

In the Matter of
VISION GRAPHICS AND PUBLISHING, INC., dba Seventh Street Family
Restaurant, and Kalayil Thomas, Respondents.

Case Numbers 32-96, 33-96, 34-96
Final Order of the Commissioner
Jack Roberts
Issued August 7, 1997.

SYNOPSIS

Corporate employer and individual respondent each failed to answer specific charges and were found in default. The Agency presented prima facie cases of sex harassment, retaliation, and aiding and abetting. Each of three complainants was awarded mental suffering damages from both respondents, and two were awarded wage loss from both respondents. ORS 659.030(1)(a), (b), (f), and (g).

The above-entitled contested case came on regularly for hearing before Warner W. Gregg, designated as Administrative Law Judge (ALJ) by Jack Roberts, Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was held on July 23, 1996, in the conference room of the Bureau of Labor and Industries, 165 East Seventh Avenue, Eugene, Oregon. The Civil Rights Division of the Bureau of Labor and Industries (the Agency) was represented by Judith Bracanovich, an employee of the Agency. Vision Graphics and Publishing, Inc., a corporation doing business as Seventh Street Family Restaurant (Respondent), was not present and was not represented by counsel, although properly served with notice of this proceeding. Kalayil Thomas (Respondent Thomas), an individual alleged to have aided and abetted Respondent corporation, was not represented by counsel, was present during the ALJ's

opening remarks at the commencement of the hearing, and voluntarily left the hearing room thereafter. Both Respondents were previously found in default for failure to file an answer to the Specific Charges. Shannon Miller (Complainant S. Miller) and Amanda Hardman (Complainant Hardman) were present throughout the hearing and were not represented by counsel. Melissa Miller (Complainant M. Miller) was delayed by car trouble and arrived at the hearing during the testimony of Dan Grinfas, the first witness. She was not represented by counsel.

The Agency called the following witnesses (in alphabetical order): Civil Rights Division (CRD) Senior Investigator Dan Grinfas; Complainant Hardman; Complainant M. Miller; Complainant S. Miller; and CRD Senior Investigator Harold Rogers. Respondents presented no evidence, having been ruled in default.

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

FINDINGS OF FACT -- PROCEDURAL

1) On August 15, 1995, Complainant Shannon Miller, a female 24 years of age, filed a verified complaint with CRD alleging that she was the victim of the unlawful employment practices of Respondent. After investigation and review, CRD issued an Administrative Determination finding substantial evidence supporting the allegations of the complaint.

2) On December 27, 1995, Complainant Melissa Miller, a female 16 years of age, filed a verified complaint with CRD alleging that she was the victim of the unlawful employment practices of Respondent. After investigation and review, CRD issued an Administrative Determination finding substantial evidence supporting the allegations of

the complaint.

3) On December 28, 1995, Complainant Hardman, a female 20 years of age, filed a verified complaint with CRD alleging that she was the victim of the unlawful employment practices of Respondent. After investigation and review, CRD issued an Administrative Determination finding substantial evidence supporting the allegations of the complaint.

4) CRD prepared for service on Respondents Specific Charges alleging that Respondent discriminated against Complainant Shannon Miller in her employment with Respondent, both on the job and at termination, based on her sex in violation of ORS 659.030, and that Respondent was aided and abetted by Respondent Thomas in violation of ORS 659.030.

5) CRD prepared for service on Respondents Specific Charges alleging that Respondent discriminated against Complainant Melissa Miller in her employment with Respondent on the job based on her sex in violation of ORS 659.030, and that Respondent was aided and abetted by Respondent Thomas in violation of ORS 659.030.

6) CRD prepared for service on Respondents Specific Charges alleging that Respondent discriminated against Complainant Hardman in her employment with Respondent on the job based on her sex and at termination based on her opposition to the unlawful practice, both in violation of ORS 659.030, and that Respondent was aided and abetted by Respondent Thomas in violation of ORS 659.030.

7) On June 19, 1996, the ALJ found that the three sets of Specific Charges involved common questions of law and fact and ordered that they be the subject of a joint contested case hearing, pursuant to Oregon Administrative Rule (OAR) 839-50-190.

8) With each of the respective Specific Charges, the Agency served on Respondents the following: a) Notice of Hearing setting forth the time and place of the hearing; b) a Notice of Contested Case Rights and Procedures containing the information required by ORS 183.413; c) a complete copy of OAR 839-50-000, *et seq.*, regarding the contested case process; d) a separate copy of the specific administrative rule regarding responsive pleadings; and e) a copy of the ALJ's order consolidating the three cases for hearing.

9) On June 20, 1996, a copy of each set of Charges, together with items a) through e) of Procedural Finding 8 above, was sent by US Post Office certified mail, postage prepaid, to Respondent corporation at 225 Q Street, Springfield, Oregon, and to Douglas Wilkinson, Attorney at Law, 644 A Street, Springfield, Oregon, as attorney for Respondent Thomas on June 20, 1996. Also on June 20, because Respondent corporation's registered agent had resigned and had no successor, the Agency caused the Charges and accompanying documents with the requisite fee to be served on the Office of the Secretary of State and caused a copy of the Charges and the accompanying documents together with notice of service on the Secretary of State to be transmitted to the last registered office of the corporation. The respective mailings were receipted for by or on behalf of the respective addressees on June 21, 1996.

10) Both the Notice of Contested Case Rights and Procedures (item b) and the Bureau of Labor and Industries Contested Case Hearings Rules (item d) at OAR 839-50-130(1), provide that an answer must be filed within 20 days of the receipt of the charging document.

11) On July 12, 1996, the Agency filed a motion for default as to each set of Charges. Finding that service had been effected on Respondents in the manner described in Procedural Finding 9, that no answer had been filed on behalf of either

Respondent, and that the time limitation for answer had expired, the ALJ found Respondents in default. Thereafter, the Agency filed its summary of the case.

12) At the commencement of the hearing, the ALJ found that Respondents had received the Notice of Contested Case Rights and Procedures and, pursuant to ORS 183.415(7), the ALJ orally advised the participants of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

13) After the commencement of the hearing, during the testimony of Grinfas, the Case Presenter called the forum's attention to allegedly inappropriate gestures and behavior by Respondent Thomas. The ALJ cautioned Respondent Thomas that should his behavior become disruptive, the ALJ would ask him to leave. Respondent Thomas stated he would leave, or words to that effect, and left the hearing room.

14) During the hearing, Complainant Shannon Miller overheard Respondent Thomas say "I'm going to kill them bitches" as he left the hearing room. She believed that meant herself and Complainant Hardman, since Complainant Melissa Miller had not arrived; the remark terrified her.

15) The Proposed Order, which included an Exceptions Notice, was issued on April 22, 1997. Exceptions, if any, were to be filed by May 2, 1997. No exceptions were received.

FINDINGS OF FACT -- THE MERITS

1) At times material herein, Respondent Vision Graphics and Publishing, Inc., was an Oregon corporation engaged in the restaurant business under the assumed business name of Seventh Street Family Restaurant (7th Street) on West 7th in Eugene, Oregon. Respondent corporation utilized the personal services of one or more employees in Oregon.

2) At times material herein, Respondent Kalayil Thomas was the owner,

president, secretary, director, and sole incorporator of Respondent corporation. Respondent Thomas operated 7th Street and held himself out to be the owner of the restaurant.

3) Complainant Shannon Miller (no relation to Complainant Melissa Miller) worked as a waitress at 7th Street from January 27 to June 2, 1995. She was 23 years of age at the time, married, and usually worked the swing shift from 3 p.m. to 11 p.m. In January 1995 while she was working at another restaurant as a waitress, Respondent Thomas offered her a waitress job stating he was buying 7th Street Family Restaurant. From about mid-March, he was at 7th Street daily.

4) Complainant Amanda Hardman worked as a waitress at 7th Street from February to June 1995. She was 20 years of age at the time and usually worked the swing shift, from 2 or 3 p.m. to 10 or 11 p.m. Respondent Thomas signed her pay checks and stated he was the owner. He was there daily, from two to six hours a day. He was a native of India about 45 to 55 years of age.

5) Complainant Melissa ("Missy") Miller (no relation to Complainant S. Miller) worked from April to June 27, 1995, at 7th Street, first as a bus person during the day and later as a hostess in the evening. She was introduced to Respondent Thomas by Complainant Hardman. She was 15 years of age at the time, and he told her to get a work permit and he would hire her. It was her first employment. As hostess, she seated patrons, brought menus and water, and acted as cashier from 5 p.m. to 9 p.m. Respondent Thomas told her he was the owner and was present daily during her shift.

6) 7th Street was open 24 hours a day and served American and Italian food. There was a 20 seat counter and nine tables. The waitress station was along one end with the drinks, ice cream and salad bar, together forming the crossbar of a "T", with the counter at a right angle forming the stem of the "T." The first table was to one side of

and separated from the end of the counter. When he was at the restaurant, Respondent Thomas generally sat either at the end of the counter nearest the waitress station or at table one, the booth closest to the waitress station.

7) In April 1995, Respondent Thomas began brushing against and eventually grabbing Complainant Hardman's buttocks as she went about her work to and from the waitress station area. In April 1995, Respondent Thomas began brushing against and eventually grabbing Complainant Shannon Miller's buttocks as she went about her work to and from the waitress station area.

8) At first, Respondent Thomas's touching of Complainant Shannon Miller was an infrequent brushing against her, intended to look accidental. The frequency escalated by June 1995. This touching and grabbing of her buttocks was unwanted and happened at least five to seven times, always in front of customers and other employees. Complainant Shannon Miller consistently told Respondent Thomas to stop, but he did not.

9) Respondent Thomas's unwanted touching made Complainant Shannon Miller feel demeaned, belittled, embarrassed, ashamed, and as if she had no say in her working conditions. She noted that he did the same thing to Complainants Hardman and Melissa Miller and to a young female customer.

10) At least twice in public Respondent Thomas told Complainant Shannon Miller that she had nicely shaped "boobies." Such comments affected her self-esteem and made her feel powerless. He made such comments to Complainants Melissa Miller and Hardman, to young customers named Jennifer and Jill, and to other young female customers. He sat with customers, deliberately arranging to sit next to young female teenagers, even when he was unwanted. His behavior made Complainant Shannon Miller angry because she considered it disgusting, unprofessional, and degrading. She

saw him repeatedly brush against the breasts of a waitress named Ronnie.

11) At first, Respondent Thomas's touching of Complainant Hardman was an infrequent brushing against her, intended to look accidental. The frequency escalated to nearly a daily occurrence by June 1995. This touching and grabbing of her buttocks was unwanted and happened 15 or more times, always in front of customers and other employees. Complainant Hardman consistently told Respondent Thomas to stop, but he did not.

12) Respondent Thomas's touching made Complainant Hardman feel scared, nervous, angry, and "dirty." Knowing that Respondent Thomas was the owner, she was sick and afraid, because she did not want to lose her employment. She noted that he did the same thing to Complainant Shannon Miller and Complainant Melissa Miller and to a young female customer, practically every day.

13) In addition to the unwanted touching, Respondent Thomas began making daily comments on Complainant Hardman's clothes and appearance, with statements like "you can see your big boobies with that" or "you can really see your butt with that, it looks nice." This made her feel "dirty" and she began wearing baggier clothes. Respondent then commented that he couldn't see her breasts. She consistently asked him to stop making the comments, but he would not. His comments and behavior made her feel angry, scared, and dirty and that she didn't want to go to work any more. Respondent Thomas made similar comments to Complainant Shannon Miller, Complainant Melissa Miller, and customers daily.

14) On one occasion, Complainant Hardman spilled water down the front of her blouse and, because he could see her breasts through her wet clothing, Respondent Thomas would not give her permission to obtain a change of clothing.

15) Respondent Thomas twice asked Complainant Hardman to accompany

him to his van, which was equipped with a VCR, to lie down and watch movies with him. This made her feel "gross and dirty," and made her fearful. He also asked her if she had sex with her boyfriend, Jason Rinehart.

16) On an occasion in the waitress break room at work, Complainant Shannon Miller was demonstrating to Complainant Hardman the operation of a "Thighmaster," an exercise device requiring the alternate spread and closure of the user's legs. Complainant Shannon Miller was wearing mid-thigh length "skorts," a pair of shorts made to resemble a skirt. Respondent Thomas came in and told Complainant Shannon Miller to "do it some more; spread it wider."

17) Complainant Hardman and Complainant Melissa Miller often had coffee after work. At first, they had coffee at the restaurant, but because of Respondent Thomas's behavior in sitting next to them and touching their legs, they began going to other restaurants. They met Linda Albert and her daughter Jill at another restaurant. Respondent Thomas followed them and invited himself to join the group. He arranged to sit next to Jill.

18) On an occasion when Complainant Shannon Miller mentioned she was tired, Respondent Thomas invited her to come into his van and he would make her not tired, would make her feel better. She told him "hell, no." She felt cheapened, unsafe, and sick. She knew that a known prostitute had previously accompanied him to the van.

19) Initially, Complainant Melissa Miller was grateful to Respondent Thomas for the job. She found it difficult to obtain employment because she was only 15 years of age. Then after a couple of weeks, Respondent Thomas began touching her buttocks by brushing against her, then later by slapping or grabbing her buttocks. The frequency escalated by June 1995. This touching and grabbing of her buttocks was

unwanted and happened at least ten times, near the counter or at the cash register, always in front of customers and other employees. She thought that telling Respondent Thomas to stop would work and even reminded him that he had teenage daughters. She consistently him told to stop, but he did not.

20) Respondent Thomas's unwanted touching made Complainant Melissa Miller feel embarrassed, inferior, and frightened. She saw him do it to others, including Complainant Hardman and young female customers. It made her angry that she couldn't do anything to stop him, that she was powerless. When she asked him to stop, he brushed it off as if she weren't serious, as if she had no feelings.

21) Complainant Melissa Miller and cook Mike White were sitting together after work when Respondent Thomas told White to move so that Respondent Thomas could sit next to her. Later that day, Respondent Thomas asked her and White if they wanted to go to his van and watch naked girls.

22) Respondent Thomas commented when Complainant Melissa Miller wore shorts that she should wear shorter shorts. She didn't wear shorts again. He constantly followed her around at work and after work, even when she went elsewhere to avoid him. His conversation always had a sexual connotation. He invited her to come lie down in his van. When she first worked at 7th Street, he gave her a ride home and suggested that she go to the coast with him. By the end of her employment, she was afraid each day of what he might do.

23) Respondent Thomas did not engage in unwanted touching or unwelcome sexual comments when his wife was on the premises for dinner, about once a week.

24) On June 2, 1995, Complainant Shannon Miller came in about 4:30 p.m. for a 5 p.m. shift. She went to sit down and Respondent Thomas came up beside her. She asked if he had anything better to do besides stand there and he said "Yes, look at

your nice boobies." She said "That's it, I'm not taking this anymore, I don't need to, this is not a work environment I want to stay at." She left, feeling that Respondent Thomas's behavior would not change and would probably get worse, and she could not continue to tolerate working under those circumstances.

25) When restaurant manager Julie Ryan asked why she quit, Complainant Shannon Miller told her it was because of the sexually offensive behavior of Respondent Thomas.

26) A few days before June 5, 1995, Complainant Hardman began work at 2 p.m. At 10:30 p.m. she was past the end of her shift and was at the cash register counting out the money when Respondent Thomas came up, made a comment, and grabbed and squeezed her buttocks and said "Just cheer up." She turned and told Respondent Thomas that if he ever touched her again, she would break his arm and call the cops.

27) On or about June 5, 1995, when Complainant Hardman stopped at 7th Street during the day for her pay check, Respondent Thomas told her to be nicer or he would fire her. She feared she would be fired if she continued to protest his unwanted sexually oriented behavior.

28) On June 7, 1995, Complainants Hardman, Shannon Miller, and Melissa Miller consulted an attorney. Complainants Hardman and Melissa Miller were still employed as waitresses at 7th Street, and wanted somehow to get Respondent Thomas to stop his offensive behavior.

29) About June 9, 1995, restaurant manager Julie Ryan asked Complainant Hardman if she planned legal action and Complainant Hardman said she did not at that time, that she just wanted the harassing behavior to stop.

30) On or shortly after June 9, 1995, Respondent Thomas asked

Complainant Melissa Miller and Complainant Hardman if they had filled out a complaint against him. They did not respond and as he walked away, Respondent Thomas said "I know two little girls that aren't going to have a job tomorrow." Larry Lindsey, a cook, overheard this remark.

31) When Respondent Thomas confronted Complainants Hardman and Melissa Miller about going to an attorney, he looked very mad, which frightened Complainant Melissa Miller.

32) On June 27, 1995, Complainant Hardman told two customers who were friends of Respondent Thomas and who had previously left without paying for their meal that she would not serve them. She had told Ryan, who said she had the right to refuse service. Respondent Thomas told her she couldn't choose her customers and fired her. Later he told her she had misunderstood and two hours after that he had Ryan fire her.

33) On June 27, 1995, knowing that Complainant Hardman had been fired, Complainant Melissa Miller came to work early and learned that the day hostess was to work that evening. She felt she was replaced, so she walked out.

34) Complainant Shannon Miller was hurt, angry, and disgusted when she quit, because she liked the job and enjoyed it when Respondent Thomas was not present making her and her coworkers uncomfortable. The unexpected loss of employment created financial stress. Her husband was employed, but her second income was needed. She applied for welfare assistance and received food stamps. The situation made her feel low, inadequate, and hopeless. Having no job and no money was very hard and painful. She sought other employment over the next three months, but was unsuccessful. Respondent Thomas had said she would not get another job in Eugene. She never received a job offer from any employer where she listed Respondent Thomas as a reference. When she quit listing 7th Street on her work

history, she was successful in getting employment. Her experience at 7th Street still bothered her at the time of the hearing. It had put great stress on her marriage and caused her insecurity and distrust of men. Up to the time of hearing, she was reluctant to work alone around men. She continued to fear physical harm from Respondent Thomas at the time of the hearing and believed he had carried out threats against Complainant Hardman.

35) Complainant Shannon Miller was hired at International House of Pancakes (IHOP) in mid-September through a friend. At 7th Street, she had earned \$4.75 an hour for 30 hours per week. Her income from tips was \$150 per week. At IHOP she earned \$4.75 an hour and worked 25 to 30 hours per week. Her tips at IHOP were \$250 per week. She lost wages totaling \$4,387.50 between June 2 and mid-September 1995, a period of 15 weeks.¹

36) Complainant Hardman had never had any prior complaints about her service and it was the first time she'd ever been fired. She felt embarrassed and demeaned. She drew unemployment and received financial help from her boyfriend and her mother. She had previously been self-supporting. She was upset for days, frequently in tears. In Eugene, it was necessary to have experience in order to obtain a waitress position, but she felt she couldn't use the period of employment at 7th Street. The reduced income damaged her self-esteem, she was depressed, gained weight, and had trouble sleeping. Up to the time of hearing she felt fearful and threatened because she had learned that Respondent Thomas was calling her a thief and a drug addict, and that one of his friends had threatened to shoot her. When she quit listing 7th Street on her work history, she was successful in getting employment. Up to the time of hearing, she was reluctant to work alone around men.

37) At 7th Street, Complainant Hardman had earned \$5.00 an hour for a 40

hour week, sometimes working overtime. Her income from tips was \$40 to \$50 per day, or \$200 per week. In early September 1995, through a friend, she got a part-time receptionist job with Supercuts, about six hours a week at \$5.50 an hour. She found waitress work at the Red Rooster in December 1995 at \$5.00 an hour, 25 to 30 hours per week. Her tips there were \$15 to \$25 per day, four days a week. In early February 1996, she began working at IHOP for \$4.75 an hour, five days a week, 30 to 35 hours per week. Her tips at IHOP were \$30 to \$35 per day. She lost wages totaling \$11,314 between June 27, 1995, and July 23, 1996, the date of hearing, a period of 56 weeks.²

38) Complainant Melissa Miller's experience with Respondent Thomas at 7th Street continued to affect her up to the time of the hearing. His behavior generally upset her, made her fearful, and was not forgotten. It made her more judgmental and less outgoing and less trusting than before. She felt that his hiring her was not to help her but rather for his own purposes. She quit using him as a reference. She does not trust males.

39) At the time of the hearing, Dan Grinfas had worked as a Senior Investigator for CRD since October 1995 investigating complaints of unlawful discrimination in employment, housing, and public accommodation. He holds a 1988 bachelor of science degree from UCLA and a 1994 law degree from Willamette University and is a member of the Oregon State Bar.

40) As part of his duties, Grinfas investigated the complaints filed by Complainants. He interviewed each complainant by telephone, keeping contemporaneous written notes of the conversations which were later or at the same time typed onto an investigative interview form. He also kept written notes of follow-up interviews which were not typed.

41) As part of his duties, Grinfas interviewed Respondent corporation's former

cooks Larry Lindsey and Mike White, Respondent corporation's customers Tracy Foust, Jason Rinehart, Jill Carson, Shar Miles, and Becky Sherrick, and Respondent corporation's former employee Kathy Crane.

42) At the time of the hearing, Harold Rogers had worked as a Senior Investigator for CRD since 1986 investigating complaints of unlawful discrimination in employment, housing, and public accommodation. He was the initial investigator on the complaint of Complainant Shannon Miller, whom he interviewed by telephone, keeping contemporaneous written notes of the conversation from which he dictated, resulting in a typed investigative interview form.

43) Grinfas dealt with Respondent Thomas as the sole representative of Respondent corporation and the restaurant. Respondent Thomas denied the collective complaints, stating there was a conspiracy among the complainants and their friends to retaliate against him because he refused to allow them to "do drugs" at the restaurant. He told Grinfas that Complainants had promised money to the witnesses for favorable testimony. Grinfas found no evidence to support these allegations.

44) The testimony of the respective Complainants and of the Agency employees appearing herein was credible.

ULTIMATE FINDINGS OF FACT

1) At times material herein, Respondent Vision Graphics and Publishing, Inc., was an Oregon corporation engaged in the restaurant business under the assumed business name of Seventh Street Family Restaurant (7th Street) in Eugene, Oregon, and utilizing the personal services of one or more employees.

2) At times material herein, Respondent Kalayil Thomas, male, operated 7th Street and was the owner, president, secretary, director, and sole incorporator of Respondent corporation.

3) Complainant Shannon Miller, female, was employed by Respondent corporation as a waitress at 7th Street from January 27 to June 2, 1995.

4) Complainant Amanda Hardman, female, was employed by Respondent corporation as a waitress at 7th Street from February to June 27, 1995.

5) Complainant Melissa Miller, female, was employed by Respondent corporation as a bus person and hostess at 7th Street from April to June 27, 1995.

6) Respondent Thomas, while operating 7th Street, subjected Complainant Shannon Miller to unwanted and offensive sexual touching and comment because of her sex.

7) Respondent Thomas, while operating 7th Street, subjected Complainant Hardman to unwanted and offensive sexual touching and comment because of her sex.

8) Respondent Thomas, while operating 7th Street, subjected Complainant Melissa Miller to unwanted and offensive sexual touching and comment because of her sex.

9) The behavior of Respondent Thomas, in subjecting Complainants to unwanted and offensive sexual touching and comment, created a hostile and abusive work environment for each of them.

10) The described working conditions were so intolerable that a reasonable person in Complainant Shannon Miller's position would have resigned because of them. Respondent Thomas intentionally imposed the described working conditions knowing that Complainant Shannon Miller was substantially certain to resign. Complainant Shannon Miller resigned on June 2, 1995, because of the described intolerable working conditions.

11) Complainant Hardman was discharged on June 27, 1995, by Respondent Thomas because she had consulted an attorney regarding the described working

conditions.

12) Complainant Melissa Miller ceased reporting for work after June 27, 1995, because of the described working conditions.

13) Complainant Shannon Miller lost wages totaling \$4,387.50 between June 2 and mid-September 1995, a period of 15 weeks, when she obtained alternate employment.

14) Complainant Amanda Hardman lost wages totaling \$11,314 between June 27, 1995, and July 23, 1996, a period of 56 weeks.

15) As a result of the described intolerable working conditions, Complainant Shannon Miller suffered severe mental distress up to the time of the hearing, characterized by damage to her self-esteem, insecurity, depression, anger, and disgust and feelings of being fearful, threatened, demeaned, belittled, embarrassed, ashamed, powerless, cheapened, unsafe, sick, and hurt. She distrusted men. The financial strain was painful, made her feel low, inadequate, and hopeless, and put great stress on her marriage.

16) As a result of the described intolerable working conditions, Complainant Hardman suffered severe mental distress on the job and up to the time of the hearing, characterized by fear, nervousness, anger, and by feeling "dirty," sick, afraid she would be fired, and not wanting to go to work any more. The discharge and reduced income damaged her self-esteem. She was depressed, gained weight, and had trouble sleeping.

17) As a result of the described intolerable working conditions, Complainant Melissa Miller suffered severe mental distress on the job and up to the time of the hearing, characterized by feeling embarrassed, inferior, frightened, fearful, angry, and powerless. At age 15, on her first job, she was subjected to touching, conversation, and

suggestions of a sexual nature making her afraid, upset, more judgmental, less outgoing, and less trusting of males.

CONCLUSIONS OF LAW

1) At all times material herein, Respondent corporation was an employer subject to the provisions of ORS 659.010 to 659.110. ORS 659.010(6).

2) The Commissioner of the Bureau of Labor and Industries has jurisdiction of the persons and of the subject matter herein and the authority to eliminate the effects of any unlawful practice found. ORS 659.040, 659.050.

3) The actions, inactions, statements, and motivations of Respondent Kalayil Thomas are properly imputed to Respondent corporation herein.

4) At times material herein, ORS 659.030(1) provided, in part:
"For the purposes of ORS 659.010 to 659.110 * * * it is an unlawful employment practice:

"(a) For an employer, because of an individual's * * * sex * * * to refuse to hire or employ or to bar or discharge from employment such individual. * * *

"(b) For an employer, because of an individual's * * * sex * * * to discriminate against such individual in compensation or in terms, conditions or privileges of employment.

" * * * * *

"(f) For an employer * * * to discharge, expel or otherwise discriminate against any person because the person has opposed any practices forbidden by this section * * * or because the person has filed a complaint, testified or assisted in any proceeding under ORS 659.010 to 659.110 * * * or has attempted to do so.

"(g) For any person, whether an employer or an employee, to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under ORS 659.010 to 659.110 * * * or to attempt to do so."

At times material herein, OAR 839-07-550 provided:

"Harassment on the basis of sex is a violation of ORS 659.030. It is discrimination related to or because of an individual's gender. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when such

conduct is directed toward an individual because of that individual's gender and:

"(1) Submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment; or

"(2) Submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual; or

"(3) Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment."

By subjecting Complainant Shannon Miller to unwelcome sexual touching and comment, Respondent corporation, aided by its owner Respondent Thomas, discriminated against her because of her sex in the terms and conditions of employment, whereby Respondent corporation violated ORS 659.030(1)(b) and Respondent Thomas violated ORS 659.030(1)(g).

5) By subjecting Complainant Shannon Miller to unwelcome sexual touching and comment, Respondent corporation, aided by its owner Respondent Thomas, created intolerable working conditions because of her sex and Complainant Shannon Miller's resignation was a constructive discharge whereby Respondent corporation violated ORS 659.030(1)(a) and Respondent Thomas violated ORS 659.030 (1)(g).

6) By subjecting Complainant Hardman to unwelcome sexual touching and comment, Respondent corporation, aided by its owner Respondent Thomas, discriminated against her because of her sex in the terms and conditions of employment, whereby Respondent corporation violated ORS 659.030(1)(b) and Respondent Thomas violated ORS 659.030(1)(g).

7) By discharging Complainant Hardman because she had sought legal advice regarding unwelcome sexual touching and comment, Respondent corporation, aided by its owner Respondent Thomas, discriminated against her by retaliation, whereby Respondent corporation violated ORS 659.030(1)(f) and Respondent Thomas

violated ORS 659.030(1)(g).

8) By subjecting Complainant Melissa Miller to unwelcome sexual touching and comment, Respondent corporation, aided by its owner Respondent Thomas, discriminated against her because of her sex in the terms and conditions of employment, whereby Respondent corporation violated ORS 659.030(1)(b) and Respondent Thomas violated ORS 659.030 (1)(g).

9) Pursuant to ORS 659.060 and by the terms of ORS 659.010, the Commissioner of the Bureau of Labor and Industries has the authority to issue an Order requiring Respondents to perform any act or series of acts reasonably calculated to carry out the purposes of ORS 659.010 to 659.110, to eliminate the effects of an unlawful practice found, and to protect the rights of others similarly situated. The amounts awarded in the Order below are a proper exercise of that authority.

OPINION

PRIMA FACIE CASE

Both Respondents were in default under OAR 839-50-330, having failed to answer any of the three sets of Specific Charges served on each of them. In such a default situation, the Agency is obligated to present a prima facie case in support of the Specific Charges and to establish damages. ORS 183.415(6), OAR 839-50-330(2). The Agency meets this burden by submitting credible testimony and documentary evidence acceptable to the forum. *In the Matter of Metco Manufacturing, Inc.*, 7 BOLI 55, 66 (1987), *aff'd, Metco Manufacturing, Inc. v. Bureau of Labor and Industries*, 93 Or App 317, 761 P2d 1362 (1988).

Where the unlawful employment practice charged is sexual harassment, a prima facie case is established when the forum finds a preponderance of evidence showing:

1. Respondent is an employer defined by statute.
2. Complainant was employed by Respondent employer.

3. Complainant is a member of a protected class (sex).
4. Respondent employer, or respondent employer's agent, in the workplace made unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature directed at complainant because of complainant's sex;
5. The conduct had the purpose or effect of unreasonably interfering with complainant's work performance or creating an intimidating, hostile, or offensive working environment, or submission to such conduct was made an explicit or implicit term or condition of employment.
6. Respondent employer had knowledge of the offensive conduct.
7. Complainant was harmed by the conduct. In the Matter of Soapy's, Inc., 14 BOLI 86, 95 (1995) (citing In the Matter of Kenneth Williams, 14 BOLI 16, 24 (1995)).

The forum finds that the Agency has satisfied these elements and established a prima facie case of sexual harassment (sex discrimination),³ an unlawful employment practice, as to Respondent corporation.

CONSTRUCTIVE DISCHARGE

This forum has consistently held that a constructive discharge occurs where an employer deliberately imposes working conditions so intolerable that a reasonable person in the complaining employee's position would feel compelled to resign and the complaining employee does resign. This was first articulated in *In the Matter of West Coast Truck Lines, Inc.*, 2 BOLI 192 (1981), *aff'd without opinion*, *West Coast Truck Lines, Inc. v. Bureau of Labor and Industries*, 63 Or App 383, 665 P2d 882 (1983) and followed thereafter.⁴ In 1989, the Oregon Supreme Court enunciated a tort standard for constructive discharge as requiring intolerable working conditions imposed deliberately for the purpose of forcing the victim to resign. *Bratcher v. Sky Chefs, Inc.*, 308 Or 501, 783 P2d 4 (1989). This forum adhered to its previous standard that, where objectively intolerable conditions resulting from unlawful employment practices lead to a victim's resignation, a constructive discharge has occurred. *In the Matter of the City of Umatilla*, 9 BOLI 91 (1990), *aff'd without opinion*, *City of Umatilla v. Bureau of Labor and*

Industries, 110 Or App 151, 821 P2d 1134 (1991); *In the Matter of Chalet Restaurant and Bakery*, 10 BOLI 183 (1992), *aff'd without opinion*, *JLG4, Inc. v. Bureau of Labor and Industries*, 125 Or App 588, 865 P2d 1344 (1993).⁵ In 1995, the Oregon Supreme Court modified the *Bratcher* constructive discharge requirements, holding that "an objective inquiry must be made to determine whether working conditions imposed by the employer are so intolerable as to force a resignation." *McGanty v. Staudenraus*, 321 Or 532, 557, 901 P2d 841, 856 (1995).

This forum thereafter described the elements of a constructive discharge resulting from unlawful employment practices as follows:

"(1) The Respondent must have intentionally created or intentionally maintained discriminatory working condition(s) related to the Complainant's protected class status;

"(2) Those working conditions were so intolerable that a reasonable person in the Complainant's position would have resigned because of them;

"(3) The Respondent desired to cause the Complainant to leave employment as a result of those working conditions or knew that Complainant was certain, or substantially certain, to leave employment as a result of those working conditions; and

"(4) The Complainant did leave the employment as a result of those working conditions." *In the Matter of Thomas Myers*, 15 BOLI 1, 15 (1996).

Respondent corporation, through Respondent Thomas, intentionally created working conditions because of Complainant Shannon Miller's sex that were so intolerable that a reasonable person in her position would have resigned because of them. Respondent corporation, through Respondent Thomas, knew that she was substantially certain to resign over the working conditions, and she did. Complainant Shannon Miller's resignation was a constructive discharge whereby Respondent corporation violated ORS 659.030(1)(a) and Respondent Thomas violated ORS 659.030(1)(g).

RETALIATION

Around the first of June, Complainant Hardman reacted to sexual touching by

Respondent Thomas by threatening to call the police if it were repeated. About June 5, he told Complainant Hardman that he would fire her if she were not nicer to him. After Complainant Shannon Miller resigned, Respondent Thomas learned that all three of these Complainants consulted an attorney. His reaction was not to lessen his unwelcome behavior, but rather to angrily advise Complainants Hardman and Melissa Miller that "I know two little girls that aren't going to have a job tomorrow." In light of those circumstances, his claim that he fired Complainant Hardman because she refused to serve two customers was clearly pretext. By discharging her in retaliation for her resistance to Respondent Thomas's offensive actions, Respondent corporation violated ORS 659.030(1)(f) and Respondent Thomas violated ORS 659.030(1)(g).

AIDING AND ABETTING UNLAWFUL EMPLOYMENT PRACTICES

Respondent Thomas was charged as having aided and abetted the unlawful practice. This forum has previously held that a corporate president and sole owner who personally participated in or precipitated the corporation's unlawful practice may be held liable under ORS 659.030(1)(g) for aiding and abetting the corporation's acts that constituted unlawful employment practices. *In the Matter of Gardner Cleaners, Inc.*, 14 BOLI 240, 254 (1995); *In the Matter of Salem Construction Company, Inc.*, 12 BOLI 78 (1993); *In the Matter of Wild Plum Restaurant, Inc.*, 10 BOLI 19 (1991); *In the Matter of Allied Computerized Credit & Collections, Inc.*, 9 BOLI 206 (1991); *In the Matter of Sapp's Realty, Inc.*, 4 BOLI 232 (1985).

Beginning about April 1995, Respondent Thomas repeatedly touched each of the Complainants in a sexual manner, ignoring their respective requests that he not do so. He also subjected each Complainant to sexually suggestive speech, again disregarding their protestations. The forum finds that the Agency has established that Respondent Thomas, as owner, president, secretary, director, and sole incorporator of Respondent

corporation personally participated in and precipitated, and thus aided, the employer corporation's unlawful practice.

This forum's previous holdings regarding aider and abettor liability are based on the Commissioner's broad remedial authority. The aiding or abetting of an unlawful employment practice by an individual is itself an unlawful employment practice subjecting the aider or abettor to the same penalties as an employer who commits an unlawful employment practice. ORS 659.030(1)(g). The Commissioner may order a respondent to "[p]erform an act or series of acts * * * reasonably calculated to carry out the purposes of * * * ORS 659.010 to 659.110 * * *, [and to] eliminate the effects of an unlawful practice found * * *." Among the effects of the unlawful employment practices found in this case were the discharge and resultant wage loss of Complainants Shannon Miller and Amanda Hardman, as well as the mental distress caused to them and to Complainant Melissa Miller.

LOST WAGES

After the hearing but before the proposed order, the Oregon Court of Appeals decided *Schram v. Albertson's, Inc.*, 146 Or App 415, 934 P2d 483 (1997), confirming that a supervisor could be individually liable for aiding and abetting an employer's unlawful employment practice under ORS 659.030(1)(g). That court determined, however, that a back pay remedy was not available from such aider and abettor supervisors charged with violation of ORS 659.030(1)(g) in a circuit court proceeding under ORS 659.121, reasoning that the ultimate responsibility for wage loss was with the employer.

This proceeding is not based on ORS 659.121. Remedies available under ORS 659.060(3) in the Commissioner's administrative forum have not always run parallel to remedies available in circuit court under ORS 659.121(1). For instance, compensatory

damages for mental suffering are recoverable under ORS 659.060(3);⁶ compensatory damages for mental suffering, in contrast, are not available under ORS 659.121(1).⁷

Under ORS 659.010(2), the Commissioner has authority to fashion a remedy adequate to eliminate the effects of any unlawful practice found and to protect the rights of other persons similarly situated (*i.e.*, to the person harmed). The loss of wages through loss of employment, as well as mental suffering, can be an effect of discrimination attributable to an employer, although perpetrated by a victim's co-employee or manager, or, indeed by a non-employee customer. Accordingly, the order in this case awards both back pay and mental suffering damages against Respondent corporation for violation of ORS 659.030(1)(a), (b), and (f), and against Respondent Thomas for violation of ORS 659.030(1)(g).

The forum is awarding to wrongfully terminated Complainants Hardman and Shannon Miller the amounts each would have earned but for the unlawful practice, less any actual earnings. No award for lost wages is made to Complainant Melissa Miller because it was not included in the Specific Charges and Respondent employer defaulted. Similarly, although the evidence suggested that Complainant Hardman's wage loss was greater than the \$7,700 initially sought by the Agency, the forum is limited to the lesser amount because that is the figure of which Respondent employer had notice prior to default. *In the Matter of 60 Minute Tune*, 9 BOLI 191 (1991), *aff'd without opinion, Nida v. Bureau of Labor and Industries*, 119 Or App 508, 852 P2d 974 (1993).

MENTAL DISTRESS

The Agency presented evidence as to each Complainant demonstrating that each suffered severe and long-lasting mental and emotional distress as the result of her treatment on the job by Respondent Thomas. They experienced fear and felt degraded,

and were frustrated by their inability to obtain relief except by leaving the situation. Complainants Hardman and Shannon Miller suffered compensable mental and emotional distress from their respective terminations. The effects of the experiences of all three complainants from working for Respondent corporation and Respondent Thomas continued until the hearing. All were adversely affected in their subsequent work relationships with males. While the length of her exposure to the offensive environment was less than that of the two adult complainants, Melissa Miller, at age 15 and on her first job, was particularly susceptible. The youth and inexperience of a victim of unlawful employment practices are factors to consider in fashioning a remedy. *In the Matter of Rose Manor Inn*, 11 BOLI 281 (1993); *Fred Meyer, Inc. v. Bureau of Labor*, 39 Or App 253, 592 P2d 564 (1979), *rev den*, 287 Or 129 (1979). The amount awarded each Complainant below recognizes her individual distress.

ORDER

NOW, THEREFORE, as authorized by ORS 659.060(3) and 659.010(2), and in order to eliminate the effects of the unlawful practices found, Respondents Vision Graphics and Publishing, Inc., and Kalayil Thomas are hereby ordered to:

1) Deliver to the Fiscal Office of the Bureau of Labor and Industries, State Office Building, Ste 1010, 800 NE Oregon Street, # 32, Portland, Oregon 97232-2162, a certified check, payable to the Bureau of Labor and Industries in trust for SHANNON MILLER, in the amount of:

a) FOUR THOUSAND THREE HUNDRED EIGHTY-SEVEN DOLLARS AND FIFTY CENTS (\$4,387.50), less lawful deductions, representing wages lost by Complainant between June 2 and September 15, 1995, as a result of Respondents' unlawful practices found herein, plus

b) THIRTY THOUSAND DOLLARS (\$30,000), representing compensatory

damages for the mental and emotional distress suffered by SHANNON MILLER as a result of Respondents' unlawful practices found herein, plus,

c) Interest at the legal rate from September 15, 1995, on the sum of \$4,387.50 until paid, and

d) Interest at the legal rate on the sum of \$30,000 from the date of this Final Order until Respondents comply herewith.

2) Deliver to the Fiscal Office of the Bureau of Labor and Industries, State Office Building, Ste 1010, 800 NE Oregon Street, # 32, Portland, Oregon 97232-2162, a certified check, payable to the Bureau of Labor and Industries in trust for AMANDA HARDMAN, in the amount of:

a) SEVEN THOUSAND SEVEN HUNDRED DOLLARS (\$7,700), less lawful deductions, representing wages lost by Complainant between June 27 and November 29, 1995, as a result of Respondents' unlawful practices found herein, plus

b) THIRTY THOUSAND DOLLARS (\$30,000), representing compensatory damages for the mental and emotional distress suffered by AMANDA HARDMAN as a result of Respondents' unlawful practices found herein, plus,

c) Interest at the legal rate from November 30, 1995, on the sum of \$7,700 until paid, and

d) Interest at the legal rate on the sum of \$30,000 from the date of this Final Order until Respondents comply herewith.

3) Deliver to the Fiscal Office of the Bureau of Labor and Industries, State Office Building, Ste 1010, 800 NE Oregon Street, # 32, Portland, Oregon 97232-2162, a certified check, payable to the Bureau of Labor and Industries in trust for MELISSA MILLER, in the amount of:

a) TWENTY-FIVE THOUSAND DOLLARS (\$25,000), representing

compensatory damages for the mental and emotional distress suffered by MELISSA MILLER as a result of Respondents' unlawful practices found herein, plus

b) Interest at the legal rate on the sum of \$25,000 from the date of this Final Order until Respondents comply herewith.

4) Cease and desist from discriminating against any employee based upon the employee's sex.

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¹Projected wages, 7th Street: $\$4.75 \times 30 \text{ hrs} = \142.50 per week, + \$150 tips = \$292.50; 15 weeks $\times \$292.50 = \$4,387.50$; Actual wages at IHOP: $\$4.75 \times 30 \text{ hrs} = \142.50 per week, + \$250 tips = \$392.50, ending wage loss.

²Projected wages, 7th Street: $\$5 \times 40 \text{ hrs} = \200 per week + \$200 tips = \$400; 56 weeks $\times \$400 = \$22,400$; Actual wages Supercuts: $\$5.50 \times 6 \text{ hrs} = \33 per week; 12 weeks $\times \$33 = \396 ; Actual wages Red Rooster: $\$5 \times 30 \text{ hrs} = \150 per week + \$100 tips = \$250; 10 weeks $\times \$250 = \$2,500$; Actual wages IHOP: $\$4.75 \times 35 \text{ hrs} = \166.25 per week + \$175 tips = \$341.25; 24 weeks $\times \$341.25 = \$8,190$; Projected wages of \$22,400 minus actual wages ($\$396 + \$2,500 + \$8,190$) $\$11,086 = \$11,314$.

³Sexual harassment is sex discrimination. *Holien v. Sears, Roebuck & Co.*, 298 Or 76, 689 P2d 1292 (1984).

⁴In the Matter of Sapp's Realty, Inc., 4 BOLI 232 (1985); In the Matter of Deanna Miller, 6 BOLI 12 (1986); In the Matter of Richard Niquette, 5 BOLI 53 (1986); In the Matter of Tim's Top Shop, 6 BOLI 166 (1987); In the Matter of Lee's Cafe, 8 BOLI 1 (1989).

⁵See also, *In the Matter of Allied Computer Credit & Collections, Inc.*, 9 BOLI 206 (1991); *In the Matter of William Kirby*, 9 BOLI 258 (1991); *In the Matter of Lee Schamp*, 10 BOLI 1 (1991); *In the Matter of Wild Plum Restaurant, Inc.*, 10 BOLI 19 (1991); *In the Matter of RJ's All American Restaurant*, 12 BOLI 24 (1993); and *In the Matter of Loyal Order of Moose*, 13 BOLI 1 (1994).

⁶*Williams v. Joyce*, 4 Or App 482, 479 P2d 513, *rev den* (1971); *School District No. 1 v. Nilsen*, 271 Or 461, 534 P2d 1135 (1975); *Fred Meyer, Inc. v. Bureau of Labor*, 39 Or App 253, 592 P2d 564, *rev den* (1979).

⁷*Holien v. Sears, supra*.