

**In the Matter of**

**WINCO FOODS, INC.,**

**WinCo Holdings, Inc., and**

**WinCo Foods, LLC**

**Case No. 53-04**

**Final Order of Commissioner Dan Gardner**

**Issued May 2, 2007**

**SYNOPSIS**

The forum found Respondent's requirement that Complainant provide 1) a doctor's note confirming that her increased absences in July and August 2002 were OFLA related and 2) additional medical documentation verifying her need for intermittent OFLA leave consistent with OAR 839-009-0260(6) which includes exceptions to the rule prohibiting an employer from requesting subsequent medical verification more often than every 30 days. The forum further found the Agency failed to establish by a preponderance of evidence that Complainant was terminated because she invoked or used OFLA provisions. The forum found that the record lacked sufficient evidence to overcome Respondent's legitimate, nondiscriminatory reason for terminating Complainant and concluded that Respondent terminated her for dishonesty pursuant to company policy. Accordingly, the forum dismissed Complainant's complaint and the Agency's formal charges. ORS 659A.183; ORS 659A.820; OAR 839-009-0230; OAR 839-009-0240; OAR 839-009-0320.

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The above-entitled case came on regularly for hearing before Linda A. Lohr, designated as Administrative Law Judge ("ALJ") by Dan Gardner, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on March 29-30, 2005, in the Clerc Conference Room of the Oregon School for the Deaf, located at 999 Locust Street NE, Salem, Oregon.

Jeffrey C. Burgess, an employee of the Agency, represented the Bureau of Labor and Industries ("BOLI" or "the Agency"). Jammie Iverson ("Complainant") was present throughout the hearing. Attorneys Tamara E. Russell, Erin Truax, and Alyssa Tormala represented WinCo Foods, Inc., WinCo Holdings, Inc., and WinCo Foods, LLC

(collectively referred to herein as “Respondent”). Wayne Duncan was present throughout the hearing as Respondent’s corporate representative.

The Agency called as witnesses: Jammie Iverson, Complainant; Stephen “Van” Roper (telephonic), Complainant’s health care provider; Richard Drawson (telephonic), Respondent’s employee; Bradley Iverson, Complainant’s husband; and Wayne Duncan, Respondent’s Woodburn Distribution Center warehouse manager.

Respondent called as witnesses: Jennifer Poe (telephonic), Respondent’s assistant warehouse coordinator; Wayne Duncan, Respondent’s Woodburn Distribution Center warehouse manager; Corey Olson, Respondent’s loss prevention employee; Roger Cochell, Respondent’s vice president of labor and human resources; and Verna Robinson (telephonic), Respondent’s payroll supervisor.

The forum received as evidence:

- a) Administrative exhibits X-1 through X-29 (generated prior to, during, or after hearing);
- b) Agency exhibits A-1 through A-5, A-8 through A-10, A-12, A-13, A-16 through A-19 (submitted prior to hearing), and A-22 through A-24 (submitted during hearing);
- c) Respondent exhibits R-1 through R-5 (submitted prior to hearing).

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

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

- 1) On January 17, 2003, Complainant filed a verified complaint with the Agency’s Civil Rights Division (“CRD”) alleging unlawful employment practices committed by Respondent after Respondent terminated her on December 23, 2002.

After investigation and review, the CRD issued a Notice of Substantial Evidence Determination on December 30, 2003, finding substantial evidence supporting the allegations in the complaint.

2) On January 7, 2005, the Agency submitted Formal Charges to the forum alleging Respondent denied Complainant family leave in violation of ORS 659A.183, and retaliated or discriminated against her in terms and conditions of employment and retaliated or discriminated against her by terminating her, because she invoked or used family leave provisions, in violation of ORS 659A.183 and OAR 839-009-0230(2). The Agency also requested a hearing.

3) On January 18, 2005, the forum served the Formal Charges on Respondent together with the following: a) a Notice of Hearing setting forth March 29, 2005, in Salem, Oregon, as the time and place of the hearing in this matter; b) a Summary of Contested Case Rights and Procedures including the information required by ORS 183.413; c) a complete copy of the Agency's administrative rules regarding the contested case process; and d) a separate copy of the specific administrative rule regarding responsive pleadings.

4) On February 4, 2005, Respondent timely filed an answer and alleged certain affirmative defenses.

5) On February 9, 2005, Respondent filed a motion to conduct an interview of Complainant and included a "First Set of Interrogatories" as an alternative to the interview. After considering Respondent's motion and the Agency's objection to the interview, the forum denied the motion and issued an order compelling Complainant to answer the interrogatories.

6) On February 22, 2005, the forum ordered the Agency and Respondent each to submit a case summary including: lists of all persons to be called as witnesses;

identification and copies of all documents to be offered into evidence; a brief statement of the elements of the claim (for the Agency only); a brief statement of any defenses to the claim (for Respondent only); a statement of any agreed or stipulated facts; and any damage calculations (for the Agency only). The ALJ ordered the participants to submit the case summaries by March 18, 2005, and notified them of the possible sanctions for failure to comply with the case summary order.

7) On February 25, 2005, the Agency moved for a protective order regarding Complainant's medical information and records and requested the ALJ to review all of the records *in camera* before releasing any information about them to Respondent.

8) On March 2, 2005, Respondent filed a motion for summary judgment that included a supporting memorandum and a "Declaration of Wayne Duncan" in support of Respondent's motion.

9) On March 8, 2005, the Agency requested an extension of time until March 22, 2005, to respond to Respondent's motion for summary judgment. Respondent did not object and the Agency's motion was granted.

10) On March 9, 2005, during ALJ's Lohr's temporary absence, ALJ McCullough conducted a prehearing conference with the participants to determine the "appropriate scope" of the protective order. The ALJ determined that some of Complainant's written answers to Respondent's interrogatories were related to Complainant's medical condition and were exempt from public disclosure. The ALJ issued a protective order pertaining to that information but asked the Agency to file a second motion requesting that any records submitted by the Agency in its case summary be subject to a protective order and deferred ruling on the Agency's motion to protect records during the discovery process until "such a request is made." On March 10, 2005, the Agency filed a supplemental motion for protective order pursuant to the

ALJ's request and requested that any protective order be expanded to cover "any medical information, whether documentary or testimonial in nature, transmitted to Respondents and/or the Forum in the Agency's Case Summary or during the hearing, including any such evidence submitted in the Agency's rebuttal to Respondent's case in chief." On March 11, 2005, ALJ McCullough granted the Agency's supplemental motion and issued a protective order governing "the use and disposition of medical, psychological, counseling and therapy records of Complainant contained in the Agency's case summary and Respondent's case summary and any testimony at hearing related to Complainant's medical or psychological history, counseling or therapy received by Complainant, and testimony related to Complainant's medical, psychological, counseling and therapy records."

11) On March 16, 2005, the Agency, through counsel, filed a response to Respondent's motion for summary judgment.

12) On March 18, 2005, the Agency and Respondent timely filed case summaries.

13) On March 21, 2005, Respondent filed a motion for postponement and requested "expedited consideration." The Agency objected to a postponement and on March 23, 2005, the ALJ denied Respondent's motion for failure to show good cause.

14) On March 25, 2005, via messenger, Respondent filed notification that it intended to call two witnesses by telephone. Respondent provided the names and telephone numbers of the witnesses.

15) At the start of hearing, pursuant to ORS 183.415(7), the ALJ advised the participants of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

16) At the start of hearing, the ALJ denied Respondent's motion for summary judgment and proceeded with the hearing.

17) The ALJ issued a proposed order on June 5, 2006, that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. The Agency requested and was granted an extension of time until June 29, 2006, to file exceptions to the proposed order. In the meantime, Respondent timely filed exceptions and was granted the opportunity to submit an addendum in rebuttal within seven days from the date the Agency filed its exceptions if the Agency's exceptions addressed Respondent's exceptions. The Agency timely filed exceptions on June 29, 2006, and Respondent did not file an addendum in rebuttal. The participants' exceptions are addressed in the Opinion section of this Final Order.

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

1) At all times material herein, Respondent was a company comprised of separate corporations and an LLC doing business in Oregon as WinCo Foods and was an employer that employed 25 or more persons in Oregon for each working day during each of 20 or more calendar workweeks in the year in which Complainant took intermittent family leave or in the year immediately preceding the year in which Complainant took intermittent family leave.

2) Respondent employed Complainant at the WinCo Foods Distribution Center in Woodburn, Oregon, from on or about January 16, 1999, until on or about December 23, 2002. At least 400 employees worked at the distribution center during Complainant's tenure. Most of the employees were union members and subject to a collective bargaining agreement. During times material, Complainant worked as a product auditor and was not subject to a collective bargaining agreement. Respondent required all nonunion employees to adhere to company personnel policies. Complainant read and signed copies of Respondent's "Company Personnel Policy" and

“Distribution Center and Office Woodburn, Oregon, Hourly Employee Working Conditions.”

3) At times material herein, Wayne Duncan was Respondent’s Woodburn distribution center warehouse manager and Complainant’s immediate supervisor. At times material herein, Roger Cochell was Vice President of Labor and Human Resources and was located at Respondent’s corporate offices in Boise, Idaho.

4) Complainant was scheduled to work 40 hours per week and worked occasional overtime hours. Product auditors were allowed to set their own weekly work schedule depending on the “job needs” and Complainant’s shifts varied. Complainant generally worked four days per week, from 4:30 a.m. to 3:00 p.m., including a half hour lunch. Sometimes she worked a 9:00 p.m. to 7:30 a.m. shift. Shift hours depended on when product was selected and loaded for distribution to other stores. Employees posted their shifts weekly.

5) Complainant performed her job well and regularly received annual pay increases.

6) In mid-2000, Complainant began having migraine headaches and sought treatment for her symptoms which included nausea and sensitivity to light and sound. Her symptoms were aggravated by loud noise and bright lights and she was exposed to both elements at her work site in the warehouse. There is no evidence that Respondent was aware of Complainant’s migraines until, at one point, Duncan observed Complainant crying in a darkened room. He had no doubt at that time that she was experiencing a migraine as she described it and suggested she go home to recover. He had sent home employees who suffered migraines at work on other occasions. When Complainant expressed concern about absences because of her migraines, Duncan recommended that she submit a request for leave under the Oregon Family Leave Act

("OFLA" or "family leave"). Other employees at the work site had used family leave for migraines. In or around September 2001, Complainant asked Respondent to designate her absences due to migraines as OFLA leave. At first, she missed work one day every other month due to migraine headaches. Gradually, her symptoms worsened and she missed more work days.

7) On September 11, 2001, Respondent sent Complainant a form letter and a copy of a Notification of Employee and Employer Rights for Federal and State Medical Leaves. The letter stated in pertinent part:

"This letter is to inform you of your rights for protection under the Family Medical Leave Act (F.M.L.A.).

"1. Provided that you qualify for a protected leave, the requested leave will be counted against your annual F.M.L.A. entitlement. Dates requested are 09/06/01 & Intermittently thereafter. (12 week maximum annual entitlement)

"2. *Enclosed you will find a medical certification form that must be completed by your attending physician. To activate your rights under a protected leave you must furnish this medical certification of your serious health condition. You must furnish this certification by 09/26/01. Failure to return this certification by the date listed will result in denial of FMLA protection and your absence could be considered unexcused, which may result in disciplinary action up to and including termination. (Please be advised that if your medical provider fails to comply with this request, FMLA coverage still may be denied.) If you feel that you cannot comply with the deadline given, please contact our office immediately. WinCo assumes NO responsibility or liability regarding the return of FMLA documents to the Corporate Office/Benefits Department. Employees who return these documents to their respective store management to be returned in the WinCo mail do so at their own risk. If local store management fails to send in such documents, or if they fail to send them in within the required time frame, WinCo bears no responsibility. Please return by U.S. certified mail if you desire proof of delivery.*

"We will require that you exhaust your sick and vacation pay for your own serious health condition and will require you to exhaust your vacation pay for the care of an immediate family member.

" \* \* \* \* \*

"Prior to your return to work our office will require a 'fitness-for-duty' medical narrative from your treating physician."<sup>i</sup> (italics added)

The letter was signed by Ray Sagarik in the “HR Benefits Department.”

8) Complainant submitted her health care provider’s certification for intermittent leave that anticipated one to two absences per month. On October 15, 2001, Respondent sent her a letter that stated in pertinent part:

“This letter is to inform you that we have determined that you do qualify for protections under the FMLA and/or State Leave Laws.

“According to the physician’s certification you have provided, we have applied FMLA and/or State Leave Law protections to your intermittent absence on 09/06/01 and intermittently thereafter. We will count this time against your annual entitlement, not to exceed 12 weeks. *You will be required to submit a Dr’s note for each subsequent absence relating to this condition listing the exact dates you are required to be absent and confirming that it is for the condition described in the physician’s certification that you have provided.*

“Please remember that you will be required to exhaust your sick and vacation pay for your own serious health condition and we will require you to exhaust your vacation pay for the care of an immediate family member.” (italics added)

On October 29, 2001, Respondent sent Complainant another letter that stated in pertinent part:

“This letter is to inform you that we have determined that you do qualify for protections under the FMLA and/or State Leave Laws.

“According to the physician’s certification you have provided, we have applied FMLA and/or State Leave Law protections to your intermittent absence on 10/08/01. We will count this time against your annual entitlement, not to exceed 12 weeks. Please remember, you are still required to follow WinCo’s attendance policy, which includes notifying management that you are unable to work at least two hours prior to the beginning [of] your scheduled shift. When notifying store management, you are required to specify whether or not the absence is due to this condition. *In addition, in order for your absence to be protected by the FMLA, you are required to submit a Dr’s note for each subsequent absence relating to this condition listing the exact dates you are required to be absent and confirming that it is for the condition described in the physician’s certification that you have provided.*

“Please remember that you will be required to exhaust your sick and vacation pay for your own serious health condition and we will require you to exhaust your vacation pay for the care of an immediate family member.” (italics added)

Respondent sent Complainant a similar letter each time she was absent due to a migraine in 2001 and 2002.

9) Respondent's sick leave policy stated, in pertinent part:

"A doctor's certificate or other authoritative verification of illness may be required by [WinCo], and if so, must be presented by the employee not more than forty-eight (48) hours after return to work, except that such certificate may be required before the employee's return to work in situations where [WinCo] reasonably believes that the employee may be disqualified by illness or injury from properly performing employee duties. Failure to provide such required certificate or verification will waive sick leave pay, even if otherwise applicable.

"Any employee found to have abused sick leave benefits by falsification or misrepresentation shall thereupon be subject to disciplinary action, reduction or elimination of sick leave benefits (whether or not paid) and shall further restore to the Company amounts paid to such employee for the period of such absence, and may be discharged by the Company for such falsification or misrepresentation.

"Employees utilizing sick leave are expected to have a bona fide illness and subsequently should be either at home, at a doctor's appointment or at a health care facility approved by the provider, etc. Employees engaging in contrary activities while alleging sickness will be subject to disciplinary action up to and including discharge."

Complainant knew and understood Respondent's sick leave policy.

10) From September through December 2001, Complainant used OFLA leave three times due to her migraine headaches and missed approximately four work days. Each time, she was treated for her migraines by family nurse practitioner, Megan Buckholtz. During that time, she began receiving Torodol shots which "knocked her out" each time for about eight hours. Her symptoms were worse in the morning hours. On the mornings that she experienced a migraine, she took two Excedrin and if the symptoms continued or she experienced nausea, she called in sick and stayed home. On those occasions, she gave herself a Torodol shot and slept. When she awoke, she was "really hungry" and felt "much better" after eating. On at least one occasion, she called her supervisor, Wayne Duncan, and told him that her migraine had resolved and

she could come in and work the rest of her shift. He had no objection to Complainant coming in to work when her migraines resolved even if it was only for an hour. She usually took a half hour to get ready for work and another half hour to drive to Woodburn from her home and she did not consider going to work after the effects of her medication wore off unless her migraine resolved two hours before the end of her shift.

11) Prior to March 1, 2002, Respondent was lax about disciplining employees who changed their schedule without permission or punched in late from lunch. On March 1, 2002, Duncan met with all hourly employees to explain a new attendance policy that, among other things, "tightened up" the provisions related to start times and lunchtime tardies. Complainant attended the meeting and received a copy of the policy.

12) On March 14, 2002, Complainant was tardy by 30 minutes. Duncan and Mike Kintz, the day shift supervisor, talked to Complainant about her tardiness and reminded her of her past tardies and inconsistent start times. Duncan believed she was not keeping to her schedule and felt he was having a "tough time" getting through to her. Duncan instructed Complainant to be consistent with her start times and told her that any changes to her schedule required supervisor approval. Kintz instructed her to type a work schedule showing her start and finish times. She typed and signed the following:

"Day shift 5 a.m. – 3 p.m. I will start at 4:30 a.m.

"Graveyard shift 9 p.m. – 7 a.m. I will start at 9 p.m. and work until 7:30 a.m.

"J-me Iverson"

Kintz wrote the following on Complainant's typewritten schedule:

"3-14-02

"J-me was instructed to follow this work schedule for start and finish times. Any changing of such [schedule] needs to be pre-approved by her supervisor.

"M. Kintz"

On the same day, Kintz documented Complainant's tardy on an Attendance/Incident Record. In the section designated "Explanation," Kintz wrote:

"J-me stated she was uncertain of her start time. Start times were discussed and understood and will not be changed w/out pre-approval of her supervisor."

13) Duncan did not care if Complainant worked the day or night shift and she was permitted to make her own weekly schedule showing which shifts she planned to work each day. However, he expected her to pick the shift she wanted to work each day and "stick to it" because he did not know if employees were tardy or "not there" when they changed their start times without telling him. Prior to the March 1 meeting, Complainant was accustomed to changing her shift when she needed to adjust her schedule without seeking prior approval. Sometimes she posted her changes on the "net" where she assumed others would notice. After Complainant's March 14 tardy, Duncan told her that she was not to change the shifts she chose each week without first obtaining his permission.

14) On April 22, 2002, Duncan documented Complainant's accrued "attendance issues" and placed the documentation in Complainant's personnel file. The document stated:

"On March 1, 2002 I covered the new attendance policy with hourly employees in a meeting. Every employee at the meeting received a copy of the new policy. [Complainant] was one of the employees that attended the meeting. Mike Kintz, dayshift supervisor, also attended the meeting.

"On March 14<sup>th</sup> I again talked to [Complainant] about being tardy and about start times, and any changes to her schedule had to be authorized by a supervisor. Mike Kintz also had the same conversation with [Complainant] on the 14<sup>th</sup>.

"[Complainant] was tardy returning from lunch on April 1, 2, 8, 9, and 10. She also changed her start time on April 6<sup>th</sup> without authorization.

"On April 18, I called [Complainant] into my office to discuss her attendance issues. She had Pete Tucker (hourly employee) as a witness per her request. [Complainant] was very defensive about her attendance problems. She said she didn't understand the policy and felt like I was

picking on her. [Complainant] didn't agree that being late from lunch was a tardy and she would refuse to sign any kind of write-up. I went over the attendance policy again with [Complainant]. I told [Complainant] I would count all five tardy days as one incident. I asked [Complainant] if she understood the policy and if not, now was the time to asked [sic] questions. [Complainant] said she had no questions and she understood but it still was unfair.

"When questioned about changing her start time on April 6, [Complainant] said she came in early due to day light savings time. [Complainant's] start time was preset for 21:00, she would have had to start at 20:00 to be 1 hour early, and she clocked in at 20:15. [Complainant] said she told Don Johnson (swing shift supervisor) she had clocked in at 20:15 and he said it was ok. Don didn't work on that day and had no recollection of a conversation between him and [Complainant]. I could not find any supervisor that told [Complainant] it was ok. [Complainant] also told Jennifer Poe that Don said it was ok that she started at that time."

15) On May 29, 2002, Duncan documented a conversation with Complainant about a "discipline issue" and a medical situation that occurred following the conversation. His statement was placed in Complainant's personnel file and it stated:

"On Wednesday May 29<sup>th</sup> I needed to address a discipline issue with Jammie. I had Mike Kintz (shift supervisor) and Pete Tucker (hourly employee) (whom Jammie had requested in our last meeting) present at this meeting. Jammie received a written warning on April 23<sup>rd</sup> for failure to follow the attendance policy: tardies, start times, lunches, breaks, etc. On May 23<sup>rd</sup> Jammie started her shift one hour before the agreed start time without a supervisor's authorization. Jammie signed a statement on March 14<sup>th</sup> stating she would not change her start time without prior authorization from a supervisor.

"I showed Jammie the statement she signed agreeing to a specific start time. After discussing the issues Jammie stated she did in fact change her schedule without supervisors [sic] permission. Jammie wrote herself in on the vacation log as starting at a different time and thought it would be ok.

"After the meeting, (approximately 10 minutes) Jammie came back into my office and said she was having another panic attack. She said she could not breathe and was hyperventilating and had chest pains. She said she needed to go to her doctor but could not drive. I called 911. After examining Jammie, the E.M.T. told her it was up to her if she wanted to go to the hospital. If not he recommended she have someone drive her home and she could follow up with her own doctor. Mike Kintz and Pete Tucker were still in my office at that time.

“The meeting with Jammie was very professional. Jammie was upset at the end of the meeting but understood.”

On the same date, Complainant went to the hospital and did not return to work that day or the next. Duncan recorded her absence from work from May 29 to May 30, 2002, as two separate incidents - an “incomplete shift” and an “absence.”

16) Mike Kintz and Pete Tucker were present during the May 29, 2002, meeting with Complainant. Each made notes about the meeting and the notes were kept in Complainant’s personnel file. In his note, dated and signed May 29, 2002, Mike Kintz stated:

“Conversation in Wayne Duncan’s office with J-Me Iverson, Pete Tucker, Wayne Duncan, and myself, Mike Kintz.

“At around 7:50 a.m. we began to speak to J-Me about her work schedule and her unauthorized changing of her start times. The conversation with Wayne was very professional and low keyed. At no time did the discussion get out of hand or personal. Pete Tucker was present at a previous meeting with J-Me and she was asked if it was ok for him to participate this time. J-Me was in agreement to have Pete present.

“As the conversation went on J-Me after admitting to not following the instructions of her supervisor on changing her start time became upset. As the conversation ended J-Me left the office. After several minutes had passed J-Me returned to the office stating she was having a panic attack and was having trouble breathing along with some chest pain. She stated she needed to go to the doctor but could not drive. At that point, Wayne Duncan asked her if she would like him to call 911. We all concurred to do so and 911 was called. J-Me had stated that this feeling or sensation had happened once before but not as bad (shortness of breath and chest pain). Paramedics arrived onsite around 8:25 a.m. Roughly 10 minutes after her return to the office, J-Me was checked out by them and after a short discussion with them agreed to be transported to the [S]alem hospital to be evaluated. At the time of transport, J-Me did not appear to be in much distress or discomfort. I returned to the office and phoned her husband Brad informing him of the situation and an e.t.a. at the hospital.”

Pete Tucker’s note was also dated and signed on May 29, 2002, and stated:

“This morning, about 7:45 or 7:50, Mike Kintz, J-Me Iverson and I met with Wayne Duncan in Wayne’s office. The purpose of the meeting was to discuss J-Me’s changing of her start time without asking permission of a supervisor first.

“Wayne said the issue had been clearly addressed in the past by himself and by Mike. J-Me said that since she had posted her schedule on the ‘net’ the week before, and because Al Swofford was aware of the schedule change, that she had taken adequate steps to follow policy.

“I asked some questions of J-Me to clarify her understanding of the policy and her actions. I asked Wayne to clarify the policy, which is that all hourly employees must specifically request permission to change their start times. Mike commented about how that policy was working in my case, under different circumstances.

“The meeting lasted about 15 or 20 minutes. By the end of the meeting, J-Me was visibly upset. J-Me left and the rest of us stayed to discuss the matter further. In about ten minutes J-Me returned to Wayne’s office to say that she was hyperventilating, having trouble breathing, and her chest hurt. She was also crying.

“Wayne called 911 and followed the directions he was given regarding making J-Me as comfortable as possible. The ambulance arrived about ten minutes later.

“After the examination, the ambulance personnel could find nothing wrong with J-Me, and gave her 2 or 3 options. J-Me chose to go to the hospital in the ambulance.”

17) Respondent’s attendance policy included a code system that assigned points to each absence (“A”), incomplete shift (“I”) or tardy (“T”). Certain absences were assigned “zero points” and included medical absences coded as: industrial injuries (“II”), federal family leave (“FM”), Oregon family leave (“OM”), and California family leave (“CM”). Funeral leave (“LF”), jury duty leave (“LJ”), military leave (“LM”), and personal leave (“LP”) also were assigned zero points. Holidays, personal days, suspensions, and vacations also were assigned zero points. All other absences, including those for illness other than the designated medical leaves, were assigned three points per absence. Incomplete shifts and tardies, unless for otherwise protected reasons, were assigned two points per incident. According to Respondent’s policy, 9 points in 3 months or 15 points in 12 months was excessive and employees who accrued excessive points were subject to discipline, suspension, or termination. All absences for any reason for each employee were documented by the appropriate code

on an annual "Attendance Record Calendar." The points accrued one year back from the last absence, incomplete shift or tardy. Duncan supervised 23 supervisors and six different shifts and, unless an absence, tardy, or incomplete shift was based on a protected status, he did not examine underlying reasons when calculating points: "an absence is an absence, and a tardy is a tardy."

18) In a letter dated May 31, 2002, Duncan notified Complainant that she was suspended for two attendance policy violations. The letter stated in pertinent part:

"Jammie Iverson #92543

"Wednesday May 29, 2002 you had an incomplete shift. The incomplete shift put you in violation of the WinCo Foods Attendance Policy; 15 points in a 12 month period is considered excessive; you received a one-day [s]uspension on May 31, 2002 for failure to work your scheduled shift.

"In accordance with progressive discipline you are hereby notified of a second disciplinary suspension of three (3) days for violation of WinCo attendance policy. The days you are to be suspended are June 3, 4, 5, 2002. This suspension is to run in conjunction with the suspension issued on May 31, 2002.

"Please be advised that any further incidents of attendance or other violations of policies and procedures could result in progressive discipline up to and including immediate termination of your employment with WinCo Foods."

19) Kintz noted Complainant's incomplete shift on an Attendance Incident Record and in the "Explanation" section wrote: "sick 5-31-01 3 pts[;] sick 2-12-02 3 pts[;] sick 2-25-02 3 pts[;] Tardies 3-14-02 2 pts [and] 4-10-02 2 pts[;] Incomplete 5-29-02 2 pts[;] Total 15 pts/1 yr." In the "Action to be taken" section, he wrote: "Discipline Pending." Each entry was separately documented in Complainant's personnel file. The contemporaneous documentation was signed each time by Complainant and the "supervisor initiating record." None of the absences or tardies was due to migraine headaches.

20) Respondent's company personnel policies included a provision pertaining to discipline and a definition of gross misconduct that stated, in pertinent part:

“Examples of gross misconduct that could result in immediate suspension and/or discharge, but these are not all inclusive, are as follows”

“1. Dishonesty

“ \* \* \* \* \*

“Falsification of Company records or any fraudulent act or statement related to company business.”

Complainant read and signed the company personnel policies.

21) From January through June 2002, Complainant used OFLA leave for her migraines five times and missed approximately eight work days. She was migraine free in February, March, and May, and missed one day of work in June due to a migraine. Complainant’s medical records show that during that time, she received no medical treatment for migraines. Between on or about July 10 and August 18, 2002, Complainant’s OFLA related absences increased significantly. During that five and one half week period, Complainant used OFLA leave 6 times, missing a total of 13 work days due to migraine headaches. Complainant provided notes from “Kathleen Marquart, PAC” after each absence. Except for the July 19, 2002, note excusing her absence due to “migraine HA” from July 16 through 18, the notes from Marquart failed to state the reason for the absences. On or about August 19, 2002, Duncan told Complainant that “she had 15 days as of 8/19/02” to provide “a doctor’s certification verifying that she was out on intermittent FMLA for 7/28, 8/06, 8/14, and 8/18.” Duncan told Complainant that if she did not submit verification, her time off would be counted as an absence. Thereafter, Complainant was absent again on August 27, 2002. Complainant provided Respondent a note from the Grande Ronde Health and Wellness Center that stated: “Patient has intermittent migraines per her medical record. Dates missed documented in record 7/28/02, 8/6/02, 8/14/02, 8/18/02, 8/27/02.” The note was signed by family nurse practitioner Van Roper. Respondent found the note inadequate and asked Complainant for additional documentation. According to Complainant’s

medical records, on September 9, 2002, Complainant had an appointment with Roper and gave him a copy of a memo dated September 4, 2002, that was addressed to Jennifer Poe and written by Ray Sagarik, HR Benefits Department in Boise, Idaho. The memo stated in pertinent part:

“Hi Jennifer!

“I just wanted to let you know that we did receive a fax from Jammie Iverson this morning (it was faxed to our offices yesterday). However, after going over it with Karen, she has some concerns about the language that was used and so we are going to request that Jammie submit a new Dr’s note. The note which she provided said ‘Patient has intermittent migraines per her medical record.’ That is already known and is not under debate. It goes on to say ‘Dates missed documented in Record 07/28/02, 08/06/02, 08/14/02, 08/18/02, [and] 08/27/02.’ Karen feels that this is not sufficient as it does not indicate that Jammie was excused from work by her physician only that they have documented that she did not go to work on those dates.

“I am sending a letter to Jammie today indicating that she will have until 09/14/02 to submit a Dr’s note which explicitly excuses her from work on those dates. If we do not receive the required note by 09/14/02 then FMLA protections will be denied for those dates.

“Just wanted to give you a heads-up. If you wish to pass this information along to Jammie to give her some advance notice, you may. As mentioned above, the letter explaining our request will go out in the mail today. I’ll CC a copy for you and Wayne.

“If you have any questions, please let me know. Thanks for your help on this! – Ray”

On the memo presented at hearing, Complainant had handwritten: “Attn: Van Roper \* \*

\* Could you please fax me a doc’s note that says I am excused from work because of migraines for 7/28, 8/6, 8/14, 8/18, 8/27. The sooner I get this taken care of the better \*

\* \* Thanks for your attention to this.” Complainant’s medical records include a chart note prepared by Roper that states in pertinent part:

“25 y/o female presents here today for follow up on her migraine headaches. She also states she needs a note for work. Migraine headaches started about 3 years ago after an MVA that she had. She apparently hit her head into the dashboard twice. She has had migraines off and on ever since. She took Toradol yesterday after she ran out of the Imitrex. Imitrex makes her head feel full. She is uncomfortable taking this

at work. Previously trialed medications include Paxil, Zomig, Cardizem, Percoset, Toradol PO, Fioricet and Anaprox. \* \* \* She has apparently had headaches on July 28, 2000, August 6<sup>th</sup>, 14<sup>th</sup>, 27<sup>th</sup>, and Sept 9<sup>th</sup>. She needs a letter for this. On review of her records again it was found that her FMLA papers will expire here in October. It was also stated in the note given to her that she needed to follow up with us to have her FMLA papers updated.”

Thereafter, Respondent received a note, dated September 9, 2002, and signed by Van Roper, that stated, “Please excuse Jammie from work due to H/A’s 7/28/02, 8/6, 8/14, 8/27 and 9/9.”<sup>ii</sup> Other than her appointment with Van Roper on September 9, Complainant’s medical records show that Complainant did not seek any medical attention for migraines after July 19, 2002.

22) On September 10, 2002, Respondent, through Sagarik, sent Complainant a letter that stated in pertinent part:

“This letter is to inform you that we have determined that you do qualify for protections under the FMLA and/or State Leave Laws.

“According to the physician’s certification you have provided, we have applied FMLA and/or State Leave Law protections to your intermittent absences on 07/28/02, 08/06/02, 08/14/02, & 08/27/02.<sup>iii</sup> We will count this time against your annual entitlement, not to exceed 12 weeks. **Please remember, you are still required to follow WinCo’s attendance policy, which includes notifying management that you are unable to work at least two hours prior to the beginning [of] your scheduled shift.**<sup>iv</sup> **When notifying store management, you are required to specify whether or not the absence is due to this condition. In addition, in order for your absence to be protected by the FMLA, you are required to submit a Dr’s note for each subsequent absence relating to this condition listing the exact dates you are required to be absent and confirming that it is for the condition described in the physician’s certification that you have provided.**

“Please remember that you will be required to exhaust your sick and vacation pay for your own serious health condition and we will require you to exhaust your vacation pay for the care of an immediate family member.”

23) On September 11, 2002, Respondent, through Sagarik, sent Complainant a letter that stated in pertinent part:

“This letter is to inform you of your rights for protection under the Family Medical Leave Act (F.M.L.A.).

“1. Provided that you qualify for a protected leave, the requested leave will be counted against your annual F.M.L.A. entitlement. Dates requested are 09/09/02 & Future Intermittent. (12 week maximum annual entitlement)

“2. *Enclosed you will find a medical certification form that must be completed by your attending physician. To activate your rights under a protected leave you must furnish this medical certification of your serious health condition. You must furnish this certification by 10/07/02. Failure to return this certification by the date listed will result in denial of FMLA protection and your absence could be considered unexcused, which may result in disciplinary action up to and including termination. (Please be advised that if your medical provider fails to comply with this request, FMLA coverage still may be denied.) If you feel that you cannot comply with the deadline given, please contact our office immediately. WinCo assumes NO responsibility or liability regarding the return of FMLA documents to the Corporate Office/Benefits Department. Employees who return these documents to their respective store management to be returned in the WinCo mail, do so at their own risk. If local store management fails to send in such documents, or if they fail to send them in within the required time frame, WinCo bears no responsibility. Please return by U.S. certified mail if you desire proof of delivery.*

“We will require that you exhaust your sick and vacation pay for your own serious health condition and will require you to exhaust your vacation pay for the care of an immediate family member.

“ \* \* \* \* \*

“Prior to your return to work our office will require a ‘fitness-for-duty’ medical narrative from your treating physician.” (italics added)

24) On September 24, 2002, Respondent sent Complainant a letter that stated

in pertinent part:

“This letter is to inform you that we have determined that you do qualify for protections under the FMLA and/or State Leave Laws.

“According to the physician’s certification you have provided, we have applied FMLA and/or State Leave Law protections to your intermittent absence on 09/09/02. We will count this time against your annual entitlement, not to exceed 12 weeks. Please remember, you are still required to follow WinCo’s attendance policy, which includes notifying management that you are unable to work at least two hours prior to the beginning [of] your scheduled shift.<sup>v</sup> When notifying store management, you are required to specify whether or not the absence is due to this condition. In addition, in order for your absence to be protected by the FMLA, you are required to submit a Dr’s note for each subsequent absence relating to this condition listing the exact dates you are required

to be absent and confirming that it is for the condition described in the physician's certification that you have provided.

"Please remember that you will be required to exhaust your sick and vacation pay for your own serious health condition and we will require you to exhaust your vacation pay for the care of an immediate family member."

25) In October 2002, Complainant provided Respondent with medical certification of her continued need for intermittent OFLA leave. The form included the "Employee/Family Medical Leave Request" combined with the completed "Certification of Physician or Practitioner" signed by Van Roper on September 26, 2002. Complainant signed the form on October 2, 2002. The anticipated frequency of absences due to migraine headaches was listed as "approx 2-4 times a month." By letter dated October 8, 2002, Respondent approved her request for intermittent leave, including her absences on September 18 and 21, 2002. Complainant's OFLA leave, along with other absences, was documented each time in an Attendance Incident Record and signed by Complainant and the supervisor initiating the record.

26) Complainant became convinced in the spring of 2002 that she was "targeted" for termination. She believed that she "started getting into trouble" because her retirement benefits were due to vest in September 2002 and Respondent would not have to pay her benefits if she was terminated before then. After she was asked to provide doctor's notes for her absences in July and August and additional medical verification of her need for OFLA leave, Complainant wrote letters to Sagarik, Karen Stinger, and "Mr. Long," all of whom were located at WinCo headquarters in Boise, Idaho. Her letter to Sagarik, dated September 26, 2002, stated in pertinent part:

"It has recently been brought to my attention that a decision has been made on your part that I will be required to reapply and submit paperwork regarding my intermittent FMLA/OFLA certification every time I miss any hours of work due to my documented health condition, as the result of some form of doubt or evidence suggesting that I do not have a legitimate serious health condition. I have provided WinCo Inc., through you, every form of medical documentation and certification as required by law as well

as those provided by your own request. I am, at this time, requesting an explanation from WinCo Foods as well as yourself, as to the nature of these claims and what legal authority you feel that you have to require what I consider to be excessive and unnecessary 'hoops' that I have been and continue to be made to jump through, when all of the documentation that I have provided to you satisfies every law and rule of the FMLA/OFLA guidelines, according to the Oregon Labor Division and the Civil Rights Department. I have been trying to be as cooperative as possible with your requests, but this latest request is over and above anything that should be asked of me. If the information I have un-officially [sic] received is in error, please let me know as soon as is convenient, as this situation is causing me undo [sic] stress that is only adding to the problems that I have been having with my health. Your attention to this matter is appreciated. \* \* \* I am requesting your answer in writing as I feel that this is the only way I can be sure that your response is official."

Complainant's letter to Stinger, dated September 26, 2002, stated in pertinent part:

"I just received a letter in the mail from Ray Sagarik stating that my FMLA/OFLA status was approved for 9-9-02 and future intermittent leave. The stipulations on this letter state that among other things I am required to provide a doctor's note for any occurrences. On graveyard shift 9-18-02 I had to leave work due to a migraine. I provided a note for this occurrence to Jennifer Poe and this note in turn was faxed to Boise. When I looked at the letter I received today, there is no mention of 9-18-02 being covered, although because I have provided a doctor's note for that day, I have to assume that it is. I contacted Ray Sagarik just to make sure and he told me that it was not covered under my doctor's note and certification and that you and Wayne Duncan apparently had a conversation about me having to supply you with another certification paperwork [sic] on top of everything that I have already supplied. I am sending you another copy of my certification paperwork which I am sure that you have received.

"I am curious how you can require me to provide documentation on this date for something I did not know anything about. If I would not have called Mr. Sagarik about this situation, I would still be in the dark about it. I have supplied and conformed to every stipulation that was required of me, per the form sent by Mr. Sagarik dated 9-24-02. According to Mr. Sagarik, the conversation between yourself and Mr. Duncan occurred on either 9-10-02 or 9-11-02. Are you now putting stipulations on past occurrences? I do not understand how I can supply you and Mr. Sagarik with every document asked for and then find out that you are requiring more information for an occurrence that should and is already covered, this even according to your own office. I have to assume that the paperwork that is being sent to me is official and accurate, but now, how can I be sure if I am complying with your requests, if I don't even know what your requests are. If this is a new stipulation you are requiring of me,

please inform me in writing of this so I can be sure of what policies are being created in my situation. According to the Oregon Labor Department/Civil Rights Division [sic], WinCo as a company may require certification every 30 days only. The exception is if the company has some sort of reasonable doubt and then the company (WinCo) is required to pay for any recertification and any expenses that go along with it. With the overwhelming amount of documentation that I have provided you, I don't understand where the doubt arises, but if this is the case, it still is no basis for denying my OFLA/FMLA request for 9/17/9/18 which has been fully certified and documented by my physician to your office.

"Again, I am requesting an explanation in writing as at this time I am extremely confused about what is required of me and what is not. At this point I am assuming that 9-18-02 is covered under OFLA/FMLA protection, my reasons for this assumption are stated clearly above.

"Thank you in advance for your attention to this matter. My return address is on the envelope or I am sure that you have it on file."

Complainant's letter to Long, dated September 25, 2002, stated:

"I am writing this letter to you as I feel that I have explored and exhausted all of my other options in resolving a matter involving myself and several members of the warehouse management staff. My name is Jammie Iverson and I work as a Product Auditor at the Woodburn Warehouse. I am sure that you have been made aware of my situation by warehouse management but I would like to take this opportunity to explain a few things that I feel have possibly been misconstrued or misinterpreted.

"I have been suffering from chronic migraine headaches for approximately 3 years. I have seen several doctors and specialists and had numerous tests and exams done to try and figure out what triggered this problem and how to control it. I have tried up to 15 different medications in the past three years and am still aggressively exploring any and all options available to me to be rid of this medical problem. I applied for and supplied documents from my physician to WinCo for protection under OFLA and FMLA due to the increasing frequency in which I had to miss time from work. This was not something I wanted to do, but it was explained to me that I was on the verge of being terminated for the amount of work I was missing. I was instructed that I would have to supply a doctor's note for any and all occurrences that I missed any time. Although I have since learned from the Oregon Labor Division [sic] that this is not the case and it is a violation for WinCo to ask for these notes, I have continued to supply them so as not to make waves and to assure management that this is a legitimate illness, although I don't understand why that would be in question. There have been several occasions when Warehouse management staff including Wayne Duncan, Al Swofford and Mike Kintz have seen first hand the effects these migraines have on me and several times those same people have insisted that I go home

because I should not have to be in a work environment when I am obviously too ill to be there.

“As of September 9 of this year, it has been explained to me that I needed to re-apply for FMLA. I am in the process of doing this and will be sending my paperwork myself this week. My doctor stated to me that he had personally faxed the forms to Boise Headquarters but for some reason as of today Ray Sagarik claims that he has not received them. I also learned today that now Ray Sagarik and Karen Stinger have made the decision, with the help of WinCo attorney’s [sic], that I have to re-submit FMLA paperwork for each and all occurrences that pertain to my migraines. Apparently they have been given some sort of doubt or evidence suggesting that I am not truly ill but that I just don’t feel like coming to work. The comment made by Mr. Sagarik recently was apparently that ‘FMLA is for people who are really sick, not for people that just don’t feel like coming to work.’ I have consistently jumped through every hoop that Wayne Duncan and Ray Sagarik have put in front of me and can only assume that at this point that I have been targeted by these same people and others for ultimate termination. I have no other reason for what is happening and this, among with a wealth of other incidents leave me no other avenues of thought. I have been the target of sexual innuendos, jokes, and other forms of inappropriate behavior by the Warehouse Management Staff including Mike Kintz and Don Kellogg and have been harassed by other supervisors when I ask for assistance from them to do my job. There was a recent complaint by a supervisor to Wayne Duncan that I was wearing inappropriate clothing that bared my stomach. I would never wear any clothing of this nature and feel that this is another prime example of an unsubstantiated attack by a supervisor.

“As a Product Auditor, when I started this position there were no set rules for schedule or shift. Wayne Duncan told me that I was responsible for auditing every selecting employee in a six week period. I was able to do that with ease and Wayne soon added that I needed to audit every store as well, both in perishable and grocery. This came after a claim by Don Kellogg that I was not auditing in perishable, although the audits and paperwork clearly show that I was on a daily basis. Wayne then added the task of keeping track of the number of times a store or employee had been audited so he could have easy access to that data in the event of a dispute from a store or employee. I have continually altered my work times or the way I audit at the whim of Wayne Duncan and other supervisors as needed, but suddenly, I began to get disciplined for my varying start times, all of this after I was approved for FMLA. I could see a clear change in attitude toward me since that time. Let me make you aware that as of the time I have taken this job, the warehouse selecting pool has close to doubled and yet I still manage to audit every selector, every store at least twice and I have implemented a checks and balances system to keep track of Supervisor’s audits at Wayne’s request because a certain supervisor (Don Kellogg) seemed unable to return audits as

Wayne required. Wayne then added to my job that all supervisors would supply me with a list of 4-5 target audit employee's [sic] that would need to be audited on a more frequent basis and soon some of those lists grew to 10-15 employees. These lists include each supervisor, each shift, and each department. I have accepted and handled these responsibilities as a challenge and have never failed to meet those standards, even while fighting my illness. I do three times the work at half the pay than any other employee who has done warehouse audits and have never once let that affect my dedication and pride in doing my job.

"There have been several other incidents of what I feel is unwarranted discipline and inappropriate behavior by the warehouse staff that I won't go into at this point in respect for your time constraints and trying to keep this letter as brief as possible. I wish to make clear to you sir that I am not writing this letter as a way to cry wolf or as a means to stir up trouble for anybody. I have been a dedicated and hard working employee for WinCo and wish to remain that way. I am having a hard time understanding why I have been singled out other than that I am being harassed and discriminated against because of past problems with certain supervisors as well as my FMLA status which has been fully, medically documented and which I have provided every possible kind of certification and doctors release that I have been asked to supply. On the last incidents I had to supply doctor's notes four times because each time I submitted a note it suddenly wasn't good enough for Mr. Sagarik's increasingly demanding rules. I honestly could not believe when I heard that my situation was being discussed with an attorney. I was under the impression that by working hard at my job and the amount of additional tasks that I handle would put me in a good light in the eyes of the Warehouse Management, not lead me to the brink of termination. The fact that an attorney was consulted can only lead me to believe that A) I am being targeted for termination and B) Warehouse Management is concerned and do acknowledge that my situation is one they feel that they could have problems with in the future.

"Thank you for your time in this matter and I understand that you are extremely busy, but any kind of response from you would be greatly appreciated. I respect you as a leader of this company and would value any input you could give me."

All of the letters were delivered to Boise on October 1, 2002.

27) On October 3, 2002, Complainant filed an intake questionnaire with BOLI. She stated in the questionnaire that she was discriminated against based on her use of "FMLA." When asked to describe "the harm or employment action" about which she was filing the complaint, Complainant stated in the questionnaire:

"I was approved for intermittent FMLA on 10/15/01 covering me from 9/16/01 to 10/5/02. My employer immediately required me to provide a doctor's excuse for every occurrence [sic] in which I missed work due to my health condition. Beginning on occurrence [sic] on 7/28/02, I was made to submit [sic] three doctor's notes for each occurrence [sic] 7/28, 8/6, 8/14, 8/18, and 8/27 2002."

In response to the question, "Why do you think this happened to you," Complainant stated:

"I think this is happening to me because I have reported sexual harassment against supervisors to the Warehouse manager. I dispelled accusations from supervisors about not doing my job properly and was able to show that it was supervisors not doing their job. I believe they wanted to terminate me before I was vested in my ESOP (retirement). Recently, comments have been made by supervisors doubting my medical condition."

In response to the question, "What reason did your employer give for the action about which you are complaining," Complainant stated:

"I was told by WinCo that by law they were allowed to require the documentation that they were asking for."

When asked on the questionnaire to "name others who were treated similarly to you under the same conditions" and to "name others who were treated differently than you were under the same conditions," Complainant wrote "N/A" on both counts. When asked to "give examples of how you were treated differently and/or harassed based on your protected class," Complainant stated:

"I was constantly asked to resubmit doctor's notes. They make increasingly demand requests [sic] to qualify my illness as OFLA/FMLA. They are telling me I have to recertify my OFLA/FMLA for a date that was already covered. Hostile work environment created by management as shown by derogatory remarks made to and about me."

28) Complainant's letters to Sagarik, Stinger and Long referring to Complainant's contacts with the Bureau of Labor and Industries prior to her filing a civil rights complaint were sent to Respondent's headquarters on October 1, 2002. There is nothing in the record establishing Respondent knew about the questionnaire

Complainant submitted to BOLI before Complainant filed a verified civil rights complaint on January 17, 2003.

29) On October 30, 2002, Duncan documented a discussion he had with Complainant about her audits and placed a note in her personnel file that stated in pertinent part:

“On October 28, 2002, I had a conversation with Jammie about the way she was setting up her audits for outbound loads in the warehouse. I told Jammie I had received complaints from supervisors and other employees about her always auditing at Dick Dawson’s (warehouse loader) door. It appeared she was auditing at this door more frequently than other loaders [sic] doors. Jammie got defensive; she accused Mike Kintz (shift supervisor) and me of harassment. I asked Jammie if she could select her audits in a different manner, one in which she would not spend more time at one particular door. Jammie was very argumentative and said she was doing audits the correct way, what I wanted her to do was wrong. She stated that she has done more audits than anybody else and I should be complementing [sic] her on the good job she does, instead I was questioning her. I told Jammie I would review her process for auditing but for now I didn’t want her auditing at Dick Dawson’s door. Later that morning I talked to Jammie and Robin (audit helper). I assigned them a door centrally located in the warehouse to do audits, and Robin was to transport the orders to be audited back and forth.

“On October 30, 2002 Robin Marcum (audit helper) approached me concerned about the changes. He was concerned that being at one door would not give him the ability to spot check all orders on the dock. Moving around the dock he was able to catch other mistakes. Robin stated he knew Jammie was spending more time at Dawson’s door than she should, but asked why Jammie just was not disciplined.”

30) In or around August or September 2002, Jennifer Poe told Duncan that Complainant told her she was at a ballgame while on sick leave and that she was worried that someone may have seen her there. When Duncan told Complainant about his conversation with Poe, Complainant told him she had not done anything to violate the sick leave policy. He reminded her that the policy was clear about requiring employees to stay at home when sick and that she must stay at home or risk being cited for misconduct. Later, another employee reported seeing Complainant on the Oregon coast with Dawson while Complainant was on sick leave. When Duncan asked

Complainant about the report, Complainant denied it and attributed the report to rumors in the warehouse. Duncan again reminded Complainant of the sick leave policy requirements. Duncan later notified Roger Cochell in Human Resources that he had received complaints from employees that gave him cause to suspect Complainant was abusing Respondent's sick leave policy. Cochell directed Respondent's Loss Prevention director Shannon Poe to conduct video surveillance of Complainant's activities on days she called in sick and was unable to work. Poe assigned Corey Olson, a Loss Prevention employee for over five years, to videotape Complainant during her regular work hours whenever she called in sick. Olson first videotaped Complainant in September or October 2002. He followed Complainant to a WinCo store on Lancaster Drive in Salem and videotaped her with the store's "in store" camcorder as she shopped for 45 or 50 minutes "around 3 p.m." On October 22, 2002, using a different video camera, Olson videotaped Complainant leaving the bank with her husband. Complainant's Attendance Incident Record shows she left work at 6:45 a.m. that day because she had a migraine. Olson videotaped Complainant again on November 14, 2002, while she was leaving Toys R Us at 2:54 p.m. The attendance record for that day shows Complainant "Called sick at 3:45 a.m. 11-13-02 \* \* \* called @ 3:55 a.m. sick (won't be in today) 11-14-02."<sup>vi</sup> At the bottom of the "explanation" section, Complainant wrote: "Both days I called in I specified I had a migraine: \* FMLA \*." On December 17, 2002, Olson videotaped Complainant and her husband leaving Carl's Jr. at 1:25 p.m. and leaving Costco at 2:15 p.m. Complainant also picked up her children from school that day around 2:30 p.m. Complainant's attendance record shows she "called at 3:30 a.m. with a really bad headache – not coming in for 12/17/02 shift."<sup>vii</sup> Olson gave the tapes to Poe.

31) On December 23, 2002, Duncan and Shannon Poe met with Complainant to question her about her activities while on sick leave. Poe asked Complainant about the sick leave policy. She stated she was aware of the policy, knew she needed to be at home while on sick leave, and that Duncan had “covered it” with her. When Poe asked about her activities on specific dates she had called in sick, Complainant denied she left the house on those dates and stated that she never left her house when using sick leave. She also stated that the warehouse employees who said they observed her shopping and engaged in social activities while on sick leave were “liars.” When Poe told her she was videotaped shopping and eating out on certain dates, she asked to see the tape before responding. Although she was not shown the tape, she admitted going to Costco, eating in a fast food restaurant, and picking up her child from school during her regular shift after calling in sick on December 17, 2002. Sometime during the meeting, Duncan called Cochell in Boise and told him that Poe gave Complainant “three opportunities to tell the truth, but she lied.” Based on Duncan’s representations about the meeting with Complainant, Cochell decided to terminate Complainant for her failure to follow the sick leave policy and for not telling the truth about her activities while absent from work on sick leave. Complainant was told she was terminated and was asked to turn in her key card and pick up her “personal effects.” Complainant was “devastated” and left in tears. On the same day, Duncan prepared a letter to Complainant documenting her discharge that stated, in pertinent part:

“This letter is to inform you that you are being discharged from employment immediately for violation of the Company Personnel policy Article XV.1 Dishonesty and XV.3; falsification of company records or any false statement related to company business and for violation of the Distribution Center and office working conditions and wage policies Article N.8. Employees alleging illness should be either at home, at a doctor’s appointment or at a health care facility approved by a provider. Employees engaging in contrary activities while alleging sickness will be subject to disciplinary action up to and including discharge.

“You were scheduled for work on 12/17/02 but called in sick indicating you were unavailable for work. Your conduct during your scheduled working hours violates the aforementioned sick leave/attendance policy.”

32) Respondent’s sick leave policy applied to any use of sick leave. Ronald Beckel was terminated in July 2001 after he called in sick for two days and was videotaped doing recreational activities at Sand Lake while using non-OFLA related sick leave. He was fired because he was dishonest about his activities on those days. Chris Wilson, a union employee, was terminated in 2003 after he called in sick with a migraine headache and later was caught on videotape engaging in recreational activities while using OFLA related sick leave on those days. He also was dishonest about his activities on the days he called in sick. Tyler Strunk was terminated in 2003 after he called in sick for four days and was videotaped engaging in recreational activities at Detroit Lake. He was dishonest about his activities while using non-OFLA related sick leave on those days. Jeffrey Miller was also terminated in 2003 for dishonesty about his activities while on OFLA related sick leave. He was videotaped by a workers’ compensation insurance company at Respondent’s request based on two witness complaints about his misuse of sick leave. Rob Hallman was suspended after witnesses observed him roofing his house while using sick leave and later reported Hallman’s activities to management. Hallman was not terminated because he was honest about his activities when Respondent confronted him with the witness complaints.

33) Complainant was “very upset” when Respondent terminated her. She was “really depressed” because the discharge occurred just before the Christmas holidays and put a “damper” on the family celebration. She enjoyed her job and was earning \$14.26 per hour at termination. Her “two income” family was immediately affected by the reduction to one income and she had to use credit cards to purchase Christmas gifts. Her belief that “doing a good job pays off” was “ruined” and she could not

understand what she “had done wrong to be treated this way.” Complainant applied for unemployment benefits and decided to go back to school. She applied for several jobs while receiving unemployment benefits. In 2003, Complainant earned \$3,759.51 while working part time for J.C. Penney Portrait Studio. When she quit her job with Penney’s in May 2004, she had earned an additional estimated \$1,500, working one to two hours per day, up to five hours per week. In June 2004, she began attending Chemeketa Community College full time. She first studied photography and graphic arts and has “just started working on courses in the medical field.” Complainant has not suffered from a migraine headache since Respondent terminated her in December 2002. She is generally a positive person and her spirits have improved. She is happy to be attending school. Her husband is still employed by Respondent and recently they encouraged his brother to apply for employment with Respondent.

34) Complainant’s testimony was not wholly credible. Although she eventually acknowledged key facts, she denied those that tended to negatively impact her case until she was confronted with documentary evidence that established otherwise. For instance, when at hearing she viewed the videotape of her activities on November 14, 2002, she readily acknowledged that it showed her leaving Toys R Us and picking up her child from school during work hours, but adamantly denied that she was using sick leave that day. As support for her claim, she pointed to Respondent’s computer printout listing personnel notes that did not include an entry for that date. On cross-examination, she was forced to acknowledge that the printout showed a file note entry for November 13, 2002, that was in fact documenting an “Attendance Incident Record” showing Complainant called in sick on November 13 and 14 for migraine headaches. Moreover, the attendance record included a note in her own handwriting stating: “Both days [November 13-14] I called in I specified I had a migraine: \* FMLA \*.” Complainant’s

tendency to back track on her testimony was also evidenced by her statement that she was not “concerned about being taped” and still would have gone out to lunch on December 17, 2002, because she did not believe her activities that day violated Respondent’s sick leave policy. She then testified that she had gone out “quite a few times” while on sick leave and only when prompted modified her testimony that it was later on in the afternoons that she “went to baseball games” on days she called in sick. She further maintained that, except for her activities on December 17, 2002, she had never left her house before 3 p.m. while on sick leave. Much later in her testimony she admitted that she was shopping on November 14, 2002, while using her sick leave. Complainant admitted, and the forum accepts as fact, that (1) she knew about and understood Respondent’s sick leave policy; (2) she previously had been told about complaints Respondent received about her “contrary” activities while on sick leave and was warned about the consequences of engaging in such activities while on sick leave; (3) on December 17, 2002, while on sick leave, she went Christmas shopping, ate in a fast food restaurant and picked up her children from school; and (4) she asked to see the surveillance video before she admitted her activities on that day. Overall, Complainant’s testimony was not reliable and the forum credited it only when it was an admission, statement against interest, or corroborated by other credible evidence.

35) Van Roper’s testimony that he was Complainant’s health care provider and that he examined her at times material was not impeached. Although he testified he was a certified family nurse practitioner, he acknowledged during cross-examination that he was not currently licensed in Oregon. Respondent did not question his credentials during the period Complainant used OFLA leave or at any time thereafter and the forum finds his qualifications are not at issue and his testimony that he was not licensed in Oregon does not affect his overall credibility.<sup>viii</sup> Roper’s testimony that he

treated Complainant for migraines and wrote notes for her employer in August and September was credible. The forum has credited his testimony as it pertains to his personal knowledge of her condition and his role as health care provider of record.

36) Bradley Iverson's testimony was generally credible. Although he had an obvious bias as Complainant's husband, he did not purport to have personal knowledge of key facts. However, his testimony on some points lacked specifics. Despite his position as one of Respondent's supervisors, he did not elaborate on his "observation" that Complainant was treated differently from other workers. He acknowledged that although he supervised her "from time to time," he was not personally involved in her discipline and did not know if others had been disciplined for similar reasons. For those reasons, the forum gave no weight to his testimony that Complainant was treated differently than her co-workers. The forum credited in its entirety his testimony that he observed that Complainant "became timid and scared about what was happening at work," that she "strongly believed she was targeted for termination," and that she suffered emotionally after she was terminated.

37) Dawson's testimony was biased due to his friendship with Complainant and he lacked personal knowledge of key facts. He admitted he had no knowledge of Complainant's discipline or medical certification requirements other than the information she supplied to him. Although he testified that he thought Complainant was treated differently than others in her situation, he "could not think of any specifics" about how Complainant was treated differently from others in the workplace. His testimony that Duncan told him Complainant was fired because she "got too close to Boise as it pertained to FMLA" was not believable because Duncan, whose testimony the forum finds credible, denied making that statement to Dawson. Absent any other evidence to support Dawson's contention, the forum concludes that the conversation never

happened. Drawson's testimony was credited only when it was corroborated by other credible evidence.

38) Wayne Duncan's testimony was generally credible. He was not impeached on any material issue and the forum credits his testimony on all key issues.

39) Jennifer Poe's testimony was generally credible. During material times, Poe was the assistant warehouse coordinator, managed the payroll and vacation tracking, and had knowledge of Complainant's work schedule. Although her memory of specific dates in 2002 had faded, she credibly testified that she observed Complainant shopping in a grocery store on a summer day while Complainant was off work on sick leave. She readily acknowledged that she could not remember the time of day or the specific shift Complainant was working when she observed Complainant in the grocery store. She also testified that Complainant told her she was attending a ballgame "with Brad and the kids" while on family leave in the spring of 2002. Her testimony was not impeached on any material issue and the forum credits her testimony on all key issues.

40) Corey Olson's testimony was generally credible. He acknowledged the flaws with the videotape and testified to only those events he observed firsthand. His testimony was not slanted toward or against Respondent or Complainant. He was not impeached in any way and the forum credits his testimony in its entirety.

41) Roger Cochell's testimony was credible. He acknowledged that he did not view the videotape but relied on Duncan's representations that the tape showed Complainant engaging in "contrary activities" while on OFLA leave and that she denied engaging in those activities until she was told about the tape. His testimony that he decided to terminate Complainant's employment based on Duncan's representations and that Respondent did not seek a second medical opinion because Complainant's actions alone violated company policies was credible. He credibly testified that

Complainant was not terminated because she contacted the human resources department with questions or because she used OFLA leave. Cochell also credibly testified that he wrote the sick leave policy and that neither the employees nor the unions ever questioned the language or the meaning of “contrary activities.” Cochell was not impeached in any way and the forum credits his testimony in its entirety.

42) The remaining witnesses were credible in the parts of their testimony that related to material issues.

### **ULTIMATE FINDINGS OF FACT**

1) At all material times, Respondent employed 25 or more persons in Oregon and was subject to the Oregon Family Leave Act.

2) At all material times, Complainant was Respondent’s employee and was eligible to take OFLA leave.

3) Complainant was a product auditor. Product auditors were allowed to set their own weekly work schedule depending on the “job needs.” Complainant’s shift varied depending on when product was selected and loaded for distribution to other stores. Complainant’s supervisor did not care if Complainant worked the day or night shift and she was permitted to make her own weekly schedule showing which shift she planned to work each day.

4) Complainant performed her job well and regularly received annual pay increases.

5) Respondent maintained sick leave and personnel policies that all hourly employees were required to follow, including Complainant. Complainant knew of the policies and that Respondent required all hourly employees to abide by the policies.

6) Respondent’s sick leave policy stated “Employees utilizing sick leave are expected to have a bona fide illness and subsequently should be either at home, at a doctor’s appointment or at a health care facility approved by the provider, etc.

Employees engaging in contrary activities while alleging sickness will be subject to disciplinary action up to and including discharge.” The policy was applicable to all uses of sick leave, including those related to OFLA covered conditions and on the job injuries.

7) Respondent’s attendance policy for hourly workers included a point system for absences that did not qualify for protected leave and for incomplete shifts and tardies to work or returning from lunch or breaks. Absences qualifying for protected leave included those due to industrial injuries, FMLA, OFLA, California family leave, funeral leave, jury duty, military leave, personal leave, holidays, suspensions, and vacations. Under the policy, 9 points in 3 months or 15 points in 12 months warranted discipline, up to and including termination.

8) Respondent’s personnel policies included a policy that designated dishonesty as an example of gross misconduct that could result in immediate discharge.

9) Complainant suffered from migraine headaches from mid-2000 until mid-December 2002. She missed at least a day of work every other month. In or around September 2001, her supervisor noticed she was ill and sent her home from work to recover from a migraine. At that time, he recommended that she submit a request for OFLA leave for her headaches. In September 2001 Complainant submitted a request for intermittent OFLA leave to recover from migraines on an as needed basis. Respondent granted Complainant intermittent leave in October 2001. From September through December 2001, Complainant used OFLA leave three times and missed approximately four work days due to her migraines.

10) When Respondent granted the OFLA leave it notified Complainant in writing that after each absence due to migraines she was required to provide a doctor’s note “listing the exact dates [she was] required to be absent and confirming that it is for

the conditions described in [her] physician's certification." Each time she was absent due to migraines she provided the required notes and was approved each time for OFLA leave.

11) Complainant's migraine symptoms were worse in the morning. When she had a migraine, she gave herself a Toradol shot which "knocked her out" for about eight hours. When she awoke, she was hungry and felt better after eating. After recovering from a migraine, she sometimes worked the rest of her shift. Getting ready for work and driving to her worksite took an hour and she did not consider going to work unless her migraine resolved two hours before the end of her shift.

12) Prior to March 2002, Respondent was lax about disciplining employees who changed their schedule without permission or punched in late from lunch. On March 1, 2002, Respondent's management conducted a meeting for hourly employees to advise them that it was "tightening up" its attendance policy pertaining to start times and lunch time tardies for hourly employees. Complainant attended the meeting and understood that Respondent was tightening up the attendance rules. Complainant had recurring attendance problems before the March 1 meeting, but had not been regularly disciplined.

13) On May 31, 2002, Complainant was suspended for three days after accruing 15 points in twelve months. Complainant was assessed 3 points per day under Respondent's attendance policy for being out sick on May 31, 2001 and February 12 and 25, 2002. None of those absences were for migraines. Complainant was 30 minutes tardy on March 14, 2002 and was counseled but no points were assessed. Complainant was tardy returning from lunch on April 1, 2, 8, 9 and 10, 2002, but Respondent assessed only 2 points for all of the April tardy dates. Complainant changed her starting time for work on April 6, 2002, without permission but no points

were assessed. On May 29, 2002, following a meeting with managers about her attendance, Complainant complained of shortness of breath and chest pains. Management called 911 and when an ambulance arrived at the work site, the ambulance attendant gave Complainant several options. Complainant chose to be taken to a hospital. Respondent assessed 2 points for an incomplete shift on May 29 and 3 points for an absence on May 30. None of the absences were due to migraines.

14) From on or about July 10 through August 18, 2002, Complainant's absences due to migraines increased. She was absent 13 days within a five and one half week period and Respondent's supervisor told Complainant that she had 15 days from August 19, 2002, to provide a doctor's note stating that she was on intermittent leave for absences on July 28, and August 6, 14, and 18, 2002. She was told that if she did not submit the documentation, her time off would be counted as absences. Thereafter, she was absent again on August 27 and September 9, 2002. Complainant had already submitted doctor's notes for some of those dates but Respondent found them inadequate. Complainant contacted her health care provider and on September 9, 2002, he submitted a note stating Complainant was absent on July 28, August 6, 14, and 27, and September 9, 2002, due to "H/A's" and stated that "we need to update new [OFLA]." The note was approved and Respondent designated Complainant's absences on those dates as OFLA leave.

15) On September 11, 2002, Respondent asked Complainant to certify her need for OFLA leave by furnishing a new medical certificate on a form Respondent provided. Complainant submitted the completed form and on October 8, 2002, Respondent approved Complainant's request for intermittent OFLA leave as needed, including her additional absences on September 18 and 21, 2002.

16) Complainant was upset by Respondent's request for documentation pertaining to her July 28 through August 18 absences and the requirement that she submit a new medical verification for her intermittent leave. On September 25 and 26, 2002, Complainant wrote three letters to WinCo headquarters after Respondent notified her on September 24 that the July 28, August 6, 14, 27, and September 9, 2002, absences qualified as OFLA leave. In her letters, she indicated that she considered the requests "to be excessive and unnecessary hoops" and that the situation was causing her undue stress. She also indicated that management had "some sort of doubt or evidence" about her use of OFLA leave. In a questionnaire she submitted to BOLI on October 3, 2002, Complainant stated that she was "told by WinCo that by law they were allowed to require the documentation that they were asking for."

17) In or around August or September 2002, Complainant's supervisor had at least two discussions with Complainant about Respondent's sick leave policy after he had received reports that Complainant attended a ball game and was seen on the coast with a co-worker while using her sick leave. Although she denied both incidents, after the second report, her supervisor placed her on video surveillance. She subsequently was videotaped by an employee from Respondent's security department on December 17, 2002, doing her Christmas shopping, eating in a fast food restaurant and picking up her child from school while on sick leave for migraines. The videotape recording began at 1:25 p.m. and showed Complainant leaving a fast food restaurant.

18) When Respondent confronted Complainant about her activities on December 17, 2002, Complainant denied engaging in those activities until Respondent told her about the videotape.

19) On December 23, 2002, Respondent terminated Complainant because she violated Respondent's sick leave policy and because she was dishonest about her activities on December 17, 2002.

20) Respondent terminated other employees in 2001 and 2003 for the same reasons. Some were on OFLA leave when they violated Respondent's sick leave policy and some were on sick leave for other reasons.

### **CONCLUSIONS OF LAW**

1) At times material herein, Respondent was a covered employer as defined in ORS 659A.150(1) and 659A.153.

2) At times material herein, Complainant was an eligible employee as defined in ORS 659A.156.

3) The actions, inaction, and motivations of Wayne Duncan and Roger Cochell properly are imputed to Respondent.

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

5) Complainant's migraine headaches constituted a "serious health condition" as defined in ORS 659A.159(1)(c) and OAR 839-009-0210(14).

6) Respondent's request that Complainant supply a doctor's note confirming that her increased absences in July and August 2002 were OFLA related, and that Complainant provide additional medical documentation verifying her need for intermittent OFLA leave, was consistent with OAR 839-009-0260(6); and, by requesting the additional documentation as a result of Complainant's increased absences, Respondent did not deny Complainant OFLA leave in the manner required by ORS 659A.150 to 659A.186 or commit an unlawful employment practice in violation of ORS 659A.183.

7) Respondent did not apply its sick leave medical verification requirement against Complainant because Complainant inquired about family leave, submitted a request for family leave, or invoked any OFLA provisions and did not therefore commit an unlawful employment practice in violation of OAR 839-009-0320.

8) Respondent did not apply its attendance policy assessing points for non-protected absences against Complainant because Complainant inquired about family leave, submitted a request for family leave, or invoked any OFLA provisions and did not therefore commit an unlawful employment practice in violation of OAR 839-009-0320.

9) Respondent did not terminate Complainant because she inquired about family leave, submitted a request for family leave, or invoked any OFLA provisions and therefore did not commit an unlawful employment practice in violation of ORS 659A.183 or OAR 839-009-0230(2).

### **OPINION**

OFLA regulates two distinct areas of employer behavior with regard to employee leaves of absence. First, OFLA establishes an entitlement providing that eligible employees working for covered employers are entitled to OFLA leave for the purposes set out in the statute, and job protection during that leave. Second, OFLA, through OAR 839-009-0320, prohibits retaliation or discrimination against any employee based on inquiry about the use of OFLA. This distinction is important because the analysis of whether or not unlawful practices occurred is different in each area. *In the Matter of Roseburg Forest Products*, 20 BOLI 8, 27 (2000).

The Agency alleges Respondent denied Complainant OFLA leave to which she was entitled by requiring her to submit medical verification for each period of OFLA leave taken in July and August 2002, by failing to instead obtain the opinion of a second health care provider if Respondent doubted Complainant's request for OFLA leave, and

by applying its sick leave policy requiring employees to be at home or at a health care facility while on sick leave to Complainant while she was on OFLA leave.

The Agency also alleges Respondent retaliated or discriminated against Complainant in the terms and conditions of her employment or retaliated or discriminated by terminating her for invoking or using OFLA leave.

For these two types of alleged unlawful practices, the Agency seeks approximately \$60,000 in lost wages and \$30,000 emotional distress damages.

Respondent denies it denied Complainant OFLA leave, or retaliated or discriminated against her or terminated her based on her inquiring about, invoking or using OFLA leave. Respondent contends Complainant was terminated because she engaged in activities while on sick leave that violated Respondent's sick leave policy and was later dishonest about those activities thereby violating Respondent's personnel policy prohibiting dishonesty in the workplace.

**A. Unlawful Denial of OFLA Leave – ORS 659A.183**

Under the OFLA, it is an unlawful employment practice for an employer to deny an eligible employee leave to recover from or seek treatment for a serious health condition “in the manner required by ORS 659A.150 to 659A.186.” To establish a prima facie case, the Agency must show that: 1) Respondent was a covered employer as defined in ORS 659A.153(1); 2) Complainant was an eligible employee, i.e., she was employed by a covered employer at least 180 calendar days immediately preceding the date her medical leave began; 3) Complainant had a “serious health condition” as defined in OAR 839-009-0210(14)(e); 4) Complainant used or would have used OFLA leave to recover from or seek treatment for her serious health condition; and 5) Respondent did not allow Complainant to use OFLA leave to which she was entitled in the manner required by ORS 659A.150 to 659A.186. *In the Matter of Gordy's Truck*

*Stop LLC*, 26 BOLI 234, 247 2005); *In the Matter of Magno-Humphries, Inc.*, 25 BOLI 175, 192 (2004), *citing In the Matter of Centennial School District*, 18 BOLI 176, 192-93 (1999).

Respondent does not dispute that it was a covered employer or that Complainant was an eligible employee. Also, Respondent admitted Complainant sometimes suffered from migraine headaches during her employment, that it approved and granted Complainant's requests for intermittent OFLA leave based on her migraines, and that it never doubted the medical basis for the requested leave. Despite its answer denying Complainant had a serious health condition, Respondent did not refute in any way evidence at hearing that demonstrated Complainant had chronic migraines that were episodic and for which she received periodic treatment. Consequently, the forum concludes Complainant had a serious health condition for OFLA purposes. OAR 839-009-0210(14)(e). The only remaining issue in dispute is whether Respondent denied Complainant use of OFLA leave to which she was entitled in the manner required by law. The entire record shows that Complainant requested and received intermittent leave for migraine headaches from September 2001 through December 2002. In its pleading, the Agency alleged that by requiring Complainant to provide a doctor's note each time she returned from OFLA leave, Respondent constructively denied Complainant leave to which she was otherwise entitled. The Agency also alleged that Respondent's sick leave policy requiring employees to either be at home, in a medical facility, or engaged in medically related activities while using sick leave violated OFLA provisions.

1. Medical Verification

ORS 659A.168(1) permits an employer to request medical verification of an employee's need for medical leave and "subsequent medical verification on a

reasonable basis.”<sup>ix</sup> The Agency has promulgated a rule that interprets “reasonable basis” as “no more often than every 30 days.” OAR 839-009-0260(6). Undisputed evidence shows Respondent twice asked Complainant to provide medical verification of her need for OFLA leave, as contemplated in ORS 659A.168(1), once in September 2001 and again in September 2002.<sup>x</sup> Each time, Complainant, through her health care provider, provided medical verification that included: the health care provider’s name, type of medical practice and specialization; Complainant’s “diagnosis” and the date the condition commenced; the beginning date of Complainant’s more recent incapacity; whether the leave was to be taken intermittently or on a reduced leave schedule; the probable duration of the leave and frequency of absences; the regimen of treatment required, including the number of visits, the general nature of the regimen, and probable duration; the nature of the treatment provided by other health care providers; and whether Complainant was unable to perform work of any kind on the requested leave dates or able to perform the essential job functions on those dates. Based on Complainant’s health care provider’s responses to the questions on the medical certification form, Respondent approved her request for intermittent leave in 2001 and again in 2002.<sup>xi</sup>

The Agency contends and Respondent disputes that Respondent violated OFLA medical verification provisions by requiring Complainant to provide an additional doctor’s note stating dates and reasons for absences in July and August 2002 when she returned from intermittent leave and an additional medical verification in September 2002. Undisputed evidence shows Respondent sent Complainant a form letter after she requested leave in September 2001, and each time she was absent for migraines thereafter, that she was required to submit a doctor’s note following “each subsequent absence relating to this condition listing the exact dates you are required to be absent

and confirming that it is for the condition described in the [initial] physician's certification that you have provided." Respondent's policy requiring a doctor's note after each absence was applicable to all employees returning from OFLA related sick leave.<sup>xii</sup> A leave policy requiring an employee to provide medical verification after each OFLA related absence may run afoul of OFLA rules when, as in some cases of intermittent leave, absence occurs more frequently than every 30 days. Exceptions to the rule are when 1) circumstances described in the previous medical verification have changed significantly or 2) the employer receives information that casts doubt on the employee's stated reason for the absence.<sup>xiii</sup> OAR 839-009-0260(6)(a)&(b). The forum finds that the record as a whole in this case demonstrates that Complainant's circumstances and condition changed significantly by mid-August 2002.

Credible evidence established that in September 2001, Complainant's absences due to migraines were anticipated to occur one to two times per month. Her personnel records show that from September through December 2001, Complainant invoked intermittent OFLA leave three times and missed approximately four work days due to migraine headaches. From January 1 through June 2002, Complainant used OFLA leave for migraine headaches five times and missed approximately eight work days altogether. On August 19, 2002, after she used OFLA leave 8 times and missed 13 work days altogether during a five week period from July 10 to August 18, 2002, Respondent asked her to provide a doctor's note verifying that her absences on July 28, August 6, August 14, and August 18 were OFLA related.<sup>xiv</sup> In or around September 9, 2002, Complainant's health care provider provided information that verified Complainant's absences, including additional absences on August 27 and September 9, were due to "H/A's" and indicated that it was time for an OFLA leave update. Thereafter, Respondent requested medical verification confirming her need for

intermittent OFLA leave for her migraine headaches, including the anticipated duration of leave and anticipated absences. Based on the renewed medical verification form from Complainant's health care provider indicating that, as of September 2002, the "probable duration of leaves and frequency of absences" was "approx. 2-4 times per month," Respondent approved the 2002 intermittent leave request. All of those facts indicate that Complainant's migraine headaches steadily worsened in July and August 2002 and the frequency of her absences increased significantly. The Agency's rule does not limit Respondent's ability to seek subsequent medical verification under those circumstances. OAR 839-0009-0260(6)(a). Indeed, Respondent's request for an additional doctor's note led to a renewed medical verification that substantiated Complainant's need for intermittent leave on a more frequent basis. Notably, Respondent, in the meantime, was receiving reports that Complainant was observed engaging in activities, such as attending ball games and going to the coast while using her sick leave. By the end of September 2002, Complainant's supervisor had reminded her of the sick leave policy at least twice and placed her on video surveillance. Those circumstances also constitute an exception to the 30 day limitation on seeking subsequent medical verification. OAR 839-0009-0260(6)(b). Based on all of those facts, the forum concludes that Respondent's request for additional medical verification complied with OAR 839-0009-0260(6) and Respondent did not constructively deny Complainant OFLA leave by seeking subsequent medical verification in August and September 2002 as the Agency alleged.

## 2. Respondent's Sick Leave Policy

Respondent's sick leave policy required employees to either be at home, in a medical facility, or engaged in medically related activities while using sick leave. The policy was applicable to all uses of sick leave, including those related to OFLA covered

conditions and on the job injuries. Additionally, Respondent required employees on OFLA leave to exhaust their sick leave. Although there was testimony that Complainant took no leave without pay during her employment, there is no evidence showing when or if Complainant had exhausted her sick leave benefits during her use of intermittent OFLA leave.

The Agency argued that Respondent's sick leave policy was Draconian and essentially placed Complainant under "house arrest" but failed to address how the policy conflicts with OFLA provisions. OAR 839-009-0210 (14) defines a "serious health condition," as it most aptly pertains to Complainant, as a condition "(e) [t]hat results in a period of incapacity or treatment for a chronic serious health condition that requires periodic visits for treatment by a health care provider, continues over an extended period of time, and may cause episodic rather than a continuing period of incapacity, such as asthma, diabetes or epilepsy." Respondent's sick leave benefits are conditioned upon its employees actually being incapacitated from performing their job duties for medical reasons. In this case, Complainant's supervisor received a report from another employee that Complainant attended a ball game while using sick leave and reminded her that she was obliged to follow Respondent's sick leave policy. After Complainant denied a second report from another employee that Complainant was observed on the coast with a co-worker while on sick leave, Respondent placed her on video surveillance. On December 17, 2002, one of the two dates for which the date and time of the videotaping is in the record, Respondent's security department employee videotaped Complainant eating in a fast food restaurant, Christmas shopping and picking up her child from school while on sick leave for migraines.<sup>xv</sup> Evidence shows Respondent's supervisory personnel relied only on that particular videotape when it decided to terminate Complainant. The Agency argued that Respondent's reliance on

the videotape was “unreasonable” and that Respondent was required to obtain clarification from Complainant’s health care provider about her condition on that day before making an employment decision adverse to Complainant.

On the other hand, Respondent argued that it was not *required* to seek medical clarification under the rule and, in any event, was not questioning whether Complainant had suffered a migraine on that date. Respondent’s stated issue with Complainant was whether she was conforming to its sick leave policy by staying home during her incapacitation. Respondent’s reasoning was that if Complainant was able to eat out, shop and pick up her children from school, she was no longer incapacitated and was therefore able to work. Respondent’s reasoning is not inconsistent with evidence in the record establishing that on days that Complainant took sick leave because of migraines, she would only go to work if she recovered more than two hours prior to her scheduled shift because it took an hour to get ready for work and drive to her worksite. Here, there is sufficient evidence from which the forum can infer that Complainant’s incapacitation had ceased in time to allow her to ready herself for work and drive to her worksite. Consequently, absent evidence showing otherwise, the forum concludes that Respondent did not apply its sick leave policy in Complainant’s case in a manner inconsistent with OFLA provisions.

**B. Retaliation or Discrimination – OAR 839-009-0320(3)**

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

To establish a prima facie case of retaliation or discrimination for purposes of OAR 839-009-0320, the Agency must show that: 1) Complainant invoked a protected right under the OFLA; 2) Respondent made an employment decision that adversely affected Complainant; and 3) there is a causal connection between the Complainant's protected OFLA activity and Respondent's adverse action. *In the Matter of Magno-Humphries*, 25 BOLI 175, 196 (2004).

1. Complainant engaged in a protected right under OFLA.

There is no dispute that Complainant invoked and utilized OFLA provisions by asking Respondent to designate her absences for migraine headaches as intermittent OFLA leave and by utilizing OFLA leave for those absences.

2. Respondent made an employment decision that adversely affected Complainant.

There is no dispute that Respondent terminated Complainant's employment. The Agency asserts that Respondent's requirement that Complainant provide medical verification for each use of intermittent leave and Respondent's enforcement of its attendance policy were employment decisions that adversely affected Complainant in the terms and conditions of her employment. Each of these actions will be discussed separately with respect to any adverse affect on complainant.

3. Causal connection between Complainant's protected OFLA activity and Respondent's actions.

Proof of a causal connection may be established through evidence that shows Respondent knowingly and purposefully discriminated against Complainant because she engaged in protected activity ["specific intent" test] or by showing that Respondent treated Complainant differently than her co-workers who were not engaged in the same protected activity ["different treatment" test]. *In the Matter of Roseburg Forest Products*, 20 BOLI 8, 28-31 (2000); OAR 839-005-0010(1). While specific intent may be

established by direct evidence of a respondent's discriminatory motive, it may also be shown through circumstantial evidence. See *In the Matter of Wal-Mart Stores, Inc.*, 24 BOLI 37, 61 (2002), citing *In the Matter of Sierra Vista Care Center*, 9 BOLI 281, 296-97 (1991) (“[E]vidence includes inferences. There may be more than one inference to be drawn from the basic fact found; it is [the] Forum’s task to decide which inference to draw. Thus, the absence of direct evidence of [respondent’s] specific intent is not determinative because such intent may be shown by the circumstantial evidence referred to herein”). (citations omitted) See also *Boynton-Burns v. University of Oregon*, 197 Or App 373, 380-381, 105 P3d 893, 897-898 (2005), quoting *DeCintio v. Westchester County Medical Center*, 821 F2d 111, 115 (2d Cir), cert. den. 484 U.S. 965, 108 S.Ct. 455 (1987)(“Proof of a causal connection can be established [1] *indirectly*, by showing that the protected activity was followed closely by discriminatory treatment or through other evidence such as disparate treatment of fellow employees who engaged in similar conduct, or [2] *directly*, through evidence of retaliatory animus directed against a [complainant] by the [respondent]”). The Agency, at all times, has the burden of proving that Complainant was terminated or otherwise discriminated against for unlawful reasons. *Wal-Mart* at 61.

### **Medical Verification for Use of Intermittent Leave**

There is no dispute that Respondent required a doctor’s note verifying Complainant’s need for leave each time she used intermittent OFLA leave or that she was required to provide the verification for absences that occurred less than 30 days apart in August 2002. The Forum has already determined that Respondent’s imposition of this requirement at that time did not result in an unlawful denial of OFLA leave in the manner intended by the statute because Complainant’s circumstances and condition

had significantly changed and Respondent was permitted by rule to make further inquiry.

Additionally, there is no evidence, direct or otherwise, of discriminatory intent on Respondent's part. There is no evidence that management or other supervisory employees made any adverse statements about Complainant's use of OFLA leave. There is no evidence that other similarly situated employees were not required to provide the same information or that Respondent concocted the requirement and applied it exclusively to Complainant because she invoked OFLA provisions. Evidence shows that Respondent's requirement was applied toward Complainant's OFLA absences that were less than 30 days apart only after the frequency of her absences increased significantly. Absent any evidence that Respondent applied the requirement with unlawful discriminatory intent, the forum concludes that the requirement was not in retaliation because Complainant invoked or used OFLA leave.

### **Respondent's Attendance Policy**

Complainant began working for Respondent in January 1999 as a product auditor. Product auditors were allowed to set their own weekly work schedule depending on the "job needs" and Complainant's shifts varied. When Complainant started her position there were no set rules for schedule or shift and she altered her work times at her supervisor's request and, by her own testimony, for her own convenience as needed. Prior to March 2002, Respondent was lax about disciplining employees who changed their schedule without permission or punched in late from lunch. However, in March 2002, Respondent tightened up its attendance policy pertaining to start times and lunch time tardies for hourly employees and gave all of its employees, including Complainant, notice of Respondent's intent to enforce its attendance policies. Even after that, Complainant's supervisor did not care if she

worked the day or night shift and she was permitted to make her own weekly schedule showing which shifts she planned to work each day. He did expect her to pick the shift she wanted to work each day and “stick to it” because he did not know if employees were tardy or “not there” when they changed their start times without telling him. When Complainant was tardy on March 14, 2002, her supervisor reminded her of the new enforcement policy and told her that she was not to change the shifts she chose each week without first obtaining his permission. While it is not surprising that Complainant may have had some confusion about her schedule, given Respondent’s previous laxity about enforcing its attendance policies, Complainant nevertheless admitted she was given notice along with the other employees that tardiness and unauthorized schedule changes would be no longer tolerated in the workplace after March 1, 2002. The Agency did not plead or introduce any evidence that other employees violated the “tightened up” attendance policy after March 2002 and were not disciplined in accordance with Respondent’s policy. Although Complainant was suspended for three days after accruing 15 points in twelve months on May 31, 2002, none of those absences were for migraines.<sup>xvi</sup>

While the Forum finds that Respondent’s enforcement of its attendance policy, being in its purpose and by its nature disciplinary and punitive, adversely affected Complainant, there is no evidence that Respondent singled out Complainant for enforcement because of her use of OFLA leave. The Agency contends that Respondent began disciplining Complainant for attendance only after she began using OFLA leave and that Complainant was disciplined for conduct that she had engaged in previously without sanction. While factually correct, the Agency’s argument ignores the fact that Respondent notified all of its employees of its intent to consistently enforce the attendance policy already in effect. Moreover, the notification occurred more than six

months after Complainant began using OFLA leave and even after the notification, Complainant continued to engage in the conduct she had engaged in previously without sanction, despite her knowledge of Respondent's intent to consistently enforce the attendance policy. Although she was counseled for attendance problems in April 2002, Complainant was not disciplined until May 31, 2002, after her attendance points reached the designated number in Respondent's attendance policy, and more than eight months after she requested OFLA leave.<sup>xvii</sup> Respondent had a history of not consistently enforcing its attendance policy and Product Auditors such as Complainant were previously allowed discretion in setting their own schedules, and that certainly could have caused Complainant confusion when Respondent began consistently enforcing the attendance policy. However, such confusion could have applied to any of Respondent's employees. Absent any evidence that the attendance policy was changed because Complainant invoked or used OFLA leave or that the attendance policy was not enforced against other employees, the forum concludes there is no causal connection between Complainant's invocation or use of OFLA and the application of Respondent's attendance policy to Complainant.

### **Respondent's Termination of Complainant**

After Complainant's supervisor received a report that Complainant attended a ball game while using her sick leave, he reminded Complainant that she was obliged to follow Respondent's sick leave policy. After Complainant denied a second report that she was observed on the coast with a co-worker while on sick leave, Respondent placed her on video surveillance. She subsequently was videotaped Christmas shopping, eating in a fast food restaurant and picking up her child from school while on sick leave for migraines. When Respondent confronted her about her activities on that date, Complainant denied engaging in those activities until Respondent told her about

the videotape. Respondent then terminated Complainant because she violated the sick leave policy and because she was dishonest about her activities on the date she was videotaped.

Undisputed evidence demonstrated that Complainant first denied her activities on December 17, 2002, but when told about the surveillance video that tracked her activities, she acknowledged that she did Christmas shopping, had lunch at Carl's Jr., and picked up her children from school during her regular work hours while on OFLA leave that day. She also acknowledged that she knew Respondent's sick leave policy prohibited such activity. At hearing, she stated that she did not believe her conduct violated the policy but the forum was not persuaded because Complainant had no reason to lie to her employer if she did not believe she was violating the policy.

The only question remaining is whether Complainant was treated more harshly than her co-workers who violated Respondent's sick leave policy and/or engaged in dishonesty. Respondent terminated other employees in 2001 and 2003 for violation of the sick leave policy and dishonesty about their activities on the dates they were on sick leave. Of those employees, some were using OFLA leave and some were not. The one employee who violated the sick leave policy but honestly disclosed his activities was not terminated. The Agency presented no credible evidence that Complainant was treated differently than her similarly situated co-workers. Not one witness, including Complainant, gave any examples of employees who abused the sick leave policy with impunity. Complainant's statement that "more than half the employees abused the sick leave policy" was not substantiated by any other evidence. Although she testified that she observed a co-worker at the movies while he was on sick leave, she agreed that she did not tell Respondent about her observation and that she did not know if

Respondent knew about the co-worker's activity on that day or whether her co-worker was ever disciplined for abusing the sick leave policy.

Drawson's statement that Duncan told him Complainant was terminated because she "got too close to Boise as it pertained to her FMLA" was not supported by any other evidence in the record. Drawson's bias coupled with Duncan's credible testimony that he did not make the statement to Drawson led the forum to conclude that Drawson's statement was not true. Additionally, Complainant consistently used OFLA leave well over a year before Respondent terminated her employment, which further undermines an inference of retaliatory motive.

To overcome Respondent's stated reason for terminating Complainant, the Agency must establish by a preponderance of evidence that Respondent's reason was not worthy of belief. The Agency did not meet that burden. Respondent's stated reason for terminating Complainant is supported by undisputed facts. While using her sick leave, Complainant engaged in activities that violated Respondent's sick leave policy, including Christmas shopping, picking up her children from school, and eating in a fast food restaurant. Complainant admitted having read Respondent's falsification policy. Despite her knowledge that dishonesty could result in immediate termination, Complainant denied shopping, picking up her children from school, or eating in a fast food restaurant while using her sick leave, and then subsequently retracted that denial. Nothing in the record demonstrates that Respondent's reasons for terminating Complainant were pretext for discrimination.

The forum therefore concludes that Respondent did not terminate Complainant because she invoked or utilized OFLA provisions as the Agency alleged.

## **RESPONDENT'S EXCEPTIONS**

Respondent objects to the forum's conclusion that Respondent constructively denied Complainant OFLA leave or otherwise interfered with her right to take an OFLA approved leave. Respondent contends the additional doctor's notes sought were "necessary and in compliance with the law" and that under OAR 839-009-0260(6) Respondent "was entitled to seek subsequent doctor's notes from [Complainant] because the '[c]ircumstances described by the previous medical verification have changed significantly (e.g. the duration or frequency of absences, the severity of conditions, complications) \* \* \*.' Thus, [Respondent] was in compliance with the law." Upon review of the record as a whole, the forum finds that the facts in this case support Respondent's contention that circumstances, i.e., the frequency and severity of Complainant's condition, changed significantly after July 10, 2002, and that under OAR 839-009-0260(6)(a), Respondent was permitted to seek medical verification for the increased absences. Consequently, the forum concludes that Respondent did not constructively deny Complainant OFLA leave by requiring additional medical verification after her absences increased in July and August 2002 and the findings, conclusions of laws, opinion and order sections of this final order are hereby modified to reflect the forum's conclusion.

## **AGENCY'S EXCEPTIONS**

In its exceptions, the Agency correctly points out that the forum erroneously concluded Van Roper misrepresented his credentials under oath. The forum drew an improper inference from Roper's testimony and has corrected the credibility finding to reflect a more accurate evaluation of his testimony.

In its remaining exceptions, the Agency reiterates its argument at hearing that Complainant was terminated because she used OFLA leave stating that 1)

Complainant's activities on the date she was videotaped in December 2002 were not "contrary activities" under a reasonable interpretation of Respondent's sick leave policy, 2) the timing of her termination, "a few weeks" after she wrote letters to Boise headquarters, is "solid circumstantial evidence of a retaliatory motive," and, alternatively, 3) "even if termination was in part due to dishonesty, if OFLA retaliation was a substantial factor in Respondent's decision to terminate Complainant, the Agency has made a sufficient showing."

First, Respondent's sick leave policy unambiguously states that an employee utilizing sick leave benefits "should be either at home, at a doctor's appointment or at a health care facility approved by the provider, etc." and not "engaging in contrary activities while alleging sickness."<sup>xviii</sup> Credible evidence established that Complainant was not at home during a time she was using her sick leave benefits and she was not filling a prescription, at a doctor's appointment, or visiting a health care facility. While under some circumstances, eating in a restaurant, shopping, and picking up children from school may not be interpreted reasonably as "contrary activities,"<sup>xix</sup> there is insufficient evidence to draw that conclusion in this case. Complainant testified that bright lights and noise aggravated her migraine symptoms and, arguably, under those circumstances, the activities that resulted in her discharge could be interpreted reasonably as inconsistent with recovering from a migraine headache. Moreover, the forum has concluded that Complainant interpreted her own activities as contrary to Respondent's sick leave policy because she was not forthright about them and, in fact, denied engaging in those activities.

While the forum is mindful that Respondent's policy is archaic and inflexible, the forum finds that it was not misapplied in this particular case. Employers are not required to provide paid sick leave benefits and when they do they can determine the

parameters of its use, but only as long as the parameters do not interfere with or diminish an employee's OFLA rights, and are equally and consistently applied to all employees invoking their sick leave benefits. As a caveat, however, any sick leave policy that requires home confinement, except for outings related to the medical condition, ignores the reality that OFLA covers extended periods of recovery, not just a day or two, and not all serious medical conditions require complete bed rest and confinement.<sup>xx</sup> In fact, in some cases, such as extended chemotherapy treatments or surgery requiring prolonged recuperation, bed rest or confinement may be, in fact, contraindicated. Consequently, a blanket home confinement sick leave policy runs the risk of interfering with or diminishing an employee's OFLA rights and exposes employers to potential liability. In any event, based on the merits of this case, the forum concludes that the Agency failed to prove by a preponderance of credible evidence that Respondent investigated Complainant differently or unreasonably or inconsistently applied the sick leave policy against her because she invoked and used OFLA provisions.

Second, the Agency's observation that the timing between Complainant's letters to corporate headquarters and her termination suggests a retaliatory motive ignores the preceding and intervening circumstances. The Oregon Court of Appeals has held that when relying on "mere temporal proximity" between the protected action and the allegedly retaliatory employment decision to indirectly establish a causal connection, the "events must be 'very close' in time." *Boynton-Burns v. University of Oregon*, 197 Or App 373, 381 (2005), citing *Clark County School District v Breeden*, 532 US 268, 273 (2001). In this case, Complainant was terminated almost three months after Respondent received letters from her inquiring about Respondent's request for medical verification. The proximity in time is marginal as to being close enough to infer

causation.<sup>xxi</sup> Moreover, the record shows she had been counseled about the sick leave policy and videotaped beginning in September after Respondent received reports from employees that she had attended a ball game and was observed at the coast while on sick leave and before Respondent received Complainant's letters on October 3, 2002. The subsequent videotaping that led to her termination was a continuation of an investigation that began before Complainant wrote the letters and ended eleven and one half weeks afterward when she denied engaging in activities that were documented on videotape. Those facts negate any causal connection based solely on temporal proximity in this case.

Third, the Agency suggests that even if dishonesty was a factor in Complainant's termination, she can still prevail on her discrimination claim "if OFLA retaliation was a substantial factor in Respondent's decision to terminate Complainant." In a mixed motive case, a complainant can prevail despite a respondent's legitimate reason for termination if the complainant shows he or she would not have been terminated absent the respondent's unlawful discriminatory motive. *See Hardie v. Legacy Health System*, 167 Or App 425, 435 (2000), *partially superseded by statute on other grounds* ("To prevail in a 'mixed motive' claim, a plaintiff must be able to show that he or she would not have been fired but for the unlawful discriminatory motive of the employer. \* \* \* The crux of the standard, regardless of which phraseology is attached to it, is whether, in the absence of the discriminatory motive, the employee would have been treated differently" [internal quotes omitted]). However, assuming the mixed motive analysis applies to actions brought under OAR 839-009-0320, this is not a mixed motive case. The Agency alleged Respondent discharged Complainant on December 17, 2002, "because she invoked OFLA." Respondent denied that allegation. The pleadings and the evidence "present a simple either-or question" and do not give rise to a mixed motive analysis.

See *McCall v. Dynic USA Corporation*, 138 Or App 1, 7-8 (1995)(when there is no allegation or defense of mixed motive and the issue involves one party alleging discrimination and the other contending there is no discrimination, the case is “a simple either-or” case). Beyond the bare proposition in the exceptions, there is nothing in the record that suggests the Agency was proceeding on a mixed motive theory. Consequently, the Agency is precluded from making that argument at this point in the proceeding. Additionally, even if there were allegations or a defense of mixed motive, there is no evidence that Respondent would have treated Complainant’s dishonesty about her use of sick leave any differently if she had not invoked or utilized OFLA leave.

For the foregoing reasons and except for the Agency’s exception to Van Roper’s credibility finding, the Agency’s exceptions to the proposed order are **DENIED**.

### **ORDER**

NOW, THEREFORE, as Respondent has been found not to have violated ORS 659A.183, OAR 839-009-0260(6), or OAR 839-009-0320 (Retaliation), the complaint and formal charges against Respondents **WinCo Foods, Inc., WinCo Holdings, Inc. and WinCo Foods, LLC** are hereby dismissed according to the provisions of ORS 659A.850.

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<sup>i</sup> The record shows Respondent was covered under the federal Family Medical Leave Act (“FMLA”) and the OFLA. Although all of Respondent’s documentation refers to FMLA, the Commissioner has jurisdiction to enforce only OFLA.

<sup>ii</sup> Ray Sagarik’s September 4, 2002, memo stated that verification was also needed for 8/18/02 but this date does not appear in Van Roper’s note of September 9, 2002.

<sup>iii</sup> See *supra* note 2. Nothing in the record shows whether Complainant’s 8/18/02 absence was designated as OFLA leave or as an unprotected absence.

<sup>iv</sup> The Forum notes that on its face, the policy requiring notice at least two hours before the beginning of a scheduled shift violates OFLA. See OAR 839-009-0250(3) (“When taking OFLA leave in an unanticipated or emergency situation, an employee must give verbal or written notice within 24 hours of commencement of the leave. This notice may be given by any other person on behalf of an employee taking unanticipated OFLA leave.” See also *In the Matter of NES Companies LP*, 24 BOLI 68, 88 n.7 (2002)(“The forum notes that an employer’s notice policies, as practiced, may not be more onerous than OFLA’s 24 hour oral notice requirement \* \* \*”). Although a difference of two hours may not seem significant in Complainant’s situation, Respondent’s call-in policy had the effect of requiring her to determine whether she would develop a migraine at least two hours before the beginning of her shift.

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Given that her early shift started at 4:30 a.m., Respondent's call in policy would require her to assess her situation prior to 2:30 a.m. It appears from this record, however, that Respondent did not enforce its call in policy against Complainant even when they might have. See *supra* notes 6 and 7.

<sup>v</sup> See *supra* note 4.

<sup>vi</sup> Calling in at 3:55 am for a 4:30 am shift would have been a violation of Respondent's requirement to call in sick no less than 2 hours before the beginning of a scheduled shift. See *supra* note 4. Nothing in the record indicates Complainant was disciplined for this.

<sup>vii</sup> Calling in at 3:30 a.m. for a 4:30 a.m. shift would have violated Respondent's call-in requirement. See *supra* note 6.

<sup>viii</sup> See discussion *infra* Agency's Exceptions.

<sup>ix</sup> Pursuant to ORS 659A.306, it is an unlawful employment practice to require an employee, "as a condition of continuation of employment," to pay the cost of *any* medical examination or health certificate, including a doctor's note verifying illness. See also OAR 839-009-0260(1). The Agency did not allege and there is no evidence showing that Complainant was required to pay for the medical verification.

<sup>x</sup> See Findings of Fact – The Merits 7 & 23.

<sup>xi</sup> The medical verification form submitted by Complainant's health care provider in 2001 is not in the record. However, the participants did not dispute that Respondent approved Complainant's request for intermittent OFLA leave in 2001, and that the frequency of her anticipated absences due to migraines was approximately one to two times per month.

<sup>xii</sup> The record is unclear as to whether all employees using sick leave were required to provide a doctor's note after each absence due to illness. Respondent's sick leave policy unambiguously states that "a doctor's certificate or other authoritative verification of illness may be required" and undisputed evidence showed that all employees absent for OFLA related reasons were required to provide a doctor's note after each absence.

<sup>xiii</sup> The employer's right to seek additional medical verification based on either of the two exceptions to the 30 day rule is limited to the time period immediately following the change in circumstances or upon receipt of information indicating possible misuse of OFLA leave. An exception, once invoked, does not create a continuing right to disregard the 30 day rule after the medical verification based on the exception is acquired. An employer does not have carte blanche to continue seeking additional verification based on the same exception once the inquiry results in pertinent information.

<sup>xiv</sup> Her absence on July 10 was approved as OFLA related prior to the absences in July and August.

<sup>xv</sup> Videotapes recorded on four separate days were referenced on the record. No definite date was provided as to one and no information as to whether Complainant was scheduled to work or called in sick. No time was given for one recorded on October 22, 2002; nor was evidence offered whether Complainant was scheduled to work on either of the days the videotapes were recorded. For these reasons the forum has not relied on those videotapes as evidence. On November 14, 2002, the third date on which a videotape was recorded, Complainant reportedly called in sick at 3:55 am. Although it is not made explicit in the record, Complainant was apparently scheduled to work the 4:30 am to 3 pm shift that day and was videotaped in a store at 2:54 pm, six minutes before she apparently would have been off work had she worked her shift. On the fourth day videotape was recorded, December 17, 2002, Complainant reportedly called in sick at 3:30 am; apparently, although again not made explicit in the record, she was scheduled to work the 4:30 am to 3 pm shift. Complainant was videotaped at 1:25 pm that day as she left a fast food restaurant. There is no evidence showing when she arrived at the restaurant, but according to her testimony, she ate lunch at the restaurant before doing some Christmas shopping and picking up her children from school.

<sup>xvi</sup> There is nothing in the record from which to determine whether Complainant's sick days on May 30, 2001 or February 12 and 25, 2002, were due to serious health conditions other than migraines that would qualify for designated medical leaves. Nothing in the record suggests that Complainant contested Respondent's assignment of points to these occurrences.

<sup>xvii</sup> Notably, the incomplete work shift that placed Complainant in violation of Respondent's attendance policy occurred after Complainant was transported by ambulance to the hospital following an anxiety attack at work and her supervisor's call to 911. When applied to those facts, Respondent's attendance policy appears unduly punitive. However, the Agency did not allege those facts in its pleading and there is no evidence the policy was applied differently to other similarly situated employees.

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<sup>xviii</sup> Since Respondent provides paid sick leave benefits, the forum infers from the whole record that Respondent's sick leave policy applies to activities taking place during paid sick leave and does not extend to activities taking place on an employee's own time - before or after work hours, or during an employee's unpaid lunch break.

<sup>xix</sup> For instance, an employee who uses OFLA for parental leave purposes or to take care of a seriously ill family member cannot be expected to remain confined to home or wherever the family member resides. In those cases, eating out, shopping, or carrying on with other necessary activities is an integral part of parental leave and leave to care for a seriously ill family member. Additionally, those particular activities are not necessarily contrary to an employee's own recovery from a serious medical condition, particularly one that requires an extended recovery period, e.g., an employee recovering from major surgery may be encouraged to take regular walks or an employee suffering from a bout of depression may be encouraged to participate in basic tasks or activities outside the home to facilitate recovery. In all those cases, a sick leave policy that thwarts an employee's road to recovery, or otherwise restricts an employee's use of family leave, runs afoul of OFLA provisions.

<sup>xx</sup> See *supra* note 16.

<sup>xxi</sup> Some examples of how close in time is considered "very close" may be found in *Thomas v. City of Beaverton*, 379 F3d 802, 812 (2004) wherein the Ninth Circuit held that a causal link can be inferred from timing alone when there is a close proximity between the protected activity and the alleged retaliation. In *Thomas*, the Court determined seven weeks was sufficient to establish a causal link and was consistent with its previous cases holding "that events occurring within similar intervals of time are sufficiently proximate to support an inference of causation," citing *Yartzhoff v. Thomas*, 809 F2d 1371, 1376 (9<sup>th</sup> Cir. 1987) (causation was inferred when adverse employment action occurred less than three months after the protected activity) and *Miller v. Fairchild Indus., Inc.*, 797 F2d 727, 731-32 (9<sup>th</sup> Cir. 1986) (adequate evidence of a causal link when the retaliatory action occurred less than two months after the protected activity). Cf *Clark County School District v Breeden*, 532 US 268, 273 (2001) (20 month lapse between the protected activity and the alleged retaliatory employment action was not close enough to establish a causal connection, and, in fact, the length of time showed no causal connection at all).