

**In the Matter of**  
**EXECUTIVE TRANSPORT, INC.**  
**and Louis Viveiros,**  
**Respondents.**

Case Number 01-97  
Final Order of the Commissioner  
Jack Roberts  
Issued July 24, 1998.

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**SYNOPSIS**

Where female complainant was subjected to unwanted and offensive sexual touching and comment by respondent corporation's owner and president, the Commissioner found that she suffered mental distress from the intolerable working conditions and her resulting resignation. The Commissioner found the owner-president aided and abetted the corporation in the unlawful sexual harassment and awarded \$3,000 for wage loss and \$20,000 to compensate complainant for mental suffering.

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The above-entitled contested case came on regularly for hearing before Warner W. Gregg, designated as Administrative Law Judge (ALJ) by Jack Roberts, Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was held on May 20, 1997, in a conference room of the State of Oregon Employment Department, 2075 Sheridan Avenue, North Bend, Oregon. The Civil Rights Division (CRD) of the Bureau of Labor and Industries (the Agency) was represented by Alan McCullough, an employee of the Agency. Executive Transport, Inc. (Respondent ETI), a corporation, was not represented by counsel and under the

rules of this forum was declared in default. Louis Viveiros (Respondent), owner and officer of Respondent ETI, was present throughout the hearing and not represented by counsel. Marjorie Pursley, formerly known as Marjorie Gover (Complainant), was present throughout the hearing and not represented by counsel.

The Agency called as witnesses, in addition to Complainant, Respondent ETI's former employees Marcia Lynn Davis and Samantha Smith, and Agency Senior Investigator Jane MacNeill (by telephone).

Respondent called as witnesses himself and business consultant Archie Mahon.

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

#### **FINDINGS OF FACT -- PROCEDURAL**

1) On July 21, 1995, Complainant, a female, filed a verified complaint with CRD alleging that she was the victim of the unlawful employment practices of Respondent dba Executive Transport. After investigation and review, CRD issued an Administrative Determination finding substantial evidence supporting the allegations of the complaint.

2) Thereafter, the Agency prepared for service on Respondent Viveiros dba Executive Transport Specific Charges alleging that Respondent employed Complainant in 1995; he discriminated against her based on her sex by creating an intimidating, hostile, and offensive working environment altering the terms and conditions of her employment; he discharged Complainant because of her failure to submit to her supervisor's sexual advances and because of her opposition to her supervisor's

unlawful behavior; and that Complainant lost income and suffered emotional damage as a result, all in violation of ORS 659.030(1)(a), (b), and (f).

3) On July 12, 1996, with the Specific Charges, the Agency served on Respondent the following: a) Notice of Hearing setting forth the time and place of hearing; b) a Notice of Contested Case Rights and Procedures containing the information required by ORS 183.413; c) a complete copy of OAR 839-50-000, *et seq.*, regarding the contested case process; and d) a separate copy of the specific administrative rule regarding responsive pleadings.

4) On July 30, 1996, counsel for Respondents timely filed an answer admitting that Complainant had been employed by Respondent ETI with Respondent as her supervisor, and controverting the other allegations of the Specific Charges, denying that Respondent committed any unlawful practice or that Complainant was damaged by any such practice. The answer further alleged Respondent ETI's corporate status and Respondent's connection therewith, and alleged that Complainant lacked the skills necessary for her position, made numerous errors, gave herself an unauthorized raise, and quit voluntarily when questioned about her performance. Respondent alleged a prior small claim action by Complainant over wages. The answer moved for dismissal for failure to join an indispensable party and for failure to state a claim, and recited several affirmative defenses including allegations that Complainant's claim was fabricated, that she was unreasonably sensitive, that she failed to mitigate damages, and that Respondent was entitled to attorney's fees.

5) Accompanying the answer were motions for postponement, change of hearing location, and for discovery. On July 31, 1996, the ALJ issued an order for case summaries and directed the Agency to respond to the motions.

6) Also on July 31, the Agency filed a motion to amend its Specific Charges to allege that Respondent ETI was the employer and that Respondent was president of the corporation who aided and abetted the unlawful practices of the employer, thus stating violations of ORS 659.030(1)(a), (b), (f), and (g). The damages alleged remained unchanged. The Agency did not oppose Respondents' motion for postponement but did oppose moving the hearing from Coos Bay to Eugene, based on the location of the witnesses.

7) On August 6, 1996, the ALJ postponed hearing to September 25, 1996, located the hearing in Coos Bay, granted Respondents' motion to depose Complainant, and, until Respondents complied with the forum's discovery rule, denied Respondents' request to depose other unnamed workers, to compel the Agency to provide documents, or to obtain documents and testimony from a subsequent potential employer.

8) On August 13, 1996, the ALJ granted the Agency's motion to amend, changed the caption of the proceeding to reflect the amendment, denied Respondents' motion to dismiss, ruled that Respondent ETI was served through its agent, Respondent Viveiros, and gave Respondent ETI until August 26, 1996, to answer.

9) On August 28, 1996, in response to the Agency's request for assistance with discovery, the ALJ issued a discovery order to Respondents for the personnel records of Complainant to be provided to the Agency by September 9. On September 6, 1996, the presiding officer was changed from ALJ Douglas A. McKean to ALJ Warner W. Gregg, who ordered Respondents to comply with the previous discovery order or submit justification for refusing discovery by September 11, 1996.

10) On September 10, 1996, the Agency and Respondents jointly moved for postponement based on the unavailability of a witness and uncompleted discovery.

Also on September 10, Respondent ETI filed its separate answer to the amended Specific Charges, incorporating by reference the previous answer of Respondent. On September 11, the ALJ postponed and reset the hearing for February 18, 1997, and on September 16, the ALJ revised that order to February 19, 1997, at the North Bend office of the State of Oregon Employment Department.

11) On January 21, 1997, the ALJ ordered that Respondent be made available for his deposition by the Agency on the same date as a deposition of Complainant was scheduled. On January 29, counsel for Respondents moved for an order allowing him to withdraw as attorney for both Respondents, citing difficulties working with Respondents and their failure to meet their financial obligations. On January 31, the ALJ permitted Respondents' counsel to withdraw from representing Respondents. In that order, the ALJ advised Respondents that the hearing remained scheduled as before and that Respondent Viveiros could represent himself therein but that Respondent ETI, a corporation, would be in default at the hearing if not represented by an attorney.

12) On or about February 1, 1997, the Agency suggested that the scheduled depositions be canceled. On February 7, 1997, Respondent requested further postponement for the purpose of obtaining new legal counsel. Also on February 7, the ALJ vacated and canceled the previous order for depositions and postponed the hearing until May 20, 1997, in the same location as before.

13) On May 8, 1997, the Agency timely filed its case summary. Neither Respondent filed a case summary.

14) At the commencement of the hearing, Respondent was present and not represented by counsel. Respondent ETI, a corporation, was not represented by counsel and was found to be in default under the forum's rules. At the commencement

of the hearing, the ALJ found that Respondent ETI had received a Notice of Contested Case Rights and Procedures containing the information required by ORS 183.413. Respondent received a Notice of Contested Case Rights and Procedures containing the information required by ORS 183.413 and had no questions about it.

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

16) The proposed order, containing an exceptions notice, was issued March 19, 1998. Exceptions, if any, were due March 29, 1998. Both the Agency and Respondent timely filed exceptions received postmarked March 27 and March 30, 1998, respectively (March 29, 1998, was a Sunday). Both sets of exceptions are dealt with in the Opinion section of this Final Order.

#### **FINDINGS OF FACT -- THE MERITS**

1) Complainant is a female who worked at Respondent ETI June 5 to June 28, 1995. She was hired as office manager and did bookkeeping and correspondence.

2) At times material herein, Respondent ETI was an Oregon corporation engaged in routing and dispatching freight shipments by truck throughout the United States and utilized the personal services of one or more individuals reserving the right to control the means by which such service was performed. Respondent was the president and sole owner of Respondent ETI and was Complainant's direct supervisor.

3) When Respondent ETI was formed, Ed Goetz was to have invested some funds and was to have had an interest in the corporation. When the corporate papers were drawn, Goetz failed to sign them. He had no record interest, but Respondent periodically referred to Goetz as his "partner." Goetz drank heavily and was infrequently in the office.

4) In order to broker the truck cargoes between states, Respondent, or his corporation, was required to be licensed by the federal Interstate Commerce Commission. That license required that Respondent and/or the corporation qualify for and carry a bond. Respondent ETI was paid a commission for moving the loads. In turn, certain of the employees, called dispatchers, were paid an hourly rate plus part of the commission for each load moved.

5) The office of Respondent ETI was in Respondent's home in Eastside, a suburb of Coos Bay. The front room of the house contained three desks, two facing each other. The third, off to one side, had a computer. There were no barriers or walls between the desks. Respondent's bedroom opened off of the office. There either was no door or it was never closed.

6) Complainant's job resume submitted to Respondent ETI listed a certificate of completion at Southwestern Oregon Community College in word processing and spreadsheet operations. The certificate dated from 1990. She had not worked in an office since that time. She acknowledged that her computer skills were "rusty," causing some problems with proper spacing on billing documents. Respondent told her to consult with Smith regarding the computer.

7) At times material, Archie Mahon was a business consultant who assisted Respondent with organizing Respondent ETI. He trained ETI office staff in the kind of business information needed for tax purposes in the brokerage business. He had no knowledge of Complainant's hourly wage. He witnessed a discussion between Respondent and Complainant regarding the possibility of her becoming a dispatcher. Mahon was present for about two hours once a week while Complainant was employed. Respondent told Mahon that Respondent started work at 5 a.m. on weekdays in order

to talk to east coast truckers. Mahon had no first hand observation of Respondent's morning routine.

8) On her second or third day on the job, Complainant was at her desk showing Respondent errors in the books. Respondent had his hand on Complainant's back as he leaned forward to see the work. Mahon cautioned Respondent that was inappropriate in an office with a female employee, that it might be misconstrued.

9) At the time of hearing, Samantha Smith was serving in the Oregon Air National Guard at Kingsley Air Force Base near Klamath Falls, Oregon. Her duty assignment called for computer expertise. She worked at Respondent ETI as a dispatcher in late June 1995. She occupied the desk across from Respondent's and observed the interaction between Respondent and Complainant.

10) During her first week on the job, Complainant exchanged back rubs, outside the clothing, with Respondent at his request. When he removed his shirt, Complainant became uncomfortable and refused any further back rubs.

11) Complainant returned from lunch one day to find Respondent in his bathrobe. He told her he didn't know she was coming back and that he was about to shower. She said she was leaving unless he got dressed. He showered and dressed.

12) Complainant had a hot tub at her house and suggested a company barbecue at her house for all employees. She never invited Respondent alone to use the tub. When her house was for sale, she showed the house to Respondent one work day during the lunch hour. He was there about fifteen minutes.

13) Smith saw Respondent talk to Complainant. As Complainant worked at the computer, Respondent leaned close over her with his hand on her back. If Complainant were standing when Respondent engaged her in conversation,

Respondent would move very close, less than twelve inches from her. In each instance, Complainant moved away from the touching and crowding.

14) Respondent frequently discussed activities outside work with Complainant, suggesting fishing and camping trips alone together. He spoke to her of his sexual encounters with other women and stated that sex relaxed him. He talked of a vacation in the Bahamas and going nude on the beach in such a way that she believed he meant for her to do that. He asked her to go dancing. He frequently asked Complainant to stay and barbecue at his house after work. Complainant consistently refused. Her refusals became more insistent as time passed. She finally told Respondent that she wasn't interested and to please not ask her again.

15) Respondent continued to touch Complainant and make suggestive remarks. She continued to move away. Once he put his hands under her shirt and she told him to get his hands off. She became increasingly stressed by his touching and comments. She considered quitting, but jobs were scarce in the Coos Bay area.. She was self-supporting, having recently separated from her husband, and needed the employment. She was very shaky emotionally. She was upset and angry that Respondent would not stop. She tried to talk to him, but it did not work. Each time she protested his actions, Respondent said either that she had mistaken his motives or that she was naive and had been hurt by other men. He stated he was not like other men. He told Complainant of his sexual experiences with a live-in girl friend. Complainant was not interested in a personal relationship with Respondent. She found his behavior and the atmosphere it created offensive and unwelcome. Each day she felt uneasy because of the sexual advances.

16) Complainant asked Smith how to stop Respondent's unwanted behavior because she didn't like the attention. Complainant was concerned, upset, and angry.

Smith suggested that Complainant tell Respondent of her concerns and that she wanted a professional environment free of sexual harassment.

17) Complainant periodically asked Respondent what had happened to Rebecca, who had started as a dispatcher when Complainant was hired. A day or so before Complainant's employment with ETI terminated, Respondent told her that Rebecca had spent two nights with him after starting work and then left.

18) On June 27, 1995, Respondent asked Complainant to stay and work overtime. He stated he thought his employees should give "200 percent" effort. She refused. She had already worked a full day and she also didn't think it was appropriate to work over into the evening where the office was in Respondent's home.

19) On June 28, 1995, Respondent showed Smith a knife he had acquired. After she commented on it, he approached Complainant to show it to her. He approached her at her desk from behind and leaned over with his arms on either side of her, holding the knife in front of her. Complainant was startled, jumped, and said to leave her alone. She felt trapped and told him to back away. She questioned his attentions and said she didn't like the harassment. He told her if she couldn't do the job to leave, "you're out of here."

20) Complainant thought she was fired and began computing her final check. Respondent asked why she was doing that and Complainant said "you fired me." Respondent said he had just given her the day off. Respondent then asked Smith if he had fired Complainant. Smith confirmed that he had. He asked Smith if she thought he was sexually harassing Complainant. Smith said that he was and that Complainant had asked that he stop. Respondent told Smith she was out, too.

21) Marcia Davis worked at ETI as a secretary from January 27 to about mid-February, 1995. Respondent was her boss. When Davis worked for Respondent ETI,

she arrived at work at 8 a.m. Respondent was usually sleeping when she arrived. After entering through the kitchen to the office, she would stand in the open doorway to Respondent's bedroom and awaken him. This made her uncomfortable as she thought it inappropriate and awkward. She never entered the bedroom. At least once it appeared that Respondent was sleeping nude.

22) Two or three times while Davis worked with Respondent, he put his hands on her for an unsolicited back rub while she worked at the computer. Respondent sat very close with his leg touching hers whenever she showed him the computer screen. He spoke of his sexual relationship with a female with whom he was breaking up. His conversations often had sexual overtones. Once, when she was agitated over the computer, he told her "Don't get your panties in a bunch." Davis felt that Respondent's behavior was an invasion of her personal space. It made her very uncomfortable. Davis did not protest to Respondent, but she did draw away from his touching. Following a dispute over pay for Saturday work in early February, Davis quit because of the overall environment.

23) Complainant had understood her pay to be \$6.25 an hour. She drew her first paycheck based on that amount. When Respondent confronted her about the amount, claiming he had hired her at minimum wage, Complainant stated she needed that much. After Complainant left Respondent ETI, she filed in small claims court for the wages she believed she had coming. The court found that her pay rate had been \$6.25 an hour and awarded over \$400 in unpaid wages.

24) Respondent did not use Mahon's consulting services, except for occasional telephone questions, after June 1995. Mahon did not visit Respondent's business after June 1995.

25) At times material, Jane MacNeill was Senior Investigator with the Agency. As part of her duties, she interviewed Archie Mahon by telephone December 21, 1995. He told her that Complainant had complained to him about Respondent's rough language and that she came into the office one day and Respondent was without trousers.

26) Respondent Viveiros was not a credible witness. He appeared to believe himself to be a victim. He testified that Complainant's allegations were untrue. He stated that she and Smith had conspired to fabricate the sexual harassment allegations, but the testimony of the witness Davis, which was not rebutted, suggested that such allegations described an ongoing practice. He stated that he had previously been victimized by a bank which had failed to file a bond it had promised for his business, and by a previous attorney who declined to represent him because Complainant had done housework for the attorney. He acknowledged most of the events complained about by Complainant, but had his own version of them. He acknowledged showing the knife, but insisted it was in the afternoon, although he later testified that Smith and Complainant left on the last day between 9:30 and 9:45 a.m. He acknowledged being in his robe one day when Complainant arrived at work, but insisted that it was in the morning and that he had overslept. He repeated his claim of beginning work at 5 a.m., despite testimony that Davis awakened him each day that she worked there. He attempted to establish that Complainant had misrepresented her computer skills, even though her resume showed that her training was four years old. He insisted that Complainant had quit, but admitted that he fired Smith for supporting Complainant. He testified that after Complainant and Smith left, he took to his bed for two or three days. After that, he said he hired no more employees and did no more business. When confronted by the Agency on cross-examination, he admitted having several other

employees after Smith and Complainant left and acknowledged investing an additional sum of money in the business before ceasing operations in September. This forum did not credit Respondent's testimony unless it was verified by other more credible evidence.

27) Archie Mahon's testimony was not entirely credible. He attempted to protect Respondent, whom he described as a truck driver with a volatile temper. Mahon stated that Respondent was not profane and that Complainant never mentioned Respondent's language or Respondent not being fully dressed at the office. He testified that Respondent had his hand on the back of Complainant's chair, rather than on Complainant, when he cautioned Respondent about getting too close physically to female employees. This forum has credited only those portions of Mahon's testimony that were corroborated by other credible sources.

28) Complainant consistently searched for replacement employment after June 1995, but was unsuccessful. This made her feel she had lost control of her employment potential. The loss of income had a significant negative effect on her life. In January 1996 she began her own housecleaning business.

29) Kay Casey replaced Complainant, working from early July to August 25, 1995. Respondent ETI had one or two short term employees after that, and ceased doing business sometime in September 1995. Respondent ETI was not in business at the time of the hearing.

#### **ULTIMATE FINDINGS OF FACT**

1) Complainant is a female who worked at Respondent ETI from June 5 to June 28, 1995, at a wage of \$6.25 an hour.

2) Respondent was the president and sole owner of Respondent ETI, a corporation, and was Complainant's direct supervisor.

3) While Complainant worked at ETI, Respondent intentionally subjected Complainant to the following behavior: placing his hand on her back, leaning close over her, rubbing her back, removing his shirt, appearing in the office in his bathrobe, standing close to her, suggesting fishing and camping trips alone together, speaking of his sexual encounters with his live in girlfriend and other women, stating that sex relaxed him, talking of going nude on the beach, asking her to go dancing, asking her to stay and barbecue at his house after work, making suggestive remarks, putting his hands under her shirt, telling complainant she was naive and had been hurt by other men and he was not like other men, approaching her with a knife from behind and leaning over with his arms on either side of her.

(4) Respondent's behavior was unwelcome to Complainant. Complainant responded to Respondent's behavior by moving away when he touched or crowded her; asking him to take his hands off her and leave her alone; refusing invitations for social activities and telling him not to invite her again; indicating her discomfort when he removed his shirt and when he wore his bathrobe in the office; attempting to talk to him about his behavior; and stating she did not like the harassment.

(5) Other female employees found Respondent's behavior offensive: one left employment after experiencing unwelcome physical and verbal conduct; another told Respondent she believed he was sexually harassing Complainant.

6) Respondent's behavior toward Complainant created and maintained working conditions which were so intolerable that a reasonable person in Complainant's position would have resigned because of them.

7) Respondent knew that Complainant was substantially certain to leave employment as a result of those working conditions.

8) Complainant resigned her employment with Respondent ETI as a result of those working conditions.

9) Following Complainant's resignation, Respondent ETI remained in business through mid-September 1995.

10) As a result of her resignation, Complainant lost wages from June 28 to mid-September 1995, a period of 12 weeks at \$6.25 an hour for a total of \$3,000.

11) Respondent's behavior toward Complainant, the resulting intolerable working conditions, and the involuntary discharge with its sudden loss of income caused Complainant serious and lasting mental distress.

### **CONCLUSIONS OF LAW**

1) At times material herein, ORS 659.010 provided, in part:  
"As used in ORS 659.010 to 659.110 \* \* \* unless the context requires otherwise:

" \* \* \*

"(6) 'Employer' means any person \* \* \* who in this state \* \* \* engages or utilizes the personal service of one or more employees reserving the right to control the means by which such service is or will be performed.

Respondent ETI was an employer subject to ORS 659.010 to 659.110 at all times material herein.

2) At times material herein, ORS 659.040(1) provided, in part:  
"Any person claiming to be aggrieved by an alleged unlawful employment practice, may \* \* \* make, sign and file with the commissioner a verified complaint in writing which shall state the name and address of the \* \* \* employer \* \* \* alleged to have committed the unlawful employment practice complained of \* \* \* no later than one year after the alleged unlawful employment practice."

Under ORS 659.010 to 659.110, the Commissioner of the Bureau of Labor and Industries has jurisdiction of the persons and subject matter herein.

3) At times material herein, the actions, inactions, statements and motivations of Respondent Louis Viveiros are properly imputed to Respondent ETI herein.

4) At times material herein, ORS 659.030(1) provided, in part:

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

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

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

" \* \* \* \* \*

"(g) For any person, whether an employer or an employee, to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under ORS 659.010 to 659.110 \* \* \* or to attempt to do so."

At times material herein, OAR 839-07-550 provided:

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

"(1) Submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment; or

"(2) Submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual; or

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

Complainant's responses to Respondent's behavior made it clear that the conduct was unwelcome. By subjecting Complainant to unwelcome sexual touching, comments and other behavior directed toward Complainant, Respondent ETI, aided by its owner Respondent Viveiros, discriminated against Complainant by creating intolerable working

conditions because of her sex, unreasonably interfering with her work performance and creating an intimidating, hostile or offensive working environment, whereby Respondent corporation violated ORS 659.030(1)(b) and Respondent Viveiros violated ORS 659.030(1)(g).

5) By subjecting Complainant to unwelcome sexual touching and comment, Respondent corporation, aided by its owner Respondent Viveiros, created objectively intolerable working conditions because of her sex and Complainant's resignation was a constructive discharge whereby Respondent corporation violated ORS 659.030(1)(a) and Respondent Viveiros violated ORS 659.030(1)(g).

6) At the time of the hearing, OAR 839-050-0110 provided in part:

"(1) Any party may be represented by counsel. All government agencies, corporations and unincorporated associations must be represented by counsel \* \* \* "

At the time of the hearing, OAR 839-050-0020 provided in part:

"(8) 'Counsel' means an attorney who is a member in good standing with the Oregon State Bar \* \* \* "

At the time of hearing, OAR 839-050-0330 provided in part:

"(2) When a party \* \* \* fails to appear at the specified time and place for the contested case hearing, the administrative law judge shall take evidence to establish a prima facie case in support of the charging document and then issue a proposed order to the commissioner and all participants pursuant to OAR 839-050-0370. \* \* \* "

Respondent ETI, a corporation, was not represented by counsel at the hearing and was therefore in default.

7) Pursuant to ORS 659.060 and by the terms of ORS 659.010, the Commissioner of the Bureau of Labor and Industries has the authority to issue an Order requiring Respondents to perform any act or series of acts reasonably calculated to carry out the purposes

of ORS 659.010 to 659.110, to eliminate the effects of an unlawful practice found, and to protect the rights of others similarly situated. The amounts awarded in the Order below are a proper exercise of that authority.

## **OPINION**

### **Default**

Respondent ETI, a corporation, was found in default, pursuant to OAR 839-050-0330(2), for failing to appear by counsel at hearing. In default situations, the Agency must present a prima facie case in support of the Specific Charges and to establish damages. ORS 183.415(6); OAR 839-050-0330(2). In default cases, the defaulting respondent is not allowed to present any evidence, examine witnesses, or otherwise participate in the hearing. *In the Matter of Metco Manufacturing, Inc.*, 7 BOLI 55 (1987), *aff'd Metco Manufacturing, Inc. v. Bureau of Labor and Industries*, 93 Or App 317, 761 P2d 1362 (1988). In this case, the corporation did not present evidence, examine witnesses, or otherwise participate in the hearing. Respondent Viveiros, the corporate president, was named personally and presented evidence, examined witnesses, and otherwise participated fully in the hearing.

### **Prima Facie Case**

To establish a prima facie case of sexual harassment, the Agency must present evidence to show that (1) At times material, Respondent ETI was an employer subject to ORS 659.010 to 659.110; (2) Respondent ETI employed Complainant; (3) Complainant is a member of a protected class, sex; (4) Respondent ETI through Respondent Viveiros engaged in unwelcome verbal or physical conduct directed at Complainant because of her protected class; (5) the conduct had the purpose or effect of creating an intimidating, hostile or offensive working environment; (6) Respondent knew or should have known of the conduct; and (7) Complainant was harmed by the

conduct. OAR 005-0010; 839-007-0550; *In the Matter of Kenneth Williams*, 14 BOLI 16, 24 (1995).

The evidence was undisputed on the first three elements of the prima facie case. As to element (4), the Complainant credibly testified to numerous instances of verbal, physical and other conduct of a sexual nature directed at Complainant by Respondent. Although Respondent testified that Complainant's allegations were untrue, his testimony was not credible. In addition, other credible witnesses testified as to some of the instances Complainant described. Even Archie Mahon, whose testimony the forum generally found protective of Respondent, testified consistently with Complainant that Mahon cautioned Respondent that leaning over Complainant while checking her work was inappropriate and might be misconstrued. The evidence establishes that Respondent engaged in verbal, physical and other conduct of a sexual nature directed at Complainant.

That the Respondent's conduct was unwelcome is apparent from credible testimony of Complainant's repeated and clear attempts to communicate this, through verbal objections and by physically moving away from Respondent, refusing social invitations from him and attempting to discuss his harassing behavior.

Respondent's conduct was directed at Complainant because of her sex.<sup>1</sup> He attempted to date her. He spoke to her of his sexual encounters with other women and stated that sex relaxed him. He stated that Complainant was naive and had been hurt by other men and that he was not like other men. The evidence demonstrates that Respondent engaged in unwelcome conduct directed at Complainant because of her protected class.

The fifth element of the prima facie case is that the unwelcome conduct must create an intimidating, hostile, or offensive working environment. What constitutes such

an environment is measured by the totality of the circumstances.<sup>2</sup> Some factors to be considered are (a) the nature of the conduct (verbal or physical), (b) the context in which the alleged incidents occurred, (c) the frequency of the conduct, its severity and pervasiveness, and (d) whether it was physically threatening or humiliating.<sup>3</sup> Those factors as they relate to this case:

(a) Nature of the Conduct: In this case there was not only abundant unwelcome verbal and physical conduct of a sexual nature such as touching directed at Complainant, but there were instances where Respondent removed his shirt, appeared in his bathrobe in the office, and on one occasion approached the Complainant with a knife.

(b) Context in which Incidents Occurred: Respondent's office, including Complainant's workspace, was located in his home, within close proximity of his bedroom which had an open door. Although some of the conduct occurred with witnesses, Complainant was also alone with Respondent in this setting during some of the instances.

(c) Frequency and Pervasiveness: All the incidents of unwelcome conduct took place in a span of a few weeks. Thus frequency and pervasiveness are established.

(d) Humiliating or Threatening Conduct: Respondent put his hands under Complainant's shirt, on more than one occasion stood or leaned near her, touched her, and rubbed her back. On one occasion Respondent approached Complainant from behind with a knife and put his arms on either side of her to show her the knife, startling her.

Under the totality of the circumstances test, then, Respondent's harassing conduct toward Complainant was sufficiently severe and pervasive to create an intimidating, hostile, and offensive working environment.

Whether particular conduct directed towards a person constitutes sexual harassment is viewed from the perspective of a reasonable person in the circumstances of the person alleging harassment (an objective standard).<sup>4</sup> Evidence established that Complainant, herself perceived the environment to be hostile and offensive and indicated in numerous ways the conduct was unwelcome. There was credible evidence that other women who worked for Respondent found Respondent's conduct offensive. The forum believes that any reasonable person in Complainant's circumstances would have found that Respondent's conduct created a hostile, intimidating, offensive working environment.

The sixth element which must be proven is that Respondent knew or should have known of the unwelcome conduct. In this case, Respondent Viveiros, whose conduct is at issue, is the president of Respondent ETI. See "Liability," below.

The seventh and final element of the prima facie case is that Complainant must be harmed by the conduct. See "Damages," below.

### **ORS 659.030(1)(g) Liability**

A corporate president and owner who commits acts rendering the corporation liable for an unlawful employment practice may be found to have aided and abetted the corporation's unlawful employment practice under ORS 659.030(1)(g). The statute declares it to be an unlawful employment practice "For any person \* \* \* to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under ORS 659.010 to 659.110."

"The Commissioner has long held that corporate presidents are liable for aiding and abetting their Respondent corporations where the presidents were found to have personally sanctioned or engaged in the alleged discriminatory acts. *In the Matter of Salem Construction Company, Inc.*, 12 BOLI 78, 87-88, 90 (1993); *In the Matter of Allied Computerized Credit & Collections, Inc.*, 9 BOLI 206, 214, 218 (1991); *In the Matter of Sapp's Realty, Inc.*, 4 BOLI 232, 270-72 (1985); *In the Matter of N.H. Kneisel,*

*Inc.*, 1 BOLI 28, 30, 38 (1976)." *In the Matter of Gardner's Cleaners, Inc.*, 14 BOLI 240, 254 (1995).<sup>5</sup>

The Agency did not allege that Respondent Viveiros was an employer. Respondent Viveiros was a person as defined in ORS 659.010(12) who was charged with having "aided and abetted" the doing of acts forbidden by ORS 659.030, in violation of ORS 659.030(1)(g). He was thus a "respondent" under ORS 659.010(13).

### **Constructive Discharge**

This forum has consistently adhered to an objective standard regarding constructive discharge that if the employer imposes objectively intolerable working conditions,<sup>6</sup> the employee's resignation due to those conditions is constructively a discharge. *In the Matter of West Coast Truck Lines, Inc.*, 2 BOLI 192 (1981), *aff'd without opinion*, 63 Or App 383, 665 P2d 882 (1983).<sup>7</sup>

" \* \* \* [T]o establish a constructive discharge, [the employee] must allege and prove that (1) the employer intentionally created or intentionally maintained specified working condition(s); (2) those working conditions were so intolerable that a reasonable person in the employee's position would have resigned because of them; (3) the employer \* \* \* knew that the employee was certain, or substantially certain, to leave employment as a result of those working conditions; and (4) the employee did leave the employment as a result of those working conditions.' *McGanty v. Staudenraus*, 321 Or 532, 557, 901 P2d 841, 856 (1995) \* \* \* ." *In the Matter of Body Imaging, Inc.*, 16 BOLI 163, 185 (1997).

In this case, this forum has found (1) that Respondents created and maintained specified working conditions (2) that were objectively intolerable, (3) that Respondents were aware that Complainant was substantially certain to leave over those conditions and (4) that Complainant did leave the employment as a result of those conditions. Her departure was a constructive discharge.

### **Damages**

Initially, Respondent's rough language and behavior toward Complainant appeared inappropriate to her and made her uncomfortable. As his behavior became

more sexually oriented, Complainant became increasingly stressed and very shaky emotionally. The touching and comment were offensive and unwelcome. She became upset, angry, and felt extremely vulnerable, visualizing financial stress if she quit the job. His continued behavior had the effect of making her uneasy each day at work. She was constantly fending off his advances. The knife incident startled her and made her feel trapped. Her emotional distress caused the work situation to be less and less tolerable. When Respondent suggested on June 28 that she leave, if only temporarily, she decided to leave for good. Her unplanned departure caused the financial distress she had feared and resulted in an unanticipated and fruitless job search of several months. Throughout that period, and to a lesser extent up to the time of the hearing, her emotional distress continued. The award in the order below is intended to compensate her for the mental suffering caused by Respondents' sexual harassment, an unlawful employment practice.

Under ORS 659.010(2), the Commissioner has authority to fashion a remedy adequate to eliminate the effects of an unlawful practice found and to protect the rights of other persons similarly situated to the person harmed. The wage loss through loss of employment, as well as mental suffering, is an effect of discrimination attributable to the Respondents. The order below awards back pay and mental suffering damages against Respondent corporation for violation of ORS 659.030(1)(a) and (b), and against Respondent Viveiros for violation of ORS 659.030(1)(g).

### **Respondent's Exceptions**

Respondent Viveiros filed a letter with the Forum in response to the proposed order in which he questioned Complainant's abilities to fill the job for which she was hired, alleged that she misrepresented her skills and lied on other job applications, and alleged that she took the job with knowledge that "Mr. Viveiros's language was more

common to truck drivers than to a professional office." Respondent further alleged that the proposed order (characterized as "the complaint") "fails to allow for the fact that during the period of employment, my girlfriend Opal Solvey was in the next room." None of those allegations were relevant to the facts as found, and were unsupported by the evidence and testimony on the whole record. Respondent apparently does not appreciate what the case was about. The forum has revised and expanded upon the Ultimate Findings of Fact, the Conclusions of Law, and the Opinion in order to further clarify the grounds and legal reasoning for the decision and award. Respondent's exceptions are without merit and are denied.

### **Agency Exceptions**

The Agency excepted to the amount of compensatory damages for mental and emotional distress in the proposed order (\$15,000) as failing to adequately compensate Complainant based on the record and the forum's awards in similar cases. The Agency's exceptions are well taken. In re-examining the record as a result of both sets of exceptions, the forum has revised Findings of Fact 15 and 28 and Ultimate Finding of Fact 11 in order to more accurately reflect the evidence on the record. Those revisions more fully recognize the duration and seriousness of the distress suffered and support an increase in the mental suffering award to \$20,000.

### **ORDER**

NOW, THEREFORE, as authorized by ORS 659.060(3) and 659.010(2), and in order to eliminate the effects of the unlawful practices found, specifically violations of ORS 659.030(1)(a), (b) and (g), Respondents EXECUTIVE TRANSPORT, INC., and LOUIS VIVEIROS are hereby ordered to:

- 1) Deliver to the Fiscal Office of the Bureau of Labor and Industries, State Office Building, Ste. 1010, 800 NE Oregon Street, # 32, Portland, Oregon 97232-2162,

a certified check, payable to the Bureau of Labor and Industries in trust for MARJORIE GOVER PURSLEY, in the amount of:

a) THREE THOUSAND DOLLARS (\$3,000), less lawful deductions, representing wages lost by Complainant between June 28 and September 15, 1995, plus

b) TWENTY THOUSAND DOLLARS (\$20,000), representing compensatory damages for the mental and emotional distress suffered by MARJORIE GOVER PURSLEY as a result of Respondents' unlawful practices found herein, plus

c) Interest at the legal rate from September 15, 1995, on the sum of \$3,000 until paid, plus

d) Interest at the legal rate on the sum of \$20,000 from the date of the Final Order herein until Respondents comply therewith, and

2) Cease and desist from discriminating against any employee based upon the employee's sex.

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<sup>1</sup>"In proving a claim for a hostile work environment due to sexual harassment . . . the plaintiff must show that but for the fact of her sex, she would not have been the object of harassment.." *Holien v. Sears, Roebuck and Co.*, 298 Or App 76, 689 P2d 1292 at 1299.

<sup>2</sup>See *Fred Meyer v. Bureau of Labor & Industries*, 152 Or App 302, 954 P2d 804 (1998).

<sup>3</sup>*U.S. Equal Employment Opportunity Commission, Notice Number 915.002* (Enforcement Guidance on *Harris v. Forklift Sys. Inc.*), March 8, 1994.

<sup>4</sup>OAR 839-007-0550(4); *In the Matter of James Meltebeke*, 10 BOLI 102, 115 (1992), *reversed and remanded on other grounds, Meltebeke v. Bureau of Labor and Industries*, 322 Or 132, 903 P2d 351 (1995).

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<sup>5</sup>See also *In the Matter of Wild Plum Restaurant, Inc.*, 10 BOLI 19 (1991) (holding corporate owner and president subject to ORS 659.030(1)(g) as an aider and abettor); *In the Matter of Loyal Order of Moose*, 13 BOLI 1 (1994) and *In the Matter of Oregon Rural Opportunities*, 2 BOLI 8 (1980) (both holding employer's manager liable under ORS 659.030(1)(g)); and *Sterling v. Klamath Forest Protective Association*, 19 Or App 383, 528 P2d 574 (1974), (holding employer's manager liable under former ORS 659.030(5)).

<sup>6</sup>In context, "objectively intolerable working conditions" means conditions that a reasonable person would find intolerable and over which a reasonable person would resign.

<sup>7</sup>See also *In the Matter of Sapp's Realty*, 4 BOLI 232 (1985); *In the Matter of Richard Niquette*, 5 BOLI 53 (1986); *In the Matter of Deanna Miller*, 6 BOLI 12 (1986); *In the Matter of Lee's Cafe*, 8 BOLI 1 (1989); *In the Matter of City of Umatilla*, 9 BOLI 91 (1990), *aff'd without opinion*, *City of Umatilla v. Bureau of Labor and Industries*, 110 Or App 151, 821 P2d 1134 (1991); *In the Matter of Allied Computerized Credit & Collections, Inc.*, 9 BOLI 206 (1991), *In the Matter of William Kirby*, 9 BOLI 258 (1991); *In the Matter of Lee Schamp*, 10 BOLI 1 (1991); *In the Matter of Wild Plum Restaurant, Inc.*, 10 BOLI 19 (1991); *In the Matter of Chalet Restaurant and Bakery*, 10 BOLI 183 (1992), *aff'd without opinion*, *JLG4, Inc., v. Bureau of Labor and Industries*, 125 Or App 588, 865 P2d 1344 (1993); *In the Matter of Sunnyside Inn*, 11 BOLI 151 (1993); *In the Matter of RJ's All American Restaurant*, 12 BOLI 24 (1993); *In the Matter of Loyal Order of Moose*, 13 BOLI 1 (1994).