

In the Matter of

LOGAN INTERNATIONAL LTD.,

Case Nos. 78-03 & 79-03

Final Order of Commissioner Dan Gardner

Issued June 17, 2005

The Agency alleged that Complainant was discharged for reporting and opposing drug use in Respondent's workplace, and that Respondent violated Oregon's whistleblower and OSHA anti-retaliation laws by discharging Complainant. The forum found that Complainant reported drug use in Respondent's workplace, but dismissed the Formal Charges because Complainant's report had no basis in fact in that the conditions he opposed did not exist and because the Agency did not establish that the person who made the decision to discharge Complainant knew that Complainant had reported and opposed drug use. ORS 654.062(5), ORS 659A.230, ORS 659A.850; OAR 839-004-0004, OAR 839-001-0100(1)(a).

The above-entitled case came on regularly for hearing before Alan McCullough, 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 December 14-16, 2004, and April 19-20, 2005, at the Oregon Employment Department, 950 SE Columbia Drive, Suite "B," Hermiston, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by case presenter Patrick Plaza, an employee of the Agency. Thomas Galbert ("Complainant") was present throughout the hearing and was not represented by counsel. Logan International Ltd. ("Respondent") was represented by Scott Terrall, attorney at law. Scott Neal was present throughout the hearing as the natural person designated by Respondent to assist in the presentation of its case pursuant to OAR 839-050-0150(3)(e).

The Agency called the following witnesses: Complainant; Danielle Galbert, Complainant's wife; Susan Moxley, Civil Rights Division senior investigator; Penny Dougherty, Complainant's former co-worker; Anthony Pixton, Complainant's former supervisor; Henry Ploeg, Respondent's quality assurance manager; Paul Eatinger (telephonic), Respondent's former manager; Scott Neal, Respondent's shipping manager; and Emmett Byma, Complainant's former co-worker.

Respondent called as witnesses: Sharon Camarillo, Respondent's customer service representative; Jim Daniels, Respondent's plant manager; Jerry Callahan, Respondent's controller; Calixto Perez, Respondent line driver; David Evans, Respondent shipping employee; Alfredo Mendez, former Respondent quality assurance employee; Susan Moxley; John Peterson, employee of Pro-Pak Logistics; Anthony Melius, employee of Pro-Pak Logistics; and Scott Neal.

The forum received into evidence:

- a) Administrative exhibits X-1 through X-37 (submitted or generated prior to and after the hearing);
- b) Agency exhibits A-1 through A-5, A-7 through A-9, A-12, A-15, A-16 (page 8 only), A-17 and A-18 (submitted prior to hearing); and A-19 through A-22 (submitted at hearing);
- c) Respondent exhibits R-1 through R-5, R-18, R-21 (submitted prior to hearing); and R-23 (submitted at hearing).

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

FINDINGS OF FACT – PROCEDURAL

1) On December 3, 2002, Complainant filed a verified complaint with the Agency's Civil Rights Division alleging that Respondent discharged him because he reported health or safety hazards in the workplace.

2) On December 3, 2002, Complainant filed a second verified complaint with the Agency's Civil Rights Division alleging that Respondent discharged him because he reported criminal activity in the workplace.

3) After investigation, the Agency issued a Notice of Substantial Evidence Determination on March 20, 2003, finding substantial evidence supporting the allegations of the complaint filed by Complainant in which Complainant alleged he had been discharged for reporting health or safety hazards in the workplace.

4) After investigation, the Agency issued a Notice of Substantial Evidence Determination on April 23, 2003, finding substantial evidence supporting the allegations of the complaint filed by Complainant in which Complainant alleged he had been discharged for reporting criminal activity in the workplace.

5) On July 23, 2004, the Agency issued Formal Charges alleging that Respondent discriminated against Complainant by discharging him: (a) in retaliation for opposing safety hazards in Respondent's workplace in violation of ORS 654.062(5)(a) and OAR 839-004-0004, and (b) in retaliation for reporting criminal activity in or around the workplace, in violation of ORS 659A.230 and OAR 839-001-0100(1)(a). The alleged safety hazard and criminal activity was the purchase and use of methamphetamine by Complainant's supervisor and a lead worker. The Agency sought damages of "[I]ost wages in an amount to be proven at hearing and currently estimated to be approximately \$8,000" and \$10,000 for emotional stress.

6) On July 26, 2004, the forum served the Formal Charges on Respondent, accompanied by the following: a) a Notice of Hearing setting forth October 19, 2004, in

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

7) On August 11, 2004, Respondent's controller, Jerry Callahan, filed an answer and request for hearing.

8) On August 16, 2004, the Agency filed a Notice of Intent to File a Motion for Default based on Respondent's failure to file an answer to the Formal Charges through an authorized representative or attorney licensed to practice law in Oregon.

9) On September 7, 2004, Oregon attorney Scott Terrall filed a Notice of Representation on Respondent's behalf and a motion to postpone the hearing based on "a conflict with another case set for the same time in Pendleton, Oregon * * * [t]hat involves multiple parties and it has been reset on a number of occasions." (Exhibit X-9)

10) On September 20, 2004, the ALJ reset the hearing for December 14, 2004, based on Mr. Terrall's clarification that he represented a party in a case with an existing court date of October 20, 2004.

11) On November 24, 2004, the Agency filed a motion opposing a subpoena served by Respondent on Leah Hamilton, Human Resources Manager, Pro-Pak Logistics, for a deposition related to records subpoenaed from Pro-Pak by Respondent. Respondent also served a subpoena duces tecum on Ms. Hamilton for the production of records.

12) On November 24, 2004, Respondent filed a motion in which it alleged that the Agency had withheld "materials relating to telephone conferences with complainant and perhaps others following the issuance of the 'substantial evidence determination'"

and argued that this prejudiced Respondent and inhibited its ability to prepare case summaries and prepare fully for the hearing. Specifically, Respondent sought an “Order compelling complete discovery, compelling the deposition of the Complainant, compelling the provision of information leading to the whereabouts of Mr. Bohms, resetting of case summary dates and resetting of the hearing date.”

13) On November 24, 2004, the Agency filed a response opposing the issuance of the orders sought by Respondent's motions of the same day. The Agency represented that the complete investigatory files had been provided to Respondent, that the Agency had contacted Complainant after the issuance of the substantial evidence determination and the notes of this interview were not copied with the investigatory files. The Agency further stated that additional witnesses had been contacted in anticipation of litigation and that it did not know the present whereabouts of Mr. Bohms. Finally, the Agency stated that it had advised Respondent one month earlier that, under the forum's rules, Respondent needed to file a motion before deposing Complainant, that the Agency would oppose that motion, and that the Agency would accept written interrogatories from Respondent.

14) On November 29, 2004, the ALJ issued an interim order denying Respondent's motion in its entirety. The ALJ addressed Respondent's different requests as follows:

Motion for Discovery Order: The ALJ ordered the Agency to deliver the following documents and information to Respondent by December 5, 2004:

“1. To the extent not already provided to Respondent, records of all interviews, including handwritten and typed notes and any recording conducted with Complainant and any other witnesses regarding this case. This does not include interviews specifically conducted by Mr. Plaza, but does include interviews conducted by any other BOLI employee or BOLI agent, whether or not acting under Mr. Plaza's direction, and includes interviews conducted from the time Complainant initiated his complaint until the present.

“2. If the Agency intends to call Mr. Bohms as a witness at the hearing, any information the Agency has concerning the current address of Mr. Bohms that has not already been provided to Respondent.”

Motion to Depose Complainant: The ALJ denied Respondent’s request on the basis that Respondent had not demonstrated that “other methods discovery are so inadequate that the participant will be substantially prejudiced by the denial of a motion to depose” Complainant. The ALJ noted that Respondent had not established that the information that it sought could not be obtained through interrogatories, and apparently had not served any yet. Finally, the ALJ concluded that the “nature of the allegations” did not provide a basis for compelling a deposition of Complainant, and it was disputed whether or not the Agency had purposefully withheld any discoverable information from Respondent.

Motion to Reset Hearing: Respondent based its motion to reset the hearing based “on the lack of complete discovery on the part of BOLI” and to give Respondent “additional time to investigate matters that may arise when discovery is completed.” The ALJ ruled that Respondent had not established “good cause,” stating that “Respondent has neither established that that the Agency has withheld discoverable information nor that it is entitled to a deposition of the Complainant. Respondent’s apparent failure to serve interrogatories is solely attributable to Respondent.”

Motion to Reset Case Summary Due Date: The ALJ ruled that “because additional discovery may be provided in response to [the ALJ’s] Interim Order, both sides may submit addendums to their case summaries related to responses to interrogatories or any additional evidence provided by the Agency to Respondent as a result of [the ALJ’s] Interim Order. The deadline for submitting addendums is 9 a.m. on December 14 * * *.”

15) On November 29, 2004, the ALJ issued an interim order ruling that Respondent had not complied with the forum’s rule that requires a party seeking to take a deposition to file a motion, and that Respondent could not take Leah Hamilton’s deposition until it filed such a motion and the forum granted Respondent’s motion. The ALJ ruled that Ms. Hamilton must comply with the subpoena duces tecum and produce the documents sought by Respondent.

16) As part of its case summary, Respondent submitted 40 pages of drug screen reports for specific employees of Respondent. Although Respondent did not request a protective order regarding those documents, the ALJ issued a Protective

Order on December 8, 2004, governing the Agency's use and disposition of the documents and any testimony at hearing related to those documents.

17) The hearing commenced at 9 a.m. on December 14, 2004. The ALJ advised Respondent and Agency of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

18) At the outset of the hearing, the Agency objected to the presence of Scott Neal, who was listed as a witness in the Agency's and Respondent's case summary. Mr. Terrall stated that Neal was present as the natural person designated to assist him in the presentation of Respondent's case, pursuant to OAR 839-050-0150(3)(e), and the ALJ overruled the Agency's objection.

19) Jeffrey Ware, another employee of Respondent, was also present during the hearing. The ALJ ordered that Neal, Ware, and Complainant were not to discuss any testimony given or statements made at hearing with anyone else except Mr. Plaza or Mr. Terrall until the hearing was concluded. The ALJ also ordered Mr. Plaza and Mr. Terrall to not discuss any witness testimony given at hearing with any other witnesses until the hearing was concluded.

20) The ALJ instructed other witnesses who testified at the hearing not to discuss their testimony with any other witnesses until the hearing was concluded.

21) When the Agency rested its case, Respondent moved to dismiss the Formal Charges. The ALJ denied the motion.

22) The hearing adjourned on December 16, 2004. On December 22, 2004, the ALJ issued an interim order stating that the hearing would reconvene on April 19, 2005, in Hermiston.

23) The ALJ ordered a transcript of the hearing to be prepared before the hearing reconvened. While the transcript was being prepared, the transcriber

determined that Tape 1 from the hearing was blank. On March 4, 2005, the ALJ mailed a transcript of the hearing to the Agency and Respondent's counsel. The ALJ ordered that the transcript was not to be shared with any witnesses at the hearing, whether they had or had not already testified. The ALJ also prepared a written summary of Tape 1 from his hearing notes, provided it to the Agency and Respondent's counsel, and asked if they would stipulate that his summary was "an adequate representation of the record during Tape 1."

24) Before the hearing reconvened, the Agency and Respondent stipulated that the ALJ's written summary of Tape 1 was "an adequate representation of the record during Tape 1."

25) On April 14, 2004, the Agency moved to amend the Formal Charges to increase the amount claimed in damages to conform to the evidence presented at hearing. The Agency sought to increase the amount of back pay sought to \$9,680 and the amount of emotional distress damages to \$30,000.

26) The hearing reconvened at 9 a.m. on April 19, 2005.

27) When the hearing reconvened, Respondent objected to the Agency's proposed amendment. The ALJ granted the Agency's request to increase the amount of back pay sought to \$9,680 because the Agency had presented evidence supporting that figure without objection from Respondent. The ALJ reserved ruling on the increase in emotional distress damages for the proposed order. The Agency's motion is granted in its entirety for reasons stated in the Opinion. This ruling is affirmed.

28) Respondent called Jim Daniels and Jerry Callahan as impeachment and rebuttal witnesses. The Agency objected to their testimony on the grounds that neither was listed in Respondent's case summary. The ALJ ruled that he would consider their testimony as an offer of proof and rule on its admissibility in the proposed order. After

reviewing the record, the ALJ concludes that only part of their testimony is admissible. The details of this ruling are contained in the Opinion.

29) Respondent called John Peterson and Anthony Melius, two employees of Pro-Pak, Complainant's subsequent employer, as witnesses. The Agency objected to their testimony as irrelevant and immaterial. Respondent represented that they were called to provide evidence that would show habit, routine, and pattern and practice of Complainant that related to the Formal Charges, and that Respondent planned to offer exhibits R-9 through R-14, which documented Complainant's performance and discharge from Pro-Pak, and R-23, Complainant's employment application at Pro-Pak, based on their testimony. Respondent further represented that Peterson and Melius were being called as impeachment witnesses with regard to Complainant's employment application at Pro-Pak. The ALJ ruled that he would allow Peterson and Melius to testify about Complainant's employment application at Pro-Pak to show prior inconsistent statements by Complainant, but would consider the remainder of their testimony as an offer of proof and rule on its admissibility and the admissibility of exhibits R-9 through R-14 in the order. For reasons stated in the Opinion, the ALJ sustains the Agency's objection to all of Peterson's and Melius's testimony about Complainant's actual work performance at Pro-Pak and exhibits R-9 through R-14. This ruling is affirmed.

30) At the conclusion of the hearing, the Agency and Respondent both asked to submit written closing arguments in lieu of oral argument. The ALJ granted the motion and set a deadline of May 6, 2005, for filing closing arguments.

31) On May 4, 2005, the ALJ conducted a post-hearing conference requested by Respondent in which Mr. Terrall requested an extension of time until May 13, 2005, to submit written closing argument. The Agency objected. After discussion, the ALJ

proposed granting an extension of time until May 9, 2005. The Agency did not object to this and the ALJ granted the Agency and Respondent an extension of time until May 9, 2005, to file simultaneous written closing arguments.

32) On May 9, 2005, the Agency and Respondent filed written closing arguments.

33) On May 26, 2005, the ALJ issued a proposed order that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. The Agency filed exceptions on June 3, 2005. Respondent did not file exceptions. The Agency's exceptions are discussed at the end of the Opinion.

FINDINGS OF FACT – THE MERITS

1) At all times material herein, Respondent Logan International Ltd. was an Oregon corporation doing business in Boardman, Oregon, and engaged or used the personal service of one or more employees.

2) At all times material herein, Respondent was engaged in the business of processing potatoes into frozen french fries. Respondent processes approximately 100 million pounds of french fries per year.

3) Complainant was first hired by Respondent on August 16, 2000, as a forklift driver on swing shift in Respondent's shipping department. His starting rate of pay was \$9.50 per hour plus a \$.10 per hour shift differential. Pursuant to Respondent's policy, he was required to take a pre-employment drug screen and started work on a 90 day probationary period.

4) Between 1999 and 2004, Respondent contracted with Comprehensive Toxicology Services to screen drug tests administered to applicants and employees. Respondent had Comprehensive screen for the presence of amphetamines, cocaine metabolite, ethanol, opiates, and THC.

5) Tony Pixton, Respondent's shipping manager, hired Complainant and was Complainant's immediate supervisor until Complainant quit Respondent's employment in July 2002. Paul Eatinger was Respondent's general manager throughout Complainant's employment with Respondent.

6) On November 30, 2000, Pixton completed a form entitled "Employee Status Change" on which he noted that Complainant had completed his probationary period and that Complainant was given a raise to \$10 per hour, plus a \$.10 per hour shift differential.

7) Effective January 11, 2001, Complainant was transferred to day shift.

8) On April 4, 2001, Complainant was promoted to day shift lead and given a raise to \$12 per hour.

9) Complainant received no written warnings or disciplinary action during the entire time he was employed by Respondent.

10) Pixton considered Complainant to be a good employee who had no performance issues, showed a lot of initiative, and got along with his co-workers. Pixton gave Complainant three written evaluations, rating him as average or above average on each evaluation. When Pixton was gone from Respondent's facility, he delegated some of his duties to Complainant.

11) Pixton did not formally discipline Complainant at any time and Complainant was not formally disciplined by anyone else employed by Respondent between his date of hire and July 2002.

12) In or around July 2002, Pixton accepted a job offer with another employer and gave Respondent notice that his last day of work would be July 31, 2002. Pixton talked with Eatinger about hiring a new shipping manager. They decided to name an interim replacement while conducting a job search for Pixton's replacement.

13) Complainant understood that Respondent planned to fill Pixton's position on an interim basis, and that if things worked out, the person occupying the interim might be hired as Pixton's replacement. Complainant hoped to get the position.

14) After discussion, Pixton and Eatinger decided to offer the interim position to Emmett Byma, an employee who had worked for Respondent for several months in Respondent's quality assurance department. Byma accepted the position.

15) On July 30, 2002, Complainant was aware that Pixton's position had been offered to and accepted by Byma.

16) Complainant believed the job should have been offered to him and was upset because the job wasn't offered to him. He also believed that Byma "couldn't handle the job."

17) Respondent stores frozen French fries in its freezer in cardboard totes that are 4'x4'x4' in size. The totes are stacked four high in Respondent's freezer, which can store 10 million pounds. If a tote is damaged by being improperly stacked, the entire contents of the tote may have to be destroyed.

18) On July 30, 2002, Byma arrived at work between 5:30 and 6 a.m. Later that morning, he observed that a tote was improperly stacked. The date on the tote indicated it had been stacked by Respondent's night shift. Byma tried unsuccessfully to fix the stack before asking Complainant, whom Byma recognized as a better hyster driver, to help him. Complainant immediately went to assist Byma, and Byma went to the office, where he remained while Complainant tried to repair the tote stack. Complainant believed Byma was responsible for the problem and became angry with him for not helping Complainant fix the problem.ⁱ After trying unsuccessfully to repair the tote stack, Complainant quit and walked off the job in the middle of his shift.

19) When Pixton was told that Complainant walked off the job, he completed an employee status form for Complainant and wrote on it "Voluntary quit – walked off the job 3 hours into shift – last day worked 7/30/02 – due 2 weeks vacation – 80 hours."

20) Respondent hired Scott Neal as shipping manager in early September 2002. Shortly after he was hired, Neal concluded that the shipping department was understaffed. Penny Dougherty, who was employed as a data entry clerk in Respondent's shipping department, told him Complainant might be a good person to rehire. Neal consulted with Eater, who pointed out Complainant's prior employment history, but told Neal if he was sure he wanted to hire Complainant to go ahead. Henry Ploeg, Respondent's quality assurance manager and safety director, also told Neal that he would be careful about hiring Complainant because he had walked off the job already in a fit of anger. In early September, 2002, Neal contacted Complainant, interviewed him, and offered him a job. Complainant accepted and went back to work as a forklift driver on day shift on September 10, 2002, at the rate of \$10 per hour.

21) Complainant was not required to take a drug test when he was rehired. However, Neal told him he would be subject to a 90-day probationary period and treated as a new employee.

22) When Complainant was rehired, he wanted to work day shift, as he and his wife were applying for child care through the Head Start program, which required that both parents work day jobs.

23) On his second day at work, Complainant became upset because co-workers were asking him product-related questions. He became angry and snapped at someone. That person complained to Neal, and Neal told Complainant that if he kept that attitude he would be discharged.

24) Shortly after Complainant's rehire, Neal offered him the job of swing shift lead in the shipping department, with a raise of \$1 per hour. Neal left work each day not long after swing shift started. He offered Complainant the job because he wanted someone with experience who was reliable and a hard worker as the lead person on swing shift. Complainant accepted the offer and transferred to swing shift.

25) Complainant's performance was very good during the first few weeks that he occupied the lead swing shift position.

26) Two to three weeks after Complainant's promotion, Neal promoted Kent Cate, who had less experience than Complainant in shipping, to the lead day shift position in the shipping department. Neal did not offer the job to Complainant and explained to Complainant that he wanted Complainant on swing shift, when Neal would be gone, because of Complainant's greater experience. Neal also told Complainant that he expected Complainant to work with and cooperate with Cate.

27) Complainant resented Neal's promotion of Cate and believed he should have been given that position.

28) For Respondent's shipping department to run effectively, it is important that the day shift and swing shift lead persons communicate with one another.

29) Complainant's performance began to deteriorate after Cate's promotion. Cate complained regularly to Neal that Complainant would not communicate or work with him.

30) Starting in mid-October 2002, Neal complained to Eatinger that Complainant would not listen to him, did not follow through with his directions, ran things in his own way, and did not get work completed.

31) At some point prior to November 1, 2002, Neal warned Complainant that he needed to work with Cate if he wanted to remain employed with Respondent.

32) On November 1, Complainant observed Cate and Neal in the freezer for 10 seconds. Based on statements from a co-worker whom he did not identify at hearing, Complainant believed Cate and Neal had been in the freezer for an hour to perform a job that should have taken only 20 minutes.

33) Complainant was a methamphetamine user from 1992 to 1996. Based on his own experiences as a methamphetamine user, Complainant believed that “a simple task like that taking an extra amount of time is just another sign * * * that they might be on speed.”

34) Neal has never spent an hour in Respondent’s freezer at one time.

35) On Saturday, November 2, 2002, Complainant, Kent Cate, Alfredo Mendez, and Dave Evans worked together to prepare some product Respondent needed to ship next door to Respondent’s closed storage facility.

36) On Monday, November 4, 2002, Cate complained to Neal that Complainant had spent most of November 2, 2002, on the computer instead of working with Cate and the others. Neal spoke with Mendez, who confirmed this. That same day, Neal made a unilateral decision to terminate Complainant based on this information, Cate’s prior complaints, and the prior warning he had given to Complainant about the need to work with Cate. Complainant and Neal did not see each other at work on November 4, 2002.

37) At the start of his shift on November 4, 2002, Complainant went to Ploeg and told him he had suspicions that Kent Cate was doing drugs, that Neal was either involved in the drug activity or knew about it, and that Complainant had a real problem with those activities happening at work.

38) Within 20 minutes of talking with Complainant, Ploeg reported Complainant’s conversation to Eatinger.

39) At the start of his shift on November 5, 2002, Complainant assumed that Ploeg had not talked to Eatinger about Complainant's report of drug use and went to Eatinger.ⁱⁱ Complainant told Eatinger that he was concerned that drug use was going on in the shipping department and implicated the entire department, including Neal. Complainant did not identify the drug he believed employees were using. Complainant also stated that it was not a safe working environment.

40) Ploeg and Eatinger both assumed that Complainant's complaints of drug use related to safety issues in the workplace.

41) Ploeg and Eatinger considered having employees drug tested and both spent time observing shipping department employees, including Cate and Neal, in the days following Complainant's complaint of drug use in the shipping department. They did not see anything that made them suspicious of drug use, so decided not to have anyone drug tested as a result of Complainant's report.

42) On November 6, 2002, Neal told Complainant that he was fired. At that time, Neal was not aware that Complainant had made allegations that Neal and Cate had attempted to buy methamphetamine at the workplace or were using it or that Neal knew that Cate had done this. On November 7, 2002, Neal completed an employee status change report for Complainant on which he wrote that "11-6-02" was the date of Complainant's "termination" and wrote the following explanatory remarks: "Tom was still in his probationary period. Tom was let go due to not following instructions. Tom wanted to do it his way and as his mgr [sic] I needed him to work with me not against me."

43) Complainant did not file a complaint of criminal activity against Neal or Cate "[b]ecause I didn't see it for myself [and] I only had suspicions." Complainant did not file a safety complaint with OR-OSHA "[b]ecause I didn't witness it."

44) During the Agency's investigation, Moxley asked Complainant what he thought "the real reason was for his termination." Moxley recorded the following response:

"Complainant explained that Neal didn't like the way Complainant ran things. Neal thought Complainant was a threat to his authority because Complainant knew more about the company, Respondent's policies and procedures than (sic) he did. Neal was not qualified for the shipping manager position and he was afraid Complainant would show him up. He was also aware that employees listened to Complainant and did what he said. On one occasion, Neal called Complainant 'pushy' with the employees but Complainant pointed out that there was a job to be done. Complainant believes that Neal wanted to be liked by all of the subordinates whereas Complainant didn't care[;] he was there to do a job."

45) Complainant completed an intake questionnaire prior to filing his complaint and was interviewed twice by Moxley during her investigation. Complainant did not make any reference to the purchase or use of methamphetamine in the questionnaire or in his interviews with Moxley. There was no evidence presented that Complainant brought up the subject of methamphetamine at any time before the Formal Charges were drafted.

46) Complainant actively sought work after his termination. He collected unemployment benefits at the rate of \$270 per week, but had no other earnings until April 10, 2003, when he was hired by Pro-Pak to fulltime work at \$12 per hour. Complainant lost \$9,680 in wages (calculated at \$11 per hour x 22 weeks) as a result of his discharge.ⁱⁱⁱ

47) As a result of his termination, Complainant became depressed and withdrawn; this affected his relationship with his wife and child. He had significant financial difficulties as a result of his loss of income, including the loss of his house.

48) At some time between June 2000 and March 28, 2003, her last date of work, Dougherty told Ploeg that she suspected drug use in the shipping department and

said she thought everyone in the shipping department should be required to take a drug test. Dougherty was not discharged because of her report.

49) Kent Cate reported safety problems related to the maintenance of hysters during his employment and never received any negative feedback from management based on his reports.

50) Alfredo Mendez reported safety issues with Respondent's battery changing equipment and never received any negative feedback from management based on his reports.

51) Susan Moxley was a credible witness. Her testimony centered on the written content of the investigative interviews she conducted. She testified that her investigative notes were an accurate reflection of the statements made by witnesses she interviewed and that she had no independent recollection of those statements. This testimony was not impeached and the forum has credited her testimony in its entirety.

52) Anthony Pixton testified in a forthright manner. He voluntarily left Respondent's employment in 2002 for another job opportunity. However, he also noted that he was not happy working for Respondent. There was no evidence that he had any grudge against Respondent, that he had maintained contact with Complainant since leaving Respondent's employ, or that he had anything to gain or lose in the hearing. He credibly testified that he did not recall telling Camarillo that Complainant became extremely upset when Pixton told him he wasn't getting Pixton's job, or that he wouldn't put Complainant in that job because of Complainant's tendency to lose his temper. His testimony that he documented everything and wrote three performance reviews for Complainant and would have noted an anger problem on the reviews, assuming Complainant had such problem, was unrebutted. He also testified credibly that he had no knowledge that Complainant damaged the totes on July 30, and the forum believes

this testimony for the reason that there is no mention of it on the employee status report related to Complainant's quitting on July 30 that Pixton signed. Based on Pixton's undisputed testimony about his habit of documenting every significant personnel event, the forum believes that Pixton would have noted Complainant's extreme anger and destruction of totes on Complainant's termination slip if he believed Complainant engaged in that behavior. The forum has credited his testimony in its entirety.

53) Sharon Camarillo was employed by Respondent from October 2000 to August 2002, then was rehired in April 2003 and was still employed by Respondent when she testified. She is a friend of Scott Neal and testified that she had been close friends with Pixton but has had a "falling out" and had some "animosity" towards Pixton at the time of the hearing. Her most significant testimony was directed at rebutting Pixton's testimony. She testified that Pixton told her that Complainant wouldn't be a good replacement for him because of anger problems, that Complainant was too critical of other employees in the workplace, and that Complainant might not be a good person to deal with customers because of a tendency to lose his temper. She also testified that Pixton told her that when Complainant became extremely upset when he learned he wasn't getting Pixton's job, and that Pixton implied that Complainant damaged totes in the freezer on July 30 before walking off the job. Based on her admitted bias towards Neal and Respondent and against Pixton and the forum's assessment of Pixton's credibility, the forum has only believed Camarillo's testimony when it was supported by credible testimony. The forum has believed Pixton's testimony whenever it conflicted with Camarillo's.

54) Henry Ploeg has been employed since 2000 by Respondent and became production supervisor in November 2003. His testimony was made suspect by prior inconsistent statements on two major issues. On February 11, 2003, he told Moxley

that Complainant told him he believed Scott Neal, John Bohms, and Kent Cate were using illegal drugs and that Bohms was the drug supplier. On August 2, 2004, he stated in writing that Complainant told him that "John Bohms and Scott Neal were taking drugs." At hearing, he testified that Complainant only complained about Scott Neal and Kent Cate going to lunch together and Cate returning from lunch with alcohol on his breath. He attempted to explain this apparent inconsistency between his statements about "drugs" and "alcohol" by saying he considered they meant the same to him, and that he considered alcohol to be a drug. The forum does not find it believable that he meant "alcohol" when he told Moxley "illegal drugs." He told Moxley that he had John Bohms drug tested a week after November 4, 2002, as a result of his discussion with Eateringer concerning Complainant's complaint, then testified that no one was drug tested as a result of Complainant's complaint. Based on his bias and these inconsistent statements, the forum has only believed Ploeg when his testimony was either corroborated by other credible evidence or undisputed by other credible evidence.

55) Emmett Byma was no longer employed by Respondent at the time of his testimony. He testified in a forthright manner and had no apparent bias. His testimony focused on the "tote" situation in the freezer on July 30, 2002. The forum has credited his testimony in its entirety and believed his testimony whenever it conflicted with Complainant's.

56) Gary Neal, Scott Neal's brother, and Pamela Neal, Scott Neal's wife, testified primarily as to their knowledge that Scott Neal has never had a drug problem and that they have never known him to use or buy methamphetamine. Their testimony was not impeached. Despite their familial bias, the forum found both to be credible witnesses and has credited their testimony in its entirety.

57) Paul Eatinger was a credible witness. Eatinger has not been employed by Respondent since 2003, when he voluntarily left Respondent's employment to move back to Idaho and work for another employer. Because he was a telephone witness, the ALJ was unable to observe his demeanor. He responded directly to all questions put to him and stated, without hesitation, what he could and could not remember. Other than his former employment with Respondent, there was no evidence of any bias in his testimony. The only significant inconsistency in his testimony was his testimony on direct, when asked if he was aware of any performance issues with regard to Complainant before November 5, 2002. He answered he recalled that "Scott had made some minor comments, I guess I would call them, concerning Tom previous to that. And of course, I was aware of Tom's previous employment record. But nothing more than that, I guess." On cross examination, Eatinger's memory was refreshed by reviewing his investigative interview with Moxley, conducted only three months after Complainant was fired, in which he stated that Neal had been complaining to him for several weeks before November 5, 2002, about various aspects of Complainant's work performance. Based on Eatinger's lack of bias, the overall consistency of his testimony, and the fact that his statements to Moxley were made closer to the events in question, the forum concludes that the prior statements made to Moxley were truthful. The forum has credited Eatinger's testimony in its entirety.

58) Calixto Perez, a current employee of Respondent at the time of his testimony, had difficulty understanding English and asked for an interpreter during his testimony. His responses to the questions asked of him reflected his lack of understanding. Based on his language difficulties and the forum's uncertainty that he fully understood the questions asked of him, the forum has given his testimony no weight.

59) David Evans worked for Respondent from 2000 to 2003, then left and was rehired in August 2004 and employed by Respondent at the time of his testimony. He testified primarily as to Complainant's work attitude and reaction to Byrna's promotion. Evans's testimony was based almost exclusively on statements he purportedly heard from others and his memory was somewhat vague. For these reasons, the forum has attached no weight to his testimony concerning Complainant. However, the forum has credited his testimony that he started a new probationary period when he returned to work for Respondent in August 2004.

60) Alfredo Mendez was employed by Respondent from August 2002 until June 2004, when he left for a different career. The forum found his testimony to be only partly credible for several reasons.

First, he still stays in touch with Neal and Ploeg and has a social relationship with Neal. In his investigative interview, he told Moxley that he and Complainant "did not meet eye to eye on things," and the ALJ concluded from his attitude at hearing, as reflected in the tone of his voice when he responded to questions about Complainant, that he disliked Complainant. This demonstrated a personal bias.

Second, he was responsive to questions on direct examination, but openly hostile towards and combative with the Agency case presenter during cross-examination. In addition, his answers on cross-examination on two significant issues were evasive. On direct examination, he testified affirmatively that Complainant's reputation in the workplace for truthfulness and veracity was questionable. When cross-examined about specific incidents, he was evasive, finally testifying that he did not recall any incidents that made him conclude that Complainant was not truthful. He was also evasive when asked to explain what he meant when he told Moxley that there was "a lot of finger pointing" going on in the shipping department.

Third, he gave considerable testimony about Complainant's attitude problems at work, then acknowledged that he only saw Complainant at shift changes.

Fourth, he testified that the previous shipping department manager walked off the job and he was in charge of shipping for two months before Scott Neal was hired. This contradicts Pixton's undisputed testimony that he resigned and left Respondent's employment on July 31, 2002, and Neal's otherwise undisputed testimony that he was hired in September 2002. There is no evidence that Pixton, the previous shipping department manager, walked off the job. He also testified on direct examination that he didn't know Complainant was swing shift lead, then testified on cross-examination that he knew Complainant had been promoted to shipping lead.

Based on Mendez's bias, demeanor, the internal inconsistency in his testimony, and the inconsistency between his testimony and other testimony that the forum has found credible, the forum has only believed his testimony when it was supported by other credible evidence in the record.

61) Dougherty was the Agency's most important witness other than Complainant and provided the only direct evidence supporting the Agency's allegations that Complainant was not on probation and that Neal knew of Complainant's reports that he and Cate were using drugs before he fired Complainant. She testified that she heard Neal tell Complainant that he wasn't on probation and that Neal told her on November 6, 2002, that he "couldn't believe that Tom was trying to spread the word that he was accusing him of using drugs and trying to take away his livelihood." The forum does not believe this testimony for two primary reasons. First, Dougherty was a biased witness. She is a friend of Complainant. Like Complainant, she hoped to get the shipping department supervisor position and was passed over. Then she lost her job in March 2003, not due to a lay off, but because Respondent eliminated her position and

Neal assumed her job duties. Second, Dougherty did not tell Moxley, the BOLI investigator, of Neal's alleged November 6, 2002, statement, claiming she "didn't remember" at that time, but recalled later when she found a contemporaneous note she wrote in a notebook she kept. She testified that she still had the note, but left it at home when she came to testify. The forum has only believed Dougherty's testimony when it was corroborated by other credible evidence in the record and has disbelieved Dougherty's testimony whenever it conflicted with Neal's.

62) Scott Neal is currently employed by Respondent and was accused of criminal activity by Complainant in the Formal Charges. Despite the fact that Complainant had no real evidence to support his accusations,^{iv} Neal did not appear vindictive. He testified with a calm demeanor and responded directly to questions. Although the Agency's case was premised on the allegation that Neal had been a user of methamphetamine or was knowledgeable about a subordinate's use of methamphetamine, there was absolutely no credible evidence presented to support this allegation. Overall, Neal's lengthy testimony was consistent and credible. There was one major inconsistency in his testimony. This inconsistency was his contradictory statements that (a) he did talk to Complainant between November 2 and November 6, 2002, about Cate's complaints; (b) he didn't talk to Complainant in that time period about Cate's complaints; and (c) he couldn't recall if he had done so. These inconsistencies could be due to failure of memory or a deliberate attempt to obscure the truth. Based on the forum's assessment of Neal's overall credibility, the forum concludes that these inconsistent statements were due to a failure of memory and credits Neal's testimony in its entirety except for these inconsistent statements. The forum has believed Neal's testimony whenever it conflicted with Complainant's testimony.

63) Danielle Galbert has been married to Complainant for four years. They have one child together. She testified that they lost their home as a result of Complainant being fired and the resultant loss of his income. Her only knowledge of Complainant's work circumstances was what Complainant told her. Based on Complainant's lack of credibility, the forum has only credited her testimony about Complainant and his work circumstances when it was corroborated by other credible testimony or undisputed. The forum has credited her testimony about Complainant's emotional state and the impact of Complainant's discharge from Respondent on Complainant and his family in its entirety.

64) Complainant was not a credible witness and his lack of credibility was reflected in several ways.

First, in his demeanor. When the hearing reconvened, he wore his sunglasses on top of his head while observing and testifying. This conveyed an impression that he did not take the proceedings seriously. While testifying and observing the proceedings, his facial expressions and body language conveyed an arrogant, almost swaggering attitude.

Second, the ease with which he made unfounded assumptions about serious matters. For example, his testimony that "good 'ol boy syndrome" was the reason he believed Ploeg had not talked to Eater about Complainant's report of drug use and his assumption that Neal and Cate were together when Cate made his alleged phone call to Bohms because Neal and Cate had left work together six hours earlier. This demonstrated a lack of concern for ascertaining facts and a willingness to accuse persons of very serious matters in order to further his personal agenda.

Third, Complainant's testimony concerning why he believed Cate and Neal were using drugs had numerous holes. Complainant testified that his suspicions of drug use

were aroused when Kent Cate called John Bohms at work on the evening on October 31, 2002. Complainant testified that he answered the phone before handing it to Bohms, and that Bohms subsequently told him that Cate was trying to buy some "speed." Complainant unequivocally testified that this was the "primary reason" he believed Cate was using methamphetamine, and that he concluded Neal was also involved in or acquiescent to Cate's drug use because Neal and Cate were together. On cross-examination, he acknowledged that the only evidence he had that Neal and Cate were together was that Neal and Cate had left work together six hours before the phone call and his unsubstantiated assumption that they were working together on a janitorial job. When asked on cross-examination why he failed to mention this "primary reason" for believing that Neal and Cate were using drugs at any time prior to or during the investigation of his complaints, his only explanation was that he believed "it was irrelevant."

Fourth, Complainant testified that he obtained further evidence that Neal and Cate were under the influence of methamphetamine at work on November 1, 2002. On that day, he observed them working in the freezer together for 10 seconds and later concluded, based on unsubstantiated hearsay, that they had taken an hour to perform a 20 minute job. Complainant concluded they were under the influence of methamphetamine – not because of anything he observed in the 10 seconds that he watched them work -- but because his personal experience as a methamphetamine user had shown him that methamphetamine caused people to take longer than usual to perform simple jobs. In rebuttal, Neal credibly testified that he has never spent a continuous hour in the freezer, noting its sub-zero temperature that requires workers in the freezer to wear "freezer suits."

Based on these reasons, Complainant reported to Ploeg and Eatinger that Neal and Cate were using drugs in the workplace. In light of the importance Complainant attached to the event, the forum finds Complainant's pre-hearing failure to mention Cate's supposed call to Bohms inexplicable. Even if the forum believed that this phone call had occurred, the forum finds Complainant's assumption about Neal's association with Cate to be totally unfounded.

Fifth, Complainant also told Moxley that he had described to Eatinger "the strange behavior that Cate had displayed at work." At hearing, Complainant failed to describe any "strange behavior" by Cate or to testify that he made this statement to Eatinger. The forum considers this a significant omission that further degrades Complainant's credibility.

Based on Complainant's personal experience with methamphetamine and his serious concerns about its use, the forum finds it improbable that he would not have mentioned methamphetamine use in his reports to Ploeg and Eatinger or state that he suspected the use of "illegal" drugs if he had any factual basis for believing that methamphetamine use was occurring.

Taking all these circumstances into account, the forum finds that Complainant's explanation about why he failed to mention Cate's call to Bohms in the investigation is not credible and concludes that Complainant made up the call from Cate to Bohms after the investigation in an attempt to bolster his case. The forum also concludes that Complainant's asserted belief that Neal and Cate were using methamphetamine in the workplace on November 1, 2002, was an unfounded assumption with no basis in fact.

In conclusion, the forum has discredited all of Complainant's testimony that was not corroborated by other credible evidence.

ULTIMATE FINDINGS OF FACT

1) At all times material herein, Respondent Logan International Ltd was an Oregon corporation doing business in Boardman, Oregon, and engaged or used the personal services of one or more employees.

2) Complainant worked for Respondent from August 16, 2000, until July 30, 2002, when he quit and walked off the job.

3) Respondent hired Scott Neal as shipping manager in early September 2002. On September 10, 2002, Neal rehired Complainant as a probationary forklift driver on day shift.

4) Shortly after Complainant's rehire, Neal promoted Complainant to swing shift lead in the shipping department. While working as swing shift lead, Complainant would not communicate with Kent Cate, the day shift lead. Neal warned him he would be terminated if he maintained that attitude. Complainant did not improve his attitude.

5) On November 4, 2002, Neal made a unilateral decision to terminate Complainant based on his work attitude and performance.

6) When Complainant arrived at work on November 4, 2002, Complainant went to Henry Ploeg, Respondent's quality assurance manager and safety director, and told him he had suspicions that Kent Cate, the shipping department's day shift lead, was doing drugs, that Neal was either involved in the drug activity or knew about it, and that Complainant had a real problem with those activities happening at work.

7) Within 20 minutes of talking with Complainant, Ploeg reported Complainant's conversation to Paul Eatinger, the plant manager.

8) At the start of his shift on November 5, 2002, Complainant told Eatinger he was concerned that drug use was going on in the shipping department and implicated the entire department, including Neal. Complainant did not identify the drug he believed

employees were using. Complainant also stated that it was not a safe working environment.

9) Ploeg and Eatinger both assumed that Complainant's complaints of drug use related to safety issues in the workplace.

10) On November 6, 2002, Neal told Complainant that he was fired. At that time, Neal was not aware that Complainant had made allegations that Neal and Cate were using drugs.

CONCLUSIONS OF LAW

1) At all times material, Respondent was an Oregon employer as defined in ORS 659A.001 and ORS 654.005(5).

2) The actions, inactions, statements, and motivations of Scott Neal are properly imputed to Respondent.

3) The Commissioner of the Bureau of Labor and Industries has jurisdiction of the persons and subject matter herein and the authority to eliminate the effects of any unlawful employment practice found. ORS 659A.800 to ORS 659A.850.

4) Respondent did not terminate Complainant because he complained of drug use in the work place and did not violate ORS 654.062(5)(a) or ORS 659A.230.

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

OPINION

TESTIMONY OF JIM DANIELS AND JERRY CALLAHAN

As discussed in Procedural Finding of Fact 28, the Agency objected to Respondent calling Jim Daniels and Jerry Callahan as witnesses based on the fact that Respondent did not list them as witnesses in its case summary. Respondent argued that it did not have to disclose them as witnesses in its case summary because they

were being called as impeachment and rebuttal witnesses. The ALJ accepted their testimony as an offer of proof, subject to a final ruling on admissibility in this Order.

Pursuant to OAR 839-050-0210, the ALJ's case summary order required the Agency and Respondent to list all persons to be called as witnesses "except that impeachment or rebuttal witnesses need not be included on the witness list[.]"

The forum's administrative rules anticipate that Respondent will structure its case in chief to meet the allegations contained in the Agency's Formal Charges and support Respondent's defenses. Any witnesses who are called to testify about those matters must be listed in Respondent's case summary.

In this case, Respondent elicited testimony on the following issues by Daniels and Callahan:

- 1) Respondent's record-keeping procedures;
- 2) Pixton's reputation for truthfulness;
- 3) Complainant's work attitude;
- 4) Problems with Penny Dougherty at work (Daniels only).

The Agency elicited testimony from Pixton and others about Respondent's record-keeping procedures in an attempt to show that Respondent deliberately hid or destroyed records that would have been harmful to its case. Respondent's record-keeping procedures are not mentioned in the Agency's Formal Charges or in Respondent's affirmative defenses, and the forum admits the testimony by Daniels and Callahan on direct examination and cross examination concerning Respondent's record-keeping procedures. The forum also admits the testimony by Daniels and Callahan on direct and cross concerning Pixton's reputation in the workplace for truthfulness, as it related to Pixton's credibility.^v On the other hand, the testimony concerning Dougherty's problems at work did not rebut any prior evidence or impeach any witness and the issue of Complainant's attitude is one that was raised in

Respondent's answer. Consequently, the Agency's objection is sustained regarding the testimony by Daniels and Callahan on direct and cross concerning Dougherty's problems at work and Complainant's work attitude.

TESTIMONY OF ANTHONY MELIUS, JOHN PETERSON, AND EXHIBITS R-9 THROUGH R-14

The Agency objected to the testimony of Anthony Melius and John Peterson, both employees of Pro-Pak, Complainant's next employer after Logan, as irrelevant. Respondent offered their testimony to demonstrate habit, routine, and pattern and practice of Complainant in support of Respondent's defense that Complainant had anger issues and was discharged based on his work performance. Melius and Peterson both testified that Complainant had performance issues, relying heavily on exhibits R-9 through R-14, which documented the following:

- 1) Complainant was hired by Pro-Pak on April 11, 2003;
- 2) Complainant was counseled on April 24, 2004 for being late due to a flat tire and failing to call in;
- 3) Complainant was counseled on April 30, 2004, for discussing personnel matters in the break room with others present;
- 4) Complainant was counseled on May 13, 2004, for interviewing an applicant whom he had been instructed not to interview, then contacting the applicant's supervisor;
- 5) Complainant was counseled on May 13, 2004, for not reporting for work or calling on two days;
- 6) Complainant was counseled on May 14, 2004, for falsifying a work report to show that more pallets had been sorted on his shift than had actually been sorted; and
- 7) Complainant was fired on May 14, 2004, for initiating a confrontation with a co-worker and shouting profanity loud enough to attract the attention of others.

ORS 40.180 (OEC 406) provides:

"(1) Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or

organization on a particular occasion was in conformity with the habit or routine practice.

(2) As used in this section, “habit” means a person’s regular practice of meeting a particular kind of situation with a specific, distinctive type of conduct.”

Although the forum is not bound by the Oregon Evidence Code, the forum looks to OEC 406 for guidance in this instance because OEC 406 specifically relates to relevancy. The forum finds that none of the testimony given by Melius or Peterson relating to the performance issues documented in exhibits R-9 through R-14 meets OEC 406(2)’s definition of “habit.” Only the last item relates to any behavior that Complainant is alleged to have engaged at Respondent’s place of employment, and that single incident is not enough to qualify as a “habit.” Consequently, neither the testimony given by Melius and Peterson related to Complainant’s work performance at Pro-Pak, nor exhibits R-9 through R-14 are admissible.

AGENCY’S MOTION TO AMEND ITS PLEADING FOR DAMAGES FOR EMOTIONAL SUFFERING

In the Formal Charges, the Agency sought \$10,000 in damages for emotional distress. After it rested its case, but before Respondent concluded its case, the Agency moved to amend the Formal Charges to increase the amount to \$30,000. Respondent objected on the grounds that the amendment was untimely.

OAR 839-050-0140 provides, in pertinent part:

“(1) Prior to the hearing a participant may amend its pleading once as a matter of course at any time before a responsive pleading is served. Otherwise, a participant may amend its pleading only by permission of the administrative law judge or by written consent of the other participants. Permissible amendments to charging documents include, but are not limited to: * * * increases or decreases to the damages, penalties, or other remedies sought. * * * Permission will be given when justice so requires.”

“(2)(a) * * * Any participant raising new issues must move the administrative law judge, before the close of the evidentiary portion of the hearing, to amend its pleading to conform to the evidence and to reflect

issues presented. The administrative law judge may address and rule upon such issues in the Proposed Order.”

The Agency moved to amend the Formal Charges before the close of the evidentiary portion of the hearing to conform to testimonial evidence that was elicited without objection. In the past, the Commissioner has awarded the sum of \$30,000 for emotional distress damages in a number of cases. See *In the Matter of Robb Wochnick*, 25 BOLI 265, 289-90 (2004) (\$40,000 awarded for emotional distress), appeal pending; *In the Matter of Northwest Pizza, Inc.*, 25 BOLI 79, 90 (2004); *In the Matter of Sears, Roebuck and Company*, 18 BOLI 47, 77 (1999); *In the Matter of Body Imaging, P.C.*, 17 BOLI 162, 189 (1998), affirmed in part, reversed in part, *Body Imaging, P.C. and Paul Meunier, M.D. v. Bureau of Labor and Industries*, 166 Or App 54 (2000). If the Agency prevailed in this case, it is possible that the testimony of Complainant and his wife might support an award of \$30,000. Respondent did not argue that it would have prepared differently for the case if the Formal Charges had originally sought \$30,000 and did not request a continuance to present additional evidence on the issue of the extent and amount of Complainant’s emotional distress. In conclusion, the Agency’s motion was timely and justice requires that it be granted.

THE AGENCY’S FORMAL CHARGES

In its Formal Charges, the Agency alleged that Respondent discharged Complainant in retaliation for reporting criminal activity in the workplace and opposing health and safety hazards in the workplace. The alleged criminal activity, use of methamphetamine, was also the alleged workplace health and safety hazard opposed by Complainant.

REPORTING CRIMINAL ACTIVITY IN OR AROUND THE WORKPLACE (WHISTLEBLOWER)

In pertinent part, ORS 659A.230(1) states that it is an unlawful employment practice “for an employer to discharge * * * an employee * * for the reason that the employee has in good faith reported criminal activity by any person[.]” OAR 839-010-0110(1) provides that an employee “reporting criminal activity is protected by ORS 659A.230(1) and these rules if * * * [t]he employee reports to any person, orally or in writing, the criminal activity of any person.”

The Agency’s prima facie case with regard to reporting criminal activity in or around the workplace consists of the following elements:

- (1) Respondent is an employer as defined by statute;
- (2) Complainant was employed by Respondent;
- (3) Complainant in good faith reported the criminal activity of a person;
- (4) Respondent discharged Complainant;
- (5) Complainant’s report of criminal activity was a substantial factor in Respondent’s discharge of Complainant.

See In the Matter of Hermiston Assisted Living, 23 BOLI 96, 121 (2002).

A. Employer/employee relationship & discharge.

Respondent and the Agency agree that Respondent was an employer as defined by statute, that Complainant was employed by Respondent, and that Respondent discharged Complainant.

B. Reporting criminal activity.

The next element of the Agency’s prima facie case requires the Agency to establish the existence of three interrelated events. First, the complainant must make a report. Second, the report must concern activity believed to be criminal. Third, the activity believed to be criminal must be reported in good faith.

1. Complainant made a “report.”

Complainant, Ploeg, and Eatinger agree that Complainant told both Ploeg, Respondent’s quality assurance manager, and Eatinger, Respondent’s plant manager, that employees in Respondent’s shipping department, including Neal, were using drugs. This constitutes an oral “report” within the meaning of 659A.230(1) and OAR 839-010-0110(1) that satisfies the reporting element of the Agency’s prima facie case. *Id* at 122-23.

2. Reporting “criminal activity.”

Complainant, Ploeg, and Eatinger all agree that Complainant reported that employees in the shipping department, including Neal, were using drugs. Although Complainant testified at hearing that he believed Cate and Neal were using methamphetamine, he did not report a specific drug or report that “illegal” drugs were being used. Based on the fact that Ploeg and Eatinger considered administering drug tests to shipping department employees based on Complainant’s report, the type of drugs that Comprehensive Toxicology Services screens for,^{vi} and the fact that Ploeg and Eatinger considered Complainant’s report to raise a safety issue, it can be inferred that Ploeg and Eatinger assumed Complainant was reporting illegal drug use. However, the forum does not need to resolve that issue for the reason that Complainant’s report was not made in “good faith.”

3. Complainant’s report of drug use was not made in “good faith.”

To determine whether or not Complainant’s report of drug use was made in “good faith,” the forum must examine the reasons that prompted his report, including his beliefs about the nature of Cate’s and Neal’s activity.

The “good faith” requirement in ORS 659A.230 is met when a whistleblower has a reasonable belief that the wrongdoing reported has occurred, and the wrongdoing

reported, if proven, constitutes criminal activity. *Hermiston* at 126. The presence of ulterior motives, such as malice, spite, jealousy, or personal gain, does not *per se* demonstrate the absence of “good faith,” but may tend to show that the whistleblower lacked reasonable belief that criminal activity was occurring. In this case, Complainant’s lack of credibility, coupled with his ulterior motives, show that he did not have a reasonable belief that criminal activity was occurring. Consequently, the forum must conclude that his report was not made in “good faith.”

First, Complainant’s credibility. Complainant testified at hearing that his primary reason for making the report was the phone call that Cate made to Bohms. For reasons previously discussed,^{vii} the forum has concluded that this call never occurred. A fabricated, nonexistent occurrence cannot form the basis for a reasonable belief. The only other basis for Complainant’s report was his 10 second observation of Neal and Cate in the freezer and his conclusion that they were under the influence of methamphetamine because they purportedly took longer than usual to perform a job. This was an unfounded assumption that had no basis in fact.

Second, Complainant’s ulterior motives. Neal and Cate both occupied jobs that Complainant wanted. Complainant resented that he had not been hired to those jobs and believed he was more qualified than Neal or Cate for their positions.^{viii} Since Complainant had no basis in fact for suspecting that Neal and Cate were using methamphetamine, the forum infers that Complainant’s report was a vindictive act based on his resentment and jealousy.

C. Complainant’s report was not a substantial factor in Respondent’s decision to discharge Complainant.

Even if Complainant had made a good faith report of criminal activity, he would still not prevail for the reason that there was no credible evidence that Neal, the person

who made the decision to discharge Complainant, had any knowledge of Complainant's report before he made the decision to fire Complainant.

Complainant testified that he made his reports to Eater and Ploeg and he also told Dougherty, Mendoza, and Bohms about his suspicions before his discharge. Eater, whom the forum found to be a credible witness, testified that he did not tell Neal of Complainant's accusations prior to Complainant's discharge. Ploeg, who was only partly credible, testified to the same and the forum has credited his testimony because it was not disputed by any credible evidence. No testimony was elicited from Mendoza concerning his knowledge of whether or not Neal knew of Complainant's report before Neal discharged Complainant. Dougherty was the only person who testified that Neal was aware of Complainant's reports, but the forum did not believe her testimony for reasons stated in Finding of Fact 61 – The Merits. Bohms did not appear as a witness. Neal himself credibly testified that he had no knowledge of Complainant's reports or accusations of drug use before Neal made the decision to discharge Complainant and actually discharged him. In addition, there was credible evidence that Complainant was fired for reasons related to his performance. Without knowledge of Complainant's report, the forum cannot conclude that Neal retaliated against Complainant for making the report.^{ix}

OPPOSITION TO HEALTH AND SAFETY HAZARDS IN THE WORKPLACE

In pertinent part, ORS 654.062(5)(a) provides that it is an unlawful employment practice “for any person to * * * discharge from employment * * * because such employee has opposed any practice forbidden by ORS 654.001 to 654.295[.]” OAR 839-0004-0004(2) provides that “Protected activities include, but are not limited to: (a) Opposing any practice forbidden by Oregon Safe Employment Act[.]” OAR 839-004-0021(1) clarifies the scope of protection, providing that:

“ORS 654.062(5) prohibits discrimination against an employee because the employee "opposed" health and safety hazards in the workplace. OSEA does not specify to whom or in what manner an employee must oppose health and safety hazards and be protected. The concern is not with how the opposition is communicated, but with the employer's reaction to the opposition.”

The Agency’s prima facie consists of the following elements:

- (1) Respondent is an employer as defined by statute;
- (2) Complainant was employed by Respondent;
- (3) Complainant opposed practices forbidden by ORS 654.001 to 654.295;
- (4) Respondent discharged Complainant;
- (5) Complainant’s opposition to practices forbidden by ORS 654.001 to 654.295 was a substantial factor in Respondent’s discharge of Complainant.

A. Employer/employee relationship & discharge.

Again, Respondent and the Agency agree that Respondent was an employer as defined by statute, that Complainant was employed by Respondent, and that Respondent discharged Complainant.

B. Complainant did not oppose practices forbidden by ORS 654.001 to ORS 654.295.

Respondent and the Agency agree that Complainant’s “opposition” consisted of a report of “drug use” by his co-workers and supervisor in the workplace that Complainant made to Ploeg and Eatinger. The forum has already concluded that Complainant had no basis in fact for concluding that his co-workers and supervisor were using drugs, and there is no other credible evidence in the record to support a conclusion that drug use was occurring in Respondent’s workplace. Accordingly, the forum cannot conclude that Complainant opposed a practice forbidden by ORS 654.001 to ORS 654.295.^x

C. Complainant's opposition to alleged drug use was not a substantial factor in Respondent's discharge of Complainant.

The forum has already concluded that Neal, the person who made the decision to discharge Complainant, was unaware of Complainant's "opposition" prior to deciding to discharge Complainant. Without this knowledge, the forum cannot conclude that Neal discharged Complainant because he opposed drug use in Respondent's workplace.

CONCLUSION

The Agency bears the ultimate burden of proof on all matters alleged in the Formal Charges and did not meet that burden. Therefore, the Agency's case fails with regard to its whistleblower and OSHA allegations and must be dismissed.

THE AGENCY'S EXCEPTIONS

The Agency filed six exceptions that can be summarized as follows:

- (1) Respondent fabricated Complainant's employment record concerning the circumstances of his last day of work in his first period of employment and fabricated Complainant's probationary period during his second period of employment.
- (2) Sufficient evidence was placed on the record that would lead a reasonably prudent person to find that illegal drugs were being used at work and the evidence demonstrates that, based on what Complainant heard and observed in the workplace, Complainant's reports of illegal drug use were in fact made in good faith.
- (3) The Agency proved, through Dougherty's testimony, that Scott Neal knew of Complainant's report of illegal drug use, and that Kent Cate likely also told Neal of Complainant's report.
- (4) Scott Neal was not a credible witness.
- (5) Dougherty was a credible witness.
- (6) Complainant early arrival at the hearing each day, his early return after lunch and breaks, and his words and actions were a better reflection of his seriousness with which he took the proceedings than the fact that he wore sunglasses on the top of his head while observing and testifying.

To begin with, the Agency's exceptions are notable in that they do not contest the ALJ's finding that Complainant was not a credible witness and the fact that the ALJ

discredited all of Complainant's testimony that was not corroborated by other credible evidence.

The ALJ's assessment of Neal's and Dougherty's credibility is set out in Findings of Fact 61 and 62 – The Merits. That assessment is supported by substantial evidence in the record. Exceptions 4 and 5 are overruled.

Exception 1, the Agency's characterization of the circumstances of Complainant's initial termination and his employment status upon rehire, is not supported by credible evidence. The Agency did not establish that Byma was responsible for improperly stacking the totes and the evidence was undisputed that Complainant, the lead person at the time, walked off the job. Although there is some circumstantial evidence indicating that Complainant may not have been on probation when rehired, there is also circumstantial evidence supporting the conclusion that he was on probation, as well as Neal's credible testimony to that fact. Exception 1 is overruled.

In its second exception, the Agency contends that there was evidence placed on the record that would lead a reasonably prudent person to find that illegal drugs were being used at work and that evidence demonstrated that, based on what Complainant heard and observed in the workplace, Complainant's reports of illegal drug use were in fact made in good faith. As described in the Opinion, there is no evidentiary support for the conclusion that Complainant himself had a good faith belief that illegal drugs were being used in the workplace. The Agency's second exception is overruled.

In its third exception, the Agency would have the forum rely on Dougherty's testimony and the notes of Cate's investigative interview to show that Neal was aware of Complainant's report at the time he fired Complainant. The Agency's exception fails based on Dougherty's lack of credibility and the fact that there is nothing in the unsworn

contents of Cate's investigative interview that establishes that Neal was aware of Complainant's report at the time he fired Complainant.

The Agency's sixth exception concerning the ALJ's evaluation of Complainant's demeanor is also overruled. Finding of Fact 64 – The Merits contains an evaluation of Complainant's words and actions that is supported by substantial evidence in the record. The fact that Complainant made timely appearances at the hearing does not change the forum's assessment of his credibility. The Agency's statement that "Complainant waited almost two and a half years to have his case heard before the Forum and during that time he fully cooperated, participated in, and ably assisted the Agency in the preparation of his case against Respondent" is irrelevant and not a part of the record.

ORDER

NOW, THEREFORE, as Respondent **Logan International Ltd.** has not been found to have engaged in any unlawful practice charged, the Complaint and the Formal Charges filed against Respondent are hereby dismissed under the provisions of ORS 659A.850.

ⁱ Complainant testified he was upset because Byrna didn't follow "[t]he golden rule: You make the mess, you clean it up."

ⁱⁱ Complainant's testimony regarding his reason for assuming Ploeg had said nothing to Eateringer is an example of the tendency he showed to jump to conclusions based on assumptions instead of facts. In pertinent part, his testimony on this subject was:

Q. "So why did you really go to Mr. Eateringer?"

A. "Because I knew nothing had been done."

Q. "And you didn't show up until just [a] quarter to 3:00 that day, and you knew that the day before he'd talked to Cate; how did you [know] nothing had been done?"

A. "Good ol' boy syndrome."

ⁱⁱⁱ The Agency's amended Formal Charges sought "\$9,680" in back pay based on the calculation of \$11.10 per hour x 40 hours x 22 weeks. However, the figure of \$9,680 is arrived at by using the wage rate of \$11 per hour.

^{iv} See Finding of Fact 64 – The Merits, in which the forum draws this conclusion and the Opinion, in which the forum concludes that Complainant’s complaint of drug use was not made in good faith.

^v Although the forum is not bound by the Oregon Evidence Code, it may rely on it for guidance and does so in this case. See, e.g., *In the Matter of Harney Rock & Paving Co.*, 22 BOLI 177, 184 (2001). ORS 40.350 (OEC 608.01(1)) provides that “[t]he credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation[.]”

^{vi} See Finding of Fact 4 – The Merits, *supra*.

^{vii} See Finding of Fact 64 – The Merits, *supra*.

^{viii} See Findings of Fact 16, 27, 44 – The Merits, *supra*.

^{ix} See *In the Matter of Oregon Rural Opportunities*, 2 BOLI 8, 13-14 (1980) (respondent found not to have retaliated against complainant for assisting another employee in filing a complaint with the Civil Rights Division when the commissioner determined there was no evidence to establish that respondent had knowledge that complainant had assisted in the filing and where there was evidence of complainant’s insubordination and poor work performance); *In the Matter of Western Stations Co.*, 18 BOLI 107, 122-23 (1999) (where there was no evidence that the manager who fired complainant was aware of complaints made by complainant, respondent’s manager could not have fired complainant in retaliation for making those complaints).

^x Compare *In the Matter of Tomkins Industries, Inc.*, 17 BOLI 192, 206 (1998) (agency’s proof that complainant’s fears about exposure to lacquer thinner were objective and reasonable, even though the exposure was not proven to violate a statute or an OR-OSHA rule, extended the protection of ORS 654.026(5) to complainant).