

**In the Matter of
SABAS GONZALEZ
dba GONZALEZ FAMILY
RESTAURANT,**

Case Number 36-99
Final Order of the Commissioner
Jack Roberts
Issued July 2, 1999.

SYNOPSIS

Gonzalez Family Restaurant, Inc., operated a restaurant and employed Claimant as a dishwasher and cook. Gonzalez Family Restaurant, Inc., paid Claimant less than the minimum wage, did not pay Claimant one and one-half times the minimum wage for his overtime hours, and failed to pay Claimant all wages due upon termination. The corporation later dissolved, but Respondent continued operating the restaurant as the successor to Gonzalez Family Restaurant, Inc. As successor to the corporation, Respondent is liable for the unpaid wages due and owing Claimant, plus interest. Respondent is not, however, liable either for civil penalty wages or for a penalty the Agency sought to impose for Gonzalez Family Restaurant, Inc.'s failure to keep and maintain records of the hours Claimant worked. ORS 652.140, 652.150, 653.025(2), 653.045, 653.055(1), 653.261(1), and OAR 839-020-0030(1).

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

L. Hadlock, designated as Administrative Law Judge ("ALJ") by Jack Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on May 18, 1999, in the Bureau of Labor and Industries office at 3865 Wolverine Street NE, #E-1, Salem, Oregon.

Cynthia Domas, an employee of the Bureau of Labor and Industries ("BOLI" or "the Agency") represented the Agency. Wage claimant Martin Sanchez was present throughout the hearing and was not represented by counsel. Neither Respondent nor his counsel was present at the hearing.

The Agency called two witnesses: Claimant Martin Sanchez and Agency compliance specialist Gerhard Taeubel.

Agency Exhibits A-1 through A-5, attached to the Agency's case summary, were offered and received into evidence. During the hearing, the Agency offered Exhibit A-6, which was received into evidence. The evidentiary record closed on May 18, 1999.

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

**FINDINGS OF FACT –
PROCEDURAL**

1) On or about July 17, 1998, Claimant filed a wage claim with the Agency. He alleged that he had been employed at the Gonzalez Restaurant, owned by Sabas Gonzalez from January 1, 1998, through June 30, 1998. Claimant further alleged that he was not paid all the wages he had earned

2) When he filed the wage claim, Claimant completed an assignment of wages.

3) Claimant brought his wage claim within the statute of limitations.

4) On November 4, 1998, the Agency served Gonzalez Family Restaurant, Inc. (through service on its counsel, Michael T. Barrett), with an Order of Determination dated October 30, 1998. The Order of Determination alleged that Gonzalez Family Restaurant, Inc., had employed Claimant from January 1, 1998, through June 30, 1998, and owed Claimant \$7560.00 in earned and unpaid wages, \$1749.60 as penalty wages, and interest on both amounts. The Order of Determination required Gonzalez Family Restaurant, Inc., within 20 days, either to pay these sums in trust to the Agency, request an administrative hearing and submit an answer to the charges, or demand a trial in a court of law.

5) On or about December 4, 1998, Gonzalez Family Restaurant, Inc., filed an Answer and Request for Hearing in which it

denied all allegations in the Order of Determination

6) On March 10, 1999, the Agency served an Amended Order of Determination on Respondent Sabas Gonzalez dba Gonzalez Family Restaurant as Successor to Gonzalez Family Restaurant, Inc. The Amended Order of Determination identified "Sabas Gonzalez dba Gonzalez Family Restaurant as Successor to Gonzalez Family Restaurant, Inc." as the employer. The remaining substantive allegations in the Amended Order of Determination were similar to those in the original Order of Determination; the significant change was in the identity of Respondent-Employer. The Amended Order of Determination was dated March 4, 1999, and was served on both Respondent individually and on his attorney, Michael T. Barrett.

7) On March 8, 1999, the Agency served a Notice of Intent to Assess Civil Penalties on Sabas Gonzalez, both individually and as the registered agent of Gonzalez Family Restaurant, Inc. The Notice of Intent identified two respondents: Gonzalez Family Restaurant, Inc., and Sabas Gonzalez dba Gonzalez Family Restaurant. The Notice of Intent alleged that "Respondent" employed Claimant and violated ORS 653.045 by failing to make and maintain payroll records. The Notice of Intent required that Respondents file an answer and request a contested case hearing within 20 days if they wished to contest this charge. Included with

the Notice of Intent was a document titled "SUMMARY OF CONTESTED CASE RIGHTS AND PROCEDURES

8) On or about March 23, 1999, attorney Michael T. Barrett filed an Answer and Request for Contested Case Hearing on behalf of Respondent Sabas Gonzalez dba Gonzalez Family Restaurant as Successor to Gonzalez Family Restaurant, Inc. Although the Answer explicitly identified itself only as an Answer to the Amended Order of Determination, it contained an admission that "employer" had not kept written payroll records. That admission was directly relevant only to the charge in the Notice of Intent, not to allegations in the Amended Order of Determination, and the Agency appears to have accepted the Answer as responding to both charging documents.

9) The March 23, 1999, Answer and Request for Hearing includes admissions that "employer" had employed Claimant, that employer was subject to the provisions of Oregon law that require record keeping, and that employer did not keep written payroll records. Employer denied the remaining allegations and requested a hearing.

10) On March 29, 1999, the Agency requested a hearing in this matter. On April 2, 1999, the Hearings Unit issued a Notice of Hearing stating that the hearing would commence at 10:00 a.m. on Tuesday, May 18, 1999, in the Agency office in Salem, Oregon. With the Notice of Hearing, the fo-

rum sent another copy of the "SUMMARY OF CONTESTED CASE RIGHTS AND PROCEDURES" and a copy of the forum's contested case hearings rules, OAR 839-050-0000 to 839-050-0440.

11) The Notice of Hearing identified "SABAS GONZALEZ dba GONZALEZ FAMILY RESTAURANT" as the sole Respondent. Consequently, as the ALJ noted at the beginning of the contested case hearing, the Agency could proceed only against Gonzalez individually, and not against the corporation, in the contested case proceeding. Throughout the remainder of this Order, all references to "Respondent" are references to Sabas Gonzalez, dba Gonzalez Family Restaurant.

11) On April 16, the forum issued a case summary order requiring the Agency and Respondent to submit summaries of the case that included: lists of all persons to be called as witnesses; identification and copies of all documents to be offered into evidence; a statement of any agreed or stipulated facts; and, for the Agency only, any wage, damages, and penalties calculations. The forum ordered the participants to submit their case summaries by May 7, 1999, and notified them of the possible sanctions for failure to comply with the case summary order.¹

¹ After the close of the contested case hearing, the ALJ discovered that

12) The Agency submitted a timely case summary that included five exhibits. Respondent submitted no case summary.

13) By motion dated May 6, 1999, postmarked May 7, 1999, and mailed to the Agency office in Salem rather than to the Hearings Unit, Respondent, through attorney Barrett, requested a postponement of the hearing and of the deadline for submitting case summaries. The Agency opposed the motion.

14) As the ALJ explained at the beginning of the contested case hearing, on May 11, 1999, she attempted to contact Barrett by calling the telephone number listed in the Oregon State Bar Directory. That number had been disconnected. She then called the Oregon State Bar to determine whether it had a more current telephone number for Barrett. It did not. The ALJ then searched an Internet telephone directory for attorney Michael T. Barrett, located in Salem, Oregon. That directory gave the same disconnected telephone number that was listed in the Oregon State Bar directory. It also, however, listed a facsimile transmission number that was working. On the morning of May 11, 1999, the ALJ sent the following facsimile transmission to that number:

her Case Summary Order had not been included in the Administrative Exhibits admitted at the beginning of the hearing. On her own motion, the ALJ received the Case Summary Order as Exhibit X-9a.

"Dear Mr. Barrett:

"I am faxing this letter to you at (503) 588-3624, a number I obtained on the Internet, because you have not provided me with a telephone number and the number in the OSB Directory ((503) 588-1989) has been disconnected. Please contact me immediately by telephone at (503) 731-4467 so I can arrange a telephonic hearing on your pending motion in the Gonzalez case. If I do not hear from you by 3:00 p.m. this afternoon, I will rule on the motion without a hearing."

15) Later that morning, the ALJ received a telephone call from the Vandermay Law Firm in Salem, Oregon. The person who called had received the facsimile transmission and stated that Barrett used to work at the firm, but had not been there for four years.

16) By order dated May 11, 1999, the forum denied Respondent's motion for a postponement and required him to submit his case summary by noon on Friday, May 14, 1999:

"By motion dated May 6, 1999, postmarked May 7, 1999, and addressed to the Oregon Bureau of Labor and Industries' Salem office, rather than BOLI's Hearings Unit in Portland, Respondent has requested a postponement of the hearing currently set for May 18, 1999. Respondent's counsel cites two reasons for the request: 1) Respondent is

absent from Oregon because of the illness of his mother; and 2) Respondent's counsel is involved in a Lane County case that currently is set for May 18, 1999. The Agency opposes the motion.

"OAR 839-050-0150(5) governs motions for postponements and provides:

"(a) Any participant making a request for a postponement of any part of the contested case proceeding must state in detail the reason for the request. The administrative law judge may grant the request for good cause shown. In making this determination, the administrative law judge shall consider:

"(A) Whether previous postponements have been granted;

"(B) The timeliness of the request;

"(C) Whether a participant has previously indicated it was prepared to proceed

"(D) Whether there is a reasonable alternative to postponement; for example, submitting a sworn statement of a witness; and

"(E) The date the hearing was originally scheduled to commence.

"(b) The administrative law judge shall issue a written ruling either granting or denying the motion and shall

set forth the reasons therefore[.]"

"In this case, neither participant previously has requested a postponement, and the case is scheduled to be heard on the date initially set forth in the Notice of Hearing. Nonetheless, neither of the grounds cited by Respondent constitutes "good cause" for a postponement. First, Respondent's counsel does not indicate whether the Lane County case was set before or after the Notice of Hearing was issued in this matter. If the court case was set after this contested case hearing was scheduled, he should have asked for a continuance in that matter. Counsel does not assert that he made any attempt to resolve the potential conflict by rescheduling the court case. Second, Respondent's counsel apparently has known of a possible conflict with a court case for some time and could have resolved any conflict weeks ago. (See Agency's Response to Respondent's Motion for Continuance, Exhibit A-1). Indeed, in a letter dated April 6, 1999, the Agency case presenter stated that she would not object to rescheduling the contested case hearing to another day during the same week of May. (*Id.*) The case presenter asked Respondent's counsel to call her to discuss a mutually acceptable date, but received no response. (*Id.*, Exhibits A-1, A-2, A-3) Under the circum-

stances, the scheduling conflict of Respondent's counsel does not amount to good cause for postponement of the hearing at this late date.

"Respondent's motion also states that he is absent from Oregon because of the illness of his mother in Mexico. The motion does not, however, indicate how long Respondent (or his lawyer) has known of this illness, how long Respondent has been absent from Oregon, or even whether the illness is such that Respondent's presence in Mexico is advisable. Nor does the motion include any documentation -- such as an affidavit of Respondent or Respondent's counsel -- supporting the few factual assertions made. These somewhat vague and unsupported assertions do not constitute good cause for postponement of the hearing, especially at this late date.

"For these reasons, the motion for postponement is **DENIED**. The hearing shall commence at 10:00 a.m. on May 18, 1999, at BOLI's office at 3865 Wolverine Street NE, #E-1, Salem, Oregon, as stated in the Notice of Hearing. To minimize any hardship on Respondent, he may appear in person or by telephone, as he chooses. Should Respondent wish to appear by telephone, he or his attorney shall promptly notify this forum of the telephone number at which Respondent may be reached

on the day of the hearing. The Agency will pay any long-distance and international telephone charges associated with any such appearance.

"The forum also **DENIES** Respondent's associated motion to postpone the due-date for case summaries to 10 days before a new date for the contested case hearing. Respondent shall submit his case summary by this Friday, May 14, 1999. In addition to filing and serving the case summary by mail, Respondent shall ensure that both the Hearings Unit and the Agency case presenter **receive** complete copies of the case summary -- including exhibits - - no later than **12:00 noon** on Friday, May 14, 1999.

"Finally, the forum notes that it had wished to conduct a telephonic hearing on Respondent's motion but was unable to do so because Respondent's counsel, Michael T. Barrett, has not provided this forum with a telephone number. The telephone number listed in the 1999 Oregon State Bar directory has been disconnected, and the Bar does not have a more current telephone for Mr. Barrett. The Agency case presenter appears to have experienced the same difficulty reaching Mr. Barrett by telephone for the last several weeks. (*Id.*, Exhibits A-2, A-3). Mr. Barrett shall immediately notify the forum and the Agency case presenter of a

telephone number at which he may be reached."

That ruling is hereby affirmed.

17) On the afternoon of May 14, 1999, the ALJ asked the Agency case presenter whether she had received a case summary or any other communication from Respondent. The case presenter stated she had not. The ALJ informed the case presenter that the Hearings Unit also had received no case summary or other communication from Respondent. This ex parte contact was disclosed on the record during the contested case hearing.

18) The contested case hearing was scheduled to begin at 10:00 a.m. on May 18, 1999. Neither Respondent nor his attorney appeared at that time. After waiting one-half hour for Respondent or his attorney to appear, the ALJ explained the issues involved in the hearing and the procedures governing the conduct of the hearing, and the Agency presented its case.

19) The Agency requested that a Spanish interpreter be present throughout the hearing. Accordingly, Robert Mogle, an Oregon certified interpreter, was present throughout the hearing, translated the proceedings in their entirety for the benefit of Claimant, and translated Claimant's testimony. Prior to interpreting the proceedings, Mogle stated his credentials on the record and took an oath or affirmation to translate the proceedings truthfully and accurately to the best of his ability.

20) Neither Respondent nor his counsel appeared at any time during the hearing and the ALJ declared Respondent to be in default. The record closed on May 18, 1999, after the Agency presented its case.

21) During the hearing, on her own motion, the ALJ corrected the case caption to delete the second word "FAMILY." The caption on the proposed order is the correct case caption.

22) The ALJ issued a proposed order on June 4, 1999, that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. The forum received no exceptions.

FINDINGS OF FACT – THE MERITS

1) From January 1, 1998, through June 30, 1998, claimant worked as a dishwasher and cook at the Gonzalez Family Restaurant, located in Salem, Oregon, under the supervision of Sabas Gonzalez. At least one other person worked at the restaurant, chef Manuel Chavez.

2) As of July 23, 1998, Gonzalez Family Restaurant, Inc. was an active Oregon corporation doing business in Oregon. Since July 1997, its registered agent had been Sabas Gonzalez. Gonzalez was responsible for the day-to-day operation of the restaurant and paid its employees.

3) On September 30, 1998, the corporation Gonzalez Family Restaurant, Inc. was involuntarily

dissolved. The restaurant continued in operation.

4) The Agency's original Order of Determination was dated October 30, 1998, and identified Gonzalez Family Restaurant, Inc. as having been Claimant's employer. Gonzalez Family Restaurant, Inc., denied all allegations in the Order of Determination.

5) The Agency's Amended Order of Determination, dated March 4, 1999, identified Claimant's employer as Sabas Gonzalez dba Gonzalez Family Restaurant as Successor to Gonzalez Family Restaurant Inc. In his Answer to the Amended Order of Determination, Respondent Sabas Gonzalez dba Gonzalez Family Restaurant as Successor to Gonzalez Family Restaurant Inc. admitted that Claimant was his employee. The forum infers from this admission, as well as the evidence regarding the corporate status of Gonzalez Family Restaurant, Inc., that Gonzalez Family Restaurant, Inc., employed Claimant from January 1, 1998, through June 30, 1998. The forum also infers that Respondent Sabas Gonzalez dba Gonzalez Family Restaurant is the successor to Gonzalez Family Restaurant, Inc.

6) The forum has accepted Claimant's credible testimony regarding the number of hours he worked at the Gonzalez Family Restaurant. During the first five months he was employed by Gonzalez Family Restaurant, Inc., Claimant worked six days per

week, at least 12 hours per day. In June 1998, chef Chavez did not work at the restaurant. Consequently, Claimant worked every day that month, again at least 12 hours per day. On the calendar he completed during the BOLI investigation, Claimant indicated that he had worked exactly 12 hours per day. Claimant testified credibly at hearing that he reported only 12 hours each day because he wanted to be sure he did not claim he had worked more hours than he really had.²

7) On behalf of Gonzalez Family Restaurant, Inc., Sabas Gonzalez paid Claimant \$500.00 in wages every two weeks, regardless of the number of hours Claimant worked. Respondent admitted that fact during an interview with Agency compliance specialist Taeubel, who speaks Spanish and was assigned to investigate Claimant's wage claim. The last time Gonzalez paid Claimant, he gave Claimant only \$250.00 because Claimant had worked only one week during the normal two-week pay period. The forum has calculated the total amount of money Gonzalez Family Restaurant, Inc. paid Claimant to be **\$6500.00** (26 weeks worked x \$250.00/week).

² Respondent told Agency compliance specialist Taeubel that Claimant had worked for him only eight or nine hours each day. The forum disbelieves that report because it was not supported by any documentary evidence and because Claimant's contrary testimony was credible.

8) Despite Taeubel's request, Gonzalez never provided him with a record of the hours Claimant worked. Gonzalez admitted to Taeubel that he did not make or maintain such records. He also admitted that fact in his Answer. During an interview with Taeubel, Gonzalez further admitted that he made no deductions from Claimant's wages for taxes, Social Security, or workers' compensation insurance, a fact corroborated by Claimant.

9) During his investigation, Taeubel interviewed chef Chavez, who confirmed that Claimant had worked at the Gonzalez Family Restaurant.

10) The Agency subpoenaed Chavez to testify at the contested case hearing, but he did not appear.

11) The forum observed Claimant carefully throughout the hearing and found his testimony generally to be credible. He gave straightforward answers to questions and did not go out of his way to portray Respondent in a bad light. For example, Claimant readily admitted that Respondent had paid him \$500.00 cash every two weeks, a fact he easily could have denied. Moreover, certain aspects of Claimant's testimony were corroborated by the information Taeubel received from Respondent and from employee Chavez, such as the fact that Claimant worked at the Gonzalez Family Restaurant and the amount of wages he was paid.

12) In some respects, Claimant was a relatively unsophisticated witness. He had difficulty reading some of the exhibits, even though they were printed in Spanish, and testified that a friend helped him complete some of the wage claim forms. The forum believes that Claimant's difficulty in reading explains why the work calendar he completed indicates incorrectly that each of the six months he worked began on a Sunday. Rather than rely on those calendars, the forum has completed its own calculations of the wages due Claimant based on his credible testimony regarding the days on which he worked, as reflected in Findings of Fact -- the Merits 6, 15, and 16.

13) In 1998, the minimum wage in Oregon was \$6.00 per hour.

14) Pursuant to ORS Chapter 653 (Minimum Wages), OAR 839-020-0030 (Payment of Overtime Wages) and Agency policy, the Agency calculated Claimant's total earned wages to be \$13,560.00. From that amount, the Agency subtracted the \$6000.00 it calculated Gonzalez had paid Claimant, with the result being that the Agency alleged that Respondent owed Claimant \$7560.00. The Agency also calculated that Respondent owed Claimant penalty wages of \$1,749.60.

15) The forum agrees with Taeubel's calculation of the number of hours Claimant worked from January 1, 1998, through May 30, 1998, and the amount

Gonzalez Family Restaurant, Inc. was required to pay him for those hours -- \$11,304.00.

16) The forum disagrees, however, with Taeubel's calculations for May 31 through June 30, 1998, because they do not include the wages Claimant earned by working on Tuesdays. Consequently, to the \$2256.00 the Agency calculated Claimant earned during that period, the forum has added \$432.00 (4 Tuesdays x 12 hours/Tuesday x \$9.00/hour)³ for a total of \$2688.00 for the period May 31 through June 30, 1998. This brings the total amount of wages Claimant earned to **\$13,992.00**.

ULTIMATE FINDINGS OF FACT

1) During the period January 1, 1998, through June 30, 1998, Gonzalez Family Restaurant, Inc. was an Oregon corporation that engaged the personal services of one or more persons in the state of Oregon, including Claimant.

2) The state minimum wage during 1998 was \$6.00 per hour.

3) From January 1, 1998, through May 30, 1998, Claimant worked 1548 hours for Gonzalez Family Restaurant, Inc., 672 of which were hours worked in excess of 40 per week. From May 31, 1998, through June 30, 1998,

Claimant worked 360 hours, 176 of which were hours worked in excess of 40 per week. For all these hours, Claimant earned a total of \$13,992.00. Gonzalez Family Restaurant, Inc. paid Claimant only \$6,500.00 and, therefore, owed Claimant \$7492.00 in earned and unpaid compensation on the day Claimant's employment terminated.

4) Gonzalez Family Restaurant, Inc. was involuntarily dissolved on September 30, 1998. Respondent Sabas Gonzalez dba Gonzalez Family Restaurant was thereafter, at all material times, the successor to Gonzalez Family Restaurant, Inc. Respondent, therefore, owed Claimant **\$7492.00** in earned and unpaid wages.

5) Gonzalez Family Restaurant, Inc., did not make or keep available to the Commissioner of the Bureau of Labor and Industries a record or record containing the actual hours worked by Claimant.

CONCLUSIONS OF LAW

1) ORS 653.010 provides, in pertinent part:

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

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

ORS 652.310 provides, in pertinent part:

"As used in ORS 652.310 to 652.414, unless the context requires otherwise:

³ All of the hours Claimant worked on Tuesdays were additional hours in excess of 40 per week. Consequently, Respondent was required to pay Claimant one and one-half times the minimum wage for those hours.

"(1) 'Employer' means any person who in this state, directly or through an agent, engages personal services of one or more employees and includes * * * any successor to the business of any employer * * * .

"(2) 'Employee' means any individual who otherwise than as 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."

From January 1, 1998, through June 30, 1998, Gonzalez Family Restaurant, Inc., was an employer and Claimant was its employee subject to the provisions of ORS 652.110 to 652.200, 652.310 to 652.414, and 653.010 to 653.261. At all material times after September 30, 1998, Respondent was Claimant's "employer" for purposes of ORS 652.310 to 652.414 and rules promulgated thereunder.

2) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the subject matter and Respondent. ORS 652.310 to 652.405.

3) ORS 653.025 requires that, except in circumstances not relevant here:

"* * * 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:

"* * * * *

"(2) For calendar year 1998, \$6.00."

Oregon law required Gonzalez Family Restaurant, Inc., to pay Claimant at a fixed rate of at least \$6.00 per hour. Gonzalez Family Restaurant, Inc., failed to pay Claimant at that rate, in violation of ORS 653.025(2).

4) ORS 653.261(1) provides:

"The Commissioner of the Bureau of Labor and Industries 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 839-020-0030(1) provides that, except in circumstances not relevant here:

"* * * 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 benefits of commissions, overrides, spiffs, bonuses, tips or similar benefits pursuant to ORS 653.261(1)."

Oregon law required Gonzalez Family Restaurant, Inc., to pay Claimant one and one-half times his regular hourly rate, in this case the minimum wage of \$6.00 per hour, for all hours worked in excess of 40 per week. Gonzalez Family Restaurant, Inc., failed to pay Claimant at the overtime rate, in violation of OAR 839-020-0030(1).

6) ORS 652.140 provides, in pertinent part:

"(1) 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.

"(2) 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."

Claimant's credible testimony proves that June 30, 1998, was his last day of work, but the record does not establish whether Claimant quit or was fired. Even assuming, however, that Claimant quit without notice, his wages would have been due no later than July 8, 1998. Gonzalez Family Restaurant, Inc., violated ORS 652.140(1) by failing to pay Claimant all wages earned and unpaid by that date.

8) As admitted successor to Gonzalez Family Restaurant, Inc., Respondent is liable for the wages owed to Claimant. 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. ORS 652.332.

9) 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."

Agency policy is not to hold successor employers liable for penalty wages under ORS 652.150. *In the Matter of Gerald Brown*, 14 BOLI 154, 169 (1995). Respondent is not liable for penalty wages.

10) ORS 653.045 provides, in pertinent part:

"(1) Every employer required by ORS 653.025 or by any rule, order or permit issued under ORS 653.030 to pay a minimum wage to any of the employer's employees shall make and keep available to the Commissioner of the Bureau of Labor and Industries for not less than two years, a record or records containing:

"(a) The name, address and occupation of each of the employer's employees.

"(b) The actual hours worked each week and each pay period by each employee.

"(c) Such other information as the commissioner prescribes by the commissioner's rules if necessary or appropriate for the enforcement of ORS 653.010 to 653.261 or of the rules and orders issued thereunder.

"(2) Each employer shall keep the records required by subsection (1) of this section open for inspection or transcription by the commissioner or the commissioner's designee at any reasonable time."

ORS 653.256 provides, 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 \$1,000.00 against any person who willfully violates ORS 653.030, 653.045, 653.050, 653.060 or 653.261 or any rule adopted pursuant thereto. However, no civil penalty may be assessed for violations of rules pertaining to the payment of overtime wages."

For purposes of these statutes, "employer" means "any person who employs another person," and does not incorporate the concept of successor liability. ORS 653.010(4). Compare ORS 652.310(1) (including "any successor to the business of any employer" in the definition of "Em-

ployer"; the definition applies only to ORS 652.310 to 652.414). Respondent was not Claimant's employer for purposes of ORS 653.045 and the commissioner lacks authority to assess a civil penalty against Respondent for Gonzalez Family Restaurant, Inc.'s violation of that statute.

OPINION

RESPONDENT AS "EMPLOYER" FOR PURPOSES OF THE WAGE CLAIM

During the period of Claimant's employment -- January 1 through June 30, 1998 -- Gonzalez Family Restaurant, Inc. was an active corporation. The corporation later was dissolved, and Respondent admitted that he was Claimant's employer as successor to Gonzalez Family Restaurant, Inc. That admission brings Respondent within the statutory definition of an "employer" that may be held liable for the wages that Gonzalez Family Restaurant, Inc., failed to pay Claimant.

MINIMUM WAGE AND OVERTIME

ORS 653.025(2) prohibited employers, during 1998, from paying their employees at a rate less than \$6.00 for each hour of work time. OAR 839-020-0030 provides that all work performed in excess of forty hours per week must be paid for at the rate of not less than one and one-half times the regular rate of pay. Gonzalez Family Restaurant, Inc., was legally obliged to pay Claimant at least \$6.00 per hour worked up to forty per week, plus one and one-

half times that wage for all hours worked in excess of forty per week.

WORK TIME

This forum has ruled repeatedly that, pursuant to ORS 653,045, it is the employer's duty to maintain accurate records of the hours and days an employee works. See, e.g., *In the Matter of Diran Barber*, 16 BOLI 190 (1997); *In the Matter of Tina Davidson*, 16 BOLI 141, 148 (1997). Where the forum concludes that an employee was employed and was improperly compensated, it becomes the employer's burden to produce all appropriate records to prove the precise amounts involved. *In the Matter of Diran Barber*, 16 BOLI at 196. Where the 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.'" (*Id.*; citation omitted).

Here, Gonzalez Family Restaurant, Inc., kept no records of the days or hours that Claimant worked. The forum has accepted Claimant's credible testimony that he worked at least 12 hours every day that he worked at the restaurant, and has credited him with 12 hours for each of those days. Claimant's credible testimony establishes that he worked a total of 1908 hours for Gonzalez Family Restaurant, Inc., 848 of which were hours worked in excess of

40 per week. For all these hours, Claimant earned a total of \$13,992.00, based on the minimum wage of \$6.00 per hour. Claimant's testimony, corroborated by Respondent's statement to Taeubel, also establishes that Gonzalez Family Restaurant, Inc., paid him only \$6500.00. Consequently, Respondent, as successor to the corporation, owes Claimant **\$7492.00** (\$13,992.00 - \$6500.00) in earned and unpaid compensation.

PENALTY WAGES

The Agency alleged that Respondent owes Claimant penalty wages of \$1749.60 for willfully failing to pay Claimant all the wages he was due. It is Agency policy, however, not to hold successor employers liable for penalty wages. *In the Matter of Gerald Brown*, 14 BOLI at 169. Accordingly, this Order does not assess civil penalty wages against Respondent.

VIOLATION OF ORS 653.045

The Agency asks this forum to impose a \$1000.00 civil penalty against Respondent for violating ORS 653.045, which requires employers to make and keep available records of the number of hours worked by each employee. Respondent has admitted that that he did not keep records of the hours Claimant worked. At the time Claimant was employed at the restaurant, however, Respondent acted as the agent of Gonzalez Family Restaurant, Inc., and was not Claimant's employer. The definition of "employer" that

applies to ORS 653.045 is "any person who employs another person," and does not incorporate the concept of successor liability. ORS 653.010(4). Consequently, Respondent, who is liable for unpaid wages *only* as the successor to Gonzalez Family Restaurant, Inc.,⁴ is not an "employer" for purposes of ORS 653.045, and cannot be made to pay a penalty for the corporation's violation of that statute.

ORDER

NOW, THEREFORE, as authorized by ORS 652.332, and as payment of the unpaid wages he owes as a result of violations of ORS 653.025(2), ORS 652.140, and OAR 839-020-0030(1), the Commissioner of the Bureau of Labor and Industries hereby orders **Sabas Gonzalez dba Gonzalez Family Restaurant as Successor to Gonzalez Family Restaurant, 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 Martin Sanchez in the amount of SEVEN THOUSAND FOUR HUNDRED NINETY-TWO DOLLARS (**\$7492.00**), less appropriate lawful deductions, in

⁴ As stated above, Respondent is liable for unpaid wages because the definition of "employer" for the purposes of wage claims does include the concept of successor liability. ORS 652.310(1).

earned, unpaid, due, and payable wages, plus interest at the legal rate on that sum from July 8, 1998, until paid.

**In the Matter of
BARRETT BUSINESS
SERVICES, INC.**

Case Number 25-98
Amended Final Order of the
Commissioner
Jack Roberts
Issued July 28, 1999.

Ed.: The final order in this case initially was issued on February 22, 1999, and published at 18 BOLI 82 (1999). The commissioner later discovered that the order had been issued with an incorrect case number in the caption and, on July 28, 1999, issued an amended order identical to the original order except that the case number in the caption was corrected, the last introductory paragraph before the Findings of Fact was deleted, and the two paragraphs quoted below were substituted. The editors have decided only to publish the two added paragraphs rather than reprinting the entire order. The final order should be cited as: 18 BOLI 82, *as amended* 19 BOLI 16 (1999). Persons wishing a complete copy of the amended final order should contact the Hearings Unit of the Bureau of Labor and Industries.

The two added paragraphs are:

"On February 22, 1999, I, Jack Roberts, Commissioner of the Bureau of Labor and Industries, having fully considered the entire record in this matter, issued the Findings of Fact, Ultimate Findings of Fact, Conclusions of Law, Opinion and Order in this case. Thereafter, Respondent sought judicial review in the Oregon Court of Appeals. On July 20, 1999, through counsel, the Agency filed its Notice of Withdrawal of Order for Purposes of Reconsideration in the Court of Appeals for the specific purpose of correcting a typographical error in the order, specifically, the incorrect agency number on the order.

"On July 28, 1999, having revised the order to include the correct agency case number originally assigned to this case, I make the following Findings of Fact, Ultimate Findings of Fact, Conclusions of Law, Opinion and Amended Order.

**In the Matter of
MURRAYHILL
THRIFTWAY, INC.**

Case Number 69-97
Amended Final Order of the
Commissioner
Jack Roberts
Issued July 28, 1999.

Ed.: The final order in this case initially was issued on May 12,

1999, and published at 18 BOLI 292 (1999). The commissioner later discovered that the order had been issued with an incorrect case number in the caption and, on July 28, 1999, issued an amended order identical to the original order except that the case number in the caption was corrected, the last introductory paragraph before the Findings of Fact was deleted, and the two paragraphs quoted below were substituted. The editors have decided only to publish the two added paragraphs rather than reprinting the entire order. The final order should be cited as: 18 BOLI 292, *as amended* 19 BOLI 16 (1999). Persons wishing a complete copy of the amended final order should contact the Hearings Unit of the Bureau of Labor and Industries.

The two added paragraphs are:

"On May 12, 1999, I, Jack Roberts, Commissioner of the Bureau of Labor and Industries, having fully considered the entire record in this matter, issued the Findings of Fact, Ultimate Findings of Fact, Conclusions of Law, Opinion and Order in this case. Thereafter, Complainant (Petitioner on Appeal), sought judicial review in the Oregon Court of Appeals. On July 20, 1999, through counsel, the Agency filed its Notice of Withdrawal of Order for Purposes of Reconsideration in the Court of Appeals for the specific purpose of correcting a typographical error in the order, specifically, the incorrect agency number on the order.

"On July 28, 1999, having revised the order to include the correct agency case number originally assigned to this case, I make the following Findings of Fact, Ultimate Findings of Fact, Conclusions of Law, Opinion and Amended Order."

**In the Matter of
BELANGER GENERAL
CONTRACTING, INC.**

Case Number 67-99
Final Order of the Commissioner
Jack Roberts
Issued August 4, 1999

SYNOPSIS

Respondent employed Claimant to install siding at a piece rate of \$50.00 per 12 square feet of siding installed. Respondent failed to pay Claimant all wages due under this agreement upon termination, in violation of ORS 652.140. Respondent's failure to pay the wages was willful, and the Commissioner ordered Respondent to pay civil penalty wages in addition to the unpaid wages it owed Claimant. ORS 652.140, ORS 652.150, OAR 839-001-0470.

The above-entitled case came on regularly for hearing before Erika L. Hadlock, designated as Administrative Law Judge ("ALJ") by Jack Roberts, Commissioner of the Bureau of Labor and Indus-

tries for the State of Oregon. The hearing was held on July 9, 1999, in Hearings Room #1004 of the State Office Building, 800 NE Oregon Street, Portland, Oregon.

Cynthia Domas, an employee of the Bureau of Labor and Industries ("BOLI" or "the Agency") represented the Agency. Wage claimant Pablo Mercado was not present during the hearing. Neither counsel for Respondent nor any other representative of Respondent was present at the hearing.

The Agency called three witnesses: interpreter Terry Rogers; Agency compliance specialist Gerhard Taeubel; and Claimant's coworker, Shane Wilson Wallis. Agency Exhibits A-1 through A-8, attached to the Agency's case summary, were offered and received into evidence.

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

FINDINGS OF FACT – PROCEDURAL

1) On or about December 21, 1998, Claimant filed a wage claim with the Agency. He alleged that he had been employed by Belanger General Contracting, Inc., from November 7, 1998, through December 3, 1998. Claimant further alleged that he was employed at a piece-rate wage of \$50.00 per

piece, had not been paid for his work, and was owed \$5052.00.

2) When he filed the wage claim, Claimant completed an assignment of wages.

3) Claimant brought his wage claim within the statute of limitations.

4) On or about March 4, 1999, the Agency served Respondent with an Order of Determination dated February 25, 1999. The Order of Determination alleged that Respondent had employed Claimant from November 7, 1998, through December 3, 1998, at the rate of \$50.00 per piece for 101.5 pieces, no part of which had been paid. Consequently, the Agency alleged, Respondent owed Claimant \$5075.00 in earned and unpaid wages, \$6460.80 as penalty wages, and interest on both amounts. The Order of Determination required Respondent, within 20 days, either to pay these sums in trust to the Agency, request an administrative hearing and submit an answer to the charges, or demand a trial in a court of law.

5) On or about March 16, 1999, attorney Sonia Montalbano filed an Answer and Request for Hearing on behalf of Respondent in which Respondent denied all substantive allegations in the Order of Determination. Respondent also asserted two affirmative defenses: inability to pay wages at the time they accrued; and that Respondent had paid Claimant \$2500.00 for work performed in full satisfaction of his claims.

6) By letter dated April 16, 1999, Montalbano notified the Agency that she no longer represented Respondent with regard to this matter.

7) On May 27, 1999, the Agency requested a hearing. On June 4, 1999, the Hearings Unit issued a Notice of Hearing stating that the hearing would commence at 9:00 a.m. on Friday, July 9, 1999, in Hearings Room #1004 of the State Office Building, 800 NE Oregon Street, Portland, Oregon. With the Notice of Hearing, the forum included a "SUMMARY OF CONTESTED CASE RIGHTS AND PROCEDURES" and a copy of the forum's contested case hearings rules, OAR 839-050-0000 to 839-050-0440.

8) On June 7, 1999, the forum issued a case summary order requiring the Agency and Respondent to submit summaries of the case that included: lists of all persons to be called as witnesses; identification and copies of all documents to be offered into evidence; a brief statement of the elements of the claim (for the Agency only); a brief statement of any defenses to the claim (for Respondent only); a statement of any agreed or stipulated facts; and any wage, damages, and penalties calculations (for the Agency only). The forum ordered the participants to submit their case summaries by June 29, 1999, and notified them of the possible sanctions for failure to comply with the case summary order.

9) The Agency submitted a timely case summary and addendum that included eight exhibits. Respondent submitted no case summary.

10) The contested case hearing was scheduled to begin at 9:00 a.m. on July 9, 1999. Nobody appeared on behalf of Respondent at that time, and the ALJ recessed the hearing for thirty minutes pursuant to OAR 839-050-0330(2). By 9:33 a.m., nobody had appeared on Respondent's behalf and the ALJ declared Respondent to be in default. The ALJ then explained the issues involved in the matter and the procedures governing the conduct of the hearing. At no time during the hearing did Respondent make an appearance.

11) In accordance with a request from the Agency, Terry Rogers, a Spanish interpreter certified by the State of Oregon, was present throughout the July 9, 1999, hearing. Before any witnesses were called, Rogers stated her credentials on the record and took an oath or affirmation to translate the proceedings truthfully and accurately to the best of her ability. Because no Spanish-speaking witnesses appeared, Ms. Rogers did not translate the proceedings. She did, however, appear as a witness regarding the affidavit of Claimant Pablo Mercado, as discussed *infra*.

12) The evidentiary record closed on July 9, 1999, after the Agency presented its case.

13) The ALJ issued a proposed order on July 16, 1999, that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. The forum received no exceptions.

FINDINGS OF FACT – THE MERITS

1) Respondent Belanger General Contracting, Inc. ("Respondent," "employer," or "the corporation") employed Claimant Pablo Mercado as a siding installer on Respondent's Cascade Summit job from November 7, 1998, through December 3, 1998. Prior to November 1998, Respondent had employed Claimant on other jobs and had paid him wages for that earlier work.

2) Claimant is not a licensed contractor. Respondent supplied all tools, equipment, and supplies that Claimant used on the Cascade Summit job.

3) Claimant recorded the number of hours he worked for Respondent each day he installed siding on the Cascade Summit job. Claimant worked a total of 188.5 hours for Respondent from November 7, 1998, through December 3, 1998, 33.5 of which were hours worked in excess of 40 hours per week.¹ Claimant

worked six days per week, Monday through Saturday.

4) Respondent agreed to pay Claimant a piece rate of \$50.00 for every 12 square feet of siding that Claimant installed on the Cascade Summit job. Claimant installed 101.5 such units of siding² on the Cascade Summit job from November 7, 1998, to December 3, 1998.

5) Respondent paid Claimant no wages for the work he did on the Cascade Summit job.

6) Claimant no longer works for Respondent. Claimant voluntarily quit working for Respondent because Respondent did not pay him the wages he was due.

7) Claimant filed his wage claim within a few weeks after he stopped working for Respondent. Gerhard Taeubel, a BOLI compliance specialist, was assigned to

calendar more accurate than Wallis's testimony on this point. Claimant's affidavit and wage claim calendar reflect his contemporaneous recording of his hours, while Wallis's testimony was based solely on his recollection of events that occurred several months ago. See Finding of Fact -- the Merits 10, *infra*.

² It is not clear from the record whether the siding came in sheets that measured 12 square feet in area, and Claimant installed 101.5 of those sheets, or whether Claimant installed a total of 1218 (101.5 x 12) square feet of siding that did not come in discrete 12-square feet-pieces. In either case, Respondent was required to pay Claimant \$50.00 x 101.5 for the work he performed.

¹ Wallis, a former employee of Respondent, testified that Claimant's hours varied and stated that Claimant worked as much as 11 1/2 hours on some days, more than Claimant stated he worked. The forum finds Claimant's affidavit and wage claim

investigate the claim. Taeubel spoke with Joel Belanger, Respondent's owner and registered agent, who admitted that he had worked with Claimant. Despite repeated requests from Taeubel, neither Belanger nor Respondent ever provided the Agency with any records of the hours Claimant worked or the amount of wages, if any, Respondent had paid him.

8) During his investigation, Taeubel spoke with Respondent's attorney, who said she could provide copies of payroll documents. Taeubel never received any such documentation.

9) Taeubel also spoke with several other individuals who confirmed that Claimant had worked for Respondent during the time period in question and had not been paid.

10) Shane Wilson Wallis, Belanger's brother-in-law and Respondent's former employee, testified under subpoena. Wallis, who worked as Respondent's superintendent for the Cascade Summit project, confirmed that Claimant had worked for Respondent on that job during the fall of 1998. Wallis also confirmed that Respondent did not pay Claimant for his work, and that Claimant quit because he was not being paid. The forum infers from these facts that Wallis was aware that Respondent was not paying Claimant wages as they became due.

11) Wallis also testified that Claimant had worked six days per week, Monday through Saturday,

on the Cascade Summit contract. That testimony confirms Claimant's report of the days he worked.

12) Claimant did not appear at the hearing in person, but the Agency submitted his affidavit, in both English and Spanish, as evidence. The two versions of the affidavit initially were prepared by someone other than Rogers. During a June 1999 meeting with Claimant and case presenter Domas, interpreter Rogers read an early version of the Spanish affidavit to Claimant, who indicated that some changes should be made. After incorporating those corrections into the English and Spanish versions of the affidavit, Rogers again read the entire Spanish affidavit to Claimant. Claimant stated that he understood the affidavit and that it was a true and accurate statement of events. Rogers verified that the English affidavit was an accurate translation of Claimant's Spanish affidavit.³

13) The forum has accepted the assertions in Claimant's affidavit and wage claim calendar as fact because: the affidavit is a sworn statement; Claimant indi-

³ Rogers wrote Claimant's changes into both the English and Spanish versions of his affidavit. She also made changes on the English affidavit to make that document a more precise translation of the Spanish affidavit. All handwritten notes on the two versions of Claimant's affidavit are Rogers' except for the signatures and notarization.

cated at the time he signed the affidavit that he would not be available for hearing; certain facts in the affidavit were corroborated by Wallis; Belanger admitted to Taeubel that he worked with Claimant; other individuals told Taeubel that Claimant had worked for Respondent and had not been paid; Respondent provided Taeubel with no time or payroll records for Claimant; and no information in the record controverts the affidavit or wage claim calendar.

14) Claimant's earned and unpaid wages total **\$5075.00** (101.5 units x \$50.00/unit).

15) The Agency calculated penalty wages in accordance with ORS 652.150, OAR 839-001-0470, and Agency policy, as follows: \$5075.00 (total wages earned) divided by 188.5 (total hours worked) equals an average hourly rate of \$26.92. This figure is multiplied by 8 (hours per day) and then by 30 (the maximum number of days for which civil penalty wages accrue) for a total of \$6460.80. The forum agrees with this calculation. Pursuant to Agency policy, this figure generally would be rounded up to \$6461.00. However, because the Agency sought only \$6460.80 in the Order of Determination, the forum instead rounds the figure down to **\$6460.00**, the amount this forum hereby awards Claimant as penalty wages.

16) The Oregon minimum wage was \$6.00 per hour in 1998, and employers then were required to pay an overtime rate of \$9.00 per hour for all hours worked in

excess of 40 per week. If Respondent and Claimant had not agreed that Claimant would be paid \$50.00 for each 12 square sheet of siding he installed, Respondent would have owed Claimant a total of \$1,231.50 (155 hours x \$6.00/hour + 33.5 hours x \$9.00/hour). The amount Respondent agreed to pay Claimant exceeded the amount it was required to pay pursuant to the minimum wage and overtime laws.

17) The evidence in the record does not establish Respondent's affirmative defense of inability to pay wages when they accrued. Nor does any evidence support Respondent's other affirmative defense -- that it paid Claimant \$2500.00 in satisfaction of his claim.

18) The testimony of all three witnesses was credible. The forum does find, however, that Claimant's affidavit is more accurate than Wallis's testimony regarding the number of hours Claimant worked. (See note 1, *supra*).

ULTIMATE FINDINGS OF FACT

1) At all material times, Respondent was an Oregon corporation that engaged the personal services of one or more persons in the state of Oregon, including Claimant, who was Respondent's employee.

2) Pursuant to their wage agreement, Respondent owed Claimant \$50.00 for each of the 101.5 units (12 square feet) of siding he installed on the Cascade

Summit job from November 7, 1998, through December 3, 1998. Respondent paid Claimant none of that money and, therefore, owes Claimant \$5075.00 in unpaid wages.

3) Respondent's failure to pay Claimant's wages was willful and more than 30 days have passed since Claimant's wages became due.

4) Civil penalty wages, computed in accordance with ORS 652.150 and OAR 839-001-0470, then rounded down, equal \$6460.00.

5) Respondent defaulted and did not meet its burden of proving either affirmative defense asserted in its answer and request for hearing.

CONCLUSIONS OF LAW

1) ORS 653.010 provides, in pertinent part:

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

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

ORS 652.310 provides, in pertinent part:

"As used in ORS 652.310 to 652.414, unless the context requires otherwise:

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

the business of any employer * * *.

"(2) 'Employee' means any individual who otherwise than as 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."

Respondent was Claimant's employer and Claimant was Respondent's 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 Respondent. ORS 652.310 to 652.414.

3) ORS 652.140 provides, in pertinent part:

"(1) 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.

"(2) 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."

Claimant's credible affidavit proves that December 3, 1998, was his last day of work, but the record does not establish whether Claimant gave Respondent notice before he quit. Even assuming, however, that Claimant quit without notice to Respondent, his wages would have been due on December 10, 1998. Respondent violated ORS 652.140 by failing to pay Claimant all wages earned and unpaid by that date.

4) 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."

OAR 839-001-0470 provides:

"(1) When an employer willfully fails to pay all or part of the wages due and payable to the employee upon termination of employment within the time specified in OAR 839-001-0420, 839-001-0430 and 839-001-0440, the employer shall be subject to the following penalty:

"(a) The wages of the employee shall continue from the date the wages were due and payable until the date the wages are paid or until a legal action is commenced, whichever occurs first;

"(b) The rate at which the employee's wages shall continue shall be the employee's hourly rate of pay times eight (8) hours for each day the wages are unpaid;

"(c) Even if the wages are unpaid for more than 30 days, the maximum penalty shall be no greater than the employee's hourly rate of pay times 8 hours per day times 30 days.

"(2) The wages of an employee that are computed at a rate other than an hourly rate

shall be reduced to an hourly rate for penalty computation purposes by dividing the total wages earned while employed or the total wages earned in the last 30 days of employment, whichever is less, by the total number of hours worked during the corresponding time period."

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) 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

DEFAULT

Respondent failed to appear at hearing and the forum held it in default pursuant to OAR 839-050-0330. When a respondent defaults, the Agency must establish a prima facie case to support the allegations of the charging document. *In the Matter of Vision Graphics and Publishing, Inc.*, 16 BOLI 124, 136 (1997). The Agency met that burden in this case, as discussed *infra*.

AGREED RATE OF PAY AND WAGES OWED

To establish a prima facie case supporting a wage claim, the Agency must prove: 1) that respondent employed claimant; 2) that respondent and claimant agreed upon a rate of pay (if that agreed rate exceeded the minimum wage); 3) that claimant performed work for respondent for which he or she was not properly compensated; and 4) the amount and extent of work claimant performed for respondent. See *In the Matter of Catalogfinder, Inc.*, 18 BOLI 242, 260 (1999).

Credible evidence in the record establishes each of these elements. The first and third elements are established by the testimony of Wallis, Respondent's former project superintendent, who testified credibly that Respondent had employed Claimant and had not paid him. That testimony confirms the allegations in Claimant's wage claim and affidavit. Moreover, Respondent at least tacitly admitted that it employed Claimant by asserting, through counsel, that it could provide the Agency with Claimant's payroll records. Respondent's owner, Belanger, also admitted to Taeubel that he had worked with Claimant.

Wallis's testimony also confirmed Claimant's assertions regarding the days he worked (Monday through Saturday). Given that Wallis's testimony and Respondent's admissions corroborate several of the assertions in Claimant's wage claim calendar

and sworn affidavit, and given that no evidence in the record controverts Claimant's other assertions, the forum finds Claimant's affidavit and wage claim calendar to be credible and reliable in their entirety. See also Factual Finding -- the Merits 13, *supra*.

Having concluded that Claimant's affidavit and wage claim calendar are credible and reliable, the forum has no difficulty finding that the agency has proved the second and fourth elements of its claim. Claimant's affidavit establishes that Respondent agreed to pay Claimant \$50.00 for each 12 square feet of siding he installed. That document and Claimant's calendar establish that Claimant installed 101.5 such units of siding and Respondent, therefore, owed him \$5075.00 in wages. The Agency met its burden of establishing a prima facie case that Respondent employed Claimant and failed to pay him \$5075.00 in earned wages.

PENALTY WAGES

The forum may award penalty wages where the respondent's failure to pay wages was willful. Willfulness does not imply or require blame, malice, or moral delinquency. Rather, a respondent commits an act or omission "willfully" if he or she acts (or fails to act) intentionally, as a free agent, and with knowledge of what is being done or not done. *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 its em-

ployee. *McGinnis v. Keen*, 189 Or 445, 221 P2d 907 (1950); *In the Matter of Jake Coke*, 3 BOLI 238, 242 (1983).

Here, Respondent's project superintendent, Willis, was aware that Claimant was not being paid. In addition, Respondent had paid Claimant for his previous work on other contracts. From these facts, the forum infers that Respondent voluntarily, intelligently, and as a free agent failed to pay Claimant any of the wages he earned from November 7 through December 3, 1998. Respondent acted willfully and is liable for penalty wages.

As this forum previously has explained, penalty wages are calculated in accordance with the relevant laws and Agency policy 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.' * * *
Statement of Agency Policy, July 23, 1996."

In the Matter of Mark Johnson, 15 BOLI 139, 143 (1996). Using that formula and rounding down (to correspond to the amount pleaded in the Order of Determination), Respondent owes Claimant \$6460.00 in penalty wages. See Finding of Fact -- the Merits 15, *supra*.

Respondent raised two affirmative defenses in its answer: inability to pay wages when they accrued; and payment of \$2500.00 in satisfaction of the

claim. No evidence in the record supports either of those defenses.

ORDER

NOW, THEREFORE, as authorized by ORS 652.332, and as payment of the unpaid wages and civil penalty wages it owes as a result of its violation of ORS 652.140, the Commissioner of the Bureau of Labor and Industries hereby orders **Belanger General Contracting, 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 Pablo Mercado in the amount of ELEVEN THOUSAND FIVE HUNDRED THIRTY-FIVE DOLLARS (**\$11,535.00**), less appropriate lawful deductions, representing \$5075.00 in gross earned, unpaid, due, and payable wages and \$6460.00 in penalty wages, plus interest at the legal rate on the sum of \$5075.00 from January 1, 1999, until paid and interest at the legal rate on the sum of \$6460.00 from February 1, 1999, until paid.

**In the Matter of
DEBBIE FRAMPTON and BRAD
FRAMPTON,
dba FRAMPTON QUARTER
HORSES**

Case No. 34-99
Final Order of the Commissioner

Jack Roberts
Issued September 17, 1999.

SYNOPSIS

Respondents employed Claimant as a horse stall cleaner at the \$75.00 per week, regardless of the number of hours she worked. Claimant was not an independent contractor, as claimed by Respondents, but an employee who was entitled to minimum wage for all the hours she worked. Respondents kept no record of the hours and dates worked by Claimant, and the forum awarded Claimant \$2,173.67 in unpaid wages based on credible testimony presented by the Agency concerning the amount and extent of work she performed. Respondents' failure to pay the wages was willful, and Respondents failed to prove their affirmative defense of financial inability to pay Claimant's wages at the time they accrued. The Commissioner ordered Respondents to pay \$1440 in penalty wages in addition to the unpaid wages. ORS 652.140(2); 652.150.

The above-entitled case came on regularly for hearing before Alan McCullough, 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 30, 1999, in a conference room in the State Office Building, 165 East Seventh, Eugene, Oregon.

The Bureau of Labor and Industries ("BOLI") was represented by David K. Gerstenfeld, an employee of the Agency. The wage claimant, Mandy Lynaye Holm, was present throughout the hearing and was not represented by counsel. Respondents were not represented by counsel.

The Agency called as witnesses: Mandy Lynaye Holm, the Claimant; Jason Holm, Claimant's brother; Codie Wright, Claimant's friend; and Newell Enos, Agency Compliance Specialist.

Respondents called as witnesses: Fred and Bonnie Stoney, Deborah Frampton's father and mother; and Respondents Bradley and Deborah Frampton.

Administrative exhibits X-1 to X-24, Agency exhibits A-1 to A-8, and Respondents' exhibits R-1 to R-12 were offered and received into evidence. The record closed on June 30, 1999.

Having fully considered the entire record in this matter, I, Jack Roberts, 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 August 28, 1998, Claimant filed a wage claim with the Agency. She alleged that Respondents employed her and failed to pay wages earned and due to her.

2) When she filed her wage claim, Claimant assigned to the

Commissioner of Bureau of Labor and Industries, in trust for Claimant, all wages due from Respondents.

3) Claimant filed her wage claim within the statute of limitations.

4) On February 2, 1999, the Agency served on Respondent Deborah Frampton Order of Determination 98-2739 based upon the wage claim filed by Claimant and the Agency's investigation. The Order of Determination alleged that Respondents owed a total of \$626.00 in unpaid wages based on Claimant having worked 21 weeks for Respondents from December 1, 1997, through April 25, 1998, at the wage rate of \$75.00 per week, and only having been paid \$949.00, plus \$1,800.00 in civil penalty wages and interest, and required that, within 20 days, Respondent either pay these sums in trust to the Agency, request an administrative hearing and submit an answer to the charges, or demand a trial in a court of law.

5) On February 6, 1999, Respondents filed an answer and requested a hearing in this matter. In their answer, they contended that Claimant was an independent contractor who agreed to work for them for \$75.00 a week, and that Claimant received her pay in the form of "clothing apparel, as well as, cash." Respondents admitted owing Claimant \$526.00 and raised the affirmative defense that they were financially unable to pay the balance of the unpaid wages

alleged in the Order of Determination.

6) On March 22, 1999, the Agency filed a "Request For Hearing" with the Hearings Unit and also served the same document on Respondents.

7) On March 24, 1999, the Hearings Unit issued a Notice of Hearing to Respondent, the Agency, and the Claimant stating the time and place of the hearing as June 30, 1999, at 9:00 a.m., in Eugene, Oregon. Together with the Notice of Hearing, the forum sent a document entitled "Summary 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 839-050-000 to 839-050-0440.

8) On April 2, 1999, the Agency moved to amend the Order of Determination to allege that Claimant earned the statutory minimum wage of \$5.50/hr. for 115 hours worked (\$632.50) from December 1 through 31, 1997; that Claimant earned the statutory minimum wage rate of \$6.00/hr. for 440 hours worked (\$2,640.00) from January 1 through April 25, 1998; that Claimant was paid a total of \$1,043.83; that the remaining unpaid wages are \$2,228.67; and that Claimant's rate per day during the period of employment pursuant to ORS 652.150 was \$48.00 and there is now due and owing to Claimant the sum of \$1,440 as penalty wages.

9) On April 9, 1999, Respondents objected to the Agency's motion to amend the Order of Determination on the basis that Claimant was an independent contractor who contracted to do a job for a set amount.

10) On April 16, 1999, the Agency filed a motion for a discovery order seeking documents related to the number of hours Claimant worked, the amount she was paid, evidence indicating she was an independent contractor, and documentation of Respondents' financial inability to pay Claimant's wages at the time they became due. The Agency's motion was accompanied by a letter setting out the Agency's unsuccessful attempts to obtain the documents by informal means.

11) On April 23, 1999, Respondents responded to the Agency's motion for a discovery order, stating that some of the requested documents did not exist, and that they would bring the others to the hearing, to the best of their ability.

12) On May 4, 1999, the forum granted the Agency's motion to amend the Order of Determination, noting that Respondents' objection that Claimant was an independent contractor constituted a defense to the wage claim, but not a reason for disallowing the motion. Respondents were given the option of filing an amended answer, in lieu of the forum deeming Respondents as having denied the new allegations contained in the Agency's amendment.

13) On May 4, 1999, the forum granted the Agency's motion for a discovery order as to all documents sought, noting that Respondents were required to provide the documents to the Agency by May 17, and that simply providing the documents at the hearing would not suffice.

14) On May 4, 1999, the ALJ issued a case summary order requiring the Agency and Respondents each to submit a list of witnesses to be called, copies of documents or other physical evidence to be introduced, a statement of any agreed or stipulated facts, and, by the Agency only, any damage calculations. The ALJ ordered the participants to submit case summaries by June 18, 1999, and notified them of the possible sanctions for failure to comply with the case summary order.

15) On May 14, 1999, the ALJ modified the case summary order, additionally ordering the Agency to provide a statement of the elements of the claim and Respondents to provide a statement of the defense to the claim.

16) The Agency filed its case summary, with attached exhibits, on June 17, 1999.

17) Respondents filed their case summary, with attached exhibits, on or about June 17, 1999.

18) On June 22, 1999, the Agency filed a request that Respondents make two witnesses available for cross-examination. These witnesses had prepared documents that were included as

exhibits with Respondents' case summary.

19) On June 23, 1999, the ALJ issued a letter to Respondents and the Agency that spelled out the Agency's request for cross-examination of witnesses, indicated the possible consequences of Respondents' failure to make the witnesses available, and instructed Respondents as to how they might go about making the witnesses available to the Agency.

20) At the start of the hearing, Respondents said they had reviewed the "Notice of Contested Case Rights and Procedures" and had no questions about it.

21) 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.

22) At the start of the hearing, the ALJ, on his own motion, excluded witnesses pursuant to OAR 839-050-0150(3).

23) On July 22, 1999, the ALJ issued a proposed order that notified the participants that they were entitled to file exceptions to the proposed order. The Forum received no exceptions.

FINDINGS OF FACT – THE MERITS

1) At all times material herein, Respondents Bradley and Deborah Frampton, a married couple, did business in Oregon as Frampton Quarter Horses, and

employed one or more persons to work at that business.

2) At all times material herein, Respondents' business consisted of buying, selling, and training horses.

3) Respondents kept their horses in a barn ("the barn") containing 22-23 horse stalls located on Highway 99, north of Eugene. The barn was owned by the Eugene Airport, which leased the barn to Steve Christianson, who in turn rented stalls to Respondents and others.

4) Prior to being employed by Respondents, Claimant had gone to the barn with Codie Wright to ride horses with Wright. Wright boarded her horse at the barn.

5) In the last week of November 1997, Respondents asked Claimant to clean their horse stalls for one week while Respondents were out of town. Claimant accepted Respondents' offer and was paid \$100 for her work.

6) Respondent Brad Frampton then asked Claimant, who was a 15-year-old high school student at the time,¹ if she would like to clean Respondents' horse stalls at the barn on a regular basis. Claimant accepted Frampton's offer. Claimant entered into an oral agreement with Frampton to clean horse stalls for Respondents in exchange for payment of \$75.00 per week. Frampton and Claimant agreed that Claimant would clean the stalls on Monday

through Friday each week, starting each day after school let out.

7) Frampton and Claimant did not discuss the length of time Claimant would be employed when Claimant was hired or at any time during her employment with Respondents.

8) The general practice in the horse industry is for stall cleaners to be paid a flat rate for performing a set amount of work.

9) Claimant started work for Respondents on December 1, 1997, and continued to work for Respondents through April 24, 1998. Claimant did not work for any other employer while employed by Respondents.

10) Claimant voluntarily quit Respondents' employment on April 25, 1998.

11) While employed by Respondents, Claimant generally worked Monday through Friday, beginning at 3:30 p.m. The time Claimant stopped work each day varied between 7:00 p.m. and 9:00 p.m. Claimant also performed some work on some Saturdays and Sundays. In addition to cleaning stalls, Claimant also periodically assisted Respondents in washing and "lunging" their horses.

12) Claimant worked an average of 25 hours per week while employed by Respondents. In total, Claimant worked 115 hours in December 1997, and 410 hours between January 1, 1998, and April 24, 1998.

¹ Claimant's birthdate is May 3, 1982.

13) Beginning in January, 1998, Claimant began completing and submitting weekly invoices to Respondents showing how much she had earned that week (calculated at \$75.00 per week), the total amount Respondents owed her in unpaid wages, and the amount of cash she had received from Respondents that week, as well as the value of any goods Respondents had purchased for her that week.

14) When Claimant began work for Respondents, she had to clean nine horse stalls a day. Subsequently, the number of stalls she cleaned per day ranged from nine to 14.

15) Claimant cleaned Respondents' horse stalls by "stripping" or "picking" them.

16) "Stripping" a stall involved removing everything on the floor of each stall except for any remaining clean wood shavings and replacing all dirty shavings with clean shavings. Claimant stripped each stall twice a week, including every Monday. It took Claimant from 15-45 minutes to strip each stall, depending on the condition of the stall.

17) "Picking" a stall involved removing horse manure and shavings that had been soiled by horse manure or urination from a stall that had mostly clean shavings in it. Claimant picked each stall on days when she did not strip the stalls. Claimant used Respondents' pitchfork and wheelbarrow to clean Respondents' horse stalls. It took Claimant from 5-20

minutes to pick each stall, depending on the condition of the stall.

18) Claimant had no special training to learn to clean Respondents' horse stalls. She had never cleaned horse stalls before starting work for Respondents.

19) Claimant invested no money in Respondents' business. She had no opportunity to earn a profit or suffer a loss.

20) While working for Respondents at the barn, Claimant spent 15-30 minutes each day talking with Wright, her brother Jason, and Respondents. Claimant occasionally was driven to a local store by Deborah Frampton, Wright, or her brother Jason to get a pop or go shopping.

21) Respondents did not maintain any record of the dates and hours that Claimant worked, and Claimant did not maintain a contemporaneous record of the dates and hours she worked.

22) When Claimant filed her wage claim on August 28, 1998, she completed a BOLI WH-127² for the months of December 1997 through April 24, 1998. Claimant indicated she had worked 5 hours per day, Monday through Friday, during that period of time. At the time Claimant completed this cal-

² A BOLI WH-127 form has two blank monthly calendars on each page containing instructions that the wage claimant is to fill in the month, year, dates of each month, and hours worked each day, excluding meals.

endar, she believed she was only entitled to unpaid wages based on the flat rate of \$75.00 per week, regardless of the number of hours she actually worked each week.

23) Based on the statutory minimum wage,³ Claimant earned \$632.50 in December 1997 and \$2,460.00 between January 1, 1998, and April 24, 1998, for a total of \$3,092.50 earned while employed by Respondents.

24) During her employment with Respondents, Claimant received a total of \$100 in cash and \$418.83 in goods and services as compensation for her work.

25) After Claimant left their employ, Respondents paid Claimant \$300 cash on November 27, 1998, and \$100 cash on January 21, 1999. Both payments were intended to compensate Claimant for work performed between December 1, 1997, and April 24, 1998.

26) On February 6, 1999, Respondents acknowledged owing Claimant \$526 based on the work she performed for Respondents performed between December 1, 1997, and April 25, 1998.

27) At the time of the hearing, Respondents still owed Claimant \$2,173.67 in unpaid wages.

28) Claimant's hourly rate of pay at the time she left Respon-

dents' employ was \$6.00 per hour.⁴

29) All the witnesses were credible and in general agreement on issues of material fact.

30) From January 1998 to the present, the horse market has gone steadily downhill, while the cost of maintaining a horse has increased at a pace with the cost of living in general.

31) Brad Frampton was also working for "OrPac" [phonetic] when Claimant began working for Respondents, but was paid in hay rather than money.

32) Between January and May 1998, Respondents maintained at least two joint personal accounts at Key Bank, one entitled "Horse Acct."

33) Between January and May 1998, Respondents wrote a number of checks on the two joint personal accounts referred to in Finding of Fact – The Merits #32 that resulted in overcharges being assessed against Respondents

⁴ Although Claimant and Respondents agreed that Claimant would be paid \$75 per week, regardless of the number of hours she worked, this agreement was contrary to the statutory mandate of ORS 653.025, which requires that an employee must be paid the statutory minimum wage for each hour they are gainfully employed. Claimant's average work hours of 25 hours per week, divided into \$75, yields an hourly pay rate of \$3.00, in contrast to the \$6.00 per hour statutory minimum wage in effect in 1998.

³ See ORS 653.025.

because their accounts lacked sufficient funds to cover the checks.

34) Between January and May 1998, Respondents continued to operate their horse business. In that time period, Respondents purchased food for their horses, made payments on retail charge accounts related to their horse business, and paid other bills, such as utility bills and mortgage payments.

ULTIMATE FINDINGS OF FACT

1) At all times material herein, Respondents Bradley and Deborah Frampton, a married couple, did business in Oregon as Frampton Quarter Horses, and employed one or more persons to work at that business.

2) Respondents employed Claimant from December 1, 1997 through April 24, 1998. During that time, Respondents suffered or permitted Claimant to render personal services to them.

3) Respondents and Claimant agreed that Claimant would be paid \$75.00 per week for all work performed, regardless of the number of hours it took Claimant to perform the work.

4) Claimant worked an average of 25 hours per week while employed by Respondents. In total, Claimant worked 115 hours in December 1997, and 410 hours between January 1, 1998, and April 24, 1998.

5) The state minimum wage during 1997 was \$5.50 per hour. In 1998 it was \$6.00 per hour.

6) Based on the statutory minimum wage, Claimant earned \$632.50 in December 1997 and \$2,460.00 between January 1, 1998, and April 24, 1998, for a total of \$3,092.50 earned while employed by Respondents.

7) During and subsequent to her employment with Respondents, Claimant received a total of \$500 in cash and \$418.83 in goods and services as compensation for her work, leaving \$2,173.67 in unpaid wages.

8) Respondents willfully failed to pay Claimant \$2,173.67 in earned, due, and payable wages within five days, excluding Saturdays, Sundays, and holidays, after she quit, and more than 30 days have elapsed from the date Claimant's wages were due.

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 652.405. During all times material herein, Respondents employed Claimant.

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) 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 even occurs first."

Respondents violated ORS 652.140(2) by failing to pay Claimant all wages earned and unpaid within five days, excluding Saturdays, Sundays, and holidays, after Claimant quit Respondents' employment.

4) At times material, ORS 653.025 required, in pertinent part:

" * * * 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:

"(1) For calendar year 1997, \$5.50.

"(2) For calendar year 1998, \$6.00."

While employed by Respondents, Claimant was entitled to be paid the statutory minimum wage. Calculated at statutory minimum wage rate, Claimant earned a total of \$3,092.50. Claimant was only paid \$918.83 in cash and goods.

Respondents violated ORS 653.025 by failing to pay Claimant minimum wage for the hours in Respondents' employ.

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."

OAR 839-001-0480 provides:

"When an employer shows that it was financially unable to pay the wages at the time the wages accrued, the employer shall not be subject to the penalty provided for in OAR 839-001-0460. If an employer continues to operate a business or chooses to pay certain debts and obligations in preference to an employee's wages, there is no financial inability."

Respondents are liable for civil penalties under ORS 652.150 for

willfully failing to pay all wages or compensation to Claimant when due as provided in ORS 652.140(2).

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 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

INTRODUCTION

The Agency alleged in its Order of Determination, as amended at hearing, that Claimant was employed by Brad and Debbie Frampton as a horse stall cleaner from November 1, 1997, through April 24, 1998, that she worked a total of 525 hours and was only paid \$918.83, and that she is entitled to \$2,228.67 in unpaid wages and \$1,440 as penalty wages. Respondents alleged that Claimant was an independent contractor, and that they were financially unable to pay Claimant the wages alleged in the Order of Determination.

EMPLOYEE OR INDEPENDENT CONTRACTOR?

This forum utilizes 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 Francis Bristow*, 16 BOLI

28, 37 (1997); *In the Matter of Geoffroy Enterprises*, 15 BOLI 148, 164 (1996). 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." *Id.* 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." *Bristow*, 16 BOLI at 37, *citing Geoffroy Enterprises*, 15 BOLI at 164.

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

A. The degree of control exercised by the alleged employer.

Claimant's reporting time was one of mutual convenience, in that it coincided with the time she got out of school and had a ride to the barn. She was expected to clean the stalls with the tools provided by Respondents, but there was no

evidence she was closely supervised while doing her cleaning. Although Claimant was expected to clean all of Respondents' horse stalls each day, she was also able to spend time visiting with her brother, Jason Holm, and his girlfriend, Codie Wright, as well as with Respondents. She only performed work that Respondents directed her to perform.

B. The extent of the relative investment of the worker and the alleged employer.

Claimant had no investment, while Respondents owned the horses and equipment and leased the facilities.

C. The degree to which the worker's opportunity for profit and loss is determined by the alleged employer.

Because she made no investment other than her time, Claimant had no opportunity whatsoever to earn a profit or suffer a loss.

D. The skill and initiative required in performing the job.

The only skills required of Claimant were the ability to use a pitchfork and wheelbarrow. The initiative required was the same that anyone employed as a manual laborer would need to use in order to keep his or her job.

E. The permanency of the relationship.

There is no evidence in the record to indicate that Claimant or Respondents, at any time prior to Claimant's termination, consid-

ered Claimant's employment to be limited to a specific duration of time.

F. Conclusion.

Four of the five factors used to determine whether an individual performing work is an employee or an independent contractor clearly indicate an employer-employee relationship. The fifth, the degree of control exercised by the alleged employer, contains indicia of both.

Respondents argue that Claimant's practice of submitting invoices showing the money due to her and Respondents' intent that Claimant perform work as an independent contractor demonstrate that Claimant was an independent contractor. The "economic reality" test used by this forum focuses on substance, not form. Mere use of a form entitled "INVOICE" that an independent contractor might use is not an indicator of independent contractor status and the forum gives no weight to it. Likewise, an employer's intent and how he or she labels a worker, or for that matter, how a worker labels herself, does not determine whether the worker is an employee or an independent contractor. *Bristow*, 16 BOLI at 40.

Considering each factor of the economic reality test, I conclude that Claimant was economically dependent upon Respondents' business and that she was an employee of Respondents.

WERE THERE ANY UNPAID WAGES DUE CLAIMANT AT THE TIME OF HER TERMINATION?

To establish a prima facie case for wage claims, the Agency must establish the following: (1) Respondents employed Claimant; (2) Claimant's agreed upon rate of pay, if it was other than minimum wage; (3) Claimant performed work for which she was not properly compensated; and (4) the amount and extent of work performed by Claimant. *In the Matter of Catalogfinder, Inc.*, 18 BOLI 242, 260 (1999). The claimant has the burden of proving that she performed work for which she was not properly compensated. *In the Matter of Graciela Vargas*, 16 BOLI 246, 253-54, citing *Ander-son v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946).

The forum has already grappled with the issue of whether Claimant was an employee or an independent contractor and determined that Claimant was an employee.

Respondents and the Agency agree that Respondents and Claimant entered into an agreement whereby Claimant would be paid \$75.00 per week for cleaning horse stalls, regardless of the hours it took. The net result of this agreement, based on Claimant's average of 25 hours worked per week, was a \$3.00 per hour wage rate. Respondents defend this result based on Claimant's assent to it and the general practice in the horse industry of paying individuals a flat rate for jobs. However, an employer's agree-

ment with an employee whereby the employer is not required to comply with the minimum wage law is not a defense to a wage collection proceeding in this forum. ORS 653.055(2); *Bristow*, 16 BOLI at 41. Neither is general industry practice, where that practice violates the minimum wage laws of this state. Consequently, this forum calculates the unpaid wages due and owing to Claimant at the statutory minimum wage, not the agreed upon rate of \$75.00 per week.

The third element of the Agency's prima facie case, whether Claimant performed work for which she was not properly compensated, is undisputed. Based on this agreed upon rate of pay of \$75.00 per week, Respondents admit that they still owe Claimant \$526 for cleaning horse stalls during the period of time encompassed by her wage claim.⁵

The final element of the Agency's prima facie case requires proof of the amount and extent of work performed by Claimant. The Agency's burden of proof can be met by producing sufficient evidence from which "a just and reasonable inference may be drawn." *In the Matter of Graciela Vargas*, 16 BOLI 246, 254 (1998). Where an employer produces no records of hours or dates worked by the claimant, the

⁵ As noted in Finding of Fact – The Merits #26, \$400 in unpaid wages due and owing was paid to Claimant more than 30 days after May 1, 1998, the due date of all of Claimant's wages.

commissioner may rely on evidence produced by the agency, including credible testimony by the claimant, "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." *In the Matter of Diran Barber*, 16 BOLI 190, 196-97 (1997), citing *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687-88 (1946). The rationale for this policy 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" when such inability is based on "an employer's failure to keep proper records, in conformity with his statutory duty * * *." *Graciela Vargas*, at 253, citing *Anderson*.

Here, Respondents produced no record of hours or dates worked by the Claimant. In fact, the only evidence of any kind produced by Respondents on this issue was some inconclusive testimony regarding how long it takes experienced and inexperienced stall cleaners to clean a horse stall. Claimant also kept no contemporaneous records, but estimated that she worked an average of five hours per day, five days a week, throughout her employment with Respondents, numbers that are reflected on her WH-127. As there are no accurate records to rely on, the forum examines the Agency's evidence to determine if it shows "the amount and extent of the em-

ployee's work as a matter of just and reasonable inference." *Id.*

Claimant's credible testimony, corroborated by her brother and his girlfriend, Codie Wright, established Claimant's arrival at work at 3:30 p.m., Monday through Friday, from December 1, 1997, through April 24, 1998. Claimant, who had no prior experience cleaning horse stalls, testified that it took her from 5-20 minutes to "pick" a stall and 15-45 minutes to "strip" a stall. Wright, who also cleaned Respondents' horse stalls at one time, validated Claimant's estimates by her testimony that it took her up to 20 minutes to "pick" a stall and 45-60 minutes to "strip" a stall. When these figures are extrapolated by multiplying them by a range of nine to 14 stalls cleaned per day, the following minimum and maximum periods of time result:

Task	Time to clean stalls	9 Stalls	14 Stalls
Pick stalls (3X/week)	5 mins.	45 mins.	70 mins.
Pick stalls (3X/week)	20 mins.	180 mins.	280 mins.
Strip stalls (2X/week)	15 mins.	135 mins.	210 mins.
Strip stalls (2X/week)	45 mins.	405 mins.	630 mins.

Since no two stalls are identically soiled on a given day, it is a reasonable assumption that the

amount of time utilized by Claimant in cleaning horse stalls ranged somewhere between 45 and 280 minutes for picking stalls each day, three times a week, and 135 and 630 minutes for stripping stalls each day, twice a week. This correlates to an absolute minimum of 6.75 hours and an absolute maximum of 35 hours Claimant spent per week cleaning stalls. There was no evidence to suggest that Claimant ever worked less than two hours in a day or more than seven. Claimant herself testified she worked a range of three to seven hours each day, a figure consistent with eyewitness testimony, the figures shown in the table above, and the fact that she sometimes performed other work than cleaning stables and did some work on weekends. Finally, Claimant's statement that she averaged five hours work per day was made at a time when she had nothing to gain by inflating her hours.⁶ Based on this evidence, the forum concludes that the Agency has satisfied its burden of showing the amount and extent of the employee's work as a matter of just and reasonable inference, and that Claimant worked an average of 25 hours per week.

PENALTY WAGES

An award of penalty wages turns on the issue of willfulness.

⁶ Claimant first made this estimate on her WH-127, which she filled out at the time she filed her wage claim seeking compensation for unpaid wages at the flat rate of \$75 per week.

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. *In the Matter of Troy R. Johnson*, 17 BOLI 285, 292 (1999), citing *Sabin v. Willamette Western Corp.*, 276 Oregon 1083, 557 P2d 1344 (1976). Respondents, as employers, had a duty to know the amount of wages due its employees. *In the Matter of R.L. Chapman Ent. Ltd.*, 17 BOLI 277, 285 (1999). Respondents believed they owed Claimant \$926 in unpaid wages at the time of Claimant's termination.⁷ Respondents acted voluntarily and as free agents. The forum concludes that Respondents acted willfully. Respondents' implied argument that they did not know they were Claimant's employer⁸ does not rebut this conclusion.

⁷ This figure is derived from adding the \$526 Respondents believed was owing to Claimant at the time of the hearing to the \$400 that Respondents paid Claimant between her date of termination and the hearing.

⁸ Respondents' assertion Claimant was an independent contractor is necessarily an assertion that they were not Claimant's employer. See, e.g., *In the Matter of Country Auction*, 5 BOLI 256, 267 (1986)(Employer, in a wage claim case, asserted he could not be found to have willfully failed to pay a Claimant at the minimum wage rate because he was unaware that the law imposed a minimum wage rate requirement on him. The commis-

Pursuant to ORS 652.150, Respondents can avoid liability for penalty wages by proving, by a preponderance of the evidence, their financial inability to pay Claimant's wages at the time they accrued. Under OAR 839-001-0480, there is no financial inability "[i]f an employer continues to operate a business or chooses to pay certain debts and obligations in preference to employee's wages * * *." Respondents offered numerous documents into evidence relating to their financial status in 1998 and 1999, as well as testimony relating the downturn in the horse market and their financial distress in 1998 and 1999. Only those reflecting Respondents' financial status from December 1997 through the end of May 1998, the period in which Claimant's wages accrued, are relevant to this inquiry.

Several conclusions can be drawn from these documents. First, Respondents wrote a number of checks, up to \$15,000 worth in the month of February 1998. Second, a number of these checks appear to have been written on Respondents' "horse account." Third, Respondents were still conducting their horse business through May 1998, as receipts show considerable amounts of hay purchased in that month. Fourth, a number of Respondents' checks bounced,

sioner held this defense to be irrelevant because "the employer, like all employers, is charged with knowing the wage and hour laws governing his activities as an employer.")

subjecting Respondents to considerable overdraft fees. Fifth, Respondents had trouble meeting their personal financial obligations, but paid some outstanding bills.

Respondents may have been in dire financial straits in May of 1998, but the law is clear. So long as they continued to operate their business and pay certain debts and obligations in preference to Claimant's wages, the forum cannot draw the conclusion that Respondents had a financial inability to pay Claimant's wages. Respondents have not met their burden of proof in proving the contrary. Accordingly, the forum assesses penalty wages in the amount of \$1,440.00. This figure is computed by multiplying \$6.00 per hour x 8 hours per day x 30 days, pursuant to ORS 652.150 and OAR 839-001-0470.

ORDER

NOW, THEREFORE, as authorized by ORS 652.332, and as payment of the unpaid wages and civil penalty wages it owes as a result of its violation of ORS 652.140, the Commissioner of the Bureau of Labor and Industries hereby orders **Deborah Frampton and Bradley Frampton** 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 Mandy Lynaye Holm in the amount of THREE THOU-

SAND SIX HUNDRED THIRTEEN DOLLARS AND SIXTY-SEVEN CENTS (\$3,613.67), less appropriate lawful deductions, representing \$2,173.67 in gross earned, unpaid, due, and payable wages and \$1,440.00 in penalty wages, plus interest at the legal rate on the sum of \$2,173.00 from June 1, 1998, until paid and interest at the legal rate on the sum of \$1,440.00 from July 1, 1998, until paid.

**In the Matter of
ANN L. SWANGER and LUTHER
M. SWANGER,
both dba MTR INVESTMENTS**

Case No. 33-99
Final Order of the Commissioner
Jack Roberts
Issued September 17, 1999.

SYNOPSIS

Where Claimant was a car salesman who was paid by commission and Respondents claimed that he was independent contractor, the forum applied the "economic reality" test and found that Claimant was a commissioned sales employee who was entitled to the statutory minimum wage for all hours worked. The forum found Claimant was paid all commissions due to him. No reliable evidence in the record established the dates and hours worked by Claimant. As a result, the Agency failed to meet its burden of proof

of showing that Claimant performed work for which he was not properly compensated, and the amount and extent of that work. The Commissioner dismissed the Order of Determination. ORS 652.140(2); ORS 652.150.

The above-entitled case came on regularly for hearing before Alan McCullough, 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 April 16 and April 21, 1999, in a conference room in the State Office Building, 165 East Seventh, Eugene, Oregon.

The Bureau of Labor and Industries ("BOLI") was represented by Cynthia L. Domas, an employee of the Agency. The wage claimant, Lane Hampton, was present through most of the hearing and was not represented by counsel. Respondents were represented by Anthony T. Rosta of Rosta & Connelly, P.C., Eugene.

The Agency called as witnesses: Lane Hampton, the wage claimant; Rick W. Curson, owner of a business that retails and wholesales vehicles; and Gerhard Taeubel, Agency Compliance Specialist.

Respondent called as witnesses: Ann L. Swanger and Luther M. Swanger, Respondents; and Shawn T. Carey and Frank Caldwell, friends of Respondents who assisted Respondents in the operation of their business.

Administrative exhibits X-1 to X-19, Agency exhibits A-1 to A-5, and Respondents' exhibits X-10 to X-16 were offered and received into evidence. The record closed on April 21, 1999.

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 29, 1998, Claimant filed a wage claim with the Agency. He alleged that Respondent Ann L. Swanger employed him and failed to pay wages earned and due to him.

2) When he filed his wage claim, Claimant assigned to the Commissioner of Bureau of Labor and Industries, in trust for Claimant, all wages due from Respondents.

3) Claimant filed his wage claim within the statute of limitations.

4) On October 16, 1998, the Agency served on Respondent Ann L. Swanger Order of Determination 98-105 based upon the wage claim filed by Claimant and the Agency's investigation. The Order of Determination alleged that Respondent Ann L. Swanger, dba MTR Investments, owed a total of \$3,524.25 in unpaid wages based on Claimant having worked 803.5 hours between November

27, 1997, through March 14, 1998, and only having been paid \$1,200, plus \$1,401.60 in civil penalty wages and interest, and required that, within 20 days, Respondent either pay these sums in trust to the Agency, request an administrative hearing and submit an answer to the charges, or demand a trial in a court of law.

5) On November 5, 1998, Respondent Ann L. Swanger, through counsel, filed an answer and requested a hearing in this matter. In her answer, she admitted that "a person known as Lane B. Hampton" sold automobiles for Respondent, and alleged the affirmative defenses that Claimant was an independent contractor and that Respondent was financially unable to pay the unpaid wages and penalty alleged in the Order of Determination.

6) On March 1, 1999, the Agency filed a "Request For Hearing" with the Hearings Unit.

7) On March 2, 1999, the Hearings Unit issued a Notice of Hearing to Respondent, the Agency, and the Claimant stating the time and place of the hearing as March 30, 1999, at 9:00 a.m., in Eugene, Oregon. Together with the Notice of Hearing, the forum sent a document entitled "Summary 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 839-050-000 to 839-050-0440.

8) On March 2, 1999, the Agency moved for a discovery order requiring Respondent to produce certain documents, accompanied by a letter setting out the Agency's unsuccessful attempts to obtain the documents by informal means.

9) On March 2, 1999, the Agency mailed its Request for Hearing to Respondent.

10) On March 3, 1999, the ALJ sent Respondent and the Agency a letter denoting the timeline for responding to the Agency's motion.

11) On March 10, 1999, the ALJ issued a discovery order requiring Respondent to produce the documents requested by the Agency in its motion for a discovery order.

12) On March 11, the Hearings Unit received a response from Respondent with regard to the Agency's motion for a discovery order indicating that Respondent had provided some of the requested documents and objecting to the production of Respondent's telephone and electric bills during the period of Claimant's alleged employment on the basis of relevance.

13) On March 11, 1999, the ALJ modified the discovery order. The ALJ required Respondent to produce all documents listed in the discovery order, to the extent they existed, and directed the Agency to provide the forum with a statement of relevance showing how those documents were rea-

sonably likely to produce relevant information.

14) On March 16, 1999, the ALJ issued a case summary order requiring the Agency and Respondent each to submit a list of witnesses to be called, copies of documents or other physical evidence to be introduced, a statement of any agreed or stipulated facts, and, by the Agency only, any damage calculations. The ALJ ordered the participants to submit case summaries by March 24, 1999, and notified them of the possible sanctions for failure to comply with the case summary order.

15) On March 16, 1999, the Hearings Unit received a statement from the Agency indicating that Respondent's telephone and electric bills were relevant based on Respondent's affirmative defense of inability to pay wages. The ALJ issued a discovery order in response that required Respondent to produce these documents.

16) On March 25, 1999, Respondent moved for a postponement of the hearing based on Respondent Ann L. Swanger's pending dental surgery set for March 29. Respondent's counsel indicated he had only learned of this surgery on March 24, that Respondent Swanger was scheduled to have all the teeth of her lower jaw removed, and that additional surgery would be done in the days following the initial surgery, making it extremely difficult for her to communicate and

attend the hearing presently set for March 30.

17) On March 24, 1999, the Agency submitted its case summary with attached exhibits.

18) On March 25, 1999, Respondent submitted its case summary with attached exhibits.

19) On March 29, 1999, the ALJ granted Respondent's motion for postponement for good cause, and rescheduled the hearing for April 16, 1999. At the same time, the ALJ issued an Amended Notice of Hearing.

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

21) 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.

22) At the start of the hearing, the ALJ, on his own motion, excluded witnesses pursuant to OAR 839-050-0150(3). Respondent's counsel moved to allow Luther M. Swanger, Respondent Ann L. Swanger's husband, to remain in the hearing room throughout the hearing, representing that he was a co-owner of MTR Investments, that he was aware of a number of transactions involving Claimant that Ann L. Swanger had no direct knowledge of, and that Respondent Ann L. Swanger's case would be preju-

diced if Luther M. Swanger could not be present during the hearing to assist Respondent Ann L. Swanger's counsel. The ALJ initially denied the motion. The Agency then moved to amend the Order of Determination to name Luther M. Swanger as an additional Respondent, based on the representation of Respondent's counsel that Luther M. Swanger was a co-owner of MTR Investments. Respondent did not object, and the ALJ granted the amendment. As a result, Respondent's motion became moot. Subsequently, Respondents stipulated that Ann L. Swanger and Luther M. Swanger both had a financial interest in MTR Investments at all times material herein.

23) At the start of the hearing, Respondents stipulated that Lane Hampton, the Claimant who was present at the hearing, was the "Lane B. Hampton" whom Respondent Ann L. Swanger referred to in her answer as having "sold automobiles for Ann L. Swanger dba MTR Investments."

24) By 5 p.m. on Friday, April 16, the Agency had concluded its case. Respondents had called two witnesses, but neither Respondent had testified yet. Accordingly, the ALJ recessed the hearing and, with the mutual assent of the participants, scheduled the hearing to reconvene at the same location at 10:00 a.m. on April 21, 1999.

25) On June 25, 1999, the ALJ issued a Proposed Order in this case. Included in the Pro-

posed Order was an Exceptions Notice that allowed ten days for filing exceptions. On June 29, 1999, the Agency requested an extension of time until August 1, 1999, in which to file exceptions based on the case presenter's work schedule and upcoming move of her personal residence. Respondents did not object, and the Agency's motion was granted. On July 27, 1999, the Agency filed Exceptions to the Proposed Order. Those Exceptions are addressed in the Opinion section of this Order.

FINDINGS OF FACT – THE MERITS

1) During all times material, Respondents Ann L. Swanger ("Ann") and Luther M. Swanger ("Luther") did business as MTR Investments ("MTR"), a partnership located in Eugene, Oregon, and employed one or more persons to work at that business.

2) Respondents entered into the business of motor vehicle sales as a result of Luther having suffered a disabling injury while driving heavy equipment. Respondents registered MTR as an assumed business name with the Oregon Corporations Division on April 14, 1997, and obtained the vehicle dealer certificate necessary to engage in commercial sales of motor vehicles pursuant to ORS Ch. 822. Respondents began selling and detailing cars¹

under the assumed business name of MTR at 2800 Roosevelt, Eugene. Respondents' inventory at that time, and at all times material, consisted of "low end, cheap cars."

3) Sometime between April and October 1997, Claimant purchased a 1980 Cadillac, license AQP792, from Respondents, arranging to pay for it by means of monthly payments.

4) In October 1997, Respondents moved their business to a car lot on 650 Highway 99, Eugene. Respondents were invited to move to that location by David Minor ("Minor"), another licensed car dealer who was already selling cars at that location, but was having trouble paying the rent. After Respondents moved MTR to 650 Highway 99, they paid rent to Minor and split the utility bills for the lot with him. Minor continued to sell cars from the shared car lot until April or May 1998. Minor, like Respondents, had his own vehicle dealer certificate.

5) In October or November 1997, Claimant was behind in his car payments to Respondents. Claimant came to Respondents' car lot and talked with Luther about making up payments and purchasing a 1985 Cadillac that was for sale on Respondents' lot. While discussing his payments, Claimant told Luther that he had prior car sales experience. Luther,

¹ Claimant sold automobiles, vans, and pickup trucks at Respondents' lot. The forum uses "cars" in a generic

sense to refer to all three types of motor vehicles.

who had no experience in car sales prior to MTR, told Claimant that Respondents couldn't have any employees, but that Claimant could sell cars for MTR to earn money for his car payments. Luther offered, and Claimant agreed, that Claimant would be paid for sales on the following commission schedule: \$50 when Respondents' profit was \$1-\$500; \$100 when Respondents' profit was \$501-\$999; and \$150 when Respondents' profit was \$1000 or more. Claimant and Luther did not enter into a written employment agreement. There was no discussion concerning how long Claimant could sell cars for Respondents.

6) Claimant began selling cars for Respondents at Respondents' lot in mid-November 1997, and continued to do so through March 7, 1998. Claimant only sold cars that were on display in Respondents' lot.

7) At the time of filing his wage claim, Claimant completed a calendar (WH-127) provided by Bureau of Labor and Industries showing that he had worked a total of 803.5 hours for Respondents between November 27, 1997 and March 14, 1998, and that he had worked every day in this time period except for December 19th and 25th, 1997, and January 1st and 2nd, 1998. Claimant's WH-127 further shows that, with the exceptions of December 19, 24-25, and 31, 1997, and January 1-2, 1998, Claimant worked 8 to 9 hours every day of

the week from Monday through Saturday.

8) During the time that Claimant sold cars for Respondents, Respondents' car lot was open from 9 a.m. to 5 p.m., seven days a week. These hours were set by Respondents. Claimant was free to leave for varying amounts of time and different times of the day without having to first obtain Luther's permission. Claimant often came to work late or left early. Claimant did not work every Sunday, and on the Sundays he did work, he often worked a very short period of time.

9) Respondents did not keep a written record of the hours and dates that Claimant sold cars at Respondents' lot.

10) Claimant did not create a contemporaneous record of the hours and dates he sold cars at Respondents' lot.

11) Claimant and Luther maintained a written record showing the cars sold by Claimant, the week in which they were sold, and how much commission Claimant received for each sale.

12) After obtaining the approval of Minor and Luther, Claimant also sold cars for Minor that were displayed on the shared car lot during the period of time that he sold cars for Respondents. Claimant only sold as many as four cars in total for Minor. There was no evidence presented concerning the number of hours Claimant spent selling cars for Minor.

13) Respondents determined the selling price for each car in their inventory. Claimant's only opportunity to make a profit was the volume of cars he sold. Claimant invested no money in Respondents' business. Claimant did not use any of his own equipment or supplies in selling Respondents' cars. Claimant did not have a vehicle dealer certificate while selling cars for Respondents.

14) Claimant wanted to be paid his commissions in cash, and Luther paid Claimant the commissions he had earned on the same day that Claimant made the sale that generated the commission.

15) Because Luther had no prior experience in car sales, he relied on Claimant to fill out the appropriate paperwork after each sale and did not give Claimant instructions as to sales techniques.

16) The skills Claimant used to sell cars for Respondents were sales skills and the ability to complete the paperwork required by law. Claimant's sales efforts were solely directed to customers who came to Respondents' lot of their own volition.

17) Shawn Carey, a good friend of Luther's, moved into a "fifth wheel trailer" parked immediately behind MTR's office building on December 2, 1997, and lived in that trailer continuously until April 1998. During the time period that Claimant sold cars for Respondents, Carey performed various odd jobs for Respondents, including construct-

ing an awning, grounds maintenance, painting, and minor car repair. He seldom left MTR's lot during business hours. Carey also had a set of keys to the lot and opened the lot when Luther was not there at 9 a.m. Carey was frequently able to observe who was present on the lot and overheard conversations on the lot between Luther and Claimant. At one point, Claimant told Carey that he made his own hours. Carey still lives in a trailer parked behind MTR's office building, although he now owns the trailer and pays rent to the owner of MTR's lot.

18) Frank Caldwell is a good friend of Luther who "hung out all day" helping Luther as a friend, starting the third week in January 1998 and continuing throughout the remainder of time that Claimant sold cars for Respondents. Caldwell lived in a motor home at Swanger's house during January and February 1998. Because of his association with Luther, Caldwell frequently had an opportunity to observe Claimant's presence, or lack of presence, at the MTR lot from the third week of January 1998 through March 7, 1998.

19) Rick Curson is the owner of Sierra Truck and Auto Sales and used Respondents' detailing service during the time Claimant sold cars for Respondents. During that time, he visited Respondents' lot an average of twice a week, at different times of the day, for 15 minutes each time, and observed Claimant selling

cars on Respondents' car lot on almost all of those occasions. He called Respondents' business at different times of the day, and Claimant answered the phone about half the time.

20) Luther was present at MTR's lot during the majority of Respondents' business hours.

21) Claimant's last day of work was March 7, 1998. He was unable to work after that because he was in jail.

22) The Agency provided nine "Statements of Transaction" that document some of Claimant's car sales for Respondents. These sales occurred on 11/28/97, 11/28/97, 12/26/97, 12/30/97, 1/31/98, 2/5/98, 2/6/98, 2/7/98, and 2/28/98. All of these dates fall on Tuesday, Thursday, Friday, or Saturday.

23) Claimant was paid, directly or indirectly, a total of approximately \$3,695 by Respondents in compensation for his car sales for Respondents.²

² The forum arrived at this total based on the following: \$1750 that Claimant admitted being paid; \$700 that Claimant couldn't "recall" if he was paid but Swangers testified he had been paid; \$600 for sales that appear in A-4, pp. 2, 4-8, but not on R-10, R-11, or R-12, with Claimant's signature and Luther's initials; \$600 for the sales of four vehicles with \$150 commissions in Claimant's last two weeks of employment with Luther ('84 Honda, '91 Chev Lumina, '88 Jeep, '86 Buick Skylark), \$300 of which was paid by Luther to Dorinda Brown, at Claimant's request.

24) On his wage claim form, Claimant stated that Respondents had only paid him "\$1200 – possibly less; if more not much."

25) Curson was a credible witness.

26) Although Carey and Caldwell were both good friends with Luther, their natural bias did not materially affect their testimony. It was apparent from their demeanor that both took the proceeding seriously. Both were articulate in their testimony and did not try to hide the extent of their relationship with Luther. Their testimony was internally consistent, consistent with one another, and consistent with Luther's. Although Taeubel, the Agency's compliance specialist, testified that Carey told him during his investigation of Claimant's wage claim that he couldn't estimate Claimant's hours because he worked in another area at the car lot and couldn't see Claimant, the forum is convinced, based on the evidence presented at the hearing, that Carey was able to observe whether or not Claimant was present at MTR's lot at least part of each day. Finally, in evaluating Carey's and Caldwell's testimony, the forum found it significant that Claimant was not called as a rebuttal witness to address the testimony of either witness. The forum has credited their testimony whenever it conflicted with Claimant's testimony.

27) Luther Swanger was an unsophisticated witness who testified in a straightforward, nonevasive manner. Unlike

Claimant, he had a direct recollection of material events and answered questions directly, without hesitation or qualification. He freely admitted that he did not maintain any record of Claimant's dates and hours worked. The only major inconsistency in his testimony was his statement that he always opened the lot in the morning, contrasted with his statement during cross-examination that Carey opened the lot when he and Ann were gone. This inconsistency, however, was not sufficient to discredit his testimony as a whole, and the forum has credited his testimony whenever it conflicted with Claimant's testimony.

28) Ann Swanger's testimony was credible. However, the forum relied on it to a limited extent because she did not witness most of the material events.

29) Claimant was not a credible witness. The forum was troubled by his selective memory. For example, he testified that he relied on his memory to determine the amount of money Respondents owed him, but was conveniently unable to recall whether or not he had been paid for certain transactions that were written down in the record he and Luther jointly maintained. The forum was even more troubled by his answers to questions directed at him by Respondents' counsel and the ALJ. On cross-examination, he repeatedly failed to respond to straightforward questions in a direct manner, and instead replied with a series of

nonresponsive and evasive answers.³ Claimant's testimony

³ An prime example of this sort of testimony during cross examination is as follows:

Q. "Looking at that one particular vehicle, at A-4, page one of nine. It's an '86 Olds Cutlass."

A. "Umhum."

Q. "Do you remember selling that car?"

A. "Yeah, I do."

Q. "And did you get paid for that car?"

A. "It's possible."

Q. "You don't know if you got paid for it?"

A. "I'm pretty sure I may have."

Q. "You're pretty sure you may have? Is that your answer?"

A. "Yes."

Q. "Did you keep some kind of records of when you got paid and when you didn't get paid?"

A. "Not exactly to the letter, but yeah, I kept some sort of a little something or other for."

"* * * * *

Q. "Your testimony, if I heard you correctly, was that there were times when you weren't being paid on some of the cars you sold for MTR, at \$50 increments. Is that right?"

A. "I believe."

Q. "You did not get paid on some of those cars?"

A. "I believe there may have been a time; I'm not sure."

Q. "Well, did you get paid on most of the cars that you sold?"

contained internal inconsistencies regarding material facts that are impossible to ignore. For example, he testified that he sold fewer than 20 cars for Respondents, yet Exhibits R-10, R-11, R-12 and A-4 show that he sold at least 30. In particular, he testified that Exhibits R-10, R-11, and R-12 were his handwritten record of cars he sold, yet those documents contained no reference to seven car sales referenced in Statements of Transaction that he himself created and the agency offered as Exhibit A-4. He testified that he sold "1-2" cars and "not more than 4" for David Minor. He testified that his first day of work was November 27, 1997, but his own handwriting on R-10 shows that he sold a car in the week ending "11/21/97. His WH-127 shows he

A. "I'm sure I did."

Q. "How many cars did you sell?"

A. "I don't know."

Q. "Approximately."

A. "I don't know."

Q. "Well, was it more than ten?"

A. "Could be."

Q. "More than twenty?"

A. "No."

Q. "You sold fewer than 20 cars?"

A. "I'm sure."

Q. "Did you get paid on all of those cars--the ones that you sold?"

A. "Same question. Um, I may have, yeah."

"* * * * *"

worked through March 14, 1998, contrasting with his testimony that he did not work after March 7, 1998, because of his incarceration. He wrote on his wage claim form that he had only been paid \$1200 by Respondents, yet admitted at the hearing that he had been paid at least \$1750. Finally, Claimant has had four felony convictions in the last 15 years that reflect adversely on his credibility.⁴ For these reasons, the forum has discredited Claimant's testimony wherever it conflicted with other credible evidence, and in some cases, has not believed Claimant even when there was no conflicting testimony.

ULTIMATE FINDINGS OF FACT

1) At all times material herein, Respondents Luther Swanger and Ann Swanger were persons doing business as MTR Enterprises in the state of Oregon, and engaged the personal services of one or more employees in the operation of that business.

2) Respondents employed Claimant from mid-November 1997 through March 7, 1998. During that time, Respondents suffered or permitted Claimant to render personal services to them.

3) Respondents and Claimant agreed that Claimant would be paid on a commission basis for all cars sold, to be calculated as fol-

⁴ See, e.g., *In the Matter of Marvin Clancy*, 11 BOLI 205, 210-11, 213-14 (1993); *In the Matter of Dan Cyr Enterprises*, 11 BOLI 172, 177, 179 (1993).

lows: \$50 when Respondents' profit was \$1-\$500; \$100 when Respondents' profit was \$501-\$999; and \$150 when Respondents' profit was \$1000 or more.

4) The state minimum wage during 1997 was \$5.50 per hour, and during 1998 was \$6.00 per hour.

5) While employed by Respondents, Claimant generated a total of \$3,695 in commissions⁵ and was paid a total of \$3,695.

6) The forum is unable to determine the dates and hours worked by Claimant, due to a lack of sufficient reliable evidence.

7) The forum is unable to compute what Claimant would have earned, had he been paid state minimum wage, due to a lack of sufficient reliable evidence to determine the dates and hours that Claimant worked.

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 652.405. During all times material herein, Respondents employed Claimant.

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) 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 even occurs first."

At times material, ORS 652.025 required, in pertinent part:

" * * * 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:

"(1) For calendar year 1997, \$5.50.

"(2) For calendar year 1998, \$6.00."

While employed by Respondents, Claimant earned and was paid a

⁵ While this figure may not be exact, due to the difficulty in deciphering the records on which the figure is based, the forum is certain that Claimant was paid all the commissions he had coming to him.

total of \$3,695 in commissions.⁶ There were no wages due Claimant at the time he ceased employment with Respondents.

4) Under the facts and circumstances of this record, and according to the law applicable to this matter, the wage claim and Agency's Order of Determination filed against Respondents, as amended at hearing, are hereby dismissed.

OPINION

INTRODUCTION

The Agency alleged in its Order of Determination, as amended at hearing, that Claimant was employed by Luther and Ann Swanger as a car salesman from November 27, 1997, through March 14, 1998, that he worked a total of 803.5 hours and was only paid \$1,200, and that he is entitled to \$3,524.25 in unpaid wages and \$1,401.60 as penalty wages. By way of defense, Respondents alleged that Claimant was an independent contractor and that Claimant was paid all money due to him in connection with his employment with Respondents. Respondents also alleged that they were financially unable to pay Claimant the wages alleged in the Order of Determination, but did not provide any evidence at hearing to support that defense.

EMPLOYEE OR INDEPENDENT CONTRACTOR?

This forum utilizes 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 Francis Bristow*, 16 BOLI 28, 37 (1997); *In the Matter of Geoffroy Enterprises*, 15 BOLI 148, 164 (1996). 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*, 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." *Bristow*, at 37, *citing Geoffroy*, at 164.

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

⁶ *Id.*

A. The degree of control exercised by the alleged employer.

Respondents exercised minimal control over Claimant. Although Claimant was at work the majority of Respondents' business hours, he was free to come and go as he pleased. Respondents controlled the price at which Claimant could sell each car, but exercised very little control, if any, over the means by which Claimant used to sell the cars, relying heavily on Claimant's prior car sales experience due to their own lack of experience. Claimant was even free to sell cars for David Minor, the other certified vehicle dealer who displayed cars on the same lot, and did sell several cars for Minor. On the other hand, Claimant could only sell cars during the business hours set by Respondents.

B. The extent of the relative investments of the worker and alleged employer.

Claimant's only investment was his time. Respondents rented the lot, paid the utility bills, had the vehicle dealer certificate required to sell cars on a commercial basis, and owned all the inventory.

C. The degree to which the worker's opportunity for profit and loss is determined by the alleged employer.

Since Claimant had no expenditures, he could earn no profit and suffer no loss. His only opportunity to earn more than minimum wage was through the

volume of cars he could sell, as he had no opportunity to negotiate the price of each car sold. There is no evidence that he had any way to attract more customers to Respondents' lot in order to increase his sales volume. Given Claimant's lack of control over customer volume or the sales price of cars, Claimant's situation is clearly "far more closely akin to wage earners toiling for a living, than to independent entrepreneurs seeking a return on their risky capital investments." *Reich v. Circle C. Investments, Inc.*, 998 F.2d 324, at 328 (5th Cir 1993), *citing Brock v. Mr. W. Fireworks, Inc.*, 814 F.2d 1042, at 1051 (5th Cir.), *cert. denied*, 484 U.S. 924, 108 S.Ct. 286, 98 L.Ed.2d 246 (1987).

D. The skill and initiative required in performing the job.

To perform his job, Claimant had to possess the verbal communication skills required to negotiate and consummate a car sale. Presumably, this involved a basic knowledge of cars. In addition, he had to be able to read and write sufficiently well to fill out a "Statement of Transaction" for every car that he sold. The initiative required consisted of the same initiative ordinarily required of "commission" salespersons in any profession whose solicitation attempts are limited to customers who shop, of their own volition, at the employer's business.

E. The permanency of the relationship.

Although the relationship only lasted four months, there is no indication that either Claimant or Respondents considered it other than indefinite at any time between mid-November 1997 and March 7, 1998.

F. Conclusion.

Although Claimant had extensive control over how he sold cars to customers who came to look at cars displayed on Respondents' lot, Claimant had no means of attracting a higher volume of customers to the lot to increase his potential sales commissions, or "profit." The relationship between Claimant and Respondents may have been of short duration, but that was only because Claimant's incarceration made it impossible for him to work. Claimant had no investment in Respondents' business, and the skill and initiative required of him was no more than that required of other commission-paying jobs, a great variety of which are performed by workers in an employment relationship. *Bristow*, at 39. Although Claimant did not work the hours claimed, he was present at Respondents' lot, selling cars, approximately 60% of the time that Respondents' lot was open, Monday through Sunday. Claimant was paid almost \$3700 for his work, and there is no reliable evidence that Claimant earned money by any other means from mid-November 1997 through March 7, 1998, except for the few cars he sold for David Mi-

nor. Clearly, Claimant's "economic reality" in this time period rested on the number of hours he worked and volume of cars he sold at Respondents' business. Finally, although Respondent Luther Swanger testified that he considered that Claimant was an independent contractor, and Claimant agreed to be paid solely on a commission basis, intent is not a controlling factor in determining whether an employment relationship exists. *Id.*, at 40. Considering each factor of the economic reality test, I conclude that Claimant was economically dependent upon Respondents' business and that he was an employee of Respondents.

WERE THERE ANY UNPAID WAGES DUE CLAIMANT AT THE TIME OF HIS TERMINATION?

To establish a prima facie case for wage claims, the Agency must establish the following elements: (1) Respondents employed Claimant; (2) Claimant's agreed upon rate of pay, if it was other than minimum wage; (3) Claimant performed work for which he was not properly compensated; and (4) the amount and extent of work performed by Claimant. *In the Matter of Catalogfinder, Inc.*, 18 BOLI 242, 260 (1999).

In wage claim cases, the claimant has the burden of proving that he performed work for which he was not properly compensated. *In the Matter of Graciela Vargas*, 16 BOLI 246, 253-54, citing *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946). This burden can be

met by producing sufficient evidence from which a just and reasonable inference may be drawn. *Id.*, at 254.

Where an employer produces no records of hours or dates worked by the claimant, the commissioner may rely on evidence produced by the Agency, including credible testimony by the claimant, "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." *In the Matter of Diran Barber*, 16 BOLI 190, 196-97 (1997), *citing Anderson* at 687-88.

The forum has already determined that Respondents employed Claimant, and that Claimant was an employee, and not an independent contractor. The second element, Claimant's agreed upon wage rate, is undisputed. Respondents and Claimant both agree that Claimant agreed to work on the commission basis set out in Finding of Fact – The Merits #5. Employers are free to compensate employees solely by commission, so long as the commission rate does not result in an employee earning less than minimum wage for all hours worked. *In the Matter of Mary Stewart-Davis*, 13 BOLI 188, 198 (1994), *aff'd without opinion, Stewart-Davis v. Bureau of Labor and Industries*, 136 Or App 212, 901 P2d 268 (1995). Consequently, Claimant is only due wages if the amount of commissions he received is less than the

wages he would have received, computed at minimum wage, for all the hours he worked, or, in the alternative, if he earned more in commissions than the wages he would have received, computed at minimum wage, for all hours he worked, and he was not paid for all his commissions.

Based on the credible testimony of the Swangers and Claimant's corresponding lack of credibility, the forum has already concluded that Claimant was paid all the commissions he earned. The remaining issue, then, is how many hours Claimant worked, and whether those hours, multiplied by the minimum wage, add up to a greater sum than the commissions Claimant received. Since Respondents produced no records of hours or dates worked by the Claimant, the commissioner may rely on credible evidence produced by the Agency to establish the amount and extent of work performed. *Barber*, 16 BOLI at 196-97. The problem for the Agency in this case is that there was no credible evidence produced at the hearing that the forum considered sufficiently reliable to form a basis for calculating Claimant's hours.⁷ The Agency's

⁷ Although the forum finds Respondents' estimate that Claimant worked "60%" of the hours he claimed more credible than the hours recorded on Claimant's WH-127, the forum also concludes that this estimate was insufficiently reliable on which to base an approximate award of damages, assuming *arguendo* that calculations based on that estimate would have

case rested on Claimant's testimony, the documents created by the Claimant, and Claimant's testimony concerning those documents. The forum's assessment of Claimant's credibility is stated in some detail in Proposed Finding of Fact – The Merits #29. In brief, Claimant's testimony and the documents he created concerning his hours worked were unreliable, unpersuasive, and simply unbelievable when evaluated in the light of credible testimony from Respondents' witnesses and Claimant's equally incredible testimony concerning how much he was paid. Neither his testimony or the WH-127 forms a basis for drawing a "just and reasonable inference" as to the amount of Claimant's work that would justify an "approximate" award of damages. *Id.*

This forum has previously declined to "speculate or draw inferences about wages owed based on insufficient, unreliable evidence." *In the Matter of Burrito Boy*, 16 BOLI 1, 12 (1997). The forum follows the same path in this case, and will not attempt to compute dates and hours worked by Claimant or wages earned by Claimant, calculated at minimum wage. As a result, despite Respondents' failure to create and maintain a record of hours worked by Claimant as required by statute,⁸ the Agency's case must fail

resulted in a back pay award to Claimant.

⁸ ORS 653.045 provides, in pertinent part:

due to its inability to prove the third and fourth elements of its prima facie case.⁹

AGENCY EXCEPTIONS

The Agency did not except to the Proposed Order's conclusion that Claimant was not owed any unpaid wages by Respondents. Instead, the Agency filed two exceptions concerning the forum's methodology in reaching that conclusion.

The Agency's first exception concerned the forum's reference, in Proposed Finding of Fact – The Merits #29, that Claimant had created a false document showing that he had fully paid for a vehicle purchased from Respondents. At hearing, Respondents offered R-

"(1) Every employer required by ORS 653.025 or by any rule, order or permit issued under ORS 653.030 to pay a minimum wage to any of the employer's employees shall make and keep available to the Commissioner of the Bureau of Labor and Industries for not less than two years, a record or records containing:

" * * * * *

"(b) The actual hours worked each week and each pay period by each employee."

⁹ Employers should not read this opinion as an open invitation to violate ORS 653.045 as a means of avoiding wage obligations to employees. Furthermore, the Commissioner is authorized to assess a civil penalty "not to exceed \$1,000 against any person who willfully violates * * * ORS 653.045 * * * or any rule adopted pursuant thereto." See ORS 653.256.

15, which consisted of 18 pages, each entitled "Statement of Transaction." Each page purported to represent a car sale made by Claimant while in Respondents' employ. Although these documents fit within the scope of a Discovery Order issued on March 10, 1999 in response to the Agency's motion,¹⁰ Respondents did not provide them to the Agency prior to the redirect examination of Luther Swanger by Respondents' counsel. Over the Agency's objection, the ALJ admitted R-15 for the limited purpose of showing the basis of certain checkmarks made by Respondents on R-10, R-11, and R-12.

In the Proposed Order, the ALJ cited Ann Swanger's testimony in concluding that Claimant had created a false document showing that the 1980 Cadillac he purchased from Respondents was paid in full on January 6, 1998. This document was part of R-15. The Agency excepted to this conclusion on the basis that it used R-15 for a purpose outside the limited purpose for which it was admitted and because Respondents had not provided it pursuant to the ALJ's March 10, 1999 Discovery Order. Upon review, the record clearly shows that Ann Swanger's testimony concerning Claimant's creation of the objectionable document was not based on her independent recollection, but was given while the document

was in front of her and she was reading from it. Based on both reasons cited by the Agency, any testimony by Ann Swanger derived from her reading the objectionable document, other than testimony concerning the checkmarks, will not be used by the forum to impeach Claimant. Finding of Fact – The Merits #29 has been modified in response to this exception.

The Agency's second exception involves the ALJ's calculation of the approximate number of hours worked by Claimant and subsequent calculation of Claimant's earnings, based on the state minimum wage. The ALJ's calculation was based on Claimant's total number of hours claimed, multiplied by 60%.¹¹ The Agency contended that these calculations were purely speculative, that the ALJ should not have performed the calculations at all when the Agency failed to meet its burden of proof as to the number of hours worked, and that engaging in additional analysis where none was required might confuse employers and employees. Upon reflection, the forum is in agreement with the Agency. This Order has been modified to reflect that agreement.

ORDER

NOW, THEREFORE, as Respondents have been found to

¹⁰ See Findings of Fact – Procedural #s 8, 11, and 13.

¹¹ The figure of "60%" represented Respondents' estimate of the number of hours Claimant actually worked, compared to the number he claimed on his WH-127.

have paid Claimant all wages due and owing by the date of his termination from Respondents' employment, the Commissioner of the Bureau of Labor and Industries hereby orders that Order of Determination 98-105 against Anne L. Swanger, dba MTR Investments, as amended at hearing to include Luther M. Swanger, also dba MTR Investments, as a Respondent, is hereby dismissed.

**In the Matter of
MAJESTIC CONSTRUCTION,
INC., and
YOGESH NARAYAN aka T.J.
NARAYAN**

Case No. 66-99
Final Order of the Commissioner
Jack Roberts
Issued September 17, 1999.

SYNOPSIS

Where Respondents submitted an answer to the Order of Determination and requested a hearing, but failed to appear at the hearing, the Commissioner found them in default of the charges set forth in the Order of Determination. Charges were dismissed against Respondent Majestic Construction, Inc. based on the Commissioner's determination that Respondent Majestic was not Claimant's employer. Respondent Narayan employed Claimant as a construction laborer and failed to pay him

any wages for 885 hours of work performed at the agreed wage rate of \$6.00/hr., in violation of ORS 652.140(1). Respondent Narayan's failure to pay the wages was willful, and the forum ordered him to pay civil penalty wages of \$1,440.00, pursuant to ORS 652.150. ORS 652.140(1), 652.150.

The above-entitled case came on regularly for hearing before Alan McCullough, 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 July 20, 1999, in Room 1004 of the Portland State Office Building, 800 NE Oregon Street, Portland, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by David K. Gerstenfeld, an employee of the Agency. Salvador Lopez Hernandez (Claimant) was present throughout the hearing. Also present throughout the hearing was Terry Rogers, an Oregon court certified interpreter in Spanish, who translated the proceedings in their entirety. Respondents, after being duly notified of the time and place of this hearing, failed to appear and no representative appeared on behalf of Respondent Majestic Construction, Inc. ("MCI").

The Agency called the following witnesses: Salvador Lopez Hernandez, Claimant; Gerhard Taeubel, Wage & Hour Division

Compliance Specialist; and Robin Beaulauier, a homeowner for whom Claimant and Respondent Narayan had performed work.

Administrative Exhibits X-1 through X-14 and Agency exhibits A-1 through A-4 were offered and received into evidence. The record closed on July 20, 1999.

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 November 23, 1998, Claimant filed a wage claim with the Agency. He alleged that Respondents employed him and failed to pay wages earned and due to him.

2) At the time he filed his wage claim, Claimant assigned to the Commissioner of Labor and Industries, in trust for Claimant, all wages due from Respondents.

3) Claimant brought his wage claim within the statute of limitations.

4) On February 5, 1999, the Agency served Order of Determination No. 98-3765 on Respondent MCI based upon the wage claim filed by Claimant and the Agency's investigation. The Order of Determination alleged that MCI owed a total of \$5,130.00 in unpaid wages and \$1,440.00 in

civil penalty wages, plus interest, and required that, within 20 days, MCI either pay these sums in trust to the Agency, request an administrative hearing and submit an answer to the charges, or demand a trial in a court of law.

5) On March 18, 1999, the Agency granted Respondent MCI an extension of time until April 12, 1999, to file an answer and request for hearing.

6) On April 9, 1999, Respondent MCI, through counsel Nancy M. Cooper, filed an answer to the Order of Determination and requested a hearing. In the answer, MCI denied that Claimant was an employee of MCI or that wages were earned by Claimant between September 23, 1996, through May 16, 1997. MCI further denied that it willfully failed to pay any wages to Claimant. MCI also asserted three affirmative defenses: that it was financially unable to pay any accrued wages; that the Agency, in the Order of Determination, failed to state ultimate facts sufficient to state a claim against MCI; and that MCI did not exist as a business until March 17, 1997.

7) On May 12, 1999, Respondent's counsel, Nancy M. Cooper, sent a letter to Taeubel that read as follows: "This letter is to inform you that I no longer represent Yogesh 'T.J.' Narayan or Majestic Construction."

8) On May 21, 1999, the Agency served a "BOLI Request for Hearing" on the forum and Yogesh Narayan, registered agent for Respondent MCI.

9) On June 4, 1999, the Hearings Unit issued a Notice of Hearing to Respondent MCI, the Agency, and the Claimant stating the time and place of the hearing as July 20, 1999, at 9:00 a.m., in Portland, Oregon. Together with the Notice of Hearing, the forum sent a document entitled "Summary 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 839-050-000 to 839-050-0440.

10) On June 15, 1999, the Agency filed a motion for a discovery order seeking documents related to: Respondent MCI's corporate status; its alleged financial inability to pay Claimant's accrued wages; any predecessor businesses; hours and days worked by Claimant and other employees of MCI; the financial interest, if any, that Yogesh Narayan and Debra Reinke had in MCI; and payroll records of MCI and any predecessor business during the period encompassed by Claimant's wage claim. The Agency's motion was accompanied by a letter setting out the Agency's unsuccessful attempts to obtain the documents by informal means. MCI did not respond and the forum granted the Agency's motion on June 23, 1999.

11) On June 23, 1999, the ALJ issued a case summary order requiring the Agency and Respondent MCI each to submit a list of witnesses to be called, cop-

ies of documents or other physical evidence to be introduced, a statement of any agreed or stipulated facts. The Agency was additionally ordered to submit wage and penalty calculations and a brief statement of the elements of the claim. Respondent MCI was additionally ordered to submit a brief statement of any defenses to the claim. The ALJ ordered the participants to submit case summaries by July 9, 1999, and notified them of the possible sanctions for failure to comply with the case summary order.

12) On June 25, 1999, the Agency filed a motion to amend the Order of Determination "to include Yogesh Narayan, aka T.J. Narayan, as a Respondent, and to make all references to Majestic Construction, Inc. or Employer in the Order of Determination also refer to Yogesh Narayan, aka T.J. Narayan." The proposed amendment was based on Respondent MCI's answer alleging that MCI did not exist as a corporation until March 17, 1997, and Claimant's assertion that "his employment relationship never changed during the time periods at issue in this action, and that at all times he dealt with Yogesh Narayan in regards to his employment."

13) The Agency filed its case summary, with attached exhibits, on July 7, 1999. Neither MCI nor Yogesh Narayan filed a case summary.

14) On July 2, 1999, a certified true copy of the Agency's motion to amend was served upon Yogesh Narayan, aka T. J. Nara-

yan, at 5227 NE 14th Place, Portland, Oregon, the same address where the forum had addressed all of its orders to Respondent MCI.

15) On July 7, 1999, the forum granted the Agency's motion to amend the Order of Determination. The forum based its ruling on the fact that Yogesh Narayan, aka T. J. Narayan, Respondent MCI's registered agent, had been served with the original Order of Determination and Notice of Hearing and all subsequent orders issued by the forum, as well as the Agency's motions; that Yogesh Narayan, aka T. J. Narayan, appeared to be Claimant's employer during all or part of the time for which unpaid wages were sought; and that no prejudice or surprise could be claimed by Yogesh Narayan, aka T. J. Narayan, in these circumstances and that justice would be best served by granting the amendment.

16) The hearing was scheduled to begin at 9 a.m. on July 20, 1999. At that time, Respondent Yogesh Narayan, aka T.J. Narayan, did not appear and had not previously announced that he would not appear. Likewise, no one made an appearance on behalf of Respondent MCI. Pursuant to OAR 839-050-0330(2), the ALJ waited 30 minutes before commencing the hearing. When Respondents did not appear or contact the hearings unit by telephone during that time, the ALJ declared Respondents Yogesh Narayan, aka T.J. Narayan,

and MCI in default at 9:35 a.m. and commenced the hearing.

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

18) During the course of the hearing, the Agency moved to amend the Order of Determination to increase the amount of Claimant's unpaid wages by \$412.50 and penalty wages from \$1,440 to \$1,680.¹ The forum denied the Agency's motion. In a default situation, amounts stated in the Order of Determination limit the relief the forum can award.² That ruling is hereby confirmed.

19) During the course of the hearing, the Agency moved to amend the Order of Determination to name T. J. Narayan as a separate Respondent, based on Robin Beaulauier's testimony indicating that Yogesh Narayan and T. J. Narayan might be different persons. The Agency's Order of Determination had previously been amended to add "Yogesh Narayan aka T. J. Narayan" as a

¹ The basis for the Agency's motion to amend was testimony by Claimant that T. J. Narayan agreed to pay him \$7.00 per hour for his work in 1997.

² See *In the Matter of Jack Crum Ranches*, 14 BOLI 258, 260-62 (1995); *In the Matter of Secretarial Link*, 12 BOLI 58, 59 (1993).

Respondent.³ The ALJ reserved ruling on the motion to the Proposed Order. Based on the forum's conclusion that Yogesh Narayan and T. J. Narayan are the same person, the Agency's motion is moot and is denied.

20) On August 24, 1999, the ALJ issued a proposed order that notified the participants that they were entitled to file exceptions to the proposed order. The Forum received no exceptions.

FINDINGS OF FACT – THE MERITS

1) During all times material herein, Yogesh Narayan, aka "T. J. Narayan" ("Narayan"), an individual person, did business under the assumed business name of Majestic Construction.

2) "Yogesh Narayan" and "T. J. Narayan" are the same person, an individual whose proper name is "Yogesh Narayan." "T. J. Narayan" is another name that "Yogesh Narayan" is also known by.

3) Claimant arrived in the United States on September 16, 1996. Claimant learned that he could find employment as a construction laborer by going to the corner of Grand Avenue and Burnside in Portland. On September 23, 1996, Claimant went to the corner of Grand and Burnside and was approached by Narayan. Claimant told Narayan he had done construction work, and Na-

rayan offered Claimant \$6.00/hr. to work for him doing construction labor. Claimant accepted Narayan's offer of employment.

4) Narayan told Claimant he would be paid weekly. Because Claimant was homeless and had recently been robbed while living on the streets, Claimant asked Narayan to hold onto Claimant's wages until he was able to open a bank account or find permanent housing. Narayan agreed to do this.

5) Although Claimant's native language is Spanish and Narayan speaks no Spanish, Claimant understands and speaks enough English so that he and Narayan were able to communicate in English.

6) Claimant worked for Narayan from September 23, 1996, through December 13, 1996. Claimant did construction labor. Each day, Claimant met Narayan at the corner of Grand and Burnside, was taken to work by Narayan, and worked side by side with Narayan. During this time period, Claimant worked from 9 a.m. until 5 p.m., Monday through Friday, with a 30-minute break for lunch, for a total of 442.5 hours.

7) Calculated at the wage rate of \$6.00/hr., Claimant earned a total of \$2,655.00 between September 23, 1996, and December 13, 1996.

8) Claimant stopped working for Narayan after December 13, 1996 because of bad weather and

³ See Finding of Fact – Procedural #14, *supra*.

Narayan's lack of work. Narayan told Claimant he would take a break for several months, then pay Claimant \$7.00/hr. when work resumed in the spring.

9) Claimant began working for Narayan again on March 3, 1997, and continued working for Narayan through May 16, 1997. As before, Claimant did construction labor and met Narayan each day at the corner of Grand and Burnside, was taken to work by Respondent Narayan, and worked side by side with Respondent Narayan. During this time period, Claimant worked from 9 a.m. until 5 p.m., Monday through Friday, with a 30-minute break for lunch, for a total of 412.5 hours. Part of this work was performed at a house owned by Robin Beaulauier and her husband. Claimant performed this work at the agreed wage rate of \$7.00/hr. No one ever told Claimant that his employer was any other person or entity than Narayan.

10) Respondent MCI incorporated as a domestic corporation in the state of Oregon on March 17, 1997, and involuntarily dissolved on May 14, 1998. According to the Oregon Corporation Division, Yogesh Narayan was MCI's registered agent.

11) Calculated at the wage rate of \$7.00/hr., Claimant earned a total of \$2,887.50 between March 3, 1997, and May 16, 1997.

12) Claimant stopped working for Narayan because Narayan told Claimant there was no more work. Claimant asked Narayan to

be paid his wages, and Narayan said he would be paid all his wages.

13) At the time of Claimant's termination, Narayan owed Claimant \$5,542.50 in unpaid wages.

14) Narayan has not paid Claimant any wages.

15) The Forum computed civil penalty wages as follows for Claimant, in accordance with ORS 652.150: \$7.00/hr. multiplied by 8 hours per day equals \$56.00; \$56.00 multiplied by 30 days equals \$1,680.00.

16) Taeubel, a Compliance Specialist employed by the Agency for the last two years, investigated Claimant's wage claim. During his investigation, he asked Respondents to provide copies of payroll and time records regarding Claimant. Respondents did not respond to his request. Taeubel also attempted unsuccessfully to contact Respondent Narayan.

17) The testimony of Claimant was credible. His testimony was consistent with prior statements on his wage claim. He responded to questions in a straightforward manner and did not attempt to embellish the facts surrounding his employment, although he could have easily done so in Respondent Narayan's absence.

18) The testimony of Taeubel was credible.

19) Robin Beaulauier's testimony was credible and reliable in all material respects except for her

statement that Yogesh and T. J. Narayan were father and son. The forum did not find this testimony reliable because there was no other evidence to support it and because Beaulauier did not provide a convincing reason for her belief that Yogesh and T. J. were two separate individuals.

ULTIMATE FINDINGS OF FACT

1) During all times material herein, Respondent Yogesh Narayan, aka T.J. Narayan, was an individual person who engaged the personal services of one or more employees in the State of Oregon.

2) Narayan employed Claimant in Oregon from September 23, 1996, through December 13, 1996, and from March 3, 1997, through May 16, 1997.

3) Claimant was not employed by Respondent MCI during times material herein.

4) Claimant earned \$5,542.50 in wages during his employment with Narayan.

5) Narayan did not pay Claimant any wages during Claimant's employment.

6) Claimant's employment was involuntarily terminated due to lack of work on May 16, 1997. At that time, Narayan owed Claimant \$5,542.50 in unpaid wages. Narayan has not paid Claimant any unpaid wages since May 16, 1997.

7) Narayan willfully failed to pay Claimant \$5,542.50 in earned, due, and payable wages no later

than May 19, 1997, the first business day after Claimant's employment was terminated, and more than 30 days have elapsed from the date Claimant's wages were due.

CONCLUSIONS OF LAW

1) During all times material herein, Respondent Yogesh Narayan, aka T.J. Narayan, 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. During all times material herein, Respondent Yogesh Narayan, aka T.J. Narayan, employed Claimant.

2) During all times material herein, Respondent Majestic Construction, Inc. was not Claimant's employer.

3) 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.

4) At times material, ORS 652.140(1) 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 or termination shall become due and payable not later than the end of the first business day after the discharge or termination."

Respondent Narayan violated ORS 652.140(1) by failing to pay Claimant all wages earned and unpaid not later than May 19,

1997, the end of the first business day after Narayan discharged or terminated Claimant. Those wages amount to \$5,542.50. However, the forum is limited in its award to \$5,130.00, the amount of back wages sought in the Order of Determination.⁴

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 Narayan is liable for \$1,440.00 in civil penalties under ORS 652.150 for willfully failing to pay all wages or compensation to Claimant when due as provided in ORS 652.140(1).⁵

6) OAR 839-050-0330(1) and (2) provide, in pertinent part:

“(1) Default can occur in four ways:

“ * * * * ”

“(d) Where a party fails to appear at the scheduled hearing.

“(2) When a party notifies the agency that it will not appear at the specified time and place for the contested case hearing or, without such notification, fails to appear at the specified time and place for the contested case hearing, the administrative law judge shall take evidence to establish a prima facie case in support of the charging document and shall then issue a proposed order to the commissioner and all participants pursuant to OAR 839-050-0370. Unless notified by the party, the administrative law judge shall wait no longer than thirty (30) minutes from the time set for the hearing in the notice of hearing to commence the hearing.”

Respondents did not appear at the hearing at all and were properly found to be in default when 30 minutes had elapsed after the specified time for the contested case hearing.

Merits #14, *supra*), the amounts stated in the Order of Determination limit the relief the forum can award in a default situation. See *In the Matter of Jack Crum Ranches*, 14 BOLI 258, 260-62 (1995); *In the Matter of Secretarial Link*, 12 BOLI 58, 59 (1993).

⁴ See Findings of Fact – Procedural ## 4 & 18, *supra*, and footnote 2.

⁵ Although the forum has computed Claimant’s civil penalty wages at \$1,680.00 (see Finding of Fact – The

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 his earned, unpaid, due and payable wages and the civil penalty wages, plus interest on both sums until paid. ORS 652.332.

OPINION

INTRODUCTION

The Agency alleged in its amended Order of Determination that Claimant was employed by Respondents Yogesh Narayan, aka T. J. Narayan, and Majestic Construction, Inc. from September 23, 1996, through December 13, 1996, and from March 3, 1997, through May 6, 1997. The Agency further alleged that Claimant worked a total of 855 hours and was paid nothing, and that he is entitled to \$5,130.00 in unpaid wages and \$1,440.00 as penalty wages. Respondents defaulted by their failure to appear at the hearing. However, Respondent MCI denied all the allegations in the original Order of Determination and alleged several affirmative defenses in its Answer and Request for Hearing. Those denials and defenses are rendered moot because of the forum's determination that MCI was not Claimant's employer. Accordingly, the charges against Respondent MCI are dismissed.

DEFAULT

Respondents failed to appear at hearing and the forum held both

Respondents in default pursuant to OAR 839-050-0330. When a respondent defaults, the Agency must establish a prima facie case to support the allegations of the charging document. *In the Matter of Leslie and Roxanne DeHart*, 18 BOLI 199, 206 (1999). The task of this forum, therefore, is to determine if a prima facie case supporting the Agency's Order of Determination has been made on the record. *DeHart*, 18 BOLI at 206.

PRIMA FACIE CASE

In this wage claim case, the elements of a prima facie case consist of proof of the following: (1) Respondent Narayan employed Claimant; (2) Claimant's agreed upon rate of pay, if it was other than minimum wage; (3) Claimant performed work for which he was not properly compensated; and (4) the amount and extent of work performed by Claimant. *In the Matter of Catalogfinder, Inc.*, 18 BOLI 242, 260 (1999).

The first element is established by the credible testimony of Claimant, who testified that his employment relationship was exclusively with "T. J. Narayan," and in the course of six months of employment, he was given no inkling that he was employed by anyone else. Claimant's employment with Narayan is corroborated by Beau-lauier's testimony that Claimant worked on her house with "T. J. Narayan," and Exhibit A-2, a handwritten statement by Antonio Perez Cruz, Claimant's co-worker, affirming that he and Claimant

were both employed as laborers by "Mr. T. J. of Majestic Construction." Although Beaulauier believed that "Yogesh" and "T. J." Narayan were two separate persons, this belief was not given credence by the forum because she never saw two separate persons and because there was no other reliable evidence to support it. Finally, although Corporation Division records indicate the Respondent MCI incorporated on March 17, 1997, with Yogesh Narayan as the registered agent, this evidence, standing alone, is insufficient to overcome the weight of credible evidence on the record that Narayan was Claimant's employer at all times material.⁶ Accordingly, the forum concludes that Yogesh Narayan, aka "T. J. Narayan," was Claimant's sole employer at all times material herein.

The second and third elements are established by Claimant's credible testimony, including the written information he provided to the Agency on his wage claim form and calendar showing the dates and hours he worked.

The final element of the Agency's prima facie case requires proof of the amount and extent of work performed by Claimant. The Agency's burden of proof can be met by producing sufficient evidence from which "a just and reasonable inference may be drawn." *In the Matter of Gra-*

ciela Vargas, 16 BOLI 246, 254 (1998). Claimant credibly testified that he worked from 9 a.m. to 5 p.m., Monday through Friday, with a 30-minute break each day for lunch, from September 23, 1996, through December 13, 1996, and from March 3, 1997, through May 16, 1997. The total number of hours reflected by this testimony is set out in Findings of Fact – The Merits ## 5 & 8. There is no evidence on the record whatsoever that casts doubt on this credible testimony,⁷ which the forum concludes satisfies the fourth element of the Agency's prima facie case.

PENALTY WAGES

An award of 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. *In the Matter of Troy R. Johnson*, 17 BOLI 285, 292 (1999), citing *Sabin v. Willamette Western Corp.*, 276 Oregon 1083, 557 P2d 1344 (1976). Respondent Narayan, as an employer, had a duty to know the amount of wages due his employees. *In the Matter of R.L. Chapman Ent. Ltd.*, 17 BOLI 277, 285 (1999). As a matter of fact, Narayan worked side by side with Claimant every day of Claimant's employment and was well aware

⁶ See, e.g., *In the Matter of Leslie and Roxanne DeHart*, 18 BOLI 199, 205-6 (1999)

⁷ Respondent Narayan did not file an Answer to the amended Order of Determination.

of the hours that Claimant worked. There is no evidence that Narayan acted other than voluntarily or as a free agent. The forum concludes that Narayan acted willfully and assesses penalty wages in the amount of \$1,440.00, the amount sought in the Order of Determination. This figure is computed by multiplying \$6.00 per hour x 8 hours per day x 30 days, pursuant to ORS 652.150 and OAR 839-001-0470.

ORDER

NOW, THEREFORE, as authorized by ORS 652.332, and as payment of the unpaid wages and civil penalty wages he owes as a result of his violation of ORS 652.140, the Commissioner of the Bureau of Labor and Industries hereby orders **Yogesh Narayan, aka T. J. Narayan**, 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 Salvador Lopez Hernandez in the amount of SIX THOUSAND FIVE HUNDRED AND SEVENTY DOLLARS (\$6,570.00), less appropriate lawful deductions, representing \$5,130.00 in gross earned, unpaid, due, and payable wages and \$1,440.00 in penalty wages, plus interest at the legal rate on the sum of \$5,130.00 from June 1, 1997, until paid and interest at the legal rate on the sum of \$1,440.00 from July 1, 1997, until paid.

**In the Matter of
DENNIS MURPHY FAMILY
TRUST, dba MT. SCOTT
RESIDENTIAL CARE HOME,**

Case No. 23-99
Final Order of the Commissioner
Jack Roberts
Issued November 16, 1999.

SYNOPSIS

Respondent owned and operated several adult care homes, including the Lambert Street Room and Board Facility, and rented a room in that facility to Complainant, a person with mental and physical disabilities. Respondent discriminated against Complainant because of his disabilities by threatening to evict him unless he took certain prescribed medications. The commissioner found that Complainant suffered emotionally as a result of the threat and ordered Respondent to pay Complainant \$10,000.00 as compensation for that suffering. ORS 659.430.

The above-entitled case came on regularly for hearing before Erika L. Hadlock, designated as Administrative Law Judge ("ALJ") by Jack Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on July 14, 1999, in Hearings Room 1004,

Portland State Office Building, 800 NE Oregon St., Portland, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by David Gerstenfeld, an employee of the Agency. Complainant David E. Cummings was present and was not represented by counsel. Respondent appeared through its counsel, Warren Wadsworth, of the law firm Bittner & Hahs, PC. Dennis Murphy also was present throughout the hearing as Respondent's representative.

The Agency called as witnesses: Complainant; Respondent employee Sandra Cantu; and nurse Linda Gillins. The Agency called BOLI senior investigator Peter Martindale as a rebuttal witness. Respondent called Cantu, Gillins, and Dennis Murphy as its witnesses.

The forum received into evidence administrative exhibits X-1 to X-15 at the start of the hearing. After the close of the hearing, the forum received administrative exhibits X-16 to X-26.

Agency exhibits A-1 through A-6, which had been attached to the Agency's case summary, were received into evidence. The Agency sought to introduce four additional exhibits during the hearing. The forum received exhibit A-7, a document dated April 12, 1996, for the limited purposes of proving the content of that document and of impeachment.¹ The forum re-

ceived exhibits A-8 and A-9 for impeachment purposes only, and received exhibit A-10 (copies of Multnomah County Administrative Rules) without limitation. From Respondent, the forum received into evidence exhibits R-1 through R-5, which had been attached to Respondent's case summary. Pursuant to order of the ALJ, Respondent submitted additional exhibits (R-4A and R-5A) after hearing, and the ALJ received those exhibits into evidence.

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

FINDINGS OF FACT – PROCEDURAL

1) On or about April 20, 1998, Complainant David E. Cummings filed a verified complaint with the Civil Rights Division of the Agency. Complainant alleged that Respondent unlawfully discriminated against him in housing on the basis of his mental disability and/or perceived mental disability.

2) After investigation and review, the Agency issued an Administrative Determination find-

feared the Agency would allege that the content of the 1996 document demonstrated a separate violation of ORS 659.430. Case presenter Gerstenfeld stated that the Agency would not seek to amend the Specific Charges to allege such a violation.

¹ Respondent had objected to introduction of the exhibit because it

ing substantial evidence that Respondent had committed an unlawful housing practice by threatening to evict Complainant from its room and board facility if he did not take his medications.

3) On February 8, 1999, the Agency submitted Specific Charges to the forum alleging that Respondent had violated ORS 659.430 by threatening to evict Complainant from its residential care facility if he did not take medications, and by making Complainant's taking of those medications a term or condition of his continuing to reside at the care facility. The Agency also requested a hearing.

4) On March 18, 1999, the forum served the Specific Charges on Respondent.

5) With the Specific Charges, the forum served on Respondent the following: a) a Notice of Hearing setting forth the time and place for hearing; b) a Summary 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 hearing process; and d) a separate copy of the specific administrative rule regarding responsive pleadings.

6) The Notice of Hearing stated that Respondent's answer was due 20 days from receipt of the notice and that, if Respondent did not timely file an answer, it could be held in default.

7) Respondent filed a timely answer through its attorney, Warren Wadsworth of the law firm Bittner & Hahs, P.C., in which it admitted that Complainant rented property from it at its residential care facility in Portland, Oregon. Respondent denied that it threatened to evict Complainant if he did not take medication, denied that it "made Complainant taking his medication a term or condition of his continuing to reside in Respondent's residential care facility," and denied that it had discriminated against Complainant. Respondent also alleged two affirmative defenses: failure to state a claim and unclean hands.

8) On March 22, 1999, the ALJ received a letter from Complainant in which he argued that he was entitled to a jury trial, not an administrative hearing. In response, the ALJ sent a letter to all participants enclosing a copy of Complainant's letter and asking Complainant's counsel and the Agency case presenter to explain to Complainant why a contested case proceeding, not a jury trial, was scheduled to take place. The ALJ also asked for clarification of Complainant's address, which the Agency provided.

9) By motion dated May 11, 1999, Respondent sought leave to depose the Complainant. The Agency did not oppose the motion, which the ALJ granted.

10) Respondent filed a motion to compel Complainant to sign forms releasing certain medical information. Respondent later withdrew that motion after Com-

plainant voluntarily complied with part of Respondent's request and, through counsel, assured Respondent that he would sign the remaining release.

11) On June 11, 1999, the forum ordered the Agency and Respondent each to submit a case summary including: lists of all persons to be called as witnesses; identification and copies of all documents to be offered into evidence; a brief statement of the elements of the claim (for the Agency only); a brief statement of any defenses to the claim (for Respondent only); a statement of any agreed or stipulated facts; and any wage, damages, and penalties calculations (for the Agency only). The forum ordered the participants to submit their case summaries by July 2, 1999, and notified them of the possible sanctions for failure to comply with the case summary order. Respondent and the Agency filed timely case summaries.

12) At the start of the hearing, counsel for Respondent stated that he had received the Summary of Contested Case Rights and Procedures and had no questions about it.

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

14) At the close of the Agency's case, Respondent moved for a directed verdict. The

forum construed the motion as one to dismiss the Specific Charges and took it under advisement. As discussed in the Opinion section of this Order, the forum now has denied the motion to dismiss.

15) Respondent's Exhibits R-4 and R-5 are summaries of certain medical records of other residents at Respondent's facility. During the hearing, Respondent agreed to submit the underlying medical records, with the residents' last names redacted, as Exhibits R-4A and R-5A. The ALJ ordered Respondent to submit those records by July 23, 1999, to both the forum and case presenter Gerstenfeld, and stated that she would issue a protective order for the documents.

16) On July 19, 1999, the ALJ issued a protective order that stated, in pertinent part:

"At the July 14, 1999, hearing in this matter, Respondent offered Exhibits R-4 and R-5, summaries of certain information from the medical records of residents of Respondent's room and board facility. Case presenter Gerstenfeld objected to the exhibits because he did not have access to the underlying medical records and could not verify the accuracy of the summaries. I ordered Respondent to submit the underlying medical records, with the last names of the residents and any other identifying information redacted, as Exhibits R-4A and R-5A. Respondent agreed to submit

those redacted documents to the Hearings Unit and to Gerstenfeld by July 23, 1999. I told the participants that the documents would be sealed and that I would issue a protective order against disclosure of information in the documents.

"I hereby find and order that:

"a) The documents to be submitted as Respondent's Exhibits R-4A and R-5A are personal, privileged and confidential medical records of persons not involved in this proceeding. As such, they are exempted from disclosure under the Public Records law pursuant to ORS 192.502(2) and ORS 192.502(9).

"b) All parties to this proceeding shall maintain the confidentiality of these records and shall not disclose them or their contents to any person not a party or a representative of a party to this proceeding.

"c) After the Final Order in this case has issued, Gerstenfeld shall return his copy of the records to Respondent or Respondent's counsel.

"d) Exhibits R-4A and R-5A shall be placed in a sealed envelope in the official record of the case. That envelope shall be labeled to indicate that the enclosed records are confidential and privileged medical records that are exempt from disclosure under the public records law."

17) The forum received Exhibits R-4A and R-5A on July 21, 1999, and closed the evidentiary record on that date.

18) On July 26, 1999, the Agency submitted a written supplemental closing argument, which the ALJ accepted for filing.

19) By order dated July 22, 1999, the ALJ ordered the participants to submit briefs answering the following questions:

"1. Oregon statutes specifically permit the establishment of housing designed to serve the needs of disabled individuals and other persons who require assistance. Such housing presumably will provide services to disabled individuals that differs from the services that would be provided to non-disabled individuals. For example, ORS 443.400(9) and (12) together permit "residential treatment facilities" for "mentally, emotionally or behaviorally disturbed people" to provide treatment that includes "medical, psychological, or rehabilitative procedures, experiences and activities designed to relieve or minimize mental, emotional, physical or other symptoms or social, educational or vocational disabilities resulting from or related to the mental or emotional disturbance, physical disability or alcohol or drug problem." Do such practices specifically authorized by statute nonetheless violate ORS 659.430 because they discriminate because of disability

by making a "distinction" or "restriction" in the terms, conditions, or privileges related to the housing? Why or why not?

"2. Do other practices neither explicitly authorized nor specifically prohibited by statute, that are designed to facilitate the provision of housing services to disabled individuals, violate ORS 659.430 if they make a "distinction" or "restriction" in the terms and conditions of housing on the basis of disability? (An example of such a practice might be the "verbal prompting" to take medication that several witnesses described at hearing.) Why or why not?

"3. MCAR 891-018-100(f) states that residents of Multnomah County Adult Care Homes have the right to refuse medication. The Agency charges, *inter alia*, that Respondent discriminated against Complainant on the basis of disability by making the taking of medication a term or condition of Complainant's ability to continue residing in Respondent's facility. Does a housing provider's violation of any one of the many statutes and rules that govern the provision of housing to disabled individuals -- thereby changing a term or condition of residency -- automatically constitute discrimination in violation of ORS 659.430? Why or why not? What if the violated rule is one that relates in some way to the resident's disability? (An

example of this might be a Multnomah County Adult Care Home's failure to give a resident complete privacy when receiving treatment or personal care, which is required by MCAR 891-018-100(w).)

"4. If the answer to Question 3 is "no," did the alleged threat of eviction for refusal to take medication nonetheless constitute discrimination? Why or why not?"

"But which may be authorized or required by administrative rule."

The ALJ ordered the participants to submit their post-hearing briefs by August 25, 1999, and also ordered the Agency to submit a response to Respondent's motion to dismiss by that same date. The ALJ later granted the Agency's August 4, 1999, unopposed motion to extend the briefing deadline to September 1, 1999. Respondent and the Agency each filed a timely post-hearing brief and the Agency filed a timely response to Respondent's motion to dismiss.

20) On September 1, 1999, Respondent filed a supplementary closing argument and supporting affidavit that responded to issues raised in the Agency's supplemental closing argument. The Agency moved to strike the affidavit and those portions of Respondent's supplemental closing argument that discuss it. Respondent opposed the motion and implicitly asked that the record be reopened so the affidavit could be received

into evidence. For reasons set forth in the Opinion section of this Order, Respondent's implicit motion to reopen the record is denied and the Agency's motion to strike is granted.

21) The ALJ issued a proposed order on October 19, 1999, that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. By November 4, 1999, the forum had received no exceptions. The ALJ then asked case presenter Gerstenfeld whether he had received any exceptions from Respondent and Gerstenfeld responded that he had. Gerstenfeld provided the ALJ with a copy of those exceptions, which he had received on October 29, 1999. The ALJ accepted this copy of Respondent's exceptions for filing and deemed them as having been timely filed. The exceptions are addressed in the Opinion section of this Final Order.

22) On November 10, 1999, counsel for Respondent left a voice-mail message informing the hearings unit that the exceptions he had filed by hand-delivery had been returned to him. The ALJ called Respondent's counsel back and discussed the matter with him. Apparently, although the exceptions were correctly addressed and hand-delivered to the Portland State Office Building where the Bureau of Labor and Industries is located, they somehow were misdirected to the Workers Compensation Board, which is located in the same building, then

sent to the Workers Compensation Board office in Salem, and eventually returned to Respondent's counsel. The ALJ informed Respondent's counsel that she had obtained a copy of the exceptions from the Agency case presenter and had accepted them as timely filed.

FINDINGS OF FACT – THE MERITS

(Respondent's residential facilities)

1) At all material times, Respondent Dennis Murphy Family Trust, dba Mt. Scott Residential Care Home, owned and operated several residential care facilities in Oregon, and rented real property at those facilities for residential purposes. Murphy oversees operations of these facilities but is not "on the floor" on a daily basis.

2) One of Respondent's residential facilities is the "Lambert Street Room and Board," which is located in Portland, Oregon, and can house up to five residents. Although all Lambert Street residents have some sort of disability, they generally do not require nursing or nighttime care. Rather, the facility is designed to provide a home-like atmosphere in which staff can give the residents verbal reminders to take their medications and engage in other Activities of Daily Living ("ADLs") such as taking showers. One of the goals at Lambert Street is to encourage residents to be independent and make decisions. Each resident at Lambert Street has a private bedroom; the re-

mainder of the living facilities are shared.

3) Lambert Street is an "adult care home" that is licensed by Multnomah County and is subject to Multnomah County Administrative Rules ("MCARs") for Adult Care Homes and the MCARs for Room and Board Facilities. Respondent's employees are instructed to become familiar with the MCARs and to comply with them.

4) Respondent operates another facility, called the Mt. Scott Residential Care Facility ("Mt. Scott"), which is located across a breezeway from Lambert Street. Mt. Scott residents are less independent and require more nursing care than the people who live at Lambert Street. Mt. Scott is a "residential care facility" that is licensed by the Oregon Department of Human Resources, Senior and Disabled Services Division ("SDSD"). People sometimes refer to the Mt. Scott Residential Care Facility and the Lambert Street Room and Board collectively as "Mt. Scott." Sandi Cantu is the administrator of both facilities and manages them for Respondent.² She supervises approximately 14 of Respondent's employees.

5) Potential residents are referred to Lambert Street by social

² Cantu's last name used to be Benfit, and many of the documents in evidence refer to her by that name. This order refers to the witness as "Cantu" throughout.

workers in hospital settings. When a social worker refers a patient to Lambert Street, Cantu evaluates the person's needs to determine whether they can better be met at Lambert Street or at Mt. Scott.

6) Lambert Street residents go across the breezeway to Mt. Scott to take their prescribed medications. Multnomah County regulations require Mt. Scott staff to make medications available to residents during a one-hour period. If a resident does not take the medication during that time, staff are supposed to dispose of the medication and notify the resident's physician.³ When a Lambert Street resident does not go to Mt. Scott for medication, Mt. Scott staff often call the resident to prompt him or her to come take the medication. Respondent considers these verbal promptings or encouragements to be part of the necessary care for residents.⁴

7) MCAR R-891-060-113 permits room and board facilities

³ Cantu testified that this required is imposed by MCAR R-891-060-560. That rule, however, provides only that unused medications "shall be disposed of according to the pharmacist's recommendations." The forum infers from the rule and Cantu's testimony that pharmacists have recommended to Respondent that medications be disposed of after one hour has passed.

⁴ Respondent's employees also give residents verbal promptings to do such things as take showers or change their clothing.

to provide promptings in certain circumstances:

"Operators, Resident Managers and service givers in Room and Board Facilities may give verbal prompting to residents if it encourages maximum resident independence and enhances the resident's quality of life."

(Complainant's disabilities and residence at Lambert Street)

8) Complainant suffers, and has at all material times suffered, from mental and physical impairments, including schizoaffective disorder, which substantially limit one or more of his major life activities, including self-care and socialization. At all material times, Respondent was aware of those disabilities.

9) Complainant's medical condition causes him to have disorganized thinking, including paranoia and suspicion. Those symptoms worsen without medication. People with Complainant's mental disabilities may take certain words in a statement out of context and give them another meaning.

10) Complainant acknowledges his physical disability (herniated disks) but does not believe he is mentally disabled or has any mental illness. When people say Complainant is mentally ill, he feels stigmatized because he is being accused of something that he believes is not true.

11) In January 1995, Complainant was admitted to the Veteran's Administration Medical Center ("VAMC") in Portland, Oregon. Documentation from that hospital stay showed that Complainant had "no physical limitations" but was prescribed Depakote, Risperidone, and Valproate, apparently for treatment of depression and cognitive disorganization.⁵ Nurse practitioner Linda Gillins, who is licensed to prescribe medicine, was Complainant's primary care provider at the VAMC and continued in that role at least through the time of hearing. Gillins coordinated Complainant's treatment with other care providers, including Dennis Morgan, Complainant's social worker. A VAMC summary report of Complainant's hospitalization stated that Complainant would be discharged to "Mt. Scott Room and Board" on March 2, 1995. The report noted that Complainant had "some difficulties maintaining a schedule in terms of showing up to take his medications and showing up for meals and other activities because of his cognitive disorganization" and stated that, "[f]or this reason, it would be helpful to give him frequent friendly reminders to help him stay on task."

12) In March 1995, Complainant was discharged from VAMC and referred to Respon-

⁵ The single page of the hospital report does not include a formal diagnosis.

dent. Starting that month, and continuing at least through the time of hearing, Complainant rented property from Respondent at Lambert Street. Complainant lives at Lambert Street, not the Mt. Scott Residential Care Facility, because his impairments do not require regular nursing care.

13) Since Complainant's 1995 hospitalization, Gillins has prescribed various medications for Complainant. As of June 1998, those medications included Depakote, Cogentin, Tagamet, Risperdal, Motrin, Desyrel, Mycler, Hydrocortizone, and Ibuprofin. Depakote is a mood stabilizer that helps keep people from becoming manic and depressed. Common side effects are sedation and weight gain that lessen with time. Risperdal is used to treat thought disorder. It can cause muscle and joint stiffness as well as tremors. Complainant suffered those side effects and took Cogentin to help his muscle stiffness. The Cogentin, in turn, can cause a dry mouth and sedation, much like an anti-histamine. For that reason, Gillins tries to keep doses low. Gillins believes Complainant benefits from taking his prescribed medications, which keep him stable and help him function at his highest level. When patients stop taking these medications, their condition generally deteriorates over several months.

14) Complainant does not like taking his prescribed medications because of side effects including lethargy, weight gain, and dry mouth. Complainant also

believes his prescribed medications affect his concentration and cause memory problems. He feels better when he does not take his medications. Throughout his treatment by Gillins, Complainant has asked about his medication levels and Gillins has tried lowering the dosages.

15) In April 1995, Mt. Scott nursing personnel developed a "RESIDENT CARE PLAN" for Complainant. That document indicated that Complainant was "independent" with his ADLs, was "good about keeping clean & neat," dressed appropriately, and only occasionally needed to be asked to shower. The plan also stated that Complainant had "to be called many [times] in a.m. to come to [the residential care facility] & get meds." Respondent's goal for Complainant was "to see [him] come over to [the residential care facility] to get his medication [at] appropriate [times and without] staff having to call him."

16) From July through September 1995, Complainant frequently refused to take his medications, and occasionally refused to take them in October, November, and December 1995. Starting in January 1996, Complainant again frequently refused his medications, through early August 1996.

17) On April 12, 1996, Complainant signed a document prepared by an employee of Respondent that stated:

"I David Cummings agree to shower 2 times a week and go

to day tx: as scheduled is Mon-Wed Thur. Showers are Tues no later than 12n Sat no later than 12n. Medications haven't been problem will continue. All clothes that need laundered will be brought to facility every Tues. Thur. Sat. for wash. If staff request an additional shower I will comply without argument. If I fail to comply with any of the above I will be given notice to vacate 7928 SE Lambert in 14 days. My lay down time in Rm is 1:00 pm - 4:30 pm and 8:00 pm - 7:30 am."

Claimant believes he was "coerced" into signing this agreement.

18) In April 1996, Cantu noted on Complainant's care plan, in the section titled "BATHING NEEDS," that he had a "contract in chart" regarding "ADLs compliance." She stated that Complainant was "isolative" and needed cues regarding "ADL compliance per contract agreement in chart." During this period, Respondent's employees spent an unusual amount of time dealing with Complainant's isolative behavior.

19) From August 1996 to October 1997, Complainant only occasionally refused to take his medications. However, during that time, Complainant frequently did not go to Mt. Scott to take his medication and did not call Mt. Scott to report that he was not going to take it. Instead of disposing of Complainant's medication after the one-hour period in which he

was supposed to take it, as the law requires, Respondent's staff often let the medications sit out unattended and unlocked for up to four hours. During that time, staff often continued to prompt Complainant (through telephone calls and personal visits to Lambert Street) to come take the medication. Cantu believes that she put her license in jeopardy by making medications available to Complainant for more than one hour.

20) In May 1997, Cantu noted on Complainant's care plan that "staff need[ed] to really enforce" the April 1996 agreement. Cantu also noted that Complainant had "improved" and was "more compliant" with regard to medications. Because of Complainant's isolative behavior, Cantu had started a process of trying to encourage Complainant either to take his medication or to inform staff that he was not going to take them, instead of just failing to go to Mt. Scott at the appointed time.

21) Respondent did not give Lambert Street residents other than Complainant additional time to take their medications. When other residents did not come to Mt. Scott to take their medicine, Respondent's employees followed the required procedure of disposing of the medication after one hour.

22) In describing his own and his staff's responsibility toward residents, Murphy twice stated that if matters got to the point of eviction, Respondent

would have failed. According to Murphy, "the whole reason [Respondent] even exist[s] is to prevent getting to that point." Murphy acknowledged that Respondent would have more difficulty getting referrals if people thought Respondent had a high rate of having residents' symptoms worsen.

(allegations of discrimination)

23) On October 20, 1997, Complainant refused to take his 8:00 p.m. medications because he believed they gave him a sore throat, swollen glands, and a dry mouth. The next day, Complainant again refused to take his 8:00 p.m. medications, reporting the same symptoms. Complainant stated that he would not take the medications until he spoke with his doctor.

24) On October 22, 1997, Complainant refused his 8:00 a.m. medications. That same day, Cantu told nurse practitioner Gillins that she would give Complainant notice to move if he did not take his medications and cooperate with treatment. Cantu's statement is accurately reflected in Gillins' electronic chart for Complainant, which other care providers review and rely upon.

25) In or around November 1997, Cantu verbally informed Complainant that she would evict him from Lambert Street if he did not take his medications. Cantu made this threat because she felt frustrated and burdened by the behaviors Complainant exhibited

when he did not take the medications.

26) Complainant felt threatened and was upset by Cantu's warning that he might be evicted. Complainant did not want to leave Lambert Street, and he started taking his medications because he believed he would otherwise be evicted. Claimant did not refuse to take medications again until January 1998.

27) Complainant testified that Cantu actually tried to hand him a paper that she stated or implied was a written eviction notice at the same time she verbally threatened to evict him. No reliable evidence corroborated that somewhat vague testimony and the forum does not find that Cantu took this action.

28) On November 19, 1997, Complainant told Gillins that Cantu had said that he would get evicted if he did not take his medication.⁶ Complainant asked Gillins to cancel his medication because he did not think he had a mental problem.

29) MCARs 891-018-100(f) (the Residents' Bill of Rights) and R-891-060-142 give residents of

⁶ Gillins' November 11, 1997, chart note states that Complainant told her that the "supervisor" had said that if he did not take his medication, he would be evicted. For the reasons set forth in Finding of Fact – the Merits 41, the forum finds that chart note, which corroborates Complainant's testimony, reliable and relies on it in making this finding.

Multnomah County adult care homes and room and board facilities the right to refuse to take medications. In addition, Cantu and Murphy testified that threats of eviction would be an inappropriate means of encouraging a resident to take medication. The forum infers from this testimony, and from the inclusion of the right to refuse medication in the Residents' Bill of Rights, that a threat to evict a resident for failure to take medications is an action that is against that resident's interests.

30) Respondent's official policy is to recognize residents' right to refuse medications, and not to threaten residents with eviction for failure to take medication.

31) Complainant filed his verified complaint with the Agency in April 1998, in which he alleged that on April 12, 1997, he "was required to sign an agreement [to] take medication for a perceived mental disability." Complainant further alleged that in November 1997, he "was threatened with eviction if [he] did not continue taking the medication."

32) After Complainant filed his complaint, senior investigator Peter Martindale was assigned to investigate the case. Martindale spoke with Complainant, Gillins, and Respondent's representatives and made contemporaneous notes of those conversations. In one of those conversations, Martindale asked Gillins about her October and November 1997 chart notes involving Complainant. Gillins did not question the reliability

of the notes during that conversation.

33) Martindale also spoke with Cantu, who said she was not aware that Complainant ever had refused to take medications. At that time, Cantu said the only problem was with the timing of Complainant taking his medications. When Martindale asked Cantu for a copy of the April 1997 agreement that Complainant alleged he had been forced to sign, he was provided with the note from April 1996.

34) For several months immediately prior to hearing, Complainant did not take his prescribed medications. Complainant stopped taking the medications after his attorney told him that he had the right to refuse them. At about the same time, Complainant's attorney also sent a letter to Respondent stating that Complainant no longer would take the medications. Complainant's behaviors have changed since he stopped taking his medications. For example, he has typed hundreds of pages of documents "day and night" and piled them in large stacks in the common living areas. According to Cantu, that is not a "baseline" behavior for Complainant. Other Lambert Street residents filed a grievance because the stacks of paper in the living areas were "overwhelming" them. In another example of "decompensation" described by Murphy, Complainant wrote notes about Jews, gun rights, "testing" the bank, and other topics on the

last rent check he submitted to Respondent prior to hearing.

35) Complainant testified credibly that he felt threatened by Cantu's statement that he would be evicted if he did not take his medications. Complainant did not want to move out of the Lambert House because he was settled in and, therefore, resumed taking the medications. The forum finds that \$10,000.00 will appropriately compensate Complainant for the fear, upset, and loss of dignity he suffered as a result of Cantu's threats. The forum does not find that, on balance, the adverse side-effects Complainant suffered outweighed the positive effects of the medications he took under duress. Consequently, the forum is not awarding money as compensation for those side-effects.

(credibility findings)

36) The forum finds that, as Gillins testified, Complainant suffers from schizoaffective disorder, which leads to disorganized thinking and paranoia. This medical testimony was confirmed by the testimony of Cantu and Murphy, who described specific episodes of Complainant's disorganized thought.⁷ From this evidence, the forum concludes that Complainant's testimony was not reliable, because his perception and memory of events was not always accurate.⁸ For that reason, the fo-

rum generally has relied on Complainant's testimony only where it was verified by other credible and reliable evidence in the record.

37) For the reasons set forth in this paragraph and the following two paragraphs, the forum finds Cantu's testimony regarding the alleged threat of eviction not credible. Cantu was extremely defensive during the contested case hearing. She avoided answering questions directly when her answers might reflect poorly on herself or Respondent. In some respects, her testimony appeared calculated to provide an after-the-fact justification for Respondent's actions. For example, Cantu testified that Respondent's employees were treating Complainant better than they treated other residents when they encouraged him for up to four hours to take his prescribed medication, instead of disposing of the medication one hour after the dose was to be administered. Cantu, however, offered no explanation of why Respondent would have favored Complainant over other residents, and the forum is skeptical of her characterization of the protracted "prompting" of Complainant as constituting preferential treatment.

38) In addition, the Agency impeached certain aspects of Cantu's statements. Cantu initially testified that, other than in the April 1996 agreement, she

⁷ See Finding of Fact – the Merits 34, *supra*.

⁸ Although Complainant's testimony was not reliable, it was credible in that

Complainant clearly believed that the events he described in his testimony had, in fact, occurred.

never communicated with Complainant about a possible eviction, and she was not aware that any other Respondent employee ever had done so. Later in her testimony, she reiterated that there was no agreement dated April 1997. In fact, on April 8, 1997, Respondent had Complainant sign a document titled "HOUSE RULES AND RESIDENT RESPONSIBILITIES," and placed the document in his file. This document included the following statement: "I agree to comply with house rules, **physicians' orders, and treatment plans** as long as I reside at Mt. Scott. **I understand that failure to comply will result in a notice to move.**" (Emphasis added). In addition, Cantu made at least three inaccurate statements to Martindale during his investigation. First, she told Martindale in May 1998 that she had never contacted the VAMC regarding Complainant, and the VAMC never had contacted her. At hearing, Cantu acknowledged that she would have had conversations with Gillins or other VAMC personnel regarding Complainant before April 1998 (when Complainant's attorney first notified Respondent that Complainant felt he had been discriminated against), although she could not remember the details of the conversations. Moreover, Gillins' chart notes confirm that Cantu did speak with her in 1997. Second, when Martindale asked Cantu whether Complainant ever had stopped taking his medication during the fall or winter of 1997,

Cantu said she was not aware of that, and that the only problem had been that Complainant sometimes took medications late, so there was not enough time between dosages. At hearing, Cantu acknowledged that "everyone" had been aware that Complainant had stopped taking his medications during that time period. Third, when Martindale told Cantu that Complainant had alleged that he was forced to sign an agreement to take medications in 1997, she told him – incorrectly – that the 1996 agreement was the only one that Complainant had signed.

39) Finally, Cantu's testimony that she neither threatened Complainant with eviction nor told Gillins that she would evict Complainant is contradicted by Gillins' notes, which the forum finds more reliable. The inconsistencies in Cantu's testimony suggest either that her memory regarding the relevant events is unreliable or that her testimony regarding those events is not credible. In either event, the forum disbelieves much of Cantu's testimony regarding the threat of eviction and has not given it weight except where it was corroborated by other credible, reliable evidence.

40) Gillins' testimony generally was reliable and credible. She is a very experienced prescribing nurse practitioner and has been Complainant's primary provider for several years. The forum has relied heavily on her explanation of Complainant's mental disabilities,

the medications she has prescribed for him, and the benefits and drawbacks of those medications.

41) On the subject of Cantu's alleged threat of eviction, however, Gillins' testimony was not persuasive. Gillins believes that Respondent provides good care at its facilities and refers many patients there. Her testimony appeared designed to benefit Respondent to the greatest degree possible. At one point, Respondent's attorney elicited testimony from Gillins that apparently was meant to suggest that one of her chart notes was substantively inaccurate. That October 22, 1997, chart note states:

"Telephone conversation with [Complainant] and with Sandy, Mr. [sic] Scott⁹

"[Complainant]:

"O: In the vague, concrete, disorganized process, [Complainant] tells me that he stopped taking his sedication [sic] two days ago because the VA doctor said it was causing "gland" problems – dry mouth. [Complainant] now says he feels "wonderful" without the medication. He would agree to "change" meds as long as he didn't have side effects. I told him any med would have side

effects and that I have lowered the dose to reduce the side effect problem – fatigued, drugged feeling, stiffness and dry mouth.

"In the past as well as now, [Complainant] has little to no insight into his illness and need for treatment. I talked with him about risking relapse/ and hospitalization, being required to leave his residence or losing [sic] visitation with his son if he had psychotic sx [sic] again. [Complainant] has no appreciation [sic] to these risks.

"I spoke Sandy, who said she would [sic] give [Complainant] notice to move if he did not take meds and cooperate with treatment."

(Emphasis added). Gillins, who had no independent recollection of this telephone conversation, testified credibly that her electronic chart notes sometimes contain typographical errors. That is apparent from the note itself. Respondent's counsel then asked Gillins whether the note might not "accurately reflect" her conversation with Cantu. Gillins testified that it might not, because she is not a trained typist and types a high volume of notes during her lunch hour. Significantly, however, Gillins did *not* testify that she believed the *substance* of her conversation with Cantu was not accurately reflected in the note. In addition, in her conversation with investigator Martindale regarding her chart notes, Gillins did not suggest that the notes did not accurately reflect her conversations

⁹ This note apparently records two separate telephone conversations; no witness believed a telephone conference between Complainant, Cantu, and Gillins had occurred.

with Cantu or Complainant. At hearing, Gillins also acknowledged that she tries to make her notes accurate. Given that the chart notes are an official record of patient care and that other care providers rely on those notes to guide their own treatment of patients, the forum gives no credence to Respondent's theory that only a typographical error caused the note to state that Cantu said she was going to evict Complainant if he did not take his medications.¹⁰ Nor does the forum give any weight to the related testimony of Gillins, to the extent it may be interpreted to imply such an incredible level of inaccuracy in note-taking.

(other patients and their medical records)

42) During 1996 and 1997, several other residents at Respondent's facilities refused to take their medications. Cantu and Murphy testified that none of those residents had been evicted or threatened with eviction be-

¹⁰ In any event, it is difficult to see how a typographical error would result in the emphasized statement being substantively inaccurate. No witness testified that Cantu told Gillins that she "would not" evict Complainant if he did not take his medications, which is the only type of statement that might get misrecorded as a statement that Cantu "would" evict him. It also defies common sense to suggest that Gillins would have attempted to memorialize a statement that Complainant "would not" be evicted if, as Cantu testified, the subject of eviction never was raised.

cause of these refusals. The forum gives no weight to this testimony. Cantu's testimony on the issue of eviction is suspect, as explained in Findings of Fact - the Merits 37, 38 and 39, *supra*, and Murphy likely would not know if any threats had been made.¹¹

ULTIMATE FINDINGS OF FACT

1) Complainant suffers from schizoaffective disorder, which is a mental impairment that substantially limits his major life activities of self-care and socialization.

2) Respondent owns and operates the Lambert Street Room and Board Facility, which is governed by the Multnomah County Administrative Rules pertaining to adult care homes and room and board facilities.

3) Complainant rented real property at Lambert Street Room and Board from Respondent.

4) Respondent threatened to evict Complainant from its real property if he did not take certain prescribed medications. That threat was against Complainant's interests.

5) Respondent made the threat because Complainant's disability caused him, if he did not take the prescribed medications, to engage in behavior that was inconvenient and frustrating to Respondent's employees.

¹¹ Even if it were true that Respondent never evicted or threatened to evict other residents, the result in this case would be the same, as explained in the Opinion section of this Order.

6) Complainant experienced mental suffering because of the threat of eviction.

CONCLUSIONS OF LAW

1) ORS 659.400 provides, in pertinent part:

"(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.

"(b) 'Has a record of such an impairment' means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

"(c) 'Is regarded as having such 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 none of the impairments described in subparagraph (A) or (B) of this paragraph, but is treated by an employer or supervisor as having a mental or physical impairment that substantially limits one or more major life activities."

"(d) 'Substantially limits' means:

"(A) The impairment renders the person unable to perform a major life activity that the average person in the general population can perform; or

"(B) The impairment significantly restricts the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner or duration under which the average person in the general population can perform the same major life activity."

Complainant is a disabled person.

2) The actions of Cantu, the administrator of Respondent's Lambert Street and Mt. Scott facilities, are properly imputed to Respondent.

3) MCAR 891-018-100, the Residents' Bill of Rights, provides, in pertinent part:

“Each resident of an Adult Care Home in Multnomah County has a right to:

“(a) be treated as an adult with respect and dignity”

“* * * * *

“(f) consent to or refuse treatment, medication or training.

“* * * * *

“(v) be involuntarily moved out of the home by an Operator only for the following:

“(1) medical reasons;

“(2) the resident’s welfare;

“(3) the welfare of other residents;

“(4) nonpayment;

“(5) behavior which poses an immediate threat to self or others;

“(6) behavior which substantially interferes with the orderly operation of the home”

“(7) the care needs of the resident exceed the ability or classification of the Operator; or

“(8) the home is no longer licensed.”

MCAR R-891-060-142 provides:

“Residents shall have the right to consent to or refuse all medications. If a resident refuses medication, the refusal shall be immediately documented in the resident’s records and appropriate per-

sons notified, including the doctor, family, legal representative and case manager. Other persons involved in providing resident services, including the Resident Manager and service giver, shall also be informed.

Respondent violated MCAR 891-018-100 and MCAR R-891-060-142 by threatening to evict Complainant if he did not take his medication. This threat of eviction was against Complainant’s interests.

4) ORS 659.430(1) states:

"No person, because of a disability of a purchaser, lessee or renter, a disability of a person residing in or intending to reside in a dwelling after it is sold, rented or made available or a disability of any person associated with a purchaser, lessee or renter, shall discriminate by:

"(a) Refusing to sell, lease, rent or otherwise make available any real property to a purchaser, lessee or renter;

"(b) Expelling a purchaser, lessee or renter;

"(c) Making any distinction or restriction against a purchaser, lessee or renter in the price, terms, conditions or privileges relating to the sale, rental, lease or occupancy of real property or the furnishing of any facilities or services in connection therewith; or

"(d) Attempting to discourage the sale, rental or lease of any real property."

OAR 839-008-0210 provides:

ORS 659.400 to 659.435, as they relate to real property transactions, prohibit handicap discrimination by:

(1) Sellers, lessors, advertisers, real estate brokers and salespersons, or the agents of any of them;

(2) Any person assisting, coercing, inducing or inciting another to permit or engage in an act or practice violating ORS 659.430.

Respondent leased real property and, therefore, was subject to the provisions of ORS 659.400 to 659.435. At all material times, Complainant was a renter entitled to the protection of ORS 659.430. Respondent made a restriction against Complainant in the terms and conditions related to Complainant's rental of Respondent's real property, in that Respondent threatened to evict Complainant if he did not take certain prescribed medications. Respondent made this restriction against Complainant because of his disability and, therefore, violated ORS 659.430(1).

5) ORS 659.430(9) states:

"Any violation of this section is an unlawful practice."

Respondent committed an unlawful practice by violating ORS 659.430(1).

6) ORS 659.435 provides:

"Any person claiming to be aggrieved by an unlawful employment practice may file a complaint under ORS 659.040, and any person claiming to be aggrieved by an unlawful practice may file a complaint under ORS 659.045. 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 or 659.045."

The Commissioner of the Bureau of Labor and Industries has jurisdiction over the persons and the subject matter herein and has the authority to eliminate the effects of any unlawful practice found. ORS 659.060(3). The award of damages and cease and desist order described below are appropriate exercises of that authority.

OPINION

The Agency's primary theory of liability is that Respondent violated ORS 659.430(1) by threatening to evict Complainant if he did not take certain prescribed medications. To establish this claim, the Agency was required to prove four things:

- 1) that Complainant was a disabled person;
- 2) that Respondent sold, leased, or rented real property to Complainant;

3) that Respondent made a distinction or restriction against Complainant in the price, terms, conditions or privileges relating to the sale, rental, lease or occupancy of real property or the furnishing of any facilities or services in connection therewith; and

4) that Respondent made the distinction or restriction against Complainant because of his disability.

ORS 659.430(1); see OAR 839-050-0010(1).

The first two elements are not subject to dispute in this case. Respondent admitted, and the forum has found, that Complainant suffers from disabilities, including schizoaffective disorder, that substantially limit his major life activities of self-care and socialization. Complainant is, therefore, a disabled person as that term is defined in ORS 659.400.¹² Respondent admits that it rented real property to Complainant.

With regard to the third element, the forum finds that

¹² The Agency also alleged that Complainant fell within the definition of "disabled person" because Complainant had a "record of such an impairment" (see ORS 659.400(2)(b)) and because Respondent "regarded [Complainant] as having such an impairment" (see ORS 659.400(2)(c)). Because the forum finds that Complainant is a disabled person because he has a mental impairment that substantially limits one or more major life activities, it need not address these alternate theories.

Respondent, through Cantu, threatened to evict Complainant if he did not take his prescribed medications. The forum was persuaded by Gillins' chart notes, which state that Cantu told her she would evict Complainant if he did not take his medications. Those notes are consistent with Complainant's credible testimony that Cantu made that threat and his similar report to Gillins. Cantu's contrary testimony was not credible, for the reasons set forth in Findings of Fact – the Merits 37, 38 and 39, *supra*.

The eviction threat violated ORS 659.430(1) if it constituted a "distinction or restriction against" Complainant in the terms or conditions of his real property rental. The threat was a "restriction" of Complainant's behavior in regard to the conditions under which he could remain in the Lambert Street facility – it forced him to choose between asserting his right to refuse medications and maintaining his housing. Moreover, that restriction was "against" Complainant because it denied him his legal right to refuse medication. The Agency met its burden of proving the third element of its claim – that Respondent made a restriction against Complainant.

The final element the Agency must prove is that Respondent threatened to evict Complainant "because of" his disability. The forum finds that it did. One of Complainant's disabilities is schizoaffective disorder. When Complainant does not take his

medications, that disorder causes him to behave in ways that are time-consuming and somewhat burdensome to Respondent's employees. At least once, those behaviors have caused other Lambert Street residents to file a grievance. Cantu testified that, although Respondent's employees generally followed the rule requiring them to make medications available to residents only for one hour, they frequently tried to get Complainant to take his medicine for up to four hours after the time it was supposed to be administered. The forum infers that Complainant's unmedicated behaviors were more difficult for Respondent to handle than the unmedicated behaviors of other residents, and that is why Respondent's employees tried so hard to persuade him to take his medicine.

During 1997, Complainant frequently failed to go to Mt. Scott to take his medications. In late October 1997, Complainant started refusing medication and asserted that he would not take any more medications until he had spoken to his doctor. The forum infers that Cantu's frustration with Complainant's unmedicated behaviors, coupled with his declaration that he was going to stop taking his medication, led her to threaten him with eviction in hopes that he either would start taking the medication (albeit under duress) or would leave the facility. It follows that she made the threat "because of" Complainant's disability. Consequently, the threat constituted

an unlawful practice that violated ORS 659.430(1).

The Agency asserted as an alternate theory of liability that Respondent violated ORS 659.430(7), which provides

"No person shall coerce, intimidate, threaten or interfere with any person in the exercise or enjoyment of, or on account of having exercised or enjoyed, or on account of having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by this section."

Because the forum has found that Respondent violated ORS 659.430(1), it need not also determine whether Respondent violated ORS 659.430(7), and that question is not addressed in this Order.

DAMAGES

Complainant testified credibly that he felt threatened by Cantu's statement that he would be evicted if he did not take his medications. Complainant explained that he did not want to move out of the Lambert Street facility because he was settled in. From Complainant's demeanor and his obvious strong feelings about being threatened in this manner, the forum infers that Complainant suffered a loss of dignity as a result of the illegal threat. No evidence in the record, however, establishes that Complainant's fear of being evicted or his indignation lasted for any particular length of time. Nor did Complainant suffer the sort of financial loss that often

accompanies illegal discrimination.

In determining mental damage 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. *In the Matter of Tyree Oil, Inc.*, 17 BOLI 26, 44 (1998), *appeal pending*. In considering the amount of damages that would appropriately compensate Complainant for the mental suffering he did experience, the forum has reviewed the mental suffering damages it has awarded in civil rights cases over the past few years. No other BOLI case has involved allegations of discrimination against disabled persons in housing. In the forum's view, the most analogous case is *In the Matter of Westwind Group of Oregon, Inc.*, 17 BOLI 46 (1998), in which a restaurant denied a patron service based on her race. The forum described the patron's mental suffering as follows:

"Complainant felt surprised, upset, humiliated, and embarrassed when [the restaurant employee] did not help her. The incident hurt her self esteem. She spoke to her pastor about the incident later because she felt depressed and hurt. Up to the time of hearing, she still thought about the incident and was upset by it. She never went to another Burger King restaurant."

Westwind Group, 17 BOLI at 50. In awarding \$15,000.00 damages for mental suffering, the forum made the following observations about discrimination in public accommodation:

"First, the battle against race discrimination has been at the front line of civil rights. Discrimination in public accommodation impairs a 'person's basic right to move about freely in society and to be recognized thereby as a part of his or her community.' It is particularly 'insidious and devastating.'

"Second, suffering in such cases is usually mental, rather than physical or financial, making it difficult to measure. However, to follow the mandate of the statute to "eliminate the effects" of discrimination, a compensatory award must be measured in terms of mental suffering.

"Third, because such discrimination is particularly devastating, it is important to emphasize that the duration of the discrimination does not determine either the degree or duration of the effects of discrimination, 'and it is these effects which damages awarded are meant to compensate.'"

Id. at 53.

The forum concludes that these considerations are equally applicable to discrimination against disabled persons in housing. Such discrimination is

particularly insidious and devastating because it undermines the disabled individual's ability to function with dignity and humanity, and as independently as possible. Although the discriminatory episode (in this case, the threat of eviction) may last only a few moments, its effects may be felt for long periods of time, as the victim continues to suffer fear and anger, or modifies his or her behavior as a result of the discrimination.

In this case, Complainant felt threatened by Cantu's threat and was bothered enough by it to report it to Gillins. In addition, he modified his behavior by starting to take the prescribed medications, in fear that he otherwise would be evicted. The forum infers from that fact that Complainant suffered impaired human dignity, in that he was unlawfully forced to choose between his right to refuse medication and his ability to remain at Lambert Street.

The forum finds, however, that Complainant's mental suffering does not rise to the level of the distress experienced by the complainant in *Westwind*, who suffered impaired self-esteem, humiliation, and embarrassment. In addition, the *Westwind* complainant, unlike Complainant, testified credibly that she was still upset by the incident at the time of hearing. No evidence in the record supports an inference that Complainant suffered similarly as a result of Cantu's threat. The types of distress Complainant did experience, including modification

of his behavior, also were experienced by the *Westwind Group* complainant. See *id.* at 50. The forum concludes that \$10,000.00, rather than the \$15,000.00 awarded in *Westwind*, will appropriately compensate Complainant for the mental suffering that resulted from Respondent's unlawful act.

The Agency argued that the forum should provide additional compensation to Complainant because he suffered adverse side-effects from taking medication that he would not have taken absent the threat of eviction. For two reasons, the forum disagrees. First, although Complainant testified credibly that he took medication that he would not otherwise have taken, no evidence in the record establishes the length of time during which he took the medications under duress. Without such evidence, an assessment of damages is difficult at best. Second, although Complainant clearly did not like taking his medications and suffered adverse side-effects from them, the objective medical testimony also establishes that Complainant benefited when he took medications in that he was less paranoid and was able to function "at a higher level." The forum is unable to conclude that the adverse effects of the medications outweighed the benefits that Complainant gained from taking them. Consequently, the forum declines to award additional damages as compensation for the side-effects Complainant experienced.

MOTION TO DISMISS

After the Agency rested its case, Respondent moved for a directed verdict on the issue of liability, which the forum construed as a motion to dismiss the Specific Charges. Respondent argued that the Agency had presented no "evidence that [Respondent] has acted discriminatorily *vis a vis* other residents who are non-disabled." According to Respondent, the Agency could prevail only if it proved that Respondent treated disabled persons differently than it treated disabled persons. Because all the residents of Lambert Street are disabled, Respondent reasoned, no discrimination against disabled persons could be established. In support of this position, Respondent cited *Anonymous v. Goddard Riverside Community Center*, FH-FL Rptr. para. 16,208, pp. 16208.1 - 16,208.2 (SDNY 1997).

In response, the Agency asserted that Respondent's reliance on a federal case based on the federal Fair Housing Act was misplaced because there are "significant" differences between that law and ORS 659.430. The forum agrees.

The decision in *Anonymous* centered on section 3604(b) of the federal Fair Housing Act, which provides that it is unlawful to:

"discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of

race, color, religion, sex, familial status, or national origin."

42 USC sec. 3604(b). The *Anonymous* plaintiff alleged that the defendants, from whom she obtained residential housing, had discriminated against her on the basis of her psychiatric disability. The plaintiff framed her claim as one of "disparate treatment," in that she alleged that defendants did not subject any non-psychiatrically disabled individuals to the same bad treatment she claimed she had received. The trial court granted the defendants' motion to dismiss plaintiff's disparate treatment claim on the ground that the plaintiff had not alleged that the defendants actually had other housing residents who were not psychiatrically disabled, and, therefore, had not sufficiently alleged that defendants treated her differently from non-psychiatrically disabled persons. *Anonymous*, at 16,208.2.

Whatever the merits of the *Anonymous* court's analysis, it does not assist Respondent in this case. The Agency has not relied solely on a disparate treatment theory. Rather, it also argues that Respondent violated the emphasized portion of ORS 659.430(1):

"No person, because of a disability of a purchaser, lessee or renter, a disability of a person residing in or intending to reside in a dwelling after it is sold, rented or made available or a disability of any person associated with a purchaser, lessee or renter, shall discriminate by:

"* * * * *

"(c) Making any distinction *or restriction against* a purchaser, lessee or renter in the price, terms, conditions or privileges relating to the sale, rental, lease or occupancy of real property or the furnishing of any facilities or services in connection therewith[.]"

This statute, unlike 42 USC section 3604, defines discrimination to include not only disparate treatment (arguably, the significance of the word "distinction") but also any "restriction against" a renter based on the renter's disability. There is no need to compare the defendant's treatment of disabled persons to its treatment of non-disabled persons. Rather, the mere fact that a defendant has made a restriction against a disabled person because of that person's disability is sufficient to establish liability under ORS 659.430.

The Agency proved: that Cantu threatened to evict Complainant if he refused to take medications; that the threat was adverse to Complainant's interests; and that the threat was made because of Complainant's disability. The evidence establishes a violation of ORS 659.430(1) and Respondent's motion to dismiss is denied.¹³

¹³ As discussed in the last section of this Opinion, the forum has given no weight to the argument made in the Agency's supplemental closing argument regarding Respondent's

RESPONDENT'S AFFIRMATIVE DEFENSES

Respondent asserted two affirmative defenses -- failure to state a claim and unclean hands. The first defense fails for the same reasons that the forum has rejected Respondent's motion to dismiss.

Respondent's "unclean hands" defense is based on two assertions: that "Complainant falsely represented to Gillins on or about November 19, 1997 that Respondent would evict him if he did not take his medications"; and that "Complainant falsely represented to his attorney, Dawna Scott, sometime in December 1997 that Respondent would evict him if he did not take his medications." The forum's finding that Respondent did, in fact, make such a threat negates the factual premise underlying Respondent's affirmative defense. For that reason, the defense fails.

THE SUPPLEMENTAL CLOSING ARGUMENTS AND THE AGENCY'S MOTION TO STRIKE

By way of Exhibits R-4, R-4A, R-5, and R-5A, Respondent sought to demonstrate that many other current and former residents had refused to take medications and had not been evicted. The

treatment of other disabled individuals. Consequently, the forum rejects the Agency's alternative theory that Respondent did subject Complainant to disparate treatment based on the "particular type of disorder" from which he suffered.

Agency filed a supplemental closing argument in which it contended that Exhibits R-4A and R-5A demonstrate that residents who, like Complainant, refused to take psychoactive medications no longer live at Respondent's facilities. "If anything," the Agency argued, "these exhibits, along with the testimony of Ms. Cantu and Mr. Murphy, show that some residents who refused medication which was not for psychological illnesses are still living at Respondent's facility, but that all residents who have refused to take the same medicines Mr. Cummings refused, no longer live there."

In response, Respondent filed a supplemental closing argument in which it provided a "detailed account of the circumstances surrounding the departure of the [former] residents identified in Exhibit R-4." Respondent asserted that each of these individuals, including those who refused to take psychoactive medications, either died, voluntarily chose to move to another facility, or suffered a deterioration in health that required a move to a facility that could provide more nursing care. Respondent supported its supplemental closing argument with the affidavit of Dennis Murphy.

The Agency then filed a motion to strike the affidavit of Dennis Murphy and those portions of Respondent's supplemental closing argument that rely on the affidavit. The Agency argued that the affidavit should be struck because the evidentiary record had been closed and the Agency did not

have the opportunity to cross-examine Murphy regarding the basis for the assertions in his affidavit. Respondent, relying on OAR 839-050-0410,¹⁴ argued that the record should be reopened for receipt of the affidavit.

The Agency's motion to strike is hereby granted, but only because the forum finds that the information in Exhibits R-4, R-4A, R-5, and R-5A is not necessary to fully and fairly adjudicate the case, with or without the additional information included in Murphy's affidavit. The issue in this case is whether Respondent, through Cantu, threatened to evict Complainant if he did not take his medications. The forum finds that evidence regarding Respondent's treatment of other residents who allegedly refused medication simply is not helpful in deciding that issue. One disabled resident's refusal of medication could cause the resident to act in ways very frustrating to Respondent's employees, while another resident's refusal might not cause any diffi-

¹⁴ OAR 839-050-0410 provides:

"The administrative law judge shall reopen the record where the administrative law judge determines additional evidence is necessary to fully and fairly adjudicate the case. In making this determination, the administrative law judge shall consider whether the evidence suggested for consideration could have been gathered prior to hearing."

culties for them. Without detailed information regarding the nature of each resident's disabilities and behaviors, any analysis of Respondent's treatment of them would be too superficial to either support or refute a claim of disparate treatment based on the particular nature of Complainant's disabilities. Consequently, the forum rejects Respondent's argument that it did not evict or threaten to evict other residents who refused medication and that the forum should, therefore, infer that Respondent did not treat Complainant in that manner. Nor has the forum given any weight either to the Agency's argument that Exhibits R-4, R-4A, R-5, and R-5A demonstrate that only residents who have refused psychoactive medications no longer reside at Respondent's facilities or to the Agency's intimation that some bad act on Respondent's part caused those residents to leave.

RESPONDENT'S EXCEPTIONS

Respondent's first exception challenges the ALJ's denial of its motion to dismiss. Respondent renews its argument that it cannot have violated ORS 659.430 unless it treated Complainant, a disabled resident, differently from non-disabled residents. Respondent implicitly concludes that, because it had no non-disabled residents, its actions toward Complainant cannot constitute a statutory violation.

Respondent's argument fails for the reasons discussed earlier in this Opinion. Under the plain language of the statute, it was

unlawful for Respondent to "discriminate" by making any "restriction against" Complainant "because of" his disability. No comparison with non-disabled persons was necessary if the Agency could prove by other means that Respondent's restrictions against Complainant were based on his disability. As discussed above, the Agency proved just that.

Respondent argues that such an interpretation of the phrase "restriction against" does not comport with the usual understanding of the word "discrimination," which requires comparison of one group of people with another. Whatever the merits of that argument in a case where a statute prohibits only "discrimination" without further explanation, it has no relevance here. ORS 659.430 *defines* discrimination to include a "restriction against" a person "because of" that person's disability. Nothing in the statute requires the Agency to prove that Respondent treated disabled persons differently from non-disabled persons. The exception is denied.

In its second exception, Respondent contends that the award of \$10,000.00 in mental suffering damages is excessive. In support of that argument, Respondent cites a string of cases from other jurisdictions awarding less money to plaintiffs who had been discriminated against in housing. Those cases have no bearing on the appropriate amount of dam-

ages in a case in *this* forum, where the commissioner serves as ultimate fact-finder. The commissioner would be similarly uninfluenced by the citation of cases from other jurisdictions in which plaintiffs were awarded significantly larger sums of money. The commissioner has compared the facts of this case to the facts in other Bureau of Labor and Industries cases in which he awarded damages for mental suffering, and has awarded an amount -- \$10,000.00 -- he finds commensurate with the degree of mental anguish Complainant suffered. The exception is denied.

ORDER

NOW, THEREFORE, as authorized by ORS 659.010(2), ORS 659.060(3) and ORS 659.435, and as payment of the damages assessed as a result of Respondent's violation of ORS 659.430(1), the Commissioner of the Bureau of Labor and Industries hereby orders Respondent **Dennis Murphy Family Trust, dba Mt. Scott Residential Care Home**, to:

1) Deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232-2162, a certified check payable to the Bureau of Labor and Industries **in trust for Complainant David E. Cummings** in the amount of **TEN THOUSAND DOLLARS AND NO CENTS (\$10,000.00)**, representing compensation for mental suffering caused by Respondent's unlawful act,

plus interest at the legal rate on the sum of \$10,000.00 from the date of the final order in this case until paid.

2) Cease and desist from making restrictions against any resident because of that resident's disabilities; and

3) Post in a conspicuous place in the shared living area of the Lambert Street facility copies of the current versions of MCARs 891-018-100 (the Residents' Bill of Rights) and R-891-060-142 printed in at least 12 point type, to be replaced with the new rules whenever those rules may be amended, together with a notice that any person who believes that he or she has been discriminated against may notify the Oregon Bureau of Labor and Industries.

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

Case No. 55-99
Final Order of the Commissioner
Jack Roberts
Issued November 30, 1999

SYNOPSIS

Respondent employed Complainant as a lead merchandiser, a position that included several evening shifts each week. Com-

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

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

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

The Agency called Complainant, Marc LeBlanc (one of Respondent's managers), Melody Taboda (a former employee of Respondent), and Colleen Jenny

(a former employee of Respondent) as witnesses. Respondent called three witnesses: LeBlanc, former store manager Deborah "Susie" Taylor, and district manager Jan Skansgaard.

The forum received into evidence:

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

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

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

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

FINDINGS OF FACT – PROCEDURAL

1) On or about February 5, 1998, Complainant Josephine Lancaster filed a verified com-

plaint with the Civil Rights Division of the Agency alleging that Respondent unlawfully had failed to restore her to the position of employment she held before she started taking leave under the Oregon Family Leave Act ("OFLA"). The Division found substantial evidence that Respondent had violated ORS 659.492.

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

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

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

5) On July 27, 1999, the ALJ ordered the Agency and Respondent each to submit a case summary including: a list of all witnesses to be called; the identification and description of any

documents of physical evidence to be offered, together with a copy of such document or evidence; a brief statement of the elements of the claim (for the Agency only); a brief statement of any defenses to the claim (for Respondent only); a statement of any agreed or stipulated facts; and any wage, damages, or penalty calculations (for the Agency only).

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

"This case involves the job protection provision of the Oregon Family Leave Act ('OFLA'). The Agency filed specific charges in which it alleged, *inter alia*, that Respondent did not reinstate Complainant to the position she held prior to commencing her family leave. Respondent admitted that allegation. (See Exhibit 1 to Agency Motion at 2, para. 6; Exhibit 2 to Agency Motion at 1, para. 2). The Agency subsequently moved for partial summary judgment on the issue of liability, arguing

that Respondent had admitted all facts necessary to establish a violation of ORS 659.484(1). Respondent opposed the motion for partial summary judgment, arguing that genuine issues of material fact remained in dispute. Earlier today, the forum received by facsimile transmission the Agency's response to Respondent's response to the motion for partial summary judgment.

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

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

'After returning to work after taking family leave under the provisions of ORS 659.470 to 659.494, an eligible employee **is entitled** to be restored to the position of employment held by

the employee when the leave commenced if that position still exists, without regard to whether the employer filled the position with a replacement worker during the period of family leave.'

"(Emphasis added).

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

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

'(1) The employer **must return the employee to the employee's former position** if the job still exists even if it has been filled

during the employee's family leave unless the employee would have been bumped or displaced if the employee had not taken leave.'

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

"Although the Agency need not prove that Complainant demanded restoration, it still must prove that Respondent *denied or refused* Complainant restoration to a job to which she was entitled. Respondent's mere *failure* to restore Complainant creates a rebuttable presumption that Respondent refused to give effect to Com-

plainant's entitlement to job restoration. Respondent may negate that presumption by coming forward with evidence that Complainant asked not to be restored to her former position.

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

*"There are additional exceptions to the rule requiring restoration. For example, OAR

839-009-0270(1) provides that the employee must be restored to his or her former position 'unless the employee would have been bumped or displaced if the employee had not taken leave.'"

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

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

employer. Similarly, the defense that an employee asked not to be restored to his or her former position simply negates an element of the Agency's prima facie case for violation of the OFLA job protection provision - that the employer deprived the employee of his or her entitlement to restoration. Consequently, the defense is not an affirmative defense that Respondent must separately plead."

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

That ruling is hereby affirmed.

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

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

ceived the original Addendum by first-class mail on August 27.

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

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

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

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

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

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

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

timely submitted the requested page.

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

FINDINGS OF FACT – THE MERITS

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

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

3) Some of Respondent's non-management employees are titled

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

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

5) By the end of 1996, Complainant had been promoted to a lead merchandising position in Zone 3 (men's and children's wear). From February until June 21, 1997, Complainant worked an average of 30.85 hours per week. Complainant generally worked Monday through Friday, plus one Saturday per month. Her work schedule included an average of one closing shift (ending around 9:45 p.m.) and 1.73 mid-shifts (ending around 7:00 or 8:00 p.m.) each week, for a total of 2.73 evening shifts each week.¹ During

this time, Complainant's late shifts (those lasting past 5:30 p.m.) varied, but at least once fell on each day of the week except Sunday. Most often, Complainant's evening shifts fell on Tuesday, Thursday, and Friday.

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

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

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

9) On June 20, 1997, Complainant's doctor restricted the amount of weight Complainant could lift and stated that she should not work more than eight hours per day. Complainant gave Taylor a note from her doctor that

¹ The record does not contain complete documentation of the hours Complainant worked during each week of her employment by Respondent. However, the record does contain detailed payroll records from the 11 weeks during which Complainant held the lead merchandising position before she went on leave, the weeks she spent as a cashier immediately before she took full-time leave,

and the 13 weeks she held the cashier position after she returned from leave. LeBlanc testified credibly that the payroll documents in the record are representative, and no witness suggested otherwise. The numbers cited in Findings of Fact -- the Merits 5, 10, 12 and 33 are calculated from the pertinent daily payroll records that are in evidence.

set forth these limitations, and LeBlanc became aware of the note. Complainant rarely had worked more than eight hours per day prior to receiving the note from her doctor and Respondent was able to accommodate the lifting and time restrictions while keeping Complainant in the lead merchandising position.

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

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

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

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

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

15) On or about July 30, 1997, Complainant requested full-time OFLA leave because of the complications associated with her pregnancy. Taylor instructed Complainant to complete a leave request form and also gave Complainant a form to have her doctor complete. Complainant submitted the completed forms, and Respondent granted Complainant's leave request on August 1, 1997, which was Complainant's last day at work prior to the birth of her child.

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

17) After Respondent approved Complainant's request, it sent her a document explaining

her leave rights. That document included the following statement:

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

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

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

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

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

21) Sometime in October 1997, Respondent recruited Colleen Jenny to work in a lead merchandising position at its Medford store. At that time, no such position was open. In early No-

vember 1997, Respondent hired Jenny to work as the lead merchandiser in Zone 3 (the position Complainant had held) and she started working in that job on November 17, 1997, after giving two weeks' notice at her previous job.

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

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

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

25) On November 12, 1997, Complainant's physician released her to return to work. The doctor

did not place any restrictions on Complainant's work duties or hours.

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

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

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

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

29) While Complainant held this part-time lead cashier position, she did not work past 5:30 on any Monday, Wednesday, Thursday, or Friday night, and did not

² In the Specific Charges, the Agency alleged that LeBlanc had, at some unspecified time, told Complainant "that someone else had been hired for her lead position in Merchandising and that only part-time work was available for her." Respondent admitted that allegation in its Answer. No evidence in the record establishes with absolute certainty *when* LeBlanc told Complainant that somebody was working in her former job. However, the other part of LeBlanc's statement - that only part-time work was available for Complainant -- logically would have followed Complainant's announcement that she was not able to work certain evening shifts. As Respondent's managers credibly explained, the only jobs that could accommodate Complainant's self-imposed time restrictions were part-time positions (except for a full-time janitorial position that Complainant was not interested in). In addition, LeBlanc testified credibly that, once Complainant stated she couldn't work certain evenings, he told her that would change the position she could hold at Respondent's store. The forum concludes by a preponderance of the evidence that LeBlanc told Com-

plainant that the Zone 3 position had been filled only *after* Complainant already had stated that she was unavailable to work Monday, Wednesday, Thursday, and Friday evenings.

work before 2:00 p.m. on Saturdays. She did frequently work closing hours on Tuesday nights.

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

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

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

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

shifts each week, for a total of 2.15 evening shifts per week.

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

35) The ALJ carefully observed Complainant's demeanor during the hearing and found that she adopted an artificially emotional tone when describing how she reacted to being assigned to the part-time cashier position. At other times, Complainant's demeanor was somewhat hostile, and she appeared reluctant to testify, both on direct and on cross-examination. During Respondent's case, LeBlanc testified credibly that Complainant had refused to provide him with a written statement of the hours she was available to work. The Agency called Complainant as its only rebuttal witness, and asked her whether LeBlanc had asked her to provide such a statement. Complainant defiantly stated that he had, and that she had not given it to him. The forum concludes from

the manner in which Complainant testified, and the inconsistencies in her testimony described in the factual findings that follow, that this admission was the only time Complainant testified credibly with regard to a material fact in dispute.

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

37) Finally, one portion of Complainant's testimony was inherently illogical. Complainant testified that she suffered emotionally from her reassignment to the part-time lead cashier position because she could not spend "any time" with her family and had to

work more nights than she had in Zone 3. This makes no sense, given that Complainant worked about four *fewer* hours per week in the cashier position than she had as a merchandiser, and also worked *fewer* total evening shifts. For the reasons described in this Finding and the two preceding Findings, the forum has given Complainant's testimony weight only where it was corroborated by other, credible evidence.

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

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

40) Jenny's testimony was not wholly credible. She testified

that, in the Zone 3 merchandising position, she worked past 5:00 p.m. only one night a week. Those are very different hours from those reflected in Complainant's payroll records from the time she held that position -- she worked an average of one closing shift *plus* almost two mid shifts per week, sometimes working three or four mid shifts a week. No witness testified that Jenny's hours as a lead merchandiser were significantly different from those of other lead merchandisers, and nothing in the record except Jenny's bias in favor of Complainant explains this inconsistency. In general, Jenny's testimony appeared exaggerated in favor of Complainant, and the forum has given it weight only where it was corroborated by other credible evidence.

ULTIMATE FINDINGS OF FACT

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

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

3) Beginning in June 1997, Complainant suffered disabilities associated with her pregnancy and her physician placed restrictions on her job duties. From July 11 through August 1, 1997, Respondent accommodated Complainant's pregnancy-related

disabilities by placing her in a part-time lead cashier position with reduced work hours.

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

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

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

CONCLUSIONS OF LAW

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

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

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

2) The actions, inactions, statements, and motivations of managers LeBlanc, Taylor, and

Skansgaard properly are imputed to Respondent.

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

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

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

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

The term "serious health condition" includes:

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

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

6) Complainant's disabilities due to pregnancy rendered her unable to perform at least one of the essential functions of her

regular position and she was, therefore, entitled to take OFLA leave. ORS 659.476(1)(c).

7) ORS 659.478 provides, in pertinent part:

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

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

** * * * *

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

OAR 839-009-0210(11) provides:

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

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

8) ORS 659.484 provides, in pertinent part:

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

OAR 839-009-0270 provides:

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

Complainant was entitled to be restored to the lead merchandising position. The employee holding that position, however,

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

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

OPINION

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

1. The employer was a "covered employer" as defined in ORS 659.470(1) and ORS 659.472;

2. The employee was an "eligible employee" – *i.e.*, he or she was an employee of the covered employer;

3. The employee had a "serious health condition";

4. The "serious health condition rendered the employee unable to perform at least one of the essential functions of the employee's regular position";

5. The employee used OFLA leave to recover from or seek treatment for the serious health condition; and

6. When the employee returned to work after taking OFLA leave, the employer refused to restore the employee to the employment position he or she held when the leave commenced.

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

In this case, only the sixth element is disputed. As explained more fully in the forum's order denying the Agency's motion for partial summary judgment,³ an employer's *failure* to restore an employee to his or her pre-leave position creates a presumption that the employer unlawfully *refused* to restore the employee to that position. The employer may rebut that presumption by proving that the employee asked not to be to his or her former position. *Cf.* OAR 839-009-0270(8) ("If an em-

ployee gives unequivocal notice of intent not to return to work, the employer's obligations under OFLA cease.").

Here, the participants agreed that Respondent did not restore Complainant to the lead merchandising position when she returned from leave, and that position was the job Complainant held when her OFLA leave commenced.⁴ The disputed issue is whether Complainant restricted her own available hours in a way that prevented her from performing the duties of the lead merchandiser position. The forum finds that she did.

First, the forum finds that Complainant told LeBlanc that she was not available to work Monday, Wednesday, Thursday, or Friday evenings. LeBlanc's credible testimony on that point was confirmed by the equally credible testimony of Taylor and Skansgaard. The Agency argued that the forum should disbelieve that evidence and instead believe Complainant's testimony that she had not placed any limitations on her hours. In its closing argument, the Agency further suggested that the managers must have reviewed Complainant's existing work records to

³ See Finding of Fact – Procedural 6, *supra*.

⁴ Complainant commenced her OFLA leave on July 11, 1997, when her hours were reduced in accordance with the restrictions her physician had imposed on her work schedule. The fact that Respondent did not immediately designate the "lost" hours as intermittent OFLA leave is immaterial.

determine what nights she never had worked as a cashier, so they could testify that those were the days on which Complainant had said she could not work during the evening. The forum finds this conspiracy theory not only inherently improbable, but completely unbelievable given the credibility of the testimony of LeBlanc, Taylor, and Skansgaard. Moreover, LeBlanc's request that Complainant provide a written statement of her available hours makes sense only if Complainant had, in fact, restricted her availability. If Complainant had not stated that she could not work certain evenings, there would have been no reason for LeBlanc to ask her to put that information in writing, which Complainant admits he did.

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

Thursday, and Friday -- and Thursday and Friday were two of the days on which Complainant had declared she could not work. By stating that she would not work the shifts required of the Zone 3 lead merchandiser, Complainant constructively announced that she did not want to be restored to that job.

Respondent did place itself in a precarious position by hiring Jenny to fill Complainant's job when she was still on leave. Had Complainant not restricted her availability, OFLA would have required Respondent to restore her to the Zone 3 merchandising position, "without regard to" the fact that it had "filled the position with a replacement worker during the period of family leave." ORS 659.484(1); see OAR 839-009-0270(1) ("The employer must return the employee to the employee's former position if the job still exists even if it has been filled during the employee's family leave unless the employee would have been bumped or displaced if the employee had not taken leave."). Respondent would have had to reassign Jenny to another position or even discharge her, if that was necessary to accomplish restoration of Complainant to her former job.⁵ If Respondent had

⁵ The quoted OFLA provisions implicitly recognize that employers may hire workers to substitute for employees on family leave *so long as they still restore the employees to their former positions when they return from leave* (unless, as here, the employees de-

chosen to keep Jenny in the lead merchandising position and had *refused* to restore Complainant to the job, that would have been a violation of OFLA.⁶

In this case, though, Complainant's decision to restrict her

clare that they no longer desire to work in those former positions).

⁶ As stated in Finding of Fact - the Merits 26, Complainant told LeBlanc on November 14 that she would not be able to work Monday, Wednesday, Thursday, or Friday evenings. LeBlanc later told Complainant that somebody else had been hired to work in the Zone 3 lead merchandising position. If LeBlanc had made that statement before Complainant told him she was unable to work certain evenings, the forum might infer that Complainant restricted her availability only because she knew that she was not going to be restored to the lead merchandising job, and was merely informing LeBlanc of the hours she would prefer to work in the *other* position she was being forced to accept. Such circumstances certainly could be construed as an unlawful refusal by the employer to restore the employee to the position she held before she commenced leave. In this case, however, the forum has concluded that LeBlanc told Complainant that her position had been filled only after she told him that she could not work certain evening shifts. Furthermore, no evidence in the record suggests that Complainant learned from any other source that the Zone 3 position had been filled before she restricted her hours. Perhaps for that reason, the Agency did not pursue a theory that Complainant limited her availability only because she already knew that she would not be restored to the lead merchandising job.

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

ORDER

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

**In the Matter of
ARG ENTERPRISES, INC., dba
Stuart Anderson's Restaurants,**

Case No. 41-99

Final Order of the Commissioner
Jack Roberts

Issued December 17, 1999

SYNOPSIS

Complainant suffered an on-the-job injury and invoked and utilized the procedures in ORS chapter 656 while in Respondent's employ when he cut himself with a knife and sought medical treatment. Respondent discharged Complainant for violating Respondent's policy of using a knife without wearing a protective cut glove, but did not discharge other workers who violated the same policy but did not suffer on-the-job injuries. The Commissioner found that Respondent discharged Complainant because of his invocation and utilization of the procedures in ORS chapter 656 and awarded \$186 in back pay damages and \$12,500 for mental suffering damages. ORS 659.410.

The above-entitled case came on regularly for hearing before Alan McCullough, 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 21, 1999, at the Eugene office of the Bureau of Labor and Indus-

tries, located at 165 E. 7th, Suite 220, Eugene, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by Linda Lohr, an employee of the Agency. Christopher Caires (Complainant) was present throughout the hearing and was not represented by counsel. Respondent was represented by Corbett Gordon, Attorney at Law. Randy Panek, Director of Human Resources for Stuart Anderson's Restaurants, was present throughout the hearing as Respondent's corporate representative.

The Agency called as witnesses, in addition to Complainant: Jennifer Peck, William Benson III, Paul Avers, Aaron Zweig, and Damon Egging, all former employees of Respondent; and Bernadette Yap-Sam, BOLI Senior Investigator.

Respondent called as witnesses: Randy Panek, Director of Human Resources and Risk Management for Stuart Anderson's; Daryl Bigley, former general manager for Respondent; Susan Martin, a vocational rehabilitation consultant; John Capaccio and Paul Landis, former employees of Respondent; Jennifer Bouman, a self-employed individual who assists law firms; and Complainant.

Administrative exhibits X-1 through X-38 were received into evidence. Agency exhibits A-1, A-3 through A-6, A-10 through A-35, and A-37 through A-41 were offered and received into evidence. Respondent exhibits R-8, and R-

11 through R-20 were offered and received into evidence.

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 6, 1998, Complainant filed a verified complaint with CRD alleging that he was the victim of the unlawful employment practices of Respondent based on Respondent's termination of Complainant on November 4, 1997. After investigation and review, the Civil Rights Division issued an Administrative Determination finding substantial evidence supporting the allegations regarding Respondent's discharge of Complainant.

2) On April 27, 1999, the Agency submitted to the forum Specific Charges alleging that Respondent discriminated against Complainant by discharging him based on his invocation or utilization of the procedures provided for in ORS Chapter 656. The Agency also requested a hearing.

3) On May 5, 1999, the forum served on Respondent the Specific Charges, accompanied by the following: a) a Notice of Hearing setting forth July 13, 1999, in Eugene, Oregon, as 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.

4) On May 18, 1999, counsel for Respondent sent a letter to Ms. Lohr, the Agency case presenter, requesting a two week extension of time in which to file an answer and asking that the hearing be rescheduled from July 13, 1999, to a date of mutual convenience.

5) On May 18, 1999, Respondent filed a motion asking to take the deposition of Complainant.

6) On May 24, 1999, Respondent filed a motion for an extension of until time June 7 to file an answer.

7) On May 26, the ALJ granted Respondent's motion for an extension of time to file an answer. The ALJ also granted Respondent's motion to depose Complainant, contingent on filing a timely answer to the Specific Charges.

8) On June 7, 1999, Respondent filed an answer to the Specific Charges.

9) On June 10, 1999, Respondent moved for a postponement of the hearing on the basis that Respondent's counsel already had depositions scheduled for July 13-15, 1999. The Agency did not oppose Respondent's motion.

10) On May 14, 1999, the forum ordered the Agency and Respondent each to submit a case summary including: lists of all persons to be called as witnesses; identification and copies of all documents to be offered into evidence; a brief statement of the elements of the claim (for the Agency only); a brief statement of any defenses to the claim (for Respondent only); a statement of any agreed or stipulated facts; and any damages calculations (for the Agency only). The ALJ ordered the participants to submit case summaries by July 2, 1999, and notified them of the possible sanctions for failure to comply with the case summary order.

11) On June 16, 1999, the ALJ granted Respondent's motion to postpone and tentatively reset the hearing to begin either on September 14 or September 21, depending on which week was free for Respondent's counsel.

12) On June 21, 1999, Respondent's counsel informed the forum that she was available for hearing on September 21, 1999, continuing to the next day if needed.

13) On June 23, 1999, the ALJ issued an amended notice of hearing resetting the hearing for September 21, 1999.

14) On June 23, 1999, the ALJ issued an amended case summary order making case summaries due on September 10, 1999.

15) On July 29, 1999, Respondent's counsel copied to the

ALJ a letter addressed to the Agency case presenter requesting Complainant's medical records and records from the University of Oregon concerning Complainant's class performance.

16) On August 18, 1999, the Agency sent a letter to the ALJ objecting to Respondent's informal discovery request for Complainant's medical records.

17) On August 23, 1999, Respondent sent a letter to the ALJ containing argument in support of its request for Complainant's medical records.

18) On August 26, 1999, Respondent filed an amended answer to the Specific Charges adding two affirmative defenses to Respondent's original answer.

19) On September 10, 1999, the Agency requested an extension of time to file its case summary on September 13, 1999. Respondent did not object. On September 10, 1999, the ALJ granted the Agency's request.

20) On September 10, 1999, the ALJ scheduled a pre-hearing conference with Respondent's counsel and the Agency case presenter regarding the issue of discovery of Complainant's medical records sought by Respondent.

21) On September 10, 1999, Respondent filed a motion for a Discovery Order to obtain records of Complainant's psychological records generated by his visits to a psychologist and a psychiatrist.

Respondent cited the Agency's earlier refusal to provide them.

22) On September 13, 1999, the ALJ conducted a pre-hearing conference with Respondent's counsel and the Agency case presenter regarding Respondent's September 10, 1999, motion for a discovery order. At the conclusion of the conference, the ALJ ordered the Agency to provide, for an *in camera* inspection, Complainant's psychological and psychiatric records as requested by Respondent. The ALJ also granted the Agency's motion for a Protective Order regarding all documents released to Respondent's counsel. The Agency provided the subject medical records to the ALJ on September 13, 1999.

23) On September 14, 1999, the ALJ issued an Interim Order summarizing the previous day's oral ruling. The ALJ also released to Respondent unredacted copies of all medical records provided by the Agency to the ALJ on September 13, 1999. In addition, the ALJ issued a Protective Order regarding the subject medical records.

24) On September 13, 1999, Respondent and the Agency timely filed case summaries.

25) On September 13, 1999, Respondent filed a Motion to Exclude Notice of Substantial Evidence Determination ("Notice") on the grounds that it was unreliable hearsay, that it contained repetitive evidence, and that the probative value of the Notice was

substantially outweighed by the danger of unfair prejudice.

26) At the commencement of the hearing, the ALJ 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.

27) Prior to opening statements, Respondent renewed its motion to exclude Agency Exhibit A-4 (the Notice), and moved to exclude Agency Exhibits A-1 (Complainant's original complaint filed with BOLI) and A-3 (BOLI's cover letter to Respondent accompanying the Notice). The ALJ denied Respondent's motion.

28) At the conclusion of the Agency's case in chief, Respondent moved for a directed verdict on the basis that the Agency had failed to establish a prima facie case. The ALJ considered Respondent's motion a motion to dismiss the Specific Charges and denied it, finding there was sufficient evidence on the record from which to establish a prima facie case of an unlawful employment practice in violation of ORS 659.410.

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

FINDINGS OF FACT – THE MERITS

1) At all times material herein, ARG Enterprises, Inc. was a foreign corporation operating eating and drinking places under the assumed business name of Stuart Anderson's Restaurants ("Respondent"), and was an Oregon employer utilizing the personal services of six or more persons.

2) Respondent is self-insured for purposes of workers' compensation insurance.

3) On September 9, 1997, Complainant completed an application for a dishwasher job with Respondent at Stuart Anderson's Black Angus restaurant located at 2123 Franklin Boulevard, Eugene, Oregon. Complainant learned of Respondent's job opening from a local newspaper ad.

4) On September 12, 1997, Respondent hired Complainant as a dishwasher and prep cook at its Franklin Blvd. location. Complainant's starting wage was \$6.00 per hour.

5) Complainant was a college student at the University of Oregon ("U of O") at the time he was hired by Respondent. His parents paid for his rent and tuition, but he was responsible for his other living expenses, including car payments, food, utilities, and credit card payments. He sought work with Respondent to earn money to pay for those expenses. He lived in a U of O fraternity when Respondent hired him.

6) Dishwashers and prep cooks employed by Respondent frequently have to use knives for cutting. During Complainant's employment, they were expected to clean the knives that they used for cutting and return them to the knife rack in the chef's office.

7) The kitchen knives¹ used by Respondent's kitchen staff are extremely sharp. Before 1995, Respondent's kitchen staff used a cloth mesh glove on their "non-dominant hand"² when cutting with knives. In 1995, Randy Panek, Respondent's Director of Human Resources and Risk Management, evaluated Respondent's current level of compensable injuries involving knife cuts and determined it was too high. In the same time period, he learned that a steel mesh glove was available that made it impossible for a knife user to suffer a cut wound³ on the user's non-dominant hand.

8) In 1995, Panek implemented a company-wide safety standard requiring all of Respondent's employees to use a

¹ The use of "knives" in this opinion refers to kitchen knives used by Respondent's employees for cutting food items.

² Throughout the hearing, witnesses stated that Respondent's policy regarding use of the steel cut glove was that the glove was required to be worn on the "non-dominant" hand, i.e., the hand that was not holding the knife.

³ However, an employee could suffer a puncture wound if the point of a sharp object penetrated the steel mesh between the links.

stainless steel cutting glove ("cut glove") whenever using a kitchen knife. This policy was implemented because Panek believed it would reduce the number of injuries involving cuts from knives. Since Panek's implementation of this policy, supervisors at Respondent's Franklin Boulevard location have understood that employees are to wear cut gloves on their non-dominant hand whenever cutting with a knife, cleaning a knife, carrying a knife, or using it in any other manner.

9) When Complainant was hired on September 12, 1997, he was provided with a number of documents to read. Included among those documents were the following:

- a) "Line/Prep Cook Safety Training – Job Duty Practices and Procedures;"
- b) "Stuart Anderson's Specific Safety Standards;"
- c) "Employee Safety Policy;"
- d) "Stuart Anderson's Safety Pledge;"
- e) "Knife Policy;"
- f) "Quiz: Line/Prep Cooks Safety;"
- g) "Quiz: Dishwasher Safety."

Complainant signed and dated documents "a" through "e" and dated on September 12, 1997.

10) The "Line/Prep Cook Safety Training – Job Duty Practices and Procedures" document that Complainant signed and dated lists a number of safety

practices and procedures developed by Panek in 1995. Each was checked off by Complainant in the space provided, including items stating "I have been shown, and will use, the proper knife usage procedures when using a knife" and "All kitchen personnel *must use a stainless steel cutting glove* when using a kitchen knife." (emphasis in original) The following statement is printed immediately above Complainant's signature:

"BY SIGNING BELOW, I AM STATING THAT I HAVE BEEN TRAINED ON, READ, AND UNDERSTAND THE ITEMS LISTED ABOVE AND AGREE TO COMPLY WITH THEM AS A CONDITION OF MY EMPLOYMENT."

There is also a line for "Trainers Signature" that is left blank.

11) The "Stuart Anderson's Specific Safety Standards" document that was signed and dated by Complainant lists safety practices and procedures for bartenders, bussers, and kitchen staff regarding the use of back braces and cut gloves and was developed by Panek in 1995. Complainant checked off three items in the space provided, including a statement that "I understand that I must wear a Company approved cutting glove whenever any cutting functions are performed. Furthermore, I understand that I must wear stainless steel gloves whenever working with the slicer or mixer accessories." The following

statement is printed immediately above Complainant's signature:

"By Signing, I am stating that I have read and understand the standards checked above and agree to comply with them as a condition of my employment."

12) The "Employee Safety Policy" document that was signed and dated by Complainant lists work safety practices to follow. Listed among the safety practices is the following statement regarding knife usage;

"Use proper knife for the job. Cut away from body and other workers; store knife in proper location when not in use. Do not obscure the presence of a knife in a drawer sink or under a cloth. Cut-resistant gloves must be worn on the opposite hand at all times."

13) The "Stuart Anderson's Safety Pledge" that was signed and dated by Complainant contains the following statement printed immediately above Complainant's signature:

"I have completed instruction and training of the safety policies, procedures, and practices for my assigned job by my Department Safety Trainer. In addition, I have read and understand the Safety Pledge above."

There are also lines for the signatures of "Department Safety Trainer" and "GM or Safety Manager" that are left blank.

14) The "Knife Policy" signed and dated by Complainant lists the following policies:

"1) Always wear a cut glove when using a knife.

2) Always clean and sanitize knife after use.

3) When walking with knife announce presence when going around corner.

4) After using knives return to knife rack in Chef's office.

5) Always walk with knives at your side and facing down.

6) Do not store knives on shelves above waist level.

7) No horseplay around anyone using a knife; always use caution."

The following is printed immediately above Complainant's signature :

"I have read the above knife policy and also understand that failure to adhere to will result in disciplinary action and can lead to termination."

15) The "Knife Policy" referred to in Finding of Fact – The Merits #14 was not a corporate policy promulgated and distributed by Panek. Rather, it was developed by the safety committee at Respondent's restaurant where Complainant was employed.

16) Complainant did not know what a cut glove was and had not received any actual training, other than reading the documents provided him by Respondent, when he signed and

completed the documents cited in Finding of Fact – The Merits #9.

17) Respondent's kitchen supervisory chain of command in 1997 was: (1) Paul Landis, head chef; (2) Bob Raub, head chef; (3) Mark Johnson, sous chef. Johnson was in charge when Landis and Raub were absent.

18) Complainant was trained the first week of his employment by "shadowing" Damon Egging, Respondent's employee who worked the same shift as Complainant as a dishwasher/prep cook, and observing how Egging performed his jobs. During his training, he was taught always to wear a cut glove while cutting with a knife. Egging did not instruct him to wear a cut glove while cleaning knives and Egging did not wear a cut glove while cleaning knives.

19) Egging, who worked for Respondent from July through November 1997, did not wear a cut glove while cleaning knives when he trained Complainant or at any other time during his employment because no one told him he was required to wear a cut glove while cleaning knives.

20) Complainant worked as a dishwasher and prep cook throughout his employment with Respondent until his discharge.

21) On September 23, 1997, Complainant signed Respondent's "Knife Policy" form again.

22) On October 11, 1997, Complainant signed Respondent's "Knife Policy" form a third time.

23) On October 18, 1997, Complainant signed Respondent's "Line/Prep Cook Safety Training – Job Duty Practices and Procedures" form again.

24) On October 18, 1997, Complainant also signed Respondent's form entitled "Dishwasher Safety Training – Job Duty Practices and Procedures." This form does not contain any references to knives.

25) Part of Respondent's safety policy consisted of distributing safety procedure forms, such as the "Knife Policy," to kitchen employees on a regular basis and asking them to sign and date them.

26) After Complainant's hire, he was given the aforementioned safety procedure forms to sign as part of Respondent's safety program. He was not given the forms to sign as a disciplinary or corrective measure.

27) During his employment with Respondent, Complainant always wore a cut glove when doing prep work with a knife.

28) During his employment with Respondent, Complainant cleaned knives when he worked as a prep cook and as a dishwasher. He never wore a cut glove when cleaning a knife because he had not been taught that Respondent's cut glove policy required him to wear a cut glove when cleaning a knife.

29) On October 24, 1997, Complainant cut his thumb at work while cleaning a knife.

Complainant was not wearing a cut glove at the time. Complainant completed his work shift after Johnson, at Landis' instruction, bandaged his hand. Complainant was given the option of going to the hospital instead of completing his shift.

30) Complainant sought medical attention after work at a local hospital, where his cut was stitched. At the hospital, he signed a medical report indicating he had lacerated his thumb on 10/24/97 while working for Respondent. His treating doctor said Complainant could return to work if he could keep his finger clean and dry and gave him a medical statement to take to work. The statement did not indicate that Complainant was released to return to work.

31) Complainant returned to work the next day and gave the medical report to Daryl Bigley, general manager at Respondent's restaurant. Bigley had Complainant complete an occupational injury report form and told him to come back to work when his stitches were removed.

32) Complainant could not have kept his finger clean and dry while working as a dishwasher and line-prep cook.

33) While Complainant was off work recuperating from his injury, Bigley reviewed Complainant's personnel records and observed that Complainant had signed Respondent's "Knife Policy" on three occasions. Bigley telephoned Tom Taylor, his district

manager, and Panek to report Complainant's injury, telling them both that Complainant had signed Respondent's various policies concerning knives several times during his short period of employment with Respondent. Bigley recommended that Complainant be discharged. Based on Bigley's recommendation, Respondent's knife policies, and the fact that Complainant would not have been cut if he had been wearing a cut glove while cleaning the knife, both Taylor and Panek agreed with Bigley's recommendation that Complainant be discharged for violating Respondent's knife safety policy.

34) Panek would not have agreed that Complainant be discharged if he had been informed that Complainant had not been trained to wear a cut glove while washing knives.

35) On November 3, 1997, Complainant received a written release to return to work without restrictions.

36) On November 3, 1997, Complainant rode his bicycle to work and presented his written release to Bigley. Bigley told Complainant that he was discharged and gave him a copy of an "Employee Separation Report" that Bigley had completed and signed. The Report stated that Complainant was discharged for "Failure to adhere to company policies/practices." On the Report, Bigley further explained the reason for the separation as follows:

"Chris [Complainant] has signed both cut glove policies & if he was wearing his glove he would have not cut his thumb."

37) All of Respondent's kitchen staff at Respondent's Franklin Blvd. location in Eugene were aware of Respondent's requirement that they wear a cut glove whenever they cut with a knife.

38) Egging, Complainant's co-worker and trainer, cut with a knife once or twice without wearing a cut glove and was reminded that he needed to wear a cut glove when cutting with a knife.

39) Paul Avers, who worked as a line cook for Respondent for 4-6 weeks around January 1997, was told during his training that he could use tongs instead of a cut glove when cutting with a knife. He understood that he was supposed to wear a cut glove when cleaning knives. Sometimes he did not wear a cut glove when cleaning knives and was "scolded" by Johnson. Avers cut himself a couple of times when not wearing a cut glove while cutting with a knife and was scolded for that. He did not file workers compensation claims for these cuts. He was never written up for not wearing a cut glove when using a knife.

40) Aaron Zweig worked as a line cook for Respondent in September, October, and November 1997. He signed Respondent's "Knife Policy" on 9/16/97, 9/23/97, and 10/14/97. He signed Respondent's

"Line/Prep Cook Safety Training-Job Duty Practices and Procedures" on 9/16/97 and 10/14/97. Sometimes he did not wear a cut glove when using a knife to cut prime rib. When observed, he was instructed to put the cut glove on. No one instructed him to wear a cut glove while cleaning knives. He was never written up for not wearing a cut glove when using a knife.

41) John Cappaccio worked for Respondent as a line/fry cook for three months in late 1997. On occasion, he did not wear a cut glove when cutting with a knife, and Landis and Johnson both corrected him, telling him he needed to wear a cut glove when cutting with a knife. Cappaccio was never written up for not wearing a cut glove when using a knife.

42) William "Beau" Benson worked for Respondent as a line/prep cook from March 1997 until September 14, 1997. On 6/13/97, he received a written warning signed by Landis that read as follows:

"After having been told to wear a cut glove on the line when cutting prime more than once by Daryl & myself you still continue to use a knife without a cut glove. This is a company policy. You signed a form when you were hired that you would wear a cut glove when using a knife, so please do."

Also on the written warning is a notation that "Daryl" was a "WITNESS TO INCIDENT." "Daryl" was Daryl Bigley.

43) On 6/13/97, Johnson received a written warning signed by Landis that read as follows:

“As the 2nd cook it is your job to be sure employees follow company instructions. After Daryl asked that you be sure that Beau wear a cut glove when cutting prime more than once in one night, and he still continued to cut prime without a cut glove. This is not acceptable especially from one who is to be in charge.”

Also on the written warning is a notation that “Daryl” was a “WITNESS TO INCIDENT.” “Daryl” was Daryl Bigley.

44) Complainant worked the following hours and earned the following gross wages during Respondent’s two week payroll period while employed by Respondent:

9/12/97-9/15/97:		
14.67 hours	\$91.02	
9/16/97-9/29/97:		
63.20 hours	\$303.05	
9/30/97-10/13/97:		
61.57 hours	\$381.42	
10/14/97-10/24/97:		
<u>36.43 hours</u>	<u>\$226.08</u>	
TOTALS		
175.87 hours	\$1,055.22	

45) After Complainant was discharged, he looked for another job by checking the help wanted ads in the local newspaper for a job he was qualified for with hours compatible with his U of O class

schedule.⁴ However, except for a work study job at the U of O, there was no evidence that Complainant contacted or made application any other employer after his discharge. Complainant was hired at a work study job at the U of O Behavioral Research & Training Division as a research assistant doing data entry at the start of December 1997 and earned \$210 in gross wages, working 10 hours a week for three weeks, at \$7 per hour.

46) Prior to coming to work for Respondent, Complainant had worked at a pizza parlor as a pizza maker, at a Burger King where he cooked, cleaned, prepped, and took orders, and as a security guard.

47) The Register-Guard is Eugene’s daily newspaper. Every day from November 3, 1997, to November 25, 1997, the Guard advertised between one and five job openings in the Eugene-Springfield metropolitan area that met the following specific criteria: (a) Complainant was qualified to perform them; (b) the job ad specified flexible or part-time hours; and (c) hours that applicants could apply were not specified or included hours after 3 p.m. In that same time period, numerous other job ads appeared for restaurant jobs that Complainant was qualified for that did not limit application hours, but did not specifically state that hours were

⁴ Complainant testified that he went to school every day until “3-4 p.m.”

flexible or part-time. None of the job ads stated a rate of pay.⁵

48) Every day from December 2, 1997, to December 19, 1997, the Guard advertised between one and three job openings in the Eugene-Springfield metropolitan area that met the following specific criteria: (a) Complainant was qualified to perform them; (b) the job ad specified flexible or part-time hours; and (c) hours that applicants could apply were not specified or included hours after 3 p.m. In that same time period, numerous other job ads appeared for restaurant jobs that Complainant was qualified for that did not limit application hours, but did not specifically state that hours were flexible or part-time. None of the job ads stated a rate of pay.

49) In November 1997, the U of O Career Counseling Center listed and filled several part-time food service jobs and security jobs that involved working 20 hours per week and paid between \$5.50 and \$7.50 per hour. The shifts worked by the hired applicants are unknown.

50) In November, December, and January 1998, the Oregon Employment Department in Eugene had 22 job orders for cooks, 1 job order for a pizza cook, 3 job orders for fast food cooks, and 23 job orders for prep food workers (prep cooks and dishwashers).

52) The Eugene-Springfield metropolitan area has a public bus transportation system that goes to all major locations in the metropolitan area and has several stops around the U of O.

53) In November and December 1997, the Eugene-Springfield metropolitan area had a very positive labor market for persons seeking restaurant kitchen jobs. A person with Complainant's job experience should have been able to find a job as a dishwasher within one week of initiating a job search.

54) At the time Complainant was discharged, he felt he was "building a life in Oregon" for the first time. Working at a job while going to school made him feel that Oregon was his home. His discharge and resulting unemployment caused him feel that his life was not integrated to the extent it had been before his discharge.

55) Complainant suffered financial distress as a result of his discharge. After his discharge, he couldn't afford to buy food and had to get food from a church while waiting to get food stamps. He was unable to pay his phone bill and lost his phone. He couldn't make his VISA credit card payments. He couldn't take his girlfriend out or call her on the phone. He experienced upset, humiliation, and feelings of degradation as a result.

56) At the time Complainant was discharged, he was on academic probation at the U of O

⁵ The forum takes official notice that the state minimum wage in 1997 was \$5.50 per hour. *ORS 653.025(1)*.

based on having earned grade point averages of 1.10, 0.80, and 2.66 his previous three terms. To avoid disqualification from school, Complainant had to earn a minimum 2.0 grade point average in fall term 1997. Complainant completed fall term 1997 after his discharge from Respondent, earning a 1.34 grade point average. When Complainant went home to California for Christmas vacation, he learned on or about December 25 that he had been disqualified from the U of O as a result of his poor grades. At the beginning of January, he returned to Oregon to pick up his things, then immediately found a job in California at Safeway paying \$7.25 per hour.

57) Complainant did not earn enough money while employed by Respondent to pay all of his bills. Complainant's VISA card was already charged to its limit at the time of his discharge. Complainant voluntarily surrendered his car rather than have it repossessed after his discharge as a result of his inability to make his November 1997 car payment, but it is uncertain whether Complainant would have been able to make the payment even if he had not been discharged. Earlier, in September 1997, Complainant's car insurance policy had been cancelled as a result of his inability to make payments.

58) In September 1997, Complainant had a car wreck. Because Complainant was uninsured, he had to borrow \$700 from his father to purchase a new

car door for his own car, and had to obtain another \$900 from his mother to reimburse the other car driver.

59) Complainant broke up with his girlfriend in September 1997, which caused him stress.

60) During Complainant's employment with Respondent, he made enemies at his fraternity house, in part because he was the only member of his fraternity who had a job, and was brought up before his fraternity standards board, had witnesses called against him, and ended up moving out of the fraternity in October 1997.

61) Complainant's parents were divorced in 1996. Complainant was upset over their divorce before and after his discharge from Respondent, which caused him continuing stress.

62) After Complainant learned he had been disqualified from the U of O, he stayed at his father's house, then moved to his mother's house. He felt humiliated to have to move back to California. He was the first member of his family to go off to college, and both of his parents were upset with him and no longer trusted him because he had wasted their money. It took Complainant a year to pay off all of the debt he had accrued in Eugene.

63) The cost incurred by Respondent from Complainant's workers' compensation claim was \$248.

64) Between January 1995 and December 1997, 64 workers' compensation claims, including Complainant's, were filed by 51 different employees at Respondent's five Oregon restaurants (Eugene, Beaverton, Salem, Milwaukie, Gresham). Respondent incurred a total of \$242,803 in costs related to those claims, which ranged from a low of \$0 to a high of \$153,735.

65) On September 14, 1997, "Beau" Benson suffered a compensable injury consisting of second-degree burns from exposure to hot butter. Benson was training a new employee at the time. He was terminated that same day for refusing to submit to a urinalysis when he went to the hospital for treatment of his burns. Benson was asked to submit to the urinalysis because his co-workers had observed him acting strangely earlier in his work shift. Benson would not have been discharged, had he taken and passed the urinalysis. After Benson's discharge, Respondent incurred \$4,179 in total expenses related to his injury.

66) In 1995, Alice Turner, Respondent's employee at the same restaurant Complainant worked at, suffered a compensable injury from falling consisting of a cut and back injury. Respondent incurred \$153,735 total expenses related to her injury. She voluntarily left Respondent's employ in August 1999 due to medical reasons unrelated to her compensable injury.

67) In 1996, Suzette Lovaro, Respondent's employee at the same restaurant Complainant worked at, suffered a compensable injury consisting of a laceration to her little finger from a broken glass. Respondent incurred \$276 total expenses related to her injury. She voluntarily left Respondent's employ.

68) In 1996, Dorothy Allbritton, Respondent's employee at the same restaurant Complainant worked at, suffered a compensable injury consisting of an injury to her right arm when she slipped on a grease stain and fell. Respondent incurred \$2,457 total expenses related to her injury. She voluntarily left Respondent's employ.

69) In 1997, J. Klinger, Respondent's employee at their Salem, Oregon, restaurant, suffered a compensable injury consisting of a strained left knee as a result of a slip and fall injury. Respondent incurred \$8,753 total expenses related to his injury. He is still employed by Respondent and was recently promoted to chef.

70) Complainant and Benson are the Respondent's only Oregon employees who filed workers' compensation claims between January 1995 and December 1997 and were discharged based on circumstances related to their injuries.

71) Peck, Avers, Egging, Bigley, Martin, Cappaccio, Panek, Bouman, and Yap-Sam were credible witnesses.

72) Paul Landis still works for Respondent. His casual attire suggested he did not take the proceedings seriously. However, the forum found his testimony credible.

73) Although "Beau" Benson had reason to carry a grudge against Respondent based on the circumstances of his discharge, that event did not appear to color his testimony. His testimony regarding Respondent's knife/cut glove policy was consistent with other witnesses, and his testimony that Bigley, Johnson, and Landis were aware that he did not always use the cut glove while working on the line was corroborated by Exhibits R-40 and R-41. Consequently, the forum has found his testimony to be credible.

74) Aaron Zweig's testimony was not entirely credible. His testimony concerning the practical difficulties in wearing a cut glove was exaggerated. His testimony that dishwashers were supposed to clean knives used by the cooks was contrary to the testimony of every other witness. He also testified initially that he worked for Respondent in late August 1998, later correcting the date to September 1997 when he was handed Exhibit A-32 to identify. However, his testimony concerning Respondent's cut glove policy was consistent with that given by the other witnesses. He was not the only witness who testified that he did not use a cut glove when cutting prime rib with a knife, and that he received correction on those occasions where he was

observed. Consequently, the forum has credited his testimony that he did not use a cut glove on occasion while using a knife and received verbal correction on those occasions where he was observed.

75) Complainant's testimony concerning his knowledge and understanding of Respondent's cut glove policy and the circumstances of his employment and discharge was credible. However, his testimony concerning the impact of his discharge on his life, which was in large part financial, tended to be exaggerated and unrealistic. The most obvious example was his testimony on direct that he was "living in the dark with no phone line and no TV" as a result of his discharge. On cross, he admitted that he did not own a television before his discharge and the "living in the dark" was a figurative reference to his state of mind, not the literal state of his life. He also attributed all of his financial distress to his discharge, when the evidence clearly showed that Complainant was in financial distress before his discharge. His testimony concerning his mitigation efforts also lacked sincerity when viewed in light of the large number of job openings in the local area he was qualified for and aware of subsequent to his discharge but did not pursue. In short, the forum has credited Complainant's testimony regarding his mental suffering and mitigation efforts only where it is supported by reason and not contradicted by other credible evidence.

ULTIMATE FINDINGS OF FACT

1) At all material times, Respondent ARG Enterprises, Inc. was a foreign corporation operating eating and drinking places under the assumed business name of Stuart Anderson's Restaurants, and employed six or more persons in the state of Oregon.

2) At all material times, Complainant was employed by Respondent at Stuart Anderson's Black Angus restaurant in Eugene, Oregon.

3) Complainant cut his thumb with a knife at work on October 24, 1997, and invoked or utilized the procedures provided for in ORS Chapter 656 the next day.

4) On November 3, 1997, Complainant was released to return to work. Complainant reported to work and was discharged by Stuart Anderson's.

5) Complainant was informed that he was discharged for violating Stuart Anderson's policy requiring kitchen employees to wear a cut glove while using a knife.

6) Since 1995, Stuart Anderson's has had a policy that all kitchen employees must wear a cut glove when using a knife. All kitchen employees in Eugene in 1997, including Complainant, were aware that they were required to wear a cut glove when cutting with a knife, but not all were aware that they were required to wear a cut glove when cleaning a knife.

7) Complainant was cleaning a knife at the time he cut himself and was not wearing a cut glove. Complainant was not aware that he was required to wear a cut glove when cleaning a knife.

8) Other dishwashers and cooks employed by Stuart Anderson's in 1997 who did not file workers' compensation claims⁶ sometimes did not wear a cut glove while cutting with a knife and were verbally instructed by the kitchen supervisory staff to wear a cut glove whenever cutting with a knife. This includes one cook who cut himself twice, but did not file a workers' compensation claim. One cook was given a written warning for not using a cut glove when cutting with a knife after receiving prior verbal warnings from Bigley, the general manager, for the same violation.

9) Complainant is the only kitchen employee discharged by Stuart Anderson's for violating the cut glove policy.

10) Complainant was discharged because of his invocation and utilization of the procedures in ORS chapter 656.

11) Complainant suffered lost wages and experienced mental suffering as a result of his discharge.

⁶ "Beau" Benson did file a workers' compensation claim; however, his injury was unrelated to his violations of Respondent's cut glove policy. See Finding of Fact – The Merits #65, *supra*.

CONCLUSIONS OF LAW

1) At all material times, Respondent was an employer who employed six or more persons in the state of Oregon and was subject to the provisions of ORS 659.010 to 659.110 and 659.400 to 659.435.

2) OAR 839-006-0120 provides:

“To be protected under ORS 659.410, a person must be a worker as defined in OAR 839-006-0105(4)(a).”

OAR 839-006-0105(4)(a) defines “worker” as follows:

“‘Worker’ means any person * * * who engages to furnish services for a remuneration, subject to the direction and control of an employer * * *.”

Complainant was a worker entitled to the protection of ORS 659.410.

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

4) The actions and inactions of Randy Panek, Daryl Bigley, Paul Landis, and Mark Johnson, described herein, are properly imputed to Respondent.

5) ORS 659.410(1) provides:

“It is an unlawful employment practice for an employer to discriminate against a worker with respect to hire or tenure or

any term or condition of employment because the worker has applied for benefits or invoked or utilized the procedures provided for in ORS chapter 656 or of ORS 659.400 to 659.460 or has given testimony under the provisions of such sections.”

Respondent discharged Complainant because of his invocation and utilization of ORS chapter 656 and, in doing so, violated ORS 659.410(1).

6) 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 under the facts and circumstances of this case to award Complainant lost wages resulting from Respondents’ unlawful employment practice and to award money damages for emotional distress sustained and to protect the rights of Complainant and others similarly situated. The sum of money awarded and the other actions required of Respondents in the Order below are appropriate exercises of that authority.

OPINION**INTRODUCTION**

The Agency alleges that Complainant was discharged based on his invocation and utilization of ORS chapter 656 after he cut himself at work with a knife. The Agency further alleges that Complainant is entitled to \$2,304 in lost wages and \$20,000 in mental suffering damages to compensate him for Respondent’s unlawful

employment practice. In reply, Respondent contends that Complainant was discharged based on a legitimate, non-discriminatory reason ("LNDR"), namely, violation of Respondent's cut glove policy. Respondent further alleges that Complainant failed to mitigate his damages and that any mental suffering experienced by Complainant was attributable to issues unrelated to Complainant's discharge.

PRIMA FACIE CASE

The Agency's prima facie case consists of the following elements:

"(a) The Respondent is a Respondent as defined by statute;

"(b) The Complainant is a member of a protected class;

"(c) The Complainant was harmed by an action of the Respondent;

"(d) The Respondent's action was taken because of the Complainant's protected class."

OAR 839-005-0010(1); see also In the Matter of Dan Cyr Enterprises, 11 BOLI 172, 178 (1993).

In this case, elements (a), (b), and (c) are undisputed. That leaves the forum to grapple with the issues of causation and the extent of harm suffered by Complainant that can be attributed to Respondent.

RESPONDENT'S ACTION WAS TAKEN BECAUSE OF COMPLAINANT'S PROTECTED CLASS.

The forum applies a different treatment analysis to determine if Respondent discharged Complainant because of his protected class. Different treatment occurs when:

"the Respondent treats members of a protected class differently than others who are not members of the protected class. When the Respondent makes this differentiation because of the individual's protected class and not because of legitimate, non-discriminatory factors, unlawful discrimination exists." *OAR 839-005-0010(2)(b).*

The Agency has the burden of proving that protected class membership was the reason for Respondent's alleged unlawful action. This burden can be met as follows:

"The Complainant begins this process [of proof] by showing harm because of an action of the Respondent which makes it appear that the Respondent treated Complainant differently than comparably situated individuals who were not members of the Complainant's protected class. The Respondent must then rebut this showing. If the Respondent fails to rebut this showing, the Division will conclude that substantial evidence of unlawful discrimination exists. If the Respondent does rebut the showing, the Com-

plainant may then show that the Respondent's reasons are a pretext for discrimination." OAR 839-005-0010(5).

In this case, the Agency met its initial burden by producing evidence that Complainant invoked or utilized the procedures provided in ORS chapter 656, that Complainant was discharged when he was released to return to work and attempted to return to work, and that other kitchen staff who engaged in same behavior that resulted in Complainant's discharge were not discharged.

Respondent's rebuttal to the Agency's prima facie case consisted of undisputed evidence that Complainant's injury was a direct result of his violation of Respondent's cut glove policy, that the cut glove policy was a legitimate part of Respondent's safety policy, and that it that it was regularly promulgated among and known by all employees, including Complainant.

Where a Respondent successfully presents evidence of an LNDR, the Agency may still prevail by proving that the proffered justification was a pretext for discrimination. Pretext can be established through credible evidence that similarly situated employees outside of the Complainant's protected class received favored treatment or did not receive the same adverse treatment.⁷

⁷ See *In the Matter of Howard Lee*, 13 BOLI 281, 290-91 (1994); *In the Mat-*

The Agency presented credible, un rebutted evidence that in 1997 at least five kitchen staff employed as dishwashers or cooks at the same restaurant Complainant worked at sometimes failed to wear a cut glove when cutting with a knife, in direct violation of Respondent's cut glove policy. Of these five employees, Damon Egging and Aaron Zweig testified that they were "reminded" or "instructed" to put on a cut glove when they were observed violating the cut glove policy, but did not testify who "reminded" or "instructed" them.⁸ Paul Avers testified that Mark Johnson, the sous chef who was in charge of the kitchen in the head chef's absence, "scolded" him for not wearing a cut glove and that he was "scolded" for actually cutting himself a couple of times with a knife while cutting without a cut glove. John Cappacio, Respondent's witness, testified that both Paul Landis, the head chef, and Johnson observed him cutting with a knife while not wearing a cut glove and they merely corrected him. None of these four ever received a written warning for their violations. Last but not least, "Beau" Benson was observed cutting with a knife with-

ter of Clackamas County Collection Bureau, 12 BOLI 129, 138-40 (1994). See also Lindeman and Grossman, *Employment Discrimination Law* (Third Edition) at 30-31 (1996).

⁸ Neither Ms. Lohr, Ms. Gordon, nor the ALJ asked the witnesses to name the individual(s) who "reminded" or "instructed" them.

out a cut glove “more than once” by Landis and Daryl Bigley before he was finally given a written warning in June 1997. Although Benson was discharged in September 1997, his discharge was unrelated to his documented violations of Respondent’s cut glove policy.

In comparison, Complainant had received no warnings that he was in violation of Respondent’s cut glove policy prior to his discharge, a fact that Bigley was aware of when he recommended that Complainant be discharged. For that matter, Complainant had never violated Respondent’s cut glove policy, as he understood it, prior to cutting himself on October 24, 1997.⁹

Complainant and Benson are the most clear-cut comparators. They were both employed in a similar period of time and both violated Respondent’s cut glove policy. Bigley, Respondent’s general manager, was aware of the violations, as were Landis and Johnson. After violating the cut glove policy more than once, Bigley received a written warning. In contrast, Complainant violated the cut glove policy once, injuring himself in the process, and was discharged. Cappaccio was employed in the same time period as Complainant and was observed violating the cut glove policy by Landis and Johnson, Respondent’s kitchen supervisory staff. However, they only instructed him

to wear the cut glove and administered no other discipline. Avers, who was employed by Respondent in early 1997, was scolded by Johnson for cleaning knives without wearing a cut glove, as well as for actually cutting himself while not wearing a cut glove when cutting with a knife, but received no other discipline. Zweig and Egging, who were both employed in the same time period as Complainant, both violated the cut glove policy and only received verbal correction. Complainant, who was discharged, invoked or utilized ORS chapter 656 as a direct result of his violation, whereas Benson, Avers, Cappaccio, Zweig, and Egging did not.

This evidence shows that Respondent’s kitchen staff who were similarly situated to Complainant received only verbal warnings for their first violation of Respondent’s cut glove policy, with the possibility of a written warning after the receipt of more than one verbal warning. In comparison, Complainant, the only employee who filed a worker’s compensation claim for an injury he suffered as a result of his violation, was discharged based on his first violation of Respondent’s cut glove policy. This comparative evidence is sufficient to establish that Respondent’s LNDR is pretextual, leading the forum to conclude that Respondent discharged Complainant because of his invocation or utilization of procedures provided for in ORS chapter 656.

⁹ See Findings of Fact – The Merits, ##16, 18-19, 27, 28, *supra*.

The forum notes Respondent also presented credible evidence that numerous other employees filed workers' compensation claims between January 1995 and December 1997.¹⁰ None of those employees except for Complainant and Benson were fired for circumstances related to their injuries.¹¹ These employees are comparators, and the forum has considered this evidence in evaluating the issue of causation. However, except for the statements contained in Findings of Fact – The Merits ##65-69, there was no other evidence presented concerning the circumstances of these employees' employment, whether any of these employees had ever violated Respondent's knife policy and, if so, to what extent, or whether they were injured as a result of violating Respondent's knife policy. Consequently, the forum concludes that, although these employees are comparators, they are not similarly situated comparators to the degree that Benson, Avers, Cappacio, Zweig, and Egging are, and has accordingly given this evidence lesser weight.¹²

¹⁰ See Finding of Fact – The Merits #64, *supra*.

¹¹ See Finding of Fact – The Merits #70, *supra*.

¹² See Lindeman and Grossman, *Employment Discrimination Law* (Third Edition) at 33 (1996) (“The critical issue when comparative evidence is offered is whether the comparisons are apt in light of all of the circumstances.”)

DAMAGES

A. Back Pay.

Where a respondent commits an unlawful employment practice under ORS chapter 659 by discharging a complainant, the forum is authorized to award the complainant back pay, absent unusual circumstances.¹³ The purpose of a back pay award is to compensate a complainant for the loss of wages and benefits that the complainant would have received but for the respondent's unlawful discrimination. *In the Matter of Salem Construction Company, Inc.*, 12 BOLI 78, 90 (1993). A complainant in an employment discrimination case who seeks back pay is required to mitigate damages by using “reasonable diligence in finding other suitable employment.”¹⁴ *In the Matter of City of Portland*, 6 BOLI 203, 210-11(1987). Where the forum determines that a back pay award is appropriate, a respondent bears the burden of proof to show that a complainant failed to mitigate his or her damages. *In the Matter of Thomas Myers*, 15 BOLI 1, 16

¹³ For example, where the complainant obtains a comparable or higher paying job the next working day after the discharge and suffers no loss of salary, wages, or fringe benefits.

¹⁴ The forum notes that a complainant's failure to exercise reasonable diligence in finding other suitable employment does not negate an entitlement to back pay, but may reduce a back pay award if the respondent proves the complainant's failure to mitigate.

(1996). To meet this burden, a respondent must prove that the complainant failed to use reasonable care and diligence in seeking employment and that jobs were available which, with reasonable diligence, the complainant could have discovered and for which the complainant was qualified.¹⁵

The Agency established Complainant's entitlement to back pay by proving that he was discharged in violation of ORS 659.410 and that he did not obtain substantially equivalent employment until January 1998. Therefore, the issue is not whether Complainant is entitled to back pay, but the amount of the award. While employed by Respondent, Complainant earned \$6.00 per hour and worked an average of 31 hours per week, for average gross weekly earnings of \$186.00.¹⁶

¹⁵ See *In the Matter of Veneer Services, Inc.*, 2 BOLI 179, 186 (1981), affirmed without opinion, *Veneer Services, Inc. v. Bureau of Labor and Industries*, 58 Or App 76 (1982). See also *EEOC v. Farmer Bros. Co.*, 31 F.3d 891, 906 (9th Cir. 1994)(to prevail on a motion for summary judgment that plaintiff in a sex discrimination case failed to mitigate her damages, defendant had to prove that "during the time in question there were substantially equivalent jobs available, which [plaintiff] could have obtained, and that she failed to use reasonable diligence in seeking one.")

¹⁶ These calculations are derived from figures in Finding of Fact – The Merits #44. The forum has used the hours worked in the four week time period extending from 9/16/97 to 10/13/97 as

The forum will use this figure as a base in calculations of how much back pay Complainant should be awarded.

Complainant testified that he sought work after his discharge by looking through the local newspaper for a job he was qualified for with late afternoon and evening hours, but he was unable to find employment until approximately a month later at a job that paid \$70 per week. He testified that there were jobs available during his period of unemployment, but he couldn't qualify for them or there was some reason that he couldn't get to the job.¹⁷ He did not testify as to any specific places of employment that he contacted or made application with after his discharge, with the exception of the job that he obtained a month later.

Respondent presented considerable evidence in an attempt to prove that Complainant failed to mitigate. To meet its burden of proof that Complainant failed to mitigate, Respondent's evidence must prove that Complainant failed to use reasonable care and diligence in seeking employment *and* that jobs were available which, with reasonable diligence, Complainant could have discov-

representative of the average hours worked by Complainant.

¹⁷ He testified that having his car repossessed limited the geographical area in which he was able to work, and that he needed a job within walking distance.

ered and for which Complainant was qualified.¹⁸

Whether or not Complainant used reasonable care and diligence in seeking employment can be determined by a scrutiny of the steps Complainant took in seeking alternative employment. According to Complainant, he conducted his job search by looking through the local newspaper's want ads, the same way he located Respondent's job. He found jobs he was qualified for, but for one reason or another, none of the jobs were suitable. These reasons included his lack of an automobile,¹⁹ his difficulty in getting to a business to fill out an application during business hours, and hours that did not mesh with his classes, which concluded at 3-4 p.m. each day. The Agency presented no evidence that Complainant actually contacted any of the employers advertising in the help

wanted ads or any other prospective employer during his period of unemployment. Exhibit R-16 clearly demonstrates that from November 3, 1997, onwards, a number of jobs were advertised in the local newspaper that Complainant was qualified to perform and that meshed with his school schedule. In addition, there were numerous jobs advertised that Complainant was qualified to perform that may have met Complainant's job requirements, had he bothered to make inquiry. Finally, the forum notes that the work-study job Complainant finally obtained involved data entry, a skill totally unrelated to any of Complainant's prior work experience. The forum concludes that Complainant did not exercise reasonable diligence in seeking alternative employment by rejecting numerous advertised jobs that he was qualified to perform without making further inquiry.²⁰

The second question the forum must answer in determining whether or not Complainant failed

¹⁸ See fn. 12, *supra*, and accompanying text.

¹⁹ The forum discounts Complainant's testimony that lack of an automobile hampered his geographical mobility, and takes official notice that, even if Complainant's car had not been repossessed, Complainant was not legally able to drive it, based on his lack of auto insurance. *ORS 806.010*. The forum also notes that Complainant had a bicycle, which he used to ride to work on the date of his discharge, and that the Eugene-Springfield area has a public bus system that goes to all major locations in the metropolitan area and has several stops around the U of O. See Finding of Fact – The Merits #53, *supra*.

²⁰ See *Booker v. Taylor Milk Co.*, 64 F.3d 860, 865 (3rd Cir.1995)(Plaintiff failed to exercise reasonable diligence in seeking alternative employment where it appeared he "did little more than register with the job Service and look through the help-wanted ads.") Cf. *EEOC v. Service News Co.*, 898 F.2d 958, 963 (4th Cir. 1990)("Looking through want ads for an unskilled position, without more, is insufficient to show mitigation, and the back pay award should accordingly be reduced.")

to mitigate his back pay damages is whether jobs were available that, with reasonable diligence, Complainant could have discovered and for which Complainant was qualified. The forum has already discussed this subject in some detail in the preceding analysis concerning Complainant's failure to exercise reasonable care and diligence in seeking employment. The Register-Guard help wanted ads establish that jobs were available that Complainant was qualified to perform. Whether or not Complainant could have discovered them was answered by Complainant when he testified that he conducted his job search efforts by looking at those very newspaper ads. In short, undisputed evidence compels the conclusion that there were jobs available that, with reasonable diligence, Complainant could have discovered and for which he was qualified.

The forum concludes that Respondent has met its burden of proof in showing that Complainant failed to mitigate his back pay damages, and that Complainant's back pay award must be reduced as a result. The next step is determining the amount of the reduction.

The Agency sought back pay damages of \$2,034, which would have compensated Complainant for his lost wages from November 3, 1997, through early January 1998 when he began working at Safeway, less the \$210 he earned at his U of O work study job. Respondent's expert witness, Susan

Martin, credibly testified that Complainant should have been able to find work as a dishwasher within one week after his discharge. The numerous help wanted ads, starting on the day of Complainant's discharge, bolster this conclusion, and the forum has accepted it as fact.²¹ Where a complainant limits his job search to a scrutiny of help wanted ads in the local newspaper, and those ads list suitable jobs that match the complainant's qualifications, but the complainant makes no further inquiry into those jobs, the forum will not require a respondent to prove the dates those jobs were filled, their specific wage rates, and specific shift where the respondent has already met its burden of proof of showing that the complainant failed to mitigate his back pay damages. The forum awards Complainant one week of back pay damages, or \$186.00.

B. Mental Suffering.

In determining damages for mental suffering, 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." *In the Matter of Vision Graphics and Publishing, Inc.*, 16 BOLI 21, 27 (1997). While prior cases serve as examples of the types of awards that are within the Commissioner's range of discretion,

²¹ See Finding of Fact – The Merits #54, *supra*.

because damages for mental suffering are purely compensatory, the amount to be awarded in any given case is completely dependent upon the facts proved. *In the Matter of Tomkins Industries, Inc.*, 17 BOLI 192, 210 (1998), *appeal pending*.

On November 3, 1997, when Complainant was discharged, he felt he was "building a life in Oregon" for the first time, in that working at a job while going to school made him feel that Oregon was his home. His discharge and resulting unemployment caused him feel that his life was not integrated to the extent it had been before his discharge. He suffered financial stress after his discharge, some of which can be attributed to his unlawful discharge. Because of his financial stress, he was unable to meet his financial obligations and had to get food from a church before he was able to get food stamps, lost his telephone, couldn't afford to take his girlfriend out, and incurred a number of debts that took him a year to pay off. These consequences caused him to experience upset, humiliation, and feelings of degradation. These are all types of mental suffering for which the forum has awarded mental suffering damages in the past.

In computing an award of mental suffering damages, the forum must also consider other factors in Complainant's life, unrelated to his discharge, that may have contributed to his mental suffering. In this case, there were a variety of

circumstances and events unrelated to Complainant's discharge that may have contributed to his post-discharge mental suffering.

Complainant experienced various personal problems prior to his discharge. He broke up with his girlfriend in September 1997. He was evicted from his fraternity in October 1997 after being brought up before his fraternity's standards board and having testimony given against him. He was on academic probation at the U of O during the entire time he was employed by R. He also testified that he experienced ongoing stress from 1995 until sometime after his discharge from his parent's divorce. Clearly, this was a young man already carrying considerable emotional baggage at the time of his discharge. Despite this baggage, the weight of the evidence indicates that the post-discharge mental suffering experienced by Complainant was *in addition* to his pre-existing distress.

Complainant testified that the majority of his mental suffering stemmed from his post-discharge financial distress. The evidence showed he was already experiencing acute financial stress prior to his discharge. He was responsible for all his own expenses except for tuition and rent. By the time of his discharge, his VISA card was already charged to its limit and he was unable to pay all of his bills even with the income he earned from Respondent. In addition, his car insurance had been cancelled in September

1997 because he couldn't afford it. He had a car wreck in September 1997 while driving as an uninsured driver and had to get \$1600 from his parents to fix his car and reimburse the other driver.

In fashioning an award of damages based on Complainant's financial distress, the forum must consider his pre-discharge financial difficulties as well as the fact that he could have reduced the mental suffering associated with his post-discharge financial hardships by exercising reasonable care and diligence to find another job. Therefore, Complainant's entitlement to mental suffering damages due to financial stress should be limited by his failure to mitigate his back pay loss. However, the forum has concluded that he would have been unemployed for one week, regardless of his mitigation efforts. Based on Complainant's tenuous financial standing at the time of his discharge, the forum infers that the absence of a paycheck for one week would have had a trickle-down effect for some time afterward, contributing financial stress.

In addition to emotional stress caused by finances, the added emotional distress caused by the discharge itself,²² though less tangible, is also compensable, and the forum finds Complainant is entitled to damages based on that emotional distress.

Seven weeks after his discharge (around December 25, 1997), Complainant was disqualified as a student at the U of O, which caused additional disruptions in his life. However, Complainant was already on academic probation at the U of O when he went to work for Respondent and remained on probation throughout his employment. The evidence is insufficient to allow the forum to determine the extent to which Respondent's discharge may have contributed to his disqualification. Consequently, any mental suffering resulting from his disqualification from school is not compensable.

The Agency prayed for an award of \$20,000 to compensate Complainant for his mental suffering. Based on the evidence presented in this case, the forum concludes that \$12,500 is an appropriate award of damages for mental suffering.

ORDER

NOW, THEREFORE, as authorized by ORS 060(3) and 659.010(2), and in order to eliminate the effects of the unlawful practices found in violation of ORS 659.410 and as payment of the damages awarded, Respondent ARG Enterprises, dba Stuart Anderson's Restaurants, is hereby ordered to:

- 1) Deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232-2162, a certified check payable to the Bureau of Labor

²² See Finding of Fact – The Merits #54, *supra*.

and Industries, in trust for Complainant Christopher Caires, in the amount of:

a) ONE HUNDRED EIGHT SIX DOLLARS (\$186.00), less lawful deductions, representing wages lost by Complainant between November 3, 1997, and November 10, 1997, as a result of Respondent's unlawful practices found herein, plus

b) TWELVE THOUSAND FIVE HUNDRED DOLLARS (\$12,500.00), representing compensatory damages for mental suffering as a result of Respondent's unlawful practices found herein, plus

c) Interest at the legal rate from November 10, 1997, on the sum of \$186.00 until paid, and

d) Interest at the legal rate on the sum of \$12,500.00 from the date of the Final order until Respondent complies herewith.

2) Cease and desist from discriminating against any employee based on the employee's utilization or invocation of ORS chapter 656.

**In the Matter of
Tomas Benitez**

Case No. 14-00

Final Order of the Commissioner
Jack Roberts

Issued January 7, 2000

SYNOPSIS

Respondent was a farm labor contractor from the mid 1980s until the commissioner refused to renew his license in 1996 and prohibited him from applying for another license for three years. Despite the fact that he had no license, Respondent acted as a farm labor contractor on six different occasions in 1996, 1997, 1998, and 1999. The commissioner imposed penalties totaling \$9500.00 for those six violations of ORS 658.410(1). In addition, while Respondent was acting as a farm/forest labor contractor, he failed to provide 88 workers with statements of their rights, in violation of ORS 658.440(1)(f), and also failed to execute written agreements with these workers, in violation of ORS 658.440(1)(g). The commissioner ordered Respondent to pay a civil penalty of \$250.00 for each of these 176 violations, for a total of \$44,000.00. The Commissioner also found that Respondent's character, competence and reliability made him unfit to act as a farm labor contractor, and denied his application for a farm labor contractor's license. ORS 658.405, ORS 658.410(1), ORS 658.440(1)(f)-(g), ORS 658.453(1), OAR 839-015-0004, OAR 839-015-0145, OAR 839-015-0508, OAR 839-015-0510, OAR 839-015-0512, OAR 839-015-0520.

The above-entitled case came on regularly for hearing before Erika L. Hadlock, designated as Administrative Law Judge ("ALJ")

by Jack Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on November 16 and 17, 1999, at the Bureau of Labor and Industries office at 3865 Wolverine Street, NE, Salem, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by Cynthia Domas, an employee of the Agency. Respondent Tomas Benitez was present throughout the hearing and was not represented by counsel. A certified and qualified Spanish interpreter translated the entire proceedings for Respondent's benefit.

The Agency called as witnesses: Respondent; Paula Benitez, Respondent's wife; Karen Guthrie, an employee of Holiday Tree Farms, Inc.; Agency employees Kay Nichols, Enrique Hidalgo, Katy Bayless, and Rolando Ramirez; Spanish interpreter Terry Rogers; and CEBECO International Seeds, Inc., employee Clifford King. Respondent called himself and Paula Benitez as witnesses.

The forum received into evidence:

a) Administrative Exhibits X-1 through X-32 (filed or generated prior to hearing), X-33 (submitted at hearing), and X-34 to X-35 (filed or generated after the hearing).

b) Agency Exhibits A-1 through A-10 and A-7a (submitted prior to hearing with the Agency's case summary) and A-4a, A-10b

and A-11 through A-17 (submitted at hearing). The Agency did not offer, and the forum did not receive, the document initially labeled as Exhibit A-10 submitted with the Agency's November 12, 1999, addendum to its case summary, later labeled Exhibit A-10A.

c) Respondent's Exhibits R-4 through R-9 and R-11 (submitted prior to hearing with Respondent's case summary). Respondent did not offer, and the forum did not receive, the documents labeled Exhibits R-1 through R-3 and R-10 that Respondent filed with his case summary.

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

FINDINGS OF FACT – PROCEDURAL

1) On or about August 24, 1999, the Administrator of the Wage and Hour Division issued a Notice of Intent to Refuse to Issue Farm Labor Contractor License and to Assess Civil Penalties, naming Tomas Benitez as Respondent. The Division alleged that: 1) on six different occasions, Respondent acted as a farm labor contractor when he did not have a valid farm labor contractor's license; 2) Respondent failed to provide 89 workers with a written statement containing the informa

tion required by ORS 658.440(1)(f); and 3) Respondent failed to execute written agreements with those workers as required by ORS 658.440(1)(g). The Division sought a total of \$363,500.00 for these alleged violations. The Division also asked the forum to find that Respondent was unfit to act as a farm labor contractor because of his lack of character, competence, and reliability, and to refuse to issue Respondent a farm labor contractor license.

2) The Agency served Respondent with the Notice of Intent on August 24, 1999.

3) On or about September 7, 1999, Respondent filed an Answer and requested a hearing regarding the matters alleged in the Notice of Intent.

4) The Agency requested a hearing on September 24, 1999.

5) On September 30, 1999, the forum issued a Notice of Hearing setting forth the time and place for hearing in this case. The Notice of Hearing identified "Tomas Benetiz" as Respondent. With the Notice of Hearing, the forum included a "SUMMARY OF CONTESTED CASE RIGHTS AND PROCEDURES" and a copy of the forum's contested case hearings rules, OAR 839-050-0000 to 839-050-0440.

6) By order dated October 11, 1999, the forum asked the participants to clarify the spelling of Respondent's last name in the case caption. The Agency promptly informed the forum that

Benitez spells his name B-E-N-I-T-E-Z and moved for a correction of the case caption to reflect that spelling. Respondent confirmed that his last name was spelled B-E-N-I-T-E-Z in a letter the Hearings Unit received on October 20, 1999. The forum later issued an order correcting the case caption to accurately reflect the spelling of Respondent's name.

7) By letter dated October 12, 1999, the Agency informed the forum that it had misspelled the name of the street in Respondent's address – 88389 Walterville Loop, Springfield, OR. The next day, the Agency informed the forum by e-mail that it understood that Respondent wished to have his mail sent to a different address. The forum disclosed this *ex parte* contact by order dated October 14, 1999, and ordered Respondent to notify the Hearings Unit in writing of the address to which he preferred mail be sent. Respondent confirmed that his correct address was 88389 Walterville Loop in a letter the Hearings Unit received on October 20, 1999.

8) On October 11, 1999, the forum ordered the Agency and Respondent each to submit a case summary including: a list of all witnesses to be called; the identification and description of any documents of physical evidence to be offered, together with a copy of such document or evidence; a brief statement of the elements of the claim (for the Agency only); a brief statement of any defenses to the claim (for Re-

spondent only); a statement of any agreed or stipulated facts; and any wage, damages, or penalty calculations (for the Agency only). The forum enclosed a form designed to help *pro se* respondents comply with case summary orders. Respondent and the Agency filed timely case summaries.

9) The Agency filed a motion for discovery order on October 27, 1999. Two days later, the forum granted that motion and issued a discovery order requiring Respondent to produce certain documents that the forum found were relevant to the case. On November 3, Respondent filed objections to the Agency's motion, which the forum construed as a motion for reconsideration of its discovery order. The forum denied the motion for reconsideration and adhered to its earlier determination that the requested documents were relevant to the allegations in the Notice of Intent.

10) On October 31, 1999, Respondent notified the forum that he intended to have his wife, Paula Benitez, serve as his "authorized representative" during the hearing. The forum denied that request, noting that only corporations, partnerships, and other associations were entitled to be represented by "authorized representatives." See ORS 183.457(1), (5).

11) On October 31, 1999, Respondent requested the services of a Spanish interpreter during the hearing. The forum

granted that request by order dated November 4, 1999.

12) On November 5, 1999, the forum granted Respondent's request for the issuance of subpoenas to Nichols and Hernandez, noting that Respondent's request suggested that the two individuals might have information related to the case. The forum sent the subpoenas to Respondent along with an order that stated, in pertinent part:

"The forum has enclosed subpoenas for Hernandez and Nichols. **It is Respondent's responsibility to serve the subpoenas and to pay applicable witness and mileage fees in accordance with ORCP 55D and ORS 44.415(2) (copies enclosed).** The subpoenas have no effect unless and until they are properly served."

Respondent did not call either Hernandez or Nichols to testify at the hearing.

13) On November 12, 1999, the Agency asked the forum to reconsider its order granting Respondent the services of an interpreter. The Agency argued that Respondent could speak English fluently and that Respondent's request for an interpreter was untimely because it was not filed 20 days prior to hearing.

14) Later on November 12, the forum issued an order granting, in part, the Agency's motion for reconsideration of the order granting Respondent's request for an interpreter. The forum rejected

the Agency's argument that it should deny Respondent's request as untimely, holding that it had inherent authority to consider late-filed requests, especially where, as here, the Hearings Unit already had arranged for the services of an interpreter at the Agency's request (for translation of documents). The ALJ stated that she would rule at the beginning of the contested case hearing whether Respondent was able to speak English effectively enough so that he was not entitled to the services of an interpreter.

15) On November 12, 1999, the Hearings Unit received an envelope from Respondent addressed to the Hearings Unit. The ALJ opened the envelope and discovered that the letter in it was addressed to case presenter Domas. The ALJ asked another case presenter, David Gerstenfeld, to read the letter and determine whether it was supposed to go to the Hearings Unit or to Domas. Gerstenfeld determined that the letter was meant only for Domas. The ALJ sent copies of the letter to Domas by facsimile transmission and state shuttle service and – without reading the letter -- retained the original letter and envelope in a sealed envelope in the hearing file. The ALJ issued an order asking Respondent to notify her if he had meant the ALJ to review the letter to Domas. At the beginning of the contested case hearing, Respondent reviewed the letter in the envelope and confirmed that it was, in fact, meant for Domas and

not for the Hearings Unit.

16) In the same order mentioned in the preceding Finding, the forum noted that the case presenter had not been served with a copy of Respondent's request for an interpreter. The forum reminded Respondent to send the case presenter a copy of any document he filed with the Hearings Unit and to indicate on any document filed with the Hearings Unit that he had, in fact, served the case presenter with a copy.

17) At the beginning of the hearing, the ALJ had a short conversation with Respondent in which she determined that he was able to speak conversational English. However, the ALJ also found that Respondent did not read much English and would be able to participate effectively in the hearing, which involved subtle legal and factual issues, only with the services of an interpreter. Accordingly, the ALJ appointed a certified and qualified interpreter to translate the entirety of the proceedings for Respondent. The ALJ noted that she was not prejudging or ruling on Respondent's ability to conduct business in English, to the extent that might be an issue in the case.

18) At the start of the hearing, Respondent stated that he had no questions about the Notice of Contested Case Rights and Procedures.

19) Pursuant to ORS 183.415(7), the ALJ verbally advised the Agency and Respondent of the issues to be addressed, the

matters to be proved, and procedures governing the conduct of the hearing.

20) During the lunch break on the first day of hearing, the participants agreed to stipulate to the allegations in paragraphs 1, 2, 3, 6, 7, and 8 of the Notice of Intent. The case presenter read the stipulations into the record after the break and Respondent acknowledged his agreement with the case presenter's reading of the stipulations.

21) On July 22, 1999, the forum issued a Final Order Based on Informal Disposition in *In the Matter of Holiday Tree Farms, Inc.*, Case Number 49-99. That order reflected a settlement agreement between the Agency and Holiday Tree Farms, Inc., in which Holiday Tree Farms, Inc., admitted that it had contracted for the services of four unlicensed farm labor contractors, including Respondent. During the November 1999 hearing in the case against Respondent, the Agency called Karen Guthrie, an employee of Holiday Tree Farms, Inc., as a witness and asked her whether she ever had given written statements of rights to workers that Respondent supplied in 1998 or had entered into written agreements with those workers. Paul Connolly, attorney for both Guthrie and Holiday Tree Farms, objected to the Agency's questions regarding Guthrie's failure to supply workers with statements of their rights and written agreements on the ground that she had a Fifth Amendment right not to testify re-

garding these matters. The ALJ overruled the objection and ordered Guthrie to testify, which she did.

22) Connolly also objected to the introduction of certain Holiday Tree Farms records on the basis that the Agency improperly had contacted Holiday Tree Farms directly, rather than contacting the company through its counsel. Connolly also claimed that the documents were obtained improperly because the Agency obtained them in preparation for hearing and did not get them by use of a subpoena, by consent of Holiday Tree Farms through counsel, or "voluntarily without counsel." The ALJ asked whether there had been a pending proceeding against Holiday Tree Farms at the time of the alleged improper contact by the Agency. Connolly conceded that there had not been and that the Final Order already had issued in Case Number 49-99 when the contact occurred. The ALJ overruled the objection and that ruling is hereby affirmed.

23) The evidentiary record closed on November 17, 1999.

24) The ALJ issued a proposed order on December 13, 1999, that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. Respondent filed timely exceptions, which are addressed in the Opinion section of this Final Order.

FINDINGS OF FACT – THE MERITS

1) Respondent first was licensed as an Oregon farm labor contractor in the mid-1980s.

2) In 1996, the Commissioner of the Bureau of Labor and Industries denied Respondent's application to renew his farm labor contractor's license, finding that Respondent did not have the necessary character, competence, or reliability to act as a farm labor contractor. The commissioner's decision was based on Respondent's failure to comply with federal and state laws related to the payment of income taxes, workers' compensation insurance premiums, and unemployment compensation taxes and fees. The commissioner also prohibited Respondent from applying for a new farm labor contractor's license for three years. See *In the Matter of Tomas O. Benitez*, 15 BOLI 19 (1996). As a result of this order, Respondent has not had a farm labor contractor's license since March 14, 1996.

3) On or about November 2, 1996, Respondent contracted with Holiday Tree Farms, Inc., ("Holiday Tree Farms") to supply approximately 75 workers to Holiday Tree Farms for the harvesting of Christmas trees. A portion of the written contract specified that Holiday Tree Farms would pay Respondent a certain amount of money for each hour worked by "crew he provides." Respondent did supply the workers to Holiday Tree Farms, which paid him at the agreed rate. Respondent and the

Agency stipulated that Respondent acted as a farm labor contractor with respect to the 1996 Holiday Tree Farms job.

4) At all material times, the headquarters for Holiday Tree Farms was located in Corvallis, Oregon.

5) On or about May 21, 1997, Respondent contracted with Harnisch Farms, Inc., ("Harnisch Farms") to supply workers to Harnisch Farms for the transplanting of rhubarb, and did supply those workers. Respondent and the Agency stipulated that Respondent acted as a farm labor contractor with respect to the 1997 Harnisch Farms job.

6) At all material times, the headquarters for Harnisch Farms was located in Albany, Oregon.

7) On or about October 18, 1997, Respondent contracted with Holiday Tree Farms to supply approximately 75 workers to Holiday Tree Farms for the harvesting of Christmas trees. Again, Holiday Tree Farms agreed to pay Respondent a specified amount of money for each hour worked by "crew he provides." Respondent and the Agency stipulated that Respondent acted as a farm labor contractor with respect to the 1997 Holiday Tree Farms job.

8) On or about November 6, 1998, Respondent contracted with Holiday Tree Farms to supply approximately 75 to 100 workers to Holiday Tree Farms for the harvesting of Christmas trees.

9) Respondent supplied 88 workers (not including himself) to Holiday Tree Farms in November 1998. He received a certain amount of money for each crew member he provided and, in addition, was paid an hourly wage. Respondent and the Agency stipulated that Respondent acted as a farm labor contractor with respect to the 1998 Holiday Tree Farms job.

10) ORS 658.440(1)(f) requires any person acting as a farm labor to give each worker, at the time of hiring, recruiting, soliciting or supplying, whichever occurs first, a written statement that describes certain terms and conditions of employment, including: the terms and conditions of employment, including the approximate length of season or period of employment and its approximate starting and ending dates; 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; and the worker's rights and remedies under the worker's compensation laws, the farm and forest labor contractor laws, the Federal Service Contracts Act, the federal and Oregon minimum wage laws, the Oregon wage collection laws, the unemployment compensation laws, and civil rights laws.

11) ORS 658.440(1)(g) requires farm labor contractors to execute written agreements with workers containing certain terms and conditions, including those

outlined in the previous Finding. These agreements must be executed at the time of hiring and prior to the worker performing any work for the farm labor contractor.

12) The Agency has developed forms that farm labor contractors may use to fulfill the requirements of ORS 658.440(1)(f) and (g) – Form WH-151 and Form WH-153, respectively. Farm labor contractors may use these forms or may develop their own statements of rights and agreements with workers that contain all the elements of the Agency forms.

13) Respondent did not give any of the workers he supplied to Holiday Tree Farms in November 1998 either Form WH-151 or another document stating the workers' rights, as required by ORS 658.440(1)(f). Respondent did not enter into written agreements with the workers using either Form WH-153 or another document containing all of the elements required by ORS 658.440(1)(g).

14) Respondent believed he was not required to provide statements of rights to workers or enter written agreements with them because he was an employee of Holiday Tree Farms, not "a contractor." He believed that Holiday Tree Farms was responsible for providing these documents.

15) In 1998, Karen Guthrie was a Human Resources employee of Holiday Tree Farms and was responsible for giving em-

ployees paperwork to complete. Guthrie did not give statements of rights to the workers supplied by Respondent; nor did she enter into written agreements with them. Guthrie did not give Respondent copies of these documents to give to the workers.

16) Holiday Tree Farms gave Respondent application forms to give to the workers, which he had the workers complete. Those application forms did not include: the approximate length of season or period of employment and its approximate starting and ending dates; the address of Holiday Tree Farms; or a statement of the worker's rights and remedies under the worker's compensation laws, the farm and forest labor contractor laws, the Federal Service Contracts Act, the federal and Oregon minimum wage laws, the Oregon wage collection laws, the unemployment compensation laws, and civil rights laws.

17) Some documentation related to terms and conditions of work was posted at the Holiday Tree Farms job site in 1988. Respondent testified that the documentation included Form WH-151. One person who worked on the job, however, stated that he never had seen Form WH-151 before an Agency employee showed it to him. Moreover, no other evidence in the record establishes that each worker at Holiday Tree Farms had ready access to whatever information was displayed. The forum finds it unnecessary to make a

finding regarding whether Form WH-151 was posted at the job site because, even if it was posted, no evidence establishes that every worker had an opportunity to access the form and review the information it contained.

18) On April 23, 1999, Respondent filed an application for a farm labor contractor's license.

19) On or about May 10, 1999, Respondent contracted with Harnisch Farms to supply 60 workers to Harnisch Farms for the harvesting of rhubarb, and did supply those workers.

20) Harnisch Farms paid Respondent \$68.00 per hour. Bayless testified persuasively that farm labor contractors commonly receive a base rate of pay, plus a certain amount per hour for each worker they supply. The forum infers that the \$68.00 per hour Respondent received consisted of a base rate of \$8.00 per hour plus \$1.00 per hour for each of the 60 workers Respondent supplied. Respondent and the Agency stipulated that Respondent acted as a farm labor contractor with respect to the 1999 Harnisch Farms job.

21) Harnisch Farms paid Respondent as an employee, not as an independent contractor. In a letter to the Agency, Harnisch Farms stated that Respondent had not provided the company with an Oregon farm labor contractor's license because the company understood that it "was not using him as a contractor."

22) On or about June 16, 1999, Respondent contracted with CEBECO International Seed, Inc., ("CEBECO") to supply approximately 15 workers to CEBECO to rouge¹ a field of rye grass. At all material times herein, the principal office for CEBECO was located in Halsey, Oregon.

23) Respondent did supply the workers to CEBECO, which paid him at an agreed rate for the workers' services. Respondent and the Agency stipulated that Respondent acted as a farm labor contractor with respect to the CEBECO job.

24) Respondent entered into written agreements with the workers he provided to CEBECO using Spanish-language form WH-153S and gave them written statements of their rights using Spanish-language form WH-151S.

25) At some point, a dispute arose between Respondent and CEBECO regarding which of them was responsible for obtaining workers' compensation coverage for the workers Respondent supplied to CEBECO.

26) From 1996 through 1999, Respondent suffered some financial hardship as a result of losing his farm labor contractor's license and the need to pay debts to the Internal Revenue Service and other government agencies. Respondent acted as a farm labor contractor from 1996 through

1999 -- even though he knew that he did not have a license -- at least in part to alleviate this financial hardship.

27) No evidence in the record suggests that any worker suffered a loss in pay or other harm because of Respondent's failure to supply statements of rights to the workers or to enter into written contracts with them.

ULTIMATE FINDINGS OF FACT

1) The commissioner denied Respondent's application for renewal of his farm labor contractor's license on March 14, 1996, and prohibited him from applying for a new license for three years. Respondent has not had a farm labor contractor's license since March 14, 1996.

2) Respondent supplied workers to Holiday Tree Farms in November 1996 for the harvesting of Christmas trees and, in doing so, acted as a farm labor contractor.

3) Respondent supplied workers to Harnisch Farms in May 1997 for the transplanting of rhubarb and, in doing so, acted as a farm labor contractor.

4) Respondent supplied workers to Holiday Tree Farms in November 1997 for the harvesting of Christmas trees and, in doing so, acted as a farm labor contractor.

5) Respondent supplied Holiday Tree Farms with 88 workers in November 1998, plus himself, for the harvesting of Christmas

¹ "Rouging" involves removing undesirable strains of grass from a field planted with grass grown for seed.

trees and, in doing so, acted as a farm labor contractor.

6) Respondent supplied workers to Harnisch Farms in May 1999 for the harvesting of rhubarb and, in doing so, acted as a farm labor contractor.

7) Respondent supplied workers to CEBECO in June 1999 for the rouging of a field of rye grass and, in doing so, acted as a farm labor contractor.

8) Each time Respondent supplied workers to farmers from November 1996 through June 1999, he did so with full knowledge that he no longer had a farm labor contractor's license.

9) Respondent did not furnish any of the 88 workers on the 1998 Holiday Tree Farms contract, at the time of hiring, recruiting, soliciting or supplying, a written statement of workers' rights that included all statutorily required information.

10) Respondent did not execute Form WH-153 or any written agreement incorporating the statutorily required information with any of the 88 workers on the 1998 Holiday Tree Farms contract, at the time of hiring and prior to the worker performing work on the contract.

11) Respondent knew or should have known that he was legally required to supply workers with written statements of their rights and to execute written agreements with them. Respondent's failure to take these actions was willful.

12) Respondent's repeated violations of ORS 658.410(1), 658.440(1)(f), and 658.440(1)(g) demonstrate that his character, competence and reliability make him unfit to act as a farm labor contractor.

CONCLUSIONS OF LAW

1) The Commissioner of the Bureau of Labor and Industries of the State of Oregon has jurisdiction over this matter and Respondent pursuant to ORS 658.407 and ORS 658.501.

2) ORS 658.405 provides, in pertinent part:

"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 or the production or harvesting of farm products; or who recruits, solicits, supplies or employs workers to gather evergreen boughs, yew bark, bear grass, salal or ferns from public lands for sale or market prior to processing or manufacture; or who recruits, solicits, supplies or employs workers on behalf of an employer engaged in these activities; or who, in connection with the recruitment or employment of workers to

work in these activities, furnishes board or lodging for such workers; 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. * * *

OAR 839-015-0004 provides, in pertinent part:

"(3) 'Farm 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 production or harvesting of farm products;

"(b) Any person who recruits, solicits, supplies or employs workers for an employer who is engaged in the production or harvesting of farm products * * *

Respondent acted as a farm labor contractor on six occasions between November 1996 and June 1999: by supplying workers to Holiday Tree Farms for Christmas tree harvesting in 1996, 1997, and 1998; by supplying workers to Harnisch Farms in 1997 for rhubarb transplanting and in 1999 for rhubarb harvesting; and by supplying workers to CEBECO in 1999 for the purpose of rouging a field of rye grass.

3) ORS 658.410(1) provides, in pertinent part:

"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."

Respondent committed six violations of ORS 658.410(1) by acting as a farm labor contractor on the six occasions described above, when he did not have a valid farm labor contractor's license.

4) ORS 658.440(1) provides, in pertinent 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 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."

OAR 839-015-0310 provides:

"(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 comes 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."

Respondent committed 88 violations of ORS 658.440(1)(f) and OAR 839-015-0310 by failing to furnish 88 workers on the 1998 Holiday Tree Farms contract with a written statement of rights containing all the statutorily required information.

5) ORS 658.440(1) also provides, in pertinent part:

"Each person acting as a farm labor contractor shall:

"* * * * *

"(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 839-015-0360 provides:

"(1) Farm and forest labor contractors are required to file information relating to work agreements between the farm and forest labor contractors and their workers with the bureau.

"(2) The commissioner has developed Form WH-153 which, in conjunction with Form WH-151, Statement of Workers Rights and Remedies, can be used to comply with this rule. Farm and forest labor contractors may use any form for filing the information so long as it contains all the elements of Form WH-153 and Form WH-151.

"(3) Farm and forest labor contractors must file the form or forms used to comply with this rule with the bureau at the same time that the contractors apply for a license renewal.

"(4) 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 representation made by the contractor in recruiting the workers."

Respondent committed 88 violations of ORS 658.440(1)(g) and OAR 839-015-360(4) by failing to execute written agreements with the 88 workers on the 1998 Holiday Tree Farms contract at the time of hiring and prior to the workers performing work on that contract.

6) The Commissioner of the Bureau of Labor and Industries has the authority to assess a civil penalty not exceeding \$2000.00 against Respondent for each of

the violations. ORS 658.453(1)(a), (c), OAR 839-015-0508(1)(a), (g), (h).

7) With regard to the magnitude of the penalties for violations of ORS 658.410(1), OAR 839-015-0512 provides, in pertinent part:

"(2) For purposes of this rule, 'repeated violations' means violations of a provision of law or rule which have been violated on more than one contract within two years of the date of the most recent violation.

"(3) When the Commissioner determines to impose a civil penalty for acting as a farm or forest labor contractor without a valid license, the minimum civil penalty shall be as follows:

"(a) \$500 for the first violation;

"(b) \$1,000 for the first repeated violation;

"(c) \$2,000 for the second and each subsequent repeated violation."

Respondent first violated ORS 658.410(1) when he supplied workers to Holiday Tree Farms in 1996. The commissioner appropriately has assessed a \$500.00 penalty for that first violation, as ordered below. Respondent's second violation of the statute occurred when he supplied workers to Harnisch Farms in 1997. The commissioner appropriately has exercised his authority by assessing a \$1000.00 penalty for that

first repeated violation, as ordered below. For each of the remaining four repeat violations of ORS 658.410(1), the commissioner appropriately has exercised his authority by assessing civil penalties of \$2000.00.

8) Civil penalties for Respondent's violations of ORS 658.440(1)(f) and (g) are governed by OAR 839-015-0510, which provides:

"(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."

The commissioner has appropriately exercised his authority in imposing a \$250.00 penalty for each of the 176 violations of ORS 658.440(1)(f) and (g), as ordered below.

9) ORS 658.445 provides, in pertinent part:

"The Commissioner of the Bureau of Labor and Industries may revoke, suspend or refuse to renew a license to act as a labor contractor upon the commissioner's own motion or upon complaint by any individual, if:

"* * * * *

"(3) The licensee's character, reliability or competence makes the licensee unfit to act as a farm labor contractor."

OAR 839-015-0520 provides, in pertinent part:

"(1) The following violations are considered to be of such magnitude and seriousness that the Commissioner may propose to deny or refuse

to renew a license application or to suspend or revoke a license:

"* * * * *

"(i) Acting as a farm or forest labor contractor without a license.

"* * * * *

"(3) The following actions of a farm or forest labor contractor license applicant or licensee demonstrate that the applicant's or the licensee's character, reliability or competence make the applicant or licensee unfit to act as a farm or forest labor contractor:

"(a) Violations of any section of ORS 658.405 to 658.485[.]"

Respondent's repeated violations of ORS 658.410(1), 658.440(1)(f), and 658.440(1)(g) demonstrate that Respondent's character, competence and reliability make him unfit to act as a farm labor contractor.

10) OAR 839-015-0520(4) provides:

"(4) When a farm or forest labor contractor's license application is denied or a license is revoked or when the commissioner refuses to renew a license, the commissioner will not issue the applicant or licensee a license for a period of three (3) years from the date of the denial, refusal to renew or revocation of the license."

Under the facts of this case, the commissioner has authority to

deny Respondent's application for a farm labor contractor's license. Denial of Respondent's application for a farm labor contractor's license as specified in the order below is an appropriate exercise of that authority.

OPINION

ACTING AS A FARM LABOR CONTRACTOR WITHOUT A FARM LABOR CONTRACTOR'S LICENSE

A. The Alleged Violations

ORS 658.410(1) prohibits people from acting as farm labor contractors unless they are licensed. A person who supplies farm workers to another person acts as a farm labor contractor if he or she either: 1) supplies the workers "for an agreed remuneration or rate of pay" to work in the production or harvesting of farm products; or 2) supplies the workers "on behalf of an employer engaged in" the production or harvesting of farm products. A person supplies farm workers "on behalf of an employer" if he or she acts as the employer's agent when supplying the workers. *In the Matter of Thomas L. Fery*, 18 BOLI 220, 235-36 (1999).

In this case, the participants agree that Respondent has not had a farm labor contractor's license since March 14, 1996. They also stipulated that, on six occasions after that date, he acted as a farm labor contractor. The evidence in the record, as set forth in the Findings of Fact, supports that stipulation.

B. Civil Penalties

OAR 839-015-0512 provides that the minimum penalties for acting as a farm labor contractor without a license are \$500.00 for the first violation, \$1000.00 for the first repeat violation, and \$2000.00 for each subsequent violation. The forum has assessed penalties in accordance with this rule as follows: for the 1996 Holiday Tree Farms job, \$500.00; for the 1997 Harnisch Farms job, \$1000.00; for the 1997 Holiday Tree Farms job, \$2000.00; for the 1998 Holiday Tree Farms job, \$2000.00; for the 1999 Harnisch Farms job, \$2000.00; for the 1999 CEBECO job, \$2000.00. Thus, the penalties for Respondent's six violations of ORS 658.410(1) total \$9500.00.

RESPONDENT UNLAWFULLY FAILED TO EXECUTE WRITTEN AGREEMENTS WITH 88 WORKERS ON THE 1998 HOLIDAY TREE FARMS CONTRACT OR TO PROVIDE THEM WITH WRITTEN STATEMENTS OF THEIR RIGHTS

A. The Alleged Violations

ORS 658.440(1)(f) requires any person acting as a farm labor contractor to furnish each worker with a written statement of certain rights. Respondent did not provide any of the 88 workers on the 1998 Holiday Tree Farm contract with a written statement of rights that included all statutorily required information. The Holiday Tree Farms application forms the workers completed did not incur

porate some of the most important required information, including the explanation of the workers' rights under the civil rights, wage and hour, worker's compensation, and farm labor laws. Respondent also failed to provide any of the 88 workers with written agreements of any sort, much less agreements including all the information required by ORS 658.440(1)(g).

Respondent testified credibly that he believed he was not required to give the workers these documents because he was an employee of Holiday Tree Farms and, therefore, did not feel he was acting as a "contractor." Inclusion of the word "contractor" in the term "farm labor contractor" is unfortunate, given that a person qualifies as a "farm labor contractor" by engaging in certain activities, including the supplying of farm workers under specified circumstances, whether the person acts as a "independent contractor" of the farm or as its employee. A person not familiar with the detailed statutory definition of "farm labor contractor" could easily, but mistakenly, assume that it covered only independent contractors. Nonetheless, the statutory language is clear – a person acts as a farm labor contractor when he or she supplies farm workers to another either as that other's agent or for an agreed remuneration or rate of pay, whether or not the person is the other's employee. Respondent was obliged to understand the laws regulating the business in which he was engaged, including the statutory definition of "farm la-

bor contractor." That obligation was heightened by the fact that he had been a licensed farm labor contractor for approximately 10 years.

B. Civil Penalties

In considering the appropriate magnitude of the penalties for Respondent's 176 violations of ORS 658.440(1)(f) and (g) on the 1998 Holiday Tree Farm contract, this forum must consider aggravating and mitigating factors, including "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" (839-015-0510(3)) and:

"(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."

OAR 839-015-0510(1).

Respondent was a licensed farm labor contractor for many years and had a duty to understand his obligation to provide the laborers on the 1998 Holiday Tree Farm contract with statements of their rights and to execute written agreements with those workers. Respondent had the ability to pro-

vide those documents, as evidenced by the fact that he did provide them to the workers on the CEBECO contract. As explained in two recent cases, this forum considers violations of ORS 658.440(1)(f) and (g) to be very serious. See *In the Matter of Thomas L. Fery*, 18 BOLI 220, 238-40 (1999); *In the Matter of Paul A. Washburn*, 17 BOLI 212, 222-25 (1998). Moreover, these violations are aggravated by Respondent's previous violations of ORS 658.410(1) in 1996 and 1997. These factors weigh in favor of a heavy penalty against Respondent.

On the side of mitigation, the forum notes that there is no evidence in the record that any person suffered a monetary loss as a result of Respondent's many violations of the farm labor contracting statutes. There are, however, no other mitigating circumstances. Even if Form WH-151 was posted at the job site, that would not mitigate the severity of the violations because there is no evidence that each of the 88 workers had ready access to the posted form and an opportunity to review its contents.

In *Fery*, this forum imposed civil penalties of \$500.00 for each of ten violations of ORS 658.440(1)(f) where the respondent used an employee handbook that contained some of the statutorily required information, cooperated with the Agency's investigation, had no previous violations on his record, and intended to comply fully with the

Agency in the future. 18 BOLI at 239. In the same case, the forum imposed penalties of \$750.00 for each of ten violations of ORS 658.440(1)(g); the penalties were higher for those violations because Respondent had provided no written agreement to the workers. *Id.* at 240.

Respondent's violations of ORS 658.440(1) are more severe than were the respondent's in *Fery* because of Respondent's other statutory violations. In addition, the application form given to the workers on the 1998 Holiday Tree Farm contract is not comparable to the employee handbook the *Fery* respondent gave his workers. If the forum were to consider only the appropriate magnitude of the penalty for each violation, it would impose a civil penalty of \$1000.00 for each of Respondent's 176 violations of ORS 658.440(1)(f) and (g), as the ALJ suggested in the Proposed Order.²

² See also *Washburn*, 17 BOLI at 225-26 (imposing \$750 penalty for each violation of ORS 658.440(1)(g) where aggravating factors were present but the respondents had no previous violations); *In the Matter of Manuel Galan*, 15 BOLI 106, 138 (1996) (assessing \$1000.00 penalty for each of 14 violations of ORS 658.440(1)(f) and \$2000.00 penalty for each of 14 violations of ORS 658.440(1)(g) where no mitigating factors were found), *aff'd without opinion, Staff, Inc. v. Bureau of Labor and Industries*, 148 Or App 451, 939 P2d 174, *rev'd* 326 Or 57, 944 P2d 947 (1997).

The commissioner, however, has discretion to determine not only the proper penalty per violation, but also whether the cumulative amount of penalties imposed is appropriate. In a case involving many violations, the commissioner may determine that the penalty per violation should be reduced so that the *total* penalty is proportionate to the seriousness of the respondent's offense where:

- 1) Many violations are associated with a single farm labor contract;
- 2) The violations involve breaches of only one statutory requirement or only a few related requirements; and
- 3) There is no evidence that any worker suffered a loss of wages or other harm.

In this case, Respondent's 176 violations of ORS 658.440(1) were associated with a single farm labor contract, involved only two related types of misdeeds,³ and there is no evidence that any worker suffered a loss of wages or other harm. The commissioner finds that a total penalty of \$176,000.00 for these violations is excessive and, therefore, orders that Respondent pay only a \$250.00 penalty for each of the

³ Respondent committed 88 violations of ORS 658.440(1)(f) by failing to provide each of 88 workers with statements of rights and 88 violations of ORS 658.440(1)(g) by failing to enter into written agreements with those workers.

176 violations of ORS 658.440(1)(f) and (g), for a total of \$44,000.00.

RESPONDENT'S EXCEPTIONS

In his exceptions, Respondent asserts that he did not believe he was required to supply statements of rights and written agreements to workers on the 1998 Holiday Tree Farms contract because he, too, was an employee of Holiday Tree Farms. As explained in the Opinion section of this Order, Respondent's belief was mistaken. A person may fall within the definition of a farm labor contractor even if he is employed by the farm to which he supplies workers and is not an independent contractor.

Respondent also claims that Form WH-151 was posted at the Holiday Tree Farms job site in 1998. The forum has added new Finding of Fact -- The Merits 17 and expanded its discussion of the civil penalties imposed to explain why it does not consider the posting of information to be a mitigating factor in this case.

In his next exception, Respondent asserts that in 1997, a BOLI employee named Hernandez told him that "it" was "ok [as] long as I was a worker and not making payroll." No evidence in the record supports this claim, which, in any event, is far too vague to support a claim of estoppel, assuming that to be the point of Respondent's assertion.

Respondent asserts that he did not understand all of the English that was spoken during the hearing. That may be true, and that is

the reason the forum supplied a certified and qualified Spanish interpreter, who translated the entire proceedings for Respondent's benefit. Respondent also claims he did not understand some of what was said even after it was translated into Spanish. The few times that Respondent asked for clarification during the hearing, it was given, and the forum has no reason to believe that Respondent did not understand the proceedings. Respondent's complaint comes too late for any relief to be granted, and the exception is denied.

Finally, Respondent argues that the penalties the ALJ proposed are excessive. In support of that argument, he discusses a settlement offer purportedly made by the Agency. The forum has disregarded Respondent's assertions regarding the settlement offer, which it deems irrelevant to its determination of appropriate penalties in this case.

However, as discussed above, the commissioner agrees that the ALJ's proposed penalty of \$1000.00 for each violation of ORS 658.440(1) is excessive. The commissioner has lowered the penalty for each of those 176 violations to \$250.00.

ORDER

NOW, THEREFORE, as authorized by ORS 658.453, and as payment of the penalties assessed for his violations of ORS 658.410(1), ORS 658.440(1)(f) and ORS 658.440(1)(g), the Commissioner of the Bureau of

Labor and Industries hereby orders Respondent **Tomas Benitez** to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 800 NE Oregon Street, #32, Portland, Oregon 97232, a certified check payable to the Bureau of Labor and Industries in the amount of FIFTY-THREE THOUSAND FIVE HUNDRED DOLLARS (\$53,500.00), plus any interest thereon that accrues at the legal rate between a date ten days after the issuance of the Final Order and the date Respondent complies with the Final Order.

FURTHERMORE, as a result of his finding that Respondent's character, competence and reliability make him unfit to be a farm labor contractor, the commissioner orders that Respondent's application for a farm labor contractor's license is DENIED.

In the Matter of

BOB G. MITCHELL and SHARON F. MITCHELL, dba GRANNY'S GRAINERY,

Case Number 45-99

Final Order of the Commissioner
Jack Roberts

Issued January 7, 2000.

SYNOPSIS

Respondents employed Complainant, a pregnant woman, as a bartender. Respondents reduced Complainant's work hours be-

cause they did not believe a bar was an appropriate place for a pregnant woman to work and because they did not want to be liable for Complainant's pregnancy. The reduction in hours and pregnancy-related comments of Respondents managerial employees created an atmosphere so intolerable that a reasonable person in Complainant's position would have quit her job. Complainant did quit her job because of these employment conditions, a result that Respondents had hoped for and intended. The commissioner ordered Respondents to pay \$5067.71 in wages and tips that Complainant lost as a result of Respondents' unlawful employment practices, plus \$7500.00 damages for mental suffering. ORS 659.010(2), 659.029, 659.030(1), 659.060(3).

The above-entitled case came on regularly for hearing before Erika L. Hadlock, designated as Administrative Law Judge ("ALJ") by Jack Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on September 9 and 10, 1999, in Salem, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by Linda Lohr, an employee of the Agency. Complainant L. Krystle Borgmann,¹ who was not represented

by counsel, was present throughout the hearing. Respondents were represented by counsel, Edward L. Daniels, Attorney at Law.

The Agency called as witnesses: Complainant; Complainant's husband, Rick Borgmann; two former employees of Respondent, Susan Benson-Porter and Mary Branum; and senior investigator Harold Rogers. Respondents called as witnesses: Respondent Bob Mitchell; manager Debrah Mitchell; and current and former employees Teresa Duffield, Patricia Howard, Michele Piefer, Terezija Joslin, Kelly Armfield, Lynette Peterson, Christine Fisher, and Edna Marie Pierce.

The forum received into evidence:

a) Administrative Exhibits X-1 through X-11 (submitted or generated prior to hearing).

b) Agency Exhibits A-1 through A-4 (submitted prior to hearing with the Agency's case summary, with A-2 being admitted only for the limited purpose of establishing jurisdiction), A-6 through A-10, A-14 and A-15 (submitted at hearing). The Agency did not offer the document marked as Exhibit A-5 that was attached to its case summary, and the ALJ did not receive that document into evidence.

¹ When she was employed by Respondent, Complainant's last name was Wheelis. Between then and the date of hearing, Complainant married

and changed her last name to Borgmann. For the sake of consistency, all portions of this Order refer to Complainant using the last name of Borgmann.

c) Respondents' Exhibits R-1 through R-3 (submitted prior to hearing with Respondents' case summary).

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

FINDINGS OF FACT – PROCEDURAL

1) On or about October 15, 1997, Complainant L. Krystle Borgmann filed a verified complaint with the Civil Rights Division of the Agency alleging that she was the victim of unlawful employment practices by Respondents. The number assigned to Complainant's case was ST-EM-SM-971015-4140.

2) Sometime in October 1997, a copy of the complaint was sent to one of Respondents' places of business. Respondent Bob Mitchell was aware of the complaint within a week and authorized Debrah Mitchell, his daughter and manager of his restaurants, to handle the investigation and to deal with the Agency.

3) Senior Investigator Harold Rogers was assigned to investigate Complainant's complaint. Rogers found that substantial evidence supported the complaint and, on January 9, 1998, he submitted an administrative determination including that find-

ing for review by his supervisor. Notices of Substantial Evidence Determination typically issue about 10 to 14 days after investigators submit the administrative determinations for supervisory review, unless the supervisors send the drafts back to the investigators, which did not happen in this case.

4) On some date not clearly established in the record, but no later than February 5, 1998, the Division issued a Notice of Substantial Evidence Determination in case number ST-EM-SM-971015-4140 finding substantial evidence that Respondents had violated ORS 659.030(1)(a) and (b). That Notice was signed by Rogers.

5) By letter dated February 5, 1998, attorney Edward L. Daniels informed the Agency that he represented "Appletree Restaurant dba Granny's Grainery" in regard to Complainant's complaint, Agency number ST-EM-SM-971015-4140. He further stated that he had "reviewed all the materials submitted by [Complainant] and the Notice of Substantial Evidence Determination." Daniels stated that if the Agency planned to pursue the matter, "we will need a formal hearing." The Agency's Medford office received this letter, which Daniels had sent to the Agency's Eugene office, on February 21, 1998.

6) By letter dated and mailed October 15, 1998, the Administrator of the Civil Rights Division informed Complainant that she had a right to pursue her complaint in circuit court. Enclosed

with the letter was a Notice of Right to File a Civil Suit. The letter was copied to both "Edward L. Daniels, Attorney" and "Successor-in-Interest; Snarky's Other Place." The Administrator addressed an otherwise identical letter to Debrah Mitchell, Manager, Appletree Restaurant dba Granny's Grainery, 1890 S. Main Street, Lebanon OR 97355. That letter also was dated and mailed October 15, 1998.

7) On June 2, 1999, the Agency filed a request for hearing and submitted Specific Charges alleging that Respondents unlawfully reduced Complainant's work hours because of her pregnancy, in violation of ORS 659.030(1)(b), and constructively discharged Complainant because of her pregnancy, in violation of ORS 659.030(1)(a). The Agency sought approximately \$10,000.00 in back wages and lost benefits plus \$20,000.00 for mental suffering.

8) On or about June 17, 1999, the hearings unit served on Respondents the Specific Charges, accompanied by the following: a) a Notice of Hearing stating that the hearing in this matter would take place on August 25, 1999, at the Agency office in Salem, Oregon; b) a Summary 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 administrative rule re-

garding responsive pleadings (OAR 839-050-0130).

9) Respondents filed a timely Answer on June 23, 1999, in which they admitted that they were Oregon employers subject to the provisions of ORS 659.010 to 659.494, and operated an eating and drinking establishment under the assumed business name, Granny's Grainery. Respondents also admitted that Complainant filed a verified complaint with the Agency alleging she was the victim of unlawful employment practices by Respondents. Respondents denied the remaining allegations in the Specific Charges.

10) On July 19, 1999, Respondents moved to postpone the hearing on the ground that one of Respondent's key witnesses had a prescheduled out-of-state vacation for the week of August 23. The Agency objected to any extended postponement, but stated that it would be amenable to a brief postponement to the first or second week in September. During a July 23, 1999, teleconference initiated by the ALJ, counsel for Respondents and case presenter Lohr stated that they were available for hearing on September 9 and 10. Accordingly, the ALJ issued an amended notice of hearing setting the hearing to commence on September 9, 1999.

11) On July 27, 1999, the ALJ ordered the Agency and Respondents each to submit a case summary including: a list of all witnesses to be called; the identi-

fication and description of any documents of physical evidence to be offered, together with a copy of such document or evidence; a brief statement of the elements of the claim (for the Agency only); a brief statement of any defenses to the claim (for Respondents only); a statement of any agreed or stipulated facts; and any wage, damages, or penalty calculations (for the Agency only).

12) Respondents filed their case summary on August 26, 1999, including documents marked as exhibits R-1 through R-3. On August 27, 1999, the Agency filed its case summary, which included copies of documents marked as exhibits A-1 through A-5.

13) On September 3, Respondents filed a supplemental case summary in which they identified additional possible witnesses.

14) At the start of the hearing, counsel for Respondents stated that he had no questions about the Notice of Contested Case Rights and Procedures.

15) 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 procedures governing the conduct of the hearing.

16) The evidentiary record closed on September 10, 1999.

17) The ALJ issued a proposed order on December 6, 1999, that notified the participants

they were entitled to file exceptions to the proposed order within ten days of its issuance. Neither the Agency nor Respondent filed timely exceptions.

FINDINGS OF FACT – THE MERITS

1) At all material times, Respondents Bob G. Mitchell and Sharon F. Mitchell jointly owned and operated an eating and drinking establishment under the assumed business name "Granny's Grainery" and were Oregon employers utilizing the personal services of one or more persons, subject to the provisions of ORS 659.010 to 659.494.

2) At all material times, Granny's Grainery was a tavern with dart boards and pool tables. Pool and dart leagues sometimes played tournaments at the tavern. There were occasional bar fights at Granny's Grainery, customers occasionally used or offered illegal drugs on the premises,² and the overall atmosphere was that of a bar, not a restaurant, although some food was served.

3) Respondents also own three Apple Tree restaurants. Over the years, several pregnant women have worked at those restaurants, some until immediately before the birth of their children.

4) At all material times, Debrah Mitchell, Bob Mitchell's daughter, managed Granny's

² Respondents' employees ejected these customers.

Grainery and Respondent's Apple Tree restaurants. Respondents had delegated her full responsibility for the businesses' day-to-day operations.

5) At all material times, Theresa Duffield was employed by Respondents as assistant manager of Granny's Grainery. At the time of hearing, Duffield worked for Respondents at one of their Apple Tree restaurants.

6) In March 1997, Complainant applied to work as a bartender at Granny's Grainery and had interviews with both Duffield and Debrah Mitchell.³ Complainant told Mitchell that she could work either full-time or part-time, but would prefer full-time work. Mitchell asked Complainant if she had children and would take a lot of time off because of that. Complainant said she had children, but child care would not be a problem.

7) Respondents hired Complainant to work evening and closing shifts at Granny's Grainery and paid her minimum wage, which in 1997 was \$5.50 per hour. Duffield was Complainant's immediate supervisor throughout her employment by Respondents.

8) Complainant started working at Granny's Grainery on March 31, 1997. That day, Complainant and Duffield worked together and Duffield instructed Complainant regarding various job duties. Duf-

field told Complainant that the closing time would vary between 11:00 p.m. and 2:00 a.m. depending on the number of customers. On Complainant's first day of work, Duffield closed the restaurant at 11:00 p.m.

9) Although Complainant was hired as a bartender, her duties at Granny's Grainery also included cooking, cleaning, stocking, serving customers, and running the cash register. On Friday and Saturday nights, a cook and cocktail waitress worked during the evening shift in addition to the bartender. They generally would leave around 10:00 p.m., although they occasionally stayed later on busy nights. The bartender handled cooking and table-waiting duties on weekday evenings and on weekends after 10:00 p.m.

10) Respondents maintained an "incident log" at Granny's Grainery based on a recommendation from the Oregon Liquor Control Commission. Duffield instructed bartenders to make notations in the incident log regarding the time they closed the bar and any problems that arose.

11) Complainant learned she was pregnant the same week she started working at Granny's Grainery. Sometime that week, Complainant informed Duffield that she was pregnant. Although Complainant and Duffield did not discuss the issue, Complainant had decided to work throughout her pregnancy.

12) Duffield set the employees' work schedules at Granny's

³ The forum finds Complainant's testimony that she was interviewed only by Duffield to be unreliable. See Finding of Fact -- the Merits 71, *infra*.

Grainery. Complainant usually worked five days a week, with Mondays and Tuesdays off.

13) The father of Complainant's unborn child, Robert Blevins, was incarcerated in Oklahoma during the time Complainant worked at Granny's Grainery. At the beginning of Complainant's employment, Blevins frequently called her collect at Granny's Grainery from prison. From April 18, 1997, through May 8, 1997, Respondents were billed for eight one-minute-long collect telephone calls placed by Blevins. The charges for those calls totaled \$31.28 (plus \$0.94 excise tax). Complainant paid that bill when Duffield presented it to her. Complainant testified unpersuasively that she did not accept any of these collect calls and that Respondents were billed automatically when the telephone was answered, regardless of whether the call was accepted.

14) In May 1997, Complainant started renting a room in the house of Rick Borgmann, a regular customer at Granny's Grainery. At that time, Complainant and Borgmann were not yet married and were not romantically involved.

15) Duffield often told Complainant that she looked tired and unwell. Duffield also told Complainant she did not have to empty the deep fryer, which required lifting. Complainant did that job anyway. Duffield never asked Complainant to provide a doctor's note stating her physical capabilities or limitations.

16) In early June, Susan Benson-Porter started working as a cocktail server at Granny's Grainery. Duffield told Benson-Porter that Complainant was a very good worker who was easy to get along with. Complainant trained Benson-Porter how to do her job.

17) On June 14, 1997, a Saturday night, ten customers entered Granny's Grainery at about 11:00 p.m. and placed an unusually large order for fried foods, which had to be cooked in several batches. Complainant asked Benson-Porter, who had worked as a cocktail waitress that evening, to stay and help with the food order. Duffield later told Complainant that she should have prepared the food herself and not asked Benson-Porter to stay late.

18) Sometime in the last two weeks of June, before June 26, Duffield told Complainant that if she needed to work fewer hours, that would be alright. Duffield said she had a rough time during her own pregnancy, and didn't know how Complainant "did it." Complainant told Duffield that she had been pregnant previously without difficulties and did not anticipate problems with this pregnancy.

19) Duffield maintained a business diary that she kept locked in the office safe at Granny's Grainery. Duffield made about eight entries in the diary during 1996 that related to four different employees. In 1997, Duffield made five notes, most of which related to Complainant. As explained in Finding of Fact -- the

Merits 69, *infra*, the forum finds that Duffield made these notes contemporaneously with the described events. A note dated June 19, 1997, states:

"[Complainant] and I had a talk, In the office. I warned her about all the complaints

"(1) If Rick's around people get ignored

"(2) Rude to customers

"(3) No service

"(4) do not want to cook food or just refuse to cook

"(5) does no stocking or side-work

"[Duffield's signature]"

At hearing, Duffield identified a customer named Ken as the only person whose name she knew who had complained about Complainant.

20) At hearing, before Duffield testified, Complainant acknowledged that Duffield had told her that a customer named Ken had complained that Complainant had not wanted to cook food for him.

21) On June 26, Complainant made the following note in the incident log:

"What a night! promoting food is great – providing there were a cook! Gets real hard when you get 5-10 orders at once; or in a row. Dont have time to take a break.

"Sometimes I feel like people are sent here to order food to

see how I react or how I handle it. Its not hard because I'm 'pregnant'. It would be hard anyway. Maybe Im just not as good as some others. Close: 12:10. [signature]"

Complainant wrote "Its not hard because I'm 'pregnant'" because Duffield already had suggested that she might want to reduce her hours because of her pregnancy.

22) At some point during her employ by Respondents, Complainant designed a "shift sheet" that bartenders used to record how much money was in the cash register. Duffield showed the shift sheets to Debrah Mitchell, who said they looked good and instructed Duffield to have the employees start using the sheets daily.

23) On or about June 25, 1997, Duffield hired Mary Branum to work as a part-time bartender at Granny's Grainery, with occasional duties as cook and cocktail waitress. Duffield instructed Branum to close the bar at midnight. Duffield did not train Branum herself, but introduced her to Complainant and stated that Complainant was a good worker who would train her well. Complainant did train Branum and showed her how to perform various job duties.

24) Sometime in late June 1997, Branum overheard Duffield state that she was going to cut Complainant's hours because she was pregnant and tired, and Duffield did not want her to lift things. Branum "didn't make anything of"

this comment because she thought that if she were pregnant, she would not want to work full-time hours. Branum believed that Duffield was motivated by concern for Complainant and her unborn child.

25) Branum did not believe that Complainant looked tired. Complainant sometimes lifted heavy items for Branum that Branum could not lift herself.

26) Branum never heard of any customer complaints about Complainant, did not observe Duffield giving Complainant a "hard time," and did not hear Complainant complain about Duffield being hard on her.

27) Cooking food was not Complainant's favorite job duty and she sometimes shut down the grill early.

28) Overall Complainant was an adequate employee.

29) On Sundays, Duffield usually posted the work schedule for the following week. Because of the Independence Day holiday, Duffield may have posted some of the July 1997 schedules early.

30) On Monday, June 30, Complainant and Borgmann went to Granny's Grainery to check Complainant's scheduled shifts for the upcoming weeks and discovered that Complainant's hours had been reduced. Duffield told Complainant that she and Debrah Mitchell had decided that Complainant should work fewer hours because they did not want to be liable for her pregnancy. The next

day that Complainant worked, July 2, she wrote in the incident log:

"Rick & I came in on Monday June 30. Asked [Duffield] about loss of hours on schedule. [Duffield] said that her & Debbie didn't want to be liable for my pregnancy."

Complainant worked an eight-hour shift on July 2.

31) Complainant took three scheduled days off over the Independence Day holiday -- July 3, 4, and 5. She then asked for additional time off because her daughter had chicken pox. Complainant was back in town and available to work by July 8, 1997. However, Duffield did not schedule her to work Wednesday through Friday, July 9 through 11. Duffield's failure to have Complainant work her regular schedule on those days constituted a reduction in Complainant's work hours.

32) Duffield reduced Complainant's work hours the work week beginning July 7 primarily because of her pregnancy, although Complainant's reluctance to cook for customers also was a factor. If Complainant had not been pregnant, Duffield would not have reduced her hours.

33) On July 8, Respondents held an employee meeting at Granny's Grainery, which Complainant attended. Complainant asked what she should do if the bar got very busy late on a weekend night and customers placed large food orders, as they had on June 14. Duffield said if that happened again, the bartender could

ask the cocktail server to work an hour late if needed.

34) After the employee meeting, Duffield "wrote [Complainant] up" because of customer complaints. That single write-up is the only one Duffield gave Complainant during her employment by Respondents.⁴ At the same time, Duffield told Complainant that she was cutting Complainant's hours not only because of her pregnancy, but also because of customer complaints. Complainant explained that she needed to work more hours so she could prepare financially for the upcoming birth of her child.

35) Duffield noted in her business diary that she had "cut [Complainant's] hours back due to complaints 6 months pregnant. She is having a hard time keeping up. I'm going to go back to basic and re-train hope that works. She did sign writeup report, but said she is pissed."

36) Complainant later made an entry in the incident log in the space for July 8: "Had work meeting today from 12:00 to 1:30. Asked [Duffield] about my hours again. She responded this time --

not only due to my pregnancy but because of customer complaints."

37) At some point between July 8 and July 15, Complainant again spoke to Duffield about the reduction in her hours. By that time, Duffield had told Complainant that she would be scheduled to work only two three-hour shifts during the work week beginning July 14. Duffield told Complainant that she needed to be retrained on cooking and that she had not been properly performing her stocking and cleaning duties.

38) Complainant and Benson-Porter worked at Granny's Grainery the evening of July 12, 1997, with Complainant working the closing shift. That night, Complainant left a note in the bar for Duffield that stated:

"Teresa,

"[Benson-Porter] & I couldn't find any after shift sheets.

"Don't know where???"

"[signature of Complainant]"

Under Complainant's signature, Debrah Mitchell wrote:

"She was the only one working 150 sheets missing. She took them."

Debrah Mitchell was referring to Complainant when she wrote "She took them." Duffield placed this note in her business diary and also wrote in the diary that the shift sheets had been present at closing the night of July 12 and were missing when the bar was opened on July 13.

⁴ Complainant testified that Duffield never had written her up. The forum rejects that testimony for the reasons set forth in Finding of Fact -- the Merits 69, *infra*. The forum also rejects Duffield's testimony that she gave Complainant four write-ups, not one, for the reasons set forth in Proposed Finding of Fact -- the Merits 69 and the Proposed Opinion, *infra*.

39) On or about July 13, 1997, Duffield wrote a note in her business diary that stated, in pertinent part:

"I wrote [Complainant] up on 7/8 and gave a verbal warning on 6/19 I have logged everything. [Duffield's signature]"

40) On or about July 13, 1997, both Branum and Benson-Porter left messages on Duffield's home answering machine stating that they were quitting their jobs.

41) Complainant was scheduled to work a three-hour evening shift on July 15, 1997. Before driving Complainant to work, Borgmann called Duffield at Granny's Grainery to complain about Complainant being made to work in the kitchen. He told Duffield that if anything happened to Complainant or her baby, when he got through with Granny's Grainery, Duffield would be working for him. After he spoke to Duffield, Borgmann told Complainant that he thought it might be time for her to quit working for Respondent because of being made to work in the kitchen.

42) Borgmann drove Complainant to work at about 6:00 p.m. that evening. Duffield had told Complainant that they could speak about Complainant's hours before Complainant started her shift. When Complainant arrived, Duffield was busy working as bartender and did not speak to her except to ask if Complainant planned to work that evening.

43) After Complainant arrived at the bar, Duffield called

Debrah Mitchell and said that Complainant was at the bar but would not work. Duffield also reported the statements Borgmann had made to her. Debrah Mitchell went to the bar and found Borgmann in the parking lot. She told Borgmann that he was being "86'd" off of the property, meaning that he was not permitted to come into Granny's Grainery or into the tavern's parking lot.

44) Debrah Mitchell then went into the tavern and told Complainant she needed to speak to her in the office. Debrah Mitchell told Complainant her hours were being cut because of customer complaints and her refusal to cook food. Complainant stated that she could not live on the wages she would earn working only six hours per week. Debrah Mitchell responded that pregnant women should not be in the bar business anyway, because of bar fights and cigarette smoke. She also told Complainant that she was going to give Complainant a write-up, which she needed to sign. Complainant refused to sign the document, handed Mitchell her keys to the bar, and quit her job.

45) After Complainant said she could not continue to work such low hours at Granny's Grainery, Debrah Mitchell offered her a job working at Respondents' Apple Tree restaurant in Lebanon.⁵ Debrah Mitchell told

⁵ Debrah Mitchell testified that she also offered Complainant a job at the Apple Tree restaurant in Albany, lo-

Complainant that the Apple Tree job would be better than working in a bar. Complainant did not have a car or other transportation to Lebanon and she did not accept the job.

46) Neither Duffield nor Debrah Mitchell ever told Complainant that her hours had been reduced for only one week.

47) Duffield and Debrah Mitchell decided to reduce Complainant's work hours both because of her pregnancy and because of her reluctance to cook for customers. But for Complainant's pregnancy, however, they would not have cut her hours.

48) Duffield and Debrah Mitchell cut Complainant's hours with the hope and expectation that this action would cause her to quit her job.

49) Complainant knew that Respondents had cut her hours because she was pregnant. She reasonably concluded that Respondents would schedule her to work few hours for the duration of her pregnancy. The reduction in hours and the pregnancy-related comments made by Duffield and Debrah Mitchell combined to make the working environment so intolerable that a reasonable per-

cated only one-half mile from Granny's Grainery. The forum has found Debrah Mitchell's testimony to lack credibility in certain material areas, and does not find her uncorroborated testimony on this point to be persuasive.

son in Complainant's position would have quit her employment.

50) Several factors contributed to Complainant's decision to quit her job: the reduction in her hours; criticisms she perceived as unjustified; her clashes with Duffield; and her dislike of cooking. However, the reduction in hours was the primary reason Complainant quit her job; she would not have done so had Respondents not cut her hours.

51) Complainant remained physically able to work as a bartender up until her child was born. If Respondents had not reduced Complainant's hours, Complainant would have worked until mid-November 1997, just before her baby was born.

52) At some point after Complainant quit working for Respondents, the single write-up Duffield had given her disappeared from Duffield's office at Granny's Grainery.

53) Complainant looked in the newspaper help-wanted advertisements, but applied for only one job after she quit working for Respondent. She did not get that job and did not return to work until about three months after the birth of her child.

54) No evidence in the record establishes whether any jobs were available in the Albany, Oregon area for which Complainant was qualified.

55) At some point between May and November 1997, Complainant and Borgmann became

romantically involved. They married on November 5, 1997. Complainant's baby was born 15 days later.

56) In April 1997, Complainant worked a total of 128.25 hours over 17 days at Granny's Grainery, for an average of 7.54 hours per day worked. In May 1997, Complainant worked a total of 147.50 hours over 21 days, for an average of 7.02 hours per day worked. In June 1997, Complainant worked 152.25 hours over 20 days, for an average of 7.61 hours per day worked. In sum, before Respondents reduced her hours, Complainant worked an average of 19.33 days and 142.67 hours per month, an average of 7.38 hours per day.

57) Respondents paid their employees twice per month. From April 2, 1997 through the pay period ending June 30, 1997 (the period during which Complainant worked a regular schedule), Complainant earned an average of \$405.38 in gross wages every half-month pay period.

58) Branum earned between \$15.00 and \$30.00 a day in tips while she worked for Respondent and the forum infers that Complainant earned about the same amount, averaging \$22.50 a day.⁶ Complainant did not report any of

her tip income on her income tax returns.

59) If Respondents had not reduced her hours for the week of July 7, Complainant would have worked three additional days – Wednesday through Friday, July 9 through 11. At 7.38 hours per day, she would have earned \$121.77 those three days, plus \$67.50 in tips.

60) If Complainant had not quit her job on July 15, and Respondents had not reduced her hours, she would have worked an average of 142.67 hours each month from mid-July 1997 through mid-November 1997. Thus, from July 15 through November 15, she would have worked a total of 570.68 hours (142.67 hours/month x 4 months). For that time, Respondents would have paid Complainant \$3138.74.

61) During that same time, Complainant would have worked 77.32 days (19.33 days/month x 4 months). On each of those days, she would have earned an average of \$22.50 in tips. Her lost tips, therefore, equal \$1739.70.

62) Complainant testified that she suffered financial distress after she quit working for Respondents because she had to depend on Borgmann and was embarrassed by her need to rely on someone she did not know well. Given that Complainant had been living with Borgmann for over two months at the time she quit, Borgmann told Duffield that if she made Complainant work in the kitchen, Duffield would be working

⁶ Complainant testified that she made between \$30.00 and \$50.00 a night in tips. The forum finds that estimate to be exaggerated.

for *him*, and Complainant married Borgmann about four months after she quit, the forum disbelieves Complainant's testimony that her suffering was heightened because she did not know Borgmann well. The forum does find, however, that Complainant suffered some financial stress during the four months between the time she quit and the birth of her child and this order includes an award of damages for that mental suffering.

63) Complainant also testified that Respondents' actions made her feel that when you are pregnant, there are things you cannot do, which she never had believed before. Complainant's testimony on this subject was contrived and the forum has given it no weight.

64) Branum was the most credible witness with knowledge of material facts. She testified in a straightforward, matter-of-fact way and gave direct answers to the questions asked. She was confident regarding the events that had taken place but admitted readily that she could not recall the exact dates on which certain events had occurred. Branum did not appear to slant her testimony to favor or harm either Respondents or Complainant and did not appear to harbor animosity toward any person involved in the decision to cut Complainant's hours. The forum has accepted Branum's testimony as fact, including her testimony that Duffield stated that she was cutting Complainant's hours because she was pregnant.

65) Duffield's testimony was credible only in part. Duffield testified defensively throughout the hearing and appeared unwilling to state anything that might reflect poorly on herself. For example, she insisted that she trained all new employees herself and never let Complainant train any of them. That statement conflicts with Branum's credible testimony that Duffield told her that Complainant would train her and that Complainant did, in fact, teach Branum how to perform her job. Duffield also testified that she -- not Complainant -- had invented the daily shift sheets that were missing on July 13, 1997. The forum finds, based on Debrah Mitchell's credible testimony, that Complainant -- not Duffield -- invented those sheets. Duffield's willingness to distort such facts casts significant doubt on the veracity of her testimony.

66) Duffield was anxious to cast Complainant's job performance in the worst possible light, both in her communications with investigator Rogers and at hearing. Duffield testified that one of Complainant's persistent problems was closing before the normal weekday closing time of 1:00 a.m. For example, Duffield stated that one of Complainant's first verbal warnings related to the fact that she had closed the tavern at midnight on Wednesday, April 30. She stated that she discovered that problem in her periodic reviews of the logbook. Indeed, the logbook reflects that Complainant closed the bar between 12:00 midnight and 12:59 a.m. 18

times. But other employees -- including Duffield -- closed between midnight and 12:59 a.m. at least 71 times⁷ during the one-year period covered by the logbook. After the case presenter pointed out the other employee's midnight closings, Duffield changed her mind and decided the regular closing time must have been midnight, and that she had disciplined Complainant for closing *before* that time.⁸ The logbook does indicate that Complainant closed earlier than midnight 10 times, including the evening that she trained with Duffield. But in the period covered by the logbook, other employees -- again, including Duffield -- closed before midnight on 21 evenings. In sum, the record indicates that Complainant closed the bar early about as often as did other employees.

67) Duffield also testified that Complainant was disciplined for closing early even though customers still were in the tavern. As evidence of this alleged misconduct, Duffield pointed to the logbook entry of April 6, when Complainant noted "Very slow closed at 12:00 though had cust's [*sic*] come in at almost 10:45 &

then order food." Duffield testified that she interpreted this entry to mean that Complainant had closed the bar even though customers still were there. Similarly, Duffield told Rogers during his investigation that Complainant had stated in the logbook that she "closed even though she had customers." The forum finds that strained interpretation consistent with Duffield's efforts to justify her actions by portraying Complainant as a very poor worker. That conclusion is corroborated by the fact that two other employees also made logbook entries that could be interpreted to mean they tried to get rid of customers to close the bar early, and there is no evidence in the record that those employees were disciplined in any way.⁹

68) Duffield misinterpreted or mischaracterized other logbook entries in her zeal to discredit Complainant. For example, on Saturday, July 12, 1997, Benson-Porter indicated in the logbook that the person who had closed the bar the previous night (July 11) had failed to perform some stocking duties. Benson-Porter mistakenly wrote that note in the

⁷ Not every bartender recorded the time at which he or she closed the tavern, notwithstanding Duffield's testimony that the bartenders were required to note the closing time each night.

⁸ In their response to investigator Rogers, Duffield and/or Debrah Mitchell stated repeatedly that closing time was 1:00 a.m. (Exhibit A-10)

⁹ Complainant made somewhat similar entries on May 21 and June 17, 1997 (when she stayed open until 1:00 a.m.). On December 18, 1996, a different employee wrote: "Closed at 12:15 Night was okay I had a hard time with some Mexicans to get them to go but no problem." On June 24, 1997, another employee wrote: "Stayed open til 1 am. There were still 10 customers. Stressful night."

logbook space for July 13, but dated it July 12 and drew arrows pointing to the space for July 12, indicating she had written her note in the wrong spot. Complainant closed the night of July 12, but did not work on July 11. During the Agency investigation, Duffield told Rogers that Benson-Porter's note had referred to Complainant. That is not correct -- someone other than Complainant had worked the closing shift on July 11. Similarly, Duffield pointed to a May 26 logbook entry stating "slow, dead, it sucks, no people" as an example of a problem with Complainant, when it actually was another employee who had written that note.

69) The Agency suggested at hearing that Duffield had manufactured her business diary after Complainant quit in a *post-hoc* attempt to justify the reduction in her hours. The forum disagrees. Duffield made two remarks in that diary that were against Respondents' interests. First, Duffield essentially stated that the reduction in hours was related, at least in part, to Complainant's pregnancy. Second, Duffield stated that she had "logged everything" - - and the log described only one verbal warning and one write-up, not the several verbal warnings and four write-ups about which Duffield testified at hearing. If Duffield had created the diary after Complainant quit, the contents of that document probably would have more closely matched the testimony Duffield gave at trial. For this reason, the forum concludes that Duffield made the diary entries contemporaneously

with the events described and also concludes that Duffield did, in fact, give Complainant one verbal warning and one write-up.

70) Debrah Mitchell's testimony also lacked credibility in part. She, like Duffield, testified that Duffield had given Complainant more than one written warning. The forum has concluded that this is not true. Consequently, the forum has credited Debrah Mitchell's testimony only where it was consistent with other credible evidence. 71)

Complainant's testimony was somewhat self-serving. Complainant was extremely reluctant to admit that any aspect of her job performance might have been deficient. She even denied having disliked cooking, when the record as a whole -- particularly her logbook entries -- makes it clear that cooking was not a task Complainant enjoyed. Nor was the forum persuaded by Complainant's testimony that she never accepted collect calls from Blevins and that Granny's Grainery was charged for those calls as soon as she answered the phone, even though she did not accept the charges. Most significantly, Complainant denied that Duffield ever had written her up, an event that the forum has concluded did occur. Complainant's denial of this event appears to have been calculated to bolster the argument that the reduction of her hours was based solely on her pregnancy, not on any deficiencies in her work performance. Complainant's willingness to distort facts to fur

ther the Agency's case casts doubt on the veracity of her testimony. Moreover, with regard to certain relatively unimportant events, Complainant's memory appears to have faded. For example, Complainant testified that only Duffield interviewed her for the job at Granny's Grainery. The forum has accepted as fact the contrary testimony of Duffield and Debrah Mitchell, who both stated that they both interviewed Complainant. That testimony was corroborated by Debrah Mitchell's identification of the handwritten notes on Complainant's job application as her own.

72) On the other hand, certain important aspects of Complainant's testimony were corroborated, particularly her testimony that Respondents reduced her hours because of her pregnancy. In addition, Complainant did make one admission against her interest at hearing -- that Duffield had told her that Ken had complained that she would not serve him food. Similarly, Complainant noted in the incident log that Duffield said she was reducing Complainant's hours because of both Complainant's pregnancy and customer complaints. If Complainant had been setting Respondents up for a false discrimination claim, as Respondents suggested at hearing, she would not have noted that customer complaints played any part in Respondents' decision to cut her hours. For these reasons, the forum has accepted the accuracy of the notes Complainant made in the incident log. Overall, the forum

found Complainant's testimony more credible than that of Duffield and Debrah Mitchell. Consequently, the forum has relied on Complainant's testimony in deciding the material facts, particularly where that testimony was supported by other credible evidence. In some instances, where Complainant's testimony was not corroborated, did not seem inherently credible, and was self-serving, the forum has not credited it.

73) The testimony of Benson-Porter was credible in large part, although she did appear to resent Duffield for scheduling her to work only one day per week. The forum has credited Benson-Porter's testimony insofar as it was consistent with other credible evidence in the record.

74) The testimony of Borgmann, Complainant's husband, was credible only in part. Borgmann clearly harbored animus against Duffield and, by extension, Respondents. Borgmann offered his negative opinion of Respondents' managerial employees even when that was not relevant to the question asked. He took every possible opportunity to portray Duffield in a negative light and then stated disingenuously that he had nothing against her. For example, Borgmann testified that Duffield was a terrible manager who gave poor service to customers and did not deal well with her employees. That testimony was partially contradicted by the credible testimony of Branum, who stated that Duffield was not

difficult to deal with and was not hard on other employees. Borgmann also testified that after Duffield stated she was reducing Complainant's hours because she was pregnant, she came out from behind the bar, stood between Borgmann and Complainant, and emphatically repeated that announcement. No other witness to the event testified that Duffield acted in this dramatic and presumably memorable manner, and the forum disbelieves Borgmann's description of her behavior. Because of Borgmann's clear bias, the forum has given his testimony little weight when it was not corroborated by other credible evidence. Because it comports with the testimony of Branum, Benson-Porter, and Complainant, however, the forum accepts as fact the kernel of truth in Borgmann's testimony -- that Respondents reduced Complainant's work hours in large part because of her pregnancy.

75) The testimony of Edna Pierce was not credible. She is a current employee of Respondents who worked as a part-time bookkeeper and bartender at Granny's Grainery while Complainant worked there. Pierce's testimony was transparently biased in favor of Respondents. She stated that working Sunday mornings was a problem because the bar was "always" dirty after Complainant closed the previous evening. The written record, however, establishes that Pierce only worked two Sundays during the time period in question, and neither of those followed a Saturday evening on

which Complainant had worked. First, Pierce testified that she was required to make a logbook entry whenever she worked as a bartender and stated that if she forgot, Duffield would tell her to go back and make an entry, which she would. After the Agency pointed out that she had made only two or three entries in the logbook from March 31, 1997, forward, Pierce decided that she must have worked other days, but forgot to make entries. None of the entries Pierce did make was for a Sunday following a Saturday on which Complainant had worked. Moreover, from April 1 through July 15, 1997, Pierce earned an average of only \$46.71 every two weeks, which confirms that she was only sporadically working a few short bookkeeping shifts, rather than any bartending shifts, which lasted far longer. For these reasons, the forum has not credited Pierce's testimony that Complainant was a poor worker, her testimony that customers complained about Complainant, or her testimony that she saw three written reprimands in Complainant's file.

76) The testimony of Patricia Newport Howard was not credible. She testified that she was worked at Granny's Grainery for about four years, until October 1997, and was pregnant while she worked there. Howard specifically stated that she worked at Granny's Grainery during July 1997 while she was pregnant with a child who was born late that month. Duffield testified similarly. Payroll records for Granny's

Grainery, however, contain no indication that Howard worked at that tavern at any time from April through July 1997. The forum, therefore, does not believe that Howard spent any significant time working at Granny's Grainery while she was pregnant. The forum's conclusion is bolstered by the fact that, during the Agency investigation, Duffield told Rogers that Complainant was the only pregnant woman who worked at Granny's Grainery while Respondents owned the bar.

ULTIMATE FINDINGS OF FACT

1) At all material times, Respondents did business as Granny's Grainery, a tavern located in Albany, Oregon, and had one or more employees within the State of Oregon.

2) Complainant started working for Respondents on or about March 31, 1997. At about that same time, Complainant discovered that she was pregnant and informed Duffield, Respondents' assistant manager, of that fact.

3) Complainant was a satisfactory worker, although she did not enjoy cooking food and sometimes shut off the grill early.

4) Debrah Mitchell, Respondents' manager, believed that the tavern was an inappropriate and unsafe place for a pregnant woman to work and conveyed that belief to Complainant. Duffield expressed disbelief that Complainant could work long hours while she was pregnant and frequently commented that Complainant looked tired.

5) Duffield and Debrah Mitchell reduced Complainant's work hours during two consecutive weeks in July 1997. Their decision to cut Complainant's hours was based both on her pregnancy and on her reluctance to cook for customers. However, but for Complainant's pregnancy, Duffield and Debrah Mitchell would not have reduced her hours.

6) Duffield and Debrah Mitchell wanted Complainant to quit her job at Granny's Grainery and hoped that reducing her hours would lead to that result. Respondents cut Complainant's hours knowing that Complainant was substantially certain to quit her job as a result.

7) The reduction in hours and the comments of Duffield and Debrah Mitchell combined to create a working environment so intolerable that a reasonable person in Complainant's position would have quit her job.

8) Complainant quit working at Granny's Grainery primarily because of the reduction in her job hours. If Respondents had not cut her hours, Complainant would have continued working until mid-November 1997, just before her child was born.

9) At the time she quit her job, Complainant was earning \$5.50 per hour plus tips that averaged \$22.50 per day. If Respondents had not reduced her hours the week of July 7, Complainant would have earned an additional

\$121.77 in wages and \$67.50 in tips that week.

10) If Complainant had not quit her job on July 15, and Respondents had not reduced her hours, she would have earned an \$3138.74 in wages and \$1739.70 in tips from July 15 through November 15, 1997.

11) Complainant suffered some financial distress as a result of her constructive discharge but did not point to any specific or lasting adverse consequences from her loss of income. The forum finds that an amount of \$7500.00 will adequately compensate Complainant for the financial stress she suffered.

12) Respondents received timely notice of the Agency's Substantial Evidence Determination in this case and suffered no prejudice if it was addressed to someone other than Respondents themselves (such as their attorney or Debrah Mitchell).

CONCLUSIONS OF LAW

1) For the purposes of ORS 659.030:

"'Employer' means any person who in this state, directly or through an agent, 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."

ORS 659.010(6). At all material times, Respondents were "employers."

2) The actions of Debrah Mitchell and Teresa Duffield, Respondents' managerial employees, properly are imputed to Respondents.

3) The Commissioner of the Bureau of Labor and Industries has jurisdiction of the persons and of the subject matter herein and the authority to eliminate the effects of any unlawful employment practice found. ORS 659.022; ORS 659.040 *et seq.*

4) ORS 659.095 provides, in pertinent part:

"(1) * * * Within one year following the filing of the complaint [pursuant to ORS 659.040(1) or 659.045(1)], the commissioner may issue, or cause to be issued, an administrative determination. If no administrative determination has been issued at the end of the one-year period, the commissioner has no further authority to continue proceedings to resolve the complaint, except as provided in ORS 659.070 and 659.085. * * *

"(2) As used in this section, 'administrative determination' means a written notice to the respondent and the complainant signed by the commissioner, or the commissioner's designee, which includes, but is not limited to, the following information:

"(a) The name of the complainant;

"(b) The name of the respondent;

"(c) Allegations contained in the complaint;

"(d) Facts found by the commissioner to have a bearing on the allegations contained in the complaint in the course of any investigation, conference or other information gathering function of the Bureau of Labor and Industries as such facts relate to laws within the bureau's jurisdiction; and

"(e) A statement as to whether investigation of the complaint has disclosed any substantial evidence supporting the allegations of the complaint."

The commissioner issued, or caused to be issued, an administrative determination within one year following filing of the complaint and, therefore, retained authority to continue proceedings to resolve the complaint.

5) ORS 659.030 outlines what acts constitute unlawful employment practices. It states, in pertinent part:

"(1) For the purposes of ORS 659.010 to 659.110, 659.227, 659.330, 659.340 and 659.400 to 659.545, it is an unlawful employment practice:

"* * *

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

The phrase "because of sex" is explained in ORS 659.029, which states:

"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."

Respondents would not have reduced Complainant's work hours had she not been pregnant. Consequently, Respondent's reduction of Complainant's work hours violated ORS 659.030(1)(b).

6) ORS 659.030 also prohibits employers from discharging employees based on their sex:

"(1) For the purposes of ORS 659.010 to 659.110, 659.227, 659.330, 659.340 and 659.400 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."

This forum and the Oregon appellate courts previously have ruled that constructive discharge claims are cognizable under this statute. Respondents' actions constituted a constructive discharge of Complainant that violated ORS 659.030(1)(a).

7) Pursuant to ORS 659.010(2), ORS 659.040, and ORS 659.060(3), the Commissioner of the Bureau of Labor and Industries has the authority under the facts and circumstances of this case to award Complainant lost wages resulting from Respondent's unlawful employment practice and to award money damages for emotional distress sustained and to protect the rights of Complainant and others similarly situated. The sum of money awarded and the other actions required of Respondents in the Order below are appropriate exercises of that authority.

OPINION

RESPONDENT'S MOTION TO DISMISS

After the Agency rested its case, Respondents moved to dismiss the Complaint and Specific Charges on the grounds that the Agency had not issued the Substantial Evidence Determination within one year of the date on which the Complaint was filed and also failed to properly serve Respondents with the Substantial Evidence Determination by that date. According to Respondents, even if the Agency timely served their attorney with the Substantial Evidence Determination, that did

not constitute timely service on Respondents. The ALJ took the motion under advisement. The forum now denies the motion to dismiss.

ORS 659.095 governs the commissioner's authority to resolve civil rights complaints and provides that the commissioner retains that authority only when he issues a Substantial Evidence Determination within one year after a complaint is filed:

"(1) * * * Within one year following the filing of the complaint, the commissioner may issue, or cause to be issued, an administrative determination. ***If no administrative determination has been issued at the end of the one-year period, the commissioner has no further authority to continue proceedings to resolve the complaint***, except as provided in ORS 659.070 and 659.085.
* * *"

"(2) As used in this section, 'administrative determination' means ***a written notice to the respondent and the complainant*** signed by the commissioner, or the commissioner's designee, which includes, but is not limited to, the following information:

"* * * * *

"(e) A statement as to whether investigation of the complaint has disclosed any substantial evidence supporting the allegations of the complaint."

(Emphasis added).

The record establishes that the Agency met these statutory requirements. Complainant filed her complaint on or about October 15, 1997. Investigator Rogers submitted his draft administrative determination, finding substantial evidence of unlawful employment practices, for review by his supervisor on January 9, 1998. Rogers testified credibly that Notices of Substantial Evidence Determination typically issue about 10 to 14 days after investigators submit the administrative determinations for supervisory review. Consistent with that testimony, Respondents' attorney informed the Agency by letter dated February 5, 1998, that he had received and reviewed "the Notice of Substantial Evidence Determination." That letter, along with Rogers' testimony, establishes that the Substantial Evidence Determination issued within *four months* of the date on which Complainant filed her complaint, well before the statutory deadline.¹⁰ This evidence also proves that Respondents' counsel received the Substantial Evidence Determination nearly eight months

before the one-year period would have run.

Respondents insist, nonetheless, that service of the Substantial Evidence Determination on their attorney did not constitute service on Respondents. The forum rejects that argument. ORS 659.096 does not require formal "service" on a respondent. Rather, it states only that an administrative determination is "a written notice to the respondent * * *." The forum finds that, for purposes of ORS 659.095, notice to an employer's attorney constitutes constructive notice to the employer. In his February 1998 letter, counsel for Respondents stated that he represented "Appletree Restaurant dba Granny's Grainery" in regard to the complaint filed by L. Krystle Wheelis, Agency case number ST-EM-SM-971015-4140. That letter establishes that counsel was acting as Respondents' agent with regard to Complainant's complaint when he reviewed the Notice of Substantial Evidence Determination. The Agency proved that Respondents' lawyer had notice of the determination, which satisfies the notice requirements of ORS 659.095.

Moreover, even if the Agency had not met the requirements of ORS 659.095, that would require dismissal only if Respondents proved that they did not receive sufficient notice to enable them to respond to the allegations in the Substantial Evidence Determination. *Colson v. Bureau of Labor and Industries*, 113 Or App 106,

¹⁰ All participants agreed that the Notice of Substantial Evidence Determination is the "administrative determination" that must be issued within one year of the date on which the complaint is filed, and that is apparent when the contents of the Notice of Substantial Evidence Determination in the record (Exhibit A-2) are compared with the statutory requirements set forth in ORS 659.095(2).

111, 831 P2d 706 (1992). Even where the Agency sends the Substantial Evidence Determination to the wrong person, entity or address, the Agency's substantial compliance with the statute is adequate unless the respondent suffers actual prejudice. *Id.* Here, Respondents claimed no actual prejudice and could show none, given that their attorney had notice of the claim no later than February 1998, 18 months before the hearing in this matter. Respondents' motion to dismiss is denied.

RESPONDENTS REDUCED COMPLAINANT'S WORK HOURS PRIMARILY BECAUSE OF HER PREGNANCY

The Agency charged Respondents with violating ORS 659.030(1)(b) by reducing Complainant's work hours because she was pregnant. To prove a violation of that statute, the Agency had to establish:

- 1) Respondents were employers subject to ORS 659.010 to 659.110;
- 2) Respondents employed Complainant;
- 3) Complainant was a pregnant woman;
- 4) Respondents took an action that harmed Complainant in compensation or in terms, conditions or privileges of employment;
- 5) Respondents took their action against Complainant because of her pregnancy.

See ORS 659.030(1)(b); *In the Matter of Soapy's, Inc.*, 14 BOLI 86, 95 (1995). In this case, the first, second and third elements are undisputed.

Nor does anyone dispute that Respondents reduced Complainant's work hours. There was, however, some confusion regarding when that happened. The ultimate reduction in Complainant's work hours occurred during the week of July 14, 1997, when Duffield scheduled Complainant to work only two three-hour shifts. Complainant first testified that she learned of the reduction in her hours on June 30, 1997. She later testified that she learned sometime between July 8 and July 13 that she would be working only two three-hour shifts the week of July 14. Careful examination of the evidence provides an explanation for this apparent inconsistency.

Complainant took Thursday through Saturday, July 3 through 5, as vacation days. She was scheduled to work July 6, but called in to report that she could not work because her daughter was ill. Complainant was back from vacation, done caring for her ill daughter, and available to work on Tuesday, July 8, 1997. Although Monday and Tuesday were Complainant's normal days off, Duffield did not schedule her to work on Wednesday, Thursday, or Friday, July 9 through 11. The forum infers that Duffield had reduced Complainant's hours by not scheduling her to work those days. That inference is consistent

with Complainant's testimony that she learned *both* on June 30 and sometime after July 8 that Duffield was going to reduce her hours.¹¹ Although everyone questioning the witnesses appeared to assume that Complainant's hours had been reduced only once, credible evidence in the record establishes that it happened twice.

In sum, the forum finds by a preponderance of the evidence that Duffield reduced Complainant's hours during two weeks -- the week of July 7 *and* the week of July 14. That action harmed Complainant by changing the terms and conditions of her employment. The remaining question is whether Respondents reduced Complainant's hours because of her pregnancy.

Respondents argue that they scheduled Complainant to work only two three-hour shifts the week of July 14, 1997, only because her job performance was poor and she needed retraining. The forum rejects this argument for two reasons. First, it does not explain why Respondents also cut Complainant's hours during the week of July 7, 1997, when no retraining was given.

Second, the forum gives little weight to Respondents' attempts to portray Complainant as a very

poor employee. Duffield testified that both customers and other employees frequently complained about Complainant, that she did not adequately perform her job duties, that she ignored customers in favor of flirting with Borgmann, that she sometimes flatly refused to serve customers, and that she kicked customers out of the bar so she could close early. Duffield also testified that she had given Complainant four written warnings within the space of several weeks when, during 1996 and 1997, she had given written warnings only to a few other employees, and only one of them had received more than one warning. If the forum believed this testimony, it would conclude that Complainant was an exceptionally poor employee and Respondents reduced her hours for reasons other than her pregnancy.

The difficulty for Respondents, however, is that Debrah Mitchell testified that she offered Complainant work as a hostess at Respondents' Apple Tree restaurants. That testimony simply is not consistent with her testimony and Duffield's describing Complainant as having multitudes of job performance problems. If Complainant were such a poor worker, particularly in the area of her interaction with customers and coworkers, Respondents would not have offered to move her into a more high-profile position at their other restaurants. In addition, Branum and Benson-Porter both testified credibly that Complainant did a good job.

¹¹ Although Duffield normally posted the work schedule only one week at a time, Debrah Mitchell testified that Duffield might have posted the schedule for the week of July 7th a week early because of the July 4th holiday.

The forum concludes that Duffield and Debrah Mitchell wanted Complainant either to quit working altogether or to switch to a job at Apple Tree because they believed she should not be working in a tavern while she was pregnant and were worried that the pregnancy might somehow result in liability for Respondents. Complainant's only actual job performance problem – a reluctance to cook – was not so significant that it alone would have caused Respondents to cut her hours. But for Complainant's pregnancy, Respondents would not have reduced her scheduled working hours. Consequently, the reduction in hours violated ORS 659.030(1)(b).

RESPONDENTS CONSTRUCTIVELY DISCHARGED COMPLAINANT BECAUSE OF HER PREGNANCY

The Agency also alleges that Respondents constructively discharged Complainant. To prove such a charge, the Agency must establish:

- 1) Respondents intentionally created or intentionally maintained discriminatory working condition(s) related to Complainant's protected work status;
- 2) Those working conditions were so intolerable that a reasonable person in Complainant's position would have resigned because of them;

3) Respondents desired to cause 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) Complainant did leave the employment as a result of those working conditions.

In the Matter of James Breslin, 16 BOLI 200, 217 (1997), *aff'd without opinion*, *Breslin v. Bureau of Labor and Industries*, 158 Or App 247, 972 P2d 1234 (1999).

As discussed earlier in this opinion, Respondents intentionally reduced Complainant's hours because of her pregnancy. That fact alone establishes the first element of the constructive discharge claim. The forum also finds that the comments Debrah Mitchell and Duffield made about Complainant's pregnancy contributed to the atmosphere that led to her resignation. Debrah Mitchell told Complainant that Granny's Grainery was a dangerous place for a pregnant woman to work. Duffield repeatedly commented that Complainant looked tired, and suggested that she did not know how Complainant managed to work long hours during her pregnancy. Those comments must be considered part of the "working conditions" in evaluating the wrongful discharge claim even though they might not, standing alone, constitute actionable harassment.

Taking the third element of the claim out of sequence, the question is whether Respondents wanted to cause 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. They did. Duffield and Debrah Mitchell thought it was inappropriate and risky for Complainant to work in the bar while she was pregnant and knew that Complainant wanted to work fulltime. They cut her hours and made the pregnancy-related comments described above with the hope and expectation that Complainant would quit her job as a result. They succeeded. These facts establish the third element of the constructive discharge claim.

The Agency also proved the second element of the claim -- that a reasonable person in Complainant's position would have quit her job because of the intolerable working conditions Respondents created. Complainant knew that Respondents had reduced her hours because she was pregnant and it was apparent to her that Respondents no longer wanted her to work at Granny's Grainery. Given those facts, it was reasonable for Complainant to conclude that the reduction in her working hours would last for the duration of her pregnancy. An employee whose hours are severely cut because of her pregnancy, and who knows that her employer wants to get rid of her, is justified in quitting

her job before she is subjected to an outright termination.

Finally, the Agency proved that Complainant quit her job because of the working conditions Respondents created. Although Complainant also was upset about being made to work in the kitchen, the forum believed her credible testimony that it was primarily the reduction in work hours that prompted her to quit. Also, as noted above, Complainant reasonably concluded that the reduction in her work hours would not be short-lived, but would continue throughout her pregnancy. The forum finds that, but for the reduction in her hours and the pregnancy-related comments of Duffield and Debrah Mitchell, Complainant would not have quit her job.

DAMAGES

A. Damages for the Unlawful Reduction of Complainant's Hours the Week of July 7, 1997

During the week of July 7, Respondents unlawfully reduced Complainant's work hours by failing to schedule her to work three of her normal shifts. As detailed in Finding of Fact – the Merits 59, *supra*, Complainant is entitled to \$121.77 in lost wages and \$67.50 in lost tips for the days she would have worked if not for the unlawful reduction in her hours, for a total of **\$189.27**.

B. Damages for the Unlawful Constructive Termination Starting July 15, 1997

Complainant quit her job on July 15, 1997, as a result of the intolerable working conditions imposed unlawfully by Respondents. If she had not quit her job, Complainant would have continued working until about November 15, 1997, shortly before the birth of her child. The forum has calculated that Complainant would have \$3138.74 in wages and \$1739.70 in tips during that time, for a total of **\$4878.44**. See Findings of Fact – the Merits 60 and 61, *supra*.

C. Mental Suffering

The Agency asks this forum to award \$20,000.00 damages for mental suffering. In determining mental damage 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. *In the Matter of Tyree Oil, Inc.*, 17 BOLI 26, 44 (1998), *appeal pending*. In considering the amount of damages that would appropriately compensate Complainant for the mental suffering she experienced, the forum has reviewed the mental suffering damages it has awarded in civil rights cases over the past few years.

Complainant testified credibly that she suffered some financial strain as a result of the reduction in her hours and constructive discharge. She did not, however,

point to any specific or lasting adverse effects of this financial strain. This forum recently decided another pregnancy discrimination case, *In the Matter of Mark and Linda McClaskey*, 17 BOLI 254 (1998). In that case, the respondents terminated the complainant, a waitress at their restaurant, because of her pregnancy. The complainant was very upset and hurt by the respondents' treatment of her, cried constantly, and suffered significant financial distress. As a result of losing her income, the complainant suffered humiliation from having to rely on charity for the first time in her life. This forum awarded the complainant \$17,500.00 in mental suffering.

Complainant's financial strain did not cause her to suffer nearly to the degree the complainant suffered in *McClaskey's*. The forum finds the extent of mental distress in this case to be more similar to the distress experienced by the complainants in *In the Matter of Dennis Murphy Family Trust* (Case No. 23-99, Nov. 16, 1999) and *In the Matter of LTM, Incorporated*, 17 BOLI 226 (1998). In *Dennis Murphy*, the respondent discriminated against the complainant in housing on the basis of his mental disability. The complainant felt threatened by the respondents' discrimination (an illegal eviction threat) and modified his behavior in response to it by taking medications he did not want to take. There was no persuasive evidence of other forms of mental suffering. The forum

awarded \$10,000.00 damages for the complainant's emotional distress. In *LTM*, the respondent illegally harassed the complainant for filing a worker's compensation claim. The harassment was short-lived and did not cause any severe depression or other mental suffering, but only resulted in the complainant "vegetating" around his home, something he did not normally do. The forum awarded \$5000.00 in damages for emotional distress. *Id.* at 240.

The forum finds that Complainant suffered mental distress in type and magnitude roughly similar to that experienced by these two complainants. The forum concludes that \$7500.00 will appropriately compensate Complainant for that mental suffering.

ORDER

NOW, THEREFORE, as authorized by ORS 659.010 and ORS 659.060(3), to eliminate the effect of Respondents' unlawful employment practices, and as payment of the damages assessed for their violations of ORS 659.030(1), the Commissioner of the Bureau of Labor and Industries hereby orders **Bob G. Mitchell and Sharon F. Mitchell, dba Granny's Grainery** to:

1) Deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232-2162, a certified check payable to the Bureau of Labor and Industries **in trust for Complainant L. Krystle Borgmann** in the amount of:

a) FIVE THOUSAND SIXTY-SEVEN DOLLARS AND SEVENTY-ONE CENTS (\$5067.71), less appropriate lawful deductions, representing wages and tips Complainant lost from July 7, 1997, through November 15, 1997 as a result of Respondents' unlawful employment practices; plus

b) Interest at the legal rate on the sum of \$5067.71 from November 16, 1997, until paid; plus

c) SEVEN THOUSAND FIVE HUNDRED DOLLARS (\$7500.00), representing compensatory damages for the mental suffering Complainant experienced as a result of Respondents' unlawful employment practices; plus

d) Interest at the legal rate on the sum of \$7500.00 from the date of the final order until paid.

2) Cease and desist from discriminating against any employee on the basis of pregnancy.

**In the Matter of
ALPINE MEADOWS
LANDSCAPE MAINTENANCE,
LLC, and RONALD PAR-
ENTEAU**

Case Number 35-99
Final Order of the Commissioner
Jack Roberts
Issued January 11, 2000

SYNOPSIS

Complainant, who was 42 years old, applied for a job opening with Respondent Alpine Meadows Landscape Maintenance, a limited liability company, as a landscape worker and was refused hire because of his age. The forum awarded Complainant \$1,043.03 in back pay and \$12,500 in mental suffering damages. Respondent Parenteau, a "member" of Respondent Alpine, was found to have aided and abetted Respondent Alpine and was held jointly liable for back pay and mental suffering damages. ORS 659.030(1)(a); ORS 659.030(1)(g).

The above-entitled case came on regularly for hearing before Alan McCullough, 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 3 and 4, 1999, in the Bureau of Labor and Industries' office at 700 East

Main, Suite 105, Medford, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by Cynthia L. Domas, an employee of the Agency. Terrance J. Hershberger (Complainant) was present throughout the hearing and was not represented by counsel. Respondents were represented by Joseph M. Charter, Attorney at Law. Ronald Parenteau ("Parenteau"), Respondent, was present throughout the hearing.

The Agency called as witnesses, in addition to Complainant: Keith Pearson and Betty Moore, employees of the Oregon Employment Department; Joseph Tam, Senior Investigator for the Civil Rights Division; Joy Delucchi, Complainant's girlfriend; Duane Duckworth, manager of the motel where Complainant lives; and Respondent Ronald Parenteau.

Respondents called as witnesses: Ronald Parenteau; Harry Bower, co-owner of Respondent Alpine Meadows Landscape Maintenance, LLC ("Alpine"); Kenneth Brown, an acquaintance of Respondent Parenteau; and Joseph Tam.

The forum received into evidence:

a) Administrative exhibits X-1 to X-24a (submitted or generated prior to hearing) and X-25 to X-40

(with two exceptions,¹ these exhibits consist of documents submitted or generated after the date of hearing);

b) Agency exhibits A-1 through A-13 (submitted prior to hearing with the Agency's case summary) and A-14 (submitted at hearing); and

c) Respondent exhibits R-4, R-5, R-8, R-10, R-11, and R-14 (submitted prior to hearing with the Agency's case summary), and R-15 (submitted at hearing).

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 October 28, 1998, Complainant filed a verified complaint with CRD alleging that he was the victim of the unlawful em-

ployment practices of Respondents based on their failure to hire him on or about July 13, 1998. After investigation and review, Civil Rights Division issued an Administrative Determination finding substantial evidence supporting the allegations regarding Respondents' failure to hire Complainant.

2) On April 19, 1999, the Agency prepared for service on Respondents Specific Charges alleging that Respondents discriminated against Complainant based on Respondents' failure to hire Complainant due to his age.

3) 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.

4) On May 7, 1999, counsel for Respondents filed an answer in which Respondents denied the substantive allegations contained in the Specific Charges and alleged several affirmative defenses.

5) On May 7, 1999, Respondents moved for a postponement on the basis that Respondents' counsel had a pre-existing trial set for June 22, 1999, the same day the hearing was set to commence.

¹ Exhibit X-26 is a copy of Respondent's letter of July 22, 1999 amending paragraph 7 of Respondent's amended answer that was filed on July 22, 1999. It substitutes for the original document, which is missing from the official hearings file. See Procedural Finding of Fact #16, *infra*. Exhibit X-28 is Respondent's original letter of July 22, which was discovered by the ALJ after receipt of X-26 from the Agency. X-27 is the original of "Respondents' Response to Requests for Admissions."

The Agency did not oppose the motion.

6) On May 14, 1999, the ALJ granted Respondents' motion to postpone and reset the hearing for August 3, 1999, a date mutually agreed upon by the Agency and Respondents.

7) On May 14, 1999, the ALJ issued an amended notice of hearing.

8) On May 14, 1999, the ALJ issued a case summary order requiring the Agency and Respondents each to submit a list of witnesses to be called, copies of documents or other physical evidence to be introduced, a statement of any agreed or stipulated facts. The Agency was additionally ordered to submit damage calculations and a brief statement of the elements of the claim. Respondents were additionally ordered to submit a brief statement of any defenses to the claim. The ALJ ordered the participants to submit case summaries by July 23, 1999, and notified them of the possible sanctions for failure to comply with the case summary order.

9) On July 6, 1999, Respondents filed a motion to amend their answer to include an additional affirmative defense stating "Complainant's charges are barred by the doctrine of unclean hands."

10) On July 6, 1999, Respondents filed a motion to compel discovery or dismiss the Agency's claim for mental suffering damages. Specifically,

Respondents sought Complainant's counseling records, alleging that Respondents had informally requested those records after Complainant was deposed on July 1, 1999, and that the Agency had refused to provide them.

11) On July 9, 1999, the Agency requested an extension of time to file a response to Respondents' motion to amend the answer. The ALJ granted the Agency's request and gave the Agency until July 16, 1999, to respond.

12) On July 13, 1999, the Agency filed a response to Respondents' motion to compel discovery or dismiss claims for mental suffering. The Agency opposed the motion on the grounds that it was untimely, that it requested privileged information, that the Agency did not have control of the records requested, that Respondents could have attempted to subpoena the records, and that Respondents' request was overly broad.

13) On July 16, 1999, the Oregon Dept. of Justice filed a response to Respondents' motion to amend their answer on behalf of the Agency. The response objected to Respondents' motion on the basis that it was subject to being stricken due to Respondents' failure to plead any facts to support their conclusory allegation.

14) On July 15, 1999, the ALJ issued a ruling in response to Respondents' motion to compel discovery or dismiss claims for

mental suffering. The ALJ overruled the Agency's objections and ruled that Complainant's counseling records were discoverable pursuant to OAR 839-050-0200(5). The ALJ ordered the Agency to provide to the ALJ, for an *in camera* inspection, "all of Complainant's medical records created between July 13, 1996 and the present showing 'any mental or emotional counseling or psychological treatment, including substance abuse, anger management, and treatment with Dr. Donnelly for stress or sleep disturbance.'"

15) On July 19, 1999, the ALJ issued a ruling in response to Respondents' motion to amend their answer. Noting that a motion to make more definite and certain would have been more appropriate, but would have produced the same result, the ALJ granted the Agency's motion to strike on the ground that Respondents' proposed amendment stated "a conclusion of law, without any facts to support it * * * [leaving] the Agency in the untenable position of having to prepare a purely speculative defense against Respondents' assertion of 'unclean hands.'" The ALJ granted Respondents leave to amend their answer to allege facts in support of its "unclean hands" defense.

16) On July 22, 1999, Respondents submitted a revised amended answer that alleged substantive facts in support of its "unclean hands" defense.

17) On July 23, 1999, both Respondents and the Agency

timely submitted their case summaries.

18) On July 27, 1999, the Agency submitted an addendum to its case summary.

19) On July 28, 1999, the ALJ granted Respondents' revised motion to amend their answer to include an "unclean hands" defense.

20) On July 30, 1999, Respondents filed a motion to strike the Agency's claim for mental suffering damages for two reasons: (1) the Agency had not yet produced Complainant's medical records as required by the ALJ's discovery order issued July 15, 1999, which prejudiced Respondents in the preparation of their case; and (2) the Agency had not mentioned damages for mental suffering in its case summary, and had waived its right to seek mental suffering damages based on that omission. On July 30, 1999, the Agency filed objections to Respondents' motion to dismiss the claim for mental suffering damages and sent the ALJ a letter stating that the Agency's case presenter had received Complainant's medical file from the VA Domiciliary in White City, Oregon that morning.

21) On July 30, 1999, after receiving Exhibit X-20, the ALJ held a telephonic pre-hearing conference with Respondents' counsel, Mr. Charter, and the Agency case presenter, Ms. Domas, to come up with a plan whereby Mr. Charter could be provided with Complainant's

medical records prior to the hearing. During the conference, the ALJ stated that Respondents were entitled to move for a continuance at the hearing if one was needed in order for Mr. Charter to prepare adequately for the hearing. As a result of the conference, Ms. Do-mas sent, via facsimile, 73 pages of Complainant's VA medical records directly to the ALJ, who conducted an *in camera* inspection of the records. After his inspection, the ALJ redacted 27 pages in their entirety, and parts of the remaining 46 pages because they contained no records within the scope of the ALJ's discovery order. On the morning of July 31, 1999, the ALJ sent the latter 46 pages via facsimile to Mr. Charter, who received legible copies of the documents in his office that same morning. At the hearing, Mr. Charter moved for release of unredacted copies of all 73 pages. The ALJ stated the basis for the redactions and denied Mr. Charter's motion. The ALJ also gave Mr. Charter the opportunity to move for a continuance, based on his July 31 receipt of the documents. Mr. Charter declined to move for a continuance.

22) On July 30, 1999, the Agency, through the Oregon Dept. of Justice, filed a motion to strike Respondents' revised motion to amend answer.

23) On August 2, 1999, Respondents filed objections to the Agency's motion to strike Respondents' revised motion to amend their answer.

24) At the commencement of the hearing, 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.

25) Prior to opening statements, the ALJ informed the participants that the Agency's motion to strike Respondents' revised motion to amend their answer was overruled, and that Respondents would be allowed to present evidence in support of their "unclean hands" defense. In the course of the hearing, the Agency requested, and was granted, a continuing objection to all testimony and exhibits relevant to this defense. The forum has concluded that Respondents' "unclean hands" defense is inapplicable in this proceeding and, in reconsideration, grants the Agency's motion to strike Respondents' revised motion to amend their answer. As a result, all testimony and exhibits or parts of exhibits that relate solely to Respondents' "unclean hands" defense have been disregarded.²

26) Prior to opening statements, Respondents objected that not all of Complainant's medical records had been released to them, and that Respondents had not been informed of the specific basis for the redaction of each fully or partially redacted record.

² See discussion of Respondents' affirmative defense of "unclean hands" in the Opinion section of this Order, *infra*.

The ALJ stated that the records had been redacted in keeping with the specific language of the July 15, 1999, discovery order requiring production of the records by the Agency. Respondents moved that all 73 pages of Complainant's medical records, in their unredacted form, be preserved in the hearings file in the event of an appeal. The ALJ stated that the records would be preserved in a sealed, marked envelope in the event of appellate review.

27) Both the Agency and Respondents were given an opportunity for closing argument after the evidentiary portion of the hearing was concluded. At the conclusion of the hearing, the ALJ requested that Respondents submit a post-hearing brief, and the Agency submit a post-hearing brief from the Oregon Dept. of Justice, with the option of also submitting a statement of agency policy, on the following issues:

(a) Whether Respondent Ronald Parenteau could be held liable as an aider and abettor to Respondent Alpine under ORS 659.030(1)(g);

(b) Respondents' affirmative defense stating "To the extent that the Agency contends that remedies can be different for complaints proceeding to hearing under ORS 659.060, the statutory scheme violates Oregon Constitution Article I, section 20, because it grants to a class of people a privilege or immunity that is not granted to the class to which Respondents belong, and the

Equal Protection Clause of the Fourteenth Amendment to the United States Constitution;

(c) Whether Respondents affirmative defense of "unclean hands" is applicable under the facts in this case and, if the fact that Complainant is not a party in the case makes a difference in the analysis.

The ALJ set a deadline of August 25, 1999, for filing the briefs.

28) On August 24, 1999, Respondent filed their post-hearing brief. It included two pages of argument addressed to the elements of a prima facie case in civil rights cases in general and in this case in particular.

29) On August 25, 1999, the Oregon Dept. of Justice filed a post-hearing brief on behalf of the Agency.

30) On August 26, 1999, the Agency sent a motion via facsimile to Mr. Charter and the ALJ to strike the portion of Respondents' post-hearing brief arguing that the Agency had failed to prove a prima facie case, on the basis that it exceeded the scope of the ALJ's order for post-hearing briefs. The Agency served the document on the Hearings Unit and Mr. Charter by first class mail on August 27, 1999. The forum agrees that Mr. Charter's discussion of the elements of a prima facie case exceeds the scope of the ALJ's order for post-hearing briefs and hereby grants the Agency's motion.

31) On September 14, 1999, the Agency sent a Request for a Protective Order directly to the ALJ, via facsimile, concerning Complainant's medical, psychological, counseling, and therapy records. The Agency filed the Request with the Hearings Unit on the same day.

32) On September 14, 1999, Respondent filed an objection to the Agency's request for a Protective Order.

33) On September 23, 1999, the ALJ issued a Protective Order effective the date of receipt by the participants requiring that "all the medical, psychological, counseling, and therapy records of Complainant" contained in the official file be placed in a sealed envelope with a notation stating the contents' exemption from disclosure under Oregon's Public Records Law and prohibiting Respondents from any future dissemination of any copies of these documents or disclosure of their contents to any person not a party or a representative of a party.

34) On October 8, 1999, the ALJ issued a proposed order that notified the participants that they were entitled to file exceptions to the proposed order. Both Respondent and the Agency timely filed exceptions, which are addressed in the Opinion section of this Final Order.

35) On October 7, 1999, Respondents filed an addition to their post-hearing brief in which Respondents stated out that the

case of *Turnbow v. K.E. Enterprises, Inc.*, 155 Or App 59, 69-70 (1998) also supports Respondents' second affirmative defense.

36) On October 8, 1999, the Agency filed a request that Respondents' letter dated October 7, 1999, be disregarded in its entirety because of its untimeliness. The forum hereby grants the Agency's request.³

37) Respondents, in their exceptions, point out that the ALJ never ruled on Respondents' pre-hearing motion that the Agency waived its right to seek damages for mental suffering because it did not specify such damages in its case summary.⁴ The Specific Charges and Answer plead and define the issues upon which evidence can be presented at hearing by the participants. In contrast, the case summary states the specific types of evidence that will be presented at hearing in support of those issues. Its contents have no substantive impact on the issues in the pleadings unless it is specifically coupled with a motion to amend. The only sanction the forum is authorized to impose based on a participant's failure to list a witness or an item of documentary evidence in a case summary is exclusion of that

³ The forum notes that it may rely on case law, including the *Turnbow* case that is the subject of the Agency's objection, whether or not a relevant case is brought to the attention of the forum by the participants.

⁴ See Finding of Fact – Procedural #20, *supra*.

witness or piece of evidence from the hearing.⁵ Consequently, Respondents' motion must be denied.

38) Respondents, in their exceptions, request a ruling on their oral motion at hearing to amend Respondents' affirmative defense regarding "unclean hands" to conform to the proof as to the Complainant's failure to disclose that he had been fired from a prior landscaping job and his false representation that he had a current pesticide applicator's license at the time of his interview with Respondent Parenteau. Respondents' motion is hereby granted.⁶

FINDINGS OF FACT – THE MERITS

1) Complainant's date of birth is December 24, 1955.

2) At all times material herein, Alpine was an Oregon limited liability company formed under ORS Chapter 63 that did was based in Ashland, Oregon, and an employer that engaged or utilized the personal services of one or more employees.

3) At all times material herein, Ronald Parenteau and Harry Bower were Alpine's sole "mem-

bers" and were both initially designated as Alpine's only "managers" under Alpine's "Operating Agreement." Each had a 50% ownership interest in Respondent Alpine. Parenteau was born in July 1949, and Bower was born in December 1939.

4) At all times material herein, Alpine was engaged in the business of landscape maintenance. Alpine's principal work consisted of mowing lawns, weeding, and pruning hedges. In the summer of 1998, Alpine's members and sole employee typically began work at 7 a.m. and sometimes worked as long as 12 hours per day. Although Parenteau also took care of Alpine's paperwork, both Parenteau and Bower mowed lawns, weeded, and pruned hedges. Alpine owned two pickup trucks that Parenteau and Bower used in the business.

5) On March 16, 1998, Respondents ran an ad in the *Ashland Daily Tidings* "Help Wanted" section that read as follows:

"LANDSCAPE MAINTENANCE Worker, Qualified applicant should be 21 or older, non-smoking, with valid OREGON driving license. Send resume with Salary requirements to: Alpine Meadows, PO box 3222, Ashland OREGON 97520."⁷

⁵ See OAR 839-050-0210(5), 839-050-0200(8).

⁶ However, this is a moot issue, inasmuch as the forum has held that the doctrine of "unclean hands" is not available in this forum. See discussion of "Affirmative Defenses" in the Opinion, *infra*.

⁷ Although the Agency has not alleged a violation of ORS 659.030(1)(d), the forum notes that this ad appears on its face to be a violation of ORS

6) Gregory Phillipot, whose date of birth is June 1, 1956, was hired on May 12, 1998, after responding to the ad. Parenteau did not ask Phillipot's age before he was hired and only learned of his age when Phillipot became eligible for company insurance benefits. Although Phillipot initially responded to the newspaper ad, he was actually hired through the "Jobs Plus" program.⁸ Phillipot continued to work for Alpine until January 1999.

7) On June 3, 1998, Parenteau contacted the Oregon Employment Department (the "Department") in Medford by telephone and filed a job order for a landscape worker with Jim Pearson, the Department's "Jobs Plus" representative. The job summary entered by Perkins into the Department's computer in the Department's standard job order format contained the following pertinent information:

"JOB: LANDSCAPE
WORKER

REQ: ABILITY TO MOVE 30#,
OPERATE POWER EQUIP-
MENT

DUTIES: MOWING, TRIM-
MING, EDGING, IRRIGATION,
ALL WORK DONE IN TEAMS

WAGE: \$7.00 HR

HOURS: 9 TO 5, MONDAY
THROUGH FRIDAY

@@APPLICANT CALL FOR
APPOINTMENT – SPECIFY
JOBS PLUS"

Although the job order form contains a space to note that an employer is requiring a driver's license for the job, Perkins did not list a requirement that applicants have a driver's license. The Department assigned job #4104943 to Parenteau's job order.

8) Parenteau's job order sought applicants who were referred by the Department's "Jobs Plus" program. Respondents were looking for someone who could work at least 40 hours per week.

9) The "Jobs Plus" program is an on-the-job training program that provides a subsidy for employers and is administered by the Department. Any person receiving unemployment or Adult and Family Services benefits is eligible to be referred by the Department to employers who have requested "Jobs Plus" candidates. When a "Jobs Plus" candidate is hired, the Department subsidizes the candidate's wage at the rate of \$6.50 per hour for the first month of employment. For the next five months, the employee's wage is

659.030(1)(d), which makes it an unlawful employment practice for "any employer * * * to cause to be printed * * * any advertisement * * * in connection with prospective employment which expresses directly * * * any limitation, specification or discrimination as to an individual's * * * age if the individual is 18 years or older * * *."

⁸ See Findings of Fact – The Merits ##7-9, *infra*, for a description of the "Jobs Plus" program.

subsidized at the rate of \$5.50 per hour.

11) Parenteau sought a "Jobs Plus" candidate because of the "Jobs Plus" wage subsidy.

12) On July 13, 1998, Keith Pearson, the Department's veterans' representative, referred Complainant to Alpine based on Parenteau's job order #4104943.

13) Complainant, who lived in Medford, telephoned Parenteau from the Department and made an appointment to meet him at a coffeehouse in Ashland later that day.

14) Complainant, who did not have a driver's license at the time, took the bus to Ashland to meet with Parenteau. Complainant took his resume, his veterans' card, and a Department referral slip with him that contained essentially the same job summary quoted in Finding of Fact #7, *supra*.⁹

15) Complainant met with Parenteau at approximately 5 p.m. During the interview, Complainant showed Parenteau the referral slip and his resume, which was 22 pages long. The first page of Complainant's resume stated that his desired wage for landscape maintenance was "\$8.00-\$12.00 HRLY" and described his extensive experience operating

landscape related power equipment and hand tools. The second page described his education in turf maintenance, turfgrass and groundcover management, and irrigation design, and stated his certification as a wildland firefighter. It also stated:

"Public Pesticide Applicator (sic) License

Issued by Oregon state Dept, (Agriculture)

Lic/no# 139524 DATE FROM [1997]

TYPE #HERB/ORN
DATE TO [12/31/2001]"

The third page was a generic letter from Complainant offering reasons why a company should hire him. Pages four through 22 contained pictures of equipment that Complainant had operated; two certificates of appreciation; a newspaper article from the Medford *Mail Tribune* describing the White City, Oregon Veterans Domiciliary and Complainant's history of homelessness and drug use before enrolling in the Domiciliary, as well as stating that his age was 42; certificates of training related to his education in turf maintenance, turfgrass and groundcover management, and irrigation design; and a pesticide applicator's license that indicated Complainant's "certification period" was from "01/14/1997 - 12/31/2001," but that his license was issued on "03/10/1997" and expired on "12/31/1997." Complainant had done landscape maintenance at the Rogue Valley Country Club in 1997 and was

⁹ The only differences are that the job referral slip omitted the language "ALL WORK DONE IN TEAMS" and specifically stated that a driver's license was "NOT REQUIRED."

fired from that job, but did not list it on his resume.

16) Parenteau's recollection at the time of the hearing was that he only looked at the first page of Complainant's resume and the photos of Complainant on equipment. He did not ask Complainant about his prior landscape maintenance experience or if he had ever been fired from a job.

17) During the interview, Parenteau asked Complainant how old he was and Complainant said he was 42 years old.

18) During the interview, Parenteau inferred from Complainant's degrees and pictures of the equipment he could operate shown in Complainant's resume that Complainant had prior landscape maintenance experience.

19) During the interview, Complainant told Parenteau that he would take the bus to and from work. Parenteau inferred that Complainant did not have a driver's license from the fact that Complainant had taken the bus to the interview.

20) At the conclusion of the interview, Parenteau indicated he would get back to Complainant concerning Alpine's job opening.

21) After the interview, Parenteau discussed Complainant's application with Bower, and they made a joint decision not to hire Complainant.

22) After making the decision not to hire Complainant, and several days after the interview,

Parenteau left Complainant's resume outside Complainant's motel room in a manila envelope. While in the motel parking lot, he wrote a note on a "yellow sticky note"¹⁰ and attached it to Complainant's resume. The note read:

"TERRY, SORRY, WE WERE LOOKING FOR SOMEONE YOUNGER, TO POSSIBLY TAKE OVER THE BUSINESS. Thanks, Ron"

23) After Complainant was interviewed on July 13, 1998, the Department referred another applicant to Alpine on July 15, 1998, in response to job order #4104943. There was no reliable evidence presented that this applicant was actually interviewed.

24) When Complainant subsequently opened the manila envelope, found Parenteau's note inside, and read it, he initially felt "numb," then experienced anger. For the next ten days or so, he felt it was futile to look for another job. He suffered stomach upset to the point where he couldn't sleep at night, and watched television 8-12 hours straight during the day, whereas he usually only watches wrestling on television. He withdrew from social contact with his acquaintances and lost his temper easily with his landlord and his girlfriend, especially when she

¹⁰ During cross-examination, Respondent Parenteau was asked "And at that time, isn't it true that you'd already written the yellow sticky note?" He responded "No, I wrote it in the parking lot" and did not deny that the note was yellow in color.

suggested he go out and look for work.

25) During this same period of time, Complainant experienced stress because his unemployment benefits were about to expire. On June 2, 1998, Complainant stated he had felt "depressed" and had "restless sleep" in the past week. He also indicated that he had been bothered in the past month by "repeated, disturbing memories, thoughts or images" of past traumatic events; that he had felt "distant or cut off from other people" in the past month; and that he had been "super alert" or "watchful" or "on guard" in the past month. Complainant was also continuing to experience emotional distress resulting from his brother's suicide in April 1997.

26) In June and July 1998, Complainant was periodically awakened in the night by numbness and paresthesia in his hands.

27) On July 27, 1998, Complainant contacted the Medford Employment Department and complained that Respondents had discriminated against him on the basis of his age. In response, Betty Moore, a supervisor at the Department, contacted Parenteau. On August 4, 1998, Parenteau visited Moore at her office to discuss Complainant's complaint. In the course of the conversation, Parenteau told Moore that he "had to have people he felt could do the job, younger people," and that he "needed younger people." Moore advised Parenteau that the Department couldn't continue to

process Alpine's job order. In response, Parenteau told Moore that he would advertise through the newspaper and hire who he wanted, and canceled the job order.

28) Complainant did not look for work for approximately ten days after receiving Parenteau's note.

29) Complainant went to work as a firefighter for Ferguson Management Company on July 28, 1998 at the wage of \$7.80 per hour, and worked through August 13, 1998, earning \$8.00 per hour his last week of employment, earning total gross wages in the amount of \$528.05.

30) Complainant worked for Personnel Source from August 4-6, 1998, at \$7.15 per hour, earning total gross wages in the amount of \$171.60.

31) Complainant went to work for Bear Creek in September 1998 for \$6.00 per hour and worked until he was laid off sometime after October 1, 1998. Complainant earned gross wages of \$1337.32 through October 1.¹¹

32) Complainant earned a total of \$2,036.97 in gross wages

¹¹ This sum was arrived at by adding total gross wages from Complainant's payroll slips through September 27, then adding 80% of Complainant's gross wages from his payroll slip for the pay period that ended October 4, 1998. The forum bases the latter calculation on the assumption that Complainant worked five days during the week that ended October 4, 1998.

at Ferguson, Personnel Source, and Bear Creek from July 28, 1998, through October 1, 1998.¹²

33) During the hearing, the Agency stipulated that it was only seeking back wages for Complainant from July 13, 1998, through October 1, 1998.

34) If Complainant had started work for Alpine on July 14, 1998, he would have worked a total of 440 hours at \$7.00 per hour from July 14 through October 1, for total gross earnings of \$3,080.00, based on working eight hours per day, five days per week.

35) In the past few years, Parenteau and Bower have discussed bringing two of their nephews into Alpine as members, in part because of Parenteau's and Bower's diminishing health. At the time of the hearing, the two

nephews were 22 and 24 years old, respectively, lived in Nevada and Virginia, respectively, and had not become members of Alpine. No evidence was presented to indicate that, in June and July 1998, there was any more than an abstract possibility that either nephew might move to Ashland and join the LLC.

36) On November 25, 1998, the Civil Rights Division received a three-page letter from Parenteau and Bower responding to the allegations in Complainant's complaint. Included in that letter was a statement to the effect that Complainant was not hired because his wage expectations were too high and he was overqualified. The letter also stated that Complainant had "[L]ost his out-of-state license, and had no transportation, other than the local bus lines. (Again, not a problem, for we hired someone before with no license, but lived locally, so we met daily, and ran the route with our company vehicles.)" Finally, the letter explained that "[T]he 'sticky' note that was left on the applicant's returned resume, was not worded properly and was a mistake. * * * "[T]he 'sticky' note used the term 'looking for a younger person.....' in reference to someone who would be willing to work for minimum wage, and after an extensive period of training and learning with the hopes of assuming the physical operations of the business."

37) Parenteau expects honesty from employees and would not hire an employee who listed

¹² Although the participants stipulated this figure was \$1,774.25, upon review of this figure and the calculations upon which it was based, the forum concludes that Complainant's gross earnings at Bear Creek during the week ending October 4, 1998, were inadvertently omitted from in this calculation. Consequently, the forum adds \$252.72 in gross wages to the stipulated figure to avoid injustice to Respondents. See also *In the Matter of Franko Oil Company*, 8 BOLI 279, 291 (1990) ("The Hearings Referee has the right and duty to conduct a fair and full inquiry and create a complete record. * * * Where errors are detected, the Hearings Referee is empowered to cause them to be corrected. This is especially true where there are arithmetic errors or other similar computation oversights.")

false information on his or her application.

38) At an undetermined point between July 13, 1998 and the date of the hearing, Parenteau became aware that Complainant's pesticide applicator license expired at the end of 1997. Sometime in 1999, Parenteau became aware that Complainant had been fired from the Rogue Valley Country Club prior to his interview with Parenteau.

39) Keith Pearson was a credible witness. His testimony related primarily to facts and issues not in controversy and was not controverted.

40) Betty Moore was a credible witness. Despite her cryptic entries in her computer regarding her conversations with Parenteau, she demonstrated a clear recollection of her conversation with him and the events surrounding that conversation. She did not exaggerate in her testimony about Parenteau's demeanor at the time of their conversation, and her testimony was straightforward and responsive to the questions put forth to her. She had a logical explanation for having taken such brief notes of her conversation with Parenteau, namely, the pre-formatted space limitation in the Department's computer program and instructions from her supervisors to be precise and use as few words as possible. It was also clear that she was not an experienced civil rights investigator and would not necessarily know what items to omit and what items to include in

a summary report concerning an alleged civil rights violation. For these reasons, the forum has credited her testimony in its entirety.

41) Kenneth Brown was a credible witness. However, his testimony was limited in its scope and only marginally relevant.

42) Harry Bower's testimony was not credible on several critical issues related to the legitimate, non-discriminatory reasons ("LNDRs") proffered by Respondents in defense of their decision not to hire Complainant. Some of his testimony was inconsistent with other credible testimony, some with his own testimony, and at least one statement inherently improbable. He testified that a driver's license was necessary for the job Complainant applied for, but acknowledged having read the statement contained in Respondents' three-page letter to the Civil Rights Division stating that the lack of a driver's license was "not a problem"¹³ before signing the letter. He testified that when he talked to Parenteau about Complainant's application and learned he was not from the Jobs Plus program, he immediately decided that Complainant could not be hired. This is in direct contrast with the undisputed fact that Complainant was a direct referral from the Jobs Plus program. He stated that the only papers Parenteau brought back from the interview with Complainant were

¹³ See Finding of Fact – The Merits #36, *supra*.

the photographs of equipment that were part of Complainant's resume. This contrasts both Parenteau's and Complainant's testimony. Finally, Bower testified that he has no idea of Complainant's age.¹⁴ Given that Complainant's age is stated in his original complaint and on the Specific Charges, and that this case had been an issue for Respondents for nine months prior to the hearing, the forum finds this testimony patently unbelievable. Accordingly, the forum gave Bower's testimony little or no weight whenever it conflicted with other credible evidence on the record.

43) Joy Delucchi's testimony was biased by her romantic relationship with Complainant. She gave exaggerated testimony that was contrary to Complainant's later testimony in an apparent attempt to bolster Complainant's case. For example, she testified that Complainant was more depressed over Alpine's failure to hire him than over the suicide of his brother. Her testimony on cross-examination also implied that Complainant had not looked for work for two months after getting the "yellow sticky note." This is a significant contrast with Complainant's testimony and documentary evidence provided by the Agency that shows Complainant started work at Ferguson Management on July 28, 1998.

For this reason, her testimony regarding the extent and duration of Complainant's mental suffering was found not credible by the forum. However, her testimony regarding the types of mental suffering experienced by Complainant as a result of Alpine's failure to hire him that was corroborated by Complainant was found credible.

44) Joseph Tam appeared to be deliberately difficult with Respondents' attorney during cross examination, and took an extended period of time before responding directly to various questions where it was obvious, by his answer, that the information sought was readily within his grasp. Despite this attitude, the substance of Tam's testimony did not indicate that he was biased in any way towards Respondents or that bias towards Respondents had influenced his investigation. In addition, his testimony on all material issues was both internally consistent and consistent with other credible evidence on the record. Consequently, the forum finds Tam's testimony to be credible.

45) Ronald Parenteau's testimony was inconsistent in a number of respects with documentary evidence created by Parenteau prior to the hearing, with other credible evidence on the record, and with common sense. Like Bowers, his testimony was not credible on several critical issues related to Respon-

¹⁴ His specific testimony was "To this day, I have no idea how old Complainant is."

dents' LNDRs.¹⁵ Accordingly, the forum gave Parenteau's testimony little or no weight whenever it conflicted with other credible evidence on the record.

46) Complainant's testimony was exaggerated to some degree regarding the extent and duration of his mental suffering and the length of time it took him to find subsequent employment after receiving the "yellow sticky note." Ironically for Respondents, the very evidence that shows Complainant's testimony to be exaggerated regarding how long it was before he looked for work also disproves Respondents' contention that he failed to mitigate his damages. However, Complainant's testimony material to his application for and subsequent rejection from Alpine's landscape worker job opening was straightforward, responsive to the questions asked of him, and unembellished. Consequently, the forum found Complainant's testimony credible in all material respects related to the Agency's allegation that Complainant was not hired because of his age. Complainant's testimony regarding the types of mental suffering he experienced has also been credited in its entirety.

ULTIMATE FINDINGS OF FACT

1) Complainant is an individual who was 42 years old in July 1998.

2) At all times material herein, Alpine was an Oregon limited liability company engaged in landscape maintenance within the state of Oregon and was an employer in this state that engaged or utilized the personal services of one or more persons.

3) At all times material herein, Ronald Parenteau was a member, manager, and 50% owner of Alpine.

4) In June 1998, Alpine advertised a job opening for a landscape worker with the Oregon Employment Department at the pay rate of \$7.00 per hour for a 40-hour workweek.

5) Complainant was referred to Alpine's job opening by the Employment Department on July 13, 1998, was interviewed for the job by Parenteau, and was not hired.

6) Complainant was qualified for Alpine's job opening of landscape worker.

7) Parenteau and Harry Bower, Alpine's other member, made a joint decision not to hire Complainant within a week of July 13, 1998.

8) Complainant was not hired based on his age.

9) On August 4, 1998, Alpine withdrew its job order from the Employment Department and did not hire anyone.

¹⁵ See discussion in the Opinion in section entitled "Unlawful Employment Practice – Respondents' action was taken because of the Complainant's protected class," *infra*.

10) Complainant suffered a \$1,043.03 gross wage loss as a result of Alpine's refusal to hire him.

11) Complainant suffered significant emotional and mental distress as a result of Respondents' conduct that was partially offset by pre-existing conditions.

CONCLUSIONS OF LAW

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

2) At all times material herein, Ronald Parenteau was a member, manager, and 50% owner of Alpine subject to the provisions of ORS 659.030(1)(g).

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

4) The actions of Ronald Parenteau and Harry Bower, described herein, and the attitudes underlying those actions, are properly imputed to Alpine Meadows Landscape Maintenance, LLC.

5) At times material herein, ORS 659.030(1)(a) provided, in pertinent part:

"(1) 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 * * * age if the individual is 18 years of age or older * * * to refuse to hire or employ * * * such individual."

Alpine, as Complainant's prospective employer, committed an unlawful employment practice through its members Ronald Parenteau and Harry Bower in refusing to hire or employ Complainant based on his age.

6)) At times material herein, ORS 659.030(1)(g) provided, in pertinent part:

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

"* * * * *

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

At all times material herein, ORS 659.010(12) provided, in pertinent part:

"Person' includes one or more individuals, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy or receivers."

Ronald Parenteau, an individual person, member, and manager of Alpine, committed an unlawful employment practice in violation of ORS 659.030(1)(g) by aiding and abetting Alpine in refusing to

hire or employ Complainant based on his age, an act forbidden by ORS 659.030(1)(a).

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 under the facts and circumstances of this case to award Complainant lost wages resulting from Respondents' unlawful employment practice and to award money damages for emotional distress sustained and to protect the rights of Complainant and others similarly situated. The sum of money awarded and the other actions required of Respondents in the Order below are appropriate exercises of that authority.

OPINION

1. INTRODUCTION

In its Specific Charges, the Agency alleges that Alpine refused to hire Complainant based on his age, and in doing so, committed an unlawful employment practice in violation of ORS 659.030(1)(a). The Agency additionally alleges that Ronald Parenteau aided and abetted Alpine in violation of ORS 659.030(1)(g). The Agency seeks remedies consisting of back pay in the amount of \$2,233 and mental suffering damages in the amount of \$12,500.

2. UNLAWFUL EMPLOYMENT PRACTICE

The Agency's prima facie case consists of proof of the following elements: (A) Respondents are

Respondents as defined by statute; (B) Complainant is a member of a protected class; (C) Complainant was harmed by an action of Respondents; and (D) Respondents' action was taken because of the Complainant's protected class. See OAR 839-005-0010(1).

A. Respondents are Respondents as defined by statute.

In their answer to the Specific Charges, Respondents admit that Alpine is a limited liability company and was an employer in Oregon subject to the provisions of ORS 659.010 to 659.435. Respondent Parenteau contends that he cannot be held liable as an aider and abettor under ORS 659.030(1)(g) as a matter of law. For reasons discussed later in this opinion,¹⁶ the forum finds otherwise, and concludes that Alpine and Parenteau are both proper Respondents as defined by statute.

B. Complainant is a member of a protected class.

Complainant, by virtue of being an individual who is 18 years old or older, is a member of a protected class as defined by ORS 659.030(1)(a).

C. Complainant was harmed by an action of Respondents.

Although Respondents contend that Complainant was not harmed because the landscape

¹⁶ See discussion of "Liability" in Opinion, *infra*.

worker position he applied for was never filled, the forum is convinced that, but for Complainant's age, he would have been hired to fill the position advertised by Alpine.¹⁷ Credible evidence establishes that Complainant lost wages and experienced mental suffering as a result of Respondents' refusal to hire him, constituting the requisite harm.

D. Respondents' action was taken because of the Complainant's protected class.

The "yellow sticky note" that Parenteau attached to Complainant's resume¹⁸ is the lens through which the analysis of causation must be viewed. It was written in the same time frame that Parenteau and Bower made the decision not to hire Complainant and was obviously intended to provide Complainant with an explanation of why he was not hired. Parenteau testified that the note was "a mistake," that its words have been taken out of context, and that there were several other reasons why Complainant was not hired. However, given that it is the most direct reflection of Parenteau's state of mind at the time

the alleged discriminatory hiring decision was made, and that none of those other reasons appear on the note, the forum concludes that Parenteau's words on the note constitute direct evidence of unlawful discrimination.

Respondents offer four LNDRs¹⁹ for not hiring Complainant. If any of those are found credible, then the forum must apply a "mixed motive" analysis, in which the burden of proof rests on Respondents to prove that the same hiring decision would have been made even if Complainant's age had not been taken into account.²⁰

¹⁹ See Finding of Fact – The Merits #42, *supra*.

²⁰ OAR 839-005-0015 specifically provides:

"Frequently, the evidence indicates that several factors contribute to causing the Respondent's action, of which only one factor is the Complainant's protected class. The Division will apply the mixed motive analysis to determine whether the Complainant's protected class membership played so substantial a part in the Respondent's action to be said to have 'caused' that action. Under this analysis, the Complainant's protected class membership does not have to be the sole cause of the Respondent's action but must have played a substantial role in the Respondent's action at the time the action was taken. A Respondent must prove that it would have made the same decision even if it had not taken Complainant's protected class into account."

The forum also notes that direct evidence of an unlawful employment

¹⁷ See discussion of causation in Opinion section entitled "Respondents' action was taken because of the Complainant's protected class," *infra*.

¹⁸ The note specifically read "TERRY, SORRY, WE WERE LOOKING FOR SOMEONE YOUNGER, TO POSSIBLY TAKE OVER THE BUSINESS. Thanks, Ron." See Finding of Fact – The Merits #21, *supra*.

Respondents' first LNDR is that the job required a valid Oregon driver's license, which Complainant lacked. Respondents point to the March 1998 newspaper ad,²¹ from which Greg Phillipot was hired, as evidence of this requirement. Contradicting this evidence is the job order itself, which does not reflect the need for a valid Oregon driver's license,²² the fact that Respondent Parenteau did not tell Complainant he would not be hired because he lacked a valid Oregon driver's license,²³ and the statement by Parenteau and Bower to the Civil Rights Division that Complainant's lack of a driver's license was "not

practice is not always necessary to trigger the mixed motive analysis under OAR 839-005-0015.

²¹ See Finding of Fact – The Merits #5, *supra*.

²² Although the job order, as entered onto the Employment Department's computer by employment representative Jim Perkins, erroneously describes Alpine's work hours as 9 a.m. to 5 p.m., this apparent error, by itself, does not establish that Parenteau specified a driver's license as a job requirement in giving the order to Perkins, particularly in view of Parenteau's and Bower's subsequent statement to the Civil Rights Division that Complainant's lack of a driver's license "was not a problem."

²³ The forum notes Parenteau's testimony that he inferred during his interview with Complainant that Complainant had no license, based on the fact that Complainant took the bus from Medford to Ashland for the interview.

a problem." The forum finds this LNDR is not credible.

Respondents' second and third LNDRs are interrelated. Those LNDRs are that Complainant was overqualified for the job, as demonstrated by his resume, and that his wage expectation was too high, based partly on his qualifications and partly on the wage expectation stated in his resume of \$8-\$12 per hour for landscape work. These LNDRs are also unworthy of credence. To begin with, Parenteau and Bower testified that they could only afford minimum wage and they placed a job order with the Jobs Plus program because of its wage subsidy. However, the job order specified a wage of \$7 per hour, \$1 more than the statutory minimum wage at the time.²⁴ Secondly, the Jobs Plus program would have subsidized \$6.50 per hour of Complainant's wage for his first month of employment, then \$5.50 per hour of Complainant's wage for the next five months. Third, Complainant knew from the job order that the job only paid \$7 per hour, and there is no evidence that he told Parenteau that he would not work for that wage. This conclusion is bolstered by the fact that within two months after July 13, 1998, Complainant took three separate jobs that all paid less than \$8.00 per hour. Finally, there is no evidence on the record that Alpine has rejected other applicants because they were "overqualified."

²⁴ See ORS 653.025.

Respondents' final LNDR relates to the "yellow sticky note." Parenteau testified that when he wrote the note, he had in mind his and Bower's younger nephews and bringing them in as members of the LLC. This argument is inherently flawed. If Parenteau's real plan was to bring in the out-of-state nephews, aged 22 and 24, into the LLC, there would be no point in advertising for applicants in the first place. In addition, no evidence was presented to indicate that, in June and July 1998, there was any more than an abstract possibility that either nephew might move to Ashland and join the LLC. Consequently, the forum also finds this LNDR not credible.

The forum concludes that Parenteau meant exactly what he said in the telltale "yellow sticky note" – that he and Bower were looking for someone younger than Complainant, and that Complainant was not hired as a landscape worker because of his age.

Respondents pose two additional arguments in an attempt to nullify the Agency's prima facie case. First, the facts that Parenteau and Bower are themselves older than Complainant, and had just hired Phillpot, who is the same age as Complainant, show that Respondents had no motivation to refuse Complainant hire based on his age. These facts create a potential inference, but do not, as a matter of law, require a conclusion that Respondents were not motivated to discriminate against Complainant because of

his age. This potential inference is overcome by the direct evidence contained in the "yellow sticky note" and the lack of credibility of Respondents' LNDRs. Second, Respondents point out that no one was actually hired to fill the job opening that Complainant applied for. A prima facie showing in a case involving allegations of age discrimination in hiring typically includes evidence that a comparator applicant, usually younger, was hired to fill the sought after position. In this case, the Agency proved by direct evidence that Respondents were looking for someone younger than Complainant, and that Complainant was not hired as a landscape worker because of his age. Consequently, the lack of a comparator is not a fatal flaw in the Agency's case.

3. LIABILITY

A. Respondent Alpine Meadows Landscape Maintenance, LLC

It is undisputed that Alpine would have been Complainant's employer, had Complainant been hired. Accordingly, Alpine is jointly and severally liable²⁵ for the damage awards made by this forum to compensate Complainant for his back pay loss and mental suffering.

²⁵ See the following paragraph, *infra*, in which the forum discusses Respondent Parenteau's joint and several liability.

B. Respondent Ronald Parenteau

Respondents argue that the *Schram*²⁶ and *Ballinger*²⁷ decisions by the Oregon Court of Appeals prevent the forum from holding Parenteau liable as an aider and abettor under ORS 659.030(1)(g).

In *Schram*, plaintiff brought a civil action in Circuit Court in which she alleged Albertson's had discriminated against her in violation of ORS 659.030, and that two supervisors employed by Albertson's had aided and abetted Albertson's in discriminating against plaintiff in violation of ORS 659.030.²⁸ Plaintiff sought back and front pay from those supervisors.²⁹ The trial court granted summary judgment to the two supervisors on the basis that plaintiff did not seek a remedy from them that was available under the statute of the facts alleged, and the Court of Appeals affirmed. The court characterized the supervisors as "low-level supervisors" who were "co-employees" with plaintiff and held that requiring these supervisors to pay plaintiff lost wages "would belie the kind of 'equitable remedies' that the legislature would have contemplated

against co-employees * * *."³⁰ Additional considerations cited by the court were the fact that Albertson's had "ultimate responsibility for the payment of lost wages," that "Albertson's is the entity that benefited from not having to pay wages to plaintiff," and that "requiring lost wages to be paid by [the supervisors] departs from the idea of restoration of plaintiff's employment status as it existed before she left her job and is more in the nature of sanctions or punishment."³¹

The *Schram* decision was addressed by this forum in 1998, where the Commissioner held that the president of a private corporation who was also an employee of that corporation could be held liable for lost wages as an aider and abettor under ORS 659.030(1)(g).³² The Commissioner reasoned that administrative proceedings brought in this forum are not based on ORS 659.121, and that the Commissioner's remedial authority in administrative proceedings is distinct from that of ORS 659.121, which governs remedies in civil suits.³³ The forum adopts the same conclusion in this case.³⁴

²⁶ *Schram v. Albertson's, Inc.*, 146 Oregon App 415, 934 P2d 483 (1997).

²⁷ *Ballinger v. Klamath Pacific Corp.*, 135 Or App 438 (1995).

²⁸ *Id.*, at 488.

²⁹ *Id.*, at 489.

³⁰ *Id.*

³¹ *Id.*

³² *In the Matter of Body Imaging, P.C.*, 17 BOLI 162 (1998), appeal pending.

³³ *Id.*, at 184.

³⁴ *Schram* can also be distinguished from this case on its facts. The *Schram* supervisors were "co-

Respondents cite *Ballinger* for the proposition that lost wages cannot be awarded against Parenteau because he is not an “employer.” Respondents miss the point. *Ballinger* can be distinguished from this case because the plaintiffs in *Ballinger* alleged that the supervisors were liable as “employers,” not because they had personally aided and abetted the unlawful discrimination.

On the surface, Parenteau’s legal relationship to Alpine, for the purpose of determining his liability as an aider and abettor, appears to be a possible obstacle. Alpine is a limited liability company set up in March 1998 under the provisions of ORS Chapter 63. Limited liability companies (“LLC”) are a relatively new concept under the law. In 1993, 18 states, including Oregon, adopted a limited liability company act (LLCA).³⁵ The LLC is a new form of business in Oregon that combines a corporation’s limited liability with a partnership’s economic and tax flexibility.³⁶ A “member” of an LLC is a person or persons with both an ownership interest in a limited liability company and all the rights and obligations of a member specified

in ORS Chapter 63.³⁷ All “members” are managers unless the articles of incorporation provide for a non-member manager or managers.³⁸

ORS 659.030(1)(g) forbids “any person, whether an employer or an employee, to aid, abet * * * the doing of any of the acts forbidden under ORS 659.010 to 659.110 * * *.” ORS 659.010(12) includes “one or more individuals” under the definition of “person.” “Employer” is defined under ORS 659.010(6) as “any person, who in this state, directly or through an agent, 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.”

In this case, it is undisputed that Parenteau was both a “member” and “manager” of Alpine, and held a 50% ownership interest in Alpine. However, due to the hybrid nature of an LLC, it is impossible to conclude, as a matter of law, that Parenteau was or was not an “employer” as defined by ORS 659.010(6).³⁹ The evidence is insufficient to establish whether or not Parenteau “directly

employees” for a large corporation. In contrast, Parenteau has a 50% ownership interest in Alpine.

³⁵ See Erich W. Merrill, Jr., *Treatment of Oregon Limited Liability Companies in States without LLC Statutes*, 73 Or L. Rev. 43 (1994)

³⁶ See Mark Golding, *Financial Aspects of Oregon Limited Liability Companies*, 73 Or L. Rev. 112 (1994)

³⁷ ORS 63.002(16)

³⁸ ORS 63.130; ORS 63.135.

³⁹ Compare *Ballinger*, 135 Or App at 452 (Corporate employer’s agent was not an “employer” for purposes of ORS 659.010(6), despite fact that agent was corporate employer’s president, was 52% shareholder, and had plenary authority to hire and fire and direct activities of employees.)

* * * engage[d] or utilize[d] the personal service” of Phillipot, Alpine’s only undisputed employee, “reserving the right to control the means by which [Phillipot’s] service is or will be performed” or that Parenteau was an “employee” of Alpine. However, it is not necessary to reach the question of whether Parenteau is an employer or an employee. The forum previously found a joint labor management trust liable as an aider and abettor under ORS 659.030(1)(g) because it met the definition of a “person” under former ORS 659.010(11).⁴⁰ In the present case, Parenteau is the “individual” who wrote the “yellow sticky note” telling Complainant he would not be hired because of his age, and, in doing so, aided and abetted Respondent Alpine in an unlawful employment practice. As a “person,” Parenteau is jointly and severally liable with Alpine for Complainant’s back pay and mental suffering damages.

4. DAMAGES

A. Back Pay

Back pay awards in hiring cases typically consist of the wages or salary earned by the

hired comparator in the relevant time period, less mitigation. In this case, there is no comparator because no one was hired, and there is no date certain that Complainant would have started work. However, it is clear from the job order and from Bower’s and Parenteau’s testimony that the job paid \$7.00 per hour and involved working a minimum of 40 hours per week, Monday through Friday. At the time of Complainant’s job interview, he was not employed. Given that Complainant took the bus to be interviewed by Parenteau on the same day he obtained the job referral, and absent any evidence to the contrary, the forum infers that Complainant would have begun working for Alpine on Tuesday, July 14, 1998, the day after the interview, and that he would have worked eight hours per day, five days a week, earning \$7.00 per hour. The forum further infers that Complainant would have worked this schedule, at this wage, until at least October 1, 1998, the date the Agency stipulated that Complainant’s entitlement to back pay ended. On July 28, 1998, Complainant obtained alternative employment at Ferguson Management, then at Personnel Source. Although his hourly wages at Ferguson and Personnel were higher than he would have earned at Alpine, his overall earnings were less.⁴¹ Adding his Bear

⁴⁰ See *In the Matter of Arden-Mayfair, Inc.*, 2 BOLI 187, 190 (1981). See also *In the Matter of Sapp’s Realty*, 4 BOLI 232, 278 (1985)(A respondent found not to be an “employer” or an “employee” who aided and abetted the respondent employer was held liable for back pay and mental suffering damages on the basis that he was “an ‘individual’ and therefore a “person” within the meaning of the statute.”)

⁴¹ Complainant earned a total of \$699.65 in gross wages from Ferguson and Personnel, whereas his gross earnings at Alpine during the same

Creek wages, Complainant earned gross wages of \$2,036.97 from July 28 through October 1, 1998. Had he been employed by Alpine, he would have earned gross wages of \$3,080.00 in that same period of time.⁴² This forum has previously held that an employer is liable for back wages

period of time would have been \$728.00 (13 days x 8 hours x \$7.00=\$728.00).

⁴² Although this figure is not a certainty, due to the fact that Alpine hired no one whose wages could be used as a lodestar, federal courts in Title VII cases have held that back pay is awardable even when they cannot be calculated with precision. See *Christopher v. Stouder Memorial Hospital*, 936 F.2d 870, 880 (6th Cir. 1991), cert. den. 502 U.S. 1013, 112 S.C. 658,. Also, the U.S. Supreme Court, in *Albemarle Paper Company v. Moody*, 422 U.S. 405 (1975), held that there is a strong presumption in favor of back-pay awards to victims of employment discrimination under Title VII, and that "backpay should only be denied for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination." In the past, this forum has held that, 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. See *In the Matter of Wing Fong*, 16 BOLI 280, 292 (1998). Therefore, this forum relies on the cited federal cases in calculating Complainant's back pay award.

until a complainant obtains subsequent employment paying at least as much as the position lost.⁴³ In this case, that did not occur until October 1, 1998, the date the Agency stipulated that Complainant's entitlement to back pay ended. Consequently, Complainant is entitled to a back pay award from July 14 through October 1, 1998, for a total gross wage loss of \$1,043.03.

The forum notes that Complainant's delay of two weeks in finding alternative employment, despite his apparent failure to look for work in that interim, does not constitute a failure by Complainant to mitigate his back pay loss,⁴⁴ absent a showing by Respondents that alternative suitable employment was offered to Complainant and that he declined it.

In addition, Respondents cite *McKennon v. Nashville Banner Publishing Company*, 115 SCt 849 (1995) for the proposition that

⁴³ See *In the Matter of James Breslin*, 16 BOLI 200, 218 (1997), affirmed without opinion, *Breslin v. Bureau of Labor and Industries*, 158 Oregon App 247, 972 P2d 1234 (1999); *In the Matter of City of Umatilla*, 9 BOLI 91, 105 (1990), affirmed without opinion, *City of Umatilla v. Bureau of Labor and Industries*, 110 Oregon App 151, 821 P2d 1134 (1991).

⁴⁴ See, e.g. *In the Matter of Love's Woodpit Barbeque Restaurant*, 3 BOLI 18, 26 (1982)(Complainant's speed in obtaining alternative employment 10 days after respondent's unlawful discharge established that complainant properly mitigated his damages.)

Complainant's entitlement to back pay should be annulled because he made misrepresentations and omissions in his resume that would have legitimately caused Alpine not to hire him, had Parenteau and Bower known of these facts. When applied to a hiring case, *McKennon* stands for the proposition that back pay liability ends for a respondent at the time the respondent discovers the facts that would have caused respondent not to hire a complainant, had the respondent known of those facts at the time the hiring decision was made. *Id.*, at 886-87. Here, Respondent Parenteau did not become aware of the misrepresentations and omissions in Complainant's resume until well after October 1, 1998, the date at which the forum has cut off Respondents' back pay liability. Consequently, the *McKennon* doctrine does not apply to this case.

B. Mental Suffering

Credible testimony by Complainant and his girlfriend, Joy Delucchi, established that Complainant experienced shock when he learned, by reading Parenteau's "yellow sticky note," that he would not be hired. Complainant experienced anger after that, then stomach upset that aggravated his pre-existing sleep problems. He became more depressed and withdrawn from his acquaintances after getting the note. For a period of at least two weeks, until he got another job, he spent an inordinate amount of time watching television. He lost

his temper easily, especially with Delucchi when she suggested he go out and look for work.

Prior to Respondent's refusal to hire him, Complainant was already experiencing stress from other sources, as well as physical problems, which caused him to feel depressed and have sleep problems. However, the record is undisputed that the emotional and related physical distress described in the preceding paragraph that was experienced by Complainant as a result of Respondents' unlawful employment practice was *in addition* to whatever distress he was already experiencing. Complainant is entitled to damages to compensate him for that distress. The forum finds that \$12,500 is an appropriate award.

5. AFFIRMATIVE DEFENSES

A. "Unclean Hands"⁴⁵

In their amended answer, Respondents plead their affirmative defense of clean hands in the following language:

"Complainant's charges are barred by the [equitable] doctrine of unclean hands in that Complainant is now in competition with Respondents and performs work for which a Landscape Contractor Board licence (sic) is required by

⁴⁵ Courts refer to the same defense both as "unclean hands" and "clean hands." The forum entitles this section "Unclean Hands" because Respondent has given that label to their defense.

ORS 671.530. Complainant does not hold a Landscape Contractor's Board license, although he holds himself out to the public as being so licensed. Complainant also drives without a license and without insurance. Complainant should not be allowed to invoke the equitable remedies of this forum for lack of employment while violating the laws of the State of Oregon in the course of his current employment."

By amendment at hearing, Respondents added the additional allegations that Complainant provided false and incomplete information on his resume.⁴⁶ Respondents argue that proper application of the clean hands doctrine would prevent the forum from granting any remedy sought by the Agency.

Clean hands "is a doctrine, maxim or principle of equity which may be invoked to deny the opposing party the right to come into a court of equity." *Gratrek v. North Pacific Lumber Co.*, 45 Or App 571, 576-77, *rev den* 289 Or 373 (1980). It "applies to any party who seeks either the affirmative or defensive intervention of the court for equitable relief." *Rise v. Steckel*, 59 Or App 675, 681, *rev den* 294 Or 212 (1982). The "purpose [of the doctrine] is to deny equitable relief to a party that, by its actions, has disqualified itself from the assistance of a

⁴⁶ See Finding of Fact – Procedural #38, *supra*.

court of conscience." *Thompson v. Coughlin*, 144 Or App 348, 352 (1996), *rev allowed*, 325 Or 367 (1997). It is inapplicable to an action at law where a legal remedy is sought. *Gratrek*, 45 Or App at 575-76. This case is an action at law. Consequently, the clean hands doctrine does not apply to the legal remedy of monetary damages sought by the Agency.

The Agency also sought an additional remedy consisting of "such other relief as is appropriate to eliminate the effects of the unlawful practices found both as to Complainant and as to others similarly situated." In this case, the ALJ recommended that the Commissioner issue an Order requiring Respondents to "Cease and desist from discriminating against any applicant from employment based upon the employee's age." This remedy, which is injunctive in nature, is properly construed as an equitable remedy.⁴⁷ The question, then, is whether Complainant's "unclean hands" prevent the Commissioner from entering a Cease and Desist Order against Respondents.

The clean hands doctrine is used to preclude a "party" from obtaining relief if the party engaged in serious misconduct related the transaction giving rise

⁴⁷ See, e.g. *E.E.O.C. v. Recruit U.S.A., Inc.*, 939 F.2d 746 (9th Cir. 1991) (An ex parte temporary restraining order and preliminary injunction sought by the E.E.O.C. were construed as an action for equitable relief).

to the claim.⁴⁸ For the purpose of this analysis, the parties to this action are the Civil Rights Division of the Bureau of Labor and Industries and Respondents. Although the monetary damages awarded, if collected, are ultimately distributed to the Complainant, the Complainant is not a “party” to this action. *OAR 839-050-0020(13)*. “Clean hands” applies to the government,⁴⁹ as well as private litigants. However, Respondents have not alleged that the Commissioner or any of the Agency’s staff engaged in any misconduct related to Respondents’ unlawful employment practices. With no evidence of misconduct on the part of the Commissioner or his staff, the clean hands doctrine cannot be invoked against the Commissioner’s Cease and Desist Order.

B. Constitutionality

In Oregon, a complainant aggrieved by an alleged unlawful employment practice as defined by ORS Chapter 659 may pursue a claim with BOLI through an administrative proceeding under

ORS 659.060 or file a civil suit in circuit court pursuant to ORS 659.121(1). Depending upon the choice of forum, a complainant’s remedies differ. Specifically, BOLI’s administrative scheme awards lost wages and benefits, related out-of-pocket expenses, and damages for emotional distress. Equitable remedies, such as reinstatement and cease and desist orders, are also available. Under ORS 659.121(1), only lost wages are available.

Respondents contend that this statutory scheme, which provides different sets of remedies against different employers, depending on a complainant’s choice of forum, violates Article I, section 20 of the Oregon Constitution because it grants to a class of employers who are subjected to suit under ORS 659.121(1) immunity from “mental suffering” damages, which is not granted to the class to which Respondents belong. Respondents’ answer also contends that this scheme violates the Equal Protection clause of the Fourteenth Amendment of the U.S. Constitution. Since Respondents have chosen not to discuss that defense in their post-hearing brief, the forum disregards it.

As an initial matter, the defense only applies to Respondent Parenteau, as an individual. Article I, section 20 “forbids inequality of privileges or immunities not available upon the same terms, first, to any citizen, and second, to any class of citizens.” *State v. Clark*, 291 Or 231, 237, 630 P2d 810 (1981); *Tanner v. Oregon*

⁴⁸ See *North Pacific Lumber Co. v. Oliver*, 286 Or 639, 596 P2d 931 (1979).

⁴⁹ See, e.g. *E.E.O.C.*, 939 F2d at 752-3. (Court declined to enforce clean hands doctrine against EEOC based on EEOC’s disclosure of investigation against employer which violated Title VII confidentiality requirement, stating that the doctrine, although applicable to government, “should not be strictly enforced when to do so would frustrate a substantial public interest.”)

Health Sciences University, 157 Or App 502, 971 P2d 435, 445 (1998). Both Respondents have asserted unequal treatment based on class membership. However, Respondent Alpine lacks standing to assert this defense because those rights are reserved for citizens, and Respondent Alpine is not a citizen.⁵⁰

In order to prevail on an Article I, section 20 defense, Respondent Parenteau must show:

“(1) that another group has been granted a ‘privilege’ or ‘immunity’ that their group has not been granted, (2) that [the regulations] discriminates against a ‘true class’ on the basis of characteristics that they have apart from the regulation[s] themselves, and (3) that the distinction between the classes is either impermissibly based on persons’ immutable characteristics, which reflects ‘invidious’ social or political premises or has no rational foundation in light of the [enabling statute’s] purpose.”⁵¹

Respondent Parenteau’s defense fails based on his inability to meet the second and third prongs of this test.

The second prong requires that the challenged regulations must discriminate against a “true

⁵⁰ See *State v. James*, 189 Or 268, 219, 219 P2d 756 (1950) (corporations or business entities are not citizens).

⁵¹ *Jungen v. State of Oregon*, 94 Or App 101, 105, 764 P2d 938 (1988).

class” on the basis of characteristics that members of the class have apart from the regulations themselves. A “true class” for purposes of section 20 is a group of persons whose characteristics or status are not created by the challenged regulations, but which exist as a result of antecedent characteristics or status.⁵²

Classes created by the challenged regulations themselves “are entitled to no special protection and, in fact, are not even considered to be classes for the purposes of Article I section 20.”⁵³ Since Parenteau’s only class was created by the challenged statutory scheme, he is not entitled to the protection of Article I section 20 as a Respondent.

The third prong requires that any distinction between true classes is impermissibly based on persons’ immutable characteristics and reflects “invidious” social or political premises or has no rational foundation in light of the statute’s enabling purpose. Respondent Parenteau has alleged no immutable characteristics or invidious premises. Furthermore, an examination of the statutory scheme shows that it is rationally

⁵² See *Hale v. Port of Portland*, 308 Or 315, 783 P2d 506 (1989).

⁵³ *Kmart Corp. v. Lloyd*, 155 Or App 270, 963 P2d 734 (1998), *rev’d and remanded on other grounds, citing Sealy v. Hicks*, 309 Or 387, 397, 788 P2d 435 (1990); *Tanner v. Oregon Health Sciences University*, 157 Or App 502, 971 P2d 435, 445 (1998).

based. ORS 659.022 sets out the legislative policy behind the statutory scheme encompassed by ORS chapter 659. In pertinent part, it reads as follows:

“The purpose of ORS 659.010 to 659.110 * * * is to encourage the fullest utilization of available manpower by removing arbitrary standards of * * * age as a barrier to employment of the inhabitants of this state; to insure human dignity of all people within this state * * *. To accomplish this purpose the Legislative Assembly intends by ORS 659.010 to 659.110 * * * to provide:

“* * * * *

“(2) An adequate remedy for persons aggrieved by certain acts of discrimination because of * * * or unreasonable acts of discrimination in employment based upon age.”

The legislature consciously implemented this policy by adopting the two separate remedial schemes embodied in ORS 659.060 and ORS 659.121(1). Oregon appellate courts have approved this remedial scheme by upholding the Commissioner’s authority to award compensatory damages for mental suffering.⁵⁴

⁵⁴ See *In the Matter of James Breslin*, 16 BOLI 200 (1997), affirmed without opinion, *Breslin dba Garden Valley Texaco v. Bureau of Labor and Industries et al*, 158 Or App 247, 972 P2d 1234 (1999)(upholding award of \$30,000 for mental suffering); *A.L.P. Incorporated et al v. Bureau of Labor*

The forum concludes that any distinction in remedies between ORS 659.060 and ORS 659.121(1) is rationally based in light of the statutory purpose set out clearly in ORS 659.022.

EXCEPTIONS

A. The Agency’s Exceptions.

In response to the Agency’s exceptions, the forum has made three changes. In Findings of Fact – The Merits ## 7 and 9, the name “Perkins” has been changed to “Pearson” where it appears in parenthesis. In the section on “Back Pay” in the Opinion, the forum has substituted “October 1, 1998” for “July 28, 1998” where it appears on page 34, line 8 of the Proposed Order.

B. Respondents’ Exceptions.

Respondents filed 24 exceptions to the Proposed Order.

1. Proposed Findings of Fact – Procedural.

Respondents’ objections have been addressed through modifications in Findings of Fact – Procedural ##21, 27, 28, 37, and 38.

2. Proposed Findings of Fact – The Merits.

Respondents’ objections in exceptions 7, 8, and 11 have been

and Industries, 161 Or App 417 (1999)(upholding award of \$20,000 for mental suffering); *Fred Meyer, Inc. v. Bureau of Labor*, 39 Or App 253, 592 P2d 564, rev den 287 Or 129 (1979)(upholding award of \$4,000 for mental suffering).

addressed through modifications in Findings of Fact – The Merits ## 19, 22, 24, and 28.

The forum disagrees with Respondents' observation that footnote 2 on page 10 is a gratuitous comment, but has modified it to reflect that no violation of ORS 659.030(1)(d) was charged.

Exception 6 dovetails with an Agency exception.

Exception 7 is addressed in a footnote to Finding of Fact – The Merits #22.

Exception 9 has already been adequately addressed in the Opinion.

Exception 10 is not supported by testimony in the record.

In Exception 12, Respondents contend that the ALJ's findings that Joseph Tam was a credible witness, despite his "deliberately difficult * * * attitude," are inconsistent. In some instances, attitude may demonstrate a lack of credibility. In this case, it did not.

3. Proposed Ultimate Findings of Fact.

Respondents' Exception 13, requesting that the forum should add "Respondents' only employee at the time of the events in question was the same age," is overruled. Although relevant as comparative evidence, it is not a fact necessary to support the forum's conclusions of law.

In Exception 14, Respondents contend that the ALJ's proposal to award the entire amount of mental distress damages sought by the

Agency, despite the finding that Complainant's mental distress "was partially offset by pre-existing conditions, violates Respondents' Due Process rights under the Fourteenth Amendment of the United States. Oregon appellate courts, as well as the forum, have long held that awards for mental suffering damages are constitutional. *Williams v. Joyce*, 4 Or App 482, 479 P2d 513 (1971); *Fred Meyer, Inc. v. Bureau of Labor*, 39 Or App 253, 592 P2d 564 (1979), *rev den* 287 Or 129 (1979); *In the Matter of Jerome Dusenberry*, 9 BOLI 173, 190 (1991). As noted in the Proposed Opinion, Complainant experienced mental suffering as a result of Respondents' unlawful employment practice *in addition* to the distress he was already experiencing. The ALJ proposed to award damages only for the mental suffering he experienced in addition to whatever distress he was already experiencing. Therefore, awarding Complainant the mental suffering damages sought by the Agency is not inconsistent with a finding that he was already experiencing suffering from other sources.

4. Proposed Conclusions of Law.

Exception 15, which objects to Nos. 2 and 6, lacks merit for reasons already described in the Opinion.

5. Proposed Opinion.

Exceptions 16, 18, 19, and 20 object to inferences and conclusions drawn from the evidence by

the ALJ. The forum notes that its determination of the witnesses' credibility was also a factor in arriving at these conclusions. Respondents' arguments repeat Respondents' arguments at hearing, which the forum has already rejected.

Exception 17, which characterizes footnote 13 on page 25 as "gratuitous," is granted. That note, containing the ALJ's candid view of Respondent Parenteau's motivation in writing the "yellow sticky note," has been deleted.

Exception 21 argues that the ALJ should have concluded that the Agency failed to prove a prima facie case under applicable federal case law. The Opinion contains an adequate discussion of how the Agency met its prima facie case, and Respondent raises no new arguments. This exception is overruled.

Exception 22 argues that Respondent Parenteau cannot be held liable as an aider and abettor under ORS 659.030(1)(g) as a matter of law. Again, the Opinion contains an adequate discussion of why the forum has found Respondent Parenteau liable under this statute. This exception is overruled.

Exception 23 contends that Complainant's back pay should be reduced, based on Proposed Finding of Fact – The Merits #29. The forum rejects Respondents' argument for the reasons stated in the Opinion.

Finally, in Exception 24, Respondents point out that the ALJ

misapplied Respondents' "clean hands" defense by failing to take into consideration the fact that at the time of his interview, Complainant misrepresented that he had a current pesticide applicators license and did not disclose that he had been fired from his only directly relevant job experience. This section of the Opinion has been rewritten to address Respondents' exception and to provide a more lucid analysis.

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 in violation of ORS 659.030(1)(a) and 659.030(1)(g) and as payment of the damages awarded, Respondents RONALD PARENTEAU and ALPINE MEADOWS LANDSCAPE MAINTENANCE, LLC, are hereby ordered to:

1) Deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232-2162, a certified check payable to the Bureau of Labor and Industries, in trust for Complainant Terrance J. Hershberger, in the amount of:

a) ONE THOUSAND FORTY THREE DOLLARS AND THREE CENTS (\$1,043.03), less lawful deductions, representing wages lost by Complainant between July 13, 1998, and October 1, 1998, as a result of Respondents' unlawful practices found herein, plus

b) TWELVE THOUSAND FIVE HUNDRED DOLLARS (\$12,500.00), representing compensatory damages for mental suffering as a result of Respondents' unlawful practices found herein, plus,

c) Interest at the legal rate from October 1, 1998, on the sum of \$1,043.03 until paid, and

d) Interest at the legal rate on the sum of \$12,500.00 from the date of the Final Order until Respondents comply herewith.

2) Cease and desist from discriminating against any applicant for employment based upon the employee's age.

In the Matter of

RICHARD R. MABE dba DICK MABE TRUCKING and dba D.M.T.C.

Case No. 03-00

Final Order of the Commissioner
Jack Roberts

Issued January 13, 2000

SYNOPSIS

Respondent employed Claimant as a log truck driver and failed to pay Claimant all wages due upon termination, in violation of ORS 652.140(1). Respondent's failure to pay the wages was willful, and Respondent was ordered to pay civil penalty wages, pursuant to

ORS 652.150. ORS 652.140(1), 652.150.

The above-entitled case came on regularly for hearing before Alan McCullough, 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 December 2, 1999, in Room 1004 of the Portland State Office Building, 800 NE Oregon Street, Portland, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by Linda Lohr, an employee of the Agency. Respondent Richard R. Mabe was present and was not represented by counsel during the hearing. An Oregon State Police officer was also present throughout the hearing to provide security for the participants.

The Agency called the following witnesses: James B. Bowers, Claimant; and Irene Zentner, Wage & Hour Division Compliance Specialist. Respondent called himself as a witness.

The forum received into evidence:

a) Administrative Exhibits X-1 through X-5 (submitted or generated prior to the hearing).

b) Agency exhibits A-1 through A-8 (submitted prior to hearing with the Agency's case summary).

c) Respondent's Exhibit R-1 (submitted at hearing).

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 22, 1999, Claimant filed a wage claim with the Agency. He alleged that Respondent employed him and failed to pay wages earned and due to him.

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

3) Claimant brought his wage claim within the statute of limitations.

4) On June 14, 1999, the Agency served Order of Determination No. 99-0245 on Respondent based upon the wage claim filed by Claimant and the Agency's investigation. The Order of Determination alleged that Respondent owed a total of \$447.50 in unpaid wages and \$3,120.00 in civil penalty wages, plus interest, and required that, within 20 days, Respondent either pay these sums in trust to the Agency, request an administrative hearing and submit an answer to the charges, or demand a trial in a court of law.

5) On June 30, 1999, Respondent filed a request for hearing.

6) On August 13, 1999, the Agency sent Respondent a "Notice of Insufficient Answer to Order of Determination" in which Respondent was advised that his "**Answer must include an admission or denial of each fact alleged in the Order and a statement of each relevant defense to the allegations.**" (Emphasis in original).

7) On August 31, 1999, Respondent filed an answer to the Order of Determination and requested a hearing. In his answer, Respondent stated he had withheld money from Claimant's final paycheck because of expenses to repair Respondent's fuel tank that Claimant had damaged.

8) On September 28, 1999, the Agency filed a "BOLI Request for Hearing" with the forum.

9) On October 5, 1999, the Hearings Unit issued a Notice of Hearing to Respondent, the Agency, and the Claimant stating the time and place of the hearing as December 2, 1999, at 9:00 a.m., in Portland, Oregon. Together with the Notice of Hearing, the forum sent a document entitled "Summary 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 839-050-000 to 839-050-0440.

10) On November 9, 1999, the forum ordered the Agency and

Respondent each to submit a case summary including: lists of all persons to be called as witnesses; identification and copies of all documents to be offered into evidence; a brief statement of the elements of the claim (for the Agency only); a brief statement of any defenses to the claim (for Respondent only); a statement of any agreed or stipulated facts; and any wage and penalty calculations (for the Agency only). The forum also sent Respondent a "Case Summary Form" designed to assist *pro se* Respondents in complying with the forum's case summary orders. The forum ordered the participants to submit case summaries by November 24, 1999, and notified them of the possible sanctions for failure to comply with the case summary order.

11) The Agency filed its case summary, with attached exhibits, on November 23, 1999. Respondent did not file a case summary.

12) On December 1, 1999, the Agency filed a letter with the Hearings Unit advising that security had been arranged for the hearing based on advice that there was "a possibility for disorder at the hearing."

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

14) The evidentiary record of the hearing closed on December 2, 1999.

15) The ALJ issued a proposed order on December 20, 1999, that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. Neither the Agency nor Respondent filed exceptions.

FINDINGS OF FACT – THE MERITS

1) During all times material herein, Richard R. Mabe did business in the state of Oregon under the assumed business names of Dick Mabe Trucking and D.M.T.C.

2) On or about January 5, 1999, the Woodburn office of the Oregon State Employment Department referred Claimant to a log truck driving job with Respondent.

3) On or about January 5, 1999, Claimant met with Respondent and took a driving test in Respondent's log truck. At the conclusion of the driving test, Respondent agreed to hire Claimant.

4) Respondent and Claimant agreed that Claimant would be paid \$65.00 a load and would be expected to haul two loads of logs per day.

5) Claimant began working for Respondent on January 6, 1999, and worked for Respondent through January 15, 1999.

6) Complainant reported each morning for work at Respondent's shop, located between Molalla

and Silverton, Oregon, then drove Respondent's log truck from a location in the state of Washington to Willamina, Oregon.

7) Claimant hauled 13 loads of logs during his employment with Respondent, earning a total of \$845.00 in gross wages.

8) It took Claimant five hours to haul one load. Claimant worked a total of 65 hours while employed by Respondent.

9) Respondent discharged Claimant on January 15, 1999.

10) At the time of Claimant's termination, Respondent owed Claimant \$845.00 in unpaid wages.

11) On February 11, 1999, the Agency sent a "Notice of Wage Claim" to Respondent notifying him of Claimant's claim for \$845.00 in wages and the basis for the claim. The Agency requested that Respondent remit a check for \$845.00 if Claimant's claim was "correct." With the Notice, the Agency enclosed an "Employer Response" form for Respondent to complete and return if he disputed the claim.

12) On February 21, 1999, Respondent responded to the Agency's Notice of Wage Claim by submitting the following: (a) a completed "Employer Response" form; (b) a check made out to "Jim Bowers" in the amount of \$397.50; and (c) a statement in which he itemized Claimant's wages earned and deductions taken from those earnings.

13) In his two-page "Employer Response" form, Respondent acknowledged that \$845.00 was the correct amount of wages earned by Claimant, but explained he had deducted \$447.50 "to repair damages to my equipment, incurred by the Claimant." Respondent also noted "I do not reward a driver for damages to my equipment, due to carelessness." Respondent signed and dated the "Employer Response" form at the bottom of the second page, directly beneath a printed statement that read as follows: "I HEREBY CERTIFY THAT THIS IS A COMPLETE, TRUE, AND ACCURATE STATEMENT OF THE FACTS RELATING TO THE CLAIM TO THE BEST OF MY KNOWLEDGE AND BELIEF."

14) Respondent's itemization of Claimant's wages earned and deductions taken from those earnings included the following text:

"Wages & Deductions for truck driving (temporary services) from 1/6/99 to 1/15/99.

"13 loads hauled @ 65.00 per load = \$845.00

"Deductions

"1. 4½ hrs. labor & time to Remove & Repair damaged fuel tank on truck (Driver Carelessness) @ \$55.00 per hour = \$247.50

"2. 1 used tail lite bar for replacement on truck (Driver Carelessness) \$200.00

"Check enclosed, Amount due \$397.50."

15) No evidence was presented to show that: (a) Respondent was required to deduct Claimant's wages by law; (b) Claimant authorized the deductions in writing; (c) The deduction was authorized by a collective bargaining agreement to which Respondent was a party; or (d) The deductions were to repay a loan.

16) The forum computed civil penalty wages as follows for Claimant, in accordance with ORS 652.150: \$845.00 divided by 65 hours worked equals \$13.00 per hour; \$13.00 per hour multiplied by 8 hours equals \$104.00 per day; \$104.00 multiplied by 30 days equals \$3,120.00.

17) Claimant's testimony was consistent with prior statements on his wage claim. He responded to questions in a straightforward, direct manner and did not attempt to embellish the facts surrounding the circumstances of his employment with Respondent. With one exception, the forum has credited his testimony in its entirety. That discrepancy is the statement on his wage claim form that he started work on January 6, compared with the note on the calendar he filled out in conjunction with his wage claim that states he worked five hours on January 5, hauling one load. However, the forum has credited him with working the full 65 hours and hauling the full 13 loads shown on his calendar based on Respondent's admissions.

18) Zentner testified in an objective, straightforward manner. Her testimony has been credited in its entirety.

19) Respondent's testimony was only partly credible. His testimony about the extent of alleged damage to his truck was exaggerated, leading the forum to believe that he actually paid out \$447.50 in cash to repair his truck. Under cross-examination, he acknowledged that he had not paid out any money for labor, but had charged Claimant \$55.00 per hour for his own time when deducting the \$447.50 from Complainant's wages. Respondent's claim that Claimant wasn't his employee, based on the fact that Respondent did not withhold taxes from his check, was disingenuous. He claimed that he does not hire employees, then testified that he had no employees until January 1999, and that he "will never" hire employees again. His general attitude throughout the hearing was that Oregon's wage and hour laws did not apply to him. As a result, Respondent's testimony has been credited only where it was corroborated by other credible evidence in the record.

ULTIMATE FINDINGS OF FACT

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

2) Respondent employed Claimant in Oregon from January

6, 1999, through January 15, 1999.

3) Claimant earned \$845.00 in wages during his employment with Respondent.

4) Respondent discharged Claimant on January 15, 1999.

5) At the time of Claimant's discharge, Respondent owed Claimant \$845.00 in unpaid wages.

6) On February 21, 1999, Respondent sent a check for \$397.50 to the Agency in payment of Claimant's wages, deducting \$447.50 from Claimant's earned wages based on damages Claimant had allegedly caused to Respondent's truck.

7) This deduction was not authorized in writing by Claimant and was not for Claimant's benefit.

8) Respondent willfully failed to pay Claimant \$845.00 in earned, due, and payable wages no later than January 18, 1999, the first business day Respondent discharged Claimant, and more than 30 days elapsed from the date Claimant's wages were due and the date Respondent sent his check for \$397.50 in payment of Claimant's wages to BOLI.

CONCLUSIONS OF LAW

1) During all times material herein, Richard R. Mabe, 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. During all times material herein, Respon-

dent Richard R. Mabe employed Claimant.

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 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 no later than January 18, 1999, the end of the first business day after Respondent discharged Claimant. Those wages amount to \$845.00.

4) 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 \$3,120.00 in civil penalties under ORS 652.150 for willfully failing to pay all wages or compensation to Claimant when due as provided in ORS 652.140(1).

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 his earned, unpaid, due and payable wages and the civil penalty wages, plus interest on both sums until paid. ORS 652.332.

OPINION

EARNED, UNPAID, DUE AND PAYABLE WAGES

The Agency alleged, and Respondent admitted that Claimant earned \$845.00 while employed by Respondent. The Agency seeks to recover \$447.50 that Respondent deducted from Claimant’s wages and has not yet paid. The only issue is whether Respondent was entitled to make that deduction.

Oregon law in this matter is set forth in ORS 652.610. In pertinent part, that statute reads as follows:

“(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;

“(d) The deduction is authorized by a collective bargaining agreement to which the employer is a party[.]”

ORS 652.610 severely limits the circumstances under which an employer may take deductions from an employee’s wages. None of those circumstances are applicable here. Consequently, Claimant is due the remaining \$447.50 in unpaid wages sought in the Order of Determination.

PENALTY WAGES

An award of 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. *In the*

Matter of Leslie Elmer DeHart, 18 BOLI 199, 209 (1999), quoting *Sabin v. Willamette Western Corp.*, 276 Or 1083, 557 P2d 1344 (1976). Respondent knew the exact amount of wages owed to Claimant, but intentionally refused to pay any of it until the Agency sent him a demand letter. In response, he sent a partial payment more than 30 days after Claimant's wages were due, intentionally making \$447.50 in illegal deductions. There is no evidence that Respondent acted other than voluntarily or as a free agent. The forum concludes that Respondent acted willfully and assesses penalty wages in the amount of \$3,120.00, the amount sought in the Order of Determination. This figure is computed by multiplying \$13.00 per hour x 8 hours per day x 30 days, pursuant to ORS 652.150 and OAR 839-001-0470.

ORDER

NOW, THEREFORE, as authorized by ORS 652.332, and as payment of the unpaid wages and civil penalty wages he owes as a result of his violation of ORS 652.140(1), **RICHARD R. MABE** is hereby ordered 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 James B. Bowers in the amount of THREE THOUSAND FIVE HUNDRED SIXTY SEVEN DOLLARS AND FIFTY CENTS, less appropriate lawful deductions, representing \$447.50 in

gross earned, unpaid, due, and payable wages and \$3,120.00 in penalty wages, plus interest at the legal rate on the sum of \$447.50 from January 18, 1999, until paid and interest at the legal rate on the sum of \$3,120.00 from February 17, 1999, until paid.

**In the Matter of
BARBARA COLEMAN dba
FEATHERBED RESORT**

Case No. 15-00
Final Order of the Commissioner
Jack Roberts
Issued January 28, 2000

SYNOPSIS

Respondent employed Claimant to manage a resort facility but did not specify what her wages would be. Respondent paid Claimant no wages despite the fact that Claimant worked for her for approximately two months. The commissioner ordered that, under these circumstances, Respondent was required to pay Claimant at least the minimum wage and that her failure to do so was willful. The commissioner ordered Respondent to pay civil penalty wages of \$1440.00 in addition to the \$1354.50 in unpaid wages she owed Claimant. ORS 652.140, ORS 652.150, ORS 653.025, ORS 653.055, OAR 839-001-0470.

The above-entitled case came on regularly for hearing before Erika L. Hadlock, designated as Administrative Law Judge ("ALJ") by Jack Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on November 18, 19 and 22, 1999, at the Eugene office of the Bureau of Labor and Industries, located at 165 East Seventh Street, Eugene, Oregon.

Linda Lohr, an employee of the Bureau of Labor and Industries ("BOLI" or "the Agency") represented the Agency. Wage claimant Shannon Esch was present during the hearing and was not represented by counsel. Respondent Barbara Coleman was represented by counsel, Margaret Wilson, who was present throughout the hearing. Respondent herself was also present during most of the hearing.

The Agency called as witnesses: Claimant Shannon Esch; Ted Crane, Les Schmig, and Doug Esch (contractors); Beverly Hadden, Kevin Hadden, Nancy Asman, Judith Kindt, and Joyce Fry (Claimant's friends and neighbors); Laura Miles (formerly employed at Coleman Mortgage); and Agency compliance specialist Tyrone Jones. Respondent called Raul Lopez, Romeo Lopez, and herself as witnesses. Romeo and Raul Lopez spoke only limited English. A certified and qualified interpreter translated the questions asked of them into Spanish and translated their responses into English.

The forum received:

a) Administrative exhibits X-1 through X-44 (received by the Hearings Unit or generated prior to hearing) and X-45 through X-47 (received by the Hearings Unit or generated after the hearing).

b) Agency exhibits A-1 through A-23 (filed with the Agency's case summary) and A-27 and A-39 (submitted at hearing; A-39 received for impeachment purposes only). The forum did not receive the documents marked as exhibits A-24, A-25, and A-26 that were attached to the Agency's case summary.

c) Respondent exhibits R-2, R-4 to R-10, R-12, R-13, R-15, R-17 (pages 1 through 8 only), and R-18 (all filed with Respondent's case summary). The forum did not receive the other documents that had been attached to Respondent's case summary, identified as exhibits R-1, R-3, R-7, R-11, R-14, R-16, and R-19 to R-21.

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

FINDINGS OF FACT – PROCEDURAL

1) On or about July 30, 1998, Claimant completed a wage claim form in which she alleged that Re-

spondent had employed her from January 1, 1998, until March 19, 1998, and had not paid her any wages. Claimant stated that she and Respondent had not settled upon a rate of pay and put "\$2,500? per month" as her claimed pay rate. Claimant filed that form with the Agency on or about September 11, 1998.

2) Claimant filed an assignment of wages along with her wage claim form.

3) On about September 18, 1998, the Agency informed Respondent that Claimant had filed a wage claim against her claiming unpaid wages of \$2500.00 per month from January 24, 1998, to March 20, 1998. The Agency requested a response by October 2, 1998.

4) Respondent filed a timely response in which she denied that Claimant ever had worked for her. On October 1, 1998, Respondent sent the Agency another letter reiterating her claim that Claimant never had been her employee.

5) On November 6, 1998, Agency compliance specialist Tyrone Jones sent a letter to Respondent in which he indicated that the Agency had evidence corroborating Claimant's claim. Jones informed Respondent that the Agency's investigation would continue and instructed Respondent how to contact him if she wished to do so.

6) On January 7, 1999, Jones informed Respondent that the Agency's investigation had revealed "an overwhelming

corroboration on behalf of the claimant and her allegation that she worked in the capacity of an employee at your business titled Feather Bed Resort." Jones also noted that the Agency had not been able to substantiate the terms of the employment agreement or the hours Claimant claimed. Therefore, he stated, the Agency would seek to collect the minimum wage of \$6.00 per hour for each hour Claimant worked. He also asked Respondent to provide any evidence refuting the hours Claimant had alleged.

7) Jones received at least one telephone call from Respondent repeating her denial that she ever had employed Claimant.

8) On or about February 4, 1999, the Agency served Respondent with an Order of Determination. The Agency alleged that Respondent had employed Claimant for 226.25 hours during the period January 24, 1998, to March 20, 1998, and was required to pay her not less than \$6.00 per hour. The Agency further alleged that Respondent had paid Claimant nothing and, therefore, owed her \$1357.50 in earned and unpaid wages, \$1440.00 as penalty wages, and interest on both amounts. The Order of Determination required Respondent, within 20 days, either to pay these sums in trust to the Agency, request an administrative hearing and submit an answer to the charges, or demand a trial in a court of law.

9) On or about February 9, 1999, Respondent filed an Answer

and Request for Hearing in which she denied that she ever had employed Claimant.

10) On September 29, 1999, the Agency requested a hearing. On September 30, 1999, the Hearings Unit issued a Notice of Hearing stating that the hearing would commence at 9:00 a.m. on November 2, 1999. With the Notice of Hearing, the forum included a copy of the Order of Determination, a "SUMMARY OF CONTESTED CASE RIGHTS AND PROCEDURES" and a copy of the forum's contested case hearings rules, OAR 839-050-0000 to 839-050-0440. The forum mailed these documents to Respondent at two addresses: one on the McKenzie Highway in Vida, Oregon, and one c/o Coleman Mortgage Company, 697 Country Club Road, Eugene, Oregon.

11) On October 5, 1999, the forum issued a case summary order requiring the Agency and Respondent to submit summaries of the case that included: lists of all persons to be called as witnesses; identification and copies of all documents to be offered into evidence; a brief statement of the elements of the claim (for the Agency only); a brief statement of any defenses to the claim (for Respondent only); a statement of any agreed or stipulated facts; and any wage, damages, and penalties calculations (for the Agency only). The forum ordered the participants to submit their case summaries by October 20, 1999, and notified them of the possible sanctions for failure to

comply with the case summary order. The forum mailed the case summary order to Respondent at the two addresses identified in the previous Finding.

12) In the first week of October, 1999, the post office returned to the Hearings Unit the Notices of Hearing it had sent to Respondent. The post office informed the Hearings Unit that the Vida, Oregon address no longer was valid and that the address for Barbara Coleman c/o Coleman Mortgage had changed to 969 Willagillespie Road, Eugene, Oregon 97401.

13) On October 7, 1999, the Hearings Unit sent another copy of the Notice of Hearing to Respondent at the Willagillespie Road address. The forum enclosed an addendum to the case summary order, which consisted of a form designed to assist *pro se* respondents in complying with case summary orders.

14) On October 11, 1999, the forum issued an order requiring Respondent to provide her correct address to the Hearings Unit and the Agency case presenter. With that order, the forum enclosed another copy of the original case summary order. The forum sent the order and enclosure to Respondent at all three addresses (Vida, Country Club Road, and Willagillespie Road).

15) On October 13, 1999, Respondent verbally informed the Hearings Unit Coordinator that her correct address was the one on Willagillespie Road. Respondent

also gave the Hearings Unit that information in writing. From the time it received this information until Respondent retained counsel, the forum sent mail to Respondent only at the Willagillespie Road address.

16) The Agency timely filed its case summary on October 20, 1999.

17) In a letter to the forum dated October 19, 1999, Respondent stated:

"After receiving notices sent to me the above referenced case including Order of Determination #98-2904, Order for Respondent to Provide Correct Mailing Address, and Addendum to Case Summary Order I find I am unable to complete the Case Summary Form due to an extreme illness which has forced me from working since early April of this year. At this moment I am unable to recall even the last names of the people I need to call as witnesses.

"Enclosed you will find a letter from one of my seven attending medical doctors. It is my hope that after the next surgeries I have my health pattern will return to a normalcy."

Respondent enclosed a letter from Veronica Alfero, M.D., which stated:

"To Whom It May Concern:

"Barbara Coleman is being treated in this office since 4/5/99. She is facing overwhelming trauma right now

since her surgery and will not be able to handle other matters at this time. Her prognosis is positive but I do not expect her to be recovered sufficiently to handle additional stresses for a period of at least 5 to 6 months."

Nothing about Respondent's letter suggested that she had provided a copy of it to the Agency case presenter.

18) The forum disclosed the *ex parte* communication described in the previous Finding in an October 22, 1999, order. In that order, the forum also stated that it was construing Respondent's letter as a motion for postponement of the hearing and of the deadline for submitting case summaries. The forum asked the Agency to file a response to the motions no later than October 26, 1999.

19) On October 25, 1999, the Agency filed a document opposing Respondent's motion for postponement on two grounds. First, the Agency asserted that the motion was untimely because the Notice of Hearing issued on September 30, 1999, and Coleman did not send her letter until October 19, 1999. Second, the Agency argued that the motion did not present good cause for postponement because Respondent's claim of health problems was vague and did not explain what stresses she could or could not handle. In addition, the Agency claimed that Respondent was actively involved in medical malpractice and other litigation in 1999 and had participated in the

legislative process during the summer of that year. According to the Agency, "Respondent has offered no evidence to show why participating in complex medical malpractice litigation is less stressful than a wage claim action involving one wage claimant who Respondent claims she did not employ."

20) Immediately after receiving the Agency's opposition to the postponement motion, the ALJ contacted case presenter Lohr and Respondent and scheduled a conference regarding the motion. During that conference, which took place on the afternoon of October 25, 1999, Respondent asserted that she would not be able to participate effectively in the hearing because of side-effects of an antidepressant drug she takes -- Wellbutrin. Respondent claimed that the medication prevented her from thinking clearly. Upon questioning by the ALJ, Respondent specifically stated that her use of Wellbutrin was the only reason she felt unable to participate in the contested case hearing. The ALJ rejected Respondent's motion for reasons she explained in an October 27, 1999, order:

"For several reasons, the forum concludes that Respondent will be able to receive a full and fair hearing despite her use of Wellbutrin. First, Respondent appears able to participate in other matters requiring concentration, memory, and mental exertion. Respondent stated during the

teleconference that she recently has resumed working several hours each day at the mortgage business she owns and operates. Moreover, in its written response to the postponement motion, the Agency asserted that Respondent is actively pursuing two malpractice suits. During the teleconference, Respondent did not deny that assertion. In addition, Respondent asserted that if the ALJ and case presenter wanted to learn about the basis of her malpractice claims, they should watch the television program 20/20 on November 3, 1999. If Respondent is mentally able to run her business and participate actively in full-blown litigation, she certainly is able to participate in a hearing regarding a single disputed wage claim.

"Second, the forum notes that Respondent did not make any claim that her mental state would preclude her from participating in the hearing until October 19, 1999. The previous day, Respondent spoke with the Agency case presenter and stated only that she might have a doctor's appointment that conflicted with the scheduled hearing date. Respondent did not indicate that her medical condition would prevent her from appearing at hearing. The forum finds Respondent's belated assertion regarding the effects

of her medication to be suspect.

"Finally, Respondent discussed her medical problems in great detail during the October 25 teleconference, identifying specific dates on which specific events allegedly occurred. Throughout the teleconference, Respondent was lucid, was able to understand the instructions of the ALJ, and responded logically to questions put to her by the ALJ and the case presenter.

"In sum, the forum finds that, despite Respondent's assertions regarding the effects of Wellbutrin on her mental state, she will be able to effectively participate in the contested case hearing process and will receive a full and fair hearing regarding the disputed wage claim. In short, Respondent has not shown good cause for an extended delay of the hearing. For that reason, **the motion for an indefinite postponement of the hearing date is denied.**"

21) Although the forum rejected Respondent's request for an indefinite postponement, it did allow a short extension because of Respondent's ongoing health issues and the relatively short notice she received regarding the hearing date. During the October 25, 1999, teleconference, the ALJ identified three dates in November on which she would be available to commence the hearing, and asked Respondent and the case presenter to identify which of

those dates they would prefer. The case presenter stated that any of the dates would work for her. The ALJ gave Respondent until 4:00 p.m. on Tuesday, October 26, to send the ALJ a facsimile transmission identifying her preferred hearing date. Respondent timely transmitted a single-page handwritten letter to the forum stating that, of the dates indicated, she preferred November 18 and 19. Accordingly, the forum rescheduled the hearing to begin at 9:00 a.m. on November 18, 1999, and to continue, if necessary, on November 19, 1999, and any additional days that might be needed. The forum also:

a) Extended the deadline for case summaries to November 5, 1999;

b) Ordered that any further motions regarding the time, place, and/or manner of hearing had to be filed and received by the hearings unit no later than 12:00 noon on Monday, November 1, 1999, unless they were based on events that occurred after that time and could not reasonably have been anticipated; and

c) Ordered that Respondent should notify the hearings unit by 12:00 noon on Monday, November 8, 1999, if she required any accommodation during the hearing process.

The forum sent this order to Respondent by both facsimile transmission and first-class mail on October 27, 1999.

22) On November 4, 1999, attorney Margaret J. Wilson en-

tered an appearance on behalf of Respondent.

23) The same day, Respondent moved to postpone the contested case hearing and the deadline for filing case summaries, claiming four grounds for postponement: 1) that her newly retained attorney did not have sufficient time to prepare for hearing and had prior commitments on the dates set for hearing; 2) that Respondent was considering filing a summary judgment motion and would need more time to do so; 3) that Respondent suffered "from severe depression and diminished concentration levels," which "ma[de] it difficult for her to gather the necessary information to submit to her attorney" and anticipated that she would "be mentally able to fully defend this matter by March, 2000"; and 4) that Claimant would not be prejudiced by a postponement. With the motion, Respondent filed a second letter from Dr. Alfero, which stated that Respondent was being treated for severe depression, discussed her symptoms, and asserted that Respondent was:

"a woman who is extremely depressed and anxious, irritable, can't get out of bed and function at all, cannot take care of her business, cannot concentrate or stay focused on a task, is overwhelmed by everything, is no longer attending to her personal grooming as she so meticulously did in the past."

Alfero concluded:

"Given her lack of prior psychiatric history and her previous high level of functioning, I feel her long-term prognosis is good. However, given the severity and duration of her depression, the comorbid anxiety, and her poor response to treatment thus far, I feel she may require 5 to 6 months to achieve stable remission."

Respondent filed the motion and accompanying documents by facsimile transmission and first-class mail.

24) The forum initiated another telephone conference on November 5, 1999, in which Lohr and Wilson participated. During that teleconference, Lohr submitted an affidavit making factual assertions regarding Respondent's ability to engage in various activities. The ALJ read the affidavit into the record during the November 5 teleconference.

25) At the end of the teleconference, the ALJ verbally denied the motion for postponement. The forum issued an order on November 8, 1999, confirming that ruling, which stated:

"Respondent's motion to postpone the hearing is DENIED. **The hearing shall commence at 9:00 a.m. on November 18, 1999, at the place set forth in the Notice of Hearing.** Respondent's motion to extend the deadline for filing case summaries is GRANTED IN PART. **Case summaries shall be filed by November 12, 1999.** Any summary judg-

ment motions also must be filed by that date.

"By order dated October 27, 1999, the forum postponed the hearing in this matter for approximately two weeks at Respondent's request. In that same order, the forum stated: "Any further motions regarding the time, place, and/or manner of hearing must be filed and received by the hearings unit no later than 12:00 noon on Monday, November 1, 1999, unless they are based on events that occur after that time and could not reasonably have been anticipated." The forum received no motions by that deadline.

"On November 4, 1999, attorney Margaret J. Wilson filed an entry of appearance on behalf of Respondent, a motion to postpone the hearing date and the deadline for filing case summaries, and a supporting affidavit. The motion was based on counsel's assertion of a need for additional time to prepare for the hearing, a conflict between the hearing date and a contract that counsel has to provide legal services to the University of Oregon, the possibility that Respondent might file a summary judgment motion, and counsel's assertion that Respondent's medical condition 'makes it difficult for her to gather the necessary information to submit to her attorney.'

"The next day, Agency case presenter Lohr filed an affidavit in opposition to the motion to postpone. The forum initiated a teleconference at 4:00 p.m. on Friday, November 5, at which Respondent's counsel and the Agency case presenter presented oral argument on the motion. After hearing argument from both sides, the forum denied the motion to postpone the hearing date. The forum did extend the deadline for filing case summaries until Friday, November 12, 1999, and ordered any summary judgment motions to be filed by that same date. This interim order serves to confirm those oral rulings.

"This forum grants opposed motions for postponements 'for good cause shown.' OAR 839-050-0150(5). The forum denies Respondent's second motion for a postponement because it is not based on good cause. This forum has sometimes granted first requests for postponements based on scheduling conflicts of Respondents' lawyers. In this case, however, Respondent unreasonably delayed retaining counsel. Respondent has been aware that this matter would go to hearing since February 1999, when she filed an Answer and Request for Hearing. In the October 25, 1999, teleconference regarding Respondent's first motion for postponement, Respondent identified her use of the anti-depressant drug Wellbutrin as

the only reason she felt unable to go to hearing on the originally scheduled date of November 2, 1999. She did not, at that time, indicate that she needed additional time to obtain counsel. The motion also is untimely because Respondent filed it after the November 1, 1999, deadline set in this forum's October 27, 1999, order, which was sent to Respondent both by facsimile transmission and first-class mail. Moreover, it appears that the scheduling conflict will not prevent counsel from assisting Respondent in preparing for hearing, and may not actually preclude counsel's presence during the hearing. In sum, the forum does not find that the scheduling conflict of Respondent's newly retained counsel presents good cause for a postponement in this case.

"The forum also is not persuaded by Respondent's assertion of a need for additional time to prepare for hearing. The Order of Determination sets forth a simple wage claim involving a single claimant. As mentioned above, Respondent herself has had months to prepare her defense to this charge. By the time this matter goes to hearing on November 18, 1999, Respondent's counsel will have had approximately two weeks to prepare, which the forum finds to be adequate. For similar reasons, the forum finds that Respondent's potential interest in filing a summary

judgment motion does not constitute good cause for a postponement.

"Finally, Respondent asserts that her depression makes it difficult for her to gather the necessary information to submit to her attorney. Nothing filed with this forum (including the October 26, 1999, letter from psychiatrist Alfero, re-submitted with the November 4 motion to postpone) comes close to establishing that Respondent is legally incompetent, and Respondent has made no such claim. As the forum stated in its October 27 interim order, Respondent spoke lucidly and logically during the October 25 teleconference, stated that she was able to work at her business several hours each day, and was able to recall details of events that occurred many months ago. The forum continues to find that Respondent will be able to effectively participate in the contested case hearing, with or without counsel, and will receive a full and fair hearing regarding the disputed wage claim. Respondent's depression does not constitute good cause for further delay of the hearing.

"The forum has extended the deadline for case summaries, however, to give Respondent's counsel an opportunity to assist Respondent in presenting her case. **Case summaries must be filed no later than Friday, November 12, 1999.**

Respondent's counsel stated that she might wish to file a summary judgment motion. Any such motion also shall be filed no later than November 12, 1999. **The contested case hearing remains set to commence at 9:00 a.m. on Thursday, November 18, 1999, at the place set forth in the Notice of Hearing.**"

The forum also ruled that, given the short time lines involved, it would consider any exhibits attached to the Agency's case summary in deciding whether Respondent was entitled to summary judgment if Respondent filed a summary judgment motion.

26) On November 9, 1999, Respondent requested that the Agency provide a Spanish interpreter for one of Respondent's witnesses. The forum granted that request the next day.

27) Respondent filed a case summary and an amended case summary on November 12, 1999, and the Agency filed a supplementary case summary the same day.

28) On November 12, 1999, Respondent filed a motion for summary judgment on the following grounds:

"1. Claimant was not an employee of Respondent's pursuant to ORS 654.310(2) and therefore this forum lacks jurisdiction over this matter.

"2. Claimant was not employed by Respondent pursuant to ORS 653.010(3) and therefore

Respondent is not subject to the minimum wage laws with regard to Claimant.

"3. Claimant cannot establish with certainty any hours of work time for Respondent (since she was never employed) and Claimant is therefore not entitled to any wages pursuant to ORS 653.025."

Respondent submitted her own affidavit and other documentation in support of the summary judgment motion.

29) The Agency filed an opposition to Respondent's summary judgment motion on November 15, 1999, arguing that material issues of fact remained in dispute.

30) On November 15, 1999, the forum denied Respondent's summary judgment motion:

"The Agency alleges, in its Order of Determination, that Respondent employed Claimant from January 24, 1998, through March 20, 1998, and paid her no wages. Respondent denies that she employed Claimant.

"During a pre-hearing conference, counsel for Respondent indicated that she might follow a summary judgment motion, and the forum gave her until Friday, November 12, to do so. The Agency waived its right to have seven days to respond to the motion, though not its underlying right to respond, and the forum indicated that it

would attempt to issue a ruling on any summary judgment motion before the date the hearing was scheduled to commence.

"Respondent has now filed a timely motion for summary judgment and the Agency has filed a response. Although Respondent cites three grounds for her motion, they all reduce to a claim that she did not employ Claimant. In her supporting memorandum, Respondent lists what she claims to be undisputed facts, including that 'Respondent never hired Claimant' and 'Respondent did not suffer or permit Claimant to perform work at the motel.'

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

sidering summary judgment motions, this forum gives some evidentiary weight to unsworn assertions contained in the participants' pleadings and other filings. *Cf. In the Matter of Tina Davidson*, 16 BOLI 141, 148 (1997) (considering contents of the Respondent's answer in making factual findings in a default hearing).

"An 'employer' is 'any person who in this state * * * engages personal services of one or more employees * * *.' ORS 652.310(1). An 'employee' is defined as:

"any individual who otherwise than as 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. * * *

"ORS 652.310(2). The question, then, is whether there is anything in the record from which this forum could infer that Claimant rendered services to Respondent for which Respondent paid or agreed to pay her.

"There are documents in the record, including Respondent's affidavit, from which the forum could conclude that Respon-

dent did not employ Claimant. However, the documents attached to the Agency's case summary and supplemental case summary create a genuine issue of material fact sufficient to defeat Respondent's summary judgment motion. Those documents include the wage claim form that Claimant filed with the Wage and Hour Division, in which she claimed that she had worked for Respondent from January 24, 1998, to March 20, 1998. With that form, Claimant submitted a calendar on which she wrote the number of hours she claims to have worked each day. In addition, a letter from plumber Ted Crane states that Claimant hired him to work for Respondent and that he was introduced to Respondent as Claimant's boss. A letter from Beverly Hadden states that Claimant 'was hired as a manager & carekeeper for [Respondent's] resort' and that she saw Claimant 'at this business daily for long periods of time doing various management duties.' A letter from Kevin Hadden implies that Claimant performed work at Respondent's place of business. A letter marked as Agency Exhibit A-9 states that Respondent told the letter's author on January 25, 1998, 'that she had hired [Claimant] as manager of her motel/cabin complex' and that the author 'saw [Claimant] working daily at [Respondent's] property.' A letter from Nancy Asman

states that Asman 'know[s] that [Claimant] was employed by [Respondent] from January through March 1998.'

"Pertinent documentation attached to the Agency's supplemental case summary includes March 1998 letters that the Agency identifies as having been authored by Respondent. Those letters could be construed as acknowledging that Claimant performed work for Respondent. In another March 1998 letter, Claimant appears to assert that Respondent employed her from January 24th to March 19th. In that letter, Claimant states 'I know you remember what you said about my salary the day you hired me.' That statement constitutes some evidence from which the forum could infer that Respondent agreed to pay Claimant a salary. Thus, documents in the record, construed in the light most favorable to Claimant, establish that there is a genuine dispute regarding both whether Claimant rendered personal services to Respondent and whether Respondent agreed to compensate Claimant for those services. Consequently, Respondent is not entitled to summary judgment.

"Respondent appears to argue that she cannot be held to be Claimant's employer because there is no evidence that she and Claimant reached an agreement regarding the wage

Claimant would receive. Indeed, certain entries on Claimant's wage claim form could be construed as an admission that she and Respondent never reached an agreement regarding Claimant's pay rate. That, however, is not necessarily fatal to a claim that Respondent was Claimant's employer. Where there is no agreement regarding wages, an individual is an 'employee' entitled to the statutory minimum wage as long as he or she renders personal services to another (unless the individual is an independent contractor or copartner or is a participant in a certain type of work training program). *In the Matter of Laverne Springer*, 15 BOLI 47, 67 (1996). The evidence discussed above creates a genuine dispute regarding whether Claimant was Respondent's employee.

"Respondent's motion for summary judgment is DENIED."

That ruling, which the forum faxed to Respondent's counsel on the day it issued, is hereby affirmed.

31) On November 16, 1999, Respondent filed exceptions to case presenter Lohr's response to the summary judgment motion, claiming that Lohr improperly had made legal argument regarding the agency's jurisdiction to hear the contested case. At the start of the hearing, the ALJ explained that she would have denied the summary judgment motion

whether or not Lohr opposed the jurisdictional argument.

32) On November 17, 1999, Respondent herself (not Respondent's counsel) filed a statement taking exception to various factual assertions made by Lohr in her affidavit opposing Respondent's second postponement motion. Respondent asked the forum to replace Lohr with "someone with rational reasoning * * * as Case Presenter for Case 15-00." At the beginning of the hearing, the ALJ noted that she lacked authority to change the case presenter and further stated that, even if she did have that authority, she would not exercise it in this case.

33) On November 10, 1999, Alfero wrote a letter stating that she believed Respondent was "not able to participate effectively in court proceedings at this time because of cognitive impairment (i.e. impaired concentration and memory)." This letter was filed with Respondent's case summary and the forum received it as an exhibit at hearing. Respondent's counsel, Wilson, did not renew the postponement motion based on the content of the letter.¹ Rather, she explained, the letter provided further explanation for Respon-

¹ The forum notes that it would not have granted such a request even if it had been made. As explained in Finding of Fact -- the Merits 43, *infra*, neither Respondent's medical condition nor any medications she was taking prevented her from participating effectively in the contested case hearing process.

dent's previous motions. Wilson also asserted that the letter was relevant to explain Respondent's mental state during the hearing and during the pendency of the hearing. Upon questioning by the case presenter, Wilson clarified that she was not arguing that Respondent's testimony at hearing should be considered unreliable. Wilson also clarified that she was not arguing that Respondent was incapable of testifying. See also Finding of Fact -- Procedural 43, *infra*.

34) At the beginning of the contested case hearing, Respondent stated that she had received the documents accompanying the Notice of Hearing, including the summary of contested case procedures. Respondent's counsel said she had no questions regarding those documents or the procedures to be followed at hearing.

35) At the beginning of the hearing, Respondent moved for leave to "testify in writing" by submitting certain documents she had authored instead of appearing as a witness. The Agency objected to the proposal on the ground that it would not give the Agency an adequate opportunity for cross-examination. The Agency also formally requested an opportunity to cross-examine Respondent as the author of the documents she proposed to submit in lieu of her testimony.

36) The ALJ first noted that, although Respondent was present in the hearing room, she had the right to leave the hearing and ap-

pear only through counsel, and such a decision would not place her in default. The ALJ then ruled that the question to be decided was not whether Respondent could "testify in writing" but, rather, whether each of the documents Respondent proposed to offer would be accepted into evidence if Respondent were not available for cross-examination.

37) The ALJ then ruled on each of the documents Respondent wished to have received as substantive evidence without making herself available for cross-examination, as follows:

a) Respondent's affidavit, labeled as exhibit R-13. The Agency objected to admission of this document and the forum ruled that it would be received only if Agency were given an opportunity to cross-examine Respondent. Because the Agency did eventually have that opportunity, the document was later received into evidence.

b) A listing of hours allegedly worked by some of Respondent's employees, marked as exhibit R-7. The Agency objected to admission of this document and the forum ruled that it would be received only if a foundation for it were laid during the hearing. No such foundation ever was laid and the document was not received into evidence.

c) October 26, 1999, letter from Respondent to the ALJ, labeled as part of exhibit X-19b. The Agency did not object to this

document, which the forum received as substantive evidence.

d) A statement authored by Respondent not labeled as an exhibit discussing her psychiatric state and attaching an information sheet on the drug Wellbutrin. The Agency objected to admission of this document and the forum ruled that it would be received only if the Agency were given an opportunity to cross-examine Respondent. Although Respondent eventually testified, she did not again offer the document and it was not received into evidence.

e) Respondent's answer, labeled as exhibit X-1b. The forum received Respondent's answer as substantive evidence.

f) Respondent's October 19, 1999, letter to the ALJ, labeled exhibit X-12. The Agency did not object to admission of this letter and the forum received it as substantive evidence.

g) Agency exhibit A-19, page 2. The Agency did not object to admission of this document, which the forum received into evidence.

h) October 1, 1998, letter from Respondent to Kay Nichols, labeled exhibit R-18. The Agency did not object to admission of this document and the forum received it into evidence.

i) Letter from Respondent to the forum labeled exhibit X-44. The Agency objected to admission of this document and the forum ruled that it would be received as substantive evidence only if the Agency were given an opportunity

to cross-examine Respondent. Because the Agency did eventually have that opportunity, the document was later received into evidence.

Respondent's counsel, Wilson, stated that Respondent would decide at a later point whether she wished to testify in light of these rulings. Wilson also asked whether Respondent's psychiatrist could be present during Respondent's testimony. The ALJ stated that the psychiatrist had a right to be present like any other member of the public, but would not be permitted to take an active role in the hearing.

38) At the start of the hearing, Wilson stated that two of Respondent's witnesses, Raul and Romeo Lopez, "were going to appear tomorrow but they're now afraid to come here because apparently the Claimant has either notified governmental agencies that they would be appearing or has told them that she was going to do so, and they're afraid that if they show up, they're going to be arrested." Wilson said she had only been notified of this difficulty the previous evening. She also stated that she had been told that both the witnesses had "taken it upon themselves * * * to make statements and have them notarized." Respondent asked to have those notarized statements admitted into evidence. The Agency objected to the request. The forum ruled that it would not accept the statements of Raul and Romeo Lopez as evidence but would allow them to testify by telephone.

39) When it came time for Raul Lopez to testify, the forum learned that he was testifying from the office of Coleman Mortgage, located only a short distance from the BOLI office in Eugene, and that Respondent had left the hearing to let him into her office. Accordingly, the ALJ cautioned Raul Lopez at the beginning of his testimony that he should provide his own answers to the questions asked and not look to Respondent for guidance. Lopez testified credibly that Respondent was not in the same room as him but was waiting in the office lobby. A similar situation occurred when Romeo Lopez testified and the ALJ gave him a similar caution. Both Romeo and Raul Lopez testified through a certified and qualified Spanish interpreter.

40) During discussion of these pre-hearing matters, the Agency served Respondent with a subpoena and witness fees. On Respondent's motion, the forum quashed the subpoena on the ground that the Agency had not identified Respondent as a witness in its case summary.

41) The hearing room was uncomfortably warm, though not intolerable, during the hearing on November 18 and 19, 1999. It was somewhat cooler on the last day of the hearing, November 22.

42) At the close of the Agency's case, Respondent moved to dismiss on three grounds: 1) the forum lacked jurisdiction because Respondent never agreed to pay Claimant at a fixed rate and Claimant, therefore,

was not an "employee" for purposes of ORS 652.310(2); 2) Claimant was not employed pursuant to ORS 653.010(3), so the forum lacked jurisdiction over the minimum wage claim; and 3) Claimant had not met her burden of proving the hours and days she worked for Respondent. The ALJ denied the motion for reasons discussed in the opinion section of this order.

43) On the last day of hearing, Respondent decided to testify. She stated that she was taking Wellbutrin, nitroglycerin, Centroid (phonetic), a blood pressure medication, aspirin, and cough medicine. Respondent delivered some of her testimony from a standing position, which gave her some relief from the pain she allegedly suffered after a "big lump fell out of [her] side" the previous evening. The ALJ observed that Respondent testified coherently and logically despite her medical and psychiatric condition, and was able to confer with her attorney throughout the hearing. Indeed, Respondent's counsel specifically stated that she was *not* arguing that Respondent's psychiatric condition rendered her testimony unreliable and that she was *not* arguing that Respondent was incapable of testifying. Respondent herself stated: "I can testify." The forum finds that neither Respondent's medical condition nor any medication she was taking prevented her from participating effectively in the contested case hearing process.

44) The evidentiary record closed on November 22, 1999.

45) On Tuesday, November 23, 1999, the ALJ received a voicemail message from Respondent on her work telephone, which she disclosed in an order dated December 2, 1999:

"On Tuesday, November 23, 1999, the ALJ received a voicemail message from Respondent on her work telephone. The ALJ disclosed the gist of the message to both case presenter Lohr and Respondent's counsel by leaving messages on their telephone answering machines. Pursuant to OAR 839-050-0310, the forum now places the substance of the ex parte contact on the record by quoting it verbatim:

"Erika Hadlock, please. This is Barbara Coleman. I just wanted her to know that when I left there, I went into the hospital, and because of the conditions in that room, and the rain, and my medical condition, I now have double pneumonia and am very, very sick. And if I live through this, I want to talk to her and tell her don't ever, ever hold another meeting in that room because the doctor told me that's what caused this pneumonia. I was in a weakened condition in the first place and very susceptible and going out in the rain and then coming back into that humid, humid terri-

ble room, this is the result. I've been in the hospital all last night and I just got out but I want you to know this has happened. Goodbye.'

"The forum does not believe the matters Respondent discussed are relevant to any fact in issue in the case, but is disclosing the contact in case either participant feels otherwise."

This message has played no part in the forum's decision regarding this matter.

46) The ALJ issued a proposed order on January 7, 2000, that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. Neither the Agency nor Respondent filed timely exceptions.

FINDINGS OF FACT – THE MERITS

1) In early 1997, Respondent Barbara Coleman purchased a distressed resort property that consisted of a four-unit motel and four cabins in Vida, Oregon. In March 1998, Respondent applied for an employer identification number for the resort business. Respondent filed the assumed business name of Feather Bed Resort with the Corporation Division on April 21, 1998. At all material times, Respondent owned another business called Coleman Mortgage, located in Eugene, Oregon.

2) The Feather Bed Resort is located about 35 miles east of

Eugene, near the McKenzie River. Claimant lives about 1/2 mile away from the resort.

3) Joyce Fry, a long-term friend of Claimant, lives on property near the Feather Bed Resort and operates a small motel on that property. Fry's daughter and son-in-law, Beverly and Kevin Hadden, also live on the Fry property.

4) After Respondent bought the Feather Bed, she asked Beverly Hadden whether she or a family member might be interested in running the resort. Beverly Hadden declined the job.

5) Sometime after that, Fry mentioned to Claimant that Respondent was looking for a motel manager. Claimant was looking for employment and was excited by the prospect of a job so close to her home.

6) On the morning of January 24, 1998, Fry told Claimant that Respondent was at the resort and suggested Claimant go talk to her. Claimant went to the resort and asked Respondent if she could make an appointment to interview for the position of manager. Respondent said they could talk about it right away. Respondent and Claimant then discussed Respondent's plan for renovating and opening the resort. Claimant told Respondent that she had no motel management experience but explained why she believed she was suited to running the resort. After one or two hours, Claimant asked when Respondent would finish interviewing candi-

dates for the managerial position and Respondent said Claimant had the job. Respondent explained that she wanted somebody who lived close to the resort, who would not need to live on the property, and who did not have a husband who also needed regular work at the resort. Respondent told Claimant she could begin work immediately. Respondent said she also planned to purchase a store and the Eagle Rock Lodge, facilities located near the Feather Bed Resort, and wanted Claimant to manage all three businesses.

7) After Respondent told Claimant she was hired, Claimant raised the issue of compensation. Respondent initially said that Claimant could name her own salary, then stated that the current director of the Eagle Rock Lodge was making \$4000.00 per month plus room and benefits. Claimant said something about "needing to see how many zeroes" she would need, and drew several zeroes on a piece of paper to indicate to Respondent that she expected to be compensated well for her work. From the way the conversation progressed, Claimant assumed that Respondent was going to pay her about \$4000.00 per month. In fact, Respondent had agreed to pay Claimant for her services, but never directly stated that Claimant would earn \$4000.00 per month or any other specific amount. As Claimant readily admitted at hearing, she and Respondent never reached an agreement regarding Claimant's rate of pay.

8) Claimant understood that many of her job responsibilities, including supervising workers and taking care of guests once the resort opened, would involve working on evenings and weekends and that she essentially would be on call at all times. Claimant believed Respondent had hired her to work on a full-time, salaried basis without fixed hours. For that reason, Claimant did not record the hours she worked each day.

9) Respondent and Claimant agreed that Claimant could do a lot of her managerial work, except for supervising other workers, at her home because the motel did not yet have electric service and was not heated. Respondent showed Claimant where keys to the motel units were hidden so Claimant could unlock the units to let in workers. After Claimant's first week of work, Respondent had a separate set of keys made for Claimant's use.

10) A pay telephone was located outside the resort and Respondent planned to have a sign instructing guests who arrived in the evening to call Claimant at home so she could come let them in.

11) Respondent told Claimant that she could hire an assistant manager to work on those days when Claimant was unavailable. Respondent said that Claimant could decide when she needed to take time off and the assistant manager would get the money Claimant otherwise

would have earned during that time.

12) Claimant's meeting with Respondent continued for five or six hours after Respondent agreed to employ Claimant as manager of the Feather Bed Resort. Respondent and Claimant discussed what Claimant's duties would be. For at least the next few weeks, Claimant would focus on readying the units for rental and overseeing other people doing work at the resort. Once the resort opened, Claimant would be responsible for supervising other workers, renting rooms, and generally managing the property. Respondent and Claimant reviewed what work needed to be done in each unit and decided which of them would be responsible for ensuring that particular tasks were completed. Respondent and Claimant agreed that Claimant would order supplies, including shampoo, conditioner, bar soaps, luggage racks, and Gideon Bibles. Claimant took notes during this meeting that reflect portions of her discussion with Respondent.

13) Respondent also said that plumbing, electrical, and light carpentry work needed to be done. Claimant asked whether Respondent was going to hire contractors herself or wanted Claimant to hire them. Respondent said Claimant should do it. Claimant agreed to ask people she knew, including her husband, to do this work for Respondent.

14) The evening of January 24, Claimant told Beverly Hadden

that Respondent had hired her to manage the resort. Claimant was elated about getting the job.

15) The same evening, Claimant told her husband, Doug Esch, that Respondent had said that the Eagle Rock director was making \$4000.00 per month and said she thought she would make a similar amount.

16) Because Respondent was eager to open the resort as quickly as possible, Claimant asked her husband whether he would be willing to do the light carpentry work that needed to be done in the motel units. He agreed. The next day, January 25, Doug Esch met with Respondent at the resort and they agreed on the work he would do.

17) That same day, Respondent called Fry and told her that she had hired Claimant as manager of the Feather Bed and had hired her husband to do some work on the premises.

18) Sometime within a few days of January 24, Claimant re-wrote her rough notes from her meeting with Respondent and added more information. In the rewritten note, Claimant stated that Respondent had said Claimant could name her own salary.

19) At the time she hired Claimant, Respondent also employed two brothers, Raul Lopez and Romeo Lopez, to perform maintenance and landscaping work on the property. One of Claimant's job duties was supervising the Lopez's work, although she did not keep track of their time

and was not responsible for paying them.

20) Raul Lopez speaks only limited English. At some point, Respondent told him that Claimant "was going to be manager" of the Feather Bed Resort. The forum inferred from the totality of Lopez's testimony that, in his mind, a motel can have a manager only after it is open and renting rooms. Consequently, his testimony that Claimant "was going to be manager" is consistent with Respondent having already hired Claimant to prepare the resort for opening.

21) During the remainder of January 1998, Claimant performed various tasks for Respondent, including supervising the Lopez brothers, checking for plumbing leaks, noting work that contractors needed to do, and identifying other items that needed attention. Claimant did research regarding what other motels paid their staff, how much they budgeted for supplies, the types of supplies they used, their office hours, their expected vacancy rates, and various motel policies. Claimant also researched the price of toiletries to be placed in the motel and cabin bathrooms. Respondent instructed Claimant to deal with personnel from Lane Electric regarding the electricity at the motel. Respondent also instructed Claimant to "get a plumber." Claimant performed these tasks in her role as manager of the Feather Bed Resort.

22) Respondent and Claimant had hoped the resort could

open within one or two weeks of the date on which Claimant started work. Various problems arose, such as the water being undrinkable, and the opening was postponed. Each week, Respondent hoped to open, and each weekend, Claimant tried to prepare for that event.

23) Because Respondent hoped to open the resort quickly, Claimant arranged for several people she knew personally to do work at the facility. One of those contractors was Claimant's husband, Doug Esch, as stated in Finding of Fact -- the Merits 16, *supra*. Although Doug Esch worked as an operator at the Cougar Dam, he had done general contracting work in the past. Esch did light carpentry jobs for Respondent, including replacing counters and cabinets in the motel kitchenettes and fixing door jambs. Respondent paid Esch promptly for that work. Claimant also arranged for Les Schmig, who worked with Esch at the Cougar Dam, to perform electrical work and for Ted Crane, a licensed plumber, to do plumbing. When Claimant introduced each of these contractors to Respondent, she called Respondent her boss. Respondent did not contradict that characterization of her business relationship with Claimant. Claimant kept track of the work the contractors performed at the Feather Bed Resort and checked its quality.

24) Although Schmig submitted his bill to Respondent on February 9, Respondent did not

pay either him or Crane for their work until March 16, 1998.

25) On January 29, 1998, someone from Jerry's Home Improvement Center told Claimant that plastic needed to be placed under the motel units to prevent moisture from collecting. Respondent authorized Claimant to take care of this problem.

26) On February 1, 1998, somebody purchased supplies for the resort from Wal-Mart, including four "knife sets."

27) Claimant's duties at the Feather Bed Resort in February 1998 were similar to what they had been in January. She generally went to the resort several times each day to check on the work of the contractors and Raul and Romeo Lopez. Claimant obtained copies of the laws governing facilities like the Feather Bed Resort and familiarized herself with them. During the time she worked for Respondent, Claimant frequently called Joyce Fry for information on renting motel units. She also obtained guest registration slips from Fry to use at the resort.

28) Throughout the time that Claimant worked for Respondent, several people who lived in the neighborhood saw her working at the resort.

29) Respondent arranged for contractors to do work related to the septic system and propane gas at the resort. Claimant followed Respondent's instructions to be present at the resort property or at her home at specific

times so she could let these contractors into the buildings. She also spoke to the propane gas worker about the heaters in the cabins.

30) Claimant usually saw Respondent at the resort on weekends and spoke with her several times each week by telephone about such things as what the workers were doing and what supplies were needed.

31) By mid-February, Respondent had not paid Claimant any money for the work she had performed at Feather Bed. Claimant asked Respondent what she had decided about Claimant's pay as a polite way of stating that she wanted her wages. Respondent said she had discovered that other motels did not pay their managers much. Claimant asked again what Respondent intended to pay her and Respondent suggested she would pay Claimant something but did not mention a specific amount.

32) Claimant continued working for Respondent because, in her words, she is "not a quitter." Claimant had arranged for Schmig and Crane to work on Respondent's property and felt obliged to ensure they were paid. In addition, Claimant still was enthusiastic about running the resort. She believed that Respondent eventually would pay her and that things "would work out."

33) Sometime in late February or early March, Doug Esch installed and stained some wood

moulding in two of the motel units at Respondent's request. Esch submitted his bill for that work on March 6, 1998.

34) On February 27, Respondent told Claimant that she planned to open the resort on Friday, March 6. Around this time, an inspector informed Claimant that the resort's water was still bad.

35) In early March, Claimant arranged for one of her friends, Judith Kindt, to work as assistant manager on weekends and arranged for another of her friends, Cherie Teuscher, to stay in her house and be available to work at the resort when Claimant was out of town. Claimant told Kindt that Respondent would call her to arrange a meeting, but that never happened.

36) On March 2, 1998, at Respondent's instruction, Claimant waited for a sewer contractor to come to the motel. Claimant and the contractor waited several hours for Respondent to show up so the contractor could explain what needed to be done. Claimant did not understand why Respondent felt it was necessary for both of them to be there to talk to the contractor.

37) On March 6, 1998, Claimant received no calls from Respondent. She called and left a message for Respondent, which she did not return. The phones near Claimant's home and the resort later "went down" and Claimant drove to Eugene to try to

talk to Respondent about the water situation.

38) On Saturday, March 7, Claimant was supposed to meet Respondent at the resort. When Respondent did not appear, Claimant asked Raul to have Respondent call Claimant at home when she arrived. Respondent did not call. Claimant went to the resort in the late afternoon to check the workers' work and found Respondent there. Respondent said she was going to open the resort that night, which puzzled Claimant because the water still had not been approved, the motel did not yet have a credit card machine, and there was no "open" sign. In Claimant's view, the motel could not open under those circumstances. Claimant told Respondent that she planned to go to town that evening and Respondent became angry with her.

39) At about six o'clock that evening, Respondent pulled her car into the Haddens' driveway, threw up her hands, and told Beverly Hadden that she was in total shock that her manager had the nerve to take off on a Saturday night when she should have been renting the motel units.

40) Sometime that weekend, Respondent told Claimant that she was dissatisfied with the moulding Esch had installed and stained because it was lighter than other moulding in the motel units.

41) Claimant worked on Sunday, March 8. She tried call-

ing Respondent, who said they could talk later. Claimant brought Teuscher to the resort to interview for the assistant manager position, but Respondent was not there. Claimant left Respondent a message regarding what still needed to be done to ready the resort to open on Monday.

42) Claimant worked on Monday, March 9, and tried calling Respondent several times, but received no answer.

43) Sometime after Respondent complained about Doug Esch's moulding work, but before the Esches received Respondent's March 16, 1999, letters (see Findings of Fact -- The Merits 47 and 48, *infra*), Claimant and Doug Esch took photographs inside some of the motel units to show the quality of the work he had done. One of those photographs shows a knife set sitting next to the sink.

44) From March 10 through 13, Claimant was out of town. Claimant had planned that Teuscher would work at the motel while she was gone.

45) On March 16, Claimant felt that the units were ready to rent. She called Respondent several times but Respondent would not speak to her.

46) Sometime during March, a credit card machine arrived at the resort. Claimant and Respondent previously had agreed that Claimant would operate the machine, so Claimant opened the package and set up the device. To do that, she briefly had to turn

on the electric breakers in one of the motel units.

47) On or about March 16, 1998, Respondent sent Claimant a letter stating, in pertinent part:

"It is my understanding from Crane Plumbing, that did the work on the motel, you are to return from your vacation on March 16th. * * *

"* * * * *

"On the very day I was able to open the motel you told me you were going to town and the next day you took off on a vacation. I did not feel you were honest or above board with me.

"Your employment is not needed or wanted in my McKenzie project. * * *"

In the letter, Respondent also complained about the moulding work Claimant's husband had done at the Feather Bed and indicated she was not going to pay the bill he had submitted. Claimant received this letter on March 19, 1998.

48) Respondent sent Claimant a second letter dated March 16 stating, in pertinent part:

"You have more gall than anyone I've ever met. To think you could name your own time you work and take two one week vacations, etc. in three weeks time. Especially when I was opening is beyond belief.

"It is obvious that you have no concept of work ethics. You do not tell the owner of the

company your plans to work for 'when you'll be able to work' and tell her how to run her own business. Unbelievable!!

"You are to give my key to Roul and STAY out of my houses and motel. How dare you open my sealed money credit machine and ordering Raul to turn on the breakers in #3 cabin when I especially told him to keep them OFF!

"Your [*sic*] the most negative person I have ever met. You only know the down side of all circumstances you definitely have an Attitude Problem. I want no part of."

Claimant also received this letter on March 19. She interpreted the two letters as meaning she was fired. March 19, 1998, was the last day Claimant performed work for Respondent.

49) On March 20, 1998, Doug Esch wrote to Respondent explaining his bill for the latter part of his work and reiterating that Respondent owed him \$160.48 for the work he had performed.

50) The next day, Claimant wrote Respondent a letter stating, in pertinent part:

"Barbara, I was hired by you on Jan. 24th and you fired me Mar. 19th. That is 2 days short of 8 weeks. You mentioned remembering business dealings from over 44 years ago, so I know you remember what you said about my salary the day you hired me. As you mentioned, I too want to be

dealt with honestly, and not be taken advantage of. Since you haven't paid me anything for nearly eight weeks work, I would appreciate payment this week, thank you.

"In reading your letter, I noticed several dates that need adjusting, i.e. 'On the very day I was able to open,' was *Thursday, 3/5 not Saturday 3/7*, 'and the next day you took off on vacation.' On Sunday, the day I supposedly left on vacation, you put up the neon Open sign, and I brought up a woman I wanted you to meet, but you weren't there. I called you twice Sunday and left a message Sunday evening, for you to call me. On Monday I was at the Motel, in fact, while I was at work, I asked to use Joyce Fry's dryer, because mine had broken that morning. I also called you, both from the motel and my home, and left messages for you to return my calls both at your home and office, but you refused to answer the phone messages. There are other errors in your letter. Maybe this is where some of the misunderstandings arose. I would like to discuss this with you, so we can become friends again.

"I see you took my suggestion last Tuesday of getting an open sign set out. They look very nice."

51) A week or two later, Claimant and Doug Esch saw that Respondent was at the resort and went there to ask her for Claim-

ant's pay and for the money they felt Respondent owed Doug Esch for the moulding work he had done. Respondent said she was not going to pay Claimant and refused to acknowledge that Claimant had done any work for her. She also refused to pay Doug Esch's second bill.

52) Respondent never has paid Claimant any money for the work Claimant performed for her.

53) All the motel-related work Claimant did between January 24 and March 19, 1998, was as Respondent's employee. Claimant did not do the work out of friendship or merely to educate herself regarding the hotel management business.

54) After she first spoke with a BOLI investigator about her claim, Claimant completed a calendar indicating the number of hours she estimated she had worked for Respondent on each day from January 24, 1998, through March 19, 1998. Claimant based the estimate on her notes regarding particular tasks she had performed on certain days, her knowledge regarding how long those tasks took, and her recollection of events.

55) Claimant estimated that she worked a total of 227.75 hours for Respondent. She acknowledged that, on January 24, one or two hours of the seven hours she recorded for that day were for an interview. Claimant was not yet an employee during that interview and the forum has deducted two hours from Claim-

ant's estimate of the total hours she worked. The forum finds that Claimant worked a total of 225.75 hours for Respondent.

56) Claimant did spend some of the time she recorded on the calendar in transit between her home and the motel. Given that Claimant lived only 1/2 mile from the motel, the forum finds that amount of time to be negligible. Moreover, that travel occurred during the work day. Respondent had authorized Claimant to work from her home and understood that Claimant sometimes would have to travel from her home to the motel to deal with matters there.

57) Claimant and her husband home-schooled their teen-aged son during early 1998 and he occasionally brought Claimant her lunch when she was at the motel or delivered other messages. Claimant did not spend time teaching her son or visiting with him during the hours she was performing work for Respondent.

58) Claimant believed Respondent was going to pay her about \$4000.00 per month to manage the Feather Bed Resort as well as the Eagle Rock Lodge and a store once Respondent purchased those other businesses. Claimant wrote "\$2500?" as her monthly salary on BOLI's wage claim form because she had managed only the Feather Bed Resort from January through March 1998 and thought she was not entitled to the entire amount Respondent had mentioned for managing all three facilities.

59) On April 16, 1998, somebody purchased various supplies from Wal-Mart for use at the resort, including four nine-piece cutlery sets.

60) On October 9, 1999, Laura Miles started working full-time for Respondent's other business -- Coleman Mortgage -- as a receptionist and typist. Miles observed that Respondent was present at the Coleman Mortgage office every weekday from then until November 8, 1999, when Miles quit her job. Respondent worked full-time at the office except on a couple of occasions when she either came in late or left early because she had doctor's appointments. During the month that Miles worked for her, Respondent closed two mortgage deals and had additional clients come in to submit mortgage applications.

61) Respondent dictated her October 19, 1999, letter to the ALJ to Miles, who typed it. Miles was surprised by Respondent's assertion in that letter that her illness had "forced [her] from working since early April" because Respondent was working at the office every day. Miles did not ask Respondent about the statement, but Respondent said something like, "how can I work -- I have to do all this stuff." Miles assumed that Respondent meant she could not do her mortgage work because she was busy with litigation.

62) On November 8, 1999, Miles received a telephone call from a woman who told her that she was going to be served with a

subpoena to testify in this case. Miles went into Respondent's office and told her about the call. Miles suggested that maybe she could submit a statement in writing instead of testifying in person. Respondent told Miles to call the case presenter and tell her that she and Respondent could not be out of the office at the same time and to also tell the case presenter that Miles did not know anything about the case. Miles started heading back to the reception area to call the case presenter, but Respondent told her to make the call from Respondent's office, in Respondent's presence. Miles called the case presenter and left a message. Later that day, Miles quit her job.

63) About a week before the hearing started on November 18, 1999, Respondent told Fry that Claimant had "turned in Raul."

64) Raul Lopez testified credibly that he was not sure why he was testifying by telephone. Earlier, Respondent had told him that he would have to make a written statement. When asked if he had told Respondent that Claimant had threatened him, he said, "Threatened to do what?" in a puzzled tone of voice. He then stated that nobody had threatened to turn him into the Immigration and Naturalization Service. Romeo Lopez also testified that nobody had threatened to turn him in to any government agency if he testified at the hearing.

65) Raul and Romeo Lopez both testified credibly that they never had spoken with Wilson,

Respondent's counsel, before she questioned them at the hearing.

66) Every aspect of Claimant's testimony was completely credible. Claimant gave straightforward, non-evasive answers to all questions asked. She did not exaggerate any facts to enhance her claim, despite many opportunities to do so. Nor did Claimant exhibit undue anger or frustration with Respondent. Rather, Claimant appeared to be a highly honest, ethical woman who simply wanted to be paid for the work she had performed. The forum finds Claimant's testimony to be truthful in all respects.

67) The testimony of each of the Agency's other witnesses also was credible. The witnesses who were friends of Claimant readily acknowledged that fact. Those who testified that they "knew" Claimant was Respondent's manager did not hesitate to admit that their knowledge arose largely from what Claimant had told them. Those who saw Claimant working at the resort did not exaggerate the scope of the tasks they observed her performing. The forum does find that the memory of Joyce Fry has faded somewhat over time, and has not given her testimony at hearing as much weight as it has the testimony of the other witnesses. The forum has credited Fry's written statement, which she wrote much closer in time to the events at issue.

68) Several witnesses testified extensively regarding whether Esch, Schmig and Crane needed

licenses to perform the work they did and whether Respondent or the contractors were required to get permits for that work. The forum finds those issues irrelevant to the question of whether Claimant was Respondent's employee, and therefore has not made findings concerning them, with one exception. Respondent testified, in an apparent attempt to impeach Claimant, that Claimant had told her that all three of the contractors were licensed, which they were not. The forum accepts as fact Claimant's contrary testimony that she never told Respondent the contractors were licensed and that the subject had never come up.

69) The testimony of Raul Lopez generally was credible, although his memory appeared to have faded significantly and somewhat conveniently regarding the pertinent events. Raul Lopez still is employed by Respondent but also considers Claimant to be his friend and the statements he was willing to make were not biased in favor of either person. Rather, he seemed most comfortable in not giving specific answers to the questions asked, but stated repeatedly that he could not remember exactly what had happened. For that reason, the forum has not given great weight to Raul Lopez's testimony except in those instances where he did not claim memory loss. One of those instances is his recollection that Respondent told him that Claimant was going to be manager of the Feather Bed Resort -- he testified to that fact several

times without hesitation or equivocation.

70) Romeo Lopez either had no knowledge of pertinent facts or was unwilling to testify to them. Accordingly, the forum has given his testimony on the merits little weight. The forum had no reason to disbelieve his testimony that nobody threatened to turn him in to a government agency if he appeared at the hearing and his testimony that he had not spoken to Wilson, Respondent's counsel, before she questioned him during the hearing. Consequently, the forum has credited Romeo Lopez's statements regarding those matters.

71) The forum believed very little of Respondent's testimony. Respondent either lied or seriously misled the forum on several occasions, as described in the following four paragraphs. Her testimony on the merits consisted mainly of stories designed to explain away inconvenient facts. It also conflicted significantly with that of Claimant, whose testimony was far more credible. The forum has given almost no weight to any aspect of Respondent's testimony.

72) Respondent's first significant misrepresentation to the forum occurred when she wrote on October 19, 1999, that she was "unable to complete the Case Summary Form due to an extreme illness which ha[d] forced [her] from working since early April of this year." On October 19, 1999, as Miles testified credibly, Respondent was working full-time at her mortgage business and had

been since at least October 9, 1999, the day Miles started working for her.

73) Respondent attempted to mislead the forum a second time during the October 25, 1999, teleconference when she stated that she just recently had been able to return to work for a "few hours a day" and later suggested that her health problems prevented her from working more than "four or three hours" each day. That was not true. As Miles testified, Respondent was working full-time at the time of the teleconference.

Respondent misrepresented her ability to work in an unsuccessful attempt to persuade the forum to postpone the hearing for a significant period.

74) Dr. Alfero's October 26, 1999, letter, filed with Respondent's second postponement motion, also contains a misstatement of fact -- that Respondent "can't get out of bed and function at all." That assertion conflicts with Miles' credible testimony that Respondent was working full-time during October 1999. The forum has no reason to believe that Dr. Alfero intentionally misled the forum. Rather, it appears likely that Respondent may not have been completely honest with her doctor.

75) Respondent's third misrepresentation to the forum concerned her two witnesses, Raul and Romeo Lopez. Respondent asked that the Lopezes be permitted to submit statements in writing, rather than testify, because Claimant had either reported the Lopezes to govern-

mental authorities or had threatened to do so.² That was not true. Raul and Romeo Lopez both testified that they had not been threatened. The forum infers that Respondent concocted the story about threats both to portray Claimant in a bad light and to prevent the Agency from cross-examining the Lopezes effectively.

76) Respondent testified that Claimant spent a great deal of time at the resort not as an employee, but merely as an unwanted "pest" who bossed around Respondent's other employees without authorization. Respondent also suggested that Claimant gathered information about the way in which other motels were managed, and passed that information on to Respondent, only to educate herself about the motel industry. The forum was unimpressed by these theories, which it finds Respondent created to explain away the inconvenient fact that Claimant spent a great deal of time engaged in managerial tasks at the resort.

77) Finally, the forum rejects Respondent's attempt to portray

² It actually was Respondent's counsel, Wilson, who told the forum that these alleged threats had been made. Wilson stated, however, that she had only learned of the threats the previous evening. The forum infers that Respondent was the person who told Wilson that Claimant had threatened the Lopezes because the Lopezes testified credibly that they never had spoken to Wilson before she questioned them during the hearing.

Claimant and her husband as trespassers. Respondent testified that Claimant and Doug Esch entered the motel units without permission sometime after April 16, 1998, to take photographs of the moulding Esch had installed, not before March 19, 1998, as the Esches testified. As proof of this offense, Respondent explained that one of the photographs showed a cutlery set that had not been purchased until April 16. Respondent offered an April 16, 1998, receipt from Wal-Mart for four "9PC CUTLERY" sets to support this claim. The forum finds this evidence unpersuasive. First, Respondent's testimony generally is unreliable and the forum gives no weight to her assertion that the photograph displays items she did not purchase until April 1998. Second, the photograph displays a *knife* set and the record also includes a receipt showing that somebody purchased four "KNIFE SET[S]" for the resort on February 1, 1998, well before Claimant and Doug Esch testified they took the photographs at issue.

ULTIMATE FINDINGS OF FACT

1) At all material times, Respondent owned and operated the Feather Bed Resort east of Eugene, Oregon.

2) On January 24, 1998, Respondent hired Claimant to work as the manager of the Feather Bed Resort and agreed to compensate her for her work, although she and Claimant did not agree on a specific rate of pay.

3) From January 24, 1998, until March 19, 1998, Claimant rendered personal services to Respondent as manager of the Feather Bed Resort. Claimant worked a total of 225.75 hours for Respondent.

4) Respondent never paid Claimant any wages for the work she performed.

5) Respondent's failure to pay Claimant's wages was willful and more than 30 days have passed since Claimant's wages became due.

6) Civil penalty wages, computed in accordance with ORS 652.150 and OAR 839-001-0470, equal \$1440.00.

CONCLUSIONS OF LAW

1) ORS 653.010 provides, in pertinent part:

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

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

Respondent employed Claimant by suffering or permitting her to work as the manager of the Feather Bed Resort.

2) ORS 653.025 provides, in pertinent part:

"Except as provided by ORS 652.020 and the rules of the Commissioner of the Bureau of Labor and Industries 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:

"(2) For calendar year 1998, \$6.00."

Respondent was required to pay Claimant at least \$6.00 for each hour she rendered personal services to Respondent as manager of the Feather Bed Resort.

3) ORS 653.055(1) provides:

"(1) Any employer who pays an employee less than the wages to which the employee is entitled under ORS 653.010 to 653.261 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

"(b) For civil penalties provided in ORS 652.150."

Respondent is liable to Claimant for the unpaid wages Claimant earned plus civil penalties as provided by ORS 652.150.

4) ORS 652.140 provides, in pertinent part:

"(1) 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 was required to pay Claimant the wages due her under the minimum wage law no later than the first business day after March 19, 1998, and violated ORS 652.140 by failing to do so.

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."

OAR 839-001-0470 provides:

"(1) When an employer willfully fails to pay all or part of the wages due and payable to the employee upon termination of employment within the time specified in OAR 839-001-0420, 839-001-0430 and 839-001-0440, the employer shall be subject to the following penalty:

"(a) The wages of the employee shall continue from the date the wages were due and payable until the date the wages are paid or until a legal action is commenced, whichever occurs first;

"(b) The rate at which the employee's wages shall continue shall be the employee's hourly rate of pay times eight (8) hours for each day the wages are unpaid;

"(c) Even if the wages are unpaid for more than 30 days, the maximum penalty shall be no greater than the employee's hourly rate of pay times 8 hours per day times 30 days.

"(2) The wages of an employee that are computed at a rate other than an hourly rate shall be reduced to an hourly rate for penalty computation purposes by dividing the total wages earned while employed or the total wages earned in the last 30 days of employment, whichever is less, by the total number of hours worked during the corresponding time period."

Respondent is liable for a civil penalty under ORS 652.150 for willfully failing to pay all wages or compensation to Claimant when due.

6) ORS 653.055(3) provides, in pertinent part:

"The Commissioner of the Bureau of Labor and Industries has the same powers and du-

ties in connection with a wage claim based on ORS 653.010 to 653.261 as the commissioner has under ORS 652.310 to 652.445 * * *."

ORS 652.332 provides, in pertinent part:

"(1) In any case when the Commissioner of the Bureau of Labor and Industries has received a wage claim complaint which the commissioner could seek to collect through court action, the commissioner may instead elect to seek collection of such claim through administrative proceedings in the manner provided in this section, subject to the employer's right to request a trial in a court of law. * * *"

The commissioner has the same authority to initiate administrative proceedings regarding claims for failure to pay the minimum wage under ORS Chapter 653 as he has to initiate administrative proceedings regarding ORS Chapter 652 claims for failure to pay wages upon which the employer and employee agreed. The commissioner has jurisdiction over this proceeding and the authority to issue an order requiring Respondent to pay unpaid wages and penalty wages to Claimant.

OPINION

RESPONDENT EMPLOYED CLAIMANT AND OWES HER \$1354.50 IN UNPAID WAGES

To establish a prima facie case supporting a wage claim, the Agency must prove: 1) that Re-

spondent employed Claimant; 2) any pay rate upon which Respondent and Claimant agreed, if it exceeded the minimum wage; 3) that Claimant performed work for Respondent for which she was not properly compensated; and 4) the amount and extent of work Claimant performed for Respondent. See *In the Matter of Catalogfinder, Inc.*, 18 BOLI 242, 260 (1999). The dispute in this case centers on the first element -- whether an employment relationship existed between Claimant and Respondent.

A. Respondent Employed Claimant

The forum finds that Respondent did employ Claimant to manage the Feather Bed Resort and prepare it for opening. Claimant testified with absolute credibility that Respondent hired her for that job. This forum would conclude from Claimant's testimony alone that Respondent had hired her. There is, in addition, ample corroborating evidence in the record, such as Fry's statement that Respondent told her in January 1998 that she had hired Claimant. Further confirmation came from Beverly Hadden, who testified that Respondent came to her the night of March 7, 1998, and said she was in total shock that "her manager" had left on a Saturday night when she should have been renting the motel units. Respondent never claimed that she had employed someone other than Claimant as manager at that time, and it was Claimant who went to town that evening despite

Respondent's unrealistic plans to open the motel. In addition, several people who lived near the resort testified credibly that they frequently saw Claimant working at the property.

Further evidence that Respondent had hired Claimant comes from Respondent's own letters to Claimant. In one March 16, 1998, letter, Respondent expressed her displeasure that the day she planned to open the motel, Claimant said she was going out of town and then left on a vacation. If Claimant was not working for Respondent, Respondent should have been indifferent to her vacation plans. In the other March 16 letter, Respondent again stated her displeasure that Claimant had taken vacation at the time Respondent was trying to open the resort. These letters simply are inconsistent with Respondent's testimony that she never employed Claimant and that any time Claimant spent at the resort property was unwelcome.

In sum, the forum finds that Respondent "suffered or permitted" Claimant to work as the manager of the Feather Bed Resort. Consequently, an employment relationship existed between them. See ORS 653.010.

B. Respondent and Claimant Did Not Agree on a Pay Rate that Exceeded the Minimum Wage

As Claimant readily admits, she and Respondent did not agree on the specific wage that

Claimant would receive. Consequently, Respondent was required to pay Claimant at least the minimum wage, which was \$6.00 per hour in 1998.

Respondent argues that because she did not agree to pay Claimant at a "fixed rate," Claimant was not her "employee" as that term is defined in ORS 652.310(2).³ She concludes that the Commissioner of the Bureau of Labor and Industries lacks jurisdiction over this case because he has jurisdiction only over wage claims of such "employees." See ORS 652.330, ORS 652.332.

Respondent's argument fails because it attempts to limit the scope of the commissioner's jurisdiction under chapter 653 by importing definitions applicable only to ORS chapter 652. As the Oregon Court of Appeals has explained, ORS chapter 652 "governs claims for unpaid **agreed** wages." *State ex rel. Stevenson v. Youth Adventures*, 42 Or App 263, 600 P2d 880, 881 (1979) (emphasis added). Consequently, it makes sense that the definition of employee applicable to that chapter provides that the employer must have agreed to pay the employee at a fixed rate. ORS chapter 653, on the other hand, "governs claims for unpaid minimum and overtime wages." *Id.* For purposes of chapter 653, a person is an "employee" of an-

other if that other "suffer[s] or permit[s]" the person to work. ORS 653.010; see *State ex rel Roberts v. Bomareto Ent., Inc.*, 153 Or App 183, 188, 956 P2d 254 (1997), *rev den* 327 Or 192 (1998).⁴ No agreement regarding a pay rate is needed. Because Respondent suffered or permitted Claimant to work for her, Claimant was Respondent's employee for purposes of ORS chapter 653.

The commissioner's authority to enforce chapter 653 minimum wage claims is set forth in ORS 653.055(3), which states that the commissioner "has the same powers and duties in connection with a wage claim based on ORS 653.010 to 653.261 as the commissioner has under ORS 652.310 to 652.445 * * *." The latter statutes authorize the commissioner to take assignments of wage claims and to seek collection through administrative proceedings. Accordingly, the commissioner has jurisdiction over this contested case proceeding, in which the Agency seeks to collect the wages Respondent owes Claimant under the minimum wage law. *Cf. In the Matter of Laverne Springer*, 15 BOLI 47, 67 (1996) (the absence of an agreement to pay wages "cannot take [a person] out of the definition of 'employee' where a minimum wage law required that

³ ORS 652.310 defines an employees as an individual whose employer "pays or agrees to pay such individual at a fixed rate * * *."

⁴ There are some exceptions to this definition of employee, such as persons who are independent contractors, but none of those exceptions applies here.

[the person] be paid a minimum wage").

C. Claimant Performed 225.75 Hours of Work for Respondent for Which Respondent Owes Her \$1354.50

It is the employer's duty to maintain accurate records of the hours that employees work. Where the forum concludes that a respondent employed a claimant without proper compensation, it becomes the employer's burden to produce all appropriate records to prove the precise hours and wages involved. Where the 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." *In the Matter of Norma Amezola*, 18 BOLI 209, 218 (1999) (internal quotation marks and brackets omitted).

Here, Respondent kept no record of the days or hours that Claimant worked. The forum has accepted Claimant's credible testimony that she determined the hours she worked from her recollection of what had happened on certain days and by reviewing notes of tasks she had performed for Respondent and calculating the amount of time spent completing those tasks. The forum concludes that Claimant's good-faith estimate that she worked 227.75 hours for Respondent is unexaggerated, reasonable, and

forms a proper basis for an award of damages in this case. The forum has deducted two hours from Claimant's estimate to account for the time she spent interviewing with Respondent before she was hired on January 24, 1998.

The forum finds that Claimant performed 225.75 hours of work for Respondent. She was entitled to receive at least the statutory minimum wage rate of \$6.00 per hour, for a total of \$1354.50. Respondent has paid Claimant no portion of that amount and, therefore, owes Claimant \$1354.50 in unpaid wages.

RESPONDENT OWES CLAIMANT \$1440.00 IN PENALTY WAGES

The forum may award penalty wages where the respondent's failure to pay wages was willful. Willfulness does not imply or require blame, malice, or moral delinquency. Rather, a respondent commits an act or omission "willfully" if he or she acts (or fails to act) intentionally, as a free agent, and with knowledge of what is being done or not done. *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 her employee. *McGinnis v. Keen*, 189 Or 445, 221 P2d 907 (1950); *In the Matter of Jake Coke*, 3 BOLI 238, 242 (1983).

Here, Respondent hired Claimant, was aware that Claimant was performing services on her behalf, and intentionally refused to pay her any wages.

From these facts, the forum infers that Respondent voluntarily and as a free agent failed to pay Claimant any of the wages she earned from January 24 through March 19, 1998. Respondent acted willfully and is liable for penalty wages.

As this forum previously has explained, penalty wages are calculated in accordance with the relevant laws and Agency policy 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.' * * * Statement of Agency Policy, July 23, 1996."

In the Matter of Mark Johnson, 15 BOLI 139, 143 (1996); see ORS 652.150; OAR 839-001-0470. Respondent owes Claimant \$1440.00 in civil penalty wages (\$1354.50 divided by 225.75 hours = \$6.00 per hour, times 8 hours = \$48.00, times 30 days = \$1440.00).

ORDER

NOW, THEREFORE, as authorized by ORS 652.332, and as payment of the unpaid wages and civil penalty wages she owes as a result of her violation of ORS 652.140, the Commissioner of the Bureau of Labor and Industries hereby orders **Barbara Coleman, dba Feather Bed Resort**, 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 Shannon Esch in the amount of TWO THOUSAND SEVEN HUNDRED NINETY-FOUR DOLLARS AND FIFTY CENTS (\$2794.50), less appropriate lawful deductions, representing \$1354.50 in gross earned, unpaid, due, and payable wages and \$1440.00 in penalty wages, plus interest at the legal rate on the sum of \$1354.50 from April 1, 1998, until paid and interest at the legal rate on the sum of \$1440.00 from May 1, 1998, until paid.

In the Matter of CITY OF KLAMATH FALLS

Case No. 02-00
Final Order of the Commissioner
Jack Roberts
Issued January 28, 2000

SYNOPSIS

Respondent, a public agency, awarded several contracts for improvements to its municipal water system during the summer of 1998. The commissioner found that five of those contracts constituted part of a single public works project, the total price of which exceeded \$25,000.00. Consequently, Respondent was required to comply with the prevailing wage rate laws with regard to each of

the five contracts, including one for which the contract price was less than \$25,000.00. Respondent failed to include with the specifications for that contract a provision stating that a fee was required to be paid to the commissioner as provided in ORS 279.375(1) and administrative rule. That failure constituted a violation of ORS 279.352(2). The commissioner assessed no civil penalty. ORS 279.352(2), ORS 279.357, ORS 279.370(1), OAR 839-016-0310, OAR 839-016-0530, OAR 839-016-0540.

The above-entitled case came on regularly for hearing before Erika L. Hadlock, designated as Administrative Law Judge ("ALJ") by Jack Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on October 7, 1999, in the Hearings Room of the Oregon Employment Department, 801 Oak Avenue, Klamath Falls, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by David Gerstenfeld, an employee of the Agency. Respondent appeared through its counsel, City Attorney Jeffrey Ball.

The Agency called Agency compliance specialist Lois Banahene, Agency administrative specialist Dana Woodward, and Respondent's Water Superintendent, David Steiner, as its witnesses. Respondent called Steiner as its sole witness.

The forum received into evidence:

a) Administrative exhibits X-1 to X-11 (generated or filed prior to hearing) and exhibits X-12 and X-13 (generated or filed after the hearing).

b) Agency exhibits A-1 through A-4 and A-6 through A-14 (submitted prior to hearing with the Agency's case summary) and A-15 and A-16 (submitted during the hearing).

c) Respondent exhibits R-1 through R-9 (submitted prior to hearing with Respondent's case summary).

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

FINDINGS OF FACT – PROCEDURAL

1) On July 19, 1999, the Agency issued a Notice of Intent to Assess Civil Penalties in which it alleged: a) Respondent had advertised for bids on a contract called the "Last Street Waterline Project" that was one of a series of water system improvement projects that constituted a single public works project the Agency called the "Water Project"; b) the cost of the Water Project exceeded \$25,000.00 and was not regulated by the federal Davis-Bacon Act; and c) Respondent

had failed to include in the specifications for the Last Street Waterline Project a provision that a fee must be paid to the Commissioner pursuant to ORS 279.351(1) and administrative rules adopted thereunder. The Agency concluded that Respondent had violated ORS 279.352(2) and OAR 839-016-0020(2)(b) and sought a single penalty of \$2000.00.

2) The Agency served the Notice on Respondent through its counsel on July 20, 1999.

3) Respondent, through its City Attorney, filed an Answer denying that the Last Street Waterline Project and other water systems improvement contracts constituted a single public works project. Respondent reiterated that denial in the context of an affirmative defense and also requested a contested case hearing.

4) On August 5, 1999, the Agency filed a request for hearing with the Hearings Unit and served Respondent with that request.

5) On or about August 9, 1999, the Hearing Unit served Respondent with: a) a Notice of Hearing that set forth the time and place for hearing; b) a Summary 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 hearing process; and d) a copy of the Notice of Intent.

6) On September 3, 1999, the forum ordered the Agency and Respondent each to submit a case summary including: lists of all persons to be called as witnesses; identification and copies of all documents to be offered into evidence; a brief statement of the elements of the claim (for the Agency only); a brief statement of any defenses to the claim (for Respondent only); a statement of any agreed or stipulated facts; and any wage, damages, and penalties calculations (for the Agency only). The forum ordered the participants to submit their case summaries by September 24, 1999, and notified them of the possible sanctions for failure to comply with the case summary order. Respondent and the Agency filed timely case summaries.

7) At the start of the hearing, counsel for Respondent stated that he had received the Summary of Contested Case Rights and Procedures and had no questions about it.

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

9) At the close of the hearing, the Agency moved to amend the Notice of Intent to include an allegation that Respondent had violated ORS 279.363 by failing to notify the Agency within 30 days of awarding the Last Street Contract. The Agency sought a civil

penalty of \$500.00 for the alleged violation. The ALJ granted the motion to amend. After the hearing, the Agency filed an unopposed motion to withdraw the amendment. On October 11, 1999, the forum issued an order granting that motion.

10) The ALJ issued a proposed order on January 7, 2000, that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. Neither the Agency nor Respondent filed timely exceptions.

FINDINGS OF FACT – THE MERITS

1) Respondent, the City of Klamath Falls, is a public agency.

2) Respondent has several different departments, one of which is the Public Works Department. The Water Division is part of that Department and has its own budget. David Steiner has been Respondent's Water Superintendent since March 1998 and heads the Water Division.

3) Respondent's water system serves 40,000 residential water customers as well as some industrial and commercial customers. It includes over 230 miles of water line.

4) In May 1996, Respondent passed an ordinance authorizing the issuance of water revenue bonds in an amount not to exceed \$7,000,000.00. The ordinance provided, in pertinent part:

“WHEREAS, the Council of the City of Klamath Falls (the

“City”), finds that it is financially feasible and in the best interests of the City to improve the City's water system and facilities through further development, repair and improvement (the “Project”); and

“WHEREAS, the City is authorized to finance the Project by issuing revenue bonds pursuant to Section 47 of the Charter of the City; and

“WHEREAS, Section 47 of the Charter of the City provides that such revenue bonds shall be secured solely from the unobligated revenues produced by the facility or similar facilities, and by, in the discretion of the City Council, mortgage or similar encumbrance upon the facility; and

“WHEREAS, the cost of the Project, including bond issuance costs and debt service reserves, is estimated to be an amount not to exceed \$7,000,000; and

“WHEREAS, the City anticipates incurring expenditures (“Expenditures”) to finance the costs of the Project and wishes to declare its official intent to reimburse itself for the Expenditures made on the Project from the proceeds of tax and revenue bonds, the interest on which shall be excludable from gross income under Section 103 of the Internal Revenue Code of 1986, as amended (the “Code”).

“WHEREAS, Section 47 of the City Charter provides that

this Ordinance (the "Ordinance") authorizing the issuance and sale of revenue bonds shall be subject to referendum, which pursuant to ORS 221.310 is for a period of 30 days after passage by the City Council and approval by the mayor; NOW THEREFORE

"THE CITY OF KLAMATH FALLS ORDAINS AS FOLLOWS:

"Section 1.

"Revenue Bonds Authorized. There are hereby authorized to be Issued in an aggregate principal amount of not to exceed \$7,000,000 of the City's Water Revenue Bonds, Series 1996 on a parity with the City's outstanding Water Revenue Bonds, Series 1994 (the "1994 Bonds"). * * *

"* * * * *

"Section 3.

"Bonds Payable Solely from Revenues. The bonds shall not be general obligation bonds of the City, nor a charge upon its tax revenues, but shall be payable solely from the net revenue of the water system and revenues which the City pledges to payment of the bonds pursuant to the ordinance to be adopted by the City and on a parity with the 1994 Bonds. * * *

Respondent later issued two-year bonds authorized by this ordinance. Respondent referred to

these bonds as the 1996 Water Bonds.

5) In a feasibility study related to the 1996 Water Bonds, Respondent's plan for spending the bond funds was described as follows:

"The Additional Bond proceeds will pay for the cost of issuing the bond, funding a reserve account, and for capital improvements to expand the capacity of the water system. Over the next ten years, the City plans to make over \$7.09 million of capital improvements to the water system, and to spend an average of \$200,000 per year for replacement of the oldest parts of the water system. * * *

The purpose of the 1996 bond measure was to obtain funds to improve Respondent's water system.

6) Respondent included a Schedule of Capital Improvements in its feasibility study for the 1996 bond measure. In that schedule, Respondent projected spending approximately \$200,000.00 per year through the year 2005 on water system "replacement" contracts.

7) The Agency publishes a Prevailing Wage Rate ("PWR") booklet twice each year that includes the wage rates that must be paid for labor on public works. The July 1997 booklet included recommended language for public works contracts:

“ALL CONTRACTS AND CONTRACT SPECIFICATIONS MUST CONTAIN A PROVISION STATING THAT THE FEE SHALL BE PAID TO THE BUREAU.”

“Examples of language satisfying ORS 279.352(2)

****Contract Specifications:**

“-The contractor is required to pay a fee to the Bureau of Labor and Industries pursuant to the provisions of ORS 279.352(2). The fee is one-tenth of one percent of the price of this contract, but not less than \$100 nor more than \$5,000, regardless of the contract price.

****Contract:**

“-The contractor shall pay a fee equal to one-tenth of one percent (.1 percent) of the price of this contract. The fee shall be paid on or before the first progress payment or 60 days from the date work first began on the contract, whichever comes first. The fee is payable to the Bureau of Labor and Industries
* * * ”

8) The February 1998 PWR booklet included a page titled "LEGISLATIVE CHANGES" that summarized 1995 and 1997 legislation affecting agencies that award contracts for public works and the contractors working on those projects. That page included the following pertinent statement:

“Public contracting agencies may not divide projects to

avoid compliance with the PWR law.”

9) Respondent did not start any construction funded by the 1996 Water Bonds until 1997 and not much was done that year. When Steiner started working for Respondent in March 1998, he determined that the 1996 Water Bond funds had to be allocated by the end of 1998. The construction season in Klamath Falls generally lasts only from April to October or November. Consequently, Respondent bid out 14 water system contracts in the spring and summer of 1998.

10) In early 1998, Respondent issued an advertisement for bids on the Last Street Waterline Project, which it described as “Construction of approximately 725 L.F. of 6 inch PVC waterline, fittings, valves and appurtenances.” The advertisement did not include a statement that a fee was required to be paid to the commissioner as provided in ORS 279.375(1) and administrative rule. The bidding period for the Last Street construction closed on June 8, 1998.

11) Respondent described the Last Street contract in a memorandum as “the construction of a replacement 6” water main on Last Street from Harriman to Addison (Idaho).” The “existing 4” cast iron main” was to be replaced with “leaded joints and 3” steel main, with welded joints.” The Last Street contract was to be funded by the 1996 Water Bond.

12) The Last Street contract was awarded to Jefferson State Rock Products, Inc., at a bid price of \$15,529.00. The engineer was Adkins Engineering.

13) The Last Street contract called for construction to be complete by July 31, 1998.

14) Respondent accepted bids on a second contract – the Iowa Street/Biehn Street Water Main – until July 9, 1998. The work involved both installation of new line and replacement of existing line and involved “construction of approximately 1500 feet of 6-inch water main and appurtenances.” The Iowa/Biehn construction was located near the intersection of Iowa and Biehn Streets, about 1/4 mile from the Last Street improvement. The engineer on the contract was Paoli Engineering; the contractor was B.J. Williams. The price of the Iowa/Biehn contract exceeded \$25,000.00 and it was funded by the 1996 Water Bond.

15) Respondent accepted bids on a third contract – the Pine Street Water Line Replacement – until July 23, 1998. That contract involved replacing approximately 2100 feet of existing 6” water main with 8” polyvinyl chloride (“PVC”) plastic pipe. The seven-block-long Pine Street improvement was located approximately one mile from the Last Street project. The engineer for Pine Street was W & H Pacific. The contractor was Grimes Construction. The Pine Street improvement cost more than \$25,000.00 and was funded through the 1996 Water Bond.

16) Respondent accepted bids on three more contracts -- the Eastside Waterline Project, the Jefferson and 11th Street Waterline Project, and the Lincoln Street Waterline Project -- until August 6, 1998.

17) Eastside involved construction of a new water main: “Construction of approximately 2760 L.F. of 12 inch ductile iron waterline, 4580 L.F. of 8 inch PVC waterline, firehydrants, valves, fittings, and appurtenances.” The construction was performed near the Klamath Falls airport, which is approximately 5 1/2 miles from the Last Street improvement. The engineer for the Eastside project was Adkins Engineering. The contractor was Mark Wendt Construction. The project cost more than \$25,000.00 and was funded by the Airport Fund.

18) The Jefferson and 11th Street project involved replacement of an existing water line and “Construction of approximately 1460 L.F. of 8 inch waterline, 420 L.F. of service line, 24 services, fire hydrants, fittings, valves and appurtenances.” This construction ran along Jefferson Street from the Sacred Heart Academy to the end of Jefferson, near 11th Street, approximately 3/4 mile from the Last Street improvement. The engineer for the Jefferson and 11th Street project was Adkins Engineering and the contractor was Mountain Pacific. The contract cost exceeded \$25,000.00 and was funded through the 1996 Water Bond.

19) The Lincoln Street project involved replacement of metallic pipe with PVC pipe: "Construction of approximately 1400 L.F. of 6 inch waterline, fittings, valves and appurtenances." The construction ran from the intersection of Lincoln and 4th Streets to about Lincoln and 7th Streets, approximately 3/4 mile from the Last Street improvement. The engineer for Lincoln Street was Adkins Engineering. The contractor was Mountain Pacific. The contract price exceeded \$25,000.00 and the construction was funded through the 1996 Water Bond.

20) The Last Street improvement was completed in about October 1998. Respondent made its last payment on the contract on or about December 10, 1998. Respondent paid a total of \$15,735.71 to Jefferson State on the Last Street contract.

21) The six water system contracts described in Findings of Fact – the Merits 10 through 20, *supra*, involved construction, reconstruction or major renovation work in the State of Oregon. The contracts were not regulated by the federal Davis-Bacon Act.

22) Respondent funded all six of these contracts except the Eastside contract from the 1996 Water Bonds. Respondent's Water Division budget included a single line item for infrastructure improvements, with specific reference to bond funding. That line item covered the cost of the five water system contracts other than Eastside.

23) The five water system contracts other than Eastside fell within the "replacement" category on Respondent's schedule of water system capital improvements for which Respondent projected spending approximately \$200,000.00 per year.

24) These five contracts all involved the replacement of existing water lines with new water lines of a more modern type. The Last Street construction and at least one other water main replacement were undertaken in part because the existing water lines were leaking.

25) None of these five water system construction projects was physically connected to another.

26) Completion of the Last Street construction was not necessary to implementation of any of the other five water system construction contracts. Nor was construction of any of other water lines a prerequisite to completion of Last Street. The Last Street construction could have been performed independently and in the absence of the other construction.

27) Respondent's action in bidding out the Last Street construction in a separate contract, rather than combining it with the other water system contracts, was not taken for the purpose of avoiding compliance with the PWR laws. Had Respondent combined all the water system improvements into a single contract, construction would not have been

completed before the end of 1998.

28) On November 18, 1998, Hedera Trumbo, a BOLI PWR coordinator, sent a letter to Jefferson State stating that the Agency had not yet received the \$100.00 public works contract fee for the Last Street Waterline Project, and asking Jefferson State to submit a fee information form along with the fee. Jefferson State sent a copy of that letter to Steiner, who received it sometime in November 1998.

29) On November 24, 1998, Jefferson State sent a facsimile transmission to the Agency stating that Last Street was a "stand-alone project in no way connected with any other project by this corporation..."

30) On December 16, 1998, Trumbo sent another letter to Jefferson State stating that the Agency had not received any response regarding its November 18, 1998, fee request. Trumbo notified Jefferson State that it could be subject to a maximum \$1000.00 penalty if it failed to pay the fee.

31) On December 28, 1998, Agency compliance specialist Banahene sent a letter to Vicky Young, Respondent's public works director. In that letter, Banahene explained the Agency's position as follows:

"Our prevailing wage rate (pwr) data base shows the City of Klamath Falls advertised bids on six waterline projects be

tween May 31, 1998 and July 26, 1998. * * *

"Oregon's prevailing wage regulations prohibit public agencies from dividing public works projects into more than one contract to avoid regulation under the prevailing wage laws. In addition, the regulations include the criteria the Bureau uses to evaluate whether multiple contracts constitute more than one project. I have included a copy of the text of Oregon Administrative Rule 839-016-0310. Generally, if a public agency uses several contracts which are closely related in purpose time and place, to conduct a public works project, it is considered one project. The Bureau also examines the manner in which the public agency administers and implements the project.

"OAR 839-016-0020(f) (copy enclosed) requires each contractor to pay a fee equal to one-tenth of one percent (.001) of the total contract price. The fee may be no more than \$5,000 and no less than \$100, and applies to all Oregon pwr projects with a total project amount of \$25,000 or more.

"At first glance, these waterline projects appear to be closely related in purpose time and place and as such would be one large project. If so, the overall combined list of projects would amount to far greater than the \$25,000.00 threshold for coverage. Fur-

thermore, if this is true, [Jefferson State's] argument (that their contract amount of \$15,529.00 for the Last Street waterline makes it a stand-alone project) would not be correct and the Jefferson State Rock Projects Inc. contract fee of \$100.00 is past due.

"Please review the enclosed administrative rules. By on or before January 6, 1998, please provide a response regarding the coverage of the Last Street Waterline project. If you determine that it is not a covered project, please provide reasons of how and why you reached that determination."

Banahene enclosed copies of OAR 839-016-0310 and OAR 839-016-0020 with this letter.

32) The December 28, 1998, letter was the first notice the Agency sent to Respondent regarding this matter.

33) On January 29, 1999, Banahene sent a letter to Respondent's attorney that stated, in substantive part:

"In November 1998, the Bureau of Labor and Industries notified Jefferson State Rock Products that a fee in the amount of \$100.00 was due on the Last Street Waterline contract. The company's response to our notice was that the Last Street project was a 'stand-alone project in no way connected with any other project by this corporation and was under the \$25,000 amt. required for the fee...'

"Through the City of Klamath Falls' response to my letter dated December 28, 1998, (copies enclosed) and subsequent phone calls with Tom Del Santos and David Steiner, the Bureau has concluded that it appears that several waterline contracts, including the Last Street Waterline, were, for all intents and purposes, part of one public improvements project. The source of funding (a five million dollar bond) was primarily intended to cover water main replacements, new steel tank reservoirs and transmission pipelines. Although pieces of the project were bid in several separate contracts, these contracts were closely related in overall purpose, time and place. A single public works project may include several types of improvement and contain several contracts.

"Upon hearing the above, David Steiner stated that although he disagreed with the outcome, he felt it was the City's responsibility, not Jefferson State Rocks Products, Inc. to pay the \$100.00 fee because there was no fee language in the contract. He asked that I direct my letter to you rather than the contractor.

"Please remit a fee in the amount of \$100.00 to the Bureau of Labor and Industries at the Portland address below, by no later than February 5, 1999."

34) On August 3, 1999, the Agency served Jefferson State Rock Products, Inc. with a Notice of Intent to Assess Civil Penalties based on Jefferson's alleged failure to pay the \$100.00 prevailing wage rate fee required by ORS 279.375 and OAR 839-016-0200 for the Last Street Waterline Project. Jefferson did not timely request a hearing on the Notice of Intent and the Administrator of the Wage and Hour Division issued a Final Order of Determination (Default) requiring Jefferson to pay a \$1000.00 penalty for the violation.

35) There is no evidence in the record that Respondent previously has violated any PWR laws.

36) There is no evidence in the record that any worker on the Last Street contract was paid less than the prevailing wage rate.

37) The Agency's Field Operations Manual ("FOM"), Volume VI – Prevailing Wage Rate, includes an "Interpretation" as follows:

VOLUME: VI – Prevailing Wage Rate	ORS: 279.357(2)
SUBJECT: Criteria Used to Determine PWR Coverage	OAR: 839-16-310(1)(2)
SOURCE: WHD Administration	DATE: 06-27-89
<input type="checkbox"/> POLICY <input checked="" type="checkbox"/> INTERPRETATION <input type="checkbox"/> REFERENCE	PAGE: 1 of 2

“Generally

“The Prevailing Wage Rate Law, ORS 279.348 to 279.363, requires that the prevailing rate of wage, as determined by the Labor Commissioner, must be paid to workers upon all public works contracts. ORS 277.348(1); 279.350(1). “Public works” are defined very broadly to include roads, highways, buildings, structures and improvements of all types, the construction, reconstruction, major renovation or painting of which is carried on by a public agency to serve the general public interest and is not limited to those public works listed. ORS 279.348(3). The only public works projects excluded are projects regulated under the federal Davis-Bacon Act. 40 U.S.C. s 279 a, projects of \$25,000 or less and certain utility district contracts. ORS 279.357(1) and (2); 261.345.

“Criteria

“1. Does the particular project in question involve improvement of “public works?” A single public works project may include several types of improvements or structures. ORS 279.348(3).

“2. What is the ultimate intent of the parties to the particular project? Precisely what did the parties contemplate their project or entity would finally look like? It must be underscored that what is meant by this criteria is not the desire to avoid

the effect of the law, but the anticipated outcome of the particular improvements the agency plans to fund. Evidence of intent will be closely scrutinized for evasion of the statute. The amount of funding that may be available to an agency or the execution of separate contracts are not regarded as determinative of intent. OAR 839-16-008(2); 839-16-100(1)(2); 839-16-310(1)(2).

"3. Are the particular projects, alleged to be separate and distinct, in actuality, one project? A project encompassing several structures or distinct improvements may be one project if the structures or improvements are similar to one another and combine to form a single, logical entity having an overall purpose or function.

"4. Is the timing of each particular improvement, alleged to be a separate and distinct project, indicative of one project or several projects? Improvements performed in one time period or in several phases as components of a larger entity will generally be considered a single project.

"5. Are the contractor, subcontractor and their respective workers either the same or substantially the same throughout the particular project or, if different, part of a continuum providing distinct improvements that complete

the public agency's ultimate intent?

"6. How do the public agency and contractors administer and perform the improvements alleged to be separate and distinct?

"7. Does the total value of all anticipated improvements to the public works exceed \$25,000? ORS 279.357(1); OAR 839-16-100(1)(a)."

38) The Agency assesses the fee required by ORS 279.352(2) on each contract for any part of a public works project. In the Agency's view, a project may include more than one contract.

39) Agency personnel use the FOM and the applicable statutes and rules to determine whether several contracts combine to form a single public works project.

40) The testimony of all witnesses was credible.

ULTIMATE FINDINGS OF FACT

1) Respondent is a public agency.

2) In the spring and summer of 1998, Respondent bid out 14 contracts for improvements to its city water system, six of which are at issue in this case: the Last Street, Iowa/Biehn, Jefferson, Lincoln, Pine, and Eastside contracts. These six contracts all involved construction, reconstruction, or major renovation designed to serve the public interest.

3) The Last Street, Iowa/Biehn, Jefferson, Lincoln, and Pine Street contracts were part of a single public works project, the total cost of which exceeded \$25,000.00.

4) Respondent did not include in the specifications for the Last Street contract a provision stating that a fee is required to be paid to the Commissioner of the Bureau of Labor and Industries as provided in ORS 279.375(1) and administrative rule.

5) Respondent knew or should have known that it was required to include this provision in the Last Street contract specifications.

6) No evidence in the record suggests that any person who worked on the Last Street contract was paid less than the prevailing wage rate.

7) No evidence in the record suggests that Respondent has committed any previous violations of the prevailing wage rate laws.

CONCLUSIONS OF LAW

1) ORS 279.348(3) defines "Public works" as follows:

"Public works' includes, but is not limited to, roads, highways, buildings, structures and improvements of all types, the construction, reconstruction, major renovation or painting of which is carried on or contracted for by any public agency to serve the public interest but does not include the reconstruction or renovation of privately owned property which is leased by a public agency."

OAR 839-016-0004 further provides:

"(17) 'Public work,' 'public works,' or 'public works project' includes but is not limited to roads, highways, buildings, structures and improvements of all types, the construction, reconstruction, major renovation or painting of which is carried on or contracted for by any public agency the primary purpose of which is to serve the public interest regardless of whether title thereof is in a public agency but does not include the reconstruction or renovation of privately owned property which is leased by a public agency.

"(18) 'Public works contract' or 'contract' means any contract, agreement or understanding, written or oral, into which a public agency enters for any public work."

Each of the six water system improvement contracts, including Last Street, was a public work, unless it fell within one of the exemptions defined in ORS 279.357.

2) ORS 279.357(1) provides, in pertinent part:

"(1) ORS 279.348 to 279.380 do not apply to:

"(b) Projects regulated under the Davis-Bacon Act (40 U.S.C. 276a). * * *"

Neither the Last Street contract nor any of the other contracts was regulated under the federal Davis-

Bacon Act. None of those contracts was exempted from the definition of "public works" by operation of ORS 279.357(1)(b).

3) ORS 279.357 further provides, in pertinent part:

"(1) ORS 279.348 to 279.380 do not apply to:

"(a) Projects for which the contract price does not exceed \$25,000.

"* * * *

"(2)(a) No public contracting agency shall divide a public works project into more than one contract for the purpose of avoiding compliance with ORS 279.348 to 279.380.

"(b) When the commissioner determines that a public contracting agency has divided a public works project for the purpose of avoiding compliance with ORS 279.348 to 279.380, the commissioner shall issue an order compelling compliance.

"(c) In making determinations under this subsection, the commissioner shall consider:

"(A) The physical separation of the project structures.

"(B) The timing of the work on project phases or structures.

"(C) The continuity of project contractors and subcontractors working on project parts or phases.

"(D) The manner in which the public contracting agency

and the contractors administer and implement the project."

OAR 839-016-0310 further provides, in relevant part:

"(1) Public contracting agencies shall not divide a public works project into more than one contract for the purpose of avoiding compliance with ORS 279.348 to 279.380.

"(2) When making a determination of whether the public agency divided a contract to avoid compliance with ORS 279.348 to 279.380, the commissioner shall consider the facts and circumstances in any given situation including, but not limited to, the following matters:

"(a) The physical separation of project structures;

"(b) Whether a single public works project includes several types of improvements or structures;

"(c) The anticipated outcome of the particular improvements or structures the agency plans to find;

"(d) Whether the structures or improvements are similar to one another and combine to form a single, logical entity having an overall purpose or function;

"(e) Whether the work on the project is performed in one time period or in several phases as components of a larger entity;

"(f) Whether a contractor or subcontractor and their employees are the same or substantially the same throughout the particular project;

"(g) The manner in which the public contracting agency and the contractors administer and implement the project;

"(h) Other relevant matters as may arise in any particular case."

The Last Street, Biehn/Iowa, Lincoln, Jefferson, and Pine Street contracts combined to form a single public works project, the total cost of which exceeded \$25,000.00. Consequently, the contracts did not fall within the exemption created by ORS 279.357(1)(a).

4) ORS 279.352(2) provides:

"The specifications for every contract for a public work shall contain a provision stating that a fee is required to be paid to the Commissioner of the Bureau of Labor and Industries as provided in ORS 279.375(1), and the contract shall contain a provision that the fee shall be paid to the commissioner pursuant to the administrative rule of the commissioner."

Respondent violated ORS 279.352(2) by failing to include the described provision in the specifications for the Last Street contract.

5) The commissioner has authority to assess a civil penalty not exceeding \$5000.00 for the viola-

tion of ORS 279.352(2). ORS 279.370(1), OAR 839-016-0530(1), (4)(b), OAR 839-016-0540(1). In determining the magnitude of that penalty, the commissioner must consider "the amount of the underpayment of wages, if any, in violation of any statute or rule" (OAR 839-016-0520(3)) plus:

"(a) The actions of the contractor, subcontractor or contracting agency in responding to previous violations of statutes and rules;

"(b) Prior violations, if any, of statutes and rules;

"(c) The opportunity and degree of difficulty to comply;

"(d) The magnitude and seriousness of the violation;

"(e) Whether the contractor, subcontractor or contracting agency knew or should have known of the violation."

OAR 839-016-0520(1).

OPINION

The Oregon Prevailing Wage Rate ("PWR") laws, collectively known as the Little Davis-Bacon Act, govern contracts for "public works," which are defined as follows:

"Public works" includes, but is not limited to, roads, highways, buildings, structures and improvements of all types, the construction, reconstruction, major renovation or painting of which is carried on or contracted for by any public agency to serve the public in-

terest but does not include the reconstruction or renovation of privately owned property which is leased by a public agency."

ORS 279.348(3). The specifications for every public works contract must include a provision informing potential contractors "that a fee is required to be paid to the Commissioner of the Bureau of Labor and Industries as provided in ORS 279.375(1) * * * ." ORS 279.352(2).

There are several exemptions from the applicability of Little Davis-Bacon. The scope of one of those exemptions, as defined in ORS 279.357(1)(a), is the central issue in this case. That statute provides:

"(1) ORS 279.348 to 279.380 do not apply to:

"(a) Projects for which the contract price does not exceed \$25,000."

The disputed question in this case is the meaning of "[p]rojects" in the context of ORS 279.357(1)(a).

The City of Klamath Falls awarded 14 different contracts for improvements to its municipal water system in 1998. The Agency contends that five of those contracts – Last Street, Iowa/ Biehn, Jefferson, Lincoln, and Pine – formed a single public works "project," the total cost of which exceeded \$25,000.00.¹ Because

¹ The Agency initially charged that an additional contract – Eastside – also was part of this public works project. At the close of the hearing, the

of that, the Agency argues, the City was required to include in the specifications for each of the contracts a provision that the contractor was required to pay a fee to the Commissioner of the Bureau of Labor and Industries as provided in ORS 279.375(1) and administrative rule. The participants agree that the City did not include such a provision in the specifications for the Last Street contract. The Agency contends that, by omitting that provision, the City violated ORS 279.352(2).

The City disagrees. It believes the Last Street contract, the cost of which was below \$25,000.00, was a stand-alone job that did not combine with the other water system improvements to form a single public works project. Consequently, it argues, the specifications for the Last Street contract did not have to include a provision stating that a fee was required to be paid as provided in ORS 279.375(1).

It is important at the outset to clarify what is *not* at issue in this case. Little Davis-Bacon includes a provision prohibiting contracting agencies from "divid[ing] a public works project into more than one contract *for the purpose of avoid-*

Agency essentially conceded that Eastside was not part of the project, because its location was relatively remote from the other five improvements, it had a different funding source, and it involved construction of a new water main and not replacement of existing pipes. The forum agrees.

ing compliance with ORS 279.348 to 279.380." ORS 279.357(2)(a) (emphasis added). The Agency concedes, and the forum agrees, that no evidence in the record suggests that Respondent let five separate contracts, rather than a single contract covering all five improvements, "for the purpose of" avoiding compliance with the PWR laws. Thus, section (2) of ORS 279.357 does not apply to this case.

Instead, the Agency asks this forum to rule that the five improvements constituted a single "project" for which the contract price exceeded \$25,000.00. If that is the case, Respondent was required to abide by the dictates of Little Davis-Bacon with regard to that entire project, because it did not fall within the exemption created by section (1) of ORS 279.357.

The threshold question, then, is whether the word "Projects" in ORS 279.357(1)(a) refers to individual contracts as they are bid out by contracting agencies or, more abstractly, to any group of public works contracts that properly are viewed as fitting together to form a single project.

The term "project" is not defined in Little Davis-Bacon. Nor has the Agency defined that word in its regulations implementing the Act.² However, the statutory con-

text for ORS 279.357(1)(a) does shed light on the legislature's intent in using the word "project." Section (2) of the statute prohibits the division of a "project" into more than one "contract" for the purpose of avoiding the PWR laws. That language suggests that a project is a large, multi-phase endeavor that may encompass more than one contract. Another portion of section (2) provides further support for that notion. It states that, in determining whether a prohibited division has occurred, the commissioner must consider:

"(A) The physical separation of the project structures.

"(B) The timing of the work on project phases or structures.

"(C) The continuity of project contractors and subcontractors working on project parts or phases.

"(D) The manner in which the public contracting agency and the contractors administer and implement the project."

ORS 279.357(2)(c). This language contemplates that the commissioner will examine various smaller public works undertakings – phases, parts, and structures – to determine whether they are, in fact, part of a single larger endeavor – a public works

² A regulation does define the term "public works project," but equates that phrase with the terms "public work" and "public works." This rule speaks only to the type of work that

may constitute a public work and does not speak to the issue of whether and when several public works contracts may combine to form a single "project."

"project." The Agency is correct in arguing that the ORS 279.357(1)(a) exemption for "[p]rojects for which the contract price does not exceed \$25,000.00" applies only where the cost of the *entire* project – not just a single contract – is \$25,000.00 or less.

The next question is what factors the commissioner should consider in determining whether a group of public works contracts combine to form a single public works project for purposes of ORS 279.357(1)(a). The Agency argues that the factors listed in section (2)(c) of that statute, quoted *supra*, are not relevant because subsection (c) starts "In making determinations *under this subsection*, the commissioner shall consider * * * [the quoted factors]." (Emphasis added). According to the Agency, the section (2)(c) factors are relevant only in determining whether a contracting agency violated ORS 279.357(2) by dividing a project into more than one contract for the purpose of avoiding compliance with Little Davis-Bacon. Similarly, the Agency argues that the factors listed in OAR 839-016-0310(2) are relevant only to consideration of whether a contracting agency improperly divided a project, in violation of ORS 279.357(2), and not to whether a group of contracts forms a single project for purposes of ORS 279.357(1)(a). To answer the latter question, the Agency argues, this forum should look exclusively to the discussion in the Agency's Field Operations Manual ("FOM"), which the

Agency contends applies specifically to section (1) of ORS 279.357 and not to section (2).

Respondent disagrees. It argues that the factors listed in ORS 279.357(2)(c) and OAR 839-016-0310(2) are the only factors this forum should consider because they are the only guidelines properly promulgated by the legislature and the Agency. Respondent also notes that the Agency sent it a letter stating that OAR 839-016-0310 "include[s] the criteria the Bureau uses to evaluate whether multiple contracts constitute more than one project." The Agency enclosed a copy of that regulation with its letter and essentially asked Respondent to use the rule to evaluate whether the Last Street construction was a covered project.

The forum agrees with Respondent that ORS 279.357(2)(c) and OAR 839-016-0310 contain the factors this forum must consider in determining whether the Last Street contract was part of a larger public works project. The listed factors concern whether various contract structures, phases, or parts are sufficiently related in time, space, contracting, administration and implementation so that they should be viewed as a single endeavor, or project. They have nothing to do with whether a contracting agency was improperly motivated by a desire to avoid the PWR laws when it divided the project into several contracts. In the absence of a statutory definition of "project," the factors listed in ORS

279.357(2)(c) provide the context demonstrating what the legislature meant when it used that term.

The forum also rejects the Agency's argument that the FOM discussion relates specifically to the definition of "project" in section (1)(a) of ORS 279.357 and that the forum should consider *only* that discussion in determining whether Last Street was part of a larger public works project. First, there is simply no reason to believe that the legislature intended the word "project" to have different meanings depending on whether the commissioner was deciding whether several contracts constitute a single project, under section (1)(a) of the statute, or was deciding whether a contracting agency improperly had divided a single project into several contracts, as prohibited by section (2) of the statute. Second, the page of the FOM in evidence is labeled an "INTERPRETATION," rather than a policy or reference. The page identifies a single statute, presumably the one to which the interpretation applies. The identified statute is ORS 279.357(2), the provision containing the factors which the Agency argues do not apply to this case. Thus, if ORS 279.357(2) were not relevant to this case, the FOM also would have no significance. The forum, of course, has concluded to the contrary that the factors listed in ORS 279.357(2) *are* those that must be considered in determining whether several contracts form a single project. Consequently, both the statute and the FOM provide guidance.

Another question is what weight to give the Agency's implementing rules and the FOM. ORS 279.357(2)(c) lists four factors the commissioner "shall" consider but does not prohibit the commissioner from taking other matters into account. Consequently, the commissioner had authority to implement a rule listing additional factors related to the definition of a "project," so long as the rule did not conflict with the statute. The forum finds that OAR 839-016-0310(2) does not conflict with the statute in any way but merely provides useful guidance to contracting agencies that must determine whether their contracts form part of a public works project. In turn, the FOM provides the Agency's interpretation of that rule.

The ultimate question is whether, taking into account the statutory and regulatory factors, as further explained by the FOM interpretation, the Last Street contract and the other four water improvement contracts formed a single public works project. The factors are:

- 1) The physical separation of the project structures (ORS 279.357(2)(c)(A) and OAR 839-016-0310(2)(a))

The five water line improvements at issue do not directly connect and some of them are separated by a significant physical distance. They are, however, part of a single system – the City of Klamath Falls municipal water system – and are linked by other pipes. Because the improve-

ments are neither directly connected nor wholly separate, this factor is not helpful in deciding whether the improvements form a single project.

- 2) The timing of the work on project phases or structures (ORS 279.357(2)(c)(B)) and whether the work is performed in one time period or in several phases as components of a larger entity (OAR 839-016-0310(2)(e))

As the FOM explains, "Improvements performed in one time period or in several phases as components of a larger entity will generally be considered a single project." Respondent contracted for the five improvements over a period of only a few months during a single construction season. The timing of the contracts suggests they were part of a single public works project.

- 3) The continuity of project contractors and subcontractors working on project parts or phases (ORS 279.357(2)(c)(C)) and whether a contractor or subcontractor and their employees are the same or substantially the same throughout the particular project (OAR 839-016-0310(2)(g))

Respondent used four different contractors and three different engineering firms on the five contracts. At first glance, this diversity of contractors and engineers could be viewed as suggesting that the improvements were not part of a larger project. However, Steiner explained that

Respondent could not bid out all the improvements in a single contract -- using a single contractor -- because the work could not have been completed by the year-end deadline for use of the Water Bond funds. Thus, Respondent's use of multiple contractors and engineers does not weigh as heavily against a "single project" finding as it might under other circumstances.

- 4) The manner in which the public contracting agency and the contractors administer and implement the project (ORS 279.357(2)(c)(D) and OAR 839-016-0310(2)(g))

A single line item in Respondent's budget covered all five of the water system improvements, including Last Street. Additionally, the funding for all five improvements came from the 1996 Water Bond measure. This factor weighs in favor of a determination that the improvements were part of a single project.

- 5) Whether a single public works project includes several types of improvements or structures (OAR 839-016-0310(2)(b)) and whether the structures or improvements are similar to one another and combine to form a single, logical entity having an overall purpose or function (OAR 839-016-0310(2)(d))

The five contracts all involved replacement of old water mains with new pipes of more modern design. The work on all the contracts was of a similar nature. In addition, the new water lines are

all part of a single, logical entity that has an overall purpose or function – Respondent's municipal water system. This factor weighs heavily in favor of a determination that the improvements were part of a single project.

6) The anticipated outcome of the particular improvements or structures the agency plans to fund (OAR 839-016-0310(2)(c))

By issuing the 1996 Water Bonds, Respondent hoped "to improve the City's water system and facilities through further development, repair and improvement * * *." Performance of each of the five contracts helped further this goal. Consequently, this factor, too, weighs in favor of a determination that the improvements were part of a single project.

This is not a clear-cut case because the factors to be considered weigh both in favor of and against a finding that the five water system contracts constituted a single public works project. However, on balance, the forum finds that each of the five improvements, including Last Street, was part of a larger project. In making that finding, the forum considers each of the following facts to be significant: 1) each contract was performed to improve part of a single, large facility – Respondent's municipal water system; 2) the improvements were of a similar nature; 3) the improvements took place during a single construction season; and 4) the funding source for all the improvements was identical. In the

absence of any one of these facts, the result of this case might be different.

The remaining question is whether Respondent violated ORS 279.352(2), which provides:

"(2) The specifications for every contract for a public work shall contain a provision stating that a fee is required to be paid to the Commissioner of the Bureau of Labor and Industries as provided in ORS 279.375(1), and the contract shall contain a provision that the fee shall be paid to the commissioner pursuant to the administrative rule of the commissioner."

The statute requires each contract for a public work to contain the specified provision. The only time the statute does not apply is if the contract – and any public works project of which the contract is a part – has a total contract price of \$25,000.00 or less. ORS 279.357(1)(a). Here, the Last Street contract was part of a larger public works project, the cost of which far exceeded \$25,000.00, and the specifications for the contract did not include the provision described in ORS 279.352(2). Respondent violated that statute by failing to include the required provision in the contract specifications.

The Agency asks this forum to impose a civil penalty of \$2000.00 for Respondent's violation of ORS 279.352(2). The commissioner may, but is not required to, assess a civil penalty for each violation of

any provision of ORS 279.348 to 279.380, including ORS 279.352(2), ORS 279.370(1), OAR 839-016-0530(1), (4)(b), OAR 839-016-0540(1). In this case, there are several mitigating circumstances. First, there is no evidence that any person was paid less than the prevailing wage rate on the Last Street contract. Second, there is no evidence in the record that Respondent previously has violated Little Davis-Bacon. Finally, Respondent did not intentionally sever the Last Street contract from the other water line improvement contracts to avoid having to comply with the prevailing wage rate laws. Under these circumstances, the forum imposes no civil penalty.

ORDER

NOW, THEREFORE, the Commissioner of the Bureau of Labor and Industries hereby finds that Respondent **City of Klamath Falls** has violated ORS 279.352(2). The commissioner assesses no civil penalty.
