not excessive. Regarding Respondent's testimony that he would have changed Complainant's hours if Complainant had presented him with the doctor's note, the forum did not ignore that testimony. The forum found it incredible. See the discussion of this issue in section two of the opinion.

ORDER

NOW, THEREFORE, as authorized by ORS 659.060(3), 659.010(2), and 659.435, and to eliminate the effects of the unlawful practice found as well as to protect the lawful interest of others similarly situated, JAMES H. BRESLIN is hereby ORDERED to:

1) Deliver to the Business Office of the Bureau of Labor and Industries, 800 NE Oregon Street #32, Suite 1010, Portland, Oregon 97232-2162, a certified check, payable to the Bureau of Labor and Industries in trust for Greg Christian, Jr., in the amount of:

a) THREE HUNDRED AND THIRTY SIX DOLLARS (\$336), less appropriate lawful deductions, representing wages Complainant lost as a result of Respondent's

unlawful practice found herein; plus,

b) Interest on the lost wages at the annual rate of nine percent accrued between March 1, 1996, and the date Respondent complies herewith, to be computed and compounded annually; plus,

c) THIRTY THOUSAND DOLLARS (\$30,000), representing compensatory damages for the mental distress Complainant suffered as a result of Respondent's unlawful practice found herein; plus,

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

2) Adopt a non-discriminatory written policy and practice regarding employees and applicants with disabilities and the employer's duty to reasonably accommodate those employees and applicants. The content of such policy is to be preapproved by the Civil Rights Division of the Oregon Bureau of Labor and Industries.

3) Cease and desist from discriminating against any current employee or applicant on the basis of disability.

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¹The "Monday and Tuesday" referred to January 29 and 30, 1996.

²At that time, Julie Donart had the highest seniority. She requested and received day shifts, usually Monday through Friday. In 1996, she worked no graveyard shifts. Complainant had the second highest seniority.

³In 1989, the Legislature amended the Oregon Revised Statutes, including

ORS 659.400 *et seq.*, to change "handicapped" to "disabled." See §§ 129 and 131, chapter 224, Oregon Laws 1989. Oregon administrative rules in chapter 839 were not changed likewise until March 12, 1996 (BL 4-1996). In addition, appellate cases and final orders issued before 1989 used the word "handicapped." In this order, the forum has used the word "handicapped" or "disabled" as they were used in the original text.

⁴ORS 659.400 to 659.460 (originally enacted in 1973 as the The Handicapped Persons' Civil Rights Act).