

# BOLI ORDERS

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Final Orders Issued By The Commissioner  
Of The Oregon Bureau of Labor and Industries

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VOLUME 16

Cited: 16 BOLI

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Published by the

OREGON BUREAU OF LABOR AND INDUSTRIES

1998

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Portland, Oregon

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EDITORS  
DOUGLAS McKEAN  
W. W. GREGG

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# BOLI ORDERS

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## INTRODUCTORY NOTE

This sixteenth volume of BOLI ORDERS contains all of the Final Orders of the Commissioner of the Oregon Bureau of Labor and Industries that were issued between April 11, 1997, and March 4, 1998.

Each Final Order is reported in full text under the official title of the order. Preceding the text of each Final Order is a synopsis, which provides immediate identification of the subject matter of the case and of the primary rulings contained in the order. In each case the charged party is referred to as the "Respondent."

A complete table of the Final Orders in this volume begins on page v. For each Final Order the table shows the page at which the order begins in this volume.

A table of the Final Orders in volumes 1 through 16 begins on page vii. For each Final Order the table shows the official BOLI Orders citation.

The Bureau of Labor and Industries Digest of Final Orders contains an outline of classifications for BOLI ORDERS. Case holdings and points of Wage and Hour and of Civil Rights law are arranged under classification numbers. The Digest contains a table of the Final Orders (with appellate cites when appropriate) and a subject index for the complete set of BOLI ORDERS volumes.

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Cite as 16 BOLI 1 (1997).

**In the Matter of  
 BURRITO BOY, INC.,  
 Respondent.**

Case Number 26-97  
 Final Order of the Commissioner  
 Jack Roberts  
 Issued April 11, 1997.

**SYNOPSIS**

Respondent willfully failed to pay wage claimant, a cook, all wages due upon termination, including overtime wages while claimant was on salary. Respondent failed to prove that claimant was an administrative employee or executive employee exempt from the requirements of the minimum wage law. The Commissioner ordered Respondent to pay wages earned and due, plus interest and civil penalty wages. ORS 652.140(1), 652.150, 653.020(3), OAR 839-20-005, 839-20-030.

The above-entitled contested case came on regularly for hearing before Douglas A. McKean, designated as Administrative Law Judge (ALJ) by Jack Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on January 9, 1997, at 165 East Seventh Avenue, Eugene, Oregon.

The Bureau of Labor and Industries (the Agency) was represented by Alan McCullough, an employee of the Agency. Paulo Rodriguez (Claimant) was present throughout the hearing. Burrito Boy, Inc. (Respondent) was represented by Terence Hammons, Attorney at Law. John Ramirez was

present throughout the hearing as Respondent's representative.

The Agency called the following witnesses: Alejandra Buendia, Claimant's former coworker; Maria Ornelas, Claimant's former coworker; Olivia Rodriguez, Claimant's sister-in-law; Paulo Rodriguez, Claimant; and Lynne Sheppard, Compliance Specialist in the Wage and Hour Division of the Agency.

Respondent called the following witnesses: Alba Batres, Respondent's employee; Cristobal Davalos, Respondent's employee; Celia Perry, Respondent's former employee; Lester Perry, Respondent's former general manager; and John Ramirez, Respondent's manager and the husband of Respondent's owner.

Administrative exhibits X-1 to X-15, Agency exhibits A-1 to A-10 and A-12, and Respondent exhibits R-1 to R-38 were offered and received into evidence. After the hearing, the ALJ requested and the Agency provided a statement of policy. Those documents were marked X-16 and X-17 and received into evidence. The record closed on March 10, 1997.

Jason Johnson, appointed by the forum and under proper affirmation, acted as an interpreter for Claimant and several witnesses called by the Agency and Respondent.

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

#### FINDINGS OF FACT – PROCEDURAL

1) On February 14, 1996, Claimant filed a wage claim with the Agency. He alleged that he had been employed by Respondent and that Respondent had failed to pay wages earned and due to him for the period August 1994 through December 1995.

2) At the same time that he filed the wage claim, Claimant assigned to the Commissioner of Labor, in trust for Claimant, all wages due from Respondent.

3) On September 9, 1996, the Agency served on Respondent an Order of Determination based upon the wage claim filed by Claimant and the Agency's investigation. The Order of Determination alleged that Respondent owed a total of \$2,491.16 in wages and \$1,264.80 in civil penalty wages. The Order of Determination required that, within 20 days, Respondent either pay these sums in trust to the Agency, or request an administrative hearing and submit an answer to the charges.

4) On September 19, 1996, Respondent, through its attorney, filed an answer to the Order of Determination and requested a contested case hearing. Respondent admitted that it employed Claimant but denied that it owed Claimant unpaid wages, and further set forth the affirmative defenses that (1) any failure to pay wages was not willful; (2) portions of the claim were barred by the statute of limitations, ORS 12.110(3); and (3) during all or portions of his employment, Claimant was an exempt employee under ORS 653.020(3).

5) On November 13, 1996, the Hearings Unit issued a Notice of Hearing to the Respondent, the Agency, and the Claimant indicating the time and place of the hearing. Together with the Notice of Hearing, the forum sent a document entitled "Notice of Contested Case Rights and Procedures" containing the information required by ORS 183.413, and a copy of the forum's former contested case hearings rules, OAR 839-50-000 to 839-50-420.\*

6) On November 21, 1996, the Administrative Law Judge issued a discovery order directing each participant to submit a summary of the case, including a list of the witnesses to be called, and the identification and description of any physical evidence to be offered into evidence, together with a copy of any such document or evidence, according to the provisions of OAR 839-50-210(1). The Agency and Respondent each submitted a timely summary and later an addendum to its summary.

7) On December 9, 1996, the Agency filed a motion to amend the Order of Determination. The amendments reflected an increase in the amount of wages claimed due, from \$2,491.16 to \$3,776.66, and an increase in penalty wages claimed due, from \$1,264.80 to \$1,498. The amendments resulted from a recomputation of amounts due based on records provided by the Claimant and Respondent and on the elimination of any overtime pay from the period before September 6, 1994. Respondent did not object to

the amendment and the ALJ granted the motion.

8) At the start of the hearing, Respondent's attorney said he had reviewed the "Notice of Contested Case Rights and Procedures" and had no questions about it.

9) Pursuant to ORS 183.415(7), the Administrative Law Judge explained the issues involved in the hearing, the matters to be proved or disproved, and the procedures governing the conduct of the hearing.

10) Pursuant to OAR 839-050-0400, the ALJ requested a statement of Agency policy on February 25, 1997. The Agency timely submitted this policy statement on March 10, 1997.

11) On March 21, 1997, the Administrative Law Judge issued a Proposed Order in this matter. Included in the Proposed Order was an Exceptions Notice that allowed ten days for filing exceptions. The Hearings Unit received no exceptions.

#### FINDINGS OF FACT – THE MERITS

1) During all times material herein, Respondent was an Oregon corporation engaged in the taco restaurant business. Respondent employed one or more persons in the State of Oregon. John Ramirez was a manager and the husband of Respondent's owner.

2) From around July 1994 to December 30, 1995, Respondent employed Claimant. Ramirez was Claimant's supervisor.

\* The Hearings Unit later sent the participants amended contested case hearing rules, OAR 839-050-0000 to 839-050-0440, effective December 9, 1996.

3) At different times during the wage claim period, Claimant worked at three of Respondent's restaurants in the Eugene area: one on Broadway, one on River Road, and one on Highway 99. His primary duty was to cook. He was not in sole charge of any of the restaurants. He did not have the power to hire or fire employees, although he sometimes advised Ramirez that an employee should be fired. He did not have access to the cash register. He, like many other employees, had a key to the restaurant where he worked. He did not write the work schedule for employees. Ramirez posted a work schedule for employees. Claimant did not supervise other employees, although at times he was a lead cook and directed the newer cooks and told employees coming in on a later shift what to do. He occasionally wrote down what food needed to be ordered for the River Road and the Broadway restaurants, and then Ramirez called in the food orders.

4) Claimant filled out a time card semimonthly. He was paid twice per month: on the fifth day of the month for the last half of the proceeding month, and on the twentieth day of the month for the first half of that month.

5) From July to October 1994, Claimant's rate of pay was \$5.00 per hour. Except for the pay period September 1 to 15, 1994, Respondent paid Claimant during this period by

check \$5.00 per hour for each hour reported on the check stubs or on the checks. Claimant worked no overtime hours, that is, hours in excess of 40 hours in a work week during this period.

6) For the pay period September 1 to 15, 1994, Claimant worked six hours each day, five days one week and five days in the next week, or 60 hours total in the two week period. Respondent paid Claimant for 54 hours at \$5.00 per hour, or gross pay of \$270.\*

7) Occasionally, Respondent paid Claimant for overtime hours at the rate of one and one-half times his regular hourly rate of pay. For example, when Claimant's regular pay rate was \$6.00 per hour, Respondent paid him \$9.00 per hour for each overtime hour worked.

8) Around mid-October 1994, Claimant's rate of pay increased to \$6.00 per hour. During the period from mid-October 1994 to mid-April 1995, Respondent paid Claimant by check \$6.00 per hour for each hour (and \$9.00 per hour for each overtime hour) reported on Claimant's time cards and on the check stubs or on the checks.

9) For the pay period November 1 to 15, 1994, Claimant worked 87 total hours, working five days per week at eight hours per day (one day at seven hours). Respondent paid him on

November 20, 1994, for 87 hours at \$6.00 per hour, for gross pay of \$522.

10) For the period January 16 to 31, 1995, Claimant worked 103 total hours and seven hours of overtime. He worked as few as two hours one day and as many as 13 hours another day. Claimant's rate of pay at that time was \$6.00 per hour, and the overtime rate was \$9.00 per hour. Respondent paid him \$534.03 (net pay) on February 5, 1995. On the check, Ramirez wrote "103 hrs O.T. = 63.00 Gross = \$639.00."

11) For the period February 1 to 15, 1995, Claimant worked 88 total hours and eight hours of overtime. During the calendar week January 29 to February 4, 1995, Claimant worked 48 hours total, which included eight hours of overtime. Claimant's rate of pay at that time was \$6.00 per hour, and the overtime rate was \$9.00 per hour. Respondent paid him \$507.41 (net pay) on February 20, 1995. On the check, Ramirez wrote "96 hrs O.T. = 72.00 \$600.00 Gross."

12) For the period February 16 to 28, 1995, Claimant worked 80 total hours, with eight hours of overtime. Claimant worked six days in one week, eight hours per day, and so worked 48 hours in that week. Claimant's rate of pay at that time was \$6.00 per hour, and the overtime rate was \$9.00 per hour. Respondent paid him \$473.43 (net pay) on March 4, 1995. On the check, Ramirez wrote "88 hrs 72.00 O.T. Gross 552."

13) In mid-April 1995, Respondent began paying Claimant a salary of \$758.33 semimonthly.

14) From June 1 to July 15, 1995, Claimant's hourly rate was \$7.00 per hour and the overtime rate was \$10.50 per hour. During this period, Respondent paid Claimant by check \$7.00 per hour for each hour worked (and \$10.50 per hour for each overtime hour worked) reported on the check stubs or on the checks.

15) From July 16 to around September 15, 1995, Respondent paid Claimant a salary of \$728 semimonthly.

16) From September 16 to October 15, 1995, Claimant's rate of pay is unclear. Respondent paid Claimant by check \$616.89 on October 5, 1995, and \$236 on October 9, 1995.

17) From October 16 to 31, 1995, Claimant's rate of pay was \$7.00 per hour. During this period, Respondent paid Claimant by check \$7.00 per hour for 64 hours reported on the check stub.

18) From November 1 to December 31, 1995, Respondent paid Claimant a salary of \$728 semimonthly.

19) For the period November 1 to 15, 1995, Claimant worked 13 days, including six days at 10 hours per day and seven days at eight hours per day. In each of two weeks Claimant worked six days and 54 hours. His hours worked were 7:30 a.m. to 4 p.m. and 6 p.m. to 8 p.m. Total hours equaled 116. Respondent paid him \$615.42 (net pay), based on the \$728 semimonthly salary.

20) Around January 1, 1996, Ramirez discharged Claimant.

21) Civil penalty wages were computed, in accordance with ORS 652.150, as follows: \$8.40 (Claimant's

\* For the period July to October 1994, Claimant's only time card in the record is for the pay period September 1 to 15, 1994. On it, Claimant recorded 60 hours worked. Ramirez wrote on the paycheck "54 hrs Gross = 270". No evidence specifically addressed this discrepancy of six hours. Claimant alleged generally that he worked uncompensated overtime and claimed on an Agency calendar that he worked 80 hours during the period September 1 to 15, 1994. However, the forum found Claimant's testimony and calendar unreliable. See Finding of Fact 22.

regular hourly rate, based on his semi-monthly salary of \$728 for 40 hours worked) multiplied by 8 (hours per day) equals \$67.20. This figure of \$67.20 is multiplied by 30 (the maximum number of days for which civil penalty wages continued to accrue) for a total of \$2,016.

22) Claimant speaks Spanish and testified through an interpreter. Others who were present in the hearing room, such as Respondent's representative Ramirez and an Agency compliance specialist, were bilingual. The Administrative Law Judge instructed the Agency and Respondent to object whenever they disagreed with a translation of a question put to a witness or the witness's testimony. The translations were rarely objected to, and when there was an objection, the interpreter retranslated the question or testimony. The forum finds the interpreter's translations accurate and reliable. With this in mind, and with an understanding of the limitations, difficulties, and inaccuracies that are associated with translations, the forum found unreliable Claimant's testimony about his hours worked, the calendars he filled out for the Agency showing his hours worked, and the notations he made on his check stubs indicating his hours worked. His testimony that he filled out the Agency calendars from a calendar (or some other pieces of paper) he kept at home was not credible. Likewise, his testimony that he filled out two time cards each pay period, one for his regular hours and one for his overtime hours, was not corroborated and not credible. His calendars were inconsistent with the time cards he filled out and with the notations he

made on his check stubs. See the discussion in the Opinion, which is incorporated herein by this reference, comparing these documents. He admitted that he was inconsistent about writing down overtime hours, but claimed that even when he did not write them down, he worked overtime hours. His memory was unreliable and his testimony was inconsistent on important information such as how many time cards he filled out each pay period. Contrary to other credible evidence in the record, he asserted he was never paid a salary and never agreed to be paid a salary. Accordingly, the forum gave little or no weight to Claimant's testimony, except that which was corroborated by other credible evidence.

#### ULTIMATE FINDINGS OF FACT

1) During all times material herein, Respondent was an Oregon corporation that engaged the personal services of one or more employees in the state of Oregon.

2) Respondent employed Claimant as a cook from July 1994 to December 1995.

3) Respondent discharged Claimant on around January 1, 1996.

4) At the time of the discharge, Respondent owed Claimant \$394, which represents \$30 earned during the period September 1 to 15, 1994, and \$364 earned during the period November 1 to 15, 1995.

5) Respondent willfully failed to pay Claimant \$394 in earned, due, and payable wages. Respondent has not paid Claimant the wages owed and more than 30 days have elapsed from the due date of those wages.

6) Civil penalty wages, computed in accordance with ORS 652.150, equal \$2,016.

#### CONCLUSIONS OF LAW

1) During all times material herein, Respondent was an employer and Claimant was an employee subject to the provisions of ORS 652.110 to 652.200, 652.310 to 652.414, and 653.010 to 653.261.

2) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the subject matter and the Respondent herein. ORS 652.310 to 652.414.

3) The actions or inactions of John Ramirez, an agent or employee of Respondent, are properly imputed to Respondent.

4) ORS 653.261(1) provides:

"The commissioner may issue rules prescribing such minimum conditions of employment, excluding minimum wages, in any occupation as may be necessary for the preservation of the health of employees. Such rules may include, but are not limited to, minimum meal periods and rest periods, and maximum hours of work, but not less than eight hours per day or 40 hours per week; however, after 40 hours of work in one week overtime may be paid, but in no case at a rate higher than one and one-half times the regular rate of pay of such employees when computed without benefit of commissions, overrides, spiffs and similar benefits."

OAR 839-20-030(1) provides in part:

"[A]ll work performed in excess of 40 hours per week must be paid

for at the rate of not less than one and one-half times the regular rate of pay when computed without benefit of commissions, overrides, spiffs, bonuses, tips or similar benefits pursuant to ORS 653.261(1)."

Respondent was obligated by law to pay Claimant one and one-half times his regular rate of pay, in this case \$8.40 per hour (based on a semi-monthly salary of \$728 for 40 hours worked), for all hours worked in excess of 40 hours in a week. Respondent failed to so pay Claimant, in violation of OAR 839-20-030(1).

5) ORS 652.140(1) provides:

"Whenever an employer discharges an employee or where such employment is terminated by mutual agreement, all wages earned and unpaid at the time of such discharge or termination shall become due and payable not later than the end of the first business day after the discharge or termination."

Respondent violated ORS 652.140(1) by failing to pay Claimant all wages earned and unpaid not later than the end of the first business day after discharging him from employment on January 1, 1996.

6) ORS 652.150 provides:

"If an employer willfully fails to pay any wages or compensation of any employee whose employment ceases, as provided in ORS 652.140 and 652.145, then, as a penalty for such nonpayment, the wages or compensation of such employee shall continue from the due date thereof at the same

hourly rate for eight hours per day until paid or until action therefor is commenced; provided, that in no case shall such wages or compensation continue for more than 30 days from the due date; and provided further, the employer may avoid liability for the penalty by showing financial inability to pay the wages or compensation at the time they accrued."

Respondent is liable for a civil penalty under ORS 652.150 for willfully failing to pay all wages to Claimant when due as provided in ORS 652.140.

7) Under the facts and circumstances of this record, and according to the law applicable to this matter, the Commissioner of the Bureau of Labor and Industries has the authority to order Respondent to pay Claimant his earned, unpaid, due, and payable wages and the civil penalty wages, plus interest on both sums until paid. ORS 652.332.

#### OPINION

The Agency contends that Claimant performed work for Respondent for which he was not properly compensated. The Agency relies primarily on Claimant's notations on his pay check stubs, on time cards he filled out, on calendar forms he filled out for the Agency, and on the testimony of Claimant and Agency compliance specialist Lynn Sheppard.

Respondent contends that Claimant was properly compensated for his work and that no wages are due. It contends that Claimant performed predominantly managerial tasks at times and was, therefore, exempt from the requirements of the minimum wage

law (particularly the requirements regarding overtime) because he was an "administrative employee," under ORS 653.020(3). Respondent relies primarily on its payroll checks and check stubs issued to Claimant, on Claimant's time cards, and on the testimony of John Ramirez, Lester Perry, Celia Perry, Alba Batres, and Cristobal Davalos. Respondent challenges the credibility of Claimant's testimony and records.

#### Hours Worked

In cases like this, the forum has long followed policies derived from *Anderson v. Mt. Clemens Pottery Co.*, 328 US 680 (1946). See *In the Matter of Mario Pedroza*, 13 BOLI 220, 229 (1994). The US Supreme Court stated in *Mt. Clemens Pottery* that an employee has the "burden of proving that he performed work for which he was not properly compensated." In setting forth the proper standard for an employee to meet this burden, the court said this:

"An employee who brings suit under 16(b) of the Act for unpaid minimum wages or unpaid overtime compensation, together with liquidated damages, has the burden of proving that he performed work for which he was not properly compensated. The remedial nature of this statute and the great public policy which it embodies, however, militate against making that burden an impossible hurdle for the employee. Due regard must be given to the fact that it is the employer who has the duty under 11(c) of the Act to keep proper records of wages, hours and other conditions and practices of

employment and who is in position to know and to produce the most probative facts concerning the nature and amount of work performed. Employees seldom keep such records themselves; even if they do, the records may be and frequently are untrustworthy. It is in this setting that a proper and fair standard must be erected for the employee to meet in carrying out his burden of proof.

"When the employer has kept proper and accurate records, the employee may easily discharge his burden by securing the production of those records. But where the employer's records are inaccurate or inadequate and the employee cannot offer convincing substitutes, a more difficult problem arises. The solution, however, is not to penalize the employee by denying him any recovery on the ground that he is unable to prove the precise extent of uncompensated work. Such a result would place a premium on an employer's failure to keep proper records in conformity with his statutory duty; it would allow the employer to keep the benefits of an employee's labors without paying due compensation as contemplated by the Fair Labor Standards Act. In such a situation we hold that an employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. The burden

then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negate the reasonableness of the inference to be drawn from the employee's evidence. If the employer fails to produce such evidence, the court may then award damages to the employee, even though the result be only approximate." 328 US at 686-88.

Thus, the employee's burden is met by proof that he has in fact performed work for which he was not properly compensated and by sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. *Id.* The forum will accept an employee's testimony as sufficient evidence where that testimony is credible. *In the Matter of Sheila Wood*, 5 BOLI 240, 254 (1986). Upon this showing, the burden shifts to the employer to produce evidence of the precise amount of work performed or with evidence to negate the reasonableness of the inference to be drawn from the employee's evidence. *Mt. Clemens Pottery*, 328 US at 687-88. In Oregon, ORS 653.045 requires employers to maintain payroll records. See also OAR 839-20-080 to 839-20-083. If the employer fails to produce such evidence, the forum may then award damages to the employee, even though the result is only approximate. *Mt. Clemens Pottery*, 328 US at 688.

#### Claimant's Testimony and Records

The forum has found unreliable Claimant's testimony about his hours worked, the calendars he filled out showing his hours worked, and the notations he made on his check stubs

indicating his hours worked. However, the forum has found Claimant's six time cards reliable. Below is a comparison of the different documents in evidence concerning each of the six pay periods covered by his time cards.

For the period September 1 to 15, 1994, Claimant's time card shows 60 total hours (10 days at six hours per day). There is an unexplained "-10" written next to the 60 total hours. The time card shows him working Saturday through Wednesday, five days each week, six hours each day. His hours were from 5 to 11 p.m. Claimant's rate of pay at that time was \$5.00 per hour. His paycheck, dated September 20, 1994, is for \$248.08. There is no check statement (stub) in evidence. On the check, Ramirez wrote "54 hrs Gross = 270". In comparison, Claimant's calendar for this period shows him working Sunday through Friday, six days each week, eight hours each day, and 80 total hours.

For the period November 1 to 15, 1994, Claimant's time card shows 87 total hours, with work five days per week at eight hours per day (one day at seven hours). Hours worked are from 2 to 10 or 3 to 11 p.m. Claimant's check stub for that period, dated November 20, 1994, shows 87 hours at \$6.00 per hour, for gross pay of \$522. Claimant's calendar, on the contrary, for this period shows different days off and indicates he worked nine hours

each day, six days per week, Monday through Saturday, and 117 total hours.

For the period January 16 to 31, 1995, Claimant's time card shows 103 total hours and seven hours of overtime. It shows that he worked as few as two hours one day and as many as 13 hours another day. Claimant's rate of pay at that time was \$6.00 per hour, and the overtime rate was \$9.00 per hour. His pay check for that period, dated February 5, 1995, is for \$534.03. There is no check stub in evidence. On the check, Ramirez wrote "103 hrs O.T. = 63.00 Gross = \$639.00." Claimant's calendar, on the contrary, shows eight hours per day, every day (with Sundays off), and 80 total hours in this period. It shows different days off and a different number of hours worked each day than his time card. Out of the 16 days in the pay period, Claimant's two records agree on only four days.

For the period February 1 to 15, 1995, Claimant's time card shows 88 total hours and eight hours of overtime. The actual daily hours written show only 80 hours total hours and no overtime. However, the time cards for the pay period January 16 to 31 and the pay period February 1 to 15 show that, for the calendar week January 29 to February 4, 1995, Claimant worked 48 hours total, which would include eight hours of overtime. Claimant's rate of pay at that time was \$6.00 per hour,

\* John Ramirez wrote information, such as the number of hours worked and the gross pay amount, on the face of Claimant's checks in preparation for Respondent's defense of this wage claim (thus, the information was not on the checks when Respondent issued them to Claimant). Ramirez got this information from a computer payroll program Respondent used. While he testified, Ramirez referred to a printout from this program. The printout was not offered as an exhibit.

and the overtime rate was \$9.00 per hour. His pay check for that period, dated February 20, 1995, is for \$507.41. There is no check stub in evidence. On the check, Ramirez wrote "96 hrs O.T. = 72.00 \$600.00 Gross." Claimant's calendar, on the other hand, shows eight hours per day for 13 of the 15 days in the period, and lists two February 11 dates. The days off and the total number of days worked on his calendar are different than those on his time card. The calendar shows 104 total hours, if eight hours are eliminated to account for the two February 11 dates.

For the period February 16 to 28, 1995, Claimant's time card shows 80 total hours, with eight hours of overtime. Claimant worked six days in one week, eight hours per day, and so worked 48 hours in that week. Claimant's rate of pay at that time was \$6.00 per hour, and the overtime rate was \$9.00 per hour. His pay check for that period, dated March 4, 1995, is for \$473.43. There is no check stub in evidence. On the check, Ramirez wrote "88 hrs 72.00 O.T. Gross 552." Claimant's calendar for this period is consistent with his time card. The calendar shows 88 total hours in this period.

For the period November 1 to 15, 1995, Claimant's time card and his November 1995 calendar show 13 days worked, which include six days at 10 hours per day and seven days at eight hours per day. At least one week Claimant worked six days and 54

hours. His hours worked were 7:30 a.m. to 4 p.m. and 6 p.m. to 8 p.m. Total hours equal 116. The pay check for this period shows net pay of \$615.42, which is based on the \$728 semi-monthly salary.

As between Claimant's time cards and his calendars, the forum found the time cards more reliable because they were filled out at the time Claimant worked rather than, in some cases, many months later when he filled out the Agency calendars.

An example of why Claimant's calendars are unreliable is shown by his October 1995 calendar, which shows that he did not work from October 21 to 31, 1995. Between October 16 and 20, 1995, the calendar shows he worked 45 hours (five days at nine hours per day). In comparison, his check stub and check for the period October 16 to 31, 1995, show that he was paid \$448 (gross) at the rate of \$7.00 per hour for 64 hours. This discrepancy between Claimant's calendar and the check stub (which paid him for more hours than he claimed on his calendar) undermines the reliability of the calendar, not the check stub.

Likewise, Claimant's notations on his check stubs were inconsistent with his calendars. For example, on his check stub for the pay period just discussed, October 16 to 31, 1995, Claimant wrote "96 horas [hours]." However, his calendar for October 1995 shows just 45 hours worked in that period, and Respondent paid him for 64 hours.

\* Claimant testified he was on a paid vacation (for which he was never paid) at the end of October 1995; however, credible evidence shows that Claimant quit work for a short time in October 1995 and was never on a paid leave.

On the check stub dated August 20, 1994, for the pay period August 1 to 15, 1994, Claimant wrote "130 horas [hours] \* \* \* 58." He testified that the "58" represented the number of over-time hours he worked that period. However, on his calendar for the period August 1 to 15, 1994, he claimed that he worked 143 hours (13 days at 11 hours per day). Selecting the work week most favorable to Claimant (Monday through Sunday) for the purpose of computing overtime,<sup>\*</sup> the forum calculates a maximum of 52 overtime hours in that period. It appears to the forum that the "58" written on his check stub represents the difference between the 130 hours Claimant says he worked in the period and the 72 hours for which Respondent paid him.

As another example, Claimant wrote "80 horas [hours] 14" on his October 5, 1994, check stub. He testified at hearing that the "14" represented, again, his overtime hours. However, his calendar for the period September 16 to 30, 1994, shows that he worked 80 hours and no overtime. Again, contrary to Claimant's testimony, the "14" notation on his check stub appears to be the difference between the 80 claimed hours and the 66 hours for which he was paid.

As a final example, on his check stub dated November 5, 1994, for the pay period October 16 to 31, 1994, Claimant wrote "117 horas [hours]." On his calendar for that period, however, he claimed that he worked just 88 hours (11 days at eight hours per day).

These inconsistencies between Claimant's time cards, his calendars, and his notations on his check stubs make the calendars and notations unreliable. Because the forum has found Claimant's testimony and this documentary evidence unreliable, there is no sufficient basis for determining whether he was improperly compensated or the amount and extent of that work as a matter of just and reasonable inference, except for those periods of time covered by the time cards. The forum will not speculate or draw inferences about wages owed based on insufficient, unreliable evidence. The forum found reliable the six semi-monthly time cards in the record. This is because each time card was written by Claimant during the pay period covered by that card, Respondent did not dispute the accuracy of the cards, and, for the most part, Respondent paid Claimant in accordance with the hours recorded on the cards.

Therefore, the issue becomes whether those time cards prove that claimant in fact performed work for which he was improperly compensated and whether he has produced sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. If so, the burden shifts to Respondent to show the precise amount of the work performed or to negate the reasonableness of the inference drawn from Claimant's evidence.

#### Wages Due

Above, in the section of this opinion where the forum examined Claimant's records, the comparison of Claimant's

time cards with the related pay checks or check stubs shows that Respondent paid Claimant in accordance with the hours he recorded on the time card in four of the six pay periods. Specifically, the forum found that Respondent paid Claimant in accordance with his hours worked (as recorded on his time cards) during the periods November 1 to 15, 1994; January 16 to 31, 1995; February 1 to 15, 1995; and February 16 to 28, 1995. There was a discrepancy, however, between the hours Claimant recorded on his time card and the wages Respondent paid for the periods September 1 to 15, 1994, and November 1 to 15, 1995.

Claimant's time card for the period September 1 to 15, 1994, shows that he worked five days in each of two weeks, or 10 days in the period. He worked six hours each day, for a total of 60 hours worked. Claimant's rate of pay at this time was \$5.00 per hour. Respondent paid Claimant gross wages of \$270 for 54 hours of work. Six hours of recorded work time are unaccounted for and unpaid for by Respondent.

Claimant's time card for the period November 1 to 15, 1995, shows 116 total hours worked.<sup>\*</sup> There is no

evidence that Respondent had an established work week — that is, a period of seven consecutive 24 hour periods commencing on a particular day — for purposes of computing Claimant's overtime. If an employer has failed to establish the beginning day of the employee's work week, the Agency's policy is to consider the work week to begin on the day the individual employee commenced work and to end seven consecutive days after the work began, or to consider the work week to begin on Sunday and end seven consecutive days later on Saturday (in other words, the work week will be the same as a calendar week).

In this case, there is no evidence of the day of the week (in July 1994) Claimant commenced work. However, consistent with Agency policy, the forum considers the work week to begin on the day Claimant commenced work in the pay period in question and to end seven consecutive days later. Thus, Claimant's work week began on November 1 and ended seven days later on November 7, 1995. Likewise, the next work week began on November 8 and ended seven days later on November 14, 1995.

\* Claimant was employed by Respondent in November 1994 and in November 1995. There are two time cards in the record covering the period November 1 to 15, and neither card has a year written on it. See exhibits A-4, p. 3, and R-37. The forum has concluded that one card, marked R-37, covers the period November 1 to 15, 1994, and the other card, marked A-4, p. 3, covers the period November 1 to 15, 1995. Evidence, including the testimony of Claimant and John Ramirez, shows that Claimant worked morning hours while he was on salary in 1995, and the time card in A-4 shows hours worked each day of 7:30 to 4:00. The other time card, R-37, shows hours worked of 2 to 10 or 3 to 11, which are like the afternoon hours Claimant worked in 1994. Furthermore, the number of hours worked (87) shown on R-37 match exactly with the number of hours compensated with the paycheck for the period November 1 to 15, 1994. See R-9.

\* See OAR 839-20-030(2)(a) (defining "work week" for purposes of computing overtime).

In the work week November 1 to 7, 1995, Claimant worked a total of 54 hours, including 14 hours in excess of 40 in the work week. Likewise, in the work week November 8 to 14, 1995, Claimant worked a total of 54 hours, including 14 hours in excess of 40 in the work week. He worked eight additional hours on November 15, 1995.

For a nonexempt salaried employee, where there is no agreed set number of hours worked each week and where the requirements of the fluctuating work week method for payment of overtime are not satisfied (that is, where the conditions of OAR 839-20-030(3)(c) through (f)\* are not met), it is the Agency's policy:

\* OAR 839-20-030, concerning overtime, provides in pertinent part:

"(3) Methods for Determining Amount of Overtime Payment Under Different Compensation Agreements:

"\*\*\*\*\*

"(c) Compensation Based Upon Weekly Salary Agreement for Regular Work Week of Less Than 40 Hours:

"(A) Where the employee is employed on a weekly salary basis, the regular hourly rate of pay is determined by dividing the salary by the number of hours agreed to be worked in the work week which such salary is intended to compensate;

"(B) For example, if an employee is hired at a salary of \$175 and it is understood that this salary is compensation for a regular work week of 35 hours, the employee's regular rate of pay is \$5 per hour (\$175 divided by 35 hours). Thus, where the employee works in excess of 35 hours in a given work week such employee must be paid \$5 per hour for each of the first 40 hours and \$7.50 per hour (1-1/2 times \$5) for each hour worked in excess of 40 hours in such work week.

"(d) Compensation Based Upon a Weekly Salary Agreement for a Regular Work Week of 40 Hours:

"(A) Where the employee is employed on a weekly salary basis, the regular hourly rate of pay is computed by dividing the salary by the number of hours which the salary is intended to compensate;

"(B) For example, where an employee is hired at a salary of \$200 and it is understood that this weekly salary is compensation for a regular work week of 40 hours, the employee's regular rate of pay is \$5 per hour and such employee must be compensated at the rate of \$7.50 per hour for each hour worked in excess of 40 hours in such work week.

"(e) Compensation Based Upon Weekly Salary Agreement for Regular Work Weeks or More Than 40 Hours:

"(A) If the employee is employed on a weekly salary basis, which is the agreed compensation for a set number of hours in excess of 40, the regular hourly rate of pay is determined by dividing the weekly salary by the set number of hours which such salary is intended to compensate;

"(B) For example, where an employee is hired at a weekly salary of \$225 and it is understood that this weekly salary is compensation for a regular work week set at 45 hours, the employee's regular rate of pay is \$5 per hour and such employee must be paid an additional sum of \$10 for such work week or a total of \$237.50 (45 hours at \$5 per hour and the five overtime hours at \$2.50

"to assume that the employee's salary is intended to compensate the employee for a regular 40 hour work week. The employee's straight time hourly rate is calculated by dividing 40 into the weekly salary. For example, if the weekly salary is \$336, the employee's straight time rate of pay would be \$8.40/hr. If the employee worked 60 hours that week, wages due and owing would be computed as follows:

"40 (straight time hrs. worked)  
x \$8.40 (straight time wage) = \$336  
"20 (overtime hrs. worked)  
x \$12.60 (straight time wage  
x 1.5) = 252

"Total wages due and owing = \$588"  
Statement of Agency Policy,  
March 10, 1997.

Here, Claimant's salary was \$728 semimonthly. Pursuant to OAR 839-20-030(3)(g), this salary is translated into its work week equivalent by multiplying it by 24 (the number of semimonthly periods in the year) and

per hour). The employee must be paid an additional \$7.50 per hour for each hour worked in excess of 45 hours in such work week.

"(f) Compensation Based Upon an Agreed Fixed Salary for Fluctuating Hours: An employee employed on a fixed salary basis may have hours of work which vary from work week to work week and the salary may be paid to the employee pursuant to an understanding with the employer that such employee will receive such fixed amount of compensation for whatever hours the employee is called upon to work in a work week, whether few or many. Where there is a clear mutual understanding of the parties that the fixed salary is compensation for the hours worked each work week, whatever their number, such a salary arrangement is permitted if the amount of the salary is sufficient to provide compensation to the employee at a rate not less than the applicable statutory minimum wage rate for every hour worked in those work weeks in which the number of hours worked is greatest, and if the employee receives overtime compensation, in addition to such salary, for all hours worked in excess of 40, at a rate not less than 1/2 the regular rate of pay. Since, under such an arrangement, the number of hours actually worked will fluctuate from work week to work week, the regular rate of the employee will vary from week to week and is determined by dividing the number of hours worked in the work week into the amount of the salary to obtain the applicable regular hourly rate for any given work week. Payment for overtime hours worked in excess of 40 hours in such work week at 1/2 such hourly rate in addition to the salary satisfies the requirements of this rule because such hours have already been compensated at the regular rate, under the salary arrangement. The following examples, based upon a weekly salary of \$300, are offered by way of illustration:

"(A) Work week #1 — 50 hours worked; the employee's regular rate of pay is \$6 per hour and the employee must be paid an additional sum equal to 1/2 the regular rate times the ten overtime hours worked or \$30, making the total compensation for that work week \$330;

"(B) Work Week #2 — 60 hours worked; the employee's regular rate of pay is \$5 per hour and the employee must be paid an additional sum equal to 1/2 the regular rate times the 20 overtime hours worked or \$50 making the total compensation for that work week \$350."

dividing by 52 (the number of weeks in the year). The regular hourly rate of pay is computed by dividing the weekly wage by the number of hours the salary is intended to compensate (in this case, pursuant to Agency policy, 40 hours). Thus, \$728 times 24 equals \$17,472, divided by 52 equals \$336. This weekly wage, \$336, divided by 40 (hours) equals \$8.40, the regular hourly rate of pay. The overtime rate of pay equals \$8.40 times 1.5, or \$12.60 per overtime hour.

As noted above, in the work week November 1 to 7, 1995, Claimant worked a total of 54 hours, including 14 hours in excess of 40 in the work week. In the work week November 8 to 14, 1995, Claimant again worked a total of 54 hours, including 14 hours in excess of 40 in the work week. He worked eight hours on November 15. Thus, Claimant worked 88 straight time hours and 28 overtime hours in the pay period. He earned \$1,092 (88 times \$8.40 equals \$739.20, plus 28 times \$12.60 equals \$352.80). Respondent paid Claimant \$728 and therefore owes him \$364 for the period November 1 to 15, 1995.

The time cards prove that claimant in fact performed work for which he was improperly compensated. He has produced sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. Therefore, the burden shifts to Respondent to show the precise amount of the work performed or to negate the reasonableness of the inference drawn from Claimant's evidence.

Respondent has not challenged the amount of work performed as shown

on Claimant's time cards, but instead claims that Claimant was a salaried, exempt employee. Therefore, the forum turns to that issue.

#### "Administrative Employee" Exemption

Respondent raised the defense that the minimum wage and overtime requirements in ORS 653.010 to 653.261 do not apply to Claimant because "he was engaged in administrative work, performed predominantly managerial tasks, exercised discretion and independent judgment, and earned a salary and was paid on a salary basis." (Respondent's answer.)

ORS 653.020 provides in pertinent part that:

"ORS 653.010 to 653.261 does not apply to any of the following employees:

\*\*\*\*\*

"(3) An individual engaged in administrative, executive or professional work who:

"(a) Performs predominantly intellectual, managerial or creative tasks;

"(b) Exercises discretion and independent judgment; and

"(c) Earns a salary and is paid on a salary basis."

The Agency has promulgated rules under ORS 653.040(3) considered necessary to carry out the purposes of ORS 653.010 to 653.261, or necessary to prevent the circumvention or evasion of ORS 653.010 to 653.261, and to safeguard the minimum wage rates set under ORS 653.010 to 653.261.

OAR 839-20-005 provides, in pertinent part:

"As used in ORS 653.010 to 653.261 and in these rules, unless the context requires otherwise:

"(1) 'Executive Employee' means any employee:

"(a) Whose primary duty consists of the management of the enterprise in which he/she is employed or of a customarily recognized department or subdivision thereof. The foregoing language of this paragraph prescribing the primary duty shall not apply in the case of an employee who is in sole charge of an independent establishment or a physically separated branch establishment or who owns at least 20 percent interest in the enterprise in which he/she is employed; and

"(b) Who customarily and regularly directs the work of two or more other employees therein; and

"(c) Who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring or firing and as to the advancement and promotion of any other change of status of other employees will be given particular weight; and

"(d) Who customarily and regularly exercises discretionary powers; and

"(e) Who earns a salary and is paid on a salary basis pursuant to ORS 653.025 exclusive of board, lodging, or other facilities.

"(2) 'Administrative Employee' means any employee:

"(a) Whose primary duty consists of either:

"(A) The performance of office or non-manual work directly related to management policies or general business operations of his/her employer or his/her employer's customers; or

"(B) The performance of functions in the administration of a school system, or educational establishment or institution, or of a department or subdivision thereof, in work directly related to the academic instruction or training carried on therein.

"(b) Who customarily and regularly exercises discretion and independent judgment; and

"(c)(A) Who regularly and directly assists a proprietor, or an employee employed in a bona fide executive or administrative capacity; or

"(B) Who performs under only general supervision work along specialized or technical lines requiring special training, experience, or knowledge; or,

"(C) Who executes under only general supervision special assignments and tasks; and

"(d) Who earns a salary and is paid on a salary basis pursuant to ORS 653.025 exclusive of board, lodging, or other facilities.

\*\*\*\*\*

"(5) 'Independent Judgment and Discretion' means the selection of a course of action from a

number of possible alternatives after consideration of each, made freely without direction or supervision with respect to matters of significance. It does not include skill exercised in the application of prescribed procedures."

OAR 839-20-004(22) provides:

" 'Primary Duty' means, as a general rule, the major part, or over 50 percent, of an employee's time. However, a determination of whether an employee has management as his/her primary duty must be based on all the facts of a particular case. Time alone is not the sole test and in situations where the employee does not spend over 50 percent of his/her time in managerial duties, he/she might have management as a primary duty if other pertinent factors support such a conclusion. Factors to be considered include, but are not limited to, the relative importance of the managerial duties as compared with other duties, the frequency with which the employee exercises discretionary powers the relative freedom from supervision and the relationship between the salary paid the employee and wages paid other employees for the kind of non-exempt work performed by the supervisor."

While Respondent specifically asserted that Claimant was exempt as an administrative employee, both Respondent and the Agency presented evidence pertinent to the requirements of an "executive employee." The forum has reviewed Claimant's duties and the requirements of both executive

and administrative employees and concludes that Claimant is not exempt from the requirements of ORS 653.010 to 653.261 as either an executive or an administrative employee. Claimant's primary duty was to cook. He did not perform office or non-manual work directly related to management policies or the general business operations of his employer. Nor was his primary duty the management of the enterprise in which he was employed or of a customarily recognized department or subdivision thereof.

One factor to consider in evaluating whether management is an employee's primary duty is the relationship between the employee's salary and the wages paid other workers for the kind of nonexempt work performed by the employee. Claimant was paid a salary from mid-July to mid-September and during November and December 1995. The only time card in the record during those periods is that for November 1 to 15, 1995. During that 15-day period, Claimant worked 116 hours. If only straight time wages were paid for all those hours (as Respondent urges), Claimant's salary of \$728 converts to an hourly rate of only \$6.28 – less than the \$7.00 per hour rate he made in October 1995 when he was not on salary. This fact weighs against a finding that Claimant was an executive employee.

In addition, the facts do not suggest that Claimant was in "sole charge" of any of the restaurants. Respondent's own witness, Celia Perry, described Claimant as the head cook, or "manager" of the kitchen, while she was the "manager" of the front, that is, of the employees who took orders and used the cash register. Furthermore,

executive decisions were not reserved to Claimant. Generally, Ramirez visited the restaurants daily and performed the hiring, firing, supervising, and scheduling functions.

Moreover, the preponderance of credible evidence does not show that Claimant customarily and regularly exercised discretion and independent judgment. Evidence that he made up of list of food to be ordered and gave directions to other cooks does not demonstrate the kind of discretion and independent judgment defined in OAR 839-20-005(5). Simply putting a head cook on salary and giving him the title of manager is not enough to make him exempt from the requirements of the minimum wage law. *In the Matter of John Mathioudakis*, 12 BOLI 11 (1993). Respondent has failed to prove its affirmative defense.

#### Penalty Wages

Awarding penalty wages turns on the issue of willfulness. Willfulness does not imply or require blame, malice, wrong, perversion or moral delinquency, but only requires that that which is done or omitted is intentionally done with knowledge of what is being done and that the actor or omittor be a free agent. *Sabin v. Willamette Western Corp.*, 276 Or 1083, 557 P2d 1344 (1976).

Respondent, as an employer, had a duty to know the amount of wages due to its employee. *McGinnis v. Keen*, 189 Or 445, 221 P2d 907 (1950); *In the Matter of Jack Coke*, 3 BOLI 238, 242 (1983). A faulty payroll system is no defense to a failure to pay wages owed and does not allow an employer's actions to be characterized as unintentional. *In the Matter of Loren*

*Malcom*, 6 BOLI 1, 10 (1986). Employers are charged with knowing the wage and hour laws governing their activities as employers. *In the Matter of Country Auction*, 5 BOLI 256, 267 (1989). Ignorance of the law is not relevant. *In the Matter of Sheila Wood*, 5 BOLI 240, 255 (1986).

Respondent asserted that Claimant was exempt from the requirements of the minimum wage laws. The facts and law prove otherwise. An employer's failure to apprehend the correct application of the law and the employer's actions based on this incorrect application do not exempt it from a determination that it willfully failed to pay overtime. *In the Matter of Mario Pedroza*, 13 BOLI 220, 232 (1994); *In the Matter of Locating, Inc.*, 14 BOLI 97, 109 (1994), *aff'd without opinion*, *Locating, Inc. v. Deforest*, 139 Or App 600, 911 P2d 1289 (1996).

Here, evidence established that Respondent knew it was paying Claimant a salary during November 1995 and knew from Claimant's time card that he was working over 40 hours in a week. Respondent intentionally did not pay Claimant overtime wages during this period. Evidence showed that Respondent acted voluntarily and was a free agent. Respondent must be deemed to have acted willfully under this test, and thus is liable for penalty wages under ORS 652.150.

#### Civil Penalty Calculation

Although Claimant earned several hourly wage rates and two different salaries during his employment with Respondent, all but \$30 of the unpaid wages were earned while Claimant was on a semimonthly salary of \$728. This salary was also his rate of pay

when he was discharged. Where more than one wage rate is earned during a wage claim period, it is the Agency's policy when determining the civil penalty

"to compute the average hourly wage during the wage claim period, no matter how many wage rates applied. As a starting point, only the wage rates used and wages earned during the actual wage claim period are used to determine the average hourly wage. The equation is as follows: Total earned during the wage claim period divided by the total number of hours worked during the wage claim period, multiplied by eight hours, multiplied by 30 days." (Emphasis original.) *In the Matter of Mark Johnson*, 15 BOLI 139, 143 (1996).

In this case, however, there is insufficient evidence to make that calculation.

Accordingly, the forum calculated the civil penalty based on Claimant's final wage rate and the wage rate at which nearly all of the unpaid wages were earned — the semimonthly salary of \$728. Using the regular hourly rate calculated above for purposes of determining the overtime rate, the forum figured the civil penalty to be \$2,016.<sup>\*</sup> See Finding of Fact 21.

Before hearing, the forum allowed the Agency to amend its Order of Determination to increase the penalty wages sought from \$1,264 to \$1,498. The Agency did not seek to again amend its pleading after the start of the hearing. OAR 839-050-0140(2). Thus, the civil penalty wages ordered below are consistent with the Agency's pleading.

#### ORDER

NOW, THEREFORE, as authorized by ORS 652.332, the Commissioner of the Bureau of Labor and Industries hereby orders BURRITO BOY, INC. to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232-2162, the following: A certified check payable to the Bureau of Labor and Industries IN TRUST FOR PAULO RODRIGUEZ in the amount of One Thousand Eight Hundred and Ninety Two Dollars (\$1,892), less appropriate lawful deductions, representing \$394 in gross earned, unpaid, due, and payable wages; and \$1,498 in penalty wages; plus interest at the rate of nine percent per year on the sum of \$394 from February 1, 1996, until paid and nine percent interest per year on the sum of \$1,498 from March 1, 1996, until paid.

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#### In the Matter of VISION GRAPHICS AND PUBLISHING, INC., Respondent.

Case Number 18-97  
Final Order of the Commissioner  
Jack Roberts  
Issued April 17, 1997.

#### SYNOPSIS

Complainant, a kitchen manager/cook, in good faith brought a civil proceeding against Respondent (who operated a restaurant in Eugene) by reporting Respondent's health code violations to the county health department. Respondent discharged complainant the next day expressly because he complained to the health department, which inspected the restaurant and found several critical violations. The department had the authority to revoke respondent's food service facility license. The Commissioner held that Respondent violated Oregon's "whistleblower" law, and awarded Complainant \$1,917 in back pay and \$20,000 for mental suffering. ORS 659.550(1); OAR 839-010-0140.

The above-entitled contested case came on regularly for hearing before Douglas A. McKean, designated as Administrative Law Judge by Jack Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on January 14, 1997, in Suite 220 of the State Office Building, 165 East Sev-enth Avenue, Eugene, Oregon.

The Bureau of Labor and Industries (the Agency) was represented by Alan McCullough, an employee of the Agency. Michael Duffy (Complainant) was present throughout the hearing. Vision Graphics and Publishing, Inc. (Respondent), after being duly notified of the time and place of this hearing, failed to appear through a representative.

The Agency called the following witnesses: Marie Beck, Complainant's former coworker; George Classen, sanitarian for Lane County; Laurie Duffy, Complainant's former wife; Michael G. Duffy, Complainant; and Kristina Mammen, Complainant's former coworker.

Administrative exhibits X-1 to X-17 and Agency exhibits A-1 to A-7 were offered and received into evidence. The record closed on January 14, 1997.

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

#### FINDINGS OF FACT — PROCEDURAL

1) On March 26, 1996, Complainant filed a verified complaint with the Civil Rights Division of the Agency. He alleged that Respondent discriminated against him when, on March 12, 1996, Respondent's owner, Cal [sic] Thomas, terminated him after he reported a health hazard at Respondent's restaurant to the county health department on March 11, 1996.

\* Arguably, the forum could have taken the total wages earned in the November 1 to 15, 1995, pay period (\$1,092) and divided this by the total hours worked in the period (116) to yield an hourly rate of \$9.41. This rate times eight hours, times 30 days yields a civil penalty of \$2,258. The forum declined to calculate the civil penalty this way because there was no persuasive evidence that Claimant worked overtime throughout his employment like that worked in this period. Thus, the forum found the regularly hourly rate of \$8.40 to be the "same hourly rate" for purposes of ORS 652.150.

2) After investigation and review, the Agency issued an administrative determination finding substantial evidence of an unlawful employment practice by Respondent in violation of ORS 659.550.

3) On November 12, 1996, the Agency prepared and duly served on Respondent Specific Charges alleging that Respondent had discharged Complainant from employment because he complained to the health department sanitarian and the sanitarian inspected Respondent's premises. The Specific Charges alleged that Respondent's action violated ORS 659.550.

4) With the Specific Charges, the forum served on Respondent the following: a) a Notice of Hearing setting forth the time and place of the hearing in this matter; b) a Notice of Contested Case Rights and Procedures containing the information required by ORS 183.413; c) a complete copy of the Agency's administrative rules regarding the contested case process; and d) a separate copy of the specific administrative rule regarding responsive pleadings. On November 18, 1996, the Agency moved for and the ALJ granted a postponement of the scheduled hearing.

5) As of December 2, 1996, and through the date of hearing, the forum had not received a responsive pleading from Respondent as required by OAR 839-050-0130.

6) On December 20, 1996, the Administrative Law Judge issued to Respondent a "Notice of Default," which notified Respondent that its failure to file a responsive pleading within the required time constituted a default to the Specific Charges, pursuant to

OAR 839-050-0330. The notice advised Respondent that it had 10 days in which to request relief from the default. As of the date of hearing, January 14, 1997, no such request was received by the forum.

7) Pursuant to OAR 839-050-0210 and the Administrative Law Judge's order, the Agency filed a Summary of the Case. The Agency later submitted an addendum to its case summary.

8) Pursuant to ORS 183.415(7), the Administrative Law Judge verbally advised the Agency of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

9) At the beginning of the hearing, the Agency made a motion to amend the Specific Charges to add a paragraph inadvertently omitted which gave the date Complainant filed his complaint with the Agency and recited that the Agency found substantial evidence of an unlawful employment practice on the part of Respondent. The motion was made pursuant to OAR 839-050-0140. The Administrative Law Judge granted the motion.

10) On April 2, 1997, the Administrative Law Judge issued a Proposed Order in this matter. Included in the Proposed Order was an Exceptions Notice that allowed ten days for filing exceptions. The Hearings Unit received no exceptions.

#### FINDINGS OF FACT – THE MERITS

1) Respondent, doing business as Seventh Street Family Restaurant, operated a restaurant in Eugene and employed one or more employees in Oregon. Respondent held a Lane County food service facility license.

Kalayil Thomas was the corporation's co-owner, president, and secretary. He managed the restaurant.

2) Respondent employed Complainant as a cook on January 9, 1996. Respondent later promoted him to kitchen manager and paid him \$1,500 per month, with no benefits. He worked seven days per week.

3) On February 15, 1996, George Classen, a sanitarian for Lane County, inspected Respondent's restaurant following complaints by two former employees. The Oregon Health Division delegated authority to Classen's county department to license and inspect food service facilities in Lane County. Classen had the authority to initiate the county's license revocation process or seek injunctive relief under ORS chapter 624. He found over a dozen specific problems, including problems with the restaurant's grills, refrigerators, and freezers. Several of the problems were critical – that is, they were possible health hazards – and violated the health code. Failure to immediately correct critical violations could result in the closure of the restaurant and in denial, suspension, or revocation of Respondent's license. A closure order would have the effect of an immediate revocation of Respondent's license. Classen reinspected the restaurant on March 5, 1996, and found the critical violations had been corrected.

4) Complainant worked to correct the problems identified in the health inspection. He was familiar with sanitation requirements and had passed a food handlers test. When Complainant talked with Thomas about needed repairs and code violations, Thomas

laughed and refused to make some repairs. He told Complainant just to tell Classen that equipment was on order.

5) On March 11, 1996, Complainant asked Classen to reinspect Respondent's restaurant. Complainant complained about the restaurant's refrigeration units and the roof leaking. Pieces of the ceiling had fallen onto the cooking area and, on one occasion, a piece of the ceiling fell and hit a customer. Classen inspected the restaurant that day. He found roof leakage in the dining area, freezer malfunctions, and water seeping into a walk-in freezer. Complainant accompanied Classen and cooperated with him during the inspection. Classen again found critical violations and scheduled a reinspection on March 12, 1996. He advised Complainant that he might lower the restaurant's sanitation rating. Complainant, in turn, told this to Thomas.

6) Before March 12, 1996, Thomas learned from Classen that Complainant had called Classen and complained about the restaurant.

7) On March 12, 1996, Thomas told Harley Eastburn, a cook at the restaurant, that he (Thomas) had to get rid of Complainant because Complainant had called the health inspector and was trying to shut the restaurant down. Thomas also threatened to "kick [Complainant's] ass." When Complainant came to work that morning, Thomas cussed at him, pushed him, threatened his family, and fired him. Later, Thomas told waitresses Marie Beck and Kristina Mammen that he had fired Complainant because Complainant had called the Health Division.

8) After he was fired, Complainant was very angry and shocked. He felt his discharge was unjustified and it lowered his self esteem. He gained weight, had trouble sleeping, and lost his temper with his wife and their children. He was afraid to say why he was fired when he applied for work. He became withdrawn and less assertive. The loss of employment caused financial hardship and stress on Complainant and his family. He was upset by the discharge for two to three months following the discharge.

9) Complainant looked for work after the discharge. He applied at a dozen restaurants for work. On April 20, 1996, he accepted a job at another restaurant with wages superior to those he received from Respondent.

#### ULTIMATE FINDINGS OF FACT

1) During times material herein, Respondent was an employer in the State of Oregon that engaged or utilized the personal services of one or more employees.

2) Respondent employed Complainant from January 9 to March 12, 1996.

3) On March 11, 1996, Complainant in good faith made a complaint to the county health department that prompted the department to inspect the restaurant and threaten to lower its sanitation rating. The county health department is a regulatory, licensing agency authorized to bring a civil proceeding or seek injunctive relief against Respondent. Thomas knew of Complainant's complaint before March 12, 1996.

4) Respondent discharged Complainant on March 12, 1996.

5) Respondent discharged Complainant because he complained in good faith to the county health department and Thomas believed a civil proceeding was initiated by the regulatory agency.

6) Complainant suffered lost wages and mental distress due to the discharge.

#### CONCLUSIONS OF LAW

1) At all times material, Respondent was an employer subject to the provisions of ORS 659.010 to 659.110 and 659.550.

2) The Commissioner of the Bureau of Labor and Industries has jurisdiction of the persons and subject matter herein and the authority to eliminate the effects of any unlawful employment practice found. ORS 659.550.

3) ORS 659.550(1) provides in part:

"It is an unlawful employment practice for an employer to discharge \*\*\* or \*\*\* retaliate against an employee \* \* \* for the reason that the employee \* \* \* has in good faith brought a civil proceeding against an employer \*\*\*."

Respondent violated ORS 659.550(1).

4) Pursuant to ORS 659.550(1) and 659.060 and by the terms of ORS 659.010, the Commissioner of the Bureau of Labor and Industries has the authority to issue a cease and desist order requiring Respondent to refrain from any action that would jeopardize the rights of individuals protected by ORS 659.550(1), to perform any act or series of acts reasonably calculated to carry out the purposes of said statute, to eliminate the effects of an unlawful

practice found, and to protect the rights of others similarly situated.

#### OPINION

##### Prima Facie Case

Respondent was found in default, pursuant to OAR 839-050-0330(1)(a), for failing to file a timely answer to the Specific Charges. In default cases, the Agency must present a prima facie case in support of the Specific Charges to prevail. ORS 183.415(6); OAR 839-050-0330(2).

A prima facie case in this matter consists of the following elements:

1) Respondent is an employer as defined by statute;

2) Respondent employed Complainant;

3) Complainant in good faith brought a civil proceeding against Respondent;

4) Respondent discharged Complainant;

5) Respondent's action (discharging Complainant) was taken because Complainant in good faith brought a civil proceeding against Respondent;

6) Complainant was harmed by Respondent's action.

ORS 659.550(1); OAR 839-010-0100(1)(d); 839-005-0010(1); *In the Matter of Earth Science Technology, Inc.*, 14 BOLI 115, 122 (1995).

The Agency established the first, second, fourth, and sixth elements of its prima facie case with documents and witness testimony. The third element requires an interpretation of the statutory language.

ORS 659.550(1) requires that an employee must have "in good faith brought a civil proceeding against an employer." Complainant testified credibly that he knew the conditions in Respondent's restaurant were not up to the sanitation code. He worked to correct the violations, but Respondent (through Thomas) refused to make some necessary repairs. Complainant's complaint to the county health department was made because of his concerns about the code violations and the uncorrected problems (such as the roof leaking) at the restaurant. This evidence establishes that Complainant's complaint was made in "good faith." The question, then, is whether his complaint against Respondent to the county health department constitutes having "brought a civil proceeding."

In *Earth Science Technology*, this forum reviewed the legislative history of ORS 659.550 and concluded that "the language 'brought a civil proceeding' was intended to encompass good faith complaints made by employees against their employers that result in an administrative agency bringing a civil proceeding against that employer." *Id.*, at 124. In that case, the employee made a good faith complaint against his employer to the Department of Environmental Quality, which in turn brought a civil proceeding against the employer to revoke its license and assess civil penalties. The forum found that this satisfied the third element of the prima facie case.

Here, Complainant made a complaint to a regulatory agency that was charged with licensing Respondent and that had the authority to bring civil

proceedings and seek injunctive relief against Respondent. As a result of his complaint, the regulatory agency inspected Respondent's restaurant and found critical violations, which, if not immediately corrected, could result in the agency suspending or revoking Respondent's license. Thomas knew that an inspection had resulted from this complaint, that critical violations were found that could jeopardize Respondent's license, that another inspection was scheduled for the following day, and that Respondent's sanitation rating could be lowered. Complainant's complaint initiated this civil proceeding process.

Making a complaint to a regulatory agency that is the licensing agency or that can bring a civil proceeding or obtain injunctive relief against the employer will invoke the protection of ORS 659.550. OAR 839-010-0140(2). The legislative history of the statute is clear that the intent of the law was to protect workers who complained to or cooperated with law enforcement agencies, including agencies supervising the certification or licensure of the employer. In testimony before the Senate Labor Committee, Representative Rijkjin stressed the sponsors' intent that a worker be protected when cooperating with civil or criminal law enforcement in any way. She used an example of a terminated worker who had been involved in a police investigation as a witness, but had not brought charges or begun legal proceedings. *Earth Science Technology*, 14 BOLI at 123-24. Likewise, OAR 839-010-0140 provides in part:

"(2) Civil proceedings include those before regulatory agencies as well as courts:

"(a) Regulatory agencies include licensing agencies of any type;

"(b) If the complaint is before a regulatory agency, civil proceedings and penalties or injunctive relief must be possible in order to invoke protection by ORS 659.550.

"(3) The employer must know or believe that a civil proceeding was initiated."

ORS 659.550 is a remedial statute, and remedial statutes are to be construed broadly so as to effectuate the purposes of the statute. *Earth Science Technology*, 14 BOLI at 125. The public interest is furthered by having employees come forward with complaints of violations of the law without fear of retribution. *Id.* (citing *In the Matter of G & T Flagging Service, Inc.*, 9 BOLI 67 (1990)). Retaliation is a particularly insidious form of discrimination, and there is a public interest in discouraging retaliation to insure the free flow of information to law enforcement agencies. *Earth Science Technology*, 14 BOLI at 125 (citing *In the Matter of Richard Niquette*, 5 BOLI 53 (1986)). Based on these considerations and the intent of the legislature that workers be protected when cooperating, in good faith, with civil or criminal law enforcement in any way, the forum concludes that "civil proceeding" should not be construed to mean a formal contested case hearing or civil court action. In a great many cases, such as this one, such a construction would result in no statutory protection for the employee,

would not effectuate the purposes or the statute, would frustrate public policy, and would be contrary to the intention of the legislature. To bring a civil proceeding, as used here, it is enough that an employee complains to or cooperates with a regulatory agency that has the authority to initiate enforcement action (such as license revocation, civil penalties, or injunctive relief) against the employer. See OAR 839-010-0140(2).

Again, Complainant's complaint before a regulatory agency initiated the civil proceeding process, and clearly Thomas was aware it had been initiated. I conclude that the Agency has established the third element of the prima facie case.

The fifth element of the prima facie case requires a showing of a causal connection between Complainant's protected class status (having brought about a civil proceeding in good faith) and Respondent's adverse action against Complainant (the discharge). The facts show that Thomas knew of Complainant's complaint and the possible consequences from the health inspection before March 12. The un rebutted credible evidence proves that Thomas's express reason for discharging Complainant was his complaint to the regulatory agency and Thomas's belief that Complainant was trying to get the restaurant shut down. The preponderance of evidence establishes the causal connection between Complainant's protected class status and his discharge by Respondent. I conclude that the Agency has established the fifth element of the prima facie case.

## Damages

### Back Wages

At the time of discharge, Complainant was earning \$1,500 per month and was working seven days per week. He was discharged on March 12, 1996, (before beginning work) and found employment with superior wages (which cut off the time for measuring back pay) beginning April 20, 1996. During March, Complainant lost \$48.39 per day (\$1,500 divided by 31 days) for 20 days (March 12 to 31), for a total of \$967.80. During April, he lost \$50 per day (\$1,500 divided by 30 days) for 19 days (April 1 to 19), for a total of \$950. Thus, Complainant's total gross lost wages equal \$1,917.80.

### Mental Suffering

In determining mental distress awards, the Commissioner considers the type of discriminatory conduct, the duration, severity, frequency, and pervasiveness of that conduct, and the type, effects, and duration of the mental distress caused. Also considered is a complainant's vulnerability due to such factors as age and work experience. *In the Matter of Pzazz Hair Designs*, 9 BOLI 240, 256-57 (1991) (citing *Fred Meyer Inc. v. Bureau of Labor*, 39 Or App 253, 592 P2d 564, 571-72 (1979), *rev den* 287 Or 129 (1979)).

Complainant and his former wife testified credibly that he suffered mentally and physically due to his unlawful discharge by Respondent. He experienced the trauma of a sudden and unexpected discriminatory termination. He felt anger, shock, and reduced self esteem. He gained weight, had trouble sleeping, and lost his temper with

his wife and their children. He became withdrawn and less assertive. He met with the anxiety, uncertainty, and financial hardship connected with the loss of employment. These types of mental distress are all compensable. Complainant's mental suffering lasted two to three months.

Based on the foregoing, the forum is awarding Complainant \$20,000 to help compensate him for the mental distress he suffered as a result of Respondent's unlawful employment practice.

#### ORDER

NOW, THEREFORE, as authorized by ORS 659.550, 659.060(3) and 659.010(2), and in order to eliminate the effects of the unlawful practice found, VISION GRAPHICS AND PUBLISHING, INC. is hereby ordered to:

1) Deliver to the Fiscal Services Office of the Bureau of Labor and Industries a certified check, payable to the Bureau of Labor and Industries in trust for Michael Duffy, in the amount of:

a) ONE THOUSAND NINE HUNDRED SEVENTEEN DOLLARS AND EIGHTY CENTS (\$1,917.80), less appropriate lawful deductions, representing wages Complainant lost between March 12 and April 20, 1996, as a result of Respondent's unlawful practice found herein; plus

b) Interest at the annual rate of nine percent (9%) on said wages from May 1, 1996, until paid, computed and compounded annually; plus

c) TWENTY THOUSAND DOLLARS (\$20,000), representing compensatory damages for the mental suffering Complainant experienced as

a result of Respondent's unlawful employment practice found herein; plus

d) Interest on said damages for mental suffering at the legal rate, accrued between the date of the Final Order and the date Respondent complies herewith, to be computed and compounded annually.

2) Cease and desist from discriminating against any employee because that employee in good faith brings a civil proceeding against Respondent.

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**In the Matter of  
FRANCES E. BRISTOW,  
dba Bristow & Associates Personnel  
Agency, Respondent.**

Case Number 30-97  
Final Order of the Commissioner  
Jack Roberts  
Issued June 11, 1997.

#### SYNOPSIS

Respondent, who operated a private employment agency, employed claimant as a recruiter. Applying the "economic reality" test, the Commissioner held that claimant was not an independent contractor. Respondent failed to pay claimant all wages due upon termination, in violation of ORS 653.025(3) (minimum wages) and ORS 652.140(1). ORS 652.140(1), 652.360, 653.025(3), 653.035(2), 653.055(1) and (2), and OAR 839-20-010.

The above-entitled contested case came on regularly for hearing before Douglas A. McKean, designated as Administrative Law Judge (ALJ) by Jack Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on March 11, 12, 24, and 25, 1997, in Suite 220 of the State Office Building, 165 East Seventh Avenue, Eugene, Oregon.

The Bureau of Labor and Industries (the Agency) was represented by Judith Bracanovich, an employee of the Agency. Jeanne Marie Kramer (Claimant) was present throughout the hearing. Frances E. Bristow (Respondent) was present and represented herself throughout the hearing.

The Agency called the following witnesses: Kimberley Arrington, a former employee of Respondent; Ione Brown, a licensing specialist with the Agency; Ronda DePoe, a former employee of Respondent; Kristin Justice, a former employee of Respondent; Jeanne Kramer, the Claimant; Marie Moser, a former employee of Respondent; Stephanie Raglin, a former employee of Respondent; and Lynne Sheppard, a compliance specialist with the Wage and Hour Division of the Agency.

Respondent called the following witnesses: Dave Altman, owner of Altman Office Furniture; Frances Bristow, Respondent; Dina DeVaney, operations manager for Nichols Products; Tobin George, a manager for Champs; Wanda Hehn; Jeanne Littleton, Consolidated Secretarial Services; Diana Morrow; Tony Rosta, attorney; Kent Russo; Tom Schoff, a financial plan-

ner; and Sandy Spitzer, Spitzer Consulting.

Administrative exhibits X-1 to X-29, Agency exhibits A-1 to A-48, and Respondent exhibits R-1, R-2, R-4 to R-8, and R-10 to R-17 were offered and received into evidence. The ALJ did not receive R-3 or R-9. The record closed on March 25, 1997.

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

#### FINDINGS OF FACT – PROCEDURAL

1) On July 23, 1996, Claimant filed a wage claim with the Agency. She alleged that she had been employed by Respondent and that Respondent had failed to pay wages earned and due to her.

2) At the same time that she filed the wage claim, Claimant assigned to the Commissioner of Labor, in trust for Claimant, all wages due from Respondent.

3) On September 26, 1996, the Agency served on Respondent an Order of Determination based upon the wage claim filed by Claimant and the Agency's investigation. The Order of Determination alleged that Respondent owed Claimant a total of \$2,586.38 in wages and \$1,140 in civil penalty wages. The Order of Determination required that, within 20 days, Respondent either pay these sums in trust to the Agency or request an

administrative hearing and submit an answer to the charges.

4) After receiving an extension of time, on October 30, 1996, Respondent, through her attorney, filed a timely answer to the Order of Determination and requested a contested case hearing. In her answer, Respondent denied that she owed Claimant the alleged unpaid wages and set forth as affirmative defenses that she was financially unable to pay such wages, that Claimant did not request and Respondent did not intentionally withhold the alleged wages, and that Claimant was an independent contractor.

5) On December 20, 1996, the Hearings Unit issued a Notice of Hearing to the Respondent, the Agency, and the Claimant indicating the time and place of the hearing. Together with the Notice of Hearing, the forum sent a document entitled "Notice of Contested Case Rights and Procedures" containing the information required by ORS 183.413, and a copy of the forum's contested case hearings rules, OAR 839-050-0000 to 839-050-0440. Upon the motions of the participants, the hearing date was postponed twice. It was finally set for March 11, 1997.

6) On January 8, 1997, the ALJ issued a discovery order directing each participant to submit a summary of the case, including a list of the witnesses to be called and the identification and description of any physical evidence to be offered into evidence, together with a copy of any such document or evidence, according to the provisions of OAR 839-050-0210(1). The summaries were due by February 18, 1997. The order advised the participants of

the sanctions, pursuant to OAR 839-050-0200(8), for failure to submit the summary. The Agency submitted a timely summary.

7) On January 29, 1997, the Agency moved for a discovery order, with attached exhibits showing the Agency's attempts to obtain Respondent's records through an informal exchange of information. On January 30, 1997, the Agency requested that the motion be held in abeyance because Respondent's counsel said the requested discovery would be provided voluntarily. Thereafter the Agency did not renew the motion. However, Respondent did not provide the requested records to the Agency.

8) On February 17, 1997, Respondent's attorney withdrew as attorney of record.

9) On February 18, 1997, Respondent and the Agency each requested additional time to obtain certain records to supplement their case summaries. The Agency had already submitted its summary with a supplement. The ALJ ordered Respondent to submit her case summary that day, and granted Respondent and the Agency until February 21, 1997, to supplement their summaries with additional exhibits. Respondent mailed and faxed a list of witnesses and a list of exhibits on February 18, 1997, but did not include copies of exhibits. On February 19, 1997, the Agency supplemented its case summary. On February 21, 1997, Respondent sent the forum supplemental lists of witnesses and exhibits, but no exhibits were attached. On February 28, 1997, Respondent submitted another list of witnesses and exhibits, along with copies of the listed exhibits.

On March 5, 1997, the Agency again supplemented its case summary with newly discovered exhibits.

10) On March 7, 1997, the ALJ conducted a prehearing conference by telephone with the participants.

11) At the start of the hearing on March 11, 1997, Respondent said she had reviewed the "Notice of Contested Case Rights and Procedures" and had no questions about it.

12) Pursuant to ORS 183.415(7), the ALJ explained the issues involved in the hearing, the matters to be proved or disproved, and the procedures governing the conduct of the hearing.

13) At the start of the hearing, the Agency moved to amend the Order of Determination. The amendment reflected a decrease in the amount of wages claimed due, from \$2,586.38 to \$2,289.52, and asked to delete its claim for penalty wages. Respondent did not object and the ALJ granted the motion. During the hearing, the Agency again moved to amend the Order of Determination to conform to the evidence, reducing the amount of wages claimed due from \$2,289.52 to \$2,137.52. The ALJ granted that motion.

14) Before the hearing resumed on March 13, 1997, Respondent contacted the Administrative Law Judge and said she was ill. The ALJ postponed the hearing and, following a conference call on March 17, 1997, set the hearing to resume on March 24, 1997. During the conference call, Respondent asked the ALJ to issue subpoenas on her behalf. The ALJ directed her to submit in writing the

names of witnesses she wanted subpoenaed and, with the names, to make a showing of the general relevance and the reasonable scope of the evidence sought by 9 a.m., Thursday, March 20, 1997. The ALJ scheduled a conference call for 2 p.m. on March 20, 1997. Respondent submitted a list of names but did not make the required showing. She did not respond to the conference call March 20. On March 21, 1997, Respondent requested a postponement of the hearing. The Agency objected to the request and the forum denied it.

15) On May 13, 1997, the Administrative Law Judge issued a Proposed Order in this matter. Included in the Proposed Order was an Exceptions Notice that allowed ten days for filing exceptions to the Proposed Order. The Hearings Unit received no exceptions.

#### FINDINGS OF FACT – THE MERITS

1) During all times material herein, the Respondent, a person, did business as Bristow & Associates Personnel Agency in Eugene, Oregon. She was a sole proprietor with 100 percent interest in the business. She employed one or more persons in the State of Oregon. She was licensed as a private employment agency.

2) In mid-October 1994, Respondent contacted Kristin Justice and offered her services as an employment agency. Later that month, they discussed Justice doing recruiting and marketing work for Respondent. They reached a verbal agreement that Justice would work for an annual salary of \$20,000 plus commission. Justice was employed by Respondent from November 14, 1994, to January 20, 1995.

Respondent changed the terms of their compensation agreement frequently. In addition to performing the duties of a recruiter, Justice developed a company logo, prepared advertising for the business, and performed clerical tasks, such as greeting clients, retrieving telephone messages, answering the telephone, scheduling appointments (for herself and the other recruiters), filing, typing, sending faxes, running errands, and maintaining the office. Respondent expected Justice to be in the office from 8 a.m. to 5 p.m. Justice estimated that she earned \$3,334 in salary plus a minimum of \$2,236 in commissions. After she demanded and received no pay, Justice contacted an attorney in March 1995. Following negotiations between their attorneys, Justice and Respondent settled the wage claim in May 1995 for \$4,000, which included six monthly payments beginning on June 1, 1995. As of March 11, 1997, Respondent had not paid off the wages owed to Justice.

3) In 1995, Respondent sought advise from attorney Anthony Rosta about hiring recruiters as independent contractors.

4) From February 3 to March 15, 1995, Respondent employed Kimberley Arrington. Arrington's duties included greeting clients (job applicants), answering the phone, handing out forms, typing, and calling employers to find out whether they had open positions. Respondent paid Arrington by the hour.

5) From March 16 to 28, 1995, Respondent employed Stephanie Raglin as a secretary. Raglin was paid by the hour and performed clerical duties,

including greeting clients, typing, filing, and answering the phone.

6) From April to October 1995, Respondent employed Marie Moser as a secretary. Respondent had Moser sign a "Nondisclosure and Noncompete Agreement." The office hours were generally from 9 a.m. to 5 or 5:15 p.m. Moser was paid by the hour and performed clerical duties, including greeting clients, typing, filing, and answering the phone. She also performed some duties normally performed by recruiters, such as "cold calling" employers, setting up applicant interviews, and trying to make employment placements.

7) In April 1995, Ronda DePoe signed a contract authorizing Respondent to assist her in securing employment. In June 1995, DePoe entered into an employment relationship as a recruiter with Respondent. DePoe was not licensed as a recruiter and had never worked as a recruiter. DePoe's duties included answering the phone; contacting employers about open positions; advertising for job openings; interviewing clients; filling out job orders, job referrals, and other forms; and arranging for the placement of clients. Initially, Respondent verbally agreed that DePoe was an employee and would earn a 30 percent commission with a guaranteed minimum of \$2,000 per month. She agreed to withhold taxes from DePoe's pay checks. A couple of days after DePoe started working, Respondent changed the compensation agreement. Under the new agreement, DePoe would receive a 1099 form at the end of the year (there were no taxes withheld), she was to be paid on commission only,

there were no benefits, she had to sign a nondisclosure-noncompete agreement, and she was required to follow the employee handbook. Respondent changed the commission arrangement several times during DePoe's employment, as other recruiters joined and left the business. DePoe quit on August 7, 1995, because she thought Respondent was cheating her on commissions.

8) From around January to March 1996, Respondent employed Diane Morrow as a recruiter. Respondent trained Morrow, who had never been an employment agency recruiter before and was never so licensed. Morrow signed Respondent's noncompete agreement. Although she did not know the legal difference between an employee and an independent contractor, Morrow believed she was an independent contractor paid on a commission basis. She never received any pay for her work. Her schedule was her own. While the office hours varied, they were usually from 8 a.m. to 5 p.m. She performed her own secretarial tasks, such as filing, typing, mailing, and answering phones.

9) In August 1995, Claimant used Respondent's agency to help her find a job. Respondent referred Claimant to a medical office for a job interview, but she did not get the job. As part of her ongoing job search, Claimant sent Respondent two résumés in November 1995. Claimant had experience as a secretary, bookkeeper, and office manager. She was seeking

employment in a medical or business office. At some point, Claimant began working in an office of H & R Block. That job was scheduled to end on April 15, 1996, so in mid-February 1996, Claimant again contacted Respondent for help finding a new job. Respondent later discussed with Claimant the possibility of Claimant working for Respondent as a recruiter. Claimant had no experience or training as a recruiter, had never sought work as a recruiter, and was not licensed as a recruiter. Respondent offered to train her. Claimant asked for and needed a base wage, but Respondent could offer her only a commission wage.

10) On March 5, 1996, Respondent hired Claimant as a recruiter. Claimant signed a document entitled "Commissioned Independent Contractor, Local and National Recruitment Placement Job Description, Employment Agreement." The document listed "Office Procedure[s]" including, among other things, that Claimant would receive a 1099 form at year end, commission payments were paid monthly based on collected funds, there were no benefits, Respondent's records were confidential, there was a noncompete agreement, Respondent could terminate the agreement at will, and Respondent's employee handbook would be followed regarding all other procedures. Claimant was hired for an indefinite period. Respondent furnished all of the equipment and supplies Claimant used on the job.\* Respondent detailed and controlled how

\* Near the end of her employment with Respondent, Claimant brought her own typewriter into the office because it had a bold feature she wanted to use. Respondent did not require her to use or bring in her own typewriter. Also around that same time, Claimant used her own 10-key calculator at work.

Claimant was to perform her duties. Respondent set the office hours, which varied but were generally from around 8 a.m. to 5 p.m. Claimant was to be paid on a commission basis. She was not allowed to hire her own employees. She worked for only Respondent during times material herein. She signed a "Nondisclosure and Noncompete Agreement" with Respondent that identified Claimant as an employee and prohibited her from operating or being employed by an employment agency for two years following termination of employment. Claimant derived no benefits other than commissions from her work for Respondent. She had no ownership interest in Respondent's business, did not share in the business's profits, and had no liability for its losses. Claimant was not Respondent's business partner.

11) Initially, Claimant had no skills as a recruiter, so Respondent assigned her work duties and trained her. Under Respondent's close supervision, Claimant filed Respondent's employer contact cards in alphabetical order; answered the phone; took messages; handled incoming mail; typed letters; performed other secretarial duties, such as typing labels and setting up new files; checked with employers by phone and by letter to discover their needs for employees; took job orders from employers; filled out job order forms, applicant contracts, and job referral forms; referred applicants to employers for interviews; and kept records of contacts with employers and applicant referrals. Respondent took Claimant to a Eugene Chamber of Commerce meeting so Claimant could develop contacts with community

business people. Respondent moved her office in April 1996. Claimant helped with this move. Over time, Claimant required less supervision of her assigned work and performed some duties by herself.

12) At some point during her employment, Claimant did some typing about the Bristow family heritage, which was later included in Respondent's business brochure.

13) Claimant obtained the business cards of 20 men with whom her late brother had done business. Claimant gave the cards to Respondent in the hope of generating job orders.

14) Respondent and Claimant met with Tom Schoff for retirement planning. Respondent characterized Claimant as an independent contractor.

15) During her employment with Respondent, Claimant considered starting her own bookkeeping business. She started gathering information about starting a new business.

16) Between March 5 and April 15, 1996, Claimant also worked for H & R Block each day (Monday to Friday) from 10 a.m. to 5 p.m. During this period, she worked for Respondent from around 7 to 9:45 a.m., and again from around 5 to 7:30 p.m. each Monday through Thursday, or around 4.5 hours per day. She worked only three hours on one Thursday. On Fridays she worked two to four hours for Respondent. During this period, she worked a total of 117.5 hours. Beginning on April 16 and until she was discharged on June 28, 1996, Claimant generally worked eight hours per day Monday to

Thursday.\* On Fridays, her work time varied from 1.5 to 8 hours each day. She did not work during the week of May 5 to 11, 1996, except for eight hours worked on Monday, May 6, 1996. She did not work during the week of June 16 to 22, 1996. During the period April 16 to June 28, 1996, Claimant worked a total of 332.5 hours. During the entire period of her employment with Respondent, Claimant worked a total of 450 hours. Respondent kept no time records for Claimant

17) Respondent discharged Claimant on June 28, 1996.

18) Respondent paid Claimant no compensation for her personal services rendered to Respondent in Oregon.

19) At times material, the minimum wage in Oregon was \$4.75 per hour, pursuant to ORS 653.025(3).

20) The forum found Claimant's testimony to be credible. She had the facts readily at her command and her statements were supported by documentary records. There is no reason to determine the testimony of the Claimant to be anything except reliable and credible.

21) Agency Compliance Specialist Lynne Sheppard contacted 10 private employment agencies in the Eugene area. None used a recruiter who was an independent contractor. Employees of a licensed private employment agency are not required by state law to be licensed. A recruiter working as an independent contractor is required by state law to be licensed.

22) During all times material, Respondent used a bookkeeper, Jeanne Littleton, to handle payroll. Based on information she got from Respondent, Littleton computed the withholdings and made out W-2 forms for the hourly employees and for Kristin Justice. Littleton also made out the 1099 forms for other recruiters (that is, besides Justice). From information she got from Respondent, Littleton did not consider the recruiters to be Respondent's employees.

#### ULTIMATE FINDINGS OF FACT

1) During all times material herein, Respondent was a person who engaged the personal services of one or more employees in the state of Oregon.

2) Respondent employed Claimant from March 5 to June 28, 1996.

3) Respondent discharged Claimant on June 28, 1996.

4) During the wage claim period, that is, from March 5 to June 28, 1996, Respondent and Claimant had an agreement whereby Claimant would be paid on a commission basis. Claimant earned no commissions.

5) The state minimum wage during 1996 was \$4.75 per hour.

6) Claimant worked 450 hours for Respondent. At the minimum wage of \$4.75, Claimant earned \$2,137.50 in wages. Respondent has paid Claimant nothing and owes her \$2,137.50 in earned and unpaid compensation.

#### CONCLUSIONS OF LAW

1) The Commissioner of the Bureau of Labor and Industries has

\* Generally, Claimant took a one-hour lunch break and the office was closed between noon and 1 p.m. each day.

jurisdiction over the subject matter and the Respondent herein. ORS 652.310 to 652.414.

2) ORS 653.010 provides in part:

"(3) 'Employ' includes to suffer or permit to work; \* \* \*."

"(4) 'Employer' means any person who employs another person \* \* \*."

ORS 652.310 provides in part:

"(1) 'Employer' means any person who in this state, directly or through an agent, engages personal services of one or more employees \* \* \*."

"(2) 'Employee' means any individual who otherwise than as a copartner of the employer or as an independent contractor renders personal services wholly or partly in this state to an employer who pays or agrees to pay such individual at a fixed rate, based on the time spent in the performance of such services or on the number of operations accomplished, or quantity produced or handled."

During all times material herein, Respondent was an employer and Claimant was an employee subject to the provisions of ORS 652.110 to 652.200, 652.310 to 652.414, and 653.010 to 653.261.

3) ORS 653.025 requires that:

" \* \* \* for each hour of work time that the employee is gainfully employed, no employer shall employ or agree to employ any employee at wages computed at a rate lower than:

"\* \* \* \* \*

"(3) For calendar years after December 31, 1990, \$4.75."

Respondent was required to pay Claimant at a fixed rate of at least \$4.75 per hour. Respondent failed to pay Claimant the minimum wage rate of \$4.75 for each hour of work time.

4) ORS 652.140(1) provides:

"Whenever an employer discharges an employee or where such employment is terminated by mutual agreement, all wages earned and unpaid at the time of such discharge or termination shall become due and payable not later than the end of the first business day after the discharge or termination."

Respondent violated ORS 652.140(1) by failing to pay Claimant all wages earned and unpaid not later than the end of the first business day after discharging her from employment on June 28, 1996.

5) Under the facts and circumstances of this record, and according to the law applicable to this matter, the Commissioner of the Bureau of Labor and Industries has the authority to order Respondent to pay Claimant her earned, unpaid, due, and payable wages, plus interest on that sum until paid. ORS 652.332.

#### OPINION

##### Claimant Worked As An Employee

Respondent contends that Claimant was not an employee, but was hired as an independent contractor. The Agency contends that Claimant worked as an employee.

"'Employee' means any individual who otherwise than as a copartner of the employer or as an independent

contractor renders personal services wholly or partly in this state to an employer who pays or agrees to pay such individual at a fixed rate \* \* \*." ORS 652.310(2); *Lamy v. Jack Jarvis & Co., Inc.*, 281 Or 307, 574 P2d 1107, 1111 (1978); *In the Matter of Crystal Heart Books Co.*, 12 BOLI 33, 40-41 (1993).

Oregon statutory law does not define "independent contractor" for purposes of wage claim law. This forum has adopted an "economic reality" test to determine whether a claimant is an employee or independent contractor under Oregon's minimum wage and wage collection laws. *In the Matter of Geoffroy Enterprises, Inc.*, 15 BOLI 148 (1996) (relying on *Circle C Investments, Inc.*, 998 F2d 324 (5th Cir 1993)). The focal point of the test is "whether the alleged employee, as a matter of economic reality, is economically dependent upon the business to which she renders her services." *Geoffroy Enterprises, Inc.*, 15 BOLI at 164. The forum considers five factors to gauge the degree of the worker's economic dependency, with no single factor being determinative. These factors are:

- (1) The degree of control exercised by the alleged employer;
- (2) The extent of the relative investments of the worker and alleged employer;
- (3) The degree to which the worker's opportunity for profit and loss is determined by the alleged employer;
- (4) The skill and initiative required in performing the job;

(5) The permanency of the relationship. *Id.*

In this case, the preponderance of credible evidence on the whole record establishes the following:

(1) The degree of control exercised by the alleged employer

Respondent exercised extensive control over Claimant's work. During the training period – which Claimant believed covered the entire period of her employment, and Respondent said lasted until around April 15, 1996 – the evidence is uncontroverted that Respondent closely supervised Claimant's activities.

Respondent set the office procedures and required Claimant to follow them. She set the office hours, dress code, and "mannerisms." She listened to Claimant's phone conversations and instructed her how to converse. She taught Claimant how to fill out all of Respondent's forms, and taught her what questions to ask. She established the compensation method. She prohibited Claimant from competing with her. Even after Claimant became more self-sufficient and scheduled her own work, she was still under Respondent's control, in that Respondent expected Claimant to continue following Respondent's practices and procedures. Respondent exercised control over Claimant in a wide-ranging way that indicates an employer-employee relationship.

\* This is the same test used by federal courts when applying the Fair Labor Standards Act. See *Circle C Investments, Inc.*, 998 F2d 324 (5th Cir 1993).

(2) The extent of the relative investments of the worker and alleged employer

Respondent supplied the office, phones, desks, chairs, typewriters, computer, calculators, stationary, records, forms, postage, and all of the other equipment and supplies Claimant used to perform her job, except that, near the end of her employment, Claimant brought in her own typewriter and calculator.\* Respondent had the private employment agency license necessary to operate the business. She paid the bills. Claimant had no financial interest in the business. I conclude that Claimant's investment in her job was relatively minor compared with Respondent's investment in her business, and this indicates an employee-employer relationship.

(3) The degree to which the worker's opportunity for profit and loss is determined by the alleged employer

Respondent established the terms of the compensation agreement with Claimant. Although Claimant ultimately agreed to Respondent's terms, this was a take-it-or-leave-it offer. Claimant wanted and needed a base wage, but was so persuaded by Respondent's assurances of future commissions that she accepted the offer.

There was no opportunity for Claimant to suffer a loss, except insofar as she would earn no commission for her work. Claimant's initiative and

hard work would obviously influence her opportunity to earn a commission from Respondent. However, the commission system Respondent set up significantly influenced Claimant's opportunity for income, or profit. Under the system, the most Claimant could earn from an account was 30 percent of the net fee received. That commission would be split if Respondent also worked on the account (such as by obtaining the job order or making the job placement). Respondent could change the applicants' fee schedule and was able to give discounts on fees, both of which would influence the amount of commissions Claimant could earn.

Further, Respondent could terminate Claimant's employment agreement at will. Following termination, Claimant would get no compensation for work performed on any account where the applicant had not started work before Claimant's termination date. Additionally, the evidence persuasively shows that Respondent unilaterally changed recruiters' compensation agreements when she thought it was fair or necessary to do so.

Finally, it should be noted that this method of compensation -- commission only -- is not by itself indicative of independent contractor status. Oregon's minimum wage law recognizes that employees who receive commission payments must still earn at least

the minimum wage. ORS 653.035(2). In previously decided cases, this forum has found that workers who were paid on commission were employees (not independent contractors) and were owed the minimum wage. See, for example, *In the Matter of U.S. Telecom International*, 13 BOLI 114, 121-22 (1994). Likewise, the administrative rules governing private employment agencies recognize that employees are often paid on a commission basis. See OAR 839-17-376(1) (requiring the licensee to keep employment records including the "rate of pay and/or rate of commission" for all employees).

I conclude that, to a large degree, Claimant's opportunity for "profit" was determined by Respondent. This shows an economic dependence by Claimant on Respondent's business and indicates an employee-employer relationship.

(4) The skill and initiative required in performing the job

The recruiter job required a certain amount of skill and training. However, as with Claimant, Respondent often hired employees who had no education, training, or experience as recruiters. Then she trained them, with varying degrees of success. Many recruiter duties were clerical in nature, such as filing, typing, greeting clients, filling out forms, and taking phone messages. The job did not require any specialized skills that suggest the job was one performed by independent contractors.

While initiative was required to be a successful recruiter, I cannot find that the recruiter job required any more initiative than other commission-paying jobs. A great variety of commission-

only jobs are performed by workers in an employment relationship. It is noteworthy that the Agency's survey of other employment agencies in the Eugene area showed that none of them used independent contractor recruiters. Likewise, it is notable that Claimant was hired to do the same job as other recruiters whom Respondent hired as employees. There is nothing about Claimant's commission-only job that suggests, as a matter of economic reality, that she was not economically dependent upon Respondent's business. The skill and initiative required of Claimant in performing her job indicate an employee-employer relationship.

(5) The permanency of the relationship

Claimant was hired for an indefinite period. No evidence suggests that Respondent hired Claimant for a temporary, limited period. Claimant worked for nearly four months, until Respondent terminated the relationship. These facts indicate employee status.

Conclusion

Considering each factor of the economic reality test, I conclude that Claimant was economically dependent upon Respondent's business. She was not licensed or bonded as an employment agency, as the law would have required her to be if she were an independent contractor, and she was not eligible to be licensed. See ORS 658.035(3)(e) (to be eligible for a license, an individual must have "a minimum of one year's experience with an employment agency"). She was not free to work as a recruiter for others, pursuant to her noncompete agreement with Respondent. She had to work solely for Respondent. She was not in business for herself; she was

\* There was disputed evidence about whether Claimant bought a computer table used in Respondent's office. Claimant testified that, while she produced the cash to pay for the desk, the money was a loan to Respondent, who didn't have money at the time the desk was purchased. Even if I were to find that Claimant bought the desk for the office (which I do not find), the conclusion that Respondent had a vastly greater investment than Claimant would be the same.

dependent upon her employment in Respondent's business. Accordingly, as a matter of law, she was an employee and not an independent contractor.

Although Respondent may have intended to hire Claimant as an independent contractor and labeled one of her documents "COMMISSIONED INDEPENDENT CONTRACTOR," this was clearly insufficient to create that legal relationship.<sup>\*</sup> An employer's intentions and how she labels a worker do not determine whether the worker is an employee or an independent contractor. It is by applying the economic reality test that we determine the worker's status. Applying the test in this case reveals that Claimant was an employee.

#### Hours Worked

As part of her claim for wages, Claimant filled out calendar forms for the Agency to show the number of hours she worked. She later modified her claimed hours. Based on these calendars and Claimant's credible testimony, the forum has concluded that she was employed and was improperly compensated. Where the forum concludes that an employee was employed and was improperly compensated, it becomes the burden of the employer to produce all appropriate records to prove the precise amounts involved.<sup>\*\*</sup>

Thus, it became Respondent's burden to produce all appropriate records to prove the precise amounts involved.

ORS 653.045 requires an employer to maintain payroll records. Respondent did not maintain any record of hours or dates worked by Claimant. Respondent presented testimony that Claimant ate meals and took care of personal matters (such as paying her bills) while at work. She also presented testimony that claimant had doctors appointments and took a family member to medical appointments occasionally during working hours. However, without records or more specific evidence, the forum has no way of knowing when Claimant left work or for how long.

Where an employer produces no records, the Commissioner may rely on the evidence produced by the Agency "to show the amount and extent of the employee's work as a matter of just and reasonable inference," and "may then award damages to the employee, even though the result be only approximate."<sup>\*\*\*</sup> Based on these rulings, the forum may rely on the evidence produced by the Agency regarding the number of hours worked by Claimant. The evidence showed that Claimant worked for 450 hours for Respondent.

Respondent also contended that, until around April 15, 1996, Claimant was in training. While Respondent never specifically claimed that this training time was not compensable work time, the law is clear that training time, as it occurred here, is compensable work time. See OAR 839-20-044;

*In the Matter of Dan's Ukiah Service*, 8 BOLI 96, 106 (1989). Thus, the time Claimant spent training as a recruiter was compensable work time.

#### Minimum Wages Due

Respondent contends that her compensation agreement with Claimant was for a commission rate only, that Claimant earned no commission, and, therefore, that Respondent owes Claimant nothing. However, ORS 653.055(2) states that "[a]ny agreement between an employee and an employer to work at less than the wage rate required by [the minimum wage law] is no defense to an action under subsection (1) of this section." Likewise, ORS 652.360 states that "[n]o employer may by special contract or any other means exempt the employer from any provision of or liability or penalty imposed by ORS 652.310 to 652.414 or by any statute relating to the payment of wages[.]" In other words, an employer may not make an agreement with an employee whereby the employer is not required to comply with the minimum wage law or the wage collection law. The commission agreement between Respondent and Claimant is no defense to a failure to pay the minimum wage or a failure to pay final wages when due.

ORS 653.025 prohibits employers from paying their employees at a rate less than \$4.75 for each hour of work time. ORS 653.035(2) provides that,

"Employers may include commission payments to employees as part of the applicable minimum wage for any pay period in which the combined wage and commission earnings of the employee will comply with ORS 653.010 to

653.261. In any pay period where the combined wage and commission payments to the employee do not add up to the applicable minimum wage under ORS 653.010 to 653.261, the employer shall pay the minimum rate as prescribed in ORS 653.010 to 653.261."

Likewise, OAR 839-20-010 provides:

"(1) Employees shall be paid no less than the applicable minimum wage for all hours worked, which includes 'work time' as defined in ORS 653.010(12). If in any pay period the combined wages of the employee are less than the applicable minimum wage, the employer shall pay, in addition to sums already earned, no less than the difference between the amounts earned and the minimum wage as prescribed by the appropriate statute or administrative rule.

"(2) Employers may include commission and bonus payments to employees when computing the minimum wage. Such commission or bonus payment may only be credited toward employees' minimum wages in the pay periods in which they are earned."

ORS 653.055(1) provides in pertinent part that "[a]ny employer who pays an employee less than the [minimum wage] is liable to the employee affected: (a) For the full amount of the wages, less any amount actually paid to the employee by the employer[.]"

It is undisputed that Respondent paid Claimant nothing. Since no commission payments were earned and thus did not add up to the applicable

\* Incongruously, Respondent also labeled this same document "EMPLOYMENT AGREEMENT."

\*\* *Anderson v. Mt. Clemens Pottery Co.*, 328 US 680 (1946); *In the Matter of Dan's Ukiah Service*, 8 BOLI 96, 106 (1989).

\*\*\* *Anderson v. Mt. Clemens Pottery Co.*, 328 US at 687-88.

minimum wage, Respondent was legally required to pay Claimant the minimum wage during the wage claim period. Therefore, Respondent owes Claimant unpaid minimum wages in the amount of \$2,137.52.

#### ORDER

NOW, THEREFORE, as authorized by ORS 652.332, the Commissioner of the Bureau of Labor and Industries hereby orders FRANCES E. BRISTOW to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232-2162, the following: a certified check payable to the Bureau of Labor and Industries IN TRUST FOR JEANNE MARIE KRAMER in the amount of TWO THOUSAND ONE HUNDRED THIRTY SEVEN DOLLARS and FIFTY TWO CENTS (\$2,137.52), less appropriate lawful deductions, representing gross earned, unpaid, due, and payable wages, plus interest at the rate of nine percent per year on the sum of \$2,137.52 from July 1, 1996, until paid.

**In the Matter of  
ODON SALINAS MORFIN,  
dba Diamond Tree Trimming or Salinas Tree Trimming, Respondent.**

Case Number 03-96

Final Order of the Commissioner

Jack Roberts

Issued June 18, 1997.

#### SYNOPSIS

Respondent failed to attend the hearing and was found in default. Finding that the Agency had presented a prima facie case that Respondent had acted as farm labor contractor without a license, failed to register a farm-worker camp, and failed to pay wages timely, the Commissioner imposed civil penalties of \$65,000. ORS 653.145; 658.410; 658.415; 658.440 (1)(c); 658.750(1); OAR 839-15-125; 839-14-065.

The above-entitled contested case came on regularly for hearing before Warner W. Gregg, designated as Administrative Law Judge (ALJ) by Jack Roberts, Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was held on October 16, 1996, in room 1004, State Office Building, 800 NE Oregon Street, Portland, Oregon. The Wage and Hour Division of the Bureau of Labor and Industries (the Agency) was represented by Judith Bracanovich, an employee of the Agency. Odon Salinas Morfin (Respondent\*), was not present and was not represented by counsel, although properly served with notice of

this proceeding, and was adjudged by the ALJ to be in default. Paulo Salinas Martinez and Guillermo Salinas Martinez, originally named as Respondents herein, were represented by James F. Halley, Attorney at Law, Portland, who was present by telephone, and upon the motion of the Agency, were dismissed as respondents herein pursuant to a Consent Order disposing of their portion of the case.

The Agency called as witnesses former Wage and Hour Division Compliance Specialists Raul Pena and Gabriel Silva. Respondent presented no evidence.

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

#### FINDINGS OF FACT – PROCEDURAL

1) On February 22, 1995, the Agency issued a Notice of Intent to Assess Civil Penalties (Notice of Intent) naming as Respondents Odon Salinas Morfin, Paulo Salinas Martinez, and Guillermo Salinas Martinez, dba Diamond Tree Trimming or Salinas Tree Trimming, unlicensed farm labor contractors. The Notice of Intent, as amended at hearing to charge only Respondent, sought to assess civil penalties against Respondent in the amount of \$65,000. The bases for the proposed civil penalties were alleged

as follows (amended allegations appear [in brackets]):

"1) Acting As A Farm Labor Contractor Without A Valid License. ([Eight] Violations) Between on or around August 1993, and in or around December 1994, [Respondent], for an agreed remuneration or rate of pay, employed and supplied workers to farmers in Oregon as set out in Appendix 1, attached hereto and incorporated herein. At all times material, [Respondent] did not possess [a] valid farm labor contractor license, in violation of ORS 658.410, ORS 658.415 and OAR 839-15-125. AGGRAVATION: [Respondent] knew or should have known of the violations, multiple (repeated) violations, magnitude and seriousness of the violations. Civil Penalty of [\$15,000].

"2) Failure To Register A Farm-Worker Camp With The Commissioner. Between in or about October 1994 through November 1994, [Respondent was] operating a farm-worker camp at 109 Eluria Street, Oregon City, Oregon, without having first registered said camp with the Commissioner, in violation of ORS 658.750(1) and OAR 839-14-065. AGGRAVATION: [Respondent] knew or should have known of the violation; magnitude and seriousness of the violation. Civil Penalty of \$2,000.

"3) Failure To Make Timely Payment of Wages Owed: [24] Violations. Between October 26, 1994 through November 17, 1994,

fin, aka Odon Salinas.

\* In this order, the term Respondent, singular, refers to Odon Salinas Mor-

[Respondent] received the farm labor services of [24] employees, as set out in Appendix 2, attached hereto and incorporated herein, within the state of Oregon, under contracts of employment with said workers that required [Respondent] to pay for such labor at the rate of \$1,000 for one month's labor (\$36.00 daily wage). [Respondent] failed to pay all sums due said workers under the contracts of employment immediately upon the termination of employment, in violation of ORS 65[2].145 and ORS 658.440(1)(c). AGGRAVATION: [Respondent] knew or should have known of the violations, the magnitude and seriousness of multiple (repeated) violations. Civil Penalty In the Amount of [\$48,000]."

The Notice of Intent was served on Respondent personally by the Multnomah County Sheriff on March 6, 1995, at 11540 NE Inverness Drive, Portland, Oregon.

2) On April 3, 1995, Respondent through counsel denied the allegations of the Notice of Intent and moved for a stay of the proceedings based on his being in federal custody, being unable to answer the charges fully without waiving his right against self-incrimination, and reserving the right to amend his response if necessary to present evidence, and requested a contested case hearing.

3) The Agency requested a hearing date and on August 11, 1995, the Hearings Unit issued to Respondent and the Agency a Notice of Hearing setting forth the time and place of the

requested hearing and the designated ALJ, together with the following: a) a Notice of Contested Case Rights and Procedures containing the information required by ORS 183.413, and b) a complete copy of the Agency's administrative rules regarding the contested case process — OAR 839-50-000 through 839-50-420.

4) On September 1, 1995, the ALJ postponed the hearing set for September 13, 1995, pending receipt of requested information regarding the availability for hearing of Respondent and the other necessary parties. Following a lengthy delay, during which none of the necessary parties were available for hearing, the ALJ on July 23, 1996, set the hearing to commence August 27, 1996. On August 12, 1996, upon motion by the Agency, the hearing was reset for October 15, 1996. On September 12, 1996, the participants agreed to a one day delay and on September 20 the order of the ALJ approved a one day delay to October 16, 1996.

5) A copy of the ALJ's July 23, 1996, Amended Notice of Hearing setting the hearing on August 27, 1996, was mailed to Respondent, postage prepaid, at 109 Eluria Street, Oregon City, Oregon, 97045 on July 23, 1996, and not returned. A copy of the ALJ's August 12, 1996, Amended Notice of Hearing setting the hearing on October 15, 1996, was mailed to Respondent, postage prepaid, at 109 Eluria Street, Oregon City, Oregon, 97045 and at 14290 S. Marjorie Lane, #2002, Oregon City, Oregon, 97045, on August 19, 1996, and not returned.\* A copy of the ALJ's September 20, 1996, Order

Resetting Hearing to October 16, 1996, was mailed to Respondent, postage prepaid, at 14290 S. Marjorie Lane, #2002, Oregon City, Oregon, 97045, on September 20, 1996, and not returned.

6) On October 7, 1996, the Agency filed its summary of the case. On October 14, 1996, with leave of the forum, counsel for then Respondents Paulo Salinas Martinez and Guillermo Salinas Martinez, filed a summary of the case.

7) At the commencement of the hearing, counsel for Paulo Salinas Martinez and Guillermo Salinas Martinez stated that each of them had received the Notice of Contested Case Rights and Procedures and had no questions about it.

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

9) At the commencement of the hearing, the Agency and counsel for Paulo Salinas Martinez and Guillermo Salinas Martinez orally presented for the record the provisions of an agreed upon disposition of the charges against Paulo and Guillermo Salinas Martinez, pursuant to the rules of this forum. Each agreed to execute a Consent Order admitting his part in the violations charged, agreeing to henceforth abide by Oregon's farm labor

contractor law, and agreeing not to seek a farm labor contractor's license for a period of three years.\* As a result, Respondents Salinas Martinez were dismissed as respondents in this proceeding.

10) At the commencement of the hearing, the ALJ found that Respondent was served with the Notice of Intent, that he was notified by mail of the hearing, that he was not present, and that he was in default.

11) At the commencement of the hearing, the Agency moved for certain amendments to the Notice of Intent. Because the proposed amendments served to reduce the obligation of the defaulting Respondent, the ALJ approved the amendments, which are reflected in the first paragraph of these procedural findings.

12) The proposed order, which included an exceptions notice, was issued April 28, 1997, and exceptions were due May 8, 1997. No exceptions were received.

#### FINDINGS OF FACT – THE MERITS

1) Raul Pena was employed as a Compliance Specialist with the Farm Labor Unit of the Agency from August 1988 to October 1995. His duties included investigation of alleged violations of wage and hour laws and farm labor contracting laws. He is fluent in both English and Spanish.

2) Gabriel Silva was employed as a Compliance Specialist with the Farm Labor Unit of the Agency from

Defender for the District of Oregon, notified the forum that she was appointed to represent Respondent only in connection with federal criminal charges and was precluded from representing individuals outside the scope of her office. The last address she had for Respondent was Eluria Street.

\* A copy of the executed Consent Order was received October 30, 1996.

\* On August 12, 1996, Respondent's counsel, an Assistant Federal Public

November 1989 to February 1995. His duties included investigation of alleged violations of wage and hour laws and farm labor contracting laws. He is fluent in both English and Spanish.

3) Respondent Odon Salinas Morfin is the father of Paulo Salinas Martinez and Guillermo Salinas Martinez. He was also known to agencies and persons with whom he had dealings as Odon Salinas.

4) In October 1994, Pena learned that Respondent was contracting with a Clackamas County farmer for the harvest of Christmas trees. Knowing that Respondent was not licensed for that activity, Pena attempted to locate him, first in Newberg and later in Washington County, but was not successful.

5) In early November 1994, Pena learned that the US Immigration and Naturalization Service (INS) had located Respondent at 109 Eluria Street, Oregon City, where he and his family were using the services of 30 or more undocumented workers in the harvesting of Christmas trees. Respondent was also providing housing for these workers at the Eluria Street address. He and his two sons were taken into federal custody.

6) Following the INS raid, some of the workers were relocated in an immigrant shelter in Mt. Angel. Working from a list provided by INS, Pena interviewed and took wage claims and assignments from about two dozen of them on November 17 and 21, 1994. Each claimant gave the dates, hours, and rate of pay, and a wage claim was prepared from that information. Pena interviewed each worker separately, in Spanish. Each told him that

Respondent was the employer. Pena saw each worker sign his own wage claim. All were from the same region in Mexico.

7) In July 1994, the record owner of 109 Eluria Street, Oregon City, sold the house on contract to Paulo and Guillermo Salinas Martinez. Motor vehicles parked there on November 7, 1994, were registered to them at that address.

8) Silva interviewed about two dozen of the workers at the Mt. Angel shelter. They stated that they had worked in Christmas trees, that Respondent was their employer, and that they were still owed about ten days' pay. They had agreed to work for one month, October 26 to November 26, for \$1,000. Previously, they had been paid in cash about every eight days on a piece work or per tree basis. They did not receive pay stubs or a tabulation of hours worked. They had stayed at Respondent's home, some for as long as two months. Respondent provided them with meals and transportation as well as sleeping quarters. They were unfamiliar with the area and never knew the name of the owner of any farm where they worked.

9) On November 15, 1994, Silva spoke with Paulo and Guillermo Salinas Martinez, who disputed some of the statements of the workers, but admitted that the business owed the workers some money. They stated they had to speak with Respondent regarding farmers who still owed him money. Respondent had made the arrangements for the work with the farmers. They acknowledged that neither they nor Respondent had an Oregon

farm labor contractor license or an Oregon farm-worker camp registration.

10) Emerald Christmas Tree Company, Bellevue, Washington (Emerald), had contracted with a number of Oregon growers for harvesting Christmas trees in 1993 and 1994 and was aware that Respondent's "family business" had done both shearing and harvesting work for several growers on the recommendation of Emerald.

11) On November 17, 1994, Silva again spoke with Paulo Salinas Martinez, who verified that certain workers on a list Silva had left with him on November 15 were owed for 10 days work. Paulo Salinas Martinez stated that there was workers' compensation coverage in his name.

12) Respondent had workers' compensation coverage through SAIF in 1992 as Salinas Tree Trimming at 23565 NE Sunnycrest, Newberg. In 1994, there was no workers' compensation coverage for Respondent, Paulo Salinas Martinez, Guillermo Salinas Martinez, Salinas Tree Trimming, or Diamond Tree Trimming.

13) On November 18, 1994, Silva authored an Agency wage claim demand letter to Respondent and his two sons regarding the claims for unpaid wages, assigned to the Commissioner for collection, of 28 workers. The wages due were calculated on the basis of \$1,000 per month, covered claims for from one to nine days per worker, and totaled \$7,865.88.

14) On November 18, 1994, based on information he had developed from growers that Emerald or its agents had

assisted Respondent in negotiating Christmas tree harvesting and shearing contracts, Silva authored an identical wage claim demand letter to Emerald, through its attorney, covering the same claims totaling \$7,865.88.

15) On November 29, 1994, after negotiations between Silva and Emerald's attorney, Emerald submitted its check payable to the Agency in the amount of \$8,526, covering certain listed worker claims including those which Pena had obtained in connection with workers employed by Respondent. In separate correspondence, Emerald acknowledged that it had contracted with Respondent as Diamond Tree Trimming to cut, bale, and load trees in 1993 and 1994, and had paid Respondent (Diamond) for all work except that represented by Emerald's November 29 check to the Agency.

16) Following the receipt of the funds from Emerald, the Agency in turn paid the amounts claimed by each of 24 workers.\*

17) The investigative records of the Agency show that in 1988, Respondent was operating as an unlicensed farm labor contractor and suspected of operating a farm-worker camp. He was directed at that time to obtain a license or risk civil penalty.

18) The Agency licensing unit, which keeps the records of farm labor contractor licenses and farm-worker camp registrations, has no record of a farm labor contractor license for Respondent, Paulo Salinas Martinez, Guillermo Salinas Martinez, Diamond

\* Wage claim or wage assignment information on the other four was incomplete.

Tree Trimming, or Salinas Tree Trimming for 1993, 1994, or any other year.

19) The Agency licensing unit has no record of a farm-worker camp registered to or by Respondent, Paulo Salinas Martinez, Guillermo Salinas Martinez, Diamond Tree Trimming, or Salinas Tree Trimming for 1994, or any other year.

20) Pena and Silva pursued investigation of some of the growers with whom Respondent contracted. The Agency sought and received civil penalties from growers Dennis Spath (1993), Larry Tracy (1993), Melvin Babb (1993), William Tucker (1993, 1994), Gordon Schuler (1993), and Bob Poublon (1993, 1994) for failure to verify the license status of Respondent, Paulo Salinas Martinez, and/or Guillermo Salinas Martinez, which constituted violations by the respective growers of ORS 658.437(2).

#### ULTIMATE FINDINGS OF FACT

1) At times material herein, and particularly in or around August 1993 and in or around December 1994, Respondent utilized the personal services of persons within this state in connection with the production or harvesting of farm products for an agreed remuneration or rate of pay.

2) Respondent was not a licensed farm labor contractor in Oregon in 1993 or 1994, or at any other time.

3) In 1994, Respondent provided food and lodging to the farmworkers in his employ in Oregon City.

4) In 1994, Respondent did not register a farmworker camp in Oregon City with the Commissioner.

5) In 1994, Respondent failed to pay wages when due to at least 24

persons who had worked for Respondent in Oregon.

#### CONCLUSIONS OF LAW

1) At times material herein, ORS 658.405 provided, in part:

"(1) 'Farm labor contractor' means any person who, for an agreed remuneration or rate of pay, recruits, solicits, supplies or employs workers to perform labor for another to work in \*\*\* the production or harvesting of farm products \*\*\*."

At times material herein, ORS 658.407 provided:

"The Commissioner of the Bureau of Labor and Industries shall administer and enforce ORS 658.405 to 658.503 and 658.830, and in so doing shall:

"(1) Investigate and attempt to adjust equitably controversies between farm labor contractors and their workers with respect to claims arising under ORS 658.415 (3).

"(2) Take appropriate action to establish the liability or lack thereof of the farm labor contractor for wages of the employees of the farm labor contractor and if appropriate proof exists of liability for wages the commissioner shall pay the same or such part thereof as the commissioner has funds on deposit or cause the surety company to forthwith pay the entire liability or such part thereof as the sums due under the bond will permit.

"(3) Adopt appropriate rules to administer ORS 658.405 to 658.503 and 658.830."

The Commissioner of the Bureau of Labor and Industries of the State of Oregon has jurisdiction over the persons and subject matter herein.

2) At times material herein, ORS 658.410 provided, in part:

"(1) Except as provided by ORS 658.425, no person shall act as a farm labor contractor without a valid license in the person's possession issued to the person by the Commissioner of the Bureau of Labor and Industries. \*\*\*"

At times material herein, OAR 839-15-125 provided:

"No person may perform the activities of a Farm or Forest Labor Contractor without first obtaining a temporary permit or license issued by the Bureau. No person may perform the activities of a Forest Labor Contractor or operate a farm-worker camp without first obtaining a special indorsement from the Bureau authorizing such performance. Unless otherwise specifically exempt, and except for cooperative corporations, no person may perform the duties of a farm or forest labor contractor or operate a farm-worker camp under a license issued to be corporation unless the person is also licensed to perform such duties."

Respondent employed workers and acted as a farm labor contractor for at least eight farmers in Oregon in 1993 and 1994 while not licensed to do so, constituting eight violations of ORS 658.410 and OAR 839-15-125.

3) At times material herein, ORS 658.705(7) provided, in part:

"'Farmworker camp' means any place \*\*\* where sleeping places \*\*\* or other housing is provided by a \*\*\* farm labor contractor [or] employer \*\*\* in connection with the \*\*\* employment of workers to work in the production and harvesting of farm crops \*\*\*."

At times material herein, ORS 658.750 provided, in part:

"(1) Every farmworker camp operator shall register with the bureau each farmworker camp operated by the operator.

"(2) The bureau shall establish, by rule, procedures for annual registration of farmworker camps."

At times material herein, OAR 839-14-050 provided, in part:

"Farm-Worker camp operators must obtain a farm labor contractor's license pursuant to ORS 658.405 to 658.475 and the rules adopted thereunder, unless otherwise exempt pursuant to OAR 839-14-060. Additionally, farmworker camp operators must obtain a special indorsement from the Bureau authorizing the operator to act as such."

At times material herein, OAR 839-14-065 provided in part:

"All farm-worker camps must be registered with the Bureau in accordance with these rules. Farmworker camp operators who are otherwise exempt from obtaining the required indorsement, must, nevertheless register the farmworker camp."

In 1994, by providing food and lodging to farmworkers in his employ in Oregon, Respondent operated a

farmworker camp without registering same with the commissioner, constituting a violation of ORS 658.750(1) and OAR 839-14-065.

4) At times material herein, ORS 658.440 provided, in part:

"(1) Each person acting as a farm labor contractor shall:

\*\*\*\*\*

"(c) Pay or distribute promptly, when due, to the individuals entitled thereto all money or other things of value entrusted to the labor contractor by any person for that purpose."

At times material herein, ORS 652.145 provided, in part:

"[I]f an employee has worked for an employer as a seasonal farmworker, whenever the employment terminates, all wages earned and unpaid become due and payable immediately. \*\*\*\*"

Respondent's failure in 1994 to promptly pay at least 24 workers all wages due constituted 24 violations of ORS 658.440(1)(c) and 652.145.

5) At times material herein, ORS 658.453 provided, in part:

"(1) In addition to any other penalty provided by law, the Commissioner of the Bureau of Labor and Industries may assess a civil penalty not to exceed \$2,000 for each violation by:

"(a) A farm labor contractor who, without the license required by ORS 658.405 to 658.503 and 658.830, \*\*\* employs a worker.

\*\*\*\*\*

"(c) A farm labor contractor who fails to comply with ORS 658.440(1)\*\*\*\*"

At times material herein, OAR 839-15-508 provided, in part:

"(1) Pursuant to ORS 658.453, the Commissioner may impose a civil penalty for violations of any of the following statutes:

"(a) Acting as a farm or forest labor contractor without a license in violation of ORS 658.410;

\*\*\*\*\*

"(e) Failing to pay or distribute when due any money or other valuables entrusted to the contractor in violation of ORS 658.440(1)(c).]"

At times material herein, ORS 658.850 provided, in part:

"(1) In addition to any other penalty provided by law, the commissioner may assess a civil penalty not to exceed \$2,000 for each violation of any provision of ORS 658.715 to 658.850."

The Commissioner of the Bureau of Labor and Industries is authorized to impose civil penalties for violations of ORS 658.410, 658.440 and 658.750. The penalties imposed in the Order below are a proper exercise of that authority.

#### OPINION

Respondent was in default. As required by the Oregon Administrative Procedures Act and by previous rulings of this forum," the Agency

presented a prima facie case establishing the elements of the violations charged. Respondent employed workers to perform labor for another in the production and harvesting of Christmas trees while not licensed to do so in 1993 and 1994. In 1994, he failed to timely pay some of those workers. In 1994, he maintained a farmworker camp which was not registered with the commissioner. Respondent had prior knowledge of the requirements of Oregon law regarding farm labor contracting and farmworker camp operation. Respondent was clearly the principal in the enterprise, aided by his two sons. The forum finds no grounds upon which to mitigate or reduce the penalties sought by the Agency in the amended Notice of Intent.

#### ORDER

NOW, THEREFORE, as authorized by ORS 658.453, Respondent ODON SALINAS MORFIN, aka ODON SALINAS, is hereby ordered to deliver to the Bureau of Labor and Industries, Fiscal Services Office Suite 1010, 800 NE Oregon Street # 32, Portland, Oregon 97232-2109, a certified check payable to the Bureau of Labor and Industries in the amount of SIXTY FIVE THOUSAND DOLLARS (\$65,000), plus any interest thereon which accrues at the annual rate of nine percent, between a date ten days after the issuance of this Final Order and the date said Respondent complies herewith. This assessment is made as civil penalty against said Respondent as follows: for eight violations of ORS 658.410, \$15,000 (\$1,000 for the first violation, \$2,000 for each

subsequent violation); for one violation of ORS 658.750(1), \$2,000; for 24 violations of ORS 658.440(1)(c), \$48,000 (\$2,000 per violation); total \$65,000.

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**In the Matter of  
MANUEL M. GALAN,  
aka Manuel G. Mosqueda, dba  
Campesino # 95, Respondent.**

Case Number 19-97  
Final Order of the Commissioner  
Jack Roberts  
Issued July 2, 1997.

#### SYNOPSIS

Respondent, an unlicensed farm labor contractor, recruited and transported workers in Oregon for herbicide application in California. Finding that Respondent acted as a farm labor contractor without an Oregon license, failed to provide at least three workers with required disclosure statements, and failed to execute required written agreements with at least three workers, the Commissioner imposed civil penalties of \$8,000. ORS 658.405(1); 658.407(3); 658.410(1); 658.415(1); 658.417(1); 658.440(1)(f) and (g); 658.453(1)(a), (c), and (e); 659.501; OAR 839-15-004(8)(c).

=====

The above-entitled contested case came on regularly for hearing before

\* ORS 183.025 to 183.725, specifically ORS 183.415(5) and (6).

\*\* See *In the Matter of John Cowdrey*, 5 BOLI 291, 298 (1986); *In the Matter of Art Farbee*, 5 BOLI 268, 276 (1986); *In the Matter of Judith Wilson*, 5

Warner W. Gregg, designated as Administrative Law Judge (ALJ) by Jack Roberts, Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was held on December 10 and 11, 1996, in a conference room of the Oregon Department of Transportation, 63055 N. Highway 97, Bend, Oregon. The Bureau of Labor and Industries (the Agency) was represented by Linda Lohr, an employee of the Agency. Manuel M. Galan, aka Manuel G. Mosqueda (Respondent), was present for a portion of the hearing on December 10 and was represented by Anthony V. Albertazzi, Attorney at Law, Bend, who left the hearing in the afternoon of December 10, 1996. Walter Armstrong, Certified Interpreter, Madras, appointed by the forum and under proper affirmation, acted as interpreter for the Spanish speaking witnesses. Agency Compliance Specialist (CS) Lesley Laing assisted with documents and telephone facilities in Medford.

The Agency called as witnesses: forest workers Jose Baltazar Escalante and Jesus Uribe Garcia (both by telephone from Medford); Agency Compliance Supervisor Nedra Cunningham; Agency CS Victor Muniz; and Agency CS Raul Ramirez. Respondent called no witnesses.

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

#### FINDINGS OF FACT – PROCEDURAL

1) On August 8, 1996, the Agency issued a "Notice Of Intent To Assess Civil Penalties" (Notice of Intent) to Respondent. The Notice of Intent informed Respondent as follows:

"THIS WILL NOTIFY YOU that the Commissioner intends to assess civil penalties against Manuel M. Galan aka Manuel G. Mosqueda, dba Campesino # 95 [Respondent] in the amount of \$8,000.00, pursuant to ORS 658.453.

"THE BASIS FOR CIVIL PENALTIES IS AS FOLLOWS:

"1. Acting As A Farm/Forest Labor Contractor Without A Valid License Or Indorsement Issued By The Commissioner. (One Violation) On or about July 1 and July 2, 1996, [Respondent] recruited, solicited, supplied, or employed workers in Oregon to perform labor upon [Respondent]'s forestation or reforestation contract on the Stanislaus National Forest at Sonora, California, USFS Contract No. 53-9A55-6-1S030. At all times material herein, [Respondent] did not possess a valid farm/forest labor contractor license, in violation of ORS 658.410, 658.415 and 658.417. Civil Penalty Assessed: \$2,000.00.

"2. Failure To Furnish Each Worker At The Time Of Hiring, Recruiting, Soliciting or Supplying, Whichever Occurs First, A Written Statement In The English Language And Any Other Language Used By The Contractor To

Communicate With Workers Containing The Terms And Conditions Of Employment And A Statement Of The Workers' Rights and Remedies. (Three Violations) [Respondent], on or about July 1 and July 2, 1996, solicited, recruited, hired and transported at least two workers in Madras, Oregon and at least one worker in Medford, Oregon to perform labor upon [Respondent]'s forestation contract in Sonora, California, USFS Contract No. 53-9A55-6-1S030, and failed to furnish each worker a written statement in English and Spanish containing the terms and conditions of employment and statement of the workers' rights and remedies, in violation of ORS 658.440(1)(f). Civil Penalty Assessed: \$3,000.

"3. Failure To Execute A Written Agreement Containing The Terms And Conditions Of Employment For Each Worker At The Time Of Hire Or Prior To Work Being Performed. (Three violations) [Respondent], on or about July 1 and July 2, 1996, solicited, recruited, hired and transported at least two workers in Madras, Oregon and at least one worker in Medford, Oregon to perform labor upon [Respondent]'s forestation contract in Sonora, California, USFS Contract No. 53-9A55-6-1S030, and failed to execute prior to hire or prior to work being performed, a written agreement between [Respondent] and each worker in English and Spanish containing the terms and conditions of employment, in violation of

ORS 658.440(1)(g). Civil Penalty Assessed: \$3,000.00.

"THE BASIS FOR ENHANCED PENALTIES IS AS FOLLOWS:

"[Respondent] has been unlicensed since 1992 and from March through July, 1994, acted as an unlicensed contractor in violation of a Consent Order executed by [Respondent] on March 11, 1994. The magnitude and seriousness of the violations and [Respondent]'s knowledge of the licensing requirement for the activities [Respondent] is engaged in warrants enhanced civil penalties."

The Notice of Intent was served on Respondent personally at 815 NW 9th Street, Redmond, Oregon, by the Deschutes County Sheriff on September 2, 1996.

2) On September 10, 1996, Respondent through counsel answered the Notice of Intent as follows (eliminating caption and cause):

"REQUEST FOR HEARING

"Employer Manuel M. Galan, aka Manuel G. Mosqueda, dba Campesino # 95 by and through its attorney, Anthony V. Albertazzi, hereby requests a contested case hearing in the above-referenced matter and answers the allegations in the Notice of intent to Assess Civil Penalties as follows:

"ANSWER TO PARAGRAPH 1

"Employer denies recruiting, soliciting, employing or supplying workers in Oregon to perform labor for USFS Contract number 53-9A55-6-1S030.

"ANSWER TO PARAGRAPH 2

"Employer alleges that it furnished each worker on USFS Contract No. 53-9A55-6-1S030 with a written statement complying with ORS 658.440(1)(f).

"ANSWER TO PARAGRAPH 3

"Employer alleges that it complied with ORS 658.440(1)(g) with respect to all workers on USFS Contract No. 53-9A55-6-1S030.

"EMPLOYER'S AFFIRMATIVE DEFENSE

"Employer alleges that ORS 658.410, 658.415 and BOLI's application thereof violate the Commerce Clause of the United States Constitution.

"Employer alleges that the procedure being used herein to adjudicate its rights amounts to a denial [of] due process of law in violation of the Constitution of the United States and the Constitution of the State of Oregon because the adjudicating party is not neutral."

3) The Agency requested a hearing date. On October 18, 1996, the Hearings Unit issued to Respondent and the Agency a Notice of Hearing, which set forth the time and place of the requested hearing and the designated ALJ, together with the following:

- a) a Notice of Contested Case Rights and Procedures containing the information required by ORS 183.413, and
- b) a complete copy of the Agency's administrative rules regarding the contested case process — OAR 839-50-000 through 839-50-420.

4) On November 19, 1996, the ALJ issued a discovery order pursuant to OAR 839-50-200 and 839-50-210 directing each participant to submit a summary of the case to be due December 2, 1996.

5) On December 2, 1996, the Agency filed its summary of the case containing a list of witnesses to be called at hearing and copies of 19 exhibits to be offered, and on December 4, 1996, the Agency filed a supplement to its summary of the case containing two additional documents to be offered. Respondent failed to file a summary of the case.

6) On December 9, 1996, the forum received by fax Respondent's motion transmitted December 6, 1996,<sup>1</sup> at 6:01 p.m. and signed and dated by counsel on December 6, 1996, requesting a postponement of the hearing scheduled for December 10, 1996, in Bend. The motion was based on a recitation of

1. Respondent's scheduled appearance<sup>2</sup> at a hearing before the Federal Board of Contract Appeals for the United States Department of Agriculture on December 11, 1996;
2. Receipt by Respondent on December 5, 1996, of discovery requested on November 19, 1996;
3. Inadequacy of discovery responses, necessitating a motion to compel;
4. The motion to compel would include names, addresses, telephone numbers, and substance of

testimony of Agency witnesses for the hearing; Agency telephone bill; names and positions of Agency employees who prepared and/or advised in preparation of the charging document; disclosure of any communications by Agency personnel or witnesses to be called to any Agency ALJ, citing ORCP Rule 36(B)(1);

5. Hearing without the requested discovery would prejudice Respondent unfairly.

Respondent requested that the hearing "be continued until such time as discovery issues has [sic] been resolved."

7) On December 9, 1996, the ALJ issued an order denying postponement providing in part:

"The USDA Board of Contract Appeals letter "Notice of Hearing" is dated November 22, 1996, at Washington, D.C. and calls for hearing at 9 a.m. December 11, 1996, in Seattle, Washington. A letter from Seattle attorney Mark Walters to Respondent's counsel of record herein, dated December 5, 1996, states 'It is imperative that Mr. Galan and his witnesses be in Seattle no later than December 10, 1996 to assist in the preparation of Staff, Inc.'s case.'

"The files and records of this proceeding disclose that on October 18, 1996, a Notice of Hearing was issued by this forum for hearing on December 10, 1996. On November 19, 1996, a routine Discovery Order pursuant to OAR 839-50-210(1)(a) was issued to the participants requiring the filing

of case summaries on December 2, 1996. The Agency timely filed its case summary on December 2 and a supplement thereto on December 4. Respondent did not file a Case Summary, timely or otherwise. The hearings file reveals no prior request for discovery filed by Respondent for adjudication by this forum.

"This proceeding is not governed by the Oregon Rules of Civil Procedure. It is a contested case proceeding under the Oregon Administrative Procedures Act, ORS chapter 183. Procedure in this matter is governed by Oregon Administrative Rules (OAR) 839-50-000, *et seq.* The Agency, the Bureau of Labor and Industries, is not a "party" under the statute and those rules. A copy of those rules was served on Respondent.

"As a matter of policy, this forum will defer to other matters scheduled by a respondent or a respondent's counsel for the same date as a hearing before this forum provided the conflicting matter was docketed prior to the hearing before this forum. The showing here is to the contrary, and there is no indication of any attempt by Respondent to reset or postpone the USDA matter. The forum infers from the fact that Respondent made no attempt to comply with the existing Discovery Order by filing a Case Summary or a motion for discovery on or before the due date of December 2, 1996, that Respondent did not intend to comply therewith.

<sup>1</sup> Unaccountably, the cover letter bears the date "August 29, 1996."

<sup>2</sup> This forum acknowledges that Respondent herein is a principle in Staff, Inc., a corporation involved in the USDA contract appeal.

"Respondent's motion to postpone the hearing scheduled herein for December 10, 1996, at 9 a.m. in Bend, said motion being received in a closed office on Friday, December 6, 1996, and actually received by the ALJ at 8:30 a.m. on December 9, 1996, is denied as being untimely and because Respondent has failed to demonstrate acceptable good cause for the request. OAR 839-50-150(5).

"Hearing will proceed as scheduled at 9 a.m. December 10, 1996. At that time, I will hear any objections Respondent may have to proceeding."

That order was transmitted by fax to Respondent's counsel at approximately noon, December 9, 1996.

8) At the commencement of the hearing, Respondent's counsel stated that Respondent had received the Notice of Contested Case Rights and Procedures and had no questions about it.

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

10) The hearing convened at 9:20 a.m., Tuesday, December 10, 1996. Respondent and his counsel were present. Respondent's counsel renewed the motion for postponement. The ALJ's ruling at hearing on the motion is set out in a separate section of this Order.

11) At 11 a.m. on December 10, 1996, Respondent left the hearing with the announced intention of driving to

Seattle. At 11:20 a.m., the ALJ adjourned the hearing until 1:00 p.m. to accommodate the arrival of the interpreter. Respondent's counsel's office telephoned the ALJ at 1:00 p.m. to advise that counsel was delayed in court. He arrived in the hearing room at approximately 1:20 p.m.

12) The Agency called witnesses Jose Baltazar Escalante (Baltazar) and Jesus Uribe Garcia (Garcia), who testified by telephone from Medford through interpreter Armstrong. Respondent's counsel cross-examined both witnesses through the interpreter.

13) Following the testimony of the Spanish-speaking witnesses, Respondent's counsel announced that he was leaving the hearing to obtain impeaching testimony of other witnesses interviewed by CS Ramirez for presentation on the following morning, December 11, 1996, and that he would waive cross-examination of anticipated Agency witnesses Hatfield, Muniz, and Cunningham. The ALJ suggested that the Agency could present those witnesses on December 11, 1996, in order to accord counsel the opportunity for cross-examination, but counsel declined. Counsel was advised on the record that the proceedings would reconvene in the same location at 9 a.m., December 11, 1996. On the record, counsel left the hearing voluntarily for the avowed purpose of obtaining witnesses. The Agency then continued its presentation of witnesses, during which the ALJ admitted certain Agency exhibits provisionally, subject to Respondent's record objection the following day. The ALJ adjourned the proceedings at 4:10 p.m. on the

afternoon of December 10 until 9 a.m., December 11, 1996.

14) The Agency and the ALJ were present and ready to proceed at 9 a.m., December 11, 1996. Neither Respondent nor his counsel were present. The ALJ determined to wait 30 minutes, pursuant to the rules of the forum. At 9:31 a.m., the ALJ received a telephone call from Respondent's counsel's office advising that counsel was "tied up in court," would not attend, and would submit a written closing argument.

15) The hearing was reconvened at 9:33 a.m., December 11, 1996, and the ALJ put the circumstances on the record and admitted without reservation those exhibits admitted provisionally the day before. The Agency completed its presentation and closing remarks. No written closing or other communication was received from Respondent's counsel or from Respondent between the adjournment of the hearing on December 11, 1996, and the issuance of the proposed order on February 24, 1997.

16) The proposed order, containing an exceptions notice, was issued on February 24, 1997. Exceptions were due March 6, 1997. Respondent, acting pro se, sought and received two extensions of time in which to file exceptions, which were received. The Agency moved to disregard the exceptions as untimely. On June 6, 1996, the ALJ found that Respondent's exceptions were timely. They are dealt with in the Opinion section of this Order.

#### RULING ON MOTION

At hearing, Respondent's counsel renewed portions of his motion for postponement, alleging that Respondent would be prejudiced unless the Agency were compelled to provide discovery of the following, which the Agency had allegedly failed or refused to make available:

- 1) logs of telephone conversations regarding this case made within 60 days prior to the date of the Notice of Intent;
- 2) a copy of the Agency's telephone bill for a period of 60 days prior to the date of the Notice of Intent;
- 3) copies of position descriptions of Agency personnel doing the investigation of the case;
- 4) identification, substance of testimony, and location of Agency witnesses;
- 5) disclosure of any ex parte communications<sup>3</sup> made by Agency personnel to any ALJ employed by the Agency concerning the case.

Respondent's counsel requested that the hearing be postponed until the information was provided or, in the alternative, that the hearing be held open until the information was provided.

The Agency opposed any postponement, responding to Respondent's motions as follows:

- 1) The Agency provided a complete copy of the Agency's investigative file in this case; other than the telephone conversations noted

<sup>3</sup> Counsel and the ALJ agreed that "ex parte communication" meant any discussion by an Agency employee with the decision maker about the facts in issue in this case.

in that file, there were no telephone logs in existence;

2) A copy of the Agency's telephone bill for a period of 60 days prior to the date of the Notice of Intent was not relevant, providing it would be burdensome, and it would contain no information regarding the identity of callers, the identity of persons called, or the substance of conversations;

3) A copy of Compliance Specialist Ramirez's position description was supplied together with the information that it was identical to that of Mr. Muniz, whose position description could not be readily located, and the position descriptions were in any event not relevant;

4) The Agency identified its witnesses and the area of their testimony in its case summary, pursuant to the hearings rules;

5) The Case Presenter had advised counsel that, to her knowledge, no ex parte contacts had taken place.

Respondent's counsel argued that the information was needed to facilitate discovery for purposes of impeachment and to determine how much investigation was done before bringing the charges, which counsel alleged were brought in bad faith. Counsel suggested that the case was unusual and was handled improperly and that the position descriptions would include the "legal" description of the employee's position and level of competence.

The ALJ determined that Respondent could obtain only documents that existed, and that no logs of the type sought existed. Noting that the Agency's offices were in several geographic locations, each of which had multiple telephone stations, each accessible to several employees, and that the bill would reflect only numbers<sup>4</sup> and not the subject matter of conversations, the ALJ ruled that using the telephone bill was not an efficacious method of discovery and that its production would be burdensome. The ALJ determined that the position descriptions were not relevant absent a showing that the investigators did something unlawful or totally outside the scope of investigating farm/forest labor practices. The ALJ noted that the Agency complied with the rules, providing the identity of Agency witnesses in its case summary and, in addition, the Agency supplied Respondent with a copy of its investigative file, which included the statement and location of each witness. The ALJ stated on the record that as the decision maker, he was unaware of any ex parte conversation about this case; the Case Presenter stated on the record that she knew of no ex parte conversation with any Agency ALJ about this case and that the Agency investigators had denied having any such conversations. Based on these findings, the ALJ denied the postponement. That ruling is confirmed.

#### FINDINGS OF FACT – THE MERITS

1) At times material herein, Respondent, using the names Manuel Galan Mosqueda and Manuel

Mosqueda Galan, did business under the assumed business name of Cam-pesino #95 at 815 NW 9th Street, Redmond, Oregon.

2) On June 14, 1996, as a result of solicitation number R5-16-96-31 of April 15, 1996, the Forest Service of the United States Department of Agriculture (USFS) awarded contract number 53-9A55-6-1S030 to Respondent for the application of herbicide on 727 acres of the Groveland Ranger District, Stanislaus National Forest, Sonora, California. Contract time, that is, the date that work could begin and the date from which progress and completion requirements were to be measured was June 24, 1996.

3) At times material herein, Respondent, whose prior company had been licensed in Oregon, had no Oregon farm/forest labor contractor license.<sup>5</sup>

4) Respondent, with a crew of from 17 to 19 workers, began work on contract number 53-9A55-6-1S030 on July 3, 1996.

5) At the time of the hearing, Raul Ramirez had been employed in the Agency Farm Labor Unit (FLU) in Medford for over two and one half years. Acting on information received from Thad Waterbury, Contracting Officer with the USFS Stanislaus National Forest, Ramirez sought out for interview workers who had been employed

by Respondent on the Groveland Ranger District contract. He obtained statements in Medford from Jesus Uribe Garcia<sup>6</sup> on July 23, 1996, and from Jose Baltazar Escalante<sup>7</sup> on July 24, 1996.

6) In July 1996, Jose Baltazar resided at 412 Manzanita, Medford, Oregon. At 4 p.m. on July 1, he left that address to be driven to Sonora, California, by Victor De Leon to work for Respondent applying herbicides. He worked on the Groveland Ranger District contract from July 3 through July 5, 1996.

7) In July 1996, Jesus Garcia resided at 833 W. Jackson, #14, Medford, Oregon. At 4 p.m. on July 1, he left the address of his friend Baltazar to be driven to Sonora, California, by Victor De Leon to work for Respondent applying herbicides. He worked on the Groveland Ranger District contract from July 3 through July 5, 1996.

8) Garcia signed a document in California written in Spanish. In English the document reads as follows:

"Campesino '95  
"Manuel Galan, Owner  
PO Box 1529  
Redmond OR 97756  
Tel/Fax: (503) 548-2358

6/30/96

<sup>5</sup> As used herein, the term "farm/forest labor contractor license" means a farm labor contractor's license with forestation or reforestation of lands indorsement required by ORS 658.410, 658.415, and 658.417.

<sup>6</sup> This witness is listed on Respondent's payroll report as "Jesus Uribe," but signed US Department of Justice, Immigration and Naturalization Service Form I-9 (INS form I-9) as "Jesus Uribe Garcia," with the same social security number. He testified as Garcia.

<sup>7</sup> This witness testified that he is generally known as Jose Baltazar.

<sup>4</sup> In addition, the bill would show only toll calls; it would not have a record of intercom calls within one office location or of local calls.

"On June 30, 1996, I was employed by a supervisor of the Campesino #95 company. The supervisor by the name of Victor De Leon has informed us that our job consisted in spraying chemicals in Sonora, California. The minimum salary for this will be \$10.23 per hour plus 90 cents of extra benefits. The documents for work has been filled out prior to starting to work. They explained to me that all loans will be deducted from my salary."

Garcia signed as laborer and Victor De Leon signed as supervisor ("El Mayordomo").

9) Victor De Leon was a foreman for Respondent on the Groveland Ranger District contract number 53-9A55-6-1S030 in July 1996.

10) At the time of the hearing, Victor Muniz had been employed in the FLU in Salem from May to December 1996. On July 23, 1996, at the request of his co-worker Ramirez, he obtained a statement at 23 SW Depot Road, # 42, Madras, Oregon, from Jose Gilberto Arreola Sanchez,<sup>8</sup> a worker who had been employed by Respondent on the Groveland Ranger District contract.

11) On or about July 2, 1996, Arreola left the Madras address to be driven to Sonora, California, by Respondent to work for Respondent applying herbicides. He worked on the Groveland Ranger District contract from July 3 through July 5, 1996. He returned home from Sonora in a car with Respondent.

12) Form WH-151 is an Agency form headed "Rights of Workers." It is intended to be receipted for by each worker before each job begins and explains the rights of workers and responsibilities of farm labor contractors in Oregon. It explains that contractors must be licensed, provide written agreements and notices of rights to workers, have a bond, pay and give notice of minimum wage, and explains that workers have legal rights, may make a claim for unpaid wages or for on-the-job injuries, may earn unemployment benefits, and are protected against discrimination. It includes the address of each Agency office. Form WH-151s is the same form in Spanish. A contractor furnishing this form or its equivalent is considered to be in compliance with ORS 658.440(1)(f).

13) Form WH-153 is an Agency form headed "Agreement Between Contractor and Workers (To be executed by both parties)." It is intended to memorialize between the labor contractor and the worker such items as rate of pay, bonus, personal loans, housing, health and day care services, employment conditions, equipment and clothing, the existence of any labor dispute, the owner of the land, any other working conditions, and acknowledgment of the WH-151 rights and remedies form and provisions of the federal service contract act, if applicable. It is intended to be signed by each worker and the contractor before each job begins. Form WH-153s is the same form in Spanish. A contractor furnishing this form or its equivalent is

<sup>8</sup> This worker is listed on Respondent's payroll report as "Jose J. Arreola," but signed INS form I-9 as "Gilberto Arreola," with the same social security number.

considered to be in compliance with ORS 658.440(1)(g).

14) Neither Respondent nor Victor De Leon furnished Garcia, Baltazar, or Arreola with a WH-151 form or its equivalent in connection with the employment in Sonora, California, in July 1996.

15) Neither Respondent nor Victor De Leon furnished Baltazar or Arreola with a WH-153 form or its equivalent in connection with the employment in Sonora, California, in July 1996. The form signed by Garcia was not equivalent to a WH-153.

16) At times material herein, Nedra Cunningham was a Compliance Supervisor in the FLU. She supervised seven compliance specialists in investigation of farm labor and wage claim matters, including Ramirez and Muniz.

17) Pursuant to Oregon statute, the Commissioner of the Bureau of Labor and Industries has adopted Oregon Administrative Rules (OAR) 839-15-000 to 839-15-610 regulating farm and forest labor contractors.

18) Prior to July 1, 1996, the activities of forest fire suppression by contract crew, application of big game repellent by contract crew, herbicide or pesticide application in the forest by contract crew, gopher baiting, and gopher trapping were among activities that were exempted from the definition of forestation and reforestation activities requiring a farm/forest labor contractor license.

19) In January 1996, Cunningham was present at a meeting which included Respondent and Commissioner Roberts. At that time, the

Commissioner informed Respondent that the Agency intended to propose changing the farm labor contractor rules to include the activities of forest fire suppression by contract crew, application of big game repellent by contract crew, herbicide or pesticide application in the forest by contract crew, gopher baiting, and gopher trapping as licensed forestation activities.

20) OAR 839-15-004(8)(c) defines in part the activities constituting the "forestation or reforestation of lands." Pursuant to statute, the Agency gave notice of rules hearings to be held in March 1996 regarding a proposed rule change intended to add activities related to the forestation or reforestation of lands in OAR 839-15-004(8)(c), with the result that persons engaged in such activities would become subject to the requirements of the Oregon farm/forest labor contracting law.

21) In a summary of proposed changes published in March 1996 and distributed at each rules hearing, the Agency gave notice that the change to OAR 839-15-004(8)(c) was a major substantive change which, if adopted, might result in licensing requirements for persons not currently licensed.

22) The summary of proposed changes was available at rules hearings held in Bend on March 26, 1996, and in Salem on March 28, 1996. Respondent attended both hearings and testified at both hearings.

23) Persons attending rules hearings were notified of the final Agency action regarding the rules involved. On or about May 30, 1996, the Agency transmitted a memorandum notice to "Interested Parties" regarding the adoption of rules relating to farm and

forest labor contractors which contained the following, in pertinent part:

"Effective July 1, 1996, administrative rules relating to farm and forest labor contractors will be amended as follows:

\*\*\*\*\*

"The following activities by a contractor have been added to the definition of activities relating to the forestation and reforestation of lands. Contractors performing these activities will be required to obtain a farm/forest labor contractor's license as of July 1, 1996:

- Forest fire suppression by contract crew
- Application of big game repellent by contract crew
- Herbicide and pesticide application by contract crew
- Gopher baiting and gopher trapping

\*\*\*\*\*

"Copies of the amended rules may be obtained by calling (503) 731-4742." (Emphasis in original.)

Respondent was among those persons to whom the memorandum notice was sent.

24) As part of her duties, Cunningham reviewed the investigative file developed by Ramirez and Muniz in this case. Included in the file was a copy of the "Campesino '95" payroll report dated July 9, 1996, identified by the notations "R5-16-96-31," and "Stanislaus N.F.," and signed by Respondent, which detailed worker hours and earnings for July 3, 4, and 5, 1996. Also included was a copy of a computerized check register from Barrett Business

Services, Inc., for the week ending July 7, 1996, noted "Customer: 305788 Campesino 95" and listing the hours, rate, pay, deductions, and social security numbers of the persons paid in connection with the Campesino '95 payroll report. The copy of the payroll report and the copy of the check register were requested by the Agency from Barrett Business Services, Inc. and received in the Agency's Salem office on August 8, 1996.

#### ULTIMATE FINDINGS OF FACT

1) At all times material herein, Respondent did not possess a valid Oregon farm/forest labor contractor license.

2) On or about July 2, 1996, Respondent recruited, transported, and employed at least three workers in Oregon to perform labor upon Respondent's forestation or reforestation contract USFS # 53-9A55-6-1S030 on the Stanislaus National Forest at Sonora, California.

3) On or about July 2, 1996, in connection with contract USFS # 53-9A55-6-1S030 at Sonora, California, Respondent failed to furnish to each of the three Oregon workers a written statement in English and Spanish containing those terms and conditions of employment required by Oregon statute and a statement of the workers' rights and remedies.

4) On or about July 2, 1996, in connection with contract USFS # 53-9A55-6-1S030 at Sonora, California, Respondent failed to execute at the time of hire or prior to work being performed, a written agreement between himself and each of the three Oregon workers in English and Spanish

containing those terms and conditions of employment required by Oregon statute.

#### CONCLUSIONS OF LAW

1) At all times material herein, ORS 658.407 provided in pertinent part:

"The Commissioner of the Bureau of Labor and Industries shall administer and enforce ORS 658.405 to 658.503 and 658.803, and in doing so shall:

\*\*\*\*\*

"(3) Adopt appropriate rules to administer ORS 658.405 to 658.503 and 658.830."

A times material herein, ORS 658.501 provided:

"ORS 658.405 to 658.503 and 658.830 apply to all transactions, acts and omissions of farm labor contractors and users of farm labor contractors that are within the constitutional power of the state to regulate, and not preempted by federal law, including but not limited to the recruitment of workers in this state to perform work outside this state, the recruitment of workers outside of this state to perform work in whole or in part within this state, \*\*\* the transportation of workers through this state and the payment, terms and conditions, disclosure and record keeping required with respect to work performed outside this state by workers recruited in this state."

The Commissioner of the Bureau of Labor and Industries has jurisdiction over the persons and subject matter herein.

2) At all times material herein, ORS 658.405 provided in pertinent part:

"As used in ORS 658.405 to 648.503 \* \* \*, unless the context requires otherwise:

"(1) 'Farm labor contractor' means any person who, for an agreed remuneration or rate of pay, recruits, solicits, supplies or employs workers to perform labor for another to work in forestation or reforestation of lands, including but not limited to the planting, transplanting, tubing, precommercial thinning and thinning of trees and seedlings, the clearing, piling and disposal of brush and slash and other related activities \* \* \*."

At all times material herein, ORS 658.410 provided in pertinent part:

"(1) \*\*\* No person shall act as a farm labor contractor with regard to the forestation or reforestation of lands unless the person possesses a valid farm labor contractor license with the indorsement required by ORS 658.417 (1)."

At all times material herein, ORS 658.415 provided in pertinent part:

"(1) No person shall act as a farm labor contractor unless the person has first been licensed by the Commissioner of the Bureau of Labor and Industries pursuant to ORS 658.405 to 658.503 and 658.830."

At all times material herein, ORS 658.417 provided in pertinent part:

"In addition to the regulation otherwise imposed upon farm labor contractors pursuant to 658.405 to 658.503 and 658.830, a person

who acts as a farm labor contractor with regard to the forestation or reforestation of lands shall:

"(1) Obtain a special indorsement from the Commissioner of the Bureau of Labor and Industries on the license required by ORS 658.410 that authorizes the person to act as a farm labor contractor with regard to the forestation or reforestation of lands."

Effective July 1, 1996, OAR 839-15-004(8) provided in pertinent part:

"Forestation or reforestation of lands' includes, but is not limited to:

\*\*\*\*\*

"(c) Other activities related to the forestation or reforestation of lands including, but not limited to, tree shading, pinning, tagging or staking; fire trail construction and maintenance; slash burning and mop up; mulching of tree seedlings; forest fire suppression by contract crew; application of big game repellent by contract crew; herbicide or pesticide application in the forest by contract crew; gopher baiting; gopher trapping and any activity related to the growth of trees and tree seedlings and the disposal of debris from the land."

As of July 1, 1996, the application of herbicide in the forest by Respondent's contract crew was an activity related to the forestation or reforestation of lands, and was within the statutory definition of forestation or reforestation of lands. In July 1996, Respondent recruited, transported, and employed at least three workers in Oregon to perform labor for another to work in the

forestation or reforestation of lands, and thereby acted as a farm labor contractor with regard to the forestation or reforestation of lands without having a farm labor contractor's license or a special indorsement authorizing him to so act and violated ORS 658.410(1) and 658.417(1).

3) At all times material herein, ORS 658.440 provided in pertinent part:

"(1) Each person acting as a farm labor contractor shall:

\*\*\*\*\*

"(f) Furnish to each worker, at the time of hiring, recruiting, soliciting or supplying, whichever occurs first, a written statement in the English language and any other language used by the farm labor contractor to communicate with the workers that contains a description of:

"(A) The method of computing the rate of compensation.

"(B) The terms and conditions of any bonus offered, including the manner of determining when the bonus is earned.

"(C) The terms and conditions of any loan made to the worker.

"(D) The conditions of any housing, health and child care services to be provided.

"(E) The terms and conditions of employment, including the approximate length of season or period of employment and the approximate starting and ending dates thereof.

"(F) The terms and conditions under which the worker is furnished clothing or equipment.

"(G) The name and address of the owner of all operations where the worker will be working as a result of being recruited, solicited, supplied or employed by the farm labor contractor.

"(H) The existence of a labor dispute at the worksite:

"(I) The worker's rights and remedies under ORS chapters 654 and 656, ORS 658.405 to 658.503 and 658.830, the Service Contract Act (41 U.S.C. §§ 351-401) and any other such law specified by the Commissioner of the Bureau of Labor and Industries, in plain and simple language in a form specified by the commissioner.

"(g) At the time of hiring and prior to the worker performing any work for the farm labor contractor, execute a written agreement between the worker and the farm labor contractor containing the terms and conditions described in paragraph (f) (A) to (I) of this subsection. The written agreement shall be in the English language and any other language used by the farm labor contractor to communicate with the workers."

By failing to furnish to at least three workers in Oregon at the time they were recruited in July 1996 with the written information contained in form WH-151, or its equivalent, Respondent violated ORS 658.440(1)(f) three times.

4) At the time of hiring and prior to the workers performing any work in July 1996 Respondent failed to execute a written agreement between himself and each of at least three workers such as form WH-153 or its equivalent and violated ORS 658.440(1)(g) three times.

5) At all times material herein, ORS 658.453 provided in pertinent part:

"(1) In addition to any other penalty provided by law, the Commissioner of the Bureau of Labor and Industries may assess a civil penalty not to exceed \$2,000 for each violation by:

"(a) A farm labor contractor who, without the license required by ORS 658.405 to 658.503 and 658.830, recruits, solicits, supplies or employs a worker.

\*\*\*\*\*

"(c) A farm labor contractor who fails to comply with ORS 658.440(1) \*\*\*.

"(e) A farm labor contractor who fails to comply with ORS 658.417(1) \*\*\*."

The Commissioner of the Bureau of Labor and Industries is authorized to impose civil penalties for the violations found herein, and the penalties assessed in the Order below is a proper exercise of that authority.

#### OPINION

At the time Respondent bid on and obtained USFS contract # 53-9A55-6-1S030, the application of herbicide in the forest by a contract crew was not an activity related to the forestation or reforestation of lands. But by the time Respondent actually started work, and

by the time he recruited workers in Oregon, the provisions of OAR 839-15-004(8) had become effective. The evidence clearly showed that the workers were recruited and transported in Oregon to California on or after July 1, 1996, and that work began on July 3, 1996. Under such circumstances, the Farm Labor Contractors Act, (ORS 658.405 to 658.503 and 658.830) applied to Respondent and the workers. ORS 658.501; *In the Matter of Manuel Galan*, 15 BOLI 106, 130 (1996), *aff'd without opinion*, *Staff, Inc. v. Bureau of Labor and Industries*, 148 Or App 450, 939 P2d 174 (1997); *Perez v. Coast to Coast Reforestation Corp.*, 100 Or App 115, 785 P2d 365 (1990); *In the Matter of Leonard Williams*, 8 BOLI 57, 73 (1989).

By its terms, ORS 658.501 applies "to all transactions, acts and omissions of farm labor contractors \* \* \* including but not limited to the recruitment of workers in this state to perform work outside this state," as well as "the transportation of workers through this state and the payment, terms and conditions, disclosure and record keeping required with respect to work performed outside this state by workers recruited in this state." Thus, because these workers were recruited and transported in Oregon for work outside the state, all of the requirements of the Farm Labor Contractors Act applied, including the rules promulgated thereunder and including, as of July 1, 1996, the language of OAR 839-15-004(8) effective that date.

The application of herbicide in the forest by Respondent's contract crew was a forestation or reforestation activity for which Respondent had no

license. There was no evidence that Respondent provided to any of the three workers a written statement in any language containing the information required by ORS 658.440(1)(f). There was no evidence that at the time of hire of the three workers and prior to any of them performing any work, Respondent executed a written agreement with them, in any language, containing the terms and conditions required by ORS 658.440(1)(g). While the document in Spanish signed by Garcia contained some pay information, it was not an adequate equivalent for WH-153. Although it bore a date of June 30, 1996, it was signed after that date.

It was uncontroverted that Respondent had knowledge that herbicide application would become a regulated activity on July 1, 1996, and that he had prior knowledge of the requirements of the Farm Labor Contractors Act. The penalties assessed are appropriate.

#### Respondent's Exceptions

Respondent excepted to the Proposed Order on several bases:

"1. The refusal of the Administrative Law judge to grant the motion to postpone was unreasonable and not in the interest of justice, infringed upon Respondent's constitutional right to be present at his own hearing to confront and cross-examine witnesses, testify on his own behalf, and adequately defend himself."

The ALJ's order denying postponement was based on the record at the time. On December 9, 1996 (and, indeed, on December 6, 1996), that

record included, in addition to the Notice of Intent and Respondent's answer:

- October 18, 1996, Notice of Hearing for hearing on December 10, 1996;
- November 19, 1996, ALJ order requiring case summaries due December 2, 1996.
- December 2, 1996, Agency case summary containing a list of witnesses and copies of 19 documents to be offered at hearing.
- December 4, 1996, supplement to Agency case summary.

Respondent had failed to file a summary of the case. There was no hint or suggestion on the record that Respondent might have a conflicting proceeding or that Respondent was alleging difficulty with discovery. Among the items to be considered by the ALJ on a motion for postponement is the timeliness of the request. In this instance, the ALJ found that the request was untimely, arriving as it did in a closed office the weekend before a Tuesday hearing. One paragraph of the motion references the USDA Board of Contract Appeals matter in Seattle December 11, 1996, and two and one half pages involved alleged discovery problems with the Agency in this case. Enclosures to the motion included a copy of USDA's letter notice of the December 11, 1996, hearing, apparently to Staff, Inc.'s Seattle counsel dated November 22, 1996, and a copy of that attorney's letter of December 5, 1996, to Respondent's counsel herein regarding Respondent's attendance in

Seattle. The ALJ may grant a postponement if there is a showing of good cause, that is, that there was an excusable mistake or a circumstance beyond the participant's control. OAR 839-050-0150(5)(a), 839-050-0020(9).<sup>9</sup> Based on the record, the ALJ denied the postponement.

Respondent enclosed further information with his exceptions, including a copy of an October 9, 1996, letter from the USDA Board of Contract Appeals confirming that on October 7, 1996, "The Board advised the parties to hold open December 10 and 11, 1996." Thus, by mid-October, and certainly by the time the Agency's Notice of Intent was served, Respondent was aware of the probability of conflict with the date set by this forum. The record herein reveals no communication or suggestion from Respondent regarding a conflict until the December 6 motion. Respondent's exception is overruled and the ALJ's ruling denying postponement is confirmed.

"2. The changes in OAR 839-15-004(8) did not affect the contract in question as no Oregon activities took place on or after July 1, 1996."

There was credible evidence that workers were recruited in Oregon after July 1, 1996, for an activity that was licensable in Oregon after July 1, 1996. Because Garcia testified that he signed the document quoted in Finding of Fact 8 after he arrived in California in July 1996, the forum has inferred that it must have been signed in July, regardless of the typed date. This exception is overruled.

<sup>9</sup> Formerly, prior to a change in numbering system only, 839-50-150(5)(a), 839-50-020(9).

"3. The propriety of the agency's investigative techniques and authority to investigate are questionable."

Respondent argued that the Agency had no statutory authority at times material to conduct an investigation where there was no complainant. At times material, ORS 658.407 charged that the Commissioner administer and enforce ORS 658.405 to 658.503 and 658.830 and "Investigate \* \* \* controversies between farm labor contractors and their workers with respect to claims arising under ORS 658.415(3)."<sup>10</sup> However, the Commissioner's authority to investigate is not so narrowly limited. Other portions of the chapter give the Commissioner broad authority over applicants and licensees for farm and forest labor activities. In addition to specific protection of worker earnings,<sup>11</sup> the Commissioner is empowered to license farm and forestation contractors<sup>12</sup> and in doing so, may either upon the protest of an individual or on the Commissioner's own motion, investigate an applicant's character and proposed method of operation,<sup>13</sup> revoke, suspend or refuse to renew an existing license,<sup>14</sup> and impose civil penalties for violations.<sup>15</sup> In addition, the Commissioner is generally charged to "cause to be enforced" all laws protecting employees.<sup>16</sup> Thus, Respondent seems to argue that the Commissioner has authority over

applicants and existing licensees, but is unable to investigate abuses by unlicensed operators deliberately ignoring the law. On the contrary, in the context of ORS 659.405 to 658.503 and 658.830, the Commissioner need not wait for or solicit an employee claim in order to initiate an investigation. An agency has such implied authority as is necessary to carry out power expressly granted. *Anderson v. Public Employees Retirement Board*, 134 Or App 422, 895 P2d 1377 (1995). Respondent's exception challenging the authority for the investigation is overruled.

"4. Regarding the charge that statements equivalent to WH-153's were not provided, the ALJ has again ruled contrary to the evidence. The June 30th statements were not provided as a substitute for the WH-153. \* \* \* A complete copy of the payroll records, exactly as provided to the US Department of Labor \* \* \* was provided at the hearing."

Agency exhibits offered and received at hearing consisted of copies of three pages of payroll report forms and three pages of a check register printout (together, A-12) and copies of 19 INS forms I-9 (A-10). Respondent exhibits offered and received at hearing were: a document in Spanish labeled "6/30/96" with signature "Jesus Uribe G." (R-1); a document in

<sup>10</sup> ORS 658.415(3) refers to the bonding of contractors to assure wage payment.

<sup>11</sup> ORS 658.407.

<sup>12</sup> ORS 658.410, 658.415, and 658.417.

<sup>13</sup> ORS 658.420.

<sup>14</sup> ORS 658.435, 658.445.

<sup>15</sup> ORS 658.453.

<sup>16</sup> ORS 651.050.

In the Matter of  
BENN ENTERPRISES, INC.,  
dba Timeout Sports Bar & Restaurant, Respondent.

Case Number 33-97

Final Order of the Commissioner

Jack Roberts

Issued July 2, 1997.

SYNOPSIS

Respondent, which operated a restaurant and bar, did not reduce complainant's work hours or discharge her because of her pregnancy. Although respondent's bar manager requested medical verification of complainant's ability to perform her job as a cocktail waitress after he learned she was pregnant, the Commissioner found that this request did not constitute discrimination because of sex in violation of ORS 659.030(1)(b). ORS 659.029, 659.030(1)(a) and (b); former OAR 839-07-510; OAR 839-007-0510(5), 839-006-0235.

The above-entitled contested case came on regularly for hearing before Douglas A. McKean, designated as Administrative Law Judge by Jack Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on March 18, 1997, in the offices of the Oregon State Employment Department, 119 N. Oakdale, Medford, Oregon.

The Bureau of Labor and Industries (the Agency) was represented by Linda Lohr, an employee of the Agency. Seree M. Allen (Complainant)

Spanish labeled "6/30/96" with signature "Victor Hugo Cruz R." (R-2); an IRS form W-4 with signature "Jose Baltazar" and date of "04-2-96" (R-3); an INS form I-9 signed "Jose Baltazar" with date of "04-02-96" (R-4); BOLI forms WH-151s and WH-153s, each with signature "Jose Baltazar" and each with date of "04-02-96" (R-5). No other payroll records were offered. No BOLI forms WH-151s or WH-153s for contract number 53-9A55-6-1S030 appear in the record. The exception is without merit.

ORDER

NOW, THEREFORE, as authorized by ORS 658.453, Respondent MANUEL M. GALAN, aka Manuel G. Mosqueda, is hereby ordered to deliver to the Bureau of Labor and Industries, Fiscal Services Office Suite 1010, 800 NE Oregon Street # 32, Portland, Oregon 97232-2109, a certified check payable to the Bureau of Labor and Industries in the amount of EIGHT THOUSAND DOLLARS (\$8,000), plus any interest thereon which accrues at the annual rate of nine percent, between a date ten days after the issuance of the Final Order herein and the date Respondent complies therewith. This assessment is made as civil penalty against Respondent as follows: for violation of ORS 658.410 and 658.417, \$2,000; for three violations of ORS 658.440(1)(f), \$3,000 (\$1,000 per violation); and for 3 violations of ORS 658.440(1)(g), \$3,000 (\$1,000 per violation); total \$8,000.

was present throughout the hearing. Benn Enterprises, Inc. (Respondent) was represented by Eugene Piazza, Attorney at Law. Angela Benn, the Respondent's representative, was present throughout the hearing.

The Agency called the following witnesses: Seree Allen, Complainant; and Jane MacNeill, Senior Investigator with the Civil Rights Division of the Agency.

Respondent called the following witnesses: Angela Benn, Respondent's co-owner; Dennis Mortimer, Respondent's manager; and Dave Pidretti, Respondent's former employee.

Administrative exhibits X-1 to X-17, Agency exhibits A-1 to A-5 and A-7, and Respondent exhibits R-1, R-2, R-3, R-5, R-6, R-7 (pp. 1 and 8), R-8, R-12, R-16, R-17, and R-19 to R-22 were offered and received into evidence. Respondent withdrew exhibits R-4 and R-18. Following the receipt of a replacement exhibit from Respondent, the record closed on May 30, 1997.

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

#### FINDINGS OF FACT – PROCEDURAL

1) On September 18, 1995, Complainant filed a verified complaint with the Civil Rights Division of the Agency. She alleged that Respondent discriminated against her because of her sex in that, after her manager learned she

was pregnant, he cut her hours and on August 5, 1995, terminated her employment.

2) After investigation and review, the Agency issued an Administrative Determination finding substantial evidence of unlawful employment practices by Respondent in violation of ORS 659.030(1)(a) and (b).

3) On around January 9, 1997, the Agency prepared and duly served on Respondent Specific Charges which alleged that Respondent had treated Complainant differently and had discharged her from employment because of her sex. The Specific Charges alleged that Respondent's actions violated ORS 659.030(1)(a) and (b).

4) With the Specific Charges, the Agency served on Respondent the following: a) a Notice of Hearing setting forth the time and place of the hearing in this matter; b) a Notice of Contested Case Rights and Procedures containing the information required by ORS 183.413; c) a complete copy of the Agency's administrative rules regarding the contested case process; and d) a separate copy of the specific administrative rule regarding responsive pleadings.

5) On January 27, 1997, Respondent filed an answer in which it denied the allegations mentioned above in the Specific Charges.

6) On February 26, 1997, Respondent requested a discovery order requiring the Agency to produce certain documents and permitting Complainant to be deposed. The Agency did not oppose the motion and the ALJ granted it.

7) On March 12, 1997, Respondent requested a postponement of the hearing because it believed the Agency had issued amended Specific Charges and Respondent had not received a copy of them. Respondent also requested a postponement to pursue settlement negotiations. The Agency opposed the motion because no amended charges had been issued and because settlement negotiations are not a basis for a postponement. The Administrative Law Judge denied Respondent's request, pursuant to OAR 839-050-0150(5), because Respondent had not shown good cause for a postponement and settlement negotiations do not serve as a basis for a postponement. OAR 839-050-0220(1).

8) Pursuant to OAR 839-050-0210 and the Administrative Law Judge's order, the Agency and Respondent each filed a Summary of the Case.

9) At the start of the hearing, Respondent submitted a prehearing brief. Pursuant to OAR 839-050-0400, the ALJ allowed the Agency to submit a statement of Agency policy and left the record open until March 27, 1997, for it. The Agency did not submit a statement of policy.

10) At the start of the hearing, the attorney for Respondent stated that he had read the Notice of Contested Case Rights and Procedures and had no questions about it.

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

12) During the hearing, the Agency moved to amend the Specific Charges to conform the damages requested to the evidence presented. Respondent argued that the claimed back wages were calculated wrong and moved to strike the claim for mental suffering. The ALJ granted the Agency's motion pursuant to OAR 839-050-0140(2) because the amendments reflected evidence introduced into the record without objection from Respondent. The ALJ denied Respondent's motion to strike.

13) Following the end of the hearing, the ALJ discovered that a video tape exhibit offered and received in evidence did not contain what it was supposed to, namely, a deposition of the Complainant. The ALJ reopened the record to allow Respondent to submit the correct exhibit tape. Respondent timely submitted the replacement exhibit, and the record closed on May 30, 1997.

14) On June 11, 1997, the Administrative Law Judge issued a Proposed Order in this matter. Included in the Proposed Order was an Exceptions Notice that allowed ten days for filing exceptions. The Hearings Unit received no exceptions.

#### FINDINGS OF FACT – THE MERITS

1) At all times material herein, Respondent was an Oregon corporation operating an eating and drinking establishment in Medford, Oregon, called the Timeout Sports Bar & Restaurant. Angela Benn was a coowner of Respondent. Respondent was an employer in Oregon utilizing the personal services of one or more persons, subject to the provisions of ORS 659.010 to 659.435.

2) From December 1994 to June 1995, Respondent employed Brandy Becker as a cocktail waitress and bartender. Becker learned she was pregnant in February 1995 and told her supervisor, Dennis Mortimer. In April 1995, Becker nearly suffered a miscarriage and was off work for two weeks. When she returned to work, Becker gave Mortimer a note (dated April 25, 1995) from a certified nurse midwife who permitted Becker to work in accordance with AMA work guidelines, unless she had complications with her pregnancy. Attached to the note was a one page document entitled "How long may women work? General guidelines from the AMA," which described various job functions – such as standing, stooping, bending, climbing, stairs, and lifting – and, using a bar graph, showed the number of weeks (of gestation) a woman could perform those functions. Becker also gave Mortimer a note (dated April 26, 1995) from her doctor stating that she could continue working 30 hours per week without restrictions. Mortimer did not restrict Becker's work activities at that time. Sometime in May 1995, Respondent assigned Becker to work at the front door checking identification. The hourly rate of pay for that position was higher than for a cocktail waitress, but the new position did not receive tips. In addition, Becker worked fewer shifts in the new position. As a result her gross income decreased. She did not object to this reassignment and intended to leave her employment

around July 1, 1995. Mortimer assigned Becker's duties to comply with the AMA guidelines. He fired Becker in June 1995.

3) Respondent's business was slowest in the summer between June and August. Everyone's work hours were cut in the summer.

4) Complainant is female.

5) Complainant was employed by Respondent as a cocktail waitress from June 30 to August 6, 1995.

6) Complainant's job duties included taking food and drink orders, delivering food and drinks, and collecting money. The work environment was a "medium size" lounge with one flight of 15 stairs, which Complainant, age 25, climbed regularly. She was in good physical condition.

7) Complainant and Respondent had no agreement about the number of hours per week Complainant would work. The cocktail waitresses' schedules varied from day-to-day and from week-to-week based on the activities occurring in the bar, such as a band playing. On Friday, June 30, 1995, Complainant worked 9½ hours. During the pay period July 1 to 15, 1995, she worked approximately 67 hours in 10 shifts as follows: Saturday, July 1, 8 hours; Tuesday, July 4, 7¼ hours; Wednesday, July 5, 3 hours; Friday, July 7, 7¼ hours; Saturday, July 8, 6 hours; Tuesday, July 11, 8½ hours; Wednesday, July 12, 8 hours; Thursday, July 13, 8 hours; Friday, July 14, 10 hours; and Saturday, July 15, 1

\* Normally, Complainant's shift started on one day (for example, Friday, June 30, at 5:45 p.m.) and ended the next day (Saturday, July 1, at 3:20 a.m.). For the purpose of this Finding of Fact, the forum has listed only the date on which the shift started (in this example, June 30). The hours worked have been rounded to quarter hours.

hour. During the pay period July 16 to 31, 1995, she worked approximately 57¼ hours in nine shifts as follows: Tuesday, July 18, 8½ hours; Wednesday, July 19, 4 hours; Thursday, July 20, 8½ hours; Friday, July 21, 6¼ hours; Saturday, July 22, 3½ hours; Tuesday, July 25, 8¼ hours; Thursday, July 27, 5 hours; Friday, July 28, 9 hours; and Saturday, July 29, 4¼ hours. During the period August 1 to 6, 1995, she worked approximately 24¼ hours in three shifts as follows: Tuesday, August 1, 8½ hours; Friday, August 4, 7¼ hours; and Saturday, August 5, 8½ hours. During the entire period of employment, Complainant worked 158½ hours. She was paid \$5.00 per hour. She earned \$792.50 (gross). She reported tips of \$130. Gross wages plus tips equal \$922.50.

8) Complainant received a total amount of \$922.50 in compensation during her employment. Of that amount, \$130 were tips reported during the first half of July 1995.

9) On her 1995 tax return, Complainant reported \$923 as her gross income from Respondent.

10) At all times material, Dennis Mortimer was an employee of Respondent and was Complainant's direct supervisor.

11) Around mid-July 1995, Respondent, through its supervisory employee Dennis Mortimer, learned that Complainant was about five months pregnant.

12) Mortimer asked Complainant for a note from her doctor concerning any work restrictions because of her pregnancy. He did this because he was aware of job function restrictions

recommended in the AMA guidelines and he was concerned about Complainant's safety. Complainant said she would get a note from her doctor at her next monthly appointment. Mortimer agreed. He placed no restrictions on her work. Complainant never gave Respondent a note from her doctor.

13) Because of high employee turnover in the bar and restaurant business, Mortimer constantly accepted job applications. Before August 6, 1995, he hired two employees, Martha Davis and Dee Ann Strang, as backup cocktail waitresses and bartenders. Complainant helped train both.

14) Around August 6, 1995, Mortimer told Complainant that she was laid off because there was not enough work, but that she was not fired. He put her "on-call", meaning that he would try to contact an on-call waitress for work when the bar was busier. Mortimer and Angela Benn were also concerned about Complainant's questionable job performance and attitude. Mortimer did not consider Complainant's pregnancy when he decided to lay her off, nor did he consider her pregnancy when he assigned her work hours. Complainant was angry because she thought she was doing the job and there was no reason for a lay off. She had bills to pay, little money, and no prospects for another job. She felt that she was laid off because she was pregnant and this embarrassed her.

15) Mortimer tried to contact Complainant for work on a couple of occasions between August 6 and 10, 1995. He received no response from Complainant. If she would have called Mortimer back, he would have put her to

work. Mortimer called Dee Ann Strang to work. She worked 29 hours. Her last day of work was August 12, 1995.

16) On September 8, 1995, Complainant took a job with Red Lion.

17) Complainant's testimony was not credible. The Administrative Law Judge carefully observed her demeanor during the hearing and found her testimony to be exaggerated and speculative on important points. For example, she claimed in her testimony and in her statements to the Agency during the investigation that, once Mortimer found out she was pregnant, he cut her hours in half. Her timecards, which she did not dispute, provide persuasive, credible proof to the contrary. See the discussion regarding Different Treatment in the Opinion below. Likewise, Complainant's testimony concerning the average amount of her nightly tips was exaggerated compared to credible testimony from both Mortimer and Pidretti and the documentary evidence. In addition, Complainant's testimony on several points was contradicted by the credible testimony of other witnesses. For example, she testified that occasionally she drank a glass of wine after her shift, but that she had cut down her drinking after becoming pregnant. Other witnesses credibly testified that she drank hard drinks, she drank more than one drink, and that they were concerned about the amount she drank. Pidretti, whom the ALJ had no reason to disbelieve, testified that he had to cut her off, that is, he had to refuse to serve her additional drinks because she drank too much. For these reasons, the forum gave Complainant's testimony less weight whenever it conflicted with

other credible evidence on the record. In some instances, the forum did not believe her testimony even when it was not controverted by other evidence.

18) Dave Pidretti's testimony was credible. He had no relationship with Respondent at the time of hearing and had no apparent personal stake in this matter. He was straightforward with his answers. He offered specifics when he could and made no attempt to fabricate answers when his memory failed.

19) Dennis Mortimer's testimony was credible. His demeanor was forthright, even when his memory was deficient. Due to his former relationship to Respondent and his central role in this case, his potential for bias and his motive to lie were obvious. However, this was not enough to cause the ALJ to conclude that his testimony was not credible. His testimony was generally consistent and was supported by other credible evidence. The ALJ was not sufficiently impressed by other evidence or his demeanor so as to find his testimony not credible.

20) Angela Benn's testimony was not credible on certain issues. Her testimony regarding Complainant's hours worked and pay was inconsistent and unreliable. It appeared to the ALJ that she attempted to create information when she was unsure of the facts. Despite these inconsistencies and some memory loss, her demeanor impressed the ALJ that she was not attempting to deceive the forum. The forum gave Benn's testimony less weight whenever it conflicted with other credible evidence on the record.

#### ULTIMATE FINDINGS OF FACT

1) At all times material, Respondent employed one or more persons within the state of Oregon.

2) Respondent employed Complainant from June 30 to August 6, 1995.

3) Complainant is female.

4) Respondent did not reduce Complainant's work hours because of her pregnancy.

5) Respondent did not discharge Complainant from employment because of her pregnancy.

#### CONCLUSIONS OF LAW

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

2) The Commissioner of the Bureau of Labor and Industries of the State of Oregon has jurisdiction over the persons and subject matter herein.

3) The actions, inactions, and knowledge of Dennis Mortimer, an employee or agent of Respondent, are properly imputed to Respondent.

4) ORS 659.030(1) provides in part:

"For the purposes of ORS 659.010 to 659.110, \* \* \* it is an unlawful employment practice:

"(a) For an employer, because of an individual's \* \* \* sex \* \* \* to refuse to hire or employ or to bar or discharge from employment such individual. However, discrimination is not an unlawful employment practice if such discrimination results from a bona fide occupational requirement reasonably

necessary to the normal operation of the employer's business.

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

ORS 659.029 provides:

"For purposes of ORS 659.030, the phrase 'because of sex' includes, but is not limited to, because of pregnancy, childbirth and related medical conditions or occurrences. Women affected by pregnancy, childbirth or related medical conditions or occurrences shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work by reason of physical condition, and nothing in this section shall be interpreted to permit otherwise."

Respondent did not violate ORS 659.030(1)(a) or (b).

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

#### OPINION

#### ORS 659.030(1)(b) – Different Treatment Because of Pregnancy

Complainant contends that she was treated differently by Dennis Mortimer after he learned she was pregnant in mid-July 1995. Specifically,

she alleged that Respondent cut her work hours in half.

Respondent denies that it cut Complainant's hours because of her pregnancy. Respondent acknowledges that Mortimer requested a note from Complainant's doctor about any work restrictions due to her pregnancy, but claims that this was done because of work restrictions placed on another pregnant waitress by her doctor and because of a concern for Complainant's safety.

The Agency has the burden of proving unlawful discrimination. *In the Matter of Motel 6*, 13 BOLI 175, 185-86 (1994) (citing *City of Portland v. Bureau of Labor and Industries*, 298 Or 104, 890 P2d 475 (1984)); and see OAR 839-005-0010(5). Here, it has failed to carry that burden.

Respondent's pay records for Complainant show that she worked only two full pay periods – July 1 to 15 and July 16 to 31. She worked 67 hours in 10 shifts during the first period, or an average of 6.7 hours per shift. She worked about 58 hours in nine shifts during the second period, or an average of 6.44 hours per shift. During her final week of work, that is, from August 1 to 6, she worked about 24 hours in three shifts, or an average of 6.0 hours per shift.

There is a difference of 15 minutes between the average number of work hours per day in the first pay period (6.7 hours) and the average number of work hours per day in the second pay period (6.44 hours). Since she worked only three days during August 1995, the average number of hours worked per day in that period is less meaningful. Nevertheless, the difference

between the August daily average and the daily average from the last two weeks in July is about 26 minutes.

As noted above, Complainant alleged that Respondent cut her hours in half after learning she was pregnant and claims this was because of her pregnancy. In light of the evidence that (1) she had no agreement with Respondent for any set number of work hours per day or per week, (2) waitresses' hours normally varied each week, and (3) the summer was Respondent's slowest season and everyone's hours were reduced, the Agency has not proved that Respondent cut Complainant's hours significantly, much less in half. The preponderance of credible evidence in the whole record regarding work hours does not prove that Complainant was treated differently than other non-pregnant cocktail waitresses. Nor does it support an inference that Respondent cut Complainant's hours because she was pregnant.

I turn now to the issue of whether Mortimer's request for medical information about any restrictions on Complainant's work due to her pregnancy constitutes illegal different treatment because of sex. The evidence is un rebutted that Mortimer requested this information from Complainant's doctor because previously he had received the AMA guidelines regarding job duties performed by pregnant women from another pregnant waitress.

*Former* OAR 839-07-510 (1986) provided that

"(1) The statutes protect pregnant women from sex discrimination in employment; pregnant women must be treated the same

as males and non-pregnant females regarding their ability or inability to work by reason of physical condition.

"(2) The statutes prohibit discrimination regarding employee and dependent spouse benefits for pregnancy where employee and dependent spouse benefits exist for other medical conditions."

On March 12, 1996, the rule was amended and OAR 839-007-0510 now provides:

"(1) The statutes protect pregnant women from sex discrimination in employment.

"(2) Regarding the ability or inability to work by reason of physical condition, pregnant women must be treated the same as males, non-pregnant females and other employees with off the job illness or injuries.

"(3) The statutes prohibit discrimination regarding employee and dependent spouse benefits for pregnancy where employee and dependent spouse benefits exist for other medical conditions.

"(4) Women needing to be absent from work because of pregnancy or childbirth may be protected by the Oregon Family Leave Act. See OAR 839-009-0020 *et seq.*

"(5) An employer may request medical verification of a pregnant woman's ability to perform her job." (Emphasis added.)

As amended, sections one, two, and three of the 1996 rule track sections one and two of the original 1986 rule. Under these sections, it is unlawful to differentiate between pregnancy and other temporary disabilities. Thus, any policy applied to pregnant workers, such as requiring a doctor's statement, must be applied equally to employees with other disabilities. There was no evidence in this case concerning how Respondent treated other employees with temporary disabilities.

Sections four and five of the 1996 rule are new. Section four refers the reader to additional protections for pregnant women available in the Family Leave Act.

Section five, which is important here, adds an interpretation not previously expressed in the rule. It makes clear that an employer may request medical verification of a pregnant woman's ability to perform her job without running afoul of the protections for pregnant women provided in ORS 659.029 and 659.030. This section took effect some seven months after Complainant's employment ended. Therefore, it does not cover this case. Nevertheless, the forum takes guidance from it.

Likewise, the forum takes guidance from the regulations interpreting and implementing Oregon's disability law, ORS 659.425, which, under some circumstances, permits an employer to inquire whether an individual has the ability to perform the duties of the position occupied. See *former* OAR 839-06-235.\*

\* At times material, OAR 839-06-235 (BL 2-1984) provided in part:

"(1) An employer may inquire whether an individual has the ability to perform the duties of the position sought or occupied.

OAR 839-007-0510 (as amended) and 839-06-235 are consistent in that they permit an employer to request medical verification of a worker's ability to perform her job. Under the old rule relating to pregnancy — OAR 839-07-510 — it would be incongruous to find that an employer had illegally discriminated against a pregnant worker by making this request, when the request was permitted by the disability rules. Such a finding of discrimination could not be made under the amended version of OAR 839-007-0510.

Since the facts do not demonstrate that Respondent treated Complainant differently than other workers with temporary disabilities, and since the law permitted Respondent to request information about a worker's ability to perform her job, the forum does not find that Respondent treated Complainant differently because of her sex by requesting medical verification of her ability to perform her job.

**ORS 659.030(1)(a) — Discharge Because of Pregnancy**

Complainant contends that Respondent discharged her because she was pregnant. She claims that Mortimer laid her off and she never went back to work.

Respondent contends that Complainant quit her job. Respondent claims that it laid Complainant off because business was slow and, when

Mortimer tried to call her back to work twice the following week, Complainant never called back.

This issue boiled down to a test between the credibility of Complainant's testimony and that of Mortimer and Benn. The forum believed Mortimer and Benn when they testified that Mortimer laid Complainant off and attempted to call her back to work, but that Complainant never returned his calls. Complainant did not dispute this testimony. Mortimer credibly testified that Complainant's pregnancy had nothing to do with the lay off. There was no persuasive evidence that this reason was pretextual. The Agency has failed to prove by a preponderance of the evidence that Respondent discharged Complainant because of her sex.

**ORDER**

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

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"(3) An employer may require a medical evaluation of an individual's physical or mental ability to perform the work involved in a position:

"(a) The individual seeking or occupying a position must cooperate in any medical inquiry or evaluation, including production of medical records and history relating to the individual's ability to perform the work involved[.]"

**In the Matter of  
ARABIAN RIDING AND RECREATION CORP., dba C Bow Arrow Ranch, Respondent.**

Case Number 24-97

Final Order of the Commissioner

Jack Roberts

Issued July 22, 1997.

**SYNOPSIS**

Respondent operated a horse rental and riding ranch, employing a 15 year old minor as a ranch hand. Respondent failed to verify a work permit, failed to file an employment certificate, failed to maintain and preserve records, employed the minor to operate a tractor, failed to pay minimum wage, and failed to post a maximum work hours notice. Respondent also employed the minor during school hours, for more than 18 hours per week and more than three hours per day when school was in session, for more than 40 hours per week and more than eight hours per day when school was not in session, and for more than ten hours a day and more than six days a week. The commissioner imposed civil penalties totaling \$23,050. ORS 652.210(1) and (2); 653.010(3) and (4); 653.025(3); 653.305(1), (2), and (3); 653.307(1), (2), and (3); 653.310; 653.315(1) and (4); 653.370(1); OAR 839-21-006(1), (5) through (13); 839-21-070(1)(a) through (e); 839-21-087(1)(g)(C); 839-21-170(1), (2), and (3);

839-21-180(1) and (2); 839-21-220(1)(a) and (3); 839-21-280(2) and (3).

The above-entitled contested case came on regularly for hearing before Warner W. Gregg, designated as Administrative Law Judge (ALJ) by Jack Roberts, Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was held on August 14 and December 19, 1996, in a conference room of the Bureau of Labor and Industries, 165 East Seventh Avenue, Eugene, Oregon. The Bureau of Labor and Industries (the Agency) was represented by Alan McCullough, an employee of the Agency. Arabian Riding and Recreation Corp. (Respondent), a corporation, was represented by William L. Ghiorso, Attorney at Law, Salem.

The Agency called as witnesses Agency child labor unit clerk Eileen Clappé (by telephone), Respondent's former ranch hands Kenzie Wright (by telephone) and Jack Pierce, Kenzie Wright's mother Carol Wright (by telephone), and Respondent's former ranch manager Gloria E. Bates (formerly Burns).

Respondent called as witnesses Thurston High School registrar Wanda Grant (by telephone) and Respondent's president Alfred J. Antonini (by telephone).

Having fully considered the entire record in this matter, I, Jack Roberts, Commissioner of the Bureau of Labor and Industries, make the following Findings of Fact (Procedural and on

\* This witness, known as Gloria Bates at the time of the hearing, was referred to in documents and testimony as Gloria Burns, and is referred to individually in this order as "Burns" or "Gloria Burns."

the Merits), Ultimate Findings of Fact, Conclusions of Law, Opinion, and Order.

#### FINDINGS OF FACT – PROCEDURAL

1) On January 29, 1996, the Agency issued a "Notice Of Intent To Assess Civil Penalties" (Notice of Intent) to Respondent. The Notice of Intent informed Respondent that the Commissioner intended to assess civil penalties against Respondent totaling \$49,150 pursuant to ORS 653.370(1), based upon multiple alleged violations resulting from Respondent's alleged employment of Kenzie Wright, a minor born April 24, 1979, between on or about February 9 and September 30, 1994. The Notice of Intent was served on Respondent's registered agent at Eugene, Oregon, and on Respondent's president at Hayward, California, on or about February 10, 1996.

2) On February 27, 1996, Respondent through counsel timely answered the Notice of Intent by denying specifically each of the multiple counts. In addition, Respondent alleged as affirmative defenses:

- 1) C Bow Arrow is not a dba of Arabian Riding & Recreation Corp.
- 2) Incorporating the previous denials, Kenzie Wright, DOB 4/24/79, was not at any time hired or employed by Respondent for agricultural or any other kind of employment or labor.
- 3) Incorporating the previous denials, the allegations which form the basis of the Notice of Intent are frivolous and without merit or truth.
- 3) The Agency requested a hearing date and on April 11, 1996, the

Hearings Unit issued to Respondent and the Agency a Notice of Hearing setting forth the time and place of the requested hearing and the designated ALJ, together with the following: a) a Notice of Contested Case Rights and Procedures containing the information required by ORS 183.413, and b) a complete copy of the Agency's administrative rules regarding the contested case process — OAR 839-50-000 through 839-50-420.

4) On July 2, 1996, counsel for Respondent requested a postponement of the hearing based on counsel's unavoidable absence from the state. The Agency did not object and on July 3 the hearing was reset to August 14, 1996.

5) The Agency and Respondent timely filed their respective case summaries.

6) At the commencement of the hearing, Respondent's counsel stated that Respondent had received the Notice of Contested Case Rights and Procedures and had no questions about it.

7) At the commencement of the hearing, pursuant to ORS 183.415(7), the ALJ orally advised the participants of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing. The ALJ noted that the violations alleged concerned the relevant statutes and rules as they existed before the 1995 session of the Oregon Legislature, which amended some of the statutes, necessitating amendment of some of the OARs.

8) At the close of the Agency's evidence on August 14, 1996, the Agency

moved to amend portions of the Notice of Intent, resulting in alleged violations and penalties summarized as follows:

1. Failure to Verify Work Permit at the Time of Hire: One (1) Violation of OAR 839-21-220(1)(a). CIVIL PENALTY IN THE AMOUNT OF \$100.
2. Failure to File Employment Certificate: One (1) Violation of OAR 839-21-220(3). CIVIL PENALTY IN THE AMOUNT OF \$100.
3. Failure to Preserve and Maintain Records: One (1) Violation of OAR 839-21-170. CIVIL PENALTY IN THE AMOUNT OF \$500. AGGRAVATION: The magnitude and seriousness of the violation.
4. Employing a Minor Under 18 Years of Age to Operate Power-Driven Farm Machinery: One (1) Violation of OAR 839-21-280(2). CIVIL PENALTY IN THE AMOUNT OF \$500. AGGRAVATION: The magnitude and seriousness of the violation.
5. Failure to Comply with ORS 653.025 Relating to the Payment of Wages: One (1) Violation [of OAR 839-21-087(1)(g)(C)]. CIVIL PENALTY IN THE AMOUNT OF \$250. AGGRAVATION: The magnitude and seriousness of the violation.
6. Failure to Post a Notice Regarding Maximum Work Hours Where a Child Under 16 Years of Age is Employed: One (1) Violation [of OAR 839-21-180, ORS 653.315(4)]. CIVIL PENALTY IN THE AMOUNT OF \$100.
7. Employment of a Child Under 16 Years of Age for Longer than

10 Hours for any One Day: 120 Violations [of ORS 653.315(1)]. CIVIL PENALTY OF \$12,000.

8. Failure to Confine Employment of a Minor Under 16 Years of Age to Outside School Hours: One (1) Violation [of OAR 839-21-070(1)(a)]. CIVIL PENALTY IN THE AMOUNT OF \$500. AGGRAVATION: The magnitude and seriousness of the violation.

9. Failure to Confine Employment of a Minor Under 16 Years of Age to Not More than 40 Hours in any One Week While School is Not in Session: 9 Violations [of OAR 839-21-070(1)(b)]. CIVIL PENALTY IN THE AMOUNT OF \$900.

10. Failure to Confine Employment of a Minor Under 16 Years of Age to Not More than 18 Hours in any One Week While School is in Session: 19 Violations [of OAR 839-21-070(1)(c)]. CIVIL PENALTY IN THE AMOUNT OF \$1,900

11. Failure to Confine Employment of a Minor Under 16 Years of Age to Not More than Eight Hours in any One Day When School is not in Session: 73 Violations [of OAR 839-21-070(1)(d)]. CIVIL PENALTY IN THE AMOUNT OF \$7,300.

12. Failure to Confine Employment of a Minor Under 16 Years of Age to Not More than Three Hours in any One Day When School is in Session: 88 Violations [of OAR 839-21-070(1)(e)]. CIVIL PENALTY IN THE AMOUNT OF \$8,800.

13. Employment of a Child Under 16 Years of Age for More than Six Days in Any One Week: 10 Violations [of ORS 653.315(1)]. CIVIL PENALTY IN THE AMOUNT OF \$1,000.

The Agency had alleged alternatives to paragraphs 8, 9, 10, 11, 12, and 13 involving the employment of a minor under 16 years of age in agriculture. After both sides had rested on December 19, 1996, the Agency conceded that Respondent's ranch was not an agricultural operation and withdrew those allegations.

9) The proposed order, containing an exceptions notice, was issued on June 4, 1997. Acting on Respondent's timely request, the ALJ extended the due date for exceptions to July 1, 1997. Respondent's exceptions were timely received and are dealt with in the Opinion section of this Order.

#### FINDINGS OF FACT – THE MERITS

1) At times material herein, Respondent was an Oregon corporation with an address of 33435 Van Duyen Road, Eugene, Oregon. At that address, beginning in February 1994, it operated a facility devoted to horse rentals and riding known as "C Bow Arrow Ranch."

2) Alfred J. Antonini was president of Respondent, and his wife, Alva, was secretary. He had also been president of CBA Operations, a corporation which operated the ranch until February 1994. The name "C Bow Arrow Ranch" referred to a tract of land of approximately 1800 acres north of Eugene near Coburg, Oregon.

Antonini was the owner of the land, which he leased to the corporation. Respondent, as well as its predecessor, CBA Operations, engaged the personal services of one or more persons at that location.

3) In early 1989, Robert Burns worked for one of Antonini's enterprises in Houston, Texas. At Antonini's request, Burns and his wife Gloria came to Oregon and managed C Bow Arrow Ranch (C Bow, or the ranch), which was operated by CBA Operations. They received a salary and use of a mobile home on the premises. They had an assumed business name of "Burns Ranch Management" in Harris County, Texas. Robert Burns died in 1992 and Gloria Burns registered individually in Lane County, Oregon, as "Burns Management" at the ranch address.

4) C Bow was a "horse operation" open to the public. In 1989, there were over 50 head of horses and some sheep, geese, and peacocks. At times material, the business offered boarding facilities for horses, trail rides, barn dances, hay rides, cookouts, and a children's horse camp.

5) The ranch managers were not expected to do all of the labor in the care and feeding of the horses and other animals and the running of the ranch operation. They were authorized to engage ranch hands as laborers, but only with the approval of Antonini. It was also policy to accept labor from customers in exchange for riding privileges. Most of this "volunteer" labor was performed by females in their early teens.\*

6) Gloria Burns was instructed by Antonini to engage ranch hands as independent contractors. Ranch hands Jack Pierce and Matt Walker registered an assumed business name of "Dakota and Indiana Ranch Contractors" at the ranch address. The ranch hands did not work for other ranches and did not hire individuals to assist them. Their work was directed by Gloria Burns, or by Antonini through Gloria Burns.

7) Jack Pierce worked as a ranch hand at the ranch from June through September 1994. He answered a newspaper ad, filled out an employment application, submitted a letter of recommendation, was interviewed twice by the manager, Gloria Burns, and was hired. He was entitled to live in a two room house on the property while he worked there for which he signed a separate agreement for living accommodations on the premises. He provided his own food and telephone. He was required to agree to a "service contract" and to acknowledge in writing his status as an independent contractor, including agreeing to provide his own insurance. As part of the application process, Burns furnished him with a copy of OAR 436-50-030.\* He was paid \$300 per month (\$10 per day), in a gross amount with no deductions. He received an IRS form 1099 rather than a W-2 for his annual earnings. He had worked there previously and

knew that the hours were approximately 7 a.m. to 5 p.m. in winter and 7 a.m. to 9 p.m. from May through September. He kept no record of the exact hours he worked each day. He was aware that the manager kept a record of days worked, but not hours.

8) The ranch hands fed and watered the horses and other animals, saddled, bridled, exercised, and put up the horses, cleaned the stalls and the barn, groomed the horses, acted as guides for trail rides of from one to 20 riders, mended fence, and ran the tractor. In addition they assisted the veterinarian, provided staff and security for events such as weddings, cookouts, and barn dances and, in the summer, acted as instructors for the children's horse camp. They worked seven days a week, and were paid once a month at \$10 per day. They received a gross check, with no deductions. The checks were signed by Alva or Alfred Antonini.

9) Individuals acting as "volunteers" performed the same work as the ranch hands. At first, a "volunteer" might just clean stalls and groom horses, supervised by a ranch hand. As they gained experience, they assumed the other duties, except for driving the tractor. The opportunity to ride without charge was often coupled with acting as a trail guide. Otherwise, the opportunity to ride without charge was limited to daylight hours late in the day on the few occasions when no event

"free" horse riding. Because Oregon law does not recognize as a volunteer one who performs labor without pay for other than a charitable, religious, or governmental entity, this order uses quotation marks when referring to the "volunteers" utilized by Respondent. ORS 653.010(3).

\* OAR 436-50-030 was a rule of the Workers' Compensation Division regarding Employer/Insurer Coverage Responsibility, implementing ORS 656.029 respecting responsibility for workers' compensation coverage between contractors and subcontractors for contract labor. The rule was repealed in 1996.

\* The Forum has used the term used by the witnesses to describe the status of individuals who performed labor for Respondent in exchange for

was scheduled. The horses had to be put in by dark.

10) As ranch manager, Gloria Burns ran the day-to-day operations. She had a ranch bank account for purchases of supplies, but all other expenditures had to be authorized and approved by Antonini in Hayward, California. She could recommend the hire of ranch hands, but Antonini had final authority. The paychecks for the ranch hands came from Hayward. Revenues from ranch operations were deposited to the corporate account and not to the ranch account. Antonini was a "hands on" administrator.

11) In 1992, Kenzie Wright, date of birth April 24, 1979, (the minor) lived with her mother on North 67th Street in Springfield, Oregon, and attended Thurston Middle School, a public school in Springfield. She was fond of horses and rode at the ranch. She began cleaning stalls and doing related work as a "volunteer" in 1992 in exchange for riding. At that time she worked after school and on weekends.

12) The minor's mother, who was employed elsewhere, sometimes worked as a "volunteer." The minor worked as a "volunteer" in the summer of 1993. Her mother would drive her to the ranch, go to her own job, and pick her up in the evening. Burns invited the minor to live at the ranch because of the long days. The minor's mother agreed and the minor lived with Burns in the mobile home.

13) The minor enrolled at Thurston High School in September 1993 and withdrew a few weeks later. Her mother arranged that she be "home schooled," and she continued to live and work at the ranch.

14) The minor was a dependable worker and performed the same duties as the regular ranch hands. She fed and watered the horses and other animals, saddled, bridled, exercised, and put up the horses, cleaned the stalls and the barn, groomed and trained the horses, acted as a guide for trail rides, and drove the tractor. In addition she assisted the veterinarian, acted as staff and security for weddings, cookouts, and barn dances and, in the summer, acted as an instructor for the children's horse camp. She also answered the telephone, scheduled riding reservations, and operated the cash register.

15) The minor kept no record of the exact hours she worked each day. Burns kept no record of employee hours but did report the number of days each worked to Respondent's headquarters for payroll purposes. Burns felt that the minor was a good worker and should be paid.

16) The ranch hands were paid each month for the number of days submitted for them by the ranch manager on individual invoices. Beginning sometime in late 1993, Burns submitted a monthly invoice for the minor. The minor began receiving a monthly check in about November 1993. She did not fill out any sort of employment application prior to receiving paychecks.

17) Available records indicate that invoices were submitted on behalf of the minor (and paid) as follows:

"Kenzie Wright to CBA Operations, December 1993, Casual Labor \$250"

"Kenzie Wright to Arabian Riding & Recreation Corp., April 1994, Casual Labor \$280"

"Kenzie Wright to Arabian Riding and Rec. Corp., May 1994, Casual Labor \$300"

"Kenzie Wright to Arabian Riding & Recreation Corp., June 1994, Contract Work \$300"

"Kenzie Wright to Arabian Riding & Recreation Corp., July 1994, Contract Work \$80"

"Kenzie Wright to Arabian Riding and Recreation Corp., August 1994, Horse Camp & Function Work \$150"

Burns was instructed by Antonini to use terms such as "casual labor" or "contract labor" on invoices for the ranch hands.

18) In Springfield Public Schools in the month of December 1993, there were 13 days (2½ weeks) when school was in session. In the month of April 1994, there were 19 days (4+ weeks) when school was in session. In the month of May 1994, there were 21 days (4+ weeks) when school was in session. In the month of June 1994, there were 15 days (3 weeks) when school was in session. School was not in session after June 21, 1994, or in July or August 1994. The minor left the ranch and the school district in September 1994.

19) There was no schedule regarding maximum work hours by minors under 16 years of age posted in a conspicuous place at the ranch while the minor worked there.

#### ULTIMATE FINDINGS OF FACT

1) At times material herein, Respondent was an Oregon corporation

operating a facility devoted to horse rentals and riding known as "C Bow Arrow Ranch" near Eugene, Oregon.

2) Between February 9 and September 30, 1994, Respondent utilized the personal services of Kenzie Wright, a minor born April 24, 1979. At all times material, she was under 16 years of age.

3) On or about February 9, 1994, Respondent did not verify the age of Kenzie Wright at the time of hire by requiring her to produce a work permit.

4) Respondent did not file a completed Employment Certificate form with the Bureau of Labor and Industries within 48 hours after hiring Kenzie Wright on or about February 9, 1994.

5) Respondent did not maintain and preserve records related to hours worked by Kenzie Wright while in Respondent's employ.

6) Respondent employed Kenzie Wright to operate a tractor.

7) Respondent did not pay employee Kenzie Wright the minimum wage of \$4.75 per hour.

8) Respondent did not post in a conspicuous place a printed notice stating the maximum work hours required in one week and in every day of the week for minors under 16 years of age.

9) Between April 1 and September 1, 1994, Respondent employed Kenzie Wright to work more than ten hours a day for 101 separate days.

10) Between April 1 and June 21, 1994, Respondent employed Kenzie Wright to work during school hours on 55 different days.

11) Between April 1 and September 1, 1994, Respondent employed Kenzie Wright to work more than 40 hours per week during three different weeks when school was not in session.

12) Between April 1 and September 1, 1994, Respondent employed Kenzie Wright to work more than 18 hours per week during 11 weeks when school was in session.

13) Between April 1 and September 1, 1994, Respondent employed Kenzie Wright to work more than eight hours per day when school was not in session on 30 separate days.

14) Between April 1 and September 1, 1994, Respondent employed Kenzie Wright to work more than three hours per day when school was in session on 55 separate days.

15) Between April 1 and September 1, 1994, Respondent employed Kenzie Wright to work more than six days in any one week during 10 separate weeks.

16) Between February 9 and September 30, 1994, Respondent did not employ Kenzie Wright in the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodity; the raising of livestock or in preparation for market, delivery to storage or to market or to carriers for transportation to market any such commodities or livestock.

CONCLUSIONS OF LAW

1) At times material herein, OAR 839-21-006 provided, in pertinent part:

"As used in ORS 653.305 to 653.360 and in OAR 839-21-001 to 839-21-500, unless the context requires otherwise:

\*\*\*\*\*

"(5) 'Employ' shall have the same meaning as that which appears in ORS 653.010(1)".

"(6) 'Employer' shall have the same meaning as that which appears in ORS 653.010(2)."

At times material herein, ORS 653.010 provided, in pertinent part:

"As used in ORS 653.010 to 653.261, unless the context requires otherwise:

\*\*\*\*\*

"(3) 'Employ' includes to suffer or permit to work; however, 'employ' does not include voluntary or donated services performed for no compensation or without expectation or contemplation of compensation as the adequate consideration for the services performed for a public employer \* \* \* or a religious, charitable, educational, public service or similar nonprofit corporation, organization or institution for community service, religious or humanitarian reasons or for services performed by general or public assistance recipients as part of any work training program administered under the state or federal assistance laws.

"(4) 'Employer' means any person who employs another person \* \* \*."

At all times material herein, Respondent was an employer and Kenzie Wright was Respondent's employee. As an Oregon employer, Respondent was subject to the provisions of ORS 653.305 to 653.370 and the administrative rules adopted thereunder.

2) At times material herein, ORS 653.305 provided:

"(1) The Wage and Hour Commission may at any time inquire into wages and hours or conditions of labor of minors employed in any occupation in this state and determine suitable hours and conditions of labor for such minors.

"(2) When the commission has made such determination, it may issue an obligatory order in compliance with ORS 183.310 to 183.550.

"(3) After such order is effective, no employer in the occupation affected shall employ a minor for more hours or under different conditions of labor than are specified or required by that order; but no such order nor the commission shall authorize or permit the employment of any minor for more hours per day or per week than the maximum fixed by law or at times or under conditions prohibited by law."

At times material herein, ORS 653.307 provided:

"(1) The Wage and Hour Commission shall provide a method for issuing employment certificates to minors and employment certificates to employers for the employment of minors in accordance with rules and regulations which it may hereafter adopt pursuant to the provisions of ORS 183.310 to 183.550, and shall by such rules and regulations require reports from employers employing minors.

"(2) Failure by an employer to comply with ORS 653.305 to 653.340 or with the regulations adopted by the Wage and Hour Commission pursuant to this section shall subject the employer to revocation of the right to hire minors in the future at the discretion of the Wage and Hour Commission, provided that an employer shall be granted a hearing before the Wage and Hour Commission prior to such action being taken.

"(3) All school districts shall cooperate with the Wage and Hour Commission and make available upon request of the commission, information concerning the age and schooling of minors who have applied for or been issued an employment certificate."

At times material herein, ORS 653.310 provided:

"No child under 18 years of age shall be employed or permitted to work in any employment listed in ORS 653.320(2), unless the person employing the child procures

\* As noted previously, the ORS and OAR sections are quoted as they appeared at times material, prior to the 1995 legislative changes.

\*\* The numbering of the referenced subsections of ORS was changed to (3) and (4), respectively, in 1989. Section 1, chapter 446, Oregon Laws 1989.

\* ORS 653.320(2) provides: No child under 14 years of age shall be employed or permitted to work in, or in connection with, any factory, workshop, mercantile establishment, store, business office, restaurant, bakery, hotel or apartment house.

and keeps on file and accessible to the school authorities of the district where such child resides, and to the police and the commission an employment certificate as prescribed by the rules and regulations adopted by the Wage and Hour Commission pursuant to ORS 653.307, and keeps a complete list of all such children employed therein."

At times material herein, ORS 653.370 provided, in pertinent part:

"(1) In addition to any other penalty provided by law, the Commissioner of the Bureau of Labor and Industries may impose on any person not regulated under the Federal Fair Labor Standards Act who violates ORS 653.305 to 653.370 or any rule adopted by the Wage and Hour Commission thereunder, a civil penalty not to exceed \$1,000 for each violation."

The Commissioner of the Bureau of Labor and Industries has jurisdiction over the persons and subject matter herein. Respondent was not regulated under the Fair Labor Standards Act.

3) At times material herein, OAR 839-21-006 provided, in part:

"As used in ORS 653.305 to 653.360 and in OAR 839-21-001 to 839-21-500, unless the context requires otherwise:

"(1) 'Agriculture' includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural

or horticultural commodities, the raising of livestock, bees, fur-bearing animals, or poultry and any practices performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market. 'Agricultural employment' is employment in 'Agriculture' as herein defined.

"\*\*\*\*\*"

"(5) 'Employ' shall have the same meaning as that which appears in ORS 653.010(1)."

"(6) 'Employer' shall have the same meaning as that which appears in ORS 653.010(2).

"(7) 'Employment Certificate' means the employment certificate issued to employers for the employment of minors pursuant to ORS 653.307, and the employment permit referred to in ORS 653.360(3).

"(8) 'Executive Secretary' means the Commissioner of the Bureau of Labor and Industries.

"\*\*\*\*\*"

"(10) 'Minor' means any person under 18 years of age.

"(11) 'Workday' means any fixed period of 24 consecutive hours.

"(12) 'Workweek' means any fixed and regularly recurring period of seven consecutive workdays.

"(13) 'Work Permit' means the employment certificate issued to minors pursuant to ORS 653.307."

At times material herein, OAR 839-21-220 provided in part:

"(1) Unless otherwise provided by rule of the Commission, no minor 14 through 17 years of age shall be employed or permitted to work unless the employer:

"(a) Verifies the minor's age by requiring the minor to produce a Work Permit and

"(b) Complies with the provisions of this rule.

"\*\*\*\*\*"

"(3) Within 48 hours after the hiring of a minor, or of permitting a minor to work, an employer shall file a completed Employment Certificate Form by taking or mailing the completed form to any office of the Bureau of Labor and Industries."

Between February and September 1994, Respondent was not engaged in agriculture at C-Bow Ranch and did not employ Kenzie Wright, a minor, in agriculture.

4) In February 1994, by permitting Kenzie Wright, a minor between 14 and 17 years of age, to work without verifying said minor's age by requiring her to produce a work permit, Respondent violated OAR 839-21-220(1)(a).

5) By failing to file a completed Employment Certificate form with the Bureau of Labor and Industries in February 1994 within 48 hours after permitting Kenzie Wright, a minor between 14 and 17 years of age, to work, Respondent violated OAR 839-21-220 (3).

6) At times material herein, OAR 839-21-170 provided:

"(1) Every employer employing minors shall maintain and preserve records containing the following information and data with respect to each minor employed:

"(a) Name in full, as used for social security recordkeeping purposes and on the same record, the minor's identifying symbol or number if such is used in place of name on any time, work or payroll records;

"(b) Home address, including zip code;

"(c) Date of birth;

"(d) Sex and occupation in which the minor is employed (sex may be indicated by use of the prefixes Mr., Mrs., Miss or Ms.);

"(e) Time of day and day of week on which the minor's workweek begins;

"(f) Hours worked each workday and total hours worked each workweek;

"(g) Date the minor became employed by the employer and date employment was terminated.

"(2) In addition to the records referred to in section (1) of this rule, every employer employing minors under 16 years of age shall maintain and preserve records containing the following information and data with respect to each minor under 16 years of age employed:

"(a) The time of day that the minor began working and the time

\* The numbering of the referenced subsections of ORS was changed to (3) and (4), respectively, in 1989. Section 1, chapter 446, Oregon Laws 1989.

of day that the minor stopped working;

"(b) A schedule of the maximum number of hours to be worked each day and each week by each minor under 16 years of age.

"(3) The records required to be maintained and preserved in sections (1) and (2) of this rule are required in addition to and not in lieu of any other recordkeeping requirement contained in OAR 839-21-001 to 839-21-500. However, when one record will satisfy the requirements of more than one rule, only one record shall be required."

By failing to maintain and preserve records related to hours worked by Kenzie Wright, a minor, while in Respondent's employ between February 9 and September 30, 1994, Respondent violated OAR 839-21-170.

7) At times material herein, OAR 839-21-280(2) provided, in part:

"(2) [N]o minor under 18 years of age may be employed to operate or assist in the operation of power-driven farm machinery of any kind. \*\*\*\*"

"(3) As used in section (2) of this rule 'assist(ing) in the operation of power-driven farm machinery', includes starting, stopping, adjusting, feeding or any other activity involving physical contact associated with the operation of the machinery."

By permitting Kenzie Wright, a minor under 18 years of age, to operate a tractor between February 9 and Sep-

tember 30, 1994, Respondent violated OAR 839-21-280(2).

8) At times material herein, ORS 653.025 provided:

"Except as provided by ORS 652.020 and the rules of the commissioner issued under ORS 653.030 and 653.261, for each hour of work time that the employee is gainfully employed, no employer shall employ or agree to employ any employee at wages computed at a rate lower than:

\*\*\*\*\*

"(3) For calendar years after December 31, 1990, \$4.75."

At times material herein, OAR 839-21-087 provided, in part:

"(1) No employer shall employ any minor to work in the State of Oregon, except under the following conditions:

\*\*\*\*\*

"(g) Where the employer is in full compliance with the provisions of the following statutes relating to the payment of wages:

\*\*\*\*\*

"(C) ORS 653.010 to 653.265[.]"

By failing to pay minimum hourly wage to Kenzie Wright, a minor, between February 9 and September 30, 1994, contrary to ORS 653.025, Respondent violated OAR 839-21-087(1)(g)(C).

9) At times material herein, ORS 653.315(4) provided:

"(4) Every employer of children under 16 years of age shall post in a conspicuous place where such children are employed, a printed notice stating the maximum work

hours required in one week, and in every day of the week from such children."

At times material herein, OAR 839-21-180 provided:

"(1) Every employer required to maintain a schedule of the maximum hours of work by minors under 16 years of age, shall post the schedule in a conspicuous place where all such minors have easy access to it.

"(2) Every notice required by any law or rule to be posted at the employer's place of business and that has applicability to the employment of minor employees shall be displayed in a conspicuous place where all minors have easy access to them."

By failing to post a schedule of the maximum hours required in one week while employing Kenzie Wright, a minor under 16 years of age, between February 9 and September 30, 1994, contrary to ORS 653.315(4), Respondent violated OAR 839-21-180.

10) At times material herein, ORS 653.315(1) provided:

"(1) No child under 16 years of age shall be employed for longer than 10 hours for any one day, nor more than six days in any one week."

By employing Kenzie Wright, a minor under 16 years of age, for more than 10 hours per day on at least 101 separate days between February 9 and September 30, 1994, Respondent committed 101 violations of ORS 653.315(1).

11) By employing Kenzie Wright, a minor under 16 years of age, for more

than six days in any one week in at least 10 separate weeks between February 9 and September 30, 1994, Respondent committed 10 violations of ORS 653.315(1).

12) At times material herein, OAR 839-21-070 provided in part:

"(1) Except as provided in section (2) of this rule, employment of minors under 16 years of age shall be confined to the following periods:

"(a) Outside school hours;

"(b) Not more than 40 hours in any one week when school is not in session;

"(c) Not more than 18 hours in any one week when school is in session;

"(d) Not more than eight hours in any one day when school is not in session;

"(e) Not more than three hours in any one day when school is in session."

By employing Kenzie Wright, a minor under 16 years of age, to work during school hours on 55 different days between April 1 and June 21, 1994, Respondent violated OAR 839-21-070 (1)(a).

13) By employing Kenzie Wright, a minor under 16 years of age, to work more than 40 hours per week during at least three different weeks when school was not in session between April 1 and September 1, 1994, Respondent committed three violations of OAR 839-21-070(1)(b).

14) By employing Kenzie Wright, a minor under 16 years of age, to work more than 18 hours per week during

11 weeks when school was in session between April 1 and June 21, 1994, Respondent committed 11 violations of OAR 839-21-070(1)(c).

15) By employing Kenzie Wright, a minor under 16 years of age, to work more than eight hours per day on 30 separate days when school was not in session between April 1 and September 1, 1994, Respondent committed 30 violations of OAR 839-21-070(1)(d).

16) By employing Kenzie Wright, a minor under 16 years of age, to work more than three hours per day on 55 separate days when school was in session between April 1 and September 1, 1994, Respondent committed 55 violations of OAR 839-21-070(1)(e).

#### OPINION

The evidence in this case establishes that Kenzie Wright, a minor under 16 years of age, worked at Respondent's C Bow Ranch beginning sometime in 1992. She was initially regarded as a "volunteer" by Respondent. Sometime in late 1993, Respondent began issuing paychecks to the minor on a regular basis, based on Respondent's pay scale for a ranch hand.

Respondent's policies regarding persons who worked at the ranch encompassed numerous violations of this state's wage and hour laws. Respondent's policies regarding Kenzie Wright working at the ranch encompassed numerous violations of this state's child labor laws. Respondent's position was that the minor was a "volunteer" during her early tenure and was not later a regular "contract" ranch hand because she did not go through the normal recruitment process and was not author-

ized by Antonini for hire as a "contractor."

#### Volunteer Status

By statutory definition, one employs another by allowing or permitting that individual to work. Such work may be voluntary, without expectation of compensation, *only if* the entity for which the services are performed is "a public employer \* \* \* or a religious, charitable, educational, public service or similar nonprofit corporation, organization or institution for community service, religious or humanitarian reasons" or the work is part of a work training program administered under state or federal assistance laws. ORS 653.010(3). There was no evidence or attempt to show that Respondent was a public employer or a religious, charitable, or educational institution as described or was involved in federal or state public assistance program. Respondent could not therefore accept the personal services of Kenzie Wright or any other individual as a volunteer.

#### Independent Contractor Status

Respondent attempted to give its ranch hands the status of independent contractors by having them register assumed business names, sign an independent contractor agreement, receive periodic compensation without deductions, and report their income on IRS form 1099. But this forum determines whether an individual rendering personal services is an employee or an independent contractor by applying an "economic reality" test. The forum has explained this test as follows:

"The forum considers five factors to gauge the degree of the worker's economic dependency,

with no single factor being determinative. These factors are:

"(1) The degree of control exercised by the alleged employer;

"(2) The extent of the relative investment of the worker and the alleged employer;

"(3) The degree to which the worker's opportunity for profit and loss is determined by the alleged employer;

"(4) The skill and initiative required in performing the job;

"(5) The permanency of the relationship." *In the Matter of Frances Bristow*, 16 BOLI 28, 37 (1997) (citing *In the Matter of Geoffroy Enterprises, Inc.*, 15 BOLI 148 (1996)).

In this instance, 1) the employer controlled the work; 2) the worker had no investment and the employer owned the facilities, livestock, and equipment; 3) the worker's opportunity for profit was limited to a daily wage; 4) job performance was ordinary labor requiring minimal skill; and 5) the relationship was an indefinite one. All of these factors suggest an employer-employee relationship between Respondent and the ranch hands, and, it follows, between Respondent and the minor. Respondent was an employer in its work relationship with Kenzie Wright and the minor was Respondent's employee.

In another case wherein the employer claimed that the minor's labor was given willingly in exchange for training opportunity, this forum said:

"It is not a defense for Respondent that [the minor] willingly and eagerly undertook the [unpaid] position. The subject statutes and rules

were clearly designed to protect minors from their own eagerness and naiveté, and from less than scrupulous potential employers." *In the Matter of LaVerne Springer*, 15 BOLI 47, 68 (1996).

#### Minimum Wage

Non-agricultural employees in Oregon, including minor employees, were entitled to a wage rate of at least \$4.75 an hour. The wage paid to Kenzie Wright, when she was paid at all, was far short of that amount.

The Agency initially charged violations encompassing the entire period between February and September 1994, and sought penalties for the multiple violations involved. At the close of its presentation, it reduced the number of daily and weekly offenses based upon the documentation it anticipated. The documentary evidence of Kenzie Wright's employment showed fewer days "billed" for her labor than the testimony originally indicated. This is not surprising, given the lack of written records and the fact that her testimony (and that of her mother and Jack Pierce) in August 1996 was almost two full years after the events it described. While it is clear that Respondent violated several statutes, the trier of fact has found violations only where the documentary evidence and the testimonial evidence coincide. Thus, while one could infer from the testimony that the minor worked ten or more hours a day, seven days a week for the entire period charged, the forum has limited penalties to those days for which she was compensated. For instance, while the testimony would give the impression that she worked all of the months of April, July, and August 1994, the

invoices indicate 28 days, 8 days, and 15 days, respectively. This necessarily alters the calculation of days worked both when school was in session and when it was not. This forum generally considers each day of a per-day violation or each week of a per-week violation as a separate violation. Because the forum is imposing sanctions, any doubt regarding the exact number of days or weeks worked has been resolved in Respondent's favor. On the other hand, the actual dates when school was in session was a matter of record in this proceeding and Respondent's suggestion that the minor was being home schooled and was not subject to the Wage and Hour Commission's rules regulating the employment of minors is without merit.

#### Minor Under 18

At times material, an employer employing a minor between 14 and 17 years of age was obligated to verify age by viewing the minor's work permit before hire. Within 48 hours after hire, the employer was obligated to file an Employment Certificate with the Agency. Respondent did not verify a work permit and did not file an Employment Certificate, either at the time the minor began work or at any time thereafter. Respondent failed to maintain and preserve records required when employing a minor, and allowed the minor to operate machinery (the tractor).

#### Minor Under 16, School in Session

Respondent might have avoided violations by verifying the minor's age. Because the minor was under 16, the employer had a number of obligations not required with older minor employees. When employing minors under

16, employers must post a printed notice stating the maximum work hours required in one week. Even more serious violations involving school requirements revolved around the minor's age. By statute, minors under 16 must work outside school hours and may not work over 10 hours a day or over six days a week. Commission regulations restrict the employment of minors under 16 to three hours per day and 18 hours per week when school is in session and eight hours per day and 40 hours per week when school is not in session. Respondent breached these statutes and rules as described herein.

The statutes and rules authorize the Commissioner to impose particular penalties. The order below is a proper exercise of that authority.

#### Respondent's Exceptions

Respondent timely filed two exceptions to the Proposed Order.

"Exception 1. The \* \* \* civil penalties \* \* \* in items 9, 11, and 13 \* \* \* should be abated [because] \* \* \* the minor \* \* \* was not enrolled in school [while] she was present and living on the property occupied by Respondent. \* \* \* [S]he had dropped out of school and was not living with either of her natural parents. \* \* \*"

Respondent argues that OAR 839-21-070(1)(a), (c), and (e) mandate that an employer not require a minor to work during times which conflict with the minor's status as a student and with the minor's school schedule, that the minor's legal guardian had consented to the minor's removing herself from school, and that Respondent did

not interfere with the minor's schooling. Rather, Respondent provided adult supervision and a place to live when the parents could or did not. It is suggested that penalties under such circumstances are inappropriate.

The cited rules were promulgated by the Wage and hour Commission under its authority to "administer, execute and carry out the provisions of ORS 653.010 to 653.545 \* \* \*," (ORS 653.520) and to "prepare, adopt and promulgate rules for the carrying into effect of ORS 653.305, 653.315 and 653.505 to 653.540 \* \* \*," (ORS 653.525). The cited rules are based on ORS 653.315 and related statutes limiting the employment of minors under 16 years of age. There are statutory exceptions to those limitations, but enrollment or non-enrollment in school is not one of them. Rather, because the statute requires that the school authorities of the resident school district be informed by certificate of a minor's work status, the Commission's rules couple the age of the child with whether or not school is in session. There is no exception in the statute or in the rules covering employment of a child who merely doesn't attend school. I cannot find that the casual presence of a supervisor, in this case a ranch foreman, is the same as employment by a parent or person standing in the place of a parent permitted by ORS 653.365.\*

Respondent's first exception is overruled.

"Exception 2. The \* \* \* penalties [in] items 7, 8, 10, and 12 \* \* \* are excessive and not borne out by the unique facts of this case. \* \* \* [D]uring all relevant times Wright was living on the business premises \* \* \* [,] was not in school [and] was present on the business premises 24 hours a day, seven days a week. \* \* \* Respondent's \* \* \* premises was Wright[']s surrogate home. \* \* \* Wright liked horses and the rural life [which] attracted her \* \* \* in the first place. \* \* \* [Her] mother believed that \* \* \* [it] was a safe and healthy environment for her daughter in the absence of a home with her own family. \* \* \* [S]ince Wright was not in school and not living at home, she \* \* \* occup[ie]d her otherwise free time \* \* \* with the various horse related activities [at] Respondent's." (Emphasis in original.)

Respondent's argument parallels that of the first exception, to the effect that ORS 653.315 and OAR 839-21-070(1)(b) and (d) are intended to prevent exploitation of a minor, that the unique circumstances of this case were not exploitive because respondent's management was providing a

\* ORS 653.365: "Notwithstanding the provisions of ORS 653.370, a parent or person standing in the place of a parent may employ the child of the parent or a child in the custody of the parent under the age of 18 years in any occupation."

ORS 653.370(1): "In addition to any other penalty provided by law, the Commissioner of the Bureau of Labor and Industries may impose upon any person \* \* \* who violates ORS 653.305 to 653.370 or any rule adopted by the Wage and Hour Commission thereunder, a civil penalty not to exceed \$1,000 for each violation."

place for the minor to live "with full knowledge and consent of the minor's guardian," and that the "penalties totaling [sic] \$14,400 are excessive, not justified, and should be abated."

The evidence indicated that Kenzie Wright's living arrangement was not a mere rooming situation arranged through the parent, and, given the expectation and actuality of the minor's labor, was not the result of Respondent's largesse. The civil penalties proposed are appropriate, within the statutory authority, not excessive, and are hereby confirmed. Respondent's second exception is overruled.

#### ORDER

NOW, THEREFORE, as authorized by ORS 653.370, Arabian Riding and Recreation Corp. is hereby ordered to deliver to the Bureau of Labor and Industries, Fiscal Services Office Ste 1010, 800 NE Oregon Street # 32, Portland, Oregon 97232-2109, a certified check payable to the BUREAU OF LABOR AND INDUSTRIES in the amount of TWENTY THREE THOUSAND FIFTY DOLLARS (\$23,050), plus any interest thereon, which accrues at the annual rate of nine per cent, between a date ten days after the issuance of the Final Order herein and the date Respondent complies therewith. This assessment is the sum of the following civil penalties against Respondent:

- (1) \$100 for violation of OAR 839-21-220(1)(a).
- (2) \$100 for violation of OAR 839-21-220(3).
- (3) \$500 for violation of OAR 839-21-170.

(4) \$500 for violation of OAR 839-21-280(2).

(5) \$250 for violation of OAR 839-21-087(1)(g)(C).

(6) \$100 for violation of OAR 839-21-180.

(7) \$10,100 for 101 violations of ORS 653.315(1) (more than 10 hours per day).

(8) \$1,000 for 10 violations of ORS 653.315(1) (more than six days per week).

(9) \$500 for violation of OAR 839-21-070(1)(a).

(10) \$300 for three violations of OAR 839-21-070(1)(b).

(11) \$1,100 for 11 violations of OAR 839-21-070(1)(c).

(12) \$3,000 for 30 violations of OAR 839-21-070(1)(d).

(13) \$5,500 for 55 violations of OAR 839-21-070(1)(e).

In the Matter of  
STAFF, INC.  
and Barrett Business Services, Inc.,  
Respondents.

Case Number 15-97

Final Order of the Commissioner

Jack Roberts

Issued July 29, 1997.

#### SYNOPSIS

Respondents, a farm labor contractor and an employee leasing company, were joint employers who took unauthorized deductions from wage claimant's wages and failed to pay all wages due upon termination, in violation of ORS 652.140(1) and 652.610(3). The commissioner held each respondent jointly and severally liable for wages due and owing. Respondents' failure to pay the wages was willful, and the commissioner ordered respondents to pay civil penalty wages, pursuant to ORS 652.150. ORS 652.140(1), 652.150, 652.610(3).

The above-entitled contested case came on regularly for hearing before Douglas A. McKean, designated as Administrative Law Judge by Jack Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on November 5, 6, and 12, 1996, and April 22 and 23, 1997, at the Oregon State Employment Department office, 119 N. Oakdale Street, Medford, Oregon.

The Bureau of Labor and Industries (the Agency) was represented by Linda Lohr, an employee of the Agency. In response to a motion for

summary judgment from Staff, Inc. and a motion to dismiss from Barrett Business Services, Inc., the Agency was represented by Assistant Attorney General Wendy Robinson. Debbie Martinez (Claimant) was present throughout the hearing. Staff, Inc. (Respondent Staff) was represented on November 5, 1996, by Anthony Albertazzi, Attorney at Law. Marguerite (Micki) Bivens, Respondent Staff's representative, was present at the hearing on November 5, 1996. Barrett Business Services, Inc. (Respondent Barrett) was represented on April 22 and 23, 1997, by Scott Terrall, Attorney at Law.

The Agency called the following witnesses: Gumaro Diaz, a former employee of Staff, Inc.; Daniel Hatfield, branch manager for Barrett Business Services, Inc.; Debbie Martinez, Claimant; and Raul Ramirez, a compliance specialist with the Wage and Hour Division of the Agency. Milo Salgado, appointed by the forum and under proper affirmation, acted as an interpreter for Mr. Diaz. Respondent Staff called no witness. Respondent Barrett called the following witnesses: Marguerite (Micki) Bivens, secretary for Staff, Inc.; and Manuel M. Galan, president of Staff, Inc. Gabriela Castro, appointed by the forum and under proper affirmation, acted as an interpreter for Mr. Galan.

Administrative exhibits X-1 to X-35, Agency exhibits A-1 to A-15 and A-20, and Respondent Staff exhibits R-1 to R-27 were offered and received into evidence. The ALJ did not receive A-21. The record closed on April 22, 1997.

Having fully considered the entire record in this matter, I, Jack Roberts,

Commissioner of the Bureau of Labor and Industries, hereby make the following Findings of Fact (Procedural and on the Merits), Ultimate Findings of Fact, Conclusions of Law, Opinion, and Order.

#### FINDINGS OF FACT – PROCEDURAL

1) On January 11, 1994, Claimant filed a wage claim with the Agency. She alleged that she had been employed by Respondent Staff and that Respondent Staff had failed to pay wages earned and due to her.

2) At the same time that she filed the wage claim, Claimant assigned to the Commissioner of Labor, in trust for Claimant, all wages due from Respondent Staff.

3) On August 20, 1996, the Agency served on Respondent Staff, Erlinda Almoroz Galan, and Manuel Mosqueda Galan an Order of Determination based upon the wage claim filed by Claimant and the Agency's investigation. The Order of Determination alleged that Respondent Staff owed a total of \$1,091.27 in wages and \$285 in civil penalty wages. The Order of Determination required that, within 20 days, Respondent Staff either pay these sums in trust to the Agency or request an administrative hearing and submit an answer to the charges.

4) On September 3, 1996, Respondent Staff, through its attorney, filed an answer to the Order of Determination and requested a contested case hearing. Respondent Staff's answer denied that it owed Claimant

unpaid wages and set forth as an affirmative defense that the claim was barred by the equitable doctrine of laches.

5) On September 10, 1996, the Agency sent the Hearings Unit a request for a hearing date. The Hearings Unit issued a Notice of Hearing to Respondent Staff, the Agency, and the Claimant indicating the time and place of the hearing scheduled for November 5, 1996. Together with the Notice of Hearing, the forum sent a document entitled "Notice of Contested Case Rights and Procedures" containing the information required by ORS 183.413, and a copy of the forum's contested case hearings rules, OAR 839-50-000 to 839-50-420.<sup>1</sup>

6) On September 30, 1996, the Administrative Law Judge issued a discovery order directing each participant to submit a summary of the case, including a list of the witnesses to be called and the identification and description of any physical evidence to be offered into evidence, together with a copy of any such document or evidence, according to the provisions of OAR 839-50-210(1). The Agency and Respondent Staff each submitted a summary.

7) At the start of the hearing, Respondent Staff's attorney said he had reviewed the "Notice of Contested Case Rights and Procedures" and had no questions about it.

8) Pursuant to ORS 183.415(7), the Administrative Law Judge explained the issues involved in the hearing, the matters to be proved or

disproved, and the procedures governing the conduct of the hearing. Pursuant to OAR 839-50-150(3)(a), the ALJ excluded witnesses.

9) At the beginning of the hearing, Respondent Staff's attorney raised the affirmative defense of claim preclusion. The ALJ heard arguments on the issue and reserved ruling on the issue until the proposed order.

10) During the Agency's case in chief, Respondent Staff's attorney, Mr. Albertazzi, its representative in the hearing, Micki Bivens, and its two witnesses, Manuel Galan and Erlinda Galan, left the hearing. Before they left, the ALJ made it clear that if they left, the hearing would continue to allow the Agency the opportunity to present a prima facie case on the record. When they left, Respondent Staff's attorney said, "We're not going to be appearing for the remainder of the hearing, and we're submitting the matter on the record only, and the testimony and cross-examination that's been given so far as well as the documents that have been admitted into evidence. We're also submitting it on our affirmative defenses."

11) Following the Agency's examination of Daniel Hatfield, the Agency made three motions: (1) to postpone the completion of the hearing; (2) to add Barrett Business Services, Inc. as a Respondent; and (3) to amend the Order of Determination to conform to the evidence, increasing the wages alleged due from \$1,091.27 to \$2,934.54 and the civil penalty wages from \$285 to \$3,281. At hearing, the ALJ granted the motion to postpone the completion

of the hearing. The ALJ notified Respondent Staff of the motions to add Barrett Business Services, Inc. as a respondent and to amend the Order of Determination. The ALJ gave Respondent Staff an opportunity to respond to those motions and to file a motion for summary judgment regarding its affirmative defense of claim preclusion. Respondent Staff did not respond to the Agency's motions and the ALJ granted them.

12) On around November 26, 1996, Respondent Staff filed a motion for summary judgment on the claim preclusion issue.

13) On December 12, 1996, Respondent Barrett filed an answer to the Amended Order of Determination. Respondent Barrett denied the allegations in the order and complained that the process by which Respondent Barrett was added as a party denied it due process. It alleged that the Agency had unclean hands in using that process.

14) On December 20, 1996, the ALJ set a briefing schedule regarding the motion for summary judgment. Following briefing by both the Agency and Respondent Barrett,<sup>2</sup> the ALJ denied the motion. See the Opinion section of this order. In addition, Respondent Barrett moved to dismiss the case against it due to an alleged lack of due process and unclean hands by the Agency. Respondent Staff did not reply to either the Agency's responsive brief on the motion for summary judgment or Respondent Barrett's motion to dismiss. Following a reply brief from the Agency, the ALJ denied the motion to dismiss.

<sup>1</sup> The contested case hearing rules were amended effective December 9, 1996. As amended, OAR 839-050-0000 to 839-050-0440 were sent to all participants in this case.

<sup>2</sup> Respondent Barrett joined in Respondent Staff's motion for summary judgment, but briefed it separately.

15) On March 6, 1997, the forum sent an Amended Notice of Hearing to Respondents, the Agency, and Claimant setting the hearing to continue on April 22, 1997.

16) On March 6, 1997, the ALJ issued a discovery order directing Respondent Barrett to submit a summary of the case and giving the Agency and Respondent Staff an opportunity to supplement their summaries. Respondent Barrett submitted a summary and the Agency submitted a supplement to its summary.

17) On April 7, 1997, the ALJ sent each participant a transcript of the proceedings on November 5, 6, and 12, 1996.

18) On April 16, 1997, the ALJ conducted a prehearing telephone conference with Ms. Lohr for the Agency, Mr. Albertazzi for Respondent Staff, and Mr. Terrall for Respondent Barrett. Mr. Albertazzi said that he still represented Respondent Staff, despite statements to the contrary earlier to Mr. Terrall, and that Respondent Staff would not appear at the hearing on April 22, 1997. Mr. Terrall requested an extension of time to submit Respondent Barrett's case summary. He moved for a postponement of the hearing because he had not received documents from Respondent Staff as promised, he did not think he had all of the participants' exhibits, and he had had the transcript for only one week. Following argument from all participants, the ALJ denied the motion for postponement.

19) At the beginning of the hearing on April 22, 1997, Respondent Barrett's attorney said he had reviewed the "Notice of Contested Case Rights

and Procedures" and had no questions about it.

20) Respondent Barrett renewed its motion for a postponement of the hearing in order to obtain and review additional discovery from Respondent Staff. The Agency opposed the motion. The ALJ denied the motion because it was untimely and Respondent Barrett had not demonstrated adequate efforts to complete discovery or review the discovery it already had during the four-plus months leading up to the hearing date in April 1997.

21) On July 8, 1997, the ALJ issued a Proposed Order. Included in the Proposed Order was an Exceptions Notice that allowed ten days for filing exceptions to the Proposed Order. On July 18, 1997, the Hearings Unit received Respondent Barrett's timely exceptions, which the forum has addressed in the Opinion section of this Final Order.

#### FINDINGS OF FACT – THE MERITS

1) During all times material herein, Respondent Staff was an Oregon corporation engaged in reforestation work. Respondent Staff employed one or more persons in the State of Oregon. Manuel Mosqueda Galan (Galan) was its president.

2) During all times material herein, Respondent Barrett was a Maryland corporation engaged in employee leasing. Respondent Barrett employed one or more persons in the State of Oregon. Daniel Hatfield was a branch manager in Salem.

3) Off and on from May 28, 1991, to July 21, 1993, Respondent Staff employed Claimant as a foreman. Galan hired Claimant and was her

immediate supervisor. Her duties included recruiting and hiring crew members, transporting the crew, supervising and inspecting their work, keeping track of hours worked, and scouting work areas. During her employment, Claimant became a licensed herbicide and pesticide applicator and her duties included mixing and applying these chemicals and supervising others in these duties.

4) In February 1992, Claimant signed a WH-153 form that said that Respondent Staff did not give draws against payroll or personal loans; however, during all times material Galan often gave draws to Claimant and other workers with checks from a "Staff, Inc. Field Account." Respondent Staff (and later, Respondent Barrett) deducted draws from employee payroll checks. Claimant signed a form entitled "Authorization for Deductions" dated February 24, 1992, that stated, "During the period of my employment in 1990 I hereby authorize the deduction from the wages I earn beginning in 1990 (1) Any loans made to me by STAFF, INC. (2) Any lodging costs paid for me." Claimant did not work for Respondent Staff in 1990. She never received a personal loan from Galan or Respondent Staff, although she received advances (draws) on wages. Claimant believed a loan was different from a draw on wages. During each period of Claimant's employment with Respondent Staff, Galan agreed to

pay Claimant's (and the other foremen's) lodging expenses, and these were never to be deducted from her pay.<sup>3</sup> During the period of employment covered by this wage claim, that is, from September 7, 1992, to July 21, 1993, Claimant never signed an authorization allowing Respondent Staff to take deductions from her payroll checks. Claimant never signed an authorization allowing Respondent Barrett to take deductions from her payroll checks. Until November 1992, Respondent Staff used a "Staff, Inc. Operation Account" for payroll checks. Thereafter, Claimant's payroll checks came from Respondent Barrett, and were either hand delivered to her by Galan or mailed to her home address. Respondent Barrett never issued checks for draws on wages.

5) During July or August 1992, Claimant worked in Medford for Harry and David, a pear packing company. She ran into a man named Guadalupe Zamora, who said that Galan was looking for her. In early September 1992, Claimant contacted Galan, who wanted to employ her again as a foreman.

6) From September 7 to 16, 1992, Claimant worked for Respondent Staff on a United States Forest Service (USFS) contract (Solicitation No. R6-4-92-46) applying big game repellent in the Malheur National Forest.<sup>4</sup> Claimant and Galan had an oral

<sup>3</sup> Manuel Galan and Respondents never charged Claimant for lodging or motel expenses until the last pay period in July 1993, when Galan discharged her. Then, contrary to the agreement between Galan and Claimant, he apparently reported to Respondent Barrett that Claimant had a \$500 hotel bill that should be deducted from her wages.

<sup>4</sup> This contract is sometimes referred to in the evidence as the "John Day contract" or the "John Day project."

agreement that Claimant would be paid \$11.00 per hour for performing her regular duties as a foreman, including mixing the repellent chemicals.<sup>5</sup> Claimant performed these duties for 6 hours on September 8, 8 hours on September 9, 8.5 hours on September 10, 6 hours on September 11, 9 hours on September 13, 6.5 hours on September 14, 9.5 hours on September 15, and 10 hours on September 16, 1992, for a total of 63.5 hours of work time. Galan paid Claimant \$4.75 per hour for driving time, that is, for her time spent transporting workers.<sup>6</sup> Claimant drove for 8.5 hours on September 7, 3.5 hours on September 9, 3.5 hours on September 10, 3 hours on September 11, 1 hour on September 12, 2.5 hours on September 13, 3 hours on September 14, 3 hours on September 15, and 3 hours on September 16, 1992, for a total of 31 hours of driving time. Accordingly, Claimant earned \$698.50 for time worked as a foreman and \$147.25 for driving, for total gross earnings of \$845.75. Respondent Staff paid Claimant net wages of \$473.47 (a check for a net amount of \$322.47 plus a \$151 draw) for 75.75 hours worked as a foreman and driving.<sup>7</sup>

<sup>5</sup> In 1992, an applicator license was not required to mix the big game repellent chemicals.

<sup>6</sup> At times, Galan paid Claimant a flat fee of \$50 (from the Staff, Inc. field account) to take a vehicle somewhere and drop it off. None of these trips is included in Claimant's wage claim.

<sup>7</sup> Respondent Staff's Operation Account payroll check stubs showed the total number of hours worked ("Reg Uts" or Regular Units), but did not distinguish Claimant's driving hours from her foreman hours. The stubs did not show the rates of pay. As a result, Claimant could not calculate from the stubs the rate of pay Respondent Staff was paying her for her foreman duties.

<sup>8</sup> This contract is sometimes referred to in the evidence as the "Sisters" contract.

7) During this time, Respondent Staff deducted around 11.6 percent from Claimant's gross wages for federal and state withholding tax, FICA, and workers' compensation insurance. Accordingly, Respondent Staff paid Claimant gross wages of around \$535.64 for her services from September 7 to 16, 1992.

8) From September 17 to October 1, 1992, Claimant worked for Respondent Staff on a USFS contract (Solicitation No. R6-1-92-2506) applying big game repellent in the Deschutes National Forest.<sup>8</sup> Her agreed rate of pay was \$11.00 per hour for foreman duties and \$4.75 per hour for driving. Claimant worked as a foreman for 7.5 hours on September 18, 4 hours on September 20, 9 hours on September 21, 9.5 hours on September 22, 6 hours on September 23, 6.25 hours on September 25, 9.5 hours on September 26, 8.5 hours on September 27, 9 hours on September 28, 6 hours on September 29, 4.5 hours on September 30, and 1 hour on October 1, 1992, for a total of 80.75 hours of work time as a foreman. Claimant drove for 6 hours on September 17, 3 hours on September 18, 1.5 hours on September 19, 3.5 hours on September 20, 3.25 hours on September 21, 3 hours

on September 22, 4 hours on September 23, 3 hours on September 5, 2.5 hours on September 26, 2.5 hours on September 27, 2.5 hours on September 28, 2.5 hours on September 29, 4.5 hours on September 30, and 2 hours on October 1, 1992, for a total of 43.75 hours of driving time. Accordingly, Claimant earned \$888.25 for time worked as a foreman and \$207.81 for time worked driving, for total gross earnings of \$1,096.06. Respondent Staff calculated Claimant's gross wages to be \$973.50. Respondent Staff deducted \$30 from her wages for "loans."

9) During times material (September 1992 to July 1993), Galan used the Staff, Inc. Field Account to pay bills, reimburse expenses, and give draws on wages.<sup>9</sup> When Galan was present at a work site, he would pay motel, gas, and other expenses from the field account. When he was not present, Galan and Claimant had an agreement whereby she would pay expenses out of her pocket and turn in the receipts to him. He would then give her a check from the field account to reimburse her. Galan gave Claimant oral authority to give draws to her crew members. Sometimes she paid draws from her own money, got the signatures of the workers acknowledging the draws, and then got reimbursed by Galan from the Staff, Inc. Field Account. Other times, if she knew the workers wanted draws and knew the total amount, she would get a field account check for the total from Galan, cash it, give out the draws, and get the signatures of the workers acknowledging the draws. Galan used

these "draw sheets" with the workers' signatures to determine the amount of deductions to take from the workers' pay checks for the draws. Galan wrote field account checks to Claimant that would reimburse her for both expenses and draws she had paid out, or that would include both reimbursement money and a draw for her on her wages. Galan kept the records regarding draws and, starting in October 1992, turned this information over to Respondent Barrett. On December 23, 1992, Galan gave Claimant a \$500 bonus for the year (1992) from the field account.

10) In October 1992, Claimant obtained a license to apply, and to supervise the application of, herbicides and pesticides. Claimant and Galan agreed that she would receive \$17.00 per hour when she performed work that required her license.

11) On October 28, 1992, Respondent Staff and Respondent Barrett entered into a written "Employee Leasing Agreement." Under the agreement, Respondent Barrett and Respondent Staff entered into a "co-employer" or "joint employer relationship."

"Under the terms of this Agreement, Barrett agrees to maintain the employment of those persons recommended by Client [Respondent Staff], provided that Barrett receives the necessary personnel information for each applicant in order to properly complete the requisite personnel and payroll documentation. It is the intention and understanding of the parties that, by this Agreement, Barrett is the

<sup>9</sup> Throughout the evidence, an advance on wages was variously called a draw, a loan, or an advance.

leasing employer and that Barrett and Client have entered into a joint employer relationship with respect to the employees covered under this Agreement under Internal Revenue Code (IRC) § 414(n)."

Respondent Staff recruited the employees and Respondent Barrett had the contractual authority to hire, discipline, direct, control, and fire the employees. Respondents were joint employers of those individuals leased to Respondent Staff for the purposes of, among other things, "implementation of policies and practices relating to the employer-employee relationship such as recruiting, interviewing, testing, selection, orientation, training, evaluation, replacing, supervising, disciplining, and terminating employees." Respondent Staff was responsible for the "day-to-day supervision and control of the joint employees[.]" Respondent Barrett provided the workers' compensation insurance, prepared the payroll (including making deductions from payroll), and paid the payroll taxes for the employees. According to Hatfield, Respondent Staff and Respondent Barrett were "co-responsible" for compliance with OSHA regulations. Employees filled out Respondent Barrett's employment applications and information from these applications was then entered into Respondent Barrett's computer system. Respondent Barrett's staff reviewed the employment applications for items such as signatures and completion of I-9 and W-4 forms, and the staff made sure the employment packets were put together properly and filed. Under the agreement, Respondent Staff,

"acknowledges and understands that Barrett relies on Client to provide accurate, timely, and verifiable hours worked information for the purposes of calculating accurate payroll and benefits. It is Client's responsibility to inform Barrett of any individual job's status as 'exempt' or 'non-exempt' under federal or state wage-hour law."

Hatfield was aware that USFS contracts required minimum wage rates for classes of workers; however, Respondent Barrett required Respondent Staff to give Respondent Barrett the number of each contract it was working on, with the pay rates and fringe benefit amounts. Respondent Barrett would then put this information into the computer, run the payroll, pay the employees, and bill Respondent Staff. Under the agreement, Respondents agreed that,

"compliance with government imposed record-keeping requirements is an essential component of the employment relationship and this Agreement. Each party to this Agreement specifically assumes the record-keeping obligations associated with its respective employment duties."

However, Hatfield believed it was Respondent Staff's responsibility to obtain and keep employees' written authorizations for deductions from wages. Respondent Staff submitted draw (or loan) amounts to Respondent Barrett, which then took deductions from the employees' pay checks and issued the paychecks to Respondent Staff. Respondent Barrett did not question the draw amounts submitted by Respondent Staff. Under the leasing

agreement, the leased employees were Respondent Staff's for the purpose of compliance with the "Fair Labor Standards Act, and similar state law requirements[.]" However, Hatfield believed both "co-employers" were responsible for complying with state and federal wage and hour laws.

12) In late October or early November 1992, Galan had Claimant and her crew members each fill out an employment application for Respondent Barrett. Galan told Claimant that Respondent Barrett was his new payroll company and that Respondent Barrett needed employment applications from each employee. Claimant and each crew member also filled out W-4 and I-9 forms, which Respondent Staff turned in to Respondent Barrett. Galan told Claimant to talk with him, not Respondent Barrett, if she had a complaint about her pay. Claimant never contacted Respondent Barrett concerning her wages until after Galan discharged her in July 1993.

13) During 1992, Claimant kept a diary of her and her crew's hours on each job. At Galan's request, Claimant kept her driving hours and her other work hours separate. She put these hours on a chart for payroll and gave the chart to Galan. There were discrepancies between Claimant's diary of hours worked and the chart Galan accepted from her because Galan refused to pay for some hours and directed her to subtract them. For example, on November 15, 1992,

Claimant drove from Medford to Madras to pick up a company vehicle and then drove back to Medford. On November 16, 1992, Claimant picked up a crew in Medford and drove them to the next job site at Shaver Lake, California. She performed this work at Galan's direction. However, Galan told Claimant not to report this time on her payroll chart because he would not pay her for this time. He told her that if she wanted the job, she would do this. She then prepared new payroll charts until he finally would accept one. Another example of time that Galan refused to pay for occurred when there was "down time" while a broken piece of machinery was being repaired, even though Galan required Claimant and the crew to stay at the work site.

14) From November 15 to December 6, 1992, Claimant worked on USFS contract number 53-9A40-3-1P02 (Solicitation No. R5-15-93-01) to control gophers in the Sierra National Forest.<sup>10</sup> Her agreed rate was \$17.00 per hour for foreman and licensed applicator duties and \$4.75 per hour for driving.<sup>11</sup> Claimant worked as a foreman and licensed applicator for 7 hours on November 17, 8 hours on November 18, 8 hours on November 19, 8 hours on November 20, 6.5 hours on November 21, 7.5 hours on November 23, 8 hours on November 24, 8 hours on November 25, 5 hours on November 27, 6.5 hours on November 28, 8.5 hours on November 30, 8 hours on December 1, 8.5 hours

<sup>10</sup> This contract is sometimes referred to in testimony as the "Shaver Lake" or "Clovis" project.

<sup>11</sup> Galan and Claimant agreed that Claimant's rate of pay would be \$17.00 per hour on this and any succeeding contracts where her applicator's license was required.

on December 2, 4.5 hours on December 3, 3.25 hours on December 5, and .75 hours on December 6, 1992, for a total of 106 hours of work time. Claimant drove for 8 hours on November 15, 11 hours on November 16, 3 hours on November 17, 3 hours on November 18, 4 hours on November 19, 3 hours on November 20, 2 hours on November 21, 2 hours on November 23, 4.5 hours on November 24, 4 hours on November 25, 5.5 hours on November 27, 5.75 hours on November 28, 2 hours on November 30, 1 hour on December 1, 2.5 hours on December 2, 1 hour on December 3, 3.75 hours on December 5, and 1 hour on December 6, 1992, for a total of 67 hours of driving time. Accordingly, Claimant earned \$1,802 for time worked as a foreman and applicator and \$318.25 for time worked driving, for total gross earnings of \$2,120.25. Respondents paid Claimant \$2,067.94 (gross).

15) From December 15 to 29, 1992, Claimant worked on USFS contract number 53-9JHA-3-1R11 to control gophers in the Six Rivers National Forest.<sup>12</sup> Her agreed rate was \$11.00 per hour for foreman duties and \$4.75 per hour for driving. Claimant worked as a foreman for 8 hours on December 15, 8 hours on December 16, 4.5 hours on December 17, 7 hours on December 18, 4 hours on December 21, 8 hours on December 28, and 6 hours on December 29, 1992, for a total of 45.5 hours of work time. Claimant drove for one hour each on December 15, 16, 17, 18, 21, 28, and 29, 1992, for a total of seven hours of driving time. Accordingly, Claimant

earned \$500.50 for time worked as a foreman and \$33.25 for driving time, for total gross earnings of \$533.75. Respondents calculated gross wages of \$527.01. Respondents deducted \$100 from Claimant's pay as a "CUST ADV." Respondent Barrett showed draws and purchases as customer advances on its statement of itemized deductions. Accordingly, Respondents paid Claimant net wages of \$385.97 rather than \$485.97. Claimant did not receive a draw of \$100 during this period.

16) Claimant made no claim for wages for the period January through March 1993.

17) From April 29 to May 2, 1993, Claimant worked on a USFS contract (Solicitation No. RFQ 4-93-30) to install, maintain, and remove tree netting in the Malheur National Forest. Her agreed rate was \$11.03 per hour for foreman duties and \$4.75 per hour for driving. Claimant worked as a foreman for 8 hours on April 29, 9.5 hours on April 30, 6.25 hours on May 1, and 3.75 hours on May 2, 1993, for a total of 27.5 hours of work time. Claimant drove for one hour each on April 29 and 30 and May 1 and 2, 1993, for a total of four hours of driving time. Accordingly, Claimant earned \$303.33 for time worked as a foreman and \$19.00 for time worked driving, for total gross earnings of \$322.33. With a check from the field account marked "loan" dated April 31 [sic], 1993, Galan gave Claimant a draw on her wages of \$500. Respondents calculated Claimant's gross wages as \$308.08, based on 27.5 hours worked and including

\$4.75 in "Sal."<sup>13</sup> Respondents deducted \$273.94 from Claimant's pay as a "CUST ADV." Accordingly, Respondents paid Claimant net wages of \$10.00 rather than \$283.94. When Claimant asked Galan about the deduction, he said it was part of the \$500 draw, but because she had not earned very much, Respondents could not deduct the whole \$500. Galan said that's just the way Respondent Barrett did this.

18) From June 1 to 3 and June 7 to 13, 1993, Claimant worked on a USFS contract (Solicitation No. R5-16-92-22) to apply herbicide in the Stanislaus National Forest. Her agreed rate for foreman duties while Galan was on site on June 1, 2, and 3, 1993, was \$13.00 per hour. Claimant worked as a foreman for 5.5 hours on June 1, 8 hours on June 2, and 8.75 hours on June 3, 1993, for a total of 22.25 hours of work time. Claimant earned \$289.25 at \$13.00 per hour for time worked as a foreman. Respondents calculated her gross earnings at \$308.93, based on 22.5 hours of work. Respondents deducted \$137 from Claimant's pay as a "CUST ADV." This \$137 was for clothing and equipment (hard hats, safety glasses, coveralls, gloves, and boots) that the USFS required Respondent Staff's workers to wear. Galan gave each worker this clothing and equipment. Claimant did not keep the clothing or equipment after the crew

completed the contract. Galan never told Claimant or the other workers that he was going to charge them for the clothing and equipment. Galan told Claimant that the \$137 deduction was for part of the \$500 draw she had received in April 1993. Accordingly, Respondents paid Claimant net wages of \$147.87 rather than \$284.87. From June 7 to 13, 1993, Claimant's agreed rate was \$17.00 per hour for licensed herbicide application. She worked as a licensed herbicide applicator for 3.75 hours on June 8, 4.5 hours on June 9, 8.75 hours on June 10, 5.25 hours on June 11, .5 hour on June 12, and 2.5 hours on June 13, 1993, for a total of 25.25 hours of work time. Her agreed rate for driving was \$4.75 per hour. Claimant drove for 11.5 hours on June 7, 3.5 hours on June 8, 3.25 hours on June 9, 2.5 hours on June 10, 3.75 hours on June 11, 10 hours on June 12, and 4.5 hours on June 13, 1993, for a total of 39 hours of driving time. Accordingly, she earned \$429.25 at \$17.00 per hour as a licensed herbicide applicator and \$185.25 at \$4.75 per hour for driving time, for total gross earnings from June 7 to 13, 1993, of \$614.50. Respondents calculated her gross earnings as \$510.98 for 25.25 hours at \$12.90 per hour (\$325.73<sup>14</sup>) and 39 hours of driving time at \$4.75 (\$185.25). Respondents deducted \$263.06 from Claimant's pay as a "CUST ADV." Accordingly,

<sup>13</sup> See footnote 14.

<sup>14</sup> Claimant's pay check stubs show "Total Hours," but these hours do not include her driving hours. Wages for her driving hours show up on the stubs as "Sal." Her "Regular" pay amount is her gross pay without the fringe benefit amount required by USFS contracts. This benefit shows up on the check stubs as "CLB," or "cash in lieu of benefit," and must be added to the gross pay to determine the actual hourly rate Respondents paid Claimant for her work (other than driving).

<sup>12</sup> This contract is sometimes referred to in the evidence as the "Humboldt Nursery" project.

Respondents paid Claimant net wages of \$207.38 rather than \$470.44. When Claimant questioned Galan about this deduction, he said it was part of her \$500 draw from April 1993. Claimant disputed the deduction and Galan said he would have to check with Respondent Barrett. Claimant never found out what the \$263.06 deduction was for. Claimant did not receive a draw during this period.

19) Toward the end of her employment, Claimant and Galan were working on different contracts in different locations. Galan called motels and arranged with them to accept Claimant's personal checks for her crew's lodging expenses. Galan made three deposits into Claimant's personal checking account between June 7 and June 16, 1993, to reimburse her for expenses (including a reel, hose, and coupling repair) and lodging that Claimant paid with her personal checks.

20) From June 14 to 29, 1993, Claimant worked on USFS contract number 53-9A40-3-1P27 (Solicitation No. R5-15-93-21) to apply herbicides in the Sierra National Forest.<sup>15</sup> Her agreed rate was \$17.00 per hour for foreman and licensed applicator duties and \$4.75 per hour for driving. Claimant worked as a foreman and licensed applicator for 10 hours on June 14, 7.5 hours on June 15, 2 hours on June 16, 7.75 hours on June 17, 8.25 hours on June 18, 9.75 hours on June 19, 4 hours on June 20, 5.25 hours on June 21, 8 hours on June 22, 7.25 hours on June 23, 5.5 hours on June 24, 7 hours on June 25, 6.75 hours on June

26, 8 hours on June 27, 7.25 hours on June 28, and 2 hours on June 29, 1993, for a total of 106.25 hours of work time. Claimant drove for 4.75 hours on June 14, 6 hours on June 15, 3.5 hours on June 16, 3.5 hours on June 17, 3.5 hours on June 18, 4.5 hours on June 19, 4 hours on June 20, 5 hours on June 21, 5 hours on June 22, 5 hours on June 23, 5.75 hours on June 24, 6.75 hours on June 25, 7.25 hours on June 26, 5 hours on June 27, 5 hours on June 28, and 5.5 hours on June 29, 1993, for a total of 80 hours of driving time. Accordingly, Claimant earned \$1,806.25 for time worked as a foreman and applicator and \$380 for time worked driving, for total gross earnings of \$2,186.25. Respondents calculated her gross earnings as \$1,452.02. This included 97 hours at \$9.57 per hour<sup>16</sup> (plus 83 cents per hour as a fringe benefit, or "cash in lieu of benefits" - "CLB"), 7.25 overtime hours at \$14.36 per hour (plus the fringe benefit), and 69.5 hours at \$4.75 per hour for driving time. Respondents deducted \$100 from Claimant's pay as a "CUST ADV." Accordingly, Respondents paid Claimant net wages of \$1,199.05 rather than \$1,299.05. Claimant never received a \$100 cash advance or draw from Galan. When Claimant argued with Galan about the hourly rate she was paid and about the \$100 deduction, he said it was an error due to Respondent Barrett's book-keeping. In another argument in July 1993 about Claimant's rate of pay when she used her applicator's license (\$17.00 per hour), Galan said that he did not have to pay her that rate, they

had only an oral agreement, and she had no proof of the agreement. He agreed to pay her and Gumaro Diaz \$13 per hour and to contact Respondent Barrett to raise their wages to that amount. He said the wage difference would show up in her next pay check. Claimant continued to argue that her wage rate was \$17.00 per hour.

21) From July 6 to 21, 1993, Claimant worked on USFS contract number 53-91VS-3-1620 (Solicitation No. IFB R5-03-93-31) to apply herbicides in the El Dorado National Forest.<sup>17</sup> Her agreed rate was \$17.00 per hour for foreman and licensed applicator duties and \$4.75 per hour for driving. Claimant worked as a foreman or licensed applicator for 8.25 hours on July 6, 9.5 hours on July 7, 10 hours on July 8, 8.5 hours on July 9, 7.5 hours on July 10, 5.5 hours on July 12, 11.5 hours on July 13, 4.5 hours on July 14, 8.5 hours on July 15, 7 hours on July 16, 10 hours on July 17, 8.25 hours on July 19, 5.75 hours on July 20, and 3.75 hours on July 21, 1993, for a total of 108.5 hours of work time. Claimant drove for 5 hours on July 6, 3.5 hours on July 7, 4.5 hours on July 8, 5 hours on July 9, 3.75 hours on July 10, 4 hours on July 12, 3.75 hours on July 13, 3.75 hours on July 14, 7 hours on July 15, 5.5 hours on July 16, 6.75 hours on July 17, 5.75 hours on July 19, 3.75 hours on July 20, and 4.75 hours on July 21, 1993, for a total of 66.75 hours of driving time. Accordingly, Claimant earned \$1,844.50 for time worked as a foreman or applicator and \$317.06 for driving time, for total gross earnings of \$2,161.56.

Respondents calculated her gross pay at \$1,914.13, including 69.75 hours at \$12.00 per hour, 64.75 hours at \$11.06 per hour, and 76 hours at \$4.75 per hour for driving time. Respondents deducted \$170 on July 16 and \$794.20 on July 30 (for total deductions of \$964.20) from Claimant's wages for "CUST ADV." Accordingly, Respondents paid Claimant net wages of \$682.23, rather than \$1,646.43. Claimant disputed the amount of her July 16 paycheck with Galan. He said he knew the check was small and he would add \$30. Neither Respondents nor Galan ever paid Claimant additional wages. Later, after he had terminated her, Galan told Claimant that \$794.20 was deducted from her last pay check (leaving a net amount of \$10.00) because Claimant owed him money for the reel and hose repair and Respondent Barrett would not let him deduct any more than that. Claimant did not owe Galan money and did not receive a draw of \$170.

22) During the performance of the El Dorado National Forest contract, Claimant refused to mix the herbicide chemicals as Galan directed because Claimant believed his formula was contrary to federal regulations and would jeopardize her license. Thereafter, Galan no longer let Claimant mix her own formulas and gave that responsibility to his nephew. This, along with the on-going dispute about her rate of pay, caused a breakdown in Galan and Claimant's relationship. USFS and the US Department of Labor began investigating Respondent Staff apparently because some

<sup>15</sup> Claimant sometimes referred to this as the "Clovis herbicide contract."

<sup>16</sup> The hourly rate of pay required on this contract for laborers was \$10.23, plus 83 cents fringe benefit.

<sup>17</sup> This contract is sometimes referred to in the evidence as the "Placerville" job.

workers had complained to the USFS about not getting paid. After Claimant was interviewed during the investigation, Galan terminated her employment and sent her home. Claimant had receipts for expenses, but Galan refused to reimburse her. Claimant's last day of work was July 21, 1993.

23) In order to comply with Oregon law requiring an employer to pay its employee all wages due immediately upon discharge, Respondent Barrett made the following arrangement with its clients. When a client discharged an employee, the client would notify Respondent Barrett of the discharge and give Barrett payroll information, such as the hours worked and the rate of pay. Respondent Barrett then calculated the gross and net wage amounts and told the client to pay the employee the net amount, minus \$10.00, with the client's check. Finally, Respondent Barrett would run the payroll through its normal process and mail its final paycheck for \$10.00 that day (with the itemized statement of deductions). The amount of the client's check to the employee (for the net wages less \$10.00) showed up as a "Cust Adv" (a draw) on Respondent Barrett's itemized statement of deductions to the employee. Respondent Barrett used this final paycheck arrangement because it could not be on site to hand the employee a final paycheck immediately upon discharge. This arrangement permitted the joint employers to pay all but \$10.00 of the employee's final wages immediately upon discharge and allowed Respondent Barrett to avoid issuing a zero-dollar final paycheck, which, according to Hatfield, drove Barrett's auditors

crazy because employees never cashed such checks.

24) Galan added up several field account checks that he had written to Claimant, plus the three deposits he had made to her personal checking account to pay for lodging and other expenses, and \$500 for motel expenses and reported these amounts to Respondent Barrett as draws or loans to Claimant. As a result, Respondent Barrett's records showed Claimant having a "one-shot" deduction of \$2,620. Following the deduction of \$794.20 from Claimant's final paycheck, a report by Respondent Barrett's staff indicated that Claimant "still owed" \$1,905.80 to Respondent Staff.

25) At some time after January 11, 1994, Claimant sued Galan and Respondent Staff for her reimbursable expenses. The matter went to arbitration and Claimant received an arbitration award in her favor against Galan and Respondent Staff in the amount of \$1,118.02. The judgment was docketed on May 31, 1995. As of October 24, 1996, the judgment was unsatisfied.

26) Claimant's testimony was credible. The Administrative Law Judge carefully observed her demeanor during the hearing. Her demeanor was forthright, even when her memory was deficient. She usually had the facts readily at her command and documentary records supported her statements. There is no reason to determine the testimony of Claimant to be anything except reliable and credible.

27) Manuel Galan's testimony was not reliable or credible. The Administrative Law Judge carefully observed

his demeanor during the hearing. Galan's bias was obvious and he demonstrated animus for Claimant and the Agency. His testimony was inconsistent on important points. It was often contradicted by Claimant's credible testimony and by his own records. In addition, the transactions summary produced by Respondent Staff was unreliable. In it, Galan treated many field account checks to Claimant as advances or draws on her wages, when credible evidence showed that these checks were reimbursements for expenses or were draws for her crew members. For example, Galan gave Claimant check number 8990, dated January 26, 1993, for \$130.43. None of Respondent Staff's records covering that period suggest that Claimant received a draw for that amount, and her pay check covering that period does not show a deduction for such a draw. However, the transaction summary lists that check as a draw paid to Claimant. The forum disregarded the information in the summary and disbelieved all of Galan's testimony except that which was corroborated by other credible evidence.

#### ULTIMATE FINDINGS OF FACT

1) During all times material herein, Respondent Staff was an Oregon corporation that engaged the personal services of one or more employees in the state of Oregon. Manuel Galan was Respondent Staff's president.

2) During all times material herein, Respondent Barrett was a Maryland corporation that engaged the personal services of one or more employees in the state of Oregon.

3) From September 7, 1992, to July 21, 1993, Respondent Staff

employed Claimant. Manuel Galan hired Claimant and was her direct supervisor during all times material.

4) From October 28, 1992, to July 21, 1993, Respondent Staff and Respondent Barrett had a joint employment relationship, and as such both Respondents employed Claimant.

5) From September 7 to 16, 1992, Claimant earned \$845.75 (gross). Respondent Staff paid her around \$535.64 (gross). Respondent Staff owes Claimant \$310.11 in earned and unpaid gross wages for this period.

6) From September 17 to October 1, 1992, Claimant earned \$1,096.06 (gross). Respondent Staff paid her \$973.50 (gross). Respondent Staff gave Claimant a draw of \$30.00 during this period and deducted \$30.00 from her net wages without written authorization from Claimant. Respondent Staff owes Claimant \$122.56 in earned and unpaid gross wages for this period.

7) From November 15 to December 6, 1992, Claimant earned \$2,120.25 (gross). Respondents paid her \$2,067.94 (gross). Respondents owe Claimant \$52.31 in earned and unpaid gross wages for this period.

8) From December 15 to 29, 1992, Claimant earned \$533.75 (gross). Respondents paid her \$527.01 (gross). Respondents deducted \$100 from Claimant's net wages without written authorization from Claimant. Claimant did not receive a draw during this period. Respondents owe Claimant \$6.74 in gross earned and unpaid wages and \$100 in net earned and unpaid wages for this period.

9) From April 29 to May 2, 1993, Claimant earned \$322.33 (gross). Respondents paid her \$308.08 (gross). Respondents owe Claimant \$14.25 in gross earned and unpaid wages for this period. Respondents gave Claimant a \$500 draw during this period. Respondents deducted \$273.94 from Claimant's net wages without written authorization from Claimant. Claimant owes Respondents \$226.06 from this period.

10) From June 1 to 13, 1993, Claimant earned \$903.75 (gross). Respondents paid her \$819.91 (gross). Respondents deducted \$400.06 from Claimant's net wages without written authorization from Claimant. Claimant did not receive a draw during this period. Respondents owe Claimant \$83.84 in earned and unpaid gross wages and \$400.06 in earned and unpaid net wages for this period.

11) From June 14 to 29, 1993, Claimant earned \$2,186.25 (gross). Respondents paid her \$1,452.02 (gross). Respondents deducted \$100 from Claimant's net wages without written authorization from Claimant. Claimant did not receive a draw during this period. Respondents owe Claimant \$734.23 in earned and unpaid gross wages and \$100 in earned and unpaid net wages for this period.

12) From July 6 to 21, 1993, Claimant earned \$2,161.56 (gross). Respondents paid her \$1,914.13 (gross). Respondents deducted \$964.20 from Claimant's net wages without written authorization from Claimant. Claimant did not receive a draw during this period and did not owe Respondents or Galan money for a reel and hose repair. Respondents owe Claimant

\$247.43 in earned and unpaid gross wages and \$964.20 in earned and unpaid net wages for this period.

13) Respondents discharged Claimant on Wednesday, July 21, 1993.

14) From September 7 to October 1, 1992, Claimant earned \$1,941.81 in gross wages from Respondent Staff. She worked 25 days during this period. Respondent Staff paid her a total of \$1,509.14 (gross). Respondent Staff owes Claimant \$432.67 in earned and unpaid gross wages for this period.

15) From November 15, 1992, to July 21, 1993, Claimant earned \$8,227.89 in gross wages from Respondents. She worked 73 days during this period. Respondents paid her a total of \$7,089.09 (gross). Respondents owe Claimant \$1,138.80 in earned and unpaid gross wages. In addition, Respondents owe Claimant \$1,338.20 for unauthorized deductions from her net wages; this amount is the sum of deductions taken for draws Claimant did not receive, reduced by the \$226.06 that remained of the \$500 draw in April 1993 and that Respondents did not deduct from Claimant's May 1993 pay.

16) During the period September 7, 1992, to July 21, 1993, Claimant worked 98 days and earned \$10,169.70. Her average daily rate of pay was \$103.77.

17) Respondents willfully failed to pay Claimant \$1,571.47 in earned, due, and payable gross wages, plus they wrongly deducted 1,338.20 in net wages. Respondents have not paid Claimant the wages owed and more

than 30 days have elapsed from the due date of those wages.

18) Civil penalty wages, computed pursuant to ORS 652.150 and Agency policy, equal \$3,113.10 (Claimant's average daily rate, \$103.77, continuing for 30 days).

#### CONCLUSIONS OF LAW

1) During all times material herein, Respondents were employers and Claimant was an employee subject to the provisions of ORS 652.110 to 652.200 and 652.310 to 652.414.

2) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the subject matter and the Respondents herein. ORS 652.310 to 652.414.

3) The actions or inactions of Manuel Galan, an agent or employee of Respondent Staff, are properly imputed to Respondent Staff.

4) *Former* ORS 652.140(1) (1991) provided:

"Whenever an employer discharges an employee or where such employment is terminated by mutual agreement, all wages earned and unpaid at the time of such discharge shall become due and payable immediately."

Respondents violated *former* ORS 652.140(1) by failing to pay Claimant all wages earned and unpaid immediately upon discharging her from employment on Wednesday, July 21, 1993.

5) *Former* ORS 652.150 (1991) provided:

"If an employer willfully fails to pay any wages or compensation of any employee whose employment

ceases, as provided in ORS 652.140 and 652.145, then, as a penalty for such nonpayment, the wages or compensation of such employee shall continue from the due date thereof at the same rate until paid or until action therefor is commenced; provided, that in no case shall such wages or compensation continue for more than 30 days from the due date; and provided further, the employer may avoid liability for the penalty by showing financial inability to pay the wages or compensation at the time they accrued."

Respondents are jointly and severally liable for a civil penalty under *former* ORS 652.150 for willfully failing to pay Claimant all wages when due as provided in ORS 652.140.

6) *Former* ORS 652.610 (1981) provided in part:

"(3) No employer may withhold, deduct or divert any portion of an employee's wages unless:

"(a) The employer is required to do so by law;

"(b) The deductions are authorized in writing by the employee, are for the employee's benefit, and are recorded in the employer's books;

"(c) The employee has voluntarily signed an authorization for a deduction for any other item, provided that the ultimate recipient of the money withheld is not the employer, and that such deduction is recorded in the employer's books; or

"(d) The deduction is authorized by a collective bargaining

agreement to which the employer is a party."

Respondents violated ORS 652.610(3) by deducting portions of Claimant's wages without written authorization from her.

7) Under the facts and circumstances of this record, and according to the law applicable to this matter, the Commissioner of the Bureau of Labor and Industries has the authority to order Respondents to pay Claimant her earned, unpaid, due, and payable wages and the civil penalty wages, plus interest on both sums until paid. ORS 652.332.

#### OPINION

##### Joint Employment Relationship

Respondent Staff stipulated that Claimant was its employee at the time this claim arose. Neither Respondent disputes that between October 28, 1992, and July 21, 1993, they had a written agreement whereby they were joint employers of Claimant. In the agreement, Respondents described their relationship this way:

"It is the intention and understanding of the parties that, by this Agreement, Barrett is the leasing employer and that Barrett and Client have entered into a joint employer relationship with respect to the employees covered under this Agreement under Internal Revenue Code ('IRC') § 414(n)."

There's no real dispute that Respondent Staff and Respondent Barrett were Claimant's joint employers. Respondent Barrett retained hiring and firing rights, had the authority to administer discipline to the employees, handled payroll matters (including the

payment of state and federal taxes), provided workers' compensation insurance, and made various fringe benefits available to its employees. Respondent Barrett was not a mere payroll agent and did not merely provide administrative services. At the same time, Respondent Staff maintained day-to-day supervision of the employees and retained the right to hire, fire, and discipline them. Respondent Staff's president, Galan, set the pay rates, obtained the contracts the employees worked on, set the work schedule, arranged for the employees' lodging, and gave them advances on wages. The forum concludes that each Respondent retained for itself sufficient control of the terms and conditions of employment to be considered a joint employer of Claimant.

The issues then are (1) whether each joint employer is required to comply with the wage and hour laws that govern employers in Oregon, and (2) whether each joint employer is liable for any violation of those laws. The forum finds that each joint employer is required to comply with Oregon's wage and hour laws and each employer is liable, both individually and jointly, for any violation of those laws.

Neither Respondent cited any law that relieves it of responsibility to comply with ORS 652.140 or 652.610. ORS 652.360 states that "[n]o employer may by special contract or any other means exempt the employer from any provision of or liability or penalty imposed by ORS 652.310 to 652.414 or by any statute relating to the payment of wages[.]" In other words, an employer may not make an agreement whereby the employer is

not required to comply with the wage collection law. Neither Respondent can by its agreement relieve itself of its obligations under the law. The employee leasing agreement between Respondents is no defense to a failure to pay final wages when due to Claimant. All joint employers are responsible, both individually and jointly, for compliance with all the applicable provisions of Oregon's wage and hour laws.<sup>18</sup>

However, Respondent Barrett contends that it is not liable for any wages due Claimant. It argues that it relied on information from Respondent Staff when it paid Claimant and it satisfied its administrative obligations to Respondent Staff and Claimant. It claims that it could not police Respondent Staff. It denies that Respondent Staff or Galan was its agent or employee, and it asserts that Respondent Staff is responsible for any failures by Galan to pay Claimant properly or to report her payroll information to Barrett.

By virtue of their employee leasing agreement, Respondents were like partners who employed Claimant. They intended to and did associate to carry on a joint enterprise for profit, and they became co-employers of Claimant and the other employees. They each share joint and several liability for any debt to their employees for wages and penalties. Each employer may, of course, take credit toward wage payments, including any required minimum wage and overtime, made to an employee by the other joint employer.<sup>19</sup> How and whether Respondents divide

their liability or indemnify each other is for them or another forum to decide.

In its exceptions, Respondent Barrett again argues that it should not be responsible for the alleged wrongdoing of Galan and Respondent Staff. It takes exception to the reference that it and Respondent Staff were "like partners," and states that Galan and Respondent Staff were not Barrett's employees, agents, or representatives. Respondent Barrett minimizes its joint employment relationship with Respondent Staff (characterizing their agreement as "a services contract") and argues that the forum should not impute Respondent Staff's actions to Respondent Barrett. It argues that Respondent Staff "could have just as easily contracted with a payroll company and/or a workers' compensation insurance carrier which would not have been responsible for any wrongs of Staff, Inc." Respondent Barrett also repeatedly makes the point that, although Barrett was Claimant's employer and accepted her application and paid her wages and provided her workers' compensation insurance, it did not direct, control, or supervise her work activities. It argues that Respondent Staff set Claimant's rate of pay and hours, and provided the payroll records Respondent Barrett used to produce the pay checks.

The weakness in Respondent Barrett's position, and the reason the forum rejects it, is that it is contrary to the facts, the law, and the terms of its joint employment agreement, which show,

<sup>18</sup> This is consistent with the responsibility of joint employers under the federal Fair Labor Standards Act (FLSA). See 29 CFR 791.2 -- Joint Employment.

<sup>19</sup> Again, this is consistent with joint employers' responsibilities under the FLSA. See 29 CFR 791.2.

among other things, that: Respondents entered into a joint employment agreement; Respondent Barrett became Claimant's employer; it retained "direction and control over the employees covered by [the] Agreement, including hire, discipline, and fire;"<sup>20</sup> it retained the authority to implement "policies and practices relating to the employer-employee relationship such as recruiting, interviewing, testing, selection, orientation, training, evaluation, replacing, supervising, disciplining, and terminating employees;"<sup>21</sup> it agreed to conduct itself in accordance with state laws regarding payroll;<sup>22</sup> it assumed the record keeping obligations associated with its employment duties;<sup>23</sup> it did not have written authorization from Claimant to take deductions from her pay; it did not pay Claimant all her earned wages due and owing upon termination; and Oregon law prohibits Respondent Barrett from exempting itself by any means from any provision of or liability or penalty imposed by state statutes relating to the payment of wages.<sup>24</sup> Under the facts found and the law applicable in this matter, Respondent Barrett is responsible for the failure to pay Claimant's earned, due, and payable wages. It may not escape liability by complaining that the other party to its agreement (the co-employer) had a hand in the supervision of Claimant and the payroll record keeping process.

### Hours Worked

In wage claim cases such as this, the forum has long followed policies derived from *Anderson v. Mt. Clemens Pottery Co.*, 328 US 680 (1946). The US Supreme Court stated therein that the employee has the "burden of proving that he performed work for which he was not properly compensated." In setting forth the proper standard for the employee to meet in carrying this burden of proof, the court analyzed the situation as follows:

"An employee who brings suit under 16(b) of the [Fair Labor Standards] Act for unpaid minimum wages or unpaid overtime compensation, together with liquidated damages, has the burden of proving that he performed work for which he was not properly compensated. The remedial nature of this statute and the great public policy which it embodies, however, militate against making that burden an impossible hurdle for the employee. Due regard must be given to the fact that it is the employer who has the duty under 11(c) of the Act to keep proper records of wages, hours and other conditions and practices of employment and who is in position to know and to produce the most probative facts concerning the nature and amount of work performed. Employees seldom keep such records themselves; even if they do, the records may be and frequently are

<sup>20</sup> Employee Leasing Agreement, section 2.1(a).  
<sup>21</sup> Employee Leasing Agreement, section 2.3(c).  
<sup>22</sup> Employee Leasing Agreement, section 3.1.  
<sup>23</sup> Employee Leasing Agreement, section 4.10.  
<sup>24</sup> ORS 652.360.

untrustworthy. It is in this setting that a proper and fair standard must be erected for the employee to meet in carrying out his burden of proof.

"When the employer has kept proper and accurate records, the employee may easily discharge his burden by securing the production of those records. But where the employer's records are inaccurate or inadequate and the employee cannot offer convincing substitutes, a more difficult problem arises. The solution, however, is not to penalize the employee by denying him any recovery on the ground that he is unable to prove the precise extent of uncompensated work. Such a result would place a premium on an employer's failure to keep proper records in conformity with his statutory duty; it would allow the employer to keep the benefits of an employee's labors without paying due compensation as contemplated by the Fair Labor Standards Act. In such a situation we hold that an employee

has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. The burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence. If the employer fails to produce such evidence, the court may then award damages to the employee, even though the result be only approximate." 328 US at 686-688.

On the basis of Claimant's credible testimony and the records in evidence in this case, the forum has concluded that she was employed and improperly compensated.<sup>25</sup> Where the forum concludes that an employee was employed and improperly compensated, it becomes the burden of the employer to produce all appropriate records to

<sup>25</sup> In its exceptions, Respondent Barrett challenged the ALJ's conclusion that Claimant's testimony was credible. It also gave reasons why her records were unreliable. An Administrative Law Judge's credibility findings are accorded substantial deference by the forum. Absent convincing reasons for rejecting such findings, they are not disturbed. *In the Matter of Western Medical Systems, Inc.*, 8 BOLI 108, 117 (1989). After considering Respondent Barrett's arguments and the evidence, the forum concurs with the ALJ's credibility findings and finds no convincing reason to reject them. Accordingly, the credibility findings have not been disturbed. Regarding the reliability of her records, Claimant explained why there were discrepancies between her daily diaries of hours worked and the reports Galan accepted from her. See Finding of Fact -- The Merits 13. That testimony was believable and the forum found her records reliable. With her records and testimony, Claimant produced "sufficient evidence to show the amount and extent of [her] work as a matter of just and reasonable inference." *Mt. Clemens Pottery*, 328 US at 688. The forum also notes that Galan recorded the hours on several of the projects, and the forum based the findings of fact concerning those projects on his records.

prove the precise amounts involved. *Id.*; *In the Matter of Dan's Ukiah Service*, 8 BOLI 96, 106 (1989).

Thus, it became Respondents' burden to produce all appropriate records to prove the precise amounts involved. ORS 653.045 requires an employer to maintain payroll records. Respondents did not maintain sufficient records of the hours or dates worked by Claimant or the agreed upon rates of pay. They did not produce reliable records to prove that Claimant took the draws or owed the money upon which they allegedly based their unauthorized deductions from her wages.

Where an employer produces inadequate records, the Commissioner may rely on the evidence produced by the Agency "to show the amount and extent of the employee's work as a matter of just and reasonable inference," and "may then award damages to the employee, even though the result be only approximate." *Anderson v. Mt. Clemens Pottery Co.*, 328 US at 687-88. On the basis of these rulings, the forum may rely on the evidence produced by the Agency regarding the number of hours worked by Claimant and her rates of pay. The evidence showed that Claimant worked for Respondents for the hours and rates of pay listed in the Findings of Fact. Respondents did not produce persuasive "evidence to negative the reasonableness of the inference to be drawn from the employee's evidence." *Id.*

#### Deductions

*Former* ORS 652.610(3) (1981) described when an employer could withhold, deduct, or divert any portion of an employee's wages. Except as required by law or authorized by a

collective bargaining agreement, nothing in that statute allowed for a deduction from wages where the employee had not authorized the deduction in writing, and particularly where the ultimate recipient of the money withheld was the employer. See *Sabin v. Willamette Western Corp.*, 276 Or 1083, 557 P2d 1344 (1976); *In the Matter of SOS Towing and Storage, Inc.*, 3 BOLI 145, 148 (1982). Here, Claimant's only written authorization for deductions referred to deductions during employment in 1990 (a year when Claimant never worked for Respondent Staff). Thus, by its very terms, the authorization did not cover the period of this wage claim. Even if the forum were to read the authorization to cover years after 1990, Claimant apparently signed it during a period of employment with Respondent Staff (in February 1992) before the period at issue here. Claimant never signed an authorization for deductions from her wages after Galan rehired her in September 1992. Claimant never signed an authorization for deductions after Respondent Barrett became her employer. Respondents' unauthorized deductions from Claimant's wages to cover draws or debts allegedly owed to Respondent Staff were illegal under ORS 652.610.

#### Setoff

*Former* ORS 652.610(4) (1981) provided in part that "Nothing in this section shall \* \* \* diminish or enlarge the right of any person to assert and enforce a lawful setoff or counterclaim or to attach, take, reach or apply an employee's compensation on due legal process." While Respondents have not asserted a lawful setoff on due legal process for the draws they gave

Claimant, she nonetheless agreed to allow a setoff from her wages due and owing for the draws she received. Accordingly, the forum reduced the amount of wages due by the amount of draws Claimant received from Respondents.

#### Penalty Wages

Awarding penalty wages turns on the issue of willfulness. Willfulness does not imply or require blame, malice, wrong, perversion, or moral delinquency, but only requires that that which is done or omitted is intentionally done with knowledge of what is being done and that the actor or omittor be a free agent. *Sabin v. Willamette Western Corp.*, 276 Or 1083, 557 P2d 1344 (1976). Respondents, as employers, had a duty to know the amount of wages due to their employee. *McGinnis v. Keen*, 189 Or 445, 221 P2d 907 (1950); *In the Matter of Jack Coke*, 3 BOLI 238, 242 (1983).

Here, evidence established that Respondents knew they were paying Claimant for the hours and at the rates they paid, knew they were deducting money from her wages, and intentionally paid her the amounts they paid. Evidence showed that Respondents acted voluntarily and were free agents. Respondents must be deemed to have acted willfully under this test, and thus are liable for penalty wages under ORS 652.150. Pursuant to Agency policy, civil penalty wages due under ORS 652.150 are rounded to the nearest dollar. *In the Matter of Waylon & Willies, Inc.*, 7 BOLI 68, 72 (1988).

Respondent Barrett argues in its exceptions that Claimant never contacted Barrett regarding her pay until after her termination. It claims that it

had no knowledge of any problem with Claimant's wages and no motive to pay her less than her appropriate wage, since it received a fee from Respondent Staff based on overall payroll. Further, it asserts that Claimant's silence constitutes acquiescence and agreement with her wages and argues that the forum should not penalize Respondent Barrett for Claimant's inaction.

The facts show that Claimant was hardly silent and did not acquiesce or agree to the wages she received. Respondent Barrett relied on Respondent Staff to inform the employees of the joint employment relationship. Respondent Barrett apparently took no independent action to notify the employees, including Claimant, that it was now their employer. Simultaneously, Galan misrepresented to Claimant that Respondent Barrett was merely a new payroll agent and specifically instructed her to bring any payroll problems to his attention, not to Respondent Barrett. Claimant complained many times to Galan about the amount of her wages, her rate of pay, and the deductions from her wages. Galan regularly put her off by claiming that Respondent Barrett's bookkeeping errors caused the problems, which he would investigate.

Respondent Barrett is not shielded from liability for a penalty wage under these facts. It has a legal responsibility to pay its employees properly and cannot hide behind the co-employer. It has a legal duty to keep appropriate records and to know the amount of wages due its employees. The delegation by contract of some of those duties to the co-employer does not relieve

Respondent Barrett of its responsibilities or liabilities. To the extent that Respondent Staff had the contractual duty to maintain payroll records and give payroll information to Respondent Barrett, Respondent Staff was Barrett's representative and Galan's knowledge should be imputed to Respondent Barrett. Accordingly, the forum rejects Respondent Barrett's exceptions.

#### Claim Preclusion

As noted above in the procedural findings of fact, Respondent Staff filed a motion for summary judgment contending that the doctrine of claim preclusion barred this wage claim. Respondent Barrett joined in the motion and, after briefing by all participants, the Administrative Law Judge denied it. He ruled as follows:

"Staff contends that Debbie Martinez's (Claimant's) wage claim is precluded because she prosecuted another action (in Jackson County District Court) against Staff through to a final judgment binding on the parties. Staff argues the wage claim is based on the same factual transaction that was at issue in the court case, seeks a remedy additional or alternative to the one sought earlier, and is of such a nature as could have been joined in the court action. Staff relies on *Rennie v. Freeway Transport*, 294 Or 319, 656 P2d 919 (1982), and argues that Claimant unilaterally and impermissibly split her claim.

"In *Rennie*, the Oregon Supreme Court said:

[A] plaintiff who has prosecuted one action against a defendant

through to a final judgment \* \* \* is barred [i.e., precluded] \* \* \* from prosecuting another action against the same defendant where the claim in the second action is one which is based on the same factual transaction that was at issue in the first, seeks a remedy additional or alternative to the one sought earlier, and is of such a nature as could have been joined in the first action.' *Rennie v. Freeway Transport*, 294 Or at 319, 656 P2d at 921.

"ORS 43.130(2) provides that a judgment is

'conclusive between the parties, their representatives and their successors in interest by title subsequent to the commencement of the action, suit or proceeding, litigating for the same thing, under the same title and in the same capacity.'

"The Agency is the assignee of Claimant's wage claim. She assigned her wage claim to the Agency before she commenced the court case against Staff. Although the Agency argues that the participants in this wage claim case are different than the parties in the court action (because here the Agency is making the claim, whereas in the court case Ms. Martinez made the complaint), I find that the participants are the same, for purposes of claim preclusion. I do not believe the principal purposes of claim preclusion – prevention of harassment of defendants by successive legal proceedings as well as economy of

judicial resources [citing *Dean v. Exotic Veneers, Inc.*, 271 Or 188, 192, 531 P2d 266 (1975)] – can or should be easily circumvented through the assignment of a claim.

"Here, Claimant has prosecuted one action (for reimbursement of expenses) against Staff through to a final judgment. Her assignee (the Agency) would be precluded from prosecuting another action against Staff if the second action (this wage claim) is one which: (1) is based on the same factual transaction that was at issue in the first, (2) seeks a remedy additional or alternative to the one sought in the court action, and (3) is of such a nature as could have been joined in the first action.

"On the first point, a determination depends on whether the 'same factual transaction that was at issue' in the court case is interpreted broadly to mean the employment relationship between Staff and Claimant, as Respondents contend, or interpreted narrowly to mean only the oral agreement on reimbursable expenses between Claimant and Staff that was outside the employment agreement, as the Agency contends. According to the facts as I understand them, the reimbursement agreement between Staff and Claimant was dependent upon and intertwined with the employment relationship. I conclude that the wage claim is based on the same factual transaction (which involves indebtedness arising during the employment

relationship) that was at issue in the court case.

"On the second and third points, I conclude that this wage claim seeks a remedy additional to the one sought in the court action and is of a nature as could have been joined in the court action. Staff has established the basic elements of claim preclusion. Nevertheless, the inquiry does not end there.

"The Agency correctly points out that there are exceptions to the general rule of claim preclusion and two of them apply here. First, a defendant is generally free to waive the right to a combined action. *Rennie v. Freeway Transport*, 294 Or at 328, 656 P2d at 924. There is no evidence here that Staff objected to the splitting of Claimant's claim. At the time of the court action for reimbursable expenses, Staff was well aware of Claimant's wage claim and had been in communication with the Agency about it. Further, the arbitrator in the court action expressly omitted any decision based on wages and denied attorney fees because it did 'not appear that this is an action for wages, but an action for reimbursement.'

'Where the parties have agreed to the separate litigation of plaintiff's claim and the first judgment expressly withholds any decision as to the other aspects of the claim, reserving them for later litigation, a subsequent action by plaintiff based on those parts of the claim reserved is not precluded by *res*

*judicata* [claim preclusion]. See Restatement (Second) of Judgments Sec. 26(1)(a). *Rennie v. Freeway Transport*, 294 Or at 328, 656 P2d at 924.

"Silence in the face of simultaneous actions based on the same factual transaction constitutes acquiescence. Staff's failure to object to splitting the claims is effective as an acquiescence in the splitting. *Rennie v. Freeway Transport*, 294 Or at 328-30, 656 P2d at 924-25 (including fn.9). Accordingly, the Agency's wage claim is not precluded.

"Second, [w]here a statutory scheme contemplates that the contentions arising from a transaction or series of transactions may be split, splitting as contemplated by the statutory scheme is not merged in or barred by a former adjudication concerning the overall transaction.' *Drews v. EBI Companies*, 310 Or 134, 141, 795 P2d 531, 536 (1990). ORS 652.380(1) provides:

'The remedies provided by ORS 652.310 to 652.414 shall be additional to and not in substitution for and in no manner impair other remedies and may be enforced simultaneously or consecutively so far as not inconsistent with each other.'

"I find that the statutory scheme in ORS chapter 652, regarding wage claims, contemplates that the contentions arising from a transaction or series of transactions may be split. Accordingly, this wage claim is not merged in or barred by the

judgment from the earlier court action involving reimbursable expenses.

"With regard to Barrett's motion for summary judgment, Barrett was not a party to the earlier court action. Therefore, Barrett is in no position to raise the defense of claim preclusion. Even if this were not the case, the exceptions to the general rule of claim preclusion described above would apply.

"The motions for summary judgment are denied. The Agency is not precluded from bringing this wage claim case against Staff or Barrett." (References to exhibits omitted.)

The forum adopts and confirms the ALJ's ruling.

**Laches**

In its answer, Respondent Staff raised an affirmative defense of laches, asserting that the "claim was originally raised in 1993. No final decision was made against Employer. Over three years later, BOLI resurrected the claim to the prejudice of Employer." Respondent Staff presented no evidence or argument in support of its defense.

Claimant filed the wage claim and assigned it to the Agency in January 1994. Following its investigation, the Agency issued an Order of Determination in August 1996. This contested case resulted from that Order of Determination.

Respondent Staff has the burden of proving the elements of the defense of laches. *In the Matter of Sapp's Realty, Inc.*, 4 BOLI 232, 240-41 (1985). It must prove (1) there was an unreasonable delay by the Agency, (2) the

Agency had full knowledge of facts that would have allowed it to avoid the unreasonable delay, and (3) the unreasonable delay resulted in such prejudice to Respondent that it would be inequitable to afford the relief sought by the Agency. *In the Matter of Tim's Top Shop*, 6 BOLI 166, 184-86 (1987) (citing *Clackamas Co. Fire Protection v. Bureau of Labor and Industries*, 50 Or App 337, 341-42, 624 P2d 141 (1981)). The mere passage of time is not sufficient to invoke the equitable doctrine of laches. *In the Matter of Marion County*, 1 BOLI 159, 162 (1978). Respondent Staff must prove that it suffered actual prejudice attributable to the passage of time. *In the Matter of the County of Multnomah*, 3 BOLI 52, 65-66 (1982). Respondent Staff's defense fails for lack of proof.

**Respondent Barrett's Exceptions**

The forum has addressed many of Respondent Barrett's exceptions in this opinion. On the basis of the facts found, the conclusions of law reached, and the reasoning explained in the opinion above, the forum hereby rejects Respondent Barrett's remaining exceptions that are inconsistent herewith.

**ORDER**

NOW, THEREFORE, as authorized by ORS 652.332, the Commissioner of the Bureau of Labor and Industries hereby orders STAFF, INC. to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232-2162, the following:

A certified check payable to the Bureau of Labor and Industries IN TRUST FOR DEBBIE MARTINEZ

in the amount of Four Hundred Thirty Two Dollars and Sixty Seven Cents (\$432.67), less appropriate lawful deductions, representing gross earned, unpaid, due, and payable wages, plus interest at the rate of nine percent per year on the sum of \$432.67 from October 1, 1992, until paid.

AND FURTHER, as authorized by ORS 652.332, the Commissioner of the Bureau of Labor and Industries hereby orders STAFF, INC. and BARRETT BUSINESS SERVICES, INC. to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232-2162, the following:

A certified check payable to the Bureau of Labor and Industries IN TRUST FOR DEBBIE MARTINEZ in the amount of Five Thousand Five Hundred Ninety Dollars (\$5,590), representing \$1,138.80 in gross earned, unpaid, due, and payable wages, less appropriate lawful deductions; \$1,338.20 in net earned, unpaid, due, and payable wages; and \$3,113 in penalty wages; plus interest at the rate of nine percent per year on the sum of \$2,477 from August 1, 1993, until paid and nine percent interest per year on the sum of \$3,113 from September 1, 1993, until paid.

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In the Matter of  
**VISION GRAPHICS AND PUBLISH-  
 ING, INC., dba Seventh Street Family  
 Restaurant, and Kalayil Thomas,  
 Respondents.**

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

**SYNOPSIS**

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

The above-entitled contested case came on regularly for hearing before Warner W. Gregg, designated as Administrative Law Judge (ALJ) by Jack Roberts, Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was held on July 23, 1996, in the conference room of the Bureau of Labor and Industries, 165 East Seventh Avenue, Eugene, Oregon. The Civil Rights Division of the Bureau of Labor and Industries (the Agency) was represented by Judith Bracanovich, an employee of the Agency. Vision Graphics and Publishing, Inc., a corporation doing business as Seventh Street Family Restaurant (Respondent), was not present and

was not represented by counsel, although properly served with notice of this proceeding. Kalayil Thomas (Respondent Thomas), an individual alleged to have aided and abetted Respondent corporation, was not represented by counsel, was present during the ALJ's opening remarks at the commencement of the hearing, and voluntarily left the hearing room thereafter. Both Respondents were previously found in default for failure to file an answer to the Specific Charges. Shannon Miller (Complainant S. Miller) and Amanda Hardman (Complainant Hardman) were present throughout the hearing and were not represented by counsel. Melissa Miller (Complainant M. Miller) was delayed by car trouble and arrived at the hearing during the testimony of Dan Grinfas, the first witness. She was not represented by counsel.

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

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

**FINDINGS OF FACT –  
 PROCEDURAL**

1) On August 15, 1995, Complainant Shannon Miller, a female 24 years

of age, filed a verified complaint with CRD alleging that she was the victim of the unlawful employment practices of Respondent. After investigation and review, CRD issued an Administrative Determination finding substantial evidence supporting the allegations of the complaint.

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

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

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

5) CRD prepared for service on Respondents Specific Charges alleging that Respondent discriminated against Complainant Melissa Miller in her employment with Respondent on the job based on her sex in violation of

ORS 659.030, and that Respondent was aided and abetted by Respondent Thomas in violation of ORS 659.030.

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

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

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

9) On June 20, 1996, a copy of each set of Charges, together with items a) through e) of Procedural Finding 8 above, was sent by US Post Office certified mail, postage prepaid, to Respondent corporation at 225 Q Street, Springfield, Oregon, and to Douglas Wilkinson, Attorney at Law,

644 A Street, Springfield, Oregon, as attorney for Respondent Thomas on June 20, 1996. Also on June 20, because Respondent corporation's registered agent had resigned and had no successor, the Agency caused the Charges and accompanying documents with the requisite fee to be served on the Office of the Secretary of State and caused a copy of the Charges and the accompanying documents together with notice of service on the Secretary of State to be transmitted to the last registered office of the corporation. The respective mailings were receipted for by or on behalf of the respective addressees on June 21, 1996.

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

11) On July 12, 1996, the Agency filed a motion for default as to each set of Charges. Finding that service had been effected on Respondents in the manner described in Procedural Finding 9, that no answer had been filed on behalf of either Respondent, and that the time limitation for answer had expired, the ALJ found Respondents in default. Thereafter, the Agency filed its summary of the case.

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

matters to be proved, and the procedures governing the conduct of the hearing.

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

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

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

#### FINDINGS OF FACT - THE MERITS

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

2) At times material herein, Respondent Kalayil Thomas was the owner, president, secretary, director, and sole incorporator of Respondent

corporation. Respondent Thomas operated 7th Street and held himself out to be the owner of the restaurant.

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

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

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

6) 7th Street was open 24 hours a day and served American and Italian food. There was a 20 seat counter and nine tables. The waitress station was along one end with the drinks, ice cream and salad bar, together forming the crossbar of a "T", with the counter at a right angle forming the stem of the "T." The first table was to one side of and separated from the end of the counter. When he was at the restaurant, Respondent Thomas generally sat either at the end of the counter nearest the waitress station or at table one, the booth closest to the waitress station.

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

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

9) Respondent Thomas's unwanted touching made Complainant Shannon Miller feel demeaned, belittled, embarrassed, ashamed, and as if she had no say in her working

conditions. She noted that he did the same thing to Complainants Hardman and Melissa Miller and to a young female customer.

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

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

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

Melissa Miller and to a young female customer, practically every day.

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

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

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

16) On an occasion in the waitress break room at work, Complainant Shannon Miller was demonstrating to Complainant Hardman the operation of a "Thighmaster," an exercise device requiring the alternate spread and closure of the user's legs. Complainant

Shannon Miller was wearing mid-thigh length "skorts," a pair of shorts made to resemble a skirt. Respondent Thomas came in and told Complainant Shannon Miller to "do it some more; spread it wider."

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

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

19) Initially, Complainant Melissa Miller was grateful to Respondent Thomas for the job. She found it difficult to obtain employment because she was only 15 years of age. Then after a couple of weeks, Respondent Thomas began touching her buttocks by brushing against her, then later by slapping or grabbing her buttocks. The frequency escalated by June 1995. This touching and grabbing of her buttocks was unwanted and happened at least ten times, near the counter or at the cash register, always in front of customers and other employees. She thought that telling Respondent Thomas to stop would work and even reminded him

that he had teenage daughters. She consistently told him to stop, but he did not.

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

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

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

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

24) On June 2, 1995, Complainant Shannon Miller came in about 4:30 p.m. for a 5 p.m. shift. She went to sit down and Respondent Thomas came up beside her. She asked if he had anything better to do besides stand there and he said "Yes, look at your nice boobies." She said "That's it, I'm not taking this anymore, I don't need to, this is not a work environment I want to stay at." She left, feeling that Respondent Thomas's behavior would not change and would probably get worse, and she could not continue to tolerate working under those circumstances.

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

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

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

28) On June 7, 1995, Complainants Hardman, Shannon Miller, and Melissa Miller consulted an attorney.

Complainants Hardman and Melissa Miller were still employed as waitresses at 7th Street, and wanted somehow to get Respondent Thomas to stop his offensive behavior.

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

30) On or shortly after June 9, 1995, Respondent Thomas asked Complainant Melissa Miller and Complainant Hardman if they had filled out a complaint against him. They did not respond and as he walked away, Respondent Thomas said "I know two little girls that aren't going to have a job tomorrow." Larry Lindsey, a cook, overheard this remark.

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

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

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

She felt she was replaced, so she walked out.

34) Complainant Shannon Miller was hurt, angry, and disgusted when she quit, because she liked the job and enjoyed it when Respondent Thomas was not present making her and her coworkers uncomfortable. The unexpected loss of employment created financial stress. Her husband was employed, but her second income was needed. She applied for welfare assistance and received food stamps. The situation made her feel low, inadequate, and hopeless. Having no job and no money was very hard and painful. She sought other employment over the next three months, but was unsuccessful. Respondent Thomas had said she would not get another job in Eugene. She never received a job offer from any employer where she listed Respondent Thomas as a reference. When she quit listing 7th Street on her work history, she was successful in getting employment. Her experience at 7th Street still bothered her at the time of the hearing. It had put great stress on her marriage and caused her insecurity and distrust of men. Up to the time of hearing, she was reluctant to work alone around men. She continued to fear physical harm from Respondent Thomas at the time of the hearing and believed he had carried out threats against Complainant Hardman.

35) Complainant Shannon Miller was hired at International House of Pancakes (IHOP) in mid-September

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

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

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

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

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

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

39) At the time of the hearing, Dan Grinfas had worked as a Senior Investigator for CRD since October 1995 investigating complaints of unlawful discrimination in employment, housing, and public accommodation. He holds

a 1988 bachelor of science degree from UCLA and a 1994 law degree from Willamette University and is a member of the Oregon State Bar.

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

41) As part of his duties, Grinfas interviewed Respondent corporation's former cooks Larry Lindsey and Mike White, Respondent corporation's customers Tracy Foust, Jason Rinehart, Jill Carson, Shar Miles, and Becky Sherrick, and Respondent corporation's former employee Kathy Crane.

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

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

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

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

#### ULTIMATE FINDINGS OF FACT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

17) As a result of the described intolerable working conditions, Complainant Melissa Miller suffered severe

mental distress on the job and up to the time of the hearing, characterized by feeling embarrassed, inferior, frightened, fearful, angry, and powerless. At age 15, on her first job, she was subjected to touching, conversation, and suggestions of a sexual nature making her afraid, upset, more judgmental, less outgoing, and less trusting of males.

#### CONCLUSIONS OF LAW

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

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

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

4) At times material herein, ORS 659.030(1) provided, in part:

"For the purposes of ORS 659.010 to 659.110 \* \* \* it is an unlawful employment practice:

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

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

\*\*\*\*\*

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

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

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

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

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

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

"(3) Such conduct has the purpose or effect of unreasonably interfering with an individual's work

performance or creating an intimidating, hostile, or offensive working environment."

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

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

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

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

659.030(1)(f) and Respondent Thomas violated ORS 659.030(1)(g).

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

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

#### OPINION

##### Prima Facie Case

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

*Labor and Industries*, 93 Or App 317, 761 P2d 1362 (1988).

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

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

The forum finds that the Agency has satisfied these elements and established a prima facie case of sexual harassment (sex discrimination), an

unlawful employment practice, as to Respondent corporation.

##### Constructive Discharge

This forum has consistently held that a constructive discharge occurs where an employer deliberately imposes working conditions so intolerable that a reasonable person in the complaining employee's position would feel compelled to resign and the complaining employee does resign. This was first articulated in *In the Matter of West Coast Truck Lines, Inc.*, 2 BOLI 192 (1981), *aff'd without opinion*, *West Coast Truck Lines, Inc. v. Bureau of Labor and Industries*, 63 Or App 383, 665 P2d 882 (1983) and followed thereafter.<sup>\*</sup> In 1989, the Oregon Supreme Court enunciated a tort standard for constructive discharge as requiring intolerable working conditions imposed deliberately for the purpose of forcing the victim to resign. *Bratcher v. Sky Chefs, Inc.*, 308 Or 501, 783 P2d 4 (1989). This forum adhered to its previous standard that, where objectively intolerable conditions resulting from unlawful employment practices lead to a victim's resignation, a constructive discharge has occurred. *In the Matter of the City of Umatilla*, 9 BOLI 91 (1990), *aff'd without opinion*, *City of Umatilla v. Bureau of Labor and Industries*, 110 Or App 151, 821 P2d 1134 (1991); *In*

*the Matter of Chalet Restaurant and Bakery*, 10 BOLI 183 (1992), *aff'd without opinion*, *JLG4, Inc. v. Bureau of Labor and Industries*, 125 Or App 588, 865 P2d 1344 (1993).<sup>\*\*</sup> In 1995, the Oregon Supreme Court modified the *Bratcher* constructive discharge requirements, holding that

"an objective inquiry must be made to determine whether working conditions imposed by the employer are so intolerable as to force a resignation." *McGanty v. Staudenraus*, 321 Or 532, 557, 901 P2d 841, 856 (1995).

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

- "(1) The Respondent must have intentionally created or intentionally maintained discriminatory working condition(s) related to the Complainant's protected class status;
- "(2) Those working conditions were so intolerable that a reasonable person in the Complainant's position would have resigned because of them;
- "(3) The Respondent desired to cause the Complainant to leave employment as a result of those working conditions or knew that

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

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

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

Complainant was certain, or substantially certain, to leave employment as a result of those working conditions; and

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

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

#### Retaliation

Around the first of June, Complainant Hardman reacted to sexual touching by Respondent Thomas by threatening to call the police if it were repeated. About June 5, he told Complainant Hardman that he would fire her if she were not nicer to him. After Complainant Shannon Miller resigned, Respondent Thomas learned that all three of these Complainants consulted an attorney. His reaction was not to lessen his unwelcome behavior, but rather to angrily advise Complainants Hardman and Melissa Miller that "I know two little girls that aren't going to have a job tomorrow." In light of those circumstances, his claim that he fired Complainant Hardman because she

refused to serve two customers was clearly pretext. By discharging her in retaliation for her resistance to Respondent Thomas's offensive actions, Respondent corporation violated ORS 659.030(1)(f) and Respondent Thomas violated ORS 659.030(1)(g).

#### Aiding and Abetting Unlawful Employment Practices

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

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

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

#### Lost Wages

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

responsibility for wage loss was with the employer.

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

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

The forum is awarding to wrongfully terminated Complainants Hardman and Shannon Miller the amounts each would have earned but for the unlawful practice, less any actual earnings. No award for lost wages is made to

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

\*\* *Holien v. Sears, supra*.

Complainant Melissa Miller because it was not included in the Specific Charges and Respondent employer defaulted. Similarly, although the evidence suggested that Complainant Hardman's wage loss was greater than the \$7,700 initially sought by the Agency, the forum is limited to the lesser amount because that is the figure of which Respondent employer had notice prior to default. *In the Matter of 60 Minute Tune*, 9 BOLI 191 (1991), *aff'd without opinion, Nida v. Bureau of Labor and Industries*, 119 Or App 508, 852 P2d 974 (1993).

#### Mental Distress

The Agency presented evidence as to each Complainant demonstrating that each suffered severe and long-lasting mental and emotional distress as the result of her treatment on the job by Respondent Thomas. They experienced fear and felt degraded, and were frustrated by their inability to obtain relief except by leaving the situation. Complainants Hardman and Shannon Miller suffered compensable mental and emotional distress from their respective terminations. The effects of the experiences of all three complainants from working for Respondent corporation and Respondent Thomas continued until the hearing. All were adversely affected in their subsequent work relationships with males. While the length of her exposure to the offensive environment was less than that of the two adult complainants, Melissa Miller, at age 15 and on her first job, was particularly susceptible. The youth and inexperience of a victim of unlawful employment practices are factors to consider in fashioning a remedy. *In the Matter of*

*Rose Manor Inn*, 11 BOLI 281 (1993); *Fred Meyer, Inc. v. Bureau of Labor*, 39 Or App 253, 592 P2d 564 (1979), *rev den*, 287 Or 129 (1979). The amount awarded each Complainant below recognizes her individual distress.

#### ORDER

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

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

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

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

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

d) Interest at the legal rate on the sum of \$30,000 from the date of this

Final Order until Respondents comply herewith.

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

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

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

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

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

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

a) TWENTY-FIVE THOUSAND DOLLARS (\$25,000), representing compensatory damages for the mental and emotional distress suffered by

MELISSA MILLER as a result of Respondents' unlawful practices found herein, plus

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

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

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**In the Matter of  
TINA DAVIDSON,  
dba Magic Care, Respondent.**

Case Number 44-97  
Final Order of the Commissioner  
Jack Roberts  
Issued August 7, 1997.

#### SYNOPSIS

Where respondent employer failed to pay wage claimant all wages due after she quit, the commissioner found respondent's failure to pay to be willful and assessed penalty wages in addition to the unpaid earnings. ORS 652.140, 652.150.

The above-entitled contested case came on regularly for hearing before Warner W. Gregg, designated as Administrative Law Judge (ALJ) by Jack Roberts, Commissioner of the Bureau of Labor and Industries of the State of Oregon and sitting in Portland, Oregon. The hearing was held by

telephone on July 10, 1997. The Bureau of Labor and Industries (the Agency) was represented by Alan McCullough, an employee of the Agency, by telephone from Eugene, Oregon. Tina Davidson, formerly doing business as Magic Care (Respondent), was not present either in person or by telephone after due notice and was in default. Danielle Felton (Claimant) was present by telephone throughout the hearing and was not represented by counsel.

The Agency called as witnesses Claimant by telephone from Milton-Freewater, Oregon, and Agency Compliance Specialist Rhoda Briggs, by telephone from Bend, Oregon. No witnesses were presented by Respondent.

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

#### FINDINGS OF FACT – PROCEDURAL

1) On or about June 25, 1996, Claimant filed a wage claim with the Agency in which she alleged that she had been employed by Respondent, who had failed to pay all wages earned and due to her.

2) At the same time she filed her claim, Claimant assigned to the Commissioner of the Bureau of Labor and Industries, in trust for Claimant, all wages due from Respondent.

3) On December 19, 1996, through the Marion County Sheriff, the

Agency personally served on Respondent at 4296 Amherst NE, Salem, Oregon, Order of Determination No. 96-113 (Determination Order) based upon the wage claim filed by Claimant and the Agency's investigation. The Determination Order found that Respondent owed Claimant \$2,329.05 straight time and overtime wages computed at \$4.75 per hour on a total of 455.75 hours worked, 69.5 of which were worked over 40 hours in a work-week, less the sum of \$1,861.13, leaving a total of \$467.92 unpaid. The Determination Order found further that the failure to pay was willful and that there was due and owing the sum of \$1,140 in civil penalty wages.

4) The Determination Order required that, within 20 days, Respondent either pay these sums in trust to the Agency or request an administrative hearing and submit a written answer to the charge.

5) On January 10, 1997, the Agency received from Respondent a written answer to the Determination Order and a request for hearing. The answer admitted that Claimant had been employed by Respondent at the times alleged and alleged that Claimant had been overpaid, thus alleging that there was nothing owed. Respondent's answer stated in part,

"I have served to the Labor and Industries copys [sic] of Miss Feltons file and have found to be she was over paid, I have servied [sic] all documents to the labor board time sheets and stubs for taxes taken out."

6) The Agency requested a hearing date and on March 27, 1997, the Hearings Unit issued a Notice of

Hearing setting forth the time and place of the hearing as July 10, 1997, in Pendleton, Oregon, which was served on Respondent together with the following: a) a Notice of Contested Case Rights and Procedures containing the information required by ORS 183.413; and b) a complete copy of Oregon Administrative Rules (OAR) 839-050-0000 to 839-050-0420, regarding the contested case process. The Notice of Hearing was placed in the regular US mail, postage prepaid, addressed to Respondent at 4296 Amherst NE, Salem, Oregon 97305 and was not returned undelivered.

7) On June 13, 1997, the Agency filed a motion for the hearing to be conducted by telephone, setting forth that Respondent, Claimant, and Agency witness Briggs were located at the time in Salem, Hermiston, and Bend, that the evidence was largely documentary, and that travel by all concerned, including the forum, to Pendleton from various portions of the state was uneconomical and unnecessary. Respondent did not file any opposition to the motion, which was served on Respondent by regular US mail, postage prepaid, addressed to her at 4296 Amherst NE, Salem, Oregon 97305 and was not returned undelivered.

8) Also on June 13, 1997, the Agency filed a motion for summary judgment, with supporting documentation, alleging that there was no genuine issue of material fact existing and that the Agency was entitled to prevail on its claims for wages and civil penalty wages as a matter of law. Respondent did not file any opposition to the motion, which was placed in the regular US mail, with postage prepaid,

addressed to her at 4296 Amherst NE, Salem, Oregon 97305 and was not returned undelivered. On June 19, 1997, the Agency filed an addendum to its motion for summary judgment, alleging a mathematical error in its original motion. Respondent again did not file any opposition to the addendum, which was placed in the regular US mail, postage prepaid, addressed to her at 4296 Amherst NE, Salem, Oregon 97305 and was not returned undelivered.

9) On June 19, 1997, the Agency advised the ALJ, Claimant, and Respondent of a change in Case Presenter from Judith Bracanovich to Alan McCullough. Respondent's copy of the Agency's letter was placed in the regular US mail, postage prepaid, addressed to her at 4296 Amherst NE, Salem, Oregon 97305 and was not returned undelivered.

10) On June 23, 1997, Case Presenter McCullough forwarded to Respondent at 2185 Bridgett Avenue, Hermiston, Oregon, with a letter, the following:

- (1) Notice of Hearing;
- (2) Summary of Contested Case Rights and Procedures;
- (3) Administrative Hearings Rules for the Bureau of Labor and Industries;
- (4) Agency Motion for Summary Judgment, with 11 exhibits;
- (5) Agency Motion for Telephone Hearing;
- (6) Addendum to Agency Motion for Summary Judgment;
- (7) June 19, 1997, letter from Case Presenter Bracanovich to Judge Gregg.

Case Presenter McCullough's letter with enclosures of June 23, 1997, was sent by certified and regular US mail, postage prepaid, addressed to Respondent at the Hermiston address and was not returned undelivered. Certified mail receipt no. P 066 192 982 shows delivery at 2185 Bridgett Avenue, Hermiston, Oregon, on June 25, 1997, and bears the apparent signature of Respondent.

11) On June 30, 1997, the ALJ denied the Agency's motion for summary judgment, finding that the hours claimed by the Agency on Claimant's behalf and those submitted by Respondent were not wholly in agreement and that summary judgment was therefore inappropriate. Also on June 30, the ALJ granted the Agency's motion for telephone hearing and directed that Respondent, who by that time was located in Hermiston, and Claimant, located in Milton-Freewater, advise the ALJ and the Case Presenter in writing by July 7, 1997, of their respective telephone numbers for July 10, 1997, at 9 a.m. Thereafter, Claimant advised the forum of her telephone number. Respondent's copy of the ALJ's June 30 order was placed in the regular U.S. mail, postage prepaid, addressed to her at 2185 Bridgett Avenue, Hermiston, and was not returned undelivered.

12) At the commencement of the hearing at 9 a.m. on July 10, 1997, Respondent had not appeared in the hearing room in accordance with the Notice of Hearing, had not advised the ALJ of a telephone number in accordance with the June 30, 1997, order, and had not advised the ALJ of any reason for a failure to respond, for tardiness, or for non-attendance. Be-

cause the Notice of Hearing and the attachments thereto together with copies of all documents were received by Respondent by certified mail at the Hermiston address and the ALJ's order of June 30 was sent to the same address with postage prepaid and not returned undelivered, the ALJ found that Respondent received the Notice of Contested Case Rights and Procedures and had notice of the date, time, and manner of hearing.

13) The hearing of July 10, 1997, commenced at 9 a.m. Pursuant to ORS 183.415(7), Claimant and the Agency were orally advised by the ALJ of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing. At 9:35 a.m., pursuant to OAR 839-050-0330(2), Respondent was found in default for failure to appear at hearing.

14) The proposed order, which contained an exceptions notice, was issued July 15, 1997. Exceptions were due July 25, 1997. No exceptions were received.

#### FINDINGS OF FACT – THE MERITS

1) During times material herein, Respondent, an individual, operated an adult foster care home under the assumed name "Magic Care" at 2185 Bridgett Avenue, Hermiston, Oregon, engaging or utilizing the personal service of one or more employees.

2) Claimant worked for Respondent from March 19 through June 8, 1996. Claimant was referred to the job by the Oregon State Employment Department, Hermiston. The job order received by the Employment Department was for a care giver for elderly

residents at \$950 per month, involving five to six shifts of eight to ten hours each per week. Claimant actually worked from one to seven shifts per week, varying in length from six to 16 hours. She was paid at or near the 15th of the month (not always on time) at the rate of \$4.75 per hour for straight time and \$7.125 per hour for hours over 40 hours in one week.

3) Claimant was hired on March 19, the day she applied. She kept her hours on time cards supplied by Respondent, entering her arrival time and quitting time in the "In" and "Out" columns respectively in the "regular time" section of the card. She worked from 2 to 8 p.m. (six hours) that day and from 8:30 a.m. to 6:30 p.m. (10 hours) on March 20. She was not paid for those hours, which Respondent claimed was "training."

4) Claimant's duties as a caregiver employed by Respondent included cooking and housecleaning, and changing, bathing, and feeding the residents. There were approximately five other caregivers, including Respondent, when Claimant began work.

5) When payday arrived on the 15th of the month, Respondent made excuses and delayed paying Claimant. Claimant found she could not plan her time off because Respondent would ask her to work on scheduled time off. Because of the uncertain hours and pay, Claimant did not return to work after June 8. At least two or three co-workers had similar difficulties with Respondent and quit.

6) Respondent acknowledged to Claimant that she owed Claimant wages when Claimant quit, and promised to pay her, but did not.

7) Rhoda Briggs was a Compliance Specialist with the Agency at times material. As part of her job duties, she accepted and investigated Claimant's wage claim. On July 17, 1996, she sent Respondent a notice of wage claim letter for \$462.55 in unpaid wages. Following receipt of records from Respondent, Briggs revised the figure to \$466.14, based on 386.75 straight time hours and 68.75 overtime hours. Briggs spoke by telephone with Respondent, who did not question the amount and assured Briggs that she would send a check for Claimant. No check was received.

8) From Tuesday, March 19, through Saturday, March 23, 1996, Claimant worked a total of 48 hours for Respondent. In subsequent weeks, Claimant worked the following hours: 58 from March 24 to March 30; 42.25 from March 31 to April 6; 57.75 from April 7 to April 13; 45 from April 14 to April 20; 9 from April 21 to April 27; 9 from April 28 to May 4; 23.5 from May 5 to May 11; 56.5 from May 12 to May 18; 41.5 from May 19 to May 25; 36.5 from May 26 to June 1; and 28.75 from June 2 to June 8, when she quit. She thus worked a total of 455.75 hours, 69 of which were hours worked over 40 hours in a work week, and earned \$1,837.06 straight time and \$491.63 in overtime wages.

9) Records submitted to the Agency by Respondent show a gross total of \$1,861.13 paid to Claimant, leaving a balance of \$467.56 owed to Claimant at the time Claimant ceased working for Respondent.

10) Briggs calculated the penalty wages due in accordance with Agency policy. The daily rate from which

penalty wages are calculated is the result of multiplying the agreed rate of \$4.75 an hour by eight hours. This daily rate is then multiplied by the number of days, up to 30, that wages remain unpaid.

#### ULTIMATE FINDINGS OF FACT

1) During times material herein, Respondent was an employer in this state.

2) Claimant was employed by Respondent from March 19 through June 8, 1996, at \$4.75 an hour straight time and \$7.125 an hour overtime.

3) From March 19 through June 8, 1996, Claimant worked a total of 386.75 straight time hours and 69 overtime hours, earning a total of \$2,328.69.

4) When Claimant ceased employment, Respondent owed her \$2,328.69 less \$1,861.13 paid, or \$467.56.

5) When Claimant quit employment, Respondent failed to pay her at the next scheduled payday for all wages earned, and for 30 days thereafter.

6) The daily rate for Claimant was \$38. Penalty wages equal \$1,140.

#### CONCLUSIONS OF LAW

1) During all times material herein, Respondent was an employer and Claimant was an employee subject to the provisions of ORS 652.110 to 652.200 and 652.310 to 652.405.

2) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the subject matter and the Respondent herein. ORS 652.310 to 652.405.

3) At times material, ORS 652.140(2) provided:

"When an employee who does not have a contract for a definite period quits employment, all wages earned and unpaid at the time of quitting become due and payable immediately if the employee has given to the employer not less than 48 hours' notice, excluding Saturdays, Sundays and holidays, of intention to quit employment. If notice is not given to the employer, the wages shall be due and payable within five days, excluding Saturdays, Sundays and holidays, after the employee has quit, or at the next regularly scheduled payday after the employee has quit, whichever event first occurs.

Respondent violated ORS 652.140(2) by failing to pay Claimant all wages earned and unpaid at the next scheduled payday after Claimant terminated employment.

4) At times material, ORS 652.150 provided:

"If an employer willfully fails to pay any wages or compensation of any employee whose employment ceases, as provided in ORS 652.140 and 652.145, then, as a penalty for such nonpayment, the wages or compensation of such employee shall continue from the due date thereof at the same rate for eight hours per day until paid or until action therefor is commenced; provided, that in no case shall such wages or compensation continue for more than 30 days from the due date; and provided further, the employer may avoid liability for

the penalty by showing financial inability to pay the wages or compensation at the time they accrued."

Respondent is liable for a civil penalty under ORS 652.150 for willfully failing to pay all wages or compensation to Claimant when due as provided in ORS 652.140.

5) At times material herein, ORS 653.025 provided, in part:

"[F]or each hour of work time that the employee is gainfully employed, no employer shall employ or agree to employ any employee at wages computed at a rate lower than:

\*\*\*\*\*

"(3) For calendar years after December 31, 1990, \$4.75."

Respondent failed to pay Claimant minimum wage for the hours in Respondent's employ.

6) At times material herein, ORS 653.261 provided, in part:

"The commissioner may issue rules prescribing such minimum conditions of employment, excluding minimum wages, in any occupation as may be necessary for the preservation of the health of employees. Such rules may include, but are not limited to, minimum meal periods, and maximum hours of work, but not less than eight hours per day or 40 hours per week; however, after 40 hours of work in one week overtime may be paid, but in no case at a rate higher than one and one-half time the regular rate of pay of such employees when computed without

benefit of commissions, overrides, spiffs and similar benefits."

At times material herein, OAR 839-20-030 provided, in part:

"(1) Except as provided in OAR 839-20-100 to 839-20-135 all work performed in excess of forty (40) hours per week must be paid for at the rate of not less than one and one-half times the regular rate of pay when computed without benefit of commissions, overrides, spiffs, bonuses, tips or similar benefits pursuant to ORS 253.261(1). \*\*\*

"(2) Definitions:

"(a) 'Work week' means any seven (7) consecutive twenty four (24) hour period as determined by the employer. \*\*\* For purposes of overtime computation, each work week stands alone;

"(b) 'Regular rate' for purposes of overtime computation means a regular hourly rate, but in no case less than the applicable statutory minimum wage rate. \*\*\*\*"

Respondent failed to pay Claimant one and one-half times the minimum wage for the hours worked for Respondent in excess of 40 hours in any one week.

7) Under the facts and circumstances of this record, and in accordance with ORS 652.332, the Commissioner of the Bureau of Labor and Industries has the authority to order Respondent to pay Claimant her earned, unpaid, due, and payable wages and the civil penalty wages, plus interest on both sums until paid.

## OPINION

## 1. Default

Respondent failed to appear at the hearing and thus defaulted to the charges set forth in the Order of Determination. OAR 839-050-0330(2). It is the charged party's responsibility to keep the Agency and this forum advised of the party's address once the party has been served with the charging document. OAR 839-050-0030(4). In a default situation, pursuant to ORS 183.415(5) and (6), the task of this forum is to determine if a prima facie case supporting the Agency's Order of Determination has been made on the record. See *In the Matter of John Cowdrey*, 5 BOLI 291, 298 (1986); *In the Matter of Art Farbee*, 5 BOLI 268, 276 (1986); *In the Matter of Judith Wilson*, 5 BOLI 219, 226 (1986); see also OAR 839-050-0330(2).

Where a respondent submits an answer to a charging document, the forum may admit the answer into evidence during a hearing and may consider the answer's contents when making findings of fact. Where a respondent fails to appear at hearing, the forum may review the answer to determine whether the respondent has set forth any evidence or defense to the charges. *In the Matter of Jack Mongeon*, 6 BOLI 194 (1987); *In the Matter of Richard Niquette*, 5 BOLI 53 (1986). In a default situation where a respondent's total contribution to the record is a request for a hearing and an answer that contains nothing other than unsworn and unsubstantiated assertions, those assertions are overcome wherever they are controverted by other credible evidence on the record. *Mongeon, supra*.

The Agency has established a prima facie case. A preponderance of credible evidence on the whole record showed that Respondent employed Claimant during the period of the wage claim and willfully failed to pay her all wages, earned and payable, when due. That evidence, which established that Respondent owed Claimant the amount in the Order below, was credible, persuasive, and the best evidence available, given the failure of Respondent to appear at the hearing. Having considered all the evidence on the record, the forum finds that the prima facie case has not been contradicted or overcome.

## 2. Hours Worked

It is the employer's duty to maintain an accurate record of an employee's time worked. ORS 653.045; *In the Matter of Godfather's Pizzeria, Inc.*, 2 BOLI 279, 296 (1982) (citing *Anderson v. Mt. Clemens Pottery Co.*, 328 US 680 (1946)). Respondent's records did not reflect any dispute as to hours worked. The order below enforces the duty of the employer to pay what was really due, since that duty is absolute. *In the Matter of Handy Andy Towing, Inc.*, 12 BOLI 284, 294-95 (1994); *Garvin v. Timber Cutters, Inc.*, 61 Or App 497, 658 P2d 1164 (1983).

## 3. Penalty Wages

Awarding penalty wages turns on the issue of willfulness. Willfulness does not imply or require blame, malice, wrong, perversion, or moral delinquency, but only requires that that which is done or omitted is intentionally done with knowledge of what is being done, and that the actor or omittor be a free agent. *Sabin v. Willamette Western Corp.*, 276 Or 1083, 557 P2d 1344

(1976). Respondent, as an employer, had a duty to know the amount of wages due to her employee. *McGinnis v. Keen*, 189 Or 445, 221 P2d 907 (1950); *In the Matter of Jack Coke*, 3 BOLI 238, 242 (1983). Evidence established that Respondent intentionally failed to pay wages. Evidence showed that she acted voluntarily and as a free agent. She must be deemed to have acted willfully under this test and thus is liable for penalty wages under ORS 652.150.

The record established that Respondent violated ORS 652.140 as alleged and owed Claimant the amount found as civil penalty wages pursuant to ORS 652.150. Earlier cases computed penalty wages based on the claimant's average daily rate for the period worked. *In the Matter of Flavors Northwest*, 11 BOLI 215, 224 (1993). By statute, the daily rate in this case was determined by multiplying the agreed upon hourly rate by eight hours. As before, the penalty period is limited to 30 calendar days from the date wages became due, *i.e.*, the next scheduled payday when a quit without notice was within five days of the next scheduled payday. ORS 652.150 (1995).

## ORDER

NOW, THEREFORE, as authorized by ORS 652.332, the Commissioner of the Bureau of Labor and Industries hereby orders TINA DAVIDSON, dba Magic Care, to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232-2109, the following:

(1) A certified check payable to the Bureau of Labor and Industries IN

TRUST FOR DANIELLE FELTON in the amount of ONE THOUSAND SIX HUNDRED SEVEN DOLLARS AND FIFTY-SIX CENTS (\$1,607.56), less lawful deductions, representing \$467.56 in gross earned, unpaid, due, and payable wages, and \$1,140 in penalty wages, plus

(2) Interest at the rate of nine percent per year on the sum of \$467.56 from June 15, 1996, until paid, plus

(3) Interest at the rate of nine percent per year on the sum of \$1,140 from July 15, 1996, until paid.

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**In the Matter of  
KATARI, INC., dba Morgan's Restaurant & Lounge, and Charles Morgan, Respondents.**

Case Number 40-97  
Final Order of the Commissioner  
Jack Roberts  
Issued August 13, 1997.

## SYNOPSIS

Respondent corporation, which operated a restaurant and lounge, discriminated against complainant, a female bartender, because of her sex when it twice reduced her shifts and gave her weekend shifts to male bartenders, in violation of ORS 659.030 (1)(b). The individual respondent, who owned and was the president of the corporation, aided and abetted the corporation's unlawful employment practice in violation of ORS 659.030(1)(g)

when he hired the male bartenders and gave complainant's shifts to them because he preferred male bartenders. Respondents did not bar complainant from employment when she twice voluntarily resigned due to the shift changes, and thus the Commissioner found no violation of ORS 659.030 (1)(a). The Commissioner awarded Complainant \$15,000 in compensation for her mental suffering. ORS 659.030 (1)(a), (b), and (g).

The above-entitled contested case came on regularly for hearing before Douglas A. McKean, designated as Administrative Law Judge by Jack Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on May 28 and 29, 1997, in the Conference Room of the Oregon Department of Transportation, Highway Division, 63055 N Highway 97, Bend, Oregon.

The Bureau of Labor and Industries (the Agency) was represented by Linda Lohr, an employee of the Agency. Amy M. Springer (Complainant) was present throughout the hearing. Katari, Inc. (Respondent Katari) and Charles Morgan (Respondent Morgan) were represented by Gregory Lynch, Attorney at Law. Kathy Morgan, Respondent Katari's representative, was present throughout the hearing.

The Agency called the following witnesses: Reed Clovos, manager of the Meadow Lakes Golf Course; Sandy Lampert and Mike Mansfield, former employees of Respondent Katari; Kathy Morgan, Respondent Morgan's wife; Susan Moxley, senior investigator with the Civil Rights

Division of the Agency; Janet Petty, employee of Respondent Katari; Amy Springer, Complainant; and Mary Williams, former manager of the Prineville Golf and Country Club.

Respondent called the following witnesses: Michelle Taylor (now Hickson), former general manager for Respondent Katari; Ike Hoff, former employee of Respondent Katari; and Charles (Chuck) Morgan, Respondent.

Administrative exhibits X-1 to X-9, Agency exhibits A-1, A-2, A-4, A-7 (except p. 9), and A-8 to A-11, and Respondents' exhibits R-1 to R-5 and R-7 to R-13 were offered and received into evidence. The Agency withdrew exhibit A-3. The record closed on May 29, 1997.

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

#### FINDINGS OF FACT – PROCEDURAL

1) On June 10, 1996, Complainant filed a verified complaint with the Civil Rights Division of the Agency. She alleged that Respondents discriminated against her because of her sex in that Respondents changed and reduced her hours because they preferred male bartenders.

2) After investigation and review, the Agency issued an Administrative Determination finding substantial evidence of unlawful employment practices by Respondents.

3) On around February 10, 1997, the Agency prepared and duly served on Respondents Specific Charges that alleged that Respondent Katari had treated Complainant differently and barred her from employment because of her sex, in violation of ORS 659.030(1)(a) and (b), and that Respondent Morgan aided and abetted Respondent Katari in violation of ORS 659.030(1)(g). Complainant claimed damages for lost wages and mental suffering.

4) With the Specific Charges, the forum served on Respondents the following: a) a Notice of Hearing setting forth the time and place of the hearing in this matter; b) a Notice of Contested Case Rights and Procedures containing the information required by ORS 183.413; c) a complete copy of the Agency's administrative rules regarding the contested case process; and d) a separate copy of the specific administrative rule regarding responsive pleadings.

5) On February 28, 1997, Respondents filed an answer in which they denied the allegations mentioned above in the Specific Charges and alleged as affirmative defenses that (1) Complainant was hired to work only one weekend, for which she received final payment, and (2) requiring a male bartender on particular shifts "because of his gender, physical strength, and masculine presence, to discourage and/or thwart probable or actual violence" was "a bonafide occupational requirement reasonably necessary to the normal operation of Respondents' business." Respondents withdrew their bona fide occupational requirement defense at hearing.

6) On March 12, 1997, Respondents' attorney, Gregory Lynch, requested a postponement of the hearing because of depositions previously scheduled in another case with out-of-town counsel. The Agency did not object and the ALJ granted a postponement, resetting the hearing for May 28, 1997.

7) Pursuant to OAR 839-050-0210 and the Administrative Law Judge's order, the Agency and Respondent each filed a Summary of the Case.

8) At the start of the hearing, the attorney for Respondents stated that he had read the Notice of Contested Case Rights and Procedures and had no questions about it.

9) Pursuant to ORS 183.415(7), the Administrative Law Judge orally advised the Agency and Respondents of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

10) During the hearing and pursuant to OAR 839-050-0140(2)(b), the Agency moved to amend the Specific Charges to delete the request for back wage damages. Respondents had no objection and the ALJ granted the motion.

11) On July 22, 1997, the Administrative Law Judge issued a Proposed Order in this matter. On August 4, 1997, the Hearings Unit received Respondents' timely exceptions, which are addressed throughout this Final Order.

#### FINDINGS OF FACT – THE MERITS

1) At times material herein, Respondent Katari was an Oregon corporation and the owner and operator of a restaurant and lounge in Prineville,

Oregon, using the assumed business name of Morgan's Restaurant & Lounge. Respondent Katari was an employer in the state of Oregon utilizing the personal services of one or more persons, subject to the provisions of ORS 659.010 to 659.435. Charles (Chuck) Morgan was an owner and the president of Respondent Katari and as corporate president is personally liable for aiding and abetting Respondent Katari in the commission of the unlawful employment practices alleged in Section 3 of the Specific Charges.

2) Complainant is female.

3) In March 1996, Respondent Morgan and his wife bought the Cinnabar restaurant and lounge, which they renamed Morgan's Restaurant & Lounge (bar). They remodeled the bar during March and early April 1996.

4) Respondent Morgan preferred male bartenders over female bartenders because if there was a fight in the bar, he believed it would be easier for a male bartender to handle it than for a female bartender. He believed that if he employed a male bartender, he would not need a bouncer.

5) Respondents hired Sandy Lampert as the bar manager in March 1996, before the bar reopened in mid-April 1996. Lampert and Complainant had worked for the previous owners of the Cinnabar. Complainant filled out an application on March 28, 1996, and gave it to Lampert. During the first half of April 1996, Lampert helped clean and restock the bar, started booking bands to provide live entertainment, and hired and scheduled bartenders and cocktail waitresses. Respondent Morgan gave Lampert the responsibil-

ity to hire and schedule enough employees to fill the shifts. Only two males applied to be bartenders. Lampert interviewed and hired Complainant, Mike Mansfield, and others to work for Respondents. Lampert posted the schedule. Complainant's shifts were Friday and Saturday nights, Sunday, and one week day. Complainant received a uniform. Around April 10, 1996, Respondent Morgan and Lampert could not agree on a salary for Lampert, and Respondent Morgan changed her title to "bar supervisor." She retained the same duties as before. After the Bull Bash weekend in mid-April, Respondent Morgan took over the responsibility for hiring and firing bar employees. Lampert then worked as a cocktail waitress, hostess, and bartender.

6) In April 1996, Complainant also worked as a part-time bartender for two other employers: the Prineville Golf and Country Club and the Meadow Lakes Golf Course. Complainant reduced her work hours for these employers to work for Respondent Katari. Complainant was never told by Respondent Morgan, Lampert, or Michelle Taylor (general manager and bookkeeper for Respondent Katari) that she was hired for only the Bull Bash weekend.

7) Complainant had seven years' experience as a bartender. She was an excellent bartender; she was well liked and very professional. She was accustomed to rowdiness in the bars where she had worked and was able to handle it. Fights were not unusual and she was able to break them up. She was never injured in a fight.

8) Respondent Morgan had a meeting with the employees before the

opening weekend. Many of the employees were former Cinnabar employees. He gave them a pep talk and told them he had never operated a restaurant and lounge before. He did not tell them they were hired to work only one weekend or that their schedules or hours were "up in the air."

9) Following the remodeling, Respondent Katari opened the bar on Thursday, April 18, 1996. The following Friday and Saturday were during the weekend of the annual Bull Bash in Prineville, which resulted in a much larger crowd than normal at the bar. Respondent Katari employed three security people, two people to check identification at the door, three bartenders (Complainant, Colleen Archer, and Mike Mansfield), and two cocktail waitresses that weekend. At 1:17 a.m. on Saturday, April 20, 1996, Prineville police were dispatched to the bar in response to "multiple fights." Two Oregon Liquor Control Commission (OLCC) inspectors observed several visibly intoxicated customers and several arguments among customers. They issued a warning to general manager Michelle Taylor regarding the visibly intoxicated customers and the disorderly activities on the premises. The Prineville Police Department advised Respondent Morgan that he needed to increase his security to maintain order at the bar. Complainant did not see any fights on Friday or Saturday night.

10) Complainant worked for Respondents Thursday through Sunday, April 18 to 21, 1996.

11) Around April 23, 1996, Respondent Morgan told Lampert that he had hired Rod Williams as a bartender

to work Friday and Saturday nights. Respondent Morgan wanted a male bartender who could handle fights and protect the female employees. Williams had no experience as a bartender. Respondent Morgan directed Lampert to train Williams. When Complainant came to the bar that day to check the work schedule, Lampert told Complainant her hours were cut because Respondent Morgan wanted male bartenders. Instead of Complainant, Williams was scheduled to work Friday and Saturday nights with Mike Mansfield. Those nights were the best nights to work because tips were the highest. Lampert, whose bartending hours were also reduced and given to Williams, was crying and Complainant was very upset. Complainant did not know what to do because she had already reduced her hours with her other employers. Lampert advised her to wait a couple of days. Complainant had several conversations with Taylor about the schedule. On Thursday, April 25, 1996, Taylor told Complainant that she (Taylor) had not yet talked with Respondent Morgan, and she apologized because Respondent Morgan wanted men behind the bar. Complainant felt hurt and embarrassed because she was replaced by Rod Williams, who had no experience. Complainant was on the schedule for only Sunday during the day. She quit because she thought she had been hired for full time work. On April 27, 1996, she turned in her uniform and Taylor paid her for her four days' work. The hourly rate of pay used to calculate Complainant's wages was wrong, and on April 29, 1996, Kathy Morgan gave Complainant a second check for the difference.

12) Complainant was able to get her hours back at the Prineville Golf and Country Club and the Meadow Lakes Golf Course. Complainant was upset when she asked her manager at Prineville Golf and Country Club, Mary Williams, for her hours back.

13) Rod Williams was incapable of performing the bartender job and Respondent Morgan fired him around April 30, 1996.

14) After Williams was fired, Respondents placed an advertisement in the newspaper for a bartender. Respondent Morgan wanted to hire a male bartender. Only females applied.

15) Respondent Morgan sent Ike Hoff to contact Complainant about coming back to work for Respondent Katari.

16) On Saturday, May 4, 1996, Taylor contacted Complainant at Respondent Morgan's direction and asked if she would return to work for Respondent Katari. Taylor offered Complainant employment with a full time schedule that included Friday and Saturday nights and Sundays, Mondays, and Tuesdays. Complainant accepted and said she could start on Monday, May 6, 1996. She said she would not be able to work until around 10 p.m. on Friday nights. Complainant needed to talk with her other two employers about her schedule. Complainant and Taylor agreed that Complainant would come in on Monday and work out her hours. Complainant was excited to return to work for Respondents because she wanted full time work and the higher income she could earn at Respondent Katari's bar. She again contacted her other employers and asked that her schedule be

adjusted to accommodate her hours at Respondents' bar.

17) On Sunday, May 5, 1996, Respondent Morgan changed his mind about hiring Complainant because Craig Ortman became available to work, and Respondent Morgan wanted to hire a male bartender. Respondent Morgan hired Ortman. Taylor called Complainant to offer her only Sunday days, on-call shifts, and work during special events. Complainant declined this job.

18) Reed Clovos, Complainant's manager at Meadow Lakes Golf Course, told her that he had seen a new male bartender at Respondents' bar. Respondent Morgan had said that he wanted male bartenders because they could tend bar and be the bouncer. Complainant and her husband went into the bar and saw Ortman working as the bartender.

19) Complainant was very upset when she did not get the full time job with Respondent Katari. She felt that what Respondent Morgan did (preferring male bartenders over female bartenders) was wrong. She was embarrassed to go back to her other jobs and again ask for her hours back. She got her hours back and continued working at her other jobs, but at an hourly rate of pay that was lower than she would have earned working for Respondent Katari. Complainant experienced financial stress during this time because her husband was unemployed and she had five children, three of whom lived with her year round and two of whom lived with her during summers. She had expected to earn more wages and tips while working at Respondents' bar than she had at her two part-time jobs.

20) OLCC prepared a compliance plan, dated August 28, 1996, for Respondent Katari to address the problems of "Disorder, overservice." This plan was sent to Respondents on September 5, 1996, following a meeting to discuss the "recent problems at your premises." One item of the plan, which Respondents agreed to, required Respondents to have a bouncer and ID checker on duty when there was any live entertainment at the bar. The OLCC inspector who inspected the bar in April 1996 and who wrote the compliance plan in August 1996 did not tell Respondents that they had to hire a male bouncer. No OLCC rule requires that a bouncer or ID checker be male.

21) Respondent Morgan's testimony was not credible. The ALJ carefully observed the demeanor of each witness and evaluated the credibility of the testimony based upon its inherent probability, its internal consistency, whether it was corroborated, whether it was contradicted by other evidence, and whether human experience demonstrated it was logically incredible. See *Lewis and Clark College v. Bureau of Labor*, 43 Or App 245, 256, 602 P2d 1161 (1979) (Richardson, J., concurring in part and dissenting in part). Respondent Morgan's testimony was internally inconsistent. For example, he denied ever saying that he preferred male bartenders; however, he also testified that he might have told people he liked male bartenders. This denial was corroborated by only his wife, and it was heavily contradicted by credible evidence (testimonial and documentary) that he made no secret of his preference for male bartenders. Likewise, Respondent Morgan testified

that Complainant was hired for only the Bull Bash weekend and that he told all the employees at the pre-opening meeting that their schedules were up in the air. That testimony was contradicted by the vast majority of the evidence in the record. Accordingly, the forum gave Respondent Morgan's testimony less weight whenever it conflicted with other credible evidence on the record. In some instances, the forum did not believe his testimony even when it was not controverted by other evidence.

22) The testimony of Michelle Hickson (formerly Taylor) was not entirely credible. Her memory was unreliable and selective. At times her testimony was evasive. On several disputed issues of fact, Hickson's testimony was inconsistent with statements she made to an investigator for the Civil Rights Division in August 1996 and was contradicted by credible evidence. Accordingly, the forum gave Hickson's testimony less weight whenever it conflicted with credible evidence on the record. In some instances, the forum did not believe her testimony even when it was not controverted by other evidence.

#### ULTIMATE FINDINGS OF FACT

1) Respondent Katari was an employer in the state of Oregon with one or more employees. Respondent Morgan was the president of Respondent Katari.

2) Respondent Katari employed Complainant.

3) Complainant is female.

4) In April 1996, Respondent Katari, through Respondent Morgan, hired a male bartender because

Respondent Morgan preferred to employ male bartenders. Respondent Morgan gave the male bartender work shifts that Complainant had been hired to work. Respondent Morgan changed Complainant's work schedule by decreasing the number of shifts she was scheduled to work and by giving her less desirable shifts because she is female. Complainant quit her employment with Respondent Katari.

5) In May 1996, Respondent Katari, through its general manager and at the direction of Respondent Morgan, again offered Complainant a full-time job as a bartender, working shifts that included Friday and Saturday nights. Complainant accepted that offer. Before Complainant began work, Respondent Morgan hired a male bartender because he preferred to employ male bartenders. He gave the male bartender shifts that had been offered to Complainant. Respondent Morgan changed Complainant's work schedule, offering her only on-call work, because she is female. Complainant again quit her employment with Respondent Katari.

6) Complainant suffered embarrassment, humiliation, disappointment, and distress because of Respondents' conduct.

#### CONCLUSIONS OF LAW

1) Respondent Katari was an employer subject to the provisions of ORS 659.010 to 659.110.

2) The Commissioner of the Bureau of Labor and Industries of the State of Oregon has jurisdiction over the persons and subject matter herein.

3) The actions, inactions, and knowledge of Respondent Morgan,

Sandy Lampert, and Michelle Taylor, each an employee or agent of Respondent Katari, are properly imputed to Respondent Katari.

4) ORS 659.030(1) provides in part:

"For the purposes of ORS 659.010 to 659.110, 659.227, 659.330, 659.340, and 659.400 to 659.460 and 659.505 to 659.545, it is an unlawful employment practice:

"(a) For an employer, because of an individual's \*\*\* sex \*\*\* to refuse to hire or employ or to bar or discharge from employment such individual. However, discrimination is not an unlawful employment practice if such discrimination results from a bona fide occupational requirement reasonably necessary to the normal operation of the employer's business.

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

\*\*\*\*\*

"(g) For any person, whether an employer or an employee, to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under ORS 659.010 to 659.110 and 659.400 to 659.545 or to attempt to do so."

Respondent Katari did not violate ORS 659.030(1)(a). Respondent Katari violated ORS 659.030(1)(b). Respondent Morgan violated ORS 659.030(1)(g).

5) Pursuant to ORS 659.060 and by the terms of ORS 659.010, the Commissioner of the Bureau of Labor

and Industries has the authority to issue a Cease and Desist Order requiring Respondents: to refrain from any action that would jeopardize the rights of individuals protected by ORS 659.010 to 659.110, to perform any act or series of acts reasonably calculated to carry out the purposes of said statutes, to eliminate the effects of an unlawful practice found, and to protect the rights of others similarly situated.

#### OPINION

#### Alleged Violation of ORS 659.030(1)(a) - Barred from Employment

The Agency contends that Respondent Katari barred Complainant from employment because of her sex, in violation of ORS 659.030(1)(a). In the Specific Charges, the Agency alleges that Respondent Katari did this by: reducing Complainant's hours around April 23, 1996 (when a male bartender was hired); again offering her full time work around May 4, 1996; then rescinding the offer around May 6, 1996 (when another male bartender was hired), and advising her she was only needed on an on-call basis; and taking these actions at a time when Complainant could not afford to work on an on-call basis.

Respondents claim that they hired Complainant for only the Bull Bash weekend, she quit after that weekend, and thus they did not bar or discharge her from employment because of her sex. They claim that Complainant never accepted their offer of employment in May 1996.

\* Respondent did not bar Complainant from employment by changing her schedule to only on-call work. A person hired for on-call or casual work is still an employee. *In the Matter of Lebanon Public Schools*, 11 BOLI 294, 306 (1993).

As explained in greater depth in the next section of this opinion, the preponderance of credible evidence revealed and the forum found the following facts. Respondent Katari hired Complainant for more than just the Bull Bash weekend and Respondent Katari's agent Lampert promised her certain shifts. Complainant quit her employment when Respondent Morgan reduced her hours in April 1996. When Taylor again offered Complainant employment in May 1996, Complainant accepted that offer, although there was to be additional discussion regarding her hours after she talked with her other employers. Respondents changed the offer to include only on-call shifts and special events. Complainant declined this position and, in effect, quit again.\*

The preponderance of credible evidence does not establish that Respondent Katari barred Complainant from employment because of her sex. The evidence shows that she quit each time Respondent Katari offered her an unacceptable schedule. The Agency did not plead (or offer evidence that would prove) that Respondent Katari actually or constructively discharged Complainant. Accordingly, the Agency has failed to prove that Respondent Katari violated ORS 659.030(1)(a).

#### Violation of ORS 659.030(1)(b) - Different Treatment in the Terms, Conditions, or Privileges of Employment

The Agency contends that Respondents reduced Complainant's work hours because of her sex, in

violation of ORS 659.030(1)(b). It alleges that Respondent Morgan preferred to employ male bartenders, especially on weekends when Complainant was scheduled to work, because the males could also act as bouncers and protect the "girls." The Agency alleges that Respondent Katari twice reduced Complainant's shifts when Respondent Morgan hired male bartenders.

Respondents contend that Respondent Katari hired Complainant for the Bull Bash weekend only and did not assure her any hours thereafter. They contend that Lampert had no authority to offer Complainant anything more than the shifts she worked during the Bull Bash weekend. They say Complainant quit after that weekend. They also contend that Complainant never accepted employment in May 1996 and that they hired Craig Ortman to fill the vacant position. They deny any intent to discriminate against Complainant because of her sex.

The preponderance of credible evidence on the whole record shows persuasively that Respondent Morgan preferred to employ male bartenders. His denial that he did so was overwhelmed by the testimony of the other witnesses, including his own witness Hickson, and by the documentary

evidence, including Respondents' exhibits. The forum has no doubt that Respondent Morgan hired Rod Williams and Craig Ortman specifically because they were male and because Respondent Morgan wanted male bartenders on the weekends.

Likewise, the preponderance of credible evidence was persuasive that Respondent Katari hired Complainant for more than just the bar's first weekend. The evidence was uncontroverted that Complainant was an excellent bartender and did a great job on the weekend of the Bull Bash. Respondent Katari employed other employees, such as Lampert and Mansfield, for an indefinite period beyond the opening weekend.<sup>\*</sup> Further, the preponderance of credible evidence shows that, in the meeting with employees before April 18, Respondent Morgan did not state, as he claims he did, that employees were hired only through the Bull Bash and that their hours were up in the air after that. No witness corroborated that claim. The forum concludes that Respondent Katari hired Complainant as a permanent employee for an indefinite period and for shifts that included weekend nights.

Respondents next claim that Sandy Lampert did not have any

authority to offer Complainant particular shifts after the Bull Bash. The preponderance of credible evidence is to the contrary. Respondent Morgan gave Lampert the authority to hire bartenders and authorized her to set the schedule. Whether her title was bar manager or bar supervisor, her duties were the same. Respondent Morgan authorized Lampert to make sure the shifts were covered and to post the schedule. She did that and, as an agent of Respondent Katari, offered the weekend night-shifts to Complainant and Mansfield. Complainant accepted this and adjusted her hours with her other employers accordingly. There was no credible evidence that Respondent Katari hired Complainant or promised her shifts for only the opening weekend.

An employer has a right to reduce or change an employee's schedule, provided the reason for that adjustment is not based on the employee's protected class. Here, the evidence is persuasive that the only reason Respondent Katari did not schedule Complainant to work weekend night shifts after the Bull Bash was her sex. Mike Mansfield continued to work weekend night shifts after the Bull Bash. The only reason Complainant was not there to work with him was that Respondent Morgan wanted male bartenders to work those shifts. By doing so, Respondent Katari discriminated against Complainant in the terms and conditions of her employment, in violation of ORS 659.030(1)(b).

The preponderance of credible evidence is also persuasive that, on Saturday, May 4, 1996, Respondent Katari (at Respondent Morgan's

direction and through the general manager Taylor) offered Complainant a full time position that included weekend night shifts. Complainant testified credibly that she accepted this position, even though her exact hours would not be determined until the following Monday, when she would start work. That evidence was corroborated by Lampert's testimony and notes. No reliable evidence rebutted it. Respondent Morgan then hired Craig Ortman for the weekend shifts, and Taylor had to call Complainant back on May 5 to offer her only on-call work. As stated above, the forum has no doubt that Respondent Morgan hired Craig Ortman specifically because he was male and because Respondent Morgan wanted male bartenders on the weekends. The forum concludes that the shifts that were first offered to Complainant were taken away from her because she is female and Respondent Morgan wanted a male to work those shifts. That constitutes discrimination because of sex in violation of ORS 659.030(1)(b).

In their exceptions, Respondents argue that, while Respondent Morgan

"may have preferred to have a male bartender on the premises during certain shifts, the clear and unequivocal testimony by [Hickson] was that Morgan never acted on this preference. [Hickson] testified that no male was ever hired in place of a female."

As explained below, the forum found Hickson's testimony unreliable. The forum specifically finds this claim — that Respondent Morgan never acted on his preference for male bartenders — incredible. The preponderance of

\* There was evidence that one employee, Colleen Archer, was discharged after the Bull Bash. She was discharged, according to Kathy Morgan and Sandy Lampert, because she was Lampert's daughter. Respondent Katari had a policy that prohibited the employment of family members of employees. There was conflicting evidence about whether the Morgans knew Archer was Lampert's daughter before she was employed. In any event, her family relationship with Lampert was the reason for her discharge, not that she was hired for only the Bull Bash weekend. The forum notes that a blanket policy, such as the one Kathy Morgan described, prohibiting the employment of an individual solely because another member of the individual's family works or has worked for the employer could violate ORS 659.340.

credible evidence showed that Respondent Morgan wanted male bartenders on weekends so they could handle the fights. Aside from that, Respondents offered no plausible reason why they would hire an inexperienced male bartender and schedule him to work weekend nights, rather than schedule the already-hired, experienced, and able female Complainant for those shifts. From the evidence, the forum must conclude that Respondents hired and then scheduled the inexperienced Williams to work the weekend night shifts solely because of his sex. The forum must also conclude that Respondents did not schedule Complainant to work the weekend night shifts solely because of her sex. Concerning Respondents' arguments that they never hired a male in place of a female, those arguments are irrelevant concerning whether Respondents reduced Claimant's work hours because of her sex, in violation of ORS 659.030(1)(b).

#### **Violation of ORS 659.030(1)(g) – Aiding or Abetting an Unlawful Employment Practice**

The forum has concluded that Respondent Katari violated ORS 659.030(1)(b) by hiring the male bartenders and reducing Complainant's shifts because of Complainant's sex. Respondent Morgan, as Respondent Katari's president and as the person who made the hiring and scheduling decisions following the Bull Bash weekend, directly aided and abetted Respondent Katari's discriminatory acts, in violation of ORS 659.030(1)(g).

In their exceptions to this section of the opinion, Respondents again argue that Respondent Morgan "never hired

a male bartender to replace a woman or instead of a woman." For the reasons given in the previous section of this opinion, the forum rejects this exception.

#### **Damages**

Awards for mental suffering damages depend on the facts presented by each complainant. Here, the forum found that the discrimination Complainant experienced caused her mental suffering including stress, upset, embarrassment, hurt, and disappointment as described in the Findings of Fact. Respondents are directly liable for these damages.

In their exceptions, Respondents claim the damages award is punitive and, therefore, unauthorized by statute. Relying on *School District No. 1 v. Nilson*, 271 Or 461, 534 P2d 1135 (1975), they argue that the facts here are far less egregious than those in *School District No. 1*, where the court struck down the Commissioner's mental suffering award of \$1,000. The forum disagrees that the damages issue here is "virtually identical" to that in *School District No. 1*, as Respondents contend.

First, the award here is for compensatory damages only. It is not an award of punitive damages.

Second, no part of the award compensates Complainant for the stress that is inherent in litigating this matter. *School District No. 1*; *In the Matter of Portland General Electric Company*, 7 BOLI 253 (1988), *aff'd*, *Portland General Electric Company v. Bureau of Labor and Industries*, 317 Or 606, 859 P2d 1143 (1993); *In the Matter of German Auto Parts, Inc.*, 9 BOLI 110

(1990), *aff'd*, *German Auto Parts, Inc. v. Bureau of Labor and Industries*, 111 Or App 522, 826 P2d 1026 (1992). Complainant heard from her patrons that Respondent Morgan made negative comments about the merits of this case. She was humiliated. However, the forum awarded her no damages for this.

Third, a lack of medical consultation or a failure to seek counseling goes to the severity of mental suffering, not necessarily to its existence. *In the Matter of Portland General Electric Company*, 7 BOLI 253 (1988), *aff'd*, *Portland General Electric Company v. Bureau of Labor and Industries*, 317 Or 606, 859 P2d 1143 (1993). A complainant's testimony about the effects of a respondent's conduct, if believed, is sufficient to support a claim for mental suffering damages. *In the Matter of Jerome Dusenberry*, 9 BOLI 173 (1991). In the proper case, with proof of emotional distress, an unlawful disparity in pay based upon sex has supported an award for mental suffering. *In the Matter of City of Portland*, 2 BOLI 110 (1981), *aff'd*, *City of Portland v. Bureau of Labor and Industries*, 298 Or 104, 690 P2d 475 (1984); *In the Matter of Courtesy Express, Inc.*, 8 BOLI 139 (1989). In relation to mental suffering, the forum sees little difference between sex-based discrimination in the form of lower wages and sex-based discrimination in the form of reduced work shifts.

Fourth, the forum has held repeatedly that financial insecurity and anxiety caused by an unlawful employment practice is compensable. *In the Matter of WS, Inc.*, 13 BOLI 64 (1994); *In the Matter of German Auto Parts, Inc.*, 9

BOLI 110 (1990), *aff'd*, *German Auto Parts, Inc. v. Bureau of Labor and Industries*, 111 Or App 522, 826 P2d 1026 (1992). Here, Complainant twice gave up part-time hours with her two other employers to take employment with Respondent Katari. She did so with an expectation that she could earn more money and work full time for one employer. She provided the sole support for her family because her husband was unemployed. Twice Respondents discriminated against her because of her sex and she had to seek additional work with the other employers. Since she was able to increase her hours with the other employers, the duration and severity of her financial insecurity were tempered. Nevertheless, it is compensable.

Finally, when an individual is discriminated against because of her immutable characteristics, such as her sex or race, the forum recognizes and may infer that she has suffered some diminution of her human dignity. *Fred Meyer, Inc. v. Bureau of Labor*, 39 Or App 253, 592 P2d 564, 571, *rev den* 287 Or 129 (1979). Often, complainants cannot articulate this, but instead complain of upset, humiliation, distress, hurt, and embarrassment. These are precisely the emotions Complainant described. This mental suffering is compensable.

The amount awarded to Complainant in the order below is compensation for her mental suffering and is a proper exercise of the Commissioner's authority to eliminate the effects of the unlawful practices found.

#### **Respondents' Exceptions**

In Respondents' exceptions to the Proposed Order, they challenge

several findings of fact. For example, they contend that Lampert had no authority to offer Claimant permanent employment. Lampert gave inconsistent testimony about the authority she had at different times, as her job evolved from bar manager to cocktail waitress. But besides Lampert's testimony, the preponderance of credible evidence shows that Respondent Katari hired Claimant and that she was still employed after the Bull Bash. That evidence also shows that Lampert set the schedule and Claimant's hours were reduced after Respondents hired Rod Williams as a bartender. Contrary to Respondents' arguments, Respondent Morgan did not make it clear to the employees that their hours were up in the air following the opening weekend.

In their exceptions, Respondents rely in part on Hickson's testimony. The forum has added a finding of fact that Hickson's testimony was not credible. See Finding of Fact – The Merits 22. After reviewing the evidence, it is clear the ALJ made findings of fact contrary to her testimony. In other words, the ALJ gave greater weight to evidence that contradicted her testimony. Express credibility findings are not needed when there is evidence in the record both to make more probable and to make less probable the existence of any particular fact. *Dennis v. Employment Division*, 302 Or 160, 169, 728 P2d 12, 18 (1986). However, to clarify the basis for the other findings and the reasoning in this order, the forum has made an express finding of fact regarding Hickson's credibility. After reviewing the evidence, the forum agreed with the ALJ's implicit credibility

finding and, for the reasons given in Finding of Fact 22, found Hickson's testimony unreliable.

Respondents also take exception to the ALJ's finding on the credibility of Respondent Morgan's testimony. An Administrative Law Judge's credibility findings are accorded substantial deference by the forum. Absent convincing reasons for rejecting such findings, they are not disturbed. *In the Matter of Western Medical Systems, Inc.*, 8 BOLI 108, 117 (1989). After considering Respondents' arguments and the evidence, the forum concurs with the ALJ's finding regarding credibility and finds no convincing reason to reject it. Accordingly, the credibility finding has not been disturbed.

After considering each of Respondents' exceptions and reviewing the evidence, the forum believes the findings, as modified, are supported by the preponderance of credible evidence. Insofar as Respondents' exceptions are contrary to the findings, they are rejected.

Respondents also took exception to three sections of the opinion. The forum addressed those exceptions in the respective sections of the opinion.

#### ORDER

NOW, THEREFORE, as authorized by ORS 659.060(3) and 659.010 (2) and to eliminate the effects of the unlawful practice found as well as to protect the lawful interest of others similarly situated, the Respondents, KATARI, INC. and CHARLES MORGAN, are hereby ordered to:

1) Deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 800 NE Oregon Street # 32,

**In the Matter of  
BODY IMAGING, P.C.,  
and Paul Meunier, Respondents.**

Case Number 08-95  
Final Order of the Commissioner  
Jack Roberts  
Issued September 16, 1997.

#### SYNOPSIS

Where respondent employer regarded and treated complainant as if she had a disability (multiple sclerosis), modified the terms and conditions of her employment and deliberately created intolerable conditions compelling complainant to resign, the commissioner found that the employer discriminated against complainant based on disability. Finding that the employer's president aided and abetted the employer, the commissioner held both liable for complainant's lost wages and benefits and mental suffering damages. ORS 659.030(1)(g); 659.400; 659.425(1)(c).

The above-entitled contested case came on regularly for hearing before Warner W. Gregg, designated as Administrative Law Judge (ALJ) by Jack Roberts, Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was held on January 22, 23, 24, and 25, 1996, in the hearings room of the Bureau of Labor and Industries, 1004 State Office Building, 800 NE Oregon Street, Portland, Oregon. The Bureau of Labor and Industries (the Agency) was represented by Judith Bracanovich, an employee of the Agency. Body Imaging,

Suite 1010, Portland, Oregon 97232-2162, a certified check, payable to the Bureau of Labor and Industries in trust for Amy M. Springer, in the amount of:

a) Fifteen Thousand Dollars (\$15,000), representing compensatory damages for the mental distress Complainant suffered as a result of Respondents' unlawful practice found herein; plus,

b) Interest on the compensatory damages for mental distress, at the legal rate, accrued between the date of the Final Order and the date Respondents comply herewith, to be computed and compounded annually.

2) Post in a conspicuous place on the premises of Morgan's Restaurant & Lounge a copy of ORS 659.030, together with a notice that anyone who believes that he or she has been discriminated against may notify the Oregon Bureau of Labor and Industries.

3) Cease and desist from discriminating against any current or future employee because of the employee's sex.

P.C., a professional corporation (Respondent), and Paul Meunier, M.D. (Respondent Meunier), were represented by William N. Mehlhaf, Attorney at Law, Portland. Respondent Meunier was present throughout the hearing on his own behalf and as the representative of Respondent. Therese Zeigler (Complainant) was present throughout the hearing. Her counsel, Gordon S. Gannicott, Attorney at Law, Portland, was also present.\*

The Agency called the following witnesses (in alphabetical order): Respondent's former business office manager Margaret Bridges; former Agency Senior Investigator James D. Kreiss; International Business Machines (IBM) customer engineer Jeffrey W. Lehman (by telephone); Respondent's former prospective co-owner and employee Michael E. Stoll, M.D.; Complainant's neurologist Reed C. Wilson, M.D.; and Complainant.

Respondents called as their witness Respondent Meunier.

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

#### FINDINGS OF FACT – PROCEDURAL

1) On August 13, 1993, Complainant filed a verified complaint with the Agency alleging that she was the victim of the unlawful employment practices of Respondent. After invest-

igation and review, the Agency issued an Administrative Determination finding substantial evidence supporting the allegations of the complaint.

2) On August 24, 1994, the Agency prepared for service on Respondent Specific Charges, alleging that Respondent discriminated against Complainant in her employment with Respondent, both on the job and at termination, based on her perceived disability in violation of ORS 659.425. With the Specific Charges, the Agency served on Respondent the following: a) Notice of Hearing setting forth the time and place of the hearing; b) a Notice of Contested Case Rights and Procedures containing the information required by ORS 183.413; c) a complete copy of Oregon Administrative Rules (OAR) regarding the contested case process; and d) a separate copy of the specific administrative rule regarding responsive pleadings.

3) On September 12, 1994, Respondent through counsel timely filed an answer wherein Respondent admitted employing Complainant in Oregon and that Respondent Meunier was her immediate supervisor. Respondent denied any unlawful employment practices or damages to Complainant based on disability.

4) On November 4, 1994, the Hearings Referee assigned was changed from Linda Lohr to Alan McCullough. On March 14, 1995, the Hearings Referee assigned was changed from Alan McCullough to Douglas A. McKean. In October 1995,

the Administrative Law Judge\* assigned was changed from Douglas A. McKean to Warner W. Gregg.

5) Between September 12, 1994, and June 6, 1995, the hearing in this matter was repeatedly delayed by order of the forum upon application of the participants. On June 6, 1995, the forum held a pre-hearing conference on the record. The meeting resolved discovery disagreements and resulted in the scheduling of responses for outstanding motions. There was discussion of the necessity for further postponement of the hearing, scheduled for June 19, based on Respondent Meunier's health.

6) On June 9, 1995, the forum postponed the hearing based on Respondent Meunier's health and directed that the participants explore available dates for hearing after October 1, 1995. There was pending at that time the Agency's motion to strike certain of Respondent's affirmative defenses and Respondent's motion for summary judgment.

7) On June 14, 1995, the Agency filed its motion to amend the Second Amended Specific Charges. The forum extended time for Respondent to object thereto until the previously pending motions were resolved.

8) On June 17, 1995, the forum struck certain of Respondent's affirmative defenses, denied Respondent's motion for summary judgment, and set the hearing for January 22, 1996. On July 31, 1995, the forum formally extended the time for Respondent to re-

spond to the pending motion to amend until September 29, 1995.

9) Respondent's objections to amendment of the Agency's Second Amended Specific Charges were timely filed. On December 28, 1995, the forum allowed the requested amendment, which served to join Respondent Meunier personally as a respondent to the charges, and directed that the Agency, by January 2, 1996, file its third amended charges incorporating all amendments previously approved by the forum. Respondents were allowed until January 9, 1996, to answer the new charges, with the option of allowing the existing answer of the corporate respondent to stand.

10) On January 2, 1996, the Agency filed its Third Amended Specific Charges and thereafter counsel timely filed the answer thereto of Respondent Meunier and advised the forum that the corporate respondent would rely on its previous answer.

11) On January 16, 1996, the Agency and Respondents timely filed their respective summaries of the case in accordance with the orders of the forum. On January 19, Respondents filed a document denominated "Respondents' Hearing Memorandum."

12) At the commencement of the hearing, counsel for Respondents stated that he had reviewed the Notice of Contested Case Rights and Procedures and had no questions about it.

13) At the commencement of the hearing, pursuant to ORS 183.415(7), the ALJ orally advised the participants

\* In this forum, the function of Complainant's private counsel is advisory. OAR 839-50-120.

\* In July 1995, the Commissioner authorized BOLI employees functioning as hearings officers to utilize the working title of Administrative Law Judge in subsequent hearings and proceedings.

of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

14) At the close of testimony the participants mutually agreed to submit written argument in accordance with a schedule set by the ALJ. Submissions under that schedule as modified with the approval of the ALJ were timely made and the record herein closed with receipt of the final submission on April 17, 1996.

15) The proposed order, containing an exceptions notice, was issued February 19, 1997. Exceptions were due, under extension of time, on March 26, 1997. Respondents timely filed exceptions which are dealt with in the Opinion section of this order.

16) After the proposed order was issued, the forum asked the Agency for a statement of Agency policy regarding aider and abettor liability under ORS 659.030(1)(g) in view of *Schram v. Albertson's, Inc.*, 146 Or App 415, 934 P2d 483 (1997), decided in February 1997. The Agency filed a policy statement, serving it on Respondents' counsel, and thereafter filed a revised statement of Agency policy, which was also served on counsel. The aider and abettor issue is discussed in the Opinion section of this order.

#### FINDINGS OF FACT – THE MERITS

1) At times material herein, Respondent Body Imaging, P.C., was an Oregon professional corporation operating an outpatient clinic engaged in diagnostic radiology and associated medical procedures performed at the request of referring medical practitioners. Originally, Body Imaging was an assumed business name for Richard

Arkless, M.D, P.C. The professional corporation later became Body Imaging, P.C., of which Respondent Meunier was the president and sole stockholder. Both as a proprietorship and as a corporation, Body Imaging utilized the personal services of six or more employees in Oregon.

2) Respondent Paul Meunier, M.D., graduated from the U.S. Military Academy in 1973 and thereafter served four years as an infantry officer. He graduated from medical school at the University of Vermont in 1981 and did his internship and residency in U.S. Army hospitals. His specialty was diagnostic radiology and he became certified by the American Board of Radiologists. He left the Army in June 1989 and began working as an employee of Richard Arkless, M.D, P.C. in November 1989, with the expectation of buying into the practice after one year.

3) Diagnostic radiology outpatient clinics are generally found only in urban areas because of the financial outlay involved and the need for a numerically large referral base. At the time of hearing there were three diagnostic radiology outpatient clinics in the Portland metropolitan area, including Respondent. Most radiologists are employed in hospitals providing inpatient as well as outpatient radiological services. Respondent's practice was totally dependent upon referrals from primary care or treating physicians. Respondent's physicians are never the treating physician. It is a competitive field.

4) Complainant began working as a receptionist for Dr. Arkless in April 1985. She remained employed, first by the proprietorship and then by the

professional corporation. She was initially supervised by Susan Arkless, wife of the proprietor.

5) In December 1990, Respondent Meunier bought a 51 percent share of the practice. In early 1991, Susan Arkless left the office. Margaret Bridges was then supervising Complainant.

6) Margaret Bridges began working for Body Imaging in September 1988. Her initial duties were billing and collections, where she was supervised by Susan Arkless. In late 1989, Bridges began supervising the "front office" help, including Complainant. Bridges became business manager in 1991 after Respondent Meunier obtained control of the practice. Respondent Meunier was then Bridges's immediate supervisor.

7) Complainant worked in reception. Her duties as receptionist involved scheduling patients for the various procedures offered by Respondent. She set up computer records from information supplied by the referring physician's office or the patient, verified personal and insurance data, and assured that the patient had information regarding preparation for the procedure and was scheduled with the right technician and/or radiologist. The receptionist also copied and mailed reports and schedule sheets; filed reports, films, and schedules; received and transmitted films; recorded patients seen and fee information; metered the outgoing mail; and turned office machines on or off as appropriate. As a receptionist, Complainant was to make every effort to schedule patients the same day when requested by referring physicians to do so, either

because of medical urgency or because the patient was from outside the area.

8) Complainant was originally the only receptionist. As the office grew, other receptionists were hired. Complainant's duties expanded to include insurance input and in 1990 she became lead receptionist, which made her responsible for assuring that the other receptionists were trained and that the front office was staffed.

9) Complainant's performance of her receptionist duties was inconsistent. She was very good with patients, both in person and by telephone. She was very good with referring physicians' offices. She was repeatedly counseled about time spent on personal phone calls, tardiness, and long lunch breaks, and on one occasion she was placed on probation by Bridges for returning late from vacation. Her written evaluations, first by Susan Arkless and later by Bridges, reflected these inconsistencies, but also reflected positive overall performance. Bridges felt that Complainant's strengths outweighed her weaknesses. Generally, written evaluation forms were completed annually. Memos of counseling or discipline were also part of each employee's personnel record.

10) Arkless and Respondent Meunier had disagreed about the operation of the practice and about their respective duties and responsibilities, with the result that when he could not re-purchase control, Arkless resigned as an employee of the corporation effective in December 1991. Respondent Meunier bought the remaining interest of Arkless and became sole owner.

11) Around December of 1990, Complainant noted numbness in the right side of her face. Her dentist referred her to a neurologist, Dr. Wilson, who examined her in January 1991.

12) Reed C. Wilson, M.D., has practiced neurology in Portland since 1975 and has been on the neurology faculty of Oregon Health Sciences University since 1977. He is an expert in the field.

13) Multiple sclerosis (MS) is an incompletely understood disease of the nervous system characterized by a genetic or inherited susceptibility combined with an acquired factor, probably a non-specific viral infection, which lays dormant and over time alters the structure of portions of the nervous system to the extent that the body mounts an antibody response to it. It is an autoimmune disease of the central nervous system, specifically of the myelin or insulation of the nerve fibers. The resulting alteration causes a lesion, or scarred area, leading to a malfunction. Evidence obtained by history and by examination which reveals malfunctions in different areas of the nervous system occurring at different times (malfunctions separated by space and time), when other causes have been ruled out, suggests more than one scarred area, or multiple lesions. Hence, multiple sclerosis. It is a progressively debilitating disease, which

can substantially limit one or more major life activities.

14) Detection and diagnosis of MS involves a history of and examination for physical symptoms of neurologic malfunction plus laboratory tests such as MRI and CSF,\* among others.

15) Dr. Wilson's examination of Complainant in January 1991 verified numbness, but not its exact cause. An MRI was normal. At that time he did not think MS was indicated, but counseled further observation because he could not rule it out. Complainant was relieved and shared the information in Respondent's office.

16) Bridges noted during the time she supervised Complainant that Complainant was "sometimes 'on,' sometimes not." Bridges learned of the facial numbness and thought she observed fatigue in Complainant. Bridges was concerned. She had a cousin who had exhibited similar symptoms and had been diagnosed with MS. When Wilson's January 1991 finding was essentially normal, Bridges suggested to Complainant that she get a second opinion. Complainant did not do so at the time.

17) Although his agreement with Dr. Arkless contained a "non-compete" clause, Respondent Meunier sensed that Arkless might attempt to dissuade referring physician offices from continuing with Respondent and might

\* MRI (Magnetic Resonance Imaging) involves the measurement of the magnetic charge in the protons of the cellular structure of body fluids, which creates an image of the body's structures. It is very sensitive in detecting abnormalities; it does not necessarily identify the exact nature of the abnormalities it detects.

\*\* CSF: A laboratory test which screens spinal fluid for multiple sclerosis; highly accurate when other sources of malfunction or infection have been eliminated by other tests.

open a competing practice. In late 1991, Complainant began visiting referring physician offices and in January 1992, she was assigned the title of "Service Coordinator." Her duties were to deliver films and reports and provide pads and forms, referral kits, and information regarding preparation of patients to the staffs of the referring physicians. She dropped off items such as coffee cake and donuts for the staffs and processed and delivered the office newsletter, "Inside Image." She explained the changes at Body Imaging, the available services and future plans, and learned what Arkless had represented about Body Imaging. The purpose of her efforts was the retention of the existing referral base.

18) When she became service coordinator, Complainant had several years' experience as a receptionist and was familiar with procedures offered by Body Imaging. She had no technical knowledge of the equipment or its operation. She was well acquainted with the office staff of each of the referring physicians' offices and had established a positive rapport with each office. The position was not full time, and Complainant performed her regular receptionist duties when she was not acting as service coordinator. Respondent paid for a three month course, "Fundamentals of Marketing," which Complainant took at Portland Community College.

19) Complainant used her own automobile in her work as service coordinator. She kept a log of her marketing or public relations activities, which required her to drive, in order to claim reimbursement for mileage. Short, "spur of the moment" trips requested

by Bridges were not all recorded in the log or in Complainant's personal appointment calendar.

20) In February 1992, Michael Stoll, M.D., Ph.D., a radiologist, began employment with Respondent. At that time, it was his intent and that of Respondent Meunier that he eventually become a shareholder in Respondent.

21) In 1991 and early 1992, Respondent Meunier planned to add MRI capability to the existing services of ultrasound, CT scanning, mammography, arthrography, fluoroscopy, and nuclear medicine. For this, he perceived a need for a marketing component beyond the services provided by Complainant.

22) Stoll recommended the hire of Stephen Weeks, who had done marketing for a competing radiology clinic with MRI capabilities where Stoll had practiced. Respondent hired Weeks in February 1992 with the title of "Provider Relations Representative." Weeks was a college graduate and had some technical knowledge of MRI equipment and of the imaging equipment used by Respondent.

23) Complainant was told by Bridges that Weeks was to concentrate on marketing the anticipated MRI services and other new business. Complainant would continue servicing the existing referral base. At times they worked together, with Complainant using her wide acquaintance to introduce Weeks to particular providers.

24) From December 16, 1991, through July 14, 1992, Complainant spent all or a portion of 21 work days in marketing and public relations activities, including film and report deliveries,

providing bakery treats, referral forms and insurance information, and explaining changes and future plans in the office. She spent nine days on these activities in April 1992, when she also delivered the office newsletter and promoted an open house scheduled for early May. There was no activity noted for February, March, or June 1992.

25) Following Complainant's January 1991 examination, Bridges continued to observe Complainant, who had headaches from time to time and still appeared distracted and fatigued. In February 1992, Bridges memorialized a conversation with Complainant about entry errors in insurance, misquotes of costs, and personal phone calls. The memo to Complainant's personnel file concluded:

"I ask[ed] Terri to be checked again for the problem last year with the numbness & she said . . . maybe."

26) On April 16, 1992, Bridges noted that Complainant appeared preoccupied and disinterested and was "making a lot of errors." She wrote:

"I ask[ed] Terri about her health and she insists she is fine — She has not been rechecked as she was supposed [sic] to have been. I ask[ed] her to be rechecked."

In the same memo, Bridges stated:

"She thinks maybe she has 'reception Burnout' — I explain[ed] she's needed there — MRI didn't materialize & she is not needed out as we had planned for —"

27) Complainant's right facial numbness persisted after January 1991. She subsequently developed

headaches and fatigue, and the numbness shifted to include the left side and seemed to increase in severity. She made a second appointment with Dr. Wilson.

28) In mid-July 1992, suspecting that the persistence and expanded location of the numbness might indicate a second base location of neurologic involvement, Dr. Wilson performed a spinal tap for a CSF test and then ordered another MRI. While the CSF results were "strongly suggestive of multiple sclerosis," the MRI was essentially normal. He thought a diagnosis of MS probable, but not confirmed, and recommended that she be followed with "serial neurological examinations" (i.e., further tests over time). He shared his findings with Complainant, who told Diana, a co-worker who had accompanied Complainant at the direction of Bridges. Bridges had instructed Diana to call Bridges with the result, which she did in Complainant's presence.

29) The following day, Complainant's co-workers knew of the diagnosis. Bridges called Complainant into her office and attempted to give her a vacation. Bridges was concerned about the psychological and emotional effect of the "probable" diagnosis. Complainant told Bridges that she didn't want special treatment and didn't need time off.

30) Upon learning of Dr. Wilson's findings, Bridges was concerned about whether Complainant should drive on office business. She asked Respondent Meunier if she should check with the corporation's attorney and insurance carrier regarding corporate liability if Complainant had a vehicle

accident in her condition. He thanked Bridges for the suggestion and told her to call. Bridges learned from the attorney and the insurance agent that Complainant's driving her own car on company business was not a problem. She reported that to Respondent Meunier, who was still concerned and directed Bridges to prohibit Complainant's driving on company business.

31) Complainant was scheduled to do marketing on August 3, 1992, including lunch with Weeks at the Metro Clinic. It was on that day that Bridges informed her that she was not to drive on company business. Complainant and Weeks had worked together to arrange that meeting several weeks in advance. Weeks drove. Complainant was the primary person arranging luncheon meetings with providers on September 18 and October 15 for herself and Weeks, who drove. She did not drive on behalf of Respondent's office after July 14, 1992.

32) Respondent Meunier twice asked to see Complainant's MRI result, which she supplied. He also saw a portion of the CSF test result.

33) Together, Stoll and Respondent Meunier looked at the MRI result and the partial CSF data. Stoll saw the MRI as normal, but was not familiar with the CSF. Respondent Meunier said there could be MS and told Bridges that Complainant should not drive for the office.

34) Complainant returned to Dr. Wilson on August 19, 1992. She had noticed some twitching around her left eye. She also reported a left hand tremor, intermittent myoclonic jerks, fatigue, and that her job duties had been changed due to her condition.

35) Because Complainant had no "neurological handicaps," Wilson thought the shift in her job duties to be unjustified. He referred Complainant to Dr. Herndon for a second opinion and at her request wrote a letter to her stating, "There is no medical reason why you are not fully capable of employment."

36) Herndon examined Complainant on September 3, 1992. His impression was possible MS. At Complainant's request, he wrote a letter regarding Complainant stating, "there is no contraindication to her continuing to work and specifically no contraindication to her continued driving."

37) The letters from Drs. Wilson and Herndon were given to Bridges by Complainant as they were received. Bridges discussed them with Respondent Meunier, who still did not want Complainant to drive for the office. Complainant never resumed the portion of her service coordinator duties that involved driving. The delivery of kits and referral pads, films and reports were handled by others or done by mail. From a projected two days per week on public relations, Complainant was reduced to a few hours a month accompanying Weeks.

38) When Bridges first informed her that she was not to drive on company business, Complainant was upset. Bridges suggested patience, then later told her that Respondent Meunier did not want her driving for the office. Complainant felt useless, embarrassed, humiliated and hurt, and as if she had been labeled an invalid. She felt totally stripped of every bit of personal dignity.

39) There was a change in Respondent Meunier's attitude toward Complainant after July 14, 1992. He had always been sharp, direct, and authoritative, but after that date things like morning acknowledgments and politeness no longer seemed to include her. He never explained or discussed the decision regarding driving. He was more critical of her in front of patients and other workers and the severity of his manner, words, and tone increased. He focused on Complainant as being responsible for any deficiency among the three receptionists.

40) From July 1992 on, Complainant was intimidated by Respondent Meunier. She was sometimes in tears from verbal confrontations with him. Bridges described Respondent Meunier as "military." Bridges spoke weekly with Complainant and saw that the situation was negatively effecting Complainant's confidence, self esteem, and ability. Complainant appeared nervous, anxious, and inhibited, and dreaded coming to work. Bridges discussed the ongoing conflict with Stoll in the hope of facilitating a solution with Respondent Meunier.

41) When Stoll was hired, Respondent began offering disability insurance to employees, including Complainant. Respondent Meunier remarked to Bridges that if anyone needed to get focused or straightened out, it was Complainant because she might need the disability insurance.

42) Stoll observed that Respondent Meunier was hard on employees, yelled at them, and had unreasonable expectations of them. It was reported to him by Complainant, Weeks, and Bridges that Respondent Meunier

focused on Complainant more than others beginning about six months after Stoll began working. Stoll spoke with Respondent Meunier in about February 1993, suggesting a kinder approach to employees, and thought his remarks were taken positively at the time.

43) Weeks related well to the existing client base and was able to bring in additional referrals. By late 1992, Respondent Meunier did not see the need for more than one person in marketing and when another receptionist resigned in the fall, Complainant was reassigned full time to reception.

44) In November 1992, Bridges placed Complainant, then working as a receptionist, on 90 days probation for failing to return from vacation on time.

45) When she could no longer work as service coordinator, Complainant felt demoted, and about January 1993 she sought to return to the position of lead receptionist. She was supported by Bridges and Stoll. Respondent Meunier opposed her appointment to the position but allowed it to occur, holding Bridges ultimately responsible for Complainant's performance.

46) On or about April 20, 1993, Respondent Meunier had instructed that he be scheduled for no more than two procedures an hour. Because she also had standing instructions from him that referring physicians were not to be refused when requesting an immediate scheduling, Complainant inserted two extra appointments. At closing, Respondent Meunier profanely questioned her scheduling, accusing her of not paying attention or listening to instructions. He stated she was

incompetent and that he had told Bridges that Complainant was not responsible enough to be lead receptionist. Complainant said nothing pleased him since he learned of her MS and he acknowledged that nothing she did pleased him, stating that she was lucky to have a job and that no one would hire her with her condition. The exchange was loud and lasted over 10 minutes. Respondent Meunier did not allow her to explain that she was following his instructions. Respondent's anger was such that she felt physically threatened.

47) Complainant went home extremely upset and called Bridges, saying she was not coming back. She felt that Respondent Meunier wanted to get rid of her. She felt stripped of dignity and respect and couldn't handle the stress. Bridges attempted to calm her by promising to talk with her the next day. Bridges told her that Respondent Meunier didn't feel that Complainant could handle lead receptionist.

48) In the spring of 1993, Respondent Meunier assigned Bridges to determine costs in regard to an office expansion. Jeffrey Lehman was a customer engineer with the International Business Machines (IBM). As a service technician, Lehman talked with Bridges about reconnecting the computer system to a nearby location. Around 5:30 p.m. on or about April 20, he was present at Respondent's office for a meeting with Stoll and Respondent Meunier to make an informal presentation of ideas for accomplishing the move.

49) While awaiting the meeting, Lehman witnessed a conversation between Respondent Meunier and an

office worker whom he later identified as Complainant. Respondent Meunier was agitated, upset, and yelling. He stood very close to Complainant and loudly admonished her for between five and ten minutes. Lehman could not distinguish the exact words and did not know whether Complainant's health or medical condition were mentioned. Complainant did not raise her voice. She appeared quite upset and Lehman called her the following day to be sure she was all right.

50) In April and May of 1993, Respondent Meunier became increasingly concerned over the planned move and over expenditures made or authorized by Bridges. He learned from Stoll that Bridges and Stoll were discussing office business by telephone after hours.

51) In early May 1993, Stoll again attempted to speak with Respondent Meunier about his manner with employees. At the time, Respondent Meunier was upset with Bridges, and Stoll's remarks had no positive effect. It was suggested that Stoll leave if he was dissatisfied. Shortly thereafter, Stoll was present when Respondent Meunier placed Bridges on probation in a loud and profane manner which made Stoll uncomfortable.

52) On May 13, 1993, Respondent Meunier authored an unscheduled employee evaluation of Bridges. The spaces on the form intended for numerical rating of performance were left blank. The "Comments" section of the form stated the following in Respondent Meunier's handwriting:

"1. Probation beginning today 5/13/93 for a period of 30 days

(immediate termination for any disruptive activities)

"2. Effective immediately you no longer have authority to sign checks for any reason. (Bring me new signature cards today)

"3. You have no authority to commit the corporation to contracts of any sort. Expenditures will be approved by Dr Meunier.

"4. I expect a proposed plan to accomplish all necessary billing tasks and to most effectively utilize personnel and space available by close of business Fri 5/14/93.

"5. Work hours 8 AM - 4:20 PM Mon - Fri."

Bridges called in sick on May 13 and first saw the evaluation on May 14. Respondent changed "today" in paragraph 2 to "Mon 5/17" and changed "5/14/93" in paragraph 4 to "5/17/93."

53) Bridges quit on or about May 17, 1993, and Respondent Meunier became Complainant's direct supervisor.

54) On May 24, 1993, Complainant worked according to her schedule until 6 p.m. and left. On the following morning, Respondent Meunier could not locate the arthrogram films of a patient he had seen the previous evening. When Complainant also could not locate them, Respondent Meunier became angry and again accused her of being unable to handle responsibility and of always making mistakes. Complainant learned from the patient that Respondent Meunier had given the films to the patient.

55) On May 25, 1993, Respondent Meunier authored an unscheduled employee evaluation of Complainant. Her

performance ratings were mostly "Needs Improvement," "Unsatisfactory," or "Not Applicable." The "Comments" section of the form stated the following in Respondent Meunier's handwriting:

"Your personnel file has been reviewed. You have been repeatedly counseled regarding violations of office policy. You are again placed on probation. Any violation of office policy, lack of attention to detail or negativism will result in your immediate termination.

"You will 1) Maintain a schedule (30 days in advance) for all receptionists. One receptionist will be sched 7:00 - 4:00 The second 9:00 - 5:30.

"2) When Joyce is not sched. as receptionist her time will be sched. for the billing office.

"3) A no-fail mechanism for signing out films will be immediately instituted. You are responsible for implementation.

"4) You are again spending too much time in personal phone calls. This must stop.

"5) You need to improve in the areas noted above. You must reach a new level of professionalism or you will be replaced."

Respondent Meunier handed the evaluation to Complainant at about 4:15 p.m. on May 25 and spent 10 to 20 minutes going over it with her in detail, particularly the expectations.

56) Complainant considered the probation conditions, particularly the film signout requirement, impossible to meet. She believed the probation was imposed as justification for eventual

termination and was based on her medical condition. She was previously reluctant to resign because she thought she would lose health coverage with a new employer due to her pre-existing neurological condition. She considered that her working conditions had become intolerable, and felt compelled to leave.

57) On May 26, 1993, Complainant opened the office and left when the other receptionists arrived. On May 27, 1993, Complainant telephoned Dr. Wilson and reported work as being "very stressful." She stated she "kind of" quit that date. She reported stomach upset and feeling anxious and unable to "unwind." Dr. Wilson prescribed valium for acute anxiety reaction.

58) On May 28, 1993, Complainant returned to leave Stoll and Respondent Meunier a copy of the following :

"Dear Drs. Meunier and Dr. Stoll,  
"Due to the unprofessional attitude and unrealistic demands placed on me personally by Dr. Paul Meunier, I regret [sic] to do so but must terminate my employment at Body Imaging P.C. effective immediately [sic].

"I can no longer allow myself to be employed with and work with a company that is extremley [sic] unprofessional and places very high and unrealistic demands on their employees. There has been no compassion or understanding given to me by Dr. Paul Meunier in regards to my medical condition. Since my diagnosis of Multiple Sclerosis in July 1992, it has become quite apparent that Dr. Meunier has changed his attitude and

opinion of me both professionally and personally and has not allowed me to obtaine [sic] the level of employment and work that I was doing prior to that time. This has cause me great fear and stress. The particular incident of April 20, 1993 gave me reason to believe that his anger was out of control and could result in personal and physical harm towards me.

"Because of these incidents and others and the unrealistic demands and verbal abusiveness and harassment I enclose my keys and vacate the premise [sic] today.

"/s/ Therese M. Zeigler"

59) Stoll never realized an ownership interest in Respondent. He left employment with Respondent in early 1994, under circumstances described as "less than amicable." At the time of the hearing there was ongoing litigation between Stoll and Respondent Meunier. Stoll admitted a personal dislike of Respondent Meunier. Respondent Meunier disputed the accuracy of some of Stoll's testimony.

60) Complainant had sought counseling on earlier occasions involving, respectively, treatment of her by her family and a personal relationship. The subject matter of those sessions was not work connected. She did not seek counseling for the stress she felt from her job or for the upset resulting from having to resign.

61) On July 12, 1993, Complainant began working for Medical Marketing and Service Group (MMSG), which was owned by an acquaintance, Mike Hawkins, who had previously

suggested that Complainant consider working there. She was paid \$1,500 per month July 12 to October 12, 1993, \$1,600 per month October 12, 1993, to February 1, 1995, and \$1,800 per month to the date of hearing (January 22, 1996).

62) Complainant was earning \$10.50 an hour, or \$1,825 per month, when employment with Respondent ceased. For the period July to October 1993, she earned \$975 less than if she had continued with Respondent; for the period October 1993 to February 1995, she earned \$3,487.50 less; for the period February 1995 to January 22, 1996, she earned \$293.75 less.

63) Complainant had worked as a volunteer with the YWCA prior to 1994. In January 1994 she began being paid at an hourly rate of approximately \$5.25 for about 15 hours a week. She worked Monday evenings from 5 to 10:30 p.m. and Saturdays from 6:45 a.m. to around 4 p.m., while working full time at MMSG. In addition to her earnings, she received the equivalent of monthly dues. Prior to the hearing, her hourly rate at the YWCA had increased slightly.

64) While working at Respondent, Complainant received medical insurance, dental insurance, profit-sharing, pension, life insurance, and disability insurance. At MMSG, the employer paid for medical insurance only. Had Complainant remained employed by Respondent, she would have been credited with five per cent pension contributions each month from July 1993 through December 1996 of \$91.25 per month (five per cent of \$1,825) or \$2,737.50. She was also out of pocket \$135 for one month's unreimbursed

medical insurance premium and \$140 for dental expenses incurred after May 1993.

65) Respondent Meunier's testimony was not totally credible. It was established that he was a demanding employer who took his medical and his corporate duties seriously and that he wanted employees to avoid mistakes and set high standards for them to meet. He denied viewing Complainant as having MS because he didn't think MS was Complainant's diagnosis, since what he saw (the MRI result and partial lab test) was inconclusive, but he acknowledged having some discussion of Complainant's condition with Bridges (to whom he referred sarcastically as "Dr. Marge" as a result), and that Bridges suggested that Complainant might have MS. He stated that restricting Complainant's driving and obtaining the medical letters were both prudent acts showing diligence in protecting the corporation, but that Complainant was not restored to outside duties because Weeks was covering marketing and she was needed in reception. He stated that he acquiesced to Complainant resuming lead receptionist duties in early 1993 because Bridges was ultimately responsible. Regarding the confrontation with Complainant of April 20, he stated he did not believe he raised his voice, although an independent witness testified that he did. He testified he did not remember giving the film to the patient on May 24, but could not deny it. He testified that during busy periods his opportunity to observe the front, or receptionist area, was limited to a few minutes per day and that he was quite busy in late May 1993. He nonetheless

placed Complainant on probation after four days as her immediate supervisor, citing a review of her file, one problem scheduling receptionist coverage as lead receptionist, and the "lost" film as justification. He acknowledged that he normally only evaluated the office manager (Bridges) and the chief technician, and that the May 25 evaluation of Complainant was his sole evaluation of a front office person. These seeming inconsistencies caused the forum to view Respondent Meunier's testimony with caution.

#### ULTIMATE FINDINGS OF FACT

1) At times material herein, Respondent was an Oregon professional corporation which engaged and utilized the personal services of six or more employees in Oregon in operating a diagnostic radiology outpatient clinic. Respondent Meunier was sole owner of Respondent from late 1991 to the time of the hearing and had sole and ultimate authority in all personnel and financial matters.

2) Complainant worked for Respondent from April 1985 until May 28, 1993. Her immediate supervisor after late 1989 was Margaret Bridges, who was supervised by Respondent Meunier. Evaluations of Complainant's job performance were positive overall.

3) Multiple sclerosis (MS) is a disease of the nervous system which over time alters the structure of portions of the nervous system. The resulting alterations cause lesions, or scarred areas, leading to malfunctions. Malfunctions separated by space and time suggest multiple scarred areas, or multiple sclerosis. MS is a progressively debilitating physical impairment

which can substantially limit one or more major life activity.

4) At times material herein, Complainant exhibited facial numbness (which was sometimes severe), headaches, fatigue, twitching around her left eye, a left hand tremor, and intermittent myoclonic jerks. Complainant was physically impaired by her condition but was not diagnosed as having MS and did not have a physical impairment that substantially limited a major life activity.

5) Bridges believed that Complainant might have MS. In January 1991, when Complainant's neurologist, Dr. Wilson, could not rule out MS, Bridges suggested that Complainant get a second opinion.

6) In December 1991, Complainant was assigned a part time position in which she used her own automobile.

7) In July 1992, when Bridges learned that Dr. Wilson thought MS was probable, Respondent Meunier told her to prohibit Complainant's driving on company business. At his direction, Bridges checked regarding corporate liability and was told that Complainant's driving on office business was not considered a problem.

8) During times material, Dr. Wilson did not make a definite diagnosis of MS. He found no medical basis for restricting Complainant's job duties. Nevertheless, Respondent Meunier continued to prohibit Complainant's driving on company business.

9) After July 1992, Respondent Meunier made remarks to or about Complainant suggesting that she was not employable elsewhere, was not insurable, and was not capable of

satisfactory job performance due to her medical condition. In April 1993, he angrily told her that she was incompetent, that she was not responsible enough to be lead receptionist, that nothing she did pleased him, that she was lucky to have a job, and that no one would hire her with her condition.

10) In late May 1993, Respondent Meunier accused Complainant of being unable to handle responsibility and of always making mistakes, and gave her a written evaluation placing her on probation. She felt physically threatened by his anger.

11) On May 28, 1993, feeling unable to cope with an intolerable work environment, Complainant resigned, citing Respondent Meunier's change in attitude toward her due to her medical condition dating from July 1992 and resulting in unrealistic demands, verbal abusiveness, and her fear of physical harm.

12) Respondent Meunier knew that Complainant was substantially certain to leave employment as the result of the working conditions imposed on her.

13) From July 1993 to January 22, 1996, if Complainant had continued employment with Respondent, she would have earned \$4,756.25 more, been credited with \$2,737.50 in pension contributions, and had \$275 in medical and dental expenses paid.

14) Complainant suffered severe mental distress as a result of Respondents' conduct.

#### CONCLUSIONS OF LAW

1) At times material herein, ORS 659.425 provided, in part:

"(1) For the purpose of ORS 659.400 to 659.460, it is an

unlawful employment practice for any employer to refuse to hire, employ or promote, to bar or discharge from employment or to discriminate in compensation or in terms, conditions or privileges of employment because:

" \* \* \* \* \*

"(c) An individual is regarded as having a physical or mental impairment."

At times material herein, ORS 659.400 provided, in part:

"As used in ORS 659.400 to 659.460, unless the context requires otherwise:

"(1) 'Disabled person' means a person who has a physical or mental impairment which substantially limits one or more major life activities, has a record of such an impairment or is regarded as having such an impairment.

"(2) As used in subsection (1) of this section:

"(a) 'Major life activity' includes, but is not limited to self-care, ambulation, communication, transportation, education, socialization, employment and ability to acquire, rent or maintain property.

" \* \* \* \* \*

"(c) 'Is regarded as having an impairment' means that the individual:

"(A) Has a physical or mental impairment that does not substantially limit major life activities but is treated by an employer or supervisor as having such a limitation;

"(B) Has a physical or mental impairment that substantially limits

major life activities only as a result of the attitude of others toward such impairment; or

"(C) Has no physical or mental impairment but is treated by an employer or supervisor as having an impairment.

"(3) 'Employer' means any person who employs six or more persons and includes the state, counties, cities, districts, authorities, public corporations and entities and their instrumentalities, except the Oregon National Guard."

At times material herein, OAR 839-06-205 provided, in part:

"(7) 'Physical or Mental Impairment' means an apparent or medically detectable condition which weakens, diminishes, restricts or otherwise damages an individual's health or physical or mental activity."

At times material herein, OAR 839-06-215 provided, in part:

"(1) As it pertains to employment, ORS 659.425 protects a [disabled] person, as defined in ORS 659.400, from discrimination by an employer because of a perceived or actual physical or mental impairment which, with reasonable accommodation, does not prevent the performance of the work involved."

At times material herein, ORS 659.435 provided, in part:

"Any person claiming to be aggrieved by an unlawful employment practice may file a complaint under ORS 659.040 \* \* \*. The Commissioner of the Bureau of

Labor and Industries may then proceed and shall have the same enforcement powers, and if the complaint is found to be justified the complainant shall be entitled to the same remedies, under ORS 659.050 to 659.085 as in the case of any other complaint filed under ORS 659.040 \* \* \*."

The Commissioner of the Bureau of Labor and Industries has jurisdiction over the persons and subject matter herein.

2) At times material herein, Respondent was an employer in this state subject to ORS 659.010 to 659.110 and 659.400 to 659.460.

3) The actions, inactions, statements, and motivations of Margaret Bridges and Respondent Meunier are properly imputed to Respondent herein.

4) At times material herein, Margaret Bridges, Respondent's supervisory employee, regarded Complainant as having multiple sclerosis (MS), a physical impairment, and treated her as if she were substantially limited in the major life activities of employment and transportation. Bridges did this when she suggested to Respondent Meunier that Complainant might have an accident in her condition while driving on Respondent's behalf that would create liability for Respondent. This substantially limited Complainant's ability to be employed in her public relations, marketing, and delivery driving duties and in the additional broad class or range of jobs requiring driving. Complainant had not been diagnosed as having MS and had no impairment that substantially limited her in any major life activity. Respondent violated ORS

659.425(1)(c) in changing the terms and conditions of her employment.

5) At times material herein, ORS 659.030 provided, in part:

"(1) For the purposes of ORS \* \* \* 659.400 to 659.460 \* \* \* it is an unlawful employment practice:

"\*\*\*\*\*

"(g) For any person, whether an employer or employee, to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under ORS \* \* \* 659.400 to 659.460 \* \* \* or to attempt to do so."

At times material herein, Respondent Meunier aided Respondent by regarding Complainant as having MS, a physical impairment, and treated her as if she were substantially limited in the major life activities of employment and transportation when he sanctioned the removal of Complainant's driving duties and later continued to prohibit her from driving on Respondent's behalf. Complainant had not been diagnosed as having MS and had no impairment that substantially limited her in any major life activity. Respondent Meunier violated ORS 659.030 (1)(g).

6) At times material herein, Respondent Meunier perceived, regarded, and treated Complainant as having MS, a physical impairment, and limited in her major life activity of employment when, based on her medical condition, he made negative remarks about her employability, insurability, performance, competence, and responsibility, and placed her on a probation with conditions she felt she could not meet, all of which was

unwelcome and offensive to her, made her feel physically threatened, and intentionally and deliberately created hostile and intimidating terms and conditions of employment so intolerable that she felt compelled to resign. Complainant had not been diagnosed as having MS and had no impairment that substantially limited her in any major life activity. By constructively discharging Complainant, Respondent violated ORS 659.425(1)(c) and Respondent Meunier violated ORS 659.030(1)(g).

7) Pursuant to ORS 659.060(3) and by the terms of ORS 659.010(2), the Commissioner of the Bureau of Labor and Industries has the authority to issue a cease and desist order requiring Respondents to perform an act or series of acts in order to eliminate the effects of an unlawful practice. The amounts awarded in the Order below are a proper exercise of that authority.

#### OPINION

##### 1. ORS 659.425(1)(c) Liability

The record herein established that Complainant was treated adversely in her employment with Respondent following an examination in July 1992, from which her neurologist concluded that a diagnosis of multiple sclerosis (MS) was "probable." MS is a progressive physical impairment which can substantially limit major life activities. At the time, Complainant was engaged part-time in public relations work for Respondent, which involved driving her own car.

Complainant's immediate supervisor from late 1989 to mid-May 1993, Margaret Bridges, dealt periodically with Complainant's performance and felt that her strengths outweighed her

weaknesses. Bridges learned immediately of the July 1992 diagnosis, which strengthened her belief that Complainant had MS and which she discussed with Respondent Meunier. He prohibited Complainant from driving on behalf of the office. He continued the prohibition after Bridges reported that Respondent's attorney and Respondent's insurer had advised that Complainant's driving for the office was not a problem, and again after both of Complainant's neurological consultants had written letters to verify that Complainant's ability to drive was not affected. From a projected two days per week on public relations, Complainant was reduced to a few hours a month.

Respondent Meunier's attitude toward Complainant changed after July 14, 1992, and his dissatisfaction with her performance escalated. His increasingly severe criticisms of her performance were coupled with negative remarks about the effects of her perceived medical condition. Respondent Meunier testified that there was insufficient data in the MRI and CSF information that he saw for him to diagnose MS. His counsel argued that for that reason, Respondent Meunier could not have regarded Complainant as disabled. But it is not necessary under ORS 659.425(1)(c) that the "disabled person" have the actual impairment they are perceived to have. The statute is violated when the individual is regarded as having a disability. An individual is regarded as having a disabling impairment when she is seen as unemployable, or uninsurable, or incapable or incompetent because of either a known or a suspected medical condition.

Respondents also argued that because Complainant was promoted to lead receptionist during the period that Respondent Meunier was allegedly treating her as disabled, Respondents could not have been guilty of discrimination. The facts, however, suggest that Respondent Meunier did not favor the reassignment to lead receptionist and permitted it only because Bridges would have to deal with any shortcomings. The facts are also clear that Respondent Meunier sanctioned the removal of Complainant's driving duties, leading to the loss of her marketing duties, and that he made negative remarks about her employability and performance and placed her on probation. Thus, his alleged acquiescence in one positive decision does not overshadow his role in the discriminatory decisions.

Respondents questioned the credibility of Complainant's claims, pointing to the lack of such allegations in Complainant's unemployment application or in any of the responses to criticisms in her personnel file and alleging that she did not suggest discrimination until well after she quit. But her letter of resignation stated her belief that it was her medical condition that accounted for Respondent Meunier's described attitude toward her after July of 1992.

##### 2. ORS 659.030(1)(g) Liability

Respondents argued that Respondent Meunier was not an employer contemplated by ORS 659.030(1), as "employer" is defined in ORS 659.010 (6), citing *Ballinger v. Klamath Pacific Corp.*, 135 Or App 438, 898 P2d 232 (1995). That case was brought under ORS 659.121, which provides a right of suit in state court for persons

aggrieved by certain statutory unlawful employment practices, including violations of ORS 659.030. In that case, the circuit court complaint named two employees and the corporate president, a majority shareholder, as defendants to charges of violating ORS 659.030 (1)(a) and (b). The Court of Appeals held that none of the three met the statutory definition of "employer."

At times material, ORS 659.030 provided, in pertinent part:

"(1) For the purposes of ORS 659.010 to 659.110, 659.227, 659.330, 659.340, 659.400 to 659.460 and 659.505 to 659.545, it is an unlawful employment practice:

\*\*\*\*\*

"(g) For any person, whether an employer or an employee, to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under ORS 659.010 to 659.110, 659.400 to 659.460 and 659.505 to 659.545 or to attempt to do so."

This provision, as it refers to ORS 659.400 to 659.435, has been unchanged since 1975, except for renumbering.\*

This proceeding is not brought under ORS 659.121. This case is brought in the administrative forum under ORS 659.060 following the filing of an administrative complaint under ORS 659.040 and a finding of substantial evidence under ORS 659.050. The Agency did not allege that Respondent Meunier was an employer. The phrase

"whether employer or employee" in ORS 659.030(1)(g) is exemplary and not exclusive. Respondent Meunier was a person (ORS 659.010(12)) who was charged with having "aided and abetted" the doing of acts forbidden by ORS 659.425, in violation of ORS 659.030(1)(g). He was thus a "respondent" (ORS 659.010(13)). As a respondent, he may be required by a cease and desist order to "[p]erform an act or series of acts \* \* \* reasonably calculated to carry out the purposes of [the statute and] eliminate the effects of an unlawful practice found \* \* \* ." ORS 659.060(3), 659.010(2)(a).

A corporate president and owner who commits an act rendering the corporation liable for an unlawful employment practice may also be found to have aided and abetted the corporation's unlawful employment practice.

"The Commissioner has long held that corporate presidents are liable for aiding and abetting their Respondent corporations where the presidents were found to have personally sanctioned or engaged in the alleged discriminatory acts. *In the Matter of Salem Construction Company, Inc.*, 12 BOLI 78, 87-88, 90 (1993); *In the Matter of Allied Computerized Credit & Collections, Inc.*, 9 BOLI 206, 214, 218 (1991); *In the Matter of Sapp's Realty, Inc.*, 4 BOLI 232, 270-72 (1985); *In the Matter of N.H. Kneisel, Inc.*, 1 BOLI 28, 30, 38 (1976)." *In the Matter of Gardner Cleaners, Inc.*, 14 BOLI 240, 254 (1995)."

In this case, Respondent Meunier sanctioned the removal of Complainant's driving duties based on an unfounded assumption that her medical condition formed a risk to the corporation. In addition, based on her medical condition, he created an intimidating work atmosphere characterized by criticism of Complainant's supposed performance deficiencies based on her employability, insurability, performance, competence, and responsibility, and placed her on probation with conditions she felt she could not meet, all of which was unwelcome and offensive to her, made her feel physically threatened, and which intentionally and deliberately created hostile and intimidating terms and conditions of employment so intolerable that she felt compelled to resign.

On the day that the proposed order issued, the Oregon Court of Appeals decided *Schram v. Albertson's, Inc.*, 146 Or App 415, 934 P2d 483 (1997), wherein the court confirmed that a supervisor could be individually guilty of aiding and abetting an employer's unlawful employment practice under ORS 659.030(1)(g). However, the court determined that a back pay remedy was not available from such aider and abettor supervisors charged with violation of ORS 659.030(1)(g) in a circuit court proceeding under ORS

659.121. The court reasoned that the ultimate responsibility for wage loss was with the employer.

As observed previously, this proceeding is not based on ORS 659.121. Remedies available under ORS 659.060(3) in the Commissioner's administrative forum have not always run parallel to remedies available in circuit court under ORS 659.121(1). For instance, compensatory damages for mental suffering are recoverable under ORS 659.060(3);\* compensatory damages for mental suffering, in contrast, are not available under ORS 659.121(1)."

Under ORS 659.010(2), the Commissioner has authority to fashion a remedy adequate to eliminate the effects of any unlawful practice found and to protect the rights of other persons similarly situated (*i.e.*, to the person harmed). The loss of wages through loss of employment, as well as mental suffering, can be an effect of discrimination attributable to an employer, although perpetrated by a victim's co-employee or manager, or, indeed by a non-employee customer. Accordingly, the order in this case awards both back pay and mental suffering damages against Respondent corporation for violation of ORS 659.425(1)(c), and against Respon-

(holding corporate owner and president subject to ORS 659.030(1)(g) as an aider and abettor); *In the Matter of Loyal Order of Moose*, 13 BOLI 1 (1994) and *In the Matter of Oregon Rural Opportunities*, 2 BOLI 8 (1980) (both holding employer's manager liable under ORS 659.030(1)(g)); and *Sterling v. Klamath Forest Protective Association*, 19 Or App 383, 528 P2d 574 (1974) (holding employer's manager liable under former ORS 659.030(5)).

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

\*\* *Holien v. Sears, supra*.

\* ORS 659.030(5) in 1975; 659.030(1)(e) in 1977 and 1979; and 659.030(1)(g), 1981 through 1993.

\*\* See also *In the Matter of Wild Plum Restaurant, Inc.*, 10 BOLI 19 (1991)

dent Meunier for violation of ORS 659.030(1)(g).

### 3. Constructive Discharge

Respondents argued that in order to prove a claim of constructive discharge, the Agency was required to show that Respondents

"deliberately created and maintained working conditions with the purpose of forcing [Complainant] to resign. *Bell v. First Interstate Bank*, 103 Or App 165, 168, 796 P2d 1226 (1990) . . . See, also, *Seitz v. Albina Human Resources Center*, 100 Or App 665, 674-75, 788 P2d 1004 (1990); and *Bratcher v. Sky Chefs, Inc.*, 308 Or 501, 783 P2d 4 (1989)."

*Bratcher* arose from questions certified from the US District Court to the Oregon Supreme Court regarding the tort of wrongful discharge in at-will employment. Equating constructive discharge to involuntary resignation, the court fashioned a subjective standard: that the deliberately created or maintained unacceptable working conditions must be imposed with the intention that the employee resign and that the employee must have left because of them. *Bratcher*, 783 P2d at 6.

Prior to *Bratcher*, this forum adhered to an objective standard regarding constructive discharge that if the employer imposes objectively intolerable working conditions, the employee's resignation due to those conditions is constructively a discharge. *In the Matter of West Coast Truck Lines, Inc.*, 2 BOLI 192 (1981), *aff'd without opinion*, 63 Or App 383, 665 P2d 882 (1983); *In the Matter of Sapp's Realty*, 4 BOLI 232 (1985); *In*

*the Matter of Richard Niquette*, 5 BOLI 53 (1986); *In the Matter of Deanna Miller*, 6 BOLI 12 (1986); *In the Matter of Lee's Cafe*, 8 BOLI 1 (1989).

*In Bell*, the court cited *Bratcher* in holding that a constructive discharge under ORS 659.030(1)(a) be established by a showing that the employer:

"deliberately created or maintained working conditions with the purpose of forcing [the employee] to resign." 796 P2d at 1227.

*In Seitz*, *Bratcher* was followed with the court requiring that under

"an allegation of constructive discharge in a claim for violation of ORS 659.030(1)(f), [the employee] must prove that [the employer] (1) deliberately retaliated, because [the employee] filed the discrimination complaints, (2) with the intent of forcing [the employee] to leave employment and (3) that [the employee] left employment because of retaliation." 788 P2d at 1010.

Despite those holdings dealing with ORS chapter 659, this forum continued to follow its own earlier precedent. *In the Matter of City of Umatilla*, 9 BOLI 91 (1990), *aff'd without opinion*, *City of Umatilla v. Bureau of Labor and Industries*, 110 Or App 151, 821 P2d 1134 (1991); *In the Matter of Allied Computerized Credit & Collections, Inc.*, 9 BOLI 206 (1991). The Commissioner explained that the *Bratcher* test for working conditions created by statutorily unlawful discrimination could produce results inconsistent with the Commissioner's remedial authority under Oregon civil rights statutes and held that where objectively intolerable working conditions created by

statutorily unlawful discrimination leave no reasonable alternative to resignation, the resignation equates to a discharge regardless of the employer's intent about the employee's tenure. *In the Matter of William Kirby*, 9 BOLI 258 (1991); *In the Matter of Lee Schamp*, 10 BOLI 1 (1991); *In the Matter of Wild Plum Restaurant, Inc.*, 10 BOLI 19 (1991); *In the Matter of Chalet Restaurant and Bakery*, 10 BOLI 183 (1992), *aff'd without opinion*, *JLG4, Inc., v. Bureau of Labor and Industries*, 125 Or App 588, 865 P2d 1344 (1993); *In the Matter of Sunnyside Inn*, 11 BOLI 151 (1993); *In the Matter of RJ's All American Restaurant*, 12 BOLI 24 (1993); *In the Matter of Loyal Order of Moose*, 13 BOLI 1 (1994).

Recently, the Oregon Supreme Court rejected the subjective standard of *Bratcher*:

" \* \* \* [I]n view of the *Bratcher* court's blurring of the distinction between purpose and intent, we now hold that the court erred when it held that a plaintiff must show, to establish a constructive discharge, that an employer acted with the purpose of forcing the employee to resign. That one aspect of the *Bratcher* opinion was inadequately considered when it was decided, and we will no longer adhere to it. \* \* \* [T]o establish a constructive discharge, [the employee] must allege and prove that (1) the employer intentionally created or intentionally maintained specified working condition(s); (2) those working conditions were so intolerable that a reasonable person in the employee's position would have resigned because of them;

(3) the employer desired to cause the employee to leave employment as a result of those working conditions or knew that the employee was certain, or substantially certain, to leave employment as a result of those working conditions; and (4) the employee did leave the employment as a result of those working conditions." *McGanty v. Staudenraus*, 321 Or 532, 557, 901 P2d 841, 856 (1995) (emphasis in original; footnotes omitted).

This forum adopted the *McGanty* standard in *In the Matter of Thomas Myers*, 15 BOLI 1 (1996).

Respondent Meunier knew that Complainant was substantially certain to leave as a result of working conditions he imposed because Bridges had resigned when a similar probation threatening "immediate termination" was imposed.

### 4. Damages

#### a. Lost Earnings

Respondents argued that, even if Complainant were unlawfully discharged, she has not suffered any recoverable damages. Respondents argued that even if she were entitled to back pay, she had no economic loss because of her earnings with the YWCA. The evidence was, however, that Complainant's earnings at the YWCA were from part-time employment performed outside her regular working hours. In other words, she would have earned the same amount even if she had remained employed by Respondent. In such circumstances, the part-time earnings do not reduce the wage loss caused by the unlawful practice. *In the Matter of Peggy's Cafe*,

7 BOLI 281 (1989); *In the Matter of Lee's Cafe*, 8 BOLI 1 (1989). In this forum, it is incumbent upon a respondent to establish any failure to mitigate damages. OAR 839-50-260(5) (former OAR 839-30-105 to the same effect); *In the Matter of Lucille's Hair Care*, 5 BOLI 13 (1985) on remand from *Ogden v. Bureau of Labor*, 299 Or 98, 699 P2d 189 (1985). Pension contributions lost are also lost earnings. *In the Matter of West Linn School District*, 3 JT, 10 BOLI 45 (1991); *In the Matter of Mini-Mart Food Stores, Inc.*, 3 BOLI 262 (1983); *In the Matter of City of Portland*, 2 BOLI 21 (1980), 2 BOLI 71 (1981); *aff'd*, *City of Portland v. Bureau of Labor and Industries*, 298 Or 104 (1984).

#### b. Mental Suffering

As to the appropriateness of mental suffering damages, Respondents also argued that Oregon law does not allow for recovery of emotional distress or mental suffering damages, only back pay, and cites *Holien v. Sears*, 298 Or 76, 689 P2d 1292 (1984). *Holien* was brought under ORS 659.121, which provided only for equitable relief. The statement quoted is correct, but it does not apply to this proceeding. Again, this proceeding was not brought under ORS 659.121, but rather is brought in the administrative forum under ORS 659.060. This forum has previously ruled adverse to Respondents' argument as follows:

"It is well settled that the Commissioner may award compensatory damages for mental suffering as an administrative remedy under the Oregon civil rights law. *Williams v. Joyce*, 4 Or App 482, 504, 479 P2d 513, 523, 524, *rev den*

(1971); *School District No. 1 v. Nilsen*, 271 Or 461, 484-86, 534 P2d 1135, 1146 (1975); *Fred Meyer, Inc., v. Bureau of Labor*, [39 Or App 253, 592 P2d 564, *rev den* (1979)]; *Gaudry v. Bureau of Labor and Industries*, 48 Or App 589, 617 P2d 668, 670-71 (1980); *City of Portland v. Bureau of Labor and Industries*, 298 Or 104, 690 P2d 475, 484 (1984); *Schipporeit v. Roberts*, 93 Or App 12, 760 P2d 1339, 1342-43, *aff'd*, 308 Or 199, 778 P2d 953 (1989). See also OAR 839-03-090.

"As the court stated in *Schipporeit*, the legislative history of ORS 659.121, which provides for civil suits in circuit court, does not show:

'any intention to abrogate the previously existing powers of the Commissioner recognized in *Williams v. Joyce*, *supra*. In *Holien*, the Supreme Court concluded that the 1977 legislation did not eliminate or reduce existing administrative remedies, including damages, in employment discrimination.' 93 Or App 12, 760 P2d at 1341.

"Thus, Respondent's reliance on *Holien* is misplaced. The Supreme Court has specifically recognized the Commissioner's power to award mental suffering damages under the Oregon civil rights law." *In the Matter of Harry Markwell*, 8 BOLI 80, 82 (1989).

In *Holien*, the Oregon Supreme Court reviewed extensively the history of the legislation, (Or Laws 1977, ch. 453) which became ORS 659.121. The Court concluded that the

legislature did not intend to foreclose the existing administrative remedies before the Commissioner of the Bureau of Labor and Industries, stating:

"In essence, the legislature, by its final action, said to aggrieved employees that under state statute:

"(1) You may continue to obtain such relief, including general damages, as is provided under administrative remedies.

"(2) You may obtain equitable relief as we provide by this statute.

"(3) You are deprived of a jury trial under the statute.

"(4) You may not recover general or punitive damages under the statute." 689 P2d at 1302' (emphasis supplied).

The statute itself dictates the same conclusion. ORS 659.121(4) states, in pertinent part:

"This section shall not be construed to limit or alter in any way the authority or power of the commissioner or to limit or alter in any way any of the rights of an individual complainant until and unless the complainant commences civil suit or action."

The Commissioner of the Bureau of Labor and Industries is authorized to award compensatory damages, including mental suffering damages, in the administrative forum as a means reasonably calculated to eliminate the effects of any unlawful practice found.

When Complainant was deprived of her outside public relations duties due to her medical condition, she felt as though she had been labeled an invalid and demoted. She was embarrassed, hurt, upset, and humiliated. She felt increasingly that Respondent Meunier wanted her to leave and she worried about health coverage. She appeared nervous and anxious, her confidence and self-esteem were shaken, and she dreaded coming to work. She was intimidated by Respondent Meunier, felt physically threatened by his anger, and was sometimes in tears from verbal confrontations with him. When she resigned, she felt stripped of personal dignity and respect and that conditions had become intolerable. She suffered stomach upset and her physician found an acute anxiety reaction due to stress. This evidence established Complainant's entitlement to the mental suffering damages awarded herein.

#### 5. Respondents' Exceptions

Respondents timely filed exceptions to the proposed order. Each is quoted and discussed below.

##### Exception 1.

"The proposed order fails to find as fact whether or not Complainant had a physical impairment."

This exception addressed Complainant's protected class membership, that is, her status as a disabled person under the definitional section of the statute, ORS 659.400, entitled to the protection afforded by the operational section, ORS 659.425. Respondents

\* ORS 659.121 has since been amended providing for compensatory and punitive damages for certain unlawful practices; the quoted language regarding the powers of the commissioner remains the same.

correctly pointed out that the proposed order failed to distinguish with precision among the definitions of disabled persons possible under ORS 659.400(2). This defect is corrected in this order. The factual findings have been revised so that the forum has found that Complainant had no impairment that substantially limited her in any major life activity but was treated by the employer as if she had such an impairment and was so limited. This describes a violation of ORS 659.425 (1)(c).

Exception 2.

"The proposed order fails to address or resolve key factual issues regarding Respondents' liability.

"a. There is no dispute that Complainant's duties were changed because another, more highly qualified employee took over her outside responsibilities, and because another receptionist left."

While it is true that Weeks had become the marketing point person, Complainant continued to assist in this effort as planned. The curtailment of her driving negatively affected her opportunity to so assist and was clearly triggered by a perception of her physical limitations. It was the initial illustration of a series of adverse occurrences traceable to Respondent Meunier's view of those limitations. Respondent Meunier's increased criticism and remarks regarding her competence were further illustrations. Because she was already a receptionist, the unpredicted happenstance of the departure of another employee leading to permanent reception duties over three months later was not seen as one of those occurrences. Neither was the probation

resulting from her late return from vacation.

"b. There is no dispute that the performance problems for which Complainant was placed on probation long predated her purported diagnosis."

Respondents supported this exception with observations from Complainant's personnel file regarding errors and inattention (February and April 1992), and attitude (May 1992). Respondents argued that to treat the disciplinary action of May 1993 "as evidence of discrimination, or as an act of discrimination itself, creates an unworkable standard for employers" regarding "problem employees." But Respondent Meunier's previous oral criticism and comment to and about Complainant suggested that his view of her as impaired played a role. Thus, the "standard" enunciated by the finding is that discipline may not be motivated, wholly or in part, by discriminatory intent, even if Complainant was not a perfect employee.

"It is not a prerequisite to statutory protection against discrimination that a complainant be a superior, error-free worker." *In the Matter of Snyder Roofing & Sheet Metal, Inc.*, 11 BOLI 61, 82 (1992).

Exception 2. is denied.

Exception 3.

"Respondents except to the proposed order's conclusion and opinion that Respondents' conduct toward Complainant was motivated by an intent to discriminate, that it brought about a constructive termination, and that it resulted in damage as found to Complainant.

"For all the reasons stated in their submissions at the hearing of this matter, and for the reason that the evidence does not support the conclusions of the order, Respondents except to the proposed order."

The forum has reviewed the argument and evidence including Respondents' submissions and found that the record, taken as a whole, supports the proposed order as revised herein. Exception 3 is denied.

**ORDER**

NOW, THEREFORE, as authorized by ORS 659.060(3) and 659.010(2), and in order to eliminate the effects of the unlawful practices found, Respondents BODY IMAGING, P.C. and PAUL MEUNIER, M.D. are hereby ordered to:

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

a) FIVE THOUSAND THIRTY-ONE DOLLARS AND TWENTY-FIVE CENTS (\$5,031.25), less lawful deductions, representing \$4,756.25 in wages lost by Complainant between May 28, 1993, and January 22, 1996, and \$275 in unreimbursed medical and dental expenditures between those dates, plus

b) TWO THOUSAND SEVEN HUNDRED THIRTY DOLLARS (\$2,730) representing pension contributions for July 1, 1993, to January 1, 1996, said sum to be paid into

Respondent's pension plan for the use of THERESE ZEIGLER, plus

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

d) Interest at the legal rate from January 22, 1996, on the sum of \$5,031.25 until paid, plus

e) Interest at the legal rate on the sum of \$1,092 from June 30, 1994, until paid, interest at the legal rate on the sum of \$1,092 from June 30, 1995, until paid, and interest at the legal rate on the sum of \$546 from January 1, 1996, until paid, plus

f) Interest at the legal rate on the sum of \$30,000 from the date of the Final Order herein until Respondents comply therewith, and

2) Cease and desist from discriminating against any employee based upon the employee's status as a disabled person.

=====

**In the Matter of  
DIRAN BARBER, dba Bob's Bistro,  
Respondent.**

Case Number 63-97

Final Order of the Commissioner

Jack Roberts

Issued September 25, 1997.

**SYNOPSIS**

Respondent, who operated a bar, employed claimant as a bartender on a monthly salary for all hours worked. Claimant was not an executive employee excluded from coverage of the minimum wage laws. Since the salary did not compensate claimant at the minimum wage rate plus the overtime rate for all hours worked, respondent failed to pay claimant all wages due upon termination, in violation of ORS 653.025(3) (minimum wages), OAR 839-20-030 (overtime wages), and ORS 652.140(1). Respondent's failure to pay the wages was willful, and the commissioner ordered respondent to pay civil penalty wages, pursuant to ORS 652.150. ORS 652.140(1), 652.150, 653.025(3), 653.055(1) and (2), 653.261(1), and OAR 839-20-030 (1).

The above-entitled contested case came on regularly for hearing before Douglas A. McKean, designated as Administrative Law Judge (ALJ) by Jack Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on August 14, 1997, in the offices of the Oregon State Employment Depart-

ment, 2075 Sheridan Avenue, North Bend, Oregon.

The Bureau of Labor and Industries (the Agency) was represented by Alan McCullough, an employee of the Agency. Lewis Wetzell (Claimant) was present throughout the hearing. Diran Barber (Respondent) was present throughout the hearing.

The Agency called the following witnesses: Sanford Groat, a compliance specialist with the Wage and Hour Division of the Agency; Lewis Wetzell, Claimant; and Sonja Wetzell, Claimant's wife. Respondent called himself as a witness.

Administrative exhibits X-1 to X-14 and Agency exhibits A-1 to A-5 were offered and received into evidence. After the hearing and pursuant to the ALJ's request, the Agency recalculated the wages alleged due. The ALJ received the Agency's recalculation, marked administrative exhibit X-15, and closed the record on August 19, 1997.

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

**FINDINGS OF FACT –  
PROCEDURAL**

1) On April 15, 1996, Claimant filed a wage claim with the Agency. He alleged that he had been employed by Respondent and that Respondent had failed to pay wages earned and due to him.

2) At the same time that he filed the wage claim, Claimant assigned to the Commissioner of Labor, in trust for Claimant, all wages due from Respondent.

3) On February 25, 1997, the Agency served on Respondent an Order of Determination based upon the wage claim filed by Claimant and the Agency's investigation. The Order of Determination alleged that Respondent owed a total of \$3,857.15 in wages and \$1,140 in civil penalty wages. The Order of Determination required that, within 20 days, Respondent either pay these sums in trust to the Agency, or request an administrative hearing and submit an answer to the charges.

4) On March 17, 1997, the Agency received Respondent's answer and request for a contested case hearing, dated March 5, 1997. In his answer, Respondent denied that he owed Claimant unpaid wages. He contended that Claimant was a bar manager and that he and Claimant had a salary agreement rather than an hourly wage agreement.

5) On June 17, 1997, the Hearings Unit issued a Notice of Hearing to the Respondent, the Agency, and the Claimant indicating the time and place of the hearing. Together with the Notice of Hearing, the forum sent a document entitled "Notice of Contested Case Rights and Procedures" containing the information required by ORS 183.413, and a copy of the forum's contested case hearings rules, OAR 839-050-0000 to 839-050-0440. Upon Respondent's motion and following a conference call among the ALJ, Respondent, and Mr. McCullough for the

Agency, the ALJ postponed the hearing date and reset it for August 14, 1997.

6) On June 27, 1997, the Administrative Law Judge issued a discovery order to the participants directing them each to submit a summary of the case, including a list of the witnesses to be called and the identification and description of any physical evidence to be offered into evidence, together with a copy of any such document or evidence, according to the provisions of OAR 839-050-0200 and 839-050-0210. The summaries were due by July 7, 1997. The order advised the participants of the sanctions, pursuant to OAR 839-050-0200(8), for failure to submit the summary. The ALJ gave Respondent an extension of time until August 8, 1997, to submit his case summary. The Agency submitted a timely summary and later supplemented it. Respondent failed to submit one.

7) On July 2, 1997, the Agency moved for a discovery order, with an attached exhibit showing the Agency's attempt to obtain Respondent's records through an informal exchange of information. On July 3, 1997, the ALJ wrote to Respondent concerning the motion and set a July 8, 1997, deadline for a response to the motion. On July 10, 1997, the ALJ granted the Agency's motion and issued a discovery order directing Respondent to provide by July 15, 1997, various records regarding the employment of Claimant. The ALJ later granted Respondent an extension of time to August 5, 1997, to produce the requested documents to the Agency. Respondent did not provide any records before or at hearing.

8) At the start of the hearing, Respondent said he had reviewed the "Notice of Contested Case Rights and Procedures" and had no questions about it.

9) Pursuant to ORS 183.415(7), the ALJ explained the issues involved in the hearing, the matters to be proved or disproved, and the procedures governing the conduct of the hearing.

10) At the end of the hearing, the ALJ asked the Agency to submit a recalculation of the alleged wages due. The ALJ received the recalculation on August 19, 1997, and closed the record.

11) On August 29, 1997, the Administrative Law Judge issued a Proposed Order in this matter. Included in the Proposed Order was an Exceptions Notice that allowed ten days for filing exceptions to the Proposed Order. On September 5, 1997, the Hearings Unit received Respondent's timely exceptions, which the forum has addressed in the Opinion section of this Final Order.

#### FINDINGS OF FACT – THE MERITS

1) During all times material herein, the Respondent, a person, did business as Bob's Bistro, a bar located in Coos Bay, Oregon. He invested the money to lease the building and business from their owner, Bob Downer (phonetic), and obtained the necessary licenses to operate the bar.

2) From August 16, 1995, to April 7, 1996, Respondent employed Claimant as a bartender. Respondent and Claimant had no partnership agreement. Claimant had no ownership interest in the business, invested no

money in it, had no right to share profits from the business, and was not liable for any losses from the business. Respondent and Claimant had a goal of becoming partners to buy the building that housed the bar.

3) Initially, Respondent and Claimant had an oral agreement that Claimant would work for \$6.50 per hour. Soon after the bar opened, they renegotiated and Claimant agreed to work for \$800 per month for all hours worked.

4) Respondent kept no time records for Claimant. A log book kept in the bar showed when Claimant worked. Claimant's wife, who also worked at the bar, kept a calendar at home. She wrote Claimant's hours worked on the calendar each day.

5) Claimant's records and testimony reveal the following information, which the forum has accepted as fact: he worked 1,726.5 total hours; of the total hours, 1,324.5 were straight time hours, that is, hours worked up to and including 40 hours in a work week; 402 hours were hours worked in excess of forty hours per week.

6) Pursuant to ORS chapter 653 (Minimum Wages), OAR 839-20-030 (Payment of Overtime Wages), and Agency policy, the Agency calculated Claimant's total earnings to be \$9,157.64. The total reflects the sum of the following: 1,324.5 hours at \$4.75 per hour (the minimum wage) which equals \$6,291.38; plus 402 hours at \$7.13 per hour (the overtime rate: 1.5 times the minimum wage), which equals \$2,866.26.

7) Respondent paid Claimant \$5,600. Respondent paid Claimant this

amount knowingly and intentionally. Respondent was a free agent.

8) Respondent discharged Claimant on April 7, 1997.

9) The forum computed civil penalty wages, according to ORS 652.150 and Agency policy, as follows: \$4.75 (Claimant's hourly rate) multiplied by 8 (hours per day) equals \$38.00. This figure of \$38.00 is multiplied by 30 (the maximum number of days for which civil penalty wages continued to accrue) for a total of \$1,140. The Agency set forth this figure in the Order of Determination.

10) The forum carefully observed Claimant's and Sonja Wetzell's demeanor and found their testimony to be credible. Where their memories were weak, they made no attempt to hide this or fabricate what occurred. Except where their memories were weak, the forum determined that Claimant's and Sonja Wetzell's testimony was reliable and credible.

#### ULTIMATE FINDINGS OF FACT

1) Respondent employed Claimant in Oregon from August 16, 1995, to April 7, 1996.

2) The state minimum wage during 1995 and 1996 was \$4.75 per hour.

3) Respondent discharged Claimant on April 7, 1996.

4) Claimant earned \$9,157.64 in wages. Respondent paid Claimant \$5,600 and owes him \$3,557.64 in earned and unpaid compensation.

5) Respondent willfully failed to pay Claimant all wages immediately when he terminated Claimant's employment and more than 30 days have

elapsed from the date Claimant's wages were due and payable.

6) Civil penalty wages, computed pursuant to ORS 652.150 and Agency policy, equal \$1,140.

#### CONCLUSIONS OF LAW

1) ORS 653.010 provides in part:

"(3) 'Employ' includes to suffer or permit to work; \*\*\*.

"(4) 'Employer' means any person who employs another person \*\*\*."

ORS 652.310 provides in part:

"(1) 'Employer' means any person who in this state, directly or through an agent, engages personal services of one or more employees \*\*\*.

"2) 'Employee' means any individual who otherwise than as a co-partner of the employer or as an independent contractor renders personal services wholly or partly in this state to an employer who pays or agrees to pay such individual at a fixed rate, based on the time spent in the performance of such services or on the number of operations accomplished, or quantity produced or handled."

ORS 68.110(1) provides:

"A partnership is an association of two or more persons to carry on as coowners a business for profit[.]"

Claimant was not a coowner or copartner with Respondent in the business of Bob's Bistro. During all times material herein, Respondent was an employer and Claimant was an employee subject to the provisions of ORS 652.110

to 652.200, 652.310 to 652.414, and 653.010 to 653.261.

2) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the subject matter and the Respondent herein. ORS 652.310 to 652.414.

3) ORS 653.025 requires that:

" \* \* \* for each hour of work time that the employee is gainfully employed, no employer shall employ or agree to employ any employee at wages computed at a rate lower than:

" \* \* \* \* \*

"(3) For calendar years after December 31, 1990, \$4.75."

Oregon law required Respondent to pay Claimant at a fixed rate of at least \$4.75 per hour. Respondent failed to pay Claimant the minimum wage rate of \$4.75 for each hour of work time.

4) ORS 653.261(1) provides:

"The commissioner may issue rules prescribing such minimum conditions of employment, excluding minimum wages, in any occupation as may be necessary for the preservation of the health of employees. Such rules may include, but are not limited to, minimum meal periods and rest periods, and maximum hours of work, but not less than eight hours per day or 40 hours per week; however, after 40 hours of work in one week overtime may be paid, but in no case at a rate higher than one and one-half times the regular rate of pay of such employees when computed without benefit of commissions, overrides, spiffs and similar benefits."

OAR 839-20-030(1) provides in part:

"[A]ll work performed in excess of 40 hours per week must be paid for at the rate of not less than one and one-half times the regular rate of pay when computed without benefit of commissions, overrides, spiffs, bonuses, tips or similar benefits pursuant to ORS 653.261(1)."

Oregon law obligated Respondent to pay Claimant one and one-half times his regular hourly rate, in this case the minimum wage of \$4.75, for all hours worked in excess of 40 hours in a week. Respondent failed to pay Claimant at the overtime rate, in violation of OAR 839-20-030(1).

5) ORS 652.140(1) provides:

"Whenever an employer discharges an employee or where such employment is terminated by mutual agreement, all wages earned and unpaid at the time of such discharge or termination shall become due and payable not later than the end of the first business day after the discharge or termination."

Respondent violated ORS 652.140(1) by failing to pay Claimant all wages earned and unpaid not later than the end of the first business day after discharging him from employment on April 7, 1996.

6) ORS 652.150 provides:

"If an employer willfully fails to pay any wages or compensation of any employee whose employment ceases, as provided in ORS 652.140 and 652.145, then, as a penalty for such nonpayment, the wages or compensation of such

employee shall continue from the due date thereof at the same hourly rate for eight hours per day until paid or until action therefor is commenced; provided, that in no case shall such wages or compensation continue for more than 30 days from the due date; and provided further, the employer may avoid liability for the penalty by showing financial inability to pay the wages or compensation at the time they accrued."

Respondent is liable for a civil penalty under ORS 652.150 for willfully failing to pay all wages or compensation to Claimant when due as provided in ORS 652.140.

7) Under the facts and circumstances of this record, and according to the law applicable to this matter, the Commissioner of the Bureau of Labor and Industries has the authority to order Respondent to pay Claimant his earned, unpaid, due, and payable wages and the civil penalty wages, plus interest on both sums until paid. ORS 652.332.

#### OPINION

##### Claimant Worked As An Employee

The chief issue in this case is whether Claimant worked for the bar as an employee or as a copartner. Respondent claimed at hearing that Claimant performed work not as an employee, as that term is defined in ORS 652.210(2) and 652.310(2), but as a copartner.\* The Agency contends that Claimant worked as an employee.

"Employee' means any individual who otherwise than as a copartner of the employer or as an independent contractor renders personal services wholly or partly in this state to an employer who pays or agrees to pay such individual at a fixed rate \* \* \*." ORS 652.310(2); *Lamy v. Jack Jarvis & Co., Inc.*, 281 Or 307, 574 P2d 1107, 1111 (1978); *In the Matter of Crystal Heart Books Co.*, 12 BOLI 33, 40-41 (1993).

ORS 68.110(1) defines a partnership as "an association of two or more persons to carry on as coowners a business for profit[.]" The Oregon Supreme Court has held that "[t]he essential test in determining the existence of a partnership is whether the parties intended to establish such a relation"; that "in the absence of an express agreement \* \* \* the status may be inferred from the conduct of the parties," and "when faced with intricate transactions that arise, this court looks mainly to the right of a party to share in the profits, his liability to share losses, and the right to exert some control over the business." *Stone-Fox, Inc. v. Vandehey Development Co.*, 290 Or 779, 626 P2d 1365, 1367 (1981) (quoting from *Hayes v. Killinger*, 235 Or 465, 470, 385 P2d 747 (1963)).

In this case, the preponderance of credible evidence on the whole record establishes that Claimant worked as Respondent's employee rather than as his copartner. The conduct of the parties indicates there was no partnership. Claimant rendered personal services wholly in this state to Respondent, who

\* Respondent did not raise this issue until hearing. In his answer to the Order of Determination, Respondent's defense was only that Claimant was paid a salary, not by the hour. Respondent wrote, "He [Claimant] was a salary employee as bar manager."

agreed to pay Claimant at a fixed rate – \$800 per month. Respondent took no pay from the bar. Respondent and Claimant, who were long-time friends before Respondent invested in the business, had no express agreement to form a partnership. Respondent testified about a partnership in future terms. In other words, he testified that he and his wife, Trina, and Claimant and his wife, Sonja, all worked hard to operate the bar successfully so that in the future they could become partners and buy the building together. Further, Claimant testified credibly that he had no right to share in the profits and no liability to share losses from the business. Respondent did not dispute this testimony.

Respondent alone invested money in the bar and he alone held the licenses necessary to operate it. Respondent had no experience operating a bar, and he consulted Claimant about how to operate it. However, the forum cannot conclude from this that Claimant had the right to exert some control over the business.

A partnership is never presumed, hence the burden of proving a partnership is upon the party alleging it. *Jewell v. Harper*, 199 Or 223, 258 P2d 115, rehearing denied 199 Or 223, 260 P2d 784 (1953); *Burke Machinery Co. v. Copenhagen*, 138 Or 314, 6 P2d 886 (1932); *In the Matter of Superior Forest Products*, 4 BOLI 223, 231 (1984); *In the Matter of Crystal Heart Books Co.*, 12 BOLI 33, 40-41 (1993). In this case, Respondent has failed to prove that he and Claimant were partners in Bob's Bistro.

### Hours Worked

Sonja Wetzell, Claimant's wife, recorded on her home calendar the number of hours Claimant worked each day. Ms. Wetzell also worked in the bar and occasionally filled in for Claimant on Sundays when he and Respondent played pool in a league. At hearing, she modified the hours claimed by Claimant to account for those times when the hours on the calendar were hers rather than Claimant's. From these calendars and Claimant's and Ms. Wetzell's credible testimony, the forum has concluded that Respondent employed Claimant and improperly compensated him. When the forum concludes that an employee was employed and was improperly compensated, it becomes the burden of the employer to produce all appropriate records to prove the precise amounts involved. *Anderson v. Mt. Clemens Pottery Co.*, 328 US 680 (1946); *In the Matter of Dan's Ukiah Service*, 8 BOLI 96, 106 (1989).

Thus, it became Respondent's burden to produce all appropriate records to prove the precise amounts involved. ORS 653.045 requires an employer to maintain payroll records. Respondent did not produce any record of hours or dates worked by Claimant. Respondent did not dispute the hours claimed, except as describe above, when occasionally Ms. Wetzell filled in for Claimant.

Where an employer produces no records, the Commissioner may rely on the evidence produced by the Agency "to show the amount and extent of the employee's work as a matter of just and reasonable inference," and "may then award damages to the

employee, even though the result be only approximate." *Anderson v. Mt. Clemens Pottery Co.*, 328 US at 687-88. From these rulings, the forum may rely on the evidence produced by the Agency regarding the number of hours worked by Claimant.

### Minimum Wage and Overtime

At hearing, Respondent did not assert any exemption or exclusion from the coverage of Oregon's Minimum Wage Law (ORS 653.010 to 653.261) or Oregon's Wage and Hour Laws (ORS chapter 652) for himself or Claimant. In his answer, however, Respondent alleged that Claimant was employed as the bar manager and paid a salary. If certain conditions are met, salaried managers may be excluded from the requirements of the minimum wage law.\*

ORS 653.020(3) provides an exclusion for certain individuals engaged in executive work, including those who perform predominantly managerial tasks. OAR 839-20-005(1) further defines an "Executive Employee" for purposes of the minimum wage law.

An executive employee means an employee (a) whose primary duty (which generally means over 50 percent of the employee's time) consists of management of the enterprise, (b) who customarily and regularly directs the work of two or more other employees, (c) who has the authority to hire or fire other employees (or whose recommendations on such issues are given particular weight), (d) who customarily and regularly exercises discretionary powers, and (e) who earns a salary and is paid on a salary basis pursuant to ORS 653.025.

A salary is defined as "no less than the [minimum] wage set pursuant to ORS 653.025, multiplied by 2,080 hours per year, then divided by 12 months." ORS 653.010(10). Under this formula, a salary must be no less than \$823.33 per month (\$4.75 times 2,080 hours equals \$9,880, divided by 12 months equals \$823.33 per month). Respondent and Claimant had an agreement whereby Claimant earned a salary of \$800 per month for all hours worked.\*\* Since Claimant was paid a salary of less than \$823 per month, he

\* Putting an employee on salary does not, by itself, cause the employee to be excluded from the coverage of Oregon's minimum wage law. See ORS 653.020 (listing excluded employees). A salary is merely one method of compensating an employee; other methods include, for example, hourly wage rates, piece rates, commissions, overrides, spiffs, bonuses, tips, and similar benefits. Likewise, giving an employee the title of manager does not automatically exclude the employee from coverage of the minimum wage law. *In the Matter of John Mathioudakis*, 12 BOLI 11, 20 (1993); *In the Matter of Burrito Boy, Inc.*, 16 BOLI 1, 19 (1997) ("Simply putting a head cook on salary and giving him the title of manager is not enough to make him exempt from the requirements of the minimum wage law.").

\*\* Respondent alleged at hearing that Claimant was paid \$800 per month plus beer and food. The law permits an employer to deduct from the minimum wage the fair market value of meals furnished by the employer for the private benefit of the employee. ORS 653.035(1); former OAR 839-20-025 (BL 3-1992). However, this only applies when an employer continuously meets certain conditions. For example, the employee must have authorized the deduc-

did not satisfy this requirement of the "executive employee" exclusion.

Further, Respondent did not argue or offer evidence to prove that Claimant met the other requirements for this exclusion.\* Evidence showed that Bob's Bistro was operated by four individuals: Respondent and his wife and Claimant and his wife. Claimant's primary duty was to tend bar. No evidence suggested that Claimant's primary duty consisted of management of the bar, or that Claimant customarily and regularly directed the work of two or more other employees, or that he had the authority to hire or fire other employees. Respondent failed to prove that Claimant was an executive employee. Thus, the forum concludes that Claimant was not an executive employee exempt from the requirements of the minimum wage law.

ORS 653.025 prohibits employers from paying their employees at a rate less than \$4.75 for each hour of work time. ORS 653.055(1) provides that "[a]ny employer who pays an employee less than the [minimum wage and overtime] is liable to the employee affected: (a) For the full amount of the wages, less any amount actually paid to the employee by the employer; \* \* \* and (c) For civil penalties provided in

tion in writing, the deduction must meet the other requirements for a lawful deduction under ORS 652.610, and the employer must make a full settlement on each regular payday of sums owed to the employer by the employee because of the meals furnished. Respondent presented no evidence to establish the fair market value of any meals or drinks provided to Claimant. Nor did he present evidence that he met the other conditions necessary to make this deduction from Claimant's minimum wage.

\* It is an affirmative defense that an employee is excluded from coverage of Oregon's minimum wage law. *In the Matter of Sunnyside Enterprises of Oregon, Inc.*, 14 BOLI 170, 183 (1995). Thus, Respondent had the duty to raise this defense and present evidence to support it. ORS 183.450(2); OAR 839-050-0130(2).

ORS 652.150." ORS 653.055(2) states that "[a]ny agreement between an employee and an employer to work at less than the [minimum wage and overtime] is no defense to an action under subsection (1) of this section." Thus, the salary agreement between Respondent and Claimant is no defense to Respondent's failure to pay the minimum wage and overtime.

OAR 839-20-030 provides that all work performed in excess of 40 hours per week must be paid for at the rate of not less than one and one-half the regular rate of pay. Respondent is obligated by law to pay Claimant one and one-half times his regular hourly rate, in this case the minimum wage, for all hours worked in excess of 40 hours in a week.

Credible evidence based on the whole record establishes that Claimant worked 1726.5 hours, including 402 overtime hours. At minimum wage with overtime, Claimant earned \$9,157.64 in wages. Respondent paid him \$5,600. Therefore, Respondent owes Claimant \$3,557.64 in earned and unpaid wages.

#### Penalty Wages

Awarding penalty wages turns on the issue of willfulness. Willfulness

does not imply or require blame, malice, wrong, perversion, or moral delinquency, but only requires that that which is done or omitted is intentionally done with knowledge of what is being done and that the actor or omittor be a free agent. *Sabin v. Willamette Western Corp.*, 276 Or 1083, 557 P2d 1344 (1976). Respondent, as an employer, had a duty to know the amount of wages due to his employee. *McGinnis v. Keen*, 189 Or 445, 221 P2d 907 (1950); *In the Matter of Jack Coke*, 3 BOLI 238, 242 (1983). Here, evidence established that Respondent knew he was paying Claimant the agreed upon salary for his work and intentionally paid those wages. Evidence showed that Respondent acted voluntarily and was a free agent. Respondent must be deemed to have acted willfully under this test, and thus is liable for penalty wages under ORS 652.150.

#### Respondent's Exceptions

Respondent objected to the ALJ's findings regarding (1) the number of hours Claimant worked, (2) whether Claimant was an employee or a partner, and (3) the reason for Claimant's termination. Respondent stated that witnesses would offer testimony that is contrary to the findings.

This forum is required to make its decisions based exclusively on the record made at hearing. Any new facts presented or issues raised in exceptions shall not be considered by the Commissioner in preparing the final order. OAR 839-050-0380(1). Respondent failed to file a case summary before hearing, as ordered by the ALJ. He offered no documents at hearing. The evidence he offered was limited to his testimony. The record of that

hearing is now closed. In his exceptions, Respondent gave no reason why, before the hearing, he could not have gathered the evidence he now wants considered. The forum therefore declines to reopen the record for new evidence.

Accordingly, the forum has considered Respondent's exceptions based on the record made at hearing. The preponderance of the credible evidence in that record supports the findings made by the ALJ. Respondent's exceptions are not supported by the evidence.

#### ORDER

NOW, THEREFORE, as authorized by ORS 652.332, the Commissioner of the Bureau of Labor and Industries hereby orders **DIRAN BARBER** to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232-2162, the following:

A certified check payable to the Bureau of Labor and Industries IN TRUST FOR LEWIS G. WETZELL in the amount of FOUR THOUSAND SIX HUNDRED NINETY SEVEN DOLLARS AND SIXTY FOUR CENTS (\$4,697.64), less appropriate lawful deductions, representing \$3,557.64 in gross earned, unpaid, due, and payable wages; and \$1,140 in penalty wages; plus interest at the rate of nine percent per year on the sum of \$3,557.64 from May 1, 1996, until paid and nine percent interest per year on the sum of \$1,140 from June 1, 1996, until paid.

**In the Matter of  
JAMES H. BRESLIN,  
dba Garden Valley Texaco,  
Respondent.**

Case Number 42-97

Final Order of the Commissioner

Jack Roberts

Issued December 10, 1997.

**SYNOPSIS**

Complainant, a disabled person (epilepsy), asked respondent to remove him from scheduled graveyard shifts because changes in complainant's daily schedule and lack of sleep could trigger seizures. Respondent refused to accommodate this request because he doubted the legitimacy of complainant's medical reasons. He refused complainant's offer to provide a note from his doctor and the doctor's telephone number. Respondent discharged complainant when he failed to work the graveyard shifts. Because the requested shift change would not have caused respondent undue hardship, the commissioner held that respondent's refusal to reasonably accommodate complainant's physical impairment and respondent's discharge of complainant violated ORS 659.425. The commissioner ordered respondent to pay complainant \$336 in back wages and \$30,000 for mental distress. ORS 659.400(1), (2)(a); 659.425(1)(a); former OAR 839-06-205, 839-06-225, 839-06-240(3), 839-06-245.

The above-entitled contested case came on regularly for hearing before Douglas A. McKean, designated as

Administrative Law Judge (ALJ) by Jack Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on August 12 and 28, 1997, in Suite 220 of the State Office Building, 165 E. Seventh Avenue, Eugene, Oregon.

The Bureau of Labor and Industries (the Agency) was represented by Linda Lohr, an employee of the Agency. Greg Christian, Jr. (Complainant) was present throughout the hearing. James Breslin (Respondent) was present and represented by James Farrell, Attorney at Law.

The Agency called the following witnesses: Carol Beamer, adjudicator, Employment Department; Erika Christian, Complainant's wife; Greg Christian, Complainant; Joel Daven, M.D., Complainant's doctor; and Eileen Langlois, former Employment Specialist, Employment Department.

Respondent called the following witnesses: James Breslin, Respondent; Shannon Breslin, Respondent's wife and bookkeeper; Julie Donart and Jeromy Smith, employees of Respondent; and Jack Salberg, Teresa Schmeichel, Stacy Sorrenson, and Ira Sweet, former employees of Respondent.

Administrative exhibits X-1 to X-13, Agency exhibits A-1 to A-8 and A-13 to A-17, and Respondent exhibits R-1 to R-3 and R-5 to R-8 were offered and received into evidence. Respondent withdrew exhibit R-4. The record closed on August 28, 1997.

Having fully considered the entire record in this matter, I, Jack Roberts, Commissioner of the Bureau of Labor and Industries, hereby make the

following Findings of Fact (Procedural and on the Merits), Ultimate Findings of Fact, Conclusions of Law, Opinion, and Order.

**FINDINGS OF FACT –  
PROCEDURAL**

1) On April 18, 1996, Complainant filed a verified complaint with the Civil Rights Division of the Agency. He alleged that Respondent discriminated against him because of his physical disability (epilepsy) in that, on January 24, 1996, Respondent did not reasonably accommodate his disability and terminated him.

2) After investigation and review, the Agency issued an Administrative Determination finding substantial evidence of an unlawful employment practice by Respondent in violation of ORS 659.425.

3) On March 27, 1997, the Agency prepared and duly served on Respondent Specific Charges that alleged that Respondent failed to reasonably accommodate Complainant's disability and terminated him, in violation of ORS 659.425(1)(a). The Specific Charges also alleged that Respondent's failure to reasonably accommodate Complainant's disability created working conditions so intolerable that a reasonable person in Complainant's position would have resigned because of it, and that Complainant's resignation due to the intolerable working conditions constituted a constructive discharge, in violation of ORS 659.425(1)(a). Complainant claimed damages for back pay and mental suffering.

4) With the Specific Charges, the forum served on Respondent the following: a) a Notice of Hearing setting

forth the time and place of the hearing in this matter; b) a Notice of Contested Case Rights and Procedures containing the information required by ORS 183.413; c) a complete copy of the Agency's administrative rules regarding the contested case process; and d) a separate copy of the specific administrative rule regarding responsive pleadings.

5) On March 28, 1997, the Agency requested a postponement of the hearing because the assigned Case Presenter had a previously scheduled out-of-state vacation and had nonrefundable airline tickets. Respondent did not respond. The ALJ found that the Agency had shown good cause for a postponement, granted the motion, and issued an amended Notice of Hearing.

6) On April 17, 1997, Respondent mailed an answer in which he denied the allegation mentioned above in the Specific Charges and alleged an affirmative defense. The Hearings Unit received the answer on April 21, 1997.

7) On April 18, 1997, the Agency moved for an order of default, alleging that Respondent had failed to file a responsive pleading within the required time, pursuant to OAR 839-050-0330.

8) On April 21, 1997, the ALJ denied the motion for default because Respondent's answer was timely filed.

9) Pursuant to OAR 839-050-0210 and the ALJ's discovery order, the Agency and Respondent each filed a Summary of the Case.

10) On July 21, 1997, the Agency notified the forum and Respondent that this case had been reassigned from

case presenter Judith Bracanovich to case presenter Linda Lohr.

11) At the beginning of the hearing on August 12, 1997, the attorney for Respondent stated that he had read the Notice of Contested Case Rights and Procedures and had no questions about it. The Agency and Respondent stipulated to facts that were admitted in Respondent's answer.

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

13) On November 21, 1997, the ALJ issued a Proposed Order in this matter. Included in the Proposed Order was an Exceptions Notice that allowed ten days for filing exceptions. On November 28, 1997, the Hearings Unit received Respondent's timely exceptions, which are addressed in the Opinion section of this Final Order.

#### FINDINGS OF FACT – THE MERITS

1) At all times material herein, Garden Valley Texaco was the assumed business name for a gasoline service station in Roseberg, Oregon, owned and operated by James H. Breslin, an employer in this state utilizing the personal services of six or more persons, subject to the provisions of ORS 659.010 to 659.435.

2) At all times material, Complainant suffered from epilepsy.

3) Complainant first developed seizures at age 15. In April 1992, when he was 24 years old, Complainant began treating with Dr. Daven, a neurologist. At all times material, Dr. Daven was Complainant's treating physician.

Dr. Daven's assessment was that Complainant suffered from "juvenile myoclonic epilepsy." Complainant experienced episodes of "grand mal seizures" and "tonic-clonic seizures," which involved losses of consciousness and tongue biting, and "petit mal seizures," which "are manifested by brief twitches of his arms or legs during which time he seems to blank out for a second or two." The doctor noted that as long as Complainant "takes his medicines regularly \* \* \* and lives an appropriate lifestyle, he has absolutely no seizures. The seizures tend to occur when he forgets the medicine, stays up late at night, or when he has been drinking and partying. On one occasion he had 15 or 20 grand mal seizures the day after a drinking binge." Complainant reported to Dr. Daven that he had given up alcohol in January 1992. Dr. Daven opined that Complainant's epilepsy was "quite brittle" and could be "exacerbated by lack of sleep. He \* \* \* should not be altering his schedule to any significant degree or working late night shifts." Dr. Daven counseled Complainant numerous times about this during their visits. A day shift was the best shift for Complainant. Complainant continued experiencing seizures during 1992 and 1993. In February 1994, Complainant had a seizure while driving a truck and was treated in an emergency room following an accident. This occurred after he missed the noon dosages of his anti-convulsant medicines; he took the medicines three times per day. Dr. Daven recommended to the Driver and Motor Vehicles Services Branch (DMV) that Complainant should not drive until he had been seizure-free for three full months. In June 1994, after

Complainant had been seizure-free since February, Dr. Daven filled out a DMV form that apparently would permit Complainant to drive. Complainant had additional seizures in November 1994, and again Dr. Daven permitted him to drive only after he had been seizure-free for three months. Dr. Daven apparently filled out another DMV form on July 19, 1995, permitting Complainant to drive; Complainant had had no seizures since November 1994. In late July 1995, Complainant had one or two additional seizures, one of which caused him to fall and injure his head. He had been taking his medications regularly, but had been working long hours "and was extremely tired."

4) Respondent employed Complainant around November 1993 as a gas station attendant.

5) Respondent hired Complainant to work the swing shift, from 1 to 9 p.m. Complainant worked on the swing shift for several months as an attendant. He worked full time at minimum wage. Beginning around September 1994, Complainant became a cashier.

6) Complainant was able to perform the essential functions of attendant and cashier with work shift accommodations.

7) Respondent's gas station was open 24 hours per day. Complainant was aware of this when he was hired. When employees were hired, Respondent told them they had to be available for all shifts. Respondent tried to accommodate Complainant's and other employees' schedule requests.

8) Four or five months after Complainant starting working for him,

Respondent learned that Complainant had epilepsy after Complainant had a motor vehicle accident due to a seizure. Respondent was aware that Complainant had had other motor vehicle accidents. Complainant told his coworkers that he had epilepsy, so in case he had a seizure they would know what to do. He never had a seizure at work. On one occasion, Complainant called in sick after a seizure and Respondent gave him the day off.

9) Respondent encouraged Complainant to further his education. In the summer of 1994, Complainant began going to school part time at Umpqua Community College in Roseburg. During that summer, he continued to work at the station around 40 hours per week.

10) Between November 1993 and January 1996, Respondent never scheduled Complainant to work graveyard shifts. However, Complainant worked two graveyard shifts for Respondent. The first shift occurred on Saturday night and Sunday, August 13-14, 1994, when Complainant worked a back-to-back schedule of a graveyard shift and then a day shift. He had already been scheduled for the Sunday day shift (from 5 a.m. to 1 p.m.) and volunteered to work the additional graveyard shift on Saturday night. He did this to help Respondent because someone had quit. Complainant thought he could do this because he was taking only two classes in school and thought he could sleep other times. The second graveyard shift occurred on Friday night to Saturday, December 2-3, 1994. Complainant worked these two graveyard shifts to "make points" with Respondent.

Afterwards, however, he felt these were bad decisions.

11) Beginning in the spring of 1995, Complainant attended school full time at Rogue Community College in Grants Pass in a diesel technology (mechanic) program. He got a room in Grants Pass and returned to Roseburg on weekends, so that he did not have to drive back and forth every day. Respondent adjusted Complainant's work schedule so that he worked only on weekend day shifts from 5 a.m. to 1 p.m., or occasionally swing shifts from 1 to 9 p.m.

12) On Sunday, January 21, 1996, Complainant wrote a note to Respondent about the upcoming week's schedule. He wrote,

"Jim, I cannot work 1-9s this weekend. I have midterms Monday and Tuesday and other plans. Sorry. If you can't accamodate [sic] me then just take me off the schedual [sic] for this week. Thanx [sic], Greg."

13) Around January 22, 1996, Respondent released a schedule that assigned Complainant to graveyard shifts.

14) Respondent scheduled Complainant to work graveyard shifts (9 p.m. to 5 a.m.) on Friday and Saturday nights, January 26 and 27, 1996. An employee who was scheduled to work these shifts had recently quit. Respondent expected all employees, including himself, to fill in on a rotating basis to cover the graveyard shifts during the

slow winter period." Respondent employed between 12 and 20 employees, depending on the season and the stability of the crew. Some employees had earlier complained to Respondent that Complainant had not been scheduled for any graveyard shifts. Respondent was not at the station when Complainant saw the schedule. When he saw it, Complainant was upset and told coworkers he could not work the graveyard shifts because of his epilepsy and possible seizures; he said his doctor told him he should not work graveyard shifts. He said his wife did not want him to work graveyard shifts. Complainant's wife did not want him to work at night because of his epilepsy. She worked full time at a Taco Bell, and she feared that he would have a seizure while he was alone with their child or while driving.

15) At that time, Complainant was going to school full time in Grants Pass, attending classes on Mondays, Tuesdays, Thursdays, and Fridays, and driving 150 miles per day to and from school. On Fridays, he got up around 5 or 6 a.m. to make it to his first class at 8 a.m. He finished school at 4 p.m. on Fridays, and then drove for about an hour to return home.

16) At 3:30 p.m. on Wednesday, January 24, 1996 (his day off from school), Complainant went to Dr. Daven's office. He was concerned that, because he was scheduled to work the graveyard shift that Friday and Saturday, staying up all night would throw off his schedule and cause him to have

seizures. Complainant spoke with Dr. Daven's nurse because the doctor was unavailable. Complainant asked whether Respondent could call Dr. Daven. Dr. Daven later said he would write a letter to Respondent or do whatever Complainant needed, because he agreed that it would not be good for Complainant to work the graveyard shift. The nurse called Complainant and left this message for him.

17) Around 4 p.m. on Wednesday, January 24, 1996, Complainant talked to Respondent about being scheduled for the graveyard shifts. Complainant told Respondent he (Complainant) could not work the graveyard shifts because of his medical condition. He said he needed to stay on a day schedule and that his doctor told him he could not change shifts if it upset his sleep pattern. He told Respondent that he could not work the graveyard shifts because the lack of sleep could cause a seizure. This was the first time Complainant had asked Respondent not to schedule him for graveyard shifts. Complainant offered to bring Respondent a note from his doctor and to give Respondent the doctor's telephone number. Respondent shook his head and said, "no." Respondent had previously heard rumors from the employees that Complainant was not going to work the graveyard shifts and that he was going to use a doctor's excuse as the reason. Respondent said Complainant could work the graveyard shifts if he wanted to, but he just didn't want to. He accused Complainant of thinking he was better than everyone else. Respondent told Complainant he had to work two graveyard shifts per month like the other employees or

suffer the consequences, meaning termination. Respondent did not think Complainant's medical reasons were legitimate. He thought a person could get a doctor to write a note saying anything the person wanted. Respondent did not tell Complainant he was fired. Complainant said he would not work the shifts. He was upset, but did not want Respondent to have hard feelings. He thanked Respondent for the employment and his help getting into school. The conversation was amiable and they shook hands. Complainant left believing he no longer had a job.

18) On January 24, 1996, after he met with Respondent, Complainant talked with Eileen Langlois at the State of Oregon Employment Department. She worked in the Dislocated Workers Unit, and had been Complainant's counselor for several years. He reported to her about his conversation with Respondent and said he would be fired if he did not work the scheduled graveyard shift. Complainant was very upset, because if a worker was fired, the worker could lose dislocated worker benefits. He was afraid he would lose his ability to complete his diesel technology training. Langlois advised Complainant to get a note from his doctor immediately and take it to Respondent. She made an appointment for Complainant with the Umpqua Valley Disabilities Network.

19) At 3:45 p.m. on Thursday, January 25, 1996, Complainant went to the Umpqua Valley Abilities Center and requested help paying his medication expenses. He reported that he did not want to return to work for Respondent "because of harrassment [sic] and bad shift assignments." The director of

\* The "Monday and Tuesday" referred to January 29 and 30, 1996.

\*\* At that time, Julie Donart had the highest seniority. She requested and received day shifts, usually Monday through Friday. In 1996, she worked no graveyard shifts. Complainant had the second highest seniority.

the center, Tricia Hoelscher, asked Complainant to get a note from his doctor about his condition.

20) On January 25, 1996, Dr. Daven wrote a note stating, "Mr. Greg Christian has epilepsy that is exacerbated by lack of sleep and changes in his schedule. I believe he is at risk of seizure recurrence if he were requested to work graveyard shift. /s/ J Daven, MD." Dr. Daven gave the note to Complainant on January 25, 1996. Complainant did not give the note to Respondent because he thought he had been discharged the day before.

21) On January 25, 1996, Complainant filed a claim for unemployment benefits with the Employment Department. He reported that he had been terminated by Respondent on Wednesday, January 24, 1996.

22) On February 16, 1996, Complainant had a motor vehicle accident when he lost control of his vehicle due to a seizure.

23) When Complainant's employment with Respondent terminated, he was making \$5.25 per hour, or about \$80 per week, which he used to pay bills. After the termination, he could not pay the apartment rent (\$335 per month) and his family moved three times. Before his employment with Respondent, Complainant had been a logger. Thus, he qualified for a dislocated worker program that allowed him to collect unemployment benefits while he was training to be a mechanic. He collected these benefits even while he worked weekends for Respondent; however, the benefits were reduced while he was employed part time.

24) About a month after the termination, Complainant got a weekend job at a mini-storage warehouse. He and his family (his wife and two-year-old son) lived in a trailer at the warehouse. Complainant could not afford the rent, so for three months he traded his work at the warehouse for the rent. During this time he received no pay and looked for other employment. His work at the warehouse still did not cover the rent, so he could not afford to live there. He and his family then moved to a trailer on the family farm, where his aunt charged them reduced rent.

25) Occasionally, Complainant worked on his family's farm. This was usually during summers, when more work was available. He received \$5.00 per hour. After he stopped working for Respondent, Complainant worked on the farm periodically (as he had time and the farm had work) until January 1997. During this time, Complainant was also attending school. About six months after the termination, Complainant started making the same income at the farm as he had made while employed by Respondent.

26) In December 1996, Complainant completed his training. In June 1997, he received an associates degree in diesel technology from Rogue Community College.

27) In January 1997, Complainant started to work for Jim Thorpe Lumber Company at \$8.00 per hour. He worked there for three months. He then went to work for Eugene Forklift for higher pay.

28) The loss of employment and income and the need to move his family caused Complainant stress. It caused stress between Complainant

and his wife and they bickered. Complainant felt angry, upset, "pushed out and betrayed" by Respondent. He had to take time to find new places to live and to move. His school grades dropped that term.

29) Complainant's testimony was generally credible.

30) Respondent's testimony regarding the conversation between him and Complainant on January 24, 1996, was not credible. Likewise, his claim that he would have changed Complainant's schedule had Complainant brought him a note from Dr. Daven was not believable.

#### ULTIMATE FINDINGS OF FACT

1) At all times material, Respondent employed six or more persons in Oregon.

2) At all times material, Respondent employed Complainant.

3) Complainant has epilepsy, a physical impairment that substantially limits one or more of his major life activities, including transportation and employment.

4) Complainant possessed the training, experience, education, and skill necessary to perform the duties of the island attendant and cashier positions with Respondent. He possessed the ability to perform the job safely and efficiently, with reasonable accommodation and without present risk of probable incapacitation to himself. With reasonable shift accommodations by Respondent, Complainant's disability did not prevent the performance of the work involved.

5) Complainant requested an accommodation from Respondent of no graveyard shifts. This accommodation

would not have imposed an undue hardship on Respondent. Respondent did not accommodate Complainant's disability. Respondent discharged Complainant because, due to his disability, Complainant was unable to work graveyard shifts.

6) Complainant lost wages and suffered mental distress because of Respondent's action.

#### CONCLUSIONS OF LAW

1) At all times material, Respondent was an employer subject to the provisions of ORS 659.010 to 659.110 and 659.400 to 659.460. ORS 659.010(6) and 659.400(3); *former* OAR 839-06-210(1) (BL 2-1984).

2) The Commissioner of the Bureau of Labor and Industries has jurisdiction of the persons and of the subject matter herein and has the authority to eliminate the effects of any unlawful employment practice found. ORS 659.040, 659.050, and 659.435.

3) ORS 659.400 (1995) provided, in part:

"As used in ORS 659.400 to 659.460, unless the context requires otherwise:

"(1) 'Disabled person' means a person who has a physical or mental impairment which substantially limits one or more major life activities, has a record of such an impairment or is regarded as having such an impairment.

"(2) As used in subsection (1) of this section:

"(a) 'Major life activity' includes, but is not limited to self-care, ambulation, communication, transportation, education, socialization,

employment and ability to acquire, rent or maintain property."

Former OAR 839-06-205 (BL 15-1990) provided, in part:

"As used in these rules unless the context requires otherwise:

"\*\*\*\*\*

"(7) 'Physical or mental impairment' means an apparent or medically detectable condition which weakens, diminishes, restricts or otherwise damages an individual's health or physical or mental activity."

Former OAR 839-06-240 (BL 15-1990) provided:

"(1) Some impairments may be temporary or mutable in nature. Short-term physical or mental impairments leaving no residual disability or impairment are not handicaps within the meaning of the statute and these rules, except where they are erroneously perceived by the employer as disabling or impairing. Examples include but are not limited to flu, common cold, or sunburn.

"(2) Conditions which are mutable only upon long-term treatment, and which either do not impair the individual's ability to perform the work involved as defined in OAR 839-06-225 or with reasonable accommodation would not impair the individual's ability to

perform the work involved as defined in OAR 839-06-225 may not form the basis for rejection of the individual for a position. Obesity is an example of such an impairment.

"(3) Conditions which are controllable by diet, drug therapy, psychotherapy, or other medical means may not form a basis for rejection of the individual for a position so long as the individual is able to perform the work involved as defined in OAR 839-06-225 in the position occupied or sought. An individual with a controlled condition as described who abandons or ignores the controlling therapy loses the protection of ORS 659.425 if the absence of the control removes the ability to perform, as defined. Examples include but are not limited to arrested alcoholism, controlled diabetes mellitus, or controlled epilepsy." (Emphasis added.)

Complainant was a disabled person at all times material herein.

4) Former OAR 839-06-225 (BL 2-1984) provided:

"(1) To come within the protection of ORS 659.425, a handicapped individual must be able to perform the duties of the position occupied or sought. 'Able to perform' shall mean, subject to the provisions of OAR 839-06-230:

"(a) Possessing the training, experience, education, and skill necessary to perform the duties of the position and normally required by the employer of other candidates for the position;

"(b) Possessing the ability to perform the job safely and efficiently, with reasonable accommodation and without present risk of probable incapacitation to him/herself. An individual occupying a particular position may at any time be evaluated to determine if there is a present risk of probable incapacitation to him/herself.

"(2) An employer may not use the provisions of this section as a subterfuge to avoid the employer's duty under ORS 659.425."

Complainant was able to perform the duties of the positions he occupied with reasonable accommodation.

5) ORS 659.425(1) (1995) provided, in relevant part:

"For the purpose of ORS 659.400 to 659.460, it is an unlawful employment practice for any employer to refuse to hire, employ or promote, or bar or discharge from employment or to discriminate in compensation or in terms, conditions or privileges of employment because:

"(a) An individual has a physical or mental impairment which, with reasonable accommodation by the employer, does not prevent the performance of the work involved."

Former OAR 839-06-205 (BL 15-1990) provided, in part:

"As used in these rules unless the context requires otherwise:

"(1) 'Accommodation' means a modification by the employer of the work site, job duties, or other requirements of a position for the purpose of enabling a handicapped person to perform the work involved. See OAR 839-06-240 [sic OAR 839-06-245].

"\*\*\*\*\*

"(8) 'Reasonable Accommodation' means a modification as defined in section (1) of this rule, which can be made without undue hardship to the employer. See OAR 839-06-240 [sic OAR 839-06-245]."

Former OAR 839-06-245 (BL 2-1984) provided:

"ORS 659.425 imposes an affirmative duty upon an employer to make reasonable accommodation for an individual's physical or mental impairment where the accommodation will enable that individual to perform the work involved in the position occupied or sought:

"(1) Accommodation is a modification or change in one or more of the aspects or characteristics of a position including but not limited to:

"(a) Location and physical surroundings;

"(b) Job duties;

"(c) Equipment used;

"(d) Hours, including but not limited to:

"(A) Continuity (extended breaks, split shifts, medically

\* In 1989, the Legislature amended the Oregon Revised Statutes, including ORS 659.400 *et seq.*, to change "handicapped" to "disabled." See §§ 129 and 131, chapter 224, Oregon Laws 1989. Oregon administrative rules in chapter 839 were not changed likewise until March 12, 1996 (BL 4-1996). In addition, appellate cases and final orders issued before 1989 used the word "handicapped." In this order, the forum has used the word "handicapped" or "disabled" as they were used in the original text.

essential rest periods, treatment periods, etc.); and

"(B) Total time required (part-time, job-sharing).

"(e) Method or procedure by which the work is performed.

"(2) Accommodation is required where it does not impose an undue hardship on the employer. Whether an accommodation is reasonable will be determined by one or more of the following factors:

"(a) The nature of the employer, including:

"(A) The total number in and the composition of the work force; and

"(B) The type of business or enterprise and the number and type of facilities.

"(b) The cost to the employer of potential accommodation and whether there is a resource available to the employer which would limit or reduce the cost. Example: funding through a public or private agency assisting handicapped persons;

"(c) The effect or impact of the potential accommodation on:

"(A) Production;

"(B) The duties and/or responsibilities of other employees; and

"(C) Safety:

"(i) Of the individual in performing the duties of the position without present risk of probable incapacity to him/herself; and

"(ii) Of co-workers and the general public if the individual's performance, with accommodation,

does not present a materially enhanced risk to co-workers or the general public (See OAR 839-06-230).

"(d) Medical approval of the accommodation; and

"(e) Requirements of a valid collective bargaining agreement including but not limited to those governing and defining job or craft descriptions, seniority, and job bidding, but this rule shall not be interpreted to permit the loss of an individual's statutory right through collective bargaining.

"(3) A handicapped person who is an employee or candidate for employment must cooperate with an employer's efforts to reasonably accommodate the person's impairment. A handicapped person may propose specific accommodations to the employer, but an employer is not required to accept any proposal which poses an undue hardship. Nor is the employer required to offer the accommodation most desirable to the handicapped person, except that the employer's choice between two or more possible methods of reasonable accommodation cannot be intended to discourage or to attempt to discourage a handicapped person from seeking or continuing employment."

Respondent failed to reasonably accommodate Complainant's physical impairment. Shift accommodation was possible without undue hardship to Respondent. Respondent violated ORS 659.425(1)(a).

6) Pursuant to ORS 659.435 and 659.060, and by the terms of ORS 659.010, the Commissioner of the Bureau of Labor and Industries has the authority to issue a Cease and Desist Order requiring Respondent: to refrain from any action that would jeopardize the rights of individuals protected by ORS 659.400 to 659.460, to perform any act or series of acts reasonably calculated to carry out the purposes of said statutes, to eliminate the effects of an unlawful practice found, and to protect the rights of others similarly situated.

#### OPINION

##### 1. Complainant is a Disabled Person

As in all disability cases, the threshold issue here is whether Complainant is a disabled person. The Agency contends that he is. Respondent stipulated that Complainant has epilepsy and was able to perform the essential functions of an attendant and cashier with work shift accommodations. However, Respondent denies that Complainant is disabled.

As noted above, "Disabled person" means a person who has a physical or mental impairment which substantially limits one or more major life activities, has a record of such an impairment or is regarded as having such an impairment." ORS 659.400(1).

##### Physical Impairment

There is no dispute that Complainant has epilepsy. This is a medically detectable condition that weakens, diminishes, restricts or otherwise damages an individual's health or physical activity. It is a physical impairment.

Former OAR 839-06-205(7), 839-06-240(3); Finding of Fact – The Merits, 3. Substantially Limits One or More Major Life Activities

"Major life activity' includes, but is not limited to self-care, ambulation, communication, transportation, education, socialization, employment and ability to acquire, rent or maintain property." ORS 659.400(2)(a).

The evidence is undisputed that Complainant has had several motor vehicle accidents due to epileptic seizures. Several times Dr. Daven caused Complainant's driver's license to be suspended following seizures. One suspension lasted around eight months. Complainant's ability to drive was constantly in peril due to his epilepsy. The forum concludes that Complainant's epilepsy substantially limited his major life activity of transportation.

Given Complainant's history of seizures resulting in motor vehicle accidents, the inherent risks to himself and others when he operated a vehicle, and his training and education was as a diesel mechanic (which the forum infers involves diesel vehicles and heavy equipment), the forum concludes that Complainant may be unable to perform or significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes that involve operating a motor vehicle. *OSCI v. Bureau of Labor and Industries*, 98 Or App 548, 554, 780 P2d 743, 747 (1989); *In the Matter of Parker-Hannifin Corporation*, 15 BOLI 245, 265, 271-73 (1997). This is not only apparent when Complainant's epilepsy is medically controlled, but would be more apparent if Complainant were unable to control his epilepsy. Thus,

the forum concludes that Complainant is substantially limited in the major life activity of employment.

Ability to Perform the Duties of the Position Occupied

To come within the protection of ORS 659.425, a disabled individual must be able to perform the duties of the position occupied or sought. "Able to perform" means:

"(a) Possessing the training, experience, education, and skill necessary to perform the duties of the position and normally required by the employer of other candidates for the position;

"(b) Possessing the ability to perform the job safely and efficiently, with reasonable accommodation and without present risk of probable incapacitation to him/herself. An individual occupying a particular position may at any time be evaluated to determine if there is a present risk of probable incapacitation to him/herself." *Former* OAR 839-06-225(1) (BL 2-1984).

Respondent stipulated that Complainant was able to perform the essential job functions of an attendant or cashier with work shift accommodations. There was no evidence to the contrary. Complainant satisfactorily performed the duties of the two positions for over two years.

*Former* OAR 839-06-240(3) provided:

"(3) Conditions which are controllable by diet, drug therapy, psycho therapy, or other medical means may not form a basis for rejection of the individual for a position so long as the individual is

able to perform the work involved as defined in OAR 839-06-225 in the position occupied or sought. An individual with a controlled condition as described who abandons or ignores the controlling therapy loses the protection of ORS 659.425 if the absence of the control removes the ability to perform, as defined. Examples include but are not limited to arrested alcoholism, controlled diabetes mellitus, or controlled epilepsy." (Emphasis added.)

Dr. Daven advised Complainant not to drink alcohol. There was conflicting evidence in the record that Complainant bought alcohol and at times told coworkers he had been drinking the night before. However, there was no persuasive evidence in the record that Complainant abandoned or ignored his controlling therapy or that the absence of control removed his ability to perform the work involved.

The forum has found that Complainant possessed the necessary training, experience, education, and skill necessary to perform the duties of the attendant and cashier positions. He possessed the abilities normally required by Respondent of other candidates for these positions. The forum found further that he possessed the ability to perform the job safely and efficiently, with reasonable accommodation and without present risk of probable incapacitation to himself. Accordingly, the forum concludes that Complainant had the ability to perform the duties of the positions occupied with reasonable accommodation. *Former* OAR 839-06-225. Put another way, Complainant's physical impair-

ment, with reasonable shift accommodations by Respondent, did not prevent the performance of the work involved. ORS 659.425(1)(a).

**2. Reasonable Accommodation**

The Agency contends that Respondent could have reasonably accommodated Complainant's disability by changing his graveyard shift on the weekend of January 26 and 27, 1996. In his answer, Respondent denied this allegation.

Oregon's law on the civil rights of disabled persons<sup>\*</sup> requires reasonable accommodation as a way of overcoming unnecessary barriers that prevent or restrict employment opportunities for otherwise qualified individuals with disabilities. Respondent had an affirmative duty to reasonably accommodate Complainant's disability so that he could perform the work involved in the position occupied. ORS 659.425(1)(a); *former* OAR 839-06-245; *Braun v. American Intern. Health*, 315 Or 460, 846 P2d 1151, 1157 (1993). Accommodation was required unless it imposed an undue hardship on Respondent. *Former* OAR 839-06-205 (8), 839-06-245(2); *Blumhagen v. Clackamas County*, 91 Or App 510, 756 P2d 650, 655 (1988).

The preponderance of credible evidence on the whole record establishes that Respondent tried to and often did accommodate employees' shift requests. The evidence is un rebutted that he did this many times for Complainant. The evidence is also un rebutted that Respondent failed to accommodate Complainant's request for a

shift change on January 24, 1996. His reason why is at the heart of the dispute.

Complainant's testimony was generally credible. He had some trouble with memory. However, the forum was impressed by his demeanor and sincerity and found Complainant truthful. He testified credibly that, when they met on January 24, he advised Respondent he could not work graveyard shifts because of his epilepsy. He offered to give Respondent a note from his doctor and offered the doctor's phone number so Respondent could verify this. He testified that Respondent refused and made it clear that if Complainant did not show up for the scheduled graveyard shifts, he would suffer the consequences. Again, Complainant's credible testimony was that the consequences were clear - Respondent would terminate him. Complainant said he would not work the required shifts, he thanked Respondent for the employment and his help getting into school, they shook hands, and Complainant left. He never returned to work for Respondent.

Respondent's testimony about the conversation with Complainant was not credible. In short, he denied that Complainant ever mentioned his epilepsy or requested accommodation of his physical impairment. His testimony was controverted by Complainant's credible testimony, by testimony that other employees knew Complainant would ask to be relieved of the graveyard shifts because of his epilepsy, by evidence that Respondent knew from other employees that Complainant

\* ORS 659.400 to 659.460 (originally enacted in 1973 as the The Handicapped Persons' Civil Rights Act).

would request accommodation of his physical impairment, and by the inconsistent statement Respondent made to Carol Beamer of the Employment Department just six days after his conversation with Complainant. Respondent told Beamer on January 30 that, in his conversation with Complainant on January 24, Complainant mentioned medical reasons and possible seizures as reasons why he could not work graveyard shifts. Respondent told Beamer that he didn't think the medical reasons were legitimate and that you can get a doctor to write a note for you saying anything you want. Accordingly, Respondent's testimony concerning his conversation with Complainant on January 24 and his reasons for not accommodating Complainant's request for different shifts was unreliable and unbelievable.

The preponderance of credible evidence on the whole record establishes that Respondent did not believe Complainant's reason for requesting accommodation. He made it clear to Complainant that bolstering the request with a doctor's note or by calling Complainant's doctor was not going to change his mind. He believed Complainant was simply coming up with a medical excuse because he didn't want to work that weekend.

At hearing, Respondent made much of the fact that Complainant never gave Respondent the doctor's note Complainant got on January 25. He testified that, had Complainant given him the note, he would have accommodated Complainant. That testimony was not credible because it was controverted by and inconsistent with other credible evidence. In addition, a

witness false in one part of his or her testimony is to be distrusted in other parts. *In the Matter of Sheila Wood*, 5 BOLI 240, 252 (1986) (quoting ORS 10.095(3), concerning the duties of jurors). Respondent believed a person could get a doctor to write a note saying anything the person wanted. He did not believe Complainant's medical reasons were legitimate. Under the circumstances, it would have been futile for Complainant to take his doctor's note to Respondent. The forum declines to require disabled persons to take futile actions to get reasonable accommodation. Given the facts found, the forum concludes that, even if Complainant had presented the doctor's note to him, Respondent would not have accommodated Complainant's physical impairment.

Respondent argued that it was not common knowledge that epilepsy can require a certain amount of sleep. He contended it was unreasonable to expect him to know this, and apparently felt he had good reason to doubt Complainant's medical claims, since Complainant had previously worked graveyard shifts.

These arguments raise no defense. When an employee requests accommodation of a physical or mental impairment, the employer may inquire into the ability of the employee to perform job related functions. *In the Matter of WS, Inc.*, 13 BOLI 64, 87 (1994); *former OAR 839-06-235*. The employer may require a medical examination to determine if the employee meets the definition of an individual with a disability, to determine if the employee can perform the essential functions of the job (with or without

reasonable accommodation), and to identify an effective accommodation that would enable the employee to perform the essential functions of the job.

Since each employer has an affirmative duty to accommodate an employee's physical impairment, the employer cannot rely on ignorance or doubts about the nature or legitimacy of the impairment as the basis for denying accommodation. Respondent's doubt about Complainant's need for accommodation was not a sufficient basis for denying accommodation. He had a duty to determine Complainant's abilities and identify an effective accommodation. He did neither.

Respondent also argued that Complainant's impairment didn't need accommodation, but that his schooling did. In other words, Respondent suggested that Complainant needed only a regular sleep schedule and could, therefore, regularly work graveyard shifts and regularly sleep other times of the day. He argued that, by restricting Complainant from working graveyard, Respondent was accommodating Complainant's school schedule, not his epilepsy.

This argument is unpersuasive. Complainant's weekend job with Respondent was only one part of his life activities. Other activities included family obligations, child care, school, medical appointments, and, the forum infers, normal activities such as entertainment and shopping. Dr. Daven testified that a day shift was the best shift for Complainant and that he should not change his schedule around. A regular graveyard schedule would not be compatible with the doctor's medical opinion or Complainant's epilepsy. Further,

Respondent did not schedule Complainant for a regular graveyard shift. He advised Complainant that he would work graveyard shifts around one weekend per month. Thus it was Respondent's irregular work schedule that needed to be changed to accommodate Complainant's disability.

#### Undue Hardship

In his answer, Respondent alleged as an affirmative defense that "[p]ermitt[ing] the complainant [sic] to work every shift but the graveyard shift had a detrimental impact on the duties of [Respondent's] other employees."

The burden of proving inability to accommodate is upon the employer. *In the Matter of WS, Inc.*, 13 BOLI at 86-87. In determining whether an accommodation is reasonable, one of the factors the forum considers is the effect of the potential accommodation on the duties and/or responsibilities of other employees. *Former OAR 839-06245(2)(c)(B)*. However, this forum will examine the totality of the circumstances surrounding the potential accommodation for purposes of determining whether it is reasonable.

Respondent presented vague evidence that some employees had complained to him because Complainant was not scheduled to work any graveyard shifts. Evidence also showed that some of these employees disbelieved Complainant's need for accommodation and thought he just didn't want to work that shift. Respondent presented no evidence of the economic effects or disruption of his operation from the proposed accommodation.

The preponderance of the evidence shows that Respondent often

accommodated Complainant's and other employees' shift requests, that Complainant worked for Respondent for over two years and only worked two graveyard shifts (which he volunteered for), that Complainant was second in seniority, and that the employee with top seniority worked no graveyard shifts in 1996. Respondent presented no evidence of a "detrimental impact" to other employees that occurred because he permitted Complainant to work every shift but graveyard. Co-workers grumbling about shift assignments is not the sort of hardship envisioned by Oregon's disability law.

Respondent failed to prove his defense. The forum concludes that accommodating Complainant's epilepsy by assigning him to shifts other than graveyard would not have imposed an undue hardship on Respondent. Accordingly, that was a reasonable accommodation. *Former* OAR 839-06-205(8).

### 3. Violation of ORS 659.425(1)

The Agency alleged that Respondent unlawfully failed to provide reasonable accommodation and discharged Complainant. In the alternative, it alleged that Respondent failed to provide reasonable accommodation and thereby intentionally created intolerable working conditions that he knew or was substantially certain would cause Complainant to leave employment, constituting a constructive discharge. Respondent denied these allegations and claimed that Complainant quit.

ORS 659.425(1) makes it an unlawful employment practice to discharge an individual because the individual has a physical impairment

that, with reasonable accommodation, does not prevent the performance of the work involved. Thus, failing to provide a reasonable accommodation to a disabled employee, requiring the employee to work without the accommodation, and discharging a disabled individual who needs the accommodation to perform the work are unlawful employment practices, in violation of ORS 659.425(1).

The evidence is un rebutted that Respondent never expressly told Complainant he was fired during the conversation on Wednesday, January 24, 1996. However, Respondent told Complainant that if he did not show up for his shift, he knew the consequences. Complainant knew the consequences were termination and told Respondent he couldn't work the graveyard shifts due to his epilepsy. Complainant thanked Respondent for the employment and they shook hands. Complainant left and never returned to work. He perceived that he was fired when his conversation with Respondent concluded.

Respondent argued that he did not fire Complainant that day. The record demonstrates, though, that Complainant's employment was terminated. Evidence suggests that after their conversation Respondent arranged to cover the graveyard shifts previously assigned to Complainant. Thus, both parties to the conversation perceived that Complainant's employment was terminated. This was because Respondent refused Complainant's request for accommodation. Even if Respondent did not technically discharge Complainant on Wednesday, January 24, he certainly terminated

Complainant's employment when Complainant did not show up for the graveyard shift on Friday, January 26.

When an employer refuses to reasonably accommodate an employee's physical impairment and the accommodation is required in order to perform the work involved, the employer has barred the employee from working. Here, Respondent discharged Complainant when he would not and did not work the scheduled graveyard shifts. Complainant did not quit. He requested accommodation to work and his employer refused. Respondent prevented Complainant from performing the work by not reasonably accommodating Complainant's physical impairment.

Even if Respondent were correct that Complainant resigned, the forum would hold that Respondent constructively discharged him. The elements of a constructive discharge are:

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

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

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

"(4) The Complainant did leave the employment as a result of those working conditions." *In the Matter of Thomas Myers*, 15 BOLI 1, 14-15 (1996) (citing *McGanty v. Staudenraus*, 321 Or 532, 557, 901 P2d 841, 856 (1995)).

By refusing to reasonably accommodate Complainant's physical impairment, Respondent intentionally created discriminatory working conditions related to Complainant's protected class status. By requiring Complainant to work without reasonable accommodation, Respondent created working conditions that were so intolerable a reasonable person in Complainant's position would have resigned because of them. No disabled person who needs a particular reasonable accommodation to perform the work involved should be required to work without it. That's intolerable, and a reasonable disabled person would resign because of it. Respondent knew that Complainant was substantially certain to leave employment as a result of those working conditions. After Respondent had told him that if he failed to work the graveyard shifts he would suffer the consequences, Complainant told Respondent he would not work those shifts. Complainant left employment as a result of those working conditions. He never showed up for work again. With the forgoing facts, the Agency proved that Respondent constructively discharged Complainant in violation of ORS 659.425(1).

### 4. Damages

#### Back Wages

The Agency alleged that Complainant lost wages estimated at \$1,008, less earnings from any interim

employment. The Agency calculated back wages based on an hourly rate of \$5.25 for approximately 16 hours per week, or \$84 per week for approximately 12 weeks. Respondent denied any wage loss and claimed that he should not be liable for lost wages that resulted from Complainant's poor job choices after the termination.

Complainant's and his wife's testimony was vague about his employment and income following his discharge by Respondent. He took a job at a mini-storage warehouse around a month after the discharge. He had no records of earnings there. He exchanged his labor on the weekends for rent on the trailer they lived in. He was not specific how many hours he worked each weekend. There is no evidence of the amount of the monthly rent. He lived in the trailer for around three months, then moved to the family farm. He worked at the farm as his school schedule allowed and as work was available, but did not remember what his income was or how much he worked. He worked on the farm until he finished school and took a job in January 1997 with Jim Thorpe Lumber Company at \$8.00 per hour.

The period for measuring back pay damages terminates when a complainant obtains a job with comparable or higher pay and it does not resume when he voluntarily quits the new job. *In the Matter of Pacific Motor Trucking Company*, 3 BOLI 100, 115 (1982), *aff'd*, 64 Or App 361, 668 P2d 446 (1983), *rev den* 295 Or 773 (1983). Because the evidence regarding Complainant's earnings at the warehouse is so vague, the forum has terminated the period for measuring back pay with

that employment. To award more would be speculative and unfair to Respondent. *In the Matter of C & V, Inc.*, 3 BOLI 152, 159-60 (1982).

Accordingly, the forum calculated Complainant's damages for lost wages as follows: \$5.25 for 16 hours per week, or \$84 per week, for four weeks, which equals \$336.

In his exceptions to the Proposed Order, Respondent argued that there was no basis for awarding back wages to Complainant because his testimony was so vague and there was no other evidence to support the award.

Credible testimony supports the award. Complainant testified that he was unemployed for around a month after Respondent terminated his employment. His wife testified credibly that he was unemployed from one to two months. On further cross-examination, she said she was unsure and that it could have been less than a month. Thus, while her estimate of how long Complainant was unemployed was not wholly reliable, she did corroborate Complainant's testimony that he was unemployed for some period of time, which she thought might have been up to two months. Complainant and his wife testified that he was looking for work during this time.

The forum concludes that Complainant was unemployed and that he searched for work during that time. Although the testimony was not exact, the forum believes it was sufficiently reliable to conclude that Complainant was unemployed for around a month. Accordingly, the forum has awarded him back pay for one month.

#### Mental Distress

"In determining mental distress awards, the Commissioner considers a number of things including the type of discriminatory conduct, and the duration, severity, frequency, and [pervasiveness] of that conduct. The Commissioner considers the type of mental distress caused by the discriminatory conduct, and the effects and duration of that distress. The Commissioner also considers complainants' vulnerability, due to such factors as age and work experience. *See Fred Meyer Inc. v. Bureau of Labor*, 39 Or App 253, 592 P2d 564, 571-72 (1979); *rev den* 287 Or 129 (1979)." *In the Matter of Pzazz Hair Design*, 9 BOLI 240, 256-57 (1991).

Respondent's unlawful conduct — his refusal to reasonably accommodate Complainant's impairment and the discharge — occurred, from Complainant's viewpoint, during a short conversation on January 24, 1996. Thus, the duration, frequency, and pervasiveness of Respondent's conduct were minimal. It would not cause the kind of mental suffering as, for example, a case of ubiquitous, continual, and long-lasting sexual harassment.

However, the severity of the conduct is high and it is precisely the type of conduct the law is designed to prohibit. People of this state have the right to lawful employment without discrimination because of disability where the reasonable demands of the position do not require such a distinction. ORS 659.405(2). It's the public policy of the state to guarantee disabled persons the fullest possible participation in the

social and economic life of the state and to encourage remunerative employment without discrimination. ORS 659.405(1). Respondent's refusal to accommodate Complainant's disability and his termination of Complainant's employment are very severe types of discrimination against a disabled person.

Evidence shows that Complainant experienced mental distress due to Respondent's unlawful conduct. He felt angry, shaken, upset, "pushed out and betrayed" by Respondent. For a month, Complainant and his family lived with stress from Complainant's unemployment. They moved from their apartment because they could no longer afford the rent. They later had to move again because they could not afford the rent. Complainant felt the fear of losing his dislocated worker benefits and his ability to complete his education. The loss of employment caused stress between Complainant and his wife and they bickered. He suffered the trauma of a sudden and unexpected discharge, coupled with the anxiety and uncertainty connected with unemployment. This is compensable. *In the Matter of WS, Inc.*, 13 BOLI 64 (1994); *In the Matter of 60 Minute Tune*, 9 BOLI 240 (1991), *aff'd without opinion*, *Nida v. Bureau of Labor and Industries*, 119 Or App 508, 852 P2d 974 (1993).

The forum is awarding the Complainant \$30,000 to help compensate him for the mental distress he suffered as a result of Respondent's unlawful employment practices.

In his exceptions, Respondent contended that the proposed award for mental distress was excessive and

unsupported by the evidence. Respondent also argued that the order ignored his testimony that if he had been presented with a doctor's note, he would have felt compelled to change Complainant's hours.

Evidence supporting the award for mental distress is described above and included credible testimony from Complainant, his wife, and Eileen Langlois. On the basis of the facts found, the award is not excessive. Regarding Respondent's testimony that he would have changed Complainant's hours if Complainant had presented him with the doctor's note, the forum did not ignore that testimony. The forum found it incredible. See the discussion of this issue in section two of the opinion.

#### ORDER

NOW, THEREFORE, as authorized by ORS 659.060(3), 659.010(2), and 659.435, and to eliminate the effects of the unlawful practice found as well as to protect the lawful interest of others similarly situated, JAMES H. BRESLIN is hereby ORDERED to:

1) Deliver to the Business Office of the Bureau of Labor and Industries, 800 NE Oregon Street #32, Suite 1010, Portland, Oregon 97232-2162, a certified check, payable to the Bureau of Labor and Industries in trust for Greg Christian, Jr., in the amount of:

a) THREE HUNDRED AND THIRTY SIX DOLLARS (\$336), less appropriate lawful deductions, representing wages Complainant lost as a result of Respondent's unlawful practice found herein; plus,

b) Interest on the lost wages at the annual rate of nine percent accrued between March 1, 1996, and the date

Respondent complies herewith, to be computed and compounded annually; plus,

c) THIRTY THOUSAND DOLLARS (\$30,000), representing compensatory damages for the mental distress Complainant suffered as a result of Respondent's unlawful practice found herein; plus,

d) Interest on the compensatory damages for mental distress, at the legal rate, accrued between the date of the Final Order and the date Respondent complies herewith, to be computed and compounded annually.

2) Adopt a non-discriminatory written policy and practice regarding employees and applicants with disabilities and the employer's duty to reasonably accommodate those employees and applicants. The content of such policy is to be preapproved by the Civil Rights Division of the Oregon Bureau of Labor and Industries.

3) Cease and desist from discriminating against any current employee or applicant on the basis of disability.

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#### In the Matter of RICHARD COLE, Respondent.

Case Number 03-98  
Final Order of the Commissioner  
Jack Roberts  
Issued December 10, 1997.

#### SYNOPSIS

Where respondent bid for and obtained a USFS contract to apply big game repellent and entered into a subcontract with another to perform this contract; and where respondent took these actions before a rule change that made the application of big game repellent an activity that required a farm labor contractor license; and where the licensed subcontractor provided the workers and performed the contract before and after the rule change; the commissioner held that respondent was not a farm labor contractor within the definition of ORS 658.405(1) and OAR 839-15-004(4) and therefore did not act as a farm labor contractor without a license when the contract was completed after the rule change. ORS 658.405(1), 658.410(1), 658.417(1), 658.453(1), OAR 839-15-004(4) and (8)(c), 839-15-125.

The above-entitled contested case came on regularly for hearing before Administrative Law Judge (ALJ) Douglas A. McKean. The hearing was held by telephone on September 9, 1997.

The Bureau of Labor and Industries (the Agency) was represented by Alan McCullough, an employee of the

Agency. Richard Cole (Respondent) represented himself.

The Agency called the following witnesses: Maria Gonzalez, United States Forest Service (USFS) Contracting Officer; and Shirley Barshaw, supervisor of the Licensing Unit of the Agency. Respondent testified on his own behalf.

Administrative exhibits X-1 to X-11 and Agency exhibits A-1 to A-12 were offered and received into evidence. The record closed on September 9, 1997.

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

#### FINDINGS OF FACT – PROCEDURAL

1) On June 13, 1997, the Agency issued a "Notice of Intent to Assess Civil Penalties" (Notice of Intent) to Respondent. The Agency alleged that Respondent acted as a farm labor contractor with regard to the forestation or reforestation of lands without a valid Farm Labor Contractor's License or Forestation Indorsement, in violation of ORS 658.410, and 658.417(1), and OAR 839-15-125. The Agency sought a civil penalty of \$2,000 for this one violation. The notice was served on Respondent on July 2, 1997.

2) By a letter dated July 21, 1997, Respondent requested a hearing and submitted an answer and two documents.

3) On July 28, 1997, the Agency requested a hearing from the Hearings Unit. On July 31, 1997, the ALJ issued to Respondent and the Agency a "Notice of Hearing," which set forth the time and place of the requested hearing. With the hearing notice, the Hearings Unit sent to Respondent a "Notice of Contested Case Rights and Procedures" containing the information required by ORS 183.413, and a complete copy of the Agency's administrative rules regarding the contested case process - OAR 839-050-0000 through 839-050-0440.

4) On July 31, 1997, the ALJ issued a discovery order to the participants directing each of them to submit a summary of the case, including a list of the witnesses to be called and the identification and description of any physical evidence to be offered into evidence, together with a copy of any such document or evidence, according to the provisions of OAR 839-050-0200 and 839-050-0210. The summaries were due by August 29, 1997. The order advised the participants of the sanctions, pursuant to OAR 839-050-0200(8), for failure to submit the summary. The Agency submitted a timely summary and an addendum.

5) On August 7, 1997, the Agency filed a motion to amend the Notice of Intent to make a correction and add a new factual allegation as an alternative basis for the proposed civil penalty. In addition, the Agency moved for a telephone hearing. During a conference call among the ALJ, Respondent, and the Agency case presenter, Respondent did not object to the motion to

amend. The ALJ granted the motion and gave Respondent until August 25, 1997, to submit an amended answer. Respondent did not do so. Respondent initially objected to the motion to hold the hearing by telephone. However, during the conference call he withdrew this objection and the ALJ granted the motion.

6) At the start of the hearing, Respondent said that he had received and read the Notice of Contested Case Rights and Procedures and had no questions about it.

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

8) On November 17, 1997, the Administrative Law Judge issued a Proposed Order in this matter. Included in the Proposed Order was an Exceptions Notice that allowed ten days for filing exceptions to the Proposed Order. The Hearings Unit received no exceptions.

#### FINDINGS OF FACT - THE MERITS

1) During all times material herein, Respondent, a natural person, was not licensed by the Commissioner of the Bureau of Labor and Industries as a farm labor contractor.

2) On February 7, 1996, the Deschutes National Forest issued a contract solicitation (number R6-1-96-108) for the application of big game repellent (BGR).<sup>\*</sup> Work on the contract was to be performed at two times, in the spring and in the fall of 1996.

3) On March 7, 1996, Respondent made an offer to perform this contract.

4) On March 15, 1996, Respondent signed the following statement:

"I, Richard D. Cole in pursuance with U.S. Forest Service contract #R6-1-96-108 agrees to pay Bermudez Bros. an amount equal to all expenses incurred by Bermudez [sic] Bros., including, BGR, wages, fuel for transportation, boarding for employees, vehicles, and all other miscellaneous items, including spray bottles and mixing tools. Upon receiving all receipts for aforementioned expenses, Richard C. Cole will compensate Bermudez Bros. providing they do not exceed the bid amount, for those expenses incurred."

5) On March 19, 1996, Andres Bermudez signed the following statement:

"Bermudez Bros. will be responsible for all supplies and services and will perform all of the duties as stated under U.S. Forest Service contract number R6-1-96-108 for the amount of \$9.75 per acre or less. Any loss or liability will be the sole responsibility of Bermudez Bros."

6) Respondent and Andres Bermudez entered into an agreement for Bermudez to perform the duties of USFS contract number 53-04GG-6-1080.

7) Andres Bermudez had a valid farm labor contractor's license with a forestation indorsement during the performance of USFS contract number 53-04GG-6-1080.

8) At the request of the USFS, on March 19, 1996, Respondent reviewed and verified in writing his bid price.

9) Respondent Richard Cole was awarded USFS contract number 53-04GG-6-1080. Richard Cole was the contractor on USFS contract number 53-04GG-6-1080.

10) On March 26, 1996, USFS Contracting Officer (CO) Maria D. Gonzalez awarded contract number 53-04GG-6-1080 to Respondent. The contract was based on solicitation number R6-1-96-108.

11) USFS contract number 53-04GG-6-1080 required, among other things, that Respondent promptly notify the Contracting Officer upon entering into any subcontract agreement. The written notification had to include at least the name, address, and telephone number of the subcontractor, the date the subcontract was entered into and its duration, a detailed description of the work being subcontracted, and documentation of the subcontractor's representative authority. In addition, the contract required Respondent to obtain all necessary federal, state, and municipal licenses and permits applicable to the performance of the contract. USFS usually lets contractors know what licenses and permits they need. At the time the contract was awarded, only a repellent applicator's license was required.

12) CO Gonzalez received no notice from Respondent that he had subcontracted work to Andres Bermudez. She did not know that Bermudez would perform work on the contract in September 1996. Respondent never gave Gonzalez or the USFS a copy of his subcontract with Bermudez.

\* Big game repellent is applied to young trees to prevent deer from eating them.

13) On March 28 or 29, 1996, Gonzalez held a prework conference with Respondent and Thomas Hittlet, the USFS contracting officer's representative (COR). Among the matters discussed was Respondent's responsibility to obtain any applicable licenses and permits to comply with federal, state, and local regulations, laws, and codes. At this time, Respondent designated Nato Chavez as his representative for the contract, in Respondent's absence. On April 8, 1996, Respondent again designated Nato Chavez as his representative, but gave Chavez the additional authority to sign invoices, contract modifications, and settlement agreements, and full authority in all contractual matters. Chavez was an employee of Bermudez.

14) On April 8, 1996, Respondent began work on the contract with a crew of 12 applicators and two foremen (himself and Chavez). They worked again on April 9, 10, 12, 13, 15, 16, 17, 18, and 19, 1996, with a 12 to 15 person crew and the same foremen. On April 22, 1996, work stopped for the spring.

15) On May 26, 1996, Respondent submitted copies of receipts to CO Gonzalez for reimbursement. The receipts were for dye (which was mixed with the BGR). On September 27, 1996, CO Gonzalez authorized payment to Respondent.

16) On May 30, 1996, the administrator of the Wage and Hour Division of the Agency issued a notice to "Interested Parties" announcing the adoption of rules related to farm and forest labor contractors. Interested parties included all currently licensed farm labor contractors, the USFS, and all persons

who had testified at public hearings regarding the proposed rule changes. The notice stated that, effective July 1, 1996, administrative rules were amended to add several forestation and reforestation activities that required a license to perform. Among the added activities was "Application of big game repellent by contract crew." The notice said, "Contractors performing these activities will be required to obtain a farm/forest labor contractor's license as of July 1, 1996." (Emphasis original.)

17) Beginning on July 1, 1996, Oregon law required farm labor contractors to have a license with a forestation indorsement to apply big game repellent with a contract crew.

18) CO Gonzalez believed that Respondent needed a farm labor contractor's license to perform contract number 53-04GG-6-1080 in September 1996. Because the contract had to be completed within 30 days or the trees would be damaged, she decided to let Respondent finish the contract without requiring him to get the state license. Gonzalez never notified Respondent that he needed a state farm labor contractor license to complete the contract.

19) Respondent was not aware the administrative rules had changed. He was not notified of the change by either the Agency or USFS.

20) On September 16, 17, 18, 1996, Respondent and COR Hittlet talked by telephone daily about resuming work on the contract. There were nine days remaining of the contract time. Respondent said his crew had left him to pick pears and tomatoes. On September 19, 1996, Respondent

resumed work on the contract with a crew of five applicators and two foremen (himself and Chavez). They worked again on September 20 and 21, 1996, with a four-to-five person crew and Chavez. Respondent was not present at the work units on September 22, 1996. Because of the small crew and poor weather, work on the contract was behind schedule. On September 23, 1996, COR Hittlet issued a Notice of Noncompliance to Respondent because work was behind schedule. Respondent helped transfer repellent to applicator packs and other small tasks for one-to-two hours per day. Work on the contract was completed in September 1996. USFS made payments on the contract to Respondent. Each time Respondent received a payment from the USFS, he in turn paid Bermudez for his expenses per their subcontract.

21) Bermudez Bros. submitted a payroll report to the Agency for the period September 15 to October 5, 1996. The report listed 16 workers including "Fortunato Chavez." The work classification for all employees was "weeding." It showed that the work was done on Forest Service land located near Bend, but there was no contract number.

22) A handwritten timecard, marked "Bend Spray," shows six employees (including Fortunato Chavez) working on September 19, 20, and 21 (marked "1st Week") and 15 employees (including Chavez) working from September 23 to 28 (marked "2nd Week") and from September 29 to October 1, 1996 (marked "3rd Week"). "Cole" is written at the top of the timecard with a telephone number. The

timecard shows workers employed by Bermudez to perform the subcontract he had with Respondent.

#### ULTIMATE FINDINGS OF FACT

1) During all times material, Respondent was not licensed by the Commissioner of the Bureau of Labor and Industries as a farm labor contractor.

2) In March 1996, Respondent bid on USFS contract number 53-04GG-6-1080 to apply big game repellent.

3) In March 1996, Respondent entered into a subcontract with Andres Bermudez, a licensed farm labor contractor with a forestation indorsement, to perform USFS contract number 53-04GG-6-1080.

4) Bermudez supplied all employees who performed USFS contract number 53-04GG-6-1080. The employees performed the contract during April and September 1996. Respondent was involved in the performance of the contract. He received payments from the Forest Service and paid Bermudez pursuant to the subcontract.

5) During all times material, Respondent was not a farm/forest labor contractor, as defined by ORS 658.405(1) and OAR 839-15-004(4) and (8)(c).

#### CONCLUSIONS OF LAW

1) The Commissioner of the Bureau of Labor and Industries of the State of Oregon has jurisdiction over the subject matter and of the person herein. ORS 648.405 to 658.503.

2) ORS 658.405 provides in part: "As used in ORS 658.405 to 658.503 and 658.830 and 658.991

(2) and (3), unless the context requires otherwise:

"(1) 'Farm labor contractor' means any person who, for an agreed remuneration or rate of pay, recruits, solicits, supplies or employs workers to perform labor for another to work in forestation or reforestation of lands, including but not limited to the planting, transplanting, tubing, precommercial thinning and thinning of trees and seedlings, and clearing, piling and disposal of brush and slash and other related activities \* \* \*; or who bids or submits prices on contract offers for those activities; or who enters into a subcontract with another for any of those activities."

Former OAR 839-15-004 (BL 2-1996) provided in part:

"As used in these rules, unless the context requires otherwise:

\*\*\*\*\*

"(4) 'Forest Labor Contractor' means:

"(a) Any person who, for an agreed remuneration or rate of pay, recruits, solicits, supplies or employs workers to perform labor for another in the forestation or reforestation of lands; or

\*\*\*\*\*

"(d) Any person who bids or submits contract offers for the forestation or reforestation of lands; or

"(e) Any person who subcontracts with another for the forestation or reforestation of lands.

\*\*\*\*\*

"(8) 'Forestation or reforestation of lands' includes, but is not limited to:

\*\*\*\*\*

"(c) Other activities related to the forestation or reforestation of lands including, but not limited to, tree shading, pinning, tagging or staking; fire trail construction and maintenance; slash burning and mop up; mulching of tree seedlings; and any activity related to the growth of trees and tree seedlings and the disposal of debris from the land."

OAR 839-015-0004 (BL 5-1996, effective July 1, 1996) provides in part:

"As used in these rules, unless the context requires otherwise:

\*\*\*\*\*

"(4) 'Forest Labor Contractor' means:

"(a) Any person who, for an agreed remuneration or rate of pay, recruits, solicits, supplies or employs workers to perform labor for another in the forestation or reforestation of lands; or

\*\*\*\*\*

"(d) Any person who bids or submits contract offers for the forestation or reforestation of lands; or

"(e) Any person who subcontracts with another for the forestation or reforestation of lands.

\*\*\*\*\*

"(8) 'Forestation or reforestation of lands' includes, but is not limited to:

\*\*\*\*\*

"(c) Other activities related to the forestation or reforestation of lands including, but not limited to, tree shading, pinning, tagging or staking; fire trail construction and maintenance; slash burning and mop up; mulching of tree seedlings; forest fire suppression by contract crew; application of big game repellent by contract crew; herbicide or pesticide application in the forest by contract crew; gopher baiting; gopher trapping and any activity related to the growth of trees and tree seedlings and the disposal of debris from the land.

\*\*\*\*\*

"(23) 'Application of big game repellent by contract crew' means work performed by workers who are recruited, solicited, supplied or employed by a person who has contracted to supply a crew of workers to apply big game repellent." (Emphasis added.)

ORS 658.410(1) provides in part:

"No person shall act as a farm labor contractor with regard to forestation or reforestation of lands unless the person possesses a valid farm labor contractor's license with the indorsement required by ORS 658.417(1)."

ORS 658.417 provides in part:

"In addition to the regulation otherwise imposed upon farm labor contractors pursuant to ORS 658.405 to 658.503 and 658.830, a person who acts as a farm labor contractor with regard to the forestation or reforestation of lands shall:

"(1) Obtain a special indorsement from the Commissioner of the Bureau of Labor and Industries on the license required by ORS 658.410 that authorizes the person to act as a farm labor contractor with regard to the forestation or reforestation of lands."

Former OAR 839-15-125 (BL 3-1990) provided in part:

"No person may perform the activities of a Farm or Forest Labor Contractor without first obtaining a temporary permit or license issued by the Bureau. No person may perform the activities of a Forest Labor Contractor \* \* \* without first obtaining a special indorsement from the Bureau authorizing such performance. \* \* \*"

Likewise, OAR 839-015-0125 (BL 5-1996, effective July 1, 1996) provides in part:

"No person may perform the activities of a farm or forest labor contractor without first obtaining a temporary permit or license issued by the bureau. No person may perform the activities of a forest labor contractor \* \* \* without first obtaining a special indorsement from the bureau authorizing such performance. \* \* \*"

Respondent was not a farm labor contractor. By bidding on a big game repellent contract and subcontracting that activity before July 1, 1996, and because he did not employ workers to perform the contract after July 1, 1996, Respondent was not acting as a farm labor contractor with regard to the forestation or reforestation of lands. Accordingly, Respondent did not need

a farm labor contractor license issued by the Commissioner and did not violate ORS 658.410, 658.417(1), and OAR 839-15-125 as alleged.

#### OPINION

The Agency alleged that Respondent acted as a farm labor contractor without the required license and forestation indorsement when he performed a big game repellent application contract in September 1996. The Agency offered two alternative theories in support of the alleged violation. First, the Agency claimed that Respondent, for an agreed rate of pay, employed workers to perform the contract in September 1996. Second, the Agency claimed that Respondent subcontracted with Bermudez, who performed the contract in September 1996. By subcontracting with Bermudez for work that required a farm labor contractor's license in September 1996, the Agency alleged that Respondent acted as a farm labor contractor without a valid license.

Respondent claimed that he entered into a subcontract with Bermudez Bros. in March 1996, before a license was required to apply BGR. He contended that Bermudez provided and paid all the workers and had the necessary state farm labor contractor license. As mitigation, he claimed that the Forest Service was negligent in not informing him of the change in the licensing rules and that he was ignorant of the change, which occurred in the middle of the contract performance.

The facts show that application of big game repellent by a contract crew was not an activity that required a license until July 1, 1996. Respondent bid on the BGR contract in March

1996, when no license was required for that activity. He entered into a subcontract with Bermudez in March 1996, before a license was required to do that. The evidence is uncontradicted that Bermudez's employees performed the contract in September 1996. There is no evidence that Respondent, for an agreed rate of pay, employed workers to perform the contract. Thus, the Agency failed to prove its first theory.

In the amended charging document, the Agency alleged that by "subcontracting with Bermudez for work performed in September 1996 that required a farm labor contractor's license, Respondent acted as a farm labor contractor without a valid farm labor contractor's license." Apparently, the Agency reads the definition of farm/forest labor contractor to include not only the act of subcontracting, but also the performance of a contract by the subcontractor.

The statutory definition of a farm labor contractor includes a person "who enters into a subcontract with another for [forestation and reforestation] activities." ORS 658.405(1). Thus the act that brings a person within the definition of a farm labor contractor is the act of entering into a subcontract. It is not the performance of the subcontract. Here, the act of entering into a subcontract occurred in March 1996, not in September 1996.

The rule definition of a forest labor contractor closely tracks the statutory definition, but the language is slightly different. The rule's definition of a forest labor contractor includes "any person who subcontracts with another for the forestation and reforestation of lands."

OAR 839-15-004(4)(e). The Agency did not argue that this definition is broader than its statutory counterpart. Nothing in the rule's language suggests that a subcontractor's performance of a forestation and reforestation contract is an act that brings the contractor within the definition.

Each subsection of OAR 839-15-004(4) refers to actions of the forest labor contractor — actions that would bring the person within the definition of a forest labor contractor. No subsection refers to an action by another, such as a subcontractor, that would bring the person within the definition of a forest labor contractor. The forum will not read the rule to be broader than the statute. Thus, under the definition of forest labor contractor in OAR 839-15-004(4), the act that brings a person within the definition of a farm labor contractor is the act of entering into a subcontract, not the performance of the subcontract. Again, the act of entering into a subcontract occurred in March 1996, not in September 1996.

Therefore, the Agency failed to prove its second theory because Respondent entered into the subcontract for application of BGR at a time when no license was required to do so, that is, before July 1, 1996.

Having failed to prove that Respondent took any action that would make him a farm/forest labor contractor after July 1, 1996, the forum concludes that Respondent did not act as a farm labor

contractor without a license and did not violate ORS 658.410, 658.417(1), and OAR 839-15-125 as alleged.\*

#### ORDER

NOW, THEREFORE, as Respondent has not been found to have violated any statute or rule as charged, the Notice of Intent to Assess Civil Penalties filed against Respondent is hereby dismissed. ORS 658.453, 183.090.

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**In the Matter of  
ANDRES V. BERMUDEZ,  
dba Bermudez Brothers,  
Respondent.**

Case Number 01-98  
Final Order of the Commissioner  
Jack Roberts  
Issued January 23, 1998.

#### SYNOPSIS

Where an unlicensed person bid for and obtained a USFS contract to apply big game repellent and entered into a subcontract with respondent (a licensed farm labor contractor) to perform this contract; where the unlicensed person took these actions before a rule change that made the application of big game repellent an activity that required a farm labor contractor

\* Compare *In the Matter of Manuel Galan*, 16 BOLI 51 (1997) (where an unlicensed person bid on and obtained a contract to apply herbicide before OAR 839-15-004(8) changed (i.e., before July 1, 1996), but then recruited workers to perform the forestation contract after the rule-change became effective, the person acted as a farm labor contractor without a license in violation of ORS 658.410(1) and 658.417(1)).

license; and where respondent provided the workers and performed the contract before and after the rule change, the commissioner held that the unlicensed person was not a farm labor contractor within the definition of ORS 658.405(1) and OAR 839-15-004 (4), and therefore respondent did not assist the person to act as a farm labor contractor without a license when respondent performed the subcontract in part after the rule change. ORS 658.405(1); former OAR 839-15-004 (4) and (8)(c), 839-15-125. Where respondent failed to furnish 41 employees with a written statement of the terms and conditions of employment as required by ORS 658.440(1)(f), and where respondent failed to execute written agreements with the 41 employees as required by ORS 658.440(1)(g), the commissioner found 41 violations of ORS 658.440(1)(f) and 41 violations of ORS 658.440(1)(g). The commissioner assessed respondent a civil penalty of \$20,500, pursuant to ORS 658.453(1), for the 82 violations. ORS 658.440(1)(f) and (g), 658.453(1); OAR 839-015-0310, 839-015-0360, and 839-015-0505 to 839-015-0512.

The above-entitled contested case came on regularly for hearing before Administrative Law Judge (ALJ) Douglas A. McKean. The hearing was held on November 18, 1997, in the hearings room of the Oregon State Employment Department, 119 North Oakdale Street, Medford, Oregon.

The Bureau of Labor and Industries (the Agency) was represented by Alan McCullough, an employee of the

Agency. Andres Bermudez (Respondent) represented himself.

The Agency called the following witnesses: Susan Dix, administrative specialist in the Wage and Hour Division of the Agency; Maria Gonzalez, United States Forest Service (USFS) contracting officer; Dan Parazoo, USFS contracting officer; Raul Ramirez, compliance specialist in the Farm Labor Unit of the Agency; and Dottie Williams, administrative specialist in the Farm Labor Unit of the Agency.

Respondent called the following witnesses: himself; Rubin Garcia, Respondent's bookkeeper; Jose Trinidad Ramirez, Respondent's employee; and Guadalupe Valero, Respondent's employee.

Administrative exhibits X-1 to X-21, Agency exhibits A-1 to A-15, and Respondent exhibit R-1 were offered and received into evidence. The record closed on November 18, 1997.

Manuela Marney, appointed by the forum and under proper affirmation, acted as an interpreter for witnesses Jose Trinidad Ramirez and Guadalupe Valero called by Respondent.

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

#### FINDINGS OF FACT – PROCEDURAL

1) On June 13, 1997, the Agency issued a "Notice of Intent to Assess Civil Penalties" (Notice of Intent) to

Respondent. The Agency alleged that (1) Respondent assisted an unlicensed person (Richard Cole) to act in violation of the farm labor contractor law, in violation of ORS 658.440(3)(e); (2) Respondent failed to furnish 41 workers with a written statement disclosing the workers' rights and remedies, in violation of ORS 658.440(1)(f) and OAR 839-015-0310; and (3) Respondent failed to execute a written agreement with each of 41 workers at the time of hiring and prior to the worker performing any work, in violation of ORS 658.440(1)(g) and OAR 839-015-0360. The Agency sought a civil penalty of \$2,000 for the alleged violation of ORS 658.440(3)(e), \$20,500 for 41 alleged violations of ORS 658.440(1)(f) and OAR 839-015-0310, and \$20,500 for 41 alleged violations of ORS 658.440(1)(g) and OAR 839-015-0360. In addition, the Agency alleged aggravating circumstances under OAR 839-015-0510. The notice was served on Respondent's bookkeeper, Rubin Garcia.

2) By a letter dated June 30, 1997, Respondent requested a hearing on the Agency's intended action and denied each allegation.

3) On July 7, 1997, the Agency requested a hearing from the Hearings Unit. On July 15, 1997, the ALJ issued to Respondent and the Agency a "Notice of Hearing," which set forth the time and place of the requested hearing. With the hearing notice, the Hearings Unit sent to Respondent a "Notice of Contested Case Rights and Procedures" containing the information required by ORS 183.413, and a complete copy of the Agency's administrative rules regarding the contested

case process -- OAR 839-050-0000 through 839-050-0440.

4) On July 22, 1997, the ALJ issued a discovery order to the participants directing them each to submit a summary of the case according to the provisions of OAR 839-050-0200 and 839-050-0210. The Agency and Respondent each submitted a timely summary. The Agency submitted addenda.

5) On July 24, 1997, the Agency filed a motion to amend the Notice of Intent to change the caption of the notice to read as it does in this order and to correct a contract number. The ALJ notified Respondent of the motion and set a response deadline. Respondent did not respond. The ALJ granted the motion and gave Respondent until August 15, 1997, to submit an amended answer. Respondent did not do so.

6) On August 4, 1997, Respondent asked the ALJ to change the location of the hearing from Salem to Medford because all of his witnesses resided in the Medford area. The Agency did not object. The ALJ granted the motion and issued an Amended Notice of Hearing.

7) On August 22, 1997, the Agency requested a discovery order directing Respondent to produce the originals of various WH-151 and WH-153 forms at the hearing. Respondent did not respond to the motion and the ALJ granted it.

8) On September 9, 1997, Respondent requested a postponement of the hearing because he had to travel to Mexico to be with a relative who had emergency surgery. The Agency did

not object and the ALJ granted the motion. Following a conference call with the participants, the ALJ reset the hearing for November 18, 1997.

9) At the start of the hearing, the ALJ reviewed the "Notice of Contested Case Rights and Procedures" with Respondent and the ALJ explained these rights and procedures to him.

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

11) On December 15, 1997, the Hearings Unit issued a Proposed Order in this matter. Included in the Proposed Order was an Exceptions Notice that allowed ten (10) days for filing exceptions. The Hearings Unit received no exceptions.

#### FINDINGS OF FACT – THE MERITS

1) During all times material herein, Respondent, a natural person, was licensed by the Commissioner of the Bureau of Labor and Industries as a farm labor contractor with a forestation indorsement. At times he did business as Bermudez Brothers.

2) In early 1994, Agency Compliance Specialist Raul Ramirez met Respondent during a compliance inspection. Ramirez explained to Respondent and his bookkeeper, Rubin Garcia, the requirements of ORS 658.440, and specifically that form WH-151 (Rights of Workers) and form WH-153 (Agreement Between Contractor and Workers) must be furnished and executed,

respectively, before work on a contract begins.

3) On February 7, 1996, the Deschutes National Forest issued a contract solicitation (number R6-1-96-108) for application of big game repellent (BGR).<sup>\*</sup> Work on the contract was to be performed at two times, in the spring and in the fall of 1996.

4) On March 7, 1996, Richard Cole made an offer to perform this contract. During all times material, Cole was not licensed by the Commissioner as a farm labor contractor.

5) On March 15, 1996, Cole signed the following statement:

"I, Richard D. Cole in pursuance with U.S. Forest Service contract #R6-1-96-108 agrees to pay Bermudez Bros. an amount equal to all expenses incurred by Bermudez [sic] Bros., including, BGR, wages, fuel for transportation, boarding for employees, vehicles, and all other miscellaneous items, including spray bottles and mixing tools. Upon receiving all receipts for aforementioned expenses, Richard C. Cole will compensate Bermudez Bros. providing they do not exceed the bid amount, for those expenses incurred."

6) On March 19, 1996, Respondent signed the following statement:

"Bermudez Bros. will be responsible for all supplies and services and will perform all of the duties as stated under U.S. Forest Service contract number R6-1-96-108 for the amount of \$9.75 per acre or less. Any loss or liability will be the

sole responsibility of Bermudez Bros."

7) Richard Cole was awarded USFS contract number 53-04GG-6-1080. Cole and Respondent entered into an agreement for Respondent to perform the duties of USFS contract number 53-04GG-6-1080.

8) CO Gonzalez received no notice from Cole that he had subcontracted the work on contract number 53-04GG-6-1080 to Respondent.

9) Cole twice designated Fortunato (Nato) Chavez as his representative for the contract, in Cole's absence. Chavez was Respondent's employee.

10) On April 8, 1996, Respondent's crew began work on the contract with 12 applicators and two foremen (Cole and Chavez). They worked again on April 9, 10, 12, 13, 15, 16, 17, 18, and 19, 1996, with a 12 to 15 person crew and the same foremen. On April 22, 1996, work stopped for the spring.

11) On May 30, 1996, the administrator of the Wage and Hour Division of the Agency issued a notice to "Interested Parties" announcing the adoption of rules related to farm and forest labor contractors. The notice stated that, effective July 1, 1996, administrative rules were amended to add several forestation and reforestation activities that required a license to perform. Among the added activities was "Application of big game repellent by contract crew." The notice said, "Contractors performing these activities will be required to obtain a farm/forest labor contractor's license as of July 1, 1996." (Emphasis original.)

12) Beginning on July 1, 1996, Oregon law required farm labor

contractors to have a license with a forestation indorsement to apply big game repellent with a contract crew.

13) Work on the contract was completed in September 1996. The USFS made payments on the contract to Cole. He in turn paid Respondent for his expenses per their subcontract. Respondent lost money on the deal.

14) Respondent submitted a payroll report to the Agency for the period September 15 to October 5, 1996. The report listed 16 workers including "Fortunato Chavez." The work classification for all employees was "weeding." It showed that the work was done on Forest Service land located near Bend, but there was no contract number. A handwritten timecard, marked "Bend Spray," shows six employees (including Fortunato Chavez) working on September 19, 20, and 21 (marked "1st Week") and 15 employees (including Chavez) working from September 23 to 28 (marked "2nd Week") and from September 29 to October 1, 1996 (marked "3rd Week"). "Cole" is written at the top of the timecard with a telephone number. The timecard shows workers employed by Respondent to perform the subcontract he had with Cole.

15) Around November 4, 1996, Respondent was awarded USFS contract number 53-04GG-7-4012 (hereinafter contract #4012) to process nursery stock at the Bend Pine Nursery. The work involved lifting ponderosa pine seedlings from seed beds in fields, placing them in coolers, and then sorting, grading, and packing them in a shed or warehouse.

16) In the afternoon of February 24, 1997, Respondent's employees

\* Big game repellent is applied to young trees to prevent deer from eating them.

began work on the contract. A crew of 19 employees began lifting seedlings. Beginning around 8 a.m. on February 25, 1997, Respondent had 41 employees lifting seedlings in the fields and working in the packing shed. Respondent's employees worked through March 7, 1997, when they completed the contract. The number of employees working each day ranged from 17 to 47. The quality of their work was very good. USFS Contracting Officer Parazoo received no labor complaints against Respondent.

17) Most of the 19 employees who worked on February 24, 1997, came with Respondent from work on a USFS contract in California. The rate of pay on the California contract was the same as that on contract #4012. On both contracts, Respondent paid half of the workers' hotel bills while they worked. Some workers who began work on February 25 came from the Medford area. Some of the workers had worked for Respondent for many years.

18) On February 25, 1997, compliance specialist Raul Ramirez inspected the Bend Pine Nursery. He talked with Respondent and workers in the warehouse regarding Forms WH-151 (Rights of Workers) and WH-153 (Agreement Between Contractor and Workers).<sup>\*</sup> Before Ramirez had arrived, none of Respondent's employees had signed the WH-151 or WH-153 forms. No worker signed or received copies of the forms before he

or she started work. Respondent showed Ramirez the application packet Respondent gives to new employees. The packet contained an employment application, an I-9 form, a W-2 form, and the WH-151 and WH-153 forms. Respondent told Ramirez that the WH-151 and WH-153 forms for this job were at his office in Winters, California. When Ramirez said he would contact Respondent's bookkeeper, Garcia, and ask him to fax copies of the forms to the Bureau's Bend office, Respondent said this was not necessary because he did not have the forms. Ramirez talked to workers. Some said they had signed WH-153 forms, others said they had not. Workers made inconsistent statements about who was supposed to pay for their motel expenses, which is a condition of employment that should be agreed to on the WH-153 form. When Ramirez again talked with him, Respondent said he did not have the WH-151 and WH-153 forms. Ramirez gave Respondent blank WH-151 and WH-153 forms and showed him a copy of Form WH-87, on which each applicant for a farm labor contractor license certifies that he or she has read and understood the WH-151 and WH-153 forms and will provide the information contained in the forms to workers as required by law. Respondent acknowledged his need to provide and execute the forms. Ramirez told Respondent to fill out the forms and turn them in to the Bureau's Bend office by the next morning.

19) On the morning of February 26, 1997, Respondent brought a stack of WH-151 and WH-153 forms to the Bureau's office. They were original forms (that is, the signatures were in ink and not photocopied). Respondent had had his workers sign the forms the previous evening. At that time, Respondent also had some workers sign another set of WH-151 and WH-153 forms, which he sent to his own office.

20) Jose Trinidad Ramirez and Guadalupe Valero have worked for Respondent for many years. They have had no problem getting paid by Respondent. They think he treats the employees very well. At the time of hearing, Respondent believed he was doing a good job with the forms.

#### ULTIMATE FINDINGS OF FACT

1) During all times material, Respondent was licensed by the Commissioner of the Bureau of Labor and Industries as a farm labor contractor with a forestation indorsement.

2) During all times material, Richard Cole was not licensed by the Commissioner of the Bureau of Labor and Industries as a farm labor contractor.

3) In March 1996, Richard Cole bid on USFS contract number 53-04GG-6-1080 to apply big game repellent.

4) In March 1996, Richard Cole entered into a subcontract with Respondent to perform USFS contract number 53-04GG-6-1080.

5) Respondent supplied all employees who performed USFS contract number 53-04GG-6-1080. The employees performed the contract during April and September 1996. Richard Cole was involved in the performance

of the contract. He received payments from the Forest Service and paid Respondent pursuant to the subcontract.

6) During all times material, Richard Cole was not a farm/forest labor contractor, as defined by ORS 658.405 (1) and OAR 839-15-004(4) and (8)(c).

7) On February 25, 1997, Respondent failed to furnish 41 of his employees with Agency forms WH-151 (Rights of Workers) and failed to execute WH-153 (Agreement Between Contractor and Workers), or comparable written forms, in English or any other language before the 41 employees started work on a reforestation contract.

#### CONCLUSIONS OF LAW

1) The Commissioner of the Bureau of Labor and Industries of the State of Oregon has jurisdiction over the subject matter and of the person herein. ORS 648.405 to 658.503.

2) ORS 658.405 provides in part:

"As used in ORS 658.405 to 658.503 and 658.830 and 658.991 (2) and (3), unless the context requires otherwise:

"(1) 'Farm labor contractor' means any person who, for an agreed remuneration or rate of pay, recruits, solicits, supplies or employs workers to perform labor for another to work in forestation or reforestation of lands, including but not limited to the planting, transplanting, tubing, precommercial thinning and thinning of trees and seedlings, and clearing, piling and disposal of brush and slash and other related activities \* \* \*; or who bids or submits prices on contract offers for those activities; or who

\* Bureau of Labor and Industries forms WH-151 and WH-153 are written in English. The same forms written in Spanish are numbered WH-151s and WH-153s. Unless otherwise noted, any reference in this Order to forms WH-151 and WH-153 is to be read to include forms WH-151s and WH-153s.

enters into a subcontract with another for any of those activities."

Former OAR 839-15-004 (BL 2-1996) provided in part:

"As used in these rules, unless the context requires otherwise:

\*\*\*\*\*

"(4) 'Forest Labor Contractor' means:

"(a) Any person who, for an agreed remuneration or rate of pay, recruits, solicits, supplies or employs workers to perform labor for another in the forestation or reforestation of lands; or

\*\*\*\*\*

"(d) Any person who bids or submits contract offers for the forestation or reforestation of lands; or

"(e) Any person who subcontracts with another for the forestation or reforestation of lands.

\*\*\*\*\*

"(8) 'Forestation or reforestation of lands' includes, but is not limited to:

\*\*\*\*\*

"(c) Other activities related to the forestation or reforestation of lands including, but not limited to, tree shading, pinning, tagging or staking; fire trail construction and maintenance; slash burning and mop up; mulching of tree seedlings; and any activity related to the growth of trees and tree seedlings and the disposal of debris from the land."

OAR 839-015-0004 (BL 5-1996, effective July 1, 1996) provides in part:

"As used in these rules, unless the context requires otherwise:

\*\*\*\*\*

"(4) 'Forest Labor Contractor' means:

"(a) Any person who, for an agreed remuneration or rate of pay, recruits, solicits, supplies or employs workers to perform labor for another in the forestation or reforestation of lands; or

\*\*\*\*\*

"(d) Any person who bids or submits contract offers for the forestation or reforestation of lands; or

"(e) Any person who subcontracts with another for the forestation or reforestation of lands.

\*\*\*\*\*

"(8) 'Forestation or reforestation of lands' includes, but is not limited to:

\*\*\*\*\*

"(c) Other activities related to the forestation or reforestation of lands including, but not limited to, tree shading, pinning, tagging or staking; fire trail construction and maintenance; slash burning and mop up; mulching of tree seedlings; forest fire suppression by contract crew; application of big game repellent by contract crew; herbicide or pesticide application in the forest by contract crew; gopher baiting; gopher trapping and any activity related to the growth of trees and tree seedlings and the disposal of debris from the land.

\*\*\*\*\*

"(23) 'Application of big game repellent by contract crew' means work performed by workers who are recruited, solicited, supplied or employed by a person who has contracted to supply a crew of workers to apply big game repellent." (Emphasis added.)

ORS 658.410(1) provides in part:

"No person shall act as a farm labor contractor with regard to forestation or reforestation of lands unless the person possesses a valid farm labor contractor's license with the indorsement required by ORS 658.417(1)."

ORS 658.417 provides in part:

"In addition to the regulation otherwise imposed upon farm labor contractors pursuant to ORS 658.405 to 658.503 and 658.830, a person who acts as a farm labor contractor with regard to the forestation or reforestation of lands shall:

"(1) Obtain a special indorsement from the Commissioner of the Bureau of Labor and Industries on the license required by ORS 658.410 that authorizes the person to act as a farm labor contractor with regard to the forestation or reforestation of lands."

Former OAR 839-15-125 (BL 3-1990) provided in part:

"No person may perform the activities of a Farm or Forest Labor Contractor without first obtaining a temporary permit or license issued by the Bureau. No person may perform the activities of a Forest Labor Contractor \* \* \* without first obtaining a special indorsement

from the Bureau authorizing such performance. \* \* \*"

Likewise, OAR 839-015-0125 (BL 5-1996, effective July 1, 1996) provides in part:

"No person may perform the activities of a farm or forest labor contractor without first obtaining a temporary permit or license issued by the bureau. No person may perform the activities of a forest labor contractor \* \* \* without first obtaining a special indorsement from the bureau authorizing such performance. \* \* \*"

Richard Cole was not a farm labor contractor. Because he bid on a big game repellent contract and subcontracted that activity before July 1, 1996, and because he did not employ workers to perform the contract after July 1, 1996, Richard Cole was not acting as a farm labor contractor with regard to the forestation or reforestation of lands. Accordingly, Richard Cole did not need a farm labor contractor license issued by the commissioner.

3) ORS 658.440 provides in part:

"(3) No person acting as a farm labor contractor, or applying for a license to act as a farm labor contractor, shall:

\*\*\*\*\*

"(e) Assist an unlicensed person to act in violation of ORS 658.405 to 658.503 and 658.830."

Richard Cole was not acting as a farm labor contractor without a license. Thus, Respondent did not assist an unlicensed person to act in violation of ORS 658.405 to 658.503 and 658.830 and Respondent did not violate ORS 658.440(3)(e) as alleged.

4) ORS 658.440(1) provides in part:

"Each person acting as a farm labor contractor shall:

\*\*\*\*\*

"(f) Furnish to each worker, at the time of hiring, recruiting, soliciting or supplying, whichever occurs first, a written statement in the English language and any other language used by the farm labor contractor to communicate with workers that contains a description of:

"(A) The method of computing the rate of compensation.

"(B) The terms and conditions of any bonus offered, including the manner of determining when the bonus is earned.

"(C) The terms and conditions of any loan made to the worker.

"(D) The conditions of any housing, health and day care services to be provided.

"(E) The terms and conditions of employment, including the approximate length of season or period of employment and the approximate starting and ending dates thereof.

"(F) The terms and conditions under which the worker is furnished clothing or equipment.

"(G) The name and address of the owner of all operations where the worker will be working as a result of being recruited, solicited, supplied or employed by the farm labor contractor.

"(H) The existence of a labor dispute at the worksite.

"(I) The worker's rights and remedies under ORS chapter 656, ORS 658.405 to 658.485, the Service Contract Act (41 U.S.C. 351-401) and any other such law specified by the Commissioner of the Bureau of Labor and Industries, in plain and simple language in a form specified by the commissioner.

"(g) At the time of hiring and prior to the worker performing any work for the farm labor contractor, execute a written agreement between the worker and the farm labor contractor containing the terms and conditions described in paragraph (f)(A) to (I) of this subsection. The written agreement shall be in the English language and any other language used by the farm labor contractor to communicate with the workers."

OAR 839-015-0310 provides in part:

"(1) Every Farm and Forest Labor Contractor must furnish each worker with a written statement of the worker's rights and remedies under the Worker's Compensation Law, the Farm and Forest Labor Contractor Law, and Federal Service Contracts Act, The Federal and Oregon Minimum Wage Laws, Oregon Wage Collection Laws, Unemployment Compensation Laws, and Civil Rights laws. The form must be written in English and in the language used by the contractor to communicate with the workers.

"(2) The form must be given to the workers at the time they are hired, recruited or solicited by the contractor or at the time they are

supplied to another by the contractor, whichever occurs first.

"(3) The Commissioner has prepared Form WH-151 for use by contractors in complying with this rule. The form is in English and Spanish and is available at any office of the Bureau of Labor and Industries."

OAR 839-015-0360(4) provides:

"Farm and forest labor contractors are required to furnish their workers with a written statement disclosing the terms and conditions of employment, including all the elements contained in Form WH-151 and if they employ workers, to execute a written agreement with their workers prior to the starting of work. The written agreement must provide for all the elements contained in Form WH-153. A copy of the agreement and the disclosure statement must be furnished to the workers in English and in any other language used to communicate with the workers. The disclosing statement must be provided to the workers at the time they are hired, recruited or solicited or at the time they are supplied to another by that contractor, whichever occurs first. Amended disclosure statements must be provided at any time any of the elements listed in the original statement change. A copy of the agreement must be furnished to workers prior to the workers starting work. Nothing in the written agreement relieves the contractor or any person for whom the contractor is acting of compliance with any represen-

tation made by the contractor in recruiting the workers."

Respondent violated ORS 658.440 (1)(f) 41 times by failing to provide a written statement as described in subsection (1)(f) to each worker at the time the worker was hired, recruited, solicited, or supplied, whichever occurred first. Respondent also violated ORS 658.440(1)(g) 41 times by failing to execute the written agreement described in subsection (1)(g) with each worker at the time of hiring and prior to the worker performing any work for him.

5) ORS 658.453(1) provides in part:

"In addition to any other penalty provided by law, the Commissioner of the Bureau of Labor and Industries may assess a civil penalty not to exceed \$2,000 for each violation by:

\*\*\*\*\*

"(c) A farm labor contractor who fails to comply with ORS 658.440(1)(f)."

OAR 839-015-0505(2) provides:

"'Violation' means a transgression of any statute or rule, or any part thereof and includes both acts and omissions."

OAR 839-015-0508 provides in part:

"(1) Pursuant to ORS 658.453, the commissioner may impose a civil penalty for violations of any of the following statutes:

\*\*\*\*\*

"(g) Failing to furnish each worker, at the time of hiring, recruiting, soliciting or supplying, whichever occurs first, a written

statement that contains the terms and conditions described in ORS 658.440(1)(f);

"(h) Failing to execute a written agreement between the worker and the farm labor contractor containing the terms and conditions described in ORS 658.440(1)(f), at the time of hiring and prior to the worker performing any work for the farm labor contractor[.]"

OAR 839-015-0510 provides in part:

"(1) The commissioner may consider the following mitigating and aggravating circumstances when determining the amount of any civil penalty to be imposed, and shall cite those the commissioner finds to be appropriate:

"(a) The history of the contractor or other person in taking all necessary measures to prevent or correct violations of statutes or rules;

"(b) Prior violations, if any, of statutes or rules;

"(c) The magnitude and seriousness of the violation;

"(d) Whether the contractor or other person knew or should have known of the violation.

"(2) It shall be the responsibility of the contractor or other person to provide the commissioner any mitigating evidence concerning the amount of the civil penalty to be imposed.

"(3) In arriving at the actual amount of the civil penalty, the commissioner shall consider the amount of money or valuables, if any, taken from employees or subcontractors by the contractor or

other person in violation of any statute or rule.

"(4) Notwithstanding any other section of this rule, the commissioner shall consider all mitigating circumstances presented by the contractor or other person for the purpose of reducing the amount of the civil penalty to be imposed."

OAR 839-015-0512 provides in part:

"(1) The civil penalty for any one violation shall not exceed \$2,000. The actual amount of the civil penalty will depend on all the facts and on any mitigating and aggravating circumstances.

"\*\*\*\*\*"

"(4) The civil penalty for all other violations shall be set in accordance with the determinations and considerations referred to OAR 839-015-0510.

"(5) The civil penalties set out in this rule are in addition to any other penalty assessed by law or rule."

Under the facts and circumstances of this record, and in accordance with ORS 658.453 and related portions of ORS 658.405 to 658.475 and of Oregon Administrative Rules, the Commissioner of the Bureau of Labor and Industries has the authority to impose a civil penalty for each violation found herein. The assessment of the civil penalty specified in the Order below is an appropriate exercise of that authority.

## OPINION

### Respondent Did Not Assist an Unlicensed Farm Labor Contractor

The Agency alleged that Respondent assisted Richard Cole to act as an unlicensed farm labor contractor by subcontracting with Cole and then performing the contract to apply big game repellent in September 1996, after the law had changed and required a license for that activity. Respondent's defense was that he believed Cole was licensed.

The facts show that application of big game repellent was not an activity that required a license until July 1, 1996. Cole bid on the BGR contract in March 1996, when no license was required for that activity. He entered into a subcontract with Respondent in March 1996, before a license was required to do that. The evidence is uncontradicted that Respondent's employees performed the contract in September 1996. There is no evidence that Cole, for an agreed rate of pay, employed or supplied workers to perform the contract.

The statutory definition of a farm labor contractor includes a person "who enters into a subcontract with another for [forestation and reforestation] activities." ORS 658.405(1). Thus the act that brings a person within the definition of a farm labor contractor is the act of entering into a subcontract. It is not the performance of the subcontract. Here, the act of entering into a subcontract occurred in March 1996, not in September 1996.

The rule definition of a forest labor contractor closely tracks the statutory

definition, but the language is slightly different. The rule's definition of a forest labor contractor includes "any person who subcontracts with another for the forestation and reforestation of lands." Former OAR 839-15-004(4)(e); OAR 839-015-0004(4)(e). Nothing in the rule's language suggests that a subcontractor's performance of a forestation and reforestation contract is an act that brings the contractor within the definition. Each subsection of former OAR 839-15-004(4) and the current OAR 839-015-0004(4) refers to actions by a person that would bring that person within the definition of a forest labor contractor. No subsection refers to an action by another, such as a subcontractor (Respondent), that would bring the person (Cole) within the definition of a forest labor contractor. The forum will not read the rule to be broader than the statute. *In the Matter of Richard Cole*, 16 BOLI 221, 229 (1997). Thus, under the definition of forest labor contractor in former OAR 839-15-004(4)(e) and OAR 839-015-0004(4)(e), the act that brings a person within the definition of a farm labor contractor is the act of entering into a subcontract, not the performance of the subcontract.

Since Cole entered into the subcontract for application of BGR at a time when no license was required to do so (that is, before July 1, 1996), and since he took no action that would make him a farm/forest labor contractor after July 1, 1996, the forum concludes that he did not act as a farm labor contractor without a license.<sup>\*</sup> *Cole, supra*. Accordingly, Respondent did not violate ORS 658.440(3)(e) as

\* Compare *In the Matter of Manuel Galan*, 16 BOLI 51 (1997) (where an

alleged when he performed the sub-contract in September 1996.

**Respondent Failed to Furnish Workers with a Written Statement Containing a Description of the Terms and Conditions of Employment and the Workers' Rights and Remedies**

The Agency alleged that Respondent failed to furnish each of 41 employees with a written statement disclosing the worker's rights and remedies, as required by ORS 658.440(1)(f). At hearing, Respondent admitted that he did not give any of his workers a WH-151 until the evening of February 25, 1997. On February 24, 1997, nineteen employees began working on the USFS contract. By the morning of February 25, 1997, forty-one employees were working on the contract. There is no evidence that Respondent gave his workers on this contract any written statement that would be the equivalent of a WH-151 before he gave them the WH-151 on February 25.

ORS 658.440(1)(f) requires a farm labor contractor to furnish to each worker, at the time of hiring, recruiting, soliciting, or supplying, whichever occurs first, a written statement (in the English language and any other language used by the farm labor contractor to communicate with workers) that contains a description of the terms and conditions of employment and disclosing the worker's rights and remedies. The commissioner has prepared WH-151 for contractors' use in

complying with this requirement. Like the statute, OAR 839-015-0310 requires the farm labor contractor to give the form "to the workers at the time they are hired, recruited or solicited by the contractor or at the time they are supplied to another by the contractor, whichever occurs first."

The evidence proves that Respondent did not comply with the requirements of ORS 658.440(1)(f) or OAR 839-015-0310 with respect to the 41 employees working on February 25, 1997. Thus, Respondent violated the statute and rule 41 times.

**Respondent Failed to Execute a Written Agreement Between Each Worker and Himself Containing a Description of the Terms and Conditions of Employment and the Workers' Rights and Remedies at the Time of Hiring and Prior to the Workers Performing Any Work for Respondent**

The Agency alleged that Respondent failed to execute a written agreement with each of 41 employees, as required by ORS 658.440(1)(g). At hearing, Respondent admitted that he did not execute a written agreement with any of his workers until the evening of February 25, 1997. As mentioned above, by the morning of February 25, 1997, forty-one employees were working on the contract.

Pursuant to ORS 658.440(1)(g), each farm labor contractor shall, at "the time of hiring and prior to the worker performing any work for the farm labor

unlicensed person bid on and obtained a contract to apply herbicide before OAR 839-15-004(8) changed (*i.e.*, before July 1, 1996), but then recruited workers to perform the forestation contract after the rule-change became effective, the person acted as a farm labor contractor without a license in violation of ORS 658.410(1) and 658.417(1).

contractor, execute a written agreement between the worker and the farm labor contractor containing the terms and conditions described in paragraph (f)(A) to (I) of this subsection. The written agreement shall be in the English language and any other language used by the farm labor contractor to communicate with the workers." Likewise, OAR 839-015-0360(4) requires the farm labor contractor to furnish a copy of the agreement to workers prior to the workers starting work.

The evidence proves that Respondent did not comply with the requirements of ORS 658.440(1)(g) or OAR 839-015-0360(4) with respect to the 41 employees working on February 25, 1997. Thus, Respondent violated this statute and rule 41 times.

**Civil Penalties**

The Agency proposed to assess civil penalties for (1) Respondent's assisting a person to act as a farm labor contractor without a license, in violation of ORS 658.440(3)(e) (\$2,000 for one violation); (2) Respondent's failure to

furnish each of 41 employees with a written statement disclosing the terms and conditions of employment and the worker's rights and remedies, in violation of ORS 658.440(1)(f) (\$20,500 for 41 violations); and (3) Respondent's failure to execute a written agreement disclosing the terms and conditions of employment and the worker's rights and remedies with each of 41 employees, in violation of ORS 658.440(1)(g) (\$20,500 for 41 violations). In addition, the Agency alleged aggravating circumstances regarding the violations of ORS 658.440(1)(f) and (g). At hearing, Respondent admitted his mistake in not taking care of the forms until after the Agency inquired about them, and he presented evidence of mitigating circumstances.

The commissioner may assess a civil penalty not to exceed \$2,000 for each of the violations. ORS 658.453(1)(c); OAR 839-015-0508(1)(g), (h), and (n). Each violation is a separate and distinct offense. OAR 839-015-0507.\* The commissioner may consider mitigating and aggravating

\* See *In the Matter of Andres Ivanov*, 11 BOLI 253, 263 (1993) (where a farm labor contractor failed to furnish each of four workers forms WH-151 and WH-153, the commissioner found four violations of ORS 658.440(1)(f)); *In the Matter of Manuel Galan*, 15 BOLI 106, 124, 127 (1996) (where corporation's foreman recruited and did not furnish 14 workers with a written description of the terms and conditions of the employment and did not execute written agreements with them, the commissioner held that the corporation violated ORS 658.440(1)(f) 14 times and ORS 658.440(1)(g) 14 times); *In the Matter of Stancil Jones*, 9 BOLI 233, 239 (1991) (where respondent failed to furnish workers with written agreements and statements of rights, such failure is a violation of ORS 658.440(1)(f) "as to each worker involved."); *In the Matter of Francis Kau*, 7 BOLI 45, 53 (1987) (contractor's failure to furnish a written statement to at least four workers constitutes four violations of ORS 658.440(1)(f)); *In the Matter of Jose Solis*, 5 BOLI 180, 202 (1986) (failure to furnish each of six workers the written statement required by ORS 658.440(1)(f) constitutes six violations of that statute, for purposes of ORS 658.453(1)(c)). But see *In the Matter of Jeffy Bolden*, 13 BOLI 292, 297-98 (1994) (where on two contracts a farm labor contractor failed to furnish up to eight workers on one contract and up to 13

circumstances when determining the amount of any penalty to be imposed. OAR 839-015-0510(1). It is Respondent's responsibility to provide the commissioner with any mitigating evidence. OAR 839-015-0510(2).

The forum found no violation of ORS 658.440(3)(e) (assisting a person to act as a farm labor contractor without a license), so, of course, there is no penalty based on that allegation.

Regarding the violations of ORS 658.440(1)(f) and (g), the forum finds three aggravating circumstances here. First, Respondent knew of his obligation to comply with ORS 658.440(1)(f) and (g) because (1) he certified in his application for a license that he had read and understood the WH-151 and WH-153 forms and would provide the information contained in the forms to workers as required by law; and (2) an Agency compliance specialist, Raul Ramirez, had advised him and his bookkeeper about these legal requirements before work on this contract began.

Second, Respondent told Mr. Ramirez on February 25, 1997, that he (Respondent) had these forms at his California office for the workers on this USFS contract. This representation to the Agency was false. Respondent told Ramirez the truth only when Ramirez said he'd get the forms from Respondent's California office.

Third, these types of violations are serious because protection of farm labor workers is at the heart of farm labor contractor statutes (ORS 658.405 to 658.503, 658.830, and 658.991),

workers on the other contract the written statement required by ORS 658.440(1)(f), the commissioner held that respondent violated ORS 658.440(1)(f) two times).

and the written statements furnished to workers and the written agreements executed with workers are keys to the workers being able to protect themselves. *In the Matter of Andres Ivanov*, 11 BOLI 253, 264 (1993); *In the Matter of Highland Reforestation, Inc.*, 4 BOLI 185, 210 (1984). Failure to furnish this information and execute these agreements frustrates the law's purpose of protecting this state's workers. *In the Matter of Highland Reforestation, Inc.*, 4 BOLI at 210. A good example of that is evident in this case, where some workers were uncertain whether Respondent would pay all or a portion of their motel expenses during their work on the contract. That information is required to be furnished to workers and is required to be in their written agreement with the farm labor contractor. Workers must have such information and such an agreement before they begin working.

The forum also finds mitigating circumstances. First, Respondent took prompt action to correct the violations. He provided documents to the Agency within 24 hours of his conversation with Mr. Ramirez, and apparently he furnished the written statements and executed the written agreements with the workers within at most 48 hours after they had begun work. In addition, there was uncontroverted evidence that Respondent had no prior violations of statutes or rules in many years as a farm labor contractor. Further, there was uncontroverted evidence that some workers, at least, considered Respondent a good employer, and

these workers had not had problems with him paying them appropriately. Finally, Respondent indicated his desire to comply with the law in the future and his regret for his past mistakes. He and his bookkeeper, Mr. Garcia, testified to their efforts to comply with the law and their belief that they were currently in compliance.

The Agency requested a civil penalty of \$500 for each of the 82 violations of ORS 658.440(1)(f) and (g). Having fully considered the aggravating and mitigating factors, and having reviewed previous final orders discussing violations of ORS 658.440(1)(f) and (g), including the aggravating and mitigating factors therein, the forum hereby assesses Respondent a \$250 civil penalty for each violation.\*

#### ORDER

NOW, THEREFORE, as authorized by ORS 658.453, ANDRES BERMUDEZ is hereby ORDERED to deliver to the Bureau of Labor and Industries, Business Office Ste 1010, 800 NE Oregon Street # 32, Portland, Oregon 97232-2109, a certified check payable to the BUREAU OF LABOR AND INDUSTRIES in the amount of TWENTY THOUSAND FIVE HUNDRED DOLLARS (\$20,500), plus any interest thereon that accrues at the

\* See *In the Matter of Manuel Galan*, 15 BOLI 106, 124, 127, 138 (1996) (\$14,000 in civil penalties for 14 violations of ORS 658.440(1)(f) and \$28,000 for 14 violations of ORS 658.440(1)(g)); *In the Matter of Jeffy Bolden*, 13 BOLI 292, 297-98 (1994) (\$800 in civil penalties for two violations of ORS 658.440(1)(f), \$300 for the first violation and \$500 for the second; and \$800 in civil penalties for two violations of ORS 658.440(1)(g), \$300 for the first violation and \$500 for the second); *In the Matter of Andres Ivanov*, 11 BOLI 253, 259-60, 263-64 (1993) (\$1,000 in civil penalties for four violations of ORS 658.440(1)(f)); *In the Matter of Francis Kau*, 7 BOLI 45, 53, 55 (1987) (\$500 in civil penalties for four violations of ORS 658.440(1)(f)); and *In the Matter of Jose Solis*, 5 BOLI 180, 202 (1986) (\$2,000 in civil penalties for six violations of ORS 658.440(1)(f)).

In the Matter of  
**GRACIELA VARGAS,**  
 aka Graciela Vargas Cardenas, dba  
 Restaurant Vargas, Respondent.

Case Number 45-97

Final Order of the Commissioner  
 Jack Roberts

Issued February 4, 1998.

**SYNOPSIS**

Respondent, who operated a restaurant and lunch truck, employed two claimants and failed to pay them all wages due upon termination, in violation of ORS 652.140(2). Respondent's failure to pay the wages was willful, and the Commissioner ordered respondent to pay civil penalty wages, pursuant to ORS 652.150. ORS 652.140(2), 652.150.

The above-entitled contested case came on regularly for hearing before Douglas A. McKean, designated as Administrative Law Judge (ALJ) by Jack Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on June 3, 1997, in Conference Room 251A of the Public Service Building, 255 Capitol Street NE, Salem, Oregon. The record was reopened and the forum received additional testimony on November 13, 1997, at the Bureau's office in Salem.

The Bureau of Labor and Industries (the Agency) was represented by Alan McCullough, an employee of the Agency. Alicia Terrero (Claimant Terrero) and Raul Cano (Claimant Cano) were present throughout the hearing

on June 3, 1997. Claimant Cano was present during the hearing on November 13, 1997. Graciela Vargas, aka Graciela Vargas Cardenas (Respondent), was present throughout the hearing on both dates. She was represented by attorney Matthew U'Ren during the hearing on November 13, 1997.

The Agency called the following witnesses: Raul Cano, Claimant; Manuel Hernandez and Enrique Hidalgo, compliance specialists with the Wage and Hour Division of the Agency; Cynthia Powers, insurance agent; and Alicia Terrero, Claimant.

Respondent called the following witnesses: Rafael Alejos; Carlos Cardenas, Respondent's son and former employee; Lorena Cardenas, Respondent's daughter and former employee; Jose Monteblanco, Respondent's bookkeeper; Uriel Quiroz, business owner; Graciela Vargas, Respondent; and Pastor Vargas, Respondent's brother and former employee.

Maria Morrison, appointed by the forum and under proper affirmation, acted as an interpreter for Spanish speaking witnesses on June 3, 1997. Jose Monteblanco, under proper affirmation, assisted and acted as an interpreter for Respondent on June 3, 1997. Christine Chabre, appointed by the forum and under proper affirmation, acted as an interpreter for Spanish speaking witnesses on November 13, 1997.

Administrative exhibits X-1 to X-31, Agency exhibits A-1 to A-22, and Respondent exhibits R-4 to R-6 were received into evidence. Respondent withdrew exhibits R-1 and R-2. The

ALJ did not receive R-3. The record closed on November 13, 1997.

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

**FINDINGS OF FACT –  
 PROCEDURAL**

1) On July 31, 1996, Claimant Terrero filed a wage claim with the Agency. She alleged that Respondent employed her and failed to pay wages earned and due to her.

2) On July 31, 1996, Claimant Cano filed a wage claim with the Agency. He alleged that Respondent employed him and failed to pay wages earned and due to him.

3) At the same time that they filed their wage claims, Claimants assigned to the Commissioner of Labor, in trust for Claimants, all wages due from Respondent.

4) On November 20, 1996, the Agency served on Respondent an Order of Determination based upon the wage claim filed by Claimant Terrero and the Agency's investigation. The Order of Determination alleged that Respondent owed her a total of \$9,050 in wages and \$1,200 in civil penalty wages. The Order of Determination required that, within 20 days, Respondent either pay these sums in trust to the Agency, or request an administrative hearing and submit an answer to the charges. At hearing, the ALJ granted the Agency's motion to amend

the wages alleged due from \$9,050 to \$8,259.

5) On November 20, 1996, the Agency served on Respondent an Order of Determination based upon the wage claim filed by Claimant Cano and the Agency's investigation. The Order of Determination alleged that Respondent owed him a total of \$7,338 in wages and \$1,440 in civil penalty wages. The Order of Determination required that, within 20 days, Respondent either pay these sums in trust to the Agency, or request an administrative hearing and submit an answer to the charges.

6) On December 6, 1996, Respondent filed an answer to each Order of Determination and requested a contested case hearing. On December 20, 1996, Respondent filed an amended answer in each case. Respondent denied that she was Claimants' employer and denied that she owed either Claimant wages or civil penalty wages.

7) On April 18, 1997, the Hearings Unit issued a Notice of Hearing to the Respondent, the Agency, and the Claimants indicating the time and place of the hearing. Together with the Notice of Hearing, the forum sent a document entitled "Notice of Contested Case Rights and Procedures" containing the information required by ORS 183.413, and a copy of the forum's contested case hearings rules, OAR 839-050-0000 to 839-050-0440.

8) On May 6, 1997, the ALJ issued a discovery order directing each participant to submit a summary of the case, including a list of the witnesses to be called and the identification and description of any physical evidence to

be offered into evidence, together with a copy of any such document or evidence, according to the provisions of OAR 839-050-0210(1). The summaries were due by May 23, 1997. The order advised the participants of the sanctions, pursuant to OAR 839-050-0200(8), for failure to submit the summary. The Agency submitted a timely summary and a supplement. Respondent submitted a summary on May 29, 1997.

9) At the start of the hearing on June 3, 1997, Respondent reviewed the "Notice of Contested Case Rights and Procedures" with the assistance of Mr. Montebanco and the ALJ explained these rights and procedures to her.

10) Pursuant to ORS 183.415(7), the ALJ explained the issues involved in the hearing, the matters to be proved or disproved, and the procedures governing the conduct of the hearing.

11) On July 31, 1997, the ALJ issued a proposed order. On August 10, 1997, Respondent, through attorney Jose Mata, requested an extension of time to file exceptions to the proposed order. The ALJ granted that request and on September 2, 1997, Respondent filed timely exceptions. In addition, Respondent moved to reopen the record. The Agency responded to the motion and on September 19, 1997, the ALJ granted it in part. The ALJ

agreed to reopen the record to take evidence on Respondent's allegation that Claimant Cano attempted to bribe a potential witness.

12) The ALJ set an additional hearing date. At Respondent's request, that date was reset to November 13, 1997.

13) At the start of the hearing on November 13, 1997, Respondent's attorney, Matthew U'Ren, stated that he understood the contested case rights and procedures and had no question about them.

14) On November 25, 1997, the ALJ issued an amended proposed order. Included in the amended proposed order was an Exceptions Notice that allowed ten days for filing exceptions to the amended proposed order. The Hearings Unit received no exceptions. The forum has addressed Respondent's original exceptions in the Opinion section of this Final Order.

#### FINDINGS OF FACT – THE MERITS

1) During all times material herein, Respondent, a person, did business as Restaurant Vargas in Cornelius, Oregon. She employed one or more persons in the State of Oregon. She employed members of her family.

2) From November 18, 1995, to May 29, 1996, Respondent employed Claimant Terrero as a cook and waitress.\* The agreed rate of pay was \$5.00 per hour.

3) From April 1 to June 10, 1996, Respondent employed Claimant Cano. The agreed rate of pay was \$6.00 per hour. Respondent and Claimant Cano were not partners.

4) Respondent bought two lunch trucks, upon which she had painted "Taqueria Vargas." Respondent obtained automobile insurance, naming Claimant Cano as one of the drivers who would frequently use a truck. Claimants worked in one of the lunch trucks, driving it to various business locations, farmers' fields, and apartments to sell food and drinks.

5) Respondent kept no time or payroll records for either Claimant.

6) Claimant Terrero's records and testimony reveal the following information, which the forum has accepted as fact: she worked 1537 total hours; of the total hours, 546 were hours worked in excess of forty hours per week. Claimant Terrero and Respondent had no agreement about overtime hours. Claimant Terrero earned \$9,050 in wages ((991 hours x \$5.00) + (546 hours x \$7.50) = \$9,050). Respondent paid her \$820. The balance of earned, unpaid, due, and owing wages equals \$8,230.

7) Claimant Cano's records and testimony reveal the following information, which the forum has accepted as fact: he worked 950 total hours; of the total hours, 546 were hours worked in excess of forty hours per week. Claimant Cano and Respondent had no agreement about overtime hours. Claimant Cano earned \$7,338 in wages ((404 hours x \$6.00) + (546 hours x \$9.00) = \$7,338). Respondent paid him nothing. The balance of

earned, unpaid, due, and owing wages equals \$7,338.

8) Claimant Terrero quit without notice on May 28, 1996, because Respondent was not paying her.

9) Claimant Cano quit without notice on June 10, 1996, because Respondent was not paying him and because he was having trouble with Respondent's son, Carlos.

10) Respondent did not pay Claimant Terrero more than \$820 in wages because Respondent considered the restaurant to be a family business, and she was treating Claimant Terrero as a member of the family. During some of the time relevant herein, Claimant Terrero lived in Respondent's house. Respondent knowingly paid Claimant Terrero only \$820 in wages, she paid her this amount intentionally, and she was a free agent.

11) Respondent knowingly and intentionally paid Claimant Cano nothing, although she suffered or permitted him to work for her and knew he was not her partner. During some of the time relevant herein, Claimant Cano lived in Respondent's house, and Respondent apparently believed this was sufficient compensation for his services. Respondent was a free agent.

12) The forum computed civil penalty wages for Claimant Terrero, in accordance with ORS 652.150 and Agency policy, as follows: \$5.00 (Claimant Terrero's hourly rate) multiplied by 8 (hours per day) equals \$40.00. This figure of \$40.00 is multiplied by 30 (the maximum number of days for which civil penalty wages continued to accrue) for a total of \$1,200.

\* Claimant Terrero did not work for Respondent from February 15 to March 11, 1996, because Respondent was not paying her and Claimant was desperate for money. During that period she worked another job. Claimant Terrero returned to work as a cook for Respondent on March 12, 1996, because Respondent told her that Respondent would soon get a liquor license and wanted her help. Claimant Terrero later worked in the lunch truck with Claimant Cano.

The Agency set forth this figure in the Order of Determination.

13) The forum computed civil penalty wages for Claimant Cano, in accordance with ORS 652.150 and Agency policy, as follows: \$6.00 (Claimant Cano's hourly rate) multiplied by 8 (hours per day) equals \$48.00. This figure of \$48.00 is multiplied by 30 (the maximum number of days for which civil penalty wages continued to accrue) for a total of \$1,440. The Agency set forth this figure in the Order of Determination.

14) Rafael Alejos worked for Glenn Walters Nursery for about 10 months in 1996 and for 1000 Farms for two months that year. At different times, Alejos had arranged with Claimant Cano's sister, Maria Refugio Gutierrez, to provide food for workers. Gutierrez had earlier owned Las Conchas Restaurant, which she sold to Respondent (and which became Restaurant Vargas), and she operated a couple of lunch trucks. Claimant Cano had operated one of these trucks for Gutierrez. In February, March, or April 1997, Claimant Cano met with Rafael Alejos. Claimant Cano asked Alejos if he would be a witness for him at the Bureau's hearing. Claimant Cano wanted Alejos to testify that Cano had been Respondent's employee. Alejos refused because he had only known Cano as Gutierrez's employee, not Respondent's. Claimant Cano then said he would give Alejos "good money," that is, a bribe, if Alejos would testify for him. Alejos refused.

15) The forum carefully observed Claimant Terrero's demeanor and found her testimony to be credible. Her testimony was consistent and

corroborated by other credible evidence. There is no reason to determine Claimant Terrero's testimony to be anything except reliable and credible.

16) The forum carefully observed Claimant Cano's demeanor and found his testimony regarding his employment with Respondent to be credible. His testimony denying his meeting in 1997 with Rafael Alejos was not credible.

17) Respondent's testimony was unreliable, inconsistent, and contradicted by other evidence, including the testimony of her own witnesses. Accordingly, the forum gave little weight to Respondent's testimony, except that which was corroborated by credible evidence.

#### ULTIMATE FINDINGS OF FACT

1) During all times material herein, Respondent was a person who engaged the personal services of one or more employees in the state of Oregon.

2) Respondent employed Claimant Terrero from November 18, 1995, to May 29, 1996. Respondent suffered or permitted Claimant Terrero to render personal services to Respondent. Respondent and Claimant Terrero had an oral agreement whereby Claimant's rate of pay was \$5.00 per hour.

3) Claimant Terrero earned \$9,050 in wages. Respondent paid her a total of \$820. Respondent owes Claimant Terrero \$8,230 in earned and unpaid compensation.

4) Respondent willfully failed to pay Claimant Terrero all wages earned and unpaid within five days, excluding Saturdays, Sundays, and holidays,

after Claimant quit employment without notice on May 29, 1996. More than 30 days have elapsed from the due date of those wages.

5) Civil penalty wages for Claimant Terrero, computed in accordance with ORS 652.150 and Agency policy, equal \$1,200.

6) Respondent employed Claimant Cano from April 1 to June 10, 1996. Respondent suffered or permitted Claimant Cano to render personal services to Respondent. Respondent and Claimant Cano had an oral agreement whereby Claimant's rate of pay was \$6.00 per hour.

7) Claimant Cano earned \$7,338 in wages. Respondent paid him nothing. Respondent owes Claimant Cano \$7,338 in earned and unpaid compensation.

8) Respondent willfully failed to pay Claimant Cano all wages earned and unpaid within five days, excluding Saturdays, Sundays, and holidays, after Claimant quit employment without notice on June 10, 1997. More than 30 days have elapsed from the due date of those wages.

9) Civil penalty wages for Claimant Cano, computed in accordance with ORS 652.150 and Agency policy, equal \$1,440.

#### CONCLUSIONS OF LAW

1) During all times material herein, Respondent was an employer and Claimants were employees subject to ORS 652.110 to 652.200, 652.310 to 652.414, and 653.010 to 653.261.

2) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the subject matter and the

Respondent herein. ORS 652.310 to 652.414.

3) ORS 653.261(1) provides:

"The commissioner may issue rules prescribing such minimum conditions of employment, excluding minimum wages, in any occupation as may be necessary for the preservation of the health of employees. Such rules may include, but are not limited to, minimum meal periods and rest periods, and maximum hours of work, but not less than eight hours per day or 40 hours per week; however, after 40 hours of work in one week overtime may be paid, but in no case at a rate higher than one and one-half times the regular rate of pay of such employees when computed without benefit of commissions, overrides, spiffs and similar benefits."

OAR 839-20-030(1) provides in part:

"[A]ll work performed in excess of 40 hours per week must be paid for at the rate of not less than one and one-half times the regular rate of pay when computed without benefit of commissions, overrides, spiffs, bonuses, tips or similar benefits pursuant to ORS 653.261(1)."

Oregon law required Respondent to pay each Claimant one and one-half times his or her regular hourly rate for all hours worked in excess of 40 hours in a week. Respondent failed to pay Claimants this overtime rate, in violation of OAR 839-20-030(1).

4) ORS 652.140(2) provides:

"When an employee who does not have a contract for a definite

period quits employment, all wages earned and unpaid at the time of quitting become due and payable immediately if the employee has given to the employer not less than 48 hours' notice, excluding Saturdays, Sundays and holidays, of intention to quit employment. If notice is not given to the employer, the wages shall be due and payable within five days, excluding Saturdays, Sundays and holidays, after the employee has quit, or at the next regularly scheduled payday after the employee has quit, whichever event first occurs."

Respondent violated ORS 652.140(2) by failing to pay Claimants all wages earned and unpaid within five days, excluding Saturdays, Sundays, and holidays, after Claimants quit employment without notice.

5) ORS 652.150 provides:

"If an employer willfully fails to pay any wages or compensation of any employee whose employment ceases, as provided in ORS 652.140 and 652.145, then, as a penalty for such nonpayment, the wages or compensation of such employee shall continue from the due date thereof at the same hourly rate for eight hours per day until paid or until action therefor is commenced; provided, that in no case shall such wages or compensation continue for more than 30 days from the due date; and provided further, the employer may avoid liability for the penalty by showing financial inability to pay the wages or compensation at the time they accrued."

Respondent is liable for civil penalties under ORS 652.150 for willfully failing to pay all wages to each Claimant when due as provided in ORS 652.140.

6) Under the facts and circumstances of this record, and according to the law applicable to this matter, the Commissioner of the Bureau of Labor and Industries has the authority to order Respondent to pay Claimants their earned, unpaid, due, and payable wages and the civil penalty wages, plus interest on those sums until paid. ORS 652.332.

#### OPINION

##### Claimants Worked As Employees

Respondent contends that Claimants were not her employees, but were living with her and just helping around the restaurant. Although she acknowledged that Claimant Cano was never her partner in the ownership and operation of one lunch truck, she nevertheless denied that he was her employee when he operated the truck. The Agency contends that both Claimants worked as employees.

"Employee' means any individual who otherwise than as a copartner of the employer or as an independent contractor renders personal services wholly or partly in this state to an employer who pays or agrees to pay such individual at a fixed rate \* \* \*." ORS 652.310(2); *Lamy v. Jack Jarvis & Co., Inc.*, 281 Or 307, 574 P2d 1107, 1111 (1978); *In the Matter of Crystal Heart Books Co.*, 12 BOLI 33, 40-41 (1993). "Employ" includes to suffer or permit to work. ORS 653.010(3).

The preponderance of the credible evidence on the whole record

establishes that Respondent suffered or permitted both Claimants to render personal services to her wholly in this state. That evidence also shows she agreed to pay each of them at a fixed rate. No evidence suggests that they were either Respondent's partners or independent contractors. The forum concludes that Claimants were Respondent's employees.

##### Hours Worked

In wage claim cases such as this, the forum has long followed policies derived from *Anderson v. Mt. Clemens Pottery Co.*, 328 US 680 (1946). The US Supreme Court stated therein that the employee has the "burden of proving that he performed work for which he was not properly compensated." In setting forth the proper standard for the employee to meet in carrying this burden of proof, the court analyzed the situation as follows:

"An employee who brings suit under 16(b) of the [Fair Labor Standards] Act for unpaid minimum wages or unpaid overtime compensation, together with liquidated damages, has the burden of proving that he performed work for which he was not properly compensated. The remedial nature of this statute and the great public policy which it embodies, however, militate against making that burden an impossible hurdle for the employee. Due regard must be given to the fact that it is the employer who has the duty under 11(c) of the Act to keep proper records of wages, hours and other conditions and practices of employment and who is in position to know and to produce the most probative facts

concerning the nature and amount of work performed. Employees seldom keep such records themselves; even if they do, the records may be and frequently are untrustworthy. It is in this setting that a proper and fair standard must be erected for the employee to meet in carrying out his burden of proof.

"When the employer has kept proper and accurate records, the employee may easily discharge his burden by securing the production of those records. But where the employer's records are inaccurate or inadequate and the employee cannot offer convincing substitutes, a more difficult problem arises. The solution, however, is not to penalize the employee by denying him any recovery on the ground that he is unable to prove the precise extent of uncompensated work. Such a result would place a premium on an employer's failure to keep proper records in conformity with his statutory duty; it would allow the employer to keep the benefits of an employee's labors without paying due compensation as contemplated by the Fair Labor Standards Act. In such a situation we hold that an employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. The burden then shifts to the employer to come forward with evidence of the precise amount of work performed

or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence. If the employer fails to produce such evidence, the court may then award damages to the employee, even though the result be only approximate." 328 US at 686-88.

Here, ORS 653.045 requires an employer to maintain payroll records. Respondent kept no such records of Claimants' work. Pursuant to the analysis then, the employee, or in this case the Agency, has the burden of first proving that each employee "performed work for which he [or she] was improperly compensated." The burden of proving the amount and extent of that work can be met by producing sufficient evidence from which a just and reasonable inference may be drawn. This forum has previously accepted, and will accept, the testimony of a claimant as sufficient evidence to prove such work was performed and from which to draw an inference of the extent of that work — where that testimony is credible. See *In the Matter of Sheila Wood*, 5 BOLI 240, 254 (1986); *Dan's Ukiah Service*, 8 BOLI 96, 106 (1989). As part of their claims for wages, Claimants filled out calendar forms for the Agency to show the number of hours they worked. On the basis of these calendars and Claimants' credible testimony, the forum has concluded that Respondent employed and improperly compensated Claimants. The forum may rely on the evidence produced by the Agency regarding the number of hours worked and rate of pay for Claimants.

Where the forum concludes that an employee was employed and improperly compensated, it becomes the burden of the employer "to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence." *Anderson v. Mt. Clemens Pottery Co.*, 328 US at 687-88; *In the Matter of Dan's Ukiah Service*, 8 BOLI at 106. Respondent did not maintain any record of hours or dates worked by Claimants.

Respondent and her witnesses produced no credible evidence to contradict Claimants' evidence. Several of Respondent's witnesses testified that they saw Claimant Terrero work around the restaurant a few times, but contended that she was just hanging around waiting for a ride home with Respondent. Likewise, these witnesses testified either that they never saw Claimant Cano drive the lunch truck or work for Respondent, or that he only drove the truck a few times. This testimony was exceedingly vague, inconsistent, unreliable, and biased. Many of Respondent's witnesses acknowledged that they were not present during much of the time Claimants worked; they were either in school, out of state, or rarely present at the restaurant. Therefore, the forum gave their testimony little or no weight. The forum concludes that Respondent's evidence did not sufficiently undermine the credible evidence produced by the Agency.

To the extent that the credibility of Claimant Cano's testimony was undermined, the forum has found that the basic elements of his claim — namely,

that he was Respondent's employee, that he worked many hours over a period of time, and that Respondent paid him nothing for this work — were supported by other credible evidence in the record, which corroborated his testimony on these points. Thus, Respondent did not produce persuasive "evidence to negative the reasonableness of the inference to be drawn from the employee's evidence." *Mt. Clemens Pottery Co.*, 328 US at 687-88.

#### Wages Due

Claimants' credible testimony and calendar forms established both their regular hourly rates of pay and the number of hours each worked. Although Respondent had no agreement with Claimants regarding overtime, Oregon law required her to pay them at time and one-half their regular hourly rate for all hours worked over 40 in a work week. Accordingly, the forum calculated Claimant Terrero's overtime wages at the rate of \$7.50 per hour (time and one-half her regular hourly rate of \$5.00) and Claimant Cano's overtime wages at the rate of \$9.00 per hour (time and one-half his regular hourly rate of \$6.00). From the credible evidence and the applicable law, the forum concluded that Respondent owes Claimant Terrero \$8,230 and Claimant Cano \$7,338 in unpaid wages.

#### Penalty Wages

Awarding penalty wages turns on the issue of willfulness. Willfulness does not imply or require blame, malice, wrong, perversion, or moral delinquency, but only requires that that which is done or omitted is intentionally done with knowledge of what is being done and that the actor or omittor be a

free agent. *Sabin v. Willamette Western Corp.*, 276 Or 1083, 557 P2d 1344 (1976). Respondent, as an employer, had a duty to know the amount of wages due to her employees. *McGinnis v. Keen*, 189 Or 445, 221 P2d 907 (1950); *In the Matter of Jack Coke*, 3 BOLI 238, 242 (1983). Here, evidence established that Respondent knew she was not paying the Claimants wages and intentionally failed to pay those wages. Evidence showed that Respondent acted voluntarily and was a free agent. Under this test, the forum finds that Respondent acted willfully and thus she is liable for penalty wages under ORS 652.150.

#### Financial Inability

ORS 652.150 provides in part that an "employer may avoid liability for the penalty by showing financial inability to pay the wages or compensation at the time they accrued."

In the proposed order the ALJ held that Respondent did not plead or prove that she was financially unable to pay Claimants' wages at the time they accrued, and thus she could not escape penalty wage liability.

In her exceptions, Respondent argued that this was "a very strict interpretation of OAR 839-50-130(2) and [was] not required." (Respondent's exceptions, at 16.) She argued that good cause for consideration of her defense should be found from her inability to fully understand the proceedings or the English language or the nature of her potential defenses. *Id.* She alleged that she was financially unable to pay Claimants' wages, and claimed there was credible evidence on the record to show it.

The defense of financial inability to pay wages at the time they accrued is an affirmative defense subject to proof. *In the Matter of Ashlanders Senior Foster Care, Inc.*, 14 BOLI 54, 81 (1995). This forum has repeatedly held that it is a respondent's burden to show the respondent's financial inability to pay a claimant's wages. See ORS 652.150, 183.450(2), and OAR 839-050-0260(3). See also *In the Matter of Jorion Belinsky*, 5 BOLI 1, 9-10 (1985); *In the Matter of Mega Marketing*, 9 BOLI 133, 138 (1990). The two Orders of Determination in this case each stated in part:

## VIII.

" \* \* \* [The] written 'Answer' must include an admission or denial of each factual allegation contained in those paragraphs and shall affirmatively allege a short and plain statement of each affirmative defense which the employer will assert at the contested case hearing. For example, the affirmative defense of financial inability to pay the wages or compensation at the time they accrued must be included in the written 'Answer.'

## IX.

" \* \* \* [F]ailure to raise an affirmative defense in the 'Answer' shall be deemed a waiver of such affirmative defense; \* \* \* evidence shall not be taken on any factual or legal issue not raised in this Order of Determination or the employer's 'Answer.'" (Emphasis added.)

OAR 839-050-0130(2) states in part:

"The failure of the party to raise an affirmative defense in the answer shall be deemed a waiver of such

defense. \* \* \* Evidence shall not be taken at the contested case hearing on any factual or legal issue not raised in the charging document or the answer, except for good cause shown to the administrative law judge, or pursuant to amendment under OAR 839-050-0140."

Neither Respondent's original answers nor her two amended answers raised the affirmative defense of financial inability to pay the wages at the time they accrued. Therefore, she waived this defense. OAR 839-050-0130(2).

Nevertheless, some evidence came in at hearing concerning respondent's financial difficulties. If Respondent wanted to amend her answers to conform to this evidence and raise this defense, she needed to make a motion to do so at hearing. OAR 839-050-0140(2)(a). She did not do this. As a result, the Agency had no opportunity to object, to seek discovery, or to present evidence to meet this new issue.

Further, the forum finds that Respondent has not shown good cause for taking evidence on this issue. In her motion to reopen the record she raised similar contentions regarding her alleged inability to understand the process or the English language. For the reasons given in the ALJ's ruling on her motion and given below regarding her claim that she didn't get a full and fair hearing, the forum is not persuaded by these arguments. Concerning her claim that she was unable to fully understand her potential defenses, the forum is likewise not persuaded. The charging documents, quoted above, each stated explicitly in

paragraph 8 that "the affirmative defense of financial inability to pay the wages or compensation at the time they accrued must be included in the written 'Answer.'" Thus, Respondent was put on notice that this was a defense available to her. She had the assistance of Mr. Montebanco before and at hearing, and the ALJ assisted her at hearing. It was not until after the proposed order was issued that she raised the defense.

As mentioned above, some evidence concerning Respondent's financial difficulties came in at hearing. Most of that evidence was Respondent's testimony. Testimony of an employer, even where such testimony is credible, is not ordinarily sufficient in and of itself to constitute an inability to pay, and does not therefore, serve to meet the employer's burden of proof. *In the Matter of Sheila Wood*, 5 BOLI 240, 255 (1986). A showing of financial inability requires specific information as to the financial resources and requirements of both the employer's business and the employer personally (where the business is not a corporation) during the wage claim period, as well as submission of the records from which that information came. *In the Matter of Country Auction*, 5 BOLI 256, 263-64 (1986). Respondent's evidence failed to show she was financially unable to pay Claimants' wages at the time they accrued.

"The meaning of ORS 652.150 is obvious: the only way an employer who has willfully failed to pay termination wages when due can avoid paying a penalty for that failure is to show that the employer could not have paid the employee

the wages when they were due. There are no exceptions or qualifications to the phrase 'financially unable.' It is a very strict standard designed to impress upon employers the absoluteness of the duty to pay wages which ORS 652.140 imposes upon them. If an employer has chosen to apply his or her resources elsewhere than to an employee's wages, [then] the employer cannot escape penalty wage liability. Herein, the Employer chose to make payments on other debts and to retain all his business assets rather than to pay the Claimant. This choosing, or setting of priorities, falls within the [ambit] of unwillingness, not inability, to pay." *In the Matter of Kenneth Cline*, 4 BOLI 68, 81 (1983).

The same can be said of the facts here. Evidence showed that Respondent continued to operate the restaurant and the lunch truck while Claimants' wages accrued and for months thereafter. During this period, she had income from other employment. The forum infers that she was paying other debts and expenses, but not Claimants' wages. The important time frame here is when claimants' wages were accruing, not months later when she sold the restaurant. In short, Respondent's vague and unsubstantiated evidence of financial inability to pay Claimants' wages was insufficient to prove this defense.

Accordingly, the forum concludes that Respondent did not plead or prove that she was financially unable to pay Claimants' wages at the time they accrued, and thus she cannot escape penalty wage liability.

### Attempted Tampering with a Potential Witness

Respondent contends that Claimant Cano attempted to bribe a potential witness (Rafael Alejos) and that this should be the death knell of these wage claims, because nothing they say can be believed. The Agency argues that this never occurred.

The ALJ heard the testimony of Alejos and Claimant Cano on this issue. He carefully observed the demeanor of each witness, assessed the consistency of the testimony and its inherent probability, assessed whether the testimony was corroborated or contradicted by other evidence, assessed whether human experience demonstrated the testimony was logically incredible, and considered any bias the witness might have. *Lewis and Clark College v. Bureau of Labor*, 43 Or App 245, 602 P2d 1161 (1979) (Richardson, J., concurring in part and dissenting in part). On the basis of his demeanor, his lack of bias or motive to fabricate his testimony, and the consistency of his testimony, the forum finds that Alejos's testimony was credible. Accordingly, the forum finds Claimant Cano's flat denial unreliable and not credible.

The issue, then, is what effect this finding should have on these wage claims. To begin with, Claimant Cano's credibility is damaged. This lowers the forum's opinion of all of his testimony. Despite this, the forum remains convinced that Respondent suffered and permitted Cano to work for her, that Cano was not Respondent's partner, that he worked with Claimant Terrero in Respondent's lunch truck, and that Respondent paid him nothing. Claim-

ant Cano's testimony regarding his employment with Respondent was corroborated by other credible evidence, including Claimant Terrero's and Carlos Cardenas's testimony. Thus, the forum finds that the preponderance of credible evidence still supports Claimant Cano's wage claim.

It's important to note that the record supporting this wage claim was not tainted by the testimony of a bribed witness. Mr. Alejos did not testify at the hearing on June 3, 1997. The forum would strike the testimony of a bribed witness. Further, no evidence in the record suggests that Claimant Cano tried to or did bribe other witnesses, and no evidence shows that other witnesses for Cano gave false testimony. Accordingly, Claimant Cano's attempt to get Alejos to testify for him does not undermine the other evidence on the record that supports his wage claim.

What the attempted bribe did was damage Claimant Cano's credibility. In some circumstances, this could undermine a wage claim and cause it to fail for lack of proof. As noted above, however, the forum finds that the preponderance of credible evidence supports Claimant Cano's wage claim, even with the diminished credibility of Cano's testimony.

The forum wants to make it clear, however, that it views tampering with witnesses (or even attempting to do so) very seriously. We do not expect or require the claimants who assign their wage claims to the Agency to be perfect citizens. But actions that undermine the fairness of the contested case hearing process require us to take whatever measures are required to maintain that fairness. This may

include striking or disregarding any evidence that may be tainted. Under the particular facts of this case, Claimant Cano's attempted bribe of a potential witness did not affect the forum's conclusions about the validity of his wage claim or Respondent's liability to him for wages earned and due.

### Respondent's Exceptions to the Proposed Order

Respondent filed timely exceptions to the original proposed order. The record was then reopened and additional evidence taken on November 13, 1997. The ALJ instructed Respondent's counsel during that hearing that Respondent could file additional exceptions to the amended proposed order concerning only issues arising from reopening the record. Respondent filed no additional exceptions.

Respondent raises a number of objections to the facts and conclusions in the proposed order. First, Respondent contends that Claimants were not her employees. She argues that Claimant Cano, while never her partner, provided services to her to entice her into a partnership. (Respondent's exceptions, at 2, 15.) As the ALJ found in his ruling on reopening the record,

"[t]here can be little doubt that Cano performed services for Respondent driving and maintaining her truck, buying food for the restaurant and the truck, cooking food, taking money, and serving lunch truck customers. Several persons, including Respondent's witnesses, made statements corroborating this. Respondent acknowledges that she and Cano never formed a partnership, and she never alleged that Cano was

an independent contractor. Thus, [the ALJ] found that Respondent employed Cano."

The forum is convinced that Respondent suffered or permitted Claimant Cano to work for her. Accordingly, she employed him, and he was her employee. ORS 653.010(3), 652.310(2). Respondent's exception on this issue is overruled.

Regarding Claimant Terrero, the evidence is persuasive that Respondent employed her. Respondent admits that Terrero did some work for her. (Respondent's exceptions, at 2.) However, Respondent argues that Terrero worked as a volunteer.

ORS 653.010(3) provides, in part:

"Employ" \* \* \* does not include voluntary or donated services performed for no compensation or without expectation or contemplation of compensation as the adequate consideration for the services performed for a public employer \* \* \*, or a religious, charitable, educational, public service or similar nonprofit corporation, organization or institution for community service, religious or humanitarian reasons or for services performed by general or public assistance recipients as part of any work training program administered under the state or federal assistance laws."

No credible evidence suggests that Claimant Terrero was providing Respondent with voluntary or donated services performed for no compensation or without expectation or contemplation of compensation. Respondent acknowledges paying Terrero for

some work. Furthermore, Respondent was not operating as a public employer or a religious, charitable, educational, public service or similar nonprofit corporation, organization or institution for community service. She was running a for-profit restaurant. Therefore, Claimant Terrero did not perform work for Respondent as a volunteer, under ORS 653.010(3). Accordingly, Respondent's exception on this issue is overruled.

Respondent next takes exception to the number of hours worked by Claimants. Respondent "contends that any work performed by claimants was minor and did not even approach many hundreds of hours they are claiming." (Respondent's exceptions, at 2.) This exception has been addressed above in the section of the opinion entitled "Hours Worked" and below in the discussion regarding Claimants' credibility. The exception is overruled.

Respondent next claims that she did not obtain a full and fair hearing and that a continuance should have been granted. (Respondent's exceptions, at 2, 3-5.) She claims the ALJ abused his discretion by not postponing the hearing to allow her to get an attorney. She contends she was unsophisticated and did not understand the process. Respondent raised these issues in her motion to reopen the record. In his ruling on the motion, the ALJ said:

"The forum disagrees with Respondent's argument that she lacked the ability to represent herself. Before hearing she used the services of Mr. Monteblanco to prepare herself. On Respondent's

behalf, Mr. Monteblanco called [the ALJ] on at least two occasions before hearing and obtained instructions and clarifications concerning the contested case process. At no time did he assert that Respondent needed legal assistance or did he request a postponement for Respondent to obtain a lawyer.

"It is all-too-common that citizens who represent themselves at hearings are unsophisticated about the contested case process and in the skill of questioning witnesses. That alone does not mean they are denied due process. The ALJ has a duty to ensure that each respondent gets a full and fair hearing. In this case, the forum believes Respondent received a full and fair hearing. [The ALJ] permitted Mr. Monteblanco to stay with Respondent throughout the hearing to assist her with translations and with her exhibits. [The ALJ] explained the contested case process at hearing, both on and off the record. Respondent was free to ask [the ALJ] questions at any time and did so. She asked questions of the Agency's witnesses and her own. In addition, the Agency's case presenter and [the ALJ] asked questions of witnesses to assist in the fact finding process. Respondent never complained about any translations at hearing, despite an instruction from [the ALJ] to do so if either participant questioned the accuracy of an interpretation. There were several bilingual persons at the hearing, and translations were rarely if ever

questioned. The time to challenge any interpretation was at the hearing, not now, in a posthearing motion or in the exceptions.

"To the extent that Respondent should have done a better job preparing and representing herself or should have gotten legal representation, these arguments do not persuade me to reopen the record and allow Respondent to present additional evidence. If it were otherwise, every *pro se* litigant who did a less-than-perfect job representing him or herself would have the right to have the record reopened to offer more evidence after the proposed order was issued. Respondent, like other *pro se* litigants, has made choices about how to defend herself. Although she now believes she did an inadequate job of it, this is not a sufficient reason to reopen the record and give her another chance to offer additional evidence."

Furthermore, the forum officially notifies that paragraph V of the Order of Determination advised Respondent of her right to be represented by counsel. The forum also sent Respondent a complete set of the Bureau's contested case hearing rules (OAR chapter 839, division 050), a Notice of Contested Case Rights and Procedures, and a Notice of Hearing. All of those documents clearly advised Respondent of her right to be represented by counsel. Through her bookkeeper and interpreter, Respondent contacted the ALJ at least twice concerning the process and her preparation, and she did not request a postponement. Before hearing, the ALJ advised Respondent

through Mr. Monteblanco of the wisdom of retaining counsel.

At hearing on June 3, 1997, Respondent asked for the first time for a postponement to hire an attorney. OAR 839-050-0110(2) states: "Once a contested case hearing has begun, no party will be allowed a recess to obtain the services of counsel." The Bureau adopted this rule specifically to address this situation. Where the Agency has advised a respondent many times before hearing of her right to obtain counsel, and where she does not decide to do so until the hearing has begun, the forum will not postpone the hearing to allow her to obtain the services of counsel. In this situation, the respondent's due process rights have not been violated and the ALJ has not violated his duty to conduct a full and fair hearing. The ALJ here properly followed OAR 839-050-0110(2). Respondent's exception on this point is overruled.

Finally, Respondent argues that the weight of the evidence does not support the proposed order. She argues that Claimants were not credible, that she was credible, that the evidence did not support the hours claimed, and (with regard to civil penalties) that there was evidence of her financial inability to pay wages at the time they accrued. The forum addressed this last point above in the "Penalty Wages" section of this opinion.

Respondent's complaints about Claimants' credibility and her complaint about the alleged number of hours worked go hand in hand. The forum has reviewed the evidence in light of Respondent's complaints and declines to change the credibility findings. The

forum finds credible evidence corroborates Claimants' testimony regarding their employment with Respondent. This evidence includes testimony from Respondent's own witnesses, and it showed that Claimants were employed by Respondent and were not properly compensated. They did not produce records of their work, and Respondent failed to keep proper records in conformity with her statutory duty. As the US Supreme Court said in *Mt. Clemens*, employees in this situation should not be penalized by denying them a recovery on the ground that they are unable to prove the precise extent of their uncompensated work. The forum accepts that the claimed work hours were estimates, but does not find that this imprecision makes Claimants' testimony incredible. The Court also recognized that. The forum believes Claimants produced "sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference." As noted in the "Hours Worked" section of this opinion above, Respondent's evidence to the contrary did not undermine the credible evidence produced by the Agency, nor do her exceptions change the forum's findings on Claimants' credibility. Respondent's exception on this point is overruled.

Respondent contends that her own testimony was credible and explains that one possible inconsistency was a mistranslation about an insignificant matter. The forum has reviewed Respondent's testimony and declines to change the finding that her testimony was unreliable, inconsistent, and contradicted by other evidence.

For example, Respondent testified that Claimant Terrero never worked in the restaurant. She later acknowledged that Terrero did work in the restaurant washing dishes, busing tables, and making food. Although Respondent tried to distinguish between letting Terrero "help" in the restaurant and employing her, the forum found such testimony disingenuous. This in turn caused the forum to treat her testimony with suspicion. Respondent's exception concerning her credibility is overruled.

#### ORDER

NOW, THEREFORE, as authorized by ORS 652.332, the Commissioner of the Bureau of Labor and Industries hereby orders **GRACIELA VARGAS, aka GRACIELA VARGAS CARDENAS**, to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232-2162, the following:

1. A certified check payable to the Bureau of Labor and Industries IN TRUST FOR ALICIA TERRERO in the amount of NINE THOUSAND FOUR HUNDRED AND THIRTY DOLLARS (\$9,430), less appropriate lawful deductions, representing \$8,230 in gross earned, unpaid, due, and payable wages; and \$1,200 in penalty wages; plus interest at the rate of nine percent per year on the sum of \$8,230 from June 1, 1996, until paid and nine percent interest per year on the sum of \$1,200 from July 1, 1996, until paid.

2. A certified check payable to the Bureau of Labor and Industries IN TRUST FOR RAUL CANO in the amount of EIGHT THOUSAND SEVEN HUNDRED AND SEVENTY

EIGHT DOLLARS (\$8,778), less appropriate lawful deductions, representing \$7,338 in gross earned, unpaid, due, and payable wages; and \$1,440 in penalty wages; plus interest at the rate of nine percent per year on the sum of \$7,338 from July 1, 1996, until paid and nine percent interest per year on the sum of \$1,440 from August 1, 1996, until paid.

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#### In the Matter of OREGON DEPARTMENT OF FISH AND WILDLIFE, Respondent.

Case Number 22-96  
Final Order of the Commissioner  
Jack Roberts  
Issued March 4, 1998.

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#### SYNOPSIS

Where the agency alleged that complainant was treated differently based on her sex and in retaliation for opposing unlawful employment practices, the commissioner found that the agency failed to prove the violations by a preponderance of evidence on the whole record. ORS 659.030(1)(b) and (f).

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The above-entitled matter came on for hearing before Warner W. Gregg, designated as Administrative Law Judge (ALJ) by Jack Roberts, Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was conducted on July 16, 17,

and 18, 1996, in a conference room of the offices of the State of Oregon Department of Employment, 1901 Adams Avenue, La Grande, Oregon. Linda Lohr, Case Presenter with the Bureau of Labor and Industries (BOLI or the Agency) represented the Agency. The State of Oregon Department of Fish and Wildlife (Respondent) was represented by Josephine Hawthorne, State of Oregon Assistant Attorney General. Sandra Whybark (Complainant) was present throughout the hearing.

The ALJ admitted into evidence Administrative Exhibits X-1 through X-18, Agency Exhibits A-1 through A-4, A-6, A-7 and A-9, and Respondent Exhibits R-1 through R-4, R-12, R-15 through R-32, and R-34 through R-47.

The Agency called the following witnesses in addition to Complainant: Complainant's mother Margaret Dudgeon, Complainant's father Ronald Dudgeon, Respondent's personnel officer Judith Hvam, and Fish and Wildlife Screens Technicians Scott Kelso, Curtis Mattson, and Charles D. Simpson.

Respondent called the following witnesses: Respondent's Enterprise Screens Manager Gary C. Findley, Respondent's personnel officer Dorothy Hoover, Scott Kelso, Agency Senior Investigator Susan Moxley, and Fish and Wildlife Biologists Bradley J. Smith and Kim Jones (by telephone).

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

Conclusions of Law, Opinion, and Order.

#### FINDINGS OF FACT – PROCEDURAL

1) On July 18, 1994, Complainant filed a verified complaint with the Agency alleging that she was the victim of the unlawful employment practices of Respondent. After investigation and review, the Agency issued an Administrative Determination finding substantial evidence supporting the allegations of the complaint.

2) On February 22, 1996, the Agency prepared for service on Respondent Specific Charges alleging that Respondent discriminated against Complainant in her employment with Respondent based on her female sex and in retaliation for having previously filed a complaint against Respondent under ORS chapter 659, and had thus violated ORS 659.030(1)(b) and 659.030(1)(f), respectively. On February 28, 1996, with the Specific Charges, the Agency served on Respondent the following: a) Notice of Hearing setting forth the time and place of the hearing; b) a Notice of Contested Case Rights and Procedures containing the information required by ORS 183.413; c) a complete copy of Oregon Administrative Rules (OAR) regarding the contested case process; and d) a separate copy of the specific administrative rule regarding responsive pleadings.

3) On March 14, 1996, Respondent through counsel filed a motion to make the Specific Charges more definite and certain in several particulars. The Agency timely opposed the motion, and on March 19, 1996, the ALJ, treating Respondent's motion as being

in the nature of a request for discovery, denied Respondent's motion conditioned on the Agency supplying Respondent's counsel with information by March 26, 1996, regarding the identity of comparators and coworkers and training opportunities referred to in the Specific Charges. The ALJ ruled further that if the Agency supplied those items, Respondent's answer would be due March 29, 1996. Finally, the ALJ ordered that each participant submit a summary of the case by April 3, 1996.

4) On March 20, 1996, Respondent moved to postpone the scheduled hearing due to the unavailability of an essential witness. The Agency's only objection was that rescheduling would create a long delay because of the necessity for the mutual availability of Respondent's counsel, the Agency Case Presenter, and the ALJ. On March 22, 1996, the ALJ postponed the hearing to July 16, 1996, extended the due date for the items ordered to be supplied by the Agency to Respondent, extended the time for Respondent's answer, and set a new date for case summaries.

5) Respondent timely filed its answer and the participants filed their respective case summaries. The Agency thereafter moved to amend its Charges and for particular discovery. Respondent filed a motion to strike and for leave to file an amended answer. On July 12, 1996, the ALJ issued a notice to the participants that he would rule regarding amendments, discovery, and challenged allegations at the time scheduled for hearing on July 16.

6) At the commencement of the hearing, counsel for Respondent stated that she had reviewed the

Notice of Contested Case Rights and Procedures and had no questions about it.

7) At the commencement of the hearing, the ALJ heard the presentation of the participants regarding telephone witnesses, discovery, the amended Specific Charges, Respondent's motion to strike, and Respondent's amended answer. Ruling that discovery had been accomplished, the ALJ allowed amendment of the amount claimed in the Specific Charges from \$15,000 to \$25,000. The ALJ denied Respondent's motion to strike, allowed Respondent's amended answer, and limited proof of discrimination and resulting damage to acts alleged to have occurred after July 1993.

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

9) On August 12, 1996, Respondent submitted all four pages of the April 1994 application of Brad Jarrett with the request that the record be reopened as the exhibit submitted at hearing had but three pages. An examination of the two documents leads the forum to the conclusion that the exhibit accepted at hearing was incomplete, in that the second page was missing, and the offer is accepted, designated as Exhibit R-48. The forum is also admitting the Gary Findley report of operation, February 28 to June 24, 1994.

10) At the close of testimony the participants mutually agreed to submit written argument in accordance with a

schedule set by the ALJ. Submissions under that schedule were timely made and the record herein closed with receipt of the final submission on August 16, 1996.

11) The proposed order, which contained an exceptions notice, was issued on December 9, 1997. Exceptions were due by December 19, 1997. No exceptions were received.

#### FINDINGS OF FACT – THE MERITS

1) Respondent is an agency of the State of Oregon engaged in natural resources regulation and preservation in various locations throughout the state and utilizing the personal services of individual employees for those purposes.

2) Complainant, female, first worked for Respondent as a seasonal Fish and Wildlife Technician 1 (screens tender) in Enterprise, beginning in March 1991. She was supervised by Gary Findley, Fish and Wildlife Manager 1.

3) Gary Findley was a screens manager for Northeast Oregon at Enterprise at the time of the hearing. He had been screens manager since March 1990. He was reclassified to F. & W. Tech 3 for a brief period in 1992 along with other Manager 1's in state service who had less than a minimum number of subordinates. This temporary removal from management was over a manager's "span of control" and was not performance based. It had nothing to do with any personnel action in connection with Complainant.

4) Complainant had worked with Findley at the Safeway in Enterprise and he had urged her to apply for the seasonal position and suggested what

extra training and knowledge she might need.

5) The duties of a Fish and Wildlife Technician 1 (working title: screens technician, screens checker, or screens tender) at Enterprise included the installation, repair, and maintenance of rotary fish screens.\* A rotary fish screen is a device installed at the headgate of a stream fed irrigation ditch intended to divert fish back into the stream and away from the irrigated land. Each rancher abutting a river or creek diverted water from the stream into the ranch fields. The installation generally consisted of a concrete basin or box supporting a shaft with paddles which were activated by the flowing water. Fish were prevented from entering the ditch by a rigid mesh arrangement on the ditch side and were shunted back toward the stream by the paddle action. The screen tenders installed screens in each box at the beginning of the irrigation season, verified that each was operating properly, kept accumulated debris cleared away, kept surrounding grass and weeds cut, greased the mechanical portions of the device, performed minor on-site repairs, and on occasion brought the mechanical assembly to the shop for repair or refit. Included among screen tender duties were contacts with ranchers regarding irrigation plans, access to land, coordination of repair shutdowns, and other operational concerns.

6) Personnel assigned to operation and maintenance of screens were assigned to check particular screens by geographic location. Screens located along a specific stream formed a route which was assigned to an individual. Each screen had an identifying number. At times material, the routes for which the Enterprise office was responsible were Upper Valley or Imnaha route (Upper Wallowa River, Hurricane Creek, Imnaha River, Little Sheep, Camp, Grouse, Freeze Out, Summit, and Upper and Lower Big Sheep Creeks), Catherine Creek route (Catherine Creek and Grand Ronde River from La Grande to Union), Lower Valley route (Lower Wallowa and Lostine Rivers, Bear and Whiskey Creeks), and Umatilla River route (Umatilla and Walla Walla Rivers, Birch Creek).

7) Personnel assigned to operation and maintenance of screens were required to maintain two separate records of their activities. One was a "Screen Maintenance Record." That form had a grid with the screen numbers along the side of the grid and the date along the top. There were codes for the screen checker to use in the corresponding square of the grid:

- 1- screen installed
- 2- screen checked, operation normal
- 3- not operating, no water
- 4- not operating, flood or trash

- 5- not operating, mechanical failure
- 6- low water, bypass operating only
- 7- by-pass not operating, repaired
- 8- screen pulled
- L- Lubricated, operation normal
- V- Vandalized screen
- R- Repaired screen, operation normal

Thus, on the screen maintenance record for Wallowa for April 1994 by screen checker Charles Simpson, an entry of "6" on line 33 in column 6 would indicate that on April 6, screen 33 had "low water, bypass operating only." The screen checker might also add at the bottom of the form or on the back pertinent detail regarding particular screens.

8) The second record kept by each screens checker was a "Report of Operation." This form had the days of the week, with each day's date, in seven equal rows, top to bottom. It was intended that the employee enter important or unusual detail for each day. Thus, on Simpson's report of operation for the week ending April 9, 1994, the entry for Wednesday, April 6, was "cleaned shop; checked some screens in the Lower Valley; set up computer table & moved computer."

9) In 1991, in addition to maintaining a screens route, Complainant periodically worked on screens repair in the Enterprise shop, assisted in installation or reinstallation of the concrete screens boxes on site, which involved working with concrete forms and running a backhoe, and had some work assignments involving wildlife operations.

10) Complainant worked as a screens tender at Enterprise until approximately the end of January 1992. At that time she transferred to Respondent's John Day office, also as a seasonal screens tender. The John Day screens manager was Coby Moulton. Respondent's Enterprise and John Day offices were both administered by Respondent's La Grande regional manager Jim Lauman. Adam Schumacher supervised the screens program for the region. Respondent's state headquarters office was in Portland.

11) Complainant complained to Respondent's management in 1991 concerning her treatment at the time by Findley. Schumacher suggested the transfer to John Day.

12) In May 1992, Findley received a formal reprimand from Respondent concerning his supervision of employees at Enterprise in 1991. As a result of an investigation into concerns expressed by a subordinate (not Complainant), Respondent found that Findley's subordinates perceived that he had favored Complainant by providing more personal guidance and career goal development to her than to his other subordinates, that he later discussed Complainant's performance with another subordinate, and that he criticized Complainant in front of her coworkers. While Findley's subordinates also perceived that his "high level of involvement in her job performance was based on a personal involvement between" Findley and Complainant, Respondent found that not to be the case.

13) In 1992, the John Day shop was principally engaged in the

\* The term "screen" or "screens" was used in the testimony and documents to mean, depending on the context: the total screen assembly, as in "screen number 143;" the generic description of a work assignment, as in "screens route," "screens construction," or "screen tender;" or the mesh portion of the individual device.

fabrication, installation, and repair of the screens mechanisms. Complainant's duties there, in addition to a screens route, were in fabricating screen assemblies, including reading blue prints, replacing old screen drum mesh, fabricating/building screen trash racks, new screen drums, covers for drive components, screen hanger gantry systems, screen walkway systems, drum cradles and paddle wheels. This included welding, metal fabrication, and the use of power tools. While at John Day, she was transferred to concrete forms construction, which included preparation of screen sites, constructing form walls and installation of rebar, installation of screen components into forms, working concrete, and pulling forms from completed pours. This included the use of power tools, backhoe, and boom truck. Although she was hired in March 1991 as a seasonal (4 to 6 months or more) employee, she was employed continuously until September 1993.

14) In July 1993, on behalf of Complainant, attorney W. Eugene Hallman, Pendleton, filed a letter with Respondent in Portland denominated "Notice of Claim" intended to satisfy ORS 30.275, Oregon's tort claim statute. The letter asserted a claim for damages against Respondent and its employees Gary Findley and Adam Schumacher for violation of Complainant's rights between March 1991 and May 1993, based on alleged discrimination and harassment of Complainant in Enterprise and John Day because of her sex. The letter alleged that the violations were continuing. It was addressed to Respondent's Director's office in Portland.

15) In December 1993, Complainant received a formal written warning from Respondent for her actions while at John Day in connection with allegations of misuse of a state vehicle, of failure to report damage to a state vehicle assigned to her and two co-workers, and of falsifying an expense claim.

16) Complainant enrolled as a part-time student at Eastern Oregon State College in La Grande in September 1993. She attended through winter term, 1994.

17) From time to time, Complainant kept a personal diary or journal. She noted such things as appointments, things to do, and her impression of events. She kept such a journal from September 1993 to early July 1994. A portion of that document, from March 7, 1993, through July 10, 1994, was received in evidence, as was the entire original document.

18) In or around December 1993, Complainant filed an employment application seeking another assignment with Respondent. She anticipated another seasonal screens tender job; she was also interested in a stream survey job with Respondent's Research section. The "job applied for" box of the application was marked "All Positions." In the "Education and Formal Training" section, Complainant entered her enrollment at Eastern Oregon State College, La Grande, showing "Pre-Dental" under "Major," plus the entry "Minor/ Fish & Wildlife."

19) In early 1994, Complainant filed an employment application seeking another assignment with Respondent. It was a copy of the earlier application except that the "job applied

for" box was marked "Fish & Wildlife Tech 1 (Screens Technician 1)."

20) Complainant was interviewed for the screens position in February by a four person panel that included Findley and Judith Hvam, a personnel officer for Respondent.

21) At the time of the interview, Findley voiced some apprehension about working again with Complainant. However, his rating of Complainant after the interview was consistent with those of the other members of the panel.

22) Beginning in 1992, the National Marine Fisheries Service (NMFS) listed the Snake River Chinook on the endangered species list. In Oregon, this affected the entire drainage for which Respondent's Enterprise office was responsible. At the same time, NMFS changed the design of the concrete boxes by changing the angle of the screens to the concrete box. NMFS provided funding (from electrical rate payers) for the rebuilding of existing screens and the placement of new screens to meet the new criteria. The new design required more concrete and stronger metals for guardrails, handrails and walkways. In addition to the maintenance of existing screens, construction of new screens and reconstruction of old screens became important. Screens maintenance routes at Enterprise no longer included shop or construction work, except for minor repair. Technicians not assigned to maintenance routes were assigned to on site construction and reconstruction of new or existing screens. Metal fabrication was done in John Day.

23) When Complainant was interviewed in February 1994, she was not hired to fill one of two seasonal screen

tender positions at Enterprise. One of the two persons hired was Brad Jarrett.

24) Brad Jarrett had a degree in fisheries management from the University of Idaho. He was the only Enterprise screens employee (other than Findley) qualified under federal rules to service the only Enterprise screens district fish trap, which was located on the Lower Valley Route.

25) In March 1994, Complainant filed a complaint with the Agency alleging unlawful employment practices based on sex by Respondent at John Day in 1993 and referencing alleged unlawful employment practices by Respondent in 1991.

26) Complainant recalled being re-interviewed by telephone in April 1994, for the screens job. When nothing happened she sought other work. On April 25, she got a mill job with RY Timber. On April 27, 1994, she was advised by Findley by telephone to come to work in a seasonal screen tender position starting May 2, 1994. The specific position offered was the combined Catherine Creek and Imnaha (Upper Valley) routes.

27) Charles "Chuck" Simpson started employment with Respondent as a seasonal Fish & Wildlife Tech 1 (Screens Technician 1) in Pendleton in 1991. He worked with Complainant occasionally in 1991 and as a seasonal Screens Technician 1 was her crew leader in 1994 in Enterprise. At that time he was in charge of the screens checkers and the local shop maintenance of screens. At the time of hearing, he was a full-time regular Fish & Wildlife Tech 2 in Enterprise. Findley had always been his manager, with the

exception of six months he was in the Research section in Burns in 1991-92. Complainant came to work as a screens checker under his leadership in early May 1994.

28) Scott Kelso was a full-time regular Fish & Wildlife Tech 2 in Enterprise at the time of the hearing. He had started in 1989 as a Seasonal Tech 1 and had worked at Enterprise since about 1990 with Findley as his manager. In May and June 1994, he was crew leader of the construction crew.

29) In a meeting with Findley and Lauman on April 25, 1994, Simpson was appointed lead worker over the screens checkers. Lauman instructed Simpson to treat the screens checkers in his charge equally, to give each the same chance to learn, to watch his language and what he said in front of them, and to act professionally. Findley told Simpson that Complainant would be coming back to work in Enterprise. He expected Simpson to show Complainant her screen route and job duties and responsibilities, give her the new employee forms, and to have her come to Simpson with any problems. If Complainant needed to talk to Findley, Simpson was to be present.

30) In April 1994, Brad Jarrett ran the Lower Valley route, Charles Simpson ran Upper Valley, and Brian Kilgore ran Umatilla and Catherine Creek. Kilgore installed several screens on Catherine Creek and Simpson installed several screens on Upper Valley. Beginning in May, Complainant was assigned the combined Catherine Creek and Upper Valley (Imnaha) routes (approximately 60 screens), Brad Jarrett was assigned the Lower Valley route, (approximately

42 screens) and Brian Kilgore retained the Umatilla River (Walla Walla River) route (approximately 35 screens). The Umatilla route was the longest in miles, followed by Catherine Creek-Upper Valley, with Lower Valley being lowest in mileage. The rancher-landowner and the available flow of water controlled when and how often the headgate above any particular screen would be opened or closed. Some headgates, as in the Lower Valley, were opened early in the irrigation season (April). Others, notably the Upper Valley such as Big Sheep, had water flow later in the season (*i.e.*, July) or not at all.

31) The construction and maintenance crews met at the Enterprise office each morning shortly after 7 a.m. to start work at 7:30 a.m. The day's activities and any problems were discussed between crew members and the respective crew leader. Both crews generally were "on the road" by 7:40 a.m. Because the Umatilla River route was run out of Pendleton, Kilgore was stationed in Pendleton and rarely came to the Enterprise office.

32) On May 2, 1994, Simpson accompanied Complainant, showing her the Upper Valley route. On May 3 he showed her the Grande Ronde and Catherine Creek screens.

33) On or about May 4, 1994, while moving lumber in a state pickup truck accompanied by Simpson and under his direction, Complainant ran the lumber into a breezeway structure at Respondent's old Enterprise shop, damaging the tailgate of the pickup. Simpson reported the damage to Findley, who called both Simpson and Complainant in on May 5 and directed that

they report the accident and obtain damage estimates. Complainant learned that it was unnecessary to file an accident report with the police. She had been concerned with the effect of such a report on her driving record and on her employability with the state, particularly in view of the John Day reprimand.

34) When he asked for an accident report, Findley was referring to an internal agency accident report, kept in the glove compartment of each vehicle and required when there is damage to the vehicle. He did not mean a police report. Because Complainant was concerned about her driving record, Findley called the state's risk management office and verified that a report to DMV was not required.

35) Complainant had several conversations with agency investigator Moxley during May and June 1994, mostly about John Day. Early on May 6, about 6:35 a.m., she told Moxley that she was considering a retaliation complaint.

36) Among Findley's duties in respect to the screens tenders were to visually observe and inspect the work twice monthly, to review work needs and accomplishments in staff meetings, and to identify work accomplished and identify and correct problem areas.

37) On May 11, Findley received a call from the regional office regarding screen number 143 on Catherine Creek. Early on May 12, on his way to a regional meeting in La Grande, he removed two links from the drive chain and readjusted the jack shaft of 143.

He was of the opinion that this maintenance duty should have been detected and repaired by the screens checker.

38) On May 12, 1994, all personnel in the screens program attended an all day meeting at La Grande. It was an orientation program for seasonal employees and dealt with such items as time sheets, payroll, insurance, performance appraisals, administrative rules, federal Fair Labor Standards Act regulations, use of state-owned vehicles, and employee behavior. The program included a short (10 minute) presentation on sexual harassment and had been scheduled in the ordinary course of agency business. A similar program was presented in 1995.

39) Complainant attended the May 12 meeting and thought the sexual harassment portion was not well done. She also thought, because some John Day employee or employees said "Well, Whybark, you've done it again," that the harassment portion might have been included because of her prior history. She was unable to identify who made the comment.

40) Sometime around May 12, uniform items were issued for the seasonal employees, including coats, hats, and some name tags. Complainant did not at that time receive a hat, a coat, or a name tag. Hats were available on an as needed basis in Findley's office, and Complainant eventually got one. At Complainant's request, Simpson asked Findley about the coat and name tag and Findley suggested that Simpson find out if the coat she'd had at John Day was available. Name tags sometimes took several months

to order. Neither Findley nor Simpson recalled whether one was ordered for Complainant, who was hired later than Mattson or Jarrett. Complainant did not receive her own coat or tag before leaving in June. Simpson gave her permission to use her own coat if one was needed.

41) Complainant also did not get her own pair of hip boots. There were boots available at the office. The ones she used did not fit well. She mentioned the boots to Simpson, but never got new ones.

42) Because an assistant regional supervisor had earlier discovered hats and boots abandoned around the Enterprise shop, vehicles and office, these items were kept in central locations and handed out as needed. Findley was unaware that Complainant's boots were an issue.

43) Complainant felt slighted by what she saw as the unavailability of uniform items and was upset by what she saw as the focus of a portion of the May 12 orientation meeting in La Grande. She thought something was amiss, because she also thought she had seen Findley on her route previously. On May 13, she decided to run her route backwards, that is, opposite the normal direction.

44) On May 13, Findley received a call from the regional office regarding screen number 109 on Catherine

Creek as well as a second complaint regarding screen number 143. Findley and Simpson were headed in that direction to do flow meter checks on some of the screens. They found debris and dead fish in front of 109. At 143, which Findley had repaired the previous day, there was a stick alongside the wall. Complainant came up, looking tense and Findley assured her he was just investigating a complaint. Complainant said if there was a problem with that screen that Brian Kilgore had the route before she did. Both Findley and Complainant were talking loudly.\* Findley commented that if she couldn't do the job, he'd find some one who could. Complainant said she was done with her route and Findley told her she could return to the office.

45) Findley and Simpson returned to screen 109 and found it as before. They removed the debris and dead fish. Each check of 109 in April and May was coded "3 - not operating, no water."

46) On May 13, a citizen named Harvey Moyer, known as a frequent complainer, called regarding Complainant's driving relative to alleged excessive speed and alleged failure to signal. Simpson discussed the complaint with her.

47) On May 16, Findley and Simpson inspected Upper Valley screens

(Complainant's) and Lower Valley Screens (Jarrett's). Findley instructed Simpson to advise the screen tenders of problems found and that the next inspection would be within a month.

48) On May 18, Simpson met with Complainant and Jarrett and advised them of what was expected of them as screens checkers. He assisted Complainant in installing two screens.

49) Overall, Complainant was a more competent screens checker than Jarrett in that she was able to assess and correct mechanical or structural difficulty with the fish screens. Jarrett was slower and required assistance with mechanical difficulties.

50) Kim Jones was a Fish & Wildlife Biologist 3, a project leader with Respondent's Research section at the time of the hearing. He had held a similar position in Corvallis in March 1994 when Complainant was interviewed for a stream survey position. Some of the stream survey work was in the Eastern Oregon region. Jones's record showed that Complainant had visited Corvallis in mid-March and advised his office that she was available beginning April 1, 1994. His record also reflected that Gary Findley gave a "good reference - hard worker, motivated" in response to a "telephone reference check" in early April. Jones had no record of what date he notified Complainant that she would be hired, but he generally advised candidates within two weeks of interview.

51) Before Complainant came to work in May 1994, Findley learned from Brad Smith, Respondent's district fish biologist, that Complainant was going to work with Respondent's Re-

search section about the middle of June.

52) During the first week of May 1994, Findley, Simpson, and Kelso discussed Complainant's leaving in mid-June and a possible search for a replacement. Findley instructed Simpson to obtain a letter of resignation from Complainant so that a search for a replacement could be authorized. Following the meeting, Simpson requested that Complainant write such a letter. He reminded her several times and finally was told that June 17 would be her last day at Enterprise.

53) Andrew Yost was hired by Respondent as a seasonal screens technician and assigned to the on-site screens construction crew under crew leader Scott Kelso in May 1994. Before Complainant left the Enterprise job, Yost asked to transfer from the construction crew to screens maintenance to take over the combined Upper Valley-Imnaha and Catherine Creek screens routes. This was cleared in a meeting including Yost, Kelso, Simpson, and Findley. As a result, Yost ran these combined routes with Complainant on June 3, and they were his from June 17 through the end of July. In August, Jarrett took over the Upper Valley-Imnaha route along with Lower Valley and Kilgore ran Catherine Creek along with Umatilla River.

54) There was no evidence that Kilgore, Jarrett, or Yost, all males, had previously complained to or about Respondent or Findley regarding any unlawful employment practice.

55) In May and June 1994, because of the concentration on on-site construction and reconstruction of the Enterprise area screens and the

\* This is a composite finding. All three persons present agreed on the date and location of this confrontation. Complainant insisted that she arrived first, removed a stick and was leaving when the other two arrived. Because Findley stated there was a stick laying near the wall, Complainant may well have removed it first. Simpson thought he or Findley may have removed the stick, but could not recall exactly. Complainant stated that Findley said he had ten men who could do the job if she couldn't. All agree that screen 109 was not mentioned.

concentration of screen fabrication and manufacture at John Day, there was very little welding or fabrication work available for either the screen techs running screens routes or for those engaged in construction. Neither Complainant nor her coworkers did other than very occasional work of this type, and she was not isolated from training opportunities in the shop.

56) In May and June 1994, Simpson provided assistance to Complainant when she asked for it. He helped her himself and at least once assigned Jarrett to help her install screens. Complainant preferred not to have Jarrett assist her because he was slow. Other than the construction crew and Kilgore in Pendleton, there was no one else available.

57) During Complainant's tenure at Enterprise, the mileage record book for Complainant's state vehicle was found in the office yard. Findley noted that it was not up to date. He instructed Simpson to go over the maintenance of vehicle mileage books with Complainant.

58) During Complainant's tenure at Enterprise, the regional office questioned why Complainant was not obtaining gasoline for her state vehicle at the fish hatchery pumps and recording same. When questioned by Simpson, Complainant stated that she had no 3686 key, which gave access to the state pumps. Simpson gave her a key.

59) Because she went into La Grande for the Catherine Creek route twice a week, Complainant had the extra duty of carrying confidential mail between the Enterprise office and the regional office. On June 9, she forgot the mail while unloading a computer.

60) On June 16, 1994, Findley instructed Simpson to prepare a report on Complainant's tenure at Enterprise. Included in the report were the damaged tailgate, the incomplete mileage book, the citizen complaint about her driving, the situations with screens 109 and 143, Complainant's failure to submit an evaluation form on the orientation presentation, an incident wherein Simpson had to go out after Complainant's monthly screens report, her tardiness in submitting a resignation letter, the undelivered mail, and the use of the gas key. Findley later learned that it was not necessary to evaluate an employee on transfer if the employee had worked less than 90 days. Simpson's report was not sent to anyone and never became part of Complainant's personnel file. The items in Simpson's report were described individually by Findley as being "no big deal;" none was ever the basis for any disciplinary or other action against Complainant.

61) Complainant was emotionally upset by what she understood as the necessity for a police report on the pickup damage. She was further upset by what she saw as Findley's focusing on her regarding the situation with screen 143 and her perceptions of his remark. She believed that her route assignment was longer and more difficult than that given others, and that she was deprived of training opportunities and assistance with her work. Each correction or discussion relayed to her by Simpson, such as the missing mail, the mileage book, or the gas key she saw as a further indication of Findley's intent to damage her. She saw each such event as a damaging blow to her chance to make screens a career.

62) Complainant's stream survey job with Respondent's Research section began on June 20 and ended in mid-September 1994. She enjoyed the assignment and in a note to Jones thanked him for "the wonderful chance to work in Research."

63) In January 1995, the Agency notified Complainant regarding her March 1994 complaint with the Agency that it had not found substantial evidence of any unlawful employment practice by Respondent.

64) In February 1995, Findley included Complainant's name, together with the names of four male 1994 employees (Wright, Bronson, Mattson, and Simpson), in an intradepartmental memo regarding prospective employees for 1995 seasonal positions. Jarrett was not included. Findley's justification of Complainant's selection included the statement that she:

"appears to be a well rounded employee in the screens program which will be a great benefit to the Enterprise Screen District in allowing us great flexibility [sic] in her assignments."

The recommended position was not funded.

65) Ronald Dudgeon, Complainant's father, was a retired US Forest Service engineer. He and Margaret Dudgeon, Complainant's mother, had moved from Arizona to assist Complainant, who was a single parent of one son. The boy was enrolled in school in Prairie City, near John Day, living with Complainant's parents when Complainant attended school in La Grande. They were still at Prairie City when Complainant began work in May

1994 at Enterprise. Ronald Dudgeon worked at a state park in Wallowa County, near Enterprise, in the summer of 1994. The boy stayed with him. Complainant visited or lived with the parents and her son as the situation allowed in 1994.

66) Complainant's parents noted that Complainant seemed emotionally upset and nervous while working at the Enterprise screens office in 1994. Her mother stated that Complainant was upset by the pickup incident (which she may have confused with the earlier John Day vehicle problem, since she testified that Complainant was not in the vehicle), and by one other incident she couldn't recall. She noted Complainant's nervousness and loss of weight. Complainant's father was even less precise as to the cause of his daughter's upset, describing "an instance something to do with a pickup" and "something to do with the screens not being ran right." "[I]t seemed like it was just one problem after another." She was stressed out and cried easily. Both noted that they discussed Complainant's work situation with her and all seemed to decide that her career plans were not working out. Both parents testified that the living situation and weekend visits to her son created a stressful time.

67) Prior to the week of the hearing, Findley had never seen the July 1993 tort claim notice letter from Complainant's attorney or Complainant's March 1994 complaint with the Agency. He was aware in 1994 that Complainant had previously accused him of sexual harassment. He denied that he took any adverse action toward or regarding Complainant in April, May,

or June 1994 because she had opposed unlawful practices or because she was female.

68) At the time of the hearing, Complainant had been employed in Boise, Idaho, as a registered dental assistant since January 1996.

69) Complainant's testimony was not altogether credible. Her testimony about her career goal to make her career in screens was not borne out by her educational goals. There was little testimony or other evidence confirming her view of events. She testified that she called Hvam and Hoover on May 13, 1994, after her upset at screen 143, but neither recalled such a call. She denied that there was debris at 109 on May 13, but two persons found it both before and after she should have been there. Her perspective on the harassment presentation at the orientation meeting was not objectively reasonable. The forum has credited only those portions of her testimony which were uncontroverted or which were confirmed by other evidence or inference on the whole record.

**ULTIMATE FINDINGS OF FACT**

1) Complainant, female, was employed by Respondent as a Fish and Wildlife Technician 1 (Screens Tender) on a seasonal basis between March 1991 and September 1993 and between May and June 1994.

2) Complainant's supervisor between March 1991 and February 1992 and in May and June 1994 was Gary Findley, Fish and Wildlife Manager 1, at Respondent's Enterprise, Oregon, office. Between February 1992 and September 1993, Complainant's supervisor was Coby Moulton at

Respondent's John Day, Oregon, office.

3) In May 1992, Findley received a formal reprimand from Respondent concerning his supervision of employees at Enterprise in 1991, including both favorable and unfavorable treatment of Complainant. Respondent made no finding of any unlawful practice involving her gender.

4) In 1994, Findley was aware that Complainant had complained regarding incidents of alleged sexual harassment involving Findley.

5) In February 1994, Complainant was interviewed for and not hired to fill one of two seasonal screen tender positions at Enterprise. Later, in April, she was notified by Findley that she was hired. She began working on May 2, 1994, with Findley as her supervisor.

6) In March 1994, Complainant was interviewed for a position with Respondent's Research section in Corvallis, Oregon. Findley gave a positive recommendation on Complainant to the Research section. She was advised in early April that she had that job beginning June 20, 1994.

7) Complainant was not treated adversely at Enterprise in May and June 1994 because of her sex, because she had opposed unlawful practices, or because she had initiated or assisted in a proceeding under ORS chapter 659.

**CONCLUSIONS OF LAW**

1) At times material herein, ORS 659.010 provided, in part:

"As used in ORS 659.010 to 659.110 \*\*\* unless the context requires otherwise:

\*\*\*\*\*

"(6) 'Employer' means any person, including state agencies, \*\*\* who in this state \*\*\* engages or utilizes the personal service of one or more employees reserving the right to control the means by which such service is or will be performed.

Respondent was an employer subject to ORS 659.010 to 659.110 at all times material herein.

2) At times material herein, ORS 659.040(1) provided, in part:

"Any person claiming to be aggrieved by an alleged unlawful employment practice, may \*\*\* make, sign and file with the commissioner a verified complaint in writing which shall state the name and address of the \*\*\* employer \*\*\* alleged to have committed the unlawful employment practice complained of \*\*\* no later than one year after the alleged unlawful employment practice."

Under ORS 659.010 to 659.110, the Commissioner of the Bureau of Labor and Industries has jurisdiction of the persons and subject matter herein.

3) At times material herein, the actions, inactions, statements, and motivations of Gary Findley are properly imputed to Respondent herein.

4) ORS 659.030 provides, in part:

"(1) For the purposes of ORS 659.010 to 659.110 \*\*\* , it is an unlawful employment practice:

\*\*\*\*\*

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

\*\*\*\*\*

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

Respondent did not discriminate against Complainant because of her sex. Therefore, Respondent did not violate ORS 659.030(1)(b).

5) Respondent did not discriminate against Complainant because she had opposed practices forbidden by ORS 659.030. Therefore, Respondent did not violate ORS 659.030(1)(f).

6) Respondent did not discriminate against Complainant because she had filed a complaint or assisted in a proceeding under ORS 659.010 to 659.110. Therefore, Respondent did not violate ORS 659.030(1)(f).

7) At times material herein, ORS 659.060(3) provided, in part:

\*\*\*\* The commissioner shall \*\*\* issue an order dismissing the charge and complaint against any respondent not found to have engaged in any unlawful practice charged \*\*\*."

The Final Order below is a proper disposition of this matter.

**OPINION**

The Agency's Specific Charges accused Respondent, through its manager, Gary Findley, in 1994, of discriminating against Complainant because of her sex, female, and in retaliation for her having previously opposed unlawful practices based on

sex and sexual harassment by Findley and other Respondent employees in 1991 and 1993, including the filing of complaints with the Agency under ORS chapter 659.

#### Retaliation

Respondent argued that there was no showing that Findley was aware in February through June 1994 that Complainant had opposed unlawful practices and particularly that Findley was aware of the contents of the July 1993 tort claim notice or of the March 1994 complaint with the Agency. Findley testified that he had seen neither until the week of the hearing. However, I conclude from the following colloquy that Findley knew that Complainant had accused him of sexual harassment:

QUESTION (by the Agency): "So when Ms. Whybark started her employment with you on May 2nd, 1994, you were aware of her previous complaints regarding you and sexual harassment; isn't that correct?"

ANSWER (by witness Findley): "Yes."

Sexual harassment is discrimination because of sex, which by definition is an unlawful employment practice. ORS 659.030(1). Accusing an employer/ manager of sexual harassment is opposing an unlawful employment practice.

Findley received a reprimand from Respondent for his management of subordinates, particularly Complainant, in 1991. But Complainant was not the employee who had initiated Respondent's investigation of Findley's management and the reprimand specific-

ally found that there was no evidence of sexual misconduct. Thus, as to the reprimand, the Agency established that Findley might have had motivation to retaliate, but that particular retaliation would not be based on an unlawful employment practice.

#### Different Treatment

Whether Respondent's allegedly adverse treatment of Complainant was because of her sex or because of retaliation or both, the Agency must show that such treatment was discriminatory, that is, that it was not accorded to males and/or was not accorded to persons who had not opposed forbidden practices.

The evidence showed that Findley was apprehensive about re-employing Complainant. On the other hand, it also showed that he evaluated her fairly on interview, that he gave a positive recommendation for her to another section of Respondent, and that he included her in his preliminary planning for his program for 1995. Jarrett, on the other hand, was not included in the 1995 planning and was not rehired.

Findley testified positively that Complainant was a competent screens tender with commensurate mechanical ability. He did have Simpson list a series of instances wherein Complainant may have fallen short of expectation, but the list was not disseminated. It was not placed in her personnel file or even discussed with her. Findley acknowledged that singly, the items listed were not "big deals," and that collectively they illustrated carelessness or inattention which could be corrected.

Respondent countered with the argument that each incident perceived as discriminatory by Complainant was, in fact, not discriminatory but rather was the result of non-discriminatory circumstances wherein Complainant was treated no differently than males or than persons who had not made complaint of unlawful employment practices. There was simply no evidence that any male screens tender, or any employee who had opposed unlawful practices, had been involved with a damaged tailgate, an incomplete mileage book, a citizen complaint about driving, a verbal confrontation about screens, a failure to submit an evaluation form on the orientation presentation, a crew leader retrieving a monthly screens report, a tardy resignation letter, undelivered mail, or the use on non-use of the a key.

The Agency alleged that the assignment of the combined Catherine Creek and Upper Valley-Ilnaha screens routes was discriminatory, in that they were ordinarily assigned to two screens tenders, and that the assignment was designed to isolate Complainant from the office and the other screens personnel. The evidence showed that she accepted the job knowing that was the assignment, that the mission of the Enterprise office had been changed by NMFS since 1991 to emphasize construction and reconstruction of the screens system, that Complainant did not request transfer to the construction crew, and that, as between the three screens checkers available, the assignment was the most logical. Jarrett was the only checker also qualified to service the fish trap in Lower Valley, and was also

the most mechanically inept and was assigned to the route closest to Enterprise, should he need assistance. Kilgore was completely isolated in Pendleton and ran a combined route which was the longest route as to distance. Complainant's route had more screens, but had fewer operating in early season than the Lower Valley. After she left to do stream survey work, Yost, a male who had not protested unlawful practices, received the exact same route assignment.

The Agency alleged that Complainant, although qualified, was not allowed to work in the shop at fabrication and welding while her co-workers with less experience were permitted to do such work. The evidence demonstrated that the job and its mission had changed since Complainant's prior employment at Enterprise. No screens tender, even among the construction crew, did fabrication in 1994 and the only welding was in connection with construction.

The Agency alleged that Complainant was denied the same assistance that her co-workers were offered and received. There was simply no evidence to support this allegation.

The Agency alleged that Findley ordered special items such as name tags, coats, and hats for "the entire crew except Complainant." There was no evidence that Findley individually ordered these items for anyone. There was evidence that Complainant did not receive some items, but no showing by a preponderance of evidence that any missing items were due to intent rather than the assumption that an ex-employee already had them or the fact that Complainant was expected to

leave in mid-June or any other non-discriminatory reason.

Thus, the Agency failed to prove by a preponderance of evidence on the whole record that in 1994 at Enterprise, Respondent engaged in any unlawful employment practice prohibited by statute which caused harm to Complainant.

#### ORDER

NOW, THEREFORE, Respondent not having been found to have engaged in the unlawful employment practices charged, the Specific Charges and the Complaint against Respondent State of Oregon Department of Fish and Wildlife are hereby dismissed according to the provisions of ORS 659.060(3).

=====

#### In the Matter of WING F. FONG

and Yuen Kuen Fong, aka Wendy Fong, dba China Hut Restaurant, Respondents.

Case Number 57-97

Final Order of the Commissioner

Jack Roberts

Issued March 4, 1998.

#### SYNOPSIS

Where respondents' employee, a cook, sexually harassed complainant, a waitress, but where respondents did not know of the cook's conduct and evidence did not show that they should

have known of it, the commissioner held that respondents were not responsible for the acts of sexual harassment. Accordingly, the commissioner dismissed the complaint and specific charges. ORS 659.030(1)(b); former OAR 839-07-550, 839-07-555(2), 839-07-565.

The above-entitled contested case came on regularly for hearing before Douglas A. McKean, designated as Administrative Law Judge (ALJ) by Jack Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on September 23 to 25, 1997, in the hearings room of the Oregon State Employment Department, 119 North Oakdale Street, Medford, Oregon.

The Bureau of Labor and Industries (the Agency) was represented by Alan McCullough, an employee of the Agency. Anita Marlene Carlson (Complainant) was present throughout the hearing. Wing F. Fong (Respondent Wing Fong, or Mr. Fong) and Yuen Kuen Fong, aka Wendy Fong (Respondent Wendy Fong, or Mrs. Fong), were present throughout the hearing and were represented by P. David Ingalls, Attorney at Law.

The Agency called the following witnesses: Consepcion (Connie) Baker, mother of Walter Baker Ravis and cousin of Josefina Romero, who formerly worked for Respondents; Anita Marlene Carlson, Complainant; Allyson Kelley, former bartender and waitress for Respondents; Walter Baker Ravis, former dishwasher for Respondents; Christy St. Range (formerly Smith), former waitress for Respondents; Vicki Stoner, waitress for

#### FINDINGS OF FACT – PROCEDURAL

1) On April 19, 1996, Complainant filed a verified complaint with the Civil Rights Division of the Agency. She alleged that Respondents discriminated against her because of her sex and race in that she was sexually harassed by Respondents' cook, De Sheng (Jimmy) Tan, throughout her employment, she was treated differently by Respondents because of her race, and on January 26, 1996, Respondent Wendy Fong terminated her because of her race.

2) After investigation and review, the Agency issued an Administrative Determination finding substantial evidence of unlawful employment practices by Respondents.

3) On around May 20, 1997, the Agency prepared and duly served on Respondents Specific Charges alleging that, with Respondents' knowledge, Respondents' employee, De Sheng Tan, sexually harassed Complainant, and that Respondent Wendy Fong treated Complainant differently and discharged her from employment because of her race. The Specific Charges alleged that Respondents' actions violated ORS 659.030(1)(a) and (b).

4) With the Specific Charges, the forum served on Respondents the following: a) a Notice of Hearing setting forth the time and place of the hearing in this matter; b) a Notice of Contested Case Rights and Procedures containing the information required by ORS 183.413; c) a complete copy of the Agency's administrative rules regarding the contested case process; and d) a separate copy of the specific

Respondents; Sheila Tokar, former hostess for Respondents; and Barbara Turner, senior investigator in the Civil Rights Division of the Agency.

Respondents called the following witnesses: Peggy Davis, bartender for Respondents; Gayla Dixon, waitress for Respondents; Wing Fong, Respondent; Yuen Kuen Fong, Respondent; Daniel Gan, cook for Respondents; May Gan, cook for Respondents; Rosemarie (Rosie) Hayes, waitress for Respondents; Daniel Kou, Respondents' manager; Mei Ying Kwong, kitchen helper for Respondents; Lesley Laing, compliance specialist in the Wage and Hour Division of the Agency; Nancy Wu Ng, former cashier for Respondents; Dave Norman, an acquaintance of Allyson Kelley; Sharon Pfeiffer, bartender and waitress for Respondents; De Sheng (Jimmy) Tan, former cook for Respondents; and Barbara Turner, senior investigator in the Civil Rights Division of the Agency.

Hardy Li and Manuela Marney, appointed by the forum and under proper affirmation, acted as interpreters for several witnesses called by the Agency and Respondents.

Administrative exhibits X-1 to X-16, Agency exhibits A-1, A-3, and A-4, and Respondents' exhibit R-1 were offered and received into evidence. The Agency withdrew exhibit A-2. The record closed on September 25, 1997.

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

administrative rule regarding responsive pleadings.

5) On June 3, 1997, Respondents' attorney requested a postponement of the hearing because it conflicted with a previously scheduled circuit court trial. On June 10, 1997, the forum granted the request. An amended Notice of Hearing was issued to the participants setting the hearing for September 23, 1997.

6) On June 6, 1997, Respondents filed an answer in which they denied the allegations of discrimination mentioned above in the Specific Charges and stated two affirmative defenses.

7) On July 7, 1997, the Agency and Respondents filed a joint motion for an order allowing them to depose the Complainant and Respondents. On July 10, 1997, the ALJ granted the motion.

8) Pursuant to OAR 839-050-0210 and the ALJ's order, the Agency and Respondent each filed a Summary of the Case. The Agency filed a supplement.

9) On September 15, 1997, Respondents' attorney moved for a discovery order directing the Agency to produce notes of interviews with witnesses. Some of the notes were made by an investigator from the Civil Rights Division at the direction of the Agency case presenter. Other notes were made by the case presenter. The ALJ granted the motion with respect to notes made by the investigator. The ALJ found that the Agency voluntarily produced its investigative file to Respondents, the file contained investigative interview notes, and the additional interview notes made by the investiga-

tor, even at the case presenter's direction, should be produced in this case. The ALJ found no reason to treat these notes differently than interview notes made by the investigator earlier in the process. The ALJ denied the motion with respect to the case presenter's notes of interviews with witnesses. In his ruling, the ALJ stated:

"The public interest in encouraging frank communications between the case presenter and Agency staff outweighs the public interest in the disclosure of those communications. ORS 192.502(1); *In the Matter of Albertson's, Inc.*, 10 BOLI 199, 203-04 (1992), *reversed and remanded on other grounds, Albertson's, Inc. v. Bureau of Labor and Industries*, 128 Or App 97, 874 P2d 1352 (1994). The case presenter may not be examined as to public records that are exempt from disclosure under ORS 192.501 to 192.505. ORS 40.270 (ORE 509).

"Likewise, there is a strong public interest in protecting the case presenter's communications with a complainant and other witnesses at a contested case hearing.

'ORS 183.450(7) allows a state agency to be represented at contested case hearings by agency employees with the consent of the Attorney General. The Attorney General has given this consent to the Bureau, and the Bureau has designated individual employees as case presenters to perform this function. At a contested case hearing, the case presenter is

authorized to perform every function related to litigation that the Attorney General would perform except presenting legal argument. ORS 183.450(8), OAR 839-50-230. An essential component of litigation is that the attorney or case presenter representing the client communicate candidly with the client regarding all facts within the client's knowledge that are relevant to the case. Here, although the client is technically the agency, the real party in interest is the Complainant. It is the Complainant who was subjected to the alleged discriminatory conduct and the Complainant who will be the beneficiary of any award of damages, not the agency. It is illogical to assume that the legislature and the Attorney General intended for an agency employee to perform all the essential functions of an attorney except for presenting legal argument and simultaneously intended to place this employee in the untenable position of being subject to examination, either by deposition or during a contested case hearing, as to the substance of any conversations between the employee and the Complainant whose case is being heard. This interpretation of the law would effectively hamstring the agency case presenter in performing the very task the legislature delegated to the case presenter to perform.' \*\*\* *In the Matter of Thomas Myers*, 15 BOLI 1, 15-16 (1996).

"The forum believes that this rationale concerning conversations between the case presenter and a complainant also applies to conversations between the case presenter and other witnesses. The case presenter must be able 'to perform all the essential functions of an attorney except for presenting legal argument,' without being placed 'in the untenable position of being subject to examination, either by deposition or during a contested case hearing, as to the substance of any conversations between the' case presenter and witnesses who were interviewed in preparation for the contested case hearing.

The forum adopts that ruling.

10) On September 18, 1997, the Agency moved that the allegations of discrimination based on Complainant's race be dismissed, along with the prayer for back pay. The ALJ granted the motion at the beginning of the hearing on September 23, 1997.

11) At the start of the hearing, the attorney for Respondents stated that he had read the Notice of Contested Case Rights and Procedures and had no questions about it.

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

13) At the start of the hearing, Respondents submitted a hearing memorandum.

14) Before opening statements, Respondents raised a question about

the issue of Respondents' knowledge of Jimmy Tan's alleged conduct. In the Specific Charges, the Agency alleged that "Respondents were aware, or should have been aware, of Tan's conduct [of a sexual nature directed at Complainant because of her sex] and took no action to stop it[.]" Respondents argued that this allegation was specific to Respondents and did not include any alleged knowledge of agents or supervisors. They claimed they were not prepared to defend against an allegation involving the knowledge of their agents or supervisors. The Agency contended that the language in the Specific Charges was broad enough to permit it to offer evidence of Dan Gan's alleged knowledge, because he was in a unique position as a bilingual person whom Respondents and employees relied on to communicate. Although the Agency acknowledged that Gan was not Respondents' supervisor or manager, the Agency claimed that Gan was an "agent," for purposes of *former* OAR 839-07-555 (2), because he was a person through whom the English-speaking employees had to communicate with Respondents. It was the Agency's position that Respondents were aware of the alleged sexual harassment and that Dan Gan or others in supervisory positions were informed of Jimmy Tan's alleged sexual harassment of Complainant or others. The ALJ ruled that the Agency could offer evidence of Gan's duties and knowledge, so that the forum could decide whether he was an

agent under *former* OAR 839-07-555 (2). Before the Agency rested its case, it moved to amend the Specific Charges to encompass this theory of liability. The ALJ granted the motion and permitted Respondents to request a continuance if necessary to meet the new theory and evidence. When the hearing resumed on September 25, 1997, the Agency withdrew its claim that Dan Gan was Respondents' "agent" as that term is used in *former* OAR 839-07-555(2).

15) On February 10, 1998, the ALJ issued a Proposed Order in this matter. Included in the Proposed Order was an Exceptions Notice that allowed ten days for filing exceptions. The Hearings Unit received no exceptions.

#### FINDINGS OF FACT – THE MERITS

1) Respondents owned and operated China Hut Restaurant (China Hut or restaurant) at all times material herein. They were employers in Oregon who engaged or utilized the services of one or more employees, subject to the provisions of ORS 659.010 to 659.435.

2) Respondent Wing Fong is a native of China. He speaks Chinese and English. He had received no complaint of sexual harassment before Complainant's. He learned of her complaint from a letter from the Agency after Complainant left employment. Mr. Fong never saw inappropriate sexual conduct at the restaurant. No one ever told him about sexual harassment involving De Sheng (Jimmy) Tan. He did

not remember a complaint by Josefina Romero involving Tan.

3) Respondent Wendy Fong came to the US from Hong Kong in 1976. She speaks Chinese and English. Mrs. Fong learned of Complainant's complaint from a letter from the Agency after Complainant left. Mrs. Fong never saw Tan sexually harass anyone at the restaurant.

4) At all times material, Respondents managed the restaurant and did not employ a manager. One of the Respondents was usually at the restaurant. Respondents employ 45 to 50 employees.

5) Complainant is a female who worked as a waitress for Respondents from on or about February 28, 1995, through January 26, 1996.

6) Complainant normally worked five days, 18 to 21 hours per week. She worked with Tan.

7) Jimmy Tan came to the United States from the Peoples Republic of China in 1986. Respondent Wing Fong hired him in 1993. Tan worked as a cook for Respondents. While employed by Respondents, Tan lived in an apartment above the restaurant. Tan spoke Chinese and a little English. He could not read English, but understood the restaurant menu. He could understand and respond to greetings in English. From July 4 to September 15, 1995, Tan was traveling and was not at Respondents' restaurant.

8) Tan got along with most employees. Some employees argued with him about food orders. Respondent Wendy Fong regularly told Tan to get back into the kitchen because he was wandering around the restaurant or

drinking coffee and not doing his job. She thought he was a little lazy and a little slow sometimes with his side work. She had no other problems with Tan.

9) Some employees, including Complainant and Tan, engaged in horseplay in the kitchen area. They joked around and employees touched each other. Some employees touched Tan on the head, which, according to superstition, was supposed to bring him bad luck. At times Complainant was friendly with Tan and touched him on the head.

10) Occasionally Complainant went into the bar at China Hut for a couple of beers after work. Occasionally she asked Tan to buy her a drink. He did. They sat and talked together at the bar.

11) Complainant was friendly and outgoing. She occasionally put her arm around other employees, including Tan when she was drinking.

12) Tan flirted with some female employees. He touched their hair and touched them on the arm and hand. He told one waitress that she was very beautiful that day and, on another day, he asked her to be his girlfriend. Some of the female employees complained to each other about Tan's conduct toward them.

13) Other employees either never heard of or saw or experienced any inappropriate conduct involving Tan.

14) Josefina Romero worked for Respondents until April 1994. She spoke Spanish and was in Honduras at the time of hearing. While she was employed by Respondents, she complained to her relative, Consecpcion

\* *Former* OAR 839-07-555(2) (BL 1-1986) provided, "An employer is responsible for acts of sexual harassment by an employee against a co-worker where the employer, its agents, or supervisory employees knew or should have known of the conduct, unless it can be shown that the employer took immediate and appropriate corrective action."

Baker, about Tan coming up behind her and touching her on the breast. Baker and Romero went to China Hut one morning and talked about this to a Chinese man who opened the restaurant and spoke good English. He said Tan would never do it again. At that time, Respondents did not employ a manager, they managed the restaurant.

15) About two years before hearing, Dan Gan, a cook, overheard a conversation in the kitchen between Respondent Wendy Fong and an employee, Rachell Cortez Puga. The conversation was about Josefina Romero's complaint about Tan's conduct. Mrs. Fong was aware of the complaint.

16) Nancy Wu Ng worked as a cashier for Respondents from 1991 to 1995. She quit employment with Respondents because of a fight with Tan over a remark he made questioning her honesty. She did not quit because of any sexual conduct by Tan.

17) When waitresses changed customer's orders, the cooks, including Tan, sometimes said, "\$10" or "\$20" or "\$50." This was a joke and not sexual.

18) During the time Complainant and Tan worked together, Tan touched Complainant's hair and arms. He took Complainant's hand when she reached for a plate. At times Tan said to Complainant that she was "very beautiful" and "be my girlfriend." When business was slow, Tan followed Complainant around in the restaurant. Sometimes, Complainant did not object to Tan's conduct. They joked around or engaged in horseplay and Complainant laughed. At times she told Tan to stop what he was doing,

but she was smiling. Other times, Complainant told him to "stop it" and to "leave me alone." He said sexual things to Complainant in English. He wagged his tongue at Complainant in a "nasty, evilish gesture, like as if 'I'd like to do this to ya.'" Occasionally, Tan called Complainant's name although her order was not ready, and then he would stick out his tongue or say sexual things to her. He did this when it appeared no one was watching. Tan touched Complainant's buttocks. On one occasion while Complainant was cleaning a table in the banquet room, Tan came up behind her, put his hands on top of her head, put his mouth on Complainant's, and would not let her go. One evening when Complainant was at her car getting ready to leave, Tan came from behind a wall, grabbed Complainant, put his hands on her breast and crotch, and wouldn't let Complainant shut her car door.

19) Tan's conduct made Complainant "feel like a piece of meat." She felt "dirty" and "upset" because Tan was constantly "pawing" her. At times she was afraid of Tan.

20) Complainant never complained to Respondents about Tan's conduct.

21) At times Respondent Wendy Fong yelled at Complainant and told her to go back to work. Complainant had problems working with Mrs. Fong, and she felt that Mrs. Fong treated her harshly much of the time. Generally, Mrs. Fong's comments to Complainant were negative.

22) Complainant complained about Tan's unwelcome conduct to other employees in the restaurant.

23) She told Walter Baker Ravis, a dishwasher and cleanup man, that while she was setting up tables, Tan came up behind her in such a way that she could not move away and he flashed money at her. Ravis never told Respondents about this.

24) Vicki Stoner, a waitress, saw Tan act in a sexual way toward Complainant. She saw him touch Complainant's hair, stroke her arm, try to put his arm around Complainant, stick his tongue out at Complainant, wag his tongue at her, and grab her by the arm and restrain her. Complainant told Stoner about Tan's conduct, including a time when Tan tried to kiss Complainant in a walk in refrigerator, and another time when Tan put his hands on Complainant in the Banquet Room. Stoner told Complainant that if she wanted Tan to stop, she had to say it and mean it. Stoner thought Complainant was sweet but naive.

25) While Complainant was still employed, Stoner told Respondent Wendy Fong that Tan was acting out of line and that Respondents would get into trouble if Tan didn't stop. Stoner did not mention sexual harassment or Complainant's name. She assumed Mrs. Fong knew what she was talking about. Mrs. Fong said it was nothing, not to worry about it.

26) On Complainant's last day of employment with Respondents, she had a loud argument with Wendy Fong. The argument involved Complainant's refusal to take a new table of customers near the end of her shift. Mrs. Fong said that if she was not going to take any more tables, she was to get out. Complainant was upset. She said she had had it. She did not

mention Tan or sexual harassment during the argument with Mrs. Fong.

27) Complainant's testimony was not all reliable. The ALJ carefully observed her demeanor at hearing and concluded that at times she tailored her testimony to bolster her claim. Some of her testimony was contradicted by credible evidence, including the testimony of Agency witnesses. Some of it was inconsistent and she exaggerated. She was biased against Respondents because of what she saw as harsh treatment by Mrs. Fong. Accordingly, the forum believed her testimony only when it was supported by other credible evidence.

28) Respondent Wendy Fong's testimony was credible with one exception. She denied knowing of the complaint from Josefina Romero about Tan. Ravis and Baker testified credibly that Romero made this complaint to someone at the restaurant, and Dan Gan testified credibly that he overheard a conversation between Mrs. Fong and an employee about the complaint. There was no reason to find that Gan, who was employed by Respondents at the time of hearing, would concoct such a story. Respondents attempted to show that Gan somehow misunderstood the questions or testified incorrectly due to some limited ability to speak English. The forum, however, found that Gan responded appropriately and clearly in English, and that he had attended college in Oregon. The forum presumes his college classes were conducted in English. Thus, Gan's testimony was not affected by some limited ability with English, and the forum believed him on

this point. Accordingly, the forum disbelieved Mrs. Fong.

29) Respondent Wing Fong's testimony was credible.

30) Allyson Kelley's testimony was not credible. She made conflicting statements at hearing and before hearing to others. Her testimony was contradicted by other credible testimony. She was biased against Respondents. Accordingly, the forum did not believe her testimony except when it was corroborated by credible evidence.

31) Christy St. Range's testimony was not altogether credible. Some of her testimony was corroborated by other credible evidence. Other parts of her testimony were inconsistent and contradicted by other evidence. Regarding the important issue of whether Respondents knew of Tan's inappropriate sexual conduct, St. Range testified that she heard Mrs. Fong tell Tan many times in English not to touch or talk to the waitresses, and to stay in the kitchen and cook. The forum found this testimony incredible for several reasons. The first language of Tan and Mrs. Fong was Chinese. Tan had limited ability to speak English. Evidence suggests that Respondents often spoke Chinese to those employees who understood it. Thus, the forum finds it incredible that Mrs. Fong would repeatedly give this direction to Tan in English. In addition, no other evidence in the record corroborates St. Range's testimony on this point. Therefore, the forum does not believe this testimony. For the reasons given above, the forum gave little or no weight to St. Range's testimony except when it was corroborated by other credible evidence.

32) Vicki Stoner's testimony was credible. The ALJ carefully observed her demeanor at hearing, and on that basis found her testimony reliable. Like other witnesses, Stoner's memory had faded. Having taken that into account, however, the forum was still impressed that Stoner tried to testify truthfully, even when she perceived her testimony to be against her own interests.

#### ULTIMATE FINDINGS OF FACT

1) At all times material, Respondents employed one or more persons within the state of Oregon.

2) Respondents employed Complainant.

3) Complainant is female.

4) Respondents' employee, Jimmy Tan, engaged in verbal and physical conduct of a sexual nature directed at Complainant because of her sex.

5) Tan's conduct was offensive and unwelcome to Complainant.

6) Tan's conduct had the effect of creating an intimidating and offensive working environment.

7) Respondents did not know of Tan's conduct directed at Complainant. There is no sufficient basis upon which to find that Respondents should have known of Tan's conduct.

8) Complainant suffered distress and impaired human dignity because of Tan's conduct.

#### CONCLUSIONS OF LAW

1) At all times material herein, Respondents were employers subject to the provisions of ORS 659.010 to 659.110.

2) The Commissioner of the Bureau of Labor and Industries of the

State of Oregon has jurisdiction over the persons and subject matter herein.

3) ORS 659.030(1) provides:

"For the purposes of ORS 659.010 to 659.110, 659.227, 659.330, 659.340, and 659.400 to 659.460 and 659.505 to 659.545, it is an unlawful employment practice:

"\*\*\*\*\*

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

Former OAR 839-07-550 (BL 1-1986) provided in part:

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

"\*\*\*\*\*

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

Former OAR 839-07-555(2) (BL 1-1986) provided:

"An employer is responsible for acts of sexual harassment by an employee against a co-worker where the employer, its agents, or

supervisory employees knew or should have known of the conduct, unless it can be shown that the employer took immediate and appropriate corrective action."

Former OAR 839-07-565 (BL 1-1986) provided:

"Generally an employee subjected to sexual harassment should report the offense to the employer. Failure to do so, however, will not absolve the employer if the employer otherwise knew or should have known of the offensive conduct."

Respondents did not violate ORS 659.030(1)(b).

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

#### OPINION

The Agency alleges that while Complainant was employed by Respondents, Respondents' employee, Jimmy Tan, sexually harassed her. It alleges that Respondents were aware or should have been aware of Tan's conduct and took no action to stop it.

Respondents deny that Tan sexually harassed Complainant and deny that they knew or should have known of that conduct.

#### Prima Facie Case of Sexual Harassment by an Employee

The Agency has the burden of proving unlawful discrimination. *In the Matter of Motel 6*, 13 BOLI 175, 186 (1994). Here, a prima facie case of sexual harassment will be established

if the forum finds a preponderance of evidence showing:

1. Respondents were employers as defined by statute;
2. Complainant was employed by Respondents;
3. Complainant is a member of a protected class (sex);
4. Respondents' employee made unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature directed at Complainant because of her sex;
5. The employee's conduct had the purpose or effect of creating an intimidating, hostile, or offensive working environment;
6. Respondents knew or should have known of the offensive conduct and failed to take immediate and appropriate corrective action;
7. Complainant was harmed by the conduct. *Former OAR 839-05-010(1) (BL 9-1982), 839-07-550, 839-07-555, and 839-07-565; In the Matter of Kenneth Williams, 14 BOLI 16, 24 (1995); In the Matter of Fred Meyer, Inc., 15 BOLI 77, 92-94 (1996).*

The participants stipulated to facts establishing the first three elements of the test. The preponderance of credible evidence established that Jimmy Tan engaged in unwelcome verbal and physical conduct of a sexual nature

directed at Complainant because of her sex, and that this conduct had the effect of creating an intimidating and offensive working environment for her. Credible evidence also established that Complainant was harmed by Tan's conduct.

#### **Actual or Constructive Knowledge of Acts of Harassment**

The remaining issue is whether Respondents knew or should have known of Tan's offensive conduct, the sixth element of the prima facie case. Respondents would be liable for Tan's conduct if they knew or should have known of it and failed to take immediate and appropriate corrective action. *Former OAR 839-07-555(2), 839-07-565; In the Matter of Fred Meyer, Inc., 15 BOLI 77, 92-94 (1996).*

"The initial inquiry should be whether the employer knew or should have known of the alleged sexual harassment. If actual or constructive knowledge exists, and if the employer failed to take immediate and appropriate corrective action, the employer would be directly liable." (Footnote omitted.) EEOC: Policy Guidance on Sexual Harassment (March 19, 1990), 8 FEP Manual 405:6695 (BNA 1990).

In this case, the preponderance of credible evidence does not establish that Respondents knew or should have known of the offensive conduct.

#### Actual Knowledge or Notice

Complainant and Respondents agree that Complainant never reported Tan's acts of harassment to Respondents. Respondents denied knowing of Complainant's complaints or any offensive conduct by Tan directed at Complainant until after Complainant's employment ended. There is no evidence that they actually heard or saw acts of harassment. Of the other witnesses, three gave testimony that would show actual knowledge by Mrs. Fong of Tan's conduct.

First, Allyson Kelley testified that she complained to Respondents many times about Tan's conduct directed at her. She once suggested that her complaints also referred to Tan's conduct directed at Complainant. The forum found Kelley's testimony not credible, except when it was corroborated by other evidence. No credible evidence corroborates her alleged complaints to Respondents. Thus, the forum disregarded her testimony on this issue.

Second, Christy St. Range testified that more than once she heard Mrs. Fong tell Tan not to touch or talk to the waitresses. For the reasons given in Finding of Fact – The Merits 31 above, the forum did not believe this testimony.

Third, Vicki Stoner testified that she told Mrs. Fong that she (Mrs. Fong) needed to talk to Tan because his conduct was out of line and would get Respondents in trouble. Stoner assumed Mrs. Fong would know that Stoner was talking about Tan's acts of harassment. Her credible, sworn testimony was that she did not mention sexual harassment or Complainant's name when she talked to Mrs. Fong. The

conversation between Stoner and Mrs. Fong was brief and interrupted, and Stoner said that Mrs. Fong just "blew [her] off." Stoner repeated this testimony several times.

The Agency presented evidence that, in interviews with an Agency investigator, Stoner made statements that were inconsistent with her testimony. In one interview, Stoner said she told Mrs. Fong that Tan's conduct was out of line and was sexual harassment. In another interview, she said she told Mrs. Fong that Tan's conduct was against the law. The Agency also presented evidence that Stoner felt pressured by Respondents to write statements supportive of their case.

The inferences the Agency urged, of course, were that: (1) Stoner told Mrs. Fong that Tan was sexually harassing Complainant, (2) Stoner's pre-hearing statements to the investigator were true, and (3) she testified to the contrary because of pressure from Respondents and out of fear for her job. The forum declines to draw those inferences. This is because the forum found Stoner's sworn testimony at hearing credible, it was consistent with Mrs. Fong's testimony, and her prior two hearsay statements were inconsistent and less reliable.

For the reasons given above, the forum cannot find a preponderance of credible evidence showing that Respondents had actual notice of Tan's conduct directed at Complainant.

#### Constructive Knowledge or Notice

Respondents would still be responsible for Tan's conduct if they should have known of it, that is, if they had constructive knowledge or constructive

\* Federal EEOC Sex Discrimination Guidelines set the same requirements. Concerning sexual harassment, 29 CFR 1604.11(d) provides:

"With respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action."

notice of it. *Former OAR 839-07-555 (2)*, 839-07-565; 1 Lindemann and Grossman, *Employment Discrimination Law* 822-23 (3rd ed. 1996). "Constructive knowledge" means

"If one by exercise of reasonable care would have known a fact, he is deemed to have had constructive knowledge of such fact; e.g. matters of public record. \* \* \* See also Constructive notice."

"Constructive notice" means

"Such notice as is implied or imputed by law \* \* \*. Notice with which a person is charged by reason of the notorious nature of the thing to be noticed, as contrasted with actual notice of such thing. That which the law regards as sufficient to give notice and is regarded as a substitute for actual notice." *Black's Law Dictionary* 314 (6th ed. 1990).

No final order of the Commissioner has addressed the issue of when constructive knowledge or notice may be held to exist. In one Oregon case, summary judgment for the employer was reversed by the Court of Appeals where the employee's evidence, "if credited, show[ed] that [a supervisor] created a pervasive atmosphere of sexual harassment, that he was the subject of an earlier sexual harassment claim that the Bureau of Labor and Industries investigated, that he was notorious within the company and that [the employer] condoned the

activity." *Mains v. Il Morrow, Inc.*, 128 Or App 625, 635, 877 P2d 88, 93-94 (1994). The forum found no other Oregon case addressing the issue.

Because Oregon's Fair Employment Practices Law contained in ORS 659.010 to 659.110 is analogous to Title VII of the Civil Rights Act of 1964, federal court decisions are instructive and entitled to great weight on analogous issues in Oregon law. *Mains v. Il Morrow, Inc.*, 128 Or App 625, 634, 877 P2d 88, 93 (1994); *In the Matter of School District No. 1*, 1 BOLI 1, 15 (1973), *aff'd in part, rev'd in part (on other grounds)*, and *remanded, School District No. 1, Multnomah County v. Nilsen*, 271 Or 461, 534 P2d 1135 (1975).

Some federal courts have addressed this issue under Title VII.

"Constructive notice ('should have known') may be held to exist by some courts where management was aware of clues such as pervasive graffiti or other offensive material throughout the premises, or an employee's history of harassing behavior. Other courts, however, have required a more rigorous showing of notice, perhaps under the theory that the plaintiff by a specific complaint could have easily put the employer on actual notice." 1 Lindemann and Grossman, *Employment Discrimination Law* 823 (3rd ed. 1996) (footnotes omitted).

"The initial inquiry in determining employer liability in hostile environment sexual harassment cases is the employer's knowledge of the situation, because an employer is liable when it knew, or 'upon reasonably diligent inquiry should have known' of the harassment." (Emphasis added.) EEOC: Policy Guidance on Sexual Harassment, 8 FEP Manual 405:6696.

"[E]vidence of the pervasiveness of the harassment may give rise to an inference of knowledge or establish constructive knowledge. *Henson v. City of Dundee*, 682 F2d 897, 905, \* \* \* [29 FEP Cases 787] (11th Cir 1982)[.] Employers usually will be deemed to know of sexual harassment that is openly practiced in the workplace or well-known among employees. This often may be the case when there is more than one harasser or victim. *Lipsett [v. University of Puerto Rico]*, 864 F2d 881, 906 (1st Cir 1988) (employer liable where it should have known of concerted harassment of plaintiff and other female medical residents by

more senior male residents)." EEOC: Policy Guidance on Sexual Harassment, 8 FEP Manual 405:6696.

Here, evidence to show constructive knowledge or notice includes Stoner's statement to Mrs. Fong, discussed above, and Mrs. Fong's knowledge of Romero's complaint against Tan. (Romero's complaint was made before she left Respondents' employment in April 1994.) In addition, several employees were aware of Tan's behavior directed at Complainant and had experienced his unwelcome conduct.

That evidence must be balanced with credible evidence that some employees never witnessed or experienced Tan's offensive conduct, and had not heard complaints of it. While many of these witnesses were still employed by Respondents and had reasons to be biased in Respondents' favor, the forum still found much of that testimony credible. The conclusion to be drawn from this conflicting evidence is *not* that the offensive conduct did not occur; the preponderance of evidence shows that it did. The conclusion is that many of Tan's acts of harassment

complained to management at least four separate times about harassing behavior and another company employee testified that the company manager responded to her complaint by suggesting that she take the harassing employee out to "get his rocks off"); but compare *Ulrich v. K-Mart Corp.*, 858 F Supp 1087, 1092 (D. Kan. 1994) (co-worker case involving multiple incidents of unwanted touching; summary judgment granted; that the employer earlier was aware of the harasser's prior consensual relationship with a co-worker did not put the employer on notice that he was a harasser); *Kirkland v. Brinias*, 944 F2d 905 (unpublished opinion), 1991 WL 174195, at \*1-2 (6th Cir) (no constructive notice where the employer knew of the rumors concerning sexual harassment but never received any formal complaints, even though the plaintiff alleged that at least one incident took place in front of the employer); *Heflin v. Daly*, 742 F Supp 515, 517, 53 FEP 1223 (C.D. Ill. 1990) (no constructive notice even though the plaintiff filed an EEOC charge, where the charge failed to allege harassment).

\* Some examples from federal cases cited in *Employment Discrimination Law* are: *Hansel v. Public Serv. Co.*, 778 F Supp 1123, 1132-33, 57 FEP 858 (D. Colo. 1991) (sexually explicit graffiti throughout the plant was literally the "handwriting on the wall" serving as notice of the sexual harassment); *Keran v. Porter Paint Co.*, 575 NE2d 428, 434, 63 FEP 570 (Ohio 1991) (notice was imputed to the employer where plaintiff's predecessor testified that she had

toward Complainant were performed so that no one else would see them. For example, there was evidence that Tan acted sexually toward Complainant near her car, in a walk-in freezer, in a banquet room, and from the kitchen when no one else was watching. In addition, there was credible evidence that some of Tan's conduct involving Complainant was consensual, such as the horseplay and Complainant touching Tan and asking him to buy her drinks.

Considering all the credible evidence on the whole record, the forum cannot find that Respondents had constructive notice of Tan's acts of harassment. While Mrs. Fong was aware of one complaint of a sexual nature against Tan, the complaint was made at least many months before Complainant's employment. The evidence does not show what Mrs. Fong knew of Tan's conduct relative to that complaint. No evidence shows whether Respondents took immediate and appropriate corrective action related to that complaint.

While some employees were aware of Tan's conduct, others were not. I cannot find that his conduct was practiced openly or was as pervasive and notorious as the Agency contends. And while Stoner told Mrs. Fong that Tan was acting out of line, she did not mention sexual harassment or Complainant. Thus, despite the earlier complaint against Tan involving a sexual act, the forum does not believe that Stoner's vague complaint to Mrs. Fong was such that she should have known Tan was sexually harassing Complainant or should have so inquired. In sum, the preponderance of credible evidence does not show that Respond-

ents should have known of Tan's sexual harassment of Complainant.

Accordingly, the Agency has not met its burden of proof. The complaint and specific charges against Respondents must be dismissed. Respondents' affirmative defenses do not require discussion.

#### ORDER

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

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