

In the Matter of
Spud Cellar Deli, Inc.
Case Nos. 21-08 & 22-08

Final Order of Commissioner Brad Avakian

Issued June 14, 2010

SYNOPSIS

The Agency alleged that Respondent, through its male president, sexually harassed two female complainants. The Agency further alleged that Respondent retaliated against one complainant by reducing her work hours after she complained of the harassment. Finally, the Agency alleged that both complainants were constructively discharged based on their sex. The Commissioner found that one complainant was subjected to sexual harassment based on “tangible employment action” and “hostile work environment” theories of sexual harassment and constructively discharged because of her sex, while the other complainant was subjected to sexual harassment based on a “hostile work environment” theory of sexual harassment but not constructively discharged or a victim of retaliation. The Commissioner awarded \$309.58 in back pay and \$10,000 in damages for emotional distress damages to the first complainant and \$5,000 in emotional distress damages to the second complainant. ORS 659A.030, OAR 839-005-0010, OAR 839-005-0021, OAR 839-005-0030, OAR 839-005-0035.

The above-entitled case came on regularly for hearing before Linda A. Lohr, designated as Administrative Law Judge (“ALJ”) by Brad Avakian, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on February 18-20, 2009, in the Oregon Employment Department conference room, Suite 105, located at 700 Union Street, The Dalles, Oregon.

Case presenter Jeffrey C. Burgess, an Agency employee, represented the Bureau of Labor and Industries (“BOLI” or “Agency”). Miriam Ruiz-Najera and Simone D. Brincken (“Complainants”) were present throughout the hearing and were not represented by counsel. Attorney Jennifer L. Bouman-Steagall represented Spud Cellar Deli, Inc. (“Respondent”). Gerald Huston, Respondent’s corporate president, was present throughout the hearing as a corporate representative.

The Agency called as witnesses: Susan Moxley, Senior Investigator, BOLI Civil Rights Division; Complainants; Shawna Moss, police detective, The Dalles Police Department; Amanda Feriante, Respondent's former employee; Brandon Hoover, Respondent's former employee; Marilyn Roth, Respondent's landlord and publisher of The Dalles Chronicle newspaper; and Gino Feriante, Amanda Feriante's father.

Respondent called as witnesses: Jim Perneti, free lance photographer; Adam Bradley, general manager, Staples; Carol Huston, Gerald Huston's wife; Hewitt Hillis, heating and electrical contractor, Oregon Equipment Company; Gerald Huston, Spud Cellar Deli, Inc. president and owner; Christina Harris, Respondent's former employee; and Tammy Kindrick, Respondent's current employee.

The forum received as evidence:

- a) Administrative exhibits X-1 through X-16;
- b) Agency exhibits A-1 through A-10 (filed with the Agency's case summary), A-11 through A-13 (submitted during the hearing).
- c) Respondent exhibits R-1 through R-6 (filed with Respondent's case summary), R-7 through R-9 (submitted during the hearing).

Having fully considered the entire record in this matter, I, Brad Avakian, 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 or about February 3, 2006, Complainant Miriam Ruiz-Najera ("Complainant Ruiz-Najera") filed a verified complaint with the Agency's Civil Rights Division ("CRD") alleging Gerald Huston, Respondent's corporate president, subjected her to discriminatory working conditions, sexually harassed her, and failed to provide a workplace free from sexual harassment in that he allegedly 1) touched her thigh; 2)

called her “muchacha caliente” which means “horny girl” in Spanish; 3) made comments about other females in her presence, such as, “Look at her boobs”; and 4) cut a hole in the wall of the women’s bathroom “so he could view women in the bathroom.” Complainant further alleged Respondent retaliated against her by cutting her work hours for reporting sexual harassment and constructively discharged her because she filed a police report against Respondent for “cutting a hole in the wall of the women’s bathroom so that he could look at women in the bathroom.” After investigation and review, the CRD found substantial evidence supporting some of Ruiz-Najera’s allegations.

2) On or about May 9, 2006, Complainant Simone D. Brincken (“Complainant Brincken”) filed a verified complaint with the Agency’s Civil Rights Division (“CRD”) alleging Gerald Huston, Respondent’s corporate president, put his arm around her and asked if he could kiss her on the lips and that she said “no” and asked him to stop. She further alleged that Huston made unwelcome and offensive comments to at least five other female employees and that she was forced to quit as a result of the “sexually hostile environment” to which she was subjected. After investigation and review, the CRD found substantial evidence supporting Brincken’s allegations.

3) On October 28, 2008, the Agency filed formal charges against Respondent, alleging that Gerald Huston, Respondent’s corporate president, knowingly and purposely subjected Complainant Ruiz-Najera and other female employees to unwelcome sexual advances, sexual comments, offensive touching, and other conduct of a sexual nature,ⁱ that the conduct was directed toward Ruiz-Najera because of her gender, and that the conduct was implicitly made a term or condition of employment, or was used as the basis for employment decisions affecting Ruiz-Najera, including her work hours, her discharge and the denial of the privileges of employment. Additionally

or alternatively, the Agency alleged the conduct, both verbal and physical, was sufficiently severe or pervasive to have the purpose or effect of unreasonably interfering with Ruiz-Najera's work performance, thereby creating a hostile, intimidating or offensive working environment. The Agency further alleged Huston was Respondent's owner and president and of sufficient rank to be Respondent's proxy and, as such, Respondent is liable for the alleged conduct. The Agency also alleged Respondent retaliated against Ruiz-Najera by cutting her work hours because she made a police report against Respondent to The Dalles Police Department. The Agency alleged Respondent intentionally created or maintained discriminatory working conditions related to Ruiz-Najera's gender, that a reasonable person in Ruiz-Najera's circumstances would have found the working conditions so intolerable that she would have resigned because of them, and that Ruiz-Najera did not return to work as a result of those conditions. The Agency further alleged Respondent desired to cause Ruiz-Najera to leave her employment, or knew or should have known that she was certain, or substantially certain, to leave her employment as a result of the allegedly intolerable working conditions, thereby constructively discharging Ruiz-Najera. Along with the formal charges, the Agency filed a request for hearing.

4) On October 29, 2008, the Hearings Unit issued a Notice of Hearing stating the hearing would commence at 9:00 a.m. on January 13, 2009. With the Notice of Hearing, the forum included the formal charges, a language notice, a Servicemembers Civil Relief Act notification, and copies of the Summary of Contested Case Rights and Procedures and the Contested Case Hearing Rules, OAR 839-050-0000 to 839-050-0440.

5) On October 28, 2008, the Agency filed formal charges against Respondent, alleging Gerald Huston, Respondent's corporate president, knowingly and

purposely subjected Complainant Brincken and other female employees to unwelcome sexual advances, sexual comments, offensive touching, and other inappropriate conduct of a sexual nature, that the conduct was directed toward Brincken because of her gender, and that the conduct was implicitly made a term or condition of employment, or was used as the basis for employment decisions affecting Brincken, including her discharge and the denial of the privileges of employment. Additionally or alternatively, the Agency alleged that the conduct, both verbal and physical, was sufficiently severe or pervasive to have the purpose or effect of unreasonably interfering with Brincken's work performance, thereby creating a hostile, intimidating or offensive working environment. The Agency further alleged that Huston was Respondent's owner and president and of sufficient rank to be Respondent's proxy and, as such, Respondent is liable for the alleged conduct. The Agency also alleged Respondent intentionally created or maintained discriminatory working conditions related to Brincken's gender, that a reasonable person in Brincken's circumstances would have found the working conditions so intolerable that she would have resigned because of them, and that Brincken did not return to work as a result of those conditions. The Agency further alleged Respondent desired to cause Brincken to leave her employment, or knew or should have known that she was certain, or substantially certain, to leave her employment as a result of the allegedly intolerable working conditions, and, therefore, constructively discharged Brincken. Along with the formal charges, the Agency filed a request for hearing.

6) On October 29, 2008, the Hearings Unit issued a Notice of Hearing in the matter of Complainant Ruiz-Najera stating that the hearing would commence at 9:00 a.m. on January 13, 2009. On October 29, 2009, the Hearings Unit also issued a Notice of Hearing in the matter of Complainant Brincken stating that the hearing would

commence at 9:00 a.m. on January 14, 2009. With the Notice of Hearing, the forum included the formal charges, a language notice, a Servicemembers Civil Relief Act notification, and copies of the Summary of Contested Case Rights and Procedures and the Contested Case Hearing Rules, OAR 839-050-0000 to 839-050-0440.

7) On or about October 30, 2008, Respondent was served with both sets of formal charges and the respective notices of hearing.

8) On October 31, 2009, the Agency filed a motion to consolidate the two cases, citing questions of fact and law common to both cases. Respondent did not respond to the motion. On November 12, 2008, the ALJ issued an interim order that granted the Agency's motion and reset the hearing to begin at 9 a.m. on January 13, 2009.

9) Respondent timely filed an answer to the formal charges involving Complainant Ruiz-Najera. In its answer, Respondent admitted employing Ruiz-Najera during the period alleged and that Ruiz-Najera made a report to The Dalles Police Department, but denied that Ruiz-Najera was subjected to unwelcome or offensive sexual conduct, that she was retaliated against, or constructively discharged because she opposed the alleged conduct or filed a police report. Additionally, Respondent alleged six affirmative defenses.

10) Respondent timely filed an answer to the formal charges involving Complainant Brincken. In its answer, Respondent admitted employing Brincken during the period alleged and that Respondent told Brincken that some other employees had complained about him, but denied that Brincken was subjected to unwelcome or offensive sexual conduct. Respondent admitted Brincken quit her employment, but denied that she was constructively discharged because she opposed the alleged sexual conduct. Additionally, Respondent alleged six affirmative defenses.

11) On December 19, 2008, the ALJ ordered the Agency and Respondent each to submit a case summary for each case that included: a list of all persons to be called as witnesses; identification and copies of all documents to be offered into evidence; and, for the Agency only, a brief statement of the elements of the claim and any wage and penalty calculations. The ALJ ordered the participants to submit their case summaries by January 5, 2009, and notified them of the possible sanctions for failure to comply with the case summary order.

12) On December 31, 2008, the Agency moved for a postponement of the hearing and an extension of time to file case summaries. The Agency's motion was made on the ground that Respondent's counsel had been traveling out of state due to a death in her family and was unable to adequately prepare for hearing. Respondent did not oppose the motion and the Agency stated that the motion was made "as a courtesy" to counsel and Respondent. On January 7, 2009, the ALJ granted the Agency's motion and extended the due date for filing case summaries. The hearing was rescheduled to commence on February 18, 2009, and the case summary deadline was extended to February 6, 2009.

13) The Agency and Respondent timely submitted case summaries.

14) At the start of hearing, the ALJ verbally informed the participants of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

15) The ALJ issued a proposed order on December 18, 2009, that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. Upon the Agency's motion, the participants were granted a 90-day extension of time to file exceptions. The Agency timely filed exceptions on April 8, 2010, that were primarily related to the proposed order's findings of witness credibility.

In response to those exceptions, the entire record has been reviewed and changes have been made throughout this Final Order.

FINDINGS OF FACT – THE MERITS

1) At times material, Respondent Spud Cellar Deli, Inc. (“Spud”) was a domestic corporation operating a restaurant in The Dalles, Oregon, under the assumed business name of Spud Cellar Deli (“Spud”).

2) At times material, Gerald “Jerry” Huston, a male, was Respondent’s owner and president.

3) Huston opened Spud on or about April 3, 2005. Initially, Huston spent much of his time overseeing the kitchen. The recipes were his own and he closely watched how the employees prepared the recipes, how they plated the food, and how promptly they served the food to the customers. He also operated the cash register and helped bus tables, also managed the day to day operations, including taking inventory, ordering groceries, and doing the scheduling, and did the bookkeeping and handled the advertising and promotions. Some employees perceived Huston as being “in the way” and always “near” them all the time. Huston continues to run the deli in the same manner and, except for adding an enclosed lottery concession and moving some kitchen fixtures, the space Spud occupies has not changed significantly.

4) Spud has a small windowless office in the back, but Huston, who is claustrophobic, prefers to conduct his business from a dining table just outside the kitchen area near the back door (“Huston’s table”). Huston can see part of the kitchen operations through a pass-through window between the kitchen and dining area. The kitchen area is small and, among other things, includes a sandwich preparation counter, a refrigerator, a utility rack, a freezer, a hand sink, and a table with soup pots. The distance between the sandwich preparation counter and the utility rack on the opposite side is approximately three feet eight inches. The distance between the sandwich

preparation counter and everything else on the opposite side is less than three feet eight inches. When Spud first opened, a 48 inch stainless steel work table with a meat slicer stood where the utility rack now stands and the kitchen was “very cluttered.” Two people could not work in the kitchen comfortably and employees tended to bump into each other while working in the kitchen.

5) The dishwashing area is next to the freezer and has three sinks for washing, rinsing, and bleaching the dishes. Dirty dishes are taken to the sink for washing after the tables are cleared. The sinks have been in the same place “since day one.” Other than some minor changes, the kitchen area is about the same size as it was when Spud opened in 2005.

6) To use the restrooms, customers must go through a door at the back of Spud’s dining area. That door leads to a hallway in which the restrooms are located next to each other on the left hand side of the hallway, with the men’s restroom closest to the door leading from the dining area into the hallway. The women’s restroom is next to another door at the end of the hallway that opens into a “giant unfinished storage room” owned by the local newspaper, The Dalles Chronicle. The Chronicle’s office is on the other side of the storage room. Both restrooms have identical vents located approximately 10 to 12 inches from the floor in the side wall of each restroom. The vents are approximately 12 by 12 inches square and there is no ducting or wiring behind the vent covers. Except for the paint color in the men’s restroom, the restrooms, vents and storage room have not changed since 2002. The vent cover in the women’s restroom covers a hole cut in the wall and there is a matching hole on the other side of the wall in the unfinished storage room that is also covered with a vent cover. The toilet in the women’s room is visible from the storage room to an observer who crouches or is prone on the floor while looking through the vent.

7) Hewitt Hillis, owner of Oregon Equipment Company, a residential and commercial construction company, installed the bathroom vents in May 2002 during a bathroom remodel for the previous tenant, Holstein's Coffee Company.

8) Huston opened the restaurant primarily to become a lottery retailer. To that end, he began doing some remodeling. Marilyn Roth, owner of the building and The Dalles Chronicle, gave him permission to store his carpentry tools in the unoccupied storage room. Not all items in the storage room belonged to Huston, including some construction equipment and a ladder. On the far side of the storage room, there are two other doors, one leading directly to The Dalles Chronicle offices. For several months after the restaurant opened, the doors to the unoccupied storage room were unlocked during business hours and restaurant employees, newspaper employees, and customers had access to the area. During times material, the door to the hallway, restrooms and storage area could not be seen from Huston's table near the kitchen.

9) On or about July 29, 2005, Huston hired Complainant Brincken ("Brincken") to take food orders and do general clean up for Respondent at the wage rate of \$7.25 per hour. Previously, Brincken and her husband had worked at a True Value hardware store with one of Respondent's employees, Amanda Feriante ("A. Feriante"). A. Feriante had encouraged Brincken to come and work with her at the Spud Cellar Deli and recommended that Huston hire Brincken.

10) Huston was Brincken's immediate supervisor throughout her employment with Respondent and was present in the deli "most of the time." Brincken worked with A. Feriante and four other employees, including Brandon Hoover, A. Feriante's boyfriend at that time.

11) Once, Huston asked Brincken if he could put his hand on her shoulder, telling her that other people had complained about that and he just wanted to make sure she was not uncomfortable. Brincken did not object and gave him permission to put his hand on her shoulder. Previously, Huston had put his hand on a female employee's shoulder while telling her she was doing a good job and the employee had told him that was sexual harassment.ⁱⁱ

12) A. Feriante worked for Respondent from April 20, 2005, until August 26, 2005. When she was first hired, Huston told her and several female co-workers that he was going to make a plexiglass changing room; that they would have to wear white T-shirts to work and he would have wet T-shirt contests and that he would turn the business into a "strip club" and have them be "pole dancers." He clearly meant comments as "jokes." On one occasion, Huston walked up behind Feriante with a lollipop in one hand and put his other hand around her and touched her just above her right hip while offering her candy. Once, he swatted her "on the butt" with some papers. These behaviors made her feel uncomfortable and objectified. On another occasion, Huston put his hand on her shoulder and complimented her on her work. Feriante saw Huston swat Andee Lynch on the behind with papers, but did not see Huston touch any other employees with his hands.

13) As of August 26, 2005, Respondent employed A. Feriante, Brandon Hoover, Brandie Grayson, Andee Lynch, and Brincken. Hoover was the only male other than Huston.

14) On August 26, 2005, Huston had a lengthy meeting with a Lottery Commission representative at Spud. Around 11 a.m., A. Feriante was talking with Andee Lynch outside Spud about something that Huston had said about Andee's daughter. Both were visibly upset. While they were talking, Amanda's father Gino

Feriante (“G. Feriante”) approached them and ascertained that they were upset about “sexual harassment” by Huston. G. Feriante was in the neighborhood because he had gone for a walk to visit Amanda at work on her break, something he did periodically.

15) G. Feriante became upset and went inside the restaurant to talk with Huston. At the time, Huston was talking with the Lottery Commission representative and had his back to G. Feriante. G. Feriante tapped Huston on the shoulder, told him to never put his hands on A. Feriante again, and added that if he did G. Feriante would be “coming after him.” G. Feriante also told Huston not to touch any of Respondent’s other female employees. In response, Huston called the police. When a police officer from The Dalles Police Department arrived, he interviewed Huston and G. Feriante. The officer told G. Feriante he could either see an attorney or go to the “Labor Board” about a possible “hostile work place claim.” Huston declined to press charges against G. Feriante.

16) Later that same day, all of Respondent’s employees except Brincken walked off the job and did not return.

17) On August 29, 2005, Respondent hired two replacement employees – Lacey Owen and Silver Hartung, both female. Complainant Ruiz-Najera (“Ruiz-Najera”), a female, was hired on August 30, 2005. Respondent hired Tiffany Bates, a female, on September 28, 2005, after Owen left Respondent’s employment on September 13, 2005.

18) On October 21, 2005, Huston, who had been talking on the phone with someone from the Lottery Commission, approached Brincken, put his hand around her shoulder like he was going to hug her, and asked her if he could kiss her on the lips. Brincken was “taken aback,” felt “shocked,” told him “no,” and stepped back. Huston began talking about how the Lottery Commission was going to let him go through the

process of having lottery machines. Huston's touching and proposal made her feel "gross" and "not happy" like she "had been violated" and her "personal boundary had been crossed."ⁱⁱⁱ She complained to Ruiz-Najera about the incident and complained she did not like to be touched because she was married. Brincken did not say anything else to Huston about the incident.

19) Previously, Andee Lynch had told Brincken that Huston said something to her about having a private evaluation in his office that involved strawberries and whipped cream. Brincken had also observed Huston making gestures towards other female employees, acting as though he were squeezing or going to smack them on the bottom. She also saw Huston come up behind other female employees and put his arm around their waist or on their shoulder. When Huston was not around, Brincken overheard those other employees talking about how that made them feel uncomfortable. Other employees also complained directly to her about Huston's behavior. As a result of what she heard and saw, Brincken tried to make sure she was not alone with or physically close to Huston, although other than his request to kiss her on the lips she never heard Huston make any sexually explicit or inappropriate comments to herself or anyone else.

20) The next day, Brincken decided to quit because of Huston's request for permission to kiss her and also decided not to tell Huston that she was leaving. She worked one more week, during which Huston was out of town the entire time. Brincken gave her letter of resignation to Tiffany Bates on October 28, 2005, and picked up her final paycheck at the same time.

21) Huston's behavior described in the Findings of Fact ## 11, 18 & 19 – The Merits was "upsetting" to Brincken. She "tried not to think about it and tried not to let it

affect [her]. It was “disturbing” and “it still upsets” her and she has tried to be more cautious with male employers since leaving Respondent’s employment.

22) In October 2005, Brincken worked 170.8 hours for Respondent, earning gross wages of \$1,238.30, an average of \$309.58 per week.

23) Brincken begin looking for work immediately after leaving Respondent’s employment and started work at another job on November 7, 2005, that paid the same as Respondent. She was happy working at her new job and did a good job; her experience with Huston did not keep her from doing a good job.

24) Ruiz-Najera was hired to wash dishes and bus tables for Respondent at the wage rate of \$7.25 per hour. Huston was Ruiz-Najera’s immediate supervisor throughout her employment. During her employment, Ruiz-Najera worked with Brincken, Tiffany Bates, Jessica Bonneau, Henry Banner, Christina Harris, Shanna Rice, and Paige Thomsen.

25) When Ruiz-Najera started work, she thought Huston was “nice,” but after starting work heard that he “joked” around with female employees in a “sexual manner.”

26) Beginning on August 29, 2005, Huston began asking his employees to read and sign a sexual harassment policy. The policy included a provision that required employees to report any sexual harassment to “the owner of Spud Cellar Deli; or other supervisor” but did not advise employees how to report harassment if Respondent’s owner was the harasser. Huston intended to send employees to his personal attorney if any of them accused him of sexual harassment. Ruiz-Najera signed the policy on September 28, 2005. Brincken did not sign the policy and there is no evidence that she was asked to sign it.

27) Prior to mid-September 2005, Huston learned of the term “muchacha caliente” from a Hispanic acquaintance in Eugene who referred to his sister-in-law as “muchacha caliente” and told Huston that she was a “hot chick” and “very beautiful.”

28) In mid-September 2005, Huston said “muchacha caliente” at work while directing the words at Ruiz-Najera. Huston said “muchacha caliente” again that day and told Ruiz-Najera his Hispanic friends had told him it meant “pretty girl.” Ruiz-Najera told Huston it did not mean “pretty girl,” but that it meant “horny girl” and she did “not want to hear it, especially if you are going to say it to me.” Ruiz-Najera also told Huston that it was disrespectful. Later that same day, Huston told Ruiz-Najera he would verify the meaning of “muchacha caliente” with his Hispanic friends. Ruiz-Najera told him “okay, but I don’t want to hear it.” Huston then talked with his Hispanic friends and they told him that “muchacha caliente” means “horny girl” and that it was not a respectful thing to say. The next time Huston said “muchacha caliente” to Ruiz-Najera, Huston said he had talked with his friends and verified that “muchacha caliente” did mean “horny girl.” Ruiz-Najera again told Huston she did not want to hear it and that it did not mean “pretty girl.” On another day, Huston said “muchacha caliente” to Ruiz-Najera once more and she told him that she did not want to hear it because it was insulting. Ruiz-Najera felt disrespected by Huston when he called her “muchacha caliente.”

29) On November 7, 2005, Ruiz-Najera discovered that the hole behind the screen in the wall of the women’s in the bathroom at Respondent’s business went all the way through the wall to the storage room on the other side, where the hole was covered by another vent screen, and that there was an upside down bucket in the storage room near the vent screen. At approximately 3:30 p.m. that same day, Ruiz-Najera went to The Dalles police department and was interviewed by Officer Shawna Moss. She reported a “peep hole” in Respondent’s women’s bathroom, and said she

believed Huston could have been watching through the “peep hole” as women used the toilet. Ruiz-Najera made a number of other statements to Moss, including telling Moss that the only reason she had not quit was because she needed the job to pay bills and that she had applied for work at other businesses, but had not yet been called in or hired. She also told Moss that that Huston “began saying ‘muchacha caliente’ (hot girl) in Spanish to [her]” and she had asked him to stop because it was disrespectful and meant “horny girl.” She told Moss that Huston told her that he had learned it from his Mexican friends in Bend and he continued calling her that name even after she asked him to stop and “at one point, after [he] came back from Bend and told [her] that she was right, he confirmed that it did mean ‘horny girl.’”

30) Also on November 7, 2005, Tiffany Bates telephoned The Dalles Police Department and told Officer Baska that she wanted to report that someone had made a “viewing hole “to watch woman [sic] use the bathroom at her place of employment.” Later that day, Baska and Detective Shawna Moss walked to Respondent’s business and spoke with Bates and Tracy Wedgwood, Bates’ coworker. Bates and Wedgwood told the officers that they were both concerned about their jobs and were not sure they wanted to pursue the matter.

31) On November 11, 2005, Baska contacted Marilyn Roth at her office and spoke to her about the case. Baska closed the case on the basis that “do [sic] to the fact that the suspect is very much aware of our finding it is highly unlikely a successful investigation would come to this.”

32) Because of numerous physical problems, Huston was and is physically unable to position himself in a manner so he could look through the vent screen from the storage room side of the wall and see the toilet in the women’s bathroom.

33) During Ruiz-Najera's employment, Respondent had a two week payroll period. Beginning with the payroll period ending September 28, 2005, Ruiz-Najera worked the following hours:

- Payroll period ending 9/13/05: 81.93 hours
- Payroll period ending 9/28/05: 61.5 hours
- Payroll period ending 10/12/05: 46.46 hours
- Payroll period ending 10/29/05: 66.17 hours
- Payroll period ending 11/11/05: 61.5 hours
- Payroll period ending 11/29/05: 53.5 hours
- Payroll period ending 12/13/05: 32.92 hours

34) On or about December 10, 2005, Ruiz-Najera handed Huston a resignation note giving two weeks notice that she was quitting. Huston posted her resignation on Respondent's bulletin board. Before giving notice, Ruiz-Najera had begun looking for other employment. Shortly thereafter, her son became sick, and she called in to work so Respondent could find a replacement for her shift. She worked a few more days, then quit coming into work. At that point, Huston was not interested in continuing Ruiz-Najera's employment for a full two weeks after she gave her notice. After giving her notice, Ruiz-Najera actively looked for employment. On January 20, 2006, she began working at Staples.

35) Victoria Hartung, a female, worked for Respondent from August 29 until November 1, 2005. On November 9, 2005, she visited The Dalles Police Department to complain about Huston's behavior. Shawna Moss, a detective from The Dalles Police Department, interviewed Hartung. Among other things, Hartung told Moss that:

1. Huston tried to touch her on her shoulder once she stepped back.
2. Huston asked her if it offended her that he would try to touch her.
3. Huston told her that one of his crews had recently all walked out and filed sexual harassment charges on him.

4. She saw Huston put his arms around Tiffany and Brincken “several times,” each time “standing beside either of the girls and putting his arm around them from behind with his hand on their shoulder. Huston would then give them a squeeze, pulling them closer to his side.”
5. In a conversation about her family, she told Huston that her sisters “are curvier and had more meat on their bones” and Huston then told her that he thought she was “pretty curvey [sic] herself.”
6. Brincken told her that Huston had asked if he could kiss her on the lips.

Although these are hearsay statements, the forum credits most of statements 1, 2, 3, and 6 as reliable because they are consistent with other credible evidence in the record. The forum discounts statement 4 because it is inconsistent with Brincken’s credible testimony. Statement 5 is given no weight because, assuming it is true, neither Complainant was aware of the conversation.

36) At the time of the hearing, Tammy Kendrick, a female, had worked for Respondent and with Huston at Respondent’s business continuously since October 2007. On one occasion during her employment, Huston patted her on the shoulder, told her she had done a good job, then asked her if it offended her when he patted her on the shoulder and she replied “no.” The forum credits Kendrick’s testimony in its entirety.

37) On November 11, 2005, Rayanna Lanquist and Regina Bergner, who both worked for Respondent for approximately three weeks in April 2005, visited The Dalles Police Department and spoke with detective Baska “about this case.” They told Baska that both had worked for Huston when the restaurant first opened. Baska prepared a “Continuation Report” that stated, in pertinent part:

“Lanquist told me that she quit the restaurant because of the stress caused by her employer Gerald Huston. She said he would yell one minute and be nice the next and he continually changed his mind on how he would want something done. She said there were a lot of sexual innuendos and she gave some examples. She said that he referred to his female employees as strippers. On one occasion he brought in a wooden bench, and Lanquist, Bergner and another female employee were sitting on it. Huston made the comment he would like a picture of the three of

them sitting on it naked. She said he was always making sexual comments.

“Bergner said that she too was a target of sexual harassment by Huston. Bergner said Huston said he told employees and customers that Bergner was his Norwegian stripper. Bergner does have an accent that sounds as if she might be from that area. I didn’t ask Bergner if she was Norwegian however. Bergner also talked about the bench incident, but she also added that one time he came up behind her and wrapped his arms around her. She said it surprised her, but at first she thought it was one of the women, but when she turned her head to see she was shocked to see it was Huston.

“Both Lanquist and Bergner both started working for Huston when he first opened the restaurant in March. Both said that the vent in the bathroom was not there when the restaurant was first opened, or when they left. I had showed them the photographs taken of the back side of the vent. Lanquist said she was the restaurant’s manager at the time it opened up and she had been in the storage room on several occasions both when she worked for Holsteins and when she worked for Huston. Holsteins was the occupant just before Huston was. She said she knows for a fact that that vent was not there.

“I explained to both that because of some events that occurred the investigation had been compromised and the case was being closed till something else developed.”

The forum gives these statements no weight because they are multiple hearsay, because Officer Baska did not appear as a witness and was not available for cross-examination, and because Lanquist’s and Bergner’s statements that there was no vent in the bathroom when they first started work for Respondent are untrue.

38) Tiffany Bates worked for Respondent from September 28 through November 30, 2005. On December 1, 2005, Bates contacted The Dalles Police Department and spoke to Detective Doug Kramer. After interviewing Bates, Kramer wrote a “Continuation Report” that stated, in pertinent part:

“Bates told me that she used to work at the Spud Cellar Deli/303 E. 3rd St and two weeks ago her Employer (Gerald Huston) smacked her on her left butt cheek while she was at work. Bates told me that she had dropped some meat that she was cutting and that was when Huston smacked her. Bates said that she had reported the incident to Sergeant Baska, but she didn’t want to have a report made because she possibly would have been

fired. Bates told me that she quit working at the Spud Cellar yesterday and has now decided she wants to pursue charges.

"I asked Bates if anyone witnessed Huston slapping her on the butt and she said that there were a few workers that saw, but Miriam Ruiz-Najera was the only one that would come forward and tell me that she saw it. Bates said that the rest of the employees are fearful of being fired if they say anything.

"I asked Bates if Huston said anything when he hit her and she said he did, but she can't recall what it was. I asked Bates if she said anything to Huston and she said no, she was shocked he did it and was afraid if she did say something he would fire her.

"Bates said that Huston has made several sexual comments to her in the past, like asking her about her sexual experiences with her boyfriend and making comments about mud wrestling and she has told him that those things are gross. I asked Bates if she had told him that she doesn't like him talking to her that way and she said no, for fear that he might fire her."

The forum gives these statements no weight because they involve multiple hearsay, because Officer Kramer did not appear as a witness and was not available for cross-examination, and because Bates's statement that she previously told Baska that Huston had smacked her on the butt is not included in Baska's November 7, 2005, notes of his interview with Bates.

39) Christina Harris has worked for Respondent on two occasions. She never worked with Complainant Brincken and worked with Complainant Ruiz-Najera for a week or less. Based on her denial of a statement potentially damaging to Huston that she made to Moxley, and two more statements – one made at the hearing and another made to Moxley -- that are contradicted by credible evidence in the record, the forum has not believed her testimony except when it was corroborated by other credible evidence. To summarize those statements, Harris told Moxley that she "imagines that Huston did say some sexual things." At hearing, she denied making that statement but the forum has determined that Moxley's interview notes were an accurate representation of statements made by Harris. She told Moxley that the father of the employee who filed a sexual harassment claim in court (Gino Feriante) came into the

business and punched Huston in the face. In contrast, Huston claimed he was punched either on the back of the head or on the shoulder and Feriante credibly testified that he did not punch Huston, but “tapped” him. Finally, she testified that she looked at the hole in the wall of the women’s bathroom, that it only went through one sheet of drywall and did not go through the other side of the wall, a statement contradicted by every other witness who testified on that issue.

40) Police detective Shawna Moss was a credible witness and the forum credits her testimony in its entirety.

41) Marilyn Roth, publisher of The Dalles Chronicle that owns the building in which Respondent’s business is located and who leases the building space to Respondent, was a credible witness and the forum credits her testimony in its entirety.

42) Amanda Feriante was a credible witness and the forum credits her testimony in its entirety.

43) Gino Feriante testified as a rebuttal witness for the Agency regarding his encounter with Huston on August 26, 2005. He was a credible witness and the forum has believed his version of the encounter whenever it conflicted with Huston’s testimony. The forum credits his testimony in its entirety.

44) Brandon Hoover was A. Feriante’s boyfriend at the time they worked for Respondent and worked for Respondent from August 2 through August 26, 2005. At the time of the hearing A. Feriante was engaged to someone else, and her fiancé accompanied her to the hearing. Although the forum does not find that Hoover’s testimony was influenced by his former relationship with Feriante, there are several reasons that lead to forum to distrust his testimony. First, he testified that he saw Huston give Brincken “a few good game slaps on the butt” and “grab her hip” once, incidents neither alleged nor testified to by Brincken. Had these events actually

occurred, it is difficult for the forum to imagine, given the nature of the case, the Agency would not have alleged them in their Formal Charges, and that Brincken herself would not have testified to them. Second, he testified that Brincken told him she did not like Huston's slaps and grab, whereas Brincken never testified that she had complained to Hoover. Third, he testified that he worked in June, July, and August 2005 for Respondent. In contrast, Respondent's unchallenged payroll record generated by its agent Paychex, which shows the dates of employment for all of Respondent's employees in 2005, shows that Hoover worked from August 2 until August 26, 2005. A. Feriante also credibly testified that Hoover only worked "3-4 weeks" for Respondent before they both quit. Fourth, Hoover became argumentative during cross examination. For these reasons, the forum only credits his testimony where it was corroborated by other credible evidence in the record.

45) Jim Perneti authenticated photographs he took of the vent between the storage area and the women's restroom three weeks prior to hearing and the forum credits his testimony in its entirety.

46) Adam Bradley, a general manager at Staples, credibly testified that Complainant Ruiz-Najera submitted an application for a job on December 30, 2005, and was hired to work at Staples on January 20, 2006, and the forum credits his testimony in its entirety.

47) Carol Huston ("C. Huston") was a credible witness, despite being married to Huston and having a financial interest in Respondent, and the forum credits her testimony in its entirety.

48) Susan Moxley has been an investigator for the Agency for 22 years. With regard to her telephone interview with Christina Harris, Moxley testified that she typed her interview notes within 15-20 minutes after interviewing Harris, that her notes were

accurate, that she did not type anything that Harris did not say, and that if there had been any ambiguity in Harris's statements or question in Moxley's mind as to what Harris said due to an unclear phone connection, she would have asked Harris to clarify her statement. As to her interview with Huston, she testified that she dictated her notes as soon as the interview was over, that she reviewed the typed notes for accuracy, that she corrected some typographical errors before putting the interview into the investigative file, and that her typed investigative notes are an accurate reflection of statements made by Huston. Her testimony as to the accuracy of her interview notes was not impeached and the forum credits her testimony in its entirety.

49) Gerald Huston's testimony was only partly credible. The forum reaches this conclusion for the following reasons. First, he told Moxley that Ruiz-Najera showed him she had removed her resignation letter from Respondent's bulletin board, but he did not know how she got into the office to do that, whereas at hearing, he testified that Henry Banner, another employee, had told him that Ruiz-Najera used a credit card to get into the office. Second, Huston told Moxley that Gino Feriante came in and slugged him on the back of the head while Huston was being interviewed by the Lottery Commission representative, then ran out. At hearing, Huston testified that Feriante took off "at a dead run." The police log maintained by The Dalles Police Department, which was received into evidence, reflects that Huston told the police that Feriante hit him "on the shoulder." The forum also notes Feriante's credible testimony that he is physically unable to run because of his disability.^{iv} Third, he told Moxley that every single employee he had in 2005 is or was on drugs, and eight or nine are in the regional prison for drugs and/or theft related charges. He qualified this statement on cross examination to say he meant only the employees in the "early part" of 2005. Fourth, he told Moxley, when asked to describe his use of the term "muchacha caliente" in Ruiz-Najera's

presence, that Ruiz-Najera did not talk to him about this at all and that he had used the term “muy caliente” while talking to someone else in the restaurant. At the hearing, he denied calling Ruiz-Najera “muchacha caliente,” but testified that he told employee Henry Banner the only two words he knew in Spanish were “muchacha caliente” and that he wanted to learn more Spanish. Ruiz-Najera also credibly testified that Huston referred to her “muchacha caliente” several times. Finally, he told Moxley that Brincken, on her last day of work, told him she was quitting while on her way out the door. In contrast, Brincken credibly testified that Huston was in Bend during her last week of work and she did not see him at all to tell him she was quitting. The forum only credits Huston’s testimony that was either uncontested or corroborated by other credible testimony.

50) Complainant Brincken’s testimony was internally consistent and consistent with the statements made to the Agency in her “Employment Discrimination Questionnaire” (“Questionnaire”) and on her “Civil Rights Division Complaint of Unlawful Practice.” In addition, her testimony that she never heard Huston make any sexually explicit or inappropriate comments but that other female coworkers complained to her about Huston’s comments is not inconsistent with her statement on her Questionnaire that Huston made “lude/inappropriate [sic] comments and remarks about certain employees.” She did not testify as to the specific names of the female coworkers whom she observed Huston touch and who complained to her about his touching and comments. However, the Agency established that Ruiz-Najera was subjected to unwelcome comments during Brincken’s employment, A. Feriante was subjected to unwelcome comments and touching by Huston in a period of time that could have overlapped Brincken’s employment, and Brincken herself was told by Huston that others had objected to his putting his hand on their shoulder. The existence of these incidents

is sufficient evidence from which to draw an inference that Brincken could have observed Huston touching coworkers and they could have complained about Huston's touching and comments to her. The forum credits Brincken's testimony in its entirety.

51) Complainant Ruiz-Najera's testimony was only partly credible. The forum reaches this conclusion based on her prehearing statements that were inconsistent with her testimony at hearing, the internal inconsistencies within her testimony at hearing, her testimony that was contradicted by Complainant Brincken's credible testimony, and her tendency to exaggerate.

Ruiz-Najera's prior inconsistent statements. First, she submitted a Questionnaire to the Agency in which she set out, in some detail, all the ways that Huston had harassed her before November 15, 2005. In that Questionnaire, she omitted any mention that Huston touched her on the shoulders. In contrast, on November 7, 2005, she told Detective Moss that Huston had touched her once on the shoulders. At hearing, she testified during cross examination that Huston had put his hands on her shoulders once or twice. Second, in the same Questionnaire, she omitted any mention of a "sink" incident. On November 7, 2005, she told Detective Moss that on one occasion when she was washing dishes, standing in front of the sink, Huston came up behind her and placed one hand on either side of her while holding a dish and she quickly moved aside out of the way and he told her he was just putting the dish in the sink. On direct examination, she testified that Huston came up behind her and placed his hands on the sink, one on either side of her, and that he did not have anything in his hand at the time. On cross-examination, she then testified for the first time that, when Huston came up behind her at the sink, his torso touched her back. Third, in Ruiz-Najera's sworn complaint she alleged she was constructively discharged "on or about November 21, 2005." At hearing, she testified that she did not submit her

resignation until December 10, 2005, and that her last day of work was December 14, 2005. Those dates differ significantly. Although the complaint form may have been drafted by the Civil Rights Division, Ruiz-Najera signed and dated the complaint in the presence of a notary and her signature appears directly under the words “I swear (or affirm) that I know and understand this complaint that it is true to the best of my knowledge, information and belief.” Consequently, any statements on the complaint form carry the same weight as sworn statements by Ruiz-Najera made at hearing.

Ruiz-Najera’s testimony that was contradicted by Brincken’s credible testimony. First, Ruiz-Najera testified at hearing that Huston “would always put his hands on [Brincken]” and that she saw Huston slap Brincken “on the butt.” She also testified that Brincken cried after Huston asked if he could kiss her. In contrast, Brincken did not testify to crying and did not even allege that Huston ever slapped her “on the butt” or that Huston had touched her on any other occasions than those set out in Findings of Fact ##11 & 18 -- The Merits. Second, Ruiz-Najera testified that Brincken heard Huston call her “muchacha caliente,” but there was no corroborative evidence that Brincken heard that statement, despite Brincken’s testimony as a Complainant and witness at the hearing.

Ruiz-Najera’s tendency to exaggerate. First, Ruiz-Najera testified that she saw Huston touch female employees other than Brincken inappropriately, but that it was really hard for her remember who those employees were because it is “so painful to remember”. She then testified that she saw Huston slap Tiffany Bates, but this testimony is not supported by any other reliable evidence.^v Given the detail Ruiz-Najera was able to testify to regarding her own personal trauma from events that happened at the same time, the forum concludes that Ruiz-Najera found it hard to remember because there was nothing for her to remember.^{vi} Second, Ruiz-Najera testified that

her discovery of the vent in the woman's restroom traumatized her to such an extent that she can still not use public restrooms unless she absolutely has to and if anything looks suspicious and there are paper towels, she uses Scotch tape that she always carries with her to tape a towel over the hole. She testified that it makes her sick to her stomach just to think about the hole. Despite this purported trauma and her belief that Huston was using the vent as a peep hole, she did not testify that she did anything to cover the vent hole in the women's restroom during the five weeks after she discovered the vent or that she stopped using the restroom, and she continued to work for Huston for the next five weeks.

Based on all of the above, the forum only credits her testimony when it was corroborated by other credible evidence. Specifically, the forum believes her testimony concerning Huston's "muchacha caliente" remarks as set out in Finding of Fact #28 -- The Merits because of Huston's lack of credibility on that issue and because it was consistent with her statement made to Detective Moss. The forum also believes her testimony that Brincken complained to her that Huston had asked if he could kiss her because Brincken credibly testified that event had occurred and that she complained to Ruiz-Najera. The forum also credits her testimony that she was insulted and felt disrespected by Huston's use of the term "muchacha caliente." Finally, the forum credits her testimony about discovering the bathroom vent, but attaches no significance to it because there is no credible evidence that Huston ever used it as a peep hole. In contrast, the forum does not believe her testimony that Huston touched her thigh because there was no evidence that he touched anyone else except on the shoulder and because of Ruiz-Najera's general lack of credibility.

ULTIMATE FINDINGS OF FACT

1) At times material, Respondent was a domestic corporation operating a restaurant in The Dalles, Oregon, under the assumed business name of Spud Cellar Deli ("Spud"). Gerald "Jerry" Huston, a male, was Respondent's owner and president.

2) Huston opened Spud on or about April 3, 2005. During all times material, he managed the business and hired and supervised all its employees, including Complainants. Spud leased the building space in which it conducted business from The Dalles Chronicle, a newspaper business located on the other side of the building from Spud. There was a large storage room located between the two businesses in which Huston stored some of his carpentry tools.

3) In 2002, 12" square bathroom vents were installed in the men's and women's restrooms leased in 2005 by Spud for customer use. The vents were still there at the time of hearing.

4) On or about July 29, 2005, Huston hired Brincken at the wage rate of \$7.25 per hour to take food orders and do general cleanup. Brincken worked with several other female employees, including Amanda Feriante and Complainant Ruiz-Najera.

5) On one occasion, Huston asked Brincken if he could put his hand on her shoulder, telling her that other people had complained about that and he just wanted to make sure she was not uncomfortable. Brincken did not object and gave him permission to put his hand on her shoulder. Previously, Huston had put his hand on a female employee's shoulder while telling her she was doing a good job and the employee had told him that was sexual harassment.

6) A. Feriante worked for Respondent from April 20, 2005, until August 26, 2005. When she was first hired, Huston, in a joking manner, told her and several female co-workers that he was going to make a Plexiglas changing room; that they

would have to wear white T-shirts to work and he would have wet T-shirt contests and that he would turn the business into a “strip club” and have them be “pole dancers.” He clearly meant comments as “jokes.” On one occasion, Huston walked up behind Feriante with a lollipop in one hand and put his other hand around her and touched her just above her right hip while offering her candy. Once, he swatted her “on the butt” with some papers. These behaviors made her feel uncomfortable and objectified. On another occasion, Huston put his hand on her shoulder and complimented her on her work. During her employment, Feriante also saw Huston swat Andee Lynch, a female coworker, on the behind with papers.

7) On August 26, 2005, all of Respondents’ employees except Brincken walked off the job and did not return after an incident in which A. Feriante’s father confronted Huston about his harassment of female employees.

8) On August 30, 2005, Respondent hired Complainant Ruiz-Najera at the wage rate of \$7.25 per hour.

9) On October 21, 2005, Huston, who had been talking on the phone with someone from the Lottery Commission, approached Brincken, put his hand around her shoulder like he was going to hug her, and asked her if he could kiss her on the lips. Brincken was “taken aback,” felt “shocked,” told him “no,” and stepped back. Huston began talking about how the Lottery Commission was going to let him go through the process of having lottery machines. Huston’s touching and proposal made her feel “gross” and “not happy” like she “had been violated” and her “personal boundary had been crossed.” She complained to Ruiz-Najera about the incident. Brincken did not say anything else to Huston about the incident.

10) Previous to October 21, 2005, Andee Lynch had told Brincken that Huston said something to her about having a private evaluation in his office that involved

strawberries and whipped cream. Brincken had also observed Huston making gestures towards other female employees, acting as though he were squeezing or going to smack them on the bottom. She also saw Huston come up behind other female employees and put his arm around their waist or on their shoulder. When Huston was not around, Brincken overheard those other employees talking about how that made them feel uncomfortable. Other employees also complained directly to her about Huston's behavior. As a result of what she heard and saw, Brincken tried to make sure she was not alone with or physically close to Huston, although other than his request to kiss her on the lips she never heard Huston make any sexually explicit or inappropriate comments to herself or anyone else.

11) On October 22, 2005, Brincken decided to quit because Huston asked if he could kiss her on the lips. She worked one more week and gave her letter of resignation to a coworker on October 28, 2005, picking up her final paycheck at the same time. She began looking for work immediately and started work at another job on November 7, 2005, that also paid \$7.25 per hour. She lost \$309.58 in gross wages during her week of unemployment.

12) Huston's behavior described in Ultimate Findings of Fact ##5, 9-10 caused Brincken to experience emotional and mental distress.

13) On or about August 30, 2005, Huston hired Ruiz-Najera to wash dishes and bus tables for Respondent at the wage rate of \$7.25 per hour.

14) Beginning on August 29, 2005, Huston began asking his employees to read and sign a sexual harassment policy. The policy included a provision that required employees to report any sexual harassment to "the owner of Spud Cellar Deli; or other supervisor" but did not advise employees how to report harassment if Respondent's

owner was the harasser. Ruiz-Najera signed the policy on September 28, 2005, but Brincken did not sign the policy and there is no evidence that she was asked to sign it.

15) In mid-September 2005, Huston said “muchacha caliente” at work while directing the words at Ruiz-Najera. Huston said “muchacha caliente” again that day and told Ruiz-Najera his Hispanic friends had told him it meant “pretty girl.” Ruiz-Najera told Huston it did not mean “pretty girl,” but that it meant “horny girl” and she did “not want to hear it, especially if you are going to say it to me.” Ruiz-Najera also told Huston that it was disrespectful. Later that same day, Huston told Ruiz-Najera he would verify the meaning of “muchacha caliente” with his Hispanic friends. Ruiz-Najera told him “okay, but I don’t want to hear it.” Huston then talked with his Hispanic friends and they told him that “muchacha caliente” means “horny girl” and that it was not a respectful thing to say. The next time Huston said “muchacha caliente” to Ruiz-Najera, Huston said he had talked with his friends and verified that “muchacha caliente” did mean “horny girl.” Ruiz-Najera again told Huston she did not want to hear it and that it did not mean “pretty girl.” On another day, Huston said “muchacha caliente” to Ruiz-Najera once more and she told him that she did not want to hear it because it was insulting. Ruiz-Najera felt disrespected by Huston when he called her “muchacha caliente.”

16) On November 7, 2005, Ruiz-Najera discovered that the hole behind the screen in the wall of the women’s in the bathroom at Respondent’s business went all the way through the wall to the storage room on the other side, where the hole was covered by another vent screen, and that there was an upside down bucket in the storage room near the vent screen. That same day, she went to The Dalles police department and reported a “peep hole” in Respondent’s women’s bathroom and said she believed Huston could have been watching through the “peep hole” as women used

the toilet. That same day, another female coworker telephoned The Dalles police department and made a similar report.

17) Two officers from The Dalles police department visited Spud on November 7, 2005, after receiving the complaints and inspected the vent. While at Spud, they talked with Tiffany Bates and Tracy Wedgwood, Ruiz-Najera's coworkers. On November 11, 2005, the police department closed the case.

18) Because of numerous physical problems, Huston was physically unable to position himself in a manner so he could look through the vent screen from the storage room side of the wall and see the toilet in the women's bathroom.

19) During Ruiz-Najera's employment, Respondent had a two week payroll period. Beginning with the payroll period ending September 28, 2005, Ruiz-Najera worked the following hours in her last seven payroll periods -- 81.93, 61.5, 46.46, 66.17, 61.5, 53.5, 32.92.

20) On or about December 10, 2005, Ruiz-Najera told Huston she was resigning, effective two weeks later. Shortly thereafter, her son became sick, and she called in to work so Respondent could find a replacement for her shift. She worked a few more days, then quit coming into work.

21) Huston's behavior described in Ultimate Finding of Fact #15 caused Ruiz-Najera to experience emotional and mental distress.

CONCLUSIONS OF LAW

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

2) The actions, inaction, statements, and motivation of Gerald ("Jerry") Huston are properly imputed to Respondent.

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

4) Respondent did not subject Complainant Ruiz-Najera to unwelcome sexual conduct directed toward her because of her gender, such that submission to the conduct was implicitly made a condition of her employment or was used as a basis for employment decisions in violation of ORS 659A.030(1)(b).

5) Respondent subjected Complainant Ruiz-Najera to unwelcome sexual conduct directed toward her because of her gender that was sufficiently severe or pervasive to have the purpose or effect of creating a hostile, intimidating, or offensive work environment, in violation of ORS 659A.030(1)(b) and ORS 659A.030(1)(a).

6) Respondent did not retaliate against Complainant Ruiz-Najera in violation of ORS 659A.030(1)(f).

7) Respondent did not constructively discharge Complainant Ruiz-Najera from employment in violation of ORS 659A.030(1)(a) and *former* OAR 839-005-0035.

8) Respondent subjected Complainant Brincken to unwelcome sexual conduct directed toward her because of her gender, such that submission to the conduct was implicitly made a condition of her employment or was used as a basis for employment decisions in violation of ORS 659A.030(1)(b).

9) Respondent subjected Complainant Brincken to unwelcome sexual conduct directed toward her because of her gender that was sufficiently severe or pervasive to have the purpose or effect of creating a hostile, intimidating, or offensive work environment in violation of ORS 659A.030(1)(b) and OAR 839-005-0030(1)(b).

10) Respondent constructively discharged Complainant Brincken from employment in violation of ORS 659A.030(1)(a) and OAR 839-005-0035.^{vii}

11) Pursuant to ORS 659A.850, the Commissioner of the Bureau of Labor and Industries has the authority under the facts and circumstances of this case to award Complainant Brincken back pay resulting from Respondent's unlawful employment practice and to award money damages to Complainants Brincken and Ruiz-Najera for emotional and mental suffering sustained and to protect the rights of Complainants and others similarly situated. The sum of money awarded and the other actions required of Respondent in the Order below are an appropriate exercise of that authority.

OPINION

The Agency alleges that both Complainants were subjected to unwelcome sexual advances, sexual comments, offensive touching, and other conduct of a sexual nature from Huston, Respondent's proxy, and their submission to the conduct was implicitly made a condition of their employment or was used as a basis for employment decisions affecting Complainants; that Huston's conduct was sufficiently severe or pervasive to have the purpose or effect of unreasonably interfering with their work performance and created a hostile, intimidating or offensive working environment for them; and that they were constructively discharged. In addition, Ruiz-Najera alleges that Respondent retaliated against her for complaining of the harassment. The Agency seeks back pay and emotional distress damages for both Complainants.

COMPLAINANT BRINCKEN

A. Sexual harassment.

The Agency alleges two theories of sexual harassment – “tangible employment action” and “hostile environment” with regard to Brincken. Specifically, the Agency alleges that (1) Respondent, through its proxy Huston, subjected Brincken to unwelcome sexual conduct directed toward her because of her gender and that submission to the conduct was implicitly made a condition of her employment or was used as a basis for employment decisions, in violation of ORS 659A.030(1)(b) and OAR

839-005-0030(1)(a);^{viii} and that (2) the sexual conduct was sufficiently severe or pervasive to have the purpose or effect of creating a hostile, intimidating, or offensive work environment, in violation of ORS 659A.030(1)(b) and OAR 839-005-0030(1)(b).

The Agency established the following facts in support of these theories:

1. Huston asked Brincken if he could put his hand on her shoulder, telling her that other people had complained about that and he just wanted to make sure she was not uncomfortable. Brincken did not object and gave him permission to put his hand on her shoulder.
- 2) Previous to October 21, 2005, Andee Lynch had told Brincken that Huston said something to her about having a private evaluation in his office that involved strawberries and whipped cream. Brincken had also observed Huston making gestures towards other female employees, acting as though he were squeezing or going to smack them on the bottom. She also saw Huston come up behind other female employees and put his arm around their waist or on their shoulder. When Huston was not around, Brincken overheard those other employees talking about how that made them feel uncomfortable. Other employees also complained directly to her about Huston's behavior. As a result of what she heard and saw, Brincken tried to make sure she was not alone with or physically close to Huston, although other than his request to kiss her on the lips, she never heard Huston make any sexually explicit or inappropriate comments to herself or anyone else.
- 3) On October 21, 2005, Huston approached Brincken, put his hand around her shoulder like he was going to hug her, and asked her if he could kiss her on the lips. Brincken was "taken aback," felt "shocked," told him "no," and stepped back. Huston's touching and proposal made her feel "gross" and "not happy" like she "had been violated" and her "personal boundary had been crossed."
- 4) On October 22, 2005, Brincken decided to quit because of Huston's request for a kiss.

"Tangible Employment Action"

The Agency's prima facie case under the tangible employment action theory consists of the following elements: (1) Respondent was an employer subject to ORS 659A.001 to 659A.030; (2) Respondent employed Brincken; (3) Brincken is a member of a protected class (sex); (4) Respondent, through Huston, engaged in unwelcome conduct (verbal or physical) directed at Brincken because of her sex; (5) Submission to

that conduct was implicitly made a condition of Brincken's employment or was used as a basis for employment decisions; and (6) Brincken suffered harm through a tangible employment action taken by Respondent based on Huston's conduct. See, e.g., *In the Matter of Barbara Bridges*, 25 BOLI 107, 119-20 (2004). The first three elements are undisputed. The Agency established the fourth element by Brincken's credible testimony regarding Huston's requested kiss. In this case, the fifth and sixth elements are intertwined. The harm was Brincken's leaving Respondent's employment as a direct result of Huston's proposal. As discussed in more detail later, the forum has determined that Brincken's leaving was a constructive discharge. Among other things, "tangible employment action" includes constructive discharge. OAR 839-005-0030(4). See also *Pennsylvania State Police v. Suders*, 542 U.S. 129 (2004). When the evidence shows that an employee is constructively discharged as a direct result of an employer's request that the employee submit to unwelcome sexual conduct, that constructive discharge is properly considered an employment decision that was made as a result of a request for submission to the conduct. In conclusion, the forum finds that Respondent, through Huston, violated ORS 659A.030(1)(b) and OAR 839-005-0030(1)(a) with respect to Brincken.^{ix}

"Hostile Environment"

The Agency's prima facie case under the "hostile environment" theory consists of the following elements: (1) Respondent was an employer subject to ORS 659A.001 to 659A.030; (2) Respondent employed Complainant; (3) Complainant is a member of a protected class (sex); (4) Respondent, through its proxy, engaged in unwelcome conduct (verbal or physical) directed at Complainant because of her sex; (5) the unwelcome conduct was sufficiently severe or pervasive to have the purpose or effect of creating a hostile, intimidating or offensive work environment; and (6) Complainant was

harmful by the unwelcome conduct. *In the Matter of Robb Wochnick*, 25 BOLI 265, 282 (2004); OAR 839-005-0030(1)(b).

The first three elements are undisputed. The remaining elements require more discussion.

The fourth element of the Agency's case is that Respondent, through Huston, engaged in unwelcome conduct (verbal or physical) directed at Brincken because of her sex. Huston's status as Respondent's owner, president, and manager is not at issue. As Respondent's corporate officer, Huston's conduct is properly imputed to Respondent and Respondent is strictly liable for any unlawful harassment found herein. See OAR 839-005-0030(3)("[a]n employer is liable for harassment when the harasser's rank is sufficiently high that the harasser is the employer's proxy, for example, the respondent's president, owner, partner or corporate officer"). The facts set out in Findings of Fact #11, 18-21 – The Merits are all relevant to the forum's determination of whether or not Huston's conduct was unwelcome. This includes the conduct that specifically targeted Brincken as well as Huston's other sexual conduct directed at women that Brincken observed or that was reported to her.^x Brincken did not testify that the first instance when Huston asked permission to put his hand on his shoulder was unwelcome to her; her testimony was she gave permission, so long as it was "just her shoulder." In contrast, she specifically testified that the sexual conduct she observed Huston directing at other women caused her to change her behavior to make sure she was not alone with or physically close to Huston. From this, the forum infers she found that conduct unwelcome. Finally, her credible testimony describing her reaction to Huston's "kiss" proposal and her decision to quit as a direct result of that conduct leaves no doubt in the forum's mind that Brincken found that behavior unwelcome. The sexual nature of the above-mentioned conduct shows that it was directed towards Brincken and her female

coworkers because they were women. This satisfies the fourth element of the Agency's prima facie case.

The fifth element of the Agency's case is whether the unwelcome conduct was sufficiently severe or pervasive to have the purpose or effect of creating a hostile, intimidating or offensive work environment. The standard for determining whether harassment based on an individual's sex is sufficiently severe or pervasive to create a hostile, intimidating or offensive working environment is "whether a reasonable person in the circumstances of the complaining individual would so perceive it." OAR 839-050-0030(2). "[T]he rule is drafted in the disjunctive; evidence that conduct created an intimidating *or* a hostile *or* an offensive working environment suffices." (emphasis in original) *Fred Meyer, Inc. v. Bureau of Labor and Industries and Georgia Stack-Rascol*, 152 Or App 302, 307, 954 P.2d 804, 807 (1998). The forum looks at the totality of the circumstances, *i.e.*, the nature of the conduct and its context, the frequency of the conduct, its severity or pervasiveness, whether it is physically threatening or humiliating, and whether it unreasonably interferes with an employee's work performance. *In the Matter of Gordy's Truck Stop, LLC*, 28 BOLI 200, 212 (2007). The forum recognizes 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), *affirmed without opinion, JLG4, Inc. v. Bureau of Labor and Industries*, 125 Or App 588, 865 P2d 1344 (1993).

The evidence set out in Findings of Fact #11, 18-21 – The Merits provides the factual context for the forum's evaluation as to whether or not Huston's conduct was

sufficiently severe or pervasive to have had the purpose or effect of creating a hostile, intimidating or offensive working environment.

To begin, the forum recognizes that isolated incidents of verbal harassment, standing alone, do not constitute unlawful sexual harassment unless they are extremely serious. *Clark County School District v. Breeden*, 532 U.S. 268, 277 (2001).^{xi} However, this is not an “isolated incident” case limited to the “kiss” incident because of the sexually charged atmosphere created by Huston through his pervasive sexual conduct directed at Brincken’s female coworkers that Brincken observed or became aware of through complaints by those coworkers, as described in Finding of Fact #19 – The Merits. In addition, the “kiss” incident was not purely verbal, in that the prelude to the kiss proposal was Huston’s act of putting his hand on Brincken in a manner that she perceived as a prelude to a hug. Because of what she had already observed or heard about, Brincken was already doing all she could to ensure that she was not alone with or physically close to Huston before the “kiss” incident. This evidence establishes the existence of an intimidating work environment for Brincken prior to the “kiss” incident. Her testimony that Huston’s touching and “kiss” proposal made her feel “gross” and “not happy” like she “had been violated” and her “personal boundary had been crossed” establishes that Huston’s behavior was offensive to her, and her complaint to Ruiz-Najera establishes that this was compounded because she was married. Viewed in the totality of the circumstances, the forum finds that Huston subjected Brincken to unwelcome sexual conduct that was sufficiently pervasive to have had the purpose or effect of creating an intimidating and offensive work environment and that a reasonable person in Brincken’s circumstances would have so perceived it.^{xii}

The final element of the Agency's case is proof that Brincken was harmed by the unwelcome conduct. Brincken's credible testimony established that she felt intimidated and offended by Huston's unwelcome sexual conduct, in that she tried to avoid being physically near him as much as possible and was offended by him touching her and asking her for a kiss.

Finally, the forum notes that Respondent, in its answer, raised the affirmative defense that:

"To the extent Complainant suffered harassment, retaliation, or improper treatment, if any, Respondent exercised reasonable care to prevent and timely correct any such behavior, and Complainant unreasonably failed to take advantage of preventative or corrective opportunities provided by Respondent, or failed to avoid harm otherwise."

Respondent's affirmative defense is only available in "hostile work environment" claims and is directed at the provisions of OAR 839-005-0030(5) which state:

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

"(a) The employer knew of the harassment, unless the employer took immediate and appropriate corrective action.

"(b) The employer should have known of the harassment. The division will find that the employer should have known of the harassment unless the employer can demonstrate:

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

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

This defense fails because of OAR 839-005-0030(3), a rule that imposes strict liability on an employer when a Respondent employer's "proxy" is the harasser.^{xiii}

In conclusion, the forum finds that Respondent, through Huston, violated ORS 659A.030(1)(b) and OAR 839-005-0030(1)(b) with respect to Brincken.

B. Constructive discharge.

To establish that Brincken was constructively discharged, the Agency must prove that Huston: 1) intentionally created or maintained discriminatory working conditions related to Brincken's gender that were 2) so intolerable that a reasonable person in Brincken's circumstances would have resigned because of them; 3) Huston desired to cause Brincken to leave her employment as a result, or knew or should have known that Brincken was certain, or substantially certain, to leave employment as a result of the working conditions; and 4) Brincken left her employment as a result of those working conditions. See OAR 839-005-0011; *In the Matter of Gordy's Truck Stop, LLC*, 28 BOLI 200, 213 (2007). This forum has consistently held that if an employer imposes objectively intolerable working conditions, *i.e.*, that a reasonable person in complainant's position would have resigned under those conditions, the employee's resignation due to those conditions is a constructive discharge. *Id.* The forum examines the evidence with these considerations in mind.

1. Huston intentionally created or maintained discriminatory working conditions related to Brincken's gender.

Undisputed evidence establishes that at least one female employee found Huston's touching to be offensive prior to Brincken's employment, and that Huston said as much to Brincken when he first asked permission to put his hand on her shoulder.^{xiv} Brincken's credible testimony, supported by the credible testimony of A. Feriante, establishes that Huston routinely made gestures towards other female employees, acting as though he were squeezing or going to smack them on the bottom and came up behind other female employees and put his arm around their waist or on their shoulder. Brincken witnessed that behavior, overheard those other employees talking about how that made them feel uncomfortable, and other employees complained directly to her about Huston's behavior. Because that conduct was of a sexual nature,

the forum concludes it was related to Brincken's gender. This satisfies the first element of the Agency's prima facie case.

2. The conditions were so intolerable that a reasonable person in Brincken's circumstances would have resigned because of them.

Respondent's deli occupied a relatively small area, with somewhat cramped work spaces and areas for the staff to move in. During her employment, Brincken, who was married, observed Huston engage in sexual conduct towards other female employees and went out of her way to avoid physical contact with him because she was afraid she would be the next target of his unsolicited touching. She was also aware that Respondent's other female employees walked off the job on August 26, 2005, after G. Feriante confronted Huston about touching his daughter and other female employees. Although there is no direct evidence on this point, it does not require a giant leap of faith for the forum to draw the inference that Brincken was aware of the circumstances under which those other employees walked off the job. When Huston placed his hand on her as though to hug her, then asked if he could kiss her, this was the proverbial straw that broke the camel's back. In Brincken's own words, although she had observed Huston touching other employees, "it's always different when it happens to you." Under these circumstances, the forum finds that Brincken's working conditions were so intolerable that a reasonable person in her circumstances would have resigned because of them.

3. Huston knew or should have known that Brincken was certain, or substantially certain, to leave employment as a result of the working conditions.

By the time the "kiss" incident occurred, several of Respondent's female employees had already quit, at least in part because of Huston's conduct. This occurred just after A. Feriante's father had come into Spud and confronted Huston about touching his daughter and other female employees. The fact that he asked Brincken if it was alright for him to put his hand on her shoulder and his statement to her

that other female employees had complained of that behavior shows Huston knew that Respondent's female employees did not like him to touch them. Respondent argues that the "kiss" incident occurred as a result of Huston's excitement from getting a phone call from the Lottery Commission, as though the absence of a libidinous motivation excuses his behavior. That argument carries no weight. Huston lost part of his workforce earlier due to similar behavior. Knowing that other female employees had complained about his touching them, Huston should have anticipated that Brincken would have objected to him putting his hand on her without permission,^{xv} as though he was going to hug her, then asking her if he could kiss her on the lips, and could have reasonably anticipated that the request for a kiss on the lips, a more intimate act, would result in Brincken's quitting.

4. Brincken left her employment as a result of those working conditions.

Brincken unequivocally testified that she quit as a direct result of the "kiss" incident and decided to quit the day after it occurred. She remained at work for an additional week only because Huston was out of town the entire time.

5. Conclusion.

The forum concludes that a reasonable person in Brincken's position would have resigned under the working conditions imposed on Brincken and finds that Brincken was constructively discharged, in violation of ORS 659A.030(1)(a).

C. Damages.

The Agency seeks back pay "estimated to be in excess of \$500" and mental suffering damages of \$30,000 for Brincken.

Back Pay

The purpose of back pay awards in employment discrimination cases is to compensate a complainant for the loss of wages and benefits the complainant would

have received but for the respondent's unlawful employment practices. *In the Matter of From the Wilderness, Inc.*, 30 BOLI 227, 290 (2009), *appeal pending*. Brincken's last day of work was October 28, 2005. She immediately began looking for work and started work at another job that paid the same as Respondent on November 7, 2005. The forum calculates that she lost one week's pay, which the forum estimates to be \$309.58.^{xvi}

Mental & Emotional Suffering Damages

In determining an award for emotional and mental suffering, the forum considers the type of discriminatory conduct, and the duration, frequency, and severity of the conduct. It also considers the type and duration of the mental distress and the vulnerability of the complainant. 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. *From the Wilderness, Inc.*, at 291-92.

Although Brincken was sexually harassed and constructively discharged, the record is somewhat meager as to the mental and emotional suffering she experienced as a result of Respondent's unlawful employment practices, being limited to her following brief testimony on that subject:

- During her employment, as a result of Huston's sexual conduct that she saw and heard about, Brincken tried to make sure she was not alone with or physically close to Huston.
- Huston's touching and proposal for a kiss made her feel "shocked," "gross" and "not happy" like she "had been violated" and her "personal boundary had been crossed."
- Huston's sexual conduct was "upsetting" to her and she tried not to think about it and tried not to let it affect her.
- She found Huston's sexual conduct "disturbing" and "it still upsets" her; she has been more cautious with male employers since leaving Respondent's employment.

Her lack of testimony concerning (a) how Huston's sexual conduct and her discharge affected her subsequent employment; (b) how that the discharge had caused her any

financial stress; (c) the degree to which she has been “upset” since leaving Respondent’s employment; or (d) how that “upset” has manifested itself is also pertinent to the appropriate amount of an award of damages for emotional and mental suffering

Based on the record as a whole, the forum finds that \$10,000 is adequate to compensate Complainant Brincken for her emotional and mental suffering.

COMPLAINANT RUIZ-NAJERA

A. Sexual harassment.

The Agency also alleges “tangible employment action” and “hostile environment” theories of sexual harassment with regard to Ruiz-Najera. The Agency established the following facts in support of these theories:

- Huston learned of the term “muchacha caliente” from a Hispanic acquaintance who referred to his sister-in-law as “muchacha caliente” and told Huston that his sister-in-law was a “hot chick” and “very beautiful.”
- In mid-September 2005, Huston said “muchacha caliente” at work while directing the words at Ruiz-Najera. Huston said “muchacha caliente” again that day and told Ruiz-Najera his Hispanic friends had told him it meant “pretty girl.” Ruiz-Najera told Huston it did not mean “pretty girl,” but that it meant “horny girl” and she did “not want to hear it, especially if you are going to say it to me.” Ruiz-Najera also told Huston that it was disrespectful. Later that same day, Huston told Ruiz-Najera he would verify the meaning of “muchacha caliente” with his Hispanic friends. Ruiz-Najera told him “okay, but I don’t want to hear it.”
- Huston then talked with his Hispanic friends and they told him that “muchacha caliente” means “horny girl” and that it was not a respectful thing to say.
- The next time Huston said “muchacha caliente” to Ruiz-Najera, Huston said he had talked with his friends and verified that “muchacha caliente” did mean “horny girl.” Ruiz-Najera again told Huston she did not want to hear it and that it did not mean “pretty girl.”
- On another day, Huston said “muchacha caliente” to Ruiz-Najera once more and she told him that she did not want to hear it because it was insulting.
- Ruiz-Najera felt disrespected by Huston when he called her “muchacha caliente.”

“Tangible Employment Action”

The Agency's prima facie case under the tangible employment action theory consists of the following elements: (1) Respondent was an employer subject to ORS 659A.001 to 659A.030; (2) Respondent employed Ruiz-Najera; (3) Ruiz-Najera is a member of a protected class (sex); (4) Respondent, through Huston, engaged in unwelcome conduct (verbal or physical) directed at Ruiz-Najera because of her sex; (5) Submission to that conduct was implicitly made a condition of Ruiz-Najera's employment or was used as a basis for employment decisions; and (6) Ruiz-Najera suffered harm through a tangible employment action taken by Respondent based on Huston's conduct. As in Brincken's case, the first three elements are undisputed. The Agency established the fourth element by Ruiz-Najera's credible testimony regarding Huston's "muchacha caliente" remarks. Unlike Brincken's case, there is no evidence that submission to that conduct was implicitly made a condition of Ruiz-Najera's employment or was used as a basis for employment decisions. The Agency alleged that Huston made negative employment decisions concerning Ruiz-Najera based on her objections to his conduct that specifically included reducing her work hours, discharging her, and denying her privileges of employment. An inspection of Ruiz-Najera's work hours does not reveal a consistent pattern of reduction in her work hours that can be tied to her objections to the "muchacha caliente" comments.^{xvii} Credible evidence in the record showed no other privileges of employment that she was denied. Finally, the forum has determined that Ruiz-Najera was not constructively discharged, as will be discussed in more detail later. In conclusion, the forum finds that Respondent did not violate ORS 659A.030(1)(b) and OAR 839-005-0030(1)(a) with regard to Ruiz-Najera.

"Hostile Environment"

The Agency's prima facie case under the "hostile environment" theory consists of the following elements: (1) Respondent was an employer subject to ORS 659A.001 to

659A.030; (2) Respondent employed Ruiz-Najera; (3) Ruiz-Najera is a member of a protected class (sex); (4) Respondent, through its proxy, engaged in unwelcome conduct (verbal or physical) directed at Ruiz-Najera because of her sex; (5) the unwelcome conduct was sufficiently severe or pervasive to have the purpose or effect of creating a hostile, intimidating or offensive work environment; and (6) Ruiz-Najera was harmed by the unwelcome conduct.

Once more, the first three elements are undisputed.

The fourth element of the Agency's case is that Respondent, through Huston, engaged in unwelcome conduct (verbal or physical) directed at Ruiz-Najera because of her sex. Huston's status as Respondent's owner, president, and manager is not at issue. As Respondent's corporate officer, Huston's conduct is properly imputed to Respondent and Respondent is strictly liable for any unlawful harassment found herein.

Huston's testimony established that he understood "muchacha caliente" to mean "hot chick" and "very beautiful" the first time he directed the term "muchacha caliente" at Ruiz-Najera. After that, he understood that it meant "horny girl" to Ruiz-Najera. Based on that evidence, the forum concludes that Huston directed the words "muchacha caliente" at Ruiz-Najera because of her female gender. Her objections to the comments and credible testimony that she found the comments insulting and disrespectful establish that they were unwelcome, thereby satisfying the fourth element of the Agency's prima facie case.

The fifth element of the Agency's case is whether the unwelcome conduct was sufficiently severe or pervasive to have the purpose or effect of creating a hostile, intimidating or offensive work environment. As in Brincken's case, the forum again recognizes that isolated incidents of purely verbal harassment, standing alone, do not constitute unlawful sexual harassment unless they are extremely serious.

First, the forum evaluates the severity of Huston's conduct. To begin with, Huston was Respondent's president, owner, and manager and Ruiz-Najera's immediate supervisor. His conduct was purely oral. All his remarks were specifically directed at Ruiz-Najera^{xviii} and all were made in the workplace. The first time Huston said "muchacha caliente" he understood it to mean "hot chick" and "very beautiful." After the second time Huston referred to Ruiz-Najera as "muchacha caliente," he clearly understood that the term meant "horny girl" to her and she told him directly that she did not want to hear it. When his Hispanic friends confirmed that "muchacha caliente" meant "horny girl" and was disrespectful, Huston again called Ruiz-Najera "muchacha caliente" *after* telling her his friends had confirmed it meant "horny girl." Finally, the term "horny girl" has a specific sexual connotation.^{xix}

Next, the forum evaluates the pervasiveness of Huston's conduct. This is not an "isolated incident" case because of the number of times Huston directed the remark "muchacha caliente" at Ruiz-Najera. Although the evidence does not show the exact time period within which Huston made those remarks, it does show a starting point – mid-September 2005 – and they could not have been made after early December 2005. Based on the statements about Huston's "muchacha caliente" remarks that Ruiz-Najera made to Moss on November 7, 2005, the forum infers that Huston made most, if not all of the remarks before November 7, 2005.^{xx}

Ruiz-Najera's credible testimony that Huston's remarks made her feel disrespected and insulted and that she objected to the remarks for those reasons establishes that Huston's behavior was offensive to her. Viewed in the totality of the circumstances, the forum finds that Huston subjected Ruiz-Najera to unwelcome sexual

conduct that was sufficiently severe and pervasive to have had the purpose or effect of creating an offensive work environment and that a reasonable person in Ruiz-Najera's circumstances would have so perceived it.

The last element of the Agency's case is proof that Ruiz-Najera was harmed by the unwelcome sexual conduct. Ruiz-Najera's credible testimony established that she felt disrespected and insulted by Huston's use of the term "muchacha caliente." This establishes the harm element of the Agency's prima facie case.

Finally, the forum notes that Respondent, in its answer, again raised the affirmative defense available in OAR 839-005-0030(5). As in Brincken's case, this defense fails because of the forum's conclusion that Huston is Respondent's "proxy."

In conclusion, the forum finds that Respondent, through Huston, violated ORS 659A.030(1)(b) and OAR 839-005-0030(1)(b) with respect to Ruiz-Najera.

B. Retaliation

The Agency alleges that Respondent retaliated against Ruiz-Najera for opposing Huston's sexual harassment, in violation of ORS 659A.030(1)(f), "by cutting her hours of work, causing her a loss of income." The evidence shows that Ruiz-Najera opposed Huston's sexual harassment in two ways: (1) by telling him not to call her "muchacha caliente," beginning in mid-September 2005; and (2) by complaining to The Dalles Police Department on November 7, 2005, about the "peephole" and also telling Officer Moss that Huston had been calling her "muchacha caliente." Through Ruiz-Najera's credible testimony, the forum has concluded that she told Huston that she did not want to be called "muchacha caliente." In contrast, there is no evidence that Huston knew that Ruiz-Najera complained to the police. Ruiz-Najera began work on August 30, 2005, and the hours she worked during each of Respondent's two week payroll periods

are set out in Finding of Fact #33 – The Merits. Those records show that she worked 81.93 hours during her first two weeks, then worked 61.5, 46.46, 66.17, 61.5, 53.5, and 32.92 hours during her remaining payroll periods. The forum attributes the large number of hours worked by Ruiz-Najera during her first two weeks to the fact that all of Respondent’s employees except for Brincken and Henry Banner had quit immediately before she was hired, and there is insufficient evidence from which to determine how many days Ruiz-Najera worked during her last payroll period. This evidence does not rise to the level of the preponderance of evidence the Agency needs to prove retaliation.

C. Constructive discharge.

The elements of the Agency’s prima facie case with respect to Ruiz-Najera’s alleged constructive discharge are the same as in Brincken’s case. Unlike Brincken’s case, Ruiz-Najera’s case fails because of the Agency’s failure to prove the fourth element of its prima facie case – that Ruiz-Najera left her employment as a result of those working conditions. The working conditions that Ruiz-Najera was subjected to were the “muchacha caliente” comments. However, she testified that the working condition that caused her to begin looking for another job was learning of the existence of the bathroom “peephole” on November 7, 2005. That testimony, coupled with her dramatic testimony about the extensive trauma the vent caused and continues to cause her, causes the forum to conclude that Ruiz-Najera quit because of her perception that the bathroom vent was a peephole created and used by Huston to spy on women while they were using the toilet. Because there was no evidence that this was a discriminatory working condition created or maintained by Huston, there can be no constructive discharge.

D. Damages.

The Agency seeks lost wages “estimated to be in excess of \$2,000” and mental suffering damages of \$50,000 for Ruiz-Najera.

Back Pay

Back pay is awarded when the forum concludes that an unlawful discharge has occurred. Since Ruiz-Najera was not unlawfully discharged, she is not entitled to any back pay.

Mental & Emotional Suffering Damages

The forum bases its award of damages for mental and emotional suffering solely on the suffering that Ruiz-Najera experienced as a result of being on the receiving end of Huston’s “muchacha caliente” remarks. Although the forum disbelieved much of Ruiz-Najera’s testimony because of the reasons set out in Finding of Fact #51 – The Merits, the forum credits her testimony that she felt insulted and disrespected by Huston’s remarks, in part because of the very nature of the remarks. That is sufficient harm on which to base an award of damages for mental and emotional suffering and the forum bases its award solely on that harm. Under the circumstances, the forum finds that \$5,000 is an adequate sum to compensate Ruiz-Najera for her emotional and mental suffering.

ORDER

NOW, THEREFORE, as authorized by ORS 659A.850(2) and ORS 659A.850(4), and to eliminate the effects of Respondent’s violations of ORS 659A.030(1)(a) and ORS 659A.030(1)(b), and as payment of the damages awarded, the Commissioner of the Bureau of Labor and Industries hereby orders **Spud Cellar Deli, Inc.** to:

(1) Deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 1045 State Office Building, 800 NE Oregon Street, Portland, Oregon 97232-2180, a

certified check payable to the Bureau of Labor and Industries **in trust for Complainant**

Simone Brincken in the amount of:

- a) THREE HUNDRED NINE DOLLARS AND FIFTY-EIGHT CENTS (\$309.58), less lawful deductions, representing income lost by Simone Brincken between October 29 and November 6, 2005, as a result of Respondent's unlawful practice found herein; plus,
- b) Interest at the legal rate on the monthly accrual of wages lost between October 29 and November 6, 2005;
- c) Interest at the legal rate on the sum of \$309.58 from November 7, 2005, until paid; plus
- d) TEN THOUSAND DOLLARS (\$10,000.00), representing compensatory damages for mental distress Simone Brincken suffered as a result of Respondent's unlawful practice found herein; plus,
- e) Interest at the legal rate on the sum of \$10,000.00 from the date of the Final Order until Respondent complies herein.

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

Miriam Ruiz-Najera in the amount of:

- a) FIVE THOUSAND DOLLARS (\$5,000.00), representing compensatory damages for mental distress Miriam Ruiz-Najera suffered as a result of Respondent's unlawful practice found herein; plus,
- b) Interest at the legal rate on the sum of \$5,000.00 from the date of the Final Order until Respondent complies herein.

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

ⁱ The "other conduct of a sexual nature" alleged was that Complainant Ruiz-Najera had discovered what she believed to be a "peephole" in Respondent's women's restroom and that she later reported the peephole and Respondent's alleged sexually offensive conduct to The Dalles Police Department.

ⁱⁱ Huston told Moxley he had put his hand on a female employee's shoulder while telling her she was doing a good job and the employee had told him that was sexual harassment but didn't recall the person's name; the forum infers this was the incident he referred to when he asked Brincken's permission to put his hand on her shoulder

ⁱⁱⁱ Brincken testified that, although she had observed Huston touching other employees, "it's always different when it happens to you."

^{iv} The forum has credited both Huston's and Feriante's unimpeached testimony about their disabilities and the restrictions those disabilities place on them.

^v Bates did not testify at hearing, and although she did tell The Dalles Police Department officer Doug Kramer that Huston slapped her on the butt, the forum considers this evidence unreliable for the reasons stated in Finding of Fact #38 – The Merits.

^{vi} This does not inherently conflict with the forum's conclusion that Brincken observed Huston touching employees because Brincken started work a month earlier than Ruiz-Najera and several employees whom Brincken worked with, including Feriante, quit before Ruiz-Najera was hired.

^{vii} In 2010, OAR 839-005-0035 was renumbered, without change in text, as OAR 839-005-0011.

^{viii} The Formal Charges specifically allege violations of OAR 839-005-0030, an administrative rule that defines the different types of sexual harassment and spells out theories of liability.

^{ix} Although Respondent raised the affirmative defenses available under OAR 839-050-0030(5), the forum does not address those defenses at this time because they are not available when the harassment consists of a "tangible employment action."

^x See, e.g., *In the Matter of State Adjustment, Inc.*, 23 BOLI 19, 27, 31-32 (2002) (forum's determination that female complainant was subjected to hostile environment sexual harassment relied in part on the harasser's derogatory references to women and explicit sexually explicit jokes that, although not directed specifically at complainant, were "within Complainant's earshot"); *In the Matter of RJ's All American Restaurant*, 12 BOLI 24, 27, 30-32 (1993) (forum's determination that female complainant was subjected to hostile environment sexual harassment included finding that complainant was aware that the harasser had embraced another female employee against her will and made a show of speaking with and sitting by attractive female customers, "further sexually charg[ing] * * * the atmosphere"); *In the Matter of Lee Schamp*, 10 BOLI 1, 17-18 (1991) (in determining whether female complainant was subjected to hostile environment sexual harassment, forum considered that complainant observed her harasser or had the harasser's victims tell her that the harasser had snapped their bra straps, squirted water onto female employee's breasts and buttocks, crowded against female employees in a sexual manner, touched female employees on the breast and buttocks, and commented on female breasts and on female employee's private lives).

^{xi} In *Breeden*, Breeden was reviewing job applicant files with her male supervisor and a coworker, also male. Her supervisor read aloud a comment that one of the applicants made to a colleague at a previous place of employment: "I hear making love to you is like making love to the Grand Canyon." After Breeden's supervisor stated that he did not know what that comment meant, a male coworker offered to explain it to him later and both men chuckled. The Supreme Court found no actionable harassment from this "isolated incident."

^{xii} Compare *In the Matter of Moyer Theatres, Inc.*, 18 BOLI 123, 136 (1999) (when one of respondent's supervisors once tugged on the complainant's skirt, told her she had a nice dress, and made a comment to her along the lines of "looking mighty fine today, are you," these incidents, standing alone, were not sufficiently severe or pervasive to create a hostile, intimidating or offensive work environment).

^{xiii} That rule reads as follows: "Employer proxy: An employer is liable for harassment when the harasser's rank is sufficiently high that the harasser is the employer's proxy, for example, the respondent's president, owner, partner or corporate officer."

^{xiv} Despite these complaints, the credible testimony of Kendrick established that Huston still touched at least one female employee by patting her on the shoulder, then asking if it offended her, *after* Brincken and Ruiz-Najera filed their complaints.

^{xv} There is no evidence that Brincken gave Huston carte blanche authority to put his hand on her shoulder when he originally asked to do that.

^{xvi} See Finding of Fact #22 – The Merits.

^{xvii} See Finding of Fact #33 – The Merits.

^{xviii} There was no evidence that Respondent employed anyone else who understood Spanish and "hot chick," "very beautiful," and "horny girl" all refer to one person, not women in general.

^{xix} Webster's defines "horny" as "easily excited sexually — usually considered vulgar." Webster's *Third New Int'l Dictionary* 1091-92 (Unabridged ed 2002).

^{xx} See Finding of Fact #29 – The Merits, *supra*.