

In the Matter of

SOUTHERN OREGON SUBWAY, INC.

Case Nos. 21-03 and 22-03

Final Order of Commissioner Dan Gardner

Issued May 24, 2004

SYNOPSIS

Where the forum found that Respondent reduced Complainant's work hours by half, reduced her pay from a salary to an hourly rate, and hired another manager to replace her after she was absent from work due to a health condition covered under the Oregon Family Leave Act ("OFLA"), the forum concluded that Respondent failed to restore Complainant to her former management position, in violation of *former* ORS 659.484. The forum further found that Respondent demoted and ultimately terminated Complainant after she returned from OFLA leave because she invoked her right to be restored to the position she held when she began her OFLA leave, in violation of *former* and *current* OAR 839-009-0270. The forum ordered Respondent to pay Complainant \$28,590.29 in back wages and \$25,000 for mental suffering incurred as a result of Respondent's unlawful practices. *Former* ORS 659.484; *former* and *current* OAR 839-009-0270; *former* and *current* OAR 839-009-0320.

The above-entitled case came on regularly for hearing before Linda A. Lohr, designated as Administrative Law Judge ("ALJ") by Dan Gardner, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on September 24-26, 2003, at the Oregon Employment Department, Room 3, 119 N. Oakdale, Medford, Oregon.

Cynthia Domas, an employee of the Agency, represented the Bureau of Labor and Industries ("BOLI" or "the Agency"). Renee K. Dangelo ("Complainant") was present throughout the hearing and was not represented by counsel. P. David Ingalls, Attorney at Law, represented Southern Oregon Subway, Inc. ("Respondent"). Ada Rodgers was present throughout the hearing as Respondent's corporate representative.

In addition to Complainant, the Agency called as witnesses: Barbara Turner, former BOLI Senior Civil Rights Investigator; Josh Bergrud, Complainant's friend; Judy

Dangelo, Complainant's mother; Julie Milstead, former Respondent employee; and Shandell Morgan (telephonic), former Respondent employee.

Respondent called as witnesses: Renee K. Dangelo, Complainant; Paul Richard ("Dick") Hackstedde, Respondent CEO and majority shareholder; Jeff Hoxsey, Respondent Operations Manager; Ada Rodgers, Respondent Operations Director; and Blanca Meza (telephonic), former Respondent employee.

The forum received as evidence:

- a) Administrative exhibits X-1 through X-34 (generated prior to hearing) and X-35 through X-38 (submitted after hearing);
- b) Agency exhibits A-1 through A-28 (submitted prior to hearing) and A-29 and A-30 (submitted during hearing);
- c) Respondent exhibits R-1, R-11, R-16, R-18, R-24, R-25 (submitted prior to hearing) and R-27 through R-32 (submitted during hearing)

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

FINDINGS OF FACT – PROCEDURAL

1) On August 10, 2001, Complainant filed a verified complaint with the Agency's Civil Rights Division ("CRD") alleging she was the victim of the unlawful employment practices of Respondent (denied reinstatement and demoted). On March 1, 2002, Complainant filed a second complaint with the CRD alleging she was the victim of the unlawful employment practices of Respondent (terminated). After investigation and review, the CRD found substantial evidence of unlawful employment practices on the part of Respondent as to both complaints.

2) On May 19, 2003, the Agency submitted formal charges to the forum alleging that Respondent failed to restore Complainant to the position she held prior to using provisions of the Oregon Family Leave Act (“OFLA”) and demoted her from her previous management position to an hourly status, in violation of *former* ORS 659.484, *former* and *current* OAR 839-009-0270. The Agency further alleged that Respondent terminated Complainant because she used OFLA leave, in violation of *former* ORS 659.484; *former* and *current* OAR 839-009-0270; *former* and *current* OAR 839-009-0320. The Agency also requested a hearing.

3) On May 22, 2003, the forum served formal charges on Respondent together with the following: a) a Notice of Hearing setting forth August 5, 2003, in Medford, Oregon, as the date 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 June 6, 2003, Respondent, through counsel, timely filed an answer to the formal charges, denying the allegations of unlawful employment practices and alleging that “[a]ny actions taken by respondent with respect to complainant were taken for bona fide business reasons and were not motivated by any OFLA leave taken by complainant.”

5) On June 6, 2003, Respondent moved for a postponement of the hearing based upon Respondent’s counsel’s previously planned vacation. The Agency declined to take a position on Respondent’s request and the forum thereafter denied the request based upon Respondent’s failure to show good cause for postponement.

6) On June 12, 2003, the Agency moved for a protective order in response to Respondent's discovery request regarding Complainant's medical and psychological records and also requested that the ALJ conduct an *in camera* inspection of the records before releasing the documents to Respondent.

7) On June 16, 2003, Respondent's counsel submitted an affidavit in support of Respondent's request for a postponement. The ALJ reconsidered her ruling and granted the postponement based on Respondent's demonstration of good cause. The hearing was reset for September 23, 2003.

8) On June 19, 2003, 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 brief statement of the elements of the claim (for the Agency only); a brief statement of any defenses to the claim (for Respondent only); a statement of any agreed or stipulated facts; and any damage calculations (for the Agency only). The ALJ ordered the participants to submit the case summaries by September 12, 2003, and notified them of the possible sanctions for failure to comply with the case summary order.

9) On June 19, 2003, the ALJ issued a protective order addressing the classification, acquisition, and use of medical and psychological records produced through discovery during the course of the hearing.

10) On July 29, 2003, the ALJ released to Respondent unredacted copies of all medical records submitted by the Agency for the ALJ's *in camera* review on July 23, 2003.

11) On August 28, 2003, the Agency requested an extension of time to file case summaries. Respondent had no objection and the ALJ extended the filing time to September 16, 2003.

12) On August 29, 2003, the Agency filed a motion for a discovery order seeking certain documents. The Agency provided a statement describing the relevancy of the documents sought and further stating that the same documents and information had been requested on an informal basis and not provided. Respondent did not file a response to the Agency's motion.

13) On September 17, 2003, the forum granted the Agency's motion for discovery order and ordered Respondent to provide the documents sought by the Agency. The forum's order was served on the participants by facsimile transmission and regular mail.

14) Respondent and the Agency timely filed case summaries on September 17 and 18, 2003, respectively.

15) On September 18, 2003, the Agency requested cross-examination of the "preparers" of two of Respondent's exhibits.

16) On September 19, 2003, Respondent moved for sanctions against the Agency based on Respondent's perception that the Agency had not timely provided Respondent with its case summary. On the same date, the ALJ conducted a pre-hearing conference with Respondent's counsel and the Agency case presenter to address Respondent's motion and to clarify and rule on the Agency's request for cross-examination. During the conference, the ALJ granted the Agency's request to cross-exam certain persons and Respondent's subsequent request to produce those persons as witnesses in Respondent's case-in-chief. At the conclusion of the conference, the ALJ found the facts regarding the case summary receipt dates did not warrant sanctions against the Agency and denied Respondent's motion. The ALJ further found that due to the imminence of the hearing and the delay Respondent's counsel experienced in receiving the Agency's case summary, counsel's case preparation was impeded. After

the pre-hearing conference, the ALJ issued an interim order resetting the hearing date to September 24, 2003, at 1:00 p.m., "to afford Respondent equal preparation time." The ALJ served the participants with the interim order by facsimile transmission and regular mail.

17) On September 22, 2003, the Agency filed, by facsimile transmission and regular mail, an addendum to its case summary.

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

19) At the start of hearing, the Agency and Respondent stipulated to the following facts:

- a) At times material herein, Respondent was a covered employer under the Oregon Family Leave Act;
- b) At times material herein, Complainant was an eligible employee under the Oregon Family Leave Act;
- c) At times material herein, Complainant suffered a serious health condition and was entitled to use provisions of the Oregon Family Leave Act.

During the hearing, Respondent withdrew exhibits pertaining to Complainant's medical records.

20) At the conclusion of the hearing, the ALJ ordered the participants to submit written closing arguments to the forum and to each other no later than 5 p.m. on October 14, 2003, and any rebuttal arguments no later than 5 p.m. on October 20, 2003.

21) The Agency and Respondent timely submitted written closing arguments and rebuttal. The hearing record closed on October 20, 2003.

22) The ALJ issued a proposed order on April 15, 2004, that notified the participants they were entitled to file exceptions to the proposed order within ten days of

its issuance. The Agency did not file exceptions. Respondent filed an exception on April 22, 2004. Respondent's exception is discussed in the Opinion section of this Final Order.

FINDINGS OF FACT – THE MERITS

1) At times material herein, Respondent Southern Oregon Subway, Inc. was a corporation doing business in Oregon, engaged in the food service business and employed 25 or more persons in Oregon for each working day during each of 20 or more calendar workweeks in 2001.

2) At times material herein, Ada Rodgers was Respondent's Operations Director and Complainant's supervisor; Dick Hackstedde was Respondent's Chief Financial Officer, Chief Executive Officer, and majority shareholder; and Jeff Hoxsey was Respondent's Operations Manager.

3) Rodgers hired Complainant as a part time sandwich maker in Respondent's South Grants Pass ("SGP") store (store #11089) in or around February 2000. Complainant started at the minimum wage rate and worked approximately 20 hours per week. She received several pay increases and earned up to \$7.00 per hour as an hourly employee. She was told to wear a uniform that included a purple shirt. Respondent's managers wore striped shirts to distinguish them from the line staff. In her initial interview with Rodgers, Complainant requested Sundays off to attend church and Respondent accommodated her request.

4) On or about February 1, 2001, Rodgers promoted Complainant to the manager's position at the SGP store. When she became the manager, Complainant's pay rate changed from an hourly rate to a weekly salary of \$350. In May 2001, she received a salary increase to \$400 per week. Her work schedule was 7 a.m. to 3 p.m. or later if an employee failed to show up for work. Complainant generally worked 40-45 hours per week.

5) Complainant's management duties included opening and closing the store, hiring and firing employees, banking the revenues taken in each day, preparing daily paperwork, attending management meetings, overseeing daily operations, and assisting the sandwich makers with their prep work and bread baking. Rodgers told Complainant to wear a striped shirt as part of her uniform while she was manager.

6) Respondent's "Employee Handbook" states that employees must be in full uniform every time they work and describes specific uniform requirements in detail. The handbook also states: "Your Supervisor will give you the details of the uniform colors worn in your store and will explain how uniforms are allocated."

7) Complainant was happy to be promoted to the managerial position because it meant more pay and she liked the hours she worked. Her management training was "on-the-job." Rodgers approved the weekly schedules, but Complainant was able to adjust the schedule without Rodgers's approval and she was responsible for ensuring that the scheduled was covered. Rodgers advised her not to discipline employees in front of others and told her that if an employee was not performing well to remove the employee from the schedule or cut back on the employee's hours. When she was not scheduled to work, an assistant manager managed the store and if not the assistant manager, then whoever had the most seniority was in charge. While she was manager, Complainant hired three people: Jesse McBain, Shandell Morgan, and "Paul" (Naylor or Sapien).

8) Between May 26 and June 18, 2001, Complainant was absent from work to undergo and recover from an appendectomy. Complainant's medical condition was an OFLA covered condition and Complainant was eligible for OFLA leave.

9) Respondent employee Blanca Meza was promoted to a managerial position in September 2000 and thereafter regularly moved from store to store covering

for employees who were out on sick leave. In May 2001, she went from Respondent's "Delta Waters" store to fill in as manager of the SGP store while Complainant was out on OFLA covered leave. Respondent's payroll records show that Meza's last day at the SGP store was June 14, 2001, and on that last day she noted on her time card: "good luck beverly."

10) Respondent employee Beverly Bergen was the manager of the North Grants Pass ("NGP") store (store # 5992) when Respondent asked her to work in the SGP store. Respondent's payroll records show that Bergen began working regularly as a manager at the SGP store on June 14, 2001. The records also show that Bergen worked at the SGP store during the first two weeks that Complainant was out on OFLA covered leave – Bergen worked 6.15 hours on May 26, 9.14 hours on May 27, 6.07 hours on May 28, 3.24 hours on May 29, 8.81 hours on June 3 and .40 hours on June 4, 2001.

11) After Bergen left to manage the SGP store, Amanda Wood managed the NGP store beginning June 13, 2001, and continued as manager until April 23, 2002.

12) While she was on medical leave, Complainant called the store and Rodgers several times. Complainant's friend, Josh, took her in to the store two times per week "to see how things were going" when she was no longer bedridden. On one visit, she spoke with McBain, who told her that Bergen was the new manager and that he believed Complainant "was not coming back." She gave little credence to his statement until he later called her and told her he had quit his job because he did not like the change in management. She was surprised at that point and thought he must be telling the truth if he quit his job as a result. McBain does not appear on Respondent's payroll records after June 3, 2001.

13) At some point, Complainant submitted an employment application to Keith Brown Building Materials (“Keith Brown”) that was dated June 11, 2001. The application shows Complainant applied for a “courtesy clerk” position and was seeking “full-time” employment. She stated on the application that she was available for employment on June 12, 2001. In response to the question: “Do you have any commitments or agreements with another employer which might affect your employment here?” she checked the “No” box. She disclosed her employment with Respondent and stated that she was “still employed” in the section designated “reason for leaving.” In the section requiring “three references, not relatives or former employers,” Complainant listed “Ada Rodgers Subway District Manager” and listed Rodgers’s cell phone number. On the application’s last page, Complainant signed an affidavit certifying, among other things, that “the information contained in this application is true and complete” and dated it “June 11, 2001.”

14) Complainant’s cell phone records show phone calls made from Complainant’s cell phone to Rodgers’s cell phone number on May 16, May 28, June 11, and June 21, 2001.

15) On June 14, 2001, Complainant’s doctor released her to work effective June 18. The work release stated in pertinent part: “Renee Dangelo is now released for full work on 6/18/01. Restrictions: No heavy lifting over > 20 lbs x 2 wks from 6/18 – 7/2/01. Full release 7/3/01.”

16) Complainant brought her medical release to the SGP store on or about June 16, 2003, and talked to Bergen about returning to work. Bergen told Complainant there were no available hours for her. Sometime thereafter, Complainant reached Rodgers by telephone to discuss her return to work. Rodgers told Complainant that Bergen had told her Complainant’s medical release limited her work hours to 20 per

week. Complainant told Rodgers that the medical release restricted her from heavy lifting and that her work hours were not limited. Rodgers indicated she was relying on Bergen's rendition of the medical release and would pay Complainant \$10 per hour for 20 hours per week. Complainant later called Rodgers to protest the lack of hours and told Rodgers she thought that she should return to her management position. Rodgers responded by informing Complainant that her position had been filled.

17) On June 18, 2001, Complainant downloaded information pertaining to the OFLA provisions from the BOLI Website. Sometime thereafter, she gave the information to Rodgers and Hoxsey.

18) Sometime after her conversation with Rodgers, Complainant was placed on the weekly work schedule beginning June 21, 2001. Complainant was scheduled to work 18 hours during the week ending June 26, 2001, but worked only about 12 hours because Bergen asked her to wait until the store "got busy" before she started each scheduled shift. On her first day back at work, Complainant was given two purple shirts to wear instead of the striped manager's shirt and that was an indicator to her that she was a line staff person again rather than a manager.

19) On or about June 27, 2001, Complainant questioned Bergen about why she was scheduled to work fewer than 20 hours during the week ending July 3, 2001. Bergen told Complainant that she had faxed Complainant's medical release to Rodgers and that Rodgers agreed the release limited her work hours to 20 per week. Later in the evening while at work, Complainant found her medical release and made an extra copy for herself. The copy of Complainant's medical release received as an exhibit in the record shows it was faxed from the SGP store on June 18, 2001, at 2:51 p.m. While at the store's copy machine, Complainant retrieved a copy of the company newsletter, titled "Good Day Subway," from a nearby trash can. The newsletter was not dated, but

the “news” items included a blurb stating: “Welcome back Renee’ (Hope you are better after your surgery)” and another item stating: “Beverly has moved from North GP store to the South GP. Mandy has taken over the North store.” The last three sentences of the newsletter state: “DO YOU HAVE ANY NEWS ABOUT YOUR STORE? LET’S HEAR FROM YOU. FAX YOUR INFORMATION TO THE OFFICE IN CARE OF JANE OR BLONCA.”

20) On June 28, 2001, Bergen told Complainant by telephone that she was giving her a written warning for being uncooperative and unhelpful to her coworkers in the workplace. Later, Bergen gave Complainant a written “Employee Warning” that claimed she had committed “violations” on June 21 and June 24, 2003, the first two days Complainant was scheduled back to work, that amounted to “substandard work” and “insubordination,” and that Complainant was “uncooperative.” Bergen noted on the warning that the violations were Complainant’s “first.” Under “Employer’s Remarks” Bergen wrote: “baked off to [sic] much white & wheat, and didn’t do special breads, when asked question walks away, doesn’t help other employees, or said [sic] I don’t know.” Under “Corrective Action to Be Taken” Bergen wrote: “smile, change attitude about work and help other employees.” Bergen signed the warning on the “Manager’s Signature” line. The date on the warning is “6-26-01” with the number “8” written over the 6 in the number 26. Complainant did not sign the warning, but wrote a response, dated June 28, 2001, that stated:

“Beverly.

“When you can give me the name of someone or specific time and date I was ever unwilling to help any employee(s) as well as a specific time and date of my substandard work, insubordination, and uncooperativeness, I will sign this write up. As far as the bread goes, Crystal baked all the bread Sunday from the time she had come to work.

“Renee Dangelo”

21) During the week ending July 3, 2001, Complainant worked approximately 15 hours. On two of the four days she was scheduled to work, she was scheduled to work only three hours.

22) Complainant asked Rodgers for one or two days off between July 4 and July 8 to attend a previously scheduled July 4 celebration with her family on the coast. Rodgers told her that since business was slow she should go ahead and take the whole time off. Complainant was on vacation from July 4 through July 8, 2001.

23) On July 9, 2001, Complainant returned from her vacation and went in to pick up her paycheck. Bergen asked her to sign a typewritten statement dated June 20, 2001, that states: "Renee Dangelo [sic] has been advised that she will no longer be on salary effective as of June 20, 2001. She will be on Hourly wage at 8.89 Per Hour." Complainant refused to sign the statement and Bergen refused to give Complainant her paycheck. Complainant copied the statement and took it to the Bureau of Labor and Industries ("BOLI"). A BOLI representative gave her a printout of a Wage and Hour statute pertaining to regular paydays to give to her manager. When she returned to work, Bergen was not there so she gave it to Bergen the following Monday, July 13, 2001, and Bergen gave Complainant her paycheck. Complainant did not request any time off after July 9, 2001. At some point, Complainant placed a note on her copy of the typewritten statement that says: "July 9, 2001 Monday I went to Subway to pick up my paycheck, which I should have received on Friday, July 6. Beverly said she was told not to give it to me unless I signed this paper agreeing to accept \$8.89 per hour. I refused to sign it and she kept my check." Complainant also placed a note on a copy of the printout the BOLI representative gave her that states: "July 9, 01[,] Monday[,] When Beverly refused to give me my paycheck, I drove to Medford to the Bureau of Labor and Industries to talk to someone. The lady there told me by law Subway can't do that. She

gave me this printout and told me to show it to the manager at Subway. The manager had already left by the time I got back to Grants Pass. I went back on Friday, July 13, 01, and showed Beverly this printout and she gave me my check.”

24) After July 3, 2001, Complainant worked 4.22 hours on July 13, 2.36 hours on July 23, and 1.79 hours on July 24, 2001. On or about July 20, 2001, Complainant accepted employment with Keith Brown as a stock clerk. She understood that Keith Brown would work around her scheduled hours at Respondent. Complainant worked 6.75 hours at Keith Brown while still employed at Respondent’s.

25) On or about July 23, 2001, Bergen presented Complainant with the same typewritten statement that she asked Complainant to sign on July 9, 2001. Complainant once again refused to sign it. Complainant made another copy of the statement which included a handwritten note at the bottom that says: “Monday 7-9-01 Renee came in to get her check[.] [A]sked her to sign this, she said no. So, I am for her, she has been told & read this & took a copy.” The notation is signed: “Manager Beverly.” At the top of the page, Complainant wrote: “copied 7-23-01 2nd time she told me to sign this.” At some point, Complainant also attached a note referencing Bergen’s handwritten note, stating: “This note was written on the agreement letter the second time Beverly told me to sign it in order to get my paycheck. It’s very difficult to read and understand Beverly’s note. (In my opinion, before you can manage any type of business, you should be capable of at least constructing a complete and proper sentence.)”

26) On or about July 24, 2001, Bergen terminated Complainant.

27) During the Agency investigation into Complainant’s civil rights complaints, Hoxsey told the Agency investigator that Respondent had previously failed to document employee breaks and that the managers told all employees they were required to take breaks and document them. He also told the investigator that Bergen had told him

Complainant was refusing to sign the break sheets. Bergen told the investigator that everyone, including Bergen, was required to sign the break sheets. She also told the investigator that she had asked Complainant three or four times to sign the sheets but Complainant refused and Hoxsey had told her to terminate anyone who refused to sign the break sheets. Bergen told the investigator that a “woman from the Bureau of Labor and Industries” told her that “she found that people were getting their breaks but said [Respondent] could be fined for not documenting them.” The “break sheet” is actually a sign-up sheet designed to track an employee’s “time out” and “time in” while on a break. It includes columns for the employee’s name and the day and month of the break.

28) On April 15, 2002, the Agency investigator received an undated letter from Hackstedde explaining why Complainant was terminated. Hackstedde stated that:

“[Complainant’s] employment relationship ended with [Respondent] for her refusal to comply with our policies and procedures. Specifically, she refused to comply with our policy on rest/break periods for employees as required by State Statute.”

29) In a letter dated June 21, 2001, Agency Wage and Hour Division Compliance Specialist Lesley R. Laing advised Respondent, through Hackstedde and Hoxsey, of the following:

“At this time you must notify all of your location managers in writing that they must ensure that *every* employee *receives and takes* a rest period of at least 10 minutes duration for adults (15 minutes for minors under the age of 18) *as close to the middle of each four (4) hour period* (or major portion thereof) of work as possible. During such rest periods the employee must be relieved from *all* duties. The enclosed table will show the number of rest periods and meal periods required for varying lengths of shifts. Please send a copy of your notice to managers to this office, together with a list of the managers, and their locations, so notified.

“Please find enclosed an ‘Investigator’s Report and Employer Compliance Agreement,’ form WH-60B. It shows violations found in the course of this investigation. Please sign the report and pledge of future compliance.

“This investigation will be closed upon proof that you have notified managers of rest period requirements and your signed acknowledgement of violations found and pledge of future compliance. Please ensure these

items arrive in this office by **July 5, 2001**. However, please be advised that if *any* complaints are received in the future that employees in any of your locations are not receiving required rest periods, an investigation may ensue. Your history regarding this issue is on the record and may be considered as aggravating factors in any decision to impose civil penalties.”

Based on that letter, Hackstedde notified his managers in writing on July 3, 2001, of the break requirements discussed in Laing’s letter as follows:

“To all Managers

“Every employee receives and takes a rest period of at least 10 minute duration for everyone 18 and older. And 15 minutes for minors under the age of 18. During such rest periods the employee must be relieved from all duties. The new list shows the number of rest periods and meal periods required for varying lengths of shifts.

“Failure to comply with the above policy will result in disciplinary action up to and including termination of employment.

“Please notify Dick, Jeff or Ada if you do not understand this policy. Please sign if you have full understanding of the above policy.”

The letter included a table showing the number of breaks required for varying shifts and space for up to 16 signatures. The first copy of the letter that Respondent submitted as an exhibit showed 12 signatures and dates ranging from July 6 to July 18, 2001. All of the names show up as hourly employees in Respondent’s payroll records. The second copy Respondent submitted during the hearing also had 12 signatures but they are not dated. The names on that list include managers Blanca Meza, Beverly Bergen, and Amanda Wood. Complainant’s name does not appear on either copy. Complainant was not aware of the wage and hour investigation and did not know about the letter pertaining to break requirements until the civil rights investigation ensued. No one spoke to Complainant about breaks. Julie Milstead, who worked in the SGP store with Complainant, was an hourly employee and her name does not appear on either copy. Milstead worked for Respondent from 1996 until 2003 and was not asked to sign the letter pertaining to break requirements that was directed to “all managers.” Milstead

recalled documenting her breaks on break sheets three or four times. Milstead was not a manager.

30) None of Respondent's employees took OFLA leave between January 1, 2000, and December 31, 2001.

31) After Complainant was terminated, she went to work for Keith Brown full time until she left in November 2001 due to a seasonal lay-off. She received unemployment benefits thereafter and continued to apply for work. She accepted all employment she was offered and earned \$17,809.71 total from her different employment between June 20 and September 24, 2003, including those hours she worked after she returned to work for Respondent. Each interim job paid at or around minimum wage and did not offer 40-45 hour work weeks. At the time of hearing, Complainant had not found a job that was similar in hours and pay to the managerial position she held at Respondent's SGP store.

32) When she lost her managerial position at Respondent, Complainant was upset and suffered financial hardship. She had purchased various items based on her earnings as a manager and still owes \$400 on a car loan she owed to her grandmother and \$2,800 in back rent owed to her mother.

33) Complainant liked her job, particularly the income, and was "devastated" and "depressed" after she realized she was no longer a manager. She "moped" over the loss of hours and did not go out as much as she had in the past, but she continued to believe that "things would work out." A usually outgoing person, Complainant stayed home and slept after she was terminated rather than go out with her friends. She felt "depressed" for approximately six months following the change in her employment status. At the time of hearing, she continued to suffer some frustration and anxiety related to her lack of financial resources.

34) Complainant's overall demeanor during the hearing was sincere. She answered questions in a forthright manner, her rendition of key facts was believable and relatively consistent with her prior statements to the Agency investigator, and her testimony was supported by other credible evidence. Consequently, the forum finds her testimony on the key issues trustworthy. However, Respondent aptly points out particular problems in the record that are addressed in the opinion section of this order. Overall, Complainant was more believable than Respondent's witnesses and the forum has credited her testimony where it was corroborated or not refuted by other credible evidence.

35) Ada Rodgers was present throughout the hearing as Respondent's designated corporate representative and heard all of the testimony before she testified. After carefully observing her demeanor, the forum concluded that much of her testimony was influenced by or in reaction to what she heard rather than a straightforward recitation of what she knew or had observed. Additionally, her testimony was internally inconsistent, contradicted by other credible evidence, or simply not believable. For instance, she testified that "no one ever showed her" Complainant's medical release and that she relied solely on Bergen's representation that Complainant's work hours were medically restricted to 20 hours per week. Contrarily, she later testified that employee medical releases are routinely faxed from the stores to Respondent's corporate office and "put in a pile" on her desk for her perusal. Complainant's medical release indicates it was faxed from the SGP store on June 18, 2001, to an unidentified destination that, in the absence of evidence to the contrary, the forum infers was Respondent's corporate office. During her interview with the Agency investigator, closer in time to the events at issue, Rodgers stated that the first time she heard from Complainant after she called to say she was having surgery was when she brought in

her medical release. She also stated that she thought the medical release restricted Complainant's hours and could not recall when she learned *she* was in error. In further contrast, Rodgers insisted at hearing that she did not hear from Complainant after she left on medical leave, that her mother, not Complainant, called to say she was having surgery, and that the only time she spoke with Complainant was when Complainant asked for time off for the July 4 holiday. Not only does her testimony conflict with her earlier statements to the Agency investigator, it is further impaired by Complainant's cell phone records which show Complainant called Rodgers at least three times before she returned from her OFLA leave and one call lasted a full seven minutes. Overall, Rodgers's testimony was not reliable and the forum only credited it when it was corroborated by credible evidence.

36) Neither Jeff Hoxsey nor Dick Hackstedde had first hand knowledge of key facts. Hackstedde stated he did not spend much time in any of his stores and Hoxsey acknowledged that he was busy opening four new stores and had little time to spend in the SGP store during the relevant time period. What little they knew about Complainant's return to work or her termination was second or third hand from Rodgers whose information purportedly came from Bergen, who did not testify in this case.

Additionally, Hoxsey's testimony that Bergen was never the manager at the SGP store and that there was in fact no manager at the SGP store during the period Complainant was on OFLA leave, was contrary to every other witness's testimony, the documentary evidence, and his own prior statement to the Agency investigator. His testimony was self serving and unreliable and the forum credited it only where it was corroborated by credible evidence.

Also, Hackstedde first testified that Respondent's written break policy precipitated the implementation of a "break form" that employees were expected to sign

when they began and ended their breaks, and that Rodgers and Hoxsey told him Complainant refused to sign the break “forms.” He later insisted the break “policy” and break “form” were one and the same document when he realized Respondent’s position at hearing was that Complainant was terminated because she refused to sign the break policy. However, his original position statement to the Agency during its investigation is consistent with his initial testimony that Complainant was terminated because “she refused to comply with our policy on rest/break periods for employees as required by State Statute.” The forum finds the abrupt shift in his account of one of the key issues particularly suspect and has credited his testimony only where it was corroborated by credible evidence.

37) Blanca Meza’s telephonic testimony was not wholly credible. Her testimony that she covered for those employees who were out on sick leave, including Complainant, and that she left the SGP store about a week before Complainant returned from her OFLA leave was believable and consistent with Respondent’s payroll records. However, her statement that Bergen became manager of the SGP store in mid-July 2001 was contradicted by Respondent’s payroll records that show Bergen was intermittently managing the store as early as May 26, 2001, and on a regular full time basis as of June 14, 2001. Moreover, her testimony that she was not aware of the SGP store’s management status and that Rodgers never gave her any information about the manager situation is suspicious in light of the note she wrote on her time card on June 14, 2001, which was directed to Bergen and stated: “good luck, beverly.” Since Respondent’s payroll records show Bergen made the change to the SGP store on that date, it is more likely than not that Meza knew who the SGP store manager was at the time she left the SGP store in June 2001. On the other hand, Meza’s statement that Bergen was still managing the SGP store as late as July 2003 when Meza voluntarily

left Respondent's employ was unrefuted and the forum accepts it as fact. The forum credited Meza's testimony only where it was corroborated by credible evidence in the record.

38) Judy Dangelo was a credible witness despite her family relationship with Complainant. Her testimony was direct and responsive and not exaggerated in any way. Her recollection of events was clear, reasonably free of bias and not impeached. The forum credits her testimony in its entirety.

39) Despite his natural bias as Complainant's close friend, Josh Bergrud was a credible witness. He was honest about his lack of personal knowledge concerning certain key events and did not exaggerate those he observed. His testimony that Complainant appeared happy with her management position, that he drove her to the SGP store twice each week to check on things before she returned to work after her OFLA leave, and that "Jesse" had told Complainant that Respondent hired Bergen as the "new" manager and was going to quit "because he didn't get along with her" was completely credible and not impeached in any way. The forum credits his testimony in its entirety.

40) Julie Milstead's testimony was reasonably straightforward despite her nervous giggles. She readily acknowledged that she left her employment after Rodgers wrongly accused her of stealing money, but demonstrated no particular bias against Respondent by her demeanor or testimony. Her statement that she could not remember ever seeing a break policy and was not asked to sign one was credible and not refuted. The forum credits her testimony in its entirety.

41) Barbara Turner was a credible witness. She had a clear recollection of her interviews with Respondent employees and testified in a direct manner about her interviews with Bergen, Rodgers, Hoxsey, and Complainant. Turner confirmed that

Bergen and Rodgers stated during the interview that they “thought” Complainant’s medical release restricted her to only 20 hours per week. Bergen and Hoxsey also stated to Turner that a 20 pound lifting restriction would not prevent Complainant from performing her management duties. Additionally, Bergen told Turner that she continued to perform the management duties because Complainant did not “resume” her duties. Turner testified that her interview summaries accurately summarized the substance of her discussions with Complainant and Respondent’s managers. The forum credits her testimony in its entirety.

ULTIMATE FINDINGS OF FACT

1) At all material times, Respondent employed 25 or more persons in Oregon for each working day during each of 20 or more calendar workweeks in the year preceding Complainant’s OFLA leave.

2) Respondent employed Complainant as a sandwich maker in February 2000 and promoted her to manager of the SGP store on February 1, 2001.

3) Complainant worked more than an average of 25 hours per week during the 180 days preceding her OFLA leave.

4) On or about May 26, 2001, Complainant had an appendectomy that required her absence from work for more than three days and included ongoing treatment by a physician.

5) When she began her OFLA leave, Complainant was a manager receiving a weekly salary of \$400 and working 40 to 45 hours per week.

6) Before Complainant began her OFLA leave, she received a pay raise and had never received a written “employee warning” about her work performance.

7) While Complainant was on OFLA leave, Respondent filled Complainant’s management position with another employee, Beverly Bergen, who had previously

managed Respondent's NGP store. Respondent filled the NGP manager's position with another employee, Amanda Wood.

8) On June 16, 2001, Complainant presented Bergen with a doctor's note that released her to work on June 18, 2001, with a 20 pound lifting restriction that was effective until July 3, 2001, at which time Complainant would be released for full duty. Bergen told Complainant that she had no hours for her.

9) After complaining to Ada Rodgers, Respondent's Operations Director, Complainant was placed on the schedule for fewer than 20 hours per week.

10) After her first two days back on the job, Complainant was given her first written "employee warning" that claimed she performed substandard work and was insubordinate and uncooperative by failing to bake enough bread or help other employees.

11) Complainant's pay rate was changed from a salary to \$8.89 per hour after she returned from OFLA leave.

12) When Complainant refused to sign a document acknowledging the change in her pay schedule, Bergen refused to give Complainant her paycheck. After Complainant went to the Medford BOLI office and returned with information pertaining to wage and hour rules, Bergen gave Complainant her paycheck. Later, Bergen again asked Complainant to sign the statement acknowledging the change in her pay status and Complainant refused.

13) Respondent did not ask Complainant to sign a break policy memorandum that was directed to "all managers."

14) Bergen terminated Complainant on July 24, 2001, which was the last day Complainant worked.

15) After she was terminated, Complainant diligently looked for work and found alternative interim employment. She earned \$17,809.71 between June 18, 2001 (the date Complainant was entitled to be restored to the same or substantially equivalent hours that she worked when she began her OFLA leave), and September 24, 2003 (the hearing date).

16) From June 18, 2001, until the hearing date, Complainant lost wages totaling \$28,590.29 (\$400 per week x 116 weeks - \$17,809.71).

17) Complainant was upset and suffered financial distress, felt depressed, and was unable to engage in activities that she routinely engaged in before she was denied restoration to the position she held when she began her OFLA leave.

CONCLUSIONS OF LAW

1) At times material herein, Respondent was a covered employer as defined in *former* ORS 659.472(1). *See also former* ORS 659.470(1).

2) The actions, inaction, statements and motivations of Richard Hackstedde, Respondent's CEO and majority shareholder; Ada Rodgers, Respondent's Operations Director; and Jeff Hoxsey, Respondent's Operations Manager, properly are imputed to Respondent.

3) *Former* ORS 659.374(1) provides that "[a]ll employees of a covered employer are eligible to take leave for one of the purposes specified in [*former*] ORS 659.476(1)(b) to (d)" except in circumstances not applicable here. Complainant was an eligible employee.

4) The Commissioner of the Bureau of Labor and Industries has jurisdiction of the persons and of the subject matter herein and the authority to eliminate the effects of any unlawful employment practices found. *Former* ORS 659.492(2); *former* ORS 659.010 to 659.110; ORS 659A.780; ORS 659A.850(2) and ORS 659A.850(4).

5) Complainant required medical treatment for a period of time that constituted a serious health condition as defined in *former* and *current* OAR 839-009-0210(14)(d).

6) Complainant was entitled to be restored to the management position she held when her leave commenced on May 26, 2001, pursuant to *former* ORS 659.484. Complainant's management position still existed when she returned to work on June 18, 2001, but was filled by another employee who continued to fill the position after Complainant returned from OFLA leave. Respondent refused to return Complainant to the management position she held when her leave commenced, thereby violating *former* ORS 659.478 and committing an unlawful employment practice. *Former* ORS 659.492(1).

7) Respondent terminated Complainant in July 2001 because she invoked a protected right under the OFLA provisions, in violation of *former* and *current* OAR 839-009-0320(3).

OPINION

The Agency alleges in this case that Respondent failed to restore Complainant to her former management position upon her return from an OFLA qualified leave, demoted her upon her return, and subsequently terminated her because she invoked or utilized OFLA provisions. Respondent denies the allegations and asserts that Complainant voluntarily worked less hours, declined to perform her management duties, and was terminated because she refused to sign a policy related to breaks and meal periods.

RESTORATION TO PREVIOUS EMPLOYMENT POSITION – *FORMER* ORS 659.484

To establish a prima facie case that Respondent committed an unlawful employment practice by failing to restore Complainant to the position she held at the time her OFLA leave began, the Agency must prove: (1) Respondent was a covered

employer as defined in former ORS 659.470(1) and former ORS 659.472; (2) Complainant was an “eligible employee” for OFLA leave, *i.e.*, she was employed by a covered employer and worked for the employer an average of at least 25 hours per week for the 180 calendar days immediately preceding the date on which her OFLA began [former ORS 659.474; former OAR 839-009-0210(2)(b)]; (3) Complainant took OFLA leave to seek treatment for or recover from a serious health condition; and (4) Complainant attempted to return to work after taking OFLA leave and was denied or refused restoration to the position she held when the OFLA leave commenced. The participants stipulated to the first three elements and the remaining issue is whether Complainant attempted to return to work following her OFLA leave and was denied or refused restoration to the management position she held when the OFLA leave began.

Under the OFLA, eligible employees are entitled to take up to 12 weeks of leave each year and are guaranteed restoration to their employment position, if it still exists, after they have exercised their leave right. See *former* ORS 659.478; 659.484 and *current* ORS 659A.162; 659A.171. However, employees are not entitled to “[a]ny right, benefit or position of employment other than the rights, benefits and position that the employee would have been entitled to had the employee not taken the family leave.” *Id.*

The Oregon Court of Appeals views the issue this way:

“[T]he determination whether an employer has violated the reinstatement right of an employee under the [OFLA] requires a determination of the employment advantages that the employee would have enjoyed with the employer if she had not taken family leave. Those advantages must then be compared with the advantages that the employee actually enjoyed on her return to employment. If the employment advantages enjoyed by the employee on her return fall short of those that she would have enjoyed had she not taken family leave, then the employer has failed to restore the employee to her employment position as required by the [OFLA].”

Entrada Lodge, Inc. v. Bureau of Labor and Industries, 184 Or App 315, 56 P3d 444, 446 (2002). In this case, there is no dispute that Complainant held a management

position with all of the associated duties and benefits when she began her OFLA leave in May 2001. The participants also agree that Complainant's pre-OFLA leave management position entailed a 40 hour or more work week at a \$400 per week salary. Evidence shows and Respondent does not dispute that upon her return from OFLA leave Complainant was scheduled for less than 20 hours per week, did not perform the management duties she performed before her OFLA commenced, and was paid \$8.89 per hour, in contrast to the hours, responsibilities, and salary she enjoyed as a manager.

An employer's failure to restore an employee to the employee's pre-OFLA position creates a rebuttable presumption that the employer unlawfully refused to restore the employee to that position. *In the Matter of TJX Companies, Inc.*, 19 BOLI 97, 113 (1999). If the position still exists and the employee would not have otherwise been bumped or displaced if the employee had not taken leave, the employer rebuts the presumption "by proving that the employee asked not to be [restored] to his or her former position. Cf. OAR 839-009-0270(8) ('If an employee gives unequivocal notice of intent not to return to work, the employer's obligations under OFLA cease.')" *Id.* at 113.

In this case, Respondent's argument that Complainant did not want to be restored to her position is overcome by a preponderance of credible evidence to the contrary. Credible evidence establishes that Complainant was happy with her job, occasionally checked in on the store when she became mobile after her surgery, and immediately presented her medical release to Respondent upon receiving the go ahead to return to work. In contrast, Respondent acknowledges it had already established Bergen as the new manager of the SGP store and replaced Bergen with Amanda "Mandy" Wood at the NGP store. Respondent suggests that Bergen took over the management duties because Complainant was unwilling to work the hours required to

perform her responsibilities as manager. There is simply no evidence of any kind that supports Respondent's attempt to explain the change in management that occurred *prior to* Complainant's return from OFLA leave. Moreover, Respondent agrees that its alternative explanation for Complainant's reduced work hours is reliant upon Bergen and Rodgers's stubborn, but disingenuous, contention that Complainant's medical release dictated the reduction in her work hours. Neither explanation is corroborated by any evidence in the record.

Credible evidence establishes that when Complainant returned from her leave, Bergen denied her any work hours and she was placed on the schedule for 20 hours or less per week only after complaining to Rodgers. Complainant acknowledges that she requested certain days off for the July 4 holiday, but contrary to Respondent's contention, there is no evidence that Complainant ever requested additional time off or to work fewer hours or that she turned down any hours she was scheduled to work.

Respondent argues that Complainant's employment application to Keith Brown, dated one week before she returned from her OFLA leave, establishes Complainant's intent to abdicate her managerial position and belies her testimony that she later accepted the Keith Brown job because she was not receiving sufficient work hours from Respondent following her return from OFLA leave. Respondent's argument is unpersuasive for two reasons. First, Respondent did not know about the application until the discovery process prior to hearing and therefore could not have relied on that information when it assigned Bergen the SGP store management position.

Second, there is sufficient evidence to negate Respondent's theory that Complainant intended to leave Respondent's employ before she was medically released for work. Complainant credibly testified, and her testimony was consistent with her prior statement to the Agency investigator, that while she was still on OFLA leave

McBain told her that Bergen had replaced her permanently as manager. While she was at first skeptical, she believed his account when he later told her he had quit his job because of the change in management. Respondent's records confirm that McBain was no longer on the payroll after June 3, 2001. It is not a stretch to infer that Complainant reacted to the information by attempting to find replacement employment as quickly as possible in order to ensure a continued income to pay her bills.

The inference is further reinforced by Complainant's actions after the date of the application. Rather than give up on her position with Respondent, which would be consistent with Respondent's assertion that Complainant planned to leave her position, Complainant repeatedly took active steps to try to be fully reinstated to her management position. For instance, when her doctor released her to work, she immediately presented her medical release to Bergen who told her there were no hours available for her to work. Evidence shows that about that time, Complainant downloaded information pertaining to OFLA provisions from the BOLI Website and sometime thereafter gave the information to Rodgers and Hoxsey. After she complained, she was put on the schedule for the following week, but only for 18 hours. Unrefuted evidence shows that in her discussions with Bergen and Rodgers, and despite her requests that they re-examine her medical release, she was repeatedly told her medical release limited the hours she could work to 20 per week.

Finally, Complainant was available for and worked all of the hours she was given, even after she accepted employment with Keith Brown, which suggests that Complainant's motivation to apply elsewhere was for a reason other than a desire to relinquish her management position and take on an entry level stock clerk job with another employer. The forum therefore finds that the Keith Brown employment

application does not undercut the premises of Complainant's liability and damage claims or her credibility as Respondent contends.

Respondent failed to rebut the presumption that it unlawfully refused to restore Complainant to her management position by proving that Complainant voluntarily restricted her availability or refused to work the required hours. Instead, a preponderance of credible evidence establishes that the employment advantages Complainant enjoyed on her return to work following her OFLA leave fell far short of those she would have enjoyed had she not taken OFLA leave. The forum therefore concludes that Respondent failed to restore Complainant to her employment position as required by *former* ORS 659.484 and *current* ORS 659A.171.

RETALIATION – FORMER AND CURRENT OAR 839-009-0320(3)

Under OAR 839-009-0320(3), “[i]t is an unlawful employment practice for an employer to retaliate or in any way discriminate against any person with respect to hiring, tenure or any other term or condition of employment because the person has inquired about OFLA leave, submitted a request for OFLA leave or invoked any provision of the Oregon Family Leave Act.” *Former* and *current* OAR 839-009-0320(3).

To establish a prima facie case of retaliation under the rule, the Agency must show that: 1) Complainant invoked a protected right under the OFLA; 2) Respondent made an employment decision that adversely affected Complainant; and 3) there is a causal connection between the Complainant's protected OFLA activity and Respondent's adverse action. *In the Matter of Roseburg Forest Products*, 20 BOLI 8, 26-27 (2000).

Complainant invoked a protected right under the OFLA.

There is no dispute that Complainant was absent from work due to an OFLA qualifying medical condition or that upon her return to work she provided Respondent

with a physician's certificate fully releasing her to work, except for a 20 pound lifting restriction that terminated two weeks from the date of the release. At hearing, Respondent acknowledged that Complainant's management position did not require her to lift over 20 pounds. By reporting to work after her OFLA leave ended and providing a proper medical release that permitted her to resume her employment, Complainant "invoked" a protected right under the OFLA provisions, *i.e.*, her entitlement to be restored to the employment position she held when her leave commenced.

Respondent's adverse employment decision

There is no dispute that Complainant's terms and conditions of employment significantly changed after she returned from OFLA leave. Respondent reduced Complainant's hours by half and changed her pay method, effectively demoting her from her management position, and acknowledged that it terminated her employment slightly more than one month after she returned from OFLA leave.

Causal connection

A causal connection between Complainant's protected activity and Respondent's adverse employment decision may be shown by either direct or circumstantial evidence. In this case, there is no direct evidence that Respondent terminated Complainant because she invoked her right to be restored to the position she held when she commenced her OFLA leave. However, a *prima facie* case of retaliation is established if there is circumstantial evidence raising an inference of retaliation. In this case, the Agency established that Respondent terminated Complainant little more than a month after she returned to work following her OFLA leave. While the temporal relationship alone may not be sufficient to establish a causal connection, it raises an inference of retaliation, particularly where the Agency establishes that Respondent engaged in a pattern of retaliatory conduct immediately upon Complainant's return to work that

continued until Complainant was terminated. Credible evidence shows the retaliatory conduct began when Complainant returned to work with a medical release and Bergen told her there were no hours for her to work. After she complained to Rodgers, Complainant was scheduled to work 18 hours for the week beginning June 20, 2001. Thereafter, despite Complainant's repeated requests that Bergen and Rodgers re-examine her medical release, her work hours were limited to fewer than 20 per week until July 3, 2001, when her only physical limitation – a 20-pound lifting restriction - was lifted. Instead of increasing her work hours after the lifting restriction was lifted, evidence shows Complainant's hours were reduced even further and her pay was summarily changed from salary to hourly. Additionally, on her first day back on the job she was told to don the purple uniform that distinguished her from management personnel and Complainant determined that Bergen had indeed assumed the managerial functions she had performed prior to taking OFLA leave, including preparing the weekly schedules. Finally, within one week of her return, Complainant was given her first "employee warning." As manager of the SGP store, Bergen admonished Complainant for "substandard work" purportedly performed on her first and second day back on the job. Those facts coupled with the temporal proximity give rise to an inference sufficient to establish a causal nexus between Complainant's protected activity, *i.e.*, invoking her right to be restored to the position she held when she began her OFLA leave, and Respondent's adverse employment decision, *i.e.*, terminating Complainant shortly after she returned from OFLA leave.

In its answer, Respondent contended that it terminated Complainant solely because she "refused to sign and acknowledge Respondent's break policy." To support its contention, Respondent produced evidence that shows the Wage and Hour Division ("WHD") investigated Respondent's break practices and required it to notify its

managers of break requirements and to provide the WHD with proof the managers were so notified. Respondent also demonstrated that it provided the WHD with the required proof. Despite that evidence and for reasons stated below, the forum finds that Respondent's purported "business" reason for terminating Complainant is not believable.

First, Complainant credibly testified that she was not asked to sign the break policy and that she had not seen the written policy until sometime during the civil rights investigation. Her testimony was bolstered by Milstead's credible testimony that she also had not been made aware of the written break policy, but had seen a "break sheet" and documented her breaks three or four times during her employment. Additionally, Respondent asserts the policy was in effect July 3, 2001, and was discussed at a meeting on July 6, when Complainant was on an approved vacation. Evidence also shows that when she returned from her vacation, the only paper she was asked to sign was the one changing her salary status to hourly. Notably, Bergen memorialized Complainant's refusal to sign the pay status change, but made no mention that Complainant refused to sign the break policy which apparently had been signed by others on July 6 and 8, 2001.¹ The forum infers that Complainant was not asked to sign the break policy on that occasion because Bergen otherwise would have noted that refusal, given its purported importance. In fact, there is no documentation that shows Complainant was ever asked or refused to sign a policy that ultimately was the basis for her termination. In light of Respondent's penchant for documenting Complainant's other purported transgressions after she returned from her OFLA leave, the forum is not persuaded that Respondent unsuccessfully attempted to obtain Complainant's signature on its break policy.

Second, even if the forum believed that Respondent asked Complainant to sign the break policy and terminated her because she refused to do so, evidence shows that at least one employee, who had not invoked a right under the OFLA provisions, was not required to sign the break policy. That evidence creates a permissible inference that Respondent treated Complainant differently than her counterpart because she engaged in a protected activity and not because of a legitimate, non-discriminatory motive.

Finally, evidence shows Complainant's work was particularly scrutinized beginning the day she returned to work and resulted in an "employee warning" that had no substance. When Complainant asked for details supporting Respondent's complaints, Respondent could not or would not provide them. Instead, she was terminated shortly thereafter for a reason unrelated to the written warning, but equally suspect.

Based on a preponderance of the credible evidence, the forum finds that Respondent engaged in a pattern of retaliatory conduct against Complainant by reducing her work hours, changing her employment status from a salaried manager to an hourly line staff employee, subjecting her to greater scrutiny, and terminating her within one month upon her return from OFLA leave. The forum further finds that Respondent was not truthful about its reason for terminating Complainant and concludes therefore that its stated reason for terminating Complainant is pretext for discrimination based on Complainant's exercise of her rights under the OFLA provisions, in violation of *former* OAR 839-009-0320(3).

DAMAGES

Back Pay

It is well established in this forum that the purpose of back pay awards in employment discrimination is to compensate a complainant for the loss of wages the

complainant would have received but for the respondent's unlawful employment practices. *In the Matter of H. R. Satterfield*, 22 BOLI 198, 210 (2001). In its pleading, the Agency seeks \$35,000 based on the amount Complainant would have earned had she been restored to her managerial position when she returned from her OFLA leave, less interim earnings. Respondent argues that Complainant's Keith Brown job application was submitted while she was still employed and therefore negates any finding of back pay because it establishes Complainant's intent to leave her employment. The forum has resolved that issue elsewhere herein by determining that Complainant in no way manifested an intention to give up her managerial position for a lower paying stock clerk position, but rather made every reasonable effort to return to her former full time employment with Respondent to no avail. The forum concludes therefore that had Complainant not taken OFLA leave in May 2001, she would have continued working 40 to 45 hours earning at least \$400 per week as Respondent's manager for the duration of her employment. The forum's calculations of Complainant's lost wages include a deduction for interim earnings and other evidence in the record does not refute that amount. The forum therefore finds Respondent liable for Complainant's wage loss between June 18, 2001 and the date of hearing in the amount of \$28,590.29.

Expenses

The Agency asks this forum to compensate Complainant in the amount of \$3,200 for debts she incurred "but for Respondent's failure to reinstate her to her manager's position and then wrongfully terminating her altogether." This forum has consistently held that "economic loss to a complainant that is directly attributable to an unlawful practice may be recovered from respondents as a means to eliminate the effects of any unlawful practice found. * * * This includes actual expenses." *In the Matter of Strategic*

Investments of Oregon, Inc., 8 BOLI 227, 250 (1990). In this particular case, the forum knows of no recovery theory that permits it to find Respondent liable for the debts Complainant happened to incur while employed with Respondent. The forum has found that the change in Complainant's employment status caused Complainant financial hardship by making it difficult for Complainant to timely pay some of her bills, including her car loan and rent. However, Respondent's actions did not cause Complainant to incur those expenses. The forum finds therefore that Complainant's debts are not compensable "out of pocket expenses" as typically contemplated by this forum.

Mental Suffering

The Agency seeks \$25,000 to compensate Complainant for the mental suffering she experienced due to Respondent's unlawful discrimination. The forum has concluded that Respondent failed to restore Complainant to the managerial position she held when her OFLA leave began, subjected her to discriminatory working conditions, and subsequently terminated her from her employment because she was absent due to OFLA leave. Complainant is therefore entitled to compensation for the mental suffering she experienced as a result of Respondent's unlawful practices.

In determining a mental suffering award, the commissioner considers the type of discriminatory conduct, and the duration, frequency, and pervasiveness of the conduct. *In the Matter of Barrett Business Services*, 22 BOLI 77, 96 (2001). The actual amount depends on the facts presented by each complainant. A complainant's testimony, if believed, is sufficient to support a claim for mental suffering damages. *Id.* at 96. an

In this case, Complainant's testimony that she was angry, upset, and tearful when she realized her hours were reduced and that she was no longer part of management was believable. Although credible witness testimony confirmed that she felt "depressed" due to Respondent's unlawful actions, it was short lived and did not

inhibit her ability to look for and secure employment for various periods during and after her employment with Respondent. Her concern about the financial effects of the change in her employment was longer term and evidence shows that none of the interim jobs she held compared to her pre-OFLA leave management position.

This forum has consistently held that financial insecurity and anxiety caused by a respondent's unlawful practices is compensable. See, e.g., *In the Matter of Entrada Lodge, Inc.*, 24 BOLI 125, 155 (2003), *amended final order on remand*. In the *Entrada Lodge* case, the forum awarded the complainant \$15,000 in mental suffering damages based on facts that showed she was suffering a heightened stress level for a short duration "which manifested itself in the form of Complainant being very worried and scared, and crying frequently" because she was not scheduled for any hours during the first two and one half weeks after she "attempted to return to work, further exacerbating her family's financial distress." In that case, the complainant was able to obtain equivalent employment within a short period. In contrast, Complainant mitigated her damages by seeking and accepting available interim employment, but did not find work equivalent to the same hours or pay as her previous management position. The forum finds that as of the hearing date, Complainant continued to suffer financial insecurity from Respondent's failure to restore her to her pre-OFLA leave employment and that \$25,000 is an appropriate award for Complainant's mental suffering as a result of Respondent's unlawful practices found herein.

RESPONDENT'S EXCEPTION

Respondent correctly points out that the proposed order incorrectly "assesses interest on the entire amount of lost wages from the commencement of the period in which wages were lost" and that the "result of this order would be to over compensate complainant by awarding her interest on wages before the right to receive wages

accrued.” The Order below has been corrected to reflect the date that interest properly accrues.

ORDER

NOW, THEREFORE, as authorized by ORS 659A.850(2) and ORS 659A.850(4), to eliminate the effect of Respondent’s unlawful employment practices, and as payment of the damages assessed for its violation of *former* ORS 659.478(1), the Commissioner of the Bureau of Labor and Industries hereby orders **Southern Oregon Subway, Inc.** 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 Renee Deangelo** in the amount of:
 - a) TWENTY EIGHT THOUSAND FIVE HUNDRED NINETY DOLLARS AND TWENTY NINE CENTS (\$28,590.29), less appropriate lawful deductions, representing wages Complainant lost from June 18, 2001, until September 24, 2003, as a result of Respondent’s unlawful employment practices; plus
 - b) Interest at the legal rate on the sum of \$28,590.29 from September 24, 2003, until paid; plus
 - c) TWENTY FIVE THOUSAND DOLLARS (\$25,000), representing compensatory damages for the mental suffering Complainant experienced as a result of Respondent’s unlawful employment practices; plus
 - d) Interest at the legal rate on the sum of \$25,000 from the date of the final order until paid.
- 2) Cease and desist from discriminating against any employee in tenure of employment based upon the employee having invoked or utilized Oregon Family Leave Act provisions.

ⁱ See Proposed Finding of Fact – The Merits 25.