

In the Matter of
THE TJX COMPANIES, INC., dba T. J. MAXX,

Case No. 55-99

November 30, 1999

SYNOPSIS

Respondent employed Complainant as a lead merchandiser, a position that included several evening shifts each week. Complainant took leave under the Oregon Family Leave Act because of disabilities related to her pregnancy. When Complainant returned from leave, she told Respondent that she could not work evening shifts on several days of the week. Consequently, Respondent was not required to restore Complainant to that position when she returned from leave. The commissioner dismissed the complaint and the specific charges. ORS 659.060(3), ORS 659.484, OAR 839-009-0270.

The above-entitled case came on regularly for hearing before Erika L. Hadlock, designated as Administrative Law Judge ("ALJ") by Jack Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on September 1, 1999, in Portland, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by Cynthia Domas, an employee of the Agency. Complainant Josephine Lancaster, who was not represented by counsel, was present throughout the hearing. Respondent was represented by Donna Sandoval of the law firm Bullivant Houser Bailey. Mr. Marc LeBlanc also was present throughout the hearing as Respondent's representative.

The Agency called Complainant, Marc LeBlanc (one of Respondent's managers), Melody Taboada (a former employee of Respondent), and Colleen Jenny (a former employee of Respondent) as witnesses. Respondent called three witnesses: LeBlanc, former store manager Deborah "Susie" Taylor, and district manager Jan Skansgaard.

The forum received into evidence:

a) Administrative Exhibits X-1 to X-21 (submitted or generated prior to hearing) and X-22 to X-24 (documents submitted or generated on or after the day of hearing);

b) Agency Exhibits A-1 to A-6 (submitted prior to hearing with the Agency's case summary and addenda to that summary), A-7 to A-9 (submitted at hearing and received for the limited purpose of establishing jurisdiction), and A-10 (submitted at hearing and received for the limited purpose of demonstrating the Agency's method of calculating Complainant's entitlement to leave); and

c) Respondent Exhibit R-1 (submitted prior to hearing with Respondent's case summary).

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

FINDINGS OF FACT – PROCEDURAL

1) On or about February 5, 1998, Complainant Josephine Lancaster filed a verified complaint with the Civil Rights Division of the Agency alleging that Respondent unlawfully had failed to restore her to the position of employment she held before she started taking leave under the Oregon Family Leave Act ("OFLA"). The Division found substantial evidence that Respondent had violated ORS 659.492.

2) On June 24, 1999, the Agency filed a request for hearing and submitted Specific Charges alleging that Respondent unlawfully had refused to reinstate Complainant Josephine Lancaster to the position of employment she held prior to taking OFLA leave, in violation of ORS 659.484 and OAR 839-009-0320. The Agency sought approximately \$1,000.00 in back wages and lost benefits plus \$10,000.00 for mental suffering.

3) On or about July 6, 1999, the Agency served on Respondent the Specific Charges, accompanied by the following: a) a Notice of Hearing setting forth the time and place of the hearing in this matter; b) a Summary of Contested Case Rights and Procedures containing the information required by ORS 183.413; and c) a copy of the forum's contested case hearings rules, OAR 839-050-0000 to 839-050-0440.

4) Respondent filed a timely Answer on July 15, 1999.

5) On July 27, 1999, the ALJ ordered the Agency and Respondent each to submit a case summary including: a list of all witnesses to be called; the identification and description of any documents of physical evidence to be offered, together with a copy of such document or evidence; a brief statement of the elements of the claim (for the Agency only); a brief statement of any defenses to the claim (for Respondent only); a statement of any agreed or stipulated facts; and any wage, damages, or penalty calculations (for the Agency only).

6) On August 13, 1999, the Agency filed a motion for partial summary judgment. Respondent filed its reply to that motion on August 18, 1999. Two days later, the Agency submitted a response to Respondent's reply by facsimile transmission. (The forum later received the original of the Agency's response by first-class mail.) On August 20, 1999, the forum denied the Agency's motion. The forum served its order on both the Agency and Respondent by facsimile transmission and first-class mail. That order stated, in pertinent part:

"This case involves the job protection provision of the Oregon Family Leave Act ('OFLA'). The Agency filed specific charges in which it alleged, *inter alia*, that Respondent did not reinstate Complainant to the position she held prior to commencing her family leave. Respondent admitted that allegation. (See Exhibit 1 to Agency Motion at 2, para. 6; Exhibit 2 to Agency Motion at 1, para. 2). The Agency subsequently moved for partial summary judgment on the issue of liability, arguing that Respondent had admitted all facts necessary to establish a violation of ORS 659.484(1). Respondent opposed the motion for partial summary judgment, arguing that genuine issues of material fact remained in dispute. Earlier today, the

forum received by facsimile transmission the Agency's response to Respondent's response to the motion for partial summary judgment.

"A participant is entitled to summary judgment only if '[n]o genuine issue as to any material fact exists and the participant is entitled to a judgment as a matter of law * * *.' OAR 839-050-0150(4)(B). In reviewing a motion for summary judgment, this forum 'draw[s] all inferences of fact from the record against the participant filing the motion for summary judgment * * * and in favor of the participant opposing the motion * * *.' *In the Matter of Efrain Corona*, 11 BOLI 44, 54 (1992), *aff'd without opinion, Corona v. Bureau of Labor and Industries*, 124 Or App 211, 861 P2d 1046 (1993); see *Jones v. General Motors Corp.*, 325 Or 404, 408, 939 P2d 608 (1997).

"ORS 659.484(1) provides, in pertinent part:

'After returning to work after taking family leave under the provisions of ORS 659.470 to 659.494, an eligible employee **is entitled** to be restored to the position of employment held by the employee when the leave commenced if that position still exists, without regard to whether the employer filled the position with a replacement worker during the period of family leave.'

"(Emphasis added).

"The statute does not state that covered employers always must restore eligible employees who have taken family leave to their prior positions, where those positions still exist. Rather, the emphasized portion of the statute creates an *entitlement* for eligible employees, which suggests that they may choose whether or not they wish to be restored to their former jobs. The statute does not indicate whether an employee should have to make a demand for such restoration, or whether the employer should always restore the employee to the former position barring a request from the employee not to be restored. In that respect, the statute is ambiguous.

"The administrative rule implementing ORS 659.484(1) resolves this ambiguity by placing the onus on the employer always to restore the employee to his or her former position:

'(1) The employer **must return the employee to the employee's former position** if the job still exists even if it has been filled during the employee's family leave unless the employee would have been bumped or displaced if the employee had not taken leave.'

"OAR 839-009-0270 (emphasis added). Read literally, the administrative rule does not allow for the possibility of the employee choosing not to be returned to his or her former job. Such a reading is illogical and conflicts with the statutory language, which merely creates an entitlement to restoration. The regulation may, however, be construed in a manner consistent with that language. To give meaning to the statutory provision creating an entitlement to restoration, OAR 839-009-0270 must be read to mean that a covered employer is required to return an eligible employee to

the position the employee held prior to commencing family leave if that position still exists, unless the employee somehow rejects that entitlement.* The employee need not make an affirmative demand for restoration.

"Although the Agency need not prove that Complainant demanded restoration, it still must prove that Respondent *denied or refused* Complainant restoration to a job to which she was entitled. Respondent's mere *failure* to restore Complainant creates a rebuttable presumption that Respondent refused to give effect to Complainant's entitlement to job restoration. Respondent may negate that presumption by coming forward with evidence that Complainant asked not to be restored to her former position.

"In this case, paragraphs III(1) through III(9) of the Agency's statement of facts, to which Respondent admitted, do not include an allegation that Respondent 'refused' to restore Complainant to her former job; nor do they include an allegation that Complainant sought to be restored to that job. Only in paragraph III(10), which Respondent denied, did the Agency allege that Respondent 'refus[ed]' to reinstate Claimant to her original position as lead in Merchandising.** In its opposition to the motion for summary judgment, Respondent alleges that Complainant asserted that 'she was not available to work the schedule she had worked prior to her leave' and that 'Complainant chose not to return to [her former] position.'*** Consequently, there remains a genuine issue of material fact regarding whether Complainant requested that she not be restored to the job she held when her leave commenced. For that reason, the Agency's motion for partial summary judgment is hereby **DENIED.**"

*"There are additional exceptions to the rule requiring restoration. For example, OAR 839-009-0270(1) provides that the employee must be restored to his or her former position 'unless the employee would have been bumped or displaced if the employee had not taken leave.'"

**"Consequently, Respondent did not, as the Agency asserts, admit all factual allegations alleged in the specific charges. Construing all facts and inferences in Respondent's favor, Respondent's denial that it 'refus[ed] to reinstate Complainant' is sufficient to raise the defense that Complainant asked not to be restored to her former position.

"In its response, the Agency implicitly suggests that this defense is an affirmative defense that Respondent was required to raise in its answer. That argument fails for two reasons. First, under OAR 839-050-0140(1), Respondent may amend its answer at any time before hearing, and if the defense were an affirmative defense, Respondent would still be entitled to raise it at this time. Second, the forum is not convinced that the defense is an affirmative defense that Respondent must plead. Rather, the defense appears to be more like the defense of "legitimate nondiscriminatory reason" for refusal to hire a member of a protected class. That defense merely negates the Agency's prima facie case of discrimination and need not be pleaded by a respondent employer. Similarly, the defense that an employee asked not to be restored to his or her former position simply negates an element of the Agency's prima facie case for violation of the OFLA job protection provision - that the employer deprived the employee of his or her entitlement to

restoration. Consequently, the defense is not an affirmative defense that Respondent must separately plead."

***"Respondent provides no documentary evidence to support these assertions. This forum does, however, give some evidentiary weight to unsworn assertions contained in respondents' pleadings in other contexts (see, e.g., In the Matter of Tina Davidson, 16 BOLI 141, 148 (1997)) and will do so in determining whether genuine issues of material fact exist for purposes of ruling on a motion for summary judgment."

That ruling is hereby affirmed.

7) On August 20, 1999, the Agency filed its case summary, which included copies of Exhibits A-1 through A-4. Respondent filed its case summary, including Exhibit R-1, the same day.

8) On August 26, 1999, the Agency submitted an Addendum to its case summary by facsimile transmission. The Addendum included a new exhibit, A-5, and provided a clearer copy of one page of Exhibit A-3. The forum received the original Addendum by first-class mail on August 27.

9) The Agency submitted a Second Addendum to its case summary by facsimile transmission on August 27, 1999. The Second Addendum identified a new Exhibit A-6. The forum received the original Second Addendum by first-class mail on August 30.

10) On August 31, 1999, the Agency submitted "Exhibit A" to its case summary by facsimile transmission. The Exhibit included the Agency's revised computation of damages. The forum received the original "Exhibit A" on September 1, 1999.

11) At the start of the hearing, counsel for Respondent stated that she had no questions about the Notice of Contested Case Rights and Procedures.

12) Pursuant to ORS 183.415(7), the ALJ verbally advised the Agency and Respondent of the issues to be addressed, the matters to be proved, and procedures governing the conduct of the hearing.

13) At hearing, Respondent, through counsel, conceded jurisdiction.

14) The evidentiary record closed on September 1, 1999.

15) By order dated September 3, 1999, the ALJ asked the Agency to submit a copy of Exhibit A-4, page 27, that was not crooked, as was the page originally submitted. The Agency timely submitted the requested page.

16) The ALJ issued a proposed order on November 4, 1999, that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. Neither the Agency nor Respondent filed exceptions.

FINDINGS OF FACT – THE MERITS

1) At all material times, Respondent The TJX Companies, Inc., dba T.J. Maxx, was a foreign corporation engaged in the retail clothing industry. At all material times, Respondent was an Oregon employer utilizing the personal services of 25 or more persons and was subject to the provisions of ORS 659.010 to 659.494.

2) Respondent opened a store in Medford, Oregon, in early 1996. At all times material to this case, Deborah "Susie" Taylor worked in a management position at the Medford store and, by about June 1997, was the store manager. Marc LeBlanc started working for Respondent on or about June 1, 1997, as Operations Assistant Manager at the Medford store and, at the time of hearing, was store manager. At all material times after June 1, 1997, LeBlanc was Complainant's direct supervisor. At all material times, Jan Skansgaard was Respondent's district manager responsible for Oregon and Washington states.

3) Some of Respondent's non-management employees are titled "lead" workers and given additional responsibilities and pay compared to other non-management employees. Among the various types of lead positions are lead merchandisers, full-time lead cashiers, and part-time lead cashiers. Respondent guarantees some employees at least 30 hours per week of work and calls those individuals "full-time" employees. Persons in positions labeled "part-time" are not guaranteed 30 hours per week but sometimes work that many hours.

4) Complainant started working at Respondent's Medford store on or about April 1, 1996.

5) By the end of 1996, Complainant had been promoted to a lead merchandising position in Zone 3 (men's and children's wear). From February until June 21, 1997, Complainant worked an average of 30.85 hours per week. Complainant generally worked Monday through Friday, plus one Saturday per month. Her work schedule included an average of one closing shift (ending around 9:45 p.m.) and 1.73 mid-shifts (ending around 7:00 or 8:00 p.m.) each week, for a total of 2.73 evening shifts each week.ⁱ During this time, Complainant's late shifts (those lasting past 5:30 p.m.) varied, but at least once fell on each day of the week except Sunday. Most often, Complainant's evening shifts fell on Tuesday, Thursday, and Friday.

6) Lead merchandisers must be available to work any evening shift. They generally are assigned to one closing shift a week and two or three mid-shifts.

7) Taylor and LeBlanc both considered Complainant a good and valuable employee. Complainant sometimes spoke to Taylor about difficulties she faced both at work and in her personal life, including marital problems. Taylor twice accommodated Complainant's personal problems by rescheduling her work hours.

8) Complainant became pregnant with her fourth child in early 1997. Complainant had difficulties with her pregnancy, including early contractions.

9) On June 20, 1997, Complainant's doctor restricted the amount of weight Complainant could lift and stated that she should not work more than eight hours per day. Complainant gave Taylor a note from her doctor that set forth these limitations, and LeBlanc became aware of the note. Complainant rarely had worked more than eight hours per day prior to receiving the note from her doctor and Respondent was

able to accommodate the lifting and time restrictions while keeping Complainant in the lead merchandising position.

10) From June 21, 1997, through July 11, 1997, Complainant worked an average of 34.83 hours per week, including a total of six evening or mid shifts.

11) On July 11, 1997, "to insure the health of both mother and baby," Complainant's doctor stated that Complainant should work no more than four to six hours per day. The doctor also stated that Complainant should not lift or push items weighing more than 25 pounds. Complainant gave Taylor a second doctor's note, which outlined these limitations. To accommodate the lifting and time restrictions, Respondent assigned Complainant to work as a part-time head cashier, which is a "lead" position.

12) Complainant worked as a cashier for about three weeks. During that time, Complainant worked an average of only 26.17 hours per week, Monday through Friday. During each of two of those weeks, she worked two evening or mid-shifts. During the last week, she worked only during the days. Respondent paid Complainant the same hourly wage and gave her the same benefits as those she had received as a lead in merchandising.

13) Complainant worked about four fewer hours per week in the cashier position than she had in the lead merchandising position. Respondent did not designate that reduction in hours as OFLA leave and Complainant did not ask to take the time as OFLA leave.

14) During these three weeks, it appeared to LeBlanc that Complainant felt that she was letting down her zone by switching to the cashier's position.

15) On or about July 30, 1997, Complainant requested full-time OFLA leave because of the complications associated with her pregnancy. Taylor instructed

Complainant to complete a leave request form and also gave Complainant a form to have her doctor complete. Complainant submitted the completed forms, and Respondent granted Complainant's leave request on August 1, 1997, which was Complainant's last day at work prior to the birth of her child.

16) Complainant's doctor generally releases new mothers to return to work after she gives them a check-up six weeks after their children are born. On the leave request form she completed, Complainant indicated that she expected to return to work on November 24, 1997, approximately six weeks after her due date.

17) After Respondent approved Complainant's request, it sent her a document explaining her leave rights. That document included the following statement:

"You must notify your supervisor **two (2) weeks** prior to your return date of your intentions to return to work, the date, and any reasonable accommodations that may be necessary."

(Emphasis in original). Respondent gives this form to every associate employee who goes on a leave of absence. The purpose of the notice requirement is to give Respondent an opportunity to prepare for the employee's return, or for the fact that the employee does not plan to return.

18) Except for this written statement, Respondent never informed Complainant that she needed to give advance notice prior to returning to work.

19) Complainant's baby was born two weeks early on September 28, 1997. She called the store and told employees that she had given birth. Complainant did not then indicate when she planned to return to work.

20) During the first week in October, Complainant brought her baby to Respondent's store and told several people that she would return to work when her physician said it was alright. Complainant did not speak to either LeBlanc or Taylor about returning to work.

21) Sometime in October 1997, Respondent recruited Colleen Jenny to work in a lead merchandising position at its Medford store. At that time, no such position was open. In early November 1997, Respondent hired Jenny to work as the lead merchandiser in Zone 3 (the position Complainant had held) and she started working in that job on November 17, 1997, after giving two weeks' notice at her previous job.

22) In late October, Taylor tried unsuccessfully two or three times to contact Complainant by telephone to confirm when she would be returning to work. Taylor either got an answering machine or nobody answered the call. Respondent's busy season begins in November and Taylor wanted to know Complainant's plans so she could incorporate that information into her own planning. When she was unable to reach Complainant, Taylor asked LeBlanc to call her.

23) On October 30 and November 2, 1997, LeBlanc called Complainant and left messages. At some point, both Taylor and LeBlanc told Skansgaard that managers had left messages for Complainant and had not heard from her. They wanted to know what step to take next, since the busy season (Thanksgiving through Christmas) was coming up.

24) On November 3, 1997, Complainant called LeBlanc and told him that she would tell him when she planned to return to work after she had her six-week checkup on November 12.

25) On November 12, 1997, Complainant's physician released her to return to work. The doctor did not place any restrictions on Complainant's work duties or hours.

26) On Friday, November 14, Complainant went to Respondent's store and told LeBlanc that she would return to work the next Monday. Complainant also stated that, because of her husband's work schedule and child care issues, she was not available to work Monday, Wednesday, Thursday or Friday nights, or Saturdays before 2:00 p.m. At

some later time,ⁱⁱ LeBlanc told Complainant that the Zone 3 lead merchandising position had been filled. LeBlanc also told Complainant that the limitations on her hours would affect the position in which Respondent could place her.

27) After meeting with Complainant, LeBlanc discussed the issue with Taylor, who called Skansgaard for advice regarding what to do about the limitations Complainant had placed on her hours. Skansgaard told Taylor to try to accommodate Complainant's schedule by giving her another lead position at the same pay rate. However, Skansgaard said that if Complainant wanted to work one of the lead merchandising positions, she needed to be available for evening hours.

28) Complainant returned to work on Monday, November 17, 1997. Taylor told Complainant that the only lead positions that fit her restricted hours were lead custodian and part-time lead cashier. Because Complainant was not interested in the custodial position, Respondent assigned her to work as a part-time lead cashier.

29) While Complainant held this part-time lead cashier position, she did not work past 5:30 on any Monday, Wednesday, Thursday, or Friday night, and did not work before 2:00 p.m. on Saturdays. She did frequently work closing hours on Tuesday nights.

30) At some point, upon the advice of a district sales manager, LeBlanc asked Complainant to give him written notice of the restrictions on her hours. Complainant said she would check with her husband regarding the exact limitations she needed to place on her working hours, and would get back to LeBlanc. After that did not happen, LeBlanc asked Complainant again to put the limitations on her hours in writing, and Complainant refused.

31) When Complainant started working as a cashier after returning from leave, Respondent paid her at the same hourly rate she had earned prior to going on leave. Respondent later gave Complainant a pay raise.

32) Complainant was somewhat upset about not being able to return to the lead merchandising position, voiced her displeasure to some of her coworkers and to one of her friends, and cried during some of those conversations. This distress was caused by Complainant's frustration at having to limit her own hours because of her husband's work schedule and child care issues, not by any unlawful act by Respondent.

33) From November 17, 1997, through April 6, 1998, Complainant worked an average of 26.79 hours per week. Her work schedule included an average of 1.46 closing shifts and 0.69 mid shifts each week, for a total of 2.15 evening shifts per week.

34) In or about early April 1998, the person who had the lead merchandising position in Zone 2 announced that she was going to quit her job. On April 7, 1998, Complainant told Respondent that she was available to work any hours. Taylor and LeBlanc then assigned Complainant to the newly open Zone 2 lead merchandising position. A few months later, Jenny left her job with Respondent, and Respondent reassigned Complainant to the Zone 3 lead merchandising position. Complainant worked the same number of hours per week in the Zone 2 position as she had in the Zone 3 position.

35) The ALJ carefully observed Complainant's demeanor during the hearing and found that she adopted an artificially emotional tone when describing how she reacted to being assigned to the part-time cashier position. At other times, Complainant's demeanor was somewhat hostile, and she appeared reluctant to testify, both on direct and on cross-examination. During Respondent's case, LeBlanc testified credibly that Complainant had refused to provide him with a written statement of the hours she was

available to work. The Agency called Complainant as its only rebuttal witness, and asked her whether LeBlanc had asked her to provide such a statement. Complainant defiantly stated that he had, and that she had not given it to him. The forum concludes from the manner in which Complainant testified, and the inconsistencies in her testimony described in the factual findings that follow, that this admission was the only time Complainant testified credibly with regard to a material fact in dispute.

36) Complainant made several assertions that were flatly contradicted by the testimony of Respondent's managerial employees. Most significantly, Complainant stated that she placed no restrictions on the hours she was willing to work when she returned from leave. LeBlanc, Taylor, and Skansgaard all testified credibly that Complainant told LeBlanc she could not work Monday, Wednesday, Thursday, or Friday evenings and also could not work Saturday mornings. Complainant's payroll records corroborate that testimony by demonstrating that, during her post-leave stint as a cashier, she did not work any such shifts. Complainant also testified that she had no conversations with LeBlanc or Taylor regarding her expected return date after her baby was born, and that she had never received any telephone messages from them. Again, LeBlanc, Taylor, and Skansgaard testified credibly to the contrary.

37) Finally, one portion of Complainant's testimony was inherently illogical. Complainant testified that she suffered emotionally from her reassignment to the part-time lead cashier position because she could not spend "any time" with her family and had to work more nights than she had in Zone 3. This makes no sense, given that Complainant worked about four *fewer* hours per week in the cashier position than she had as a merchandiser, and also worked *fewer* total evening shifts. For the reasons described in this Finding and the two preceding Findings, the forum has given

Complainant's testimony weight only where it was corroborated by other, credible evidence.

38) Taylor and LeBlanc both testified that, had Complainant not restricted her hours, Respondent would have returned her to the Zone 3 lead merchandising position and would have assigned Jenny to another job. The forum finds this testimony to be highly speculative and gives it no weight.

39) In other respects, however, LeBlanc's testimony was reliable and credible, particularly with respect to the fact that Complainant limited her availability for work after her child was born. That testimony comports with the credible testimony of both Taylor and Skansgaard, who stated that LeBlanc told them that Complainant had restricted her available hours. The forum carefully observed the demeanor of all three of these witnesses, who delivered their testimony straightforwardly, without guile, and did not appear to exaggerate facts to assist Respondent's defense. The forum finds the testimony of all three witnesses credible in all material respects.

40) Jenny's testimony was not wholly credible. She testified that, in the Zone 3 merchandising position, she worked past 5:00 p.m. only one night a week. Those are very different hours from those reflected in Complainant's payroll records from the time she held that position -- she worked an average of one closing shift *plus* almost two mid shifts per week, sometimes working three or four mid shifts a week. No witness testified that Jenny's hours as a lead merchandiser were significantly different from those of other lead merchandisers, and nothing in the record except Jenny's bias in favor of Complainant explains this inconsistency. In general, Jenny's testimony appeared exaggerated in favor of Complainant, and the forum has given it weight only where it was corroborated by other credible evidence.

ULTIMATE FINDINGS OF FACT

1) At all material times, Respondent was an Oregon employer utilizing the services of 25 or more persons in the State of Oregon.

2) Respondent employed Complainant starting in April 1996 and Complainant worked an average of more than 25 hours per week from then until August 1, 1997.

3) Beginning in June 1997, Complainant suffered disabilities associated with her pregnancy and her physician placed restrictions on her job duties. From July 11 through August 1, 1997, Respondent accommodated Complainant's pregnancy-related disabilities by placing her in a part-time lead cashier position with reduced work hours.

4) Beginning August 2, 1997, Complainant took full-time leave because of the disabilities she continued to suffer as a result of her pregnancy.

5) Complainant returned to work on November 17, 1997, after the birth of her child. Complainant told Respondent she was not available to work Monday, Wednesday, Thursday, or Friday evenings, or Saturdays before 2:00 p.m.

6) The lead merchandiser position Complainant held prior to commencing her leave required complete availability for evening shifts.

CONCLUSIONS OF LAW

1) The Oregon family leave laws apply to "covered employers," which are defined as:

"employers who employ 25 or more persons in the State of Oregon for each working day during each of 20 or more calendar work-weeks in the year in which the leave is to be taken or in the year immediately preceding the year in which the leave is to be taken."

ORS 659.472(1); see ORS 659.470(1). At all material times, Respondent was a covered employer.

2) The actions, inactions, statements, and motivations of managers LeBlanc, Taylor, and Skansgaard properly are imputed to Respondent.

3) ORS 659.474(1) provides that "[a]ll employees of a covered employer are eligible to take leave for one of the purposes specified in ORS 659.476(1)(b) to (d)" except in circumstances not applicable here. Complainant was an eligible employee.

4) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the persons and the subject matter involved in this case and the authority to eliminate the effects of any unlawful employment practice found. ORS 659.492(2); ORS 659.010 *et seq.*

5) ORS 659.476 specifies the purposes for which OFLA leave may be taken, including:

"To recover from or seek treatment for a serious health condition of the employee that renders the employee unable to perform at least one of the essential functions of the employee's regular position."

The term "serious health condition" includes:

"Any period of disability due to pregnancy, or period of absence for prenatal care."

ORS 659.470(6). Complainant's disabilities due to pregnancy were "serious health conditions" for purposes of OFLA.

6) Complainant's disabilities due to pregnancy rendered her unable to perform at least one of the essential functions of her regular position and she was, therefore, entitled to take OFLA leave. ORS 659.476(1)(c).

7) ORS 659.478 provides, in pertinent part:

"(1) Except as specifically provided by ORS 659.470 to 659.494, an eligible employee is entitled to take up to 12 weeks of family leave within any one-year period.

"(2)(a) In addition to the 12 weeks of leave authorized by subsection (1) of this section, a female employee may take a total of 12 weeks of leave within any one-year period for an illness, injury or condition related to pregnancy or childbirth that disables the employee from performing any available job duties offered by the employer.

"* * * * *

"(5) The Commissioner of the Bureau of Labor and Industries shall adopt rules governing when family leave for a serious health condition of an employee or a family member of the employee may be taken intermittently or by working a reduced workweek. * * *"

OAR 839-009-0210(11) provides:

"'Intermittent leave' means leave taken for a single serious health condition in multiple blocks of time that requires an altered or reduced work schedule."

Complainant was entitled to take 12 weeks of OFLA leave for disabilities related to her pregnancy. Complainant's intermittent OFLA leave commenced when she started working reduced hours on July 11, 1997. Complainant's full-time OFLA leave commenced on August 2, 1997.

8) ORS 659.484 provides, in pertinent part:

"(1) After returning to work after taking family leave under the provisions of ORS 659.470 to 659.494, an eligible employee is entitled to be restored to the position of employment held by the employee when the leave commenced if that position still exists, without regard to whether the employer filled the position with a replacement worker during the period of family leave. * * *

OAR 839-009-0270 provides:

"(1) The employer must return the employee to the employee's former position if the job still exists even if it has been filled during the employee's family leave unless the employee would have been bumped or displaced if the employee had not taken leave. The former position is the position held by the employee when family leave began, regardless of whether the job has been renamed or reclassified. * * *"

Complainant was entitled to be restored to the lead merchandising position. The employee holding that position, however, must be available to work evenings. By declaring that she was not available to work Monday, Wednesday, Thursday, or Friday evenings, Complainant constructively announced that she did not want to be restored to the position she held when her leave commenced. Consequently, Respondent was not required to restore her to that job.

9) Pursuant to ORS 659.060(3), the Commissioner of the Bureau of Labor and Industries shall issue an order dismissing the charge and complaint against any respondent not found to have engaged in any unlawful practice charged.

OPINION

An employee who takes leave under the Oregon Family Leave Act (“OFLA”) is “entitled to be restored to the position of employment held by the employee when the leave commenced if that position still exists, without regard to whether the employer filled the position with a replacement worker during the period of family leave.” ORS 659.484(1). To establish a prima facie case that an employer unlawfully denied restoration to an eligible employee, the Agency must prove:

1. The employer was a “covered employer” as defined in ORS 659.470(1) and ORS 659.472;
2. The employee was an “eligible employee” – *i.e.*, he or she was an employee of the covered employer;
3. The employee had a “serious health condition”;
4. The “serious health condition rendered the employee unable to perform at least one of the essential functions of the employee’s regular position”;
5. The employee used OFLA leave to recover from or seek treatment for the serious health condition; and
6. When the employee returned to work after taking OFLA leave, the employer refused to restore the employee to the employment position he or she held when the leave commenced.

ORS 659.470 *et seq.*; *Cf. In the Matter of Centennial School District*, 18 BOLI 176, 192-93 (1999) (setting forth elements for claim of unlawful denial of OFLA leave), *appeal pending*.

In this case, only the sixth element is disputed. As explained more fully in the forum’s order denying the Agency’s motion for partial summary judgment,ⁱⁱⁱ an employer’s *failure* to restore an employee to his or her pre-leave position creates a presumption that the employer unlawfully *refused* to restore the employee to that

position. The employer may rebut that presumption by proving that the employee asked not to be to his or her former position. *Cf.* OAR 839-009-0270(8) ("If an employee gives unequivocal notice of intent not to return to work, the employer's obligations under OFLA cease.").

Here, the participants agreed that Respondent did not restore Complainant to the lead merchandising position when she returned from leave, and that position was the job Complainant held when her OFLA leave commenced.^{iv} The disputed issue is whether Complainant restricted her own available hours in a way that prevented her from performing the duties of the lead merchandiser position. The forum finds that she did.

First, the forum finds that Complainant told LeBlanc that she was not available to work Monday, Wednesday, Thursday, or Friday evenings. LeBlanc's credible testimony on that point was confirmed by the equally credible testimony of Taylor and Skansgaard. The Agency argued that the forum should disbelieve that evidence and instead believe Complainant's testimony that she had not placed any limitations on her hours. In its closing argument, the Agency further suggested that the managers must have reviewed Complainant's existing work records to determine what nights she never had worked as a cashier, so they could testify that those were the days on which Complainant had said she could not work during the evening. The forum finds this conspiracy theory not only inherently improbable, but completely unbelievable given the credibility of the testimony of LeBlanc, Taylor, and Skansgaard. Moreover, LeBlanc's request that Complainant provide a written statement of her available hours makes sense only if Complainant had, in fact, restricted her availability. If Complainant had not stated that she could not work certain evenings, there would have been no reason for LeBlanc to ask her to put that information in writing, which Complainant admits he did.

Second, Respondent proved, by a preponderance of the evidence, that the limitations Complainant placed on her hours amounted to an assertion that she would not work the same position she held when her leave commenced. LeBlanc, Taylor, and Skansgaard all testified credibly that lead merchandisers had to be available to work any evening during the week. Complainant's payroll records confirm this, showing that when she was in the Zone 3 lead merchandising position, she worked an average of almost three evening shifts per week, at least once working five evenings in one week. Those records also show that Complainant's evening shifts varied, falling at least once on every night of the week other than Sunday. Most often, the evening shifts fell on Tuesday, Thursday, and Friday -- and Thursday and Friday were two of the days on which Complainant had declared she could not work. By stating that she would not work the shifts required of the Zone 3 lead merchandiser, Complainant constructively announced that she did not want to be restored to that job.

Respondent did place itself in a precarious position by hiring Jenny to fill Complainant's job when she was still on leave. Had Complainant not restricted her availability, OFLA would have required Respondent to restore her to the Zone 3 merchandising position, "without regard to" the fact that it had "filled the position with a replacement worker during the period of family leave." ORS 659.484(1); see OAR 839-009-0270(1) ("The employer must return the employee to the employee's former position if the job still exists even if it has been filled during the employee's family leave unless the employee would have been bumped or displaced if the employee had not taken leave."). Respondent would have had to reassign Jenny to another position or even discharge her, if that was necessary to accomplish restoration of Complainant to her former job. ^v If Respondent had chosen to keep Jenny in the lead merchandising

position and had *refused* to restore Complainant to the job, that would have been a violation of OFLA.^{vi}

In this case, though, Complainant's decision to restrict her availability meant that Respondent was not required to restore her to the position she held before her leave, because Complainant essentially had announced that she was not able to work that position. In sum, Respondent successfully rebutted the presumption that its failure to restore Complainant to her former position of employment was unlawful.

ORDER

NOW, THEREFORE, as Respondent has not been found to have engaged in any unlawful practice charged, the Complaint and the Specific Charges filed against Respondent are hereby dismissed according to the provisions of ORS 659.060(3).

ⁱ The record does not contain complete documentation of the hours Complainant worked during each week of her employment by Respondent. However, the record does contain detailed payroll records from the 11 weeks during which Complainant held the lead merchandising position before she went on leave, the weeks she spent as a cashier immediately before she took full-time leave, and the 13 weeks she held the cashier position after she returned from leave. LeBlanc testified credibly that the payroll documents in the record are representative, and no witness suggested otherwise. The numbers cited in Findings of Fact -- the Merits 5, 10, 12 and 33 are calculated from the pertinent daily payroll records that are in evidence.

ⁱⁱ In the Specific Charges, the Agency alleged that LeBlanc had, at some unspecified time, told Complainant "that someone else had been hired for her lead position in Merchandising and that only part-time work was available for her." Respondent admitted that allegation in its Answer. No evidence in the record establishes with absolute certainty *when* LeBlanc told Complainant that somebody was working in her former job. However, the other part of LeBlanc's statement -- that only part-time work was available for Complainant -- logically would have followed Complainant's announcement that she was not able to

work certain evening shifts. As Respondent's managers credibly explained, the only jobs that could accommodate Complainant's self-imposed time restrictions were part-time positions (except for a full-time janitorial position that Complainant was not interested in). In addition, LeBlanc testified credibly that, once Complainant stated she couldn't work certain evenings, he told her that would change the position she could hold at Respondent's store. The forum concludes by a preponderance of the evidence that LeBlanc told Complainant that the Zone 3 position had been filled only *after* Complainant already had stated that she was unavailable to work Monday, Wednesday, Thursday, and Friday evenings.

ⁱⁱⁱ See Finding of Fact – Procedural 6, *supra*.

^{iv} Complainant commenced her OFLA leave on July 11, 1997, when her hours were reduced in accordance with the restrictions her physician had imposed on her work schedule. The fact that Respondent did not immediately designate the “lost” hours as intermittent OFLA leave is immaterial.

^v The quoted OFLA provisions implicitly recognize that employers may hire workers to substitute for employees on family leave *so long as they still restore the employees to their former positions when they return from leave* (unless, as here, the employees declare that they no longer desire to work in those former positions).

^{vi} As stated in Finding of Fact - the Merits 26, Complainant told LeBlanc on November 14 that she would not be able to work Monday, Wednesday, Thursday, or Friday evenings. LeBlanc later told Complainant that somebody else had been hired to work in the Zone 3 lead merchandising position. If LeBlanc had made that statement before Complainant told him she was unable to work certain evenings, the forum might infer that Complainant restricted her availability only because she knew that she was not going to be restored to the lead merchandising job, and was merely informing LeBlanc of the hours she would prefer to work in the *other* position she was being forced to accept. Such circumstances certainly could

be construed as an unlawful refusal by the employer to restore the employee to the position she held before she commenced leave. In this case, however, the forum has concluded that LeBlanc told Complainant that her position had been filled only after she told him that she could not work certain evening shifts. Furthermore, no evidence in the record suggests that Complainant learned from any other source that the Zone 3 position had been filled before she restricted her hours. Perhaps for that reason, the Agency did not pursue a theory that Complainant limited her availability only because she already knew that she would not be restored to the lead merchandising job.