

**In the Matter of**  
**SERVEND INTERNATIONAL, INC., dba Flomatic International**

**Case No. 01-00**

**August 28, 2000**

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**SYNOPSIS**

Complainant, an African American, alleged that Respondent subjected her to racial harassment through co-workers and a supervisor by exhibiting nooses in her presence and engaging in actions and making remarks derogatory towards African Americans, then retaliated against her by terminating her employment with Respondent when she complained of the harassment to Employment Trends, her joint employer. The commissioner found that Complainant's race/color was not a reason for the nooses and actions and remarks associated with them, that a reasonable African American would not have perceived the derogatory remarks and actions directed towards her by a co-worker as sufficiently severe or pervasive to create a hostile, intimidating or offensive working environment, and that Respondent had not violated ORS 659.030(1)(b). The commissioner held that Respondent unlawfully discharged Complainant based on her complaints of racial harassment by Respondent's employees to the joint employer who had referred her to Respondent. The commissioner awarded Complainant \$20,000 in mental suffering damages, but did not award back pay damages, finding that Complainant had failed to mitigate her damages. ORS 659.030(1)(b); ORS 659.030(1)(f); OAR 839-005-0010(1); OAR 839-005-0010(4).

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The above-entitled case came on regularly for hearing before Alan McCullough, designated as Administrative Law Judge (ALJ) by Jack Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on September 16 and 17, 1999, in Hearings Room 1004, Portland State Office Building, 800 NE Oregon St., Portland, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by Linda Lohr, an employee of the Agency. Complainant Lynice Morgan was present. Kenneth C. Crowley, counsel for Complainant, was present on September 16. Respondent was represented by John E. Murray, of the law firm Davis & Kuelthau, and

Gayle K. Rowe, of the law firm Dunn, Carney, Allen, Higgins & Tongue. Robin LaKamp was present throughout the hearing as Respondent's representative. An Oregon State Police officer was also present throughout the hearing to provide security.

The Agency called as witnesses, in addition to Complainant: Dorothy Weiss, assignment manager for Employment Trends; and Peter Martindale, Civil Rights Division senior investigator.

Respondent called as witnesses: Dorothy Weiss; Jennifer Henry, Complainant's former co-worker; Nye Sherwood, Respondent's production manager; and Tracie Basile, division manager of Employment Trends.

The forum received into evidence:

a) Administrative exhibits X-1 through X-28 (submitted or generated prior to the hearing).

b) Administrative exhibits X-1a,<sup>1</sup> X-29<sup>2</sup> and X-30.<sup>3</sup>

c) Agency exhibits A-1 through A-5 (submitted prior to hearing with the Agency's case summary), A-6 and A-7 (submitted at hearing).

d) Respondent's exhibits R-2, R-5 through R-8, R-10, R-11, R-13, R-15, and R-17 through R-20 (submitted prior to hearing with Respondent's case summary).

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

#### **FINDINGS OF FACT – PROCEDURAL**

1) On July 14, 1998, Complainant filed a verified complaint with the Civil Rights Division of the Bureau of Labor and Industries alleging that she was the victim of the unlawful employment practices of Respondent in that she was subjected to racial harassment and retaliation in the form of discharge on June 16, 1998. On January 20,

1999, BOLI amended Complainant's complaint to correct a technical defect. After investigation and review, the Civil Rights Division issued an Administrative Determination finding substantial evidence supporting the allegations regarding Respondent's discharge of Complainant.

2) On July 13, 1999, the Agency submitted to the forum Specific Charges alleging that Respondent discriminated against Complainant by subjecting her to "an intimidating, hostile and offensive work environment" by harassing her based on her race/color in violation of ORS 659.030(1)(b), and by discharging her based on her opposition to the harassment in violation of ORS 659.030(1)(f). The Agency also requested a hearing.

3) On July 21, 1999, the forum served on Respondent the Specific Charges, accompanied by the following: a) a Notice of Hearing setting forth September 16, 1999, in Portland, Oregon, as the time and place of the hearing in this matter; b) a notice of Contested Case Rights and Procedures containing the information required by ORS 183.413; c) a complete copy of the Agency's administrative rules regarding the contested case process; and d) a separate copy of the specific administrative rule regarding responsive pleadings.

4) On August 12, 1999, Respondent, through local counsel George J. Cooper of Dunn, Carney, filed an answer to the Specific Charges.

5) On August 20, 1999, Respondent, through local counsel Cooper and Gayle K. Rowe, also of Dunn, Carney, filed a motion for out of state counsel John E. Murray, and the firm of Davis & Kuelthau, S.C., Milwaukie, Wisconsin, to appear *pro hac vice* for Respondent. The motion was accompanied by an affidavit of Mr. Murray and exhibits certifying compliance with the requirements of ORS 9.241 and UTCR 3.170.

6) On August 24, 1999, the forum granted Respondent's motion to allow Mr. Murray to appear and participate in this case as counsel *pro hac vice* for Respondent.

7) On August 24, 1999, Respondent filed a motion to be allowed to depose Complainant. This document was not served on Kenneth C. Crowley, Complainant's attorney of record.

8) On August 25, 1999, the forum ordered the Agency and Respondent each to submit a case summary including: lists of all persons to be called as witnesses; identification and copies of all documents to be offered into evidence; a statement of any agreed or stipulated facts; a brief statement of the elements of the claim and any damages calculations (for the Agency only); and a brief statement of any defenses to the claim (for Respondent only). The forum ordered the participants to submit case summaries by September 7, 1999, and notified them of the possible sanctions for failure to comply with the case summary order.

9) On August 26, 1999, the forum issued a notice that the correct case docket number was "01-00."

10) On August 30, 1999, the Agency filed objections to Respondent's request to depose Complainant, stating that Complainant was unavailable for deposition in that she had left Oregon in early August based on her husband's threats of retaliation for having filed a criminal action against him, now pending, involving child abuse. The Agency stated that Complainant did not intend to return to Oregon except for the duration of the hearing. The Agency also noted that a telephone deposition was not practical because of the uncertainty of Complainant's whereabouts. This document was not served on Crowley, Complainant's attorney.

11) On August 30, 1999, the Agency requested that an Oregon State Police officer be present during the hearing to provide security in the event Complainant's husband attempted to retaliate against her.

12) On August 30, 1999, the ALJ conducted a pre-hearing conference with Ms. Lohr and Mr. Murray to discuss Respondent's motion to depose Complainant and the Agency's objections. At the conclusion of the conference, the ALJ concluded that, based on the materiality of Complainant's testimony and the short time remaining before hearing, a deposition was an appropriate means of discovery. The ALJ granted Respondent's motion to depose Complainant and Mr. Murray and Ms. Lohr agreed that Complainant would be deposed at the offices of Dunn, Carney at 9 a.m. on September 15, 1999. On August 31, 1999, the ALJ issued a written interim order memorializing the pre-hearing conference, the ALJ's ruling, and Ms. Lohr's and Mr. Murray's agreement as to the deposition time and place. By oversight, this interim order was not served on Crowley, Complainant's attorney.

13) On August 31, 1999, the forum granted the Agency's request for security.

14) On September 7, 1999, the Agency and Respondent timely filed their case summaries.

15) On September 8, 1999, the Agency made a written request that Respondent make available Robin LaKamp, Nancy Kerrigan, and the author of Exhibit R-13 available for cross-examination at the hearing.

16) On September 8, 1999, the forum granted the Agency's request in an interim order and notified Respondent and the Agency that Respondent's failure to make LaKamp, Kerrigan, and the author of Exhibit R-13 available for cross-examination "may result in the exclusion of Exhibits R-12, R-13, and R-14 [which Kerrigan had

authored] from evidence at the hearing or the hearing being continued at a later date in order to allow the Agency an opportunity to rebut the evidence.”

17) On September 8, 1999, Respondent sent a letter directly to the ALJ, via facsimile, stating its intent to offer R-14, despite the probable absence of Nancy Kerrigan from the hearing, and that Robin LaKamp, who authored Exhibit R-12, and Dorothy Weiss or Tracie Basile, one of whom authored Exhibit R-13, would be present at the hearing.

18) On September 8, 1999, Respondent filed a letter with the Hearings Unit stating that Respondent did not agree with the Agency’s statement of agreed or stipulated facts in the Agency’s case summary, specifically, proposed stipulated facts numbers 4, 5, and 6.

19) At 3:57 p.m. on September 13, 1999, Kenneth C. Crowley sent a letter directly to the ALJ, via facsimile, in which he identified himself as Complainant’s attorney and objected to Respondent’s deposition of Complainant on September 15, 1999, because he had only learned that morning that the forum had ruled on Respondent’s motion to depose Complainant and he was unavailable at the time set for deposition because he was preparing for a five-day jury trial in Federal District court set to begin on September 20. Mr. Crowley mailed the original letter to the Hearings Unit that same day.

20) After receiving Crowley’s letter on September 13, the ALJ attempted to conduct a pre-hearing conference with Ms. Lohr, Mr. Crowley, and Mr. Murray regarding Mr. Crowley’s concern, but was unable to reach all three individuals at the same time. The ALJ then contacted these individuals separately and engaged in a teleconference with Ms. Lohr and Mr. Crowley in an attempt to resolve this matter. In the course of these conversations, several things became apparent to the ALJ. First, that Mr.

Crowley was insistent on representing his client at any deposition and was not available on the afternoon of September 14 or any time on September 15. Second, that Complainant could not be reached with any certainty prior to the evening of September 14 because she had taken a bus from the Midwest to Portland for the deposition and hearing, and did not have the financial resources to make a second trip back if the hearing was postponed. Third, that Mr. Murray believed he needed to depose Complainant in order to represent his client adequately, and was willing to conduct that deposition during the evening or on the first day of the hearing, if necessary, to accommodate everyone's schedule. Fourth, that Mr. Crowley would not object to Mr. Murray being given considerable leeway at the hearing during his cross-examination of Complainant to essentially inquire into the same areas he would have inquired into in a deposition, if that would solve the problem and allow the hearing to continue, a suggestion to which Ms. Lohr did not object. Fifth, the ALJ was not available to continue the hearing on September 18, if necessary, and could not come back on the 20<sup>th</sup> because of a hearing set with Ms. Lohr in Eugene on the 21<sup>st</sup>.

Under the circumstances, the ALJ concluded that Mr. Crowley's suggestion that Mr. Murray be allowed a similar scope of inquiry in his cross-examination of Complainant that he would have been entitled to in a deposition was an acceptable solution. On the evening of September 13, the ALJ telephoned Mr. Murray and left a voice mail message regarding his decision. Mr. Murray telephoned the ALJ the next morning and stated his unhappiness with the solution, but indicated a willingness to proceed. He suggested several compromise solutions involving a delay in the hearing that would allow him to depose Complainant prior to the hearing. The ALJ telephoned Mr. Crowley and Ms. Lohr to present Mr. Murray's compromise solutions, but found that

they were unworkable, given Mr. Crowley's schedule. The ALJ then telephoned Mr. Murray, Mr. Crowley, and Ms. Lohr and informed them that the hearing was reset for 8:30 a.m. on September 16, and that Mr. Murray would be allowed considerable latitude in his cross examination of Complainant. Mr. Murray indicated he intended to file an objection to the forum denying him the opportunity to depose Complainant before the hearing.

21) At the commencement of the hearing, the ALJ verbally 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.

22) Prior to opening statements, Respondent objected to the ALJ's denial of Respondent's motion to depose Complainant, contending that Respondent suffered considerable prejudice as a result, in that cross-examination is not a substitute for a deposition, and Respondent would incur additional expenses at hearing because of its inability to conduct a deposition of Complainant before the hearing.

23) On November 5, 1999, the ALJ discovered that neither participant had provided a copy of Exhibit X-28 to him. The ALJ telephoned both Ms. Lohr and Mr. Murray that day and asked them each to provide him with a copy of that document. On November 10, 1999, the ALJ received a copy of Exhibit X-28 from Mr. Murray, a copy of which Mr. Murray also served on Ms. Lohr.

24) On March 22, 2000, the ALJ issued a proposed order that notified the participants that they were entitled to file exceptions to the proposed order.

25) On March 31, 2000, Respondent filed timely exceptions to the proposed order.

26) On April 3, 2000, the Agency requested an extension of time until April 7, 2000 in which to file exceptions to the proposed order.

27) On April 3, 2000, Respondent filed supplemental exceptions to the proposed order and a request for a new hearing with a new ALJ, with the right to depose Complainant prior to the hearing. Respondent alleged its inability to depose Complainant violated its due process rights and caused severe prejudice to Respondent at the hearing. Respondent's request is denied, for reasons stated in the Opinion section.

28) On April 4, 2000, the ALJ issued an interim order granting the Agency an extension until April 7, 2000, in which to file exceptions to the proposed order.

29) On April 7, 2000, the Agency filed exceptions to the proposed order.

#### **FINDINGS OF FACT – THE MERITS**

1) Complainant is an African American.

2) At all times material herein, Respondent Servend International, Inc., was a foreign corporation engaged in the business of assembling beverage dispensing valves that operated in Portland, Oregon, under the assumed business name of Flomatic International, and was an Oregon employer that utilized the personal services of one or more persons.

3) Complainant applied and was hired at Employment Trends ("ET"), a temporary employment agency, in March 1998.

4) Respondent became a client employer of ET in 1996 when Respondent began utilizing ET to provide temporary employees. In 1998, an average of 30 to 45 ET employees were jointly employed at Respondent as a result of ET's referrals. In 1998, Respondent got all of their temporary production employees from ET.

5) At all material times, ET employees who were jointly employed by client employers were paid by checks written by ET. ET employed site managers who periodically visited the work sites of client employers. Client employers of ET had the

unilateral right to terminate the assignment of an ET employee. ET directed its employees to notify it of any problems they had with client employers.

6) ET employs assignment managers who are responsible for meeting the staffing needs of specific client employers. In 1998, Dorothy Weiss was ET's assignment manager in charge of Respondent's account.

7) When ET initially referred employees to Respondent, ET's onsite representative would give them an orientation handbook, which Respondent and ET had jointly developed and go over its rules. Respondent expected ET's onsite representative to explain that Respondent has "zero tolerance" for discrimination, and that any problem should be brought to the attention of Sherwood, Respondent's production supervisor, or another supervisor if Sherwood was absent. Respondent did not have a written harassment policy during Complainant's employment with Respondent.

8) On or about March 12, 1998, Weiss referred Complainant to Respondent's Portland facility. Weiss also told Complainant that Nye Sherwood, Respondent's production supervisor, was a very nice guy and she could take any problems to Sherwood, but should also report any problems, including racial harassment, to Weiss or anyone else available at ET.

9) ET referred Complainant to Respondent because of her prior experience in assembly and production. At Respondent's facility, Complainant was assigned to work in the electric room, wiring solenoids.

10) Complainant worked 8 hours per day, Monday through Friday, during her employment with Respondent, and was paid \$7.00 per hour.

11) Complainant's immediate supervisor in the electric room was Andy Thomas. Thomas' supervisor was Nye Sherwood, a Caucasian who was Respondent's production, quality assurance, and customer service manager.

12) Respondent had about 30 employees during Complainant's employment. An average of 10 persons worked in the electric room, most of them temporary employees of ET. Complainant was the only African American working in the electric room, a room approximately 12' by 14' in size that had five different workstations. Because of the small size of the room, Complainant and her co-workers could hear whatever conversations were occurring in the electric room.

13) Shortly after starting work for Respondent, Complainant asked for and was given a week off to assist her mother after her mother fell off her bike and broke her kneecap. At Sherwood's request, ET reassigned Complainant to Respondent at the end of the week. Sherwood made this request based on his observation that Complainant was a good worker.

14) Complainant had no problems with her co-workers from the time she began work with Respondent until June 1998. During that time, she and Jennifer Henry, a Caucasian who was also an ET employee, became friends. Complainant and Henry talked about their families and listened to "Walkman" radios, telling each other when certain songs came on the radio. Henry bought Complainant a tape of some music that she knew Complainant liked.

15) One of Jennifer Henry's hobbies is doing macramé with hemp string. On June 2, 1998, Henry returned from a lunch break with some brown hemp string. While Complainant was sitting right next to her, she tossed a short length of brown hemp string across the table to Nate Hall, a Caucasian co-worker who had a special expertise in tying knots, and instructed him to make her a "noose." Hall made a noose and threw

it back to Henry, who put it around the neck of a water bottle on the table, looked at Complainant, swung it, and said, "see, and it works, too." There were five or six persons in the electric room when this incident occurred.

16) Complainant became very upset and went downstairs for about five minutes. The incident particularly upset her because it reminded her of what happened to her father. Before Complainant was born, some men in Mississippi put a rope or chain around her father's neck and dragged him. Complainant's father later told her about this incident. When she saw the noose, it brought back memories of that story to her and she "kind of felt what he was going through." During the hearing, Complainant cried the first time she testified about the Henry noose incident.

17) When Complainant returned to the electric room, the bottle and noose were gone. Complainant never told anyone employed by Respondent or ET of her father's experience. Complainant never saw Henry's string again.

18) On Friday, June 5, 1998, Complainant and a number of other co-workers employed by Respondent and ET, including Henry, did not work because Respondent was doing inventory. When Complainant went to Respondent's facility to pick up her check that day, she talked to Sherwood, telling him she had a problem she wanted to talk to him about. She told him that Henry had Hall make a noose with string, that Hall threw it across the table, and that Henry put it around the neck of a water bottle, dangled the bottle, and said "see it works." Although Complainant did not tell Sherwood of her father's experience, by the end of the conversation, Sherwood understood that the Henry noose incident was racially offensive to Complainant. During the conversation, Complainant also requested a transfer to another department. At the end of the conversation, Sherwood told Complainant he would talk with her again on the following Monday.

19) Complainant did not complain to Sherwood about Henry's noose until June 5 because Respondent held a company party on a yacht on a date between June 2 and June 5, and Complainant did not want to upset anyone before the party, which she planned to attend.

20) On June 8, the Monday following Complainant's conversation with Sherwood, Sherwood approached Complainant at her workstation and asked her to come to his office. During their subsequent conversation, which lasted 30 to 45 minutes, Complainant described more details about the noose incident with Henry. Complainant told Sherwood she perceived the incident as racial harassment and requested a transfer to another department. Sherwood told Complainant he would talk to Henry about the incident.

21) Immediately afterwards, Sherwood spoke with Henry. Henry told Sherwood that she makes macramé things out of hemp string, asked Hall to show her some new knots, and that one of Hall's knots had included a knot around the neck of a bottle. Sherwood told Henry that Complainant had perceived it as a noose with racial connotations. Henry told him nothing racial was intended and that she was sorry if she had offended Complainant. Sherwood told Henry that it was a serious incident, told her of Respondent's "zero tolerance" discrimination policy, and advised that her assignment with Respondent might be ended if some kind of agreement couldn't be reached with Complainant. Sherwood also spoke with Hall and Complainant's other co-workers in the electric room. Hall corroborated Henry's story, but did not describe his knot as a "noose." No one else in the electric room told Sherwood that they had heard Henry use the word "noose."

22) Immediately after meeting with Henry and talking with the other electric room employees, Sherwood spoke with Complainant again. He told her what Henry

and her co-workers had told him, and said that Henry seemed sincere and was sorry if Complainant was offended. Complainant again asked him to transfer her to another department. Sherwood then asked Complainant to meet with Henry to see if they could work things out, adding that if it didn't work out, a transfer was possible.

23) Complainant then met with Henry for 30 to 45 minutes. It was a very emotional meeting, during which both Complainant and Henry cried. Henry was apologetic and told Complainant that she meant nothing racial by the knot and was very sorry if it offended Complainant. Henry also told Complainant that she had a sister in a skinhead gang and was trying hard not to be like her. Complainant told Henry she did not believe that nothing racial was intended by the knot.

24) Following her meeting with Henry, Sherwood had Complainant meet with him again in his office. During this meeting, Complainant noticed a full-sized rope noose hanging on the wall inside Sherwood's office. Complainant was upset and crying, but was shocked and stopped crying when she noticed the noose. Complainant said nothing about it to Sherwood, as she believed there was no point in talking about the noose in Sherwood's office because she had complained to him about the Henry noose incident on the previous Friday, her current meeting with Sherwood involved that incident, yet Sherwood displayed a full-sized noose in his office.

25) The rope noose was given to Sherwood a few years earlier by Nancy Kerrigan, a former employee of Respondent, as a "suicide" joke. Sherwood kept it in his office as a macabre reminder that there was always a way out if things got too bad. Nooses lacked racial significance to Sherwood until Complainant complained on June 5 about Henry's noose.

26) During the meeting, Sherwood asked Complainant if she wanted him to terminate Henry. Sherwood told her if he discussed the incident with ET, ET might

suggest ending both Henry's and Complainant's assignments, and that he would probably also recommend this, since he thought the incident was an unfortunate misunderstanding and it would be unfair to punish only Henry.

27) At the conclusion of his third meeting with Complainant on June 8, Sherwood instructed Complainant to immediately report to him anything in Respondent's workplace that she perceived as racial harassment.

28) Complainant never saw the noose in Sherwood's office again.

29) Sherwood did not report Complainant's complaint about Henry and the noose to ET, although his verbal agreement with ET called for him to do so.

30) Later in the week beginning June 8, 1998, an ET representative advised Sherwood that the noose on his wall was inappropriate and he removed it from his office that same week.

31) Complainant returned to work in the electric room on June 8, following her third meeting of the day with Sherwood. Later that day, Sherwood approached Complainant on three occasions and asked her how things were going. The first two times, Complainant said she was fine. The third time, Complainant said she was uncomfortable. Complainant then approached Andy Thomas, the electric room supervisor, and asked if there was any other place in the building for her to work. Subsequently, Thomas told Complainant that she could take a vacationing employee's place for three days in Respondent's downstairs department.

32) On June 9, 10, and 11, Complainant worked in Respondent's downstairs department doing covers for machines. During that time, Sherwood approached several times and asked her how things were going. Each time, she told him she was comfortable. Sherwood told her that he was looking for a permanent transfer for her, but there might be days when she would have to work with Henry.

33) On Friday, June 12, Complainant was assigned to work in the electric room again.

34) During Complainant's employment with Respondent, Respondent had five different departments. The valve production and mounting block departments shared the same room. The other three departments, including the electric room, were all in separate rooms. Departmental transfer of employees was not unusual, and was normally based on Respondent's business needs. Because of the small size of Respondent's operation, peaks in demand necessitated that all employees at some time temporarily transfer to other departments to avoid slowdowns in production.

35) Mike Jones is a Caucasian who worked in Respondent's electric room and was also employed by ET. On the morning of June 12, Complainant was the only African American in the electric room. She heard Jones tell another co-worker, "Lynice thinks I'm poor white trash." Jones then turned to Complainant and said, "You think I'm poor white trash, don't you." Another Caucasian co-worker then asked Jones if he lived in a trailer home and had clothes hanging out on a line. When Jones answered "yes," that co-worker told him he was "poor white trash." Jones then asked Complainant what she thought. Complainant responded by asking what it had to do with her job. Jones said nothing else to Complainant that day. Complainant believed Jones was picking on her and trying to get her to start an argument and perceived that Jones was "harassing" her. Prior to this incident, Complainant and Jones had worked together without any problems.

36) During the afternoon of June 12, in Complainant's presence, Jones made some comments about "gangbangers," made some gestures that Complainant believed were "gang signs," and commented "what you got on this bag," which Complainant interpreted as being related to drug dealers. Complainant was the only African

American in the electric room at the time. Complainant perceived that Jones was speaking and acting in a way intended to imitate African-American males and was offended by these remarks.

37) During Complainant's employment at Respondent, she heard no other comments she perceived as racial other than those described in Findings of Fact – The Merits 15, 35, and 36.

38) On June 12, 1998, Complainant went to ET after work and complained to Weiss about the Henry noose incident and Jones' "poor white trash" comments.

39) On June 15, 1998, Weiss called Sherwood and related Complainant's complaints to him. Sherwood was surprised and upset. He told Weiss that he had already spent several hours investigating the Henry noose incident. Regarding the Jones allegation, he expressed upset that Complainant hadn't followed his instructions to come to him immediately if any harassment had occurred. He told Weiss Complainant had been insubordinate by not coming to him immediately with her complaints about Jones and asked Weiss to terminate Complainant's assignment.

40) Complainant did not complain to Sherwood about Jones because she believed it would do no good, based on Sherwood's response to her complaint about Henry's noose, which had left her with the feeling that she was supposed to solve the problem herself, and the presence of the noose in his office after she complained to him about Henry's noose.

41) Sherwood never told Complainant not to take any complaint to ET.

42) Before, during, and after Complainant's employment with Respondent, Sherwood held regular meetings for all permanent and temporary employees, including Complainant while she was employed by Respondent. Racial harassment and discrimination were among the subjects discussed at those meetings. At the meetings,

Sherwood stated that racial harassment would not be tolerated in Respondent's workplace, and that anyone who felt they had been harassed should come to him or any supervisor immediately. Sherwood stated that Respondent would investigate the complaining employee's allegations and take whatever steps were appropriate. At the meetings, Sherwood never told employees not to also go to ET with complaints of harassment.

43) On June 15, the same day Sherwood had asked ET to terminate Complainant, Liz Cole, ET's site manager who was assigned to Respondent, met with Complainant at Respondent's facility. Cole told Complainant she wanted to talk to her because she had heard about the problems Complainant had been having at Respondent's. Cole told Complainant she wanted to assign her to a job in another environment where she would be happier. Cole offered Complainant a temporary job in ET's office doing fulltime clerical work that required no skill or prior experience, at \$8.00 per hour, until ET could find another assembly and production position for Complainant. Cole told Complainant she could wear whatever she wanted while working at ET and that ET would train her. During this conversation, Cole was insistent that Complainant work somewhere else, but Complainant responded that she wanted a couple of days to think over Cole's proposal.

44) On the morning of June 16, Cole met with Complainant again at Respondent's facility. Complainant insisted that she wanted to continue working for Respondent, but Cole told her that her assignment with Respondent was terminated. Cole told her it was Sherwood's decision. When Complainant asked why, Cole responded "You made the complaint; you have to go." This upset Complainant and she cried. She went back to the electric room and got her things, telling her co-workers goodbye and that she was being kicked off the job.

45) Complainant liked the type of work she performed for Respondent, was a good worker, and would have liked to keep working there if Respondent had taken appropriate steps to eliminate racial harassment from its workplace.

46) On June 16, Sherwood met with Jones and questioned him about Complainant's "poor white trash" allegation. Jones admitted making the alleged comments and had no explanation for them. Sherwood told Jones that his comments were inappropriate in the workplace, that they might be misconstrued, and that he should not make comments like that again. Sherwood told Jones that his assignment with Respondent might be ended if he made similar comments again. Sherwood also believed that Jones' comments were not racial harassment.

47) The Henry noose incident, Complainant's observation of Sherwood's noose, and Jones' comments on June 12 upset Complainant. Before her discharge from Respondent, she talked with two co-workers and told them she felt she had been treated unfairly and she was upset about it. When ET terminated her assignment with Respondent based on Respondent's wishes, she was upset because she felt it was unfair. She felt that way for a long time, and at the time of the hearing, still felt upset that Respondent had treated her unfairly.

48) ET paid Complainant's wages for the full week of June 15-19, 1998, as though she had continued working for Respondent.

49) On June 19, 1998, Complainant met with Weiss and Tracey Basile, ET's branch manager at the ET location where Weiss was employed. During that meeting, Complainant informed Weiss and Basile that Jones was imitating African-American males and had made comments about "gangbangers" the same day he made the "poor white trash" comments. Complainant told them she believed Jones' "poor white trash" comments were racial harassment.

50) At the hearing, Complainant testified that she thought Jones' "poor white trash" comments were "harassment" and stated she did not think of them "as being racial discrimination." Complainant also testified that she thought the "gangbanger" comments were "racial."

51) On June 22, 1998, ET again offered Complainant a job working at ET's "Halsey" office doing clerical work at \$8.00 per hour until ET could locate an assembly and production job for Complainant. This job was closer to Complainant's home than Respondent's facility. Complainant declined the job because she wanted assembly and production work, not clerical work, and wanted to return to work for Respondent. Because Complainant would have been physically present in ET's office when employers called ET seeking employees, accepting ET's offer would have put her in the position of being the first person offered any assembly and production job openings that came up in ET's office.

52) Sometime between June 19 and June 24, 1998, Sherwood became aware of Complainant's allegations that Jones had imitated African-American males and made comments about "gangbangers." Sherwood questioned Jones and other employees in the electric room about Complainant's allegations. Jones denied them, and none of the other employees he talked with corroborated Complainant's allegations. As a result, Sherwood concluded that the incidents complained of by Complainant had not occurred. Sherwood then held an employee meeting to address discrimination, telling Respondent's employees that Respondent has "zero tolerance" for "discrimination or harassment" and that employees needed to report any incidents of discrimination or harassment to him immediately.

53) On June 24, 1998, Weiss and Basile met with Sherwood to discuss Complainant's allegations. Sherwood indicated that he had already conducted his own

investigation, informed Weiss and Basile of the results, and told them he did not want them to interview Henry and Jones.

54) On June 23, July 1, and July 10, 1998, ET telephoned Complainant with several job offers at assembly and production jobs that paid \$7.00 per hour. Complainant, who did not have voice mail at the time but did have caller I.D., returned ET's calls. Each time, the jobs had already been filled.

55) On July 14, 1998, ET offered and Complainant accepted an assembly and production job at Connor Formed Metal Products Assembly that paid \$7.25 per hour. The job was expected to last about two weeks. Complainant quit the job on July 20, 1998, because she was upset at ET for ET's handling of the situation with Respondent and ET's refusal to refer her back to Respondent for further employment. Complainant did not return to Connor to see if they would rehire her.

56) Between July and November 1998, Complainant checked the want ads two or three times a week looking for work. She also registered with a couple of temporary employment agencies that did not call her. She filled out two job applications a week on the average, but did not find work until November. In November 1998, she was referred to Vision Plastics by another temporary employment agency. Complainant worked there for six months, earning \$7.00 per hour. Complainant left Vision after she had earned enough money to catch up on her bills.

57) In July 1999, Complainant learned of behavior by her husband that came as a terrible shock to her and made her angry and upset. In response, she immediately left for the Midwest with her three children, fearing for their safety. Subsequently, she filed criminal charges against him. During the hearing, she feared that her husband would retaliate against her during her stay in the Portland area. She was still mad and upset about her husband's behavior at the time of the hearing.

58) Weiss and Basile created contemporaneous incident reports regarding Complainant's allegations, their meetings with Complainant, and their conversations with Sherwood. These incident reports were neither complete nor entirely accurate.

59) Sometime within a year after Complainant's termination from Respondent, Sherwood created a three page "Incident Report" describing his knowledge of Complainant's allegations and actions taken in response to those allegations. Sherwood did not contemporaneously document any of these events, and this document was created solely from memory. The forum finds that Sherwood's report is incomplete and unreliable, based on inconsistencies between the report, Sherwood's testimony, and other credible evidence presented at the hearing.

60) Both the Agency and Respondent listed Mike Jones as a witness in their case summary list, but neither called him to testify as a witness at the hearing.

61) On July 20, 1998, Complainant filed a complaint with the Civil Rights Division of BOLI alleging that ET subjected her to different treatment in Respondent's workplace based on her race/color and failed to take action on her complaints of racial harassment in Respondent's workplace. The Division investigated this complaint, interviewing Weiss and Basile in the process.<sup>4</sup>

62) At the time of the hearing, Dorothy Weiss was currently employed by ET as a sales representative and had worked for ET for four years at the time of the hearing. She had almost no current recollection of the events surrounding Complainant's allegations, and her testimony was based almost exclusively on her notes, which were incomplete and not entirely accurate.<sup>5</sup> Consequently, her testimony has been credited only where it is corroborated by other credible evidence.

63) Tracie Basile was very candid and straightforward during direct examination, but defensive on cross-examination as she was questioned about

evidentiary documents that were created by ET. She acknowledged that her incident reports, upon which she based a significant part of her testimony, were not entirely complete. However, her current recollection of the events surrounding Complainant's allegations was better than Weiss's almost negligible recollection, supporting her assertion, made on recross, that she had an independent recollection of some of the events that were not recorded in ET's "incident reports." Although her testimony regarding specific dates of events was not entirely credible, the forum has credited the substance of her testimony regarding the actual events themselves.

64) Jennifer Henry was an extremely nervous witness who was conveniently unable to recollect specifics concerning the noose incident, the central subject of her testimony. Specifically, she couldn't recall whether or not she asked Nate Hall to make a "noose," whether she and Hall said anything at all to each other while he was tying knots, and whether or not she swung the bottle around after putting the noose on it. In addition, Henry had become a permanent employee of Respondent about one year prior to the hearing and the forum believes this may have influenced her testimony. She also testified she couldn't recall if she told Complainant that her sister is a skinhead, then later denied that her sister is a skinhead. In conclusion, the forum finds that her inability to recall was based on an unwillingness to tell the truth and has discredited her testimony except where it was corroborated by other credible evidence.

65) Nye Sherwood presented a forthright demeanor to the forum while he testified. However, his memory of the relevant events had faded and he had no reliable, documentation to rely upon to assist his recollection due to his failure to contemporaneously document the events surrounding Complainant's allegations. In addition, Sherwood's testimony concerning his role in Complainant's temporary transfer to Respondent's downstairs department is at odds with the time frame it actually

occurred in. Sherwood testified that he had Andy Thomas relocate Complainant to a different department 1 ½ to 2 weeks after her complaint about Henry, whereas the forum has determined that Complainant's last day of work with Respondent was only eleven days after she first brought the Henry matter to Sherwood's attention. Respondent did not call Thomas as a witness to corroborate Sherwood's version of Complainant's transfer.

66) Complainant was a credible witness. She testified in a straightforward, consistent, and convincing manner during direct and cross-examination. Although her memory had dimmed somewhat with regard to several events, such as the exact date when she first reported Mike Jones' "gangbanger" comments to ET and the specific date she met with Dorothy Weiss and Tracie Basile, her memory was unimpaired and her testimony convincing concerning the substance of her allegations. The forum's conclusion in this regard is bolstered by two additional statements. First, her candid statement that she did not consider Mike Jones' "poor white trash" remarks to be "racial discrimination." Second, she did not embellish Jones' "gangbanger" comments in an effort to show that they were specifically directed at African Americans. In conclusion, the forum has credited her testimony in its entirety except in those instances where her memory was not certain. In those instances, the forum has credited her testimony wherever it was corroborated by other credible evidence. The forum has credited Complainant's testimony wherever it conflicts with Sherwood's as to material issues.

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

- 1) Complainant is an African American.
- 2) At all times material herein, Respondent was an employer in the state of Oregon utilizing the personal services of one or more persons.
- 3) Complainant was jointly employed by Respondent and Employment Trends, a temporary employment agency, between March 12, 1998, and June 16, 1998.

4) On June 2, 1998, Jennifer Henry, one of Complainant's Caucasian co-workers, asked Nate Hall, another Caucasian co-worker, to make a noose out of a short length of some hemp string she used for macramé. Hall did this and gave it to Henry, who put the noose around the neck of a water bottle, looked at Complainant, who was seated next to her, swung it, and said "see, and it works, too." Henry's and Hall's actions and statements were not based upon Complainant's race/color.

5) Complainant believed Henry's statements and actions were because of Complainant's race/color and was upset and offended by them.

6) On Friday, June 5, a day Complainant was not scheduled to work, Complainant told Nye Sherwood, Respondent's production manager who was in the direct line of people with supervisory authority over Complainant, about the Henry noose incident and requested a transfer to another department. At the end of the conversation, Sherwood understood that Henry's noose was racially offensive to Complainant and said he would talk more about it with Complainant on Monday, June 8, Complainant's next scheduled workday.

7) On June 8, Complainant discussed the Henry noose incident at length with Sherwood and asked again to be transferred to another department. Sherwood promptly investigated the incident. He told Henry that it was a serious incident, told her of Respondent's "zero tolerance" discrimination policy, and advised that her assignment with Respondent might be ended if some kind of agreement couldn't be reached with Complainant. Sherwood told Complainant his conclusion, then asked Complainant to meet with Henry to try and work things out.

8) Complainant met with Henry, who apologized, told Complainant that she had a skinhead sister and was trying hard not to be like her, and told Complainant that the noose had no racial meaning to her.

9) Complainant then met with Sherwood again and told him she didn't believe Henry was sincere. During this meeting, she noticed a full-sized noose hanging on his office wall. Complainant was shocked by the presence of the noose, but did not comment on it. Sherwood asked Complainant if she wanted him to terminate Henry, noting that ET might suggest terminating both Complainant and Henry and that he would concur with this suggestion. Sherwood also instructed Complainant to immediately report any further harassment to him so he could conduct an immediate investigation.

10) The noose was a gift to Sherwood from a former co-worker, and he kept it on the wall as a macabre reminder that there was always a way out if things got too bad. It had no racial significance to him until Complainant complained on June 5 about Henry's noose.

11) In the afternoon of June 8, Complainant asked Andy Thomas, the electric room supervisor, for a transfer. Thomas arranged for a temporary, three-day transfer into Respondent's downstairs department.

12) Later in the week beginning June 8, Sherwood removed the noose from his wall on the advice of an ET representative.

13) On June 12, Complainant was reassigned to the electric room. That morning, Mike Jones, a Caucasian co-worker, directed comments towards Complainant in which he referred to himself as "poor white trash." That afternoon, Jones made comments about "gangbangers," made gestures Complainant believed to be gang signs, and made a remark Complainant believed was drug-related, all the time speaking and acting in a way that Complainant perceived to be an imitation of African-American males. These remarks and behavior were offensive to Complainant.

14) On June 12, Complainant went to ET after work and complained about the Henry noose incident and Jones' "poor white trash" remarks. Complainant did not complain to Sherwood because of her reasonable belief that it would do no good, based on his response to her complaint about Henry's noose and the noose in his office.

15) On June 15, a representative of ET telephoned Sherwood and told him of Complainant's complaints about the Henry noose incident and Jones' "poor white trash" remarks. Sherwood was upset because Complainant had not followed his directive to immediately notify him of any racial harassment, because he thought he had already taken care of the Henry noose incident, and because she had complained to ET. Sherwood asked ET to terminate Complainant's assignment to Respondent.

16) On June 16, ET terminated Complainant's assignment to Respondent based on Sherwood's request.

17) On June 19, Complainant told ET about Jones' "gangbanger" comments and imitation of African-American males. ET reported this to Sherwood between June 19 and June 24. Sherwood promptly investigated by interviewing Jones and his co-workers, who denied that the alleged incidents had occurred. Based on their denials, Sherwood concluded that Complainant's allegations were unfounded. Sherwood then held an employee meeting, at which he told employees again that Respondent had zero tolerance for racial harassment and that any harassment should be reported to him immediately.

18) Complainant experienced substantial mental suffering as a result of the Henry noose incident, her observation of Sherwood's noose, and Jones' remarks and behavior detailed in Ultimate Finding of Fact 12, and the termination of her assignment with Respondent.

19) Complainant suffered three weeks' lost wages as a result of the termination of her assignment with Respondent, but failed to mitigate her wage loss by declining ET's June 22, 1998, job offer described in Findings of Fact – The Merits 43 and 51.

### **CONCLUSIONS OF LAW**

1) At all times material herein, Respondent Servend International, Inc. dba Flomatic International was an employer subject to the provisions of ORS 659.010 to 659.110.

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

3) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the persons and subject matter herein.

4) ORS 659.030(1)(f) provides, in pertinent part:

“(1) For the purposes of ORS 659.010 to 659.110, \* \* \*, it is an unlawful employment practice:

“\* \* \* \* \*

“(f) For any employer \* \* \* to discharge \* \* \* any person because the person has opposed any practices forbidden by this section \* \* \*.”

Nye Sherwood requested termination of Complainant's assignment to Respondent in retaliation for her complaints of racial harassment to Employment Trends, and Complainant was discharged from Respondent's employment for that reason, constituting a violation of ORS 659.030(1)(f).

5) ORS 659.030(1)(b) provides, in pertinent part:

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

“(b) For an employer, because of an individual's race, \* \* \*, color \* \* \* to discriminate against such individual \* \* \* in terms, conditions or privileges of employment.”

OAR 839-005-0010(1) provides:

(1) Substantial evidence of intentional unlawful discrimination exists if the Civil Rights Division's investigation discovers such evidence as a reasonable person would accept as sufficient to support the following four elements:

"(a) The Respondent is a Respondent as defined by statute;

"(b) The Complainant is a member of a protected class;

"(c) The Complainant was harmed by an action of the Respondent; and

"(d) The Complainant's protected class was a reason for the Respondent's action."

OAR 839-005-0010(4) provides, in pertinent part:

"(4) Harassment in employment based on an employee's protected class is a type of intentional unlawful discrimination. \* \* \*

"(a) Conduct of a verbal or physical nature relating to protected classes other than sex is unlawful when:

"(A) Substantial evidence of the four elements of OAR 839-005-0010(1) is shown; and

"(B) Such conduct is sufficiently severe or pervasive to have the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment."

"\* \* \* \* \*

"(b) The standard for determining whether harassment is sufficiently severe or pervasive to create a hostile, intimidating or offensive working environment is whether a reasonable person in the circumstances of the complainant would so perceive it."

"\* \* \* \* \*

"(d) Harassment by Supervisor, No Tangible Employment Action: Where harassment by a supervisor with immediate or successively higher authority over the individual is found to have occurred but no tangible employment action was taken:

"(A) The employer is liable if the employer knew of the harassment unless the employer took immediate and appropriate corrective action.

"(B) The employer is liable if the employer should have known of the harassment. The Civil Rights Division will find that the employer should have known of the harassment unless the employer can demonstrate:

"(i) That the employer exercised reasonable care to prevent and correct promptly any harassing behavior; and

“(ii) That the complaining individual unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

“(e) Harassment by Coworkers or Agents: An employer is liable for harassment by any of the employer’s employees or agents who do not have immediate or successively higher authority over the complaining individual where the employer knew or should have known of the conduct, unless the employer took immediate and appropriate corrective action.”

Complainant’s race/color was not a reason for the June 2, 1998, Henry noose incident, and the Henry noose incident does not constitute a violation of ORS 659.030(1)(b). Complainant’s race/color was a reason for the June 12, 1998, “gangbanger” comments and related behavior by Jones; however, these comments and behavior were not severe or pervasive enough to have the purpose or effect of creating an intimidating, hostile or offensive working environment for a reasonable African American in the circumstances of Complainant and did not constitute a violation of ORS 659.030(1)(b).

Complainant’s race/color was not a reason for the existence of the full-sized noose in Sherwood’s office on June 8, 1998. Consequently, Sherwood’s noose did not constitute a violation of ORS 659.030(1)(b).

6) Pursuant to ORS 659.060(3) and by the terms of ORS 659.010(2), the Commissioner of the Bureau of Labor and Industries has the authority to issue a Cease and Desist order requiring Respondent: to refrain from any action that would jeopardize the rights of individuals protected by ORS 659.010 to 659.110, to perform any act or series of acts reasonably calculated to carry out the purposes of said statutes, to eliminate the effects of an unlawful practice found, and to protect the rights of the Complainant and other persons similarly situated.

## **OPINION**

## **INTRODUCTION**

In its Specific Charges, the Agency alleged that Respondent unlawfully discriminated against Complainant: (1) in terms and conditions of employment by subjecting her to racial harassment by coworkers and a supervisor, in violation of ORS 659.030(1)(b); and (2) by discharging her in retaliation for complaining of racial harassment, in violation of ORS 659.030(1)(f). The Agency sought \$5,000 in back pay and \$30,000 in mental suffering damages.

## **TERMS AND CONDITIONS OF EMPLOYMENT – RACIAL HARASSMENT**

### **A. The Henry noose incident.**

This incident occurred when Henry, a Caucasian co-worker of Complainant's, asked Hall, another Caucasian co-worker, to make a noose out of a short length of brown hemp string. Hall made a noose and threw it back to Henry, who put it on the neck of a water bottle on the table, looked at Complainant, who was sitting next to her, swung it, and said, "see, and it works, too." This act caused Complainant to "kind of fe[e]l" what her father had gone through while being dragged by the neck by a rope or chain in Mississippi a number of years earlier and upset her so much she had to leave her work area until she could gain control of her emotions. The noose incident upset Complainant so much she felt she could no longer work with Henry, and she cried during the hearing the first time she testified about it.

A prima facie case of co-worker harassment in this case consists of the following elements:

- (1) The Respondent is a Respondent as defined by statute [OAR 839-005-0010(1)(a)];
- (2) The Complainant is a member of a protected class [OAR 839-005-0010(1)(b)];
- (3) The Complainant was harmed by harassment directed at her by co-workers [OAR 839-005-0010(1)(c); OAR 839-005-0010(4)(e)];

(4) The Complainant's protected class was a reason for the co-worker harassment [OAR 839-005-0010(1)(d)];

(5) The harassment was sufficiently severe or pervasive to have the purpose or effect of unreasonably interfering with the Complainant's work performance or creating an intimidating, hostile or offensive working environment [OAR 839-005-0010(4)(a)(B)];

(6) The standard for determining whether harassment was sufficiently severe or pervasive to create a hostile, intimidating or offensive working environment is whether a reasonable African American in the circumstances of the Complainant would so perceive it. [OAR 839-005-0010(4)(b)];

(7) The Respondent knew or should have known of the harassment [OAR 839-005-0010(4)(e)].

The first and second elements of the Agency's prima facie case are undisputed, and the forum's analysis begins with the third element, whether or not Complainant was harmed.

1. Was Complainant harmed by Henry's noose?

Complainant's credible testimony established that she was offended by the noose incident and so upset that she had to leave her work station temporarily and felt she could no longer work with Henry, as evidenced by her subsequent requests to Sherwood for a transfer to a different department. This satisfies the "harm" requirement of OAR 839-005-0010(1)(c).

2. Was Complainant's race/color a reason for Henry's noose?

There was no direct evidence presented linking Henry's noose to Complainant's race/color. Circumstantial evidence indicating that Complainant's race/color may have been a reason for Henry's noose consisted of the following: (1) Although there were five or six other employees in the electric room at the time of the incident, Henry's use of the noose to swing the bottle and her related comment were directed at Complainant; (2) There is a cultural significance to a noose in race relations between Caucasians and African Americans<sup>6</sup>; and (3) Henry's credibility was suspect, casting doubt on her

assertion that Complainant's race/color was not a reason for the noose. Circumstantial evidence leading to a contrary inference included: (1) A preponderance of the evidence did not establish that Henry bore a racial animus towards African Americans or had ever engaged in any other racial harassment of African Americans; (2) Henry and Complainant had been friends at work until the Henry noose incident; (3) A preponderance of the evidence did not establish that Henry was aware of the cultural significance of a noose to African Americans in the United States; and (4) Henry was not aware that Complainant's father had been the victim of a noose incident.

Although the noose and Henry's behavior surrounding it were sufficient to cause Complainant, based on her specific circumstances, to reasonably conclude that her race/color were a reason for the noose and behavior, her conclusion is not supported by a preponderance of the evidence, and the Agency has failed to meet its burden of proof on this element of its prima facie case. Consequently, the Agency's claim regarding the Henry noose incident must fail.

**B. The Sherwood noose incident.**

While meeting with Sherwood on June 8 to discuss the Henry noose incident, Complainant observed a full-sized rope noose hanging on the wall in his office. She was shocked, but said nothing, concluding that there was no point in talking about Sherwood's noose because she had complained to him about Henry's noose both on June 5 and earlier that morning and her meeting with Sherwood involved that noose, yet Sherwood still had a full-sized noose hanging in his office. Sherwood's explanation, which the forum has accepted as credible, was that it had been hanging on his wall for several years as a macabre "suicide" joke, and that it had no racial significance to him until Complainant told him she found Henry's noose to be racially offensive. Sherwood took the noose down later that week, after he discussed it with an ET representative,

who advised him it was inappropriate to have a noose hanging in his office. Complainant never saw the noose again after her June 8 meeting with Sherwood.

In this case, a prima facie showing of harassment by a supervisor, with no tangible employment action, consists of the following elements:

- (1) The Respondent is a Respondent as defined by statute [OAR 839-005-0010(1)(a)];
- (2) The Complainant is a member of a protected class [OAR 839-005-0010(1)(b)];
- (3) The Complainant was harmed by harassment directed at her by a supervisor with immediate or successively higher authority over her [OAR 839-005-0010(1)(c); OAR 839-005-0010(4)(d)];
- (4) The Complainant's protected class was a reason for the supervisory harassment [OAR 839-005-0010(1)(d)];
- (5) The harassment was sufficiently severe or pervasive to have the purpose or effect of unreasonably interfering with the Complainant's work performance or creating an intimidating, hostile or offensive working environment [OAR 839-005-0010(4)(a)(B)];
- (6) The standard for determining whether harassment was sufficiently severe or pervasive to create a hostile, intimidating or offensive working environment is whether a reasonable African American in the circumstances of the Complainant would so perceive it. [OAR 839-005-0010(4)(b)];
- (7) The Respondent knew or should have known of the harassment [OAR 839-005-0010(4)(d)]

Again, the first two elements of the Agency's prima facie case are undisputed, and the forum's analysis begins with the third element, whether or not Complainant was harmed by Sherwood's noose.

1. Was Complainant harmed by Sherwood's noose?

Complainant observed Sherwood's full-sized rope in his office while meeting with him to discuss racial harassment she believed she had experienced from Henry's noose. Complainant was upset and crying, but was shocked and stopped crying when she noticed the noose. At that point, based on the presence of the noose while they were talking about another offensive noose, Complainant concluded that Sherwood

would not take any meaningful action about any future complaints of harassment. This emotional upset on Complainant's part satisfies the "harm" requirement of OAR 839-005-0010(1)(c).

2. Was Complainant's race/color a reason for Sherwood's noose?

Sherwood's original intention in hanging the noose in his office had nothing to do with Complainant's race/color. On June 5, he was put on notice that nooses were racially offensive to Complainant. No evidence was presented to establish that Sherwood was aware that a noose could have a racial significance before that date. Complainant saw the noose on June 8, then never saw it again. Later that week, Sherwood removed it from his office. Although the presence of Sherwood's noose was sufficient to cause Complainant, based on her specific circumstances, to reasonably conclude that her race/color was a reason for the noose, her conclusion is not supported by a preponderance of the evidence, and the Agency has failed to meet its burden of proof on this element of its prima facie case. Therefore, the Agency's claim regarding the Sherwood noose incident must fail.

C. Mike Jones "poor white trash" remarks.

On June 12, Complainant was reassigned to the electric room. On the morning of June 12, 1998, Mike Jones, a Caucasian co-worker, directed remarks referring to himself as "poor white trash" to Complainant, the only African American in the electric room, and asked her if she thought he was "poor white trash." At the time the remarks were made, Complainant perceived them as "harassment," but not as "racial discrimination." When Sherwood investigated this allegation, Jones admitted making the remarks and had no explanation for them. Sherwood concluded that Jones' remarks did not constitute racial harassment and counseled Jones that his assignment with Respondent might be ended if he made similar remarks again.

The forum evaluates this claim under the same standards as the Henry noose incident. Once more, the first two elements of the Agency's prima facie case are undisputed, and the forum's analysis begins with the third element, whether or not Complainant was harmed by Sherwood's noose.

1. Was Complainant harmed by Jones' remarks?

Based on Complainant's credible testimony that she felt "harassed," the forum concludes that she was harmed by Jones' remarks.

2. Were Jones' remarks based on Complainant's race/color?

Several facts give rise to an inference that Complainant's race/color was a reason for Jones' remarks. First, their subject matter was race/color, albeit Jones' race/color. Second, they were directed at Complainant, the only African American in the room. Third, Jones had no explanation for his remarks when questioned about them by Sherwood. Giving rise to the opposite inference are the facts that Jones' remarks were derogatory towards himself, not African Americans; Complainant did not believe at the time that they were directed at her because of her race<sup>7</sup>; and there was no testimony, credible or incredible, to shed light on Jones' state of mind when he made these remarks. Jones' remarks may have been intended to racially harass Complainant or may have been intended as self-deprecation. The Agency bears the burden of proving, by a preponderance of the evidence, that Complainant's race/color was a reason for Jones' remarks and has not met that burden in this instance.

**D. Mike Jones' "gangbanger" remarks.**

In the afternoon of June 12, the same day that Jones earlier made the "white trash" remarks, Jones made some comments in Complainant's presence about "gangbangers," made some gestures that Complainant believed were "gang signs," and commented "what you got on this bag," which Complainant interpreted as being related

to drug dealers. Complainant perceived that Jones was speaking and acting in a way that was intended to imitate African American males and was offended by these remarks. Complainant brought this behavior to ET's attention after Respondent terminated her assignment, and ET passed the complaint on to Sherwood. Sherwood interviewed Jones and his co-workers, all of whom denied that the behavior had occurred, and concluded that the incidents had not occurred. He then held an employee meeting to remind all employees of Respondent's "zero tolerance" policy and that employees needed to immediately report any incidents of discrimination or harassment to him.

The forum evaluates this claim under the same standards as the Henry noose incident.

1. Was Complainant harmed by Jones' behavior?

Complainant credibly testified that she was offended by Jones' conduct, which satisfies the prima facie element of harm.

2. Was Complainant's race/color a reason for Jones' behavior?

Complainant, who was the only African American present when Jones' behavior occurred, testified credibly to her perception and the basis for her perception that Jones was speaking and acting in a way intended to imitate African-American males and portray them as gang members and drug dealers. Complainant was also the only actual witness to the event who testified. In that testimony, she testified credibly that she believed his behavior was "racial." In defense, Respondent presented testimony by Sherwood that he had investigated Complainant's allegations and determined that they had not occurred. Based on an assessment of Complainant's credibility, the forum has already determined that Jones in fact engaged in the alleged behavior. Accordingly, Sherwood's determination carries no weight as to whether Jones' behavior was based

on Complainant's race/color. Based on Complainant's credible account of Jones' behavior and the fact that Complainant was the only African American present when the behavior occurred, the forum concludes that Jones' behavior was based on Complainant's race/color.

3. Was Jones' conduct sufficiently severe or pervasive to have created an intimidating, hostile and offensive working environment in the perception of a reasonable African American in the circumstances of Complainant?

The forum applies an objective standard to determine whether Jones' conduct was sufficiently severe or pervasive to have created an "intimidating, hostile or offensive working environment" for a "reasonable person in the circumstances of the Complainant," applying this standard in light of the "totality of the circumstances." *Fred Meyer*, 152 Oregon App 307, 309. This forum has previously recognized that "there is an inverse relationship between the requisite severity and pervasiveness of harassing conduct: as the severity of the conduct increases, the frequency of the conduct necessary to establish harassment decreases." *In the Matter of Chalet Restaurant and Bakery*, 10 BOLI 183, 195-96 (1992). The forum finds that Jones' conduct, standing alone, was not sufficiently severe to have created an intimidating, hostile or offensive working environment for a reasonable African American in the circumstances of the Complainant. Furthermore, because it was the only incident in which Complainant's race/color was a reason for the harassment, the forum also finds that the incident was not part of an environment or series of events in which harassment was sufficiently pervasive to have created an intimidating, hostile or offensive working environment for a reasonable African American in the circumstances of the Complainant.<sup>8</sup>

**DID SHERWOOD TERMINATE COMPLAINANT'S ASSIGNMENT WITH RESPONDENT IN RETALIATION FOR HER COMPLAINTS OF RACIAL HARASSMENT?**

ORS 659.030(1)(f) prohibits an employer from discharging an employee because the employee has opposed any practice forbidden by ORS Chapter 659. It gives an

employee the right to oppose what the employee reasonably believes to be an unlawful practice. As long as the employee's belief that discrimination has occurred is a reasonable one, the employee is protected against retaliation for complaining about the discrimination. *In the Matter of Pzazz Hair Designs*, 9 BOLI 240, 255 (1991).<sup>9</sup> The rationale is that appropriate opposition should not be chilled by fear of retaliation – even if, as a matter of fact or law, there is no violation.<sup>10</sup> The manner of opposition must be reasonable.<sup>11</sup>

In this case, Complainant was discharged by Respondent after she complained about the Henry noose incident and Jones' "white trash" remarks to ET, her joint employer. The forum has concluded that, at the time of her June 12 complaint to ET, Complainant had a reasonable subjective belief that her race/color was a reason for the Henry noose incident, although it is not clear from the evidence she believed at that time that the "poor white trash" comments were related to her race/color. Under the circumstances, Complainant reasonably believed, at the time of her complaint, that at least one of the incidents she was fired for complaining about constituted unlawful harassment.

When ET brought those complaints to the attention of Sherwood, he became upset and immediately instructed ET to terminate Complainant's assignment. Sherwood acknowledged that he terminated Complainant's assignment to Respondent in direct response to being informed of these complaints by ET, but stated that the termination was not based on the complaints but on the fact that Complainant's complaints to ET established that Complainant had been insubordinate in failing to complain immediately to him about Jones' remarks. Respondent's contention that it had the right to terminate Complainant for insubordination because she ignored Sherwood's directive to complain to him "immediately" if she experienced harassment does not hold

water. To begin with, Complainant had the absolute right to complain to ET, or anyone else for that matter, about racial harassment she experienced at Respondent's place of business.<sup>12</sup> Second, by failing to take appropriate corrective action after Complainant's first complaint in requiring that Complainant try to work things out herself with Henry, failing to adequately consider transferring her to another department where she did not have to work with Henry, and threatening to retaliate against Complainant by discharging her if Henry was discharged, Sherwood himself created a situation whereby Complainant reasonably believed that he would not take appropriate action with regard to any harassment complaint she brought to his attention and brought her next complaint to the attention of ET, instead of Sherwood. Third, ET was Complainant's joint employer and had instructed Complainant to bring any harassment to their attention. Fourth, a retaliatory motive was established on Sherwood's part after the Henry noose incident, when he told Complainant that he could tell ET about the incident and that ET might suggest ending both Henry's and Complainant's assignments to Respondent, noting that he would probably agree with that suggestion. Fifth, Complainant testified credibly that Liz Cole, the ET representative who formally terminated Complainant's assignment with Respondent, told her "You made the complaint; you have to go" in response to Complainant's query about why Sherwood wanted her discharged. Finally, Sherwood did not discharge Complainant after she complained to him about the Henry noose incident, but only after she went to ET, giving rise to the inference that she was terminated because she went "whistleblowing" to ET.

Based on all these reasons, the forum concludes that Respondent discharged Complainant based on her opposition to racial harassment in the workplace, violating ORS 659.030(1)(f) in the process.

## **DAMAGES**

### **A. Back Pay**

Where a respondent commits an unlawful employment practice under ORS chapter 659 by discharging a complainant, the forum is authorized to award the complainant back pay, absent unusual circumstances. *In the Matter of ARG Enterprises, Inc.*, 19 BOLI 116, 136 (2000). The purpose of a back pay award is to compensate a complainant for the loss of wages and benefits that the complainant would have received but for the respondent's unlawful discrimination. *In the Matter of Salem Construction Company, Inc.*, 12 BOLI 78, 90 (1993). A complainant in an employment discrimination case who seeks back pay is required to mitigate damages by using "reasonable diligence in finding other suitable employment." *ARG*, 19 BOLI at 136; *In the Matter of City of Portland*, 6 BOLI 203, 210-11 (1987). Where the forum determines that a back pay award is appropriate, a respondent bears the burden of proving that a complainant failed to mitigate his or her damages. *ARG*, 19 BOLI at 136; *In the Matter of Thomas Myers*, 15 BOLI 1, 16 (1996). To meet this burden, a respondent must prove that the complainant failed to use reasonable care and diligence in seeking employment and that jobs were available which, with reasonable diligence, the complainant could have discovered and for which the complainant was qualified. *ARG*, 19 BOLI at 137.

In this case, Complainant earned \$7.00 per hour while employed by Respondent. She was discharged on June 16, 1998. However, ET paid her wages in full through June 19, 1998. On June 15, and again on June 22, 1998, ET made Complainant a fulltime job offer to perform unskilled clerical work in ET's Halsey office. There was no evidence to indicate this was not a good faith job offer. The job was closer to Complainant's house than Respondent's facility, would have paid \$8.00 per hour, did

not require Complainant to dress any differently than she would have for assembly and production work, and would have only lasted until ET was able to successfully refer Complainant to another assembly and production job. However, Complainant declined ET's offer, as she did not want to perform clerical work and wanted to return to work for Respondent. ET's records show that Complainant could have been placed at an assembly and production job paying \$7.00 per hour as early as June 23, had she accepted ET's offer to perform clerical work in ET's office. Instead, Complainant was not at home when ET called her on June 23 with a job referral that would have paid \$7.00 per hour, and the job was filled by the time she returned ET's call. ET also called Complainant with job referrals on July 1 and July 10 for jobs that paid \$7.00 per hour, but Complainant was not available to take the calls.

ET continued to contact Complainant with job referrals, and placed her at Connor Formed Metal Products Assembly on July 14, 1998, in a fulltime job doing assembly and production that paid \$7.25 per hour. Complainant quit that job and her employment with ET on July 20, 1998, because she was upset at ET's handling of the situation with Respondent and ET's refusal to refer her back to Respondent. In November 1998, Complainant found another job.

Under these specific circumstances, the forum concludes that Complainant's refusal of ET's temporary good faith job offer at \$8.00 for performing unskilled clerical work constituted failure to use reasonable care and diligence in seeking employment. It also constitutes proof that a job was available which, with reasonable diligence, the complainant could have discovered and for which the complainant was qualified. Respondent has satisfied its burden of proving showing that Complainant failed to mitigate her back pay loss, and Complainant is not entitled to any damages for back pay.

## **B. Mental Suffering**

In determining mental distress awards, the commissioner considers a number of things, including the type of discriminatory conduct, and the duration, frequency, and pervasiveness of that conduct. *In the Matter of James Breslin*, 16 BOLI 200, 219 (1997), *aff'd without opinion, Breslin v. Bureau of Labor and Industries*, 158 Or App 247, 972 P2d 1234 (1999). Awards for mental suffering damages depend on the facts presented by each complainant. A complainant's testimony about the effects of a respondent's conduct, if believed, is sufficient to support a claim for mental suffering damages. *In the Matter of Sears, Roebuck and Company*, 18 BOLI 47, 77 (1999).

In this case, the forum's award of mental suffering damages is based on Complainant's retaliatory discharge. Complainant testified that she was upset over her discharge and felt it was unfair that she was fired, accurately perceiving that she had been fired because she complained about behavior that she reasonably believed to have been motivated by her race/color. She credibly testified that she felt upset about the discharge for a long time afterward and was still upset, to some degree, at the time of the hearing.

Considering all of these factors, the forum concludes that \$20,000 is an appropriate award of mental suffering damages. In formulating this award, the forum takes into consideration the fact that since July 1999, over a year after the discriminatory acts, Complainant has also experienced difficult circumstances caused by a collateral source that have caused extreme emotional distress.<sup>13</sup>

## **RESPONDENT'S REQUEST FOR A NEW HEARING**

As noted in Finding of Fact – Procedural 27, within the time period for filing exceptions, Respondent requested a new hearing with a new ALJ and the right to depose Complainant before the new hearing. Respondent claimed it had been denied

due process and severely prejudiced by the ALJ's denial of Respondent's request to depose Complainant before the hearing. Respondent argues that Complainant, unlike Respondent's witnesses, had no documentation of her allegations at the time of her testimony and "Consequently, there was no paper record that could contradict any of her testimony at the hearing." Respondent could have obtained any existing "paper record" by making an informal discovery request of the Agency prior to the hearing for documentation of the Complainant's allegations, then requesting a discovery order for these documents if the Agency refused to provide them. *Former OAR 839-050-0200(2)(c) and (3)*. There is no evidence in the record that Respondent ever requested these documents.

Furthermore, there is no automatic entitlement to conduct depositions in this administrative forum. The ALJ, "In his or her discretion \* \* \* may order discovery by a participant," and "The authority to order and control discovery rests with the administrative law judge." *Former OAR 839-050-0200(1) and (9)*. The ALJ initially granted Respondent's motion to take Complainant's deposition in that, "based on the materiality of Complainant's testimony \* \* \* a deposition was an appropriate means of discovery in this case." A finding of materiality is not synonymous with due process. The ALJ later rescinded his interim order because Complainant's private counsel was unavailable. Complainants have the right to have their private counsel present at depositions, and Respondent's argument that Complainant and Crowley, her private counsel, had the time to participate in a deposition based on the facts that Crowley was present at the hearing during Complainant's testimony and met with Complainant for 30-40 minutes the morning of September 14, 1999, is not compelling. Furthermore, the forum notes that Respondent did not serve Crowley with its motion to depose Complainant; the ALJ, by oversight, did not serve its August 31, 1999 interim order

granting Respondent's motion to depose Complainant on Crowley; and the Agency case presenter apparently also neglected to inform Crowley until September 13, 1999 of the pending deposition.

Respondent's request for a new hearing, with a new ALJ, is denied.

## **RESPONDENT'S EXCEPTIONS**

Respondent's exceptions fall into four categories. First, Respondent argues that there was no evidence that Complainant's allegations of racial harassment were because of her race. Second, Respondent challenges that its workplace was not a racially hostile work environment as a matter of law. Third, Respondent excepts that Complainant was discharged based on her failure to bring her complaints of harassment to Nye Sherwood, not in retaliation for making the complaints. Fourth, Respondent contends that the award for mental suffering is excessive.

### **A. Harassment "because of" race/racially hostile work environment.**

Respondent argues that the conduct of Henry, Sherwood, and Jones which the ALJ determined constituted racial harassment was in fact unrelated to Complainant's race and that there is "no evidence" supporting the ALJ's conclusion. The forum has reviewed the facts and the law and determined that Complainant's race/color was not a reason for the Henry or Sherwood noose incidents or the Mike Jones' "poor white trash" remarks and revised the Ultimate Findings of Fact, Conclusions of Law, Opinion, and Order to reflect that determination. The forum has also determined that, although Complainant's race/color was a reason for Jones' "gangbanger" comments, those comments were not sufficiently severe or pervasive to constitute unlawful discrimination and made corresponding revisions to the Conclusions of Law, Opinion, and Order.

### **B. Retaliatory discharge.**

Respondent's exception that Complainant was discharged based on her failure to bring her complaints of harassment to Nye Sherwood, not in retaliation for making the complaints, is not supported by the record. Respondent argues that the ALJ failed to focus on the Agency's burden of persuasion that Respondent's LNDR was pretextual. To the contrary, the proposed opinion articulates a number of specific reasons supporting the conclusion that Respondent's termination of Complainant was both pretextual and retaliatory. Respondent's exception is denied.

**C. Mental suffering damages.**

Respondent excepts to the ALJ's proposed \$30,000 award for mental suffering damages. Respondent argues that the ALJ gave insufficient weight to the traumatic circumstances Complainant was experiencing at the time of the hearing based on her husband's alleged criminal behavior towards her child and his threats of violence against Complainant. Respondent cites *A.L.P. Inc. v. Bureau of Labor and Industries*, 161 Or App 417 (1999), in which the commissioner awarded a complainant \$20,000 in mental suffering damages for more egregious harassment, as precedent for lowering the damage award to Complainant.

The forum disagrees with both of Respondent's contentions. First, the traumatic circumstances experienced by Complainant arose in July 1999, over a year after the date of the discriminatory acts. Complainant testified that she was upset over Respondent's discriminatory acts even up to the time of the hearing. Duration of a complainant's mental distress is a factor this forum considers in determining mental distress awards. *In the Matter of Vision Graphics and Publishing, Inc.*, 16 BOLI 21, 27 (1997). Even if the forum discounts Complainant's upset after July 1999, this still leaves thirteen months in which Complainant experienced mental suffering as a result of

Respondent's discriminatory act. In *A.L.P.*, the complainant's mental distress only lasted for two months.<sup>14</sup>

The commissioner is authorized to award complainants damages designed to eliminate the effects of any unlawful practice found. *ORS 659.010(2), ORS 659.060(3)*. In this case, a \$20,000 award for mental suffering damages is an appropriate exercise of that authority, based on the mental suffering testified to by Complainant that she experienced between June 16, 1998 and July 1999. The forum has reduced the ALJ's proposed award of \$30,000 for mental suffering damages to \$20,000 based on the determination that Complainant was not a victim of unlawful racial harassment.

### **THE AGENCY'S EXCEPTIONS**

The Agency excepts to the ALJ's conclusion that Complainant failed to mitigate her back pay loss, citing *In the Matter of Snyder Roofing & Sheet Metal, Inc.*, 11 BOLI 61 (1992) to support its position that Complainant was not required to accept ET's \$8.00 per hour clerical position because it was not "substantially equivalent" to the position she held prior to her unlawful termination. On this issue, *Snyder* is not helpful to the Agency, as it does not define "substantially equivalent" employment and merely stands for the proposition that a complainant who is unlawfully discharged is not required to go into business for himself in order to mitigate back pay loss. *Id.*, at 82-83.

The Agency also argues that ET's job offer was not in good faith, justifying Complainant's refusal to accept it. However, the Agency presented no evidence to show it was not a good faith offer or that Complainant perceived it was not a good faith offer. On the contrary, Complainant testified that she declined the job because she did not want to do clerical work and wanted to return to work for Respondent. Neither reason is an indicator she perceived bad faith on the part of ET.

Finally, the Agency contends that the ALJ based the determination that Complainant's refusal to accept ET's clerical job foreclosed her from a back pay award on the fact that, by declining the job, Complainant "missed an opportunity to be physically present on ET's premises when a job in her field became available." This is incorrect. Complainant's missed opportunity was merely a byproduct of her failure to accept ET's clerical job offer, not the basis for the ALJ's conclusion that she failed to use reasonable care in seeking employment. The forum takes issue with the Agency's assertion that "employment agencies could limit potential damages for their wayward clients, and possibly themselves, by offering a terminated employee a job scrubbing toilets, as long as it paid more than the employee's previous job." The determination of whether or not a Complainant has exercised reasonable care and diligence in seeking employment is dependent upon the facts of each case. The preponderance of the evidence in this case supports the conclusion that Complainant did not exercise reasonable care and diligence in mitigating her back pay loss.

### **ORDER**

NOW, THEREFORE, as authorized by ORS 659.010(2) and ORS 659.060(3), and in order to eliminate the effects of the unlawful practices found in violation of ORS 659.030(1)(f) and as payment of the damages awarded, Respondent SERVEND INTERNATIONAL, INC. is hereby ordered to:

- 1) Deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232-2162, a certified check payable to the Bureau of Labor and Industries in trust for Complainant LYNICE MORGAN, in the amount of TWENTY THOUSAND DOLLARS AND NO CENTS (\$20,000.00), representing compensation for mental suffering caused by Respondent's unlawful acts, plus interest at the legal rate on the sum of \$20,000.00 from the date of the final order in this case until paid.
- 2) Cease and desist from discriminating against any employee based upon opposition to any practices forbidden by ORS 659.030.

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<sup>1</sup> Exhibit X-1a is a copy of the Agency's Request for Hearing that was not present in the original hearings file at the time of hearing. Subsequently, the forum obtained a copy of that document from the Agency case presenter for inclusion as an administrative exhibit.

<sup>2</sup> Exhibit X-29 is a letter sent by facsimile from Respondent's counsel Murray to the ALJ, dated September 8, 1999, in which Murray responded to the Agency's request to cross-examine witnesses. See Finding of Fact – Procedural 17, *infra*.

<sup>3</sup> Exhibit X-30 is a letter Complainant's counsel Crowley sent directly by facsimile to the ALJ on September 13, 1999. See Finding of Fact – Procedural 19, *infra*.

<sup>4</sup> Although the record does not reflect what happened to the complaint against ET, the forum notes that joint employers, including temporary employment agencies such as ET, are also prohibited from discriminating.

<sup>5</sup> See Finding of Fact – The Merits 58, *supra*.

<sup>6</sup> See The Columbia Encyclopedia (5<sup>th</sup> ed. 1993) (“Between 1882, when reliable data was first collected, and 1968, when the crime had largely disappeared, there were at least 4730 lynchings in the United States, including some 3440 black men and women. Most of these were in the Reconstruction era South, where southern whites used lynching and other terror tactics to intimidate blacks into political and social submission. \* \* \* Most blacks were lynched for outspokenness, in the aftermath of race riots, and for other presumed offenses against whites.”) However, the forum also notes that the only evidence produced at hearing related to this was Complainant's testimony concerning the specific incident that occurred to her father in Mississippi before she was born.

<sup>7</sup> The forum notes that Complainant had changed her mind about the reason for Jones' remarks by the time she complained to ET on June 19 about the “gangbanger” remarks and had come to believe that her race/color was a reason for his remarks, apparently as a result of his subsequent “gangbanger” comments.

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<sup>8</sup> Compare *In the Matter of Auto Quencher*, 13 BOLI 14, 21-22 (1994) (During an African American's two week period of employment, his Caucasian supervisor stated that "there ain't nothing worse than a black assed nigger" and that "blacks had smaller brains than white people." The forum held that this behavior was sufficiently severe to create an offensive working environment for the complainant and to a reasonable person.)

<sup>9</sup> See also EEOC Compliance Manual, Section 8, Retaliation, p. 9. This document may be found on the Internet at [www.eeoc.gov/docs/retal.txt](http://www.eeoc.gov/docs/retal.txt) (visited February 18, 2000).

<sup>10</sup> See Lindeman and Grossman, *Employment Discrimination Law*, Third Edition, vol. 1, at 657 (1996).

<sup>11</sup> *EEOC Compliance Manual, Retaliation*, at p. 9.

<sup>12</sup> *Id.*, at p. 7.

<sup>13</sup> See Finding of Fact – The Merits, 57, *supra*.

<sup>14</sup> *In the Matter of A.L.P. Incorporated*, 15 BOLI 211, 223 (1997), *aff'd*, 161 Or App 417 (1999).