

BOLI ORDERS

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

VOLUME 1

Cited: 1 BOLI

Published by the

OREGON BUREAU OF LABOR AND INDUSTRIES

1995

Copyright 1995
by
Oregon Bureau of Labor and Industries
Portland, Oregon

All rights reserved

EDITORS
DOUGLAS McKEAN
W. W. GREGG

Printed in the United States of America

BOLI ORDERS

TABLE OF CONTENTS

Introductory Note	iv
Table of Final Orders	v
BOLI Final Orders	1

INTRODUCTORY NOTE

This first volume of BOLI ORDERS contains all of the known Final Orders of the Commissioner of the Oregon Bureau of Labor and Industries that were issued between December 13, 1973, and July 14, 1980.

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

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

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

* One Final Order, *In the Matter of Harold Carlson, #6-72 (1975)*, has been left out of BOLI ORDERS because no complete copy of it is known to exist. The case involved an alleged violation of ORS 659.033(1)(a) (1969), which was amended by the Oregon Legislature in 1973. The order was reversed on appeal. *Carlson v. Bureau of Labor*, 24 Or App 277, 545 P2d 620 (1976).

TABLE OF FINAL ORDERS

In the Matter of	1 BOLI
Acco Contractors, Inc. (1980)	260
Bend Millworks Company (1979)	214
Blue Cross of Oregon (1980)	272
Bright's Arco (1976)	46
City/County Computer Center (1979)	197
Clackamas County Fire District No. 1 (1980)	244
Cornet Stores (1979)	208
Corvallis Disposal Company (1980)	266
DADU Enterprises, Inc. (1979)	201
Doyle's Shoes, Inc. (1980)	295
Eastern Airlines, Inc. (1979)	193
Fred Meyer (1978)	84
Fred Meyer (1979)	179
Frontier Construction Company (1979)	224
Gaudry, Joseph Lawrence (1980)	235
Gonzalez, Alfonso P. (1978)	121
Healthways Food Center (1979)	205
Jenks Hatchery, Inc. (1980)	275
LeeBo Line Construction, Inc. (1979)	210
Lewis and Clark College (1978)	130
Marion County (1978)	159
Marv Tonkin Ford Sales, Inc. (1976)	41
Midas Muffler Shops (1978)	111
Montgomery Ward and Co., Inc. (1976)	62
Montgomery Ward and Co., Inc. (1978)	100
N. H. Kneisel, Inc. (1976)	28
N. H. Kneisel, Inc. (1976)	51
Nehia, Inc. (1975)	24
North Bend, City of (1980)	230
Pacific Paper Box Co. Inc. (1978)	95
Paskett, Scott (1979)	190
Polk County Education Service District (1980)	280

School District No. 1 (1973)	1
School District No. 1 (1976)	52
School District No. 1 (1978)	129
School District Union High 7J (1979)	163
Schurman, Robert K. (1978)	69
Sierra Tile Manufacturing, Inc. (1980)	291
Southern Oregon College (1976)	55
Terminal Ice and Cold Storage Company, Inc. (1978) ...	151

**In the Matter of
SCHOOL DISTRICT NO. 1,
Multnomah County, Oregon,
Respondent.**

Case Number 01-71
Final Order of the Commissioner
N. O. Nilsen
Issued December 13, 1973.

SYNOPSIS

Where Respondent's regulations required Complainant, a probationary teacher, to resign when she became pregnant, the Commissioner held that Respondent discriminated against Complainant because of her sex, in violation of ORS 659.030. Respondent failed to carry its burden of proof that its regulations amounted to bona fide occupational requirements reasonably necessary to the normal operation of its business. The Commissioner awarded Complainant attorney fees and damages for mental distress, and ordered Respondent to remedy others similarly situated. ORS 659.030, 659.010, 659.020, 659.022, 659.040, 659.050, 659.060.

The above-entitled matter having come on regularly for hearing before a Tribunal appointed by the Labor Commissioner, composed of John R. Gustafson, Assistant Commissioner of Labor, the hearing being held at the State Office Building, Portland, Oregon, at 9:30 a.m., on March 30, 1971, and a subsequent hearing on objections to officially noticed facts having been held on June 13, 1972, the Complainant and other persons similarly

situated being represented by Albert Menashe, Assistant Attorney General, and the Respondent being represented by Mr. Mark McClanahan, of its attorneys, and the Tribunal having heard the witnesses called by the parties and having considered the exhibits and arguments of counsel together with their briefs, and the tribunal being fully advised in the premises, does hereby make the following Findings of Fact:

PROCEDURAL MATTERS

1) The Respondent is a duly organized school district existing by virtue of ORS Chapter 332 and subject to ORS 659.010 to 659.115, the Teacher Tenure Law (now Fair Dismissal Law) ORS 342.805 to 342.960 and ORS 342.440 to 342.480 requiring board-teacher consultation on terms of employment.

2) That on or about November 12, 1970, Sally Flury, a female certified teacher employee of the Respondent, filed a verified complaint with the Civil Rights Division of the Oregon Bureau of Labor against the Respondent, School District No. 1, stating that said Respondent was engaged in employment practices which were contrary to ORS 659.030, based on sex, and that the said Sally Flury was discriminated against by the Respondent because of her sex.

3) Following the filing of her complaint by Sally Flury, the allegations contained therein were investigated by the Civil Rights Division of the Oregon Bureau of Labor. That upon the conclusion of said investigation an administrative determination was made that there existed substantial evidence supporting the allegations of the complaint

of discrimination. Thereafter, efforts at conciliation were unsuccessful. Subsequently, the official files and records compiled by the Bureau of Labor Civil Rights Division in the matter of Sally Flury v. School District No. 1, were duly certified to an authorized Assistant Attorney General by a duly authorized officer of the Civil Rights Division of the Oregon Bureau of Labor familiar with the details thereof for the drafting of charges in preparation for a public hearing.

4) That thereafter the Attorney General drew Specific Charges of Discrimination against the Respondent and said charges and a Notice of Hearing were duly served upon the Respondent. That the hearing on the charges was scheduled for the 30th day of March, 1971, at the State Office Building, 1400 SW Fifth Avenue, Portland, Oregon. That at the time and place set for the hearing on this matter the Complainant, Sally Flury, was personally present. The presentation of testimony and exhibits on behalf of the charges was made by Mr. Albert Menashe, an Assistant Attorney General of the State of Oregon. The Respondent was present by and through Mark McClanahan, of its attorneys, who presented testimony and documents on behalf of the Respondent. That on June 13, 1972, a subsequent hearing was held at the State Office Building, Portland, Oregon to hear and determine the objections to officially noticed facts not previously ruled upon as a matter of law. The Tribunal was in attendance at all times during the presentation of testimony, other evidence and arguments of counsel. That said hearings were held pursuant

to the rules of procedure adopted by the Labor Commissioner for the conduct of such hearings. That during the course of the hearings the Tribunal, or the Tribunal through the Legal Officer, ruled on the admissibility of evidence.

GENERAL BACKGROUND FINDINGS

1) For many years school District No. 1, Multnomah County, Oregon, has been, and still is, a school district subject to the Teacher Tenure Law (now called Fair Dismissal Law) contained in ORS 342.805 to 342.960. The same system for evaluation of probationary teachers before granting them tenure has been followed by School District No. 1 for at least 25 years.

2) That the parties, through their respective counsel, have stipulated that the allegations in the Answer contained in Paragraph VI of Respondent's Second Defense are true with the exception that there was no stipulation to the word "voluntarily" contained on page 5, line 3 of the Answer. The stipulated material reads as follows:

"Answering the allegations of paragraph VI respondent admits and alleges that its Board of Directors has adopted and since for the last few years has printed and circulated Rules and Regulations bering [sic] the date of September 9, 1968; that a copy of Chapter Six of said Rules and Regulations entitled 'Leaves of Absence' is attached hereto marked Exhibit B and by this reference incorporated herein; that except as otherwise provided in the Agreement with Portland Association of Teachers hereinafter described the

provisions of said Chapter Six were and are in force and effect during all of 1970 and to and including the present time; and that Section A thereof provides in part as follows:

'1. Teachers on a leave of absence shall have their names listed in the position held at the time such leave was granted * *

*

'2. A voluntary leave of absence is defined as a leave of absence granted upon the written request of a teacher for a reason deemed adequate by the formal action of the Board. No voluntary leave of absence shall be granted to a probationary teacher except for those entering the military service under provisions of the Selective Service Act.

'3. Upon the recommendation of the office of the superintendent, a voluntary leave of absence may be granted without pay to permanent teachers for a period not to exceed one year.

*** [Stated reasons]

'4. (a) As soon as any permanent teacher becomes aware of her pregnancy, she shall request a maternity leave of absence in writing. The effective date of the leave shall be determined by the Superintendent, the leave may be shortened if such action is recommended by a physician. If a maternity leave of absence expires during the school year

and no suitable position is open, the Superintendent may postpone the reassignment of a teacher affected until the beginning of the next fall term.

'(b) Successive leaves of absence for maternity shall not be granted for a greater period of time than four years.

'(c) As soon as any probationary teach becomes aware of her pregnancy she shall submit her resignation. The effective date of the resignation shall be determined by the Superintendent.'

"Respondent further admits and alleges that since on or about May 25, 1970, it has been and now is a party to an Agreement with Portland Association of Teachers; that on the subject of maternity leaves and pursuant to ORS 342.460 Portland Association of Teachers was, when said Agreement was made, and still is, the exclusive representative of all teachers employed by respondent, including the complainant Sally Flury; that respondent has caused said Agreement to be printed and circulated; that a copy of the Table of Contents and pages 1, 5 to 6, 8 to 16, 19 to 20 and 22 is attached hereto marked Exhibit C and by this reference incorporated herein; and that Article 12, Section J 2a of said Agreement describes all those entitled to maternity leave as follows:

'a. Maternity leave for one school year shall be granted to a tenure teacher. The leave may, on written request, be

extended for another school year.'

"Respondent further admits and alleges that during the fall of 1970 the complainant Sally Flury, then employed as a Third-year probationary teacher, notified respondent that she was pregnant and expected a child in the latter part of January or early part of February, 1971; that thereafter she requested that she be granted a leave of absence commencing in the latter stages of pregnancy at a time to be determined by the District in light of her physical condition and continuing for the balance of the year of 1970-1971; that in accordance with the above-quoted provisions of said Rules and Regulations and Agreement, respondent directed her to resign her position, such resignation to be effective as of the time her physical condition in the latter stages of pregnancy would not permit her continued work as a teacher; that respondent advised her that she could teach up to January 4, 1971, and agreed to continue her employment as long as her condition made such possible; that in fact, she ceased to teach classes and to attend to her work as a teacher on December 22, 1970; that on or about January 18, 1971, she wrote respondent a letter which stated in part:

'If the Board wishes to construe this letter as a resignation tendered under protest, that is its prerogative.'

and that on January 25, 1971, respondent's Board of Directors duly adopted the following resolution:

'The following named third-year probationary teacher at Binnsmead has submitted a resignation, although protesting that she should not be required to do so; it is therefore

'RESOLVED that the resignation of Sally Flury, Social Security No. [REDACTED] dated January 18, 1971, is hereby accepted and her position is declared vacant; provided, however, that in the event it should be finally determined by a tribunal of competent jurisdiction that the requirement that she submit her resignation was unlawful as applied to her, this resolution shall thereupon be rescinded as of this date of this adoption and the acceptance of said resignation will be revoked.'

3) School District No. 1, Multnomah County, Oregon, has uniformly applied its resignation policy to all pregnant probationary teachers. School District No. 1 uniformly requires a female probationary teacher to resign even though she has been recommended for tenure and even though she is kept in the classroom as a teacher. Sometimes she continues to teach through the remainder of the school year although she has been previously forced to resign.

4) That School District No. 1 regularly employs about 3,700 to 3,900 teachers during a school year. (Exhibit 7 shows 3,668 teachers employed as of February 28, 1971)

5) The consultation agreement between School District No. 1 and Portland Association of Teachers (PAT), is effective for the year of July 1, 1970 to June 30, 1971 only. The terms and conditions of the consultation agreement show that such agreement basically follows the policies, rules and regulations previously and unilaterally established by the Board of School District No. 1. The consultation agreement did not change the previously existing and unilaterally established terms or conditions of maternity leave for either tenure teachers or probationary teachers.

6) That tenure school districts are granted three successive years of employment in which to evaluate a probationary teacher before deciding whether or not such teacher should be elected to tenure. As a matter of fact School District No. 1 has not used that entire three year period to evaluate probationary teachers. It is also conceded by the Respondent that the one year maternity leave policy provided for in the school district's policies and the part of the consultation agreement with PAT covering tenure teachers is a matter of convenience rather than a matter of necessity. It was further conceded that there could be shorter appropriate periods of absence from the classroom if maternity purposes alone were considered.

7) I find that the teacher replacement problem advanced by School District No. 1 is, as a general rule, not true.

8) Respondent School District No. 1 has consistently refused to grant to any probationary female teachers, including Mrs. Sally Flury and Mrs.

Susan Tenison, third year probationary teachers, an unpaid leave of absence for maternity reasons regardless of the individual facts surrounding their pregnancies, and has consistently required all such female probationary teachers to resign their positions and from their employment with said district immediately upon becoming aware of their pregnancy.

**SCHOOL DISTRICT NO. 1'S
AVOWED REASONS FOR REQUIRING
IMMEDIATE RESIGNATION OF
PREGNANT PROBATIONARY
TEACHERS AND EXTENSIVE
LEAVES OF ABSENCE FOR TENURE
TEACHERS**

1) Teacher Tenure Law.

a) Witnesses on behalf of School District No. 1 testified that the Teacher Tenure Law was one of the primary reasons for requiring the immediate resignation of all pregnant probationary teachers. One of its witnesses further testified that there was a need for a full three years of evaluation of each probationary teacher before recommending that teacher for tenure.

b) The School District's witnesses further testified that tenure proceedings to discharge an unsatisfactory teacher are expensive and time consuming.

c) They further testified that if maternity leaves were given to all probationary teachers on the same basis as tenure teachers (1 year or more) such leaves would cause a great impact upon the district. It was testified that more lost classroom days were experienced because of maternity problems than because of all other

factors combined. I find this to be true largely because of School District No. 1's requirement that extensive leaves or resignation result from maternity situations. It was also stated the School District No. 1 spends more time counseling on problems arising out of pregnancy than on almost anything else.

At the same time that witnesses for the School District testified to the need for strict unalterable rules requiring resignation of pregnant female probationary teachers, its witnesses admitted that a full three years to evaluate a probationary teacher was not necessary in some cases. These witnesses further pointed out that a final notice is required to be sent to a teacher by March 15 of each year if the School District intends not to accept that teacher for the following year. The evidence in the record shows that no more than four or five percent of third year probationary teachers are refused tenure on nonmaternity grounds. As a factual matter School District No. 1 requires three formal evaluations per year to be given a probationary teacher by his or her school principal in the ordinary course of events. The first is due October 20th; the second is due December 1st; and the third and final formal written evaluation is due on or before February 1st of the school year. No formal evaluation is made thereafter. It was conceded by the School District's witnesses that if the Teacher Tenure Law did not exist there would be no objection to granting maternity leaves to probationary teachers under some factual situations. However, it was further stated that there would be some limit to the maternity leaves

required by School District No. 1 as far as a minimum time of service was concerned before being entitled to maternity leave.

The facts further show, and I find, that probationary teachers have traditionally received time off for varying periods of time and for various causes specified in the policies of the School District and in the consultation agreement with the Portland Association of Teachers. Although Respondent has contended that probationary teachers are not given leaves of any kind other than military leave, sick leave or leave based upon an on-the-job injury, it appears from the record, and I find, that the policies of the School District and the consultation agreement contemplate that probationary teachers are qualified to receive additional types of leaves of absence. The following additional leaves of absence are authorized which would not terminate their employment, and during the times of such leaves probationary teachers would continue to be employed for tenure purposes:

- a. Illness of a member of the teacher's household or of one who is dependent upon the teacher for the major portion of his support.
- b. Absence because of quarantine.
- c. Attendance at the funeral of a friend or a distant relative or a member of his immediate family.
- d. When subpoenaed to appear as a witness in Court.
- e. While serving on jury duty.
- f. When granted emergency leave.
- g. Professional leave.

- h. Exchange teacher leave.
- i. Study leave.
- j. Service with a teacher's association involved with the collective bargaining process.
- k. Political leave.
- l. Other extended leaves with or without salary which may be granted at the discretion of the board.

I find that many of the leaves provided for in the policies and in the consultation agreement are mandatory. Some are mandatory for long periods of time. I also find that a third year probationary teacher could be off work on sick leave or because of an on-the-job injury for extended periods of time. Under such circumstances School District No. 1 has given up its authority to evaluate the teacher for tenure purposes and to curtail the absence of the teacher. In those situations, even though the District would not have an opportunity to evaluate the teacher and although the continuity of learning would be considered on leave, his or her employment relationship would not be terminated nor would the teacher be required to resign. On the other hand, a third year probationary teacher, who may or may not be required by the employer to actually cease teaching because of her physical condition brought about by her pregnancy, would be treated differently in that she would be required to resign her position with the school district and, if re-employed the following year, would be required to serve a full three year probationary period over again.

School District No. 1, through its witnesses, admitted that the Teacher

Tenure Law does not require a tenure district to evaluate a probationary teacher, except by implication, and does not require any particular method, manner, type or timing in any evaluation actually made or to be made.

2) The second reason advanced for requiring the resignation of probationary teachers is that pregnancy is voluntary, not involuntary and, therefore, can be deferred past the probationary period. This practice of evaluating the issue of "voluntariness" of actions by a teacher is not applied in any situation other than to the female teacher who becomes pregnant even though voluntary acts by probationary teachers may individually, or by accumulation, result in their being unavailable for evaluation during the probationary period (sick leave, injury leave, association leave, political leave, professional leave, court appearances, emergency leave, family illness). I take official notice that pregnancy and childbirth are natural functions of females which at some stage generally produces a temporary disability. Each female's period of disability is individual. On occasion such disability occurs at a time or under conditions which have no adverse impact on her ability to carry out her teaching duties.

3) The continuity of the learning process is the third reason advanced for requiring a resignation and replacement of the pregnant teacher.

It appears from the evidence admitted under this heading, and I find, that no empirical or scientific study has ever been made concerning the effect on the school children of School District No. 1 if a maternity leave were

allowed by either probationary teachers or tenure teachers based upon a period of time that considered only the medical needs of the teacher giving birth. It appears that the school policy requiring all pregnant teachers to either resign if probationary or take a leave of absence for up to four years if a tenure teacher has been enforced for so long, and on such an almost universal basis, that no statistics or other demonstrable evidence would be available to show whether or not an interruption in the continuity of learning through shorter maternity leaves would materially and adversely affect such teacher's pupils. In essence I find this was conceded when one of Respondent's witnesses admitted that the adverse effect upon such children was only a feeling because the matter was never really examined. The evidence further shows that in many cases not only the remainder of the existing year is taken by a teacher but also the full next year may be taken also. This clearly shows that the matters of maternity leaves or severances are essentially matters of convenience or supposition rather than matters of business necessity.

4) The fourth avowed reason for requiring the resignation of pregnant probationary teachers is the problem of finding replacement teachers.

Testimony was submitted by the School District that extensive problems were faced by it in finding replacement teachers for those leaving either because of maternity leave or maternity severance. Again no empirical or scientific data was submitted to substantiate this testimony to show that the same problem would exist if shorter periods of maternity leave were

sanctioned in all cases. The School District admitted that there was only "some advantage" in being able to offer a position of long duration to a teacher who will replace a teacher on maternity leave or who has been terminated because of maternity. It does not appear that the general policy of requiring extensive maternity leaves for tenure teachers or termination by pregnant teachers is a matter of business necessity rather than the matter of convenience. I so find based upon my specific findings 1 through 4 immediately preceding this general finding.

STATISTICAL STUDIES

Several statistical studies purporting to show loss of teacher time on the job for various reasons were submitted in evidence.

I find that I cannot give affirmative weight to these statistics for the reasons that:

1) They are spotty rather than complete and consistent over several years;

2) They generally lacked a full explanation of how they were selected;

3) They are subject to various interpretations;

4) They are not meaningful because the School District has used different criteria in granting or requiring pregnancy and maternity absences as distinguished from granting or requiring absences for other authorized purposes. Examples are:

a) Although Respondent's Exhibit 10 purports to be statistics based upon an alleged random sampling during the school year 1968-69, it is significant that the witness who testified to this Exhibit did not make the alleged

random sampling himself and did not testify to any random formula that was supposed to be used to show that the same would be objective or representative. The survey purports to be of four different categories of teachers with School District No. 1 based on longevity. If the statistics are to be believed they would tend to show that the younger teachers take shorter consecutive periods of sick leave and that the older teachers tended to take longer consecutive periods of sick leave. If these figures should be accepted as 100% accurate and complete they would tend to show more than that employees with longevity receive greater fringe benefits because of their seniority. They could further show that 1/6th of all teachers in the school district take 11 or more days each school year for sick leave.

b) At the same time, Exhibit 7 of Respondent tends to show that only 24 out of 2,583 tenure teachers had maternity leave as of February 2, 1971, for the school year 1970-71. This is about 1/100th of the tenure teachers. Added to this would be the figures from Respondent's Exhibit 11 which tend to show that during the school year 1968-69 there were 51 probationary teachers who were required to resign because of maternity reasons. Assuming that there were approximately the same number of probationary teachers in 1968-69 as there were in the school year 1970-71, to-wit: 1,000, this would mean that 1/20th of the probationary teachers resigned because of maternity reasons. Therefore, the combined total of 1/100th of tenure teachers (24) and 1/20th of the probationary teachers

(51) would fall, combined or individually, greatly below the percentage of probationary and tenure teachers who took extensive sick leave (about 580). Inasmuch as the School District requires extensive absences by pregnant teachers which absences have no relationship to the teacher's ability to perform on the job and inasmuch as there were no clear statistics introduced by the employer to show that extensive periods of time off the job are a business necessity in all maternity cases, as distinguished from business convenience, it is my finding that the statistics that are available to me in this case do not show that the number of female teachers who become pregnant, whether permanent or probationary, are so numerous, or their pregnancies occur at such times during the year that this condition could not be accommodated by reasonable adjustments within the system just as reasonable adjustments have been made for other absences. Automatic termination of all female probationary teachers and required long term leaves for tenure teachers under the circumstances are arbitrary and are distinctions based upon the sex of the class adversely affected (female teachers) rather than the individual condition of the pregnant teacher and her ability to perform her job.

DESCRIPTION OF PROBATIONARY TEACHER EVALUATION PROCEDURE

School District No. 1 testified through its witnesses that the first year of probation for a teacher is the least important as far as the evaluation of that teacher is concerned. The School District's witnesses also felt that the

third year of probation was the most important for evaluation purposes. However, such witnesses were candid enough to admit that the individual facts surrounding a teacher determined how much time she would be off the job on maternity leave. Respondent's Exhibit B and C attached to its Answer, and Complainant's Exhibits 2 and 3 admitted in evidence, show that each probationary teacher is supposed to be evaluated. Three written evaluation reports are to be filed with the administration by the principal of the school where the teacher is employed. The first written evaluation is due on October 20th of a school year, the second on December 1st of the school year, and the third was originally contemplated to be due by January 15th of the school year but by stipulation between the Association representing the teachers and the school administration this period was extended to February 1st of the school year. The testimony of the witnesses for the School District very clearly showed that the process of evaluation takes place by visits in the classrooms, by conferences with the teacher, and by evaluating the teacher's conduct in school activities outside of the classroom. The school year encompasses approximately 185 teaching days. The teacher reports for work somewhere about the 1st of September of the year and with the exception of several holidays and extended Christmas and Spring vacations, works to about the middle of June. The number of teaching days in a year approximates only 1/2 of the total number of days in a year. The written evaluations of the teacher are performed within the first five months of the school year so that a decision may

be made and communicated to the teacher on or before March 15 of the school year as to whether that teacher will be asked to return the following school year. March 15th is approximately 13 weeks before the end of classroom activity for the school year. The third written evaluation report of the principal is a general form and is labeled by the school district as a "Final Report on Probationary Teacher". That report is the one due by February 1, of the given school year. February 1st is approximately 19 weeks before the end of classroom activity for the school year. The final report contains a recommendation that the probationary teacher be elected to either second year probationary status, third year probationary status or permanent tenure. Therefore, as a fact, School District No. 1, through practice, has determined that for all essential purposes it has made enough of an evaluation of a probationary teacher by midpoint of each school year to be able to make the final evaluation report. Historically then, School District No. 1 has decided it needs a maximum of 19 out of the 37 weeks in a school year to adequately evaluate its probationary teachers. Since there are approximately 37 weeks per year in which evaluations could be made, I find that extensive maternity leaves of absence may not prevent School District No. 1 from having the opportunity to adequately evaluate its probationary teachers.

QUALIFICATIONS OF SALLY FLURY, INDIVIDUALLY, AS A TEACHER

1) Sally Flury is a female who appears to be in her mid 20's. She is well

within the normal child bearing years. Mrs. Flury has been regularly employed by School District No. 1 as a certified teacher on probationary status for the school years 1968-69, 1969-70 and 1970-71. On December 22, 1970 she was relieved of her duties as a classroom teacher and on February 15, 1971 was terminated as a probationary teacher by School District No. 1 acting in conformity with its long established policies.

2) The only reason for the termination of Sally Flury as a teacher in School District No. 1 was her pregnant condition. The School District policy automatically required such termination of all probationary teachers regardless of the facts or circumstances of each individual case other than the fact of pregnancy.

3) Great value is given by the Board of School District No. 1 to the individual school principal's evaluation of a probationary teacher in determining whether or not to grant tenure to a probationary teacher

4) Mrs. Flury had her doctor's approval and would have taught for an indefinite period of time between December 22, 1970, and the date of her expected confinement for delivery purposes, estimated to be on or about the 1st to 15th of February, 1971, if the option had been open to her. I further find that Sally Flury attempted to resist the enforcement of her employer's policy that required resignation of all pregnant probationary teachers at a time decided upon by the school administration. Mrs. Flury did not resist her employer's decision to terminate her classroom teaching as of December 22, 1970, because of the School

District's known policy of unilateral control over when she would be relieved of classroom duties.

5) I further find that Sally Flury's pregnancy and required resignation were irrelevant to the issue of continuity of learning by students at Binnsmead School during the school year 1970-71 inasmuch as it was determined by the school administration, before Mrs. Flury left her teaching post, that no new teacher would be hired upon her termination. This administrative decision was made by the school because a lower than anticipated student population existed at Binnsmead. Therefore, rather than lay another teacher off or have another teacher transferred to another school Mrs. Flury was relieved of teaching duties at the beginning of the Christmas vacation period. No new teacher was hired to replace her and no other teacher was transferred from Binnsmead to another school or laid off in order to adjust the student-teacher ratio at Binnsmead. If Mrs. Flury had not been pregnant the "continuity of learning" of the students at Binnsmead would have been interrupted in any event as one of the teachers at Binnsmead would have been transferred to another school or laid off in order to correct the student-teacher ratio.

GENERAL FINDINGS

Bona fide occupational requirement reasonably necessary to the normal operation of the employer's business.

1) I find that, although the Teacher Tenure Law grants the tenure school district three successive years of employment of a teacher in which to evaluate whether to elect that teacher

to tenure or not, there are other provisions of the law which in essence require the district to make that evaluation sooner than the three years of employment, and as a factual matter the School District has habitually and consistently made every evaluation they have felt necessary long before said three years has expired. I further find that the school district has, as a practical matter, determined there are many reasons why a probationary teacher may be off work and not subject to continuation for extensive periods of time during the probationary period and that this has not hampered its evaluation of such teachers. Therefore, I find that the requirement of resignation of pregnant probationary teachers, no matter what the circumstances of their individual case, is an arbitrary requirement. Resignation is only for the convenience of the School District and is not a business necessity. School District No. 1 traditionally has been able to adequately function and evaluate its probationary teachers for tenure purposes in much less than three full successive years of employment.

2) I find that the School District's self-imposed requirement that a teacher resign, if in probationary status, is a self-imposed limitation by the school district voluntarily curtailing its ability to fully evaluate a probationary teacher for substantial periods of time. Such self-curtailed cannot be enforced against the wishes, or to the prejudice, of the pregnant female probationary teacher since the employer has failed to clearly establish that business necessity required such lengthy absences from the classroom.

3) School District No. 1 voluntarily curtailed its ability to evaluate probationary teachers by requiring that a pregnant probationary teacher resign. In addition it has voluntarily curtailed its ability to evaluate a probationary teacher through the numerous types of leaves or other excuses available to a probationary teacher which justify that teacher's absence from the school room during usual school hours when she would normally be evaluated.

4) I take official notice of and find that pregnancy and childbirth are natural functions of females. A failure to grant reasonable maternity leaves to pregnant teachers, based upon individual considerations and during any state of their employment, is discrimination based upon sex so long as the school district has any form of leaves, policies or practices which excuse any teacher from attendance during usual school days and hours.

5) I find as a fact that School District No. 1 has failed to produce clear and convincing evidence showing that the uniform policy of the school district requiring a pregnant probationary teacher to resign her position immediately upon becoming aware of her pregnancy is a bono fide occupational requirement reasonably necessary to the normal operation of the School District's business. Job performance and circumstances, on an individual teacher basis, is not considered by School District No. 1.

6) I find that the School District has failed to produce clear and convincing evidence showing that its requirement that a permanent tenure teacher take a leave of absence, generally for at least the remainder of the school year, is a

bono fide occupational requirement reasonably necessary to the normal operation of the School District's business. Job performance and circumstances, on an individual teacher basis, is not considered.

7) That in making these determinations of fact I have construed the exception of "bono fide occupational requirement reasonably necessary to the normal operation of the Employer's business" to be of extremely limited application in order to carry out the purpose and policy of ORS 659.010 to ORS 659.110 in eliminating both the practice and effects of discrimination in employment based upon sex. To do otherwise would allow an employer who normally discriminates to continue such discrimination and defeat the purpose of the law.

8) I specifically find that not only was Mrs. Sally Flury discriminated against by School District No. 1 on the basis of her sex in a pregnancy and maternity situation, but that this same School District has uniformly discriminated in the same area against all other persons similarly situated, to-wit: female teachers. I further find that the discrimination has been in a greater degree as far as female probationary teachers are concerned compared with female tenured teachers. Individual female teachers have not been judged as individuals or on the circumstances surrounding their pregnancy, maternity and teaching situation by School District No. 1 and as a consequence of artificial, arbitrary and unnecessary barriers imposed by it upon female teachers that class of employees suffered unequal treatment by their employer based upon their sex.

SUPPLEMENTAL FINDINGS

Based upon the supplemental hearing before the Commissioner of Labor on the Statement of Detrimental Pecuniary Effect of Discrimination, I hereby make my Supplemental Findings as follows:

Attorney's Fees For Private Legal Assistance

I find that the professional services performed by Richard Hunt, attorney at law, on behalf of the Complainant, Sally Flury, were all directly involved with and directly resulted from the Respondent's unlawful practices which were found to exist by the Tribunal in this case.

I further find that the services performed by Mr. Hunt were reasonable and necessary to protect the civil rights of Sally Flury and to lessen the effects on her of the unlawful practices committed prior to Mr. Hunt's employment and which practices and effects continued after his employment.

I also find that Mr. Hunt's professional services were supplemental to and did not duplicate or usurp the functions of the Bureau of Labor or its legal staff under ORS 659.010 to 659.115.

I find that even though the private attorney's fees contracted in this case by the Complainant to protect her civil rights and lessen the effect of Respondent's unlawful practices on her were reasonably worth \$250.00, that together with the other remedies provided in this case, the sum of \$150.00 is appropriate to reimburse Mrs. Flury for attorney's fees expended.

Humiliation, Frustration, Anxiety and Nervousness

I find that Mrs. Sally Flury suffered humiliation, frustration, anxiety and nervousness as a proximate result of the unlawful employment practices found by the Tribunal to exist in this case and that an appropriate sum to be awarded to eliminate these effects of the unlawful practices is \$700.00.

Based upon the Findings of Fact of the Tribunal appointed to determine the facts of unlawful practices in this case, and on my Supplemental Findings concerning money remedies, I hereby make my Conclusions of Law.

CONCLUSIONS OF LAW

1) The Commissioner of Labor has jurisdiction over this case by virtue of a verified complaint in writing signed by Sally Flury and containing the name and address of her employer together with a statement of some particular facts alleged to constitute an unlawful employment practice based upon sex. ORS 659.040(1); 42 USCA 2000e; *Graniteville v. EEOC*, 438 F2d 32 (4th Cir. 1971).

2) The Attorney General of Oregon, or his designated deputy, is charged with preparing and serving charges of discrimination he intended to prefer against the Respondent herein based upon information developed from the records and files certified to him by the Labor Commissioner's Office after that office has investigated, found substantial evidence of discrimination and has been unable to conclude the matter with a written conciliation agreement acceptable to all persons concerned. ORS 659.060.

3) The Portland Association of Teachers (PAT), as a limited collective consultation representative (salaries and related economic policies only) for all certificated teachers employed or to be employed by School District No. 1, would be a proper party to this proceeding but not a necessary part so long as no remedy is sought to be enforced directly against PAT and since the "Consultation Agreement" signed by representatives of PAT and School District No. 1 did not change prior unilaterally determined school board policies on matters which are not salaries or related economic policies (maternity and pregnancy terminations and leaves). ORS 342.450 to 343.470; *Richards v. Griffith Rubber Mills*, 300 FSupp 338, 340-341 (D. Ore. 1969); *Bowe v. Colgate-Palmolive Co.*, 416 F2d 711, 719 (7th Cir. 1969).

4) The Teacher Tenure Law does not specifically require the tenure district to evaluate a probationary teacher prior to that teacher gaining tenure. However, some evaluation prior to gaining tenure is generally implied since upon being employed by a tenure school district for three successive years the teacher becomes a "permanent teacher" upon being rehired by the district. No specific amount, type or form of evaluation is required. Neither is evaluation required in every year of employment since the law specifically gives credit to a teacher for years of employment at a school district prior to the time it becomes a tenure district. Such prior credit could amount to the full three successive years. ORS 342.805 to 342.955; *Papadopoulos v. Bd. of Higher Ed.*, 14 Or App 130, 511 P2d 854 (1973).

5) The word "employed" as used in the statute defining a "permanent teacher" is not synonymous with the word "worked." It is contemplated that a teacher may be employed while not performing any duties. A person is employed so long as his employment relationship with his employer has not been terminated regardless of whether or not the employe has temporarily ceased performing duties. A leave of absence does not terminate the employment relationship although certain benefits may be suspended during the leave. ORS 342.815(5); *State ex rel. Nilsen v. Johnston, et ux.*, 233 Or 103, 377 P2d 331 (1962); *Chenault v. Otis Engineering Corp.*, 423 SW2d 377, 383; *State ex rel. Cutright v. Akron Civil Service*, 95 Ohio App 385, 120 NE2d 127; *Souhwestern Bell Tel. Co. v. Thombrough*, 232 Ark 929, 341 SW2d 1, 3.

6) Nothing in the Teacher Tenure Law allows a tenure district to discriminate based upon sex. Sex discrimination among teachers has been specifically condemned as a policy matter for many years although specific enforcement procedures were not made a part of that policy. ORS 342.805 to 342.955, 342.970(1).

7) Ordinarily a tenure district has three successive years of employment in which to evaluate a probationary teacher. This general rule is not applicable to situations in which the probationary teacher goes into the military service or into the Peace Corps. In such cases the probationary teacher is allowed to complete the balance of three years started prior to military or Peace Corps service. ORS 408.270, 236.040.

8) After the filing of a complaint the Labor Commissioner or his authorized deputy may, during the investigation, or thereafter, add as respondents additional persons not named as respondents in the original complaint. ORS 659.050.

9) The scope of the Attorney General's charges of discrimination and the public hearing thereon control the terms of the order, and the proceedings are not in any way limited by the scope of attempted conciliation as neither the fact of nor the extent of conciliation is jurisdictional. ORS 659.060, 651.060; OAR 839-14-005, Rule 3; *Beverly v. Lone Star Lead Construction Corp.*, 437 F2d 1136, 1140 (5th Cir. 1971); *School District No. 1, Multnomah County v. Nilsen, et al.*, 262 Or 559, 570-571, 499 P2d 1309 (1972); *Sanchez v. Standard Brands, Inc.*, 431 F2d 455, 465-467 (5th Cir. 1970).

10) Oregon's Fair Employment Practices Law contained in ORS Ch. 659.010 to 659.110 is analogous to Title VII of the Federal Civil Rights Act of 1964, and federal court decisions are entitled to great weight in Oregon on analogous issues in Oregon law. *Williams v. Joyce*, 4 Or App 482, 509, 479 P2d 513 (1971); *School District No. 1, Multnomah County v. Nilsen, et al.*, 7 Or App 396, 407-408, 490 P2d 1265 (1971), *rev'd on other grounds*, 262 Or 559, 499 P2d 1309 (1972).

11) In evaluating the rules and policies of school districts under Oregon's civil rights statutes, it is not enough that such rules and policies may appear neutral and reasonable on their face, operate equally against all persons, or are convenient. ORS 659.030; *Griggs*

v. *Duke Power*, 401 US 424, 915 Sct 849, 853 (1971).

12) In the areas of race, religion, color, national origin, sex and age such rules and regulations must treat the individual employee as an individual and not on any characteristic generally attributed to the group or class sought to be protected by the civil rights laws. ORS 659.030; *Richards v. Griffith Rubber Mills*, 300 FSupp 338, 340 (D. Ore. 1969).

13) The only exception to Conclusions of Law numbers 11 and 12 is where the employer can establish that its requirements or practices for the particular job amount to a bona fide occupational requirement reasonably necessary to the normal operation of the employer's business. The test is business necessity, not business convenience. ORS 659.030; *Dias v. Pan American*, 442 F2d 385, 388 (5th Cir. 1971), *cert. denied*, 404 US 950, 92 Sct 275 (1971); *Schattman v. Texas Employment Commission*, 330 FSupp 328, 311-312 (1971), *rev'd on other grounds*, 459 F2d 32 (5th Cir. 1972), *cert. denied*, 409 US 1107 (1973).

14) The legislative objective underlying the adoption of Oregon's statutes prohibiting discrimination in employment is the same as the objective of Congress in enacting Title VII of the Civil Rights Act of 1964. It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of employees over other employees.

Under Oregon law, practices, procedures or job requirements neutral on their face, and even neutral in terms of intent, cannot be maintained if they

operate to freeze the status quo of prior discriminatory employment practices. ORS 659.010, 659.020, 659.022, 659.030, *Griggs v. Duke Power*, 401 US 424, 915 Sct 849, 853 (1971); *Dias v. Pan American*, 442 F2d 385, 386 (5th Cir. 1971), *cert. denied*, 404 US 950, 92 Sct 275 (1971).

15) What is required by Oregon law as well as federal law on the same subject is the removal of artificial, arbitrary and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of impermissible classification (race, religion, color, national origin, sex and age). ORS 659.020, 659.022; *Griggs v. Duke Power*, 401 US at 853; *Dias v. Pan American*, 442 F2d at 386.

16) Oregon's civil rights laws require the posture and condition of the job seeker or job holder to be taken into account. ORS 659.010, 659.020, 659.022, 659.060; *Griggs v. Duke Power*, 401 US at 853; *Dias v. Pan American*, 442 F2d at 386-389; *Richards v. Griffith Rubber Mills*, 300 FSupp at 340.

17) Oregon civil rights law, like Title VII of Civil Rights Act of 1964, proscribes not only overt discrimination, but also practices that are fair in form but discriminatory in operation, regardless of the motive of discriminate. The touchstone is business necessity. If the employment practice operates to exclude any person within the protected class and cannot be shown to be related to job performance, the practice is prohibited. ORS 659.020, 659.022, 659.030; *Griggs v. Duke Power*, 401 US at 853; *Dias v. Pan American*, 442 F2d at 386-389.

18) Whatever criteria is used by the employer, there must be a demonstrable relationship to successful performance on the job for which the criteria is used. ORS 659.030; *Griggs v. Duke Power*, 401 US at 853-854, *Dias v. Pan American*, 442 F2d at 386-389.

19) Good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as built-in headwinds for those in the classes protected (race, religion, color, national origin, sex and age) and are unrelated to measuring job capability. ORS 659.030; *Griggs v. Duke Power*, 401 US at 854; *Dias v. Pan American*, 442 F2d at 386-389; *Richards v. Griffith Rubber Mills*, 300 FSupp at 340-341; *School District No. 1, Multnomah County v. Nilsen, et al.*, 262 Or at 570.

20) The civil rights laws of Oregon, like their federal counterpart, are directed toward the consequences of employment practices, not simply the motivation. ORS 659.030; *Griggs v. Duke Power*, 401 US at 854; *Dias v. Pan American*, 442 F2d at 386-389.

21) Tests, procedures and practices are not to become the masters of reality. Oregon's Legislature like Congress has made qualifications to perform the job the controlling factor so that race, religion, color national origin and sex become irrelevant. Tests used must measure the person for the job and not the person in the abstract. ORS 659.030; *Griggs v. Duke Power*, 401 US at 854, 856; *Dias v. Pan American*, 442 F2d at 386-389.

22) The burden of proof to establish that a requirement is necessary to the normal operation of the employer's business is on the employer, not upon

the Labor Commissioner, the complainant or the Attorney General. ORS 659.030; *Griggs v. Duke Power*, 401 US at 854; *Dias v. Pan American*, 442 F2d at 388; *Weeks v. Southern Bell Tel.*, 408 F2d 228, 232 (5th Cir. 1969); *Schattman v. Texas Employment Commission*, 330 FSupp at 329.

23) The bona fide occupational qualification exception in the state law like the federal law must be interpreted narrowly in order to prevent the exception from swallowing and emasculating the rule. ORS 659.020, 659.022, 659.030; *Dias v. Pan American*, 442 F2d at 387; *Weeks v. Southern Bell*, 408 F2d at 232; *Richards v. Griffith Rubber Mills*, 300 FSupp at 340.

24) The administrative rule requiring the Attorney General to have the burden of proof applies only to the Specific Charges of discrimination he has made in the proceedings and not to matters of defense. There is no administrative rule of the Labor Commissioner which specifies respondent's burden of proof, since defenses are not required to be plead in contested cases under ORS Ch. 183. OAR 839-14-005, Rules 3 and 8; ORS 183.420.

25) The administrative interpretation of a law by the enforcing agency is entitled to great deference in the courts. Oregon Const. Art. III, § 1; *Broughton's Estate v. Central Ore. Irr. Dist.*, 165 Or 435, 448, 463, 108 P2d 276 (1941); *Griggs v. Duke Power*, 401 US at 855.

26) Discrimination based upon race, religion, color, national origin, sex or age is inherently class discrimination even though individual rights are involved. Class remedies are authorized although only one individual has filed a

complaint. ORS 659.010(2), 659.020, 659.022, 659.028, 659.030; *Williams v. Joyce*, 4 Or App at 506-509; *Potts v. Flax*, 313 F2d 284 (5th Cir. 1963); *Lance v. Plummer*, 353 F2d 585 (5th Cir. 1965); *Jenkins v. United Gas*, 400 F2d 28 (5th Cir. 1968); *School Dist. No. 1, Multnomah Co., v. Nilsen, et al.*, 262 Or at 570-571; *Graniteville v. EEOC*, 438 F2d 32, 37 (4th Cir. 1971); *Parliament House Motor Hotel v. EEOC*, 444 F2d 1335 (5th Cir. 1971).

27) With or without a specific statute preventing discrimination based upon sex, several tribunals have held the conduct of school boards to be arbitrary and unconstitutional when pregnant probationary teachers and other female employes were either not granted maternity leaves or were forced to resign. The civil rights laws of Oregon are not more permissive than the 14th Amendment in this field. *Board of Education v. Allen*, 52 Misc. 2, 959, 30 App Div 2d 742; *Jinks v. Mays*, 3 FEP Cases 964 (1971); *Caruth v. Airilla, et al.*, No C237274, Maricopa County Superior Court, Arizona; *In the Matter of Arbitration between Middleton Educational Assn. and Middleton Board of Education (Connecticut) Arbitration Assn.*, Case No 1239-003071 (April 26, 1971); *Minnesota v. Crow-Wing County Welfare Board*, Before the Dept. of Human Rights (March 25, 1971); *Bravo v. Board of Education*, 345 FSupp. 155 (N.D. Ill. 1972); *Richards v. Griffith Rubber Mills*, 300 FSupp at 340; *La Fleur v. Cleveland Bd. of Educ.*, 465 F2d 1184, cert. granted, April 23, 1973.

28) When a respondent has been found to have engaged in an unlawful practice, the Commissioner of Labor is

required to issue an appropriate cease and desist order. ORS 659.060(4).

29) An appropriate cease and desist order must:

- a) Take into account the subject matter.
- b) Take into account the need to supervise compliance.
- c) Eliminate the effects of any unlawful practice found.
- d) Protect the rights of the complainant.
- e) Protect the rights of other persons similarly situated.
- f) Carry out the purposes of ORS 659.010 to 659.110 which are:

1. To encourage the fullest utilization of available manpower by removing arbitrary standards.
2. To insure human dignity.
3. To protect health, safety and morals of all people from consequences of intergroup hostility, tensions and practices of any kind.
4. To provide an adequate remedy for persons aggrieved by the acts of discrimination involved.

ORS 659.010(2), 659.022; *Williams v. Joyce*, 4 Or App at 503-509; *School District No. 1, Multnomah Co. v. Nilsen*, 262 Or at 570-571.

30) ORS 659.010 to 659.115 contemplates the limited use of private legal counsel by an aggrieved person prior to and at all stages of the processing of civil rights matters so long as the services of private counsel are authorized by statute or do not duplicate or usurp the functions of the

administrative agency established to administer and enforce ORS 659.010 to 659.115, and so long as the services are reasonably calculated to protect the civil rights of the aggrieved person and lessen the effects of the unlawful practices thereon. ORS 659.010 to 659.115 (especially ORS 659.040 and 659.045).

31) Because of the sparse legal budget provided the administrative agency by the legislature to process only the court-like administrative hearing stages of civil rights proceedings, the expense for private legal counsel by an aggrieved person may be, and in this case is, an effect of the unlawful employment practice found to exist. In such cases reimbursement for the out-of-pocket expense of private counsel in a reasonable sum is an appropriate method of eliminating the effects of the unlawful practices. ORS 659.010(2), 659.022; *Williams v. Joyce*, 4 Or App at 500, 503, 504, 509.

32) The remedies which may be fashioned by the Labor Commissioner to carry out the requirements of ORS 659.010(2), 659.020 and 659.022 are not limited by the ordinary rule in actions at law in courts of this state in that the award of attorneys' fees between parties is limited to those cases specifically provided for by statute or by agreement between the parties. *Williams v. Joyce*, 4 Or App at 499, 500, 503, 504, 509.

33) The Labor Commissioner is authorized to make awards of compensatory damages against any respondent for mental or emotional distress caused by humiliation, frustration, anxiety, tension and nervousness suffered as an effect of an unlawful

practice. ORS 659.010(2), 659.022; *Williams v. Joyce*, 4 Or App 482, 494-506.

34) Pregnancy is a natural condition and childbirth is a natural process for females. *Carter v. Howard*, 160 Or 507, 518, 86 P2d 451 (1939); Opinions Attorney General (June 6, 1972) No. 6922.

35) School District No. 1 is, and at all times relevant herein has been, an employer subject to ORS 659.010 to 659.110. ORS 659.010(6); *School Dist. No. 1, Multnomah Co. v. Nilsen*, 7 Or App 396, 490 P2d 1265 (1971); *School Dist. No. 1, Multnomah Co. v. Nilsen*, 262 Or 559, 499 P2d 1309 (1972).

36) School District No. 1 has violated ORS 659.030 since on or about September, 1969, by continuously discriminating against Sally Flury in employment and in the terms or conditions thereof with School District No. 1 because of her sex. ORS 659.030.

37) School District No. 1 has violated ORS 659.030 since August 21, 1969, the effective date of the anti-sex discrimination legislation administered by the Labor Commissioner, by continuously discriminating against all female teacher employes of the district by requiring the resignation of pregnant probationary teachers and by requiring lengthy leaves of absence of tenured pregnant teachers regardless of the circumstances in each individual's case. ORS 659.030.

38) School District No. 1 has violated ORS 659.030 by printing and circulating publications which expressed limitations, specifications and discrimination in employment as to sex which

were not based upon a bona fide occupational qualification. ORS 659.030.

Based upon the Findings of Fact and Conclusions of Law in this matter, together with my reading and considering the whole record herein, I hereby enter my Order as follows:

ORDER

1. General

All prior determinations made by the Presiding Officer of the Tribunal or myself are hereby adopted as my own and affirmed with the exception of the part of the Order of December 24, 1971, wherein and whereby the Presiding Officer denied the request of the Respondents Exceptions to the Tribunal's Proposed Findings of Fact. That Order is specifically reversed and the Exceptions will be filed of record herein.

2. Specific Remedy for Complainant

To eliminate the effects upon the Complainant of the Respondent's unlawful employment practices found herein, the Respondent shall deliver to the office of the Oregon Bureau of Labor, Room 479, State Office Building, Portland, Oregon, within ten (10) days of the date of this Order, a cashiers check or money order payable to Mrs. Sally Flury in the amount of \$850.00 as and for reimbursement for out of pocket attorney's fees and for humiliation, frustration, anxiety and nervousness. This sum shall draw interest at the rate of 6% per annum from date of this Order to date of payment.

3. Injunctive Provisions

The Respondent, School district No. 1, Multnomah County, its board, agents, officers, employes and successors in interest and all persons in

active concert or participation with any of them are enjoined from engaging in any acts or practices which have the purpose or effect of refusing to hire or employ or to bar or discharge from employment any individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment because of the sex of the individual or of any other person with whom the individual associates, including, but not limited to:

1) Printing or circulating or causing to be printed or circulated any statement, advertisement or publication, or to use any form of application or to make any inquiry in connection with prospective employment which expresses directly or indirectly any limitation, specification, or discrimination, unless based upon a bona fide occupational qualification.

2) Discharging, expelling or otherwise discriminating against any person because said person has opposed any unlawful employment practices based upon the sex of any person or because said person has filed a complaint, testified or assisted in any proceeding under 659.010 to 659.110.

3) Aiding, abetting, inciting, compelling, or coercing the doing of any unlawful employment practices based upon the sex of any person under ORS 659.010 to 659.110.

4) Limiting, segregating, or classifying Respondent's employes in any way which would deprive or tend to deprive them of equality in the terms, conditions, privileges and opportunities of employment, or of benefits accruing through employment but enjoyed legally or practically after termination of employment.

5) Engaging in any acts or practices which perpetuate or tend to perpetuate the discriminatory effects of practices which in the past have had the effect of discriminating against individuals because of the sex of any person.

4. Liaison

1) The Respondent, School District No.1, Multnomah County, will within thirty (30) days of this Order, designate a person who will be an established liaison between School District No. 1, and the Civil Rights Division of the Oregon Bureau of Labor to aid in the implementation of the remedies required by this Order. Within 30 days thereafter, and at other appropriate times the liaison shall have the affirmative duty, on behalf of Respondent, to furnish a copy of this Order to all persons who are currently involved or who will become involved in recruiting, screening, considering, notifying or otherwise processing certificated personnel in their employment relations including advancements with Respondent.

2) The Respondent, School District No.1, Multnomah County, will submit to the Civil Rights Division of the Oregon Bureau of Labor for approval within sixty (60) days of this Order, either proof of compliance or written reports as follows:

a) Within sixty (60) days after entry of this Order and at sixty (60) day intervals thereafter for a period of three (3) years, the liaison representative for School District No. 1, will file with the Civil Rights Division, written reports specifying in detail the efforts made by School District No. 1, during the preceding sixty (60) day period to

implement each and every requirement of this Order, and further, specifying in detail the results of said efforts.

b) As part of the aforementioned required reports commencing within sixty (60) days after the entry of this Order, the liaison representative for School District No. 1, will provide an organizational and personnel chart showing those certificated personnel who are currently affected by pregnancy, maternity or complications thereof. The chart will be kept current by the liaison representative from figures and facts of record as of the first day of each said reporting period. The said chart shall show the name of the teacher involved with each particular position she filled before and after her leave together with the salary of that person in each instance and the dates she filled the positions.

c) Within sixty (60) days after receipt of this Order by the Respondent, the liaison representative shall post a copy of the Order in this case in the usual place or places where notices are posted for certificated personnel in each school or administration building in School District No. 1. The copy of the Order shall be continuously posted for not less than thirty (30) days. Thereafter, and for the next three consecutive years a copy of the Order shall be posted between the dates of September 1 and October 1 as herein above set out.

5. Specific Class Remedy Provisions Involving Pregnancy or Post Pregnancy Situations

1) The Respondent, School District No. 1, shall not have or use any written or unwritten employment policy or practice which excludes from

employment as certificated personnel any applicant for or employe of the Respondent because of pregnancy, or other disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, or recovery therefrom except on an individual basis of a bona fide occupational requirement reasonably necessary to the normal operation of the employer's business. If the Respondent shall contend that a bona fide occupational requirement exists in an individual case the Respondent must specify in writing the reason or reasons for the existence of such requirement and provide a copy thereof to the Civil Rights Division of the Bureau of Labor and to the applicant or employee. If the Labor Commissioner requests, the Respondent must demonstrate both the bona fide requirement and the necessity claimed to exist.

2) In interpreting and applying any of the requirements herein, whether affirmative or negative, disabilities cause or contributed to by pregnancy, miscarriage, abortion, childbirth and recovery therefrom are, for all job-related purposes, temporary disabilities and must be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment. Written and unwritten employment policies and practices, including, but not limited to, the commencement and duration of leaves, the availability of extensions, the accrual of seniority and other benefits and privileges, reinstatement, and payment under any health or temporary disability insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy or

childbirth on the same terms and conditions as they are applied to other temporary disabilities. Provided, however, that where the termination of an employee who is temporarily disabled is caused by employment practices or rules under which insufficient or no leave is available for pregnancy or maternity situations, such a termination violates the terms of these Orders if it prevents, in fact, reasonable pregnancy and maternity leaves and it is not justified by business necessity.

3) During the probationary period, evaluation of teachers who become pregnant shall be scheduled by Respondent at such times and in such manner that an adequate evaluation may be made while allowing the pregnant teacher a reasonable period or periods of absence from classroom and other teaching duties for pregnancy and maternity purposes regardless of the time of year her pregnancy commences or ceases.

For the purposes of this requirement, an adequate evaluation will be considered to have been made or waived by the Respondent if, under all circumstances of a given case including, but not limited to prompt knowledge of the pregnancy or any complications thereof, the Respondent had an adequate opportunity to evaluate the teacher.

4) The Respondent, School District No. 1, shall eliminate the effects of its unlawful resignation policy and practice based on pregnancy for certificated personnel by:

a) Furnishing a copy of this Order to and offering to rehire, within 60 days of the date of this Order, all certificated personnel who resigned since

August 21, 1969, with the Respondent under the same terms and conditions that reasonably would have existed but for the required resignation. If accepted by the individual the position shall be provided.

b) Offering all such persons who resigned since August 21, 1969, compensatory damages including, but not limited to:

1. Lost wages or salary.
2. All forms of out of pocket expenses.
3. Mental or emotional suffering or distress.

c) Reporting in writing to the Civil Rights Division of the Bureau of Labor each sixty (60) days beginning February 1, 1974, and continuing until released from further reports, or complete compliance:

1. The names, addresses and phone numbers of all persons with whom satisfactory resolution of the requirements of subsections (a) and (b) have been tentatively completed, together with copies of any documents to be entered into and the terms of such resolution for prior approval by the Civil Rights Division of the Oregon Bureau of Labor.

2. The names, addresses and phone numbers of all persons covered by this section who have not, or will not, enter into a resolution of the requirements of subsections (a) and (b), together with the reasons no tentative resolution has been agreed upon.

3. The names, last known addresses and phone numbers of all persons covered by this section who cannot be contacted by the Respondent or its agents together with a

statement of the specific actions taken in an effort to contact each person.

d) Establishing a uniform method in writing through which job openings, advancements and transfer opportunities are announced and by which applicants therefor and those on pregnancy or maternity leaves are notified, solicited, screened, considered and otherwise processed to assure those certificated personnel who will be or are on a pregnancy or maternity related leave will have adequate opportunity to resume active employment with the Respondent without losing any benefits, current or future, which would normally accrue to any certificated personnel not on leave. Provided however, nothing in this provision shall require the Respondent to pay salary to persons on leave.

e) Establishing a uniform written method by which salaries and salary increases are determined in pregnancy and maternity situations, whether unilaterally or through a bona fide collective bargaining process.

5) For the purposes of this order pregnancy or maternity related leaves include, but are not necessarily limited to:

a) Absences because of pregnancy or complications of pregnancy.

b) Absences because of delivery or recuperation after delivery.

c) Absences due to miscarriage or abortions or contemplated abortions including recuperation thereafter.

6) If any certificated personnel who resigned or was discharged since August 21, 1969, because of Respondent's practices and policies involving

pregnancy does not agree to a proposed resolution of her case by September 1, 1974, she may request a hearing be had on the facts of her case and an order entered thereon as provided in Section 7, set out hereinafter.

7) The office of the Commissioner of the Oregon Bureau of Labor or its successors shall retain jurisdiction in this matter and if for any reason not specified herein new facts should develop which would affect any of the remedies provided herein, or the unlawful employment practice of the Respondent or any of its board, agents, officers, employees or successors should continue, or any person or party affected thereby contends that any of the provisions of these Orders are ambiguous or need to be interpreted, the Complainant, any person similarly situated, the administrator of the Civil Rights Division, the Respondent, or any of them may petition the Labor Commissioner for a supplementary order and relief which would interpret provisions of the Orders, or provide an adequate remedy for the Complainant or other persons similarly situated, to carry out the purposes of the Civil Rights Law, and eliminate the effects of the unlawful practices found to exist.

8) If this Order is appealed and this Order, or any portion thereof is stayed during the appeal the time or times specified herein for the performance of any act or series of acts will automatically be extended to commence thirty (30) days subsequent to the decision of the highest appeal court which decided any issue in this case.

**In the Matter of
NEHIA, INC.,
dba The Turquoise Room,
William J. Sahli, and Robert L. Hayes,
Respondents.**

Case Number 01-75
Final Order of the Commissioner
Bill Stevenson
Issued June 30, 1975.

SYNOPSIS

Where Respondent, a public accommodation (night club), and an independent contractor (a security provider) and his employee, checked age identification so as to exclude black persons and racially mixed groups from the club, the Commissioner found that the Respondents violated ORS 659.010(14) by discriminating against persons because of their race and color and because of the mixed racial makeup of the group they were with. ORS 659.010(14), 659.037, 30.675(1).

The above entitled matter having come on regularly for hearing before Russell M. Heath, designated Presiding Officer by the Commissioner of the Oregon Bureau of Labor, on February 24, 1975, pursuant to notice to all of the named parties; Albert L. Menashe, Assistant Attorney General, appeared on behalf of the Agency and each of the individual Complainants; William McGeorge, attorney appeared on behalf of the Respondent, Nehia, Inc., an Oregon corporation; the Respondent William J. Sahli arrived at the hearing some minutes late and appeared on

his own behalf and represented himself, and the Presiding Officer heard the witnesses called on behalf of the parties and on behalf of the Agency and the Complainants, and considered the exhibits duly received and arguments of counsel and the parties, and issued his Proposed Findings of Fact, Proposed Conclusions of Law and Proposed Order;

Thereafter, the Presiding Officer's Proposed Findings of Fact, Proposed Conclusions of Law and Proposed Order were duly served on each of the parties herein adversely affected thereby; and the Respondent Nehia, Inc., having filed objections and exceptions to the Presiding Officer's Proposed Findings of Fact, Proposed Conclusions of Law and Proposed Order, and the Respondents Robert L. Hayes and William J. Sahli not having filed any objections or exceptions thereto and;

The Commissioner of Labor having personally considered the whole record and the objections and exceptions filed by Nehia, Inc. and the relevant portions of the record pertaining thereto and being otherwise fully advised in the premises, hereby makes and enters his Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1) I hereby adopt as my own and by this reference incorporate herein the Findings of Fact made by the Presiding Officer contained in Exhibit "A" (Proposed Findings of Fact, Proposed Conclusions of Law and Proposed Order) attached hereto, to wit, those portions of Exhibit "A" from line 25 at page 1 to line 19 at page 9 and from line 6 at

page 10 to line 16 at page 13 EXCEPT that:

a) The last three words of line 9 and the first two words of line 10 all at page 7 are deleted, and,

b) The amounts proposed by the Presiding Officer to be awarded the Complainants herein as damages, to wit, \$2,000.00 to Floyd S. Davidson (Ex. "A", line 8 at page 11), \$2,200 to John B. Robinson (Ex. "A", lines 5 and 6 at page 12), and \$3,000.00 to Sharon E. Coleman (Ex. "A", line 14 at page 13), are hereby deleted and the sums set out below substituted therefor, which sums I find to be appropriate awards of damages to compensate the complainants for the damages described and found to have been suffered herein:

Floyd S. Davidson - \$2,000.00

John B. Robinson - \$2,000.00

Sharon E. Coleman - \$2,500.00

2) I specifically do not adopt the Conclusory Findings reached by the Presiding Officer set out in Exhibit "A" (line 20 at page 9 to line 5 at page 10) and my own Conclusory Findings are substituted therefor and set out as, follows below:

CONCLUSORY FINDINGS

1) The Respondent, Nehia, Inc., dba The Turquoise Room, at all times material herein, was a liquor licensee licensed to dispense alcoholic beverages on the premises with the responsibility of determining that patrons of the Club be at least 21 years of age; and that Nehia, Inc., delegated the age identification function to the Respondent, Robert L. Hayes and Oregon

Statewide Securities, Inc., and authorized Hayes to furnish employees to perform this essential function on behalf of Nehia, Inc.

2) The Respondent, Sahli, was assigned to the Turquoise Room by the Respondent, Robert L. Hayes, to perform the function of checking age identification and at all times material herein was acting on behalf of the Respondent, Nehia, Inc., in performing said function and determining who would be admitted to the Club.

3) The Respondent Sahli was instructed by the Respondent Hayes to perform, and did perform, the function of check age identification in such a manner that as many black persons as possible were excluded from the Club and discouraged from patronizing the Club and that as many mixed racial groups as possible were excluded from the Club or discouraged from patronizing the Club. In this regard, the Respondent Sahli treated black persons and racially mixed groups differently and more stringently than white persons or all white groups were treated with respect to checking age identification in that black persons were required to have an OLCC card as a condition of admission to the Club and were not offered or permitted to show other age identification or sign an S-146 form while white persons were not required to have an OLCC card as a condition for admission to the Club and were permitted to sign an S-146 form and permitted to show other identification.

4) Donald Anderson, at all times material herein, was an employee of Nehia, Inc., and was employed at the Turquoise Room to collect an

admission charge from patrons; and in the performance of this function he knew that the Respondent Sahli was imposing different and more stringent requirements for admission upon black persons and mixed racial groups than were being imposed upon white persons or all white groups.

Further, Anderson knowingly participated in the racially discriminatory manner in which the age identification was being performed at the place of entrance to the premises; and further, Anderson from time to time exercised authority to admit patrons and gave directions to the Respondent Sahli as to whom should be admitted. Anderson was aware and knew that during the entire period that he and the Respondent Sahli worked together at the entranceway to the premises that the Respondent Sahli at no time ever attempted to or did in fact refuse to respond to directions given him by Anderson when instructed to admit patrons.

5) The Complainants, John B. Robinson and Floyd S. Davidson, because of their race and color and because of the mixed racial makeup of the group they were with and Sharon E. Coleman, because of her race and color were each subjected to and were the victims of the racially discriminatory practices described herein which took place at the Turquoise Room and as the effects thereof were caused to and did suffer mental anguish and distress as described herein.

* * *

I specifically do not adopt those Conclusions of Law reached by the Presiding Officer set out in Exhibit "A", line 1 at page 14 to line 13 at page 15,

and instead, I substitute therefor my own legal conclusions as set out below:

CONCLUSIONS OF LAW

1) The Respondent, Nehia, Inc., an Oregon corporation, is a place of public accommodation as defined in ORS 30.675(1).

2) That Nehia, Inc., dba The Turquoise Room, is liable for any unlawful practices as defined in ORS 659.010(14) engaged in by any person or persons acting on its behalf whether such person or person be employees, independent contractors or employees of independent contractors.

3) The Respondent, Nehia, Inc., violated the provisions of ORS 659.010(14) in that the Respondents, William J. Sahli and Robert L. Hayes, while acting on behalf of Nehia, Inc., did discriminate against and place restrictions on black persons or members of racially mixed groups who sought admission to the Turquoise Room because of the race and color of such persons or the mixed racial makeup of the groups which sought admission to the Turquoise Room.

4) That every person, whether acting in a personal capacity or as a corporate agent who commits an unlawful practice as defined in ORS 659.010(14) is personally liable for such unlawful practices.

5) That Robert L. Hayes, doing business as Oregon State Security and later as Oregon Statewide Security, Inc., was during the time material herein, an independent contractor engaged by Nehia, Inc. to provide security services on the Club premises and was thereafter acting on behalf of a

place of public accommodation as defined in ORS 30.675.

6) The Respondent, Robert L. Hayes, violated the provisions of ORS 659.037 in instructing and directing his employee, William J. Sahli, to discriminate against black persons seeking admission to The Turquoise Room because of their race and color.

7) That William J. Sahli, during the times material herein, was employed as a security guard by Mr. Hayes, doing business as Oregon State Security and later Oregon Statewide Security, Inc., as was assigned by Mr. Hayes, pursuant to this contract with Nehia, Inc., to perform security services at the Club and that while so employed and assigned, William J. Sahli was acting on behalf of a place of public accommodation as defined in ORS 30.675.

8) The Respondent, William J. Sahli, violated the provisions of ORS 659.010(14) in performing the job function on behalf of the Respondent, Nehia, Inc., of checking the age identification of individuals seeking admission to the Turquoise Room in performing said function in such a manner as to deny admission to The Turquoise Room to as many black persons as possible including the Complainants and to as many mixed racial groups as possible because of the race and color of their members.

9) The Respondent, Nehia, Inc., dba The Turquoise Room, a place of public accommodation and the Respondents, Sahli and Hayes, acting on behalf of such place of public accommodation, are each jointly and severally liable for the damages found herein to have been suffered by the Complainants, Floyd S. Davidson,

John B. Robinson and Sharon Coleman.

10) The Complainant, Floyd S. Davidson, was the victim of and subjected to the unlawful practices committed by the Respondents, and each of them, described herein above because of his race and color and because of the mixed racial makeup of the group he was with when he sought admission to The Turquoise Room on or about June 5, 1972.

11) The Complainant, John Robinson, was the victim of and subjected to the unlawful practices committed by the Respondents, and each of them, as described herein above because of his race and color and the mixed racial makeup of the group he was with when he sought admission to The Turquoise Room on or about June 5, 1972.

12) The Complainant, Sharon E. Coleman, was the victim of and subjected to the unlawful practices engaged in by the Respondents, and each of them, as described herein above and was harassed and otherwise discouraged from seeking admission to The Turquoise Room in June of 1972.

ORDER

I hereby adopt as my own and by this reference incorporate herein the Proposed Order made by the Presiding Officer, all as set out in Exhibit "A", attached hereto, from line 5 at page 16 through line 25 at page 17, EXCEPT that:

a) The sum of \$2,000.00 is substituted for the figure of \$2,200.00, which appears on line 9 at page 16, and

b) The sum of \$2,000.00 is substituted for the figure of \$2,200.00, which appears on line 14 at page 16, and

c) The sum of \$2,500.00 is substituted for the figure of \$3,000.00, which appears on line 19 at page 16.

[Editor's Note: No copy of "Exhibit A," the proposed order referred to in the case, is known to exist.]

**In the Matter of
N. H. KNEISEL, INC.
and Norman H. Kneisel,
Respondents.**

Case Number 07-72

Final Order of the Commissioner

Bill Stevenson

Issued January 23, 1976.

SYNOPSIS

Where a corporate respondent and its president relegated black persons, because of their race and color, to jobs carrying the least responsibility, status and pay; refused to promote complainant, a black man, because of his race and color; and retaliated against complainant because he opposed practices forbidden by the civil rights laws, and because he filed a complaint with the Civil Rights Division, the Commissioner held that the respondents violated ORS 659.030(1) and 659.030(4), and the corporate president violated ORS 659.030(5) by aiding and

abetting the corporation. The Commissioner awarded the complainant \$4,000 for his mental suffering, and enjoined respondents. ORS 659.010(6), and 659.030(1), (4), and (5).

The above entitled matter having come on regularly for hearing before Russell M. Heath, designated as Presiding Officer by the Commissioner of the Oregon Bureau of Labor, the Hearing being convened in Room 225, Cramer Hall, Portland State University, 730 SW Mill Street, Portland, Oregon, at 9:00 a.m. on August 17, 1972, and continuing through August 21, 1972; the Agency and complainant being present and represented by Victor Levy, Assistant Attorney General and the respondents being present and represented by Fred B. Duffy, attorney; the Presiding Officer being at all times present, having heard the witnesses called by the parties and having considered their exhibits duly received and arguments of counsel issued his Proposed Findings of Fact, Proposed Conclusions of Law and Proposed Order. Respondents filed exceptions to all the proposals and the Labor Commissioner having considered the exceptions and the entire record, hereby makes his Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

Procedure

1) This matter arose on or about March 9, 1971, on which date Carl Thomas, a black man, filed with the Civil Rights Division of the Oregon Bureau of Labor, a complaint of discrimination alleging that his then employers, N. H. Kneisel, Inc., and Norman H.

Kneisel, had unlawfully failed and refused to consider him for a promotion solely because of his race and color.

2) Prior to an administrative determination on the merits of the aforementioned complaint, the same Carl Thomas on or about May 10, 1971, filed with the Civil Rights Division a second complaint of discrimination alleging in substance that N. H. Kneisel, Inc. and Norman H. Kneisel had unlawfully terminated his employment because he had opposed practices forbidden by Oregon's Civil Rights statutes and because he had filed a complaint of discrimination against them.

3) Both the aforementioned complaints of discrimination triggered an investigation by the Civil Rights Division at the conclusion of which an administrative determination was made that there existed substantial evidence in support of the allegations in Mr. Thomas' complaints.

4) Upon such determination by the Civil Rights Division, efforts were made to resolve the complaints through conciliation, but such efforts were unsuccessful.

5) Thereafter, the Commissioner of the Oregon Bureau of Labor, by and through Gayle Gemmill, Administrator of the Civil Rights Division, drew Specific Charges of Discrimination against N. H. Kneisel, Inc., an Oregon Corporation and Norman H. Kneisel, an individual.

6) Said Charges and a Notice of Hearing set for August 9, 1972, were subsequently duly served on the aforesaid respondents, but prior to the appointed date of hearing said respondents through their attorney, Fred

B. Duffy, requested a set-over of the hearing and such was granted by the Presiding Officer who thereupon re-set the hearing for August 17, 1972.

Jurisdiction

1) There was ample testimony to the effect and I therefore find that respondent, N. H. Kneisel, Inc. is presently and has been since 1964 or thereabout an Oregon Corporation doing business as Trailways Bus Depot; that in the operation of its aforesaid business, which is located in Portland, Oregon, said respondent maintains approximately 13 to 14 employees in a variety of positions included, but not limited to Office Manager, Secretary, Tour Counselor, Ticket Agent, and Custodian and Baggage Handler.

2) Further testimony was to the effect and I so find that respondent Norman H. Kneisel is presently and has been since its formation, sole owner and president of N. H. Kneisel, Inc.; that the said individual respondent retains for himself and exercises exclusive authority with respects to employment matters including, but not necessarily limited to, hiring, firing, promoting, assigning and transferring of N. H. Kneisel, Inc. employees.

3) The complainant and Agency have alleged in part that on two separate occasions, March 9, 1971, and May 10, 1971, the complainant, Carl Thomas, filed a complaint with the Civil Rights Division of the Oregon Bureau of Labor complaining that the respondents, and each of them, had unlawfully discriminated against him in connection with his employment with N. H. Kneisel, Inc., because of the said complainant's race and color. During the course of the hearing, counsel for

the respondents and each of them, stipulated as to the aforesaid allegations and I therefore find same as fact.

General Background

1) Respondent, Norman H. Kneisel, is a Portland businessman whose present commercial activities encompass such businesses as a travel agency, a bus depot, and various real estate and livestock ventures. Mr. Kneisel first entered into business in this state in 1949 when he contracted with Continental Trailways to manage the Trailways Bus terminal, hereinafter referred to as "depot"; located at 1001 SW Fifth Avenue, Portland, Oregon. In 1964 or thereabout, Mr. Kneisel formed N. H. Kneisel, Inc., and Oregon corporation of which he is presently and has been since its creation, president and sole owner. Under the terms of Mr. Kneisel's aforementioned contract he staffs the depot and receives compensations for his services to Continental Trailways and Pacific Trailways by way of commissions on express sales and passenger ticket sales consummated at the depot. Although Mr. Kneisel individually remains the contract manager of the depot as to Continental Trailways and Pacific Trailways, his corporate structure, N. H. Kneisel, Inc., has since its creation operated the depot and paid salaries of depot employees.

2) As sole owner and president of N. H. Kneisel, Inc. and as contract manager of the depot, Mr. Kneisel retains full and final authority over all depot employment and personnel matters including, but not necessarily limited to, the recruiting, hiring, compensating, promoting and transferring of all depot employees. The record in

its entirety amply reflects that while Mr. Kneisel has in the past and does presently employ persons in various management positions at the depot (e.g., Assistant Terminal Manager, Office Manager, Head Ticket Agent), he delegates little if any decision-making power over personnel matters to such subordinates.

3) Base on Mr. Kneisel's testimony, the Presiding Officer's evaluation of Mr. Kneisel's demeanor and manner while testifying, and testimony of past and present depot employees, I find said respondent to be a strong-willed, self-made man who is a demanding and critical employer. When not absent from the city, Mr. Kneisel has participated actively in the day-to-day operation of the depot, but has at no time herein mentioned formalized employment policies with respect to the recruiting, hiring, transferring, promoting or the compensating of depot employees.

4) Although relevant testimony was somewhat vague, I find that respondents maintain a depot work force of between 12 and 20 employees, and that the number varies seasonally as business demands vary; that the depot work force includes, but is not necessarily limited to, custodian and/or baggage handlers, ticket agents, office manager, secretarial personnel and Trailways Green Carpet tour guides and escorts.

5) Testimony and documents received failed to establish the total number of persons employed by respondents in their operation and management of the depot during the period from 1949 to the present. However, based on Exhibits A3, A6, A7

and A8, I find that during the period 1966 to 1972 approximately 85 persons were so employed and I infer and find that the total number of person so employed during the period from 1949 to the present easily exceeds 100.

Promotion

1) The Complainant, Carl E. Thomas, on or about August 15, 1967, was hired by respondents to perform custodial and baggage handling duties on a full-time regular basis at the depot. Some of the terms and conditions of his depot employment, including minimum wage, were governed by a union agreement then in force between respondents and Service Employees Union, Local 49. With respect to his custodial function, Mr. Thomas' day-to-day duties included sweeping, mopping, washing windows and restrooms, and generally maintaining the cleanliness of the depot. In addition to the aforementioned custodial duties, Mr. Thomas was responsible for loading and unloading baggage carried by Trailways buses. Such baggage handling duties required that Mr. Thomas have working familiarity with the geographic areas served by the Trailways buses utilizing the depot. In accord with Mr. Thomas' credible and undisputed testimony, I find that his work day at the depot often included the performance of various non-custodial and baggage handling duties requested by his supervisors and fellow depot employees such as temporarily standing in at a ticket window, carrying boxes containing brochures, fueling buses, handling mail sacks, maintaining the depot postage meter, and carrying parcels from the depot to the post office.

2) Undisputed testimony established and I find that during late 1970 and early 1971, Mr. Thomas actively sought an employment promotion from his custodial/baggage position to a ticket agent position; further that his efforts in addition to submitting a formal application included several requests for promotion directed to Dennis Zeisler, then Assistant Depot Manager and subsequently one such request directed to respondent N. H. Kneisel; further that despite such efforts, Mr. Thomas was not promoted.

3) The record is replete with respondent's contention that Mr. Thomas' failure to obtain a promotion was wholly unrelated to his race and color. Mr. Kneisel testified that Mr. Thomas was denied a promotion because he was not qualified for a position as ticket agent and because he had not been a satisfactory employee in his custodial/baggage position. More specifically, Mr. Kneisel testified that Mr. Thomas was habitually late in reporting to work; that he had a poor attitude; that he lacked salesmanship; and that he was unable to read and write intelligently.

Under direct examination Mr. Kneisel testified that the requisite qualifications for a position as depot ticket agent are as follows: 1) ability to read and write intelligently, 2) knowledge of mathematics, 3) orientation toward sales, 4) neat physical appearance, 5) good attitude, and 6) knowledge of geography. Mr. Kneisel further testified that prior ticket agent experience, although not a requirement, is a desirable qualification and that lack of prior job stability is a disqualifying feature.

Further testimony established, and I find, that at no time herein material has Mr. Kneisel established the validity of aforementioned qualifications as to whether they are actually job-related; nor has he ever formulated or administered any type of written test for the purpose of determining whether a ticket agent applicant possesses the aforementioned qualifications.

Based on further testimony I find that although Mr. Kneisel has in some instances administered to applicants an oral test to determine that applicant's qualifications, such tests are neither always administered nor are they capable of objective administration and objective evaluation. I further find that Mr. Kneisel does not as a practice record an oral test nor has he ever validated such tests to determine job-relevancy.

I further find, based on undisputed testimony of Mr. Zeisler and Mr. Harris that starting ticket agents are accorded on-the-job training to enable them to learn the various duties required.

4) Based on the clear weight of evidence, I find that when Mr. Thomas applied for a promotion to a ticket agent position, he possessed indisputable reading and writing abilities; further, that respondents were aware that he possessed such abilities since he had filled out two written application forms in addition to writing two demonstrably articulate letters of complaint.

5) Although Mr. Kneisel testified that he had doubts as to Mr. Thomas' knowledge of geography, based on the admitted fact that the said Mr. Kneisel never received complaints regarding Mr. Thomas' loading of buses coupled with the undisputed fact that the proper

loading of buses requires a working knowledge of geography, I find that Mr. Thomas possessed and had demonstrated sufficient knowledge of geography to qualify for a position as ticket agent. I further find that when Mr. Thomas applied for a promotion, Mr. Kneisel was aware that the said Mr. Thomas possessed such knowledge.

6) Respondents did not contend that Mr. Thomas' knowledge of mathematics was insufficient for him to qualify for the position of ticket agent and I do not so find. To the contrary, based on Mr. Thomas' testimony, I find that when he applied for a promotion he possessed adequate mathematical abilities to qualify for the position.

7) Respondent did contend that Mr. Thomas was not neat in appearance. Testimony on this issue was of a most general nature and not persuasive, particularly considering the strenuous nature of Mr. Thomas' duties. I find Mr. Thomas was not disqualified for the position because of his appearance.

8) Respondents did contend that Mr. Thomas displayed a "poor" attitude and lacked "salesmanship." However, Mr. Kneisel was unable to support these contentions except by testifying that Mr. Thomas did not converse with him enough when both were working on the loading dock; that Mr. Thomas had once refused to load a bus; and that Mr. Thomas had once been "caught" reading a magazine. I am unable to accord significant weight to the foregoing testimony for two reasons. First, I do not find that such testimony as to a failure to converse amicably while sharing a manual task; a single instance of an alleged refusal to

perform another manual task, testimony concerning which incident was controverted; and another single instance of alleged inattention to his work, again subject to different interpretations in the offered testimony, supports a finding that Mr. Thomas, who was employed at the depot for more than 3-1/2 years, had a poor attitude and lacked salesmanship. Second, such testimony as to these incidents is contrary in large part to other and more credible testimony of Mr. Zeisler, Mr. Harris, and Mr. Thomas.

Notwithstanding the foregoing, I find Mr. Kneisel's determination of such qualifications as "attitude" and "salesmanship" wholly subjective and susceptible to arbitrary application and therefore, subject to careful review in a case of this kind.

In accord with the foregoing, I am unable to find that Mr. Thomas' "attitude" and/or "salesmanship" was a disqualifying feature in his quest for a promotion.

9) Based on undisputed testimony, I find that Mr. Thomas also possessed in certain respects, some degree of prior ticket agent experience in that he had on occasion staffed a ticket window temporarily and had performed some duties required of ticket agents.

10) In accord with the foregoing, I do not find that Mr. Thomas was denied a promotion either because he was in fact unqualified or because respondents believed him to be unqualified, at least as to those qualifications set out by Mr. Kneisel.

11) The record contains considerable testimony relating to an oral test administered by Mr. Kneisel to Mr. Thomas. Mr. Kneisel testified to the effect that such test revealed Mr. Thomas' lack of qualifications for the ticket agent position. However, I find that said test was administered to Mr. Thomas after he had filed a Civil Rights complaint and after Mr. Kneisel was aware that he had so filed. In addition, Mr. Kneisel admitted, and I find that prior to administering the test in question, he had already determined not to promote Mr. Thomas. I infer and find from the foregoing, together with my earlier findings relating generally to such oral tests, that such oral test was administered for the purpose of justifying respondent's discriminatory conduct and not for the purpose of determining Mr. Thomas' fitness as a ticket agent.

12) Despite Mr. Kneisel's aforementioned contention to the effect that Mr. Thomas was not a satisfactory employee during his 3-1/2 years as a custodian/baggage handler, I am unable to so find. The great weight of evidence compels me to find to the contrary.

Although Mr. Thomas was admittedly late in reporting to work approximately 50 percent of the time, I find that such late reporting in no significant way adversely affected the smooth operation of the depot generally, or Mr. Thomas' work performance specifically. Documents received in evidence clearly show and I find that in most cases, Mr. Thomas was late by a matter of a few minutes. In addition, it was clearly established through testimony and I find that Mr. Thomas' late

reporting had never hindered the loading and unloading of buses. I accord special significance to the admitted fact Mr. Kneisel did not express concern about Mr. Thomas' lateness in reporting for work until after the said Mr. Thomas sought a promotion; further that such lateness in reporting was only brought to Mr. Thomas' attention after he applied for a promotion and finally, the ample and convincing testimony to the effect that Mr. Kneisel actively manages the depot in a critical and demanding manner. I cannot find that had Mr. Thomas' tardiness affected either his work performance or the depot operation in any degree, Mr. Kneisel would have remained silent as to what his testimony characterized as a disqualifying deficiency.

In accord with the above, I infer and find that Mr. Thomas' lateness in reporting for work did not in fact reflect adversely on his work performance nor was it considered by respondents to be of any significant importance prior to the filing of the complaint.

Finally based on credible, convincing, and for the most part undisputed testimony of Mr. Zeisler, supported by the significant fact that Mr. Thomas' depot employment was without incident until he sought a promotion, I find that when the said Mr. Thomas applied for a promotion, he had been for a period of approximately 3-1/2 years, a better than satisfactory depot employee.

13) I accord additional significance to the undisputed fact that during Mr. Thomas' depot tenure as a custodian/baggage handler, Timothy Harris, a white person, was hired as a baggage handler and was within one

year thereafter promoted to a ticket agent position.

14) Based on the great weight of testimony, I find that during the period from 1949 to the present, a period covering approximately 23 years, respondents have employed a total number of four black persons in the depot, three of whom, Carl Thomas, Daisy Mottley, and Paul Belcher, were present and gave testimony during the hearing.

15) I further find that each of the aforementioned black persons employed by respondents was hired to perform custodial and/or baggage handling duties.

In so finding I disregard the partly contrary testimony of Mr. Kneisel to the effect that he had at one time during the approximately 23 year period, employed a black woman as depot switchboard operator; this testimony was wholly uncorroborated and markedly lacking in specificity and particularity.

16) Although the record contains testimony to the effect that a starting ticket agent at the depot may in certain instances receive less compensation than a custodian/baggage handler, the weight of credible testimony was to the effect, and I find, that custodial and/or baggage positions are presently and have been during all times material herein, the lowest status positions at the depot in terms of potential earning power, nature of work, authority, and responsibility.

17) Based on undisputed testimony, I find that none of the aforementioned black persons employed by respondents in the depot was ever promoted and/or transferred from

custodial/baggage to any other depot position, whereas in accordance with findings set forth above and testimony of Mr. Zeisler, Mr. Harris, Mr. Murphy, and Ms. Rhoton, a number of white depot employees, including those performing primarily custodial/baggage duties, were so promoted and/or transferred.

18) Based on other credible testimony of Ms. Mottley; together with testimony of Ms. Nancy Rhoton, a white former depot employee; Mr. Harris, a White former depot employee; the complainant, Mr. Thomas; and Mr. Joseph Bosch, Field Representative with the Civil Rights Division, I find that past and present depot management personnel, including Mr. Kneisel, have in fact made remarks either directed to or overheard by the aforementioned witnesses, which remarks were racially prejudicial and clearly expressive of an intent on the part of respondents and their agents to treat black persons differently than white.

19) Based on the foregoing findings, I infer, find, and conclude that respondents, during all times material herein, have denied to black persons, because of their race and color, access to all depot employment positions other than custodial/baggage positions; that since baggage/custodial positions are presently and have been the lowest status depot positions in terms of potential earning power, responsibility, nature of work, and authority, respondents have denied in the past and continue to deny equal depot employment opportunities to black persons.

20) In accord with foregoing findings and particularly finding No. 19, I

infer, find, and conclude that respondents have during all times herein material intended to discriminate against black persons as found and set forth above.

21) In accord with all the foregoing findings, I infer, find and conclude that Mr. Thomas was denied a promotion from his custodial/baggage position to a ticket agent position because of his race and color.

Termination

1) In accord with undisputed credible testimony, I find that after receiving no definitive reply to his continued requests for a promotion, Mr. Thomas wrote and sent two substantially identical letters to appropriate management personnel of Continental and Pacific Trailways in which he alleged racially discriminatory employment practices on the part of respondents.

2) Mr. Kneisel admitted and I find that the aforementioned letters were forwarded to him on or about March 8, 1971; that he thereupon became concerned and initiated personal meetings to discuss the matter with Mr. Bosch, Field Representative of the Civil Rights Division, and with various other persons including his Corporate Vice President(s) and Mr. Zeisler, his Assistant Depot Manager.

3) On or about March 9, 1971, the following events occurred:

a) Mr. Thomas signed and filed a complaint of discrimination with the Civil Rights Division alleging that respondents had unlawfully discriminated against him because of his race and color in denying him a promotion.

b) Mr. Kneisel instructed Mr. Zeisler to watch Mr. Thomas and to keep

notes on his daily activities, which notes were to be submitted to Mr. Kneisel on a daily basis; such notes were in fact thereafter kept and retained.

c) Mr. Kneisel initiated a meeting with Mr. Thomas wherein he expressed displeasure with Mr. Thomas for having written the aforementioned letters. During this meeting, Mr. Thomas made known his desire not to discuss the matter further as follows:

"... because of Mr. Kneisel's treatment of me in regard to my request up to that point; he hadn't seemed open, frank to me about the situation. I was frankly suspicious of his motive. I did not want to discuss the matter until I had a clear picture of what my legal rights were in the matter; I did not want to make statements or be drawn into compromises which I could not get out of at a later day."

4) Based on Mr. Thomas' further credible testimony, I find that subsequent to March 9, 1971, his fellow depot employees were generally less friendly and conversant with him, and I infer and find therefrom that Mr. Kneisel had made known to the depot employees generally, his displeasure with Mr. Thomas for having written the aforementioned letters and having filed a Civil Rights complaint.

5) On April 23, 1971, Mr. Thomas initiated a meeting with Mr. Chappel who had just prior thereto been hired as Assistant Depot Manager upon the resignation of Mr. Zeisler. During this meeting, Mr. Thomas expressed his willingness to perform his duties in whatever manner Mr. Chappel might prefer, and further, indicated his desire

that the conflict between himself and Mr. Kneisel would not affect his work performance or his working relationship with Mr. Chappel. I further find based on credible testimony of Mr. Thomas, that at no time did Mr. Chappel formally revise or change Mr. Thomas' work scheduled but rather he often interrupted Mr. Thomas' performance of duties by instructing him to leave what he was doing on a moment's notice and to do something else. I find that despite the inconvenience and hardship this sort of supervision caused Mr. Thomas according to his testimony, he followed Mr. Chappel's instructions without complaint or incident until April 27, 1971.

6) I find that on April 26, 1971, Mr. Kneisel initiated a meeting, attended by himself, Mr. Chappel, and Mr. Thomas, during which meeting Mr. Kneisel administered the aforementioned oral test to Mr. Thomas.

7) I find that during the morning hours of April 27, 1971, Mr. Chappel interrupted Mr. Thomas' performance of his usual duties and ordered him to clean an office which Mr. Thomas had never in his 3-1/2 years of depot employment been requested or required to clean. There is considerable testimony in the record concerning whether the office in question was properly the responsibility of the depot custodian or the building custodial service. Regardless of the determination of such issue, I find that Mr. Thomas believed he was being harassed rather than being requested to perform a legitimate job within his established scope of responsibility. I find that Mr. Thomas refused to clean the office in question and attempted to explain to Mr. Chappel his

reasons for so refusing, but that Mr. Chappel would not allow Mr. Thomas to state his reasons. I find that Mr. Chappel thereupon left Mr. Thomas, conferred in person with Mr. Kneisel and by phone with Mr. Kelly, Assistant Business Manager of the Service Employees Union, Local 49; that he thereafter returned to Mr. Thomas and informed him that he was fired and that his check would be ready within a matter of minutes. I find that within a matter of approximately 15 minutes thereafter, Mr. Thomas departed from the depot and that at no time prior to his departure did Mr. Kneisel ask him why he had refused Mr. Chappel's order, despite the fact that Mr. Thomas had been a depot employee for more than 3-1/2 years while Mr. Chappel had been at the depot less than 1 month. Mr. Kneisel admitted and I find that he personally authorized Mr. Chappel to fire Mr. Thomas.

Mr. Thomas did not have the duty to immediately carry out every order from his supervisor, for example orders which were immoral, illegal, unfair or degrading. Orders of such a nature would be evidence of a hostile atmosphere and evidence of retaliation.

However, I do not find that the order from Mr. Chappel to clean the room fell within the category of orders that could reasonably be disobeyed, particularly since his regular duties included general maintenance. Since Mr. Thomas' employment was covered by a collective bargaining agreement which included a grievance procedure, he had an established orderly procedure available to him for resolving the issue of his specific duties.

In light of Mr. Thomas' long period of employment with the respondent, termination seems unnecessarily abrupt and may well reflect the pressure and change of atmosphere about which Mr. Thomas testified. However, considering all the circumstances and even though Mr. Thomas apparently felt he was being harassed, his refusal to clean the office was not justified or warranted and I am unable to find that his termination was because he opposed racially discriminatory employment practices or because he had filed a complaint of discrimination against the respondent.

8) I find that Mr. Kneisel, by his actions and statements created an atmosphere at the depot that encouraged Mr. Thomas' fellow employees and supervisors to be less friendly toward him and critical of his work performance. This hostile atmosphere was the background that set the stage for Mr. Thomas' abrupt termination. I find that this change of attitude toward Mr. Thomas, which resulted in different treatment, was directly attributable to the fact that he wrote letters to Continental Trailways and Pacific Trailways and because he filed a complaint with the Civil Rights Division.

Damages

1) In accord with Mr. Thomas' convincing and candid testimony, the Presiding Officer's evaluation of Mr. Thomas' manner while testifying, and respondent's method and manner of discriminating against him as found and set forth above, I find as fact that the said Mr. Thomas suffered humiliation, indignity, frustration, anxiety, tension, and nervousness as effects of the racially discriminatory activities of

respondents and each of them; further that \$4,000 is a reasonable value in compensation thereof.

CONCLUSIONS OF LAW

1) The corporate respondent, N. H. Kneisel, Inc., is presently and has been during all times material herein an "employer" within the definition thereof set forth in ORS 659.010(6) and as such is subject to the provisions of ORS 659.010.

2) In accordance with the facts as found and recited herein-above, I conclude as a matter of law that the respondents, and each of them, have been in continuous violation of the provisions of ORS 659.030(1) by relegating black persons, because of their race and color, to those depot jobs and positions carrying the least responsibility, status and pay.

3) I conclude as a matter of law that Norman H. Kneisel violated the provision of ORS 659.030(5) by aiding and abetting N. H. Kneisel, Inc., in failing and refusing to promote Carl Thomas solely because of his race and color and in discriminating against Carl Thomas because he opposed practices forbidden by ORS 659.010 to 659.110 and because he filed a complaint with the Civil Rights Division.

4) In accordance with the facts as found and recited herein-above, I conclude as a matter of law that respondents, and each of them, violated the provisions of ORS 659.030(1) by failing and refusing to promote Carl Thomas solely because of his race and color.

5) In accordance with the facts as found and recited herein-above, I conclude as a matter of law that the

respondents, and each of them, did not violate the provisions of ORS 659.030(4) by discharging Mr. Thomas because he opposed practices forbidden by ORS 659.030(1) nor because he filed a Complainant of Discrimination with the Civil Rights Division of the Oregon Bureau of Labor.

6) In accordance with the facts as found and recited herein-above, I conclude as a matter of law that respondents, and each of them, violated the provisions of ORS 659.030(4) by discriminating against Mr. Thomas because he opposed practices forbidden by ORS 659.030 and because he filed a complaint pursuant to ORS 659.040.

7) In accordance with the facts as found and recited herein-above, I conclude as a matter of law that the following damages were sustained by Carl Thomas as effects of unlawful employment practices engaged in by respondents, and each of them; said damages are therefore compensable effects under ORS 659.010 to 659.110, as unlawful employment practices found by the Commissioner of the Oregon Bureau of Labor.

a) Humiliation, indignity, frustration, anxiety, tension, and nervousness: \$4,000.00.

ORDER

In accordance with the Findings of Fact and Conclusions of Law set forth above, IT IS HEREBY ORDERED THAT,

1) Respondents shall deliver to the office of the Oregon Bureau of Labor, Room 473, State Office Building, Portland, Oregon, within ten (10) days of the date of this Order, a cashier's

check or money order payable to Carl Thomas in the amount of \$4,000.00.

2) Respondents shall, within twenty (20) days of the date of this Order, deliver to the office of the Oregon Bureau of Labor, Room 473, State Office Building, Portland, Oregon, a written bona fide job offer directed to the complainant and offering him a position as depot ticket agent; said offer shall remain open for acceptance by the complainant for a period of ten (10) days.

3) Respondents shall, within twenty (20) days of the date of this Order, deliver to the Office of the Oregon Bureau of Labor, Room 473, State Office Building, Portland, Oregon, a written apology directed to the complainant.

4) Respondents shall place and retain, for a period of not less than ten (10) years, within Mr. Thomas' personnel file or files, a complete copy of these Findings of Fact, Conclusions of Law and Order, along with a copy of respondent's letter of apology above ordered.

5) Respondents shall within ten (10) days of the date of this Order post in an easily visible portion of the depot, a complete copy of these Findings of Fact, Conclusions of Law and Order, and shall maintain said posting for a period of not less than ninety (90) days.

6) The respondents, N. H. Kneisel, Inc. and N. H. Kneisel, their agents, officers, employees and successors in interest and all persons in active concert or participation with any of them are enjoined from engaging in any of the acts or practices hereinafter

described, which have the purpose or effect of refusing to hire or employ or to bar or discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions, or privileges of employment because of the race and color of any individual or any other person with whom the individual associates:

a) Printing or circulating or causing to be printed or circulated any statement, advertisement or publication, or to use any form of application or to make any inquiry in connection with prospective employment which expresses directly or indirectly any limitation, specification, or discrimination, unless based upon a bona fide occupational qualification.

b) Aiding, abetting, inciting, compelling or coercing the doing of any of the acts forbidden under ORS 659.010 to 659.110, or to attempt to do so.

c) Limiting, segregating, or classifying respondents' employees in any way which would deprive or tend to deprive them of equality in the terms, conditions, privileges, and opportunities of their employment because of race and color.

d) Engaging in any acts or practices which perpetuate or tend to perpetuate the discriminatory effects of practices which in the past may have had the effect of discriminating against individuals because of their race and color.

7) Respondent Norman H. Kneisel shall, within thirty (30) days of the date

of this Order, designate a person who will be an established liaison between N. H. Kneisel, Inc., and the Civil Rights Division to aid in the implementation of the remedies required by this Order.

8) Respondents shall, within sixty (60) days of the date of this Order, submit to the Civil Rights Division for approval an affirmative action program providing definite goals, timetables, and methods by which black persons will be recruited, hired for, and retained in those depot positions heretofore filled exclusively by white persons.

Respondents' affirmative action program will further include but not be limited to the following:

a) Written job descriptions for all employment positions at Trailways Bus Depot; said descriptions will accurately and objectively detail only those duties which are required in carrying out the position and only those qualifications necessary to perform the required duties which are "convenient" and those qualifications which may be desired.

b) Uniform grievance procedure whereby employees can appeal for relief from supervisory actions believed to be improper due to alleged bias because of race and color.

9) Respondents shall, within thirty (30) days after approval of the aforementioned affirmative action program by the Civil Rights Division and at one hundred-twenty (120) day intervals thereafter for a period of three (3) years, file with the Civil Rights Division written reports specifying in detail the efforts made by N. H. Kneisel, Inc.,

during the preceding one hundred-twenty (120) day period, to implement each and every requirement of this Order, and further specifying in detail the results of such efforts.

10) As part of the aforementioned reports, respondents shall provide an organizational and personnel chart showing each position with the Trailways Bus Depot when it is at its fullest staffing potential. The chart will be kept current by respondents from figures and facts of record as of the first day of each preceding one hundred-twenty (120) day period. The chart shall show the name of the person filling each position together with the race and color of that person. If a position has remained unfilled during the previous month, such fact will be noted on the chart.

IT IS FURTHER ORDERED that the office of Commissioner of the Oregon Bureau of Labor or its successors shall retain jurisdiction in this matter and if, for any reason not specified herein, new facts should develop which would affect any of the remedies provided herein, or the discriminatory conduct of any of the respondents should continue, the complainant, any persons similarly situated, the Administrator of the Civil Rights Division, or any of them may petition me for a Supplementary Order and Relief which would provide an adequate remedy for the complainant, or other persons similarly situated to carry out the purpose of the Civil Rights laws, and eliminate the effects of such alleged unlawful practices.

In the Matter of
MARV TONKIN FORD SALES, INC.,
an Oregon Corporation; and Ray
Gentile and Harlan Griffith,
Respondents.

Case Number [none]
Final Order of the Commissioner
Bill Stevenson
Issued April 2, 1976.

SYNOPSIS

Where Respondent corporation's agent asked different questions of a female applicant for a vehicle sales job than the questions asked of a male applicant, and the questions provided some evidence of different treatment based on the Complainant's sex, the Commissioner found the questions were not a factor in Respondent's decision not to hire the Complainant. Respondent did not violate ORS 659.030 where the corporation offered the job to a male before Complainant, a female, applied, and the Complainant was not qualified for the job. ORS 659.030.

The above entitled matter having come on regularly for hearing before Russell M. Heath, designated as Presiding Officer by the Commissioner of the Oregon State Bureau of Labor, the hearing being held in Room 36 of the State Office Building, 1400 S.W. Fifth Avenue, Portland, Oregon commencing at 9:00 a.m. on March 4, 1974, and continuing through March 8, 1974; the Complainant being present and the Civil Rights Division being present and represented by Victor Levy, Assistant

Attorney General, and the Respondents being present and represented by Terry Baker, Attorney at Law. On October 10, 1975, Dale Price was designated as Presiding Officer to replace Russell Heath who left state service. Having considered the entire record, I make the following Evidentiary Rulings, Findings of Fact, Conclusion of Law and Order.

EVIDENTIARY RULINGS

1) At the time of the hearing, testimony was elicited from various witnesses regarding events which occurred subsequent to the date of filing of the complaint. This testimony centered on attempts to resolve the issues of this case through negotiation among the parties. An objection was lodged and was based upon the theory that matters of attempted settlement prior to litigation are inadmissible as evidence of unlawful discrimination. A ruling was reserved. Upon review, the objection is overruled. This testimony was offered to show continuing acts of discrimination, not to expose the properly informal details of attempted settlement.

2) At the time of the hearing, testimony was elicited from Marv Tonkin regarding what field investigator Sandy Henderson had told Respondent Harlan Griffith. The testimony was objected to as hearsay and a ruling was reserved. Upon review, the objection is sustained.

3) At the time of hearing, a SR-22 certificate was offered in evidence and was objected to as irrelevant. Upon review the objection is overruled.

4) At the time of hearing, testimony was elicited which attempted,

through complainant's testimony, to separate the extent of alleged injury attributable to the actions of the various Respondents. This line of inquiry was objected to as outside the knowledge of the Complaint. A ruling was reserved. Upon review the objection is sustained.

FINDINGS OF FACT

Procedural

1) The Complainant, Sheila Sanford, on May 11, 1973, signed and filed with the Civil Rights Division of the Oregon Bureau of Labor, a complaint of unlawful discrimination on a form provided by the Civil Rights Division. Her signature was notarized by Notary Public Linda Baggenstos. Said Complainant alleged unlawful employment practices based upon sex by Marv Tonkin Ford Sales Incorporated. The complaint was subsequently amended in accordance with ORS 659.050(1) to include as Respondents Ray Gentile and Harlan Griffith who acted as employees and agents of Marv Tonkin Ford Sales Incorporated at all times incident to this inquiry.

2) Following the filing of said complaint, the allegations contained therein were investigated by Sandy Henderson, a field representative with the Civil Rights Division. At the conclusion of said investigation, an administrative determination was made that there existed substantial evidence to support the allegations of the complaint. Thereafter efforts were made to resolve the matter through conciliation, but such efforts were unsuccessful.

3) Thereafter, the Commissioner of the Oregon Bureau of Labor, by and through Gayle Gemmell, Administrator

of the Civil Rights Division, drew specific charges of unlawful discrimination against the Respondents, and each of them. It was charged that Respondents and each of them have:

a. Engaged in and continue to engage in unlawful employment practices designed and calculated to limit and restrict the sales personnel in the Recreational Vehicle Division of the Respondent, Marv Tonkin Ford, to males only.

b. Since on or about May 10, 1973, refused and continue to refuse to employ Sheila Sanford as a sales person in the Recreational Vehicle Division of Respondent Marv Tonkin Ford because of her sex.

c. Commencing on or about May 10, 1973, and continuously thereafter, aided and abetted each other and the Respondent Marv Tonkin Ford to engage in an unlawful employment practice, to wit, the refusal to hire Sheila Sanford because of her sex for a sales position in the Recreational Vehicle Division of the Respondent Marv Tonkin Ford.

Said charges were duly served upon the Respondents, and each of them. The hearing on the charges was scheduled for the fifth day of March, 1974, at the State Office Building, 1400 S.W. Fifth Avenue, Portland, Oregon.

4) Presiding Officer Russell M. Heath was present at all times during which the said hearing was convened. During the course of the hearing, the Presiding Officer ruled on motions by counsel and on the admissibility of evidence. Certain such rulings were reserved.

Background

1) Respondent Marv Tonkin Ford Sales Incorporated is an Oregon corporation of which Marv Tonkin is President. The Corporation is and was at all times mentioned herein a retail vehicle sales, leasing and rental organization employing numerous persons in a variety of capacities including, but not limited to, salespersons, clerical personnel, parts clerks, and supervisory personnel.

2) Respondent Ray Gentile was employed by Respondent Marv Tonkin Ford Sales Incorporated beginning in December of 1967. At the time Complainant applied for work with Respondent Corporation, Mr. Gentile was Assistant Sales Manager of the Recreational Vehicle Center and was responsible for initial screening of job applicants and forwarding of applications and recommendations to Respondent Harlan Griffith.

3) Respondent Harlan Griffith was employed by Marv Tonkin Ford Sales Incorporated beginning in February of 1973. At the time Complainant applied for work with Respondent Corporation, Mr. Griffith was manager of the Truck and Recreational Vehicle Divisions and was responsible for hiring and firing of employees within these divisions.

4) I find that Complainant, Sheila Sanford, is a female person who initially applied for employment at the aforementioned Recreational Vehicle Center on May 10, 1973.

5) Respondent Corporation has employed women in the past and at the time of the hearing in a variety of jobs including, but not limited to, Overseas Military Sales Manager, Daily

Rental Manager and Recreational Vehicle Sales Person at the Recreational Vehicle Center.

Chronology

1) On May 9, 1973, an ad appeared in the Oregonian newspaper soliciting applicants for "Recreational Vehicle Sales Counselor" with Respondent Corporation. I find that this ad was used to draw applicants for the one available position at the Recreational Vehicle Center and for the other sales locations where recreational vehicles, trucks, and automobiles are sold.

2) On May 9, John Langdon, a long time friend of Respondent Ray Gentile, was interviewed for the position at the Recreational Vehicle Center and was offered the job contingent upon agreement of his wife.

3) I find that at approximately 5:00 p.m. on May 10, 1973, after telephoning the Recreational Vehicle Center, Complainant did apply in person for the job in question and was interviewed by Respondent Gentile.

4) On May 11, 1973, early in the morning, Respondent Gentile spoke to Respondent Griffith about Complainant's application for employment and suggested that she was not qualified for employment as a vehicle sales person due to her lack of sales background and her driver's license which forbade her from driving Respondent Corporation's vehicles. Respondent Griffith concurred.

5) On May 11, 1973, between 8:30 and 9:30 a.m., Mr. Langdon accepted the offer of the only available job at the Recreational Vehicle Center and did begin working a few days later.

6) On May 11, 1973, well after 9:00 a.m. and after Mr. Langdon had accepted the job at the Recreational Vehicle Center, Complainant telephoned Respondent Gentile, identified herself, and was informed that the job at the Recreational Vehicle Center had been filled.

7) On May 11, 1973, at about 10:00 a.m., an acquaintance of Complainant's, one Mr. Dan Leedom, at Complainant's request, did telephone Respondent Gentile and was told that the job was still open. This was consistent with the prior filing of the job at the Recreational Vehicle Center in that when talking to Mr. Leedom, Respondent Gentile was acting in response to instructions from Respondent Griffith to solicit applicants for sales jobs at Respondent Marv Tonkin Ford's sales areas other than the Recreational Vehicle Center.

8) Following Complainant's filing of her complaint on May 11, 1973, field investigator Sandy Henderson of the Oregon Bureau of Labor Civil Rights Division telephoned Mr. Tonkin and arranged for a second interview for Complainant.

9) On May 18, 1973 Complainant was interviewed by Respondent Griffith and was given employment application forms and a credit check form to fill out; and was told that a restriction apparent on her motor vehicles operator's license, which forbade her from driving any vehicle except a certain 1965 Chevrolet, would have to be removed before she could be insured or employed by Respondent Corporation.

10) I find that on May 31, 1973, Complainant received a letter from Respondent Harlan Griffith which stated

in part that because of her failure to return completed credit check and employment application forms, and her failure to verify the lifting of the restriction from her motor vehicle operator's license, that Respondent Griffith assumed that her interest in working for Respondent Corporation had "terminated."

11) I find that field investigator Sandy Henderson telephoned Mr. Griffith after learning of the above mentioned letter to Complainant, and that Mr. Griffith stated that upon receipt of the forms and verification required he would find a place for Complainant in the organization.

12) On or about June 8, 1973, Respondent Griffith did telephone field investigator Henderson and did inform her that due to necessary sales staff reassignments pursuant to an impending leasing of the Recreational Vehicle Center to Cabana Corporation, that he would no longer be able to find a job for Complainant and that because Complainant had not cleared her driver's license, that he assumed that she was no longer interested in employment with Respondent Corporation.

13) On or about June 15, 1973, Cabana Corporation did take over occupancy and control of what was previously Respondent Corporation's Recreational Vehicle Center pursuant to a lease agreement with Respondent Marv Tonkin Ford Sales Incorporated.

Job Qualifications

1) The qualifications for the job of Recreational Vehicle Sales Person were reasonable and included the following:

a. Sales background;

b. Motor vehicle operator's license permitting operation of Respondent Corporation's vehicles.

2) Complainant's background included very little selling experience and a restricted motor vehicle operator's license which would prevent her from operating Respondent Corporation's vehicles.

3) Successful applicant John Langdon had considerable sales experience and was licensed to allow operation of Respondent Corporation's vehicles.

Job Availability

1) I find that there was only one position available at Respondent Corporation's Recreational Vehicle Center in May of 1973, and that this position was filled by John Langdon.

2) Respondent's Oregonian newspaper ad of May 9, 1973, was used to fill the job at the Recreational Vehicle Center, as well as to attract potential sales personnel for employment at other locations where recreational vehicles, trucks and automobiles are sold.

3) Respondent Griffith did, on May 18, 1973, discuss with Complainant a job available at Respondent Corporation's Truck Center where recreational vehicles trucks and automobiles are sold. Complainant did then state her desire to work only at the Recreational Vehicle Center.

Different Treatment

1) Both Complainant and John Langdon were asked to consult their spouses before being hired by Respondent Corporation due to the

likelihood of lengthy and irregular working hours.

2) Some questions were asked Complainant regarding her attire, her children, her means of relating to male co-workers, which were not asked of John Langdon. These questions provide some evidence of different treatment based upon Complainant's sex, but were not a factor in Respondent's decision not to hire Complainant.

CONCLUSIONS OF LAW

1) At all times material herein, Respondent Marv Tonkin Ford Sales Incorporated was and is an Oregon corporation authorized to do business in Oregon and is an employer subject to ORS 659.010 through 659.110.

2) At all times material herein, Respondent Ray Gentile was an employee of Respondent Corporation with authority and responsibility for preliminary screening in recruiting, hiring, promoting, transferring, and discharging employees and prospective employees of and for the Recreational Vehicle Division of Respondent Corporation. As such, Mr. Gentile is subject to ORS 659.010 through 659.110.

3) At all times material herein, Respondent Harlan Griffith was the managing agent of the Truck and Recreational Divisions of Respondent Corporation, and was responsible for the recruiting, hiring, promoting, transferring and discharging of employees and prospective employees of the Recreational Vehicle and Truck Divisions. As such, Mr. Griffith is subject to ORS 659.010 through 659.110.

4) The specific charges of unlawful employment practices based upon sex against Respondents Marv Tonkin

Ford Sales Incorporated, Ray Gentile, and Harlan Griffith are not supported by the weight of the evidence presented and Respondents did not commit unlawful employment practices in violation of ORS 659.030.

ORDER

In accordance with the Findings of Fact and Conclusions of Law set forth above, it is hereby ordered that the specific charges of unlawful employment practices based upon sex and the complaint against Marv Tonkin Ford Sales Incorporated, Ray Gentile and Harlan Griffith and each of them are dismissed.

**In the Matter of
Marvin Bright, dba
BRIGHT'S ARCO,
Respondent.**

Case Number [none]

Final Order of the Commissioner

Bill Stevenson

Issued June 30, 1976.

SYNOPSIS

Where Respondent employer refused to hire a Mexican American complainant as a part-time service station attendant when he responded to a newspaper advertisement the day after it was published, Respondent did not commit an unlawful employment practice because the one position available

was filled on the day the ad first appeared, and complainant's national origin or color bore no relation to his non-hire. ORS 659.010(6); 659.030(1); 659.060(4).

The above entitled matter having come on regularly for hearing before Russell M. Heath, designated Presiding Officer by the Commissioner of the Oregon Bureau of Labor, the hearing being held in room 208, Memorial Union Building, Oregon State University, Corvallis, Oregon at 9:30 a.m. on November 13, 1974; the Agency and Complainant being present and represented by Thomas E. Twist, Assistant Attorney General, and the Respondent being present and represented by Donald R. Todorovich, Attorney at Law. On October 10, 1975, Dale A. Price was designated as Presiding Officer to replace Russell M. Heath, who left State service. The Commissioner of Labor having reviewed the Findings of Fact, Conclusions of Law and Order proposed by the Presiding Officer and having considered the exceptions thereto filed by parties to this action does hereby make the Findings of Fact, Conclusions of Law and Order, which follow the Evidentiary Rulings herein.

EVIDENTIARY RULINGS

1) At the time of the hearing, testimony from Ms. Jeanette Sargeant was elicited regarding what Mr. Paul Anderson had said during a Corvallis Human Relations Committee meeting held in October 1971. The testimony was objected to as hearsay and a ruling was reserved. Upon review, the objection is sustained.

2) At the time of the hearing, testimony from Mr. Richard Olsen was elicited regarding his knowledge of Mr. Bright's reputation for trust and veracity in the community. The testimony was objected to as being incompetent and irrelevant. A ruling was reserved. Upon review the objection is sustained.

3) At the time of the hearing, testimony from Mr. Bill Foster was elicited regarding how he knew that Respondent Mr. Bright had hired an applicant prior to Complainant's time of application. The witness stated that Mr. Bright told him someone had been hired. The testimony was objected to as hearsay and a ruling was reserved. Because the declarant, Mr. Bright, was present at the hearing and subject to cross examination, the objection is overruled.

4) At the time of the hearing, testimony was elicited from Mr. Bill Foster regarding whether he was subpoenaed to appear at the hearing. The testimony was objected to as irrelevant and a ruling was reserved. Upon review, the objection is overruled.

FINDINGS OF FACT

Procedural

1) Complainant Charles Martinez did on October 12, 1971, file with the Civil Rights Division of the Oregon Bureau of Labor a complaint of discrimination alleging that Marvin Bright, dba Bright's ARCO, had unlawfully refused to consider him for employment solely because of his national origin or color.

2) Pursuant to the filing of the aforementioned complaint, the Civil Rights Division conducted an investigation of the allegations contained therein. At the conclusion of said

investigation an administrative determination was made that there existed substantial evidence in support of the Complainant's allegations. Subsequent efforts to resolve the matter through conference and conciliation were unsuccessful.

3) Thereafter, the Commissioner of the Oregon Bureau of Labor, by and through Lee E. Moore, Administrator of the Civil Rights Division, drew Specific Charges of unlawful employment practices based upon national origin or color against Marvin Bright, dba Bright's ARCO. The Specific Charges are as follows:

A) Commencing on or about October 6, 1971, and continuously thereafter the Respondent, Marvin Bright, because of the national origin or color of Charles Martinez refused to hire and employ Charles Martinez, who had applied for employment as a gas station attendant at the Respondent's service station business in Corvallis, Oregon.

B) That as the effect of the Respondent's refusal to hire and employ Charles Martinez because of Charles Martinez's national origin or color, Charles Martinez has suffered damages for which he claims compensation as follows:

(1) Humiliation, indignity, tension and nervousness \$5,000; (2) Travel expenses incurred as a result of attending public hearing \$200; (3) Loss of income for the period of October 7, 1971, to July 1, 1974, \$4,430. Total \$9,630.

4) Said charges and a Notice of Hearing were duly served upon the Respondent. The hearing on the charges was scheduled for November

7, 1974, in room 208 of the Memorial Union Building, Oregon State University, Corvallis, Oregon. Upon request of attorney for Respondent, the hearing was set over to November 13, 1974.

5) The Presiding Officer, Dale A. Price, was present at all times during which the said hearing was convened. During the course of the hearing, Presiding Officer Russell M. Heath ruled on motions by counsel and on the admissibility of evidence and reserved certain rulings.

Background

1) Respondent Marvin Bright was at the time of hearing and at all times material herein, the owner and operator of an ARCO service station located at 2100 N.W. 9th Street, Corvallis, Oregon, and known as Bright's ARCO. During October 1971 and at all times material herein, Mr. Bright employed four to five employees at Bright's ARCO.

2) As owner and manager of Bright's ARCO, Mr. Bright retained full and final authority over all employment and personnel matters including but not limited to recruiting, hiring, compensation, promoting and firing of all employees and prospective employees of Bright's ARCO.

3) Complainant Charles Martinez is a Mexican American male who during all times material herein did reside in Corvallis, Oregon, where he is attending Oregon State University.

4) The alleged involvement of Complainant's acquaintance, Mr. Paul Anderson, in the events material herein cannot be considered in weighing the evidence herein because Mr.

Anderson did not testify nor did he sign any written statements, nor did Complainant hear the conversations alleged to have taken place between Mr. Anderson and Respondent Bright.

5) Respondent Bright did work the 7:00 a.m. to 4:00 p.m. shift at Bright's ARCO service station at all times material herein.

6) Because it is impossible to discern when Respondent Bright first attempted to "kill" the newspaper ad for the position in question, I draw no inference from the fact that this ad did run beyond the date of hiring Mr. John Moore.

Chronology

1) It has been stipulated and I find that on October 6, 1971, the following job opening advertisement was placed by Respondent Bright in the Corvallis Gazette Times:

"Experienced Service Station Attendant needed. Over 21, must be clean cut. Part time night shift and weekends. Call 753-3865."

2) In the afternoon or early evening of October 6, 1971, Mr. John L. Moore did apply for the job at Bright's ARCO in person and in response to the aforementioned ad. Mr. Moore did speak to Mr. Bright and was on this day hired for the position in question, although he was not to begin work until the next week.

3) On October 7, 1971, at approximately 11:30 a.m., Complainant Charles Martinez did telephone Respondent Bright in response to the aforementioned ad and did tell Mr. Bright that he had six months service station experience, to which Mr. Bright responded that six months was

inadequate experience and that he had a prior applicant with greater experience.

4) On October 7, 1971, at approximately 2:30 p.m., Complainant did apply for the job in question in person at Bright's ARCO, and did tell Respondent that he had one and one half year's experience as a service station attendant. Respondent did then tell Complainant that the position had been filled.

5) On October 8, 1971, at approximately 5:00 p.m., a friend of Complainant, one Manual Silva, did apply in person at Bright's ARCO for the position in question and was informed by an employee, not Mr. Bright, that the job was probably filled, but that Mr. Silva should call Mr. Bright later to be certain.

6) Mr. Silva did telephone Respondent later on the same day, October 8, 1971, and was informed by Mr. Bright that the job had, in fact, been filled.

7) On October 8, 1971, at about 9:00 p.m. and subsequent to Mr. Silva's call to Respondent Bright, Complainant did call Bright's ARCO and did inquire about the job opening in question and an employee, not Mr. Bright, did tell him to come in person on the next day to talk to Mr. Bright about the job.

8) On October 9, 1971, at approximately 9:00 a.m., Complainant did telephone Bright's ARCO and was informed by an unidentified employee that the job in question was still available and that Mr. Martinez should come to Bright's ARCO to talk to Mr. Bright about the job.

9) Mr. John Moore did begin work in the only available job of service station attendant at Bright's ARCO on October 14, 1971.

Job Availability

1) There was only one job as service station attendant at Bright's ARCO available during the times material herein.

2) Respondent believed that John Moore was hired on October 6, 1971, and would begin work during the next week. In reaching this finding I have considered Mr. Bright's testimony and demeanor during testimony which seemed honest, reasonable and truthful.

3) Any confusion regarding job availability when Complainant applied on October 7 and thereafter was a result of Respondent's failure to immediately inform all of his employees that he had filled the job on October 6, 1971, and not as a result of Respondent's own consistent reporting that the job was filled at all times subsequent to his interview with John Moore on October 6, 1971.

Qualifications

1) There was ample testimony offered regarding job qualifications and Complainant's ability to perform the tasks required for the position in question. I make no finding on this matter because the job was filled prior to Complainant's application and Complainant's qualifications were therefore not at issue.

2) Successful applicant John Moore had approximately three years experience as a gas station attendant prior to application for work at Bright's

ARCO and was in all respects qualified for the position in question.

ULTIMATE FACTS

Respondent Marvin Bright did fill the one available job as part-time service station attendant at Bright's ARCO by hiring a fully qualified applicant, John Moore, on October 6, 1971. Complainant Charles Martinez was not hired because he did not apply until October 7, 1971. Complainant's national origin bore no relation to his failure to obtain employment at Bright's ARCO.

CONCLUSIONS OF LAW

1) Respondent Marvin Bright, dba Bright's ARCO, was at all times material herein an employer within the definition thereof set forth in ORS 659.010(6) and as such is subject to the provisions of ORS 659.010 through 659.110.

2) In accordance with the facts as found and recited herein, I conclude that the Respondent Marvin Bright, dba Bright's ARCO, has not violated the provisions of ORS 659.010 through 659.110 in filling the position in question, nor did he unlawfully discriminate against Complainant Charles Martinez because of his national origin or color.

ORDER

In accordance with the aforesaid Findings of Fact and Conclusions of Law, it is hereby Ordered that the Specific Charges and the complaint of unlawful discrimination based upon national origin or color against Respondent Marvin Bright, dba Bright's ARCO, are dismissed in accordance with ORS 659.060(3).

In the Matter of N. H. KNEISEL, INC. and Norman H. Kneisel, Respondents.

Case Number 07-72
Amended Final Order of the
Commissioner
Bill Stevenson
Issued July 1, 1976.

SYNOPSIS

The Commissioner deleted eight parts of the final order, reported at 1 BOLI 28 (1976), because they had become moot. The Commissioner retained jurisdiction of the matter to permit the complainant, any persons similarly situated, or the Administrator of the Civil Rights Division to petition for an adequate remedy, if necessary.

The above entitled matter having come regularly for hearing before Dale A. Price, designated as Presiding Officer by the Commissioner of the Oregon Bureau of Labor; the Hearing having been convened in Room 678, State Office Building, 1400 S.W. 5th Avenue, Portland, Oregon, at 9:00 a.m., on May 20, 1976. The Labor Commissioner, being present at this hearing, hereby issues the following Additional Findings of Fact, Additional Conclusions of Law and Amended Order.

ADDITIONAL FINDINGS OF FACT

1) On January 23, 1976, the Commissioner of the Bureau of Labor issued Findings of Fact, Conclusions of Law and Order concerning unlawful

employment practices based upon race and color by N.H. Kneisel Inc., and Oregon Corporation and Norman H. Kneisel, an individual.

2) On January 31, 1976, Complainant requested a reconsideration of Parts 2, 5, 8 and 10 of the Order.

3) On March 15, 1976, Respondents filed a Petition for Reconsideration of the Order on the grounds that Respondents were no longer involved with Trailways Bus Depot and therefore certain parts of the Order may be moot.

4) The Request for Reconsideration of the Order with respect to Parts 2, 5, 8 and 10 was granted and a hearing was held on May 20, 1976.

5) The Respondents no longer control or operate the Portland Trailways Bus Depot, but do still engage in other enterprises which employ various people in various jobs.

6) There is no evidence that unlawful practices formerly occurring at the Trailways Bus Depot also exist in Respondents current businesses.

7) Complainant no longer desires employment with Respondents.

ADDITIONAL CONCLUSIONS OF LAW

1) Since Complainant no longer desires employment with Respondent, those portions of the Order relating to an offer of employment are moot.

2) Requirements that the Order be posted in the Bus Depot, that Respondents develop an affirmative action program for the Bus Depot, and that Respondents provide a personnel chart for the Bus Depot are all moot.

AMENDED ORDER

In accordance with the foregoing Additional Findings of Fact and Additional Conclusions of Law, portions 2, 3, 4, 5, 7, 8, 9, and 10 of the January 23, 1976, Order are hereby deleted. All other provisions of the Order of January 23, 1976, remain unchanged and in full force and effect.

IT IS FURTHER ORDERED that the Office of the Commissioner of the Oregon Bureau of Labor or its successors shall retain jurisdiction in this matter and if for any reason not specified herein, new facts should develop which would affect any of the remedies provided herein, or the discriminatory conduct of any of the Respondents should continue, the Complainant, any persons similarly situated, the Administrator of the Civil Rights Division or any of them may petition me for a Supplementary Order and Relief which would provide an adequate remedy for the Complainant, or other person similarly situated to carry out the purpose of the Civil Rights Laws, and eliminate the effects of such alleged unlawful practices.

**In the Matter of
SCHOOL DISTRICT NO. 1,
Multnomah County, Oregon,
Respondent.**

Case Number 01-71

Order of the Commissioner Based on
the Mandate of the Court of Appeals

Bill Stevenson

Issued July 23, 1976.

SYNOPSIS

Following the issuance of a Final Order in this case, *In the Matter of School District No. 1*, 1 BOLI 1 (1973), and Respondent's appeals to the state Court of Appeals and Supreme Court, the Commissioner issued this remand order enjoining Respondent from discriminating against any probationary teacher on the basis of her pregnancy or other disability caused or contributed to by pregnancy, miscarriage, abortion, childbirth, or recovery therefrom. The Commissioner ordered Respondent to notify all probationary teachers who were required to resign for pregnancy or maternity related reasons since August 21, 1969, that they would be given preference for reemployment, and that they had a right to compensation for monetary damages, with limitations. The Commissioner retained jurisdiction to administer Respondent's compliance with this Order.

The Court of Appeals decision is reported at *School District No. 1 v. Nilson*, 17 Or App 601, 523 P2d 1041 (1974). The Supreme Court decision is reported at 271 Or 461, 534 P2d 1135 (1975).

Based upon the Judgment and Mandate of the Court of Appeals on Judicial Review of the Findings of Fact, Conclusions of Law and Order of the Commissioner of the Bureau of Labor entered in this cause on or about the 23rd day of May, 1975, The Commissioner of the Oregon Bureau of Labor hereby enters the following Order.

ORDER

I. Injunctive Provisions

The Respondent, School District No. 1, Multnomah County, its board, agents, officers, employees, and successors in interest and all persons in active concert or participation with any of them are enjoined from engaging in any acts or practices which have the purpose or effect of requiring or causing the termination of any probationary teacher because of pregnancy or other disability caused or contributed to by pregnancy, miscarriage, abortion, childbirth or recovery therefrom.

II. Remedies

A) The Respondent, School District No. 1, shall within sixty (60) days of the date of this Order provide a copy of this Order by certified mail to all pregnant probationary teachers who resigned for pregnancy or maternity related reasons since August 21, 1969.

B) Except as provided in B) 2 and 3 below, the Respondent School District No. 1, shall within sixty (60) days of the date of this Order provide written notice by certified mail to all probationary teachers who were required to resign by the unlawful employment practices enjoined in "I" above since August 21, 1969, for pregnancy or maternity related reasons, advising them that they will be given preference for

reemployment with Respondent School District for openings as they occur in positions for which they are qualified.

(1) The form of this notice shall be presented in writing to the Presiding Officer for the approval of the Commissioner of the Bureau of Labor prior to delivery to teachers.

(2) If a teacher otherwise entitled to notice under this section has been reemployed by Respondent School District prior to the date of this Order, in a position comparable to that from which she resigned, then no notice need be provided to her under this section. Respondent shall provide to the Presiding Officer a list of all teachers in this category certified by the clerk of the School District.

(3) If a teacher otherwise entitled to notice under this section has, prior to the date of this Order, advised Respondent School District in writing that she is not interested in reemployment with Respondent School District, then no notice need be provided to her under this section. Respondent School District shall provide a list of all teachers in this category with copies of the teachers' written statements to the Presiding Officer.

C) Respondent, School District No. 1, shall within sixty (60) days of the date of this Order provide written notice by certified mail to each probationary teacher who resigned for pregnancy or maternity related reasons since August 21, 1969, advising them of their right to compensation for any monetary damage suffered as a result of the unlawful employment practices of Respondent School

District enjoined in Part I of this order and including:

Lost wages or salary to be computed as follows:

- 1) Date of forced resignation.
- 2) Date of completion of seventh month of relevant pregnancy.
- 3) Total days unlawfully prevented from working.
- 4) Rate of pay per work day at time of forced resignation.
- 5) Total lost wages (amount in # 3 multiplied by amount in # 4).
- 6) Total earned from other sources or which could, with reasonable diligence, have been earned during same period.
- 7) Net lost wages or salary (amount in # 5 minus amount in # 6).

Selection of the end of the seventh month as the terminal point for lost wages is based upon a reasonable average physical capacity as reflected by standard III B) of Respondent's maternity leave policy of January 10, 1972, Exhibit Y in this proceedings, which states in part that:

"In no case may such leave or effective date of resignation or change of status begin later than the end of the seventh month of pregnancy unless a physician appointed by the District recommends in writing to the contrary."

D) The notice to be provided in C) above shall be subject to the following limitations:

- 1) The form of notice provided under section C) shall be presented in writing to the Presiding Officer for the approval of the Commissioner of the

Bureau of Labor prior to the delivery to teachers.

2) Said notice may include a statement of the heavy burden of proof required of any teacher who asserts damage in the area of mental or emotional suffering or distress as established by the decision of the Supreme Court in this case.

E) The following limitations are placed upon the right to compensation of any probationary teacher:

- 1) No compensation shall be awarded for the remainder of the school year after a probationary teacher was physically able to return to work but chose not to do so.
- 2) No compensation shall be awarded for sick pay while absent for pregnancy related reasons.

III. Administration

A) The Commissioner of the Bureau of Labor retains jurisdiction in this case and hereby appoints Presiding Officer Dale A. Price to administer all aspects of compliance with this Order. All correspondence initiated pursuant to the provisions of this Order shall be addressed to Dale A. Price, Presiding Officer, Oregon Bureau of Labor, 2300 SW 6th Avenue, Portland, Oregon 97201.

B) If the Commissioner of the Bureau of Labor does not approve of the form of any notice presented for approval by Respondent School District pursuant to this Order, he will provide to Respondent School District a form of notice consistent with the provisions of this Order.

C) A probationary teacher's right to claim compensation and preferential consideration for rehiring will be

deemed waived if no claim or request is made in writing to the Respondent School District within one hundred and twenty (120) days of the receipt of the notice of these rights.

D) Respondent School District shall, within thirty (30) days of the date of this Order, provide a written list of the names and addresses of all probationary teachers who have resigned from the School District for pregnancy or maternity related reasons since August 21, 1969, to the Presiding Officer.

E) Respondent School District shall, within one hundred and twenty (120) days of the date of this Order and each sixty (60) days thereafter provide a written statement of the names, addresses, and telephone numbers of all persons with whom proposed settlement has been reached and the terms thereof to the Presiding Officer. This requirement will terminate when all members of the class have entered settlements or when all reasonable efforts to locate an individual member of the class have failed. In the event of inability to locate an individual member of the class, the Respondent School District shall provide documentation of efforts to locate that person to the Presiding Officer.

F) It is the intent of this Order to encourage all parties to make good faith efforts to reach settlement in all cases without further action by the Commissioner of the Bureau of Labor. If a probationary teacher who was required to resign does not reach an agreement for settlement with Respondent School District within one hundred and eighty (180) days from the date of this Order, she may petition the

Presiding Officer for an additional fact-finding hearing and a supplementary order consistent with the provisions of this Order. The petition shall be in writing and shall state relevant facts in support of her claim.

G) Any member of the affected class claiming compensation under the provisions of this Order shall provide to Respondent School District, upon request, all medical information relevant to the determination of a claim for compensation.

H) If this Order is appealed and this Order or any portion thereof is stayed during the appeal, the time or times specified herein for the performance of any act or series of acts will automatically be extended to commence thirty (30) days subsequent to the decisions of the highest appellate court which decided any issue in this Order.

**In the Matter of
The State of Oregon, By and
Through the State Board of Higher
Education Operating
SOUTHERN OREGON COLLEGE
at Ashland, Respondent.**

Case Number 04-74
Final Order of the Commissioner
Bill Stevenson
Issued July 23, 1976.

SYNOPSIS

Finding that Respondent's search committee refused to consider

Complainant, who was a qualified applicant, for the position of director of its student health center because he was 63 years old and respondent's retirement age was 65, the Commissioner held that Respondent violated ORS 659.026. The Commissioner found that complainant was not as qualified as the 58-year-old successful applicant, and would not have been hired even if given fair consideration. The Commissioner awarded no lost wages. Finding that complainant suffered humiliation, frustration, and mental anguish from being advised by Respondent that the committee would not consider his qualifications because he would only be available for approximately one year (due to his age), the Commissioner awarded \$2,500 for mental anguish. The Commissioner ordered Respondent not to disqualify future applicants between ages 18 and 65¹ because of their age. ORS 659.010(2) and (6); 659.026(1), (2), and (3); 659.060(3).

The above-entitled matter having come on regularly for hearing before hearings officer Russell M. Heath, designated as Presiding Officer by the Commissioner of the Oregon Bureau of Labor, the hearing having been convened at 9:30 a.m. on February 4, 1975, in Room 305, Student Union Building, Southern Oregon College, Ashland, Oregon, and continuing through February 5, 1975; the

¹ Ed: At the time of the violation herein, ORS 659.026 prohibited public employers from discriminating based on age if the individual was 25 years of age or older and under 65 years of age; at the time of the hearing and order herein, the statute prohibited public employers from discriminating based on age if the individual was 18 years of age or older and under 65 years of age.

Complainant being present and the agency being present and represented by Victor Levy, Assistant Attorney General, and the Respondent being present and represented by Harry Skerry, Attorney at Law. On October 10, 1975, Dale A. Price was designated as Presiding Officer to replace Russell M. Heath, who resigned from his employment with the State of Oregon. Bill Stevenson, Commissioner of Labor, having considered the Findings, Conclusions and Order proposed by the Presiding Officer and the exceptions thereto does hereby make the Findings of Fact, Conclusions of Law and Order, which follow the Presiding Officer's Evidentiary Rulings herein.

EVIDENTIARY RULINGS

1) During the hearing, and by way of preliminary matters, the Presiding Officer listed eleven items which had been offered in evidence during a pre-hearing conference on February 3, 1975. An objection to admission of the Oregon State University Personnel File of Complainant was lodged by Mr. Levy on the basis that parts of the file are incompetent and constitute hearsay. A ruling was reserved. Upon review the objection is sustained with respect to the whole file except with respect to a letter from M. Popovich, Dean of Administration at Oregon State University, to Complainant dated June 2, 1964, and stating that Complainant's employment at the Oregon State University Student Health Center

was terminated effective June 30, 1964. As to this letter the objection is overruled.

2) During the hearing, testimony was elicited from Complainant regarding when he first became licensed to practice medicine in the State of Oregon. An objection was lodged on the ground that the best evidence of the content of a document such as a license is the license itself. A ruling was reserved. Upon review, the objection is overruled.

FINDINGS OF FACT

Procedural

1) The Complainant, Dr. John H. Kuitert, M.D., on or about February 24, 1972, did file with the Civil Rights Division of the Oregon Bureau of Labor a complaint alleging unlawful discrimination. His signature was notarized by Notary Public Aldine Clement. Said Complainant alleged unlawful employment practices based upon age by Dr. Alvin L. Fellers, Dean of Students at Southern Oregon College, and the Oregon Board of Higher Education.

2) On November 29, 1974, said complaint was amended to denote [the] State of Oregon by the Oregon State Board of Higher Education as Respondent.

3) Following the filing of said complaint, the allegations contained therein were investigated by a field investigator with the Civil Rights Division. At the conclusion of said investigation, an administrative determination was made that there existed substantial evidence to support the allegations of the complaint. Thereafter efforts were made to resolve the matter through conciliation, but such efforts were unsuccessful.

4) Thereafter, the Commissioner of the Oregon Bureau of Labor, by and through Lee E. Moore, Acting Administrator of the Civil Rights Division, drew Specific Charges of unlawful discrimination against the Respondent. It was charged that:

Commencing on or about January 1972 the Respondent sought to fill the position of Director of the Student Health Center at Southern Oregon College at Ashland. That on or before January 24, 1972, Dr. John H. Kuitert, M.D., applied for said position. That at the time of said application, and at all times material herein, Dr. Kuitert was in all respects fully qualified to fill said position. That the Respondent refused to fairly consider or to employ Dr. Kuitert for said position because of his age, and sought to and did employ for said position a person younger in age than Dr. Kuitert.

Said charges were duly served upon the Respondent. The hearing on the charges was scheduled for the fourth day of February 1974 in Room 305, Student Union Building, Southern Oregon College, Ashland, Oregon.

5) Presiding Officer Russell Heath was present at all times during which the hearing was convened. During the course of the hearing, Presiding Officer Russell Heath ruled on motions by counsel and on the admissibility of evidence. Certain such rulings were reserved.

Background

1) Respondent Oregon State Board of Higher Education operates Southern Oregon College which is,

and was at all times material herein, an institution of higher education employing persons in a variety of positions including, but not limited to, faculty and maintenance personnel.

2) At all times material herein Respondent had no procedure for administrative review of alleged unlawful employment practices which was available to Complainant Dr. John H. Kuitert.

3) Complainant was born on August 28, 1908, and was sixty-three (63) years of age at the time he applied for employment with Respondent.

4) Screening of applicants for the job in question was conducted by the Search Committee for Health Center Director, which included: a local psychiatrist who worked part time with Southern Oregon College students; a Medford gynecologist; a physician active in planned parenthood; an Ashland physician who sees many college students; the Director of Southern Oregon College's Nursing Program; the Southern Oregon College Athletic Director; a health care center staff member; a faculty member active in women's sports; the Director of Southern Oregon College's Counseling and Guidance Center; and six (6) students who had voiced an interest. This committee did initial screening of applicants for qualifications, and conducted interviews with finalists before forwarding recommendations to the College President. Final approval of the applicant recommended was by the President of Southern Oregon College.

5) The position in question was an administrative job. The Oregon State Board of Higher Education does require retirement of its administrators at

age sixty-five (65), but an administrator may be retained beyond age sixty-five (65) if the appointing authority, who is the President of Southern Oregon College in this case, deems retention of such employee to be for the benefit of the College.

Chronology

1) On December 10, 1971, the Search Committee issued an announcement of an opening for the position of Director of the Student Health Center at Southern Oregon College.

2) On January 19, 1972, Complainant wrote to the Dean of Students at Southern Oregon College to roughly outline his medical experience and to request details and a job description.

3) On January 24, 1972, Dr. Alvin Fellers, Dean of Students of Southern Oregon College, wrote to Dr. Kuitert to forward a copy of the job description, an application form, and a brochure regarding Southern Oregon College in general.

4) Later in January Complainant did submit his completed application.

5) On February 2, 1972, the Search Committee for Health Center Director met and decided that because Dr. Kuitert would be sixty-five years of age in approximately one year, that they would not consider his qualifications but would seek a physician who would be available for a number of years.

6) On February 4, 1972, Dean of Students Dr. Alvin Fellers wrote a letter which stated that because Complainant would be available only for approximately one year, that the Search Committee had decided to look for

another physician who would be available for a number of years.

7) On March 1, 1972, the Search Committee for Health Center Director voted to recommend Dr. Robert Schmidt, who was fifty-eight (58) years of age, for the position in question.

8) In March 1972, Dr. Sours, who was at all times material herein President of Southern Oregon College and the appointing authority for the position in question, did accept the aforementioned Committee recommendation and did hire Dr. Robert Schmidt as Director of the Southern Oregon College Student Health Center.

9) In July 1972, Dr. Schmidt began working at Southern Oregon College as Director of the Student Health Center.

10) In July 1974, Dr. Schmidt voluntarily terminated his employment with Respondent to take a position with the U.S. Veteran's Domiciliary in White City, Oregon.

Qualifications

1) Respondent did reasonably require the following qualifications for the position in question:

a. That the applicant be a medical doctor who is a general practitioner.

b. That the applicant be experienced in the field of medicine.

2) The Director of the Student Health Center was expected to do the following:

a. Reestablish credibility of the Center with the students.

b. Establish preventive medicine and family planning programs.

c. Develop the educational potential of the Center.

d. Establish a working relationship with county health agencies, valley physicians, and [the] college press.

3) Complainant did have considerable experience in the following areas at the time of his application:

a. Internship at US Marine Hospital, Norfolk, Virginia.

b. Residency at University of Nebraska Medical School Bacteriology and Fever Therapy.

c. Assistant Superintendent of School for Epileptics and Mental Defectives in Glenwood, Iowa.

d. Residency, Veteran's Administration Neuropsychiatry in Wasco, Texas.

e. US Army Medical Corps:

(1) Chief of Medical and Surgical Services at Veteran's Hospital, St. Cloud, Minnesota.

(2) Chief of Physical Medicine Service at Fitzsimmons Army Hospital, Denver, Colorado.

(3) Chief of Physical Medicine Rehabilitation, Walter Reed Hospital, Washington, D.C.

(4) Chief of Physical Medicine, Army Tripler Hospital, Honolulu, Hawaii.

(5) Chief of Physical Medicine Rehabilitation and Professor at Army Medical School, Fort Sam Houston Army Hospital, Texas.

(6) US Army Medical Corps Liaison to Canadian Army and Canadian Department of Defense.

(7) Post Surgeon, 4th Infantry, Fort Lewis, Washington.

(8) Chief of Professional Services for Medicare.

(9) Surgeon for Military District of Washington, D.C.

f. Staff Physician, Oregon State University.

g. Chief, St. Vincent Hospital Rehabilitation Center, Erie, Pennsylvania.

At the time of his application for the position in question, Complainant had not practiced medicine for about two years. Complainant was not at the time of application, nor had he ever been, a general practitioner.

4) Complainant's employment was terminated in 1964 at Oregon State University where he worked in a position similar to the position here in question at the Oregon State University Student Health Center.

5) Successful applicant Dr. Robert Schmidt had experience in the field of medicine as follows:

a. Two years rotating internship for general practice.

b. Plant Physician for Chrysler Motor Factory, Detroit, Michigan.

c. US Navy Medical Corps, 1942-1946.

d. Internal Medicine and Cardiology, Cincinnati, Ohio, 1946-1964.

e. General medical practice and surgery, Brookings, Oregon, 1954 to time of application.

At the time of his application for the position in question Dr. Schmidt was a general practitioner and Curry County physician with extensive contacts established in the county in which Southern Oregon College is situated. He was familiar with the college, the

community, its health facilities and physicians. He had strong credibility in the student community.

6) Although they have attempted to justify their failure to consider Complainant's application for employment by stating a need for several years availability, Respondent has failed to produce evidence to show that the time Complainant had available prior to reaching age sixty-five was not adequate to perform the duties required. The doctor hired for the position did, in fact, stay for only a short period of time, and was praised for his work upon resignation.

ULTIMATE FACTS

1) Complainant Dr. John H. Kuitert was not afforded fair and thorough consideration of his qualifications for the position of Director of the Student Health Center at Southern Oregon College because of his age.

2) Complainant and the Agency have demonstrated that Complainant was unlawfully discriminated against because of his age. An assessment of damages incident to Complainant's injury must consider the issue of whether he would have been hired but for the proven unlawful discrimination. By providing evidence, obtained subsequent to the aforementioned unlawful act, and set forth in the Qualifications section above, Respondent has shown that Complainant was not as well qualified as was the successful applicant who was at the time of application an active general practitioner in the Southern Oregon area, with experience as a County Physician and with extensive contacts in the medical community surrounding Southern Oregon College. Complainant would not have been

hired for the position in question even if given thorough and fair consideration. In view of this evidence, Complainant suffered no lost wages as a result of the unlawful action of Respondent, and an award of back pay is not therefore an appropriate remedy.

3) I find that Complainant became depressed and suffered considerable mental anguish as a direct consequence of Respondent's unlawful action in deeming him too old to fill the position in question while Complainant felt himself to be fully capable of performing the duties described in the relevant job description.

4) Because of the unlawful employment practice of Respondent, Complainant Dr. John H. Kuitert has suffered damages for which he shall be compensated by Respondent in the following amount:

Humiliation, frustration, mental anguish, and suffering – \$2,500.00.

Total Damages – \$2,500.00.

CONCLUSIONS OF LAW

1) At all times material herein, Respondent Oregon State Board of Higher Education was an employer within the definition contained in ORS 659.010(6) and as such is subject to the provisions of ORS 659.010 through 659.110.

2) The specific charges of unlawful employment practices based upon age against Respondent Oregon State Board of Higher Education are supported by the weight of the evidence presented, and Respondent committed an unlawful employment practice in violation of ORS 659.026, in that it failed to consider Complainant for the

position in question because of his age.

3) Due to the unlawful act described herein, Complainant suffered humiliation, frustration, and mental anguish damages in the amount of \$2,500.00.

ORDER

In accordance with the Findings of Fact and Conclusions of Law set forth above, it is hereby Ordered that:

1) Respondent Oregon State Board of Higher Education pay to Complainant Dr. John H. Kuitert the sum of \$2,500.00 for humiliation, frustration, mental anguish, and suffering by delivering a check in this amount to the business office of the Bureau of Labor, Room 443, 1400 S.W. Fifth Avenue, Portland, Oregon, 97201 not later than thirty (30) days from the date of this Order.

2) A copy of these Findings of Fact, Conclusions of Law and Order shall be provided to all persons hereafter participating in the hiring of professional persons for Respondent for a period of two (2) years from the date of this Order.

3. Respondent is hereby enjoined from disqualifying any future applicants between the ages of eighteen (18) and sixty-five (65) from consideration for positions in their institutions because of their age.

**In the Matter of
MONTGOMERY WARD
AND COMPANY, INC.,
an Illinois Corporation,
Respondent.**

Case Number 02-76
Final Order of the Commissioner
Bill Stevenson
Issued August 10, 1976.

SYNOPSIS

In April 1974 Respondent rejected Complainant as an appliance salesman after a brief medical examination by Respondent's general practitioner physician, who disqualified Complainant on the basis of a heart attack in 1968. Complainant's heart condition was a physical handicap that did not prevent the performance of the work involved, there being a reasonable expectation of continuous performance based upon the medical opinion of a cardiac specialist who had monitored Complainant since 1968. The Commissioner awarded back pay from the intended date of hire to any future date when Respondent would offer Complainant a comparable position, and awarded \$2,000 for mental anguish. ORS 659.010(2) and (6); 659.060(3); 659.400(1) and (2); 659.405(1) and (2); 659.425(1).

The above entitled matter having come on regularly for hearing before Russell M. Heath, designated as presiding officer by the Commissioner of the Bureau of Labor, the hearing having been convened at 9:10 a.m., May

7, 1975, in room 669, State Office Building, 1400 S.W. 5th, Portland, Oregon, and continuing through May 9, 1975; the Complainant being present, the agency having been represented by Victor Levy, Assistant Attorney General, and the Respondent being present and represented by Greg Byrne, Attorney at Law. On October 10, 1975, Dale A. Price was designated presiding officer to replace Russell M. Heath, who had resigned from state service. Bill Stevenson, Commissioner of the Bureau of Labor of the State of Oregon, having considered the findings, conclusions and order proposed by the presiding officer, the exceptions thereto and relevant portions of the official record does hereby make the findings of fact, conclusions of law and order which follow the presiding officer's evidentiary rulings herein.

EVIDENTIARY RULINGS

1) At hearing, evidence was elicited on whether Complainant had suffered any distress, anguish or concern in connection with his rejection from employment for Respondent. The testimony was objected to as irrelevant. A ruling was reserved and briefs from counsel were requested. Upon review the objection is overruled.

2) At hearing, evidence was elicited as to the age of Complainant's wife. The testimony was objected to as irrelevant. A ruling was reserved. Upon review the objection is sustained.

FINDINGS OF FACT

1) Complainant James M. Williams, on April 29, 1974, filed with the Civil Rights Division of the Oregon State Bureau of Labor a complaint of

discrimination alleging that Dr. Jack Battalia, Medical Director for Montgomery Ward's Jantzen Beach store, refused to hire him for a job as appliance salesman because of his history of heart trouble. Although the complaint named Dr. Battalia as well as Montgomery Ward as Respondent, the corporation only will hereafter be considered as party Respondent.

2) The Civil Rights Division conducted an investigation of the allegations of the complaint. At the conclusion of said investigation, an administrative determination was made that there existed substantial evidence in support of Complainant's allegations. Subsequent efforts to resolve the matter through conference and conciliation were unsuccessful.

3) Thereafter the Commissioner of the Bureau of Labor, by and through Lee E. Moore, Administrator of the Civil Rights Division, drew Specific Charges of unlawful employment practices based upon physical handicap against Montgomery Ward and Company Incorporated. The Specific Charges were as follows:

A. On or about April 1974, the Respondent had available a job opening in its Jantzen Beach store for an appliance salesman. On or about April 25, 1974, Complainant James M. Williams applied for said position and was rejected therefore by the Respondent because of the Complainant's physical handicap, to wit, a heart condition. At all times material herein Complainant was and is in all respects fully qualified to fill said position, and his physical handicap, to wit, his heart condition, was not such as to prevent him from

performing the work of an appliance salesperson.

B. That as the effects of the unlawful employment practice of the Respondent, James M. Williams has suffered damages for which he claims compensation as follows:

(1) Back pay from May 1, 1974.

(2) Humiliation, frustration, anxiety, nervousness, and mental anguish and suffering in the sum of \$7500.00.

4) Said charges and Notice of Hearing were duly served upon the Respondent. The hearing on the charges was scheduled for May 7, 1975, in room 669, State Office Building, 1400 S.W. 5th, Portland, Oregon.

5) Presiding officer Russell M. Heath was present at all times during which the said hearing was convened. During the course of the hearing, the presiding officer, Russell M. Heath, ruled on motions by counsel and on the admissibility of evidence, and did reserve certain such rulings.

Background

1) Respondent Montgomery Ward Incorporated was at all times material herein the owner and operator of a department store called by its corporate name and located at the Jantzen Beach Center on Hayden Island, Portland, Oregon. At all times material herein Respondent did employ more than six (6) employees at the Jantzen Beach store, including but not limited to salespersons.

2) Complainant James M. Williams is a person with a medical history which indisputably includes a subendocardial infarction, commonly called a heart attack, which occurred in 1968.

3) Complainant has been since his attack, and was at the time of hearing, under periodic care of Dr. Harold Dygart, a heart specialist who has, for a period of about six (6) years, monitored the performance of Complainant's cardiovascular system at regular intervals.

4) Complainant suffered no recurrence of heart trouble subsequent to his attack in 1968. Since his attack, Complainant was employed by the Appliance Center, Raleigh, North Carolina, as appliance salesperson from May through July 1969, and as sales manager for the Don Fraser Company of Vancouver, Washington, from September 1969 through December 1973. He was recommended by both of these employers for similar employment. This work history was delineated on his application for employment with Montgomery Ward Incorporated.

Chronology

1) In February or early March of 1974, Complainant James M. Williams applied for a sales position at Respondent's Jantzen Beach store, and did list his prior heart attack on the application form in addition to submitting a letter from his cardiologist summarizing his recovery and physical capabilities. Letters of recommendation were also submitted.

2) After between two (2) and five (5) weeks, on or about April 22, 1974, Complainant went to Respondent's Jantzen Beach store and spoke with Mrs. Arnold, an employee in Respondent's personnel office, regarding his application for employment.

3) At the time of his initial conversation with Mrs. Arnold, Complainant expressed an interest in appliance

sales, and Mrs. Arnold did telephone Mr. Martin, head of the appliance department for the Jantzen Beach store.

4) Later on the same day, Complainant met with Mr. Martin in the presence of Mrs. Arnold. Mr. Martin described the job soon to be available in appliance sales, and did hire Complainant for that job to begin on May 2, 1974, subject to a satisfactory result from a physical examination of Complainant to be conducted by Respondent's company doctor before that date.

5) Immediately subsequent to Mr. Martin's statement of his intent to hire Complainant, Mrs. Arnold telephoned the office of Respondent's company doctor, and was told that because Complainant had had a heart problem, Dr. Battalia's nurse felt that there would be no reason to schedule him for a physical examination. Mrs. Arnold telephoned Dr. Battalia's nurse again, and was told that a full history of the heart problem would be required before an examination could be scheduled. Mrs. Arnold relayed this information to Complainant.

6) Within two (2) days of this conversation, Complainant obtained a letter from Dr. Harold Dygart which stated that all relevant data had been submitted with Complainant's application for employment with Respondent. Complainant gave this letter to Mrs. Arnold.

7) Complainant subsequently went to see Mr. Martin in the appliance department and explained his problem regarding the physical examination, and sought Mr. Martin's aid in getting an examination scheduled.

8) It is not clear how many telephone calls Mrs. Arnold made to Dr. Battalia's office or at what stages of the events listed, but she did obtain an appointment for a physical examination for Complainant.

9) On May 1, 1974, Complainant was given a physical examination by Dr. Battalia, Respondent's company doctor.

10) About three (3) days subsequent to the examination, Complainant telephoned Respondent's personnel office and was told that the report of his physical examination had been received and that Respondent could not hire him. This rejection was based on Dr. Battalia's analysis of Complainant's heart condition.

Qualifications

Complainant was at the time of his application for the position in question a fully qualified appliance salesperson.

Reasonable Expectation of Continuous Performance

1) The determinative issue in this case is whether Complainant's physical condition at the time of application presented only a possible risk of reinjury, and did thus afford a reasonable expectation of continuous availability; or whether it presented a high probability of incapacitation while performing the ordinary tasks comprising the job in question, and could thus be deemed to prevent its performance.

2) Mr. Jim Martin, manager of the appliance section of Respondent's Jantzen Beach store, is not a medical expert, but did possess the most thorough knowledge of the requirements and duties of the job in question. Mr. Martin indicated, and I find, that the

duties of appliance salespersons consist primarily of speaking with the public about possible purchases. Any moving of appliances would normally be handled by warehousepersons with sporadic shifting of appliances by salespersons. This work did not constitute strenuous physical exertion. Mr. Martin was aware of Complainant's heart condition, and was of the opinion that the physical work involved would not present a problem for Complainant.

3) Dr. Dygart, a heart specialist who had monitored Complainant's heart condition throughout the period from his subendocardial infarction until his application for employment with Respondent corporation, a period of six (6) years, must be considered the most qualified to ascertain the risk for Complainant in a job of the type in question. Dr. Dygart was familiar with the requirements of the job in question as outlined in Respondent's job description and he did believe that Complainant would be able to perform the duties of the job in question satisfactorily for an extended period of time without serious danger to his health. He stated that the only limitation would be against Complainant engaging in sustained strenuous work. Dr. Dygart stated that the condition of Complainant's heart as monitored by his blood pressure, EKG, and X-ray, among other tests, was good since his attack. He further stated that a single high blood pressure reading, as found by Respondent's physician, could be induced by excitement, and that only long term monitoring could provide meaningful data on physical capabilities.

4) Respondent's physician, Dr. Battalia, had only walked through the appliance sales area of Respondent's Jantzen Beach store, and did not have a thorough knowledge of the requirements of the job for which Complainant applied. Because he saw Complainant for only one-half hour, and did not consult with the physician who had been continuously treating Complainant since his attack, Dr. Battalia did not have adequate data to accurately define Complainant's physical limitations. Dr. Battalia did conclude that there was a high likelihood of incapacitation if Complainant attempted to perform the duties of appliance salesperson.

5) Respondent suggests that it would be impractical to require their physician to conduct examinations and testing over an extended period of time to determine an accurate prognosis of Complainant's health. The alternatives are to turn down the applicant based upon a brief appraisal or to rely upon the opinions of those medical professionals who have gathered the relevant data over the requisite period of time. Respondent has chosen the former course of action in an admitted effort to minimize the risk of out of pocket costs for on-the-job injuries by obtaining the best physical specimens possible. Because a heart condition requires prolonged monitoring to determine the boundaries of tolerable activity, the disqualification of Complainant based upon a single brief examination, in this case, without additional testing or thorough consideration of the data presented by those who have done such monitoring, is inconsistent with the statutorily prescribed public policy to guarantee for the physically

handicapped the fullest possible participation in the economic life of the state. (ORS 659.405)

6) Complainant has worked for an extended period of time since his heart attack at a job which is more physically demanding than that of appliance salesman. His ability to handle physical labor confirms that he was able to handle the less strenuous job of appliance salesperson.

ULTIMATE FACTS

1) Complainant was qualified for the job of appliance salesperson at the time of his application. He was hired subject to passing a physical examination. He was given a physical examination and was subsequently denied the job in question because of his physical handicap. Complainant has been unlawfully discriminated against by Respondent corporation in that his physical condition did afford a reasonable expectation of continuous performance and his physical handicap would not have prevented his performance of the job of appliance salesperson.

Damages

1) The average earnings of appliance salespersons for Montgomery Ward Incorporated's Jantzen Beach store for 1974 were \$14,301.20. Although new employees may tend to earn less, this factor is not considered due to Complainant's prior experience in appliance sales.

2) Complainant earned \$6,588.20 in 1974 and \$8,165.22 in 1975.

3) The evidence indicates that Complainant was unlawfully discriminated against because of his physical handicap. Complainant had been

hired by Mr. Martin, with a specific reporting date named and subject only to approval of Complainant's physical condition by the company doctor. The loss of wages suffered by Complainant was the direct result of the unlawful appraisal of his physical condition. An award of back pay is granted to be computed from the date of intended hiring in May 1974 until the date on which Respondent offers Complainant a position comparable to that position from which Complainant was unlawfully excluded. Damages shall be computed at the average rate of pay for appliance salespersons at Respondent's Jantzen Beach store in 1974, reduced by the amount of wages earned by Complainant in other employment during the relevant period. To this amount will be added annual interest at the rate of six per cent (6%). The amount of lost wages to be awarded shall be computed as follows:

A. 1974

Base year average earnings	\$14,301.20
Complainant's earnings 1974	<u>\$6,588.20</u>
Difference	\$7,713.00
Interest at 6% per annum	<u>\$464.58</u>
Total	\$8,177.58

B. 1975

Base year average earnings	\$14,301.20
Complainant's earnings 1975	<u>\$8,165.22</u>
Difference	\$6,135.98

Interest at 6% per annum \$368.16

Total \$6,504.14

C. 1976:

(1) If Respondent offers Complainant suitable employment in 1976, then the damages for lost wages for 1976 shall be computed as the difference between a percentage of the base year average earnings of \$14,301.20 representing the portion of 1976 which has elapsed at the time of the job offer. This subtotal shall be augmented by annual interest at six per cent (6%).

(2) If Respondent fails to offer Complainant a job in 1976, then the amount of damages for lost wages in 1976 shall be computed as in paragraphs 3A and 3B above.

D. 1977 and years subsequent: Damages for wages lost in 1977 and subsequent years in which Respondent fails to offer complaint suitable employment shall be computed as in paragraph 3C above.

4) Complainant testified that Respondent's failure to hire him has forced him to take a more strenuous job which he does not feel he will be able to continue until retirement, and that this has been a cause of great concern to him. In addition, Respondent's unlawful extension of Complainant's period of unemployment subsequent to the discriminatory action and until he found other employment was a cause of considerable stress and mental anguish. Complainant has suffered damages due to frustration, mental anguish and suffering for which he shall be compensated in the amount of \$2,000.

5) Because of the unlawful employment practice of Respondent, Complainant has suffered damages for which he shall be compensated by Respondent in the following amount:

A. Lost wages: \$14,411.72 plus losses for 1976 and years subsequent as computed in Damages paragraphs 3C and 3D above.

B. Mental anguish: \$2,000.00.

CONCLUSIONS OF LAW

1) At all times material herein, Respondent Montgomery Ward Incorporated was an employer within the definition contained in ORS 659.400(2), and as such is subject to the provisions of ORS 659.400 to 659.435.

2) Complainant's weakened heart condition at the time of his application for employment with Respondent corporation does constitute a physical handicap under the statutory definition contained in ORS 659.400.

3) The Specific Charges of unlawful employment practices based upon a physical handicap against Respondent Montgomery Ward Incorporated are supported by the weight of the evidence presented. By refusing to hire Complainant because of a physical handicap which did not prevent performance of the job in question, Respondent did commit an unlawful employment practice in violation of ORS 659.425.

ORDER

In accordance with the findings of fact and conclusions of law set forth herein, it is hereby ordered that:

1) Respondent Montgomery Ward Incorporated shall pay to Complainant

James M. Williams the following damages:

A. Lost wages plus interest for the years 1974 and 1975 in the amount of \$ 14,711.72, plus losses incurred in 1976 and years subsequent as computed in Damages paragraphs 3C and 3D above.

B. Mental anguish: \$ 2,000.00.

2) Payments in the amount of \$16,711.72 – including \$14,711.72 for lost wages for the years 1974 and 1975, including interest, and \$2,000.00 for mental anguish – shall be delivered to the business office of the Bureau of Labor in room 443 of the State Office Building, 1400 S.W. Fifth (5th) Avenue, Portland, Oregon 97201 not later than thirty (30) days from the date of this order.

3) Payment for wages lost in years subsequent to 1975 shall be due in the business office within thirty (30) days of the date upon which Respondent is notified in writing of the exact amount of such damages by the Commissioner of the Bureau of Labor.

4) Respondent Montgomery Ward Incorporated shall offer to Complainant James M. Williams the next available position as appliance salesperson in any of its stores in the Portland / Vancouver area.

5) Within ten (10) days of the date of any offer of employment made to Complainant pursuant to the requirement in paragraph 4 above, Respondent shall inform the Commissioner of the Bureau of Labor in writing of the type of job offered, the date offered, and acceptance or rejection of the offer by Complainant.

In the Matter of
ROBERT K. SCHURMAN
and **French & French International,**
Inc., dba French and French,
Respondent.

Case Number [none]

Final Order of the Commissioner

Bill Stevenson

Issued February 27, 1978.

SYNOPSIS

Where Respondents, who were private employment agency licensees, violated statutes and agreements by (1) failing to provide to clients refunds of fees and/or an explanation of withholding of refunds, (2) failing to credit against fees the costs incurred by clients in funding payment of the fees, and (3) failing to demonstrate financial responsibility by leaving unpaid large debts to his landlord and vendors and by not providing collateral for his bond, the Commissioner revoked the private employment agency licenses of Respondents. ORS 658.035(3)(a); 658.115(1); 658.185(2)(b), (d) and (e), and (3)(c).

The above-entitled matter having come on regularly for hearing before R. D. Albright, designated as Presiding Officer by the Commissioner of the Oregon Bureau of Labor, the hearing having been convened at 9:00 a.m. on February 8, 1977, in the Portland Water Bureau Auditorium, 1800 S.W. Sixth Avenue, Portland, Oregon, and continuing through 3:30 p.m. of the same day; the Agency having been represented by Thomas E. Twist,

Assistant Attorney General, and the Respondent not being present but represented by Roosevelt Robinson, Attorney at Law;

NOW, THEREFORE, Bill Stevenson, Commissioner of the Bureau of Labor of the State of Oregon, having considered the Proposed Reserved Ruling, Proposed Decision and Opinion, Proposed Findings of Fact, Proposed Conclusions of Law and the Proposed Order filed herein by the Presiding Officer and having also considered the exceptions thereto and relevant portions of the official record herein, does hereby make the following decision in regard to the Reserved Ruling, the Findings of Fact, the Conclusions of Law and hereby enters the Order which is set out below.

RULINGS

At the very beginning of the contested case hearing, Mr. Roosevelt Robinson, attorney for Respondents, moved to dismiss the Charges brought by the Agency on the grounds that the issues raised by the Charges were moot due to the expiration of the two licenses in question. Mr. Robinson also moved, by way of an alternative in the event that the first motion was not granted, that the Presiding Officer grant a continuance in order to "prepare for this matter on the merits." The Presiding Officer reserved ruling as to the first motion and denied the second motion.

Motion to Dismiss

The Presiding Officer has denied the Motion to Dismiss. I hereby adopt this ruling.

The record indicates that on September 1, 1976, a Notice of Proposed

Revocation or Suspension of Agency License was executed and filed. This notice indicated an intention on the part of the Agency to revoke or suspend the licenses in question because of five practices alleged to have been engaged in by the Respondents during 1976, and further alleged to be unlawful. Two copies of the notice were served upon Robert K. Schurman on November 15, 1976, in San Diego County, California. On December 28, 1976, the Respondents requested that a contested case hearing be had in regard to the charges set out in the notice.

On midnight, December 31, 1976, the subject private employment agency licenses expired. Neither Mr. Schurman nor French & French International, Inc. have applied for a renewal license. The contested case hearing in this matter was held on February 8, 1977.

In enacting the provisions of ORS chapter 658, the legislature of the State of Oregon articulated its policy within the provisions of ORS 658.008. Relevant recitations of this policy are as follows:

"658.008 Policy. The purpose of ORS 658.005 to 658.245 is to protect the health, safety and general welfare of the people of Oregon in their dealings with employment agencies. To accomplish this purpose the Legislative Assembly intends to provide a procedure:

"(1) For determining where and by whom employment agencies will be operated in this state.

"(2) To assure the public that persons operating employment

agencies in this state are continuously qualified by experience, training, good character and responsibility.

"(5) For the administration and enforcement of ORS 658.005 to 658.245 by the Labor Commissioner."

ORS 658.115 provides as follows:

"658.115 Suspension or Revocation of Licenses; Penalty in Lieu of Suspension; Disciplinary Proceedings.

"(1) The Labor Commissioner shall revoke or suspend any license issued under ORS 658.005 to 658.245 whenever it appears to the Commissioner that if the licensee were then applying for a license his application should be denied or whenever the licensee has violated any of the provisions of ORS 658.005 to 658.245 or of the rules and regulations adopted pursuant thereto." (Emphasis supplied)

Finally, provisions of ORS 658.035 provide guidance to the Labor Commissioner as to the qualifications he must scrutinize in regard to the issuance of private employment agency licenses. This statute provides, among other things, that:

"(3) The applicant for a license, to be eligible therefore, shall:

"(a) Show financial responsibility;

"(b) Be of good character;

"(d) Be a person whose license to operate an employment agency

in any state has not been denied or revoked within three years before the date of application."

In regulating the activities of the private employment agency industry within the State of Oregon, the Labor Commissioner must act within the provisions of ORS chapter 183, the Administrative Procedures Act. This Act contemplates among other procedures, an investigation of possible violations of ORS chapter 658, an administrative analysis of the investigation, a decision as to whether or not to proceed with disciplinary activity, the preparation and filing of a notice of intent to pursue disciplinary action and the specification therein of allegedly improper activities, the scheduling and conduct of a contested case hearing if the licensee requests such a proceeding, the publication of proposals by a fact finder, the submission of exceptions to the proposals by a party aggrieved by the proposals, and finally, the execution and filing of a final order. If Respondent's Motion is well founded, all of these single steps would have to be accomplished within the confines of the licensing year, which extends from January 1 through the following December 31. The possibly miscreant licensee could effectively moot any of the issues raised by his alleged misdeeds by simply allowing his license to lapse for a period of time before reapplying for a new license.

Should such a reapplication occur, the Agency having been frustrated in regard to its responsibility of formulating a final administrative determination as to the possible violations of the regulatory act, would be faced with severe practical problems in regard to

reacting to the reapplication. Examples of the practical problems in this regard would be the possible nonavailability of witnesses and erosion of recollective ability on the part of the witnesses still available.

The Agency charged the licensee with violations, during the license year, of the regulatory statutes. These charges, which were served upon the licensee on November 15, 1976, required the licensee to notify the Labor Commissioner within 20 days if a contested case hearing in the matter was desired. During the period November 15, 1976, to December 28, 1976, the licensee requested a contested case hearing. The request for a contested case hearing was in effect a general denial and served to put the Agency on its proof as to:

(a) Whether the facts alleged to have occurred in the charges took place.

(b) If the facts charged took place, were the regulatory statutes violated;

(c) If violations occurred ought the sanctions referred to in the notice or any sanctions be imposed upon the licensee.

Placing these factors directly at issue between the parties created a legal dispute which cannot and would not be mooted by the expiration of a mere paper certificate of license.

It is our view and the basis of our holding in this matter that the Agency was and is entitled to create a record in regard to this licensee's activities and that the expiration of a paper certificate of license does not prevent the Agency from proceeding to a final

administrative determination as to the questions of:

(a) Whether the alleged violations took place, and

(b) If they did occur, what sanctions, if any, are appropriately imposed.

The determination of these questions is vital to the regulatory function of the Agency and its legislative mandate of passing upon the rights of a licensee to conduct the business of a private employment agency within the State of Oregon.

Motion for Continuance

Mr. Robinson's oral motion for a continuance appears from the record to have been grounded upon a lack of personal opportunity to have prepared for the presentation of Respondent's case. The Presiding Officer placed upon the record the fact that on February 4, 1977, Mr. Oler, a lawyer whose law office is situated in California and who had associated Mr. Robinson in regard to providing representation to the licensee at the contested case hearing had placed a telephone call to Mr. Albright, wherein he mentioned the possibility of a continuance but did not ask for a continuance as such. Mr. Oler indicated to Mr. Albright that he had not opened the file in the case until February 3, 1977. However, Mr. Oler's telegram of December 18, 1976, indicates substantial lawyerly involvement at that point and moreover he had been engaged in negotiations with the Agency in regard to the charges themselves during the period November 15, 1976, to December 28, 1976. Nowhere in the record is there any indication that any of the attorneys representing Respondents in this

matter were denied timely access to the Notice of Proposed Revocation or Suspension of Agency License and thus an opportunity to prepare a defense. In denying the motion for a continuance, the Presiding Officer exercised his discretion in the matter, apparently on the basis of the lack of timeliness of the motion and the failure to state adequate grounds in support of it.

It should also be noted that Mr. Roosevelt Robinson was present at every stage of the proceedings and participated in the proceeding in that he cross-examined witnesses and objected to the introduction of various items of documentary evidence. Although it is true that the Respondents did not present any witnesses on their own behalf, nor introduce documents in support of their denial of the charges, by no means does it follow that the Respondents went without adequate legal representation at the contested case hearing as a result of the Presiding Officer's ruling. I adopt this ruling of the Presiding Officer.

FINDINGS OF FACT

Jurisdiction

1) On December 22, 1975, the Bureau of Labor issued to Robert K. Schurman, comprising the majority shareholder, and French & French International, Inc., an Oregon corporation, dba French & French, an employment agent's license designated 026-76 as to a main office at Suite 350, Lloyd 500 Building, 500 N.E. Multnomah, Portland, Oregon 97232. On that same date, the Bureau of Labor issued to Robert K. Schurman, comprising the majority shareholder and French & French International,

Inc., an Oregon corporation, dba French & French, an employment agent's license designated 027-76, as to the operation of a main office at Suite 350, Lloyd 500 Building, 500 N.E. Multnomah, Portland, Oregon, and a branch office at 1500 S.W. First Avenue, Suite 880, Portland, Oregon 97201.

2) French & French International, Inc. is an Oregon corporation initially incorporated on March 9, 1972. Its initial and present registered agent was and is Robert K. Schurman.

3) On November 15, 1976, in San Diego, California, Robert K. Schurman was personally served with Notices of Proposed Revocation or Suspension of Private Employment Agency Licenses (numbered 026-76 and 027-76). From then until December 28, 1976, the parties attempted to negotiate an informal resolution of the dispute without success.

4) On December 28, 1976, the licensee requested a contested case hearing in regard to the charges set out in the notice.

5) On January 12, 1977, a Notice of Hearing was filed and a copy properly served upon the licensee setting February 7, 1977, as the date

for the contested case hearing. On January 18, 1977, an Amended Notice of Hearing was filed and properly served upon the licensee resetting the hearing date to February 8, 1977. On that date, the contested case hearing took place.

As to Charges Against the Licensee

CHARGE # 1 - CHARGING OF A FEE IN EXCESS OF THE CONTRACTUAL SCHEDULE OF FEES TO APPLICANT CONNIE GROVE ON JUNE 18, 1976, IN VIOLATION OF ORS 658.155(2).

6) The amount of fee alleged to amount to an overcharge appears to be \$7.10. I am unable to find from the evidence presented on this issue that Connie Grove was charged a fee in excess of her contractual obligation; indeed, if such an overcharge did take place, I would be unable to find that such an overcharge was anything but a computational error.

CHARGE # 2 - FAILURE TO REFUND PRORATED FEES TO APPLICANTS KENNETH COOK, CONNIE GROVE, THERESA DEAN, PALLE JOHANSEN AND EDWARD GOFFARD, OR OTHERWISE COMPLY WITH THE PROVISIONS OF ORS 658.185 IN RESPECT TO REFUNDS DUE AND OWING TO KENNETH COOK, CONNIE GROVE, THERESA DEAN, PALLE JOHANSEN AND EDWARD GOFFARD.¹

¹ The applicable provisions of ORS 658.185 are as follows:

"658.185 Limitations on charges; manner of calculating certain charges; credits and refunds.

"(1) As used in this section:

"(a) 'Permanent employment' means all employment that lasts 90 calendar days or more.

"* * *

"(2)(a) If an individual is employed in temporary employment through the services of an employment agency, the charge for services paid by the individual shall not exceed one-ninetieth of the charge for permanent employment for each consecutive calendar day during the period the individual is employed or compensated as though employed.

KENNETH COOK

7) On July 27, 1976, Kenneth Cook filed a complaint with the Oregon Bureau of Labor stating that he was

due a refund of an employment agency fee which he had previously paid to the licensee. Mr. Cook's claim arose from the fact that the placement he had obtained by means of his

"(b) If an individual leaves employment within 90 days after the starting date of employment, the employment agency shall reduce the charge for services payable by the individual to that payable for temporary employment under paragraph (a) of this subsection and shall refund any charge paid in excess of that amount.

"(c) Notwithstanding the other provisions of this section, in no instance in which the employment secured is subsequently terminated shall the charge for services by an employment agency be greater than the total gross earnings of the individual.

"(d) All interest, fees or other charges paid or required to be paid to any person or organization in order to procure the funds to pay an employment agency's charge for services shall be allowed as a credit against the charge. The provisions of this paragraph shall be stated in all contracts provided for in ORS 658.172.

"(e) A refund when due shall be made within 10 days after request therefor by the individual. If the decision of the employment agency is not to make a refund, the agency shall notify the individual and the Labor Commissioner in writing, within such 10-day period, as to the specific reasons or circumstances for which the refund is not made. If the agency fails to properly notify the individual and the Labor Commissioner or fails to tender a refund within the 10-day period, the agency shall be liable to the individual in the amount of an additional sum equal to the amount of the refund.

"(3)(a) If an individual secures employment in which he is to be paid on the basis of straight commissions, or a drawing account against commissions, or either a drawing account or salary plus commissions, the charges for services payable by the individual may be predicated upon the projected total gross earnings of the individual during the first year of employment as estimated by the employer and upon the employer demonstrating to the agency reasonable grounds therefor.

"(b) Upon the conclusion of the individual's first six months and the conclusion of his second six months of employment, a computation of his actual total gross earnings may be provided by the individual to the agency, and, predicated upon appropriate proof of such earnings, an adjustment in the charge for services shall be made by which either the agency shall refund to the individual any excess charge paid by him or the individual shall pay to the agency any deficiency thereon.

"(c) If the individual's employment is terminated prior to the conclusion of the first 12 months of employment, the actual total gross earnings of the individual for the period of employment shall be projected to 12 months on a pro rata basis as though the individual had been employed for the entire period of 12 months, and a computation shall be made thereon. The charge for services paid or payable by the individual shall be predicated upon such computation as though he had been so employed."

contract with the licensee terminated after 56 days of employment and I find this to have been the case.

8) Mr. Cook was unable to reach the licensee and provide notice of the claim but on July 27, 1976, Robert Lorts, an investigator for the Agency who worked primarily in the area of regulation of the private employment industry, notified the licensee of Cook's claim. Mr. Lorts in August of 1976 brought the Cook claim to the attention of Mr. Bertrand Close, an attorney representing Mr. Schurman at that time.

9) On December 17, 1976, approximately five months after Mr. Schurman and his attorney received notice of the claim of Kenneth Cook, the Peerless Insurance Company, the surety in regard to a bond furnished the Oregon Bureau of Labor in reference to the licensee, paid to Kenneth Cook the sum of \$230.61. This payment was pursuant to a claim made by Mr. Cook against the surety in regard to a refund due Mr. Cook.

10) The Bureau of Labor, as of the date of the contested case hearing, had not received any writing from the licensee explaining the reasons why the licensee had not made a refund to Mr. Cook.

11) Based on the above, I find as Ultimate Facts that:

(a) On and after July 27, 1976, Kenneth Cook was not paid a refund by the licensee.

(b) The licensee has failed to provide the Agency with a written explanation as to why the refund was not made.

CONNIE GROVE

12) I find that the licensee placed Connie Grove in a position and that she started work on June 7, 1976. She paid the licensee a fee in the amount of \$323.00 on June 18, 1976.

13) Connie Grove terminated her employment in this position on June 25, 1976. On June 28, 1976, Connie Grove reported the termination of this employment to the licensee. On July 12, 1976, Connie Grove was told by the "manager" of French and French that she would receive the refund which she had claimed within ten (10) days. Not having received the refund, on July 28 Connie Grove attempted to recontact the licensee, but was unable to do so because of the fact that the licensee's phone had been disconnected.

14) On July 29, 1976, Connie Grove told Mr. Lorts the circumstances of the refund that she had claimed from the licensee. Mr. Lorts told her to get in touch with Mr. Close and advised Connie Grove that Mr. Close was representing Mr. Schurman in this matter and was the appropriate person to contact. Connie Grove contacted Mr. Close and acquainted him with the circumstances of her claim against the licensee.

15) Mr. Lorts also acquainted Mr. Close with the fact of Connie Grove's refund claim in August of 1976.

16) Up to the time of the contested case hearing the Oregon Bureau of Labor has not received a written explanation from the licensee as to why a refund was not made to Connie Grove.

17) On November 8, 1976, Connie Grove received payment in the amount

of \$311.83 from the Peerless Insurance Company pursuant to a claim she had made to them in regard to the refund which had become due her in July of 1976.

18) Based on the above, I find as Ultimate Facts that:

(a) The licensee failed to pay a refund to Connie Grove.

(b) The licensee has failed to provide the Agency with a written explanation as to why the refund was not paid.

THERESA DEAN

19) On May 17, 1976, the licensee placed Theresa Dean in a position and received from her on that date the sum of \$306.77. Thereafter, Theresa Dean terminated her employment in the position procured for her by means of the services of the licensee and thereafter in June of 1976 requested a refund from the licensee. She made this request to Robert K. Schurman, who promised that he would mail to her the sum of \$180.65 within two weeks, which sum represented his computation of the refund due her.

20) Theresa Dean filed a complaint with the Bureau of Labor on August 4, 1976. Mr. Lorts had previously brought the claim for refund of Theresa Dean to the attention of Robert K. Schurman on approximately July 27, 1976. Mr. Schurman stated to Mr. Lorts that he was aware of Theresa Dean's claim.

21) On November 8, 1976, Theresa Dean received payment in the amount of \$177.25 from the Peerless Insurance Company pursuant to a claim she had made to them in regard to the refund which had become due her from the licensee in June of 1976.

22) Up to the time of the contested case hearing the Agency had not received a written explanation from the licensee as to why a refund was not made to Theresa Dean.

23) Based on the above, I find as Ultimate Facts that:

(a) The licensee has failed to pay a refund to Theresa Dean.

(b) The licensee has failed to provide the Agency or Theresa Dean with a written explanation as to why the refund was not paid.

PALLE JOHANSEN

24) The licensee obtained employment for Mr. Johansen on June 6, 1976. Mr. Johansen paid a fee for this service to the licensee in the amount of \$335.00.

25) Mr. Johansen testified, and I so find, that the employment obtained for him by French and French terminated on July 14, 1976. Mr. Johansen testified, and I so find, that he attempted to reach French & French immediately after termination of his employment but was unable to contact anyone at the agency because the business had been closed. Mr. Johansen did discover, however, that Mr. Bertrand Close was representing Mr. Schurman in regard to business activities subsequent to the closure of the licensee's business. Mr. Johansen met with Mr. Close in August of 1976 and acquainted him with the circumstances of his claim for refund. Mr. Johansen testified, and I so find, that he did not receive his refund until about the 16th or 17th of November, 1976. On November 17, 1976, the Peerless Insurance Company presented him with a check in the amount of \$186.67.

26) Mr. Lorts testified, and I find, that the Bureau of Labor received nothing in writing from Mr. Schurman indicating reasons for failure to pay the refund. Mr. Johansen also did not receive anything in writing from the licensee explaining why a refund would not be paid him.

27) Based on the above, I find as Ultimate Facts that:

(a) The licensee failed to pay this refund to Palle Johansen.

(b) The licensee has failed to provide the Agency or Mr. Johansen with a written explanation as to why a refund was not paid.

EDWARD GOFFARD

28) On November 10, 1975, Mr. Edward Goffard entered into a standard employment agency contract with licensee. On December 19, 1975, the licensee placed Mr. Goffard with the Harrison Manufacturing Company. Mr. Goffard paid the licensee a fee in the amount of \$820.80.

29) Mr. Goffard terminated his employment with the Harrison Manufacturing Company approximately 78 days after he had commenced it. In about April of 1976, Mr. Goffard saw Robert K. Schurman at the Lloyd Building location and indicated that he was seeking some type of refund from the employment agency fee paid. Robert K. Schurman told Mr. Goffard that he would contact Goffard and indicate to him what more explicit documentation

should be furnished Mr. Schurman. Mr. Goffard never heard from Mr. Schurman and was unable to contact him due to the closure of the licensee's business. Finally, Mr. Goffard on or about October 22, 1976, mailed to the licensee data concerning his refund.

30) Mr. Goffard did not receive any written explanation from the licensee in regard to reasons why a refund would not be paid. He did not receive a refund from the licensee at all and it was not until on or about January 22, 1977, that he received \$602.00 from "an indemnity company." Mr. Lorts as well did not receive any written explanation from the licensee setting out reasons why a refund would not be paid to Mr. Goffard.

31) Based upon the above, I find as Ultimate Facts that:

(a) The licensee failed to pay a refund to Edward Goffard.

(b) The licensee failed to provide the Agency or Mr. Goffard with a written explanation as to why a refund would not be paid.

CHARGE # 3 - VIOLATING THE PROVISIONS OF ORS 658.185(2)(d) BY FAILING TO PROVIDE OR GIVE CREDIT FOR INTEREST AND OTHER CHARGES INCURRED BY APPLICANTS KENNETH COOK AND CONNIE GROVE IN OBTAINING FUNDS TO PAY THE AGENCY FEE WHEN THEIR EMPLOYMENT TERMINATED PRIOR TO 90 DAYS.²

² ORS 658.185(2)(d) provides as follows:

"(d) All interest, fees or other charges paid or required to be paid to any person or organization in order to procure the funds to pay an employment agency's charge for services shall be allowed as a credit against the charge. The provisions of this paragraph shall be stated in all contracts provided for in ORS 658.172."

KENNETH COOK

32) Mr. Cook obtained a loan from the First State Bank of Oregon in order to pay the contractual fee to the licensee resulting from employment he obtained on May 28, 1976, and became liable for interest charges as a result of the loan.

33) Based upon Finding 32 as well as the Findings I have set out in Paragraphs 7, 8, 9, 10 and 11, I find as Ultimate Facts that:

The licensee made no provision to allow Kenneth Cook a credit as to loan fees for which he had become obligated to the First State Bank.

CONNIE GROVE

34) I find no evidence in the record bearing upon this Charge as it relates to Connie Grove.

CHARGE # 4 - FAILURE TO REFUND OR ADJUST THE AGENCY FEE WHEN APPLICANT EDWARD GOFFARD'S EMPLOYMENT WAS TERMINATED BEFORE HE HAD BEEN EMPLOYED A YEAR IN VIOLATION OF ORS 658.158(3)(c).³

35) The compensation agreement relative to the employment which generated a fee from Mr. Goffard to the licensee was entirely on a commission basis.

36) Based upon Finding 35 and also upon those findings set out in Paragraphs 28, 29 and 30 and upon the ultimate findings set out in Paragraph 31, I find as ultimate facts that:

The licensee failed to provide any refund at all to Kenneth Goffard.

CHARGE # 5 - FAILURE TO DEMONSTRATE FINANCIAL RESPONSIBILITY TO SUCH AN EXTENT THAT IF THE LICENSEE WERE NOW APPLYING FOR A LICENSE AS PROVIDED FOR IN ORS 658.035, SUCH APPLICATION WOULD BE DENIED.

The Surety Bond Situation

37) The licensee's application for a 1976 private employment agency license was accompanied by an American Fidelity Fire Insurance Company surety bond in the amount of \$2,000. This bond was conditioned upon compliance with ORS 658.005 to 658.245, the payment of all sums (by the licensee) legally owing to any person when the employment agency or its agents have received such sums, the payment of all damages occasioned to any person (by the licensee) by reason of any willful misrepresentation, fraud, deceit or other unlawful act or omission by the employment agency, or its agents or employees acting within the scope of their employment, and payment of all sums legally owing to any employee of the employment agency.

38) On March 31, 1976, Mr. Lorts received a Notice of Cancellation from American Fidelity Fire Insurance Company indicating that the bond would be cancelled effective thirty (30) days from March 31, 1976.

39) On April 2, 1976, Mr. Lorts sent a letter to the licensee indicating that a receipt of cancellation of the American Fidelity bond had been received by the Bureau of Labor, and requiring the licensee to obtain another surety bond in the same amount as the American Fidelity bond. This letter

also advised that the licensee was to procure this bond and file it with the Bureau of Labor no later than April 29, 1976.

40) On or about May 12, 1976, Mr. Lorts received a bond indicating that the Peerless Insurance Company stood as surety in regard to the same conditions previously stated. The duration of this bond was to be until December 31, 1976. Mr. Lorts took steps by way of correspondence to obviate difficulties presented by a possible lapse between the period from the cancellation from the American Fidelity Insurance bond to the effective date of the Peerless Insurance Company bond and received return correspondence from the broker for Peerless Insurance Company (Fred S. James and Company) to the effect that no lapse had occurred.

41) On June 1, 1976, Mr. Lorts received a letter from Mr. Schurman requesting that the face amount of the surety bond then in existence and which served to at least partially protect the interest of potential creditors of the licensee, be reduced from \$2,000 to \$1,000. In early June of 1976 obligations were accruing to the licensee which he subsequently did not meet. This request was not acted upon favorably by the Agency, but if it had been, claimants against the Peerless Insurance Company bond would have received only a partial recovery from this source at least.

42) On July 27, 1976, Mr. Lorts received a notice of cancellation of the Peerless Insurance Company bond effective thirty (30) days after July 27, 1976. On July 29, 1976, Mr. Lorts communicated with the licensee to the

effect that receipt of the Peerless Insurance Company cancellation notice had taken place and requiring the licensee to provide another bond. Thereafter, no further bonds in regard to the licensee's operation during the license year 1976 were received by Mr. Lorts or the Bureau of Labor.

The Licensee and Thomas Bowers

43) During 1976, Thomas Bowers was an account executive with Fred S. James and Company, an insurance broker. Mr. Bowers' duties amounted to the solicitation of new business and the handling of existing business for his employers.

44) In 1976, prior to April 27, Thomas Hatfield, a C.P.A. who was acquainted with the licensee, called Mr. Bowers on the telephone and asked Mr. Bowers if Fred S. James would be able to provide a surety bond for the licensee. Soon thereafter Robert K. Schurman and Thomas Bowers talked on the telephone and in that conversation discussed the issuance of a private employment agency surety bond in the amount of \$2,000. On approximately April 27, 1976, the licensee and Mr. Bowers agreed that the licensee would collateralize the surety bond to the extent of \$1,250. The basis for the arrival at this amount of collateralization resulted from Mr. Schurman's indication that he anticipated the Bureau of Labor allowing him to reduce the face amount of the bond from \$2,100 [sic] to \$1,000 because, for a period of three years or more, he had had no claims against bonds which he had maintained in connection with his license. In support of the licensee's application for the bond, Robert K. Schurman submitted to the Fred S.

³ See footnote 1, *supra*.

James Company, and particularly to Mr. Bowers, a loan application which the parties treated as a financial statement. This document indicated that the net worth of the licensee's business was \$2500.00. This loan application was dated April 28, 1976. During the period April 27, 1976, to the first part of July 1976, Mr. Schurman failed to provide the agreed-upon collateralization for the bond and continued to offer Mr. Bowers excuses as to his reasons for not so providing it. Around the first part of July 1976, Mr. Bowers went to the licensee's office and found that it was closed. Mr. Bowers went to the licensee's home in Lake Oswego and determined that he was not there. A short time later Mr. Bowers went to Tom Hatfield and Mr. Hatfield told him that Mr. Schurman had left for California. Mr. Bowers then contacted Mr. Bertrand Close and was informed that the licensee's business had shut its doors. Mr. Close provided Mr. Bowers with a phone number where Robert K. Schurman could be reached in San Diego and Mr. Bowers did contact him at this San Diego telephone number, but still failed to receive the promised collateralization. As of the date of the hearing Robert K. Schurman had not collateralized the bond or provided any portion of the agreed collateralization amount.

45) The insurance company with which Mr. Bowers had brokered the \$2,000 surety bond, the Peerless Insurance Company, during the period November 8, 1976, to January 27, 1977, paid claims against the bond totaling \$1,924.21. Mr. Bowers' employer, Fred S. James, reimbursed the Peerless Insurance Company in that

amount and Mr. Bowers' employer has deducted the amount of its reimbursement from a Christmas bonus which would normally have been paid to Thomas Bowers. The Fred S. James Company took this step because Thomas Bowers had not been able to secure the collateralization which Robert K. Schurman promised Thomas Bowers would be provided.

The Licensee's Unpaid Obligations

46) As of the date of the hearing, the licensee owed to the Oregonian Publishing Company the sum of \$2,897.25 for services which were last rendered to the licensee on or about July 1, 1976.

47) As of the date of the hearing, the licensee owed to Pacific Northwest Bell the sums set out below in regard to the account listed next to these sums:

\$2,106.39 billed to Robert K. Schurman, Suite 350, 500 N.E. Multnomah, Portland, OR 97232;

\$959.76 billed to Robert K. Schurman, dba French & French, 1500 S.W. First, Suite 880, Portland, OR 97201;

\$238.66 billed to Robert K. Schurman, 65 Tanglewood Drive, Lake Oswego, OR 97034.

48) On September 13, 1976, a federal tax lien was filed in the office of the Oregon Secretary of State in the amount of \$7,110.61 against French & French International, Inc., with an address at 1500 S.W. First Avenue, Room 880, Portland, Oregon 97201.

49) On November 19, 1976, a Default Order and Judgment, unsatisfied as of the date of the hearing, was docketed against French & French

International, Inc., an Oregon corporation. The amount of the Judgment was \$2,440, plus \$600 in costs. The Default was entered after the Defendant had failed to appear for the trial. (*The Harver Company v. French & French International, Inc.*, Circuit Court, Multnomah County, No. 423027)

50) On November 15, 1976, a Judgment was entered against Robert K. Schurman, aka Mike Shawn, dba French & French Employment Service. The amount of the Judgment was \$21,105.65 and costs and disbursements, including \$2,500 attorney's fee. (*Lloyd Corporation, Ltd. v. Robert K. Schurman, etc.*, Circuit Court, Multnomah County, No. A7607 09835).

51) On March 2, 1976, Judgment was entered against French & French International, Inc., for \$692.93 and \$204.50 costs. The file indicates \$78.42 was received in partial satisfaction. (*Granning & Treece Loans v. French & French International, Inc.*, District Court, Multnomah County, No. 155401).

52) On August 31, 1976, a Default Order and Judgment was entered against French & French - Crown Plaza, abn of Personnel Consultants, Inc. The Judgment was for \$232.35 and \$29.50 in costs. (*National Credit Bureau, Inc. v. French & French - Crown Plaza, abn of Personnel Consultants, Inc.*, District Court [Multnomah County], No. 158001)

53) David Blanchard was employed by the licensee at both the licensee's main office and the branch office during 1976. He was hired by Robert K. Schurman, and his employment lasted from March 1, 1976, to approximately the end of April 1976. At

the time of Mr. Blanchard's termination in April of 1976, the licensee owed him wages. Mr. Schurman promised to mail Mr. Blanchard's wages to a forwarding address Mr. Blanchard provided him in the state of Massachusetts. Robert K. Schurman never forwarded these wages to David Blanchard.

54) David Blanchard assigned his wage claim against the licensee to the Wage Collection Division of the Oregon Bureau of Labor. The Oregon Bureau of Labor brought action for wages against the American Fidelity Fire Insurance Company, who was the licensee's surety as to the period during which Mr. Blanchard was employed. As a result of the filing of this legal action, the Bureau of Labor received and paid to David Blanchard the sum of \$535.00.

55) Based upon all the findings set out above and in particular upon Findings of Fact 37-54, I find as Ultimate Facts that:

(a) The licensee, both personally and through and by his corporation, has substantial obligations based upon judgments entered against him and his corporation which judgments were unsatisfied as of the date of the contested case hearing.

(b) The licensee's corporation, as of the time of the contested case hearing owed a substantial amount of taxes to the Internal Revenue Service;

(c) The licensee, either through choice or inability, failed to honor promises he had made in regard to the payment of money to a number of his creditors.

(d) The licensee owed at the time of the hearing substantial sums to the phone company and the newspapers in which he advertised;

(e) During the license year 1976, two surety companies cancelled surety bonds they had provided to the licensee and the licensee failed to maintain a surety bond during the latter half of 1976.

CONCLUSIONS OF LAW

CHARGE # 1 - CHARGING OF A FEE IN EXCESS OF THE CONTRACTUAL SCHEDULE OF FEES TO APPLICANT CONNIE GROVE, ON JUNE 18, 1976 IN VIOLATION OF ORS 658.155(2).

1) Based upon Finding of Fact 16, I conclude that no violation of ORS 658.155(2) occurred.

CHARGE # 2 - FAILING TO REFUND PRORATED FEES TO APPLICANTS KENNETH COOK, CONNIE GROVE, THERESA DEAN, PALLE JOHANSEN AND EDWARD GOFFARD OR OTHERWISE COMPLY WITH THE PROVISIONS OF ORS 658.185 IN RESPECT TO REFUNDS DUE AND OWING TO KENNETH COOK, CONNIE GROVE, THERESA DEAN, PALLE JOHANSEN AND EDWARD GOFFARD.

2) Based upon Findings of Fact 7, 8, 9, 10 and 11, I conclude that:

(a) On and after July 27, 1976, Kenneth Cook was due a refund from the licensee;

(b) The licensee's failure to pay a refund to Kenneth Cook constitutes a violation of ORS 658.185(2)(b);

(c) The licensee's failure to provide the Agency with a written explanation as to why the refund was not made constitutes a violation of ORS 658.185(2)(e);

(d) The violation set out in Paragraphs (a), (b), and (c), above, are grounds for a revocation or suspension of the licenses in question.

CONNIE GROVE

3) Based on Findings of Fact 12, 13, 14, 15, 16, 17 and 18, I conclude that:

(a) On and after June 28, 1976, Connie Grove was due a refund from the licensee;

(b) The licensee's failure to pay a refund to Connie Grove constitutes a violation of ORS 658.185(2)(b);

(c) The licensee's failure to provide the Agency and Connie Grove with a written explanation as to why the refund was not paid constitutes a violation of ORS 658.185(2)(e);

(d) The violations set out in Paragraphs (a), (b), and (c), above, are grounds for a revocation or suspension of the licenses in question.

THERESA DEAN

4) Based upon Findings of Fact 19, 20, 21, 22 and 23, I conclude that:

(a) On or after June of 1976 Theresa Dean was due a refund from the licensee;

(b) The licensee's failure to pay a refund to Theresa Dean constitutes a violation of ORS 658.185(2)(b);

(c) The licensee's failure to provide the Agency and Theresa Dean written explanation as to why the refund was not paid constitutes a violation of ORS 658.185(2)(e);

(d) The violations set out in Paragraphs (a), (b), and (c), above, are grounds for a revocation or suspension of the licenses in question.

PALLE JOHANSEN

5) Based upon Findings of Fact 24, 25, 26 and 27, I conclude that:

(a) On and after August of 1976 Palle Johansen was due a refund from the licensee;

(b) The licensee's failure to pay a refund to Palle Johansen constitutes a violation of ORS 658.185(2)(b);

(c) The licensee's failure to provide the Agency and Palle Johansen with a written explanation as to why the refund was not paid constitutes a violation of ORS 658.185(2)(e);

(d) The violations set out in Paragraphs (a), (b), and (c), above, are grounds for a revocation or suspension of the licenses in question.

EDWARD GOFFARD

6) Based on Findings of Fact 28, 29, 30 and 31, I conclude that:

(a) On and after April of 1976 Edward Goffard was due a refund from the licensee;

(b) The licensee's failure to pay a refund to Edward Goffard constitutes a violation of ORS 658.185(2)(b);

(c) The licensee's failure to provide the Agency and Edward Goffard with a written explanation as to why the refund was not paid constitutes a violation of ORS 658.185(2)(e);

(d) The violations set out in Paragraphs (a), (b) and (c), above, are grounds for a revocation or suspension of the licenses in question.

CHARGE # 3 - VIOLATING THE PROVISIONS OF ORS 658.185(2)(d) BY FAILING TO PROVIDE OR GIVE CREDIT FOR INTEREST AND OTHER CHARGES INCURRED BY APPLICANTS KENNETH COOK AND CONNIE GROVE IN

OBTAINING FUNDS TO PAY THE AGENCY FEE WHEN THEIR EMPLOYMENT TERMINATED PRIOR TO 90 DAYS.

KENNETH COOK

7) Based upon Findings of Fact 32 and 33, I conclude that:

(a) The licensee was obligated to allow as a credit against the fee paid him by Kenneth Cook, the amount of the interest charges for which Kenneth Cook had become liable;

(b) The failure to so allow as a credit the charges referred to above constitutes a violation of ORS 658.185(2)(d);

(c) The violations referred to above are grounds for a revocation or suspension of the licenses in question.

CONNIE GROVE

8) Based upon Finding of Fact 34, I conclude that no violation of ORS 658.185(2)(d) took place in regard to Connie Grove.

CHARGE # 4 - FAILURE TO REFUND OR ADJUST THE AGENCY FEE WHEN APPLICANT EDWARD GOFFARD'S EMPLOYMENT WAS TERMINATED BEFORE HE HAD BEEN EMPLOYED A YEAR IN VIOLATION OF ORS 658.185(3)(c).

9) Based upon Findings of Fact 35 and 36, I conclude that:

(a) On and after April of 1976 Edward Goffard was due a refund from the licensee;

(b) The licensee's failure to refund or adjust the agency fee paid by Edward Goffard constitutes a violation of ORS 658.185(3)(c);

(c) Such a violation is a ground for a revocation or suspension of the licenses in question.

CHARGE # 5 - FAILURE TO DEMONSTRATE FINANCIAL RESPONSIBILITY TO SUCH AN EXTENT THAT IF THE LICENSEE WERE NOW APPLYING FOR A LICENSE AS PROVIDED FOR IN ORS 658.035, SUCH APPLICATION WOULD BE DENIED.

10) Based upon all the Findings of Fact set out above, and in particular upon Findings of Fact 37 through 55, I conclude that if the licensee were presently an applicant for a private employment agency license such an application should be denied in that the licensee has failed to make the showing of financial responsibility contemplated by ORS 658.035(3)(a).

ORDER

IT IS HEREBY ORDERED that pursuant to ORS 658.115 the licenses numbered 026-76 and 027-76 are hereby revoked.

In the Matter of
FRED MEYER, INC.
Respondent

Case Number 03-77

Final Order of the Commissioner

Bill Stevenson
Issued July 14, 1978.

SYNOPSIS

Complainant, a 16-year-old black male, was subjected to frequent and persistent racially derogatory names, remarks and "jokes" by his immediate

supervisors, and was discharged based on their evaluations and on sub-standard performance caused by the racial slurs and abuse. The Commissioner found that Respondent employer failed to maintain a racially neutral work environment and to correct the abuse once it was known to management. The Commissioner held that exhaustion of a union grievance procedure was not a prerequisite to filing a complaint with the Bureau of Labor, that there was no constitutional impediment to the Commissioner awarding humiliation damages, and that the 1977 private right of action statute did not prevent the award of such damages. The Commissioner awarded \$388.50 in back pay and \$4,000 to compensate Complainant for humiliation, ridicule and embarrassment. The Commissioner ordered Respondent to make the Order part of Complainant's personnel file, furnish a copy to anyone inquiring about his employment or performance, post a copy of the Order in the employee area of every Respondent store in Oregon, and provide to each employee a specific written description of the Order and where a copy could be examined. ORS 659.010(2); 659.030(1)(a); 659.050(1); 659.060(1) and (3); 659.095; 659.121.

The contested case in the above-entitled matter came on regularly for hearing before R. D. Albright, who was designated as Hearings Officer in this matter by Bill Stevenson, Commissioner of the Oregon Bureau of Labor. The hearing was held on May 25, 1977, in Portland, Oregon. The Complainant was present and testified

during the course of the hearing. The case for the Oregon Bureau of Labor was presented by Thomas E. Twist, Assistant Attorney General, of its attorneys, and the case for the Respondent was presented by Harry Chandler, Attorney at Law.

Thereafter, I, Bill Stevenson, Commissioner of the Oregon Bureau of Labor, considered the record in the matter, and I now enter the Findings of Fact, Ultimate Findings of Fact, Conclusions of Law, Rulings on Motions and Affirmative Defenses propounded by the Respondent, and Final Order, all of which are set out below.

FINDINGS OF FACT -- PROCEDURAL

1) The Respondent, Fred Meyer, Inc., was and is an Oregon corporation authorized to do business in Oregon and is an employer subject to the provisions of ORS 659.010 to 659.110.

2) On August 21, 1972, Dana E. Hayes, a black male, filed a verified complaint with the Civil Rights Division of the Oregon Bureau of Labor alleging that the Respondent had unlawfully discriminated against him in connection with his employment because of his race and color.

3) Following the filing of the verified complaint by Dana E. Hayes, the Civil Rights Division investigated the allegations in the complaint and determined that substantial evidence existed to support the Complainant's allegation that he had been discriminated against, in his employment, by the Respondent because of his race and color.

4) Thereafter, the Civil Rights Division of the Oregon Bureau of Labor

scheduled a conciliation meeting with Respondent's representative for November 12, 1974. During the course of that meeting, Respondent's representative unequivocally denied that any unlawful conduct by Respondent had occurred, and stated that Respondent's position in this regard was final. Within the next few weeks, some correspondence passed between the Civil Rights Division and the Respondent alluding to the possibility of further settlement and conciliation discussions, but the record fails to indicate that either party to the negotiations have ever actively attempted to resume them.

FINDINGS OF FACT - THE MERITS

1) The Complainant was employed by the Respondent from on or about May 25, 1972, to on or about July 14, 1972, and then re-employed by Respondent for the period from on or about August 20, 1972, to some time in September of 1972. During both periods of employment the Complainant was 16 years of age.

2) The first period of Complainant's employment occurred at the "Division Street" Fred Meyer store in Portland, Oregon. Complainant was assigned to perform duties involving the stocking and display of merchandise for sale to the public in the Variety Department at that store location.

3) During this first period of employment, the Complainant was supervised by the following people who held the following titles:

Mr. Bowman - Manager of Variety Department

Mr. West - Assistant Manager, Variety Department

Mr. Fetters - "third in charge,"
Variety Department

Mr. Bonk - "fourth in charge,"
(Management Trainee) Variety
Department

Each of these supervisors could and did direct Complainant's actual performance of his assigned duties, although Mr. Bowman's contact with the Complainant was minimal.

4) During this period of employment there were at least two other employees, white males, employed in a similar capacity to that of Complainant, and these employees and Complainant were generally referred to by other store personnel as "stockboys."

5) On occasion, when Complainant and another stockboy or stockboys were working together at a given task, Mr. Fetters would engage the white stockboy or stockboys in social conversation and would allow the white stockboy or stockboys to cease work during the period of the conversation. Mr. Fetters would then criticize the Complainant because the task assigned to all the stockboys was not being accomplished quickly enough. Because of other contact between Mr. Fetters and the Complainant of an overt racial nature, I draw the inference that Mr. Fetters accorded different treatment to the white stockboys than the treatment he accorded to the Complainant because of the Complainant's race and color, and further that Mr. Fetters acted with the intent to discriminate against the Complainant because of his race and color. The result of this treatment was to make the Complainant feel intimidated and "belittled" by Mr. Fetters, and isolated, different and inferior to the other employees.

6) Mr. Fetters asked Complainant on several occasions if the Complainant belonged to the "Black Panthers," and each time received a response that the Complainant did not. (I take notice of the fact that at the time in question the Black Panthers were generally thought to be a militant organization of blacks which advocated immediate racial changes.) I find that this particular inquiry was made, and indeed repeated, in order to single out the Complainant from the other store employees because of his race and color, and calculated to embarrass, offend and isolate the Complainant, particularly since there is no evidence of any behavior or the espousal of any philosophy on the part of Complainant which would have otherwise prompted such inquiries on Mr. Fetters' part. The effect of these inquiries was to make Complainant feel isolated, different and inferior to the other employees.

7) On several occasions, but at least once in front of other employees, Mr. Bonk asked Complainant how he came to live in the suburban neighborhood he did and indicated "he was surprised I lived out in that neighborhood, that how could I get out in that neighborhood, that was I accepted in that neighborhood, was, was I comfortable around it, did anyone give me any problems and, in that neighborhood[.]" Mr. Bonk made similar inquiries about Complainant's high school. These inquiries were calculated by Mr. Bonk to embarrass, harass and offend the Complainant because of his race and color and to isolate him from the other white employees and this was the effect achieved on the Complainant.

8) Mr. Bonk often questioned the Complainant as to whether he liked Cadillac automobiles with white side-wall tires and fur upholstery. The Complainant interpreted these inquiries as a reflection of stereotypical thinking which has for some time associated black people with Cadillac automobiles, and I find that Mr. Bonk intended that the Complainant make this interpretation. These inquiries embarrassed and distressed the Complainant and I find that they were calculated to do so by Mr. Bonk.

9) In the presence of other employees, and upon occasion in the presence of customers, Mr. Bonk would tell the Complainant "Black Sambo" jokes. In the course of his narration of these jokes, Mr. Bonk would effect a black accent. The jokes dealt with Black Sambo's food preferences and Black Sambo's laziness.

Mr. Bonk would ask the Complainant whether he shared Black Sambo's food preferences and whether the Complainant was lazy like Black Sambo. Mr. Bonk told Complainant a "lot" of these jokes. I find that the narration of these anecdotes embarrassed and distressed Complainant and that they were calculated to do so by Mr. Bonk.

10) At times when Complainant was mixing paint in the presence of a customer Mr. Bonk would make reference to Complainant's color in comparison to the color of the paint being mixed. Mr. Bonk would ask the Complainant whether he wished that the paint was black or whether the particular color of the paint excited the Complainant. I find that the Complainant was embarrassed and distressed by

these inquiries and that this effect was calculated by Mr. Bonk, who intended the Complainant to be embarrassed and distressed.

11) Several times in the presence of others when the Complainant would meet Mr. Bonk in the stockroom or in the store, Mr. Bonk would walk in an exaggerated and affected manner. The Complainant perceived Mr. Bonk's exaggerated and affected manner of walking as consisting of another racial slur directed at him by Mr. Bonk, and Mr. Bonk intended that the Complainant so perceive his conduct. This conduct by Mr. Bonk embarrassed and distressed the Complainant.

12) Mr. Bonk called the Complainant "Shaft," "Mohammed," and "Uncle Tom" on several occasions. (I take notice of the fact that "Shaft" is a fictitious character in the world of entertainment. He is a tough, black private detective.) I find that these appellations directed to Complainant were intended by Mr. Bonk to single Complainant out because of his race and color and to distress and embarrass Complainant, and I further find that the appellations had precisely this effect upon Complainant.

13) Aside and apart from the rendition of the "Black Sambo" jokes, Mr. Bonk talked "a lot" about Complainant's food preferences. These inquiries were intended by Mr. Bonk to single Complainant out from the other employees because of Complainant's race and color, and distressed and embarrassed Complainant. Mr. Bonk intended that Complainant be distressed and embarrassed by these inquiries.

14) The appearance and texture of Complainant's hair was the subject of

Mr. Bonk's interest and comment at various times. ("Several times he would, he would like to try to touch it and say it was like wool or like a rough brush or a wire brush or whatever.") I find that these tonsorial inquiries embarrassed and distressed Complainant and that this was the effect that Mr. Bonk intended these inquiries to have.

15) On one occasion, Complainant and Mr. Bonk were in the stockroom when a white female employee, a Mrs. Butler, entered the stockroom. Mrs. Butler was married to a black man and Mr. Bonk knew this fact. As Mrs. Butler was leaving Mr. Bonk asked her, in Complainant's presence, "How do you kill a nigger?" (according to Dana Hayes' testimony) or "How do you beat a nigger?" (according to Mrs. Butler's testimony). Under cross-examination Mr. Bonk testified that, although he denied recollection of this incident, if it had occurred he would not have used the word "kill." I find that this conversation took place and that it caused the Complainant humiliation, distress and embarrassment and was calculated to do so by Mr. Bonk.

16) Mr. Fetters was aware of some of the treatment meted out to the Complainant by Mr. Bonk in that he observed a number of the conversations and incidents alluded to above.

17) I find that virtually every contact that the Complainant had with Mr. Bonk, one of his supervisors, amounted to an exposure to Mr. Bonk's pointless racial inquiries, or racial "humor" and that the distress, humiliation and embarrassment this exposure caused Complainant adversely affected his work performance. I further find that the treatment

accorded Complainant by Mr. Fetters, and Mr. Fetters' participation in and knowledge of the treatment accorded to the Complainant by Mr. Bonk, further adversely affected Complainant's work performance.

18) I find that the Complainant never consented to, encouraged or repelled in kind in any regard to any of the racial inquiries, actions or dialogue initiated and carried forward by Mr. Bonk or Mr. Fetters.

19) During this initial period of employment, at about its halfway point, Mr. West, Respondent's Assistant Manager, became aware that Mr. Bonk's supervision of Complainant had racial overtones to it, when he overheard Mr. Bonk referring to the Complainant in a conversation with Mr. West as "Mohammed." Under Mr. West's questioning, Mr. Bonk admitted to Mr. West that he had told "Black Sambo" jokes to the Complainant and that he "teased" the Complainant about Cadillac automobiles. Mr. West told Mr. Bonk that in Mr. West's judgment such interaction between Mr. Bonk and the Complainant was "not proper." Mr. West advised Mr. Bonk of his feelings of impropriety on two separate occasions. Mr. West did not advise any of his superiors of the type of interaction that Mr. Bonk engaged in with the Complainant. I find that Mr. Bonk did not pay heed to Mr. West's advice and Mr. Bonk's racial harassment of the Complainant increased throughout this initial period of employment to the point where the harassment was more severe at the termination of the initial period of employment than it had been in the beginning or the middle.

20) The Variety Department Manager, Mr. Bowman, terminated the Complainant on or about July 14, 1972. In so doing, he acted ostensibly out of considerations regarding Complainant's immaturity and work performance. Mr. Bowman testified and I so find that there had been only one occasion when the Complainant's work performance required Mr. Bowman to "counsel" him. Mr. Bowman testified and I so find that "50%" of his decision to terminate Complainant was based upon the recommendations of the other three supervisors.

He also testified, and I so find, that he relied upon his own observations as the balance of the basis for his decision to terminate the Complainant. There is no evidence in the record to indicate that the Complainant's race and color personally motivated Mr. Bowman, one way or the other, in reaching his decision to terminate the Complainant.

21) I find that the Complainant's first period of employment with the Respondent lasted a total of eight weeks, and that during the last two weeks (the period July 2, 1972, through July 15, 1972) he worked an average of 37 hours per week at the rate of \$2.10 per hour.

22) Complainant complained to his union concerning his discharge and the circumstances of his discharge and the union negotiated with Respondent a reinstatement to a similar position in another of Respondent's retail stores. This reinstatement became effective August 20, 1972, and the Complainant's second period of employment with Respondent lasted until September 16, 1972, when the Complainant

and Respondent terminated the employment by mutual consent. During this second period of employment there is no evidence in the record of overt racial discrimination directed at Complainant. Complainant testified that his job performance during this second period of employment was "below average" and indicated these reasons for his performance:

"By that time I was sort of fed up with Fred Meyers and I was pretty discouraged, and I just wanted to be through with them basically. * *
* Well, the harassment, the jokes, the intimidations, the treatments."

23) Following the termination of his second period of employment with Respondent, Complainant returned to school and did not attempt to find employment through the course of that school year or during the following summer.

ULTIMATE FINDINGS OF FACT

1) The Civil Rights Division of the Oregon Bureau of Labor made reasonable efforts to resolve Complainant's complaint with the Respondent prior to service of Specific Charges of Discrimination on the Respondent.

2) During Complainant's first period of employment with Respondent, Complainant was a victim of more or less continual racial harassment and abuse.

The chief actor as to the abuse and harassment was the fourth-ranking supervisor, Mr. Bonk. The third-ranking supervisor, Mr. Fetters, knew of the situation and at times participated in the abuse and harassment. The second-ranking supervisor, Mr. West, knew of instances of the abuse and

harassment and took only insufficient and ineffectual means to correct the situation, which did not include passing on the information to higher supervisory personnel.

3) As a consequence of the circumstances set out in paragraph (2) above, the Complainant suffered humiliation, distress, embarrassment and anxiety, as well as a loss of self-confidence. His performance during both periods of employment suffered adversely because of these circumstances.

4) The first-ranking supervisor relied in part on the recommendations of the three lower ranking supervisors in regard to his decision to terminate the Complainant from his position at the "Division Street" store. Two of these supervisors were motivated, in giving their recommendation, by active considerations of racial prejudice specifically directed at the Complainant. The third knew of some instances of the abuse directed at Complainant and was ineffective in correcting the situation. Any correctly perceived instances of the Complainant's substandard work performance on Mr. Bowman's part which influenced his termination decision were contributed to and caused, at least in part, by the racial abuse and slurs directed at the Complainant. That is to say that, when Mr. Bowman observed the Complainant performing poorly, what he was in fact observing was the effect of the racial discrimination directed at the Complainant. The abuse and racial slurs were thus substantial factors in regard to Mr. Bowman's decision to terminate Complainant. In short, Complainant

was terminated, on or about July 14, 1972, because of his race and color.

5) Complainant's performance during his second period of employment was substandard, and this substandard performance was a result of the past discrimination meted out by the Respondent.

CONCLUSIONS OF LAW

1) Respondent had a duty under the law to provide the Complainant with a racially neutral work environment in the sense that it was obliged to prevent its supervisory agents from subjecting Complainant to racial abuse and harassment. This duty was an affirmative duty in the sense that Respondent should have ensured that the work environment was racially neutral and should have taken active steps to maintain the environment in that status. Respondent's legal duty in this regard was breached in these particulars:

(a) The racial abuse and harassment directed against Complainant by two supervisory personnel.

(b) The failure, once this situation became known by a more senior supervisor (West), to put a stop to these occurrences.

The breach of this legal duty constitutes a violation of ORS 659.030(1)(a).

2) The racially discriminatory actions of the supervisors, Messrs. Bonk, Fetters, West and Bowman are imputed to the Respondent.

3) Respondent's termination of Complainant on July 12, 1972, because of his race and color, constitutes another violation of ORS 659.030(1)(a).

4) Findings of Fact - Procedural (4) and Ultimate Findings of Fact (1) constitute compliance with the conciliation provisions of ORS 659.060(1) and 659.050(1).

RULINGS ON MOTIONS AND AFFIRMATIVE DEFENSES PROPOUNDED BY RESPONDENT

1) Motion to Dismiss Charges Due to Alleged Failure of the Bureau of Labor to Undertake Reasonable Efforts to Conciliate the Claim.

This motion is denied. Assuming, for the sake of argument only, that the language of ORS 659.050(1) ("the Commissioner may cause immediate steps to be taken through conference, conciliation") can be construed to impose an absolute jurisdictional condition precedent to the scheduling and conduct of a contested case hearing, this issue is disposed of by means of Findings of Fact - Procedural (4), Ultimate Findings of Fact (1) and Conclusion of Law (4).

2) Motion to Dismiss Because of the Complainant's Failure to Exhaust the Grievance Procedure Established by the Collective Bargaining Agreement in Attempting to Resolve his Complaint.

Respondent's attack on the Commissioner's jurisdiction in regard to this issue is supported by citation to two Oregon Supreme Court cases and a United States Supreme Court case, all of which cases involve the application of the National Labor Relations Act. It will be helpful here to discuss these cases with a view toward distinguishing them from the facts and circumstances at issue here.

Republic Steel Corporation v. Maddox, 379 US 650, 85 S Ct 614 (1965) involved a suit brought by an employee for severance pay which was provided for in a collective bargain. He brought his legal action in the Alabama State Court and received a judgment. The Appellate Courts of Alabama affirmed the Trial Court Judgment on the basis that under Alabama law, Maddox was not required to exhaust the contract grievance procedures in regard to his attempt to recover severance pay. The Court reversed the Alabama State Court Judgment and laid down this rule:

"As a general rule in cases to which federal law applies, federal labor policy requires that individual employees wishing to assert contract grievances must attempt use of the contract grievance procedure agreed upon by employer and union as a mode of redress." [379 US] at 652.

State ex rel Nilsen v. Berry, 248 Or 391, 434 P2d 471 (1967), another case cited by the Respondent, leans heavily on *Maddox*. The issue in that case was whether doctrines of federal labor law, applied to a provision in a collective bargaining agreement between a labor union and an employer engaged in interstate commerce, prevailed over inconsistent local rules. The dispute involved overtime wages, provisions for which were set out in the collective bargain. The Labor Commissioner had brought his action to recover overtime wages, under the provisions of Oregon law. The Oregon Supreme Court held that the operative federal statute which reposed jurisdiction exclusively in the federal courts

pre-empted the field, state legislation to the contrary notwithstanding. The Court quoted with approval language from *Teamsters Local v. Lucas Flower Co.*, 369 US 95:

"[W]e cannot but conclude that in enacting [section] 301, Congress intended doctrines of federal labor law uniformly to prevail over inconsistent local rules." [369 US] at 104.

Gilstrap v. Mitchell Bros. Truck Lines, 270 Or 599, 606, 529 P2d 370 (1974), the third case cited by the Respondent, involved a dispute between the truck-owner employees and the trucking company employer in regard to certain oral and written agreements concerning the trucks. The Court excused the employees from strict compliance with the mandatory grievance procedure because of reasons not material here, but essentially the case can be regarded as a restatement of the general rule laid down in *Maddox*.

This agency takes the legal position that cases brought under the provisions of ORS chapter 659 involving the Labor Commissioner's enforcement of civil rights (and not involving disputes as to overtime and severance pay entitlements) are not subject to the *Maddox* rule. This position is supported by the United States Supreme Court case of *Alexander V. Gardner-Denver Co.*, 7 EPD 6793 [415 US 36] (1974), which contains the following language in regard to this issue:

"We think, therefore, that the federal policy favoring arbitration of labor disputes and the federal policy against discriminatory employment practices can best be accommodated by permitting an

employee to pursue fully both his remedy under the grievance-arbitration clause of a collective bargaining agreement and his cause of action under Title VII." [7 EPD] at 6802-3.

Title VII is the federal counterpart of the statutes and administrative machinery providing for the resolution of civil rights complaints found in ORS Chapter 659.

The *Alexander* court provided a convincing rationale to support its holding:

"Arbitral procedures, while well suited to the resolution of contractual disputes, make arbitration a comparatively inappropriate forum for the final resolution of rights created by Title VII. This conclusion rests first on the special role of the arbitrator, whose task is to effectuate the intent of the parties rather than the requirements of enacted legislation." [7 EPD] at 6801.

There is another analysis set out to explain the availability of separate distinct forums:

"In submitting his grievance to arbitration, an employee seeks to indicate his contractual right under a collective bargaining agreement. By contrast, in filing a lawsuit under Title VII, an employee asserts independent statutory rights accorded by Congress. The distinctly separate nature of these contractual and statutory rights is not vitiated merely because both were violated as a result of the same factual occurrence. And certainly no inconsistency results from permitting both rights to be enforced in their respectively

appropriate forums[.]" [7 EPD] at 6799.

Respondent's motion is denied.

(3) The Respondent's Assertion By Way of Affirmative Defense That the Commissioner is Without Authority to Make an Award for Humiliation, Mental Distress, Etc., in Employment Discrimination Cases.

The Respondent argues that the Commissioner is without authority to award humiliation damages because:

(1) There is a constitutional prohibition to such an award absent a jury trial, and

(2) The recent approval of a bill by the Oregon legislature which grants a private cause of action to a complainant and does not provide for compensatory and punitive damages acts as a prohibition to such an award by the Commissioner.

The constitutional question - In *Williams v. Joyce*, 4 Or App 482, 479 P2d 513 (1971), the Supreme [sic] Court of Oregon in its consideration of the propriety of an award of damages for mental distress suffered as a result of racial discrimination in housing, held that there was no constitutional impediment which barred the legislature from authorizing an agency to award such damages. Arguing that a distinction between this case and the present circumstances exists because *Joyce* is a housing case and this case is an employment case, seems a perfect example of a distinction without a difference.

There is, however, an employment discrimination case, *School District No. 1 v. Nilsen*, 271 Or 641, 534 P2d 1135 (1975), which indicates that such

damages are properly awarded provided the record contains a sufficiency of evidence of humiliation, ridicule and embarrassment. The award for these damages was reversed only because of an insufficiency as to the quantum and quality of evidence of humiliation, ridicule and embarrassment. The Court stated at 484:

"There was no evidence of humiliation. No one reviled the Complainant, accused her of any moral impropriety, or ridiculed or embarrassed her because she was pregnant. At most, it was reported to her by some third party that the principal had said that if he had known she was going to cause this much trouble, he would have fired her"

In the present case, as the findings reflect, there is an abundance of evidence concerning ridicule, embarrassment and humiliation meted out to the Complainant by the Respondent. This situation was particularly egregious in view of Hayes' youth. That a young man should encounter such environment in his initial venture into the world of work is outrageous. In circumstances such as this an award for humiliation, mental distress, etc., is not only appropriate but is indeed contemplated by the legislature of the State of Oregon.

The recently enacted statute - Respondent contends that the enactment of ORS 659.095 and ORS 659.121 in 1977 remove from the Commissioner any ability (which he might have had) to award damages for humiliation which the courts expressly approved in *School District No. 1*. Respondent claims these statutes have retroactive

effect on substantive rights involving operative facts which occurred before their effective date. This agency believes that had the legislature so intended this retroactive effect, it would have expressly addressed itself to the issue in the language of the new procedural statutes it was enacting.

By way of summary, the position of the Bureau of Labor is that, whatever the effects of the newly enacted statutes on the Commissioner's ability to award damages for humiliation resulting from operative facts occurring after October 4, 1977, these statutes have no effect on the Commissioner's ability to award these damages under the facts and circumstances of this case.

FINAL ORDER

NOW, THEREFORE, as provided by ORS 659.060(3) and 659.010(2) and in order to eliminate the effects of the unlawful practices found and to protect the rights of other persons similarly situated, Respondent is ordered to:

1) Deliver to the Portland office of the Oregon Bureau of Labor within fifteen (15) days of the execution of this Order a certified check, payable to Dana Hayes, in the amount of Four Thousand Dollars (\$4,000.00) to compensate him for the humiliation, ridicule and embarrassment suffered at Respondent's hands.

2) Deliver to the Portland office of the Oregon Bureau of Labor within fifteen (15) days of the execution of this Order a certified check, payable to Dana Hayes, in the gross amount of Three Hundred Eighty-Eight Dollars and Fifty Cents (\$388.50) representing back pay for the period July 15, 1972,

through August 19, 1972, computed at the rate of 37 hours per week (\$2.10 per hour) for five weeks.

3) Make a copy of this document a permanent part of any personnel recordation it maintains concerning the employment of Dana Hayes during the year 1972, and to furnish a copy to anyone making inquiries concerning Mr. Hayes' employment or his performance with Respondent.

4) To post, for a period of 120 days, which period shall be deemed to begin on the tenth day following the date of this Order or on the tenth day following the vacation of any stay order obtained by Respondent concurrent with Respondent's pursuit of appellate remedies, a copy of this document, in every separate business establishment maintained by the Respondent within the State of Oregon, in places within those establishments accessible to and frequented by each and every employee of Respondent.

5) To provide to each employee of Respondent within forty (40) days of the date of this Order or within forty (40) days of the vacation of any stay order obtained by Respondent concurrent with Respondent's pursuit of appellate remedies, a written copy of the textual material set out below:

"In 1972, a black employee of Fred Meyer, Inc., filed a Complaint with the Civil Rights Division of the Oregon Bureau of Labor, charging that Fred Meyer, Inc. had unlawfully discriminated against him in connection with his employment because of his race and color. Fred Meyer, Inc. denied the allegations of this Complaint and thereafter a contested case hearing, under the

provisions of the Oregon Administrative Procedure Act and the Oregon Fair Employment Practices Law, was held. Following this hearing, the Commissioner of the Oregon Bureau of Labor published Findings of Fact, Ultimate Findings of Fact, Conclusions of Law, Rulings on Motions and Affirmative Defenses propounded by the Respondent, and an Order. Contained in the Conclusions of Law reached by the Commissioner appeared this language:

'Respondent had a duty under the law to provide the Complainant with a racially neutral work environment in the sense that it was obliged to prevent its supervisory agents from subjecting Complainant to racial abuse and harassment. This duty was an affirmative duty in the sense that Respondent should have ensured that the work environment was racially neutral and should have taken active steps to maintain the environment in that status'

"The full text of the Labor Commissioner's Findings of Fact, Ultimate Findings of Fact, Conclusions of Law, Rulings on Motions and Affirmative Defenses propounded by the Respondent, and Order is available for examination at (Note: In this blank should be inserted the place within Respondent's establishment where a copy of this document is posted and where the employees can read and examine it.) "The full text can also be read and examined at the office of the Civil Rights Division of the Oregon

Bureau of Labor, 2nd Floor, State Office Building, 1400 S.W. Fifth Avenue, Portland, Oregon 97201."

"Fred Meyer, Inc. will not tolerate any conduct on the part of any employee of Fred Meyer, Inc. which detracts from a work environment of total racial neutrality and which in any way resembles the conduct found by the Labor Commissioner to have occurred in this particular case."

If the language set out immediately above is provided to the employee as an inclusion with other written material, such language shall be bordered on all four sides and shall be set in type all in capital letters or in type larger than that of the other written material.

**In the Matter of
PACIFIC PAPER BOX CO. INC.,
an Oregon Corporation; and
James D. Faville, an Individual.
Respondents.**

Case Number 02-77
Final Order of the Commissioner
Bill Stevenson
Issued July 27, 1978.

SYNOPSIS

Relying on the credibility finding of the Hearings Referee rejecting Complainant's assertion that the individual

Respondent stated a preference for females in the position sought, the Commissioner found that Respondent employer did not refuse to hire the male Complainant based on his sex. Where Complainant was in a pool of three females and seven males from which two females were hired into an existing unskilled work force of 24 females and four males, the Commissioner held that, without data concerning prior applicant flow and the relevant labor market, the disproportionate number of females in the unskilled work force alone could not satisfy the Agency's burden of proving a discriminatory practice. The individual Respondent was not an aider and abettor where there was no unlawful practice. Charges against both Respondents were dismissed. ORS 659.010(6) and (12); 659.030(1) and (5); 659.060(3).

The above-entitled matter having come on regularly for hearing before R. D. Albright, who was designated Presiding Officer by the Commissioner of the Oregon Bureau of Labor; the hearing having been convened at 9:30 a.m., on April 5, 1977, in Room 773, State Office Building, 1400 S.W. 5th Avenue, Portland, Oregon; the Complainant being present and the Agency being present and represented by John Peterson, Assistant Attorney General, and the Respondents being present and represented by Ferris Boothe, Attorney at Law. Bill Stevenson, Commissioner of the Oregon Bureau of Labor, having considered the Findings, Conclusions, and Order proposed by the Presiding Officer, R. D. Albright, and having considered the

whole record, the exhibits received and arguments of counsel, and being fully advised in the premises does hereby make the following Findings of Fact, Ultimate Findings of Fact, Conclusions of Law, and Order.

FINDINGS OF FACT – PROCEDURAL

1) The Respondent Pacific Paper Box Co. Inc., was and is an Oregon corporation authorized to do business in Oregon, and an employer subject to the provisions of ORS 659.010 to 659.110.

2) The Respondent James D. Faville has been and continues to be president of Respondent Pacific Paper Box Co. Inc., and has exercised and continues to exercise full supervisory and managerial authority over the recruiting, hiring, and promoting and compensating the employees of Respondent Pacific Paper Box Co. Inc.

3) On or about January 12, 1972, Craig F. Berger filed a verified written complaint with the Civil Rights Division of the Oregon Bureau of Labor alleging that Respondent Pacific Paper Box Co. Inc. had unlawfully discriminated against him in connection with seeking employment because of his sex.

4) On or about February 11, 1977, the Commissioner of the Oregon Bureau of Labor caused specific charges to be served on the Respondents alleging, in part, that:

1. On or about January 11, 1972, Respondent Pacific Paper Box Co. Inc. refused to hire or employ Craig Berger (the Complainant) because of his sex.

2. Respondent James D. Faville aided and abetted Respondent

Pacific Paper Box Co. Inc. in the commission of the act described in # 1 of this paragraph.

5) Following the filing of the specific charges herein, a hearing was convened by the Commissioner for the purpose of considering all the evidence relevant to the charges.

6) R. D. Albright, the Presiding Officer, after considering all the evidence, made and issued Proposed Findings, Conclusions, and Order, favorable to the Respondents.

FINDINGS OF FACT – THE MERITS

1) In or about the first part of January 1972, the Respondents caused a job announcement for temporary employment with the Respondents to be posted by the Oregon State Employment Division.

2) The jobs announced were on the production line of the paper box assembling process. The jobs required, for their performance, no knowledge or skill above and beyond manual dexterity. The starting pay for the job was Two Dollars and fifty-four cents (\$2.54) per hour.

3) The Oregon State Employment Division referred ten (10) applicants to Respondents, including the Complainant, to interview for the job announced. Seven (7) of the applicants were male and the remaining three (3) were female.

4) The selection of the applicants for employment made by Respondents were based upon a comparison of the applicant's performances during the interview process, and the form and content of their written applications. Respondent James D. Faville conducted the interviews.

5) After interviewing all ten (10) applicants, the Respondents hired two (2) female applicants, Ms. Judy Hall and Ms. Altha Paul.

6) Ms. Judy Hall had previous production line experience as a packer for Nabisco Company. The educational and employment background of Ms. Altha Paul, one of the two (2) applicants selected, and of the Complainant, are in areas unrelated to work on a production line. Ms. Paul has a college degree in anthropology, biology and art, and work experience as a teacher, a welfare assistance worker, and as an assistant supervisor in the library of Pacific University. The Complainant has a college degree in chemistry and philosophy.

His prior work experience includes employment as a counselor at a child care center, and as an attendant at two (2) institutions for developmentally and emotionally disturbed children.

7) During the interviews conducted, Respondent James Faville discussed with each applicant the information contained in his or her written application.

8) In his written application, the Complainant stated that he had been "fired" by his most recent previous employer, Parry Center for Children, because of "incompatibility with a new supervisor."

9) At hearing, Complainant testified and I find that during his interview, he briefly discussed with Mr. Faville the circumstances surrounding his discharge by the Parry Center, and did advise Mr. Faville that he was discharged by the Parry Center without

cause, as part of a general turnover of employees by a new administration.

10) At hearing, Respondent James Faville testified and I find that around the time of Complainant's interview, Mr. Faville was a member of the Board of Directors of the Morrison Center, a child care facility which was similar to and, in fact, next door to the Parry Center. Mr. Faville testified that he was familiar with the work of the Parry Center and with its administrative personnel. He further testified that he understood Parry Center's approach to counseling to be "unstructured," in the sense that the work at Parry Center relates to the mental and emotional state of interned youths.

11) At hearing, Respondent James Faville testified to his impressions of the Complainant during and after the interview process. He testified that "what stood out to me immediately was that he [Complainant] had been terminated from the Parry Center." Mr. Faville also stated that "I thought Mr. Berger was antagonistic to some extent and seemed to have a chip on his shoulder, which . . . as compared to Alpha Paul, it was like night and day . . ." Mr. Faville also testified that his knowledge of the "unstructured" work of Parry Center had a negative effect on his evaluation of the Complainant's desire and ability to perform the repetitive tasks required on a production line.

12) At hearing the Complainant, in his testimony, attributed to James Faville an admission of sex discrimination. According to the Complainant, Mr. Faville admitted to the Complainant that he preferred women in jobs on the assembly line. At hearing, Mr. Faville

denied that he made such an admission, and was unequivocal in this regard. My finding on this point in dispute is in accordance with the testimony of Mr. Faville.

13) Respondent James Faville testified and I find that it has always been and that it continues to be Respondents' policy and practice to retain in a permanent position; or to rehire in positions which later become available, any employee hired on a temporary basis, if the employee demonstrates by his or her work performance the desire and ability to remain employed by Respondents.

14) Consistent with Respondents' stated policy in regard to retention or rehiring of temporary employees, Ms. Judy Hall was rehired by Respondent approximately one (1) year following the termination of her temporary position. Ms. Altha Paul was retained by Respondent in a permanent position, following the expiration of her temporary status.

15) During the year 1972, Respondents employed twenty-eight (28) persons in unskilled positions, twenty-four (24) of whom were females, and four (4) of whom were male.

ULTIMATE FINDINGS OF FACT

1) On January 12, 1972, Complainant Craig F. Berger and nine (9) other individuals made application with Respondent for employment in two (2) temporary and unskilled positions.

2) The Respondents hired two (2) of the three (3) female applicants, and rejected the eight (8) remaining applicants, including the Complainant and one (1) female applicant, on the basis of a comparison of their respective

backgrounds and their performances during the interview process.

3) Both the Complainant and the two (2) female persons hired were qualified to perform the duties of the production line job in question.

4) The Respondents offered legitimate and non-discriminatory reasons for their refusal to hire and employ the Complainant.

5) It has not been established that the reasons offered by the Respondents for refusing to hire and employ the Complainant were pretextual and a subterfuge for discrimination because of sex.

CONCLUSIONS OF LAW

1) The evidence does not establish that Respondent Pacific Paper Box Co. Inc. denied employment to Complainant because of his sex, in violation of ORS 659.030.

2) The evidence does not establish that Respondent James D. Faville aided and abetted the commission of an act by Respondent Pacific Paper Box Company, Inc., which constitutes an unlawful employment practice in violation of ORS 659.030.

OPINION

ORS 659.030 prohibits an employer from discriminating in the hiring of employees on the basis of sex. The Agency had the initial burden of establishing that Respondent had violated this provision by rejecting the Complainant. The Agency tried to meet its burden through the testimony of Complainant, and by numbers which it characterized as "statistical proof."

The Complainant testified that at the very outset of the application process certain persons in the Employment

Division of the State of Oregon had knowledge of Respondents' alleged preferences for women as unskilled employees, and that these persons tried to discourage him from making application with Respondent. However, conspicuous in their absence at hearing were the names, presence, and testimony of such persons.

At hearing, the Complainant also attributed to James Faville an admission of sex discrimination, which Mr. Faville denies making. According to the Complainant, Mr. Faville stated directly to the Complainant that he "preferred women" in the job in question. However, no testimony was offered, and apparently none was available, to corroborate the statement which Complainant attributes to Mr. Faville. The Presiding Officer received and considered the testimony of the Complainant and Mr. Faville, and thereafter did make and issue a Proposed Order which was favorable to the Respondents. It is obvious that in order to reach a result favorable to the Respondents, it was necessary that the Presiding Officer believe Mr. Faville in his denial of the alleged admission, and disbelieve the Complainant's testimony. In the absence of testimony which corroborates the admission the Complainant attributes to Mr. Faville, or other evidence in the record which impugns the credibility of Mr. Faville with respect to this issue, I adopt the result reached by the Presiding Officer in regard to this disputed issue of fact.

The "numbers" which the Agency characterized as "statistical proof" represent and include the following:

(a) The number of males, including the Complainant, (7), and

females (3), who made application for the positions announced by Respondents;

(b) The number of males (4) and females (24) employed by Respondents as unskilled laborers and operatives, in or around the year 1972;

(c) The number of males and females employed by Respondent in positions similar to or the same as the position for which the Complainant applied, at a time shortly following Complainant's application.

The most that can be said of the "numbers" is that they show a substantially greater number of females employed as unskilled laborers by Respondents than were males, in and around 1972. However, this does not amount to proof of discriminatory hiring practices by Respondents. It is only proof that in 1972 there were more women than men employed by Respondents as unskilled laborers. In fact, without additional evidence that, in the years preceding 1972, the number of male applicants was substantially equal to or greater than the number of female applicants, it is entirely possible that the numerical predominance of females in the work force in 1972 was the result and the effect of a disproportionately greater number of female persons in the labor market and female applicants for the kind of work involved. In the absence of additional data pertaining to applicant flow and the relevant labor market, the burden of proof remained with the Agency, and never shifted to the Respondent.

ORDER

In accordance with ORS 659.060(3), it is hereby ordered that the Complaint and Specific Charges against Respondents Pacific Paper Box Co. Inc., and James D. Faville, alleging the commission of unlawful employment practices because of the sex of Craig F. Berger, be and are dismissed.

**In the Matter of
MONTGOMERY WARD
AND COMPANY, INC.,
an Illinois corporation doing business in Oregon, Respondent.**

Case Number 02-76
On Remand from the Oregon
Supreme Court
Final Order of the Commissioner
Bill Stevenson
Issued August 1, 1978.

SYNOPSIS

The Commissioner found that Respondent employer, in April 1974, unlawfully rejected Complainant as an appliance salesman after a brief medical examination on the basis of a heart attack in 1968. The Commissioner found that Complainant's heart condition was a physical handicap that did not prevent the performance of the work involved, there being no probability that he could not perform the job in

a satisfactory manner or that he would be incapacitated. Because Respondent was predisposed to reject Complainant on the basis of the heart history, refused to consult with or evaluate the opinion of the treating physician, and sought thereby to reduce its business risk, the Commissioner ordered back pay from the intended date of hire to the date of the order, to be computed as in the original order (*In the Matter of Montgomery Ward and Company, Inc.*, 1 BOLI 62 (1976)), excluding the time between the Court of Appeals decision (*Montgomery Ward and Company, Inc. v. Bureau of Labor*, 28 Or App 747, 561 P2d 637 (1977)) and the Supreme Court decision (*Montgomery Ward and Company, Inc. v. Bureau of Labor*, 280 Or 163, 570 P2d 76 (1977)), and extending through 60 day monitoring intervals from the order date until Respondent offered the next available comparable position. The Commissioner awarded \$2000 for mental anguish, ordered Respondent to refrain from refusing employment on the basis of a handicap not preventing performance, and ordered Respondent to post in all Portland area stores a declaration that Respondent was an equal opportunity employer with respect to the handicapped. ORS 659.010(2); 659.060(3); 659.405(1); 659.425(1).

The above-entitled matter having come on regularly for hearing before Russell M. Heath, designated as presiding officer by the Commissioner of the Bureau of Labor, the hearing having been convened at 9:10 a.m. on May 7, 1975, in room 669, State Office Building, 1400 S.W. 5th, Portland,

Oregon, and continuing through May 9, 1975; the Complainant being present, the Agency having been represented by Victor Levy, Assistant Attorney General, and the Respondent being present and represented by Greg Byrne, Attorney at Law. On October 10, 1975, Dale A. Price was designated presiding officer to replace Russell M. Heath who had resigned from state service. On August 10, 1976, Bill Stevenson, Commissioner of the Bureau of Labor, did make and issue a Final Order in this matter, which was adverse to the Respondent. [Ed: *In the Matter of Montgomery Ward and Company, Inc.*, 1 BOLI 62 (1976).] The Respondent thereafter made appeal to the Oregon Court of Appeals, which upon review of the case, reversed the Commissioner's Order. [Ed: *Montgomery Ward and Company, Inc. v. Bureau of Labor*, 28 Or App 747, 561 P2d 637 (1977).] The Oregon Supreme Court, upon its review of the Court of Appeals decision, reversed that decision and remanded the case to the Commissioner for a determination on the present record in accordance with the Court's opinion. [Ed: *Montgomery Ward and Company, Inc. v. Bureau of Labor*, 280 Or 163, 570 P2d 76 (1977).] The Commissioner, being fully advised in the premises, does hereby issue this modified Order in accordance with the opinion of the Oregon Supreme Court.

FINDINGS OF FACT – PROCEDURAL

1) The Respondent, Montgomery Ward, Inc., was and is an Illinois corporation authorized to do business in Oregon, and at all times material herein has operated a retail

department store in its corporate name located at the Jantzen Beach Center on Hayden Island, Portland, Oregon. At all times material herein Respondent has employed more than six (6) employees at the Jantzen Beach store, and is an employer subject to the provisions of ORS 659.010 to 659.425.

2) On April 29, 1974, James M. Williams filed a verified complaint with the Civil Rights Division of the Oregon Bureau of Labor alleging that the Respondent, through its agents, had engaged in an unlawful employment practice in refusing to hire and employ the Complainant because of a physical handicap.

3) Following the filing of the verified complaint by James M. Williams, the Civil Rights Division investigated the allegations in the complaint and determined that substantial evidence existed to support the Complainant's allegations that he had been discriminated against in seeking employment by the Respondent because of his physical handicap.

4) Thereafter, the Commissioner of the Oregon Bureau of Labor, by and through his duly authorized agents and representatives, did cause specific charges to be filed against Respondent, and the matter came on regularly for hearing.

FINDINGS OF FACT - THE MERITS

1) At times material herein, the Complainant James M. Williams had a medical history of a single subendocardial infarction, commonly known as a heart attack, which occurred in 1968.

2) Complainant has been since his heart attack, and was at the time of hearing, under the care, treatment and

close medical observation of Dr. Harold Dygart, a Fellow of the American College of Cardiology, or in common terminology, a "heart specialist." Complainant's medical history subsequent to his heart attack, and as of his application for employment with the Respondent, had been compiled by Dr. Dygart in the course of five (5) to six (6) examinations per year over a period of six (6) years. The Complainant achieved positive results from the treatment administered by Dr. Dygart. It was Dr. Dygart's medical opinion and I find that at the time Complainant made his application with Respondent, he had had since 1968 "a stable, uninvolved situation from a practical standpoint" for six (6) years, and that Complainant's cardiac condition was of no clinical significance except in work requiring continued, hard, physical effort.

3) Since his attack in 1968, Complainant was employed as an appliance salesperson for the Appliance Center, Raleigh, North Carolina, from May through July 1969, and sales manager for the Don Fraser Company of Vancouver, Washington, from September 1969 through December 1973. Complainant was recommended by both employers for the same or similar work.

4) In or around March of 1974, Complainant tendered to Respondent a written application for employment as a salesperson. Complainant voluntarily disclosed on his application the prior occurrence of a heart attack in 1968. In support of his application, Complainant submitted a letter from his attending physician, Dr. Dygart, which summarized Complainant's medical

history referred to in paragraph 2 above, and expressed the doctor's medical opinion that Complainant's cardiac condition had no medical significance to work not involving continual strenuous activity. Letters of recommendation by his former employers were also submitted.

5) On or about April 22, 1974, Complainant inquired in person at Respondent's Jantzen Beach store, regarding his application for employment. He spoke with a Mrs. Arnold, of Respondent's personnel office.

6) At the time of his inquiry, Complainant expressed an interest in employment with Respondent as an appliance salesperson. Mrs. Arnold telephoned a Mr. Martin, head of the Appliance Department of Respondent's Jantzen Beach store.

7) Later on the same day, Complainant was interviewed by Mr. Martin, in the presence of Mrs. Arnold. Mr. Martin described a job soon to be available in appliance sales. In accordance with Mr. Martin's testimony, I find that the duties of the job for which the Complainant was interviewed consisted primarily of speaking with the public about possible purchases. Any moving of appliances would normally be handled by warehousemen with sporadic shifting of appliances by salespersons. I make this finding in the face of Dr. Battalia's testimony. At hearing, Dr. Battalia was asked:

MR. LEVY: "How much time is spent by the average salesman moving around appliances in a given day at Jantzen Beach?"

DR. BATTALIA: "I couldn't tell you; I wouldn't know how they

would change their displays, how often; how often they make a sale and fit another one in, sell from the floor * * * I would imagine they probably move 3, 4, maybe 5 refrigerators a day * * * if their operation is the same as ours at the Vaughn street store, it would amount to about that much."

MR. LEVY: "But you don't know in fact what it is?"

DR. BATTALIA: "No, and I wouldn't sit there at the counter and count it either."

I find the facts in accordance with Mr. Martin's testimony on the grounds that, as the Manager of the Appliance Sales Department at the Jantzen Beach store and as the supervisor of the appliance salespersons, he was required to know and did observe their day to day responsibilities including the shifting of appliances, and was therefore most familiar with the degree and continuity of strenuous activity required in the job of appliance salesperson.

8) During the interview referred to in paragraph 7, Mr. Martin expressed his intention to hire Complainant as appliance salesperson. Complainant was to commence work on May 2, 1974, contingent upon his satisfactorily passing a medical examination before the said date. The examination would be conducted by a Dr. Battalia, a general practitioner and employee of Respondent.

9) Immediately following Martin's decision to hire Complainant, Mrs. Arnold telephoned Dr. Battalia's office to schedule a medical examination of Complainant. Upon her disclosure of Complainant's heart attack in 1968,

she was informed by the office that there was no reason to schedule a physical examination, because of Complainant's previous heart attack.

10) Mrs. Arnold made several telephone calls to Dr. Battalia's office in which she expressed her desire to have a physical examination scheduled. After several inquiries, Mrs. Arnold was told by the office that a full history of Complainant's heart condition would be required before an examination could be scheduled. Mrs. Arnold conveyed this requirement to the Complainant.

11) Approximately two (2) days after the conversation referred to in paragraph 10, Complainant delivered to Mrs. Arnold a letter from Dr. Dygart stating that all relevant data had been submitted with Complainant's application for employment. I find that the doctor was referring to the letter Complainant submitted with his application, which summarized the doctor's medical opinion of Complainant's physical capabilities, and the medical history of Complainant's condition.

12) Complainant subsequently met with Mr. Martin in the Appliance Department and sought his assistance in obtaining an examination.

13) After repeated telephone calls to Dr. Battalia, Mrs. Arnold obtained an appointment for the examination of the Complainant.

14) On May 1, 1974, Complainant was medically examined by Dr. Battalia.

The examination was completed in approximately one-half hour. At hearing Dr. Battalia testified that he had detected a "split first heart sound," and

"reduced pedal pulses" and a blood pressure reading of 160/108 in the right arm and 154/98 in the left arm.

15) At hearing Dr. Dygart testified and I find that he had carefully monitored Complainant's cardiovascular condition since his heart attack in 1968 and that the medical techniques he employed during this period included, and were not limited to, blood pressure analyses, electrocardiograms (EKGs), and x-rays of the heart, and that all the EKGs and x-rays since 1968 have been normal.

Dr. Dygart also testified and I find that during his eight (8) years of treatment and observation of the Complainant, he had not, either prior to or subsequent to, Dr. Battalia's examination, observed the presence of a "split first heart sound." He further testified that even were a "split first heart sound" detected, recent studies have challenged the old belief that it would indicate the presence of heart disease.

Dr. Dygart further testified without contradiction, and I find, that some people are born without "pedal pulses" and that although "reduced pedal pulses" may have some relationship to a general hardening of the arteries, they would have no particular relationship to the Complainant's previous heart attack.

Dr. Dygart also testified and I find that during the eight (8) years of his treatment and observation of the Complainant, he had never found Complainant's blood pressure reading to be as high as that found by Dr. Battalia during his brief examination. He further testified and I find that a single blood pressure reading, as was found by Dr. Battalia during the above-

described examination, can be induced by factors other than cardiovascular difficulties, such as simple nervousness or anxiety, and that only long term monitoring of a heart patient's cardiovascular system can provide meaningful data probative and predictive of the limits of a heart patient's physical capabilities.

16) Notwithstanding the obvious conflict between his medical findings and the medical opinion expressed by Dr. Dygart, of which Dr. Battalia was aware, Dr. Battalia neither consulted Dr. Dygart at any time before or after the examination, nor did he otherwise attempt to reconcile his findings with the medical opinion of Dr. Dygart.

17) On the basis of his findings, Dr. Battalia concluded that the employment of Complainant as an appliance salesperson would be incompatible with Complainant's physical condition.

18) Approximately three (3) days after said examination, Complainant was informed by Respondent's personnel office that, on the basis of Dr. Battalia's recommendation, he would not be hired by Respondent.

19) At hearing Dr. Dygart testified to his medical opinion as to Complainant's physical condition in relation to the duties of an appliance salesperson, and in conformity with that opinion I find that Complainant was physically able to perform the job of appliance salesperson at the time of his application, and that the evidence demonstrates a probability that Complainant could perform the job in a satisfactory manner for an extended period of time, without danger to his health and well-being. Dr. Dygart further testified and I find that the only limitation would be

against Complainant engaging in sustained strenuous work.

At hearing Respondent, through Dr. Battalia, testified to its motives for rejecting the Complainant. Respondent suggested that it would be impractical to require their physician, Dr. Battalia, to conduct the necessary tests, such as EKGs and angiograms, over an extended period of time, to determine an accurate prognosis of the Complainant's health. I find that the alternatives were to reject the Complainant based upon a brief examination, or to rely upon the opinion of those medical experts who had gathered the most reliable prognostic data over the requisite period of time. Respondent chose the alternative of rejecting the Complainant in an admitted effort and with the motive to minimize the risk of economic loss by hiring only those individuals that it determined were the best physical specimens available.

21) At hearing Dr. Battalia testified and I find that were his own private patient to make application for work, that he would conduct additional tests such as EKGs and angiograms on the patient before advising what work was suitable. Dr. Battalia further testified and I find that were he Complainant's personal physician, he would not have forbidden the Complainant from accepting employment in the appliance sales position.

22) Since August 16, 1974, Complainant has been employed as a salesperson in the Home Improvement Center of a Fred Meyer store located in Vancouver, Washington. His duties and activities involve on a daily basis lifting, unassisted, bags of building materials weighing in excess of eighty

(80) and sometimes up to ninety (90) pounds. As of the hearing, Complainant was able to perform the said labor without any difficulties resulting from his previous heart attack.

ULTIMATE FINDINGS OF FACT

1) From the outset of Complainant's application, Respondent, through the actions of Dr. Battalia and his staff, demonstrated a predisposition to deny Complainant the job of appliance salesperson because of a physical handicap.

2) On or about April 24, 1974, Respondent refused to hire Complainant as an appliance salesperson on the basis of a medical examination by an employee of Respondent, Dr. Battalia.

3) The medical examination of Complainant by Dr. Battalia was cursory, and his findings and conclusions were in open and significant conflict with the medical findings and conclusions of Complainant's treating physician, Dr. Harold Dygart.

4) Dr. Dygart was in the best position to provide an accurate prognosis of whether the Complainant was able to perform the appliance salesperson job in a satisfactory manner, and without danger to his health and well-being.

5) Respondent denied employment to Complainant because of a physical handicap, based upon insufficient medical data, in an effort and with a motive to minimize its business risks.

6) Respondent has not shown a probability either that Complainant, because of his handicap, could not perform the job of appliance salesman in a satisfactory manner, or that he would

be incapacitated, were he thus employed.

7) At all times material herein, the Complainant was fully qualified to perform the work of appliance salesperson, and his handicap presented no obstacle to the reasonable expectation of his continued performance of the job for an extended period of time.

8) Respondent acted unreasonably and in bad faith in refusing to employ the Complainant as appliance salesman.

9) As a consequence of the circumstances set out in paragraphs 1 through 8 above, the Complainant suffered distress, humiliation, mental pain and anguish.

10) As a consequence of the circumstances set out in paragraphs 1 through 8 above, the Complainant has suffered and continues to suffer losses in pay from May 2, 1974, to the present, at the rate of pay as set out in paragraphs 2, 3 and 4 of the Order, *infra*.

EVIDENTIARY RULINGS

1) At hearing evidence was elicited on whether Complainant had suffered any distress, anguish or concern in connection with his rejection from employment by Respondent. This testimony was objected to by the Respondent as being irrelevant. A ruling was reserved and briefs of counsel were requested. Being fully advised in the premises, and having concluded that the Respondent in rejecting the Complainant acted unreasonably and in bad faith, I conclude that sanctions in the form of damages for pain, humiliation, and suffering are appropriate in this case. And accordingly, the

evidence was relevant to the issues of the case. The objection is overruled.

2) At hearing evidence was elicited as to the age of Complainant's wife. The testimony was objected to as irrelevant. A ruling was reserved. Being fully advised in the premises, I conclude that the offer of evidence was objectionable as irrelevant to the issues in controversy. The objection is sustained.

CONCLUSIONS OF LAW

1) Respondent violated ORS 659.425(1) in refusing to hire and employ the Complainant as appliance salesperson because of a physical handicap in the absence of the probability either that, because of the handicap, the Complainant could not perform the job in a satisfactory manner, or that he would be incapacitated were he thus employed.

2) Based upon the Findings of Fact, Ultimate Findings of Fact, and Conclusion of Law herein, and in accordance with ORS 659.060(3) and 659.010(2), monetary damages in back pay and for the stress, humiliation, mental pain and anguish suffered by the Complainant at Respondent's hand, are appropriate to compensate the Complainant and to remedy the effects of the unlawful employment practice found.

OPINION

On October 18, 1977, the Oregon Supreme Court reviewed the decision of the Commissioner in this matter and remanded the case to the Commissioner for a decision on the merits, according to the Court's interpretation of ORS 659.425(1).

The Court decided that the statute imposes upon an employer the obligation not to reject a prospective employee because of a physical or mental handicap, unless there is, because of the defect, a probability of unsatisfactory work performance or incapacitation of the applicant. The Court further decided that the question whether the employer acted reasonably and in good faith goes to the propriety of an award of back pay and levying of sanctions against the employer who has violated the statute by unlawfully rejecting an applicant. However, it is unclear from the court's decision whether the court intended that a finding of unreasonable and bad faith conduct is a necessary condition precedent to an award of back pay and the levying of sanctions. To the extent that it is a necessary condition precedent, the court has departed significantly from the approach of the United States Supreme Court under Title VII, the federal discrimination statute. In the case of *Albermarle Paper Co. v. Moody*, 422 US 405 (1975), the Court held that because Title VII is a remedial statute directed to the consequences of employment practices, not simply to the motivation of the employer, an employer's good faith is not a sufficient reason for denying back pay to a victim of unlawful employment discrimination.

In any case, to the extent that a finding of unreasonable and bad faith conduct is a condition precedent to an award of back pay and the levying of sanctions, that condition has been satisfied in the instant case (see Part II of the Opinion, *infra*).

Part I: Respondent Has Violated ORS 659.425(1)

Respondent relies for its refusal to hire Complainant on the testimony of its employee, Dr. Battalia. Dr. Battalia's conduct and testimony in regard to the Complainant are set out in detail in the Findings of Fact and Ultimate Findings of Fact, *supra*. In summary, it was his opinion that the Complainant, because of his handicap, was physically unfit to perform the job of appliance salesperson.

In concluding that Respondent has violated ORS 659.425(1), it was incumbent upon me to resolve certain conflicts in the medical evidence presented at the hearing by Dr. Battalia, on the one hand, and Dr. Dygart, on the other. My resolution of that conflict is based on the probative value to be accorded the evidence. The factors I considered relevant to the value of the evidence included, but were not limited to, the following:

1) Comparison of the experts' qualifications; in the sense that I have found Dr. Dygart to be a "heart specialist" and Dr. Battalia to be a general practitioner;

2) The experts' interest in the decision constituting the subject of this case;

3) Comparison of the medical examinations conducted, in terms of their thoroughness and comprehensiveness, particularly the methods and techniques employed, the length of time required to complete the examinations, and, in the case of Dr. Dygart, the number and regularity of examinations over an eight (8) year period of time, and the reasons for the

examinations (whether for treatment or in relation to the ultimate decision in question);

4) The knowledge of Complainant's physical condition as exhibited by the experts under direct and cross examination;

5) The Complainant's medical history, showing positive results and a stable condition after a single subendocardial infarction in 1968;

6) The Complainant's historically proven ability to perform similar or more physically demanding jobs after his heart attack in 1968.

In reviewing the evidence in light of the above factors, I find the testimony of Dr. Battalia on the physical ability of the Complainant to perform the job of appliance salesperson both unreliable and unpersuasive, and that Dr. Harold Dygart was in the best position to provide and that he did provide an accurate prognosis of whether the Complainant was able to perform the appliance salesperson job in a satisfactory manner and without danger to his health and well-being.

Part II: Respondent Acted Unreasonably And In Bad Faith

Whether conduct is reasonable depends upon the circumstances in question. I have found that at the very outset of Complainant's application, Respondent, through the actions of Dr. Battalia, was predisposed to reject the Complainant and never intended to give serious consideration to his application after his heart attack in 1968 came to light, and that clear evidence of this predisposition was Respondent's initial refusal to even schedule a physical examination. That

predisposition was characteristic of Respondent's final decision against hiring the Complainant. In light of the statutory declaration of policy contained in ORS 659.405, to guarantee to handicapped individuals the fullest possible participation in the economic life of the state and to engage in remunerative employment, it was unreasonable for Respondent to deny employment to Complainant based upon an *a priori* assessment of the business risks which such employment presented, without according to the Complainant a real and meaningful consideration of his physical capabilities.

The term "bad faith" and similar language have been judicially defined as involving a neglect or refusal to fulfill some moral or legal duty or obligation, not prompted by an honest mistake as to one's duties, but by some interested motive. *See Blank v. Black*, 14 Or App 470, 512 P2d 1016 (1973).

At hearing Respondent admitted to having an interested motive: to minimize its business risks. Because of ORS 659.425(1) and ORS 659.405(1), an employer's jealous concern for its business interests must give way to the employment rights of physically able handicapped individuals. Under the latter provision, the Complainant is guaranteed the right to the "fullest possible participation in the . . . economic life of the State, to engage in remunerative employment . . . without discrimination." Under the former provision, the Respondent was obligated to grant to Complainant his full legal rights. This could have been accomplished had Respondent made a real and meaningful attempt to

ascertain the actual boundaries of Complainant's physical ability, before rejecting him on the basis of his physical condition. If a brief physical examination was not sufficient to provide meaningful data probative and predictive of his physical capabilities, as I have found it was not, Respondent was required to rely on that medical evidence from Dr. Dygart, which was both available and sufficient.

By first refusing to even grant a physical examination to the Complainant, by performing the most cursory of examinations, even in the light of contrary and more probative medical opinion, by failing to address that opinion if Respondent had seriously doubted its validity, and by having a predisposition and ultimately deciding to reject the Complainant on the basis of insufficient data, Respondent has shown bad faith in denying employment to the Complainant.

ORDER

1) The Respondent is ordered to deliver to the Portland office of the Oregon Bureau of Labor within fifteen (15) days of the execution of this Order a certified check, payable to James Williams, in the amount of Two Thousand Dollars (\$2,000.00) to compensate him for the humiliation, mental pain, anguish, and concern suffered at Respondent's hand.

2) The Respondent is ordered to pay to the Complainant compensation in an amount equal to the difference between the average income of all appliance salespersons in Respondent's Jantzen Beach store and Complainant's actual earnings, plus interest at the rate of 6% per annum, for the periods set out below, by delivering a

check to the Portland office of the Oregon Bureau of Labor made payable to James Williams, no later than August 30, 1978:

(a) From May 2, 1974, to December 31, 1974;

(b) 1975;

(c) 1976;

(d) From January 1, 1977, through March 21, 1977, the date of the Court of Appeals decision herein;

(e) From October 18, 1977, the date of the Supreme Court decision herein, until August 1, 1978, the effective date of this order.

3) Respondent is ordered to pay to the Complainant an amount equal to the difference between the average income of appliance salespersons in Respondent's Jantzen Beach store and Complainant's actual earnings, at sixty (60) day intervals, commencing with the period of August 1, 1978, through October 1, 1978, and continuing at such intervals thereafter, until Complainant has been employed by Respondent in some permanent position, or has rejected an offer of permanent employment as appliance salesperson in the Portland-Vancouver area. Payment under this section shall be made by delivering a check to the Portland office of the Oregon Bureau of Labor, made payable to James Williams, no later than the tenth day following the end of each interval; payments to commence on October 10, 1978.

4) Respondent and Complainant are ordered to meet with a representative of the Oregon Bureau of Labor, to be designated by the Commissioner, within ten days after the entry of this Order, and at such times as may be

necessary thereafter, for the purpose of liquidating any amounts owing and payable to the Complainant under this Order. Upon failure of the Respondent and Complainant to agree upon a sum certain and owing to the Complainant under this Order, a hearing shall be convened for the purpose of liquidating said amount.

5) The Respondent is ordered to offer to Complainant the next available position as appliance salesperson in any of its stores in the Portland-Vancouver metropolitan area. In addition, Respondent is ordered to offer to the Complainant the next available position of appliance salesperson or any other position in the sales facet of Respondent's business, in any of Respondent's stores outside the Portland-Vancouver metropolitan area. However, the Complainant's rejection of an offer of employment in a position other than appliance salesperson, and/or in any position outside the Portland-Vancouver metropolitan area, shall not constitute satisfaction and release of Respondent's obligation to offer employment to the Complainant in the position of appliance salesperson in the Portland-Vancouver metropolitan area, or to compensate Complainant for his monetary losses.

6) Respondent is ordered to provide in writing to the Commissioner within ten days of the date of any offer of employment conveyed to the Complainant, the type of job offered, the date of the offer, and the acceptance or rejection by Complainant of the offer.

7) Respondent is ordered to refrain and is hereby enjoined from refusing employment to an individual because

**In the Matter of
Marlo Incorporated, dba
MIDAS MUFFLER SHOPS
and Hugh Minter, Respondents.**

Case Number 03-76

Final Order of the Commissioner

Bill Stevenson

Issued August 3, 1978.

SYNOPSIS

A corporate Respondent employer and an individual Respondent, who owned part of the corporation, acted on the advice of a franchisor's representative that Ceylon-born Complainant's "foreign accent would be offensive to the American public," and discharged Complainant because of his national origin. Complainant performed his duties satisfactorily and spoke fluent and clearly understandable English. The Commissioner held that Respondents violated ORS 659.030(1), and awarded him \$575 in lost wages, \$335 in job search expenses paid to an employment agency, and, noting that being discharged was a major disgrace in Complainant's culture and that it caused him extreme depression, embarrassment and mental anguish temporarily affecting his ability to seek employment, awarded him \$1,000 for mental anguish. The Commissioner ordered Respondents to cease discriminating on the basis of national origin. ORS 659.010(2); 659.030(1); 659.060(3).

The contested case in the above-entitled matter came on regularly for hearing before R. D. Albright, who is

of a handicap, unless Respondent is able and has acquired evidence to show a probability either that because of the handicap, the individual could not perform the job in a satisfactory manner, or would be incapacitated were he thus employed.

8) Respondent is ordered to take whatever actions are necessary and appropriate to assure that the employment practices and decisions of its managerial, supervisory, and subordinate personnel are consistent and in compliance with the terms of this Order.

9) Respondent is ordered to post in its stores in the Portland-Vancouver metropolitan area, on places conspicuous to applicants for employment and current employees of Respondent, a written declaration that Respondent is an equal opportunity employer with respect to the handicapped.

10) The Commissioner shall retain jurisdiction of this matter for such time as may be necessary, for the purpose of supervising compliance with the terms of this Order, and to liquidate the amount, if any, owing from Respondent to the Complainant, in compensation attributable to the appliance sales position.

designated as Hearings Officer in this matter by Bill Stevenson, Commissioner of the Oregon Bureau of Labor. The hearing was held on October 25, 1976, in Portland, Oregon. The Complainant was present and testified during the course of the hearing. The case for the Oregon Bureau of Labor was presented by Albert L. Menashe, Assistant Attorney General, of its attorneys, and the case for the Respondent was presented by Albert J. Bannon, Attorney at Law.

Thereafter I, Bill Stevenson, Commissioner of the Oregon Bureau of Labor, considered the record in this matter, and I now enter the Findings of Fact, Ultimate Findings of Fact, Conclusions of Law, Rulings on Motions and Objections to Admission of Evidence by the Respondent and Order, all of which are set out below.

FINDINGS OF FACT – PROCEDURAL

1) The Respondent Marlo Incorporated was, at all times material herein, an Oregon corporation authorized to do business in Oregon and an employer subject to the provisions of ORS 659.010 to ORS 659.110.

2) The Respondent Hugh Minter was, at all times material herein, an owner and agent of Respondent Marlo Incorporated, and an employer subject to the provisions of ORS 659.010 to ORS 659.110.

3) On May 10, 1972, Durward Gurusinghe, a native of Ceylon, filed a verified written complaint with the Civil Rights Division of the Oregon Bureau of Labor alleging that he had been discriminated against in employment by

Midas Muffler and Hugh Minter because of his national origin.

4) Following the filing of the verified complaint by Durward Gurusinghe, the Civil Rights Division investigated the allegations in the complaint and determined that substantial evidence existed to support the Complainant's allegation that he had been discriminated against, in his employment, by the Respondents because of his national origin.

5) The Civil Rights Division of the Oregon Bureau of Labor made reasonable efforts to resolve Complainant's complaint with the Respondent prior to service of specific charges of discrimination on the Respondent, but its attempts were unsuccessful.

FINDINGS OF FACT – THE MERITS

1) The Complainant, Durward Gurusinghe, is of Ceylonese national origin. At the time of the hearing, he was of brown complexion and 42 years of age. Although he spoke with a noticeably foreign accent, his command of the English language was grammatically precise. He spoke fluent English and was clearly understandable.

2) The Complainant emigrated from Ceylon to the United States in January 1970.

3) The Complainant's educational background includes two (2) years of law school in Ceylon, courses in journalism and auto mechanics in Ceylon and in the United States at Portland Community College.

4) The Complainant was educated in the English language, with a British derivation. Since kindergarten, the Complainant has spoken English as his primary language, to such extent

that, at the time of the hearing, he no longer had total command of the Ceylonese language.

5) The Complainant's employment background prior to his emigration included the following: fifteen (15) years as a ticket agent for Air India Airlines; eight (8) years in the Public Relations section of the Ceylon Fisheries Department; and experience in auto and motorcycle racing as a driver and a mechanic.

6) His primary responsibilities as ticket agent for Air India Airlines included answering telephone inquiries by the public, providing travelers with price computations, writing of tickets, and briefing members of the public with respect to international and local travel arrangements and requirements.

7) At all times material herein, and particularly in 1972, the shares of Respondent Marlo Incorporated, dba Midas Muffler Shops, were solely owned by Respondent Hugh Minter and one Clyde Anderson. Respondents were parties to several franchise agreements with Midas Muffler International to sell and install mufflers and various other equipment on motor vehicles in the Portland metropolitan area. Respondents had the sole franchise agreements with Midas Muffler International in the Portland area.

8) In 1972, and under the above-referred franchise agreements, Respondent Marlo Incorporated operated four (4) Midas Muffler stores in the Portland area. Respondents maintained in each store a staff of approximately three (3) to four (4) employees: a Manager, an Assistant Manager, and one or two Installers. The Manager had primary responsibility for the

store's office work. He had secondary or fill-in responsibility in the shop area whenever the need arose.

9) In January 1972, Respondents Marlo Incorporated and Hugh Minter placed the following advertisement in the Oregonian newspaper requesting applications for a management position with the Respondent:

"Automotive Center Manager, Assistant Manager, for exhaust system installation, good pay, life insurance, hospitalization, incentives, paid vacation, please send resume to Box AR342 Oregonian."

10) On the date of the advertisement, the Complainant was employed as Manager of the Auto-Parts Department of the White Front Store, a large mercantile establishment. He had been employed therein for approximately twenty-two (22) months prior to the date of the advertisement, and during part of this period as a salesman in the Auto-Parts Department.

11) The Complainant responded to the advertisement in the manner therein requested, and was given an interview by Respondent Hugh Minter and Mr. Clyde Anderson. During the interview, the particulars of Complainant's education and employment background were discussed, as well as Respondents' operation of their business, and their intention to open a new shop in the Beaverton area.

12) Mr. Minter and Mr. Anderson both testified at hearing, and I find that during the above-referred to interview they were impressed and pleased by Complainant's demeanor and accent, and believed that Complainant's

accent would be beneficial to their business.

13) Subsequent to the above-referred to interview, Mr. Minter notified Complainant that the management position had been filled, and was therefore not available for Complainant's employment.

14) At the hearing, Mr. Minter testified and I find that contrary to his statement to the Complainant referred to in paragraph 13, the management position had not been filled and was still available, and that the statement he made to the Complainant was an intentional falsehood.

15) Shortly after the interview referred to in paragraphs 11 and 12 above, an encounter took place at the White Front store between Complainant and Mr. Minter. During this encounter, Mr. Minter offered employment to Complainant as an Installer. Mr. Minter assured Complainant that his initial employment as an Installer would be preparatory to his advancement to a managerial position, which would take place within a short period of time, contingent upon the adequate performance of his duties as an Installer.

16) Complainant accepted Respondent's offer of employment and on March 24, 1974, he began employment with Respondents as an Installer in the Front Street store, at a rate of pay of \$115.00 per week, in reliance upon Respondents' assurances of his advancement into a managerial position within a short period of time.

17) The duties of an Installer primarily involved installation of mufflers, (exhaust systems) and shock

absorbers. For its adequate performance the job required welding knowledge.

18) At the time of Complainant's initial employment by Respondent, both Hugh Minter and Clyde Anderson knew that Complainant had no prior experience in muffler installation or in welding. Hugh Minter assured Complainant that he would have sufficient time while employed by Respondent to become proficient in the mechanics of welding and muffler installation.

19) At the time of Complainant's initial employment by Respondent, the Front Street store was staffed by Darrell Hanson and Vern Sowards, Installer.

20) The Complainant worked as an Installer for approximately five (5) weeks under the supervision and with the assistance of Hanson and Sowards, respectively. Respondent Hugh Minter maintained continual contact with Hanson and Sowards concerning Complainant's performance and progress.

21) At hearing both Hugh Minter and Complainant testified and I find that Complainant was never warned or criticized about his work performance by Respondents or their employees, beyond constructive suggestions which are normally made to a new employee. Indeed, on several separate occasions, Hugh Minter expressed to Complainant his satisfaction with Complainant's job performance and progress.

22) After Complainant had worked approximately five (5) weeks as an Installer, he was transferred by Hugh Minter to the Front Street store office.

23) At all times material, both before and after Complainant's transfer to the office, Respondents employed no persons in any of its stores as clerical or sales workers exclusively. As stated above, the office work of the Respondents' stores was the primary responsibility of the store manager, who had secondary or fill-in responsibilities in the mechanic shop, whenever the need arose.

24) The office duties of store manager included the following: quoting prices of parts and services to prospective customers over the telephone; maintaining the store's books and records; and as stated above, assisting in the shop whenever necessary.

25) At hearing Hugh Minter testified and I find that approximately seventy-two percent (72%) of Respondents' customers inquire by telephone of Respondents' prices and services before actually engaging the business of Respondents. On the basis of the stated testimony and the entire record, I find that the telephone work of Respondents is fairly described as sales work.

26) When a telephone inquiry is made of Respondents, the employee responding to the inquiry must ascertain the make and model of the vehicle in question and consult the Midas Muffler equipment catalog to determine the price for the equipment desired by the customer.

27) At hearing Complainant testified that, at the time of his transfer to the office, he was told by Hugh Minter that the transfer was pursuant to Respondent's plan for Complainant's eventual promotion to a managerial

position. On the basis of this testimony and the entire record, I find that Complainant's transfer to the office was preparatory to his promotion to a managerial position.

28) At hearing Hugh Minter and Darrell Hanson testified and I find that it generally takes one (1) to two (2) weeks for a new employee hired or promoted to fill a managerial role to become sufficiently familiar with the overall operation of the business to perform office tasks in a satisfactory manner.

29) Under the franchise agreement for the Front Street store, a representative of Midas Muffler International, the franchisor, may periodically visit and otherwise observe the Respondents in order to monitor the operation of the Respondents' business. Pertinent sections of the franchise agreement are as follows:

"In order to assist . . . Midas franchisees to . . . achieve maximum results, Midas makes available to all franchisees advice, information, experience, guidance and know-how, with respect to management, financing, merchandising and service . . ."

"In this connection, Midas has entered into this agreement . . . in recognition of the fact that Clyde Anderson [and] Hugh Minter will have full managerial responsibility and authority for the management and operation of the Franchisee's business."

Part four (4) of the franchise agreement provides as follows:

"(b) Franchisee shall abide by all lawful and reasonable policies and regulations established from

time to time by Midas in connection with the operation of his shop. Franchisee shall also follow the directions of Midas at all times with respect to the manner of rendering services licensed hereunder, so as to maintain the highest standards of excellence thereof.

"* * *

"(d) Midas shall have the right, at reasonable times, to visit the shop for the purpose of inspecting the merchandise and equipment on hand, taking inventories, inspecting the nature and quality of goods sold and services rendered and the manner and method of operating the shop . . ."

Part eight (8) provides:

"(a) This Agreement may be terminated at any time without cause at the will of either party . . ."

30) At the time of Complainant's employment with Respondent, Mr. Robert Teed was the franchisor's representative who made the inspections and recommendations to Respondent as provided in the franchise agreement. It was Mr. Teed's procedure to call the local franchisee, posing as a prospective customer, and to thereby evaluate the franchisee's telephone answering technique. These calls were sometimes taped by Mr. Teed for use as instructional tools in connection with his advice to the franchisee.

31) Within a few days after Complainant's transfer to the office, Mr. Teed made a phone call to the Respondent, posing as a prospective customer. The Complainant answered the call and his performance was thereby monitored. At hearing Mr.

Teed testified and I find that he made two subsequent calls shortly following the first call, to which the Complainant also responded. Mr. Teed did not tape his conversations with the Complainant.

32) On the same day of the above-referred to calls, Mr. Teed visited the Front Street store, and did advise and encourage Respondent Minter to discharge the Complainant.

33) On May 5, 1972, a few days after Mr. Teed's stated recommendation, Hugh Minter discharged Complainant from employment, effective May 19, 1972.

34) At hearing Hugh Minter testified and I find that the decision to discharge Complainant was based on the conclusion and recommendation by Mr. Teed that Complainant was "hurting the business." Mr. Minter also testified and I find that on the day of Complainant's discharge, Mr. Minter told Complainant that he had no choice but to follow Mr. Teed's recommendation.

35) At hearing Complainant testified and I find that on the day of his discharge he was told by Respondent Minter that it was Robert Teed's conclusion and advice that Complainant's "foreign accent would be offensive to the American public." I find that this was Mr. Teed's conclusion, and that his conclusion and recommendation were the cause-in-fact of Complainant's discharge.

36) At hearing Hugh Minter testified and I find that at all times material herein, he was not aware of any complaints by customers or by any individuals other than Robert Teed,

concerning the question of Complainant's comprehensibility on the telephone, or his responses to telephone inquiries. In accordance with Mr. Minter's testimony and on the basis of the record as a whole, I find that no complaints were made by customers about the character and quality of Complainant's work performance in regard to telephone inquiries.

37) At hearing Hugh Minter testified and I find that Respondents had no evidence that their business was suffering and losing customers as the result of Complainant's job performance in regard to telephone inquiries, other than the assertion of Robert Teed that Complainant was hurting the business and his accent was offensive to the American public. In accordance with Hugh Minter's testimony and on the basis of the entire record, I find that Respondents had acquired no evidence that Complainant's job performance in regard to telephone inquiries was any detriment to the success of Respondent's business.

38) At hearing Complainant testified and I find that on the day of Robert Teed's visit to Respondents' premises, and upon being introduced to Mr. Teed, Complainant offered to shake hands as a matter of normal courtesy, but was ignored by Mr. Teed.

39) At hearing Complainant offered the undisputed testimony of Larry Bates, his former supervisor and employer at the White Front Store. Mr. Bates testified and I find that during Complainant's employment at the White Front Store, in and before 1972, he and the Complainant talked on a telephone system on a regular basis regarding business matters and,

despite the Complainant's accent, he was at all times understandable. Mr. Bates further testified and I find that he talked with the Complainant only months before the hearing and that during this conversation no changes were apparent in the Complainant's accent or in his English speaking ability. On the basis of having listened to tape recordings of Complainant's testimony at hearing, and in accordance with the testimony of Mr. Bates, I find that at all times material to this matter, the Complainant was both fluent in English and clearly understandable.

40) Mr. Bates also testified and I find that the duties of Complainant at the White Front store were substantially the same as his duties in the office of Respondent, particularly in regard to telephone inquiries and the use of a voluminous vehicle-equipment catalog.

41) On the basis of the entire record, I find that Complainant's job performance in the office of Respondent was adequate, and that the quality of his work performance was equal to that which one might reasonably expect of an employee in the first few days on a new job.

42) The discharge of Complainant came without prior warning. Complainant was shocked by its occurrence and particularly by its suddenness. Before he was told of his discharge, Complainant had not anticipated being discharged by Respondent.

43) At hearing Complainant testified and I find that among Ceylonese people in the nation of Ceylon and in the Ceylonese community in Portland, wherein Complainant resided at the time of his employment with

Respondent, it is a major disgrace for one to be discharged from his employment.

44) At hearing Complainant testified and I find that his termination from employment caused in him extreme depression, embarrassment, and mental anguish, and that as a consequence of his depression and mental anguish, he was unable to undertake a real and meaningful search for other employment for approximately one (1) month following his discharge.

45) In or around June of 1972, Complainant engaged the services of French & French Employment Agency. Through such services, Complainant obtained a job with Handyman Hardware store on June 24, 1972. His duties at Handyman were substantially the same as his duties at White Front and in the office of Respondent, to the extent that they involved continual contact with the public, both in person and by telephone for the securing of sales and service agreements, and his utilization of a voluminous parts catalog.

46) Complainant paid to French & French for its services a fee in the sum of \$335.00.

47) The Complainant was employed by Handyman until October 1973, at which time he became employed as a salesman by Sears and Roebuck. His duties as salesman require for their performance continual use of the telephone for the securing of sales agreements.

ULTIMATE FINDINGS OF FACT

1) The Commissioner of the Oregon Bureau of Labor, by and through his duly authorized agents and representatives, caused an investigation to

be made of the allegations contained in the complaint filed by Durward Gurusinghe on May 10, 1972. The Bureau of Labor administratively determined that the investigation disclosed substantial evidence supporting the allegations made by the Complainant.

2) On or about March 20, 1972, Durward Gurusinghe, a native of Ceylon, was employed by Respondent Marlo Incorporated, dba Midas Muffler. On or about May 6, 1972, Durward Gurusinghe's employment with Marlo Incorporated was terminated by Respondent Hugh Minter acting on behalf of Marlo Incorporated, and upon the advice of Midas Muffler International through its representative, Robert Teed.

3) Mr. Robert Teed recommended to the Respondents the immediate discharge of the Complainant on the basis of Mr. Teed's belief that Complainant's "foreign accent would be offensive to the American public." The Complainant was therefore discharged by Respondent because of his national origin.

4) The reasons offered by Respondents at hearing, to explain and to justify the discharge of Complainant as being based upon his inadequate work performance as Installer and in the office of the Front Street store, were pretextual and a subterfuge for discrimination based upon Complainant's national origin.

5) As a consequence of the circumstances set out in paragraph 2 and 3 above, the Complainant suffered losses in pay in the sum of \$575.00 for the period May 19, 1972, to June 24, 1972, computed at the rate of pay of \$115.00 per week; and in the sum of

\$335.00 in expenses he incurred in his search for alternative employment subsequent to his discharge by Respondents.

CONCLUSIONS OF LAW

1) Complainant's discharge by Respondents constitutes an unlawful employment practice in violation of ORS 659.030(1).

(2) Based Upon the Findings of Fact, Ultimate Findings of Fact and Conclusion of Law set out above, and in accordance with ORS 659.060(3) and ORS 659.010(2)(a), monetary damages in back pay and for the mental pain, anguish, distress and humiliation the Complainant suffered at Respondents' hands are appropriate to compensate the Complainant for his losses, and to remedy the effects of the unlawful practice found.

RULINGS ON MOTIONS AND OBJECTIONS TO THE ADMISSION OF EVIDENCE

1) Motion by Respondent to dismiss on the grounds that the Agency failed to show that it had conducted an investigation after the complaint was filed, and found substantial evidence of discrimination.

This motion is denied. It is obvious that an investigation had been conducted, and substantial evidence found. Indeed, Respondent does not deny the fact of the investigation and of the investigative finding, but only contends that the Agency has committed prejudicial error by not proving at hearing that an investigation took place and that the Agency found substantial evidence of discrimination. Had there been no investigation and finding, a hearing of the matter would not have

taken place. Furthermore, the Agency's initial investigation and its findings are merely preliminary internal procedures precedent to a case hearing. To require an administrator of the Agency to appear and to testify to the fact of the investigation and investigative finding would be to require a useless act, having no probative value to the case for the Agency or for the Respondent.

2) Respondents' objection to the admission in evidence of Agency Exhibit "F," to show the fee Complainant paid to French & French Employment Agency, on the ground that it is not the best evidence of such payment and of the amount paid.

Objection is overruled. Agency Exhibit "F" shows that a check was drawn by Complainant in the sum of \$335.00, and was made payable to the order of French & French. The check also shows that payment was received by French & French. In addition, Complainant's testimony clearly described the circumstances surrounding the issuance of the check. The check and Complainant's testimony, when taken together, are admissible under ORS 183.450 as evidence upon which a reasonably prudent person would rely in the conduct of his or her everyday affairs.

OPINION

This matter came on regularly before me under ORS 659.030, which prohibits an employer from discharging an individual because of the national origin of any person. The Agency established a prima facie case of unlawful discharge by producing evidence of the following: that the Complainant is of Ceylonese national origin; he was

discharged by Respondents; and his foreign accent was a factor in the discharge. The burden shifted to Respondents to articulate and show the existence of a legitimate, non-discriminatory reason for the Complainant's discharge.

Respondents alleged that Complainant was transferred to the office of the Front Street store because his performance as an Installer was inadequate, and that he was thereafter discharged because his performance in the office was also unsatisfactory. I have found that Complainant did adequately and satisfactorily perform the mechanical duties of an Installer. I base this finding on, among other considerations, the admitted and total absence of any statement by Hugh Minter to the Complainant during his work as an Installer which may reasonably be characterized as criticism of, and dissatisfaction with, his job performance. Additionally, I find nothing in the record which would enable one to reasonably infer that in Hugh Minter's mind, the performance of the Complainant was so inadequate as to warrant his transfer or discharge. In addition, my finding in this regard is consistent with the probative weight accorded to Respondents' testimony by the Presiding Officer, who found it lacking in credibility.

The essence of Respondents' position in regard to Complainant's office work is that he could not be understood by customers on the telephone and was slow in answering telephone inquiries. At hearing, conspicuous in their absence, were one or more customers who could not understand and were confused by the Complainant.

Indeed, the sum total of Respondents' evidence on the question of Complainant's comprehensibility was the testimony of Robert Teed in regard to three (3) phone conversations he had with the Complainant. In conflict with Mr. Teed's testimony was the weight of reliable evidence, not least of which was the Complainant's demonstrated fluency at hearing, particularly when under the pressure of cross-examination. It is significant that no allegation was ever made by Respondents that the Complainant, after his discharge, had achieved marked improvements in his English speaking ability. In addition, I find Respondents' evidence inconsistent and unpersuasive. Two examples will suffice. First, Respondents offered testimony that an employee's adequate understanding and performance of the installation process was a condition precedent to his adequate performance of office tasks. Respondents then allege that Complainant both failed to understand and adequately perform the duties of Installer. In light of this allegation, it is difficult to understand the transfer of Complainant to the very facet of the business which requires for its performance an adequate understanding and performance of the job of Installer, and by which Respondents obtained 72% of their customers. Second, Respondents testified that at the time of and subsequent to Complainant's employment, Respondents employed no persons in their stores as clerical or sales employees exclusive of other responsibilities. Indeed, Hugh Minter testified that even the store Manager was expected to be "a jack of all trades." In light of this testimony, it is difficult to understand Respondents' allegation that the

Complainant, because he could not do the job of Installer, was transferred to the office to determine whether he could be used in some other capacity.

The Complainant's evidence at hearing was consistent and without variation. He told a coherent and cohesive story. His testimony was credible, and I found it most persuasive.

ORDER

1) The Respondents are ordered to deliver to the Portland office of the Oregon Bureau of Labor within fifteen (15) days of the execution of this order a certified check, payable to Durward Gurusinghe, in the amount of One Thousand Dollars (\$1,000.00) to compensate him for the humiliation, embarrassment, pain and mental anguish suffered at Respondents' hands.

2) The Respondents are ordered to deliver to the Portland office of the Oregon Bureau of Labor within fifteen (15) days of the execution of this order a certified check, payable to Durward Gurusinghe, in the amount of Five Hundred and Seventy-five Dollars (\$575.00) in back pay from May 19, 1972, to June 24, 1972.

3) The Respondents are ordered to deliver to the Portland office of the Oregon Bureau of Labor within fifteen (15) days of the execution of this order a certified check, payable to Durward Gurusinghe, in the amount of Three Hundred and Thirty-five Dollars (\$335.00), to compensate the Complainant for the amount paid by him to French & French Employment Agency.

4) The Respondents are ordered to refrain and are hereby enjoined from refusing to hire or employ or to bar or discharge from employment any

individual or to discriminate against any individual in compensation or in terms, conditions or privileges of employment because of the national origin of the individual or of any other person.

In the Matter of ALFONSO P. GONZALEZ, Respondent.

Case Number [none]
Final Order of the Commissioner
Bill Stevenson
Issued August 29, 1978.

SYNOPSIS

Respondent employed individuals in forest labor and bid upon forest labor contracts while his incomplete license application for 1977 was pending, and thus acted as a contractor without a license. Respondent knowingly employed illegal aliens, and failed to notify the Agency of a change in the circumstances described on his application, when he operated two vehicles to transport workers. There was insufficient evidence that, on his application, Respondent concealed the identity of prospective employees, made false statements concerning vehicles, or failed to provide insurance information. During the proceeding, Respondent applied for a 1978 license and the Commissioner ordered that a 1978 license issue subject to a suspension of 15 days for acting as a forest labor

contractor without a license, to a suspension of 15 days for knowingly employing illegal aliens, and a suspension of 10 days for failing to notify the Agency of changes in circumstances, all suspensions to run concurrently. ORS 658.405(1); 658.410; 658.425; 658.440(2)(d); OAR 839-15-055(8).

The contested case in the above-titled matter came on regularly for hearing before R. D. Albright, who was designated as Hearings Officer in this matter by Bill Stevenson, Commissioner of the Oregon Bureau of Labor. The hearing was held on March 14, 1978, in the Medford City Hall. The case for the Agency was presented by Thomas E. Twist, Assistant Attorney General, and the Respondent was represented by Paul W. Haviland and Larry C. Hammack, Attorneys at Law.

Thereafter, I, Bill Stevenson, Commissioner of the Oregon Bureau of Labor, considered the record in this matter and I now enter the Findings of Fact, Ultimate Findings of Fact, Conclusions of Law, Opinion and Final Order, all of which are set out below.

FINDINGS OF FACT – PROCEDURAL

1) By letter dated November 14, 1977, the Oregon Bureau of Labor informed Alfonso P. Gonzalez that it proposed to deny Mr. Gonzalez's application for a 1977 Farm Labor Contractor License. By letter dated November 17, 1977, Mr. Gonzalez, through his attorney, Paul W. Haviland, requested a contested case hearing in connection with the Bureau of Labor's proposed action.

2) A contested case hearing in this matter was scheduled for January 12, 1978, at 9:30 a.m. at the Bureau of Labor office in Medford, Oregon. Thereafter, the hearing was continued pursuant to a request for continuance filed by Respondent's attorneys.

3) After the contested case hearing had been continued, Alfonso P. Gonzalez submitted to the Oregon Bureau of Labor an application for a 1978 Farm Labor Contractor License, which application was received in the Portland Office of the Oregon Bureau of Labor on January 12, 1978.

4) At the time of the contested case hearing which took place on March 14, 1978, there was therefore pending before the Commissioner an application for a 1977 Farm Labor Contractor License and an application for a 1978 Farm Labor Contractor License. Also, at the time of the hearing, the Commissioner had determined not to issue a temporary permit pending the issuance of a 1978 Farm Labor Contractor License for reasons set out in the Amended Notice of Hearing on file herein.

Set out below are those charges forming the bases for the Commissioner's decision to deny the applications for a 1977 and 1978 Farm Labor Contractor's License filed by Alfonso P. Gonzalez as well as his refusal to issue a temporary permit following receipt of the 1978 application, the Findings of Fact and Ultimate Findings of Fact made by the Commissioner based on the record in this matter, the Conclusion of Law and Opinion reached by the Commissioner in light of the Findings, and an Order

representing the final administrative disposition of this matter.

CHARGE - THE APPLICANT, ALFONSO P. GONZALEZ, DURING THE LICENSE YEAR 1977, ACTED AS A FARM LABOR CONTRACTOR AS DEFINED IN ORS 658.405 WITHOUT A LICENSE TO SO ACT.

FINDINGS OF FACT

1) By letter dated October 21, 1976, Alfonso P. Gonzalez's insurance agent, one A. P. Potter, mailed to the Administrator of the Wage and Hour Division of the Oregon Bureau of Labor a Farm Labor Contractor Corporate Surety Bond, which was received in the office of the Bureau of Labor on October 27, 1976. Liability under this corporate surety bond purported to commence January 1, 1977.

2) By letter dated December 1, 1976, the Administrator of the Wage and Hour Division of the Bureau of Labor informed Mr. Gonzalez that the corporate surety bond previously received by the Bureau was on a form no longer in use. The letter went on to inform Mr. Gonzalez that in order to be licensed for the year 1977 he would have to complete an application, submit a current bond form and pay a \$20.00 licensing fee prior to January 31, 1977.

3) Although Mr. Gonzalez testified that he responded to the letter of December 1, 1976, and submitted an application prior to October 11, 1977, I do not credit this testimony because of the lack of corroboration, e.g., a file copy of the application, a cancelled check or a check stub, and I find instead that there was no response by Mr. Gonzalez to the December 1, 1976, letter. By letter dated September 14, 1977,

an investigator of the Wage and Hour Division of the Bureau of Labor wrote Mr. Gonzalez drawing Mr. Gonzalez's attention to the previous letter of December 1, 1976, referred to above, and informing Mr. Gonzalez that he was currently without a license. The letter went on to request the submission of Mr. Gonzalez's application along with the application fee and a corporate surety bond.

4) On October 17, 1977, there was received, in the Portland office of the Bureau of Labor, an application for a Farm Labor Contractor License, in duplicate, a Farm Labor Contractor Corporate Surety Bond, and a \$20.00 licensing fee. A form of tree planter's and farm labor contractor's license was prepared by the Bureau of Labor but not signed by the issuing authority, nor transmitted to Mr. Gonzalez. Mr. Gonzalez's application indicated that no vehicles would be used to transport Mr. Gonzalez's workers.

5) The Bureau of Labor did not issue to Mr. Gonzalez a temporary permit pending the issuance of Mr. Gonzalez's license as provided by ORS 658.425.

6) On November 8, 1977, and again on November 18, 1977, Mr. Gonzalez had in his employ a number of workers who were engaged in the planting of trees in Oregon. A number of these workers were, on these dates, apprehended by officials of the United States Immigration and Naturalization Service and at the time of their apprehension were paid wages due them by their employer, Mr. Gonzalez. Mr. Gonzalez has admitted the fact of their employment.

7) On November 24, 1977, Mr. Gonzalez was engaged in bidding on a tree planting contract with the United States Department of the Interior, and on January 3, 1978, he received notice to proceed with this contract.

8) On January 30, 1978, Mr. Gonzalez received a notice to proceed in regard to another contract upon which he had bid earlier with the United States Department of the Interior.

ULTIMATE FINDING OF FACT

Mr. Gonzalez's employment of workers to plant trees on November 8, 1977, and November 15, 1977, and his bidding and execution of contracts with the United States Department of the Interior occurred more than 20 days after his application for a 1977 Farm Labor Contractors License had been received by the Oregon Bureau of Labor.

CONCLUSIONS OF LAW

1) Mr. Gonzalez's application for a 1977 Farm Labor Contractor License was complete on its face, in light of its declared intention not to use vehicles to transport farm workers, when it was received in the Portland office of the Oregon Bureau of Labor on October 17, 1977. Accordingly, by operation of law and pursuant to the provisions of ORS 658.425(1), Mr. Gonzalez received a temporary permit valid for 15 days, from October 17, 1977, although in actuality he received no such temporary permit. Such a temporary permit is renewable for a period of not more than five days.

2) Mr. Gonzalez's employment of workers to plant trees in Oregon on November 8, 1977, and again on November 18, 1977, and his contractual

activities with the United States Department of the Interior during the latter portion of the 1977 licensing year constitute activity as a Farm Labor Contractor as defined in ORS 658.405(1), at a time when Mr. Gonzalez lacked a license issued by the Oregon Bureau of Labor to act as a farm labor contractor. The employment and the contractual activity referred to above constitute a violation of ORS 658.410.

CHARGE - THE APPLICANT, ALFONSO P. GONZALEZ, DURING THE 1977 LICENSING YEAR, KNOWINGLY EMPLOYED ALIENS IN OREGON, WHICH ALIENS WERE NOT LEGALLY PRESENT OR EMPLOYABLE IN THE UNITED STATES.

FINDINGS OF FACT

1) On November 8, 1977, officials of the Immigration and Naturalization Service stopped two van type vehicles outside of Shady Cove, Oregon. The vehicles contained approximately 14 employees of Mr. Gonzalez who, under questioning by the officials of the Immigration and Naturalization Service, admitted that they were aliens illegally present in the United States. All but four of the people apprehended in the two vans were admittedly illegally present in this country. Mr. Gonzalez has admitted that he was the employer of these aliens.

2) On November 8, 1977, Bill Adams, an employee of the Wage and Hour Division of the Oregon Bureau of Labor, questioned Mr. Gonzalez as to why he was employing these undocumented aliens. Mr. Gonzalez replied with words to the effect that "everybody does it."

3) On approximately November 18, 1977, the Immigration and Naturalization officials conducted an apprehension operation similar to the one which had taken place on November 8, 1977. On this second occasion, three of Mr. Gonzalez's employees were apprehended who admitted they were illegally within the country. Mr. Gonzalez admitted that these three aliens were his employees and these individuals were in fact paid wages due to them at the time of their apprehension.

4) The aliens seized by the Immigration and Naturalization Service on November 8, 1977, and November 18, 1977, were all of Mexican birth, all had Spanish surnames and it was necessary to communicate with them by means of the Spanish language.

5) Two contracts with the United States Department of the Interior bid upon and entered into by Mr. Gonzalez during the latter portion of the 1977 licensing year include this language:

"Alien Labor - This contract involves the employment of unskilled labor working under arduous field conditions. Such employment may be attractive to persons coming from foreign countries, sometimes illegally. Bidders are reminded that it is a crime to bring into the United States, transport within the United States, and to harbor here, aliens who do not have a proper visa for entry and working in this country. 8 USC Sec. 1323-1. If violations are suspected by the COAR during the performance of work on this (these) project(s), such will be reported to the US Immigration and

Naturalization Service for investigation and appropriate action. Conviction of the contractor for commission of a criminal offense referred to herein will be deemed sufficient cause to default the contract and initiate debarment, or suspension proceedings to prevent the contractor from receiving future contracts."

6) At the contested case hearing, Mr. Gonzalez testified as follows on direct examination:

Mr. Haviland: "[D]o you at any time ever inquire as to a person, ah, being legal or illegal aliens of anybody?"

Mr. Gonzalez: "No, because Mexicans are people too, and I have been approached sometime with the question, well, if I have papers or not although I am a citizen of this country, this I think is discrimination just because I have darker skin than other people and I resent that very much."

Mr. Gonzalez testified as follows at the hearing under cross-examination:

Mr. Twist: "Is it your testimony that a . . . in regard to people that you directly employ that you never make any inquiries as to a . . . their citizenship?"

Mr. Gonzalez: "No."

Mr. Twist: "Never?"

Mr. Gonzalez: "No, I don't recall."

7) Mr. Gonzalez is a naturalized citizen of the United States, having been born and educated in the country of Mexico, and speaks Spanish fluently. He has been engaged for a substantial number of years in the farm

labor contracting industry and over these years has had substantial contact with Mexican agricultural laborers. Moreover, I infer from his testimony on direct examination set out above and from other portions of his testimony that he was aware of the problems and concerns surrounding the presence in this country and this state of legally unemployable aliens.

ULTIMATE FINDINGS OF FACT

1) In connection with the circumstances set out in the Findings of Fact in regard to occurrences on November 8, 1977, and November 18, 1977, Mr. Gonzalez had reason to know and actually knew that the individuals apprehended by the Federal Immigration and Naturalization Service and employed by Mr. Gonzalez at the time of their apprehension were illegally present in the United States and not legally employable in the United States.

2) Based upon the Findings of Fact set out above, Mr. Gonzalez had reason to believe that inquiries directed to his then employees might have revealed their illegal status.

CONCLUSIONS OF LAW

1) Mr. Gonzalez's failure to make any inquiries at all as to the employability status of his employees apprehended by the Immigration and Naturalization Service on November 8, 1977, and November 18, 1977, constitutes, as a matter of law, knowledge within the meaning of the word "knowingly" as it is used in ORS 658.440(2)(d).

2) Under the circumstances found to have existed in the Findings of Fact set out above and under similar circumstances it is necessary for a farm

labor contractor to make inquiries reasonably calculated to determine the legal employability status (or lack of it) of his employees or applicants for employment, in order to avoid a violation of ORS 658.440(2)(d).

3) The conduct of Mr. Gonzalez set out in the Findings of Fact and Ultimate Findings of Fact above constitute a violation of ORS 658.440(2)(d).

CHARGE - THE APPLICANT, ALFONSO P. GONZALEZ, FAILED TO LIST IN HIS APPLICATION FOR A FARM LABOR CONTRACTOR LICENSE WHICH HE SUBMITTED TO THE OREGON BUREAU OF LABOR ON OR ABOUT OCTOBER 11, 1977, THE NAMES AND DUTIES OF EMPLOYEES OR PERSONS WHOM HE EXPECTED TO EMPLOY IN CONNECTION WITH HIS FARM LABOR CONTRACTOR BUSINESS, AND IN SO DOING WILLFULLY CONCEALED THIS INFORMATION FROM THE OREGON BUREAU OF LABOR

ULTIMATE FINDING OF FACT

There is insufficient evidence in the record to support findings to the effect that Mr. Gonzalez willfully concealed the information referred to in the charge from the Oregon Bureau of Labor.

CHARGE - THE APPLICANT, ALFONSO P. GONZALEZ, MADE MISREPRESENTATIONS AND FALSE STATEMENTS CONCERNING, AND WILLFULLY CONCEALED ON HIS APPLICATION FOR A FARM LABOR CONTRACTORS LICENSE, WHICH HE SUBMITTED TO THE OREGON BUREAU OF LABOR ON OR ABOUT OCTOBER 11, 1977, INFORMATION RELATING TO VEHICLES INTENDED BY THE APPLICANT FOR THE TRANSPORT OF FARM WORKERS IN CONNECTION WITH HIS FARM LABOR CONTRACTOR BUSINESS.

ULTIMATE FINDING OF FACT

There is insufficient evidence in the record to support findings to the effect that Mr. Gonzalez willfully concealed the information referred to in the charge from the Oregon Bureau of Labor.

CHARGE - THE APPLICANT, ALFONSO P. GONZALEZ, FAILED TO PROVIDE ALONG WITH HIS APPLICATION FOR A FARM LABOR CONTRACTOR LICENSE, WHICH HE SUBMITTED TO THE OREGON BUREAU OF LABOR ON OR ABOUT OCTOBER 11, 1977, SATISFACTORY PROOF OF THE EXISTENCE OF A POLICY OF LIABILITY INSURANCE IN CONNECTION WITH VEHICLES INTENDED TO BE USED FOR THE TRANSPORT OF FARM WORKERS.

ULTIMATE FINDING OF FACT

The application for a 1977 Farm Labor Contractor License, which was submitted to the Bureau of Labor on October 17, 1977, indicated no intention to utilize vehicles for the transport of farm workers. Since we have found insufficient evidence to support a finding that Mr. Gonzalez willfully concealed in that application information relating to vehicles intended by the applicant for the transport of farm workers, there is consequently insufficient evidence to support a finding in regard to a failure to provide along with that application satisfactory proof of the existence of a policy of liability insurance as charged above.

CHARGE - THE APPLICANT, ALFONSO P. GONZALEZ, AFTER SUBMISSION OF HIS APPLICATION FOR A FARM LABOR CONTRACTOR LICENSE ON OR ABOUT OCTOBER 11, 1977, FAILED TO NOTIFY THE OREGON BUREAU OF LABOR OR LOCAL OFFICE OF THE OREGON STATE EMPLOYMENT SERVICE OF THE SUBSTANTIVE CHANGE IN

THE CIRCUMSTANCES INDICATED ON THE APPLICATION, TO WIT: THE USE OF VEHICLES TO TRANSPORT FARM WORKERS IN CONNECTION WITH HIS ACTIVITIES AS A FARM LABOR CONTRACTOR

FINDINGS OF FACT

1) As we have found above, the application for a 1977 Farm Labor Contractor License submitted by Mr. Gonzalez to the Oregon Bureau of Labor on October 17, 1977, indicated no intent to utilize vehicles in transporting Mr. Gonzalez's farm workers.

2) At the time of the apprehension of Mr. Gonzalez's employees on November 8, 1977, by the Immigration and Naturalization officials, these employees were being transported in connection with their employment in two vans registered to Mr. Gonzalez.

3) Mr. Gonzalez did not notify the Bureau of Labor or a local office of the State Employment Service of the fact that he was utilizing vehicles to transport workers in connection with his activity as a farm labor contractor.

ULTIMATE FINDING OF FACT

The utilization of vehicles to transport workers in connection with Mr. Gonzalez's activities as a farm labor contractor amounts to a substantive change in the circumstances indicated on the application Mr. Gonzalez submitted as of October 11, 1977.

CONCLUSION OF LAW

Mr. Gonzalez's failure to notify the Bureau of Labor or a local office of the State Employment Service of the fact that he was, as of November 8, 1977, utilizing vehicles to transport workers in connection with his activities as a farm labor contractor constitutes a violation

of Oregon Administrative Rule 839-15-055(8).

OPINION

The substantial issue in this proceeding is whether or not the applicant knowingly employed illegal aliens. Mr. Gonzalez testified that he did not know the illegal status of his employees; indeed he testified that it was his practice to make no inquiries at all as to their employability status or their citizenship. This practice amounts to a voluntary choice, on Mr. Gonzalez's part, not to know the precise employability status (under ORS 658.440(2)(d)) of his employees or applicants for employment. The logical result of Mr. Gonzalez's position is that continuing this employment practice he need never concern himself with the legislative mandate embodied within the provisions of ORS 658.440(2)(d).

There were, however, facts and circumstances which would have been impossible for Mr. Gonzalez to ignore. Before the apprehension by Federal authorities on November 8, 1977, Mr. Gonzalez had in his employ 14 Spanish surnamed individuals. It was necessary to communicate with them in Spanish. He was a long time employer in an industry long beset with problems involving illegal Mexican aliens. His exculpatory explanation and his defense asserted to this charge is not tenable under a well established body of Oregon law.

"Knowledge of facts and circumstances which would put a reasonable man on his inquiry is tantamount to knowledge of such facts as a reasonably diligent inquiry would reveal." *Ehler v. Portland Gas & Coke Co.*, 223 Or 28,

46, 352 P2d 1102, 353 P2d 864 (1960). *Hendrix v. McKee*, 281 Or 123, 134, 575 P2d 134 (1978).

See also *Heitkemper v. Schmeer et al*, 130 Or 644 (1929), and *Cameron v. Edgemont Investment Co.*, 136 Or 385 (1931).

ORDER

ACCORDINGLY, based upon the foregoing Conclusions of Law that Alfonso P. Gonzalez has violated ORS 658.410, ORS 658.440(2)(d) and OAR 839-15-055(8):

NOW, THEREFORE, IT IS HEREBY ORDERED THAT:

1) The Bureau of Labor will issue to Alfonso P. Gonzalez a 1978 Farm Labor Contractor's license, which license will become effective five days from the date of this Order.

2) Said license is hereby suspended for 15 days from the date of its effect based upon violation of ORS 658.410.

3) Said license is hereby suspended for 15 days from the date of its effect based upon violation of ORS 658.440(2)(d).

4) Said license is hereby suspended for 10 days from the date of its effect based upon violation of OAR 839-15-055(8).

5) The suspensions imposed by paragraphs 2, 3, and 4 above shall run concurrently.

In the Matter of SCHOOL DISTRICT NO. 1, Multnomah County, Oregon, Respondent.

Case Number 01-71

Final Order of the Commissioner, Bill Stevenson, Based on the Mandate of the Oregon Supreme Court.

Issued October 16, 1978.

SYNOPSIS

On reconsideration of *In the Matter of School District No. 1*, 1 BOLI 52 (1976), which was based on the mandate of the Court of Appeals, the Commissioner issued this order pursuant to the opinion of the Supreme Court.

Subsequent to a hearing in the above-entitled matter, the Presiding Officer issued Proposed Findings of Fact, Proposed Conclusions of Law and a Proposed Order. The Respondent filed exceptions to the Presiding Officer's proposals and the Commissioner of the Bureau of Labor issued Findings of Fact, Conclusions of Law and an Order in favor of the Complainant. [*In the Matter of School District No. 1*, 1 BOLI 1 (1973).] Respondent subsequently petitioned the Court of Appeals for review of the Commissioner's Order. The Court of Appeals upheld the Commissioner's Order. [*School District No. 1 v. Nilsen*, 17 Or App 601, 523 P2d 1041 (1974)] Respondent appealed to the Supreme Court which upheld the Commissioner's Order in part and reversed in part, and remanded the case to the Commissioner for preparation of an

Order consistent with the Court's opinion. [*School District No. 1 v. Nilsen*, 271 Or 461, 534 P2d 1135 (1975)]. The Commissioner issued a revised Order on remand. [*In the Matter of School District No. 1*, 1 BOLI 52 (1976).] Respondent filed a petition for rehearing and reconsideration and a stay of the Order pending action upon the petition. The petition for hearing was denied, and the reconsideration and stay were granted. This Order is issued pursuant to the opinion of the Supreme Court and after thorough reconsideration of those errors alleged in Respondent's petition.

INJUNCTIVE PROVISIONS

The Respondent School District No. 1, Multnomah County, its board, agents, officers and successors in interest and all persons in active concert or participation with any of them are enjoined from requiring the resignation of teachers, employed by said Respondent, who become pregnant while in a probationary status except as allowed by law.

REMEDIES

It is hereby noted that the Complainant, Sally Flury, has received all to which she is entitled under the opinion of the Supreme Court. Respondent re-employed Complainant who completed her probationary service and was granted tenure.

ORDER

Therefore being fully advised in the premises, and in the absence of complaints from other persons similarly situated to Sally Flury, the Commissioner does hereby enter this Final Order in conclusion of the above-entitled matter.

**In the Matter of
LEWIS AND CLARK COLLEGE,
an Oregon nonprofit corporation,
Respondent.**

Case Number 05-77
Final Order of the Commissioner
Bill Stevenson
Issued December 6, 1978.

SYNOPSIS

The Commissioner found that Complainant, a female with nontenured teaching experience in studio art with Respondent employer, was not accorded equal opportunity for interview and possible selection to a tenure track teaching position as Assistant Professor with Respondent's regular Art Department. The all-male search committee rank-ordered the candidates, of whom Complainant was the only female, but failed to follow the order of invitation. Influenced heavily by the Department Chairman and the College Dean, the committee invited two male candidates for interview. One accepted the position. The Commissioner found that the denial of an interview was a denial of consideration of Complainant's candidacy. The Commissioner also found that the College subsequently refused Complainant teaching positions because she filed a complaint with the Agency regarding her nonselection. The Commissioner awarded the difference between Complainant's actual earnings and the

earnings and fringe benefits including comparable vested rights in its pension plan of the successful candidate from the date of his appointment to the date she ceased actively seeking work, a total of \$34,683.97, plus interest. The Commissioner ordered Respondent to offer Complainant a tenured position, or begin paying her the equivalent, beginning with the next academic year. ORS 659.010(2); 659.030(1)(a) and (d); 659.060(3).

The contested case in the above-entitled matter came on regularly for hearing before R. D. Albright, who was designated as Hearings Officer in this matter by Bill Stevenson, Commissioner of the Oregon Bureau of Labor. The hearing was convened on December 20, 1977, at 9:30 a.m. in Portland, Oregon. The Complainant was present and testified at the hearing. The case for the Agency was presented by Thomas E. Twist, Assistant Attorney General, and the case for the Respondent was presented by Jeffrey M. Alden and Harry S. Chandler, attorneys at law.

Thereafter, I, Bill Stevenson, Commissioner of the Oregon Bureau of Labor, considered the record in the matter and I now enter the Findings of Fact, Ultimate Findings of Fact, Conclusions of Law and Final Order, all of which are set out below.¹

¹ For the purposes of convenience hereinafter, the Complainant, whose maiden name was "Kornberg," will usually be referred to as "Hart" and the Respondent, Lewis and Clark College, will usually be referred to as "College."

**FINDINGS OF FACT –
PROCEDURAL**

1) At all times material herein, the Respondent Lewis and Clark College was an Oregon nonprofit corporation existing and duly incorporated and organized under the laws of the State of Oregon and, as an employer, subject to the provisions of ORS 659.010 to ORS 659.110.

2) On or about June 29, 1972, the Complainant, Dianne Kornberg Hart, filed a complaint with the Civil Rights Division of the Oregon Bureau of Labor, alleging that she had been unlawfully discriminated against in connection with her application for employment by the Respondent.

3) Thereafter, the Civil Rights Division of the Oregon Bureau of Labor investigated Hart's complaint and the finding was made that substantial evidence existed to support the allegations of the complaint.

4) The Civil Rights Division attempted to resolve the complaint with the Respondent but was unsuccessful.

**FINDINGS OF FACT –
BACKGROUND**

5) The Art Department of the College first came into existence as a distinct department with the hiring of Bernard Hinshaw as its first faculty member and Chairman in 1946.

6) The College has recognized for some time and there has existed and does exist a distinction between the studio faculty and the Art Department faculty with the result that a teacher of painting, drawing, design, weaving, ceramics, silk-screening, etc., is considered a member of the studio faculty and a teacher of art history would be

considered a member of the Art Department faculty, but not a member of the studio faculty. The terminal academic degree for a member of the studio faculty is a Master of Fine Arts, hereinafter referred to as an MFA degree, and for an art historian, a Doctorate of Philosophy.

7) Academic tenure in the art department faculty is achieved only in connection with full-time positions, which are designated as "tenure-track" positions.

8) Since 1946, no woman has achieved tenured status on the studio faculty, although a number of men (at least three) have achieved this status. The three referred to are Professors Hinshaw, Shores and Paasche.

9) Only one woman, Alice Asmar, taught full-time in a "tenure-track" position on the studio faculty during a period of two years beginning in 1955. She was hired on a full-time basis for the academic years 1955-57 to teach Art History, which is not a "studio" subject, but due to inadequate training in that field, taught studio courses. She obtained a leave of absence in 1957 and her relationship with the College was severed in 1959 for apparent economic reasons. Six men have taught full-time in "tenure-track" positions.

10) Ten women (including Hart) have taught studio courses at the College in nontenure track positions.

FINDINGS OF FACT – THE MERITS

11) Hart taught studio courses for the College in the summer school of 1969 for an eight-week period in the fields of painting, life drawing and visual study and basic design. Hart exercised full and complete responsibility

for these classes, without supervision of any sort and with almost no contact with colleagues on the art department faculty. She testified, and her testimony is undisputed, that she had a "good experience" with her students, that she was "comfortable" with her classes and experienced "positive feedback" from her students. Because this testimony is undisputed I find in accord therewith.

12) I further find that, despite their testimony to the contrary, a favorable report of Hart's teaching experience reached the ears of either Professor Shores, who was present on campus during this period, or Professor Hinshaw, and that they were aware of this report when they evaluated her candidacy in 1972. I reach this finding and make this inference because I am unable to credit an assertion that the College would have allowed instruction to be presented to its students for a period of eight weeks without arriving at any judgment of the competence of the instruction (even after the fact) of however informal a nature.

13) In May of 1972 a male member of the studio faculty was in his sixth year of full-time teaching at the College. Prior to May of 1972, he had received an offer of a terminal contract for the academic year 1972-73. This offer of a terminal contract came about as a result, at least partially, of perceived teaching inadequacies on the faculty member's part and also as a result of a perceived failure to paint as much and exhibit as widely as the College would have liked (according to Dean Brown) and according to Professor Shores almost entirely as a result of the faculty member's "approach and

methods in his class and studio procedure . . ."

14) The faculty member referred to above submitted his resignation on or about May 1, 1972.

15) On May 5, 1972, John E. Brown, the College's Dean of Faculty, constituted a Search Committee charged with the duty of "locating and recommending a suitable replacement for" the resigning member. The Search Committee was composed of four male faculty members, the Chairman being Professor Shores, the Art Department Chairman, and the members consisting of Professor Hinshaw, the former department chairman, Professor Ferrua, a professor of Romance Languages, and Professor Chrisman, a professor of Music. A memorandum was sent by Dean Brown to each member appointed. The memorandum made no mention of consideration to be given to qualified women or minority members, although every other Search Committee appointment memorandum produced by the College and authored by Dean Brown, relevant to the period in question, made such specific mention.

16) The title of the position in question was "Assistant Professor," with primary teaching responsibilities for painting, drawing and visual studies. The position was a tenure-track position. There is evidence in the record which would indicate that the qualifications which were requisite for consideration were:

(a) Formal degree work in the area of responsibility associated with the position;

(b) Teaching experience in the area of responsibility associated with the position;

(c) Demonstrated ability as an artist.

I find that these requirements were not explicitly conveyed to the Search Committee prior to the commencement of interviews, and that if they were conveyed (in less explicit terms) that the members of the Search Committee paid them little if any heed.

17) Dean Brown announced the opening through placement offices of several prominent universities. In order to provide the members of the Search Committee with evidence on which to base their final recommendations, candidates were requested by Dean Brown to submit a dossier containing:

(a) a standard vita - detailing educational background, work experience, etc.;

(b) transcripts of formal academic work, letters of recommendation, etc.; and

(c) evidence of their own artistic abilities through portfolios and painting slides, pictures, and/or actual pieces of their work.

18) Nine applicants applied for this specific position. In making this finding I specifically do not credit the testimony of Professor Shores, which if believed, would indicate the existence of a substantially large number of candidates. My basis for this credibility judgment is set out under the Opinion portion of this Final Order.

19) The nine applicants were: (a) Ken Paul; (b) Wilson L. Orr; (c) Ray Barnes; (d) Hart; (e) Kenneth J.

Pawula; (f) Thomas W. Nuzum; (g) Robert E. Coghill; (h) John H. Morris, Jr.; and (i) Rosco Wright. Hart is a woman and was the only female applicant.

20) The Search Committee began to meet sometime between early May of 1972 and June 1, 1972. The purpose of the meetings was to begin to evaluate the applications of the candidates. During the course of these meetings, I find that the Search Committee reached a substantial agreement as to the type of candidate they were seeking. I make the finding as to this agreement based upon a single credible element common to the testimony emanating from Professors Hinshaw and Ferrua and on the basis of a letter written by Professor Chrisman approximately five months after the Search Committee began to meet.

As expressed by Professor Ferrua:

"Well, my impression was that emphasis be given to somebody - young, dynamic teacher probably. Seems to me which would - who would be able to motivate the students."

As expressed by Professor Hinshaw:

"We wanted an effective teacher. We wanted someone who per . . . could, we hope, generate enthusiasm, interest, ah, in those classes. Who could make them interesting for non-majors, because in many of our classes we do have students who do not consider themselves art majors and this perhaps is a - indicates a rather special talent on the part of a person - a teacher. Some might be able to deal effectively with ah -

interested, professionally oriented people and not do quite so well with the kind I've described and we needed someone who could do both those things."

Again, by Professor Hinshaw:

"Well, I wanted to be – to feel in that individual, ah, enthusiasm for one thing; vitality, interest, ah, ah, feeling that there is a future here to be created and that it's up to him to do it. Ah, he's alone in that whole rather large and important area and it had been declining. Our courses in this area had declined in number and apparently in effectiveness. And we especially wanted someone who could pick up, enliven, ah, vitalize those important courses."

As expressed by Professor Chrisman:

"The Art Department wanted someone who could renew an active and interested participation among the students in art. Also, we wanted someone who could teach in a manner that would stimulate enthusiasm and excitement in the Department as well as show promise as an active part of the community in its relation to art."

By way of summary, I find that the Search Committee sought a candidate who would reawaken an enthusiasm in the courses the person would teach, which enthusiasm the Committee perceived to have declined during the previous incumbent's management of the courses.

21) I find that there was no agreement among the members of the Search Committee as to what methodology they were to employ in locating

this desirable candidate. In reaching this finding, I specifically do not credit the recurrent testimony of Professor Shores to the effect that the quality of the visual material was the "paramount" consideration, either for himself or as the agreed upon criterion for the Committee as a whole. I fail to credit his testimony on this score because I find it uncorroborated in the testimony of the other members of the Search Committee and also for reasons set out in the Opinion portion of this document.

22) Instead of an agreed upon methodology for selection, the individual members used different methods and applied different standards.

Professor Hinshaw: "Well, I wanted to be – to feel in that individual, ah, – enthusiasm for one thing; vitality, interest ah – ah – feeling that there is a future here to be created and that it's up to him to do it. Ah – he's alone in that whole rather large and important area and it had been declining. Our courses in this area had declined in number and apparently in effectiveness. And we especially wanted someone who could pick up, enliven, ah – vitalize those important courses.

Counsel for Agency: "How did you propose to determine how those characteristics were present in the applicant?"

Hinshaw: "Well, the first place there were the ah, portfolios that gave in detail the background educational experience of these people. Then there were also required of them examples by way of slides – photographic transparencies of

their work and then from this we made selections for people to interview. And it was to be in the interviews, I suppose, where we would be able to make judgment – right or wrong about these personality characteristics I have mentioned.

Counsel for Agency: "Do you recollect if the Committee agreed on what paramount consideration or considerations were to be in evaluating the various candidates so that an order of interview could be determined?"

Hinshaw: "I can only speak for myself. Ah, we conferred – I, I suspect it's quite possible that different members of the Committee might have had a slightly different emphasis upon these different things. Ah, some might have been more interested in the ah, examples of the work. Some perhaps would have placed a little more importance upon the background in terms of schooling and others might have attributed more importance to the personality. Ah, in my own case, I think that I was certainly wanting to be that the schooling was adequate and the work interesting, but I was maybe a little more interested in the personal characteristics of the applicants than some of the others might have been. I don't know if that's true or not really – I know what my own interest was, was heavy in that area."

Professor Ferrua considered all the material available on the candidates arriving at his evaluation of their candidacies and applied different standards

to different candidates. For example, he was impressed with Barnes' painting and with Hart's background.

Professor Chrisman's letter of October 17, 1972, supplies the record with specific indications of what the criteria were not:

"We decided that our decision should not be based on the following: the graduate school of the candidate (because schooling doesn't necessarily determine the value of an artist or teacher); the type of painting the candidate produced (this is a subjective judgment, one which I personally did not let affect my own decisions, because I am not qualified to be an art critic); the geographic location of the candidate. Also after maybe the third meeting (after the screening list had been made) Prof. Shores and Prof. Hinshaw told us that Dianne Homberg (sic) (name used prior to that time) was Jack Hart's wife. It was decided that her relationship to Hart should have no bearing on our decision."

23) Three of the Search Committee members, individually, ranked the candidates for purposes of determining an order of interview. The order of ranking was as follows:

Professor Shores: 1. Paul; 2. Pawula; 3. Barnes; 4. Orr; 5. Hart.

Professor Hinshaw: 1. Paul; 2. Pawula; 3. Barnes; 4. Orr; 5. Hart.

Professor Ferrua: 1. Barnes; 2. Hart; 3. Orr; 4. Paul.

24) At the time of their applications, both Paul and Pawula were Professors of Art, Paul at the University of Oregon and Pawula at the University of

Washington. I find that Professor Shores ranked Professor Paul first because of reasons related to the fact that he had met him prior to the ranking and because he had submitted "such good credentials and recommendations," that is, essentially for reasons related to the professional deference one established educator would grant another. The same consideration of professional deference would also hold true for Professor Pawula. As for the relative rankings of Barnes and Orr, I am unable to find specifically the reasons for the ranking he accorded them because I disbelieve his testimony to the effect that his evaluation of their visual material was the "paramount" consideration in their ranking as far as he was concerned.

25) Professor Hinshaw's rank listing is identical to Professor Shores'. Professor Hinshaw was unable to recollect either making the rank listing or his reasons for the order of names. I draw the inference from the record and from his testimony dealing with the more or less autonomous powers he, as former Chairman had exercised in hiring matters, that he would have deferred to the judgment of the present department chairman, at least in regard to determination of a preliminary order for interview.

26) Professor Ferrua characterized his rank list as his "contribution to the work of the Committee." The Professor ranked Barnes as he did "based mostly on the visual material."

Professor Ferrua ranked Hart second:

Counsel for Agency: "Now on Exhibit 32. Thank you. On Exhibit

32 you ranked an individual by the name of Komberg second."

Ferrua: "Yes."

Counsel for Agency: "Now, ah, what was it that you liked about that particular candidacy?"

Ferrua: "Well, a combination of ah, excellent grades. Ah, good recommendations and visual part of the dossier."

Counsel for Agency: "What was it that your (sic) liked about the visual part of the dossier? I guess you mean the visual material – the slides . . ."

Ferrua: "The visual material, the slides, um, well ah, tender and sensual colors and shades I would say."

Counsel for Agency: "And you liked that painting – that example of painting of that visual material?"

Ferrua: "Yes, I did. That's why I placed him (sic) second in rank."

In the final analysis, Professor Ferrua rated Barnes ahead of Hart for these reasons:

"Yes, I think that the only difference was that Ms. - ah, Mrs. Art's (sic) paintings were donated certain monochromatic and monomorphilogoc . . . quality and in Barnes' there was more research, more exploration in several directions."

Professor Ferrua rated Hart's art work ahead of Orr's for these reasons:

"Um, probably, um, the same um, restriction I had ah, in regard to Mrs. Hart ah, it was all repetitive ah, but ah, repetitive forms and shapes and no variety and, but in

addition no, no colors. Also, in Mrs. Hart's there were very . . . very good mastering of color and tender quality of colors, but didn't exist in Orr's."

27) Professor Chrisman did not remember preparing a written rank list of candidates but he did discuss his thoughts concerning the merits of the individual candidates with other members of the Committee. I find that Professor Chrisman, although his testimony is replete with references to visual materials of the candidates that he did or did not like, did not, in the final analysis, base his evaluation of the candidates upon the quality of their work or personal likes or dislikes or the type of visual material that they had submitted. I make this finding based upon his assertion in his October 17, 1972, letter that

"We decided that our decision should not be based upon the following: . . . the type of painting the candidate produced (this is a subjective judgment, one which I personally did not let affect my own decisions, because I am not qualified to be an art critic); . . ."

This finding is also based upon his testimony at the hearing:

Counsel for Respondent: "Okay. Is there any discussion about aspects of the individuals' paintings which should or should not be considered?"

Professor Chrisman: "Um, we discussed the type of painting wouldn't be a factor. That um, ah, there were a number of different styles that somebody could paint in. Ah, for example, the difference

between Dianne Hart's and Wilson Orr's paintings; considerably different. One was very realistic and the other more of a surrealistic – if I'm not misusing the term – uh, surrealistic nature – and we felt that – especially in my own feelings that should not be a consideration since we were interested in somebody who could teach painting and their own expression, ah, could be whatever it was."

I also find that Professor Chrisman viewed Hart as a "capable painter" and that there was agreement as to her competence among the Committee.

I do find that Professor Chrisman eliminated Hart from any further personal consideration in regard to an interview, despite her "very strong record," based completely upon an inference he had drawn from a brief dialogue with Professor Shores:

"I inferred from the reaction to Dianne Hornberg (sic) from Ken Shores and Bernie Hinshaw that she did not generate a sense of this desirable (as far as we were concerned) enthusiasm. My impression of her as conveyed by the two members of the Committee who had met her was that she was competent as a painter and as a teacher (this was explicitly stated) but that she wasn't the type of person that could create the enthusiastic pursuit of art in the college . . ."

Professor Chrisman elaborated on the circumstances of the drawing of this inference at the contested case:

Counsel for Agency: "Would you tell the presiding officer what

words or actions or conduct on the part of Professor Shores or Professor Hinshaw gave ah, might have ah, formed the basis for this inference that you drew?"

Professor Chrisman: "Yes, I remember Ken Shores at one time saying ah, oh, yes, Dianne Kornberg - I thought it was Hornberg - once taught summer school at Lewis and Clark. Something to that effect."

Counsel for Agency: "And that single bit of information transmitted to you gave rise to the inference referred to in the sentence that I read to you. Is that your testimony?"

Professor Chrisman: "Yes, sir."

Counsel for Respondent: "Do you have any feeling as to why you inferred something negative from what he said [?]."

Professor Chrisman: "Yes, I thought . . . this is all a misunderstanding. I thought he is conveying what was probably just a neutral comment - now that I think about it. Neutrally saying 'oh, she used to or she taught one summer in the summer school.' I thought that he was aware of how she was doing and I thought - the reason I took a negative position on that is because I thought, assuming that he knew that ah, what kind of teacher she was - that if she had been a very strong candidate for teaching at Lewis and Clark, he would have conveyed a much stronger, positive evaluation. So that lack of a position, I took, just

because it was neutral, I took negatively."

28) I find that Professor Shores did comment to Professor Chrisman regarding Hart's summer employment by the college and that the comment was calculated by Professor Shores to create a negative impression in Professor Chrisman's mind regarding Hart's performance in the summer program and a resultant negative impression regarding her candidacy. I find that Shores calculatedly conveyed this impression to Chrisman because he wished to diminish the stature of Hart's candidacy in Chrisman's mind and that Shores acted in this fashion because of Hart's female sex.

29) The Search Committee interviewed Ken Paul first. Search Committee reactions to Professor Paul were mixed although according to Professor Shores his initial favorable impression was validated and following an interview with Dean Brown and a subsequent meeting of Dean Brown and Professor Shores, this candidate was eliminated because he lacked an MFA degree. I find this elimination of Professor Paul by Dean Brown had three effects, which were:

(a) The Search Committee was now explicitly aware that an MFA degree was a prerequisite.

(b) Since the elimination of Paul operated as an elimination of Professor Pawula, the Committee was left with only three remaining candidates, Orr, Barnes and Hart, at least as to candidates who had been ranked for interview.²

(c) It placed the Search Committee on notice that Dean Brown was prepared to participate in and oversee the selection process.

30) I make the following findings in relationship to the comparative candidacies of Hart, Orr and Barnes as they stood prior to the first interview:

(a) Degree - all three had recently acquired Master of Fine Arts degrees from large universities - Hart from Indiana; Orr from Stanford; and Barnes from Yale.

(b) Academic Transcripts - Hart was the only candidate to provide a record of her grades. I find that by any standard, her graduate record at Indiana of eight "A"s and two "B+"s, can be described as "brilliant." The Search Committee, of course, at this stage had no idea of the grades Orr and Barnes had received in graduate school. Additionally, Hart's list of graduate courses is the most complete and descriptive of the three and described academic preparation most favorable to a candidacy.

(c) Teaching Experience - In measuring Hart (by means of [Exhibits]) against the Exhibit relating to Barnes' candidacy and against the Exhibit relating to the candidacy of Wilson Orr,

I find Hart's teaching experience to have been the most complete, comprehensive and responsible. In making this finding, I am mindful of the fact that some of Hart's teaching experience was gained at the College, although I believe this finding to be supportable even without this particular element of evidence. For example, if Hart's teaching experience is compared to Barnes, this is the result:

Hart Experience: 1968 - taught classes in life drawing and painting in Richland, Washington; 1968-69 Teaching Associate at Indiana in Design course; Summer 1969 Instructor at Lewis & Clark teaching Design, Painting & Life Drawing; 1969-70 Associate Instructor at Indiana U. teaching Drawing and 3-D Design.

Barnes Experience: 1971-72 Assistant Instructor in Drawing Courses at Yale.

Hart Responsibility: Met students independently in each instance. Complete responsibility for conduct of class. Had sole responsibility for award of grades in each instance.

Barnes Responsibility: Did not have sole responsibility for conduct of class. Did not have sole responsibility for award of grades.

accorded the candidacies of Orr and Barnes for a variety of reasons:

- (a) Mr. Coghill's application arrived too late;
- (b) Mr. Wright's experience was too extensive for the entry level position contemplated and his Master of Science degree was clearly inappropriate;
- (c) Mr. Morris did not submit visual material and none was requested by the Committee;
- (d) Mr. Nuzum failed to provide letters of recommendation, a transcript or a sufficiency of visual material.

According to Professor Ferrua:

"All I can say is that, from that number we came down to four or five candidates. Eliminating the others for some reason, lack of MFA, lack of illustration . . ."

² Messrs. Coghill, Wright, Morris and Nuzum never received the attention

(d) Letters of Recommendation - I am unable to find a superiority as between the letters of recommendation of Hart or Orr, but this is not the case when those of Hart and Barnes are compared. First of all, the College requested three letters from candidates and Barnes supplied only two. The missing letter was to have originated with one Lester Johnson, head of the Department of Painting at Yale, and was "withdrawn" by that individual. I find that this set of circumstances should have, absent discrimination against her based upon her sex, provided Hart with an advantage over Barnes at this stage in this particular area. Additionally and fortuitously, the same Professor, William Bailey, who had taught at both Yale and Indiana, wrote a letter of recommendation for Hart and a letter of recommendation for Barnes. Contrasting the two letters, I find that the one in reference to Hart is clearly more laudatory than the one in reference to Barnes and I believe that anyone, carefully comparing the two, would reach the same conclusion. By way of summary, I find that the letters of recommendation of Hart and Orr are equal and that Hart's letters were clearly superior to Barnes'.

(e) Exhibition Record - Professor Shores testified as to his familiarity with and the prestige he accorded various exhibitions in which Hart had participated. Professor Shores could not evaluate the prestige accorded exhibitions at the University of East Anglia or the Norwich School of Art or Norwich City College at which places Barnes had exhibited. Shores nevertheless testified that Hart's exhibition record was a personal consideration in rating

her last. I disbelieve this testimony and specifically find that but for the sexual consideration which I find he entertained in reference to her candidacy that this would have been a favorable factor as to her in any comparison he made with the male candidates, particularly Barnes. An example of Shores' bias in this area is supplied by the fact that when Hart was 16 years old she exhibited a print in the Northwest Printmakers Henry Gallery Show. Shores was questioned as follows:

Counsel for Agency: "Well, would it have been impressive for a high school girl to have had an exhibit hung?"

Shores: "Indeed it would, yes."

(f) Other Data in Files - I find that but for the sexual considerations entertained by Professor Shores that eliminated Hart from further or serious consideration of her application, containing as it did recordation of her graduate record, her scholarships, her extracurricular activities, her foreign travel and her academic honors would have been extremely favorable considerations in any truly objective comparison entertained between herself and Barnes and Orr.

(g) Quality of Visual Material Submitted - This comparison can only be made with reference to the four Search Committee members:

(1) Professor Ferrua - This Committee member utilized this subjective standard in his comparison of the candidates. He rated Hart ahead of Orr and behind Barnes and this rating, in part at least, reflected this subjective criterion.

(2) Professor Chrisman - I have already found that this Committee member based his elimination of Hart exclusively upon an inference he drew from a dialogue with Professor Shores and that he did not base his evaluation of the candidates upon the quality or type of visual material they submitted. However, he did view Hart as a "competent painter" and we can infer from [an exhibit] that the Committee agreed as to her competence. He also viewed Wilson Orr's visual material "as somewhat limited."

(3) Professor Hinshaw - This Committee member's recollection was too limited in regard to this particular aspect of the selection process to provide any material for analysis on this subject.

(4) Professor Shores - The Chrisman letter includes an explicit assertion that another committee member stated that Hart was "competent" as a painter. Since my analysis of Professor Ferrua's testimony convinces me that a categorical statement as to competence of a painter would not have emanated from him, I draw the inference that this statement stemmed from Professor Shores and that the statement was not debated or discussed. Although I have found that the evaluation of the visual material was not a "paramount" consideration either for Professor Shores individually or for the Committee as a whole, I do find that it was a partial factor in any evaluation engaged in by Professor Shores. I recognize as well that, absent considerations based upon the sex of one of the candidates, it is entirely permissible to rate a "competent" painter fifth among five "competent"

painters. My finding that impermissible consideration based on sex influences Shores' evaluation and treatment of Hart's candidacy is supported by other findings in this document, but it is also supported by the following factor. Shores placed a value upon diversification as exemplified by the material produced by other candidates. Yet Orr's visual material could hardly be categorized as diversified. According to Professor Chrisman:

"His painting, ah, his paintings were all of a radio tower in ah, Palo Alto, or someplace down near Stanford. And ah, they were basically - each painting was basically a different perspective of this same, same tower. I remember it was very ah, I would describe it as very technological. The colors were metallic. Ah, the ah, type of painting would be very, very realistic. He was able to ah, almost in a sense of photographing, the ah, ah, radio tower. He portrayed this in his, his paints. * * *

"Um, remember asking him whether he had planned to move on from ah, his radio tower paintings; whether he would actually try something new and he said 'why should I?'"

31) After Professor Paul's and Professor Pawula's elimination, Wilson Orr was invited to interview with the Search Committee. This interview took place despite the fact that Orr had been ranked behind Barnes on all three rank lists, and presumably would have been ranked behind Barnes by Professor Chrisman, (if this gentleman ever ranked the candidates) and behind Hart on one rank list.

The circumstances leading up to the interview are as follows: Orr was resident at the time of his application in Palo Alto, California, and lived in the vicinity of Stanford University, from which institution he was to receive an MFA in June of 1972. Dean Brown was a Stanford graduate. Dean Brown planned a vacation trip for late May or early June which was to include a stopover in the Stanford vicinity. Prior to Dean Brown's departure, he and Professor Shores discussed the existence of Orr's candidacy and it was decided that Brown would visit Orr and determine if Orr was "still interested in the position." Before Brown left, he acquainted himself with Orr's application materials which had been provided to the College thus far. Brown was favorably impressed by his review of these materials.

Dean Brown met with Orr on the Stanford campus. They talked for a period of from 3½ to 4 hours. Dean Brown formed a favorable impression of and a liking for Orr. Dean Brown looked at approximately half a dozen original paintings which had been executed by Orr. Dean Brown found the work "interesting." During the course of the meeting, Orr expressed doubts to Brown as to whether he ought to work full-time strictly as an artist or pursue a career as a teacher. Brown appreciated this candor and did not interpret Orr's dilemma as problematic to his candidacy. Brown's overall impression of Orr was to the effect that:

"My impression of him was that he was ah, intelligent, ah, that he was ah, articulate. That he was . . . had a good sense of humor. That he was ah, I think I would say more

relaxed kind of person. That he would ah-um, he was confident about his work. Ah, he listened well; he seemed to me, he listened well."

Dean Brown contacted Professor Shores after his meeting with Orr. He articulated Orr's vocational dilemma. Brown indicated that he liked Orr. He recommended that the Search Committee interview Orr.

32) Professor Shores testified that the interview with Orr took place as a result of a "shuffling" of positions prior to the Paul interview, and that the new "shuffled" order was: (a) Paul; (b) Orr; (c) Barnes; (d) Pawula; (e) Hart.

I do not believe this testimony and I do not find in accord with it. My reasons for disbelief are set out in the opinion portion of this document and additionally include these factors:

(a) This item of testimony is uncorroborated by any other Search Committee member;

(b) It places too great a strain on my credulity to believe that Orr would have switched places with Pawula in the minds of the Art Department members after their initial ranking. The record contains no remotely credible explanation for reducing Pawula from second to fourth and elevating Orr from fourth position to second. After all, until the interview, Orr had no real champion (with the possible exception of Dean Brown who was not a member of the Search Committee, and this sponsorship came about after the Paul interview) - that is to say, that there is nothing in Professor Chrisman's testimony to suggest that Chrisman would have preferred Orr to Barnes or Hart.

(c) It is impossible for me to reconcile Professor Shores' emphasis on diversity with the visual material the record reflects was submitted by Orr.

I find instead that given the fortuitous circumstances of Dean Brown's proposed trip to Stanford and Dean Brown's favorable reaction to Orr that the Committee conducted the Orr interview as a matter of expediency and by way of accommodation to their superior, Dean Brown, whose recent rejection of Professor Paul might well have been interpreted by the Search Committee as an indication of disenchantment with their methods, procedures and efficiency.

33) The Wilson Orr interview by the Search Committee resulted in an offer of the position to him. The reaction of the Search Committee members was as follows:

(a) Professor Shores - Was favorably impressed.

(b) Professor Ferrua - "Failed to be convinced or impressed."

(c) Professor Chrisman - His reaction to Orr was mixed:

Counsel for Respondent: "All right. What do you recall about that interview?"

Professor Chrisman: "Um, he was very ah, soft spoken person. He ah, seemed very capable of what he was doing, very . . . he seemed to be competent - that he would be a competent teacher. Um, I remember asking him whether he had planned to move on from ah, his radio tower paintings, whether he would actually try something new and he said 'why should I?'"

Counsel for Respondent: "Did that affect your judgment about him?"

Professor Chrisman: "It did to a certain extent."

Counsel for Respondent: "Negatively?"

Professor Chrisman: "Well in a sense, in a slight way, I thought well, I can be flexible if given time."

(d) Professor Hinshaw - He remembered nothing.

Mr. Orr was offered the position and resolved his vocational dilemma by rejecting it.

34) Ray Barnes was next interviewed for the position. He was offered the position and accepted it. The record, more in the case of Barnes than that of Orr, illustrates the extreme importance of the interview in the evaluation of a candidate and the importance, as far as an evaluation goes, of personal human contact between a candidate and the members of the Search Committee.

Professor Shores met Barnes at the airport. He was initially provided with a guest room at the College, but spent the remainder of the visit, that is, three or four days, as a guest at Professor Shores' home. On the second day of the visit, he was interviewed by the Search Committee. The meeting lasted two or three hours. What took place at the interview can best be described in Barnes' words:

"Okay. Um, the members of the Search Committee asked ah, a variety of questions um, about my educational background. Um, about my work. Um, things I was interested in. Um, very sort of -

they were making an inquiry about me – whole aspects of me as a person in my education. * * *

"Well, when I said, they asked me about my education. That, that took quite a lot of time, you know, my experiences and courses and ah, that I'd taken at the three colleges I had attended. Um, that was quite a heavy part of the um, inquiry they made. The search. Ah, interests, um, attitudes about teaching. Um, things that I would like to do if I had got the job, you know, projects. Um, the way I would have handled classes, so forth."

According to Professor Hinshaw:

"We had more time with him and I remember particularly that Ken Shores and I meant (sic) with him at dinner and at Ken's house. I remember having with him ah, and with Ken Shores several hours. * * *

"I was impressed with him at that time on the basis – in the way I mentioned I thought was important. Ah, he seemed to have ah, extraordinary amount of eagerness, enthusiasm, ah, diversity of ah, interests in regard to his own work and in regard to his desire to create a career for himself and to begin it with us. This seemed to me extraordinarily evident and vivid and I think that influenced me quite a bit in my disposition toward him."

According to Professor Chrisman:

"Um, when he came, he immediately struck me as being very enthusiastic about what, what he was

doing. My impression of his – the variety had did – had done and um, sort of the liveliness of those paintings ah, was substantiated by meeting him. He was, was interested in all kinds of ah, all kinds of things. Ah, my impression was immediately positive – very positive. He um, ah, we had both gone to Yale, so we discussed ah, ah, discussed things about New Haven and about the University and mutual friends and ah, we talked a lot about ah, well I can only remember vaguely, that we talked a lot about art and music and ah, I don't remember anything else."

According to Professor Ferrua:

Counsel for Agency: "Okay. Now, how did you feel about him after the interview?"

Professor Ferrua: "I felt that my first impression was . . . corroborated by the experience of talking to him and his juvenile enthusiasm. His ah, broad interest in other fields of painting and I thought he would be a very communicative personality to have on campus. * * *"

Counsel for Agency: "After, after the interview, were you less impressed, equally impressed, as impressed or more impressed?"

Professor Ferrua: "I thought he was some kind of confirmation. Um, maybe an improvement on, one my previous good impression. But my impression was that certainly he made a very good impression on everybody else on the Committee. Um, yes."

Counsel for Agency: "Did the interview add additional information to the information you already had about . . . Professor Barnes?"

Professor Ferrua: "Yes, because we were . . . given the possibility of asking all kinds of questions and I remember that each one of us took advantage of exploring his culture, his background and those things that were not clear in his . . . dossier or transcript, that were told us orally. * * * Add to that, you know, a very warm personality – young, energetic, dynamic, very eclectic culture you know, besides his field was interested . . . besides his field was interested in cinema, in poetry and many other things and that added . . ."

I find that once the Search Committee approved Barnes' candidacy that his appointment was virtually assured and that any interviews, subsequent to the successful interview with the Search Committee, with other administrators of the College amounted to nothing but pro-forma approval of the Search Committee selection.

35) Hart was never interviewed for the position though in a geographic sense she was more accessible to the Committee than any other candidate, since she was a resident of Portland, Oregon, the city in which the College is located.

36) On June 27, 1972, Professor Shores discussed the position by telephone with Hart and indicated that she was still under consideration. On June 28, 1972, Hart heard from Shores that the position had been offered to and accepted by Barnes. The contract formalizing the hiring of Barnes was drafted June 28, 1972, and executed by Barnes on June 29, 1972. I find that Shores' indication to Hart that she was still under consideration on June 27, 1972, was false and that by that time the College had become fixed in its intentions to engage Barnes for the position. I find further that no official of the College engaged in the selection process seriously considered it to be a possibility that Barnes would decline the position if it were offered.

37) I find that shortly following the successful interview of Barnes, at a time when Shores had no expectation that Barnes would not accept the College's offer of employment, Shores proposed to Dean Brown that Hart be granted an interview. This proposal was rejected by Dean Brown. I find that Shores made this proposal with the specific intention to effect a deceitful appearance that the selection process was being carried on in a fair and evenhanded manner, free from considerations of the sex of any candidate, and to deny to Hart or to anyone else who might later scrutinize the process, the ability to draw the inference that Hart's female sex was the reason for her rejection.³

³ Counsel for Agency: "Well, could you tell me more precisely what he (Shores) said if you can? What did he say?"

Dean Brown: "Okay, I call, the call was about what happened in connection with the candidate; candidate Ray Barnes visit. The question was, was, did the visit, ah, from the point of view of the College, was the visit affirmative, so that he was going to be offered the position? The answer was yes. The

I find that the sex of Hart was the motivation for this rejected proposal as well as the motivation for Shores' treatment of other aspects of her candidacy.

38) Hart asked for and was given an appointment with President Howard, President of the College, which took place in President Howard's office on July 6, 1972. The others in attendance at the meeting were Arleigh Dodson, who was acting in Dean Brown's stead during his vacation, and Professor Shores. Hart read a prepared statement. A dialogue followed between Hart and President Howard in the course of which President Howard remarked that if Hart were to file a complaint (she referred to the possibility of filing such a claim with the Bureau of Labor in the course of reading [her

next question I had was: who is the next candidate? Is Dianne in the, in the next candidacy, because she knew she had been a candidate. He said, yes. And as I recall and I wish to stress that I do not have absolute recall for the absolute, for his exact words. The context of it was a question. In view of the fact that Dianne is in Portland -- in view of the fact that Dianne is, ah, the wife of a colleague, in view of the fact that she would have been next one. Ah, shall we just go ahead and interview her anyway? That's my memory of it and why I say concern, I am adding my interpretation of what he was saying. He was asking a question."

Counsel for Agency: "Do you mean, well, did you understand that, ah, that the interview would be just a matter of courtesy, but conducted in the context where it was already determined that Barnes was going to be offered the job?"

Dean Brown: "I said, that was precise -- precisely my question. I said, are you saying that there are doubts about whether or not Barnes was going to be offered the job or are you saying that everything is affirmative. That the Search Committee was affirmative. That Arleigh Dodson was affirmative and that the President was affirmative. That was my question Mr. Twist - in, in, in response to his. He said, no, I've told you that's completely affirmative. And that's the word courtesy and probably my word. I said then, I do not think it would be appropriate to interview her; just because, fact I think I suggested and Ken immediately agreed that there would be in, in such a ah, activity, there would be an element of gesture which would be bordering on ah, discourtesy."

Counsel for Agency: "Bordering on hypocrisy."

Dean Brown: "All right, hypocrisy . . ."

statement]), that she would not be considered for any future openings in the Art Department.

39) On November 8, 1973, Hart sent Professor Shores a letter reapplying for any positions which might become open in the Art Department. I find that several openings for which she was qualified did become open between the time the letter was transmitted and the date of the hearing in this matter. I find that Professor Shores had appointing authority in regard to these positions and that he failed to consider Hart for these positions. I find that he failed to consider Hart for these positions by way of retaliation against her for filing a complaint with the Oregon Bureau of Labor and for opposing the Respondent's sexually discriminatory conduct.

40) The record contains exhibits and testimony stemming from the Respondent indicating that rigid Search Committee procedures were in existence in May and June of 1972 and that these procedures were communicated to this particular Search Committee and that this particular Search Committee followed these procedures. The procedures referred to are set out in [an exhibit]:

"Our procedures do not envision that all ranked candidates will be asked to visit. Candidates are ranked in order. Following a visit, another candidate is invited only if there is doubt in the Committee's mind about the advisability of making an offer . . ."

I specifically find that in May and June of 1972 that there were no written Search Committee procedures. I further find that what Search Committee procedures were in effect in that period were in the developmental stage.

I specifically do not find that any procedures which could be characterized as rigid or definite were communicated to Professor Shores or that he in turn communicated such procedures to the Search Committee.

I find that from the time of his hiring through the end of the summer session in the academic year 1976-77, Barnes received the sum of \$69,056.46 in wages from the College. I find that during that period Hart received the sum of \$26,768.47 in income representing wages from various employers. The receipt of this income and the differential between the two incomes can be illustrated in this fashion:

	Barnes	Hart	Differential
1972	\$3,466.68	\$1,047.68	\$2,419.00
1973	\$12,331.59	\$288.88	\$12,042.71
1974	\$12,016.62	\$7,240.88	\$4,775.74
1975	\$14,904.93	\$12,581.76	\$2,323.17
1976	\$14,896.64	\$5,609.27	\$9,287.37
1977	<u>\$11,440.00</u>	<u>\$0.00</u>	<u>\$11,440.00</u>
	\$69,056.46	\$26,768.47	\$42,287.99

42) I find that during the period from July of 1972 through the end of 1976 Hart was either employed and receiving income or was actively seeking work. I find that she was not actively seeking employment during the period January 1, 1977, to August 31, 1977, and that during this period of time Barnes earned \$11,440.

43) I find that Barnes during the period beginning in September of 1972 and continuing through the end of 1976 received fringe benefits of a value of \$3,835.98 for which Hart would have been eligible and which she would have elected to receive.

44) I find that for the academic year 1977-78 Barnes received a contract calling for wages in the amount of \$14,410 and fringe benefits of a value of either \$1,275 or \$1,379, depending upon the health coverage he elected.

ULTIMATE FINDINGS OF FACT

1) I find, based upon the above basic Findings of Fact, that Hart was as qualified for an interview by the Search Committee as was Orr or Barnes.

2) I find that Professor Shores and Dean Brown dominated the selection procedures of the Search Committee. Dean Brown's dominance consisted of:

- (a) His veto of Paul's candidacy;
- (b) His dictation that Orr be interviewed.

The Committee acknowledged and acquiesced to Dean Brown's dominance by preparing themselves to be and by ultimately being impressed by Orr (except for Professor Ferrua).

Professor Shores illustrated his dominance by:

(a) Dictating that Paul was to be the first candidate interviewed;

(b) Bringing it about that the job was offered to Orr under circumstances where the only totally positive response to the Orr interview came from Shores;

(c) Effectively eliminating Hart from any serious consideration, to wit, an interview by the Committee.

3) I find that this is the procedure the Committee followed:

(a) They reviewed the applications;

(b) With the possible exception of Professor Chrisman, the individuals on the Committee individually ranked the applications so as to arrive at an order of interview;

(c) The other members then acquiesced to Professor Shores' desire to interview Professor Paul first;

(d) They then abandoned their order of ranking and their individual preferences because of the convenient and fortuitous circumstances of Dean Brown's visit to Stanford and interviewed Orr;

(e) They acquiesced to Brown's and Shores' obvious liking for Orr and offered him the job;

(f) They then allowed Shores to influence their decision to next interview Barnes, were impressed by him and offered him the job.

4) In terms of the consideration of a candidacy, the only meaningful, significant consideration took place at the Search Committee interview. The denial of an interview to Hart constituted a denial of a consideration of her candidacy. I further find that given the Search Committee's commitment to finding a candidate capable of generating and renewing enthusiasm, that the only way the presence of this quality could be detected and measured was by means of an interview.

5) Professor Shores' treatment of Hart's candidacy, for example the ranking he gave her, the impression he conveyed to Chrisman and his ignoring of Ferrua's stated preference, ensured that Hart would never be interviewed and Professor Shores' treatment of Hart's candidacy was motivated by Hart's female sex.

6) Professor Shores failed to consider Hart for openings in the Art Department for which she was qualified after June of 1972 because she had filed a complaint under ORS 659.010 to 659.110 and because she had opposed the College's sexually discriminatory conduct.

OPINION

I have found that Shores' treatment of Hart's candidacy was motivated by considerations relating to her female sex. In reaching this finding, I have disbelieved several propositions advanced by Professor Shores as a witness in this matter. I will discuss these propositions in order:

1) That considerably more than nine applications were received for the position in question. The argument that develops from this position is to

the effect that Hart's ranking was relatively high and that therefore impermissible considerations of Hart's female sex must have been absent.

I have found contrary to this position because:

(a) [The exhibit upon which Finding of Fact 19 is based] speaks to the contrary;

(b) Professor Shores himself expressed some doubt as to the validity of this assertion;

Counsel for Agency: "Is it your testimony that 30 or 40 applications that you and Professor Hinshaw looked at were received after the job announcement had gone forth in May of 1972?"

Professor Shores: "Well, I'm really sorry. I wish I could remember for everyone's sake. I just don't recall whether those were received after the fact or whether we pulled some from our unsolicited files. I'm very sorry, but I just don't recall."

(c) The proposition is uncorroborated by any other Search Committee member. To the extent that it might be argued that the proposition is corroborated by Professor Chrisman's reference to "about three or four boxes full of applications," I have resolved this problem by reference to Professor Shores' testimony set out above, and I find that applications in excess of nine, if they existed, represented general unsolicited applications not directed at the specific opening which concerns us here.

2) That the "paramount" consideration for ranking before the interviews was the quality of the visual materials.

I have found to the contrary because:

(a) The testimony is uncorroborated by other Search Committee members and in fact is contradicted by Professor Chrisman;

(b) I also tend to disbelieve this assertion as I did the first proposition advanced because of the uncontradicted reliable testimony from Dean Brown to the effect that Professor Shores proposed an exercise in deceit. (See footnote 3).

The record and my findings establish that Hart was qualified, or at least as qualified, as Orr and Barnes to receive significant consideration (an interview) by the Search Committee for the position in question. Orr and Barnes received such consideration and both were offered the position. The College has offered an explanation for the circumstances surrounding the preferred treatment accorded these male candidates. I deem this explanation to be completely insufficient to provide a legitimate explanation for this disparate treatment accorded Hart and I believe my factual conclusions to the effect that sexual considerations were involved in Hart's failure to reach the interview stage of the selection process to be inescapable.

The Complainant has offered testimony in the area of what she characterizes as "damages suffered . . . in her professional capacity," accruing to her as a result of the Respondent's sexually discriminatory conduct. I do not believe these damages to be legally cognizable under the provisions of ORS chapter 659. Because I do not believe that I have the capacity to provide a dollar remedy for the Complainant as to this specific area of possible

damage, I have not made findings as to whether or not the Complainant was, in fact, damaged in these particulars.

CONCLUSIONS OF LAW

1) Based upon the Findings of Fact and Ultimate Findings of Fact set out above, I conclude that the treatment of Hart's candidacy by Professor Shores for the position available in 1972 and for other positions which became available thereafter can properly be imputed to the Respondent.

2) Based upon the Findings of Fact and Ultimate Findings of Fact set out above, I conclude that the treatment accorded Hart and her candidacy by the Respondent for the position which became available in 1972 constitutes a violation of ORS 659.030(1)(a).

3) Based upon the Findings of Fact and Ultimate Findings of Fact set out above, I conclude that the treatment accorded Hart and her candidacy by the Respondent for positions which became available after June, 1972, constitutes a violation of ORS 659.030(1)(d).

4) Based upon the Findings of Fact and Ultimate Findings of Fact set out above, I conclude that the damages and remedy referred to in the Order portion of this document are appropriately awarded under the provisions of ORS chapter 659 and particularly under the provisions of ORS 659.060(3) and 659.010(2).

ORDER

The Respondent is ordered as follows:

1) To deliver to the Civil Rights Division of the Oregon Bureau of Labor,

within 20 days of the date of this Order, a certified check payable to the order of Dianne K. Hart, representing the differential between the wages received by Ray Barnes from the College and the wages received from employment by Hart during the period from July 1, 1972, to December 31, 1976. The basis for computation of the total amount of this certified check shall be as follows:

(a) \$ 2,419.00, with simple interest at 6% per annum from January 1, 1973, to the date payment is made.

(b) \$12,042.71, with simple interest at 6% per annum from January 1, 1974, to the date payment is made.

(c) \$ 4,775.74, with simple interest at 6% per annum from January 1, 1975, to the date payment is made.

(d) \$ 2,323.17, with simple interest at 6% per annum from January 1, 1976, to the date payment is made.

(e) \$ 9,287.37, with simple interest at 6% per annum from January 1, 1977, to the date payment is made.

2) To deliver to the Civil Rights Division of the Oregon Bureau of Labor, within 20 days of the date of this Order, a certified check payable to Dianne K. Hart, representing the value of the fringe benefits for which Hart would have been eligible and which she would have elected to receive and which were actually received by Barnes during the period from July 1, 1972, through December 31, 1976. The basis for computation of the amount of this certified check shall be as follows:

(a) \$622.00, with simple interest at 6% per annum from Sept. 1, 1973.

(b) \$895.00, with simple interest at 6% per annum from Sept. 1, 1974.

(c) \$969.00, with simple interest at 6% per annum from Sept. 1, 1975.

(d) \$993.00, with simple interest at 6% per annum from Sept. 1, 1976.

(e) \$356.98, with simple interest at 6% per annum from Dec. 1, 1976.

3) To offer, in writing, tenure-track employment to Dianne K. Hart as an Assistant Professor of Art, such employment to commence with the academic year 1979-80 or at any time thereafter, and to involve the teaching of painting, drawing and design to the College's students on a full time basis. The employment is to be compensated at the rate the College pays Assistant Professors with four consecutive years of service at Lewis and Clark, who are employed on a full time basis. If such employment is not offered for the academic year commencing September, 1979, then the years of consecutive service for purposes of computing the compensation, which must nevertheless be paid to Hart, shall commence to accumulate over and above four, commencing in September 1979. Such an offer of employment need not be made with tenure status but at the time Hart commences such employment, she shall be considered to have accumulated four years toward attainment of tenure. An offer of such employment to Hart shall include a provision to the effect that she shall have 45 days from the time of her receipt of the offer to accept or reject it. If Hart ignores such an offer until 45 days have passed or rejects it within 45 days of its tender, then the College shall have no further obligation to Hart stemming from this Order.

Should the College fail to offer such employment to Hart, then commencing September 1, 1979, and continuing until such time as Hart is actually employed or fails to accept or reject such an offer within the time limits set out above, College shall compensate Hart at the rate it compensates other Assistant Professors with at least four years of consecutive service with College, such compensation to include all fringe benefits.

Additionally, without regard as to whether College offers Hart employment commencing September 1979, as of September 1, 1979, College shall vest Hart in College's current pension plan in such a manner as if she had been employed by College during the period from July 1, 1972, to December 31, 1976, at the rate of compensation paid to Ray Barnes during the period from July 1, 1972, to December 31, 1976.

**In the Matter of
TERMINAL ICE AND COLD
STORAGE COMPANY, INC.,
an Oregon Corporation, Respondent**

Case Number 04-77

Final Order of the Commissioner

Bill Stevenson

Issued December 26, 1978.

SYNOPSIS

Where the supervisory and clerical duties of Complainant and her male comparator were similar in the skill,

effort and responsibility required, the Commissioner found that Respondent employer committed an unlawful employment practice in paying Complainant less due to her sex, and was guilty of unlawful retaliation in discharging Complainant when she asked for a raise. The Commissioner awarded the Complainant \$10,474.83 in lost wages, including the difference in her pay plus the net loss from the date of her discharge until she found alternate employment; awarded her \$1,000 for mental distress over the unexpected and unjustified discharge; awarded her pension benefits based on her intended service; ordered Respondent to put a copy of the Final Order in her personnel record; and ordered Respondent to assure that employees receive pay and opportunity to compete for positions without regard to sex. ORS 659.010(2); 659.030(1)(a) and (d); 659.050(1); 659.060(1) and (3).

The above entitled matter having come on regularly for hearing before Dale A. Price, designated as Presiding Officer by the Commissioner of the Oregon Bureau of Labor; the hearing having been convened at 9:30 a.m. on April 10, 1978, in Conference Room "D" of the Labor and Industries Building, Salem, Oregon, and continuing through April 12, 1978; the Complainant having been present, the Agency having been represented by Thomas E. Twist, Assistant Attorney General, and the Respondent having been represented by Paul Ferder, Attorney at Law.

Being fully advised in the premises, the Commissioner of Labor, Bill Stevenson, does hereby make the

following: Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT – PROCEDURAL

1) The Respondent, Terminal Ice and Cold Storage Company, Inc., was and is an Oregon corporation authorized to do business in Oregon and is an employer subject to the provisions of ORS 659.010 through 659.110.

2) On or about August 22, 1974, the Complainant, Virginia M. Loe filed a verified complaint with the Civil Rights Division of the Oregon Bureau of Labor alleging that the Respondent had unlawfully discriminated against her in connection with her employment because of her sex.

3) Following the filing of the verified complaint by Virginia M. Loe, the Civil Rights Division investigated the allegations in the complaint and determined that substantial evidence existed to support the Complainant's allegation that she had been discriminated against, in her employment, by the Respondent because of her sex.

4) Thereafter, the Civil Rights Division attempted to reach an informal resolution of the complaint through conference, negotiation and conciliation, but was unsuccessful in these efforts.

FINDINGS OF FACT – THE MERITS

1) Complainant is a female person.

2) Respondent owns and operates several cold storage warehouses specializing in the shipping, receiving and storage of frozen foods. Respondent's warehouses operate on two types of programs called distribution and production warehousing. Production warehousing involves receipt of foods

in bulk from major suppliers and agricultural growing areas and the shipping of these foods for sale. Distribution warehousing involves receipt of many small lots of foods from suppliers and shipping of all the foods found in grocery store frozen food cabinets. Each plant operated by Respondent consists of a warehouse and a separate office where telephones are located and documents incident to shipping, receiving and storage of foods are prepared.

3) Complainant was hired by Respondent on February 14, 1966, as a shipping clerk in Respondent's Salem plant. As shipping clerk, Complainant handled the documentation related to the movement, by railroad, truck and container, out of the warehouse #12.

4) Complainant's initial supervisor was Mildred Megquire, who did supervise the office personnel in Respondent's Salem Plant #12 until her retirement in July of 1969.

5) Upon the retirement of Ms. Megquire, Complainant assumed the duties of supervision of office personnel at the request of Harold Robertson, who was then plant manager at Respondent's Salem Plant #12.

6) From July 1969 until early in 1972, Complainant did train and supervise office personnel in the performance of clerical functions incident to shipping and receiving. Complainant was responsible for preparation of necessary paperwork incident to shipping, receiving and reporting functions for Salem Plant #12 including, but not limited to, the taking of orders and preparation of bills of lading.

7) During the period July 1969 - early 1972, respondent did employ several males in office supervisory positions in Respondent's other plants. These males were paid more than Complainant in Salem. It is noted that the job descriptions and resultant duties of these comparators do vary significantly within each plant. Some male comparators did at times act as warehouse managers in the absence of the regular managers.

8) Early in 1972, prior to the creation and filling of the position of NORPAC Coordinator, Complainant became aware of Respondent's intention to add a major distribution warehousing program, to be called NORPAC, which would become an additional function of the Salem Warehouse #12, where she was employed by Respondent. The NORPAC Program was to be headed by a program coordinator whose duties would be similar to those performed by Complainant.

9) Complainant was interested in competing for the position of NORPAC coordinator and she did apply for the position by expressing her interest to Harold Robertson, who was then the Plant Manager of Salem Plant #12. Mr. Robertson expressed reservations to Complainant about the ability of Complainant, or any woman, to function effectively in the cold temperatures of the warehouse or to deal effectively with the potentially boisterous and vulgar "over-the-road" truck drivers who would participate in the planned NORPAC distribution program. Mr. Robertson did convey Complainant's interest in the position to Mr. Dayton in Respondent's general offices in Portland.

10) Respondent hired a male, Patrick Gaffrey, as NORPAC Coordinator in March of 1972, to begin work on or about April 1, 1972.

11) On April 1, 1972, Patrick Gaffrey assumed the position of NORPAC Coordinator at Respondent's Salem Warehouse #12. Mr. Gaffrey's functions involved coordination of the paperwork incident to the receiving, storing and shipping of small lots of frozen foods handled in the NORPAC Distribution Warehousing Program. Mr. Gaffrey's duties did not require any significant amount of work in the warehouse, but could be performed almost entirely from a desk in the office.

12) Mr. Gaffrey had three (3) years prior experience with Respondent in the Respondent's general office and in other plants where he performed various warehouse functions and did contribute to the running of another distribution warehousing program similar to the NORPAC Program.

13) Complainant's experience focused on production warehouse documentation, but included experience in distribution warehousing. The paperwork involved in the two types of warehousing are very similar so that Complainant's skills, although acquired in a predominately production warehouse context, were in large measure applicable to distribution programs as well.

14) Complainant did train Pat Gaffrey in certain aspects of the documentation process including, but not limited to, the preparation of bills of lading.

15) Both Complainant and Pat Gaffrey had supervisory responsibility over clerical persons working within their respective programs.

16) Pat Gaffrey did occasionally work in the warehouse portion of Plant #12 doing stenciling and checking for damages to packages. This work was neither required nor was it a significant portion of his work effort.

17) In addition to the paperwork functions, comparable to the functions Pat Gaffrey performed for the NORPAC Program, Complainant did regularly perform the following tasks for which Pat Gaffrey had no comparable duties:

(a) Ordered all railroad cars and handled the railroad report for the entire plant.

(b) Handled petty cash for the entire office.

(c) Prepared the safety report for the plant.

(d) Arranged container shipping for the plant.

18) The regular program, for which Complainant handled documentation, did move a greater volume of product in and out of Plant #12 during the relevant period in 1972 - 1974 than did the NORPAC Program. The NORPAC Program, however, did involve the handling of numerous small lots of product than did the regular program. The regular program did not have certain time saving devices, such as the teletype which NORPAC used to facilitate receipt of orders. The use of gross tonnage or number of line items in and out of the plant will not, therefore, suffice as a measure of comparative effort required by Complainant and Pat Gaffrey in documentation tasks.

19) Complainant and her staff and Pat Gaffrey and his staff occupied similar office space in the same

building. They used similar equipment for the performance of their respective office jobs with the exception of Mr. Gaffrey's use of the teletype for receiving orders. Use of the teletype generated less paperwork per order than did the alternate systems used by Complainant, who had no access to the teletype.

20) In early August of 1974, Complainant entered the office of Dale Keeney who was then the manager of Respondent's Salem Plant #12. Complainant did protest the increasing amount of work assigned to her clerical staff and to herself. The increased workload was in part attributable to the opening of Respondent's new plant at Brooks, Oregon, near Salem where a new clerical employee, Pat Anderson, was assigned to be supervised by Complainant. Complainant asked Mr. Keeney for a raise in pay to compensate for the heavy workload. Mr. Keeney stated that he would discuss the matter with Mr. Affolter, who was a vice-president in Respondent's general office. Complainant requested a discussion of the matter with Mr. Affolter. Mr. Keeney agreed to let Complainant speak with Mr. Affolter.

21) During the weekend following Complainant's discussion with Mr. Keeney, Mr. Keeney did telephone Pat Gaffrey at his home to request that Mr. Gaffrey take an active hand in alleviating the backlog of clerical work in the plant office.

22) On August 13, 1974, Mr. Keeney contacted Complainant and stated that she could not speak with Mr. Affolter, that she would receive no increase in pay nor a promotion, that her "ultimatum" was rejected, that she

would no longer be head office girl in the office, and that she would no longer be anything in the office.

23) Mr. Keeney did issue a separation notice for Complainant dated August 13, 1974. The reason for separation cited by Mr. Keeney was "quit."

24) Complainant worked for Respondent for 8½ years and intended to continue working for Respondent at least until she would have had 10 years of employment, which would afford a higher level of compensation under Respondent's pension plan.

25) Complainant lost her group medical insurance coverage, which Respondent buys for its employees, as a direct consequence of her unlawful discharge.

26) As a consequence of the circumstances set out in paragraph 22 above, Complainant suffered humiliation, anxiety, and embarrassment at being forced to rely upon public assistance at an age, and at a time in her career, when she reasonably assumed that her several years of service had provided her with secure employment and certain pension and medical benefits incident to that employment.

27) Complainant did supervise and train Pat Anderson, who was a clerical worker at Respondent's Brooks plant. Patrick Gaffrey, who was then and is still employed by Respondent, did corroborate Mrs. Loe's testimony by verifying this relationship in his testimony. Dale Keeney, as plant manager, was aware that Complainant supervised Pat Anderson and yet Mr. Keeney testified that Ms. Anderson reported to him rather than to Complainant and

that Complainant had no responsibility for the Brooks operation. Because of this wilful misrepresentation by Mr. Keeney, his testimony is afforded little weight in these proceedings.

ULTIMATE FINDINGS OF FACT

1) The Civil Rights Division of the Oregon Bureau of Labor made reasonable efforts to resolve Complainant's complaint with the Respondent prior to the service of the Specific Charges of Discrimination on the Respondent.

2) During the period July 1969 through early 1972, the division of labor varied markedly among Respondent's office supervisors. There is inadequate proof to establish that Complainant's job was substantially similar to those jobs held by male employees Wally Pippit, Larry Christianson, and Virgil Schubert as alleged in the Specific Charges.

3) Harold Robertson, then plant manager of Respondent's Warehouse Plant #12, had a protective attitude toward women and especially toward his longtime associate Virginia M. Loe. Mr. Robertson thought that the position of NORPAC Coordinator would be an uncomfortable and inappropriate place for a woman to work. Mr. Robertson's attitude pervaded his communication with Complainant in that he did attempt to discourage Complainant from trying to obtain the job because of her sex, in spite of the fact that the position required little if any warehouse work and was almost entirely a position comprised of office functions with which she was largely familiar.

4) Mr. Robertson did not have authority to hire the NORPAC

Coordinator. Only the Portland general office could hire for that position. In the absence of evidence regarding Mr. Robertson's communications with the general office on the subject of Complainant's application, we cannot determine whether Complainant was excluded from the position of NORPAC Coordinator because of her sex.

5) Both Complainant and Pat Gaffrey brought relevant skills to their respective supervisory positions. Complainant had superior skill in documentation and office functions relative to general shipping and receiving, which she used to train Mr. Gaffrey. Mr. Gaffrey had greater experience than did Complainant in the area of distribution warehousing.

6) Complainant and Mr. Gaffrey had similar areas of responsibility at Salem Plant #12 during the period May 1972 through August 13, 1974. Both were responsible for documentation incident to shipping, storage and receiving of goods. Both supervised clerical assistants. Complainant did have significant additional duties including, but not limited to, reporting functions and arranging for railroad and container shipments.

7) Both Complainant and Mr. Gaffrey were required to work considerable amounts of overtime to accomplish the tasks assigned and both did function under substantially similar working conditions. Both brought valuable and complimentary skills to their jobs. Both had similar areas of responsibility. There was no significant difference between Complainant's job and Pat Gaffrey's job during this period. I find that the failure to pay Complainant an amount equal

to the compensation paid to Mr. Gaffrey during the same period was based solely on Complainant's sex.

8) Dale Keeney chose to interpret Complainant's request for a raise in pay in August of 1974 as an ultimatum. Complainant did not tell Mr. Keeney that she would quit if she did not receive a raise in pay, yet Mr. Keeney attempted to disguise his involuntary discharge of Complainant behind a ruse of voluntary termination. Mr. Keeney fired Complainant because of her sex, in that she objected to her increasing work load while being paid a lesser amount than was earned by Pat Gaffrey, a male co-worker with a similar job and similar abilities.

9) The exact amount of overtime worked by Complainant and Pat Gaffrey is not ascertainable using the evidence at hand. The evidence suggests that female employees were encouraged to claim not more than two hours per day of overtime regardless of how many hours they actually worked. Pat Gaffrey's recollection of amounts of overtime which he worked was based on a vague memory without corroborating documentation. A comparison of compensation received by these employees must, therefore, be based only upon pay actually received, as we presume to equate the number of overtime hours worked by each.

10) As a result of Respondent's different treatment of Complainant while working for Respondent and due to the shock of finding herself unexpectedly and unjustly unemployed because of Respondent's unlawful termination of her employment, complainant was humiliated, embarrassed and forced to seek public support

through unemployment compensation, which was very much against her principles and did cause her considerable mental distress.

CONCLUSIONS OF LAW

1) Respondent had a duty under the law to insure that the Complainant received the same compensation as did a male counterpart, Pat Gaffrey, who possessed comparable skill and did substantially similar work under similar working conditions. This duty was an affirmative duty in that Respondent should have insured equality in the terms and conditions of employment of its employees. Respondent's legal duty in this regard was breached by payment of a male employee at a higher pay rate than that paid to a female counterpart. The breach of this legal duty constitutes a violation of ORS 659.030(1)(a).

2) Respondent's termination of Complainant on August 13, 1974, because of her complaints of the sex discrimination against her, does constitute another violation of ORS 659.030(1)(d).

3) Finding of Fact - Procedural 4) and Ultimate Finding of Fact 1) constitute compliance with the conciliation provisions of ORS 659.060(1) and 659.050(1).

ORDER

NOW, THEREFORE, as provided by ORS 659.060(3) and 659.010(2) and in order to eliminate the effects of the unlawful practices found, and to protect the rights of other persons similarly situated, Respondent is ordered to:

1) Deliver to the Portland Office of the Oregon Bureau of Labor within

fifteen (15) days of the execution of the order a certified check payable to Virginia M. Loe, in the amount of One Thousand Dollars (\$1,000.00) to compensate her for the humiliation, ridicule and embarrassment suffered because of Respondent's actions.

2) Deliver to the Portland Office of the Oregon Bureau of Labor within fifteen (15) days of the execution of the order a certified check payable to Virginia M. Loe, in the amount of Ten Thousand Four Hundred Seventy-Four Dollars and Eighty-Three Cents (\$10,474.83) representing back pay for the period August 13, 1974, through July 8, 1975, when Complainant obtained alternate employment at a higher pay rate, and the difference in pay between Complainant and Pat Gaffrey for the period April 1, 1972, through August 13, 1974, and the value of Complainant's lost medical insurance. This amount was computed as follows:

(a) Pat Gaffrey's earnings for the period 4/1/72 to 8/13/74 are \$24,050.27. Complainant's earnings for the period 4/1/72 to 8/13/74 are \$20,813.86. The difference is \$3,236.41.

(b) Lost medical and health insurance benefits for 11½ months, when Complainant was unlawfully excluded from work, computed at \$460.00; employer's cost of \$40.00 per month, which is deemed the cost for Complainant to obtain her own insurance coverage.

(c) Pat Gaffrey's yearly earnings (1974) are \$11,146.75. The portion of the year that Complainant was unlawfully out of work is 11/12 (.916), which equals \$10,210.42. Minus

unemployment compensation received by Complainant for this period of \$3,432.00. The net Amount equals \$ 6,778.42.

(d) The sum of (a), (b), and (c) equals \$10,474.83.

3) As a direct result of Respondent's unlawful acts found herein Complainant Virginia M. Loe lost certain rights to receive a pension to which she would have been entitled as an employee of Respondent Terminal Ice and Cold Storage Company, Inc. Complainant must be placed in the same position as to her pension rights as she would have been in if she had been paid at the rate she should have been paid, as defined in the Findings of Fact attached hereto, and as if she had not been terminated, but had been allowed to complete her intended ten (10) years of employment with Respondent. Accordingly, it is hereby ordered that Respondent shall arrange compensation for Complainant's loss of pension benefits in an amount equal to what she would have received had she been allowed to complete her intended ten (10) years of service to Respondent at the rate of pay paid to Mr. Gaffrey. The Commissioner retains jurisdiction in this matter and the Respondent shall, within forty-five (45) days of the service of this order, provide to the Bureau of Labor and to the Complainant, evidence of compliance with this provision of this order.

4) Respondent shall make a copy of this document part of any personnel recordation it maintains concerning the employment of Virginia M. Loe, and shall furnish a copy to anyone making inquiries concerning Mrs. Loe's

employment or her performance with Respondent.

5) Respondent shall take whatever steps are necessary to insure that each of Respondent's employees receives appropriate compensation for work performed and the opportunity to compete for other positions without regard to their sex.

**In the Matter of
MARION COUNTY,
an Oregon Public Agency,
Respondent.**

Case Number 02-78
Final Order of the Commissioner
Bill Stevenson
Issued December 26, 1978.

SYNOPSIS

Respondent public employer's female supervisory employee rejected complainant, a male, for a clerical position based on his sex, in violation of ORS 659.030(1)(a), by assuming that as a man he would be unhappy in the position, and would either resign or "try to climb up over others." The supervisor's opinions were imputed to Respondent. The Commissioner awarded stipulated damages of \$1,070 and ordered Respondent to insure that future applicants receive fair consideration without regard to the applicants' sex.

ORS 659.010(2); 659.030(1)(a); 659.050(1); 659.060(1) and (3).

The above entitled matter having come on regularly for hearing before Dale A. Price, designated as Presiding Officer by the Commissioner of the Oregon Bureau of Labor; the hearing having been convened at 9:30 a.m. on April 18, 1978, in Room "E" of the Labor and Industries Building, Salem, Oregon, the Complainant having been present, the Agency having been represented by Rudolph Westerband, Assistant Attorney General, and Respondent having been represented by Larry Pound, Attorney at Law.

Having considered relevant portions of the record, the Presiding Officer's Proposed Order, and exceptions thereto, the Commissioner of Labor, Bill Stevenson, does hereby make the following: Findings of Fact, Conclusions of Law, Rulings on Motions and Order.

**FINDINGS OF FACT –
PROCEDURAL**

1) The Respondent, Marion County, is a public employer in the State of Oregon and is subject to the provisions of ORS 659.010 through 659.110.

2) On or about October 30, 1974, the Complainant, David Lyle, filed a verified complaint with the Civil Rights Division of the Oregon Bureau of Labor alleging that the Respondent had unlawfully discriminated against him in connection with his application for employment because of his sex.

3) Following the filing of the verified complaint by Donald Lyle, the Civil Rights Division investigated the

allegations in the complaint and determined that substantial evidence existed to support the Complainant's allegation that he had been discriminated against in his application for employment by the Respondent because of his sex.

4) Thereafter, the Civil Rights Division attempted to reach an informal resolution of the complaint through conference, conciliation and negotiation, but was unsuccessful in these efforts.

FINDINGS OF FACT – THE MERITS

1) Complainant Donald Lyle is a male person.

2) Respondent Marion County Juvenile Department is an agency of Marion County government which employs several persons in a variety of positions including, but not limited to, clerical positions.

3) Kay Ostrom was Respondent's Director of Family Court Services, a position which includes responsibilities for direction of the Juvenile Department. Mr. Ostrom ultimately decided who would be hired by the Juvenile Department.

4) Kay Ostrom did frequently conduct interviews of applicants for employment, but he did at times delegate the interviewing duties to other members of the Juvenile Department's Family Court Management Team, including Julie Fullerton and Dale Perkins. This team was comprised of supervisory and support staff personnel who shared management duties with Mr. Ostrom. Kay Ostrom retained the authority to accept or reject the recommendations of the members of his Family Court Management Team

as to who should be hired, but he almost always accepted the team's recommendations.

5) Julie Fullerton was employed by Respondent on or about December 16, 1971, to work as a Clerk Typist.

6) In May of 1973, Julie Fullerton was promoted to Administrative Secretary (Office Manager), and was at times herein relevant, a member of Respondent's Family Court Management Team.

7) Dale Perkins was employed by Respondent on or about August 30, 1968, to work as a Clerk Stenographer. She was promoted to Administrative Assistant on August 1, 1972, and was a member of Respondent's management team at all times herein relevant.

8) On September 20, 1974, Respondent had a vacancy in a clerical position in the Juvenile Department.

9) In early September 1974, Respondent sought and received from the Marion County Civil Service Commission a certified list of persons deemed most qualified to fill the position in question. This list included Complainant's name.

10) Complainant did seek, and was interviewed for, the clerical vacancy in question in mid-September 1974 by Respondent's employees Julie Fullerton and Dale Perkins. At the hearing the Complainant stated that the interview had gone well and that he felt he had a good chance to be hired.

11) On September 20, 1974, Complainant was well qualified for the position in question, in that he did possess excellent clerical skills, rated on a Clerk Typist II test by the Marion County Civil

Service Commission at 84.35 out of a possible 100 on the written examination, and at a typing speed of 69 words per minute.

12) Complainant was, at the time of his interview for the position in question, a man with a wide range of experience in a variety of employment settings.

13) When Julie Fullerton interviewed Complainant, she was a new inexperienced supervisor who was admittedly uncertain of her own management abilities and who admittedly preferred to conduct interviews in the presence of her supervisor, Kay Ostrom, who was unavailable on the day Complainant was interviewed.

14) Julie Fullerton and Dale Perkins recommended that Constance Stewart, a female, be hired for the clerical position which Complainant sought.

15) Complainant was not hired by Respondent, who hired a female, Constance Stewart, in his stead.

16) Subsequent to the hiring of Constance Stewart, Complainant contacted the Marion County Civil Service Commission and sought reasons for his rejection by Respondent as a matter of right under Marion County Civil Service rules.

17) Julie Fullerton responded to the Civil Service inquiry by writing a hand written note which stated the following reasons for Complainant's rejection:

"Overqualified for the position. Arrogant. He wouldn't be happy for long working in this position and I'm sure he would either not stay, or because he's a man, (This

comment is from his attitude, not my opinion) try to climb up over others."

Ms. Fullerton offered no specific examples of, or justification for, her statements regarding Complainant's alleged arrogance or predicted unhappiness if hired.

ULTIMATE FINDINGS OF FACT

1) Complainant was well qualified for the position, in that he did demonstrate unusually strong clerical skills.

2) Complainant was not hired for the position in question, but a female person, Constance Stewart, was hired instead.

3) Julie Fullerton was a novice supervisor at the time she interviewed Complainant for Respondent. She was admittedly insecure in her position. The prospect of supervising a man with broad experience and considerable competence was too threatening for Julie Fullerton to cope with.

4) Julie Fullerton did disqualify Complainant on the basis of classical stereotypes about males being aggressive, ambitious, arrogant people who might try to "climb up over others." As his potential immediate supervisor, Julie Fullerton would have been the one over whom Complainant would have first had to climb if he was hired and inclined toward promotion. Due to Julie Fullerton's serious doubts about her own supervisory ability, and her generalizations about male characteristics, she chose to disqualify Complainant. As explicitly established in the note she wrote to the Civil Service Commission, Complainant believed that there existed a causal relationship between being a man and trying to "climb up over

others." Complainant's sex was, then, a factor in the rejection of his application for employment with Respondent.

CONCLUSIONS OF LAW

1) Respondent is responsible for the sexually discriminatory conduct of Julie Fullerton, Respondent's agent who interviewed Complainant for Respondent.

2) Respondent had a duty under the law to insure that the Complainant received the same consideration as did female applicants for the clerical position in question without regard to his sex. Respondent's legal duty was breached by Julie Fullerton's rejection of Complainant's application with specific written reference to Complainant's sex as a factor in her decision not to recommend Complainant for the position. The breach of this legal duty constitutes a violation of ORS 659.030(1)(a).

3) Finding of Fact - Procedural (4) establishes compliance with the conciliation provisions of ORS 659.050(1) and 659.060(1).

RULINGS ON MOTIONS

During the hearing, Respondent moved to strike the Specific Charges for lack of timeliness, citing the difficulty in reconstructing events to bring a proper defense. A ruling on this motion was reserved at the time of hearing.

The issue of timeliness can be a crucial one in cases where the absence of specific documents or witnesses prohibits a Respondent from preparing an adequate defense. We do not have such a case here. There is evidence that Julie Fullerton, who actually interviewed Complainant and

recommended that he not be hired, was available and could have been called as a witness if the Respondent had so desired. All documents known to be relevant to the consideration of Complainant's application by Respondent are also available for scrutiny.

The evidence is complete in this case. In the absence of an assertion that any specific witness or document is deemed to be prejudicially unavailable, I cannot allow a motion to strike based merely on the passage of time. Respondent's motion is denied.

ORDER

NOW THEREFORE, as authorized by ORS 659.060(3) and 659.010(2) and in order to eliminate the effects of the unlawful practices found, and to protect the rights of others similarly situated, Respondent is ordered to:

1) Deliver to the Portland Office of the Oregon Bureau of Labor within fifteen (15) days of the execution of this order a certified check payable to Donald Lyle in the amount of One Thousand Seventy Dollars (\$1,070.00), which is the stipulated amount of damages for this violation.

2) Take whatever steps are necessary to insure that each applicant for the future employment openings in Marion County Juvenile Department receives fair consideration for the position without regard to that applicant's sex.

In the Matter of SCHOOL DISTRICT UNION HIGH 7J, Respondent.

Case Number 39-78

Final Order of the Commissioner

Mary Wendy Roberts

Issued February 27, 1979.

SYNOPSIS

Based upon written waiver of hearing and stipulated facts agreed to by the two female Complainants and Respondent employer, the Commissioner found that Respondent committed an unlawful employment practice based on sex as to each Complainant by refusing use of accumulated sick leave with pay for bona fide disability due to pregnancy, when male employees were allowed to use accumulated sick leave for any temporary disability, regardless of its nature. The facts arose prior to the passage of ORS 659.029, but the Commissioner found that ORS 659.030's prohibition of sex discrimination had been consistently interpreted to include prohibition of discrimination due to pregnancy. The Commissioner awarded one Complainant \$1,586.76, representing 26½ days sick leave with interest; and awarded the other \$884.75, representing 17½ days sick leave with interest. ORS 659.010(2); 659.020; 659.022; 659.029; 659.030(1); 659.060(3).

The above-entitled matter came on before me as the result of the Complainants and the Respondent, the parties herein, having executed and filed with me a document entitled

"Controversy Submitted In Lieu of Notice of Hearing and Filing of Specific Charges of Discrimination," which document is attached to the appendix part of this Order, and by this reference is incorporated herein and made a part hereof. In that document, the parties agree to submit this contested case directly to the Commissioner of Labor upon stipulated facts, and to forego the filing of Specific Charges and Notice of Hearing and the designation by the Commissioner of a Presiding Officer to hear Specific Charges and to make proposed Findings of Fact, Conclusions of Law and Order. The parties reserved to themselves the right to submit memoranda of law for the consideration of the Commissioner prior to the issuance of her Final Order, and such written authority has been submitted by the Respondent. The parties reserved to themselves the right to oral argument, but have elected not to exercise that right. The parties reserved to themselves the right of appeal to the Oregon Court of Appeals from any Final Order which is adverse to any party.

I, Mary Wendy Roberts, Commissioner of the Oregon Bureau of Labor, having examined and considered the Memorandum of Law submitted by Dennis Bean, Attorney at Law and counsel for Respondent, and being fully advised in the premises, hereby enter the following Findings of Fact, Findings of Ultimate Fact, Conclusions of Law and Order.

FINDINGS OF FACT - PROCEDURAL

The following facts were agreed and stipulated to by the parties, and

are incorporated into and made a part of these findings.

1) The parties to this contested case proceeding are the Complainants Marilyn Dedrick and Jo Ellen Reif, and the Respondent, School District Union High 7J.

2) At all times material, the Respondent was and is a public employer subject to the provisions of ORS 659.010 to 659.110.

3) On or about February 10, 1975, and July 21, 1975, Mrs. Marilyn Dedrick and Mrs. Jo Ellen Reif, respectively, filed verified complaints with the Civil Rights Division of the Oregon Bureau of Labor, alleging that because of their female sex, the Respondent, their employer, refused to allow them to use their accumulated sick leave with pay, for maternity.

4) In order to bring this matter to a final administrative conclusion, the parties agreed to submit this controversy directly to the Commissioner of the Oregon Bureau of Labor, on the terms and conditions as set out in the document which is designated as Exhibit "A" and which is attached to the Appendix part of this Order.

FINDINGS OF FACT—THE MERITS

The following facts were agreed and stipulated to by the parties, and are incorporated into and made a part of these findings.

1) The Complainants, Mrs. Marilyn Dedrick and Mrs. Jo Ellen Reif, commenced their employment with the Respondent as regular full time teachers, on or about September 1, 1969, and September 1, 1973, respectively, and permanently terminated their employ-

ment with the Respondent on or about June 15, 1975.

2) In the school year from August 1974 to June 15, 1975, all regular full time teachers in the Respondent's employ were beneficiaries of a "sick leave program" which allowed all teachers ten (10) days sick leave of absence with full pay during each school year and the accumulation of sick leave with full pay to a maximum of 150 days. Sick leaves of absence with full pay were granted for all temporary disabilities other than pregnancy. In the case of a disability relating to pregnancy, however, female teachers were placed on maternity leave of absence without pay for the period of their disability.

3) Marilyn Dedrick became pregnant in approximately August of 1974. From on or about April 28, 1975, to June 8, 1975, Marilyn Dedrick was physically unable to work because of maternity and, therefore, was absent from work upon the advice of her physician. Marilyn Dedrick gave birth to a child on May 20, 1975. Marilyn Dedrick returned to work on or about June 8, 1975. Marilyn Dedrick gave to Respondent timely notice of her pregnancy and requested the use of twenty six and one-half days (26½ days) of sick leave with pay, which she had accumulated. Respondent denied Mrs. Dedrick's request for a sick leave with pay, and placed her on a "maternity leave" without pay, for the aforesaid period of her disability.

4) Jo Ellen Reif became pregnant in approximately April of 1974. From on or about January 29, 1975, to March 1, 1975, Jo Ellen Reif was physically unable to work because of maternity and, therefore, was absent

from work upon the advice of her physician. Jo Ellen Reif gave birth to a child on January 30, 1975. Jo Ellen Reif returned to work on or about March 9, 1975. Mrs. Jo Ellen Reif gave to Respondent timely notice of her pregnancy and requested the use of seventeen and one-half (17½) days of sick leave with pay which she had accumulated. Respondent denied Mrs. Reif's request for sick leave with pay, and placed her on a "maternity leave of absence" without pay, for the aforesaid period of disability.

MATTER IN DISPUTE

The matter in dispute between the parties is as follows:

1) The Complainants contend that the Respondent's exclusion of maternity related disability from its "sick leave program" constitutes discrimination in employment because of sex, in violation of ORS 659.030(1), as that statute was in effect during the school year from September 1974 to June 1975.

2) The Respondent contends that the above described "sick leave program" was not discriminatory because of sex and violative of ORS 659.030(1).

ULTIMATE FINDINGS OF FACT

1) During the school year from September 1974 to June 1975, the Respondent maintained a "sick leave program" which denied to the Complainants and to other female teachers similarly situated, in the case of disability due to pregnancy, compensation paid by the Respondent to all other teachers not pregnant, including male teachers prevented from working by

any temporary physical or mental disability.

2) The Respondent's denial of pay to the Complainants and to other female teachers similarly situated during a period of bona fide disability due to pregnancy, and its granting of leave with full pay to male teachers temporarily disabled, without qualification as to the nature of the disability suffered, constituted discrimination in employment against the Complainants and other female teachers similarly situated, in compensation, and in the terms, conditions and privileges of their employment, because of their female sex.

3) Respondent's sick leave program placed burdens of an economic nature solely upon the Complainants and on other female teachers similarly situated.

CONCLUSIONS OF LAW

In the school year 1974 to June 1975, Respondent violated ORS 659.030(1) in denying to female teachers, including the Complainants, in the case of disability due to pregnancy, sick leave with full pay, and thereby placing burdens upon the Complainants and on other female teachers, which did not result from a bona fide occupational requirement reasonably necessary to the normal operation of the Respondent's business.

OPINION

The prohibition in ORS 659.030(1) against sex discrimination in employment was established in Oregon by enactment of the Oregon Assembly in the fall of 1969. As enacted, and as in effect during the school year 1974 to

1975, ORS 659.030(1) provided, in pertinent part, that,

"It is an unlawful employment practice:

(1) For an employer, because of the . . . sex . . . of any individual . . . to . . . discriminate against such individual in compensation or in terms, conditions or privileges of employment. *However, discrimination is not an unlawful employment practice if such discrimination results from a bona fide occupational requirement reasonably necessary to the normal operation of the employer's business, including, but not limited to, discrimination due to the physical requirements of the employment, lack of adequate facilities to accommodate both sexes or special environmental conditions justifying such employment.*" (Emphasis supplied.)

In passing into law ORS 659.030(1), Oregon's Legislative Assembly voiced their recognition of the activity of women in Oregon's labor market. The Assembly further recognized that working women are a benefit to society, and that they will seek employment, like their male counterparts, for a multitude of reasons, not least of which is economic need. The Assembly took notice of the fact that the absence of an ability of women to participate on an equal basis with males, in compensation and in the terms, conditions and privileges of their employment, will work a severe hardship on working women, their families and dependents, and deny to our society the fruits of their labor.

The Assembly also recognized that although they will enact progressive laws, many employers will hold fast to the last vestiges of an unfortunate page of this country's history. Therefore, the Legislature specifically declared its purpose in passing ORS 659.030(1) into law. ORS 659.020 provides, in pertinent part, that:

"(1) It is declared to be the public policy of Oregon that practices of discrimination against any of its inhabitants because of . . . sex . . . are a matter of state concern and that such discrimination threatens not only the rights and privileges of its inhabitants but menaces the institutions and foundations of a free democratic state.

"(2) *The opportunity to obtain employment without discrimination, because of . . . sex . . . hereby is recognized and is declared to be a civil right.*" (Emphasis supplied.)

History has shown us that it is substantially more difficult to change attitudes than it is to change laws. Hence, the Assembly created machinery for protecting new rights declared, and also to encourage and promote attitudinal changes necessary for full compliance with new legislation. ORS 659.022 provides, in pertinent part, that:

"The purpose of ORS 659.010 to 659.110 . . . is to encourage the fullest utilization of available manpower by removing arbitrary standards of . . . sex . . . as a barrier to employment of the inhabitants of this state; . . . To accomplish this purpose, the legislative assembly intends . . . to provide:

"(1) *A program of public education calculated to eliminate attitudes upon which practices of discrimination because of . . . sex . . . are based.*" (Emphasis supplied.)

On June 28, 1971, Norm O. Nilsen, the then Commissioner of the Oregon Bureau of Labor, issued for mass publication Bureau of Labor "Guidelines, Sex Discrimination in Employment" (reproduced in full in the Appendix of this Order as Exhibit "B"). The purposes of the Guidelines are specifically stated:

"The Bureau of Labor has issued these guidelines in order to help employers and employees understand the law and to bring employment practices into affirmative compliance. They have resulted from thorough studies since 1969 by the Citizens Ad Hoc Committee on Sex Discrimination in Employment and the State Advisory Council on Sex Discrimination in Employment, which held ten public hearings throughout the state . . .

"The Bureau of Labor staff is available to offer all assistance possible in helping employers analyze employment practices and create affirmative programs to prevent and eliminate discrimination because of sex."

Since at least the first publication of the Guidelines in 1971, the Bureau, upon request, has provided and continues to provide assistance to employers to establish programs which comply with ORS 659.030(1). Where, as in the instant case, a program does not comply with ORS 659.030 and the

Bureau's guidelines, the Bureau of Labor has utilized the provisions of Chapter 659 *et seq.* to compel compliance. (See *School District No. 1 v. Nilsen*, 271 Or 461, 534 P2d 1135 (1975).

Had the Respondent requested Bureau assistance prior to the filing of the initial complaints upon which this proceeding arises, as to whether its "sick leave program" violates ORS 659.030(1), all assistance, including a copy of the Bureau's Guidelines, would have been provided. The Guidelines state, in pertinent part:

"(1) A maternity leave policy and practice in context with other temporary physical disability or sick leave should assure:

"(a) A reasonable period of leave based upon temporary physical disability without loss of any of the previous employment benefits [*School District No. 1 v. Nilsen, infra*].

"(b) *****

"(c) *Employees taking leave shall be entitled to apply earned sick leave . . . to maternity.*" at p. 4. (Emphasis supplied.)

Respondent's Contentions

The Respondent purports to articulate one defense to the complaints of unlawful discrimination in this case. It is their contention that the United States Supreme Court has already decided that the sole exclusion of disabilities due to pregnancy from an insurance benefits plan and a paid sick leave policy does not amount to gender based discrimination. *General Electric v. Gilbert*, 429 US 125, 136 (1976); *Nashville Gas Co. v. Satty*, 434 US 136 (1977). See also *Geduldig v.*

Aiello, 417 US 44 (1974). In short, the Respondent would require, on the one hand, that the Bureau of Labor reexamine and reverse its long-standing and consistent interpretation of ORS 659.030(1); and on the other, for the courts of Oregon, to consider the holdings in the above-cited cases as a fair statement of Oregon law.

Because particular deference is due opinion of the U. S. Supreme Court, a reexamination by the Bureau of its interpretation of ORS 659.030 in light of the above-cited decisions seems appropriate.

General Electric v. Gilbert, *supra*, and *Nashville Gas Co. v. Satty*, *supra*, are cases of statutory construction. The statute construed was Title VII of the Civil Rights Act of 1964, 42 USC. § 2000e *et seq.* *Geduldig v. Aiello*, *supra*, was brought and decided under the equal protection clause of the 14th Amendment to the United States Constitution. As the first two decisions present the construction of a statute analogous in purpose and language to ORS 659.030, they will be addressed.

Both *General Electric v. Gilbert* and *Nashville Gas Co. v. Satty* involve programs that did not provide monetary benefits in the case of a disability due to pregnancy. However, any and all other disabilities were covered, including peculiarly male conditions caused by or resulting in prostatectomies and circumcisions. Indeed, in view of the coverage of all temporary disabilities including those of a "voluntary" nature (except pregnancy), the "voluntary" nature of most pregnancies was not a determinative factor in either case. Neither adopted by the court nor dispositive in either case was the

company's argument that a disability due to pregnancy is not an "illness or injury." However, dispositive of both cases was the court's reasoning in *Gilbert*.

"There is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not." 429 US 125.

Conversely stated, because both pregnant males, and pregnant females, do not receive compensation during and for their disabilities due to pregnancy, the necessary nexus between being female on the one hand and the condition and exclusion of pregnancy, on the other, is absent.

The court in *General Electric v. Gilbert* was strongly divided, 5 to 3, with one Justice, Blackmun, concurring only in part. The Bureau of Labor concurs with Supreme Court Justices Brennan and Marshall, who, dissenting, characterized the court's analysis as "simplistic and misleading." They explained:

"For although all mutually contractible risks are covered irrespective of gender . . . the plan also insures risks such as prostatectomies, vasectomies, circumcisions that are specific to the reproductive system of men and for which there exists no female counterparts covered by the plan. Again, pregnancy affords the only disability, sex-specific or otherwise, that is excluded from coverage . . ."

The strong division of the justices of the court in *General Electric v. Gilbert* does not reflect a like division in the

nation. In fact, at the time *General Electric v. Gilbert* was decided, seven federal circuit courts had considered the same problem and had *unanimously* ruled there was sex discrimination in such regulation or programs. See *Communication Workers v. American Telephone and Telegraph Co. Longlines Dept.*, 513 F2d 1024 (2nd Cir 1975); *Wetzel v. Liberty Mutual Insurance Co.*, 511 F2d 199 (3rd Cir 1975); *Gilbert v. General Electric*, 519 F2d 661 (4th Cir 1975); *Tyler v. Vickery*, 517 F2d 1089 (5th Cir 1975); *Satty v. Nashville Gas Co.*, 522 F2d 850 (6th Cir 1975); *Holthaus v. Compton and Sons, Inc.*, 514 F2d 651 (8th Cir 1975); *Huchison v. Lake Oswego School District*, 519 F2d 961 (9th Cir 1975).

There has been little enthusiasm among state courts for the *General Electric v. Gilbert* decision. Only Rhode Island has elected to follow it. See *Narragansett Electric Co. v. Rhode Island Commission for Human Rights*, 374 A2d 1022 (1977). On the other hand, every other state court that has passed on this question under its laws has refused to follow *Gilbert*. *Anderson v. Upper Bucks Co. Area Vocational Technical School*, 373 A2d 126 (Pa 1977); *Brooklyn Union Gas Co. v. New York State Human Rights Appeal Board*, 41 NW 2d 84, 390 NY Supp 2d 884, 359 NE2d 393 (1976); *Mass. Electric Co. v. Mass. Commission Against Discrimination*, 375 NE2d 1192 (Mass 1978); *Castelano v. Linden Board of Education*, 158 NJ Super 350, 386 A2d 396, (1978); *Franklin Mfg. Co. v. Civil Rights Commission*, (Iowa S Ct 1978); *Murray v. Waterville*

Board of Education, 17 EPD 8575 (Maine 1978).

Prior to *General Electric v. Gilbert*, it was the weight of authority among state courts, including the Oregon Court of Appeals, that the exclusion of pregnancy caused disability from a sick leave or insurance benefits program violates the applicable state statute. *School District No. 1 v. Nilsen*, 17 Or App 601 (1974) (discussed *infra*); *Ray-O-Vac v. Wisconsin Dept. of Industry, Labor and Human Relations*, 10 EPD 10564 (Wis 1975); *Nursing Homes, Inc. v. Wisconsin Dept. of Industry, Labor and Human Relations*, 7 EPD 9126 (Wis 1974); *Board of Education City of New York v. New York State Division of Human Rights*, 6 EPD 877 (NY 1973).

Even after *Gilbert*, federal courts, including the Supreme Court itself, have been reluctant to accept the full impact of the *Gilbert* decision. See *City of Los Angeles v. Manhart*, 16 EPD 8250 (1977); *Nashville Gas Co. v. Satty*, 434 US 136 (1977); *Jacobs v. Martin Sweeps Co., Inc.*, 550 F 2d 364, (6th Cir 1977); *Eberts v. Westinghouse Electric Co.*, 17 EPD 8574 (3rd Cir 1978).

General Electric v. Gilbert is an anachronism in employment discrimination cases. The analysis by the Supreme Court of previous landmark decisions and the weight of federal circuit court decisions on the issue in question, was obviously strained, presumably in order to reach a result considered desirable by the justices comprising the majority.

Upon reexamination of the Bureau's guidelines in light of *General Electric v. Gilbert*, we must agree with

the Massachusetts court, in the case of *Mass. Electric Co. v. Mass. Commission Against Discrimination*, [375 NE2d 1192 (Mass 1978)]:

"Pregnancy is a condition unique to women, and the ability to become pregnant is a primary characteristic of the female sex. Thus any classification which relies on pregnancy as the determinative criteria is a distinction based on sex."

State of the Law in Oregon

The Oregon Supreme Court has already decided that pregnancy based discrimination constitutes sex discrimination. *School District No. 1 v. Nilsen*, 271 Or 461, 534 P2d 1135 (1975). However, according to the court, the Bureau's analysis of an employment program which classifies because of pregnancy, does not end automatically with the conclusion that ORS 659.030(1) has been violated. The court, at 271 Or at 477, explained that pregnancy discrimination, although sex discrimination, is lawful in the State of Oregon, if it results from a bona fide occupational requirement reasonably necessary to the normal operation of the employer's business.

The facts of *School District No. 1 v. Nilsen* are similar in many respects to the facts of the instant case. The Portland Public School District maintained a policy which required probationary teachers to resign from employment upon learning of their pregnancy, thereby losing many benefits and credits which they had accumulated. In addition, the School District maintained a policy of denying paid sick leave to female teachers disabled by reason of pregnancy.

In the contested case proceeding before the Commissioner of Labor, Norm O. Nilsen, the School District was found to have committed sex discrimination in violation of ORS 659.030 in maintaining the two above-described policies.

The School District appealed from the Commissioner's Final Order to the Oregon Court of Appeals, which affirmed that Order. The Supreme Court again affirmed the decision of the Commissioner and the Court of Appeals insofar as they related to the policy requiring resignation. However, because the Commissioner had not formally charged the School District with a violation of ORS 659.030 in maintaining the sick leave policy above described, the court held that the legality of the policy had not been properly brought before the Commissioner. Therefore, that portion of the Final Order and of the Court of Appeals' decision was vacated.

The Supreme Court decision in *School District No. 1 v. Nilsen* is the law in the State of Oregon on whether distinctions because of pregnancy constitute discrimination by an employer because of sex in violation of ORS 659.030(1). Indeed, that decision is controlling of the instant case. The court said:

"It is our conclusion that although regulations relating to pregnancy are adopted, and albeit only females can become pregnant, such facts *do not per se* result in sex discrimination as contemplated by the statute. Only where the regulations place burdens upon women because of pregnancy which bear no reasonable relation

to a 'bona fide occupational requirement reasonably necessary to the normal operation of the employer's business' are such regulations unlawfully discriminatory. In this regard, the District as an employer, has not satisfactorily explained the manner in which the required resignation of pregnant probationary teachers bears any relation or is necessary to the normal operation of its business." 271 Or at 477.

The "bona fide occupational requirement" exemption is specifically stated in ORS 659.030(1), *supra*. The court's declaration of this exemption in *School District No. 1 v. Nilsen* constituted a reasonable and correct recitation of the Legislature's intent.

In the instant case, the Respondent has neither contended nor endeavored to explain how its sick leave policy results from a bona fide occupational requirement reasonably necessary to the normal operation of its business. Neither does the Respondent contend nor attempt to show that its program did not place burdens or work hardships on female teachers. Indeed, it appears to be Respondent's ultimate position that, because of *General Electric v. Gilbert* and *Nashville Gas Co. v. Satty*, the exclusion of pregnancy from its sick leave program is not sex discrimination, as a matter of law.

Even if, for the sake of discussion, the effect of *General Electric v. Gilbert* and *Nashville Gas Co. v. Satty* on the laws of the State of Oregon, was something more than informational, the federal Congress as well as the Oregon Legislative Assembly have

both made it clear that they do not consider those cases a correct interpretation of legislative intent and the meaning of their enactments. On the heels of *General Electric v. Gilbert*, the Congress amended Section 701 of Title VII of the Civil Rights Act to state:

"(k) The terms 'because of sex' or 'on the basis of sex' include but are not limited to, because of or on the basis of pregnancy, child birth or related medical conditions; and women affected by pregnancy, child birth or related medical conditions shall be treated for all employment-related purposes, including receipt of benefits under fringe benefit programs as other persons not so affected but limited in their ability or inability to work, and nothing in section 703(h) of this Title shall be permitted to permit otherwise . . ." (Emphasis supplied.)

It is clear from Committee Reports from both Houses of Congress that the Congress was dismayed by the failure of the Supreme Court in *General Electric v. Gilbert* to correctly ascertain Congressional intent and purpose in prohibiting employment discrimination because of sex. According to these reports, the Supreme Court would have ascertained Congressional intent had it joined in the unanimous holdings of all federal Circuit Courts of Appeal prior to *General Electric v. Gilbert* and had it given substantial deference to the long-standing administrative interpretation of Title VII by the Equal Employment Opportunity Commission, the enforcement agency.¹

¹ H.R. REP. NO. 95-948, 95th Congress, 2nd Session (1978), reprinted in

The dismay of Congress was shared by our own State Legislative Assembly. On October 4, 1977, SB 714 was passed into law as ORS 659.029. That statute provides:

"For the purposes of ORS 659.030, the phrase 'because of sex' includes but is not limited to, because of pregnancy, child birth 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."

ORS 659.029 and Section 701(k) of Title VII are substantially identical in language and purpose. During the last session of the Oregon Legislative Assembly, the proponents of ORS 659.029 (SB 714) repeatedly expressed their determination that the Oregon courts would not fail to ascertain the intent of the Assembly and the meaning of ORS 659.030, as had the

Supreme Court of the United States, of analogous statutory language in *General Electric v. Gilbert*.²

It is difficult to overemphasize the significance of the response by the Oregon Assembly to *General Electric v. Gilbert*. For almost a decade, the Oregon Bureau of Labor has interpreted and applied ORS 659.030 as identifying pregnancy-based discrimination as sex based discrimination where sick leave programs are concerned. In the face of the Bureau's open and active interpretation of ORS 659.030, since at least 1971, the Assembly took no legislative action to clarify its intent until the anomalous decision of the Supreme Court in *General Electric v. Gilbert*. Particularly in light of the passage of ORS 659.029, it is reasonable to conclude that had the Oregon Legislature taken exception to the Bureau's interpretation of ORS 659.030, it would have either voiced its exception through corrective legislation, or given the Oregon courts ample opportunity to reverse their previous analyses and holdings in *School District No. 1 v. Nilsen, supra*, in reliance on the case of *General Electric v. Gilbert*. Rather than except to that interpretation, the Oregon Legislative

861 Labor Law Reports, Employment Practices, Commerce Clearing House Extra Edition, October 31, 1978, at pp. 400-420. Senate no. 95-331, 95th Congress, 1st session (1977), reprinted in 861 Labor Law Reports, Employment Practices, Commerce Clearing House Extra Edition, October 31, 1978, at pp. 500-509.

² Proponents and supporters of SB 714 (ORS 659.029) who, during the 1977 Session of the Oregon Legislative Assembly, testified that the purpose of the legislation was to clarify and not alter existing law (ORS 659.030) included: State Senator Mary Roberts, sponsor of the bill (now Labor Commissioner); Nellie Fox of AF of L-CIO; Jane Edwards, Attorney at Law; Richard Bullock of Senator Mary Roberts' office (now State Senator).

Assembly quickly affirmed it, by clarifying its intent so as to avoid any anachronism in discrimination law originating from courts of the State of Oregon.

ORDER

NOW, THEREFORE, pursuant to ORS 659.060(3) and 659.010(2) and in order to eliminate the effects of the unlawful practice found, Respondent is ordered to:

Deliver to the Portland Office of the Oregon Bureau of Labor, within fifteen (15) days of the execution of this Order, a certified check made payable to Mrs. Marilyn Dedrick in the sum of \$1,586.76, which represents paid sick leave in the principal amount of \$1,301.15, with simple interest added at 6% per annum from June 15, 1975, to February 15, 1979, as agreed and stipulated to by the parties; and a check to Mrs. Jo Ellen Reif in the sum of \$884.75, representing paid sick leave in the principal amount of \$726.05, with simple interest added at 6% per annum from June 15, 1975, to February 15, 1979, as agreed and stipulated to by the parties.

EXHIBIT "A"

CONTROVERSY SUBMITTED IN LIEU OF NOTICE OF HEARING AND FILING OF SPECIFIC CHARGES OF DISCRIMINATION

I

The parties to this controversy which is before the Oregon Bureau of Labor are the Complainants, Marilyn Dedrick and Jo Ellen Reif, and the Respondent, School District Union High 7J.

II

At all times material herein, the Respondent was and is a public employer

subject to the provisions of ORS 659.010 to 659.110.

III

On or about February 10, 1975, and July 21, 1975, Mrs. Marilyn Dedrick and Mrs. Jo Ellen Reif, respectively, filed verified complaints with the Civil Rights Division of the Oregon Bureau of Labor, alleging that because of their female sex, the Respondent, their employer, refused to allow them to use their accumulated sick leave with pay for maternity.

IV

In order to bring this matter to a final administrative conclusion, the parties agree to submit this controversy directly to the Commissioner of the Oregon Bureau of Labor, waiving any rights which they might have to a contested case hearing before a presiding officer who is designated by the Commissioner, and the ability to file exceptions to Proposed Findings of Fact, Conclusions of Law and Order issued by presiding officer, but reserving to themselves the right to oral argument before the Commissioner should they so desire and a further right to submit written authority for the consideration of the Commissioner, prior to the issuance of her final Order.

V

The following facts are agreed and stipulated to by the parties:

1) The Complainants, Mrs. Marilyn Dedrick and Mrs. Jo Ellen Reif, commenced their employment with the Respondent as regular full-time teachers on or about September 1, 1969, and September 1, 1973, respectively, and permanently terminated their

employment with the Respondent on or about June 15, 1975.

2) In the school year from August, 1974 to June 15, 1975, all regular full-time teachers in Respondent's employ were beneficiaries of a "sick leave program" which allowed all teachers ten (10) days sick leave of absence with full pay during each school year and the accumulation of sick leave with full pay to a maximum of 150 days. Sick leaves of absence with full pay were granted for all temporary disabilities other than pregnancy. In the case of a disability relating to pregnancy, however, female teachers were placed on maternity leave of absence without pay for the period of their disability.

3) Marilyn Dedrick became pregnant in approximately August of 1974. From on or about April 28, 1975, to June 8, 1975, Marilyn Dedrick was physically unable to work because of maternity and, therefore, was absent from work upon the advice of her physician. Marilyn Dedrick gave birth to a child on May 20, 1975. Marilyn Dedrick returned to work on or about June 8, 1975.

Marilyn Dedrick gave to Respondent timely notice of her pregnancy and requested the use of twenty-six and one half (26½) days of sick leave with pay which she had accumulated. Respondent denied Mrs. Dedrick's request for a sick leave with pay, and placed her on a "maternity leave" without pay for the aforesaid period of her disability.

4) Jo Ellen Reif became pregnant in approximately April of 1974. From on or about January 29, 1975, to March 1, 1975, Jo Ellen Reif was physically unable to work because of

maternity and, therefore, was absent from work upon the advice of her physician. Jo Ellen Reif gave birth to a child on January 30, 1975. Jo Ellen Reif returned to work on or about March 9, 1975.

Mrs. Jo Ellen Reif gave to Respondent timely notice of her pregnancy and requested the use of seventeen and one half (17½) days of sick leave with pay which she had accumulated. Respondent denied Mrs. Reif's request for sick leave with pay, and placed her on a "maternity leave of absence" without pay for the aforesaid period of her disability.

VI

The controversy which exists between the parties is as follows:

1) The Complainants and the Civil Rights Division of the Bureau of Labor contend that Respondent's exclusion of maternity related disability from its "sick leave program" as stipulated to in paragraph V (2), (3) and (4) above, constitutes discrimination in employment on the basis of sex in violation of ORS 659.030(1).

(2) The Respondent contends that the matters stipulated to in paragraph V (2), (3) and (4) above, do not constitute violations by the Respondent of ORS 659.030(1).

VII

The parties further agree that should the Commissioner of the Oregon Bureau of Labor conclude that the matters stipulated to in paragraph V (2), (3) and (4) above constitute violations of ORS 659.030(1), that damages should be the following:

1) In the case of Marilyn Dedrick, twenty-six and one half (26½) days of

sick leave pay, for a total sum of \$1,301.15, with interest added at 6% per annum from June 15, 1975, until the principal amount is paid;

(2) In the case of Jo Ellen Reif, seventeen and one half (17½) days of sick leave pay, for a total sum of \$726.25, with interest added at 6% per annum from June 15, 1975, until the principal amount is paid.

VIII

The parties further understand and agree that any party aggrieved by any Final Order issued by the Commissioner may petition for judicial review of that Order pursuant to ORS 183.310 to 183.500.

Signed by: Marilyn Dedrick, Complainant; Jo Ellen Reif, Complainant; Dennis W. Bean, Attorney for Respondent; Mary Wendy Roberts, Commissioner, Oregon Bureau of Labor.

Dated: February 7, 1979.

EXHIBIT "B"

GUIDELINES: SEX DISCRIMINATION IN EMPLOYMENT

The Bureau of Labor has issued these guidelines in order to help employers and employees understand the law and to bring employment practices into affirmative compliance. They have resulted from thorough study since 1969 by the citizen Ad Hoc Committee on Sex Discrimination in Employment and the State Advisory Council on Sex Discrimination in Employment, which held 10 public hearings throughout the state.

The State Advisory Council made the guideline recommendations based upon Oregon Revised statute 659, interpretations of federal law, Title VII of the Civil Rights Act of 1964 made by

the Equal Employment Opportunity Commission, and the body of law on discrimination in employment which is the result of recent federal court decisions. These guidelines will help employers to comply with federal as well as state law regarding employment practices.

The Bureau of Labor staff is available to offer all assistance possible in helping employers analyze employment practices and create affirmative programs to prevent and eliminate discrimination because of sex.

N. O. Nilsen, Commissioner of Labor. Dated: June 28, 1971.

Enforcement of Civil Rights Law (ORS 659.010 - .110)

The law declares as a public policy of Oregon that the opportunity to obtain employment without discrimination because of sex is a civil right.

It provides that the abilities of an individual and not any arbitrary standards which discriminate against the individual shall be the measure of an individual's fitness and qualification for employment.

The law prohibits discrimination in employment because of sex by any employer, labor organization or employment agency.

The Bureau of Labor is responsible for the elimination and prevention of discrimination in employment by this process:

1) Any person having a complaint of alleged unlawful employment practice may, by himself or his attorney, file this complaint in writing with the Commissioner at any Bureau of Labor office.

2) Investigation will be made of employment practices for substantial evidence of discrimination.

3) Where substantial evidence is found, steps may be taken through conciliation to effect settlement of the complaint, eliminate the effects of the unlawful practice and otherwise carry out the purpose of the law.

4) When conciliation fails, respondents will be required to appear at a public hearing before the Commissioner or a tribunal appointed by him to determine the facts. After consideration of all the evidence, findings of fact and conclusions of law will be issued, either dismissing the charge or issuing cease and desist orders. Any conciliation agreement or Commissioner's order may be enforced in court by injunction or by suit in equity.

5) Appeal from such orders may be made to the Court of Appeals in accordance with provisions of ORS Chapter 183.

These guidelines will be used in determining discriminatory practices in enforcement of the law.

The Bureau of Labor is responsible for investigating and establishing substantial evidence in support of a complaint of discrimination. Employers will be held responsible for demonstrably proving that such discrimination is a bona fide occupational requirement reasonably necessary to the normal operation of the employer's business.

Hiring

1. Job advertising

a. Employers engaged in recruiting activity must recruit employees of both sexes for all jobs unless sex is a demonstrably bona fide occupational

requirement. (See section on Bona Fide Occupational Requirements)

b. It is a violation for a help-wanted advertisement of any kind to indicate a preference, limitation, or specification based on sex unless sex is a demonstrably bona fide occupational requirement for the particular job involved. (See section on Bona Fide Occupational Requirements). Placement of an advertisement in columns classified on the basis of sex is considered an expression of preference, limitation or specification based on sex.

2. Applications

a. Use of different application forms for men and women is discriminatory.

b. Generally, information about a spouse's occupation or income or applicant's family status is not relevant to the applicant's qualification for a job.

3. Considering qualifications

a. Uniform qualifications must be used for men and women applicants.

b. Where testing is used, the same tests for men and women applicants are required.

c. Only qualifications and tests demonstrably relevant to the job being applied for should be used.

d. Qualifications and tests must be judged without prejudice regarding sex of the applicant.

4. Hiring – Refusal to consider, refer, recommend, or hire an individual because of sex is discrimination by an employer and by any persons in any way participating in the hiring process.

5. Married women – All practices which make distinctions between married and unmarried persons must

apply equally to both sexes. Example: A rule which forbids or restricts the employment of married or unmarried women and which is not applicable to married or unmarried men is discrimination.

6. Women with children – All practices which involve age of or number of children must apply equally to men and women.

7. Hiring of relatives – A rule which prohibits members of the same family from working for the same employer usually denies the female equal opportunity for employment thereby causing discrimination. Members of the same family shall be employed on the merits of their individual qualifications and performance. Specific problems involving such employment should be dealt with by employers as individual situations without the use of a general rule.

Terms, Conditions, Privileges of Employment

Employees of both sexes are entitled to equality with regard to all terms, conditions and privileges of employment including, but not limited to:

1. Sick leave and pay, vacation time and pay, any other leaves, retirement age and benefits, rest periods and smoking breaks, company offered training, classes given on company time, pass privileges on company transportation, compensatory pay during jury service, physical facilities and accommodations.

2. Insurance:

a. Generally, an employer complies with the requirement of the law if the benefits received by male and female employees are equal.

b. An employer who provides maternity benefits to wives of male employees must provide such to female employees.

c. Where coverage for wives and families of male employees is provided, coverage must be provided for husbands and families of female employees.

3. Maternity leave – Women who require time away from work on account of childbearing and pregnancy shall be entitled to maternity leave. The prime objective in considering the validity of maternity leave practices is to insure to working women continuity of employment without loss of benefits. Factors demonstrably necessary to job performance, health, safety, and the employer's reasonable need for orderly operation of business should be considered from the perspective of that prime objective.

a. When the employer has leave policies, written or unwritten, and the employee would qualify for any leave, maternity leave for a reasonable period of time must be granted. However, policies which grant no maternity leave after one year of employment are considered discriminatory since such policies have discriminatory effect upon women of childbearing age.

b. Where there is no established leave policy, childbearing must be considered by the employer as justification for a leave of absence for a reasonable period of time if the employee signifies her intent to return to work within a reasonable time. The time and conditions of maternity leave should be clearly agreed and stipulated as far as possible before the leave begins. Such employee shall be reinstated to

employment with out loss of any benefits, terms, or conditions as if she had not left her position for maternity leave.

c. Because there are factors of infinite variety which might affect a reasonable policy, it is not possible to establish any arbitrary standards for when a maternity leave should begin or end. Under normal circumstances the employee cannot be required to cease work prior to the day she desires unless demonstrable evidence of factors adversely affecting health can be shown.

GUIDE FOR WRITING MATERNITY LEAVE POLICIES

1. A maternity leave policy and practice in context with other temporary physical disability or sick leave should assure employees:

a. A reasonable period of leave based upon temporary physical disability without loss of any of the previous employment benefits.

b. Length and dates of leave within terms of the policy will be determined by employee upon advice of her physician and planned with employer having adequate assurance of employee's intention to return to the job and adequate time to make arrangements for temporary performance of employee's work during leave.

c. Employee taking leave shall be entitled to apply earned sick leave, paid vacation, and leave without pay in any combination to maternity leave.

d. Employee shall return from leave to her previous job if possible, and if not, to one of comparable status and benefit without loss of seniority, or benefits.

e. Any exception to the terms of the official policy will be based upon individual physical condition of employee documented by her physician, or specific factors of job performance documented by the employer, or determined by mutual voluntary agreement between employee and employer.

2. Employers should instruct all supervisory personnel of their responsibility for maintaining the terms of the policy.

3. Employers should effectively inform employees of this policy and to post it for continuous employee information.

Equal Pay and Equal Job Qualifications

1. Wage schedules must not be related to or based upon the sex of the employee.

2. Equal pay and equal job status must be given to men and women who perform work requiring substantially similar skill, effort, and responsibility. (Example: Differences in classification based upon "light" and "heavy" jobs should be examined for substantial difference in work performed.)

3. The employer may not discriminatorily restrict one sex to certain job classification. Where certain job classifications or departments are composed of only one sex, employers should take steps to make jobs in all classifications available to all qualified employees of both sexes. (Example: An electrical manufacturing company may have a production division with three functional units: One (assembly) all female; another (wiring) all male; and a third (circuit boards) also all male. The highest

wage attainable in the assembly unit is considerably less than that in the circuit board and wiring units. In such a case the employer must take steps to provide qualified female employees opportunity for placement in job openings in the other two units.)

Promotion and Seniority Systems

1. Separate lines of promotion or separate seniority lists based upon sex are discriminatory.

2. Employees of both sexes shall have equal access to all training programs and promotion opportunities. (Example: Women have not been typically found in significant numbers in supervisory and management jobs. In many companies management trainee programs are one of the ladders to management positions. Traditionally, few women have been admitted into these programs. An important element of commitment to equal opportunity employment practices is to include women candidates in management trainee programs.)

Employment Agencies

An employment agency shall not make any inquiry or advertisement in connection with prospective employment which expresses directly or indirectly any limitation, specification, or preference, or discrimination as to sex unless based upon a bona fide occupational requirement (See section on Bona Fide Occupational Requirements.)

Reprisals

The law, ORS 659.030(4), defines as an unlawful practice "for any employer, labor organization, or employment agency to discharge, expel or otherwise discriminate against any person

because he opposed any practices forbidden by this law or because he has filed a complaint, testified or assisted in any proceeding under the law."

Aiding and Abetting

The law, ORS 659.030(5), also specifies that it is unlawful "for any person, whether employer or employee, to aid, abet, incite, compel, or coerce the doing of any of the acts forbidden under the law or to attempt to do so."

Additional Information

For information and assistance call the office of: Women's Equal Employment Opportunity, Civil Rights Division, 1400 S.W. 5th Avenue, Portland, Oregon 97201.

In the Matter of FRED MEYER, INC., an Oregon corporation, Respondent.

Case Number 03-77
Final Order of the Commissioner
Mary Wendy Roberts
Upon Remand From the Oregon Court
of Appeals
Issued March 30, 1979.

SYNOPSIS

Where a 16-year-old black male Complainant was subjected to frequent and persistent racially derogatory names, remarks and "jokes" by his immediate supervisors and was discharged based on their evaluations

and on substandard performance, Respondent employer committed an unlawful employment practice by failing to maintain a racially neutral work environment, including failing to correct the abuse once it was known to management. Exhaustion of a union grievance procedure was not a prerequisite to filing a complaint with the Commissioner. There was no constitutional impediment to the Commissioner awarding damages for humiliation, and the 1977 private right of action statute did not prevent the Commissioner from awarding such damages. The Commissioner awarded Complainant \$388.50 in back pay and \$4,000 for humiliation, ridicule and embarrassment. The Commissioner ordered Respondent to make the Final Order part of complainant's personnel file and to furnish a copy to anyone inquiring about his employment or performance. The posting requirements of the original Final Order, *In the Matter of Fred Meyer, Inc.*, 1 BOLI 84 (1978), were eliminated from this Order on Remand from the Court of Appeals. *Fred Meyer, Inc. v. Bureau of Labor*, 39 Or App 253, 592 P2d 564 (1979), *rev den* 287 Or 129 (1979). ORS 659.010(2); 659.030(1)(a); 659.050(1); 659.060(1) and (3); 659.095; 659.121.

The contested case in the above-entitled matter came on regularly for hearing before R. D. Albright, who was designated as Hearings Officer in this matter by Bill Stevenson, Commissioner of the Oregon Bureau of Labor. The hearing was held on May 25, 1977, in Portland, Oregon. The Complainant was present and testified during the course of the hearing. The

case for the Oregon Bureau of Labor was presented by Thomas E. Twist, Assistant Attorney General, of its attorneys, and the case for the Respondent was presented by Harry Chandler, Attorney at Law.

Thereafter, Bill Stevenson, then Commissioner of the Oregon Bureau of Labor, considered the record in the matter, and entered the Findings of Fact, Ultimate Findings of Fact, Conclusions of Law, Rulings on Motions and Affirmative Defenses propounded by the Respondent and Final Order. [*In the Matter of Fred Meyer, Inc.*, 1 BOLI 84 (1978).]

Subsequent to the issuance of the Commissioner's Order in the above-entitled matter, Respondent petitioned the Court of Appeals for review. Based upon the Judgment and Mandate of the Court of Appeals on Judicial Review of the Findings of Fact, Conclusions of Law and Order of the Commissioner [*Fred Meyer, Inc. v. Bureau of Labor*, 39 Or App 253, 592 P2d 564 (1979), *rev den* 287 Or 129 (1979)], I, Mary Wendy Roberts, Commissioner of the Oregon Bureau of Labor, enter the following order as set out below.

FINDINGS OF FACT – PROCEDURAL

1) The Respondent, Fred Meyer, Inc., was and is an Oregon corporation authorized to do business in Oregon and is an employer subject to the provisions of ORS 659.010 to 659.110.

2) On August 21, 1972, Dana E. Hayes, a black male, filed a verified complaint with the Civil Rights Division of the Oregon Bureau of Labor alleging that the Respondent had unlawfully

discriminated against him in connection with his employment because of his race and color.

3) Following the filing of the verified complainant by Dana E. Hayes, the Civil Rights Division investigated the allegations in the complaint and determined that substantial evidence existed to support the Complainant's allegation that he had been discriminated against, in his employment, by the Respondent because of his race and color.

4) Thereafter, the Civil Rights Division of the Oregon Bureau of Labor scheduled a conciliation meeting with Respondent's representative for November 12, 1974. During the course of that meeting, Respondent's representative unequivocally denied that any unlawful conduct by Respondent had occurred, and stated that Respondent's position in this regard was final. Within the next few weeks, some correspondence passed between the Civil Rights Division and the Respondent alluding to the possibility of further settlement and conciliation discussions, but the record fails to indicate that either party to the negotiations have ever actively attempted to resume them.

FINDINGS OF FACT – THE MERITS

1) The complainant was employed by the Respondent from on or about May 25, 1972, to on or about July 14, 1972, and then re-employed by Respondent for the period from on or about August 20, 1972, to some time in September of 1972. During both periods of employment the Complainant was 16 years of age.

2) The first period of Complainant's employment occurred at the "Division

Street" Fred Meyer store in Portland, Oregon. Complainant was assigned to perform duties involving the stocking and display of merchandise for sale to the public in the Variety Department at that store location.

(3) During this first period of employment, the Complainant was supervised by the following people who held the following titles:

Mr. Bowman - Manager of Variety Department

Mr. West - Assistant Manager, Variety Department

Mr. Fetters - "third in charge," Variety Department

Mr. Bonk - "fourth in charge," (Management Trainee) Variety Department

Each of these supervisors could and did direct Complainant's actual performance of his assigned duties, although Mr. Bowman's contact with the Complainant was minimal.

4) During this period of employment there were at least two other employees, white males, employed in a similar capacity to that of Complainant, and these employees and Complainant were generally referred to by other store personnel as "stockboys."

5) On occasion, when Complainant and another stockboy or stockboys were working together at a given task, Mr. Fetters would engage the white stockboy or stockboys in social conversation and would allow the white stockboy or stockboys to cease work during the period of the conversation. Mr. Fetters would then criticize the Complainant because the task assigned to all the stockboys was not being accomplished quickly enough. Because of other contact between Mr.

Fetters and the Complainant of an overt racial nature, I draw the inference that Mr. Fetters accorded different treatment to the white stockboys than the treatment he accorded to the Complainant because of the Complainant's race and color, and further that Mr. Fetters acted with the intent to discriminate against the Complainant because of his race and color. The result of this treatment was to make the Complainant feel intimidated and "belittled" by Mr. Fetters, and isolated, different and inferior to the other employees.

6) Mr. Fetters asked Complainant on several occasions if the Complainant belonged to the "Black Panthers," and each time received a response that the Complainant did not. (I take notice of the fact that at the time in question the Black Panthers were generally thought to be a militant organization of blacks which advocated immediate racial changes.) I find that this particular inquiry was made, and indeed repeated, in order to single out the Complainant from the other store employees because of his race and color, and calculated to embarrass, offend and isolate the Complainant, particularly since there is no evidence of any behavior or the espousal of any philosophy on the part of Complainant which would have otherwise prompted such inquiries on Mr. Fetters' part. The effect of these inquiries was to make Complainant feel isolated, different and inferior to the other employees.

7) On several occasions, but at least once in front of other employees, Mr. Bonk asked Complainant how he came to live in the suburban neighborhood he did and indicated "he was surprised I lived out in that neighborhood,

that how could I get out in that neighborhood, that was I accepted in that neighborhood, was I comfortable around it, did anyone give me any problems and, in that neighborhood . . ." Mr. Bonk made similar inquiries about Complainant's high school. These inquiries were calculated by Mr. Bonk to embarrass, harass and offend the Complainant because of his race and color and to isolate him from the other white employees, and this was the effect achieved on the Complainant.

8) Mr. Bonk often questioned the Complainant as to whether he liked Cadillac automobiles with white sidewall tires and fur upholstery. The Complainant interpreted these inquiries as a reflection of stereotypical thinking which has for some time associated black people with Cadillac automobiles, and I find that Mr. Bonk intended that the Complainant make this interpretation. These inquiries embarrassed and distressed the Complainant and I find that they were calculated to do so by Mr. Bonk.

9) In the presence of other employees, and upon occasion in the presence of customers, Mr. Bonk would tell the Complainant "Black Sambo" jokes. In the course of his narration of these jokes, Mr. Bonk would affect a black accent. The jokes dealt with Black Sambo's food preferences and Black Sambo's laziness. Mr. Bonk would ask the Complainant whether he shared Black Sambo's food preferences and whether the Complainant was lazy like Black Sambo. Mr. Bonk told Complainant a "lot" of these jokes. I find that the narration of these anecdotes embarrassed and distressed Complainant

and that they were calculated to do so by Mr. Bonk.

10) At times when Complainant was mixing paint in the presence of a customer Mr. Bonk would make reference to Complainant's color in comparison to the color of the paint being mixed. Mr. Bonk would ask the Complainant whether he wished that the paint was black or whether the particular color of the paint excited the Complainant. I find that the Complainant was embarrassed and distressed by these inquiries and that this effect was calculated by Mr. Bonk, who intended the Complainant to be embarrassed and distressed.

11) Several times in the presence of others when the Complainant would meet Mr. Bonk in the stockroom or in the store, Mr. Bonk would walk in an exaggerated and affected manner. The Complainant perceived Mr. Bonk's exaggerated and affected manner of walking as consisting of another racial slur directed at him by Mr. Bonk, and Mr. Bonk intended that the Complainant so perceive his conduct. This conduct by Mr. Bonk embarrassed and distressed the Complainant.

12) Mr. Bonk called the Complainant "Shaft," "Mohammed," and "Uncle Tom" on several occasions. (I take notice of the fact that "Shaft" is a fictitious character in the world of entertainment. He is a tough, black private detective.) I find that these appellations directed to Complainant were intended by Mr. Bonk to single Complainant out because of his race and color and to distress and embarrass Complainant, and I further find that the appellations had precisely this effect upon Complainant.

13) Aside and apart from the rendition of the "Black Sambo" jokes, Mr. Bonk talked "a lot" about Complainant's food preferences. These inquiries were intended by Mr. Bonk to single Complainant out from the other employees because of Complainant's race and color, and distressed and embarrassed Complainant. Mr. Bonk intended that Complainant be distressed and embarrassed by these inquiries.

14) The appearance and texture of Complainant's hair was the subject of Mr. Bonk's interest and comment at various times. ("Several times he would, he would like to try to touch it and say it was like wool or like a rough brush or a wire brush or whatever.") I find that these tonsorial inquiries embarrassed and distressed Complainant and that this was the effect that Mr. Bonk intended these inquiries to have.

15) On one occasion, Complainant and Mr. Bonk were in the stockroom when a white female employee, a Mrs. Butler, entered the stockroom. Mrs. Butler was married to a black man and Mr. Bonk knew this fact. As Mrs. Butler was leaving Mr. Bonk asked her, in Complainant's presence, "How do you kill a nigger?" (according to Dana Hayes' testimony) or "How do you beat a nigger?" (according to Mrs. Butler's testimony). Under cross-examination Mr. Bonk testified that, although he denied recollection of this incident, if it had occurred he would not have used the word "kill." I find that this conversation took place and that it caused the Complainant humiliation, distress and embarrassment and was calculated to do so by Mr. Bonk.

16) Mr. Fetters was aware of some of the treatment meted out to the Complainant by Mr. Bonk in that he observed a number of the conversations and incidents alluded to above.

17) I find that virtually every contact that the Complainant had with Mr. Bonk, one of his supervisors, amounted to an exposure to Mr. Bonk's pointless racial inquiries, or racial "humor" and that the distress, humiliation and embarrassment this exposure caused Complainant adversely affected his work performance. I further find that the treatment accorded Complainant by Mr. Fetters, and Mr. Fetters' participation in and knowledge of the treatment accorded to the Complainant by Mr. Bonk, further adversely affected Complainant's work performance.

18) I find that the Complainant never consented to, encouraged or replied in kind in any regard to any of the racial inquiries, actions or dialogue initiated and carried forward by Mr. Bonk or Mr. Fetters.

19) During this initial period of employment, at about its halfway point, Mr. West, Respondent's Assistant Manager, became aware that Mr. Bonk's supervision of Complainant had racial overtones to it, when he overheard Mr. Bonk referring to the Complainant in a conversation with Mr. West as "Mohammed." Under Mr. West's questioning, Mr. Bonk admitted to Mr. West that he had told "Black Sambo" jokes to the Complainant and that he "teased" the Complainant about Cadillac automobiles. Mr. West told Mr. Bonk that in Mr. West's judgment such interaction between Mr. Bonk and the Complainant was "not

proper." Mr. West advised Mr. Bonk of his feelings of impropriety on two separate occasions. Mr. West did not advise any of his superiors of the type of interaction that Mr. Bonk engaged in with the Complainant. I find that Mr. Bonk did not pay heed to Mr. West's advice and Mr. Bonk's racial harassment of the Complainant increased throughout this initial period of employment to the point where the harassment was more severe at the termination of the initial period of employment than it had been in the beginning or the middle.

20) The Variety Department Manager, Mr. Bowman, terminated the Complainant on or about July 14, 1972. In so doing, he acted ostensibly out of considerations regarding Complainant's immaturity and work performance. Mr. Bowman testified and I so find that there had been only one occasion when the Complainant's work performance required Mr. Bowman to "counsel" him. Mr. Bowman testified and I so find that "50%" of his decision to terminate Complainant was based upon the recommendations of the other three supervisors. He also testified, and I so find, that he relied upon his own observations as the balance of the basis for his decision to terminate the Complainant. There is no evidence in the record to indicate that the Complainant's race and color personally motivated Mr. Bowman, one way or the other, in reaching his decision to terminate the Complainant.

21) I find that the Complainant's first period of employment with the Respondent lasted a total of eight weeks, and that during the last two weeks (the period July 2, 1972, through July 15,

1972) he worked an average of 37 hours per week at the rate of \$2.10 per hour.

22) Complainant complained to his Union concerning his discharge and the circumstances of his discharge and the Union negotiated with Respondent a reinstatement to a similar position in another of Respondent's retail stores. This reinstatement became effective August 20, 1972, and the Complainant's second period of employment with Respondent lasted until September 16, 1972, when the Complainant and Respondent terminated the employment by mutual consent. During this second period of employment there is no evidence in the record of overt racial discrimination directed at Complainant. Complainant testified that his job performance during this second period of employment was "below average" and indicated these reasons for his performance:

"By that time I was sort of fed up with Fred Meyers and I was pretty discouraged and I just wanted to be through with them basically.

" * * *

"Well, the harassment, the jokes, the intimidations, the treatments."

23) Following the termination of his second period of employment with Respondent, Complainant returned to school and did not attempt to find employment through the course of that school year or during the following summer.

ULTIMATE FINDINGS OF FACT

1) The Civil Rights Division of the Oregon Bureau of Labor made

reasonable efforts to resolve Complainant's complaint with the Respondent prior to service of Specific Charges of Discrimination on the Respondent.

2) During Complainant's first period of employment with Respondent, Complainant was a victim of more or less continual racial harassment and abuse. The chief actor as to the abuse and harassment was the fourth-ranking supervisor, Mr. Bonk. The third-ranking supervisor, Mr. Fetters, knew of the situation and at times participated in the abuse and harassment. The second-ranking supervisor, Mr. West, knew of instances of the abuse and harassment and took only insufficient and ineffectual means to correct the situation, which did not include passing on the information to higher supervisory personnel.

3) As a consequence of the circumstances set out in paragraph 2 above, the Complainant suffered humiliation, distress, embarrassment and anxiety, as well as a loss of self-confidence. His performance during both periods of employment suffered adversely because of these circumstances.

4) The first-ranking supervisor relied in part on the recommendations of the three lower ranking supervisors in regard to his decision to terminate the Complainant from his position at the "Division Street" store. Two of these supervisors were motivated, in giving their recommendation, by active considerations of racial prejudice specifically directed at the Complainant. The third knew of some instances of the abuse directed at Complainant and was ineffective in correcting the

situation. Any correctly perceived instances of the Complainant's substandard work performance on Mr. Bowman's part which influenced his termination decision were contributed to and caused, at least in part, by the racial abuse and slurs directed at the Complainant. That is to say that, when Mr. Bowman observed the Complainant performing poorly, what he was in fact observing was the effect of the racial discrimination directed at the Complainant. The abuse and racial slurs were thus substantial factors in regard to Mr. Bowman's decision to terminate Complainant. In short, Complainant was terminated, on or about July 14, 1972, because of his race and color.

5) Complainant's performance during his second period of employment was substandard, and this substandard performance was a result of the past discrimination meted out by the Respondent.

CONCLUSIONS OF LAW

1) Respondent had a duty under the law to provide the Complainant with a racially neutral work environment in the sense that it was obliged to prevent its supervisory agents from subjecting Complainant to racial abuse and harassment. This duty was an affirmative duty in the sense that Respondent should have ensured that the work environment was racially neutral and should have taken active steps to maintain the environment in that status. Respondent's legal duty in this regard was breached in these particulars:

a) The racial abuse and harassment directed against Complainant by two supervisory personnel.

b) The failure, once this situation became known by a more senior supervisor (West), to put a stop to these occurrences.

The breach of this legal duty constitutes a violation of ORS 659.030(1)(a).

2) The racially discriminatory actions of the supervisors, Messrs. Bonk, Feters, West and Bowman are imputed to the Respondent.

3) Respondent's termination of Complainant on July 12, 1972, because of his race and color, constitutes another violation of ORS 659.030(1)(a).

4) Findings of Fact - Procedural 4 and Ultimate Findings of Fact 1 constitute compliance with the conciliation provisions of ORS 659.060(1) and 659.050(1).

RULINGS ON MOTIONS AND AFFIRMATIVE DEFENSES PROPOSED BY RESPONDENT

1) Motion to Dismiss Charges Due to Alleged Failure of the Bureau of Labor to Undertake Reasonable Efforts to Conciliate the Claim.

This motion is denied. Assuming, for the sake of argument only, that the language of ORS 659.050(1) ("the Commissioner may cause immediate steps to be taken through conference, conciliation") can be construed to impose an absolute jurisdictional condition precedent to the scheduling and conduct of a contested case hearing, this issue is disposed of by means of Finding of Fact - Procedural 4, Ultimate Finding of Fact 1 and Conclusion of Law 4.

2) Motion to Dismiss Because of the Complainant's Failure to Exhaust the Grievance Procedure Established

by the Collective Bargaining Agreement in Attempting to Resolve his Complaint.

Respondent's attack on the Commissioner's jurisdiction in regard to this issue is supported by citation to two Oregon Supreme Court cases and a United States Supreme Court case, all of which cases involve the application of the National Labor Relations Act. It will be helpful here to discuss these cases with a view toward distinguishing them from the facts and circumstances at issue here.

Republic Steel Corporation v. Maddox, 379 US 650, 85 S Ct 614 (1965) involved a suit brought by an employee for severance pay which was provided for in a collective bargain. He brought his legal action in the Alabama State Court and received a judgment and the Appellate Courts of Alabama affirmed the Trial Court Judgment on the basis that under Alabama law, Maddox was not required to exhaust the contract grievance procedures in regard to his attempt to recover severance pay. The Court reversed the Alabama State Court Judgment and laid down this rule:

"As a general rule in cases to which federal law applies, federal labor policy requires that individual employees wishing to assert contract grievances must attempt use of the contract grievance procedure agreed upon by employer and union as a mode of redress." [379 US] at 652.

State ex rel Nilsen v. Berry, 248 Or 391, 434 P2d 471 (1967), another case cited by the Respondent, leans heavily on *Maddox*. The issue in that case was whether doctrines of federal

labor law, applied to a provision in a collective bargaining agreement between a labor union and an employer engaged in interstate commerce, prevailed over inconsistent local rules. The dispute involved overtime wages, provisions for which were set out in the collective bargain. The Labor Commissioner had brought his action to recover overtime wages, under the provisions of Oregon law. The Oregon Supreme Court held that the operative federal statute which reposed jurisdiction exclusively in the federal courts pre-empted the field, state legislation to the contrary notwithstanding. The Court quoted with approval language from *Teamsters Local v. Lucas Flower Co.*, 369 US 95:

"[W]e cannot but conclude that in enacting §301, Congress intended doctrines of federal labor law uniformly to prevail over inconsistent local rules." [369 US] at 104.

Gilstrap v. Mitchell Bros. Truck Lines, 270 Or 599, 606, 529 P2d 370 (1974), the third case cited by the Respondent, involved a dispute between the truck-owner employees and the trucking company employer in regard to certain oral and written agreements concerning the trucks. The Court excused the employees from strict compliance with the mandatory grievance procedure because of reasons not material here, but essentially the case can be regarded as a restatement of the general rule laid down in *Maddox*.

This agency takes the legal position that cases brought under the provisions of ORS chapter 659 involving the Labor Commissioner's enforcement of civil rights (and not involving disputes as to overtime and severance pay

entitlements) are not subject to the *Maddox* rule. This position is supported by the United States Supreme Court case of *Alexander v. Gardner-Denver Co.*, 7 EPD 6793 [415 US 36] (1974), which contains the following language in regard to this issue:

"We think, therefore, that the federal policy favoring arbitration of labor disputes and the federal policy against discriminatory employment practices can best be accommodated by permitting an employee to pursue fully both his remedy under the grievance-arbitration clause of a collective bargaining agreement and his cause of action under Title VII." [7 EPD] at 6802-3.

Title VII is the federal counterpart of the statutes and administrative machinery providing for the resolution of civil rights complaints found in ORS chapter 659.

The *Alexander* Court provided a convincing rationale to support its holding:

"Arbitral procedures, while well suited to the resolution of contractual disputes, make arbitration a comparatively inappropriate forum for the final resolution of rights created by Title VII. This conclusion rests first on the special role of the arbitrator, whose task is to effectuate the intent of the parties rather than the requirements of enacted legislation." [7 EPD] at 6801.

There is another analysis set out to explain the availability of separate distinct forums:

"In submitting his grievance to arbitration, an employee seeks to indicate his contractual right under a

collective bargaining agreement. By contrast, in filing a lawsuit under Title VII, an employee asserts independent statutory rights accorded by Congress. The distinctly separate nature of these contractual and statutory rights is not vitiated merely because both were violated as a result of the same factual occurrence. And certainly no inconsistency results from permitting both rights to be enforced in their respectively appropriate forums[.]" [7 EPD] at 6799.

Respondent's motion is denied.

3) The Respondent's Assertion By Way of Affirmative Defense That the Commissioner is Without Authority to Make an Award for Humiliation, Mental Distress, Etc., in Employment Discrimination Cases.

The Respondent argues that the Commissioner is without authority to award humiliation damages because:

1) There is a constitutional prohibition to such an award absent a jury trial, and

2) The recent approval of a bill by the Oregon legislature which grants a private cause of action to a complainant and does not provide for compensatory and punitive damages acts as a prohibition to such an award by the Commissioner.

The constitutional question – In *Williams v. Joyce*, 4 Or App 482, 479 P2d 513 (1971), the Supreme [sic] Court of Oregon in its consideration of the propriety of an award of damages for mental distress suffered as a result of racial discrimination in housing, held that there was no constitutional

impediment which barred the legislature from authorizing an agency to award such damages. Arguing that a distinction between this case and the present circumstances exists because *Joyce* is a housing case and this case is an employment case, seems a perfect example of a distinction without a difference.

There is, however, an employment discrimination case, *School District No. 1 v. Nilsen*, 271 Or 641, 534 P2d 1135 (1975), which indicates that such damages are properly awarded provided the record contains a sufficiency of evidence of humiliation, ridicule and embarrassment. The award for these damages was reversed only because of an insufficiency as to the quantum and quality of evidence of humiliation, ridicule and embarrassment. The Court stated at 484:

"There was no evidence of humiliation. No one reviled the complainant, accused her of any moral impropriety, or ridiculed or embarrassed her because she was pregnant. At most, it was reported to her by some third party that the principal had said that if he had known she was going to cause this much trouble, he would have fired her"

In the present case, as the findings reflect, there is an abundance of evidence concerning ridicule, embarrassment and humiliation meted out to the Complainant by the Respondent. This situation was particularly egregious in view of Hayes' youth. That a young man should encounter such an environment in his initial venture into the world of work is outrageous. In circumstances such as this an award for

humiliation, mental distress, etc., is not only appropriate but is indeed contemplated by the legislature of the State of Oregon.

The recently enacted statute – Respondent contends that the enactment of ORS 659.095 and 659.121 in 1977 remove from the Commissioner any ability (which he might have had) to award damages for humiliation which the courts expressly approved in *Joyce* and implicitly approved in *School District No. 1*. Respondent claims these statutes have retroactive effect on substantive rights involving operative facts which occurred before their effective date. This agency believes that had the legislature so intended this retroactive effect, it would have expressly addressed itself to the issue in the language of the new procedural statutes it was enacting.

By way of summary, the position of the Bureau of Labor is that, whatever the effects of the newly enacted statutes on the Commissioner's ability to award damages for humiliation resulting from operative facts occurring after October 4, 1977, these statutes have no effect on the Commissioner's ability to award these damages under the facts and circumstances of this case.

ORDER

NOW, THEREFORE, as provided by ORS 659.060(3) and 659.010(2) and in order to eliminate the effects of the unlawful practices found and to protect the rights of other persons similarly situated, Respondent is ordered to:

1) Deliver to the Portland office of the Oregon Bureau of Labor within fifteen (15) days of the execution of this

Order a certified check, payable to Dana Hayes, in the amount of Four Thousand Dollars (\$ 4,000.00) to compensate him for the humiliation, ridicule and embarrassment suffered at Respondent's hands.

2) Deliver to the Portland office of the Oregon Bureau of Labor within fifteen (15) days of the execution of this Order a certified check, payable to Dana Hayes, in the gross amount of Three Hundred Eighty-Eight Dollars and Fifty Cents (\$ 388.50) representing back pay for the period July 15, 1972, through August 19, 1972, computed at the rate of 37 hours per week (\$ 2.10 per hour) for five weeks.

3) Make a copy of this document a permanent part of any personnel recordation it maintains concerning the employment of Dana Hayes during the year 1972, and to furnish a copy to anyone making inquiries concerning Mr. Hayes' employment or his performance with Respondent.

**In the Matter of
SCOTT PASKETT
and Craig Boone, Respondents.**

Case Number 18-78
Final Order of the Commissioner
Issued March 30, 1979.

SYNOPSIS

Respondents, an apartment house owner and his manager, did not commit an unlawful practice in evicting

Complainant, a black female, for failure to timely pay rent. Complainant testified inconsistently regarding her attempt to pay rent, and the record showed that no rent was paid. The Agency did not present corroboration, which was arguably available from complainant's sisters, as to Respondent Boone's alleged racially abusive language. The Commissioner dismissed the specific charges as to both Respondents. ORS 659.033(1)(b); 659.060(3).

The above entitled matter having come on regularly for hearing before Dale A. Price, designated as Presiding Officer by the Commissioner of the Oregon Bureau of Labor, the hearing having been held in Room 773 of the State Office Building, 1400 S.W. Fifth Avenue, Portland, Oregon. Commencing at 9:30 a.m. on October 9, 1978, and continuing through the afternoon of the same; the Complainant having been present and the Agency having been represented by Michael J. Tedesco, Assistant Attorney General, and the Respondents having been present and represented by Mr. William H. Mitchel, Attorney at Law. A proposed decision having been issued on January 23, 1979, and no exceptions having been filed during the thirty days allowed, the Commissioner of the Oregon Bureau of Labor does hereby issue the following Findings of Fact, Conclusions of Law, Rulings on Motions, Opinion and Final Order.

**FINDINGS OF FACT –
PROCEDURAL**

1) At all times material herein, Respondents were persons engaged in the business of owning and managing

real property for rent and as such, they are subject to the proscriptions of ORS 659.010 through 659.110.

2) On or about December 7, 1974, Dorothy Bryant filed a verified complaint with the Civil Rights Division of the Oregon Bureau of Labor alleging that she had been evicted from her apartment in Respondent's Cameo Plaza Apartments premises by Respondents because of her race.

3) Following the filing of the verified complaint by Dorothy Bryant, the Civil Rights Division investigated the allegations in this complaint and determined that substantial evidence existed to support the Complainant's allegation that she had been discriminated against in her eviction because of her race.

4) Thereafter, the Civil Rights Division attempted to reach an informal resolution of the complaint through conference, conciliation and negotiation, but was unsuccessful in these efforts.

FINDINGS OF FACT – THE MERITS

1) Complainant is a black woman who resided at the Cameo Plaza Apartments, Apartment 111, located at 7660 East Burnside, Portland, Oregon, from January 1, 1974, until September 15, 1974.

2) Respondent Scott Paskett was at all times material herein owner of Cameo Plaza apartments.

3) Respondent Craig Boone was at all times material herein the manager of the Cameo Plaza Apartments. Mr. Boone was originally employed by Property Management Incorporated and was retained by Mr. Paskett when

he assumed ownership of the subject apartments.

4) Among the duties incident to management of the Cameo Plaza apartments was the duty to collect the monthly rental payment from the tenants and to evict tenants who violated the terms of their rental agreements.

5) Respondent Craig Boone demanded September rent payment from Complainant on September 7, 1974. Complainant refused to pay Mr. Boone and telephoned Respondent Scott Paskett on or about September 7, 1974, to complain about alleged verbal abuse and different treatment meted out by Mr. Boone and allegedly based upon Complainant's black race. During this telephone conversation, Respondent Scott Paskett told Complainant that Mr. Boone was employed to collect rents and that complainant should forthwith tender the September rent payment to Mr. Boone.

6) Complainant did not tender payment of rent for her apartment in and for September of 1974.

7) Complainant was evicted by Respondents on September 15, 1974, for failure to pay rent lawfully due and owing since September 1, 1974.

ULTIMATE FINDINGS OF FACT

1) The Civil Rights Division of the Oregon Bureau of Labor made reasonable efforts to resolve the complaint with the Respondent prior to the service of Specific Charges of Discrimination upon Respondent.

2) Complainant did not tender rent for September of 1974 and was evicted from her apartment in mid-September 1974 because of her failure

to pay rent, which was due on September 1, 1974, and not because of her race and color.

CONCLUSIONS OF LAW

Dorothy Bryant was evicted from her apartment by the Respondents because she failed to pay rent. The eviction of the tenant for failure to pay rent does not violate ORS 659.033(1)(b).

RULINGS ON MOTIONS

During the hearing, Respondents moved to dismiss the Specific Charges against them on the grounds of the passage of an excessive amount of time. Respondents asserted that the passage of an allegedly unjustified period of time had prejudicially weakened their ability to present an adequate defense to the charges against them. A ruling upon this motion was reserved at the time of the hearing. Respondents specifically cited the unavailability of the majority of tenants who occupied their apartment complex at times material herein and who, they assert, could have corroborated their defense.

In this case, there was insufficient evidence presented to support the allegations contained in the Specific Charges.

OPINION

Complainant alleges that, while a resident of the Cameo Plaza Apartments, she entered an informal agreement with the manager who preceded Respondent Mr. Boone, which allowed her to pay rent not on the first of each month, but prior to the tenth. Early in her testimony, Complainant alleged that she borrowed money and offered rent payment on or about September 7, 1974, to Respondent Mr. Boone,

then the manager of the Cameo Plaza Apartments in which she lived. In response to his demand for payment, Complainant further alleged that Mr. Boone refused to accept her rent payment and stated that he wanted to "move out all niggers." Complainant testified that Mr. Boone indulged in racial slurs against her and other blacks "several times" while he was the manager of the Cameo Plaza Apartments. Complainant referred specifically to an incident of alleged abusive language delivered by Mr. Boone to Complainant and to her sister during a disagreement about use of a parking spot assigned to Complainant on or about September 7, 1974, the same day when Mr. Boone sought her September rent payment.

On cross examination during the hearing, Complainant testified that she never offered rent; that it was demanded and that she refused to pay rent because of "abusive language." This statement conflicts with Complainant's statement on direct testimony, that she did offer rent to Mr. Boone on September 7, 1974. It is not disputed that Complainant did not tender payment of rent at any time subsequent to September 7, 1974.

At times material herein, Complainant had two sisters living in the immediate proximity to her apartment at the Cameo Plaza. Sister Rosetta resided with the Cameo Plaza and sister Mary resided in a duplex within sight of the Complainant's apartment. Complainant's sisters were in excellent positions to be parties to, and to witness events relevant to matters at issue here. One of Complainant's sisters was directly involved in a disagreement, in which

Complainant was also involved, with Respondent Mr. Boone over use of the Cameo Plaza parking lot. In view of their close proximity to and participation in relevant events material to the issues at hand, it is worthy to note that Complainant's sisters were unable or unwilling to testify, directly or by deposition, in support of Complainant's allegations of unlawful discrimination based upon her race.

In the absence of corroboration by supporting testimony of other witnesses or by documents, and in light of Complainant's inconsistent testimony regarding tender of rental payment on September 7, 1974, I cannot declare Complainant's self-serving allegations of racial slurs to constitute substantial evidence in support of her allegations.

The Assistant Attorney General has failed to carry the burden of proof in this case. The Specific Charges and the Complaint against the Respondents and each of them must be dismissed.

ORDER

WHEREAS the Presiding Officer has deemed the evidence presented to be inadequate to establish that Respondents did engage in unlawful practices against Complainant, the Specific Charges and the Complaint as against each of the Respondents are hereby dismissed under the provisions of ORS 659.060(3).

In the Matter of
EASTERN AIR LINES, INC.,
a Delaware corporation doing business in Oregon, Respondent.

Case Number 23-78
Final Order of the Commissioner
Mary Wendy Roberts
Issued March 30, 1979.

SYNOPSIS

Based upon stipulated facts, the Commissioner found that Respondent engaged in an unlawful employment practice based on sex by using minimum and maximum height requirements for flight attendants of 5'7" to 6'2" for males and 5'2" to 5'9" for females. The female Complainant was 5'11" tall. The Commissioner found that if height was a bona fide occupational requirement, it was not facially neutral in its application. Because males of Complainant's height were not barred from the position based on height, the Commissioner found that Complainant was the victim of sex discrimination and Respondent committed an unlawful employment practice in advising her that it was unable to consider her for employment as a flight attendant because she did not meet the height requirements for females. The Commissioner awarded Complainant \$3179.50 in lost wages, less interim earnings, and ordered Respondent to cease using gender based height standards not justified by a bona fide occupational requirement reasonably necessary to the normal operation of Respondent's business. ORS

659.010(2); 659.022; 659.030(1)(a); 659.060(3).

The above entitled matter was scheduled for a contested case hearing to be conducted on November 14, 1978. Prior to the hearing, the parties agreed to have the case decided on Joint Stipulation of Fact and Written Briefs. This decision is being issued under the authority of ORS 659.060. On December 13, 1978, R. D. Albright was designated by Bill Stevenson, then Commissioner of the Oregon Bureau of Labor to replace Neil H. Running as Presiding Officer.

FINDINGS OF FACT – PROCEDURAL

1) The following Administrative Exhibits were received into evidence by the Presiding Officer:

X-1 Specific Charges of Unlawful Discrimination. Dated 8-29-78.

X-2 Notice of Hearing. Dated 09-19-78.

X-3 Designation of Presiding Officer. Dated 10-4-78.

X-4 Substitution of Presiding Officer. Dated 10-26-78.

X-5 Joint Stipulation of Facts. Received 12-12-78.

X-6 Trial Brief - Michael J. Tedesco. Received 12-12-78.

X-7 Brief of Eastern Air Lines, Inc. Received 12-14-78.

X-8 Stipulation signed and Dated 1/2 & 1/9/79. Received 01-18-79.

2) On January 18, 1979, the following Joint Stipulation of Fact was received:

STIPULATION

"I, Michael J. Tedesco, Assistant Attorney General, for the State of Oregon and I, Richard P. Magurno, Attorney for Eastern Air Lines, Inc., agree to the following stipulation:

"That we waive a public hearing in the matter of the alleged unlawful employment practices based upon sex by Eastern Air Lines, Inc., rather we request that the Oregon Bureau of Labor decide the merits of this case upon written briefs that were submitted to the Oregon Bureau of Labor in December of 1978."

FINDINGS OF FACT – THE MERITS

1) Following is the Joint Stipulation of Facts received in the office of the Presiding Officer on December 12, 1978.

Joint Stipulation of Facts

"1) Eastern Air Lines, Inc. ('Eastern') was at all relevant times and is now a common carrier by air having a place of business within the State of Oregon and is an employer within the meaning of the applicable provisions of the Oregon Fair Employment Practices Act. (ORS [chapter] 659)

"2) Ms. Zoe Ann Wilson is a female who resides in the State of Oregon and who is 5'11" in height.

"3) On December 22, 1974, Ms. Wilson completed an application for employment by Eastern as a flight attendant. On or about that same date she mailed that application along with a covering letter to Eastern. This letter and Ms. Wilson's application were received by Eastern at its corporate

headquarters in Miami, Florida, on December 30, 1974.

"4) On January 15, 1975, Ms. Wilson wrote to Eastern referencing her earlier application and again expressing interest in being considered for a position as a flight attendant. This letter was received by Eastern on January 20, 1975.

"5) Sometime after January 20, 1975, Eastern responded for the first time to Ms. Wilson's letters of December 22, 1974, and January 15, 1975, and advised her that all recruitment and hiring activity for flight attendants had been suspended for several months.

"6) Ms. Wilson responded to Eastern's letter in an undated letter in which she continued to express interest in a position as flight attendant. This letter was received by Eastern on February 7, 1975.

"7) On March 15, 1975, Ms. Wilson again wrote to Eastern and requested consideration for a flight attendant position when Eastern resumed hiring. This letter was received by Eastern on March 20, 1975.

"8) On September 16, 1975, Ms. Wilson again wrote to Eastern 'to update my file and keep it current.' This letter was received by Eastern on September 23, 1975.

"9) On September 30, 1975, in Portland, Oregon, Ms. Maggie Lance of Eastern Air Lines interviewed Ms. Wilson and administered Eastern's aptitude test to Ms. Wilson.

"10) On October 8, 1975, Eastern wrote to Ms. Wilson and

told her that since she did not meet its maximum height requirements for females it was 'unable to consider you for employment.'

"11) On October 23, 1975, Ms. Wilson filed a verified complaint, F-FEP-S-HI-75-1493, with the Oregon Bureau of Labor alleging that Eastern had discriminated against her on the basis of her sex in that she was denied an opportunity to be considered for a position as a flight attendant because she exceeded the maximum height requirements for females. However, Ms. Wilson did not exceed the height requirement for males.

"12) In August of 1976 the Civil Rights Division of the Oregon Bureau of Labor commenced an investigation of Ms. Wilson's complaint. On June 7, 1977, the Civil Rights Division determined that 'substantial evidence of discrimination has been found to support the allegations of . . .' Ms. Wilson's complaint. The Civil Rights Division attempted to conciliate the complaint and on July 11, 1977, Eastern advised the Civil Rights Division that it declined the offer of conciliation.

"13) On August 29, 1978, the Oregon Bureau of Labor filed the Complaint in this proceeding, No. 23-78.

"14) Eastern has established minimum and maximum height requirements for its flight attendants. In 1975 and thereafter, Eastern's height standards for females are 5'2" to 5'9" and for males 5'7" to 6'2".

"15) The 5'2" minimum and 6'2" maximum standards are essential qualifications for the performance of the safety aspects of a flight attendant's work. A person who was less than 5'2" in height could not adequately perform the safety functions required of a flight attendant. Similarly, a person who was more than 6'2" in height could not work in certain areas such as galleys found on some aircraft flown by Eastern because of the limited height of these areas."

2) On December 12, 1978, and December 14, 1978, briefs were received from the attorneys for the Agency and Respondent respectively.

CONCLUSIONS OF LAW

1) The Respondent's employment standards regarding height are not facially neutral. The disparity between the employment opportunities offered to male flight attendant applicants of a height between 5'7" and 6'2" and the denial of such an opportunity to female applicants of the same height range is sufficient to establish a prima facie case of sex discrimination under ORS 659.030(1)(a).

2) A distinction in employment opportunity based solely upon gender is not valid in the absence of the employer's demonstration of a bona fide occupational requirement (BFOR) reasonably necessary to the normal operation of the employer's business.

3) There may be a BFOR reasonably necessary to the normal operation of the Respondent's business which would permit the setting of some height standard even though it may discriminate on the basis of sex on its

face or in its effect. However, in this case Respondent does employ individuals of the same height as Complainant and in the same position as Complainant sought and from which Complainant was barred solely on the basis of sex.

4) Elimination of discrimination against an individual is consistent with the purpose and content of Oregon's Fair Employment Practices Act. ORS 659.022 indicates:

"The purpose . . . is to encourage the fullest utilization of available manpower by removing arbitrary standards . . . as a barrier to employment . . ."

ORS 659.030 provides in part:

"(1) . . . It is an unlawful employment practice:

"(a) for an employer, because of an individual's sex . . . to refuse to hire or employ . . . such individual."

5) The application of Respondent's height standards to a statistically viable sample does not rebut a prima facie case of discrimination where a 5'11" individual is denied application for a job solely on the basis of sex.

6) There is insufficient evidence to support an award of damages due to mental suffering and humiliation.

ORDER

NOW, THEREFORE, as provided by the provisions of ORS 659.060(3) and 659.010(2) and in order to eliminate the effects of the unlawful practices found and to protect the rights of other persons similarly situated, Respondent is ordered to:

**In the Matter of
CITY/COUNTY COMPUTER
CENTER, a division of the City of
Salem and County of Marion, State
of Oregon, Respondent.**

Case Number 08-78
Final Order of the Commissioner
Mary Wendy Roberts
Issued April 23, 1979.

SYNOPSIS

Respondent committed an unlawful employment practice by refusing permanent hire of a female Complainant to a clerk-messenger job she had successfully filled as a temporary employee for four months, and hiring a male based on a perception that Complainant might not be able to handle the lifting and stacking requirements of the job. Finding that those requirements had not been a problem for Complainant and that Respondent ignored her actual individual ability in basing her exclusion on a paternalistic stereotypical presumption due to her sex, the Commissioner awarded stipulated damages of \$4,163, and ordered that a copy of the Final Order be placed in Complainant's personnel file. ORS 659.010(2); 659.030(1); 659.060(3).

The contested case in the above-entitled matter came on regularly for hearing before R. D. Albright, who was designated as Presiding Officer in this matter by Bill Stevenson, then Commissioner of the Oregon Bureau of Labor. The hearing was held on September 13, 1978, in Salem,

1) Deliver to the Portland Office of the Oregon Bureau of Labor within fifteen (15) days of the execution of this Final Order, a certified check, payable to Zoe Ann Wilson, representing the amount Complainant would have earned had she not been denied employment by the Respondent as a result of an unlawful practice of discrimination commencing June 1, 1975, the date Respondent resumed hiring flight attendants, through November 17, 1975, which is Three Thousand One Hundred Seventy-Nine Dollars and Fifty Cents (\$3,179.50) less any amounts earned by Complainant during that period.

2) Complainant is to provide to Respondent within ten (10) days of the date of this Final Order a figure which represents that portion of the Two Thousand Eight Hundred Eighty-Nine Dollars and Fifteen Cents (\$ 2,889.15) of other income earned by Complainant during the period June 1, 1975, through November 17, 1975.

3) Cease and Desist from the use of gender based height standards that discriminate on the basis of sex and are not justified by the existence of a BFOR reasonably necessary to the normal operation of Respondent's business.

Oregon. The Complainant was present and testified during the course of the hearing. The case for the Oregon Bureau of Labor was presented by Cliff Ouelette and Randolph B. Harris, Assistant Attorneys General, of its attorneys, and the case for the Respondent was presented by William E. Blair, Assistant City Attorney. The hearing was conducted under the authority and provisions of ORS 659.060.

FINDINGS OF FACT – PROCEDURAL

The Agency and the Respondent stipulated to the facts set forth in the following paragraphs numbered 1, 2, and 3.

1) At all times material herein, the Respondent, City/County Computer Center, was and is an employer subject to the provisions of ORS 659.010 to 659.110.

2) On or about October 16, 1975, Betty Lois Grandmason, a female, filed a verified complaint with the Civil Rights Division of the Oregon Bureau of Labor, alleging that she had been and continued to be discriminated against in connection with her employment by her employer, the Respondent, City/County Computer Center, because of her sex.

3) In the event it is found that Respondent did engage in the unlawful employment practice charged, Complainant's damages are Four Thousand One Hundred Sixty-Three Dollars (\$4,163.00).

FINDINGS OF FACT – THE MERITS Chronology

1) Respondent, City/County Computer Center, is a shared computer facility between the City of Salem and

Marion County. Complainant worked for the Respondent as a Clerk-Messenger during the summer of 1975, at which time the following persons were also employees of Respondent: George Smith, Director; Hank Jackson, Operations Manager; Ordina Bond, Operations Supervisor; and Marvin Pauls, Fred Graves and Tim Wheeler, Computer Operators.

2) Respondent had a temporary opening for the position of Clerk-Messenger during the month of June 1975 while the regular Clerk-Messenger, Mr. Calender, was absent.

3) Complainant was a work-study student assigned to Respondent during the Spring term of 1975 and applied for temporary summer work with Respondent. Respondent hired Complainant to fill the Clerk-Messenger position for the month of June.

4) During June 1975, Mr. Calender informed Respondent that he did not intend to return to work with Respondent. Complainant made formal application for the full-time position of Clerk-Messenger.

5) Respondent's Operations Manager considered a number of applicants for the position of Clerk-Messenger and hired a man for the full-time position. However, the new Clerk-Messenger resigned after one and a half (1½) days on the job. Respondent's Operations Supervisor then asked Complainant to resume performance of the duties of the Clerk-Messenger.

6) Approximately August 1, 1975, Bond gave Complainant a status slip indicating a pay increase from \$2.51 to \$3.51 per hour, which was the starting

salary for the permanent Clerk-Messenger position. Complainant asked Bond if that meant she had the permanent Clerk-Messenger position. Bond indicated to the Complainant that she would have to wait for Jackson to return before a decision could be made. Bond further indicated that Grandmason's application had not been received, but that Bond would try to locate the application. Subsequently, about mid-August, Complainant was informed that a man had been hired for the Clerk-Messenger position and that she was to train him for the position.

7) Complainant trained the new male Clerk-Messenger and her employment was then terminated about October 1, 1975.

Job Requirements

1) The job of Clerk-Messenger consisted of decollating and bursting computer printouts, maintaining supplies in the computer room, storing and organizing supplies in the storeroom, and delivering orders and finished jobs by car to various offices.

2) The job description indicated that boxes of computer paper needed to be stacked four or five high. The boxes of computer paper varied in weight between 30 and 60 pounds and from 10 inches to 24 inches in height, width and depth.

3) At the request of the parties, an on-site inspection of the employment area was conducted by the Presiding Officer and the following observations were made:

(a) The storeroom is a large room with boxes of computer forms stored on all sides and additionally forming an

island in the center. Some boxes are stored on metal shelves with the remainder stacked on the floor.

(b) The boxes of computer forms are three rows deep along the walls of the storeroom leaving an aisle way about three feet wide between the boxes and the center island of stacked boxes.

(c) Some of the stacks are three boxes high while others are seven boxes high.

(d) To aid in the work, a five foot metal folding step ladder and hand truck are available for use in the storeroom.

(e) The computer is in constant operation during a 24-hour day.

It is not disputed that this configuration is the same as it was at all times material herein.

4) At the present time Respondent uses a lifting test to qualify applicants for the position of Clerk-Messenger. However, at the time Complainant worked for Respondent, no such test existed.

5) Prior to Complainant's employment, no females had been employed in the Clerk-Messenger position. However, Respondent has currently employed two females in the Clerk-Messenger position.

Issue

1) At the time Grandmason, a 5'2" female, was first being considered for the temporary Clerk-Messenger position, she discussed her ability to perform the Clerk-Messenger duties with Jackson. She testified in part as follows:

"He wanted to know if I was sure I wanted to do this. If I thought I could handle it and I told him I thought I could. The only problem that might come up would be stacking boxes . . . It never did. We never had any problem with it."

2) Bond, the Respondent's Operations Supervisor, testified that she did not recall Complainant ever coming to Bond and indicating Complainant was having trouble stacking boxes.

3) Jackson and Bond interviewed and discussed the various applicants for the Clerk-Messenger job, but the hiring decision was made by Jackson. Jackson testified that his reason for not hiring Complainant was:

"Cause she had commented to Ordina and myself that that was a serious problem as was the lifting — the physical part of lifting the boxes up four, five, six high, and it become a problem and so we felt we needed somebody that could do that job and so that is why we did not hire her."

4) Computer Operators Wheeler and Graves testified they had never complained about Complainant's performance regarding stacking boxes, nor had they ever helped Complainant. Jackson, Operations Manager, and Pauls, Computer Operator, indicated they had voluntarily helped stack some boxes.

5) Complainant testified that Jackson asked her to train the new Clerk-Messenger saying, "I have decided to hire a man."

ULTIMATE FINDINGS OF FACT

1) Respondent's position that Complainant was unable to perform

the job was unsubstantiated by the facts. Complainant did satisfactorily perform the job of Clerk-Messenger between June 1, 1975, and October 1, 1975.

2) Respondent's Operations Manager made a decision not to hire Complainant on the basis of her sex, while disregarding her actual individual ability to perform the job of Clerk-Messenger.

3) Respondent's exclusion of Complainant from the position of Clerk-Messenger was based on a speculative presumption that a female of small physical size would be unable to perform lifting tasks without the actual testing of Complainant's ability.

CONCLUSIONS OF LAW

The exclusion of Complainant from employment based upon a speculative presumption of her physical limitations constitutes an unlawful employment practice of discrimination on the basis of sex.

OPINION

During the hearing the following testimony was elicited:

Blair/Question: "You're the one that made the hiring decision and you know what went through your mind at the time and I guess no one else does. Can you tell us, did Ms. Grandmason's sex play any part in your decision that she was not going to be hired for the job?"

Jackson/Answer: "It did not. And may I clarify a point here. I have three girls at home . . . One of them right now is a gymnast for Boise State on an athletic scholarship . . . the other one is 18 years old and works for Safeway in stock. I would not recommend

**In the Matter of
David Durchins, comprising the
majority shareholder, and
DADU ENTERPRISE, INC.,
dba Tower Personnel Recruiters,
Respondents.**

Case Number 40-78

Final Order of the Commissioner

Mary Wendy Roberts

Issued April 23, 1979.

SYNOPSIS

Respondent private employment agency collected a job placement fee from Complainant in excess of the schedule in the contract between the employment agency and Complainant. The transaction was complicated by Respondent's oral agreement with Complainant's boyfriend that, unknown to her, the boyfriend would pay half of the fee. The Commissioner found that neither revocation or suspension of Respondent's license, nor the \$622 civil penalty recommended by the Hearings Referee, was justified, since this was Respondent's first violation. However, the Commissioner held that ORS 658.155(2) absolutely prohibited on the excess charge collected by Respondent, and that a \$200 civil penalty was appropriate. ORS 658.115(2); 658.155(2).

The above entitled matter came on regularly for hearing before Neil H. Running, designated as Presiding Officer by the Commissioner of the Oregon Bureau of Labor, at 9:30 a.m. on November 16, 1978, in Room 216 of

either one of those to do that type of job even though physically they could handle it."

Blair/Question: "Why not?"

Jackson/Answer: "Cause of the potential danger of hurting themselves."

It would appear that Jackson's actions in denying Complainant the Clerk-Messenger job were motivated by a sincere concern for female employees in that position, but concern based upon sex rather than upon the individual abilities of the Complainant. A good faith belief based upon stereotypical attitudes about a protected class is not a valid defense for discrimination.

ORDER

NOW, THEREFORE, as provided by the provisions of ORS 659.060(3) and 659.010(2) and in order to eliminate the effects of the unlawful practices found and to protect the rights of other persons similarly situated, Respondent is ordered to:

1) Deliver to the Portland Office of the Oregon Bureau of Labor within fifteen (15) days of the execution of this Final Order a certified check, payable to Betty Lois Grandmason, in the gross amount of Four Thousand One Hundred Sixty-Three Dollars (\$4,163.00) representing the amount of damages stipulated to by the parties.

2) Make a copy of this document a permanent part of any personnel recordation it maintains concerning the employment of Betty Lois Grandmason during the year 1975, and to furnish a copy to any one making inquiries concerning Ms. Grandmason's employment.

the State Office Building, Portland, Oregon. The Oregon Bureau of Labor was represented by Steve Tiktin, and Respondent represented himself.

Thereafter, I, Mary Wendy Roberts, Commissioner of the Oregon Bureau of Labor, having considered the record, Proposed Order of the Presiding Officer and Exceptions filed by the Respondent, and being fully advised in the premises, hereby enter the following Findings of Fact, Conclusions of Law, Opinion and Final Order.

FINDINGS OF FACT – PROCEDURAL

1) Respondent David Durchins is the majority shareholder and operator of a private employment agency in the State of Oregon, has been duly licensed as a private employment agency by the Oregon Bureau of Labor for the years 1976, 1977, 1978, and is subject to the provisions of ORS 658.005 to 658.245 and Administrative Rules 839-17-001 to 839-17-279.

2) On or about May 23, 1977, Complainant Karen Fardell filed a verified complaint with the Wage and Hour Division of the Oregon Bureau of Labor alleging that Respondent attempted to collect and collected a charge for services from said Complainant in excess of the schedule in the contract to procure employment between Respondent and Complainant, who was an applicant for employment, contrary to the provisions of ORS 658.155(2).

3) Following the filing of the verified complaint by Complainant, the Wage and Hour Division investigated the allegations in the complaint and determined that substantial evidence existed to support the Complainant's

allegation as set forth in her verified complaint.

4) Thereafter, the Wage and Hour Division attempted to reach an informal resolution of the complaint through conference, conciliation and negotiation, but was unsuccessful in these efforts.

5) Thereafter, the Oregon Bureau of Labor caused to be served upon the Respondent a Notice of Proposed Revocation or Suspension of License or Imposition of Civil Penalty.

FINDINGS OF FACT – THE MERITS

1) In 1975, Respondent met and became friendly with one Chuck Elbaum, who had been in prior years involved with private employment agencies, and was at that time an insurance agent.

2) In April of 1976, Chuck Elbaum introduced Complainant to Respondent as his girlfriend and also as an applicant for a fee paid employment position through Respondent's private employment agency.

3) On April 4, 1976, Respondent and Complainant entered into a fee paid contract which provided among other things, the following:

"In the event I am willing to accept a referral on a position where I may pay the fee, I understand a new contract must be negotiated and this contract canceled."

4) During the remainder of April and the first part of May 1976, Respondent tried to place Complainant in two or three fee-paid positions without success.

5) Thereafter, Respondent and Chuck Elbaum, at the request of the latter and without the knowledge of

Complainant, entered into an oral agreement whereby Complainant would be placed into a half fee paid position which would be paid by the employer and the remaining half, which would normally be paid by Complainant, paid by Chuck Elbaum. It was also agreed that Complainant was not to be told of this arrangement.

6) On May 11, 1976, Complainant and Melody Ollison, an agent of Respondent, executed a Job Referral Document which provided, among other things, the following:

"Fee is negotiable at this point, client is willing to pay half if employer will pay half – to be discussed."

7) As a result of said Job Referral Document, Complainant was hired by Kelly-Clarke Company. The total placement fee was \$600, which was equal to Complainant's salary for one month.

8) A statement dated May 13, 1976, for \$300 was addressed to the Kelly-Clarke Company, with a copy to Complainant. A statement dated May 13, 1976, for \$300 was addressed to Complainant, but both the statement and the copy of the Kelly-Clarke statement were sent to Chuck Elbaum at his business address. Kelly-Clarke Company paid the Respondent \$300. No payment was made by either Complainant or Chuck Elbaum.

9) A statement dated August 23, 1976, for \$300 was addressed to Complainant, but was sent to Chuck Elbaum at his business address. No payment was made by either Complainant or Chuck Elbaum.

10) A statement, undated, but with the handwritten notation "sent

7-28-76", for \$300 was addressed to and sent to Chuck Elbaum at his business address. No payment was made by Chuck Elbaum.

11) As Respondent continued to press Chuck Elbaum for payment, their friendship gradually began to cool until it stopped completely and Chuck Elbaum began avoiding Respondent.

12) A statement dated September 13, 1976, for \$300 was addressed to and sent to Complainant directly. Subsequent thereto Complainant sent Respondent an undated letter in which she agreed to try to pay \$25 per month.

13) Complainant made three \$25 payments to Respondent totaling \$75 during the period from December 1976 through March 1977. Complainant returned a statement dated January 3, 1977, with one of the \$25 payments with a notation of a change of address. No further payments were ever made by either Complainant or Chuck Elbaum.

14) A final statement for \$225 dated May 2, 1977, was sent to Complainant which, among other things, contained the provision:

"unless balance is paid by Monday 5/16/77, this account will be assigned to collection."

15) On or about May 16, 1977, Respondent assigned the said account to Credit Resources Inc., with instruction that collection efforts were to be made upon both Complainant and Chuck Elbaum.

16) On May 23, 1977, Complainant filed a verified complaint against Respondent with the Wage and Hour Division of the Oregon Bureau of Labor.

17) The amount of the civil penalty in lieu of suspension of license, as provided in the Notice of Proposed Revocation or Suspension of License or Imposition of Civil Penalty, was determined by the Wage and Hour Division in accordance with ORS 658.005 to 658.245 and Administrative Rules 839-17-001 to 839-17-279 and approved by the Commissioner of the Oregon Bureau of Labor through the Deputy Commissioner.

ULTIMATE FACTS

1) The Wage and Hour Division of the Oregon Bureau of Labor made reasonable efforts to resolve Complainant's complaint with Respondent prior to the service of Notice of Proposed Revocation or Suspension of License or Imposition of Civil Penalty.

2) Respondent attempted to collect and collected a charge for service from Complainant in excess of the schedule in the contract to procure employment between Respondent and Complainant.

CONCLUSIONS OF LAW

1) The Commissioner of the Oregon Bureau of Labor has jurisdiction of the person and the subject matter herein.

2) Respondent violated the provision of ORS 658.155(2) which provides:

"No charge for service to be collected shall be in excess of the schedule in the contract to procure employment between the agency and the applicant for employment."

3) In his Proposed Order the Presiding Officer upheld a civil penalty of Six Hundred Sixty-Two Dollars (\$662.00) which was assessed by the

Wage and Hour Division and approved by the then Commissioner, Bill Stevenson. This penalty amount includes an amount equal to costs to the Oregon Bureau of Labor for processing the case. I find no statutory authorization for such an assessment. I have reviewed all the factors in this case and being fully aware this was Respondent's first and only violation, and that said violation was the result of a verbal business contract (in lieu of required fee-shared contract) based on a personal friendship and not likely to be repeated, I hereby reduce the civil penalty to Two Hundred Dollars (\$200) pursuant to ORS 658.115(2).

OPINION

While Respondent admits the acts which constitute the violation, he seeks to justify or to mitigate his role due to Complainant being aware of the partial fee situation through the Job Referral Document which she signed, the letter in which she accepted liability for the remainder of the fee, and her partial payment thereon. This was fully considered by the Commissioner and it was determined that while this reasoning might contain some merit in other areas of the law, it has no weight here since ORS 658.155(2) absolutely prohibits such activity as practiced by Respondent and makes no provision for mitigation, even though the circumstances point to Complainant's probable knowledge.

ORDER

NOW, THEREFORE, as provided by the provisions of ORS 658.005 to 658.245 and Administrative Rules 839-17-001 to 839-17-279 and in order to eliminate the effects of unlawful violations found and to protect the rights

of other persons similarly situated, Respondent is ordered to deliver to the Portland Office of the Oregon Bureau of Labor within fifteen (15) days of the execution of this Final Order, a certified check in the amount of TWO HUNDRED DOLLARS (\$200) payable to the Commissioner of the Oregon Bureau of Labor.

**In the Matter of
William Boscole and Rita Boscole,
dba HEALTHWAYS FOOD CENTER,
Respondents.**

Case Number 60-78
Final Order of the Commissioner
Mary Wendy Roberts
Issued April 23, 1979.

SYNOPSIS

Respondent employers' son, who was the store manager, refused to consider female Complainant for a stockperson job involving moderate to heavy lifting. Complainant had experience with heavy work and asked to demonstrate her ability to lift, but was not given the opportunity. The position was later filled by a male. The son's testimony was inconsistent and the Commissioner credited the Complainant's testimony that the son considered the job to be "man's work" and that he did not want to work with a woman. The Commissioner found that Respondents committed an unlawful

employment practice, found insufficient evidence of mental anguish, awarded Complainant \$763.90 in wage loss, and ordered Respondents to cease discriminating against job applicants based on sex. ORS 659.010(2); 659.030(1); 659.060(3).

The above entitled matter having come regularly for hearing before Neil H. Running, designated as Presiding Officer by the Commissioner of the Oregon Bureau of Labor, the hearing having been convened at 9:30 a.m. on February 20, 1979, in Room 216 of the State Office Building, Portland, Oregon. The Oregon Bureau of Labor was represented by Michael J. Tedesco, Assistant Attorney General, and the Respondent was represented by Duane Vergeer, Attorney at Law.

Having considered the record and the Proposed Order of the Presiding Officer, and being fully advised in the premises, I, Mary Wendy Roberts, Commissioner of the Oregon Bureau of Labor, hereby make the following Findings of Fact, Conclusions of Law, Opinion and Final Order.

FINDINGS OF FACT – PROCEDURAL

1) It is stipulated by both counsel that the correct designation of the Respondent is William Boscole and Rita Boscole doing business as Healthways Food Center.

2) At all times material herein the Respondent was and is an employer subject to the provisions of ORS 659.010 to 659.110.

3) On or about November 10, 1975, Julia Lynn Foster filed a verified complaint with the Civil Rights Division

of the Oregon Bureau of Labor alleging she had been discriminated against in connection with her prospective employment by the Respondent.

FINDINGS OF FACT – THE MERITS

1) During the month of November 1975, the Complainant, Julia Lynn Foster, a female person, was 18 years of age, weighed 120 pounds and was 5'5" tall. In June 1975, she had completed landscaping courses at Portland Community College and found employment with McNaughton Landscaping Company. In the course of her employment she was engaged in digging trenches for sprinkling systems, moving dirt in wheel borrows and lifting turf, sacks of seed and fertilizer weighing up to 100 pounds. She was laid off in October 1975 due to the seasonal nature of the work.

2) The Respondent caused to be printed on or about November 3, 1975, in the Help Wanted Section of the Oregonian, an advertisement for a stock person at the Fifth Avenue store where William Boscole, Jr., the son of William Boscole and Rita Boscole, was manager. The said position required moderate to heavy lifting.

3) As a direct result of said advertisement, the Complainant applied at the Fifth Avenue store on or about November 3, 1975. She was given a standard application form, which she completed and submitted to William Boscole Jr. She was not given an opportunity to demonstrate whether or not she could do the required work, although she insisted that she could and requested to do so. It was implied she would not be hired because she was a woman.

4) The Complainant was not hired for the said position. Michael Cooper, a male person, was hired on or about November 17, 1975, as a stock person at the Fifth Avenue store. His wage was \$2.50 per hour for the first week and \$2.75 per hour thereafter.

5) The Complainant remained unemployed until the middle part of November 1975, when she found temporary work with Meier & Frank Company through the Christmas season at a salary of \$612.00 per month. She was again unemployed from the second week of January 1976 through the end of February 1976, when she found permanent employment.

6) The differential between Complainant's actual earnings and pay attributable to a person who would have worked for the Respondent in the position which the Complainant applied for from November 3, 1975, until she found permanent employment in February 1976 amounts to \$763.90.

CONCLUSIONS OF LAW

1) The Commissioner of the Oregon Bureau of Labor has the jurisdiction of the person and subject matter herein.

2) The Complainant was denied equal employment opportunity through discrimination by reason of sex in violation of ORS 659.030(1).

3) As a result of said discrimination, the Complainant was damaged in the amount of \$763.90.

4) There was insufficient evidence presented to support a finding of humiliation, frustration, anxiety, nervousness, mental anguish and suffering as set forth in the Specific Charges.

OPINION

The Complainant testified that after completing the application for employment, she presented it to William Boscole Jr., who told her that the job was "mans work" and that whoever was hired, he would have to work with that person and he did not want to work with a woman. She further testified he told her that since he didn't seek "women's work" she shouldn't seek "mans work." In his testimony William Boscole Jr. denied the alleged statements, but did admit receiving an application from the Complainant. William Boscole Sr. testified as to the company policy concerning hiring and to the alleged circumstances surrounding the hiring of Michael Collins.

The testimony of Williams Boscole Jr. is suspect due to certain inconsistencies: *i.e.*, he was asked if he discussed with the Complainant her ability to do the work. His answer was: "We never spoke about her job at the time. We only spoke about filling out the form and that was it." He was later asked if he described for the job applicants how much work the job entailed? His answer was: " I reviewed the job just a little bit so they would get some sort of idea." This inconsistency would indicate that either William Boscole Jr. was not truthful concerning his conversation with the Complainant or, if he was truthful concerning the said conversation, then he omitted discussing with her the job requirements, but did discuss the job requirements with the other applicants.

Because of this and other inconsistencies in the testimony of William Boscole Jr. and observation of the demeanor of the witnesses by the

Presiding Officer, I gave greater weight to the testimony of the Complainant, which was also somewhat corroborated by the facts.

ORDER

NOW, THEREFORE, as provided by the provisions of ORS 659.060(3) and 659.010(2) and in order to eliminate the effects of unlawful practices found and to protect the rights of the persons similarly situated, the Respondent is ordered to:

1) Deliver to the Portland Office of the Oregon Bureau of Labor within fifteen (15) days of the execution of the Final Order, a certified check payable to Julia Lynn Foster in the gross amount of Seven Hundred Sixty-Three Dollars and Ninety Cents (\$763.90).

2) The Respondent is ordered to Cease and Desist from discriminating against applicants for employment based on sex.

**In the Matter of
CORNET STORES,
a California corporation,
Respondent.**

Case Number 64-78
Final Order of the Commissioner
Mary Wendy Roberts
Issued June 11, 1979.

SYNOPSIS

Where pregnant Complainant took excessive rest breaks, sat down when she should have been working, failed to help out in other departments, and required help from others to keep her department in order; and where Respondent employer had no paid or unpaid medical or other leave available for employees, the Commissioner found that Complainant was terminated because she was unable or unwilling to perform the work required. The Commissioner held that Complainant was not discriminated against because of her sex, and ordered that the Specific Charges against Respondent be dismissed. ORS 659.030(1).

The above entitled matter came on regularly for hearing before Neil H. Running, designated as Presiding Officer by the Commissioner of the Oregon Bureau of Labor; the hearing was convened at 9:30 a.m. on February 23, 1979, in the Home Federal Savings Building at 707 Main Street, Lebanon, Oregon. The Oregon Bureau of Labor was represented by Randolph B. Harris, Assistant Attorney General, and Respondent by Robert Evnen, Attorney at Law.

Having considered the record and the Proposed Order issued on March 20, 1979, and being fully advised in the premises, I, Mary Wendy Roberts, Commissioner of the Oregon Bureau of Labor hereby make the following Findings of Fact, Conclusions of Law, Opinion, and Final Order.

**FINDINGS OF FACT –
PROCEDURAL**

All parties stipulated to paragraphs 1 and 2 below.

1) At all times material herein, Respondent Cornet Stores, a California corporation, was and is an employer subject to the provisions of ORS 659.010 to 659.110.

2) On or about February 1, 1977, Complainant Carol M. Rosin, female, filed a verified complaint with the Civil Rights Division of the Oregon Bureau of Labor alleging she had been discriminated against in connection with her employment by her employer, Respondent Cornet Stores, a California corporation, because of her sex.

FINDINGS OF FACT – THE MERITS

1) Respondent Cornet Stores is a corporation organized under the laws of the State of California with its principal office in Pasadena, California. Respondent operates a chain of commercial variety stores, one of which is located in Lebanon, Oregon.

2) On or about August 18, 1976, Complainant was hired by Respondent as a store clerk in the Fabric Department of the Lebanon Store. Complainant's duties consisted of waiting on customers, operating the cash register, stocking shelves with bolts of fabric, and ordering new stock. When she was not occupied in her own

department, Complainant was expected to assist in other departments.

3) In November of 1976, Complainant discovered that she was pregnant. She informed two of her supervisors, Hulda Cutlip and Opal Broadrow, of her condition. There is a conflict as to whether the store manager, Oral L. Cole, first heard of Complainant's condition from the two supervisors or from Complainant herself; however, it is clear that he was aware of the situation in November 1976.

4) Complainant's pregnancy was essentially normal except for excessive weight gain and a breech presentation, which ultimately necessitated surgical delivery. Her physician would have allowed her to work with only the qualification that she do no heavy lifting until approximately May 9, 1977.

5) As Complainant's condition progressed, the manager began to receive complaints from Hulda Cutlip and Opal Broadrow that Complainant was "sloughing off" in her work. She was accused of taking excessive rest breaks and sitting down on the carpet display or at the pattern counter when she should have been working. It was also reported to the manager that in addition to Complainant failing to help out in other departments as was expected, she required help from others to keep her own department in order. The manager observed Complainant from time to time and determined the accusations were essentially correct.

6) On the Sunday prior to January 15, 1977, the manager called Complainant into his office to discuss his observation of her work and the complainants he had received. The tone of

the conversation which took place was friendly. As a result of that conference Complainant was terminated on January 15, 1977. Upon Complainant's termination the manager completed a Termination Report which indicated, among other things, that Complainant voluntarily quit and was eligible for re-hire. There was no medical leave, leave without pay, or leave with pay available to employees of Cornet Stores.

7) Complainant looked for another job in the general area, but could find none. She remained unemployed until her baby was born on June 20, 1977.

CONCLUSIONS OF LAW

1) The Commissioner of the Oregon Bureau of Labor has jurisdiction of the parties and subject matter herein.

2) No evidence was presented with regard to one paragraph of the Specific Charges.

3) Complainant was terminated from her position on January 15, 1977, because she was either unable or unwilling to perform the work required of her. She was not terminated because of pregnancy and, accordingly, she was not discriminated against because of her sex. Complainant was treated in the same manner Respondent would have treated any other employee similarly unable to perform. There was no medical leave, leave without pay, or leave with pay available to employees of Cornet Stores.

OPINION

The issue in this matter is whether Complainant's discharge was occasioned by her pregnancy or by unsatisfactory job performance. The record of Complainant's performance was

described clearly by the testimony of Respondent's witnesses, Hulda Cutlip, Opal Broadrow, and Oral L. Cole. Their testimony was in turn corroborated by Ruby Hallahan by means of affidavit due to a family emergency.

The Agency brought forward only one witness on Complainant's behalf, her physician. While his testimony was supportive of her ability to work, it did not reach the issue of her actual job performance.

That the manager, Oral L. Cole, intended the Complainant's termination to be in the nature of voluntary maternity leave because she was no longer able to do the work is corroborated by the Termination Report, which indicates his attitude in the matter at the time.

Understandably, Complainant's condition may have contributed in some part to the overall quality of her performance. However, the weight of the evidence leads to a conclusion that performance itself, rather than pregnancy, was the reason for the discharge.

ORDER

NOW, THEREFORE, it having been found that Respondent has not engaged in or committed any unlawful employment practice, it is hereby ordered that the Specific Charges in this matter be dismissed.

**In the Matter of
LEEBO LINE CONSTRUCTION, INC.,
an Oregon corporation,
Respondent.**

Case Number 10-78
Final Order of the Commissioner
Mary Wendy Roberts
Issued July 30, 1979.

SYNOPSIS

Where Respondent employer terminated Complainant's employment as a journeyman linemen in part because he requested additional safety equipment before proceeding with the job, the Commissioner awarded Complainant \$1,035 in lost wages for the period between termination and Complainant's next job. ORS 654.062(5)(a); 659.010(2); 659.060(3); OAR 437-84-409.

The contested case in the above-entitled matter came on regularly for hearing before Glenda E. Anderson, who was designed as Presiding Officer in this matter by Bill Stevenson, then Commissioner of the Oregon Bureau of Labor. The hearing was held on September 15, 1978, in Albany, Oregon. The case for the Oregon Bureau of Labor was presented by Cliff Ouelette, Assistant Attorney General, and the case for Respondent was presented by Daniel A. Post, Attorney at Law.

Having considered the record and the Proposed Order issued on May 23, 1979, and being fully advised in the premises, I, Mary Wendy Roberts, Commissioner of the Oregon Bureau

of Labor hereby make the following Ruling on Motion, Findings of Fact, Ultimate Findings of Fact, Conclusion of Law, Opinion, and Final Order.

RULING ON MOTION

At the beginning of the hearing, Respondent moved to dismiss based on laches and a ruling was reserved. Respondent's motion to dismiss based on laches is hereby denied. Respondent contends that the lapse of two years has prejudiced its defense. The record however does not show the particular areas in which Respondent was prejudiced. Both parties stipulated to the admission of statements made by Respondent's employee witnesses dated November of 1976, only a few months following the occurrence at issue in this case.

FINDINGS OF FACT – PROCEDURAL

Both parties stipulated to paragraphs 1 and 2 below.

1) At all times material herein, Respondent LeeBo Line Construction, Inc., was and is an employer subject to the provisions of ORS 659.010 to 659.110.

2) On or about June 28, 1976, Lee Ronald Stollar filed a verified complaint with the Civil Rights Division of the Oregon Bureau of Labor alleging that he had been discriminated against in connection with his employment by LeeBo Line Construction, Inc., because of his request for safety equipment.

3) The Civil Rights Division investigated the allegation in the complaint filed by Mr. Stollar and determined that substantial evidence existed to support Complainant's allegation of discrim-

ination in employment because of his request for safety equipment.

FINDINGS OF FACT – THE MERITS

1) Lee Ronald Stollar is a journeyman lineman and during May 1976 he was listed on the books of the Eugene branch of the Journeyman Lineman Union. He was hired during May 1976 to work for the LeeBo Line Construction Company as a journeymen Lineman. Mr. Stollar was employed by LeeBo Line Construction Company on two previous occasions in 1975: once during January or February and again in August. Mr. Stollar testified at the hearing that he is and has worked for 15 to 20 companies during that period of time. Prior to the instance in this case, he had never been fired from a job.

2) On June 28, 1976, while working on an electric line construction job for Respondent, Mr. Stollar requested additional fiber to be used to cover electric lines prior to climbing an electric pole identical or similar to the pole pictured in [an exhibit in the record].

3) Mr. Stollar testified that at the time he requested the additional fiber to cover the electric lines, he was working with an apprentice who had little or no experience working above hot lines. The location of the particular pole in question next to an historic covered bridge prohibited the use of a bucket truck. Mr. Stollar indicated that a bucket truck provides an additional element of safety and protection because the lineman does not have to climb up the pole through the cross arm where the electric lines are attached.

4) The record reflects the electric lines carried 20,000 volts and the wire in question was 50 to 52 inches from the center of the pole. Oregon Administrative Rules (OAR), Workman's Compensation Board Occupational Safety and Health Code, Electrical Transmission and Distribution Facilities, at OAR 437-84-409 states:

"No employee shall be permitted to approach or take any conductive object, without an approved insulating handle, closer to exposed energized parts than shown in Table V-1, . . . Table V-1 indicates 15.1 to 35 . . . kilovolt requires a minimum working and clear hot stick distance of 2 feet 4 inches."

In this instance only 26 inches remained between the permissible approach distance and the center of the pole.

5) Mr. Stollar testified that Randy Minor, his foreman, did not require him to complete the job without aid of the additional fiber that he had requested. The unavailability of this fiber resulted in the loss of an entire morning's work for one crew.

6) On June 28, 1976, after the incident involving the alleged safety hazard, Tex Toliver, superintendent with LeeBo Line Construction Company, informed Mr. Stollar that he was fired.

7) Stollar subsequently received a termination and work record signed by Tex Toliver, which states the reason for termination as "for benefit of job" and states under Workman's Ability "not good on this job."

8) Stollar testified that his termination was the result of his request for

additional safety equipment and that the following conversation took place at the end of the day on June 28, 1976, between himself and Tex Toliver:

"What's the deal Tex? Am I getting laid off or fired or what? And he said 'well we're going to let you go.' And I said, 'it's all over that pole up there that we didn't have fiber to do this morning,' and he said 'Yeh.' He said, 'you haven't been satisfied with several other things here' - he said, oh, and I said, 'you know that contract we have with the union is both for me and for you,' and he said 'yeh, but you can't run a job according to a contract.' I said, 'but well- what it really comes down to' - I says - 'is that job this morning where I didn't want to put the guy wire up and the time we lost cause we didn't have the fiber.' And he said, 'yeh, that's right.'"

9) Mr. Haze, owner of LeeBo Line Construction Company, testified that the company did not receive notice of any safety violations with regard to the particular job in question. The record reflects that the State Safety Inspector was present on the job at various points during the work progress, but that he did not observe the particular circumstance involved in this case.

10) Mr. Haze testified that LeeBo Line Construction Company has instituted their own safety rules which are more stringent than the state safety rules. Respondent company holds regular safety meetings and requires all employees to sign statements that they have read and are familiar with the company safety rules.

11) In addition to Complainant and Respondent company owner, Mr. Haze, who each testified at the hearing, five written statements were read into the record. The parties stipulated that had the witnesses been present, their testimony would have been the same as their signed statements, but the parties did not stipulate to the truth of the witnesses statements.

12) Randy Minor's statement made November 11, 1976, shows that he was a foreman for LeeBo Line Construction Company during the job in question in this case and that he was Mr. Stollar's immediate supervisor. Minor's statement indicated that he complained of Stollar's talking and poor job performance to Toliver, the Job Superintendent, two weeks prior to the incident in question in this case. Minor's statement indicated that he felt LeeBo Line Construction Company was very safety conscious.

13) John Leights' statement was made July 7, 1976, to Bev Russell, an investigator for the Oregon Bureau of Labor. Leights was a fellow crew member and had only worked a couple of weeks on the job in question. Regarding the incident in this case, Leights' statement is in part that:

"It didn't seem that we needed more fiber, but he (Stollar) knows more than I do. It upset the foreman because he had to shut down and go to another pole. We had that pole already to go. We wasted four hours. I don't know if they would let him go for that reason. I had heard rumors before, that they were going to fire him. He had the gift of gab. It might have slowed us down some."

14) Mr. Haze testified that he drove to Corvallis from the job site on the afternoon of Monday, June 28, 1976, to pick up Mr. Stollar's pay check from the payroll clerk because June 28th was not a normal payday. The record reflects that a check was presented to Stollar at the end of the day when Toliver terminated Stollar's employment.

15) Stollar testified that he signed the books of the Eugene branch of Journeyman Lineman Union upon his employment termination with LeeBo Line Construction, and that he was employed on July 15, 1976, by another company.

16) Both Stollar and Haze testified that the duration of employment for journeymen linemen is contingent upon the length of time necessary to complete specific jobs.

17) Stollar testified that he was receiving \$10.79 an hour on the date of his termination from his job with LeeBo Line Construction Company.

ULTIMATE FINDINGS OF FACT

1) In order to comply with the State Safety Rules, Complainant requested additional safety equipment prior to performing the job in question in this case.

2) One of the reasons Complainant was terminated on Monday, June 28, 1976, was his request for additional safety equipment.

CONCLUSION OF LAW

LeeBo Line Construction Company engaged in an unlawful employment practice by basing the Complainant's employment termination in part on the Complainant's opposition to a safety hazard.

OPINION

Much of the testimony in this case is either self-serving or in conflict. Therefore, it is necessary to rely heavily on the sequence of events involved in this case. Monday, June 28, 1976, was not a normal payday, but rather the very day Stollar requested additional safety equipment. I conclude therefore, that Stollar's request for additional safety equipment played some part in the decision to fire him. The fact that Respondent may have had several reasons for firing him is not a defense if the opposition to a safety hazard played any part in the decision to fire Complainant.

ORDER

NOW, THEREFORE, as provided by the provisions of ORS 659.060(3) and 659.010(2) and in order to eliminate the effects of the unlawful practices found, and to protect the rights of other persons similarly situated, Respondent is ordered to deliver to the Portland Office of the Oregon Bureau of Labor within thirty (30) days of the execution of this Final Order, a certified check payable to Lee Ronald Stollar in the amount of ONE THOUSAND THIRTY-FIVE DOLLARS AND EIGHTY-FOUR CENTS (\$1,035.84), representing the amount Lee Ronald Stollar would have earned during the period between June 28, 1976, the date Stollar's employment was terminated, and July 15, 1976, when Stollar acquired other employment.

**In the Matter of
BEND MILLWORKS COMPANY,
an Oregon corporation, Respondent.**

Case Number 54-78

Final Order of the Commissioner

Mary Wendy Roberts

Issued October 18, 1979.

SYNOPSIS

Finding that Respondent employer had directed a security company not to hire females as security guards for Respondent's plant, the Commissioner imputed to Respondent the security company's failure to hire Complainant, a qualified female, for Respondent's security guard position, and found that Respondent had committed an unlawful employment practice based on sex. The Commissioner rejected Respondent's defense of a purported bona fide occupational requirement (BFOR), finding that the nighttime guard position requirement of working alone in the dark was not one of the "special environmental conditions" contemplated by ORS 659.030 as an example of a BFOR exception, and that where no effectiveness exception was justified, it was up to the applicant to weigh and accept the risks presented by a job. Because there was no other position available in the area commensurate with Complainant's experience and training, Respondent was liable for Complainant's relocation costs of \$417.20, as well as stipulated back wages of \$765. The Commissioner awarded Complainant \$300 for mental suffering for loss of human dignity and self-esteem caused by the unlawful

rejection. ORS 659.010(2) and (11); 659.022; 659.030(1); 659.060(3).

The contested case in the above-entitled matter came on regularly for hearing before R. D. Albright, who was designated Presiding Officer in the matter by Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries. The hearing was held on February 8, 1979, at the Oregon State Highway Division office in Bend, Oregon. Complainant was present and testified during the hearing. The case for the Bureau of Labor and Industries was presented by Michael J. Tedesco, Assistant Attorney General; the case for Respondent was presented by Lee C. Nusich, Attorney at Law. Also present during the hearing was Etta Creech, Hearings Clerk. The hearing was conducted under the authority and provisions of ORS 659.060.

Having considered the entire record in the matter, the evidence duly received, the Proposed Order issued and Exceptions filed, the Commissioner of the Bureau of Labor and Industries hereby makes the following Findings of Fact, Ultimate Findings of Fact, Conclusions of Law, Opinion and Order.

**FINDINGS OF FACT –
PROCEDURAL**

1) The parties have stipulated to the following facts:

(a) Respondent is a "person" as defined in ORS 659.010(11).

(b) Mildred Anderson, Complainant, filed a verified complaint on November 29, 1977, with the Civil Rights Division of the Bureau of Labor and In-

dustries against Bend Millworks Company.

(c) In the event that discrimination is found, the back pay award is to be Seven Hundred Sixty-Five Dollars (\$765.00).

2) Subsequent to the filing of the aforementioned complaint the Civil Rights Division investigated the allegations contained therein and determined that substantial evidence existed in support of Complainant's allegations.

3) The Civil Rights Division attempted to reach a settlement of this case through conference, conciliation and negotiation, but was unsuccessful in those efforts.

FINDINGS OF FACT – THE MERITS

1) Complainant, female, was raised in Bend, Oregon. From 1969 until December of 1976, Complainant lived in Utah and worked in the security field. In December of 1976, Complainant returned to Bend and began seeking employment in security work.

2) Complainant is a Licensed Private Detective with experience in airport security and plain clothes detective work.

3) The Oregon Employment Office referred Complainant to a job opening with Pinkerton's, Inc., in February of 1977. Upon inquiry to Pinkerton's, Inc. on February 4, 1977, Complainant was informed that the security position to be filled was with the Bend Millworks Company.

4) Respondent Bend Millworks Company is an Oregon corporation engaged in the manufacture of wood products at its plant on the outskirts of the city of Bend.

5) Pursuant to a contract with Respondent, Pinkerton's, Inc. provided a security guard to patrol Respondent's plant from 12:30 a.m. to 7:30 a.m. daily and on weekends.

6) Pinkerton's, Inc. was directed by Respondent not to place any women in the security guard position. In fact, Pinkerton's, Inc. removed a woman from that position at the direction of Respondent. Pinkerton's, Inc., through the contractual agreement with Bend Millworks, is an agent of Respondent, and the Pinkerton's, Inc. refusal to hire Complainant on the direction of Respondent is imputed to Respondent.

7) Upon applying for the Bend Millworks security guard position at Pinkerton's, Inc. in February of 1977, Complainant was informed that because she was a woman she could not be considered for that position. She was also told that this was the only job opening at Bend Millworks.

8) In an attempt to have her qualifications considered, Complainant telephoned Respondent and talked with its Personnel Manager, James P. Anderson. She was informed however that Pinkerton's, Inc. handled all matters concerning hiring for that security guard position at Respondent's plant.

9) Complainant continued to seek employment in the Bend area, but found only a part-time opening available in the security field. Unable to find work in her field in her home town, she returned to Utah to search for work and took a position which required her to relocate her family to Utah.

10) Complainant suffered damages due to loss of back wages in the amount of \$765.00, as stipulated.

11) Complainant incurred out-of-pocket expenses for relocation to Utah in the amount of \$417.20. This amount includes \$74.00 for airline tickets, \$246 for a moving van, and \$97.20 for motel accommodations.

12) Complainant experienced mental suffering in that she felt angry and indignant at the inference of inferiority inherent in being rejected solely on the basis of her sex for the only full-time position in her profession available in Bend.

FINDINGS OF FACT – AFFIRMATIVE DEFENSE

1) Arthur Pozzi, President of Respondent company, prohibited Pinkerton's, Inc. from using a woman security guard on Respondent's premises. This prohibition was based on his sincere concern for the physical safety of a female security guard. He felt that a female security guard working alone and unarmed would be susceptible to physical or sexual assault from intruders on Respondent's premises.

2) Mr. Pozzi believed that perhaps a highly trained woman could safely perform the security guard job, but he knew Pinkerton's, Inc. did not employ people with training equivalent to that of a police officer.

3) The Pinkerton's, Inc. security guard's duties at Bend Millworks included patrolling the perimeter and interior of the plant. The security guard patrolled alone and unarmed for 50 minute periods and checked in at time clock stations around the mill. If the guard observed anything unusual, the

guard reported it to the Bend Millworks guard station at the front gate.

4) The Pinkerton's, Inc. guard was under order from Bend Millworks not to apprehend any person, but rather to report immediately to the Bend Millworks guard station at the front gate where a guard was located. The authorities could be called when needed from this guard station.

5) The Bend Millworks plant was poorly lit, had numerous stacks of lumber, and was a dark and isolated place at night.

6) Respondent produced no evidence that sexual assaults had occurred in dark and isolated places in Bend at night.

7) The security problems at Bend Millworks were created primarily by young people in the parking lot area and transient people from the railroad track which partially borders the plant.

8) Pinkerton's, Inc.'s security guard job at Bend Millworks was not particularly hazardous, and the guard did not carry a gun. In the last seven years no security guard has been hurt at Bend Millworks.

9) Verna Herb worked for Pinkerton's, Inc., previously as a security guard. She testified that she would not have chosen to perform the security guard position at Bend Millworks due to the poor lighting and the obstructions caused by the stacks of lumber. She felt there was some danger of potential sexual assault. However, she indicated in her testimony and I find that the security guard position at Bend Millworks was no more dangerous than a security guard position in downtown Bend.

ULTIMATE FINDINGS OF FACT

1) Complainant, female, applied for a security guard position at Bend Millworks through Respondent's agent Pinkerton's, Inc., and was denied employment on the basis of her sex.

2) Complainant suffered damages as a result of Respondent's refusal to consider or hire her for the security guard position.

CONCLUSIONS OF LAW

1) Respondent unlawfully discriminated on the basis of sex in prohibiting the employment by Pinkerton's, Inc. of a female security guard to be assigned to Respondent's premises.

2) Complainant suffered damages in back pay, relocation costs, and mental suffering because of Respondent's discrimination against her on the basis of her sex.

3) Respondent has not proved the existence of a gender-related bona fide occupational requirement reasonably necessary to the normal operation of Respondent's business.

4) In this case, the applicable statute is the statute which was in effect in February 1977, when the discriminatory incidents took place. At that time, ORS 659.030 stated:

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

"1) for an employer, because of the race, religion, color, sex or national origin of any individual or of any other person with whom the individual associates, to refuse to hire or employ or to bar or discharge from employment such individual or to discriminate against such individual in compensation or

in terms, conditions, privileges of employment. However, discrimination is not an unlawful employment practice if such discrimination results from a bona fide occupational requirement reasonably necessary to the normal operation of the employer's business, including, but not limited to, discrimination due to the physical requirements of the employment, lack of adequate facilities to accommodate both sexes or special environmental conditions justifying such employment."

OPINION

Bona Fide Occupational Requirement (BFOR)

Respondent asserts the affirmative defense set forth in the language of ORS 659.030, which was in effect in February 1977. The discriminatory incidents in this case took place on or about February 4, 1977. Complainant did not file her complaint until November of 1977, at which time the current language of ORS 659.030 was in effect. The applicable statute is the one in effect at the time the discriminatory incidents took place.

The general policy statement in ORS 659.022 provides background for the interpretation of ORS 659.030:

"The purpose of ORS 659.010 to 659.110 and 659.400 to 659.435 is to encourage the fullest utilization of available manpower by removing arbitrary standards of . . . sex . . . as a barrier to employment of inhabitants of this state; to insure human dignity to all people within this state, and protect their health, safety and morals from the

consequences of intergroup hostility, tensions and practices of discrimination of any kind based on . . . sex . . ." ORS 659.022.

In interpreting ORS 659.030 in *School District No. 1 v. Nilsen*, 271 Or 461,480, 534 P2d 1135 (1975) (hereinafter cited as *Nilsen*), the Oregon Supreme Court stated:

"It is our conclusion that it is not the Commissioner's prerogative to construe the exception of 'bona fide occupational requirement reasonably necessary to the normal occupation of the employer's business' to be of 'extremely limited application'."

Nilsen was a sex discrimination case arising out of the termination of a probationary school teacher because of her pregnancy. The Court pointed out that ORS 659.030, while similar to the federal employment discrimination statute, contained examples of bona fide occupational requirements (the physical requirement of employment, lack of adequate facilities to accommodate both sexes, and special environmental conditions justifying such employment) which were broader than those of federal Equal Employment Opportunity Commission (EEOC) guidelines. The court indicated that it would therefore not be persuaded by the narrow EEOC or federal court interpretations of the bona fide occupational requirement exception under the federal statute, because it was "apparent that the Oregon Legislature did not desire (in enacting ORS 659.030) to take the adamant, unyielding position of the EEOC . . ." in regard to bona fide occupational requirement. 271 Or at 482. The Court concluded that the

"bona fide occupational requirement" (BFOR) exception under the Oregon statute should not be given a narrow or limited application, but rather "must be construed fairly by giving it usual, normal and even-handed application. . . ." 271 Or at 480.

In *Nilsen*, the Oregon Supreme Court quoted *Griggs v. Duke Power Company*, 401 US 424 (1971), which affirms that only job-related exceptions to antibias statutes are allowable. *Griggs, supra*, precisely identifies the mandate of employment discrimination legislation. Congress requires "the removal of artificial, arbitrary and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification." 401 US at 431. Arbitrary barriers are those imposed without consideration of the individual job applicant. "Congress has not required that the posture and condition of the job-seeker be taken into account." 401 US at 436.

Taking all of the above into consideration, *Nilsen, supra*, sets out the following guidelines for the commissioner to follow in appraising the BFOR defense:

1) The Commissioner must construe the defense "fairly, by giving it usual, normal, and even-handed application. . ." 271 Or at 480.

2) Once the employer's discriminatory conduct has been proved, the burden is on the employer to prove the existence of the BFOR which would allow the otherwise discriminatory acts.

3) The BFOR must be proven by a preponderance or outweighing of the evidence.

In an effort to assure the fair, normal and evenhanded application of a BFOR defense, as mandated by *Nilsen*, the Commissioner has established the following criteria:

1) A BFOR must be reasonably necessary to the essence of the business.

2) As alleged BFOR is less stringently scrutinized if the alleged BFOR is necessary to prevent great danger to a large number of people.

3)(a) There must be a factual basis for believing that all or substantially all individuals in the class discriminated against by the BFOR would be unable to perform the job, or

3)(b) It must be shown that it would be impossible or impractical to screen applicants on a individual basis.

I will now apply these criteria to the facts in this case.

First, in asserting the affirmative defense of BFOR, Respondent must show that the BFOR is reasonably necessary to the essence of its business. Respondent Bend Millworks was in the wood products business and was contracting with Pinkerton's, Inc. for security guards to protect its property from damage. Respondent has not claimed that women would protect Respondent's property less effectively than would men.

Second, the scrutiny of the alleged BFOR is less stringent where failure to screen applicants according to the

BFOR would result in great danger to a large number of people. While any inability of the security guard to perform due to her gender could result in loss or damage of property, it would not endanger the lives of many people. A less stringent application of the BFOR tests is not, therefore, required.

Third, there must be proof of a factual basis for believing that (a) all or substantially all women would be unable to perform safely and efficiently the security guard duties, or that (b) it would be impossible or impractical to screen applicants individually.

Concerning (a): The record reflects that Respondent's fear of sexual attack on a female guard was hypothetical. No security guard at Bend Millworks had been attacked or hurt for at least seven years. The record reflects that even Respondent's president felt that some women who had sufficient training would be able to perform the security guard position.

Concerning (b): Respondent does not contend that Pinkerton's Inc. was unable to screen applicants for Respondent on an individual basis. Even though Respondent's president indicated that some women would have been able to perform the security guard position safely had they had police training, women were not given an opportunity to show that they possessed the requisite qualifications. All women were prohibited from employment in the security guard position by Respondent. The record reflects that the training, qualifications, experience and the individual characteristics of the Complainant would have qualified her for the position had she been given individual consideration.

Respondent relies on the statutory BFOR example that permitted an employer to discriminate on the basis of sex where it was justified by "special environmental conditions." Mr. Anderson, personnel manager for Respondent, testified that in the 50 job classifications at Bend Millworks there is no discrimination on the basis of sex because, although many jobs at Bend Millworks are dangerous, the danger is the same for men and women. Respondent contends, however, that the security guard position has special environmental conditions which justify discrimination on the basis of sex because they require a security guard to patrol a dark and isolated plant alone. These conditions are significantly different from those set forth in *Dothard v. Rawlinson*, 433 US 321(1977), where because of the deplorable physical condition of the Alabama Maximum Security Male Penitentiaries, the Court did not strike down a rule which prohibited women from contact positions there.

Furthermore, the Supreme Court qualified its decision in *Dothard* with the following statement:

"In the usual case, the argument that a particular job is too dangerous for women may appropriately be met by the rejoinder that it is the purpose of Title VII to allow the individual women to make that choice for herself." 433 US at 335.

The Supreme Court has thereby affirmed that it is the individual job applicant who may weight and accept risks when job effectiveness is not in question. A sex-related BFOR may not be justified by the mere argument that women should not work alone in the

dark. *Weeks v. Southern Bell Telephone*, 408 F2d 228 (5th Cir 1969), explicitly rejected this type of justification:

"... Title VII rejects... this type of romantic paternalism as unduly Victorian and instead vests individual women with the power to decide whether or not to take on unromantic tasks. Men have always had the right to determine whether the incremental increase of remuneration for strenuous, dangerous, obnoxious, boring or unromantic tasks is worth the candle. The promise of Title VII is that women are now to be on equal footing. We cannot conclude that by including the BFO[R] exception Congress intended to renege on that promise." 408 F2d 236.

Rosenfeld v. Southern Pacific, 444 F2d 1219 (9th Cir 1971), illustrates the Ninth Circuit Court of Appeals' consistent rejection of the argument that women as a class are "physically unsuited" for certain kinds of work. In that case, the Court characterized the employer's argument, noting there was no contention:

"that the sexual characteristics of the employee are crucial to the successful performance of the job... nor is there need for authenticity or genuineness... Rather, on the basis of general assumption regarding the physical capabilities of female employees, the company attempts to raise a commonly accepted characterization of women as the 'weaker sex' to the level of a BFO[R]." 444 F2d at 1224.

This characterization was found to be statutorily unacceptable.

In conclusion, it is evident that Complainant Anderson was denied employment for which she was eminently qualified. When Bend Millworks Company reiterated that her application would not even be considered, thereby ruling out any individual evaluation, unlawful discrimination occurred. Finally, Respondent has failed to establish by a preponderance of the evidence the existence of a bona fide occupational requirement reasonably necessary to the normal operation of Respondent's business which would justify otherwise unlawful discrimination on the basis of sex.

Damages

Complainant attempted to obtain security work in the Bend area with no success. The one position offered her was unsatisfactory because it was not full-time. Complainant therefore returned to Utah to look for security work and was successful. Wages from the security position Complainant took in Utah mitigate the damages which occurred as a result of Respondent's unlawful employment practice of discrimination based on sex. Therefore, the relocation costs Complainant incurred in connection with such mitigation are rightfully included in the damage award. Those damages include \$74 for an airline ticket, \$246 for a moving van, and \$97.20 for motel accommodations, totaling \$417.20.

Because the parties stipulated to a back pay award of \$765 in the event unlawful employment practices were proved, the damage award for back pay is \$765.

Complainant has asked for damages of \$2000 for mental suffering. The record reflects that Complainant

was not subjected to verbal abuse, direct ridicule, embarrassment or public humiliation. What the Complainant did suffer was anger and indignation that her qualifications would not be considered solely because she is female. Complainant felt she was treated unfairly and experienced the added frustration of being able to do nothing about it. She was told that Pinkerton's, Inc. was under direct orders from Respondent not to use any women as security guards at Respondent's plant. Yet when Complainant contacted Respondent, she was informed Pinkerton's, Inc. hired all the security guards. Complainant also found the situation emotionally trying in that she felt like an outcast in her own home town.

The Supreme Court of Oregon has indicated that in an appropriate case damages may be awarded to a complainant for mental suffering. In *Fred Meyer, Inc. v. Bureau of Labor*, 39 Or App 253, 592 P2d 564 (1979), involved a 16-year-old boy on his first job who was subjected to vicious and outrageous racially-motivated verbal abuse by a supervisor, the court upheld the Commissioner's award of \$4000 for mental suffering. Clearly, Complainant Anderson was not subjected to this exaggerated type of abuse.

The Supreme Court in *School District No. 1 v. Nilsen*, supra, stated:

"There was no evidence of humiliation. No one reviled the Complainant . . . ridiculed or embarrassed her . . . The best that can be said of Complainant's proof is that she found the situation emotionally trying because when she found the rules required her

resignation, she became insecure and upset about what the future would bring . . . In effect, she was placed in a position of conflict and financial insecurity and this caused anxiety." 271 Or at 484-485.

The court in *Nilsen* disallowed an award for damages for mental suffering and then distinguished the case of *Williams v. Joyce*, 4 Or App 482, 479 P2d 513 (1971), in which an award for \$200 was made:

"By way of comparison, see *Williams v. Joyce*, 4 Or App 482, 479 P2d 513, 40 ALR 3d 1272 (1971), in which damages for humiliation were approved where rental of living premises to a black was refused because she was black. An award would be proper in such a case because of the indignity visited from the inference that black people are inferior. There was no similar inference which could be drawn in the present case [*Nilsen*]. Thus with respect to the individual Complainant before us, money damages for humiliation should have been denied." 4 Or App at 486.

In *Montgomery Ward v. Bureau of Labor*, 42 Or App 159, 600 P2d 542 (1979), the Oregon Court of Appeals found that not all discrimination necessarily creates an inference of indignity or inferiority. While Complainant Anderson did not suffer humiliation, she clearly did suffer "from [an] indignity visited from the inference that [women] are inferior" analogous to the suffering of the Complainant in *Williams*. The Oregon Legislature, in enacting ORS chapter 659, included sex as one of the characteristics to be protected from

discriminatory practices. In so doing, the Legislature included women among those entitled to the human dignity insured all people within this state. To conclude that women rejected for employment on the basis of their sex do not suffer indignity would be to defeat the legislative purpose so clearly stated in ORS 659.022. And this case is more than a simple refusal to hire. Complainant was told she could not have a job in her chosen profession, despite her qualifications, solely because she is female. She was thus made to suffer the indignity visited from the inference that she is inferior to all men. The extent of this indignity is indistinguishable from that of *Williams*. The Oregon Court of Appeals in *Williams* clearly supports the authority of the Commissioner to award damages for mental suffering in this case and concludes as follows:

"that in the absence of any contention that the award for humiliation was excessive, the trial court erred in setting it aside.

"In *Antidiscrimination Laws in Action in New Jersey: A Law-Sociology Study*," 19 Rutgers L Rev 189, 242-43 (1965), Professor Blumrosen discussed the question presented here with regard to the New Jersey statutes:

"The question which arises is whether the Division on Civil Rights is empowered to award such damages (for humiliation and mental suffering). The language of the statute would seem to permit such damages. . . . The lack of pecuniary standards by which to measure these damages might lead a

court to hesitate before allowing administrative assessment of them. However, there is no logical reason to treat them as anything but actual compensation for actual harm . . ." 4 Or App at 504.

ORS 659.022(2) provides for an "adequate remedy for persons aggrieved by certain acts of discrimination." Discrimination based upon sex is one of those discriminatory acts set forth in ORS 659.022(2).

In *Williams*, the Court of Appeals further held that the Commissioner has authority to award damages for mental suffering which is a "direct proximate and natural result of an infringement of a legal right." 4 Or App at 504. The very purpose of ORS chapter 659, as set forth in ORS 659.022, is to protect the right to human dignity by removing arbitrary standards based on sex:

"The purpose of ORS 659 . . . is to encourage the fullest utilization of available manpower by removing arbitrary standards of . . . sex . . . as a barrier to employment of the inhabitants of the state; to insure human dignity to all people within this state, and protect their health, safety and morals from the consequences of intergroup hostility, tensions and practices of discrimination of any kind based on . . . sex . . ."

While Complainant in this case has not suffered exaggerated humiliation, she has suffered the very indignation and damage to self-esteem that civil rights legislation was intended to prevent. The restoration of back pay and reimbursement of out-of-pocket expense incurred in security work does

not make whole the Complainant's loss of human dignity. Therefore, based on the facts in this case, Complainant is awarded \$300 for mental suffering.

ORDER

NOW, THEREFORE, as provided by the provisions of ORS 659.060(3) and 659.010(2) and in order to eliminate the effects of the unlawful practices found and to protect the rights of other persons similarly situated, Respondent is ordered to:

1) Deliver to the Portland Office of the Bureau of Labor and Industries within thirty (30) days of the execution of this Order, a certified check payable to MILDRED ANDERSON, in the gross amount of ONE THOUSAND FOUR HUNDRED EIGHTY-TWO DOLLARS and TWENTY CENTS (\$1,482.20). This amount includes:

- (a) \$765.00 - Back Wages
- (b) \$417.20 - Travel Expenses
- (c) \$300.00 - Mental Suffering

2) Respondent is ordered to Cease and Desist from discriminating against any applicant for employment because of the applicant's sex.

**In the Matter of
FRONTIER CONSTRUCTION COM-
PANY, an Oregon corporation,
Respondent.**

Case Number 31-78
Final Order of the Commissioner
Mary Wendy Roberts
Issued November 5, 1979.

SYNOPSIS

Where Complainant refused to work a backhoe in a slide area in reliance upon the expert opinion of an independent soils engineer that the area was unstable and life-threatening, and where he had no means of curing the hazard, the Commissioner found that Respondent employer constructively discharged Complainant for opposing an unsafe practice (1) by directing him to leave the work site if he would not return to work, and (2) by not providing safe alternative work, in violation of ORS 654.062(5)(a). The Commissioner awarded Complainant \$2,386.48 in back pay for the period Complainant was unlawfully prevented from working, and ordered Respondent not to retaliate against employees for opposing safety hazards. ORS 654.010; 654.062(5)(a); 659.010(2); 659.060(3).

The above-entitled matter came on regularly for hearing before Dale A. Price, designated as Presiding Officer by the Commissioner of the Bureau of Labor and Industries. The hearing was held in Room 12, State Office Building, 1400 S.W. Fifth Avenue, Portland, Oregon, on November 17, 1978.

Complainant was present. The Agency was represented by Randolph B. Harris, Assistant Attorney General, and Respondent was represented by Roger Luedtke, Attorney at Law. Having considered the entire record, I, Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries, make the following Findings of Fact, Conclusions of Law, Opinion and Order.

FINDINGS OF FACT - PROCEDURAL

1) At all times material herein, Respondent Frontier Construction Company was an Oregon corporation doing construction work in the State of Oregon, and, as an employer, was subject to the provisions of ORS 659.010 to 659.110.

2) On June 30, 1977, William Junkman filed a verified complaint with the Civil Rights Division of the Oregon Bureau of Labor alleging that he had been discharged from his employment as a consequence of his objection to the existence of a safety hazard on his job.

3) Following the filing of Mr. Junkman's verified complaint, the Civil Rights Division investigated the allegations in the complaint and determined that substantial evidence existed to support the Complainant's allegation that he had been discharged because of his opposition to a safety hazard.

4) Thereafter, the Civil Rights Division attempted to reach an informal resolution of the complaint by conference, conciliation and negotiation, but was unsuccessful in these efforts.

FINDINGS OF FACT - THE MERITS

1) At all times material herein, Complainant was a qualified crane operator capable of operating other heavy equipment.

2) On January 1, 1977, Complainant was working for Respondent at Respondent's Haskins Creek project, where his supervisor was Don Maynard.

3) On or about June 16, 1977, Respondent's Project Coordinator, Henry Birenbaum, came to Haskins Creek to seek an equipment operator from the Haskins Creek project for a brief assignment to repair a slide area near Toledo, Oregon. Donald Maynard offered to send Complainant to the Toledo site.

4) Complainant went to the Toledo job site on June 20, 1977, and reported to Bill Blankenship, Respondent's foreman.

5) Bill Blankenship was not a civil engineer nor a soils specialist. His experience included carpentry and some excavation work on the construction of sewage and water-treatment plant sites.

6) Upon reporting to the Toledo job site, Complainant began working on a back-hoe, under Mr. Blankenship's supervision, to repair the slide area. When Complainant began digging with a back-hoe where Bill Blankenship told him to dig, his initial strokes broke water pipes, worsening the slide area which had at least in part been caused by water beneath the surface of the earth.

7) Throughout his brief employment at the Toledo job site, Complainant was concerned about what he

deemed the absence of a planned approach and inadequate concern for safety of the workers. Complainant was particularly concerned about danger from potential landslides. Complainant mentioned these concerns to Bill Blankenship on several occasions before June 29, 1977, but Mr. Blankenship assured Complainant that everything was under control and that his apprehension was unwarranted.

8) The City of Toledo employed, at times material herein, a staff engineer, Jerry Sessums, to oversee the repair work at the Toledo site where Complainant worked. Mr. Sessums was schooled in civil engineering technology and was employed by Barnett and Associates, an engineering firm specializing in soils and geologic foundations, from 1974 through the period here relevant. Mr. Sessums is an expert in the field of soils and geologic foundations.

9) On June 29, 1977, Complainant was working on a quay-way on the hillside when one side of his back-hoe settled quickly, suggesting to Complainant that the loose material on the hill was slipping. Complainant got off his machine and spoke to Jerry Sessums, who had no vested interest in the project. He was told by Mr. Sessums that the work area was extremely unsafe due to the presence of tension cracks, which Mr. Sessums showed Complainant, and due to the failure of Bill Blankenship to plan for the removal of the over-burden, or loose material above the slide plane, which could potentially slide down and bury the Complainant and his machine. Mr. Sessums pointed out some material which had just fallen. He further stated

to Complainant that he would not himself continue to work under these conditions until the material above had been removed. The work site was, at this point in time, unsafe.

10) Complainant had no means of curing the hazard at the Toledo site himself.

11) Complainant relied upon Jerry Sessums' judgment and took his machine out of the quay-way at a time when Bill Blankenship was not at the site. Complainant then went to a phone booth and attempted to contact company officials to report the situation.

12) When Bill Blankenship returned to the site and found that Complainant's machine had been removed, he located Complainant and asked him to return to work in the same location on the quay-way. When Complainant refused, citing the hazard, Bill Blankenship stated that Complainant might as well leave the job site if he would not operate the back-hoe, since there was no other work to be done.

13) Complainant left the Toledo job site June 29, 1977, and did not return to it, to the Haskins Creek project, or to any other of Respondent's job sites. There was work available operating heavy equipment at the Toledo site only through August 4, 1977. Complainant was not recalled to the Toledo job site at any time between June 29, 1977, and August 4, 1977.

14) On June 30, 1977, Complainant filed a complaint with the Accident Prevention Division (ADP) of the Oregon Workers' Compensation Board. The APD inspected the Toledo job site on July 5, 1977, after continuing work

in the slide area had been performed by Mr. Blankenship, and found no slide-related hazard at that time.

15) Complainant's last hourly rate of pay while employed by Respondent was \$12.97 per hour. Complainant worked 8 hours per day. Complainant lost 23 days of work.

ULTIMATE FINDINGS OF FACT

1) On June 29, 1977, an on-site, unbiased staff engineer expert, Jerry Sessums, judged Respondent's Toledo work site to be extremely dangerous due to potentially lethal and imminent landslide hazards. Complainant had no means of curing the hazard himself. Complainant reasonably relied upon Mr. Sessum's analysis of the hazard and took his machine out of the danger zone to wait his supervisor's return and the alleviation of the hazard.

2) Respondent's foreman, Bill Blankenship, returned to the site, but refused to direct efforts to make the work site safe or to provide alternative safe work for Complainant. Mr. Blankenship directed Complainant to leave the job site if he did not wish to work under the hazardous conditions as they were on June 29, 1977. Complainant was thereby constructively discharged by Mr. Blankenship due to Complainant's opposition to the safety hazard.

3) Complainant left the job site on June 29, 1977. Mr. Blankenship continued Complainant's work himself after Complainant left the site, and the area was made safe by the removing of earth prior to July 5, 1977, when the APD inspected the site. Complainant was not recalled to work subsequent to

the removal of the hazard and the APD inspection.

4) As a direct consequence of Respondent's unlawful action, Complainant lost wages from July 5, 1977, the day APD inspected the work site, through August 4, 1977, when the Toledo excavation was completed. The amount of wages lost was Two Thousand Three Hundred Eighty-Six Dollars and Forty-Eight Cents (\$2,386.48).

CONCLUSIONS OF LAW

1) The actions of Respondent's foreman, Bill Blankenship, are imputed to the Respondent.

2) Respondent violated ORS 654.062(5)(a) in that it discharged Complainant because Complainant opposed a practice forbidden by ORS 654.010:

a) Respondent's refusal to make Complainant's imminently dangerous, potentially lethal work place safe or to provide alternative safe work constitutes Respondent's failure to furnish a safe place of employment, a practice forbidden by ORS 654.010.

b) Complainant's withdrawal from work because of an unbiased on-site expert's opinion that an imminent, potentially lethal hazard existed, which Complainant could not cure, constitutes opposition to Respondent's practice forbidden by ORS 654.010.

c) Respondent's directing Complainant to work at the unsafe site or to leave constitutes constructive discharge of Complainant because of Complainant's opposition to Respondent's practice forbidden by

ORS 654.010. This constructive discharge satisfies the discharge requirement of ORS 654.062(5)(a).

3) Because Complainant opposed Respondent's failure to furnish a safe work place by withdrawing from the work site before an APD inspection, Complainant is entitled to the limited damage remedy of back pay from July 5, 1977, the day the APD inspected the work site, through the last day Complainant would have worked at the Toledo site, August 4, 1977.

OPINION

Violation of ORS 654.062(5)(a)

There are three elements of a violation of ORS 654.062(5)(a):

A) Complainant must have opposed

B) a practice forbidden by ORS 654.001 to ORS 654.295, and

C) Respondent must have barred, discharged from employment, or otherwise discriminated against Complainant because of Complainant's opposition.

1) The Requisite "opposition"

The first issue in this case is whether Complainant Junkman's withdrawal from work constitutes the opposition required by ORS 654.064(5)(a). In arguing for a negative response, Respondent relies upon the reasoning in *Pintok v. Employment Division*, 32 Or App 273 (1978) (hereinafter cited as *Pintok*). In *Pintok*, the Oregon Court of Appeals held in part that refusal to do required work does not constitute opposing a practice forbidden by ORS chapter 654. The refusal in *Pintok*, however, can be clearly distinguished

from the withdrawal in the instant case in the following ways:

a) In *Pintok*, the referee found that the employee had the means to cure the safety problem. Complainant Junkman, on the other hand, did not.

b) In *Pintok*, the employee was threatened with sinus and throat problems, which could develop over a period of time. Complainant Junkman, in contrast faced the imminent danger of being buried alive.

c) In *Pintok*, the employee himself judged the working environment unsafe and walked off the job. Complainant Junkman, however, was in a unique position, having the benefit of counsel from a staff engineer who had been regularly present on the work site and had no reason to side with either employee or employer. This expert, Jerry Sessums, observed what he deemed an extremely dangerous, potentially fatal, imminent hazard. Mr. Sessums told Complainant that the quay-way upon which he was working was unstable and extremely dangerous. He showed Complainant the tension cracks, evidence that a large amount of over-burden material was moving and could easily fall at any time upon Complainant in his work area. Mr. Sessums pointed to some material which had just fallen as further evidence of an unstable situation. Therefore, in concluding that the danger was too serious and imminent to allow him to wait for an APD evaluation before withdrawing from work, Complainant relied not upon just his own judgment, but upon that of an unbiased on-site engineer.

Each of the above distinctions between *Pintok* and the instant case is

significant. The refusal to work in *Pintok*, where the hazard perceived by the employee was minor and the means to alleviate it were at the disposal of the employee who chose instead to leave the area, is therefore not sufficiently analogous to the withdrawal from work in the instant case, where the hazard perceived by an unbiased expert might have proven deadly at any time and where no means to alleviate it were within Complainant's control. The decision in *Pintok* does not apply to the instant case.

Where a worker is in imminent danger of death or serious bodily harm and the protection afforded through an agency such as the APD is inadequate because of the imminence of danger, and where the employee has no means to cure the safety problem, the employee may withdraw from work without penalty for such withdrawal. In such limited circumstance, the withdrawal constitutes the requisite opposition described in ORS 654.062(5)(a). The protection afforded by this interpretation of opposition is limited, however, in that the employee cannot refuse alternative safe work or demand pay from the employer under ORS 654.062(5)(a) during the interim period before an official safety inspection by an agency such as the APD.

2) The Practice Forbidden by ORS 654.001 to 654.295

The second question in this case is whether Complainant Junkman's opposition was to a practice forbidden by ORS 654.001 to 654.295. I find that it was. The forbidden practice in this case is described by the language of ORS 654.010 to 654.015:

"Every employer shall furnish employment and a place of employment which are safe and healthful for employees, and shall . . . use such . . . safeguards . . . and . . . practices as are reasonably necessary to render such employment and place of employment safe and healthful. No employer shall . . . maintain . . . any place of employment which is unsafe or detrimental to health."

In all but the most dire of situations, an employee must rely upon the APD of the Worker's Compensation Board to assess the safety of the employee's workplace. The employee's perception of unsafeness justifies notification of the APD, but not the further step of walking off the job before an APD evaluation. However, Complainant Junkman was in a most dire situation. He was working in a place which imposed an imminent risk of death or serious bodily harm. In coming to this conclusion, he relied not on just his own judgment, but also on that of the only unbiased expert available. In these unusual and extreme circumstances, Respondent's failure to remove the hazardous over-burden evident on June 29, 1977, or to provide alternative safe employment, constitutes a violation of its duty to furnish a safe place of employment.

3) Discharge From Employment Because of Opposition

The third and last element which must exist in a violation of ORS 654.062(5)(a) is the employer barring, discharging from employment, or otherwise discriminating against the employee because of the employee's opposition to, in this case, a safety

hazard. Respondent herein did not actually bar or terminate Complainant's employment. However, Respondent did, through its employee Bill Blankenship, direct Complainant to leave the work site if he would not cease his opposition to Respondent's safety hazard (*i.e.* return to the unsafe work). Respondent should have made Complainant's work site safe or allowed Complainant to do alternative safe work. Respondent's directing Complainant to work at the unsafe site or leave constitutes constructive discharge of Complainant which satisfies the third requirement of ORS 654.062(5)(a).

Damages

Complainant Junkman lost wages from the day he withdrew from the work site, June 29, 1977, to August 4, 1977, the last day he could have worked at the Toledo work site. There was no alternative work available to Complainant during this time. Because the Complainant's opposition to Respondent's failure to furnish a safe work place took the form of a withdrawal from the work site before an APD inspection, Complainant is afforded the limited protection of back pay from July 5, 1977, the day the APD inspected the worksite, to August 4, 1977.

ORDER

NOW, THEREFORE, as authorized by ORS 659.060(3) and ORS 659.010(2) and in order to eliminate the effects of the unlawful practices found and to protect the rights of others similarly situated, Respondent is ordered to:

1) Deliver to the Portland office of the Bureau of Labor and Industries within fifteen (15) days of the execution of this Order a certified check payable to WILLIAM JUNKMAN in the amount of TWO THOUSAND THREE HUNDRED EIGHTY-SIX DOLLARS AND FORTY-EIGHT CENTS (\$2,386.48) representing back pay for the period for which Complainant was unlawfully prevented from working.

2) Take whatever steps are necessary to insure that workers opposing safety hazards in the future shall not have their rights to work in any way prejudiced by such opposition.

In the Matter of CITY OF NORTH BEND, Oregon, Respondent.

Case Number 42-78
Final Order of the Commissioner
Mary Wendy Roberts
Issued January 25, 1980.

SYNOPSIS

Where Respondent's Director of Public Works learned as a result of an Accident Prevention Division (APD) inspection that a previous directive for employees not to enter the sewer system pending correction of safety hazards had not been followed; where the director laid off seven workers until the hazards were corrected or alternate safe work was found; where all the

workers were returned to work; and where there was no evidence that Respondent knew that an employee had caused the APD inspection, the Commissioner held there was no violation of ORS 654.062(5). The Commissioner found that a letter to a local newspaper from a worker's wife protesting the layoff could not legally form the basis for a claim of retaliation by that worker, because the statute does not protect an employee from the result of a complaint not his own. The Commissioner dismissed the specific charges. ORS 654.062(5)(a) and (b); 659.060(3).

The complaints in the above-entitled matter were filed pursuant to the provisions of ORS 654.062(5)(b), and the hearing was conducted under the authority and provisions of ORS 659.060.

The contested case in the above-entitled matter came on regularly for hearing before R. D. Albright, designated as Hearing Officer in this matter by Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries. The hearing was held on January 25, 1979, at the City Council Chambers in North Bend, Oregon. The Complainants were present and testified during the course of the hearing. The case for the Bureau of Labor and Industries was presented by Michael J. Tedesco, Assistant Attorney General, and the case for the Respondent was presented by Robert L. Thomas, Attorney at Law. Also present during this hearing was Etta Creech, Hearings Clerk.

Having considered the entire record in this matter, evidence duly

received and arguments of counsel, I, Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries, make the following Findings of Fact, Conclusions of Law, Opinion and Order.

FINDINGS OF FACT

1) At all times material herein, Respondent City of North Bend, Oregon, was and is a city incorporated under Oregon law and an employer subject to the provisions of ORS 654.001 to 654.295 and 659.010 to 659.110.

2) On or about February 26, 1976, Donald Middleton, Russell J. Anderson, Henry Bowden, Donald Lyons, Jack Graves, and Dick Morana filed verified complaints with the Bureau of Labor and Industries. Messrs. Middleton, Anderson, Bowden, Lyons, Graves, Morana, and Brant, Complainants herein, alleged that the Respondent discriminated against them relating to the terms and conditions of their employment.

3) In the event Respondent is found to be in violation of ORS 654.062(5)(a), Complainants' back pay awards are as follows:

Paul Brant \$548.00
Donald Middleton 548.00
Jack Graves 78.40
Donald Lyons 48.72
Dick Morana 48.72
Henry Bowden 44.00
Russell Anderson 43.28

NOTE: All parties stipulated to the above Findings of Fact numbers one, two and three.

4) At a meeting in late 1975, Respondent's street maintenance crew complained to Al Roth, Respondent's

City Administrator, that the crew did not have the gas tester and protective clothing needed for safe entry into sanitation sewers. In response, Roth informed the crew that a gas tester was available at the Sewer Treatment Plant. However, when the crew request use of the tester, the crew was told that it was for treatment plant use only.

5) Complainant Middleton, acting as Safety Coordinator for the street crew, later notified Paul Sterns of the Oregon Accident Prevention Division (OAPD) of health and safety problems concerning the street crew's sewer work.

6) As a result of Middleton's notification, the OAPD inspected the city maintenance department's work-place(s) on January 12, 1976. On February 4, 1976, OAPD cited Respondent for various violations of the Oregon Safe Employment Act, ORS chapter 654. On the citation, OAPD termed sewer maintenance violations "serious."

7) In response to the citation pointing out that requiring workers to enter the sewer manholes under current conditions was a violation of law, William Bourne, Respondent's Director of Public Works, told Harold Gammon, the street maintenance crew's supervisor, that workers were not to enter the sewers until the safety problems had been corrected.

8) Due to the recent loss of his wife and daughter, Mr. Gammon was suffering from substantial mental and physical problems and therefore failed to pass Bourne's order on to the street maintenance crew.

9) On February 23, 1976, the OAPD held a follow-up inspection and found that even though the sewer safety problems had not been corrected, street crew workers were still being required to enter sewer manholes. The inspection team met with Mr. Bourne to inform him that the street maintenance crew could not enter the sanitary sewers until the safety problems had been corrected. Mr. Bourne did not know until then that his order forbidding such entry was not being followed. During this meeting, Mr. Bourne consulted by telephone with Al Roth, the City Administrator, who later joined the meeting.

10) At the February 23 meeting between the OAPD inspection teams and Mr. Bourne, Mr. Bourne became very angry that the workers were still entering sewer manholes despite his earlier order to the contrary.

11) At the end of the meeting, Mr. Bourne laid off all seven Complainants, the entire street maintenance crew.

12) The duties of the laid-off workers included maintaining the city sanitary and storm sewer system, maintaining signs, cutting excess brush, sweeping streets, maintaining the airport, and other general work required to keep up public property in the city. The street sweeping and airport maintenance duties were performed by two workers who never had occasion to enter the sewer system. Not even all the sewer work required entry into a sewer. However, it was difficult to predict, before a sewer problem arose, whether or not curing it would require sewer entry.

13) At the time Complainants were laid off, there was work available for at

least some of the seven Complainants that did not require sewer entry.

14) Either the same day as or the morning following the aforementioned meeting, the OAPD contacted Mr. Bourne and made clear to him that the only work that could not be done was that which required entering the sewer manholes. Having identified some alternative safe work, Mr. Bourne began calling the street maintenance crew back to work in order of seniority. Five of the crew were back to work within two days, and the other two were back in three weeks.

15) At no time was Respondent informed that the OAPD's inspections were the result of an employee complaint. Although Respondent's City Manager, Al Roth, certainly knew of the street crew's complaints made directly to him, Respondent did not know of Complainant Middleton's complaint to the OAPD.

16) Before March 2, 1976, Complainant Morana assumed the street maintenance supervisor's position when the supervisor was absent. When this occurred, Mr. Morana began receiving an extra 10 percent in pay on the second day of the supervisor's absence. The applicable union contract stipulated this increase in pay and also provided that the senior worker on the job would assume the acting supervisor position. Complainants Morana and Lyons were equal in seniority.

17) On February 28, 1976, a letter from Complainant Morana's wife appeared in the Public Forum section of the local newspaper. The letter was a direct criticism of Respondent's actions in laying off Complainants.

18) March 2, 1976, the next working day after Ms. Morana's letter appeared in the newspaper, Mr. Bourne informed Complainant Lyons that he was to assume the supervisor's duties when the supervisor was absent. Complainant Morana estimate that he lost approximately \$250 as a result of Mr. Lyons replacing him as first standby for the supervisory position.

ULTIMATE FINDINGS OF FACT

1) In later 1975, Complainants, as a group, complained about sewer safety and health problems to Respondent's City Manager, Al Roth. Their safety representative, Don Middleton, later complained to the OAPD about these problems.

2) Respondent's employee Roth knew of the group complaint, as it was made to him. Respondent did not know that a complaint instigated the first OAPD inspection or that such complaint was made by Complainant Middleton.

3) Respondent laid off all seven workers on the street maintenance crew on February 23, 1976, failed to call back two of those workers for three weeks, and demoted Complainant Morana from first to second standby street maintenance supervisor on March 2, 1976.

4) There is not substantial evidence that Respondent laid off the street maintenance crew on February 23, 1976, because of either the group complaint which had been made at least two months earlier or the OAPD complaint made by the group's representative at least one-and-one-half months earlier. Rather, the evidence indicates and I so find that the reason

for the crew layoff was William Bourne's anger at the fact that his earlier order that the crew not enter sewers had not been carried out, and his frustration at the failure of his subordinates to handle safety and health problems. He also believed that he needed some time to identify alternative safe work for the crew and to make sure that continued violations did not occur.

CONCLUSIONS OF LAW

1) Respondent is legally responsible for the acts of its employee, William Bourne, described herein.

2) Respondent's laying off Complainants and continuing the layoff of two Complainants for three weeks were not unlawful practices under ORS 654.062(5)(a), because they were not done in retaliation for Complainants' complaints concerning health and safety problems.

3) Respondent's demoting Complainant Morana was not an unlawful practice under ORS 654.062(5)(a) because that statute does not protect an employee from the result of a complaint not his own.

OPINION

In order to prove their claim under ORS 654.062(5)(a), Complainants in this case must offer substantial evidence of four elements: an employee complaint, Respondent's knowledge of such complaint, Respondent's discriminatory act against the employees/Complainants, and a direct causal relationship between Respondent's discriminatory act and the employee complaint. The lack of adequate proof of the second and last elements causes this claim to fail.

The complaint by Complainant Middleton which set events into motion which eventually led, in an attenuated sense, to the layoffs was not in fact even the complaint of which Respondent had knowledge. Even if it had been, I cannot find sufficient evidence that employee complaint was either the motivating factor or the immediate cause of the layoff. Although it is true that Complainants would probably not have been laid off but for the complaint by their representative Middleton, which resulted in the OAPD's inspection and the subsequent employer liability and anger which led to the lack of work and layoffs, this chain does not provide a direct enough causal relationship to support a finding of a violation under ORS 654.062(5)(a). The motivating factor and immediate cause of the layoff was instead the Respondent's anger and frustration at its continuing problems with not the complaints, but the violations themselves. As far as Respondent's employee Bourne knew when he ordered the layoffs, either the street maintenance crew had disobeyed his order to not enter the sewers or the street crew supervisor had failed to effectively convey or enforce the order, much less take measures to obtain the necessary safety equipment. Either interpretation led to Mr. Bourne's anger at the breakdown of his chain of command and to his response that he would simply have to suspend the crew's work while he identified alternative safe work and took measures to insure that adequate safety equipment was obtained and further risk of penalty prevented when the crew resumed entering the sewers. The layoff was perhaps an arbitrary or capricious response to anger and

frustration, but it was not a reprisal for an employee complaint and therefore not illegal under ORS 654.062(5)(a).

Neither has substantial evidence been presented that the failure to call back two of the seven workers for three weeks, when the other five were called back almost immediately, was because of employee safety and health complaints. Although one of the two workers laid off for three weeks could have been characterized as the instigator of the employee complaints and therefore a potential target for retaliation, the other worker was not so distinguished. No evidence was offered to rebut the Respondent's assertion that it called back workers on a seniority basis, nor was persuasive evidence offered that there was ample work for all seven, rather than just five, of the street crew workers, before the last two were called back to work.

ORS 654.062(5)(a) does not bar an employer from discriminating against an employee because someone other than the employee has complained about violations of ORS chapter 654. It protects an employee from discriminatory actions in response to the employee's complaint, and only to the employee's complaint:

"No person shall . . . discriminate against any employe . . . because such employe has . . . made any complaint . . . related to ORS 654.001 to 654.295 . . ." (Underlining added.) ORS 654.062(5)(a)

No evidence was offered that Ms. Morana's letter was in fact her husband's complaint. The question of whether the evidence supports a finding that Complainant Morana was demoted in response to his wife's letter is

therefore not reached, as ORS 654.062(5)(a) does not protect Complainant Morana from the consequences of Ms. Morana's complaint.

ORDER

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

In the Matter of
JOSEPH LAWRENCE GAUDRY,
dba The Keyhole Kitchen and The
Keyhole Supper Club, Respondent.

Case Number 14-78

Final Order of the Commissioner

Mary Wendy Roberts

Issued February 7, 1980.

SYNOPSIS

Where Respondent – who operated a restaurant and bar, a place of public accommodation within the meaning of ORS 30.675 – had a policy to limit the admission of black or racially mixed couples through the subterfuge of a stringent age and identification check by security personnel; and where Respondent, through an agent, denied white female Complainant admittance to the establishment because of the race and color of

her black male companion, Respondent violated ORS 30.670. Finding that emotional distress was the most usual result of discrimination in public accommodations and that the duration of the discriminatory incident was less indicative of the severity of emotional upset than was the continuing nature of the upset, the Commissioner awarded Complainant \$2,500 in damages. The Commissioner ordered Respondent to post a notice in every establishment he maintained in Oregon regarding the law on public accommodation discrimination, and ordered Respondent to cease restricting admittance on the basis of race and color. ORS 30.670; 30.675; 471.130; 659.010(2) and (14); 659.045(1); 659.060(3).

The contested case in the above-entitled matter came on regularly for hearing before Neil H. Running, designated as Presiding Officer by the Commissioner of the Bureau of Labor and Industries. The hearing was convened at 9:30 a.m. on January 23, 1979, in Room 216 of the State Office Building in Portland, Oregon, and reconvened at 9:30 a.m. on March 26, 1979, in Room 514 of the State Office Building in Portland, Oregon. Complainant was present and testified during the course of the hearing. The Bureau of Labor and Industries was represented by Thomas E. Twist, Assistant Attorney General, and Respondent was represented by Howard R. Hedrick, Attorney at Law. Also present during this hearing was Etta Creech, Hearings Clerk.

Having considered the entire record in this matter, evidence duly

received and arguments of counsel, I, Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries, make the following Findings of Fact, Ultimate Findings of Fact, Conclusions of Law, Opinion and Order.

FINDINGS OF FACT – PROCEDURAL

1) At all times material herein Respondent Joseph Lawrence Gaudry was the proprietor, liquor licensee and operator of the business known as The Keyhole Kitchen and The Keyhole Supper Club, a place of public accommodation as defined in ORS 30.675. As such Respondent was subject to the provisions of ORS 659.010 to 659.110.

2) On or about October 6, 1976, Vanessa R. Duncan filed a verified complaint with the Civil Rights Division of the Bureau of Labor and Industries alleging she was discriminated against by a place of public accommodation because of race and color.

FINDINGS OF FACT – THE MERITS

1) On September 18, 1976, Complainant, a white female, was over 22 years of age. Her friend, David Rogers, a black male, was over 21 years of age. Rogers was in the US Navy and stationed at Bremerton, Washington. On said date, a Saturday, Rogers was in Portland on liberty. He and Complainant went together to the Keyhole Supper Club at N.E. 102nd and Halsey where they intended to spend the evening.

2) In order to enter the Keyhole Supper Club, a patron was required to pass a security guard, who would demand identification if not satisfied that the patron was at least 21 years of

age. Rogers presented a drivers license and a US Navy identification card. The latter contained his photograph. He was passed through. Complainant then offered four pieces of identification: a drivers license, a plastic birth certificate card, a US Government identification card, and an expired US Government driver's license. None of the identification contained a photograph of Complainant, but all contained the date of her birth: April 22, 1954. Complainant was refused admission. The security guard said that her proof of age was not adequate. (The said identification was later stolen from Complainant.)

3) When Complainant was refused admission, both she and Rogers left the Keyhole Supper Club without argument. They discussed the matter while sitting in their car in the club's parking lot and decided to return to the club and confront the security guard who had refused Complainant admission – which they did. When the security guard continued to refuse Complainant admission, Complainant became more and more frustrated and angry. The arguing took place in plain view of other patrons in the area for 25 minutes. When Complainant asked to see the person in charge of the premises, the security guard told her he wasn't there. Finally, in order to end the scene, the security guard allowed Complainant to enter the club with Rogers. The security guard did not require Complainant to provide, nor did she provide, additional identification. After entering the club, Complainant was so upset over the episode that she and Rogers only remained there for about 10 minutes.

4) The following statutory provisions were in effect during the times material herein and were referred to during the testimony of the witnesses Duncan, Sahli, Newell and Respondent Gaudry:

"[ORS] 471.130 Requiring statement of age or identification card from certain purchasers.

"(1) All licensees and permittees of the commission, before selling or serving alcoholic liquor to any person about whom there is any reasonable doubt of his having reached 21 years of age, shall require such person to produce his identification card issued under ORS 471.140. However, if the person has no identification card, the permittee or licensee shall require such person to make a written state of age and furnish evidence of his true age and identity.

"(2) The written statement of age shall be on a form furnished or approved by the commission, including, but not limited to the following information:

Date _____

I am 21 years of age or over.

Signature _____

Evidence in support of age and identity:

Driver's License No. _____

State _____

Military Record No. _____

Other _____

(Fill in license or card number of any two or more of above)."

Although Complainant requested that she be allowed to fill in and execute the written statement of age referred to in the above provisions, (the Form S-146), the security guard did not allow or require her to do so either on the occasion of her first attempt to enter Respondent's premises or on her second attempt, when she was finally admitted.

5) On September 23, 1978, Complainant and Rogers were married and she is now known as Vanessa D. Rogers.

6) Respondent employed Club Security Co., Inc., of which Joaquin Newell was a partner, for security at the Keyhole Supper Club. William Sahli worked directly for Newell and was the security guard who first refused Complainant admission to the club, and finally admitted her to September 18, 1976. During the month of September 1976, Newell was absent on a vacation trip, during which Sahli worked under the direct supervision of Respondent.

7) There was a standard practice at the Keyhole Supper Club of discouraging the patronage of racially-mixed couples (in this context, couples including one black person) and black persons in order to limit the number of racially-mixed couples and black persons in the club, since Respondent believed that racially-mixed couples and black persons were responsible for various problems in the club. This standard practice was communicated to William Sahli by Respondent, who ordered Sahli to implement it.

8) The method used to try to discourage patronage of racially-mixed couples and black persons was to

enforce a more rigid proof of age requirement for racially-mixed couples and black persons than for white persons. This method was communicated to William Sahli by the Respondent, who ordered Sahli to implement it.

9) Respondent also communicated to William Sahli a general order to tell black persons and racially-mixed couples, if asked, that Respondent was not on the premises. In fact, either Respondent or his brother were always at the Keyhole Supper Club during its hours of operation.

10) Complainant suffered serious and marked effects when her attempt to enter Respondent's premises with her black male friend, David Rogers, met with the reaction by Respondent which is described above. Subjected to discrimination, which was obvious to her and to the observation of other patrons, Complainant became very angry, humiliated, embarrassed and upset, and experienced real and tangible frustration and depression. She perceived the harassing treatment she received as a blow to her own self-esteem and an insult to the inherent human dignity of her companion, a man who she subsequently married. This treatment, which she apparently felt was symptomatic of society's disapproval of her relationship with Mr. Rogers, demeaned and strained that relationship. These effects were more than temporary, transitory consequences: they lasted intensely throughout the weekend of the discrimination and, to a lessening extent, afterward, and I believe they were sincerely reflected in her testimony and that of David Rogers.

ULTIMATE FINDINGS OF FACT

1) I find that Complainant's attempts to enter Respondent's premises received the treatment by Respondent described above because of the race and color of David Rogers.

2) I find that the treatment accorded to Complainant by Respondent came about as a direct consequence of Respondent's standard practice of discouraging the patronage of black persons and racially-mixed couples, and Respondent's implementation of that practice by the method of imposing a more rigid proof of age requirement upon black persons and racially-mixed couples than upon white persons or couples.

3) I find that Complainant, as a result of the treatment by Respondent described above, suffered serious and continuing mental anguish.

CONCLUSIONS OF LAW

1) Respondent Joseph Lawrence Gaudry, during the times material herein, operated a place of public accommodation as defined by ORS 30.675(1).

2) During the times material herein, the security guard, William Sahli, was an agent of Respondent with regard to admission of prospective patrons into the premises in question, including those admission procedures relating to Complainant on September 18, 1976. Sahli's actions as they related to Complainant can properly be imputed to Respondent.

3) Respondent committed an unlawful practice, as defined in ORS 659.010(14) and contrary to the provisions of ORS 30.670, in that he engaged in practices designed and

intended to, and which did, harass, discourage and deny to Complainant the full and equal enjoyment of accommodations, advantages, and facilities of the premises in question by imposing, because of the race and color of David Rogers, restrictions and distinctions as conditions for admission to the premises.

4) The Commissioner of the Bureau of Labor and Industries has the authority to award money damages to Complainant herein under the facts and circumstances of this record, and the sum of money awarded as damages in the Order below is an appropriate award.

5) The Commissioner of the Bureau of Labor and Industries has the authority to require that Respondent meet the notice requirement herein under the facts and circumstances of this record, which describe Respondent's practice of discouraging the patronage of racially-mixed couples and black persons, and the notice requirement made in the Order below is appropriate to protect the rights of persons situated similarly to Complainant from that practice.

OPINION

1) Both Complainant and David Rogers testified that while in the car in the club parking lot discussing the refusal of Complainant's admission to the club, they saw a racially-mixed couple emerge from the exit. As Complainant had just seen this couple enter the club, their exit aroused the suspicions of Complainant and Rogers. Upon talking with the couple, Complainant and Rogers found that, in their case also, the white female's identification was found wanting and she was

refused admission. With this discovery Complainant became determined to confront the club security guard for the second time. The names of the couple were not obtained, nor were they produced as witnesses. This unsupported testimony was considered too vague to be given any serious credibility.

2) The lapse of time between the date of the above-described incident (September 18, 1976) and the date the verified complaint was filed (October 6, 1976), and the allegation that Complainant consulted with Rogers before filing said complaint, were considered and determined to be irrelevant.

3) Testimony that in 1978, Complainant and Rogers returned to the Keyhole Supper Club, which had been remodeled and re-named "The Great Gatsby," but still under the same management, and were admitted without incident was considered and determined to be irrelevant to the discrimination against Complainant and non-dispositive of any questions as to whether Respondent's discriminatory practices continued vis-a-vis other persons.

4) Joaquin Newell and William Sahli appeared under subpoena as witnesses for the Civil Rights Division. I rely on the testimony of Sahli as clear, direct evidence that Respondent treated Complainant as he did because of an impermissible racial motive. Although I found the testimony of the witness Newell to be somewhat equivocal, I did not find it to be inconsistent with the testimony of Sahli.

5) I have found that the actions of Sahli, as they related to Complainant's attempts to enter Respondent's

premises, were a direct implementation of Respondent's practice of discouraging the patronage of racially-mixed couples. Had Sahli's actions been motivated by the legitimate concerns about Complainant's actual age suggested by testimony of Respondent, it would have been consistent with those concerns to have either allowed Complainant to complete the Form S-146 and bring into play the defense provided by ORS 471.135 or to have requested the assistance of the police in removing her from the premises. Respondent did neither, but instead finally simply admitted her.

It is apparent from the Proposed Order entered in this case by the Presiding Officer that he disbelieved Respondent's denials as to the standard practice of discouraging the patronage of black persons and racially-mixed couples and the method employed by Sahli. I adopt this analysis of the record and, like the Presiding Officer, choose instead to believe the testimony of Mr. Sahli, since I believe this testimony to be more credible and more consistent with the other items of evidence in the record.

It is important to note, however, that even if, as Respondent maintains, he had not given specific orders to William Sahli to implement a discriminatory practice by a discriminatory method, Respondent would still be responsible for discriminatory acts committed by his agent Sahli within the scope and in the course of Sahli's agency. Mr. Sahli's acts concerning the admission of patrons were clearly within the scope and in the course of his agency. Moreover, after making himself inaccessible to black persons or racially-

mixed couples who wished to voice complaints about the admission practices of his security guards, even though he or his brother were always on the premises, Respondent clearly and deliberately delegated admission authority to his security guards and could not successfully defend himself in this matter with the assertion, were it to be believed, that he did not know of or did not condone discriminatory practices of his guards.

6) Any monetary award I make in this matter will be limited to that which compensates Complainant for damages she suffered because of Respondent's discriminatory acts. The following three points are focal to the discussion of such award:

a) The battle against race discrimination in places of public accommodation has been the front line of the civil rights movement in the United States. Matters involving discrimination on buses and in soda fountains were among the first litigated under the Civil Rights Act of 1964. This makes sense, because public accommodation discrimination law strikes at the very heart of discrimination: an effort to impair a person's basic right to move about freely in society and to be recognized thereby as a part of his or her community. Denial or abridgment of that right conveys in a particularly persuasive way the fragility of the victim's position as a functioning member of society. Although no setting for race discrimination is anything less than egregious, discrimination in public accommodations can be particularly insidious and devastating.

b) The brief duration and discrete nature of the contact between

complainant and respondent in most public accommodation discrimination cases dictate that the suffering resulting therefrom is usually mental rather than financial or physical. The law forbidding discrimination in places of public accommodation was enacted to prevent the infliction of such suffering and, when it does occur, to compensate the victim therefor. That this suffering is usually entirely mental rather than physical or financial makes it less easily described (much less measured in pecuniary terms), but no less palpable or destructive. The very nature of most public accommodation discrimination therefore necessitates that, in order to follow the law's mandate to eliminate the effects of discrimination in places of public accommodation, I must often measure a compensatory award solely in terms of the complainant's mental suffering.

c) Because discrimination in public accommodations can be particularly devastating, yet fleeting in duration, it is important to emphasize that the duration of the discrimination by itself does not determine either the degree or the duration of the effects of the discrimination, and it is these effects which damages awarded are meant to compensate.

In this case, fleeting discrimination resulted in Complainant's serious and continuing mental suffering. There is ample evidence of acute mental suffering during the 25 minute discriminatory episode, followed by a weekend of anguish. There is also some evidence of the long-term negative effect of the discrimination on Complainant's relationship with her now-husband.

In addition to the degree and extent of suffering of which there is persuasive proof, I may infer from the fact of the discrimination itself mental suffering of which there may be little or no specific proof, especially if the discrimination has taken the form of racial harassment. Oregon courts have acknowledged that mental anguish is one of the effects of race discrimination:

"Indignity must be the natural, proximate, reasonable, and foreseeable result of race discrimination . . . ; indignity visited from the inference in such discrimination that black people are inferior." *Gray v. Serruto Builders, Inc.*, 110 NJ Super 297, 265 A2d 404 (1970), cited with approval in *Williams v. Joyce*, 4 Or App 482, 497, 479 P2d 513, 40 ALR 3d 1272, *rev den* (1971); *School District No. 1 v. Nilsen*, 271 Or 461, 534 P2d 1135 (1975).

It is in recognition of the particularly insidious and pervasive offensiveness of discrimination in places of public accommodation and the inference of mental suffering which can be made from the occurrence of this type of discrimination, as well as the evidence adduced concerning Complainant's mental suffering, that I make this award of mental suffering damages.

The award's figure of \$2,500 is appropriate in light of the few standards for determining mental suffering damage amounts contained in case law. In *Fred Meyer v. Bureau of Labor*, 39 Or App 253 (1979), the Court considered both the vulnerable age of the complainant and the continuing nature of the severe form of employment discrimination. Other cases have

considered whether or not the mental suffering involved public humiliation, and whether the magnitude of distress was verified by evidence of mental or emotional impairment. *Browning v. Slenderella Systems*, 54 Wash 2d 440, 341 P2d 859 (1959), cited with approval in *Williams v. Joyce, supra*; *Seaton v. Sky Realty Co., Inc.*, 491 F2d 634 (1974).

In this case, Complainant was subjected to public humiliation; she was not acutely vulnerable to emotional distress due to a factor such as extreme youth; and there was no non-subjective evidence of mental or emotional impairment. Since duration of the discrimination is usually an especially invalid measure of damages in public accommodation cases, I instead assess the duration and severity of the effects of the discrimination. Although the evidence and allowable inferences support a finding of the severe impact of the discrimination during its duration and for the following two days and serious distress afterward, I cannot find that the compensable effects afterward continued to be as severe as Complainant purported. Some continuing distress can be inferred from the nature of the discrimination, but Complainant did not present persuasive evidence of severe mental distress continuing beyond the weekend of the discriminatory incident. Her two examples of longer-term distress were that occasioned by the pursuit of her complaint to the Bureau of Labor and Industries and that which strained her relationship with her future husband for an unspecified amount of time. In the former case, the distress is not compensable, as Oregon law does not

allow a damage award for mental suffering inherent in being a litigant or complainant in a discrimination case. See *School District No. 1 v. Nilsen, supra*. Concerning the latter example, while I believe that the discrimination caused continuing strain upon Complainant's relationship with David Rogers, I cannot believe that the severity of this strain was long-lasting, as Complainant's relationship with Rogers culminated in marriage two years later.

It is always difficult to assign a specific amount of money as compensation for suffering which does not lend itself to pecuniary quantification. In this case, however, the evidence and allowable inferences support and award of \$2,500 as compensation for Complainant's severe mental suffering for two days and her continuing, but decreasingly severe, suffering thereafter, all caused by Respondent's acts of discrimination.

ORDER

NOW, THEREFORE, as provided by the provisions of ORS 659.060(3) and 659.010(2) and in order to eliminate the effects of unlawful practices found and to protect the rights of persons similarly situated, Respondent is ordered to:

1) Deliver to the Portland office of the Bureau of Labor and Industries, within fifteen (15) days of the execution of this Order, a certified check payable to VANESSA ROGERS in the amount of TWO THOUSAND FIVE HUNDRED DOLLARS (\$2,500), in order to compensate Complainant for damages suffered by her as a result of Respondent's unlawful practices.

2) To post, for a period of 90 days from the tenth day after the date of this order or from the tenth day following the vacation of any stay order obtained by Respondent concurrent with Respondent's pursuit of appellate remedies, a readable copy ORS 30.670, 659.045(1) and 659.010(14) with notice that any person who believes that he or she has been discriminated against in a place of public accommodation may notify the Oregon Bureau of Labor and Industries at 1400 S.W. Fifth Avenue, Portland, Oregon, 97201, or 229-5413, in every separate business establishment maintained by Respondent within the State of Oregon, in a location within or outside each establishment accessible to and frequented by each and every person seeking admission, and each and every employee or agent of Respondent who regulates admission to the premises.

3) Cease and desist from engaging in practices designed and intended to harass, discourage and deny to persons the full and equal enjoyment of accommodations, advantages and facilities of public accommodations by imposing restrictions and distinctions based upon race or color as conditions for admission.

**In the Matter of
CLACKAMAS COUNTY FIRE DIS-
TRICT NO. 1, aka Milwaukee Fire
Protection District No. 56,
Respondent.**

Case Number 05-78
Amended Final Order of the
Commissioner
Mary Wendy Roberts
Issued February 13, 1980.

SYNOPSIS

Where Respondent public employer had no rational and scientific basis for refusing to employ two Complainants as dispatchers because both were older than Respondent's age limit of under 36 for firefighters, the Commissioner found that a dispatcher's age was not a bona fide occupational requirement reasonably necessary to the normal operation of the Fire District's business, and that Respondent violated ORS 659.026. The Commissioner denied Respondent's motion to dismiss on the basis of laches, because Respondent failed to show how the lapse of over five years from the time of the respective complaints to the time of hearing prejudiced Respondent's defense, as all witnesses and documents were available at hearing. The Commissioner awarded lost wages less interim earnings to each Complainant, and ordered Respondent to cease using any maximum age limit for employment as a dispatcher. ORS 45.250(1)(b); 242.726; 659.010(2); 659.015; 659.026; 659.060(3).

The contested case in the above-entitled matter came on regularly for hearing before Glenda E. Anderson, who was designated Presiding Officer in this matter by Bill Stevenson, then Commissioner of the Oregon Bureau of Labor. The hearing was held on August 22, 1978, and continued through August 31, 1978, in Portland. The Agency was represented by Rudolph Westerband, Assistant Attorney General, and Respondent was represented by William Brunner, Attorney at Law.

On October 17, 1979, Mary Wendy Roberts, Commissioner of the Oregon Bureau of Labor and Industries, issued Findings of Fact, Ultimate Findings of Fact, Conclusions of Law, Rulings on Motions, Opinion, and an Order in the above-entitled matter. Subsequent to the issuance of said Findings, Conclusions, Rulings, Opinion, and Order, the Commissioner issued a Notice of Reconsideration dated October 31, 1979. Subsequent to receipt of Notice of Reconsideration, Respondent petitioned the Court of Appeals for Judicial Review of the October 17, 1979, decision. Subsequent to Respondent-Petitioner's filing of its Petition for Judicial Review, the Commissioner filed with the Court of Appeals a withdrawal of the decision in this matter for the purposes of reconsideration. The Commissioner's withdrawal was acknowledged by the Court of Appeals and the Commissioner was afforded an additional period of time, until February 15, 1980, in which to affirm, modify or reverse the decision in this matter. Execution of portions of the said Order were stayed pending reconsideration.

On November 28, 1979, December 17, 1979, and January 7, 1980, after the issuance of proper Notices of Hearing, the Commissioner caused to be convened supplementary hearings for the purpose of completing the record in this case in order to facilitate reconsideration and the proper resolution of certain issues relating to damages in this matter. These supplementary hearings were conducted by Dale A. Price, who was designated as Presiding Officer in these proceedings by the Commissioner, the original Presiding Officer in this matter being no longer employed in that capacity by the Bureau of Labor and Industries. In attendance at the hearings were William L. Brunner, Counsel for Respondent; and Complainants Donald Christner and Jefferson Bradley. Thomas E. Twist, Assistant Attorney General, attended the December 17, 1979, hearing as Counsel for the Agency, while Rudolph Westerband, Assistant Attorney General, attended the November 28, 1979, and January 7, 1980, hearings in that capacity.

At the commencement of the first supplementary hearing, Respondent through its Counsel filed a Motion to Stay Further Proceedings. The hearing was continued pending the Presiding Officer's consideration of Respondent's motion, which was denied by the Presiding Officer in a written ruling dated December 11, 1979. At the December 17, 1979, supplementary hearing, Respondent through its Counsel elected not to exercise its right to cross-examine Complainants, or to offer evidence to meet the additional evidence entered on that date, but instead rested on its objection to

the hearing and to the entry of additional evidence, on the grounds that Respondent lacked notice adequate to meet and rebut the evidence entered. Taking note of Respondent's objections, the Commissioner caused the hearing to be reconvened on January 7, 1980, upon notice given to all parties, for the purpose of affording Respondent every opportunity to meet and, if possible, rebut the evidence placed in the record on December 17, 1979. At the January 7, 1980, supplementary hearing, Respondent through its Counsel filed a Motion to Stay Further Hearings and Submission of Evidentiary Materials, which was denied orally by the Presiding Officer. Respondent through its Counsel then elected not to exercise its right of cross-examination or to in any other manner attempt to meet and rebut the evidence entered on December 17, 1979.

Having considered the entire record on the matter, evidence duly received and the arguments of counsel, I, Mary Wendy Roberts, Commissioner of the Oregon Bureau of Labor hereby make the following Amended Findings of Fact, Amended Ultimate Findings of Fact, Conclusions of Law, Rulings on Motions, Amended Opinion and Amended Order. These Amended Findings of Fact, Amended Ultimate Findings of Fact, Conclusions of Law, Rulings on Motions, Amended Opinion and Amended Order do in their entirety revise, replace and supersede the document dated October 17, 1979, containing my original Findings of Fact, Ultimate Findings of Fact, Conclusions of Law, Rulings on Motions, Opinion and Order in this matter.

AMENDED FINDINGS OF FACT – PROCEDURAL

1) At all times material, Clackamas County Fire District No. 1, aka Milwaukie Fire Protection District No. 56 (hereinafter referred to as Fire District), was a Rural Fire Protection District organized under ORS chapter 478 and an employer subject to the provisions of ORS 659.010 to 659.110.

2) On December 26, 1972, Jefferson D. Bradley, age 36, and on January 2, 1973, Donald O. Christner, age 47, each filed a verified complaint with the Civil Rights Division of the Oregon Bureau of Labor alleging that Respondent had unlawfully discriminated against each of them in connection with his application for employment because of his age.

3) The Civil Rights Division investigated the allegations in the complaints filed by Bradley and Christner and determined that substantial evidence supported Complainants' allegations of discrimination in application for employment because of age.

4) All parties stipulated to the fact that unsuccessful settlement and conciliation negotiations took place prior to the hearing.

AMENDED FINDINGS OF FACT – THE MERITS

1) In 1972, the Board of Directors of the Fire District authorized the position of Fire Alarm Dispatcher-Clerk (hereinafter referred to as Dispatcher) to be filled by Civil Service open competition. One vacancy existed in the Dispatcher position, which was required to be filled under Civil Service examination, with appointment by the "Appointing Power" of the Fire District,

in accordance with Civil Service Regulations.

2) On December 8, 1972, the Civil Service Commissioner for the Fire District posted an announcement for a Dispatcher vacancy which listed the job qualifications, duties, salary and application requirements. Under the heading "Entrance Requirements" on the announcement, the following appeared:

"AGE: MUST HAVE REACHED 21st BIRTHDAY BY THE TIME OF APPLICATION AND NOT HAVE PASSED AGE 35 AT TIME OF EMPLOYMENT."

3) The General Rules and Regulations of the Civil Service Commission of the Fire District, which were in effect at the time of the Dispatcher vacancy, cited the following requirement:

"Sec. 1 AGE

"Applicant must have passed his 21st birthday by the time of application and not have passed his 36th birthday by the time of appointment . . . Proof of birth shall be a pre-requisite to acceptance of application."

The maximum age limit in the rules is not the same as that cited in the announcement described in Finding 2 above. Because the rules appear to supersede the announcement, and because both Complainants exceeded either age limit when they attempted to apply, I will hereinafter refer to the maximum age limit as the 36th, rather than 35th, birthday.

4) Notice was published in several newspapers, including the December 20, 1972, Milwaukie, Oregon, Review, which indicated that an open

competitive examination for the Dispatcher position would be conducted. The notice further indicated that application to take the examination had to be filed at the Fire District's main station business office (10636 S.E. Fuller Road) prior to 8:00 p.m. on December 22, 1972. No age requirement was stated in the notice.

5) Jefferson D. Bradley and Donald O. Christner each became aware of the opening for Dispatcher by seeing a newspaper notice similar to that described in the preceding paragraph.

6) At some time prior to 8:00 p.m. on or about December 22, 1972, each Complainant visited the Fire District's main station business office to apply for the position of Dispatcher. Fire District personnel refused to provide them with application forms because each Complainant had passed his 36th birthday. Mr. Bradley was 36 years and 12 days of age and Mr. Christner was 47 years of age.

7) By letter dated January 22, 1973, Jefferson Bradley made formal complaint to the Civil Service Commissioner of the Fire District, alleging that his treatment at the hands of the Fire District violated ORS 659.026. His letter provided, in pertinent part, that:

"This is to notify your Board that in accordance with Civil Rights Statutes ORS 659.026, your form of employment of "Dispatcher" in December of 1972, was discriminatory to all whom are of age 35 and over.

"I was denied the privilege to apply due to the fact that I was 12 days beyond your age limit. It appears

that regardless of experience or background, the age limit prevails.

"I am not so much interested in seeing someone ousted so that I or some other person over the age limit may be employed, as to see your organization come up to standards set down by the Civil Rights Statute, in the event, that an opening should again arise, that any person feeling qualified may apply and be tested for the opening."

8) The Civil Service Commissioner of the Fire District received and discussed Mr. Bradley's letter of complaint on or about January 22, 1973. Neither the Fire District nor its Civil Service Commission offered Mr. Bradley an opportunity for redress of his grievance or responded to Mr. Bradley in any fashion. Furthermore, the Civil Service Commission of the Fire District had no internal procedure for administrative review and redress of the complaint filed by Mr. Bradley.

History of the Maximum Age Limit

9) At hearing, Fire Chief Harry Carpenter and Assistant Chief Francis Hiland testified for the Fire District on the maximum age limit of 36 for hire as a Dispatcher. On the basis of their testimony, I make the following findings of fact:

Prior to 1969, four independent Rural Fire Districts and the Fire District joined together to form a central dispatch system, governed by a committee representing the five fire districts. Before this centralization, each fire district maintained its own dispatch operation under which dispatch duties were performed by firefighters on a part-time or rotation basis. Each fire district

required that to be hired for the job of firefighter, the applicant be no older than age 36.

At sometime between approximately 1964 and 1968, the five districts modified their dispatch functions by employing, on a full-time basis, civilian personnel (non firefighters) to perform dispatch duties.

In or about 1969, the newly-centralized dispatch system was placed under the supervision of Respondent in an effort to improve the dispatch services provided each district. The fire districts generally felt that dispatch services needed improvement in the screening of dispatcher (non firefighter) applicants, the training of newly-hired dispatchers, and the on-going supervision of dispatchers.

Once it had assumed the supervision of the central dispatch system, the Fire District retained, as their own personnel, individuals previously hired and employed as dispatchers by the several fire districts. Also retained were many of the rules and regulations governing employment in the several fire districts, including the maximum age limit of 36 for hire as a firefighter. However, by Civil Service Commission rule, the Fire District made this maximum age limit applicable to all full-time employees, including dispatchers, even though by rule, dispatchers were no longer firefighters. The following employees of the Fire District were affected by this maximum age rule:

1. Chief of the Fire Department
2. Assistant Chiefs (Fire Marshall- Training Officer)
3. Captains
4. Lieutenants

5. Driver-Engineers
6. Firemen
7. Dispatcher (non-firefighter capacity)

Dispatcher Duties

10) On the basis of the testimony of various Fire District personnel concerning the duties of the dispatchers from December 1972 to the date of hearing, I make the following findings of fact:

The primary responsibility of a dispatcher was and is the dispatch personnel and equipment as required to meet routine and emergency situations. Additionally, they handle routine calls for information. During July 1977, the frequency of calls handled by each dispatcher averaged 3.3 per minute. This average represented all calls handled by each dispatcher, including non-emergency calls for information.

Other duties in addition to dispatching were and are regularly assigned to dispatchers, on the basis of any special knowledge, skills, or interest each dispatcher brings to the job or shows an interest in mastering while on the job. These duties vary from general cleaning and janitorial work, to drafting and updating street maps, to maintaining equipment.

From December of 1972 to approximately July of 1975, dispatchers (non-firefighters) worked a 24-48 hour shift: 24 hours on duty, 48 hours off duty. Dispatchers used a bunk bed next to or near the dispatch console for rest and sleeping purposes during their 24 hour shift. Depending upon personal preference, dispatchers stood or sat at the console when operating dispatch equipment. From 1972 to 1975,

it was unusual to require a dispatcher to operate console equipment for 24 hours without adequate rest or relief.

The console equipment operated by dispatchers in and around 1972 included a short-wave radio, telephone, teleautograph (a graphic printer which transmit printed messages), and a Call Director System (a telephone system linking all fire stations). Since 1972, various equipment has been added and replaced.

From approximately July 1975 to the hearing of this matter, a dispatcher typically worked three 10 hour shifts from midnight to 10 a.m., followed by three days off, following in turn by three days on duty from 10 a.m. to midnight. Bunk beds are no longer required or utilized by dispatchers.

At all times material, emotional stress and strain is experienced in the normal performance of dispatching for the Fire District. The degree of stress may vary from hour to hour, day to day, or even minute to minute, depending upon the frequency and the nature of calls received and handled.

The Maximum Age Limit As An Occupational Requirement

11) On the basis of the testimony of Chief Carpenter, Assistant Chief Highland, and Mr. William Johnson, Chairman of the Civil Service Commission of the Fire District, I make the following findings of fact:

At all times material, the Fire District made no job task analysis and undertook no studies to determine the mental effort and stress involved in performing the duties of Dispatcher (non-firefighter).

At all times material, the Fire District made no objective analysis and relied upon no statistical or scientific studies to establish its contention that the maximum age limit of 36 for hire as a Dispatcher (non-firefighter) is an occupational requirement reasonably necessary to the normal operation of the Fire District's business.

12) On the basis of the testimony of Dr. William Armbruster, Director of the Industrial Health Clinic of Physician and Surgeons Hospital, professor of environmental medicine at the University of Oregon Medical School, and eminent practitioner and certified specialist in Preventive Occupational Medicine, I make the following findings of fact:

With some exceptions, all human beings experience, as part of the dying process, physiological changes attributable to aging. These changes ultimately impair learning capacity, mental agility, and ability to cope with stress, the three attributes most necessary to a Dispatcher (non-firefighter), according to the Fire District. However, it would be very unusual, indeed rare, for those changes to become so pronounced by age 36 that they would impair an individual's mental agility, learning capacity, and ability to handle stress as necessary in dispatching for the Fire District. Much more important than age itself in determining or affecting these attributes are other factors such as general health, physical fitness, quality of personal and familial life, work environment, the existence of debilitating habits such as smoking or drinking and ultimately, motivation. There is no correlation between age and motivation and because of the

many latter factors, chronological age and physiological age may not coincide in any individual.

13) On the basis of the testimony of Dr. Peter Bullard, a licensed, psychologist practicing in the area of job-related stress; Fred Heim, Dispatch Supervisor for Marion County Fire Department; Jack Homer, Director of Emergency Communications Bureau of Portland; and Harvey McGowan, Personnel Analyst for the City of Portland, I make the following findings of fact:

It is both feasible and practical for the Fire District to deal with applicants for the dispatcher position who are older than 36 on an individualized basis. There are a number of scientific examinations and personnel testing procedures by which the Fire District can determine, during the application process, whether the individual applicant has the requisite mental agility, learning capability, and ability to cope with stress to perform the job of Dispatcher in a safe and efficient manner. In addition to those tests and procedures, a reliable factor for determining job performance potential is an applicant's previous work experience. The more stressful the applicant's previous work experience, the more likely the applicant will be able to cope with the job-related stress experienced by dispatchers with the Fire District. Other factors indicative of work performance potential include those which I have found to be relevant, and which are set out in Finding 12 above.

14) On the basis of the testimony of Dr. Robert Rempfer, Professor of Mathematics and Statistics at Portland

State University, I make the following finding of fact:

The Fire District has established no statistical correlation between being older than 36 on the one hand and unsatisfactory work performance in dispatching for the Fire District on the other, or between any conditions which are alleged by the Fire District to be attributable to the aging process on the one hand, and unsatisfactory work performance on the other.

15) On the basis of the testimony of all witnesses, and most specifically on the testimony of Dr. William Armbruster, M.D.; Dr. Peter Bullard, Ph.D.; Dispatch Supervisor Fred Heim; Personnel Analyst Harvey McGowan; Communications Systems Director Jack Homer, and all Fire District personnel, I make the following finding of fact:

The age of an applicant for the job of Dispatcher (non-firefighter) is an irrelevant factor for determining work performance potential in the applicant. Indeed, if the applicant's age is considered, it may result in the disqualification of individuals most able to perform dispatching in a safe and efficient manner and in the employment of individuals who, in comparison, lack those qualities which are bona fide occupational requirements reasonably necessary to the normal performance of the job.

16) On the basis of the entire record, I make the following finding of fact:

At all times material, qualities in an applicant for the job of Dispatcher (non-firefighter) which are bona fide occupational requirements necessary to the normal operation of the Fire

District's business include and are not limited to the following: good physical and mental health; normal hearing and vision; mental agility; alertness and capacity for concentration; precise articulation; personal conscientiousness and motivation; ability to take and follow orders and directions; emotional stability.

17) A Dispatcher (non-firefighter) was hired by the Fire District on February 1, 1973, to fill the position for which Complainants in this case were denied the opportunity to apply and be considered.

18) At hearing, evidence was entered showing the total wages paid to dispatchers by the Fire District from 1971 to 1977, including all automatic pay increases and advancements in rank. Using this data we can establish what amounts Complainants would have earned but for Respondent's unlawful acts.

19) Complainant Jefferson Bradley worked at various jobs after February 1, 1973, when Respondent would have hired him but for Respondent's unlawful act, but he did not obtain permanent full-time employment at a pay rate greater than or equal to that which he would have earned if employed by Respondent until after December 31, 1974. If Mr. Bradley had been hired by Respondent on February 1, 1973, he would have earned \$17,405 from Respondent during the period February 1, 1973, through December 31, 1974. In fact, Mr. Bradley earned \$6,795.81 from various sources during the same period, February 1, 1973, through December 31, 1974. Mr. Bradley is entitled to a back pay award from Respondent in the amount of the difference between what he would have

earned, but for Respondent's unlawful act, and what he actually earned during the same period.

\$17,405.00

-6,795.81

\$10,609.19 Back pay due Mr. Bradley

20) Complainant Donald Christner worked at various jobs after February 1, 1973, when Respondent would have hired him but for Respondent's unlawful act, but he did not obtain permanent full-time employment at a pay equal to or greater than that which he would have earned if employed by Respondent. On October 26, 1977, Mr. Christner became a full-time student and was thereafter unavailable for full-time employment. Mr. Christner is not entitled to back pay after October 27, 1977. If Mr. Christner had been hired by Respondent on February 1, 1973, he would have earned \$54,268 from Respondent during the period February 1, 1973, through October 26, 1977. In fact, Mr. Christner earned \$38,960.67 from various sources during the same period, February 1, 1973, through October 26, 1977. Mr. Christner is entitled to a back pay award from Respondent in the amount of the difference between what he would have earned, but for Respondent's unlawful act, and what he actually earned during the same period.

\$54,268.00

-38,960.67

\$15,307.33 Back pay due Mr. Christner

AMENDED ULTIMATE FINDINGS OF FACT

1) Respondent sought applicants and Complainants attempted to apply

for the position of Dispatcher (non-firefighter). Fire District refused to allow Complainants to apply for this position solely because each had passed his 36th birthday.

2) As a consequence of Respondent's unlawful action against him, Mr. Bradley suffered a loss of wages in the amount of \$10,609.19, for which he is entitled to compensation. As a consequence of Respondent's unlawful action against him, Mr. Christner suffered a loss of wages in the amount of \$15,307.33, for which he is entitled to compensation.

CONCLUSIONS OF LAW

1) The Fire District violated ORS 659.026 by its policy of rejecting applications for the job of dispatcher by persons who had passed their 36th birthday and refusing to hire any such person for that position, and by refusing to hire Complainants in the dispatcher position because they had passed their 36th birthdays.

2) The requirement that an appointee for the position of Dispatcher (non-firefighter) be not older than 36 is not based upon relevant physical requirements and is not a bona fide occupational requirement reasonably necessary to the normal operation of the Fire District's business.

3) Complainants are entitled to an award of back pay in accordance with ORS 659.060(3) and 659.010(2).

RULINGS ON MOTIONS

1) Demurrers

At the time of hearing, the Fire District filed a demurrer to the Specific Charges stating that the Petition of Specific Charges or claims by the Bureau of Labor do not state facts

sufficient to constitute a cause of action.

The Specific Charges served upon the Fire District and by reference made a part of the record set forth facts which are sufficient, if proven, to form a prima facie case of unlawful practices of discrimination based on age, as set forth in ORS 659.026. This demurrer is therefore disallowed.

At the time of hearing, the Fire District also filed a demurrer to the Specific Charges citing the equitable principal of laches in that the Bureau of Labor allegedly allowed an unreasonable and prejudicial amount of time to pass in its investigation, review, findings, and filing of Petition of Specific Charges in this matter.

Fire District failed to show specifically how the lapse of time has prejudiced the presentation of the case. Respondent's witnesses appeared to all still be available. No critical bits of documentary evidence are noted as absent. The demurrer is therefore disallowed.

2) Rulings Reserved

At the hearing, a ruling as to the admission of four exhibits (a to d, below) was reserved.

a) A file folder containing certified true copies of job descriptions from fire departments in various parts of Oregon which show the non-existence of any maximum age limitations for hire in the job of dispatcher, and in some cases for firefighter, with the said fire departments is admitted into evidence as relevant for corroborative purposes.

b) The deposition of Assistant Chief Hiland, dated 8-16-78, is

admitted into evidence, in accordance with ORS 45.250(1)(b), which provides:

"The deposition of a party, or any one who at the time of taking the deposition was an officer, director or managing agent of a public or private corporation, partnership or association which is a party, may be used by an adverse party for any purpose."

c and d) W-2 forms for Jefferson Bradley and Donald Christner, and a statement of unemployment compensation received by Donald Christner, are admitted into evidence as relevant to the issue and computation of back pay damages.

AMENDED OPINION

The Fire District is charged with having maintained a policy governing employment as Dispatcher (non-firefighter) which is unlawful under ORS 659.026. Because of its policy, the Fire District refused to hire and employ any person as a dispatcher who had passed his 36th birthday.

I have concluded that Complainants Jefferson Bradley and Donald Christner were aggrieved by the Fire District's refusal to employ them solely because of their age.

The Legislature's purpose in enacting ORS 659.026 was set forth in ORS 659.015:

"It is declared to be the public policy of Oregon that available manpower should be utilized to the fullest extent possible. *To this end the abilities of an individual, and not any arbitrary standards which discriminate against an individual solely because of his age, should*

be the measure of the individual's fitness and qualification for employment." (Emphasis added)

To effectuate its policy, the Legislature provided in ORS 659.026:

"UNLAWFUL EMPLOYMENT PRACTICE FOR PUBLIC EMPLOYER TO DISCRIMINATE BECAUSE OF AGE.

"(1) It is an unlawful employment practice for a public employer or any person acting for a public employer to disqualify or discriminate against any individual in any civil service entrance, appointment or promotion examination or rating, or to refuse to hire, employ or re-employ or to bar, discharge, dismiss, reduce, suspend or demote any individual because of his age if the individual is 25 years of age or older and under 65 years of age; but the compulsory retirement of employees required by law at an age under 65 years and the selection of employees on the basis of relevant educational or experience requirements or relevant physical requirements, including, but not limited to, strength, dexterity, agility and endurance, are not unlawful employment practices.

"(2) The complaint and appeal procedure provided under this chapter shall not apply to an employee, against whom an unlawful employment practice described in subsection (1) of this section has allegedly been practiced, to whom there applies a procedure for administrative review of the practice as provided under any other statute governing employment by a public employer.

" * * *

"(4) The provisions of this Act do not apply to:

" * * *

"(g) Fire chiefs and firemen of a political subdivision of this state who are classified as firefighters by the governing body of the political subdivision."

Before passing upon the ultimate issues presented, I must first decide whether the exemptions in (2) and (4)(g) above apply to this case.

ORS 659.026(2)

It appears that, by virtue of ORS 242.726, the Civil Service Commission of the Fire District was required to investigate complaints alleging an abuse of the provisions of ORS 242.702 to 242.824, which pertain to the creation of Civil Service Commissions in Rural Fire Districts and the promulgation of rules and regulations governing, among other things, entrance requirements for employment in the said fire districts. I have found that the Civil Service Commission of the Fire District had no procedure effectuating ORS 242.726 which provided or which would have provided Complainants an opportunity for a full hearing, consideration, review and fair disposition of their complaints. I have found that Complainant Bradley filed a complaint with the Civil Service Commission of the Fire District, challenging the unfairness of the maximum age requirement in the Civil Service Commission rules themselves. I have found that the Civil Service Commission did not respond to the charges made by Mr. Bradley. Clearly, ORS 659.026(2) does not encompass a complaint by an applicant

for employment (rather than an employee) with the Fire District which challenges a rule or regulation promulgated by the Fire District. In any event, the Civil Service Commission of the Fire District had no administrative procedure for resolution of the complaints by Complainants. Hence, ORS 659.026(2) does not apply.

ORS 659.026(4)(g)

ORS 659.026(4)(g) applies only to fire chiefs and firemen "who are classified as firefighters." The position sought by the Complainants was Dispatcher, classified by Civil Service Commission rule as a non-firefighter. Hence, this exemption does not apply.

Issue Presented

The only issue presented is whether the Fire District has met its burden of producing evidence sufficient to establish a statutory defense to the proscriptions in ORS 659.026. In the words of that statute, the Fire District must show that its maximum age limitation of 36 for hire as a dispatcher was based upon "relevant physical requirements, including, but not limited to, strength, dexterity, agility, and endurance."

In the absence of Oregon case law concerning ORS 659.026, a reasonable standard must be established for determining what, specifically, must be proven by the Fire District to carry its burden. The landmark decisions of *Hogsdon v. Greyhound Lines, Inc.*, 499 F2d 859 (7th Cir 1974); *Usery v. Tamiami*, 531 F2d 224 (5th Cir 1976); and *Weeks v. Southern Bell Telegraph*, 408 F2d 228 (5th Cir 1969) will be of assistance in this regard.

In *Weeks v. Southern Bell Telegraph, supra*, the plaintiff, a female, brought suit under Title VII of the Civil Rights Act of 1964, 42 USC Section 2000(e), alleging that her employer refused to consider her application for the position of switchman, because of her sex, in violation of said statute.

Title VII prohibits employment discrimination because of sex unless such discrimination results from a bona fide occupational requirement (BFOR) reasonably necessary to the employer's business. The ultimate issue presented was whether the employer had produced evidence sufficient to show that being male constituted a BFOR for the job of switchman which is reasonably necessary to the normal operation of its business. The company contended that strenuous work is required in the job of switchman, and, hence, qualification for the job should be limited to males.

According to the Court, an employer carries its burden by proving that it had reasonable cause to believe — that is, a factual basis for believing — that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved. However, even when the employer cannot carry this burden, if it demonstrates "that it is impossible or highly impractical to deal with women on an individualized basis, it may apply for a reasonable general rule." 408 F2d at 235, n. 5. The court ultimately decided that the company had not carried its burden under either standard.

The facts of *Hogsdon v. Greyhound Lines, supra* (hereinafter cited as *Greyhound*) and *Usery v. Tamiami, supra*, (hereinafter cited as *Tamiami*)

are substantially similar. The US Department of Labor brought suit under the *Age Discrimination in Employment Act of 1967*, 29 USC 5621, *et seq.*, which prohibits age discrimination in employment unless such discrimination results from a "bona fide occupational requirement reasonably necessary to the normal operation of the particular business," language consistent with the "relevant physical requirement" language of ORS 659.026.

Greyhound Bus Company and Tamiami (Trailways) followed an industry-wide policy of setting maximum age limits for new bus drivers. The maximum age limits set by Greyhound and Tamiami were 35 and 40, respectively.

Both Greyhound and Tamiami subscribed to an industry-wide policy of conducting operations under a seniority system. Under that system, there are two general classifications of drivers, those who perform "regular runs" and those who perform "extra board." Extra board drivers consist of operators who have insufficient seniority to successfully obtain a regularly scheduled run. Tamiami's seniority system relegates any new bus driver to 7 to 12 years of extra board driving before he or she has sufficient seniority to obtain a regular run. However, Greyhound's new drivers are relegated to 10 to 40 years of extra board driving, depending upon the seniority list in the territory in which the driver is employed.

In both companies, extra board drivers are on call 24 hours per day, 7 days per week, and must be prepared to go anywhere in the continental United States at any time, under any conditions, and on very short notice. Tight scheduling and unforeseen

demands frequently severely diminish a driver's ability to predict the time of the next assignment. Extra board driving places enormous mental and physical demands on drivers as the result of unpredictable scheduling and combinations of short distance and transcontinental runs in all type of driving conditions. Extra board driving gravely taxes the bodies, minds, and the personal and familial lives of even very youthful drivers.

The 7th Circuit Court in *Greyhound* and the Fifth Circuit Court in *Tamiami* had to decide what specifically must be proved by an employer, given considerable safety factors, to carry its burden of showing that its age requirement is a "bona fide occupational requirement, reasonably necessary to the normal operation of its particular business."

Although equally mindful of the imminent danger to life and property in the event of a driver's failure to withstand the rigors of extra board, the two courts pronounced different standards governing an employer's burden of proof. While the 5th Circuit Court in *Tamiami* adopted the standard it had previously pronounced in the case of *Weeks v. Southern Bell Telegraph, supra*, the *Greyhound* court attempted to distinguish its decision from the 5th Circuit's *Weeks v. Southern Bell Telegraph, supra*, decision and pronounced its own standard, saying:

"Due to such compelling concerns for safety, it is not necessary that *Greyhound* show that all or substantially all bus driver applicants over 40 could not perform safely . . . *Greyhound* must demonstrate that it has a rational basis in fact to

believe that elimination of its maximum hiring age will increase the likelihood of risk or harm to its passengers. *Greyhound* need only demonstrate, however, a minimum increase in risk of harm for it is enough to show that elimination of the hiring policy might jeopardize the life of 1 or more person than might otherwise occur under the present hiring practice." 499 F2d at 863.

As stated above, the 5th Circuit's decision in *Tamiami* was a reaffirmation of the standard it had pronounced in *Weeks v. Southern Bell Telegraph, supra*, because, according to the court, the *Weeks* standard takes into account the existence of compelling safety considerations. Hence the three part standard of *Weeks* was applied to *Tamiami*, as follows:

a) An employer (*Tamiami*) must prove that it had a reasonable cause to believe, that is, a factual basis for believing, that all or substantially all applicants above the age of 40 would be unable to perform safely and efficiently the duties of the job involved (in *Tamiami*, extra board driving). If the employer cannot carry this burden, it must show instead that:

b) It is impossible or highly impractical to deal with applicants over 40 on an individualized basis. This burden can be carried by establishing that some members of the over 40 class possess a trait precluding safe and efficient performance of the job, which trait cannot be ascertained by means other than knowledge of the applicant's age.

c) In order to avail itself of the defenses stated in a) and b) above, the employer must first show that the

essence of its business operation would be undermined by not hiring members of the younger than 40 class, exclusively.

Of the *Greyhound* decision, the 5th Circuit in *Tamiami* said the following:

"The *Greyhound* court distinguished *Weeks* on the grounds that 'the Fifth Circuit was not confronted with a situation where the lives of numerous persons are completely dependent on the capabilities of the job applicant.' 499 F2d at 861-62. The question raised, therefore, is whether the *Weeks* requisite of the [bona fide occupational requirement test] should be dropped or modified where the safety factor is present. Though we agree with the *Greyhound* court that the safety of third parties is a factor which cannot be ignored, we believe that this safety factor is already appropriately highlighted within the current framework of the *Weeks* . . . test." 11 EPD 10, 916 at 7856.

Upon thorough review of the *Greyhound* and *Tamiami* decisions, the Bureau of Labor adopts the three-part standard pronounced in *Tamiami* for use in implementing ORS 659.026. That standard is precise and comprehensible and therefore capable of practical application, whether or not safety considerations exist in the given case. Equally important, it achieves a balance of valid and sometimes competing interests between, on the one hand, the Legislature's purpose of eradicating age discrimination based on arbitrary and outmoded stereotype and, on the other hand, the concern shared by all reasonable people that

an employer not be encumbered from doing business or discharging its primary responsibilities to the public in a safe, efficient and successful manner.

In the final analysis, I am convinced that under either the *Greyhound* or *Tamiami* standard, the Fire District has fallen short of carrying its burden. Under either *Greyhound* or *Tamiami*, an employer carries its burden by producing evidence sufficient to convince a reasonable person that there is a reason to doubt that people above a certain age are able to perform the job in question in a safe and efficient manner. The following evidence was introduced in *Greyhound* and *Tamiami* to establish the existence of a reasonable doubt:

a) In both cases, the employer followed an industry-wide policy of refusing to hire any individual on extra board who had passed the maximum age limit in question.

b) In both cases, the employer introduced testimony by medical experts who are eminent scholars and practitioners in their fields. The medical experts testified that:

(1) Certain physiological and psychological changes accompany the aging process which decrease a person's ability to drive safely;

(2) Even the most refined examinations cannot detect all of these changes;

(3) The maximum age limits in question were by no means arbitrary cutoffs.

c) In both cases, the employer introduced testimony by former high-ranking officials of the Interstate Commerce Commission (in *Tamiami*, the

Safety Director of that agency) and the Bureau of Motor Carrier Safety of the US Department of Transportation to explain the strains of inter-city bus driving and the importance of the driver's commitment to traffic safety. They also testified that the age limits in question were by no means arbitrary cutoffs.

d) In both cases, the employer called its own drivers who were above the maximum age limit for hire on extra board, and who were currently on the regular run as the result of superior seniority. They all testified that being presently above the maximum age limit, they could not withstand the rigors of extra board.

e) In *Greyhound*, the employer introduced valid statistical evidence reflecting that Greyhound's safest driver (on regular runs) is one who has 16 to 20 years of experience with Greyhound and is between 50 to 55 years of age.

f) In *Greyhound*, the employer introduced valid statistical evidence showing that extra board drivers, even with the advantage of youth, experience twice as many accidents per million miles driven than those experienced by regular run drivers.

G) In *Greyhound*, the employer introduced a statistical study sponsored by the Bureau of Motor Carrier Safety of the US Department of Transportation showing that older drivers become fatigued more quickly, and consequently experience a greater proportion of accidents after prolonged driving than younger drivers.

The courts in both cases considered as compelling the rigors of extra board driving and the effects of such

driving on the bodies and minds of individuals of all ages, but particularly on older drivers.

Although I adopt the *Tamiami* rules, I am greatly assisted by the *Greyhound* decision. The court in *Greyhound* appeared to place a burden of proof on the employer which could be carried by producing considerably less evidence than the rule pronounced by the court in *Tamiami*. However, despite the undisputed existence of "over-riding safety factors," the defendant in *Greyhound* did not rest its case for the disqualification of all persons above age 35 on conclusory opinions of one or more medical experts, or on the undisputed fact of a motor carrier's obligations to its passengers and the public at large, or on the employer's good faith. Greyhound Bus Company realized that the disqualification of all persons above a certain age must be justified and can only be justified by producing evidence sufficient to establish that it had a rational and scientific basis for claiming that all people above age 35 should be disqualified for new employment as a bus driver.

The Fire District has not carried its burden no matter what standard is applied to the evidence presented. The Fire District has proven only that certain qualities must exist in an applicant if the applicant is to perform dispatching in a safe and efficient manner. The Fire District has not produced sufficient evidence to show that it had a rational and scientific basis for believing that the elimination of its maximum age limit would increase the likelihood of injury to the public. Neither has it shown a rational basis for believing that all or substantially all persons past age 36

are unable to perform dispatching duties in a safe and efficient manner. Nor am I convinced that it is impractical or impossible for the Fire District to deal with applicants over 36 or any age on an individualized basis. On the contrary, based upon the evidence, it appears to me that the most effective means to prejudice work performance potential in an applicant for dispatcher is to disregard his or her age, and to utilize tests and procedures available to the Fire District to screen out those applicants of all ages who do not possess the attributes which, I agree, are desirable in a dispatcher.

AMENDED ORDER

NOW, THEREFORE, in accordance with the provisions of ORS 659.060(3) and 659.010(2) and in order to eliminate the effects of the unlawful practices found and to protect the rights of other persons similarly situated, the Fire District is ordered to:

1) Disregard the document dated October 17, 1979, containing my original Findings of Fact, Ultimate Findings of Fact, Conclusions of Law, Rulings on Motions, Opinion, and Order in this matter and consider that document entirely revised, replaced and superseded by these Amended Findings of Fact, Amended Ultimate Findings of Fact, Conclusions of Law, Rulings on Motions, Amended Opinion and Amended Order.

2) Deliver to the Portland Office of the Oregon Bureau of Labor within fifteen (15) days of execution of this Amended Order, a certified check payable to JEFFERSON D. BRADLEY in an amount TEN THOUSAND SIX HUNDRED NINE DOLLARS and NINETEEN CENTS (\$10,609.19)

representing back pay minus mitigation for the period February 1, 1973, through December 31, 1974.

3) Deliver to the Portland Office of the Oregon Bureau of Labor within fifteen (15) days of execution of this Amended Order, a certified check payable to DONALD O. CHRISTNER in an amount FIFTEEN THOUSAND THREE HUNDRED SEVEN DOLLARS and THIRTY-THREE CENTS (\$15,307.33) representing back pay minus mitigation.

4) Refrain and is hereby enjoined from setting and using any maximum age limit for employment as a Dispatcher (non-firefighter) and is encouraged to pursue an alternative means of selecting potential employees, as described by the various experts who testified at the hearing in this matter.

**In the Matter of
ACCO CONTRACTORS, INC.,
an Oregon corporation, Respondent.**

Case Number 27-79
Final Order of the Commissioner
Mary Wendy Roberts
Issued April 7, 1980.

SYNOPSIS

Where Respondent employer told Complainant he was no longer needed, in part because Complainant had caused a Workers' Compensation Board safety inspection and, on the previous day, had given Respondent's co-owner a list of safety complaints and demands for their resolution, the Commissioner held that Respondent discharged Complainant in violation of ORS 654.062(5). Finding that Complainant would have quit anyway due to a disabling injury, the Commissioner limited lost wages to \$496 and denied any award for job search and relocation. In denying a motion to dismiss for want of jurisdiction, the Commissioner ruled that Complainant's filing of a questionnaire at a Bureau field office within 30 days of his termination satisfied the requirement of ORS 654.062(5)(b). ORS 659.010(2); 659.040(1); 659.060(3); 654.062(5)(a) and (b); OAR 137-03-050(5); and 839-01-005.

The above-entitled matter came on regularly for hearing before Jon Wu, designated as Presiding Officer by the Commissioner of the Oregon Bureau of Labor and Industries. The hearing was held in the Lecture Room at the

Eugene Public Library, 100 West 13th Avenue, Eugene, Oregon, on August 27, 1979. Complainant Mark Buddenburg was present and testified. The Agency was represented by Michael J. Tedesco, Assistant Attorney General; Acco Contractors, Inc., Respondent, was represented by John Arnold, Attorney at Law. Also present were Norma Archibald and Glenn Shields, agents of Acco.

A proposed decision was issued on January 23, 1980. No exceptions thereto were filed during the time period allowed. Having considered the entire record in the matter, I, Mary Wendy Roberts, Commissioner of the Oregon Bureau of Labor and Industries, hereby make the following Ruling on Respondent's Motion, Findings of Fact, Ultimate Findings of Fact, Conclusions of Law, Opinion and Order.

RULING ON MOTION

Respondent made a motion to dismiss based on lack of jurisdiction by the Bureau of Labor and Industries. Respondent argued that the Bureau of Labor and Industries did not have jurisdiction because a complaint was not filed within the 30 day period mandated by ORS 654.062(5)(b). In response, the Bureau of Labor and Industries sought to introduce an Intake Questionnaire which was filled out by the Complainant within the 30 day period. Admission of the questionnaire was denied, but the motion to dismiss was also denied subject to reconsideration at the end of the hearing. See OAR 839-01-005 and 137-03-050(4). For the reasons stated below, the ruling on admissibility of the Intake Questionnaire is reversed, and the motion to dismiss is denied.

This case was brought under ORS 654.062(5), which gives Complainant "thirty days after he has reasonable cause to believe that such a violation has occurred" to file a complaint with the Labor Commissioner alleging a discharge on the basis of a complaint regarding safety violations. However, the statute also provides that the complaint shall be processed under the procedures, policies and remedies established by ORS 659.010 to 659.110. Discrimination complaints under ORS chapter 659 may be filed up to one year after the alleged discrimination occurs. ORS 659.040(1). In this case, apparently, the Civil Rights Division of the Bureau of Labor and Industries processed the complaint as it would a chapter 659 complaint, without considering the 30 day limitation period for chapter 654 complaints.

Generally, statutory language requiring the filing of a complaint by Complainant within a specified period of time is held to be mandatory or jurisdictional, rather than directory. See, e.g., *Iowa Civil Rights Commission v. Massey-Ferguson, Inc.*, 207 NW2d 5 (Iowa 1973). Nevertheless, while it is true that the document entitled "Complaint of Discrimination" was not signed by the Complainant until December 12, 1978, more than 30 days after October 17, 1978, the date the alleged act of discrimination occurred, it is hereby ruled that the document entitled "Intake Questionnaire," which was received by the Bureau of Labor and Industries on November 7, 1978, sufficiently met the requirements of ORS 654.062(5)(b).

While the Questionnaire states that "this is not a formal filing of a discrimination charge," ORS 654.062(5)(b)

requires only that a "complaint" be filed, as opposed to ORS 659.040(1), which requires a "verified complaint." In view of the shorter filing period for a chapter 654 complaint, this distinction makes sense. Complainant promptly took his grievance to the Bureau of Labor and Industries office and filled out the Intake Questionnaire, but could not complete the "complaint" within the 30 day period because the Coos Bay office of the Bureau of Labor and Industries, which received the initial Intake Questionnaire, did not have the complaint forms available for Complainant to complete. He had to wait until the forms were mailed to him from the Portland office. He completed and filed these forms promptly, but after the 30 day period. Under the circumstances and in order to reach substantial justice, the Intake Questionnaire was a sufficient complaint to met the statutory requirements. See, e.g., *Tidwell v. American Oil Company*, 332 F Supp 424 (D.C. Utah 1971), *White v. Motor Wheel Corp.*, 236 NW2d 709 (Mich. App. 1975) and *Ornelas v. Scoa Industries, Inc.*, 587 P2d 266 (Ariz. App. 1978), holding generally that, absent specific statutory language to the contrary, technical defects should not be fatal in determining whether statutory filing periods have been met.

While at the hearing admission of the Intake Questionnaire was denied, it is within the discretion of the Presiding Officer to reverse that ruling and admit the questionnaire into evidence, in order to reach substantial justice. On the basis of the preceding ruling, the questionnaire is clearly relevant, and substantial prejudice would occur to Complainant if it were not received.

See, 27 *CJS Discretion*, 48 *CHJS Judges*, Secs. 44 and 56(c) and 73 *CJS Public Admin. Bodies and Proc.*, Sec. 136. See also, *State v. Bain*, 193 Or 688, 702-4 (1952).

FINDINGS OF FACT – PROCEDURAL

1) At all times material herein, Respondent was an employer subject to the provisions of ORS 659.010 to 659.110 and 654.062.

2) On November 7, 1978, Mark Buddenburg filed a complaint with the Civil Rights Division of the Oregon Bureau of Labor and Industries alleging that he had been discharged from his employment as a consequence of his complaints about safety hazards on the job.

3) Following the filing of Complainant's complaint, the Civil Rights Division investigated the allegations in the complaint and determined that substantial evidence existed in support of Complainant's allegations.

4) The Civil Rights Division attempted to reach a settlement of this case through conference, conciliation and negotiation, but was unsuccessful in these efforts.

FINDINGS OF FACT – THE MERITS

1) On June 12, 1978, Complainant was hired as a crusher mechanic and laborer for Respondent. On September 14, 1978, Complainant sustained a back injury. He was ordered by his chiropractor not to work from October 3, 1978, to October 19, 1978. To temporarily replace Complainant, Respondent hired a Mr. Faren, who worked until October 18, 1978, then left for a permanent position. On that date, a

Mr. White was hired to replace Mr. Faren.

2) Because of his injury, Complainant became concerned about safety at the worksite and made a complaint to the Workers' Compensation Board. On October 10, 1978, a board representative, Mr. Olsen, inspected Respondent's site. Olsen told Glenn Shields, crusher foreman at the site, that Complainant had complained of safety violations at the site. A resulting inspection found safety violations.

3) On October 16, 1978, Complainant presented a list of safety concerns to Norma Archibald, co-owner of Acco Contractors, Inc. On the reverse side of the list were a number of changes which Complainant wished to see made at Respondent's site. These changes involved curing the named safety violations, putting Complainant in charge of maintenance, making Complainant answerable to Ms. Archibald, hiring someone to shovel, and replacing lost or stolen tools. Ms. Archibald was not willing to make all the changes requested and left the discussion with the impression that Complainant was going to quit and file for unemployment benefits. Complainant left the discussion with the impression that he was supposed to return on Monday, October 23, 1978, and continue work for two weeks until a new employee was trained.

4) On October 17, 1978, Complainant went to Respondent's site to request time off on Monday morning, October 23, to catch up on sleep after returning from a trip to Bakersfield, California. Complainant's wife went with him and waited in the truck while Complainant talked with Shields. At

that time, Shields, the foreman, who had authority to hire and fire employees, told Complainant he was through with Respondent. Complainant asked when that had happened and was told it happened when he handed the list of safety concerns and suggestions to Ms. Archibald. Complainant left on his trip to Bakersfield, but called Ms. Archibald during the weekend of October 21 and 22 to verify the statement of Shields. Ms. Archibald claimed that he had quit on the 16th. Complainant denied having quit. Ms. Archibald said that in any case, he was not needed to train the new employee. On October 25, 1978, Complainant returned to Respondent's site and collected his final pay check from Respondent.

5) Because Complainant filed for unemployment insurance benefits in California effective October 22, 1978, the California Employment Development Department investigated the reason for his separation from Respondent. According to a letter from the California Employment Development Department, the Department

"confirmed the reason for separation as replaced while employee was out due to an injury and that no misconduct on the job was involved. This information was obtained [from] Norma Archibald, on December 12, 1978."

6) Complainant had been unhappy with the conditions at Respondent's site. He did not get along with Shields and had been concerned about the safety of the job. Due to his injury, and based upon his own testimony and the report of Complainant's chiropractor, Complainant would have been unable to continue the type of

work required of him by Respondent. Complainant would not have continued there any longer than the two weeks necessary to train a new employee. Complainant would have returned to Brookings, Oregon, from Bakersfield, California, and would have looked for a new job even if he had not been terminated.

7) Complainant worked an average of 40 hours per week for Respondent at a rate of \$7.50 per hour. As a result of his termination, he suffered damage in the amount of \$600, which represents wages for two weeks he would have otherwise worked for Respondent. However, he collected \$104 in unemployment benefits for the week of October 31 through November 4, 1978, from the State of California.

ULTIMATE FINDINGS OF FACT

1) On October 10, 1978, and October 16, 1978, Complainant made complaints about safety problems at Respondent's job site.

2) Both Shields, Respondent's foreman, and Ms. Archibald, Respondent's co-owner, knew that Complainant had made complaints about safety problems at Respondent's job site.

3) Shields terminated Complainant's employment with Respondent on October 17, 1978.

4) A substantial and direct reason Complainant was terminated was his complaints about safety conditions at Respondent's job site.

5) As a direct consequence of the termination, Complainant lost wages for the period from Monday, October 23, 1978, until Friday, November 4, 1978, in the amount of \$600. Offset against the unemployment benefits,

Complainant suffered damages in the amount of \$496.

CONCLUSIONS OF LAW

1) The Intake Questionnaire received by the Bureau of Labor and Industries on November 7, 1978, is a sufficient complaint for the purposes of ORS 654.062(5)(b).

2) The Commissioner of the Oregon Bureau of Labor and Industries has jurisdiction of the parties in the subject matter herein.

3) Shields was an agent of Respondent with authority to hire and fire employees and, therefore, Respondent must bear responsibility for Shields' action in terminating Complainant.

4) Respondent discharged Complainant from employment because Complainant made complaints related to ORS 654.001 to 654.295. This discharge is prohibited by ORS 654.062(5)(a).

5) The Commissioner of the Bureau of Labor and Industries has the authority to award money damages to Complainant herein under the facts and circumstances of this record, and the sum of money awarded as damages in the Order below is an appropriate award.

OPINION

The testimony of Complainant and that of Respondent's witnesses, Mr. Shields, foreman, and Ms. Archibald, Respondent's co-owner, conflicted on whether Complainant quit or was terminated. Ms. Archibald testified that she thought Complainant quit on October 16, 1978, or that Complainant was going to quit. On cross-examination, however, she stated that her

understanding was not that Complainant had quit, and that she had waited to see what he would do. She admitted that when Complainant called from California the next weekend, she told him that he would not be needed to train the new employee and thereby implied that there would be no work for him when he returned to Oregon.

In further support of the position that Complainant was terminated is the letter from the California Employment Development Department to the Oregon Department of Justice stating that the "Department had confirmed the reason for separation as *replaced*' while absent due to injury. (Emphasis added.) This confirmation came from Norma Archibald. This letter from the California Employment Development Department, dated August 30, 1979, was received into evidence by the Presiding Officer on September 4, 1979, after the hearing, by request of the Assistant Attorney General and within the 10 day admission period agreed to at the hearing by Respondent.

The testimony was conflicting on the date of termination. Shields admitted making the statement on October 17 that Complainant was through as of the time he handed the list of safety concerns and demands to Ms. Archibald the previous day. Shields stated that he thought that Complainant had quit, but if not, he would have terminated Complainant, not because of safety-related complaint, but because of Complainant's demand or suggestion on the list submitted October 16, that Complainant take orders only from Respondent and not from Shields and that someone else be hired to do the shoveling.

Shields' testimony about the date of termination was not credible. Complainant stated that his purpose for talking with Shields on October 17 was to ask for time off after his trip from California. Complainant's wife went with him and waited in the truck while her husband talked with Shields. Shields admitted that Complainant had asked for time off shortly before October 18. The apparent contradiction was that, earlier in his testimony, he denied speaking with Complainant at all until after Complainant returned from California.

Both of Respondent's witnesses emphasized the demands or suggestions regarding the role of Acco personnel made by Complainant on October 16, 1978, as the reason for any unhappiness with Complainant. They denied being concerned about the inspection on October 10 or the written safety complaints made by Complainant on October 16, 1978. They testified that they were regularly subjected to unannounced inspections by the State Bureau of Mines. Whether or not safety violations were found on these occasions is not clear. It is clear from the testimony of Respondent's agents that the inspection caused by Complainant resulted in findings of safety violations.

Shields testified that his concern was only because of Complainant's demands or suggestions regarding personnel matters made on October 16, and not because of the safety complaints. Shields was asked by the Assistant Attorney General whether he became angry when the Workers' Compensation Board inspector stated that Complainant had made safety

complaints. Shields first admitted that he was angry. Then he very quickly changed his position and stated that he was not angry, but only that he was not happy about it.

Considerable testimony was given by all of the witnesses to the effect that Shields and Complainant did not get along very well. Complainant's October 16 demands or suggestions regarding the roles of Respondent's personnel probably underscored the alleged termination. However, on the basis of all the witnesses' testimony and their demeanor, it is not believable that the complaints about safety violations did not also play a substantial role. The fact that Respondent may have had other reasons for terminating Complainant is not a defense if the complaints about safety hazards played a substantial part in the decision to terminate Complainant.

Complainant's request for payment of expenses incurred in search of employment and in relocating in the sum of \$1,000 is denied. Such an award may be appropriate in certain cases, but it is not appropriate here. Testimony and exhibits adduced reflect that Complainant would have quit in any event to seek employment consistent with his health limitations.

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 and to protect the rights of others similarly situated, Respondent is ordered to:

1) Deliver to the Portland office of the Oregon Bureau of Labor and

Industries, within thirty (30) days of the execution of the Final Order, a certified check payable to MARK BUDDENBURG in the gross amount of FOUR HUNDRED NINETY-SIX DOLLARS, (\$496.00), representing back pay for the two week period for which Complainant was unlawfully prevented from working, minus paid unemployment benefits.

2) Ensure that workers who complain about safety hazards in the future shall not have their right to work in any way prejudiced by such complaints.

**In the Matter of
CORVALLIS DISPOSAL COMPANY,
an Oregon corporation, Respondent.**

Case Number 09-78

Final Order of the Commissioner

Mary Wendy Roberts

Issued April 16, 1980.

SYNOPSIS

Where Respondent employer failed to reinstate Complainant, a compensably injured worker with an unrestricted medical release, to an available and suitable position, the Commissioner held that Respondent violated ORS 659.415. Respondent's duty to reinstate a compensably injured worker released from medical restriction was not extinguished when no position was available at the time of the worker's

demand, but continued until a suitable position became available. The intent of ORS 659.435 was to include violations of ORS 659.415 among the unlawful employment practices statutes enforced by the Commissioner. The Complainant was awarded \$1,775.10 in net back wages. ORS 659.010(2) and (13); 659.060(3); 659.405(2); 659.415; 659.435.

The contested case in the above-entitled matter came on regularly for hearing before Glenda E. Anderson, designated as Presiding Officer in this matter by Bill Stevenson, then Commissioner of the Bureau of Labor. The hearing was held on September 26, 1978, in Corvallis, Oregon. The case for the Bureau of Labor was presented by Michael J. Tedesco, Assistant Attorney General, and the case for Respondent was presented by Robert Mix, Attorney at Law.

Having considered the entire record in the matter, evidence duly received and arguments of counsel, I, Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries, hereby make the following Findings of Fact, Ultimate Findings of Fact, Conclusions of Law, Opinion and Order.

**FINDINGS OF FACT –
PROCEDURAL**

1) The parties stipulated to the following facts:

a) Respondent Corvallis Disposal Company received Specific Charges and a Notice of Hearing.

b) Respondent employs six or more persons.

c) Complainant Harvey Castle requested to return to full-time

employment with Respondent on January 7, 1976, in a conversation with Richard Eisenbrandt, Respondent's General Manager.

d) Respondent did not reinstate Complainant to his former position or to any other position with Respondent.

2) At all times material herein, Respondent was and is an employer subject to the provisions of ORS 659.400 to 659.420.

3) On or about January 8, 1976, Complainant filed a verified complaint with the Civil Rights Division of the Bureau of Labor and Industries, alleging that he had been and continued to be discriminated against in connection with his employment by Respondent because of Respondent's failure to reinstate Complainant to his job following his recovery from a compensable injury.

FINDINGS OF FACT – THE MERITS

1) Complainant was hired by Respondent on or about January 20, 1971, to empty garbage cans into a garbage truck.

2) Complainant had injured his left knee before his employment with Respondent.

3) In May 1975, Complainant slipped off a roof at home and reinjured his left knee. He missed approximately four weeks of work after this reinjury.

4) On or about September 1, 1975, when approaching a garbage can while working for Respondent, Complainant stepped on a rock and again injured his left knee.

5) Complainant continued to work for Respondent until October 15, 1975, when he underwent surgery to correct

the knee injury sustained in September 1975.

6) Complainant was compensated by the Oregon Workers' Compensation Board for his September 1975 injury.

7) On November 3, 1975, Complainant applied for unemployment compensation through the Oregon Employment Division. The Employment Division mailed, and Respondent received, on or about November 4, a form stating that Complainant was applying for unemployment compensation. Question 10 on that form asks the applicant "Why are you no longer working there? Check one." Complainant checked two squares in response to that question: "Quit" and "Other."

8) On November 4, 1975, Complainant was filling his truck with gasoline at Respondent's pump, a privilege extended to employees, when the following incident occurred. Respondent's General Manager, Richard Eisenbrandt, approached Complainant and asked why he was using Respondent's gas pump since his unemployment form indicated that he had quit. Complainant indicated that he had not quit, and both persons walked away without further discussion.

9) Complainant received a light duty work release from Robert E. Steele, M.D., his duly-licensed physician, on November 13, 1975. He presented the release to Respondent's General Manager Eisenbrandt and inquired about a job at that time.

10) Respondent did not have any light duty jobs available, and

Respondent Eisenbrandt so informed Complainant at the time.

11) Also on November 13, 1975, James Trower, a Manpower Specialist II with Oregon Employment Division, called Respondent Eisenbrandt regarding Complainant's employment status. Mr. Trower recorded the content of this telephone conversation on Employment Division form 359C in the normal course of business. The form includes Trower's following record of Respondent Eisenbrandt's statement to him:

"No light work available - as far as I know he will be released by his doctor about 12-2 and will be back to work at that time."

Respondent Eisenbrandt's above-evidenced understanding that Complainant intended to return to work indicates that any previous misunderstanding regarding Complainant's quitting no longer existed as of November 13, 1975. As of November 13, 1975, both Complainant and Respondent intended that Complainant would return to work for Respondent when Complainant obtained an unrestricted work release.

12) Respondent Eisenbrandt interviewed Michael D. Watkins to fill Complainant's position on November 5, 1975. Watkins began work in that capacity on November 25, 1975.

13) Complainant received a full work release from Dr. Steele dated January 6, 1976.

14) On January 7, 1976, Complainant inquired to Respondent Eisenbrandt about reinstatement with Respondent. Eisenbrandt told Com-

plainant that Respondent did not have an opening at that time.

15) Respondent employs approximately 36 to 38 people. Five are mechanics, three are office workers, one is a dispatcher, and the remaining, except for General Manager Eisenbrandt, work on the garbage trucks collecting garbage.

16) Respondent did not contact Complainant in any way to offer him reinstatement or reinstate him to any position at any time after Complainant made his January 7, 1976, request for reinstatement.

17) After January 7, 1976, the first vacancy Respondent had for a position on a garbage truck occurred on April 26, 1976, when another employee terminated employment. This position was identical to the position which Complainant had worked for Respondent.

18) While he was employed by Respondent, Complainant earned \$192 per week.

19) Between April 26, 1976, and September 1, 1976, Complainant received \$95 per week, or a total of \$1,738.50 in unemployment compensation.

20) Complainant returned to school in September 1976. Absent a showing of the exact starting date, I find that Complainant started school at the earliest date in September: September 1, 1976.

ULTIMATE FINDINGS OF FACT

1) On or about September 1, 1975, Complainant sustained an on-the-job injury while working for Respondent.

2) The Workers' Compensation Board compensated Complainant for his September 1975 injury.

3) At least by November 13, 1975, Respondent knew that Complainant had not quit and confirmed that Complainant intended to return to full-time work upon obtaining an unrestricted work release.

4) On January 6, 1976, Complainant received a full work release from Dr. Steele.

5) On January 7, 1976, Complainant requested that Respondent reinstate him to full-time work. Respondent, through General Manager Eisenbrandt, responded that it had no full-time openings at that time.

6) Subsequent to January 7, 1976, Respondent had no available and suitable work for Complainant until April 26, 1976.

7) Respondent did not reinstate Complainant to his former position or any other position. Furthermore, Respondent made no effort to contact or notify Complainant of, or take any steps to reinstate him into, the suitable work which became available on April 26, 1976, or any other such work available thereafter.

8) As a direct consequence of not being reinstated to the suitable position available with Respondent on April 26, 1976, Complainant lost wages in the amount of \$3,513.60, which represents gross wages for the 18 week period between April 26, 1976, and September 1, 1976, when Complainant started school. The \$1,735.50 in unemployment benefits which Complainant received during the same time period mitigates, and therefore, must be

subtracted from, the above lost wage figure of \$3,513.60.

CONCLUSIONS OF LAW

1) The Commissioner of the Bureau of Labor and Industries has jurisdiction of the parties and the subject matter herein.

2) Respondent's General Manager Eisenbrandt was, at all times material herein, an employee of Respondent and acted within his authority in the matters described herein. Therefore, Respondent must bear legal responsibility for General Manager Eisenbrandt's actions described herein.

3) Complainant sustained a compensable injury while working for Respondent.

4) Complainant met his obligation under ORS 659.415 to demand reinstatement by requesting to return to work following his receipt from his duly-licensed physician of a full work release and his presentation of the release to Respondent.

5) Respondent did not meet its obligation under ORS 659.415 to reinstate Complainant because Respondent failed to reinstate (or even offer to reinstate) Complainant to the available and suitable job Respondent had in April 1976, or to any position with Respondent.

6) Respondent engaged in an unlawful employment practice in that it failed, after its worker's demand, to reinstate that worker, who had sustained and recovered from a compensable injury, to his former job to or to an available and suitable job.

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

authority to award money damages to Complainant herein under the facts and circumstances of this record, and the sum of money awarded as damages in the Order below is an appropriate award.

OPINION

1) Respondent's three affirmative defenses raised in its Amended Answer and incorporated into its Exceptions to the Proposed Order are without merit.

a) ORS 659.415, under which this matter was brought, is a constitutionally valid enactment of the Oregon Legislature under its police power authority to determine what civil rights are to be protected in furtherance of the general welfare of society.

b) The Commissioner of the Bureau of Labor and Industries has jurisdiction to enforce ORS 659.415. Although ORS 659.435, which empowers the Commissioner to enforce ORS 659.400 to 659.435, indirectly refers to ORS 659.010(13), the "unlawful employment practices" language of the latter statute does not limit rights under ORS 659.435. The Legislature has specifically qualified the descriptions of "unlawful employment practices" referred to in ORS 659.010(13) (and enumerated in ORS 659.030) by mandating that the definitions of ORS 659.010 are to be used "unless the context requires otherwise." ORS 659.400 to 659.435 fit exactly into the latter statutory exception. To conclude otherwise, *i.e.* to construe "unlawful employment practices" to include merely those practices referred to in ORS 659.010(13), would totally negate the purpose of ORS 659.400 to 659.435: To recognize and declare the

rights of the physically and mentally handicapped in Oregon. The intent of the Legislature on this matter is clearly stated in ORS 659.405(2): "It is hereby declared to be the policy of the State of Oregon to protect these rights and ORS 659.400 to 659.435 shall be construed to effectuate such policy." To recognize and declare these rights but not find a means for their enforcement would totally frustrate the intent of the Legislature.

c) The Commissioner of the Bureau of Labor and Industries has the authority to award damages to eliminate the effects of unlawful practices under ORS 659.415. ORS 659.435, through which the Commissioner enforces ORS 659.415, establishes the right of an aggrieved person to the remedies under ORS 659.050 to 659.085. Under ORS 659.060(3), the Commissioner has the authority to grant a cease and desist order, as defined in ORS 659.010(2), to "carry out the purposes of ORS 659.010 to 659.110 and 659.400 to 659.435, (and) eliminate the effects of an unlawful practice found . . ." The Commissioner's authority to issue the cease and desist order described in ORS 659.060(3), which can include an award of damages, is thereby incorporated into ORS 659.435 and applicable to enforce the rights described in ORS 659.415.

2) The version of ORS 659.415 in effect during the relevant time period stated that:

"A workman who has sustained a compensable injury shall be reinstated by his employer to his former position of employment or employment which is available and

suitable upon demand for such reinstatement, provided that the workman is not disabled from performing the duties of such position. A certificate by a duly licensed physician that the physician approves the workman's return to his regular employment shall be prima facie evidence that the workman is able to perform such duties."

Clearly, this statute imposes upon an employer an obligation to reinstate an employee who has suffered a compensable injury once that employee has recovered and made a demand for reinstatement. The only qualification to the employer's obligation under ORS 659.415 is that the work must be available and suitable.

In this case, the Respondent's first available job after Complainant's recovery and demand for reinstatement opened up on April 26, 1976, when another employee terminated employment. Because this position was identical to Complainant's former position, there is no question of its suitability for Complainant. The only question to be resolved in this case is the meaning of the word "available," as used in ORS 659.415. It is possible to construe the statute so that the word means "available at the time of demand." It is equally possible to construe the statute to mean that the employer's obligation continues until the first available (and suitable) position is offered to the recovered employee.

When a statute is unclear, as in this case, I must look to legislative history for manifestations of the Legislature's intent in using the word "available." ORS 659.415 was enacted by the

1973 Legislative Assembly without recorded debate. In the absence of indications of legislative intent, an administrative agency has two obligations. The first obligation is to interpret the statute in a reasonable manner. The second is to interpret the statute broadly enough to avoid eliminating rights that might reasonably be inferred to derive from the statute.

Given these obligations, it is appropriate to interpret "available" as meaning that the employer has a continuing obligation to at least attempt to reinstate the recovered employee into the first suitable position available. There is nothing in this statute that requires an employer to hold the injured worker's job open until such time as the employee has recovered. The unpredictability of recovery in most injury cases and the employer's need to continue normal business operations require that the employer be allowed to fill an injured worker's position during the worker's recovery. Given that, it is reasonable to assume that a suitable position may not be available precisely at the time of the worker's recovery and demand for reinstatement. To relieve the employer of the obligation to reinstate under such circumstances would be to provide an injured worker with an empty right.

It is thereby reasonable to interpret ORS 659.415 as requiring that an employer offer an injured worker the first suitable position available after the worker's recovery and demand for reinstatement. ORS 659.415 is silent as to how long this obligation continues, but I interpret it to mean herein that it continues at least as long as the 3 to 4

month period relevant herein, an eminently reasonable amount of time.

ORDER

NOW, THEREFORE, as provided by the provisions of ORS 659.060(3) and 659.010(2) and in order to eliminate the effects of the unlawful practices found and to protect the rights of other persons similarly situated, Respondent is ordered to:

1) Deliver to the Hearings Section of the Portland office of the Bureau of Labor and Industries, within thirty (30) days of the execution of this Order, a certified check payable to Harvey Castle in the gross amount of \$3,513.60, representing gross back pay damages for the period from the time when Complainant was not reinstated to available and suitable work until Complainant returned to school, minus any appropriate legal deductions, and minus the \$1,738.50 in unemployment compensation received during the same period.

2) Take all appropriate steps to ensure that any worker who has sustained a compensable injury will be reinstated to his or her former job or the first suitable job available after the worker's demand for such reinstatement, provided that the worker is not disabled from performing the duties of such job.

**In the Matter of
Northwest Hospital Service, dba
BLUE CROSS OF OREGON,
an Oregon non-profit corporation,
Respondent.**

Case Number 52-78
Final Order of the Commissioner
Mary Wendy Roberts
Issued May 22, 1980.

SYNOPSIS

Where Respondent employer's installation and use of a computer in its Medicare claims section led to significant staff reductions between 1975 and 1978, employees were laid off in inverse order of seniority, the selection of a white female for a temporary four month assignment was based on her specialized experience, and where Complainant, a black female who had previously filed civil rights complaints against Respondent, was not denied the temporary position or laid off because of her race and color or because she had filed complaints with the Agency, the Commissioner found no violation of ORS 659.030. ORS 659.030 (1)(a) and (d); 659.060(3).

The above-entitled matter came on regularly for hearing before Dale A. Price, designated as Presiding Officer in this matter by the Commissioner of the Oregon Bureau of Labor and Industries. The hearing was held on March 6, 1979, in Room 514 of the State Office Building, 1400 S.W. Fifth Avenue, Portland, Oregon. The Agency was represented by Michael J. Tedesco, Assistant Attorney General,

and Respondent was represented by Thomas A. Gordon, Attorney at Law. Complainant was present.

Having considered the entire record in this matter, I, Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries, hereby make the following Ruling Upon Motion, Findings of Fact, Ultimate Finding of Fact, Conclusion of Law, Opinion, and Order.

RULING ON MOTION

At the conclusion of the presentation of the Agency's case, Respondent moved to dismiss the Specific Charges, alleging that the Agency had failed to establish a prima facie case of the unlawful practices charged. A ruling upon the motion was reserved. After thorough consideration of the record, Respondent's motion is hereby denied.

FINDINGS OF FACT – PROCEDURAL

1) At all times material herein, Respondent Northwest Hospital Service, dba Blue Cross of Oregon, operated a business employing numerous persons in a variety of positions in the State of Oregon, and as such it was subject to the provisions of ORS 659.010 to 659.110.

2) On March 12, 1976, Complainant Mable Smith filed a verified complaint with the Civil Rights Division of the Bureau of Labor and Industries alleging that Respondent had discriminated against her in connection with her employment based upon her race and color. On April 4, 1977, Complainant filed a verified complaint with the Civil Rights Division alleging that Respondent had discriminated against

her in connection with her employment in retaliation for her filing the March 12, 1976, complaint.

3) On May 10, 1978, Complainant filed a verified complaint with the Civil Rights Division alleging that Respondent had discriminated against her in connection with her employment in retaliation for her filing the March 12, 1976, and April 4, 1977, complaints.

4) Following the filing of the complaint dated May 10, 1978, the Civil Rights Division investigated the allegations in that complaint and determined that substantial evidence existed to support Complainant's allegation of retaliation.

5) Thereafter, the Civil Rights Division attempted to reach an informal resolution of the May 10, 1978, complaint through conference, conciliation and negotiation, but was unsuccessful in these efforts.

FINDINGS OF FACT – THE MERITS

1) On December 4, 1967, Respondent hired Complainant as a Claims Analyst in its Medicare Claims Department.

2) Complainant's duties included the processing of medical claims. This work required some technical medical expertise which Complainant, a licensed practical nurse, possessed.

3) Complainant was in all respects a competent employee for Respondent.

4) Complainant occasionally met with her supervisor, Bettigene Reiswig, on a social basis.

5) During the summer of 1977, Respondent installed a computer system to reduce costs and increase efficiency. Although this computer was to

perform part of the work formerly accomplished by Complainant and her fellow Claims Analysts, the extent of the computer's capabilities was not then accurately predictable.

6) Shortly after the installation of the computer, Respondent realized that the machine's capabilities were greater than anticipated and that the reduction in need for services by employees in positions associated with the computer would be greater than expected.

7) During 1977, a Performance Standards Review Group assumed certain functions formerly performed by Claims Analysts, including some of the technical medical tasks.

8) As a consequence of the installation of the computer and the shifting of functions to a Performance Standards Review Group, Respondent downgraded the position of Claims Analyst to Claims Reviewer, thereby increasing the number of Claims Reviewers and placing Claims Reviewers and Claims Analysts on the same seniority scale.

9) In December of 1977, as a result of computer-induced problems with hospitals (called providers), Reiswig was ordered to create a temporary liaison position titled Project Analyst. This was basically a telephone pool position. It lasted only four months. Because it was temporary, this position was outside of the seniority system, and there was no requirement that Respondent openly post notice of the vacancy concerning it.

10) On December 27, 1977, Reiswig hired Linda Nelson, one of Respondent's Claims Analysts, for the

temporary position of Project Analyst. Ms. Nelson, a white person, was hired in part because she was due for layoff from her prior position, but primarily because of her considerable experience in the telephone pool as a duty collateral to her analyst duties. Ms. Nelson had less seniority than Complainant.

11) Complainant testified, and I find, that she informed Respondent's personnel office that she might be leaving her job within one year. She also mentioned this possibility to her co-workers. A memo from Respondent's personnel files shows that Respondent was aware that Complainant was considering leaving her job. Because of this expressed possibility, Respondent delayed layoffs in Complainant's department and put less emphasis on attempts to locate an alternative position for Complainant within its own organization than it did for others similarly situated.

12) Several Claims Reviewers were laid off by Respondent between the summer of 1977 and April 1978. All were laid off in inverse order of seniority except for the aforementioned Linda Nelson. The staffing level of the Medicare Claims Department slid from a high of 39 employees in 1975 to a low of 18 employees in 1978.

13) On April 4, 1978, a management team from Respondent's parent company analyzed Respondent's business and ordered a reduction in staff. Pursuant to this order, several employees were discharged, among them Complainant, who was discharged on April 14, 1978.

ULTIMATE FINDINGS OF FACT

As a consequence of the installation of a computer system and the shifting of certain of its functions to another group, Respondent's Medicare Claims Department went from a high of 39 employees in 1975 to a low of 18 employees in 1978. There is no evidence to suggest that race, color, or retaliation for civil rights complaints was a factor in the hiring of a temporary Project Analyst or the sequence of employee layoffs.

CONCLUSION OF LAW

In not hiring Complainant for the temporary Project Analyst position and in discharging Complainant, Respondent did not, because of Complainant's race, color, or filing of civil rights complaints under ORS 659.010 to 659.110, discriminate against Complainant in connection with her employment. This discharge did not, therefore, violate ORS 659.030 or constitute an unlawful employment practice.

OPINION

Complainant was a competent and favored employee of Respondent. She was on friendly terms with her supervisor and had shared some time with her supervisor outside the office environment. The increased efficiency in Respondent's business operations due to installation of a computer led to a shift in responsibilities. The impact of this change upon personnel could not be precisely predicted. The computer proved more efficient than expected and caused a substantial reduction in Respondent's need for the services of Complainant and her co-workers. The loss of jobs was an unfortunate by-

product of computerization, but there was no unlawful employment practice in Respondent's action.

As evidence of Respondent's alleged discrimination based upon race, color and retaliation, Complainant cites the placement of Linda Nelson, a white employee with less seniority than Complainant, in a temporary liaison position. This position was temporary and was awarded to Ms. Nelson primarily because of her superior experience in phone pool work. There was no unlawful employment practice in this action.

ORDER

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

**In the Matter of
JENKS HATCHERY, INC.,
an Oregon corporation, Respondent.**

Case Number 59-78
Final Order of the Commissioner
Mary Wendy Roberts
Issued May 23, 1980.

SYNOPSIS

Where Respondent employer paid three female Complainants a lesser

wage than that paid to a male worker, where a comparison of the skill, effort and responsibility exercised by Complainants to that exercised by the man showed that Complainants were 40 hour per week workers while the man, on salary, normally worked a 50 hour week, lived at the hatchery site and was jointly responsible to respond to emergencies at any time he was on the premises; and where the skills needed could be learned on the job and the basic working conditions were identical, but the live-in component of the man's position made the effort and responsibility of the jobs not comparable, the Commissioner found no violation of ORS 659.030. ORS 659.030(1);659.060(3).

The contested case in the above-entitled matter came on regularly for hearing before R. D. Albright, designated as Presiding Officer by the Commissioner of the Oregon Bureau of Labor and Industries. The hearing was convened at 10 a.m. on March 21, 1979, in the George Miller "B" Room of the Linn County Armory in Albany, Oregon. The Bureau of Labor and Industries was represented by Michael J. Tedesco, Assistant Attorney General. Respondent was represented by Dean M. Quick, Attorney at Law. Complainants and Melvin Jenks, Secretary/Treasurer of Respondent Corporation, were present. Also present was Etta Creech, Hearings Clerk.

Having considered the entire record in this matter, I, Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries, hereby make the following Findings of Fact, Ultimate

Findings of Fact, Conclusion of Law, Opinion, and Order.

FINDINGS OF FACT -- PROCEDURAL

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

2) On or about September 14, 1977, Dorothy A. Housing, Dorothy Morris, and Deborah McCullom filed verified complaints with the Civil Rights Division of the Bureau of Labor and Industries, alleging that they had been and continued to be discriminated against on the basis of their female sex in connection with their employment by Respondent. Such discrimination, if found to exist, would violate ORS 659.030.

3) Following the filing of the aforementioned verified complaints, the Civil Rights Division investigated the allegations and determined that substantial evidence existed to support Complainants' allegations contained in their complaints.

4) Thereafter, the Civil Rights Division attempted to reach an informal resolution of the complaints by conference, conciliation and negotiation, but was unsuccessful in these efforts.

5) The parties stipulated that in the event Respondent was found to have violated ORS 659.030, damages would be as follows:

Dorothy A. Housing: \$4,400.00

Dorothy Morris: \$1,000.00

Deborah McCullom: \$3,900.00

6) All demands for damages for mental suffering by Complainants were

withdrawn by the Bureau of Labor and Industries.

7) Upon the motion of the Presiding Officer, without objection by either party, all references to ORS chapter 652 in the Specific Charges were stricken.

FINDINGS OF FACT -- THE MERITS

1) Respondent operates a chicken hatchery. The general operation of the hatchery involves receiving two truck-loads of fertilized chicken eggs per week, processing these eggs into baby chicks, and shipping the hatched baby chicks to growers for raising and marketing. The hatchery processes 150,000 chicks per week.

2) Each female Complainant was employed by Respondent at all times material herein.

3) Since each of the Complainants performed the same duties for Respondent, they will be considered as a group.

4) The regular duties Complainants performed for Respondent included debeaking and vaccinating chicks, transferring eggs, dumping boxes, cleaning trays, and loading and unloading trucks during regular working hours. On occasion, Complainants also made deliveries of small loads of chicks using a panel van, performed some farm work, such as painting, or were placed on call during regular working hours on Wednesdays.

5) None of the duties performed by Complainants required any particular skill or previous experience. However, some of Complainants' duties, such as debeaking and vaccinating, required development of manual

dexterity because quick and safe handling of the chicks was essential to the efficient operation of Respondent's business. For example, debeaking required Complainants to pick up a chick in each hand and place the chicks' beaks against a hot iron to blunt the beaks. This operation prevented the chicks from injuring each other with their beaks. Chicks were vaccinated against disease by placing each chick's neck against a button so that an automatic vaccinating needle pierced the chick's neck. Improper performance of Complainant's duties, particularly debeaking and vaccinating, could result in death to the improperly handled chicks.

6) Complainants were required to work 40 hours per week, from 6 a.m. to 4:30 p.m. on Monday, Tuesday, Thursday, and Friday. Their rate of pay was \$3.25 per hour, for a four week gross wage of \$520.

7) Robert Moxley was a male employee of Respondent at all times material herein.

8) Mr. Moxley was required to work 50 hours per week and was paid \$650 per month therefor. This monthly figure is based upon a per hour wage of slightly less than \$3.25. In addition, Moxley was required to live on Respondent's premises and to be on call at all times he was present on the premises. For this component of his job, Moxley received an additional \$250 per month and a free trailer parking space. Moxley's total monthly compensation was \$900.

9) During Moxley's 50 hour work week for Respondent, he was regularly required to clean hatcher and incubator racks; transfer chicks; set eggs on

Wednesday and Sunday evenings; un-load incoming trucks (including those arriving on evenings and weekends when necessary); and load outgoing trucks. During the summer, outgoing trucks had to be loaded outside Complainants' regular working hours early in the morning or late in the evening in order to avoid daytime temperatures which could damage baby chicks. On occasion, Moxley made deliveries of chicks with a large truck or performed others tasks within his area of experience as required by Respondent, such as carpentry, plumbing, or operation of farm machinery. Although Moxley was not required to use these skills regularly, he did use them during his employment with Respondent to repair roofs, fix pipes, and help on the farm. Moxley performed all of the above tasks during his regular working hours of 7 a.m. to 4:30 p.m. Monday through Friday and one-half day on Saturdays, on Wednesday and Sunday evenings, or as required incidentally on evenings or weekends outside his regular working hours.

10) In addition to the tasks mentioned in Finding of Fact 9 above, Moxley's job with Respondent also required him to live on the Respondent's premises and to be on call at all times he was present on the premises in case of emergency.

11) In addition to Moxley, Respondent employed two other people who lived on the premises: Bert Fritz and Ben Miller. Each of these employees were also required to live on the premises and to be available at all times they were present on the premises for regular work or to handle any unusual emergencies in the hatchery.

12) Power failures were the most common emergencies at Respondent's hatchery. When a power failure occurred, the hatchery could sustain large losses in a short period of time unless power was reinstated very quickly. As these losses were uninsurable, Respondent provided its own form of insurance by employing a staff of live-in employees who were readily available and trained to deal with an emergency as soon as it occurred. The live-in employees and the Jenks' brothers, who also resided on the premises, were instantly alerted of a power failure affecting the hatchery by an alarm system which activated a bell in each of these person's homes. When the alarm sounded, all live-in employees responded if they were present. Usually the bell was first answered by Fritz during he night and by Miller during the day. The first answerer would switch on the auxiliary power generator to restore power to the hatchery. If the generator failed, the other people responding to the alarm joined the first answerer in evacuating chicks from the hatcher's order to prevent smothering. Although at the time of the hearing, Moxley had not actually had to perform the switching operation himself, he was instructed in its use and had responded to the alarm bell.

13) To make the above-described self insurance system reliable, Respondent required at least one of the three live-in employees to be present on the premises at all times. Although Moxley did not need specific permission each time he wished to leave the premises, he checked to make sure at least one other live-in employee was

on call so that his departure would not leave the farm unattended.

ULTIMATE FINDINGS OF FACT

1) The duties performed by Complainants and Moxley in and around the hatchery under similar conditions during regular working hours may have been comparable or even substantially equal in the skills, efforts, and responsibilities they involved. However, Complainants' job and Moxley's job taken as a whole were not comparable or substantially equal, since Moxley's job included a separate and additional component which Complainants' job did not include: Moxley's job required him to live on the premises and be available at all times he was on the premises to respond to an emergency.

2) Complainants were compensated at the rate of \$3.25 per hour for the work they performed during their 40 hour work week. Moxley's monthly salary for the work he performed during his 50 hour work week translated into a per hour wage slightly lower than \$3.25. The additional \$250 per month and free trailer parking space Moxley received was compensation for his additional job component, the live-in responsibility.

CONCLUSION OF LAW

Respondent did not unlawfully discriminate against Complainants on the basis of their female sex by compensating them for their work at a different rate than that used to compensate Moxley as charged, since, when taken as a whole, Complainants' job was not substantially equal or even comparable to Moxley's job. Therefore, Respondent did not violate ORS 659.030 as charged.

OPINION

To determine if wage discrimination based upon sex has occurred under ORS 659.030, it is necessary to consider the skills, efforts, responsibilities, and working conditions of the work of employees of one sex as compared to the skills, efforts, responsibilities, and working conditions of the work of employees of the other sex. Where these factors are shown to be equal, substantially equal, or comparable to the requisite degree, wage discrimination is unlawful. However, an employer is justified in compensating employees at different rates who perform at different levels of skill, effort, or responsibility or work under dissimilar conditions, regardless of the employees' sex.

In the instant matter, the work required of both the Complainants and Moxley was basically unskilled labor. While Complainants' jobs required some manual dexterity in handling the baby chicks, and while Moxley's job required manual dexterity of a different sort developed through years of experience as a handyperson, neither job required any particular prior skill or training. Any skills required could be and were learned on the job. As Complainants and Moxley worked mostly in or around the hatchery, the working conditions for all of them were basically identical.

While the skills and working conditions of Complainants and Moxley were thereby equal or substantially equal and certainly comparable, their jobs, when taken as a whole, cannot be considered equal or substantially equal. In fact, due to the additional job component required of Moxley, the efforts and responsibilities of the given

employees cannot even practically be compared.

The efforts and responsibility of Complainants involved only the proper performance of their jobs during regular working hours to avoid fatalities to individual or small groups of chicks due to improper debeaking or vaccination. Moxley's efforts and responsibilities during his 50 hour work week may have been comparable to Complainants' efforts and responsibilities during their regular working hours but, due to the nature of the live-in job component of Moxley's job, he was required to expend considerably more effort just to make himself available to respond to emergencies at all times he was present. Further, Moxley carried more responsibility since, in the event of an emergency, he and the other live-in employees were ultimately responsible for the proper maintenance of the entire batch of chicks in the hatchery.

ORDER

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

In the Matter of

POLK COUNTY EDUCATION SERVICE DISTRICT, formerly known as Polk County Intermediate Education District, a political subdivision of the State of Oregon, Respondent.

Case Number 56-78

Final Order of the Commissioner

Mary Wendy Roberts

Issued May 29, 1980.

SYNOPSIS

Where Respondent denied female Complainant the use of paid sick leave for her pregnancy disability, and refused to re-employ her for the balance of her probationary teaching contract following her maternity leave; and where Complainant worked until just before delivery, and Respondent's Superintendent thought it "unseemly" and "inappropriate" for female teachers to continue teaching and interacting with school children in the late stages of pregnancy, the Commissioner found that Complainant's pregnancy played a "key role" in the Superintendent's recommendation to the Board that she not be allowed to finish her current contract, and that the prohibition against discrimination "because of sex" in ORS 659.030 included pregnancy. The "key role" test "requires more than a minimal but less than maximal causal relationship between the worker's pregnancy and the employer's action." Because the Superintendent had noted some performance deficiencies before Complainant's pregnancy, the Commissioner did not find that sex bias motivated his recommendation that she not be offered another annual

contract. The Commissioner awarded the value of the sick leave Complainant should have been allowed, plus the pay she would have earned from the date her doctor released her for work to the end of the current contract term, and ordered Respondent not to discriminate on the basis of sex. ORS 659.010(2); 659.030(1); 659.060(3).

The contested case in the above-entitled matter came on regularly for hearing before Dale A. Price, designated as Presiding Officer in this matter by the Commissioner of the Bureau of Labor and Industries. The hearing was convened at 9:30 a.m. on January 16, 1979, at the Department of Human Resources Building in Dallas, Oregon. Complainant was present and testified. The Agency was represented by Thomas E. Twist, Assistant Attorney General, and Respondent was represented by Kenneth E. Shetterly, Attorney at Law.

Having considered the entire record in this matter, I, Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries, hereby make the following Findings of Fact, Ultimate Finding of Fact, Conclusion of Law, Opinion, and Order.

FINDINGS OF FACT – PROCEDURAL

1) Respondent Polk County Education Service District is a public employer in the State of Oregon.

2) On or about August 4, 1975, Complainant Julia Donaldson, a woman, filed a verified complaint with the Civil Rights Division of the Bureau of Labor and Industries, alleging that Respondent had unlawfully

discriminated against her in connection with her employment because of her sex.

3) Following the filing of Complainant's verified complaint, the Civil Rights Division investigated the allegations in the complaint and determined that substantial evidence existed to support Complainant's allegations that she had been discriminated against in her employment by Respondent because of her sex.

4) Thereafter, the Civil Rights Division attempted to reach an informal resolution of the complaint through conference, conciliation and negotiation, but was unsuccessful in these efforts.

FINDINGS OF FACT – THE MERITS

1) Complainant was hired by Respondent in late August 1972 as a Speech and Hearing clinician to work in the classrooms of several schools in Polk County. Complainant was hired on probationary status and remained in this status for the three consecutive contract years she spent in Respondent's employ. For each of these three years, Complainant and Respondent entered into separate annual contracts, the third of which, while calling for a salary to be paid in 12 equal monthly installments, contemplated actual work between August 27, 1974, and June 6, 1975. Had Respondent offered Complainant a contract for the fourth year (1975-1976), which it did not, such contract would have provided Complainant with tenure.

2) Respondent's Speech and Hearing Department consisted of three clinicians: Complainant, Louise Fenton, and Marjorie Christiansen, the

last of whom had some administrative and supervisory duties in connection with the running of the Department. Respondent's Superintendent, Elton Fishback, was ultimately responsible for the conduct of the department.

3) On March 11, 1974, Superintendent Fishback wrote an evaluation of Complainant which identified "cooperation and loyalty with administration and Board" as areas in which Complainant needed to improve.

4) While employed by Respondent in 1974, Complainant became pregnant. Superintendent Fishback became aware of her pregnancy either during the summer or early in the fall when school resumed. He asked Complainant when she would commence her maternity leave. Complainant explained that the child was due on November 2, 1974, but that she was unable to give him an exact date for the commencement of her absence because she wished to continue active employment as long as she was physically able, and her date of disability, as the date of the onset of labor, was not predictable with great accuracy. A similar dialogue between the two was repeated a number of times, with Complainant finally indicating that if the child were not born by December 1, 1974, she would begin her leave on that date.

5) Based upon Complainant's performance evaluations prior to her pregnancy and upon the consistent testimony of co-workers, including Ms. Christiansen, who had certain supervisory responsibilities over Complainant, I find that Complainant was, at times material herein, a competent Speech and Hearing Clinician. Furthermore,

her ability to work in the classroom was not significantly diminished by her pregnancy.

6) Complainant worked until approximately one day before the birth of her child on November 14, 1974.

7) Complainant was unable to work due to physical disability resulting from childbirth between November 14, 1974, and January 1, 1975.

8) At all times material herein, Respondent had a sick leave policy which credited each employee up to twelve days per year of paid leave for personal physical disability which prevented job performance. The policy stated that employees "shall be granted sick leave" for absences owing to their own illness. There was no precondition in this policy that an employee had to request the pay for such leave. The policy allowed accrual of unused days from year to year. Pregnancy and childbirth-related disabilities were the only gender-related exclusions from the application of this policy. At the time of her first day of absence due to physical disability related to childbirth, November 14, 1974, Complainant had accumulated 13-1/2 days of sick leave. Respondent was aware that Complainant was absent from November 14, 1974, until January 1, 1975, due to her own disabling condition. Complainant received no sick leave compensation from Respondent.

9) Complainant obtained her physician's written verification, dated December 18, 1974, that her (physical) inability to work would end on January 1, 1975.

10) Respondent also had a maternity leave policy in effect at all times

material herein. This policy provided for unpaid maternity leave not to exceed six months and encompassing a period to be jointly determined by the employee and the Superintendent. It did not require a physician's certificate before an employee could return to work.

11) In a letter to Superintendent Fishback dated November 19, 1974, Complainant requested six months of maternity leave commencing on December 1, 1974. The letter also stated that caring for her child might not require a leave for the entirety six months and that if, at an earlier time, her child no longer required her continuous care, she would notify Fishback and determine, with him, the earliest convenient date for her to resume her duties with Respondent.

12) Superintendent Fishback granted the Complainant's request by letter, stating that Complainant's maternity leave would begin December 1, 1974, and terminate on May 31, 1975.

13) On December 18, 1974, Superintendent Fishback wrote an evaluation of Complainant which characterized her as "satisfactory" in "scholarship" and "professional skill"; "unsatisfactory" in "personality"; "lacking" in "dependability," "cooperation," "loyalty," and "neatness"; "poor" in "attitude"; "inadequate" in "professional ethics"; and "poor" in "organization." This evaluation was worse than the Complainant's prior evaluations and inconsistent with the testimony of other members of Respondent's Speech and Hearing Department. On January 13, 1975, Complainant and Fishback met to discuss this evaluation.

14) On January 15, 1975, Complainant wrote to Superintendent Fishback requesting that, because of her child's good health and her physician's belief that she could safely return to her duties on March 1, 1975, her maternity leave be terminated on February 29, 1975, and she be permitted to return to her work on Monday, March 3, 1975. (March 3 was the first working day of March 1975.)

15) At a February 18, 1975, special session of the Polk County Intermediate Education District Board of Education (hereinafter referred to as the Board), Complainant presented a packet to the Board which included the December 1975 statement of her physician described in Finding of Fact No. 9 above.

16) Superintendent Fishback thereafter recommended to the Board that it deny Complainant's request to return to work as of March 1, 1975. Fishback also recommended to the Board that it not extend to Complainant an offer for a fourth annual contract, for the next school year. The Board accepted and acted upon both of Fishback's recommendations and so notified Complainant on or about March 14, 1975.

17) Although physically able and willing and having presented her physician's release, Complainant was not allowed to return to work for Respondent as of March 1, 1975, or any time thereafter.

18) Respondent, through Superintendent Fishback, did not employ a substitute for Complainant's position until approximately March 3, 1975, long after Complainant had informed Respondent, by her January 15, 1975,

letter, of her capability and desire to return to work effective March 1, 1975.

19) Superintendent Fishback testified that there were several reasons for his recommendations to the Board concerning Complainant's future employment. Among these stated reasons were the following:

a) Complainant's alleged failure to provide a physician's release to the effect that she was physically and mentally able to return to work.

b) Fishback's allegedly grave concerns about Complainant's professional competence and emotional stability.

c) Complainant's allegedly "careless attitude" and her frustration with Fishback's alleged desire to provide continuity to the clinical program by not giving him a precise date for the commencement of her absence from work.

d) Complainant's alleged lack of cooperation and loyalty, and her alleged attitude problems.

Fishback's above-stated reasons for not recommending Complainant's continued employment have been exposed as pretextual in the following aspects:

a) No physician's release was required by Respondent's maternity leave policy. Complainant did nonetheless present a physician's release, dated December 18, 1974, at her February 18, 1975, meeting with Respondent's Board. Respondent did not request from Complainant further information concerning her physical and mental capability to work.

b) Concerns about Complainant's competence and emotional stability were first expressed during the debate

over her pregnancy and were not shared by those who worked most closely with and at times supervised Complainant. Fishback himself never observed Complainant in the performance of her duties.

c) Concern about continuity was a ruse in that even though Complainant gave Respondent December 1, 1974, as the latest possible starting date of her leave, she was not replaced until well after she had expressed her readiness to return to work. Fishback provided no evidence of Complainant's alleged carelessness.

20) Superintendent Fishback testified and I find that he believed that it was "inappropriate" and "unseemly" for female teachers to continue teaching and interacting with school children during the latter stages of pregnancy. He also stated his belief that women in the latter states of pregnancy are more emotional and prone to injury than non-pregnant women. Fishback cited the "literature" and his college "training" to support his beliefs. He also stated that Polk County citizens are "conservative" and religious and implied that women should forego their right to work in order to go off quietly to await delivery of their children, rather than embarrass themselves and the community by displaying their pregnancy in the classroom. I find that Fishback's disapproval of Complainant's conduct in failing to absent herself from the classroom in the latter stages of her pregnancy played a key role in his decision to write a negative evaluation of Complainant's work performance on December 18, 1974, and his recommendation to the Board concerning her return to work under her third year

contract. This recommendation in turn, was the basis for the Board's decision not to allow Complainant to return to work during the 1974-75 school year.

21) Fishback's stated concerns about Complainant's attitude, cooperation, and loyalty were not pretextual. Complainant was by her own admission an outspoken person. Her willingness to state her opinions was a source of friction between her and some of her fellow workers, including Fishback and his secretary, Sandy Williams. This friction predated and therefore was not caused by Complainant's pregnancy (although I can infer that Complainant's pregnancy-related conduct may have impacted it). Ms. Williams described Complainant as sometimes sarcastic, said that Complainant acted as if she felt superior to her fellow workers, and said that Complainant made derogatory remarks about Fishback in his absence. Ms. Williams cited an incident in which Complainant allegedly scolded a part-time employee whose dress she considered inappropriate. Ms. Williams made Fishback aware of these problems which, when affirmed by Fishback's own observation of Complainant's demeanor, played a role in Fishback's later negative evaluation of Complainant and in his recommendation to Respondent's Board that Complainant not be allowed to return to work under her third year contract. Their role became key under the more thorough scrutiny reasonably incident to his recommendation to the Board that Complainant not be offered a fourth year (1975-76) contract and tenure. This recommendation, in turn, was the basis of the Board's decision

not to offer Complainant another contract or tenure.

22) There is no substantial evidence on the record that the alleged exacerbation of Superintendent Fishback's concerns about Complainant's attitude, loyalty, and cooperation by her pregnancy-related conduct played a key role in his decision to recommend against Complainant's fourth year contract and tenure.

FINDINGS OF FACT - DAMAGES

1) As a direct consequence of Respondent's unlawful acts found in the Conclusions of Law below, Complainant suffered loss of pay for the work period from March 1, 1975, when she was willing and able to return to work, through June 6, 1975, the final day of work for that school year. Complainant's rate of pay when she left Respondent's employ was \$9,690 per year, to be paid in 12 monthly installments. Each monthly installment should have been \$807.50 (\$9,690 divided by 12). Complainant lost her salary for the installments which would have been paid between March 1 through August 26, 1975. Complainant therefore lost five and five-sixths payments, or \$4,710.42.

2) Back pay damages due to Complainant for the pay loss described in Finding of Fact No. 1 above must be reduced by \$1,096.98, which is the undisputed amount which Respondent paid her on June 6, 1975, as her final paycheck.

3) Back pay damages due to Complainant for the pay loss described in Finding of Fact No. 1 above must also be reduced by the amount of unemployment compensation

Complainant received during the period in which she was unlawfully prevented from working: \$1,230.

4) Because Complainant was not given any sick leave pay by Respondent for her maternity disability, and because this disability exceeded the 13-1/2 days of paid sick leave she had accrued by the start of her disability, she must be compensated for the 13-1/2 days of sick pay to which she is entitled. The daily rate of sick pay at Complainant's pay rate was \$51.00. Complainant is therefore entitled to \$686.50 in sick pay benefits.

ULTIMATE FINDINGS OF FACT

1) Complainant was a competent employee of Respondent at all times material herein. She became pregnant in 1974, had a child on November 14, 1974, was on sick leave thereafter, followed by maternity leave between December 1, 1974, and May 31, 1975. Complainant was willing to return, and physically capable of returning, to her duties for Respondent, as she asked to do, as of March 1, 1975.

2) Respondent did not allow Complainant to return to work during the 1974-75 school year. Superintendent Fishback's disapproval of Complainant's unwillingness to remove herself from the classroom during the latter stages of her pregnancy played a key role in his negative evaluation of Complainant and his recommendation that she not be allowed to return from leave to work during the 1974-75 school year. His recommendation, in turn, was the basis of Respondent's decision not to allow Complainant to return to her work during the 1974-75 school year. This decision placed a burden

upon Complainant because of her pregnancy.

3) Respondent did not offer Complainant a fourth year contract and tenure for the 1975-76 school year. Superintendent Fishback's concerns about Complainant's attitude, loyalty, and cooperation played a key role in his recommendation that she not be offered another contract and tenure. His disapproval of Complainant's pregnancy-related conduct did not play a key role in his concerns about her attitude, loyalty, and cooperation or in his recommendation. Fishback's recommendation was the basis of Respondent's decision not to offer Complainant a fourth year contract and tenure.

4) Respondent's sick leave policy at times material herein operated to exclude Complainant from compensation solely upon the basis of her pregnancy.

5) Damages due to Complainant in compensation for Respondent's unlawful actions found in the Conclusions of Law are to be computed as follows:

Back Pay =	\$4,710.42
+ Sick Pay Due =	688.50
- Salary Received	
6-6-1975 =	- 1,096.98
- Appropriate Legal Deductions	-
- Unemployment Comp Received =	- 1,230.00
Net Amount Due =	\$ _____

CONCLUSIONS OF LAW

1) Respondent is an employer subject to the provisions of ORS 659.010 to 659.110.

2) The actions, and motivations for these actions, of Superintendent Fishback and Respondent's Board of Education are properly imputed to Respondent.

3) Discrimination against a female because of pregnancy or childbirth is discrimination because of sex.

4) Respondent's refusal to allow Complainant to return to work after her child's birth to finish her contract for her third probationary year of employment (1974-75) is a violation of ORS 659.030(1)(a), because it constitutes discrimination in terms, conditions or privileges of employment because of Complainant's sex.

5) Respondent's failure to offer Complainant a fourth year contract (1975-76) and tenure is not a violation of ORS 659.030(1)(a), because it did not constitute discrimination because of Complainant's sex.

6) Respondent's failure to award Complainant sick pay benefits for absence due to her childbirth-related disability constitutes a violation of ORS 659.030(1)(a), because it constitutes discrimination in terms, conditions or privileges of employment because of Complainant's sex.

7) The monetary damages awarded in the order below are appropriate and are as provided and contemplated by the provisions of ORS chapter 659.

OPINION

1. Legal Standard

ORS 659.030 prohibits an employer's discrimination against a worker because of the worker's sex. "Because of sex" includes "because of pregnancy or childbirth." Only females

become pregnant and bear children. Therefore, any requirement imposed only upon pregnant persons, although it may appear neutral on its face, has a disparate impact upon women and therefore is a requirement based upon sex. Subsequent to the events of this case, the Oregon Legislature manifested its agreement with this conclusion by enacting ORS 659.029, in order to clarify that ORS 659.030's general proscription of employment discrimination based upon sex includes discrimination based upon pregnancy or childbirth.

The only legal issue for resolution in this matter is, given the "because of . . . sex" language of ORS 659.030, how strong must the causal relationship between the employer's action and the worker's pregnancy be in order to violate that statute? Need the pregnancy be only "a factor," however minor, in the employer's action? Or, at the other extreme, must the pregnancy be "the only factor" in the employer's action? The "a factor" test would impose a light burden of proof upon the entity attempting to prove unlawful discrimination; the "the only factor" test would impose a heavy burden of proof upon that entity.

Instructed by the Equal Employment Opportunity Commission's interpretation of analogous federal statutes, I adopt a test which falls between the two above-cited extremes: the "a key role" test. Under this test, the relevant question in this case is: did Complainant's pregnancy play a "a key role" in Respondent's actions? This test occupies a range or parameter, rather than a slot, on the spectrum between the above two extremes. It requires a

more than minimal but less than maximal causal relationship between the worker's pregnancy and the employer's action. The precise strength required of that link cannot be pinpointed on a general basis, but the range within which that link's strength must fall can and is described by the "a key role" test.

2. Application of The Legal Standard to This Case

A. The Decision to Not Allow the Complainant to Return to Work During the 1974-75 School Year.

Complainant became pregnant while in Respondent's employ. Complainant wanted to and did work as long as she was physically able before starting her sick and maternity leaves. Complainant's ability in the classroom was not significantly diminished by her working up to the day prior to her delivery.

Superintendent Fishback imposed an unwritten corollary to Respondent's maternity leave policy requiring a pregnant woman to remove herself from the classroom before her obvious pregnancy became to "unseemly," to quote Fishback. In Complainant's case, following this corollary would have meant forfeiting pay during a period in which she was able to work. Fishback's disapproval of Complainant's violation of this unwritten policy played a key role in both his evaluation of Complainant and his recommendation concerning her return to 1974-75 work. This evaluation and recommendation in turn caused Respondent's Board to decide not to allow Complainant to return to work during the 1974-75 school year. This decision infringed upon Complainant's right to

work because of her sex and therefore violated the general proscription of ORS 659.030.

I reach the latter conclusion, as well as the conclusion that the failure to pay Complainant sick pay benefits violated the same statutory provision, because Respondent's failure to allow Complainant to return to her third year work placed a burden upon Complainant because of her pregnancy, and additionally because there was no showing that the actions were based upon a bona fide occupational requirement reasonably necessary to the normal operation of Respondent's business. Respondent's denial to Complainant of sick leave with pay and its denial of third year post-delivery employment (because Superintendent considered Complainant's employment in a visibly pregnant condition unseemly and unsuitable) placed burdens upon Complainant because of her female sex which were not placed upon her male counterparts. The Superintendent's disapproval of Complainant's conduct concerning her pregnancy based upon the reasons he articulated reveal the kind of stereotypical prejudice against women in employment situations which has been prohibited by the provisions of ORS 659.030 since 1969.

B. The Decision Not to Offer Complainant a 1975-76 School Year Contract and Tenure.

The right of any employer to make management decisions cannot be usurped by this Agency in the absence of a clear case of unlawful discrimination. In this matter, Complainant would have been granted tenure if she had been given a contract for her next year (1975-76) in Respondent's employ.

Because of the semi-permanent nature of a tenured relationship, an employer has the right to carefully scrutinize each employee prior to entering such a relationship.

Superintendent Fishback had the discretion to recommend whether Respondent's employees would be awarded contracts. Fishback is an individual who highly values what he perceives as respect and politeness among his employees. He defines attitude, loyalty, and cooperation in terms of these characteristics. In Complainant, he found an outspoken individual whose conflicts with some fellow employees seemed to violate his standards of politeness and respect. The comments of his secretary regarding interpersonal problems between herself and Complainant and between Complainant and others, combined with his own observations of Complainant's demeanor, led Fishback to issue at least one performance evaluation before Complainant's pregnancy with low ratings of Complainant's cooperation, loyalty, and attitude. This appraisal, subjective though it may have been, was within his authority. Whether his perceptions of Complainant were arbitrary or unfair is not the question before this forum; the issue is whether his discriminatory attitude about pregnancy played a key role in his perceptions and actions based thereon.

The Agency has established that Complainant's pregnancy played a key role in Fishback's recommendation that Complainant not be allowed to return from her maternity leave and complete her third probationary year of employment. But did her pregnancy

also play a key role in Fishback's second recommendation, that Complainant not be offered a contract and tenure for her fourth year of employment? It is evident that actual concerns about an employee's attitude, cooperation, and loyalty do constitute legitimate non-discriminatory reasons to recommend denial of contract and tenure. Respondent has introduced substantial evidence of such concerns. The Agency therefore has the burden of rebutting this showing by establishing that these reasons were pretextual or that pregnancy played a key role in them.

Having established that pregnancy played a key role in the decision concerning Complainant's completion of her 1974-75 work, the Agency may not merely presume the continuation of this unlawfulness in the decision concerning denial of tenure and the 1975-76 contract. While I can infer that Superintendent Fishback's response to Complainant's pregnancy-related conduct may have played a role in his already-existing perception of Complainant's loyalty, cooperation, and attitude problems, there is no substantial evidence that such response by itself played a key role in the latter perception, which was first documented long before the pregnancy issue arose.

An employer's standards concerning a tenure decision can properly be stricter than the standards concerning return from a leave of absence. In the absence of substantial evidence of an unlawful causal link between Complainant's pregnancy and Respondent's failure to offer her contract and tenure, I cannot deprive Respondent of its discretion to select the employees

to which it grants the semi-permanent status afforded by tenure. In the context of the aforementioned legitimate non-pretextual reasons for dissatisfaction with Complainant, the Agency's presumption of continuing discrimination is inadequate in itself to support a finding of an unlawful act in Respondent's denial of a fourth year contract and tenure. There simply is no substantial evidence that Complainant's pregnancy-related conduct, or its impact upon Superintendent Fishback's concerns about her attitude, cooperation, and loyalty, played a key role in Fishback's second recommendation to the Board concerning the 1975-76 contract and tenure, and the Board's adoption of that recommendation.

C. Damages.

What did Complainant actually lose as a consequence of Respondent's unlawful acts? Clearly, she lost the right to continue working through the remainder of the 1974-75 school year. Complainant had accrued 13 1/2 days of paid sick leave to which she also claims entitlement. Complainant had more than 13 1/2 days of childbirth-related disability. The fact that Respondent's sick leave policy made pregnancy and childbirth-related disabilities the only sex-linked exclusion, and the ample precedent of case law treating pregnancy- and childbirth-related temporary disability the same as any other temporary disability, require that Complainant receive compensation for the accrued sick time she used.

D. Compliance.

In this matter, after evaluating the record concerning two of Respondent's actions based upon

Superintendent Fishback's recommendations, I have found substantial evidence that one action was unlawful and no substantial evidence that the other was unlawful. Despite the latter finding, Respondent should be aware that its continued reliance upon the judgment of any employee who has evidenced an unlawful discriminatory attitude could render Respondent vulnerable to civil rights charges in the future and cast into doubt Respondent's compliance with that part of the Order below which mandates that Respondent take steps to prevent future sex discrimination against its employees. Before playing a significant role in employment decisions, an employee who has unlawfully discriminated in even one instance should be fully instructed on the policy and requirements of Oregon Fair Employment Practices Law, and his or her ability and willingness to adhere thereto should be carefully evaluated.

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 and to protect the rights of others similarly situated, Respondent is ordered to:

1) Deliver to the Hearings Section of the Portland Office of the Bureau of Labor and Industries, with 30 days after the date of the execution of this document, a certified check payable to the Bureau of Labor and Industries in trust for Julia Donaldson in the amount determined under the provisions of the formula delineated in Ultimate Finding of Fact No. 5 above, representing back pay and sick pay due, less

compensation received from Respondent on June 6, 1975, less appropriate legal deductions and less unemployment compensation received by the Complainant during the period of back pay accrual.

2) Take whatever steps are necessary to insure that persons in its employ shall not be prejudiced in any way in their opportunities to work because of their sex.

In the Matter of SIERRA TILE MANUFACTURING, INC., Respondent.

Case Number 07-79

Final Order of the Commissioner

Mary Wendy Roberts

Issued June 4, 1980.

SYNOPSIS

Where Respondent's president identified black Complainant's race and color over the telephone and refused to hire Complainant for an unskilled laborer position, and the president told an Agency investigator that he had hired too many of "those blacks" already, the Commissioner found that Respondent employer committed an unlawful employment practice in violation of ORS 659.030(1)(a). The Commissioner awarded lost wages to Complainant based on what he would have made for a period of 18 weeks, after which he found other

employment. ORS 659.010(2); 659.030(1)(a); 659.060(3).

The above-entitled matter came on regularly for hearing before Dale A. Price, designated as Presiding Officer in this matter by the Commissioner of the Bureau of Labor and Industries. The hearing was held on May 31, 1979, in Room 221 of the State Office Building, 1400 S.W. Fifth Avenue, Portland, Oregon. Complainant was present and testified. The Agency was represented by Michael J. Tedesco, Assistant Attorney General. Respondent was represented by its president, Dick Williams, and by Richard T. Clark, Attorney at Law.

Having considered the entire record in this matter, I, Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries, hereby issue the following Findings of Fact, Ultimate Finding of Fact, Conclusion of Law, Opinion, and Order.

FINDINGS OF FACT -- PROCEDURAL

1) At all times material herein, Respondent Sierra Tile Manufacturing, Inc., was and is a corporation employing several persons and engaged in the business of manufacturing roofing tile within the State of Oregon. As such, Respondent was and is an employer subject to the provisions of ORS 659.010 to 659.110.

2) On or about December 7, 1977, Complainant Eddie Manning filed a verified complaint with the Civil Rights Division of the Bureau of Labor and Industries alleging that he had been and continued to be discriminated against in connection with his prospective

employment by Respondent because of his race or color.

3) The parties to this contested case agreed that Sierra Tile Manufacturing, Inc. is the only appropriate Respondent in this matter. Therefore, references in the Amended Specific Charges to Oil Filter Service Company, Inc. and Dick Williams as Respondents are hereby stricken.

FINDINGS OF FACT – THE MERITS

1) On December 2, 1977, Respondent solicited applicants for the position of laborer in an advertisement placed in The Oregonian newspaper.

2) On or about December 2, 1977, Complainant, a black male, telephoned Respondent to answer the December 2, 1977, advertisement. He conversed with Respondent's President, Dick Williams, about the laborer job.

3) Mr. Williams was in charge of hiring laborers for Respondent. Because Respondent's turnover of laborers was high, Mr. Williams had occasion to speak to many applicants during a short period of time. Therefore, Mr. Williams has no specific recollection of his telephone conversation with Complainant. Complainant, on the other hand, has a specific and detailed memory of that conversation.

4) During his telephone conversation with Complainant, Mr. Williams inquired about Complainant's recent employment history and was told that Complainant had been unemployed for about three months. (Complainant had recently been discharged from military service.) Mr. Williams expressed to Complainant his belief that anyone who wanted to work would

have found a job before three months had elapsed.

5) Complainant did not mention his race or color during his conversation with Mr. Williams. Mr. Williams, however, made reference to having hired several of "y'all" in the past and further stated that several "y'all" didn't show up for work. These references made it clear to Complainant that Mr. Williams had identified him as a black person. Complainant's voice does exhibit a slight drawl which is stereotypically identified as characteristic of black persons.

6) During their telephone conversation, Mr. Williams asked Complainant to call back later. When Complainant did this, he was told not to call again.

7) Complainant was not hired as a laborer by Respondent.

8) The only qualifications for Respondent's laborer work contained in the record are good physical condition (in order to do heavy lifting) and willingness to work. That Complainant was and is physically qualified at all times material to perform Respondent's laborer work is not disputed. Complainant was also willing to do the laborer work.

9) On or about December 6, 1977, Complainant called the Civil Rights Division of the Bureau of Labor and Industries and spoke to Reina Smith, an attorney employed as a civil rights investigator by the Bureau. Complainant told Ms. Smith the details of his conversation with Mr. Williams.

10) Ms. Smith telephoned Mr. Williams immediately. She took notes during her conversation with Mr.

Williams. During that conversation, Mr. Williams made several references to "those blacks" and at least once stated that he had hired too many of "those blacks" already.

11) Respondent's advertisement offered pay for a 40 hour week at the rate of \$2.50 per hour for the first two weeks of employment and at least \$3 per hour thereafter.

12) At hearing, the Agency sought back pay damages for only 18 weeks after Respondent failed to hire Complainant. During this period of time, Complainant was available for employment and received unemployment compensation at the rate of \$55 per week. After 18 weeks, Complainant was employed.

ULTIMATE FINDINGS OF FACT

1) On or about December 2, 1977, Complainant, a black person, answered Respondent's newspaper advertisement for laborer work by telephoning Respondent and applying for such work. He spoke with Dick Williams, Respondent's president and person responsible for hiring laborers for Respondent. Mr. Williams inferred from his interpretation of Complainant's telephone voice that Complainant was a black person. Because of his beliefs about black employees, Mr. Williams specifically intended to discriminate against Complainant, and did in fact exclude Complainant from fair consideration for the position in question because of his race and color.

2) Had Respondent hired him, Complainant would have earned gross wages of \$2,120 during the 18 weeks of unemployment after the Respondent failed to hire him. Instead, he

received only unemployment compensation during this period of time, in the total amount of \$999.

CONCLUSIONS OF LAW

1) The actions, and motivations for those actions, of Respondent's president, Dick Williams, who was responsible for hiring Respondent's employees, are properly imputed to Respondent.

2) Respondent's exclusion of Complainant from fair consideration for employment because of Complainant's race and color barred Complainant from employment because of his race or color, and therefore constitutes a violation of ORS 659.030(1)(a).

3) The Commissioner of the Bureau of Labor and Industries has the authority to award monetary damages to Complainant herein under the facts and circumstances of this record, and the sum of money awarded in the Order below is an appropriate award.

OPINION

The only issue in this matter is why Dick Williams, Respondent's president and person in charge of hiring, did not hire Complainant for work as laborer for Respondent.

I first look to evidence on the record of the motive(s) Mr. Williams manifested in his December 2, 1977, telephone conversation with Complainant. Because the turnover rate for Respondent's laborers was high, Mr. Williams had occasion to speak to numerous applicants during a short period of time. Consequently, Mr. Williams does not specifically remember his telephone conversation with Complainant. He therefore could offer little direct testimony on the above question. In contrast, however, Complainant's

testimony revealed a specific and detailed memory of his conversation with Mr. Williams, including the innuendoes which led Complainant to reasonably believe that he was being discriminated against because of his race and color.

It must be noted that Mr. Williams and Complainant each has a pecuniary interest in the outcome of these proceedings and a potential bias because of that interest. For further evidence concerning the reason why Mr. Williams did not hire Complainant, I look therefore to the testimony of Reina Smith, a trained professional civil rights investigator who has no basis for bias in this case. It is Ms. Smith's testimony that her conversation with Mr. Williams included his references to having hired too many blacks, and related remarks, which weights the evidence in favor of the Agency's allegation that Mr. Williams did not hire Complainant because of his race and color. This testimony corroborates Complainant's perception that Mr. Williams specifically intended to discriminate against him because of his race and color. Together, the testimony of Complainant and Ms. Smith supply substantial and direct evidence of Mr. Williams' racially discriminatory attitude toward and action against Complainant.

Although the Agency requested compensation for Complainant's mental distress, the record does not contain evidence sufficient to demonstrate suffering beyond the normal frustration incident to the administrative processing of a case of this type.

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 and to protect the rights of other persons similarly situated, Respondent is hereby ordered to:

1) Deliver to the Hearings Section of the Portland office of the Bureau of Labor and Industries, within 30 days of the execution of this Order, a certified check payable to the Bureau of Labor and Industries in trust for Eddie Manning in the gross amount of TWO THOUSAND ONE HUNDRED TWENTY DOLLARS (\$2,120) (representing back pay which Complainant would have earned, but for Respondent's unlawful act) minus any appropriate legal deductions and minus \$990 (representing unemployment compensation Complainant received during the period of time for which back pay damages are awarded).

2) Cease and Desist from barring persons from employment on the basis of their race and color.

In the Matter of DOYLE'S SHOES, INC., an Oregon corporation, Respondent.

Case Number 05-79
Final Order of the Commissioner
Mary Wendy Roberts
Issued July 14, 1980.

SYNOPSIS

Respondent employer did not discriminate against female Complainant on the basis of sex by paying her less as a store manager than was paid to two male store managers because, taken as a whole, their work involved differing skill, effort, and responsibility, under differing working conditions from Complainant. Respondent's subsequent failure to promptly implement a negotiated pay raise was because of Respondent's financial condition, not Complainant's sex. ORS 659.010(6); 659.030(1); 659.060(3).

The contested case in the above-entitled matter came on regularly for hearing before R. D. Albright, designated as Presiding Officer in this matter by the Commissioner of the Bureau of Labor and Industries. The hearing was held on March 14, 1979, in the City Council Chambers in North Bend, Oregon. Complainant was present and testified. The Agency was represented by Michael J. Tedesco, Assistant Attorney General, and Respondent was represented by Marvin B. Waring, Attorney at Law. Also present was Etta Creech, Hearings Clerk. The hearing was con-

ducted under the authority and provisions of ORS 659.060.

Having considered the entire record in this matter, I, Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries, hereby issue the following Rulings Upon Motions, Findings of Fact, Ultimate Findings of Fact, Conclusions of Law, Opinion, and Order.

RULINGS UPON MOTIONS

1) At the beginning of the hearing, Respondent made a motion for dismissal of the Specific Charges because the pleadings failed to allege proper notice to Respondent. This motion was denied because ORS chapter 183, governing contested case procedures, requires that notice be given, but does not state that proper notice must be pleaded.

2) At the beginning of the hearing, Respondent made a motion for dismissal of the Specific Charges. This motion was based upon the contention that ORS chapter 659, under which these charges were brought, violates constitutional guarantees of equal protection in that it gives Complainant the option of proceeding in civil court or through the Bureau of Labor and Industries, but does not give Respondent the same option, thereby denying the Respondent an opportunity for a jury trial. The motion was denied because it is beyond this Forum's discretion to determine the constitutionality of legislative enactments. Such authority is reserved for the courts.

FINDINGS OF FACT - PROCEDURAL

1) At all times material herein, Respondent Doyle's Shoes, Inc., was and

is an employer subject to the provisions of ORS 659.010 to 659.110.

2) On December 14, 1977, Complainant Angeline C. Pennington filed a verified complaint with the Civil Right Division of the Bureau of Labor and Industries alleging that Respondent had discriminated against her in connection with her employment because of her sex.

3) Both parties to this contested case agreed to strike from the Specific Charges filed in this matter the reference to alleged violations of ORS 652.210 to 652.230 and the prayer of damages for mental suffering.

FINDINGS OF FACT – THE MERITS

1) At all times material to this case, Respondent Doyle's Shoes, Inc., owned and operated at least one retail store in Oregon. During the times specified herein, Respondent owned and operated three such stores: "Doyle's Shoes, Inc." in Coos Bay, Oregon; "Rough and Ready" in North Bend, Oregon; and "Joe's Horse Barn" in Roseburg, Oregon. These stores sold western goods, boots, shoes and clothing. "Joe's Horse Barn" also sold tack (stable gear).

2) Respondent's corporate structure was as follows: Doyle B. Harroun was president and sole shareholder; Wesley E. Hausauer (manager of "Rough and Ready") and Fred L. Higgenbotham (manager of "Doyle's Shoes, Inc.") were members of the board of directors; and Complainant (manager of "Joe's Horse Barn") was secretary of the corporation.

3) Complainant began working for Respondent in 1969 as a part-time bookkeeper. In 1976, she became a

sales clerk. In March 1976, when Respondent purchased its third store, "Joe's Horse Barn," Respondent and Complainant agreed that Complainant would manage this store.

4) Respondent paid Complainant, Hausauer, and Higgenbotham \$700 per month each to manage their assigned store. Higgenbotham and Hausauer were paid an additional \$200 per month to be buyers.

5) Each of Respondent's three managers was responsible for the operation of their store. Their duties included maximizing the efficiency of store operation; hiring, firing, and supervising store staff; opening and closing the store; and keeping basic records. The annual volume of business done in Complainant's store was less than the annual volume of business done in either of the other two stores.

6) In the retail trade, a buyer is an individual who makes major marketing decisions. A store's success in selling its merchandise is strongly influenced by its buyer's judgment and skill in selecting future merchandise. The duties of Respondent's buyers included attending shows where future styles were shown, meeting with salespersons, and selecting styles, patterns and fabrics for merchandise to be sold in Respondent's stores during the next season. These duties involved substantial responsibility, after-hours work, and out-of-town travel. Periodic buying efforts were based upon the buyer's continuing knowledge of marketing trends.

7) Complainant did the daily bookkeeping for her store. The other two managers did minor daily

recordkeeping, but not bookkeeping at their stores. As corporate secretary, Complainant had check-signing authority which the other two managers did not have. She also kept the minutes of the corporate meetings, which the other two managers did not do. Complainant was not paid an additional amount for the performance of the above duties.

9) Complainant had no previous management experience when she became manager of "Joe's Horse Barn".

10) Although Complainant began her managership with Respondent as a novice, by the time of her termination Complainant had become what Respondent termed "a good manager."

11) Prior to their employment as Respondent's managers and buyers, Hausauer and Higgenbotham had experience in the retail business, both having been retail outlet managers or assistant managers and buyers or assistant buyers.

12) The difference between the managerial skill and experience of Complainant and Hausauer and Higgenbotham was particularly marked during the first 10 months of Complainant's managership.

13) At the time Respondent purchased "Joe's Horse Barn", the store was in severe financial difficulty. It never became profitable, even though Respondent, Hausauer, and Higgenbotham gave Complainant considerable assistance on a regular basis to help turn the store into a profitable operation.

14) Respondent did not differentiate between, or base, any of the store

managers' salaries directly upon the profitability of their respective stores.

15) In December 1976, or January 1977, Complainant approached Respondent and requested that, because of Complainant's contributions to Respondent and Complainant's management experience over the past 10 months, Complainant be paid the same as Hausauer and Higgenbotham. Mr. Harroun told Complainant that she could make this suggestion at the next meeting of the Board of Directors. He indicated to Complainant that he did not think that Hausauer and Higgenbotham would approve her request; that he would not participate in or influence their decision; and that he would accept their decision.

16) Complainant, Harroun, Hausauer and Higgenbotham had a very close, family-like relationship with each other.

17) On January 6, 1977, Complainant asked Respondent's Board of Directors for a pay raise to \$900 per month, the salary level of Hausauer and Higgenbotham. The Board of Directors agreed that Complainant should receive the raise. Whether the board agreed to this pay raise because it felt that Complainant performed work equal or substantially equal to the work of Hausauer or Higgenbotham is not clear.

18) After the board's decision, Harroun said that Respondent was financially unable to pay the raise at that time, but that Respondent would execute the board's decision as soon as the funds were available.

19) Because of its poor financial condition, Respondent terminated the

employment of Hausauer and Higgenbotham at the end of February 1977.

20) Harroun took over the management of Respondent's North Bend and Coos Bay stores and all the buying duties for Respondent's three stores between March 1977 and August 1977. Complainant continued to manage "Joe's Horse Barn" during this time.

21) In March 1977, Respondent began to pay Complainant \$800 per month.

22) In the spring of 1977, Respondent applied for and obtained a Small Business Administration loan. This loan had a provision that no corporate officer's pay could be raised. Complainant, as corporate secretary, was a corporate officer.

23) In August 1977 Respondent notified the Small Business Administration that Complainant earned her salary as a store manager, not as a corporate officer. In September, the Small Business Administration administered the terms of Respondent's loan to delete any reference to a salary limitation for Complainant.

24) In August 1977 Respondent hired a person to coordinate activities among all Respondent's stores, buy for all stores, and manage one store. This new employee, Mr. Kolkhurst, an experienced manager who also had buying experience, was to have greater responsibility than any other store manager. Kolkhurst was hired at a salary of \$1,200 per month.

25) In September 1977 Respondent began to pay Complainant \$900 per month, the sum specified in the January 1977 Board of Directors decision.

26) Complainant terminated her employment with Respondent as of October 31, 1977. During October, after she gave notice of her resignation, Complainant injured herself on the job and was unable to work full-time. At Respondent's request, Complainant did work part-time to train her replacement. Complainant received a full month's pay for her October work. She also received approximately \$400 in income replacement benefits for October 1977 from the Workers' Compensation Board for her on-the-job injury.

27) By the time of the hearing, Respondent had closed two of its three stores ("Doyle's Shoes, Inc." and "Joe's Horse Barn") due to its poor financial condition.

ULTIMATE FINDINGS OF FACT

1) While employed by Respondent as manager of one of its three retail stores, Complainant, a female, did not do work equal or substantially equal to the work done by either Wesley Hausauer or Fred Higgenbotham, both males and, until March 1977, managers-buyers of Respondent's other two stores. Complainant's work, taken as a whole, involved the performance of duties requiring different skill, effort, and responsibility than the duties of Hausauer and Higgenbotham, taken as a whole. Complainant's working conditions differed from those of Hausauer or Higgenbotham because of at least one circumstance: Complainant's store had less annual sales volume than that of either Hausauer's or Higgenbotham's stores.

2) Because of the differences between the work performed by Complainant and that performed by

Hausauer and Higgenbotham, Respondent did not pay Complainant the same total pay as it paid either Hausauer or Higgenbotham. Although in January 1977 Respondent agreed to pay Complainant a salary which was the same as the total salary it paid Hausauer or Higgenbotham, Respondent did not necessarily do so in recognition of the alleged equality of their work. In March 1977, Respondent implemented half of that agreement; in September 1977, it implemented the other half. Respondent's delay in fully putting into effect the agreement was caused by its poor financial condition.

3) While employed by Respondent as a manager of one of its retail stores, Complainant did not do work equal or substantially equal to work done by Kolkhurst, Respondent's overall coordinator and manager of one of Respondent's stores as of August 1977. Complainant's work involved the performance of duties requiring less and different skill, effort, and responsibility than the duties of Kolkhurst.

4) Because of the differences between the work performed by Complainant and that performed by Kolkhurst, Respondent did not pay Complainant the same total pay as it paid Kolkhurst.

CONCLUSIONS OF LAW

1) The actions, and motivations for those actions, of Respondent's corporate Board of Directors, its sole shareholder and president, and its employee store managers are properly imputed to Respondent. The above persons included Doyle Harroun, Wesley Hausauer, and Fred Higgenbotham.

2) Respondent's not paying Complainant the same salary before September 1977 as that received by each of its two male managers-buyers Hausauer and Higgenbotham does not violate ORS 659.030(1)(a), because it does not constitute discrimination against Complainant in compensation because of her sex.

3) Respondent's not paying Complainant the same salary as that received by Respondent's male coordinator and manager Kolkhurst does not violate ORS 659.030(1)(a), because it does not constitute discrimination against Complainant in compensation because of her sex.

OPINION

The Agency has failed in this case to prove that Complainant did work equal or substantially equal to that of Hausauer and Higgenbotham, involving the performances of duties requiring equal or substantially equal skill, effort, and responsibility under similar working conditions.

The work performed by Complainant, Hausauer, and Higgenbotham can be divided into two components: managerial tasks and buying/book-keeping duties.

The managerial tasks performed by Complainant and by Hausauer and Higgenbotham differ in the following respects. Hausauer and Higgenbotham had substantially more management experience than did Complainant. This gap was so marked in the first 10 months of Complainant's managership that I cannot seriously consider an equal pay claim for a period commencing before January 1977, when Complainant asked for a pay raise. From

their greater experience can be inferred the fact that Hausauer and Higgenbotham were also more skilled than was Complainant. This inference is confirmed by the fact that Hausauer and Higgenbotham spent considerable time offering advice to, and otherwise helping, Complainant with her managerial tasks on a regular basis. The fact that the annual sales volume of each store Hausauer and Higgenbotham managed exceed that of Complainant's store indicates that Hausauer and Higgenbotham had greater activity to manage, and therefore at least somewhat different working conditions, than Complainant.

In addition to managing their stores, Hausauer and Higgenbotham both bore the responsibility of buying merchandise for all of Respondent's stores. This buying responsibility was a crucial function which involved major marketing decisions and considerable skill and efforts that differed from those involved in Complainant's job. The fact that Complainant did not perform this buying function is the most striking difference between her work and that of Hausauer and Higgenbotham.

Although they did minor daily recordkeeping, neither Hausauer or Higgenbotham performed the daily bookkeeping tasks which Complainant performed for her store.

The buying and bookkeeping duties described above and in the Findings of Fact involved different and not comparable kinds of skills, efforts, and responsibilities. There is no evidence that the working conditions involved in performing these duties were similar.

The Agency contends that evidence that Respondent's Board of

Directors, comprised of the three store managers and president of Respondent's corporation, agreed to pay Complainant a salary equal to that of Hausauer and Higgenbotham proves that Respondent's board believe that the work of Complainant, Hausauer, and Higgenbotham was equal. There is substantial evidence that the board did make such an agreement, but there is not substantial evidence that the board based this decision upon a conclusion that the three managers did equal work. The personal relationships between members of the board make it particularly difficult to analyze the basis for this agreement. If anything, however, the evidence supports the inference that the board agreed to raise Complainant's pay because of the close family-like relationship of its members and because Complainant was trying hard to become a good manager. The minutes of the meeting at which the board agreed to the raise, written by Complainant, vaguely describe the board's action as rooted in agreement that a raise was "fair and equitable" and "based on her (Complainant's) contribution to the Corporation." A later written statement by Hausauer, which presents more compelling evidence that the Board's motivation was based upon equal pay considerations, was prepared in contemplation of litigation and after Hausauer had left Respondent's employ. It was undated, offered upon an insufficient foundation, and offered not to prove the truth of what was asserted therein, but instead to impeach a witness. While the board's agreement to raise Complainant's salary to a level equal to that of Hausauer and Higgenbotham might form the basis of a wage

claim, the evidence of it contained in the record herein cannot by itself sustain this discrimination claim.

In sum, the Agency has presented substantial evidence that Complainant is a female, that Hausauer and Higgenbotham are male, and that during a given period Complainant was paid less per month than either of the latter two people. The Agency has also proved that all three held the same formal title in their employment for the Respondent. However, the record shows that, taken as a whole, their work involved differing skills, efforts, and responsibilities under different working conditions. The Agency, therefore, has not proved a prima facie case of a compensation violation under ORS 659.030(1)(a).

I do not need to reach the further question of whether the Agency has proved a prima facie case of equal pay for comparable work or work of comparable worth or, if so, whether either case would constitute a violation of ORS 659.030. Even if the Agency has proved either case and if such case is a violation of ORS 659.030, Respondent has rebutted any prima facie compensation discrimination case concerning Complainant with its showing of a legitimate, non-discriminatory reason for not compensating Complainant at the rate of \$900 per month between January and September 1977. Respondent cited its severe financial difficulties as the reason for failing to immediately implement its agreement to pay the Complainant \$900 per month, the salary Hausauer and Higgenbotham earned at the time of the agreement. The testimony of Complainant, Hausauer, and Harroun

referred to Respondent's poor financial condition. The fact that Respondent laid off Hausauer and Higgenbotham in February 1977 and, by the time of hearing, had closed two of its three stores attests to the dire financial condition of Respondent's corporation. The fact that in spite of its financial woes, Respondent implemented in March 1977 half of its agreement to pay Complainant \$900 per month, at practically the same time it laid off the two managers to whom Complainant compares herself, and the additional fact that as of September 1977 Respondent implemented the other half of its agreement with Complainant, lead to the inference that Respondent raised Complainant's salary as much and as fast as its financial condition allowed.

In response to Respondent's above-cited rebuttal evidence, the Agency has not shown that the Respondent's stated reason for paying Complainant less than \$900 per month after January 1977 was a pretext or discriminatory in its application. Indeed, within approximately one month after her request for a salary raise, Complainant was paid more by Respondent than either Hausauer and Higgenbotham were paid, as by that time they had both been laid off by Respondent because of its financial condition. Shortly thereafter, Complainant received a \$100 raise in pay. Furthermore, within one-and-one-half years of starting her managership as a novice, Complainant was earning the salary which the two more experienced male managers had earned up to six months earlier, when they were terminated.

Given the evidence on the record, it is impossible for me to affirm the Presiding Officer's conclusion that Respondent unlawfully discriminated against Complainant in her compensation by paying her less than it paid Hausauer or Higgenbotham during their employment by Respondent.

Discussion of any compensation claim comparing Complainant's salary with that of Mr. Kolkhurst, the overall coordinator, manager and buyer Respondent hired in August 1977 is unnecessary, as their work was clearly neither equal, substantially equal, nor comparable.

ORDER

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