

In the Matter of

GORDY'S TRUCK STOP, LLC,

Case No. 03-05

Final Order of the Commissioner Dan Gardner

Issued February 28, 2007

SYNOPSIS

The Agency established by a preponderance of credible evidence that Respondent, through its principal, Gordon Wanek, subjected Complainant to offensive and unwelcome sexual conduct that created a hostile and intimidating work environment, in violation of ORS 659A.030(1)(b). The Agency also established that Respondent's principal intentionally created intolerable working conditions because of Complainant's sex and that her subsequent resignation was a constructive discharge, in violation of ORS 659A.030(1)(a). The forum concluded that Respondent is liable for Wanek's unlawful conduct and awarded Complainant \$20,000 in mental suffering damages and \$10,200 in back wages. ORS 659A.030; OAR 839-005-0030.

The above-entitled case came on regularly for hearing before Linda A. Lohr, designated as Administrative Law Judge ("ALJ") by Dan Gardner, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on August 16, 2005, in the Oregon Employment Department Conference Room located at 1645 NE Forbes Road, Suite 100, Bend, Oregon.

Cynthia L. Domas, an employee of the Agency, represented the Bureau of Labor and Industries ("BOLI" or "the Agency"). Bonnie Wilcox ("Complainant") was present throughout the hearing and was not represented by counsel. Jennifer S. Wells, Attorney at Law, represented Gordy's Truck Stop LLC ("Respondent"). Gordon ("Gordy") Wanek, Respondent's managing member and owner, was present throughout the hearing.

The Agency called as witnesses: Bonnie Wilcox, Complainant; Randy Graves, Deschutes County Sheriff's Deputy; Robin Brown, Roy Harris, Debra Harris, and Terry Short, Respondent's former employees; Tracy Davidson, Complainant's companion; and Kerry Johnson, BOLI senior civil rights investigator.

Respondent called as witnesses: Gordon Wanek, Respondent's managing member and owner; Robert Troy, Respondent's former employee; and Shelly Drinnen, Respondent's former employee.

The forum received as evidence:

- a) Administrative exhibits X-1 through X-13;
- b) Agency exhibits A-1 through A-8 (submitted prior to hearing) and A-10 (submitted during hearing);
- c) Respondent exhibits R-2 and R-3 (submitted during hearing).

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

FINDINGS OF FACT – PROCEDURAL

1) On or about May 10, 2003, Complainant filed a verified complaint with the Agency's Civil Rights Division ("CRD") alleging she was the victim of Respondent's unlawful employment practices. After investigation and review, the CRD found substantial evidence supporting the allegations of the complaint.

2) On May 20, 2005, the Agency submitted Formal Charges to the forum alleging Respondent, through owner Gordon Wanek, discriminated against Complainant by directing unwelcome physical and/or verbal sexual advances toward her because of her gender and to which submission was implicitly made a term or condition of employment or that were sufficiently severe or pervasive to have the effect of creating a

hostile, intimidating, or offensive working environment for Complainant, in violation of ORS 659A.030(1)(b). The Agency also alleged Complainant was compelled to quit her employment due to the intolerable working conditions created by Respondent, in violation of ORS 659A.030(1)(a). The Agency requested a hearing.

3) On May 24, 2005, the forum served Formal Charges on Respondent accompanied by the following: a) a Notice of Hearing stating the hearing would begin at 9 a.m. on October 4, 2005, in Bend, Oregon; b) a language notice; c) a Servicemembers Civil Relief Act Notification; d) a Summary of Contested Case Rights and Procedures containing the information required by ORS 183.413; e) a complete copy of the Agency's administrative rules regarding the contested case process; and f) a separate copy of the specific administrative rule regarding responsive pleadings.

4) On June 13, 2005, Respondent, through counsel, timely filed an answer to the Formal Charges.

5) On June 14, 2005, the forum reset the hearing for August 16, 2005, based on Respondent's request for postponement dated June 13, 2005, and the participants' agreement to move the hearing back to August.

6) On June 14, 2005, the forum ordered the Agency and Respondent each to submit a case summary including: a list of all persons to be called as witnesses; identification and copies of all documents to be offered into evidence; a brief statement of the elements of the claim (for the Agency only); a brief statement of any defenses to the claim (for Respondent only); a statement of any agreed or stipulated facts; and any damage calculations (for the Agency only). The ALJ ordered the participants to submit case summaries by August 5, 2005, and notified them of the possible sanctions for failure to comply with the case summary order.

7) The Agency and Respondent timely filed case summaries.

8) At the start of hearing, pursuant to ORS 183.415(7), the ALJ 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.

9) The ALJ issued a proposed order on August 23, 2006, that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. Respondent timely filed exceptions which are addressed in the Opinion section of this Final Order.

FINDINGS OF FACT – THE MERITS

1) At times material herein, Respondent Gordy's Truck Stop LLC was a limited liability company conducting business in La Pine, Oregon, as a truck stop and restaurant, and was an employer utilizing the personal services of one or more persons.

2) At times material, Gordon Wanek was Respondent's owner and managing member. Wanek supervised the business and all its employees, including Terry Short, Respondent's day and swing shift manager.

3) Complainant worked as a prep/line cook for Respondent from July 25, 2002, until January 3, 2003.

4) Respondent's regular restaurant hours were 6 a.m. to 10 p.m., seven days per week. Complainant worked the 6 a.m. to 2 p.m. shift, 40 hours per week, earning \$8.50 per hour.

5) On January 3, 2003, Complainant was talking on her cell phone to her roommate, Tracy Davidson, while taking a mid-morning break during her regular work shift. At that time, Wanek and maintenance man, Robert Troy, were leaving the restaurant to take some garbage to the dump. Complainant was standing on the sidewalk outside the restaurant when Wanek walked by Complainant on his way to his truck. As he passed her, he lightly squeezed her left breast and startled her. She exclaimed, "What are you doing?" and he replied, "I'm feeling you up." She had almost

slipped off the curb and she said to him, "you almost made me fall." Wanek said nothing and continued toward his truck and left. Complainant told Davidson, "He just grabbed my tit."

6) Complainant's co-worker, Robin Brown, was getting some trash bags from an area near Complainant when he heard her say, "What are you doing?" Complainant looked quite upset and Brown asked her what was wrong. She responded, "You saw, you know what's wrong." He observed that Wanek had been standing close to her, but he did not see Wanek touch Complainant or hear Wanek's response to her question.

7) Complainant attempted to find Short, her immediate supervisor, to report the incident. Short had left the restaurant earlier and Complainant called Short at her residence. She told Short that Wanek had "grabbed" her breast. Complainant was very upset and Short did not know how to help her. Respondent did not have a sexual harassment policy that Short knew of and Short advised Complainant to call the police and BOLI.

8) After she reported the incident to Short, Complainant called the Deschutes County Sheriff's Office and made a complaint against Wanek on January 3, 2003. Deputy Randy Graves investigated the complaint the same day and interviewed Complainant, Short, Brown and Wanek, who admitted he had touched Complainant. The next day, Graves interviewed Troy. Deputy Graves took notes during each interview and on January 4, 2003, typed up a report that stated in pertinent part:

"NARRATIVE:

"On 1-3-03 contact was made with Bonnie Wilcox [Complainant] regarding a sexual harassment complaint. The sexual harassment took place at Gordy's Truck Stop. Wilcox was taking a break and talking on her cell phone. Wilcox was taking her break near the back door located on the south side of the business. As per Wilcox, while she was talking on her cell phone, Gordon Wanek the owner of Gordy's walked out of the business and as Wanek past [sic] Wilcox, Wanek touched Wilcox with a light pinch contact with his fingers on Wilcox's left breast. Wilcox advised

Wanek touched her under her left arm and on her left side of her breast. Wilcox received no injuries from Wanek's light pinch contact. Wilcox said when Wanek touched her it took her by surprise and Wilcox said to Wanek, 'what are you doing?' Wanek then replied 'I'm feeling you up.' Wilcox then told Wanek 'you almost made me fall.' Wanek then walked off. Wilcox said [sic] attempted to contact her boss Terri Short but Short had already left work for home. Wilcox contacted Short at her residence and told Short what had taken place, and that she was no longer going to work at Gordy's due to Wanek's contact with her.

"Wilcox only had two possible witnesses to what had taken place at Gordy's, a Robin and Bob who also are employees at Gordy's Truck Stop. Contact was made with Terri Short to get more information on Robin and Bob so that they could be contacted for statements. Short advised the two subject names were Robin Brown and Robert Troy. At the time of contact Short advised that Wilcox had contacted her to report what had taken place at Gordy's.

"Contact was made with Robin Brown a possible witness to this complaint, the contact was made on 1-3-03 at 3:40 p.m. Brown said in substance that he was getting trash bags from a cupboard near Wilcox and after picking up the trash bags he started to turn around, as Brown turned he heard Wilcox say 'what are you doing?' Brown said Wanek was standing about six inches from Wilcox when he turned but never observed Wanek touch Wilcox and never heard Wanek say anything to Wilcox. Brown then walked back into the building.

"The suspect in this case Gordon Wanek was contacted on 1-3-03 at 4:44 p.m. Wanek said in substance that he was leaving the business after picking up garbage as he walked out Wilcox was at the back door talking on her cell phone, as he walked past [sic] Wilcox he used one finger and poked Wilcox in the side. Wanek said he only used one finger poking Wilcox in the ribs on Wilcox's left side and approximately four to six inches from her breast. Wanek said Wilcox said to him 'what are you doing?' Wanek replied 'what do you think I'm feeling you up or something,' Wanek advised he then walked out to his pick up and left. Wanek said he never had any intention of touching Wilcox's breast; he just poked Wilcox as a friendly gesture.

"Contact was made with Robert Troy one of the possible witnesses on 1-4-03 at 9:41 a.m. Troy said in substance that he and Gordon had been loading garbage into Gordon's pick up. As Troy and Gordon left they walked past [sic] Wilcox who was outside the back door talking on her cell phone. As Troy and Gordon walked past [sic] Wilcox, Troy heard Gordon say something to Wilcox as he walked past [sic] but did not here [sic] what it was, they continued on out to the pickup and left. Troy advised he never observed Wanek touch Wilcox at any time.

“This case will be referred to the Deschutes County D.A.’s office for review.

“Case closed. End of report.”

The Deschutes County D.A.’s office ultimately declined the case and Deputy Graves closed his file on February 24, 2005.

9) Complainant finished her shift on January 3, 2003, although Wanek’s conduct was “eating [her] up” because she thought “he was getting away with something.” She did not go back to work thereafter because she was too uncomfortable. After her initial shock and upset, she became angry and believed she had no other alternative but to quit her job.

10) Usually an outgoing and “bubbly” person, Complainant became wary and appeared “standoffish” to her former co-workers. She felt isolated from those she had befriended at work who still worked for Respondent and perceived that she was the “talk of the town” because friends and even strangers off the street asked her about the incident. She filed for unemployment benefits but had difficulty finding a job. She sent out numerous applications and interviewed at local restaurants, but could not get a job. Complainant remained upset about the incident and her subsequent unemployment for six to eight months after she left Respondent’s employ.

11) At or around the end of July 2003, Complainant found a job at Pozzi Windows working 40 hours per week and earning \$9-9.50 per hour. After working two eight hour days, she quit her employment at Pozzi Windows and began another job search. Complainant had difficulty finding new employment so she moved to Idaho on or about October 3, 2003.

12) After Complainant filed a civil rights complaint in May 2003, BOLI notified Respondent and requested a “complete written response to the allegations.” On June 13, 2003, Respondent, through Wanek, submitted a response, stating:

"On January 3, 2003, I was walking through the area where the prep cooks are stationed along with Robert Troy. Bonnie Wilcox, a prep cook, was blocking my path. As I tried to get around her I raised my arms to make room to squeeze by her. She asked, "Are you trying to touch my breast." I replied, "I was only trying to squeeze by you."

"Robert Troy witnessed the incident and will verify that I did not touch her.

"Bonnie Wilcox has sworn that Robyn Brown heard this exchange. Robin Brown was not even in the area at the time this incident occurred and did not hear this exchange.

"Bonnie Wilcox has sworn that she immediately reported this incident to Terry Short, the restaurant manager, but Terry Short was not in the restaurant that day because it was her day off.

"I feel that Bonnie Wilcox wanted to quit her job because of personal reasons and was looking for an excuse to quit and also get unemployment. I did not do anything wrong and will fight this defamation of my character."

In a later letter to BOLI, dated July 21, 2003, Wanek, stated:

"I'm a seventy two year old man who is about 5'5". I have never been arrested or even received a traffic ticket while living here in Oregon these past 21 years. I have a spotless record. Ms. Wilcox is about 5'8" or 5'9" and weight [sic] 350 to 400 pounds. Everything Ms. Wilcox has said is a lie. I have a witness who saw what happened and has stated that I did not do any of the actions she is accusing me of. Her witness stated that he did not see or hear what happened. I did not see her on the phone at any time and there is no phone in [sic] the kitchen. All Ms. Wilcox wanted is unemployment because she is in the foster care program. My final statement is that I did not do anything wrong and I have proved that."

13) Wanek squeezed supervisor Short's arm every time he talked to her and occasionally commented that he would "rape her if [she] didn't take his money for a meal." Although Short never observed Wanek touching anyone else inappropriately, some of the female employees complained to her that Wanek made "inappropriate" comments. At least one employee told Short that she did not want to "go to the dump" with Wanek because she did not want to be alone with him in his truck. Other female employees complained about doing "garbage runs" with Wanek and said they did not like being "hugged" by him. When Respondent's assistant manager, Debra Harris, suggested to Wanek that a newly hired hostess was not performing her work very well,

Wanek responded, “yeah, but look at her tits.” On another occasion, Roy Harris, Debra Harris’s husband, was doing paperwork for Respondent in Wanek’s office when he saw Wanek make a “lewd gesture” toward employee Christy Wallace. Wanek made a “hip and pelvic thrust” movement toward Wallace that she did not see because her back was turned.

14) La Pine, Oregon, is a small community with a population of around 18-20,000 people. Wanek owns substantial property in La Pine and leases the property to local businesses. His holdings include two strip malls in La Pine with approximately 33 business lessees and a strip mall in Redmond with approximately 8 business lessees. Wanek previously co-owned a carpet store with former partner and friend Robert Troy.

15) Complainant’s testimony was reasonably straightforward and not impeached in any way. The only disputed facts are whether Wanek touched Complainant’s breast and whether the touch was purposeful. Complainant’s account of the incident was more believable than Wanek’s different versions because it did not change over time and was consistent with her emotional reaction and subsequent conduct which were corroborated by other credible evidence. The forum credits Complainant’s testimony in its entirety.

16) Gordon Wanek’s testimony on key issues was not believable. In his initial story to Deputy Graves, Wanek admitted touching Complainant “in a friendly gesture” by “poking her in the ribs.” He also told Graves that Complainant was talking on her cell phone at the time and after he poked her, she said to him, “What are you doing?” He acknowledged to Graves that his response to Complainant was, “What do you think, I’m feeling you up or something.” In his position statement to BOLI, he denied doing anything to her and stated that he “did not see her on the phone at any time and there is no phone in the kitchen.” At hearing, he emphatically stated that he “never touched her”

at all. His contrary statements cannot both be true. The forum concludes that neither is true. Consequently, the forum disbelieved Wanek's testimony unless it was a statement against interest or corroborated by credible evidence.

17) Robert Troy's testimony that he did not see Wanek touch Complainant was consistent with his previous statement to Deputy Graves. However, his bias as Wanek's former business partner and friend surfaced when Troy testified that Complainant was sitting in the break room drinking coffee when he and Wanek left for the garbage dump. His testimony was contrary to his prior statement to Deputy Graves that Complainant was "outside the back door talking on her cell phone" when Wanek and Troy walked by her and that he heard Wanek "say something" to Complainant but did not hear what was said. Consequently, the forum discredited Troy's testimony in its entirety.

18) Terry Short's testimony was credible. She had no apparent bias toward Respondent or Complainant and testified only to facts within her knowledge and recollection. She was not impeached in any way and the forum credits her testimony in its entirety.

19) Deputy Graves was a credible witness. His testimony was consistent with the contemporaneous notes he kept in the course of his duty as a deputy sheriff and the forum credits his testimony in its entirety.

20) Debra Harris's testimony was credible. She demonstrated no particular bias toward or against Respondent or Complainant and testified to facts within her knowledge and recollection. The forum credits her testimony in its entirety.

21) Roy Harris's testimony was credible. He and his wife, Debra Harris, worked for Respondent at times material and he demonstrated no bias toward or against Respondent or Complainant. He recounted only his firsthand observations and

his testimony that he saw Wanek make a lewd gesture toward a female employee was completely believable. He acknowledged that the employee, Christy Wallace, was not aware of the gesture at the time and that the incident occurred in August 2002. The forum credits his testimony in its entirety.

22) Despite her previous close relationship with Complainant, Tracy Davidson's testimony was not unduly biased. Her testimony that she was talking to Complainant by telephone when Complainant told her that "Gordy just grabbed [her] tit" was believable and corroborated by Complainant's cell phone records showing she had made a call to Davidson during the relevant time period. Davidson's testimony that Complainant cried and became emotional about the incident and that her upset lasted 6 to 8 months thereafter was also credible and corroborated by other credible witness testimony. Davidson also credibly testified that Complainant was shocked that Wanek laughed it off as a joke and later became distrustful of others and withdrawn. According to Davidson, local townspeople asked Davidson and Complainant about the incident which upset and humiliated Complainant. Davidson's testimony was believable and not impeached in any way and the forum credited her testimony in its entirety.

23) Robin Brown's testimony was credible. His memory was poor due to the passage of time, but he acknowledged that his statement to Deputy Graves was closer in time to the incident and the more accurate account of what he observed in January 2003. The forum credited his testimony to the extent that it was reasonably consistent with his prior statement to Graves.

24) Shelley Drinnen testified that Wanek never touched her or made inappropriate comments to her while she was employed by Respondent. However, despite the opportunity to do so, Drinnen did not controvert Short's and D. Harris's testimony that she asked them not to send her on "garbage runs" with Wanek because

she did not want to be alone with him in his truck and did not like Wanek “hugging” her. The forum gave her testimony weight only when it was consistent with other credible evidence.

ULTIMATE FINDINGS OF FACT

1) At times material herein, Respondent conducted a business in Oregon and was an employer utilizing the personal services of one or more persons.

2) At times material herein, Respondent employed Complainant, a female, as a prep/line cook.

3) On January 3, 2003, Gordon Wanek, Respondent’s owner and managing member, purposely and knowingly squeezed Complainant’s breast and told her he was “feeling her up” while she was on a break during her regular work hours.

4) Wanek’s conduct was offensive and unwelcome to Complainant.

5) Other female employees found Wanek’s behavior toward them offensive.

6) Respondent had no written sexual harassment policy.

7) Wanek’s conduct toward Complainant was based on her gender and created working conditions so intolerable that a reasonable person in Complainant’s position would have resigned under those conditions.

8) Wanek knew or should have known that Complainant was substantially certain to leave her employment as a result of those working conditions.

9) Complainant left her employment with Respondent on January 3, 2003, because of the intolerable working conditions created by Respondent.

10) Complainant found replacement employment with Pozzi Windows on or about August 1, 2003, for 40 hours per week at \$9-9.50 per hour. After working two eight hour days, Complainant voluntarily quit her replacement employment.

11) By leaving Respondent's employ, Complainant lost wages from January 4 to August 1, 2003, a period of 30 weeks at \$8.50 per hour, 40 hours per week, for a total of \$10,200.

12) Wanek's conduct toward Complainant caused her to suffer emotional distress, characterized by shock, anger, embarrassment, and emotional upset that extended over a six to eight month period.

CONCLUSIONS OF LAW

1) At times material herein, Respondent was an employer subject to the provisions of ORS 659A.010 to ORS 659A.030 and ORS 659A.800 to ORS 659A.865.

2) The actions, inaction, statements, and motivation of Gordon Wanek are properly imputed to Respondent.

3) The Commissioner of the Bureau of Labor and Industries has jurisdiction of the persons and of the subject matter herein and the authority to eliminate the effects of any unlawful employment practices found. ORS 659A.800 to ORS 659A.865.

4) By subjecting Complainant to unwelcome sexual conduct directed toward her because of her gender that was sufficiently severe to alter her work conditions and create a hostile, intimidating, and offensive work environment, Respondent discriminated against Complainant on the basis of sex, contrary to the provisions of OAR 839-005-0030 and in violation of ORS 659A.030(1)(b).

5) By intentionally creating and maintaining discriminatory working conditions based on Complainant's gender that were so intolerable Complainant was compelled to leave her employment, Respondent constructively discharged Complainant and committed an unlawful employment practice in violation of ORS 659A.030(1)(a) and OAR 839-005-0035.

6) Pursuant to ORS 659A.850, the Commissioner of the Bureau of Labor and Industries has the authority under the facts and circumstances of this case to award

Complainant lost wages resulting from Respondent's unlawful employment practice and to award money damages for emotional distress sustained and to protect the right of Complainant and others similarly situated. The sum of money awarded and the other actions required of Respondent in the Order below are an appropriate exercise of that authority.

OPINION

The Agency alleged Respondent, through its proxy, Gordon Wanek, unlawfully discriminated against Complainant because of her gender by subjecting her to unwelcome sexual conduct that was implicitly a condition of her employment and sufficiently severe or pervasive to have the effect of creating a hostile work environment. The Agency further alleged Respondent intentionally created or maintained working conditions so intolerable that Complainant was forced to quit her employment. The Agency seeks a \$13,000 judgment for Complainant's loss of income and \$20,000 in mental suffering damages against Respondent.

SEXUAL HARASSMENT

To establish sexual harassment, the Agency is required to prove the following elements: (1) Respondent was an employer subject to ORS 659A.001 to 659A.030; (2) Respondent employed Complainant; (3) Complainant is a member of a protected class (sex); (4) Respondent, through its proxy, engaged in unwelcome conduct (verbal or physical) directed at Complainant because of her sex; (5) the unwelcome conduct was sufficiently severe or pervasive to have the purpose or effect of creating a hostile, intimidating or offensive work environment; and (6) Complainant was harmed by the unwelcome conduct. *In the Matter of Robb Wochnick*, 25 BOLI 265, 282 (2004); OAR 839-005-0030(1). The first three elements are not disputed. Additionally, Gordon Wanek's status as Respondent's owner and managing member is not at issue. As Respondent's corporate officer, Wanek's conduct is properly imputed to Respondent

and Respondent is strictly liable for any unlawful harassment found herein. See OAR 839-005-0030(3)("[a]n employer is liable for harassment when the harasser's rank is sufficiently high that the harasser is the employer's proxy, for example, the respondent's president, owner, partner or corporate officer").

A. Unwelcome Sexual Conduct

Complainant credibly testified that during a break at work, Respondent's owner Gordon Wanek, squeezed her left breast and stated he was "feeling her up." Wanek's emphatic claim at hearing that he "never touched" Complainant was contradicted by Deputy Graves's credible testimony that Wanek told Graves during an investigative interview, conducted on the same day the incident occurred, that he "poked" Complainant in the side "four to six inches" from her breast. Wanek also told Graves that when Complainant asked him what he was doing, he responded, "What do you think, I'm feeling you up or something." Wanek's contradictions bolster Complainant's credible account of the incident which did not vary over time and remained unembellished. Moreover, her conduct immediately following the incident was consistent with someone who has been subjected to offensive sexual conduct. Her co-worker, Robin Brown, observed that she looked "upset" immediately after the incident. Her supervisor, Terry Short, observed that Complainant was "very upset" when she reported the incident to Short on the same day it happened. Additionally, Complainant contacted law enforcement almost immediately after she spoke with Short. There is no plausible reason why Complainant would have taken such action if Wanek "never touched her" as he now contends.

The same facts that establish Complainant was subjected to verbal and physical sexual conduct also show that Complainant neither welcomed nor invited such conduct. Complainant credibly testified that she was talking on her cell phone while on a break

and was so startled by Wanek's hand on her breast that she almost fell off the curb where she was standing. Moreover, his hand on her breast and response that he was "feeling her up" upset her to the extent that she contacted her supervisor, filed a police report, and quit her job on the same day it happened. Those facts are sufficient to establish that Wanek's sexual contact was neither welcome nor consensual.

Finally, the forum can reasonably infer by Wanek's specific actions, *i.e.*, touching a particularly intimate part of Complainant's body and telling her he was "feeling her up," that his conduct was directed toward Complainant because of her sex. Terry Short credibly testified that she had received complaints about Wanek from other female employees who were uncomfortable accompanying him alone on "garbage runs" and who did not like the way he "hugged" them. Wanek's comment to Short ("Yeah, but just look at her tits") when Short pointed out one female employee's work performance problems further demonstrates his conduct was part of an overall pattern of sexually aggressive behavior based on gender. Absent any evidence that Wanek treated male employees in a similar fashion, the forum concludes that but for Complainant's sex, she would not have been subjected to Wanek's offensive sexual conduct.

B. Hostile, Intimidating, or Offensive Work Environment

The standard for determining whether conduct is sufficiently severe or pervasive to have created a hostile, intimidating or offensive working environment is from the objective standpoint of a reasonable person in Complainant's particular circumstances. *Robb Wochnik*, 25 BOLI at 285; OAR 839-005-0030(2).

In making that determination, the forum looks at the totality of the circumstances, *i.e.*, the nature of the conduct and its context, the frequency of the conduct, its severity or pervasiveness, whether it is physically threatening or humiliating, and whether it unreasonably interferes with an employee's work performance. 25 BOLI at 265; see

also *In the Matter of Executive Transport, Inc.*, 17 BOLI 81, 93 (1998). Although this case involves an isolated incident, the conduct, when viewed in light of the particular circumstances, was sufficiently severe to have created a hostile work environment and altered Complainant's working conditions.ⁱ Credible evidence shows Wanek's conduct was well beyond the good natured horseplay he initially represented to law enforcement. He purposely touched Complainant on an intimate part of her body without her consent. He not only squeezed her breast, he told her he was "feeling her up." As business owner and Complainant's ultimate supervisor, Wanek was directly responsible for Complainant's job and regular paycheck. Her dependence on him for her livelihood made her susceptible to the terms and conditions he implied by his overt sexual conduct. Respondent had no sexual harassment policies in place and the most that supervisor Short could do for Complainant was to recommend that she call the police and BOLI. With no remediation, Complainant was placed in the untenable position of choosing between a regular paycheck and the likelihood that Wanek's cavalier and unsolicited liberties would continue.

Notably, the Oregon Court of Appeals in *Cantua v. Creager*ⁱⁱ recognized that "state and federal statutes [that] prohibit unwelcome sexual conduct in the workplace * * * show a strong public policy against nonconsensual sexual advances toward employees. That public policy indicates that nonconsensual sexual contact with one's employees is quite reprehensible." Although, for whatever reason, the sheriff's investigation did not result in criminal charges, Wanek subjected himself to possible criminal liability by purposely squeezing Complainant's breast without her consent. See ORS 163.415 (defining sexual abuse in the third degree); ORS 163.305(6) (defining "sexual contact"); *State v. Woodley*, 306 Or 458, 462-63 (1988) (describing the test for intimate sexual contact under ORS 163.415 and 163.425).

Evidence shows Complainant herself believed Wanek's conduct toward her was hostile and sexually abusive. The forum finds that any reasonable person in her circumstances would have believed the same. Consequently, based on the totality of circumstances established herein, the forum has determined that Wanek's conduct, subjectively and objectively, at best, was inappropriate, demeaning, and discrimination based on sex, and, at worst, constituted sexual abuse. By any description, it was unlawful and created a hostile, humiliating, and intimidating work environment that significantly altered Complainant's working conditions.

CONSTRUCTIVE DISCHARGE

This forum has consistently held that if an employer imposes objectively intolerable working conditions, *i.e.*, that a reasonable person in Complainant's position would have resigned under those conditions, the employee's resignation due to those conditions is a constructive discharge. *In the Matter of Executive Transport, Inc.*, 17 BOLI 81, 95 (1998). Respondent is liable for a constructive discharge if Wanek 1) intentionally created or maintained discriminatory working conditions related to Complainant's gender that were 2) so intolerable that a reasonable person in Complainant's circumstances would have resigned because of them; 3) Respondent desired to cause Complainant to leave her employment as a result, or knew or should have known that Complainant was certain, or substantially certain, to leave employment as a result of the working conditions; and 4) Complainant left her employment as a result of those working conditions. *Robb Wochnik*, 25 BOLI at 287; OAR 839-005-0035.

The forum has already found that 1) Wanek knowingly and purposely engaged in conduct that was 2) objectively intolerable, 3) Wanek knew or should have known that Complainant was substantially certain to leave because of the particular conduct, and 4) Complainant had no other recourse and, in fact, left her employment because of

Wanek's conduct. The forum therefore concludes that Respondent, through its proxy, Wanek, constructively discharged Complainant.

DAMAGES

1. Back Pay

The commissioner has the authority to fashion a remedy adequate to eliminate the effects of unlawful employment practices. When, as here, a complainant is constructively discharged on the basis of sex, that remedy properly includes an award of back pay. *Executive Transport, Inc.*, 17 BOLI at 96. Additionally, this forum has consistently held that the purpose of back pay awards in employment discrimination cases is to compensate a complainant for the loss of wages and benefits the complainant would have received but for the respondent's unlawful employment practices. *In the Matter of Emerald Steel Fabricators, Inc.*, 27 BOLI 242, 277 (2006), *appeal pending*.

Here, the Agency established that Complainant lost wages from January 4 until on or about August 1, 2003, because she was constructively discharged based on her gender. Credible evidence shows Complainant used reasonable diligence seeking employment while receiving unemployment benefits and that she found employment at Pozzi Windows in or around the end of July 2003 at a higher pay rate than the \$8.50 per hour she earned while in Respondent's employ. Although she voluntarily quit two days after she began her new employment, she is only entitled to back wages for the interim period she was unemployed before she accepted the Pozzi Windows job. See *In the Matter of Northwest Pizza, Inc.*, 25 BOLI 79, 88 (2004)(a complainant's right to back wages is cut off when the complainant obtains replacement employment for a similar duration and with similar hours and hourly wages as respondent's job). In this case,

Complainant acknowledged that the job she accepted in July 2003 was for a similar duration and with similar hours and hourly wages as her job with Respondent.

Consequently, the forum has determined that Complainant would have earned approximately \$10,200 between January 4 and August 1, 2003, the date she obtained replacement employment at Pozzi Windows. Respondent owes Complainant \$10,200 for the wages she lost due to Respondent's unlawful employment practice.

2. Mental Suffering

In determining a mental suffering award, the forum considers the type of discriminatory conduct, and the duration, frequency, and severity of the conduct. *Emerald Steel Fabricators*, 27 BOLI at 278. The actual amount depends on the facts presented by each complainant. A complainant's testimony, if believed, is sufficient to support a claim for mental suffering damages. *Id.*

Based on her credible testimony and the testimony of other credible witnesses who observed Complainant following her constructive discharge, the forum finds Complainant suffered emotional distress as a direct result of Respondent's unlawful employment practice. Credible evidence shows she was shocked and humiliated by Wanek's overt sexual conduct and that she became distrustful and withdrew from her normal social contacts, which was contrary to her usually outgoing nature. The forum has determined that Wanek's behavior was tantamount to sexual abuse and his status as Respondent's owner gave Complainant no choice but to leave her employment which affected Complainant financially and emotionally for at least six months after her constructive discharge. While relatively short lived, Complainant's distress was caused by a particularly egregious form of sexual harassment perpetrated by the person who controlled her livelihood. Consequently, the forum awards Complainant \$20,000 in

damages to help offset the suffering caused by Respondent's unlawful employment practice committed through its proxy, Gordon Wanek.

EXCEPTIONS

Respondent timely filed exceptions to the following areas of the proposed order:

1. Findings of Fact – The Merits

Respondent challenges numerous factual findings on the ground that they were based on “irrelevant hearsay and character evidence” that should not have been allowed and that the inclusion of such evidence in the factual findings “violates due process” and Oregon Evidence Code provisions. Specifically, Respondent contends that whatever witnesses Short, Debra Harris, and Roy Harris experienced, observed, or were told by other employees related to Respondent, was irrelevant and constituted inadmissible character evidence because those witnesses “had no personal knowledge of the events asserted as a basis for this claim.” Respondent's argument has no merit.

First, while the forum may draw on the Oregon Evidence Code for guidance in a matter not addressed in this forum's contested case hearing rules, these proceedings are not governed by the Oregon Evidence Code. *In the Matter of United Grocers*, 7 BOLI 1, 2 (1987).

Second, comparative evidence related to a complainant's protected class and a respondent's prior acts related to the nature of the offense are relevant in discrimination cases alleging different or unequal treatment. *See In the Matter of Howard Lee*, 13 BOLI 281, 292 (1994)(“In the context of discrimination law, where the nature of the offense is that it was motivated by the victim's membership in a protected class, the manner in which other members of that class have allegedly been treated is clearly relevant to the inquiry. To the extent that comparative evidence relating to the protected class at issue may also reflect prior bad acts by respondent, the evidence will not be

excluded for that reason”). See also *In the Matter of Dunkin’ Donuts*, 8 BOLI 175, 178-79 (1989)(“[T]he manner in which other members of [a statutorily protected class] have been treated is crucial to the inquiry [into discrimination allegations], and thus relevant * * * Comparator evidence is common in employment discrimination cases”).

In this case, credible evidence established that Respondent made inappropriate comments or gestures to other female employees and that some of those employees complained to Short and D. Harris on several occasions about Respondent’s inappropriate hugging on “garbage runs.” That evidence is relevant to whether Respondent touched Complainant’s breast deliberately or accidentally and was properly considered by the forum. Contrary to Respondent’s contention, neither Short’s nor Harris’s testimony was impeached by Christy Davis’s June 3, 2004, statement, written well over a year after Complainant filed a civil rights complaint against Respondent, or by Shelley Drinnen’s statement, written on the same date. Neither denied previously complaining to Short or D. Harris about Respondent’s conduct and their subsequent written statements and Drinnen’s subsequent testimony do not negate Short’s and D. Harris’s credible testimony. In this forum, an ALJ’s credibility findings are accorded substantial deference and absent convincing reasons for rejecting those findings, they are not disturbed. *In the Matter of Robb Wochnick*, 25 BOLI 265, 290 (2002), *citing In the Matter of Staff, Inc.*, 16 BOLI 97, 117 (1997).

Respondent’s assertion that the factual finding pertaining to Respondent’s “assets” in paragraph 11 is “not related to this case” and “has no place in this opinion” has no merit. That finding establishes Respondent’s pecuniary interest in most of the business community in La Pine, a small town with barely 20,000 residents, which lends credence to Complainant’s testimony that she had difficulty finding a job for over seven months after her constructive discharge. Moreover, Respondent’s apparent

omnipresence in the community validates Complainant's perception that she was the "talk of the town" which contributed to the emotional distress she suffered as a result of Respondent's unlawful practices. For those reasons, Respondent's exceptions to paragraphs 10, 11, 17, and 21 of the findings of fact in the proposed order are **DENIED**.

2. Ultimate Findings of Fact – The Merits

Respondent disputes the finding in paragraph 11 that Complainant lost wages "from January [4] to August 1, 2003, a period of 30 weeks at \$8.50 per hour, 40 hours per week," because "it fails to recognize that Complainant received unemployment compensation over that period of time." Additionally, Respondent contends the back wages award does not include a reduction for lawful withholdings.

It is well established in this forum that unemployment benefits received by a complainant are not deducted from a back pay award. *In the Matter of Mark & Linda McClaskey*, 17 BOLI 254, 273 (1998). See also *In the Matter of German Auto Parts, Inc.*, 9 BOLI 110, 131 (1990), *aff'd German Auto Parts v. Bureau of Labor and Ind.*, 111 Or App 522, 826 P2d 1026 (1992)("It is not the public policy of the State of Oregon to encourage or reward the weighing of costs and benefits of discrimination. The Bureau of Labor and Industries is charged with eliminating and preventing discrimination in employment. To allow private employers to offset unemployment compensation benefits in cases of employment discrimination would encourage and subsidize their unlawful practices"). Consequently, the forum was not required to consider Complainant's unemployment benefits when determining the lost wage amount.

Additionally, contrary to Respondent's contention, the order requiring Respondent to pay lost wages allows for "lawful deductions," which necessarily include required tax withholdings. For those reasons, Respondent's exception to paragraph 11 of the ultimate findings of fact in the proposed order is **DENIED**.

3. Order

Respondent asserts there is “no legal basis for the interest” on Complainant’s established wage loss, which the forum computed at the legal rate from September 1, 2003, until paid. Additionally, Respondent contends the passage of time between the hearing date and the proposed order precludes an accrued interest award.

This forum has long held that “an award of interest on [a] back pay award is justified to compensate [a] complainant fully for the effect of not having had use of the back pay since it accrued.” *In the Matter of C & V, Inc.*, 3 BOLI 152, 163 (1982), *citing In the Matter of City of Portland*, 2 BOLI 110, 142-44 (1981)(“Prejudgment interest on the back pay award beginning from the complainant’s initial injury and continuing through the resolution of the case and payment of the back pay award are means of addressing generally the effects of the complainant’s not having had the back pay since it accrued”). Moreover, in the *City of Portland* case, the forum noted that in a prior BOLI case, “interest accrued and was awarded over a period in excess of three years predating the Final Order” and that “the award and computation were not disturbed by the Oregon Court of Appeals or Supreme Court.”ⁱⁱⁱ In a much later case, interest accrued and was awarded for a period of four years predating the final order. *See In the Matter of Body Imaging, P.C.*, 17 BOLI 162, 191 (1998), *Order on Reconsideration, aff’d in part, rev’d in part, Body Imaging, P.C. and Paul Meunier, M.D. v. Bureau of Labor and Industries*, 166 Or App 54, 999 P2d 475 (2000). The forum is not aware of any case in which the commissioner abated prejudgment interest on a back wage

award due to the length of the proceeding. For that reason, Respondent's exception to the order requiring accrued interest is **DENIED**.

However, the forum notes that in this case the ALJ erroneously computed interest on Complainant's lost wages from September 1, 2003, until paid, instead of from the date Complainant was constructively discharged. Consequently, the forum has recomputed the interest on Complainant's back pay award as follows: 1) Interest at the legal rate on the monthly accrual of wages Complainant would have earned between January 4 and August 1, 2003, and 2) interest at the legal rate on the accrued lost wages of \$10,200 from August 1, 2003, until paid.

ORDER

NOW, THEREFORE, as authorized by ORS 659A.850(2) and ORS 659A.850(4), and to eliminate the effects of Respondent's violation of ORS 659A.030 and as payment of the damages awarded, the Commissioner of the Bureau of Labor and Industries hereby orders **Gordy's Truck Stop LLC** to:

Deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 1045 State Office Building, 800 NE Oregon Street, Portland, Oregon 97232-2180, a certified check payable to the Bureau of Labor and Industries **in trust for Complainant Bonnie Wilcox** in the amount of:

- 1) TEN THOUSAND TWO HUNDRED DOLLARS (\$10,200), less lawful deductions, representing income lost by Bonnie Wilcox between January 4 and August 1, 2003, as a result of Respondent's unlawful practice found herein; plus,
- 2) Interest at the legal rate on the monthly accrual of wages lost between January 4 and August 1, 2003;
- 3) Interest at the legal rate on the sum of \$10,200 from August 1, 2003, until paid; plus,
- 4) TWENTY THOUSAND DOLLARS (\$20,000), representing compensatory damages for mental distress Bonnie Wilcox suffered as a result of Respondent's unlawful practice found herein; plus,
- 5) Interest at the legal rate on the sum of \$20,000 from the date of the Final Order until Respondent complies herein; and,

- 6) Cease and desist from discriminating against any employee based upon the employee's gender.

ⁱ The U.S. Supreme Court noted in *Clark County School District v. Breeden*, 532 US 268, 271 (2001) that unless "extremely serious," isolated incidents will not amount to a "discriminatory change in the terms and conditions of employment."

ⁱⁱ 169 Or App 81, 85 (2000).

ⁱⁱⁱ *In the Matter of Montgomery Ward and Company, Inc.*, 1 BOLI 62 (1976), *rev'd*, *Montgomery Ward v. Bureau of Labor*, 28 Or App 747, 561 P2d 637, *rev'd and remanded*, 280 Or 163, 570 P2d 859 (1977), *order on remand*, 1 BOLI 100 (1978), *aff'd as modified*, *Montgomery Ward v. Bureau of Labor*, 42 Or App 159, 600 P2d 542 (1979).