In the Matter of

WILDFANG, INC.,

Case No. 09-06

Final Order of Commissioner Dan Gardner

Issued August 26, 2006

SYNOPSIS

Respondent failed to complete and return BOLI's 2005 prevailing wage rate survey by the date the Commissioner had specified. After considering any aggravating and mitigating circumstances, the Commissioner imposed a $1,000 civil penalty for Respondent's violation of ORS 279C.815(3). ORS 279C.815; ORS 279C.865; OAR 839-025-0520; OAR 839-025-0530; OAR 839-025-0540.

The above-entitled case came on regularly for hearing before Linda A. Lohr, designated as Administrative Law Judge ("ALJ") by Dan Gardner, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on July 26, 2006, in the Bureau of Labor and Industries conference room, located at 3865 Wolverine Drive NE, Bldg. E-1, Salem, Oregon.

Case Presenter Cynthia L. Domas, an employee of the Agency, represented the Bureau of Labor and Industries ("BOLI" or "the Agency"). Ginny Essman, Vice President of Operations for Wildfang, Inc. ("Respondent"), appeared as Respondent's authorized representative.

The Agency called as witnesses: Leanna Harmon, research analyst in the Workforce and Economic Research Division of the Oregon Employment Department, and Marsha Jossey, administrative specialist in the Prevailing Wage Rate Unit of the BOLI Wage and Hour Division.

Respondent called its authorized representative, Ginny Essman, as a witness.

The forum received into evidence:

a) Administrative exhibits X-1 through X-8 (submitted or generated prior to hearing);

b) Agency exhibits A-1 through A-6 (submitted prior to hearing);

c) Respondent exhibits R-1 through R-4 (submitted prior to hearing).

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

FINDINGS OF FACT – PROCEDURAL

1) On March 24, 2006, the Agency issued a Notice of Intent to Assess Civil Penalties ("No-

tice") alleging Respondent unlawfully failed to complete and return the 2005 Construction Industry Occupational Wage Survey ("wage survey") by September 19, 2005, in violation of ORS 279(C).815(3). The Agency alleged aggravating circumstances and sought a civil penalty of $1,000 for the single alleged violation. The Notice gave Respondent 20 days to file an answer and make a written request for a contested case hearing.

2) The Agency served Respondent with the Notice on or about March 27, 2006, by certified mail.

3) On April 11, 2006, Respondent timely filed an answer through its authorized representative, Ginny Essman. In its answer, Respondent denied it failed to complete and return the 2005 wage survey by the September 19 due date and requested a hearing.

4) On June 5, 2006, the Agency requested a hearing. On June 6, 2006, the Hearings Unit issued a Notice of Hearing stating that the hearing would commence at 10 a.m. on July 26, 2006. The hearing notice included a copy of the Notice of Intent, a language notice, a Servicemembers Civil Relief Act notification, and copies of the Summary of Contested Case Rights and Procedures and the Contested Case Hearing Rules, OAR 839-050-0000 to 839-050-0440.

5) On June 15, 2006, the forum issued a case summary order requiring the Agency and Respondent to submit case summaries that included: lists of all persons to be called as witnesses; identification and copies of all documents to be offered into evidence; and any civil penalty calculations (for the Agency only). The forum ordered the participants to submit their case summaries by July 14, 2006, and notified them of the possible sanctions for failure to comply with the case summary order.

6) The Agency and Respondent timely filed case summaries.

7) Prior to hearing, the Agency filed a motion to amend the Notice to correct scrivener's errors. Respondent did not file a response in opposition to the motion and the forum granted the Agency's motion.

8) Before the hearing began, the ALJ verbally advised the participants of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

9) The ALJ issued a proposed order on August 3, 2006, that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. Neither the Agency nor Respondent filed exceptions.

FINDINGS OF FACT – THE MERITS

1) At all material times, Respondent was a duly registered Oregon corporation engaged in construction. Respondent employed approximately 22 persons

in Oregon. Respondent's principal place of business was located at 3725 Kashmir Way SE, Salem, Oregon, and its mailing address was PO Box 12125, Salem, Oregon 97309.

2) At all times material, Ginny Essman was Respondent's vice president of operations. Essman also was responsible for preparing payroll, tracking accounts payable and receivable, hiring and firing personnel, and handling contract matters. Essman has worked for Respondent since 1989.

3) The Workforce and Economic Research Division of the Oregon Employment Department ("Employment Department") contracted with BOLI each year from 1999 to 2005 to conduct wage surveys. The purpose of the wage surveys is to aid the BOLI Commissioner in the determination of the prevailing wage rates in Oregon. In 2005, as in past years, the BOLI Commissioner used the wage surveys to determine Oregon's prevailing wage rates.

4) As part of its contract with BOLI, the Employment Department routinely maintains electronic files showing the name and "survey ID" number of each business entity to whom wage survey packets are sent each year, the address where each survey was sent, whether each survey was returned and whether it was timely returned, the date on which each survey was sent, and whether and when reminders were mailed to each business entity.

5) The Employment Department conducts wage surveys by first sending "presurvey" postcards to business entities that have been identified through the Quarterly Census Employment and Wages ("QCEW") database, using the North American Industry Classification [Code] System ("NAICS") to determine which entities perform construction contracts. Contractors who participated in the previous year's survey are sent a postcard notifying them that they have been selected to participate in the current wage survey and that the survey packet will follow in the mail. An entity that is identified as one that supplied or made deliveries to construction sites is sent a post card requiring a response to questions about any labor performed during deliveries. All other entities are sent a postcard requiring a response to questions about the nature of the construction work they perform, *e.g.*, whether they perform residential only, nonresidential, or a combination thereof. The postcard questionnaires require a response. Depending on the response to the questions, the Employment Department may or may not mail a wage survey packet to the responding entity. If an entity fails to respond, the Employment Department sends a wage survey packet to the address or addresses listed for that entity.

6) On July 5, 2005, the Employment Department sent Respondent a presurvey postcard requiring a response. Respondent did not return the postcard.

On August 10, 2005, the Employment Department sent Respondent a 2005 wage survey packet that included a pre-addressed, postage paid, envelope for return of the survey. The survey packet also included a notice that its completion and return was required by law and violation could result in the assessment of civil penalties. The packet included instructions to complete and return the survey by September 19, 2005. Respondent's corporate vice president received the 2005 wage survey packet that was mailed to Respondent's mailing address: PO Box 12125, Salem, Oregon 97309.

7) On September 26, 2005, the Employment Department sent Respondent a reminder postcard advising that the completed wage survey had not been received, that Respondent was required to complete and return it by law, and that penalties could be imposed. On October 10, 2005, the Employment Department sent Respondent a second wage survey packet, labeled "Final Notice" with a printed warning: "SURVEY PAST DUE * * * Please Respond Immediately" along with the same advisory set forth in the reminder postcard. Respondent did not respond.

8) On February 17, 2006, the Agency, through its Prevailing Wage Rate Unit, sent Respondent a letter that stated, in pertinent part:

> "Our records indicate that despite reminders, you failed to return a report for the 2005 [prevailing wage rate survey] by September 19, 2005. Our records also indicate that this may not be the first time you have failed to respond as required. If that is the case, you have violated the law in multiple years.
>
> "Since you have not responded to the survey, it has become necessary to begin the Administrative Process. We will soon serve upon you a Notice of Intent and ultimately a judgment in this matter. You are advised that failure to return this survey or filing fraudulent or incomplete information will result in penalties. We would prefer to resolve this matter prior to taking legal action; however, without your cooperation, this is not possible. You may stop this action by completing and returning the enclosed 2005 [wage survey] by no later than March 3, 2006.
>
> "If you did not perform any non-residential construction within Oregon during the time period covered by this survey, you can satisfy your legal obligation to respond to the survey by answering questions 1 and 2 of the survey as directed, signing it where indicated and returning it in the pre-addressed, postage paid envelope included in the survey booklet.
>
> "If we do not receive a completed survey from you by March 3, 2006, we will assess a civil penalty against you based on your continuing viola-

tions. Each day that you do not provide the survey is a separate violation, and each violation can subject you to a civil penalty of up to $5,000. (ORS 279(C).865 and OAR 839-025-0510)."

The letter was mailed to Respondent's mailing address and a copy sent to Respondent's business location. Respondent received the letters on or about February 21, 2006, but did not respond.

9) After Respondent was served with the Notice of Intent to Assess Civil Penalties on or about March 27, 2006, Respondent's vice president contacted the Agency and the Employment Department and offered to send the completed wage survey by facsimile transmission. On March 29, 2006, the Employment Department received a completed wage survey from Respondent.

10) On the Wage Data Form of the 2005 wage survey, Respondent identified the week it employed "the greatest amount of non-owner hours at non-residential construction sites between September 1, 2005, and August 31, 2005" and listed seven workers, their wage rate region, skill level, number of hours they worked during that week, and their basic hourly rate.

11) In 2004, the Employment Department mailed a presurvey postcard and, later, a wage survey packet to Respondent at the mailing address listed in its database: PO Box 12125, Salem, Oregon 97309. The completed wage survey was due by September 17, 2004. Thereafter, the Employment Department mailed a reminder postcard to Respondent on September 21, 2004. During the week of October 12, 2004, the Employment Department mailed a second wage survey packet along with a final reminder to complete and return the wage survey packet that was past due. Respondent received the 2004 wage survey. The Employment Department did not receive a completed 2004 wage survey from Respondent by the September 17 due date.

12) Returned wage surveys were accepted and included in the survey results as late as October 28, 2005. The survey database was then closed to prepare for a rate setting meeting with the BOLI Commissioner and his staff on November 4, 2005. Surveys received after October 28, 2005, were not included in the results of the survey as published by the Oregon Employment Department in January 2006 and not considered by the BOLI Commissioner when setting prevailing wage rates.

13) Harmon and Jossey were credible witnesses and the forum credited their testimony in its entirety.

14) Ginny Essman's testimony that Respondent timely submitted the 2005 wage survey was self serving, not supported by credible evidence, and was contradicted by credible evidence establishing that the Employment Department did not receive Re-

spondent's completed wage survey until March 29, 2006. The forum gave no weight to Essman's testimony concerning when Respondent mailed the 2005 wage survey.

ULTIMATE FINDINGS OF FACT

1) Respondent was an Oregon employer in 2005.

2) The Commissioner conducted a wage survey in 2005 that required persons receiving the surveys to make reports or returns to the Agency for the purpose of determining the prevailing wage rates.

3) Respondent received the 2005 wage survey packet.

4) Respondent failed to return the completed survey by September 19, 2005, the date specified by the Commissioner.

5) Respondent received the 2004 wage survey packet and did not return the completed survey by September 17, 2004, the date specified by the Commissioner.

CONCLUSIONS OF LAW

1) The actions, inaction, and statements of Ginny Essman are properly imputed to Respondent.

2) Respondent was a person required to make reports and returns under ORS 279C.815 who violated ORS 279C.815(3) by failing to return the Commissioner's 2005 wage survey by September 19, 2005.

3) The Commissioner is authorized under ORS 279C.865 to assess civil penalties not to exceed $5,000 for each violation of any provision of ORS 279C.800 to 279C.870 or any rule of the commissioner adopted thereunder and, having considered any aggravating and mitigating circumstances in accordance with OAR 839-025-0520, has exercised his discretion appropriately by imposing a $1,000 civil penalty for Respondent's single violation of ORS 279C.815(3).

OPINION

2005 PREVAILING WAGE SURVEY VIOLATION

To prove Respondent violated ORS 279(C).815(3), the Agency must establish:

> (1) Respondent is a "person" as defined in ORS 279(C).815(1);
>
> (2) The commissioner conducted a survey in 2005 that required persons receiving the surveys to make reports or returns to the Agency for the purpose of determining the prevailing wage rates;
>
> (3) Respondent received the commissioner's 2005 survey; and
>
> (4) Respondent failed to make the required reports or returns within the time prescribed by the commissioner.

In the Matter of Emmert Industrial Corp., 26 BOLI 284, 289 (2005).

The first three elements are not in dispute. The only issue is whether Respondent failed to complete and return the 2005

wage survey within the time prescribed by the Commissioner.

The undisputed facts are threefold: 1) Respondent received the 2005 wage survey; 2) Respondent was required to complete and return the survey by September 19, 2005; 3) the Employment Department received the completed wage survey from Respondent on March 29, 2006. Essman provided no proof that she completed and returned the wage survey before the required due date as Respondent's answer contended. On the other hand, credible evidence established that the Employment Department has no record of having received anything from Respondent until it received the completed wage survey on March 29, 2006. Moreover, Essman admitted she had no contact with the Employment Department or the Agency until March 28 or 29, 2006. Credible evidence shows the Employment Department sent Respondent a postcard on September 26, 2005 that stated in bold lettering, "Survey Past Due Please Respond" and on October 10, 2005 sent a "final reminder" and another survey booklet that stated in bold lettering, "Survey Past Due Please Respond Immediately." Essman gave no explanation for why she did not make inquiry about those "reminders" if she believed she had already sent the completed wage survey to the Employment Department.

Additionally, evidence shows the Agency sent Respondent a letter on February 17, 2006, warning Respondent that if the Agency did not receive the completed survey by March 3, 2006, a civil penalty would be assessed for a continuing violation of ORS 279C.815. Essman's contention that she mailed the completed survey "for the second time" on March 2, 2006, is not supported by credible evidence.[1] Instead, a preponderance of credible evidence shows that Essman took no action to respond to the survey until after the Notice of Intent to Assess Civil Penalties issued on March 24, 2006. The Agency proved Respondent failed to make the required reports or returns within the time prescribed by the Commissioner and Respondent is liable for civil penalties.

CIVIL PENALTY

The Agency seeks $1,000 as a civil penalty for Respondent's violation of ORS 279(C).815(2). In determining the appropriate penalty amount, the forum must consider Respondent's history, including prior violations, if any, and Respondent's actions in responding to the prior violations, the opportunity and degree of difficulty to comply, the magnitude and seriousness of the current violation,

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[1] Essman presented a copy of an envelope postmarked March 2, 2006, that she admitted was stamped with Respondent's postage meter. She did not say when she delivered the envelope to a US Post Office and there is no other postmark that shows when the envelope was mailed from a US Post Office.

and whether Respondent knew it was violating the law. The forum must also consider all mitigating circumstances presented by Respondent. OAR 839-016-0520.

A. Aggravating Circumstances

First, the Agency alleged and credible evidence established that Respondent failed to complete and return the 2004 wage survey by the September 17, 2004, due date as required by the Commissioner. Essman admitted at hearing that Respondent had received the previous year's survey, but equivocated about whether the 2004 survey was completed and returned by the due date established by the Commissioner. However, Employment Department records unequivocally demonstrated that Respondent neglected to complete and return the 2004 wage survey form as required. Credible evidence showed that several reminders were sent to Respondent in 2004, and Respondent failed to respond. That historical fact, although outside the scope of the charging document,[2] is an aggravating circumstance that may be weighed in determining an appropriate penalty. *In the Matter of The Landscape Company of Portland,* 22 BOLI 77 (2001). In this case, Respondent's past failure to return the required survey demonstrates Respondent's knowledge of the violation and that Respondent does not take its legal obligation seriously.

Second, the 2005 wage survey was mailed to Respondent well over a month before the required due date giving Respondent ample opportunity to comply with the law. Moreover, Respondent had at least two reminders after the due date passed before the Agency warned that sanctions were imminent, and, even after the Agency's February 17 final warning letter, Respondent remained unresponsive until the Notice of Intent to Assess Civil Penalties issued on March 24, 2006. Also, Respondent presented no credible evidence that it had difficulty complying with the law. In fact, Respondent introduced evidence that shows it would have been relatively easy for Respondent to have timely submitted the wage survey. According to the responses to the questions in the completed wage survey Respondent submitted on March 29, 2006, Respondent had seven employees who performed "the greatest amount of non-owner hours at non-residential construction sites" during Respondent's "peak week" between September 1, 2004, and August 31, 2005. Since it is required by law to maintain payroll records for its employees, Respondent should have had little difficulty acquiring and providing the requested information. Based on the credible evidence herein, the forum concludes that Respondent had ample opportunity and a minimal

[2] ORS 183.415 requires formal notice of the "matters asserted or charged." Here, the only matter asserted or charged for which penalties are sought is the 2005 violation.

degree of difficulty to comply with the prevailing wage rate laws.

Third, while this forum previously has held that wage survey violations are not as serious as violations involving the failure to pay or post the prevailing wage rate, the forum also has determined that "workers may suffer substantial financial harm if the prevailing wage rates set by the Commissioner do not accurately reflect wages paid in the community because employers who pay their employees well do not return the surveys." *F.R.Custom Builders*, 20 BOLI 102, 111 (2000). Moreover, since the Commissioner is mandated to "make determinations of the prevailing wage rates," the forum infers that the wage surveys, conducted pursuant to ORS 279C.815 (5), are the Commissioner's primary source of "relevant data and information" to ensure that the determinations accurately reflect wages paid in the community. The forum also infers that the relevant data and information are less useful if not submitted in time to be considered in the prevailing wage rate calculations. In this case, Respondent's data would have been considered in the 2005 survey because the evidence shows Respondent was performing non-residential work during 2005. Consequently, Respondent's non-compliance is serious because it undermines the Commissioner's ability to complete his statutory duty to accurately determine the prevailing wage rates. *See In the Matter of Emmert Industrial Corporation*, 26 BOLI 284, 289 (2005).

B. <u>Mitigating Circumstances</u>

Respondent presented no mitigating circumstances for the forum to consider. Essman's claim that she submitted the wage survey before it was due on September 19, 2005, was contradicted by other credible evidence, including evidence that the Employment Department received Respondent's completed survey well over six months past the date designated by the Commissioner.

C. <u>Civil Penalty Amount</u>

Although the Commissioner may impose a penalty of up to $5,000 for Respondent's violation, the Agency has already mitigated Respondent's violation by seeking $1,000 as a civil penalty. Having considered the aggravating circumstances, the forum assesses a $1,000 civil penalty.

ORDER

NOW, THEREFORE, as authorized by ORS 279C.865 and as payment of the penalty assessed as a result of Respondent's single violation of ORS 279C.815(3), the Commissioner of the Bureau of Labor and Industries hereby orders **Wildfang, Inc.** to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 1045 State Office Building, 800 NE Oregon Street, Portland, Oregon 97232-2180, a certified check payable to the Bureau of Labor and Industries in the amount of ONE THOUSAND DOLLARS ($1,000.00), plus any interest that

accrues at the legal rate on that amount from a date ten days after issuance of the Final Order and the date Respondent complies with the Final Order.

In the Matter of

JORGE E. LOPEZ,

Case No. 73-05

Final Order of Commissioner Dan Gardner

Issued September 26, 2006

SYNOPSIS

The Agency established by a preponderance of evidence that one wage claimant worked at Mi Ranchito Restaurant and two wage claimants worked at La Sierra Nevada Family Restaurant and were not paid their full wages when their employment ceased. The Agency failed to show that Respondent was liable for the unpaid wages. Instead, the Agency introduced evidence that Mi Ranchito Restaurant was owned by Respondent's corporation at times material and that La Sierra Nevada Family Restaurant was owned by someone other than Respondent. The Commissioner concluded Respondent did not employ Claimants and dismissed the wage claims and the Agency's Orders of Determination. ORS 652.140; ORS 652.150; ORS 653.055; OAR 839-020-0030.

The above-entitled case came on regularly for hearing before Linda A. Lohr, designated as Administrative Law Judge ("ALJ") by Dan Gardner, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on April 11, 2006, in the W.W. Gregg Hearing Room of the Bureau of Labor and Industries, located at 800 NE Oregon Street, Portland, Oregon.

Jeffrey C. Burgess, an Agency employee, represented the Bureau of Labor and Industries ("BOLI" or "the Agency"). Lucia Vargas Jacinto ("Claimant Jacinto") was present throughout the hearing and was not represented by counsel. Dora Alicia Quijada Herrera ("Claimant Quijada") and Esmeralda Angelina Ruiz Olmedo ("Claimant Ruiz") were not present at the hearing but testified individually by telephone. Jorge Lopez ("Respondent") failed to appear for hearing in person or through counsel. Terry Rogers, a certified Spanish interpreter, was present throughout the hearing and interpreted the entire proceeding for the benefit of Claimant Jacinto and interpreted all three Claimants' testimony during the hearing.

The Agency called Claimants and BOLI Wage and Hour Division compliance specialist Stan Wojtyla as witnesses.

The forum received as evidence:

a) Administrative exhibits X-1 through X-6;

b) Agency exhibits A-1 through A-21 (filed with the Agency's case summary).

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

FINDINGS OF FACT – PROCEDURAL

1) On August 19, 2003, Claimant Quijada filed a wage claim form in which she stated that Respondent had employed her from May 1 to December 31, 2002, and failed to pay her wages for hours she worked from November 1 to November 15, 2002, and from December 15 to December 30, 2002.

2) At the time she filed her wage claim, Claimant Quijada assigned to the Commissioner of the Bureau of Labor and Industries, in trust for Claimant, all wages due from Respondent.

3) On August 12, 2004, Claimant Jacinto filed a wage claim form in which she stated that Respondent had employed her from March 11 to May 21, 2004, and failed to pay her for the hours she worked during that period.

4) At the time she filed her wage claim, Claimant Jacinto assigned to the Commissioner of the Bureau of Labor and Industries, in trust for Claimant, all wages due from Respondent.

5) On September 8, 2004, Claimant Ruiz filed a wage claim form in which she stated that Respondent had employed her from May 29 to July 11, 2004, and failed to pay her for the hours she worked in that period.

6) At the time she filed her wage claim, Claimant Ruiz assigned to the Commissioner of the Bureau of Labor and Industries, in trust for Claimant, all wages due from Respondent.

7) On December 13, 2004, the Agency issued Order of Determination No. 03-2780. In the Order, the Agency alleged Respondent had employed Claimant Quijada during the period November 1 through December 30, 2002, failed to pay her for all hours worked in that period, and was liable to her for $718.25 in unpaid wages, plus interest. The Agency also alleged that Respondent's failure to pay all of Claimant Quijada's wages when due was willful and he was liable to her for $1,560 as penalty wages, plus interest. In addition to the penalty wages, the Agency alleged Respondent paid Claimant Quijada less than the wages to which she was entitled under ORS 653.010 to 653.261 and was therefore liable to her for $1,560 as civil penalties pursuant to ORS 653.055(1)(b), plus interest. The Order gave Respondent 20 days to pay the sums, request an administrative hearing and submit an answer to the charges, or demand

a trial in a court of law. The Order was issued to "Jorge E. Lopez, P&P Performance."

8) On December 13, 2004, the Agency issued Order of Determination No. 04-3008. In the Order, the Agency alleged Respondent had employed Claimant Jacinto during the period March 11 to May 21, 2004, failed to pay her for all hours worked during that period, and was liable to her for $3,020.95 in unpaid wages, plus interest. The Agency also alleged that Respondent's failure to pay all of her wages when due was willful and he was liable to Claimant Jacinto for $1,692 as penalty wages, plus interest. In addition to the penalty wages, the Agency alleged Respondent paid Claimant Jacinto less than the wages to which she was entitled under ORS 653.010 to 653.261 and was therefore liable to her for $1,692 as civil penalties pursuant to ORS 653.055(1)(b), plus interest. The Agency further alleged Respondent had employed Claimant Ruiz during the period May 29 to July 11, 2004, failed to pay her for all hours worked during that period, and was liable to her for $680.32 in unpaid wages, plus interest. The Agency also alleged that Respondent's failure to pay all of her wages when due was willful and he was liable to Claimant Ruiz for $1,692 as penalty wages, plus interest. In addition to the penalty wages, the Agency alleged Respondent paid Claimant Ruiz less than the wages to which she was entitled under ORS 653.010 to 653.261 and was therefore liable to her for $1,692 as civil penalties pursuant to ORS 653.055(1)(b), plus interest. The Order gave Respondent 20 days to pay the sums, request an administrative hearing and submit an answer to the charges, or demand a trial in a court of law. The Order was issued to "Jorge E. Lopez, P&P Performance."

9) On January 25, 2005, the Agency issued a Notice of Intent to Issue Final Order by Default to "Jorge E. Lopez, P&P Performance." The Agency advised Respondent that if he did not file an "Answer or Request for Hearing or Court Trial" in response to Order of Determination No. 03-2780 by February 4, 2005, the Agency would issue a final order by default. Also, on January 25, 2005, the Agency issued a second Notice of Intent to Issue Final Order by Default to "Jorge E. Lopez, P&P Performance." The Agency advised Respondent that if he did not file an "Answer or Request for Hearing or Court Trial" in response to Order of Determination No. 03-3008 by February 4, 2005, the Agency would issue a final order by default. On February 7, 2005, Respondent filed an answer and request for hearing by facsimile transmission that stated, in pertinent part:

> "Regarding case number: 043008
>
> " * * * * *
>
> "The purpose of this letter is to petition for a hearing due to the following reasons:

"I only owe $450.00 to Esmeralda not the amount that she is requesting.

"Lucia Vargas was paid in full. I have witnesses that can testify that she was paid in full. Also her husband tried to blackmail me and I didn't succumbed [sic] because as I previously stated, I paid her in full, on the contrary, Lucia took jewelry that belonged to my mother and has not returned it. I also have witnesses that can attest to this.

"Also, I don't understand why P & P Performance is being charged because La Sierra Nevada does not have anything to do with P&P performance.

"Regarding case number: 032780

"This claim is regarding Dora Quijada. I would like to petition for a hearing because I do not owe the amount being requested. I only owe Dora $150.00 dollars and can also provide witnesses that can attest to this.

"Please let me know if there is anything else I need to do in order to facilitate my petition for a hearing. I really appreciate your help in resolving this issue."

10) On March 2, 2006, the Agency requested a hearing on Order of Determination 03-2780. On the same date, by separate request, the Agency requested a hearing on Order of Determination 04-3008. On March 6, 2006, the Hearings Unit issued a Notice of Hearing stating the hearing would commence at 9 a.m. on April 11, 2006. With the Notice of Hearing, the forum included copies of the Orders of Determination, a language notice, a Servicemembers Civil Relief Act notification, and copies of the Summary of Contested Case Rights and Procedures and the Contested Case Hearing Rules, OAR 839-050-0000 to 839-050-0440.

11) On March 9, 2006, the forum issued an interim order addressing fax filings, timelines for filing responses to motions, and service of documents.

12) On March 20, 2006, the ALJ ordered the Agency and Respondent each to submit a case summary that included: a list of all persons to be called as witnesses; identification and copies of all documents to be offered into evidence; and, for the Agency only, a brief statement of the elements of the claim and any wage and penalty calculations. The ALJ ordered the participants to submit their case summaries by March 31, 2006, and notified them of the possible sanctions for failure to comply with the case summary order.

13) On March 14, 2006, the Agency timely filed a case summary. Respondent did not file a case summary.

14) Respondent did not appear at the time and place set for hearing and no one appeared on his behalf. The ALJ found Re-

spondent to be in default, and commenced the hearing.

15) At the start of hearing, the ALJ swore in the interpreter and afterward the Agency waived the ALJ's recitation of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

16) At the start of hearing, the ALJ, on her own motion, consolidated the cases (Orders of Determination 03-2780 and 04-3008) for the purpose of hearing based on the common Respondent and the efficacy of hearing both cases at once.

17) At the start of hearing, the Agency moved to amend Order of Determination No. 04-3008 to correct a typographical error by interlineation to change Claimant Ruiz's rate of pay from $7.50 per hour as stated in the Order to $7.05 per hour in accordance with the minimum wage at that time. The ALJ granted the motion and the Order was amended to reflect the corrected pay rate. (Statement of ALJ)

18) The ALJ issued a proposed order on June 2, 2006, that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. The Agency timely filed exceptions which are addressed in the Opinion section of this Final Order.

FINDINGS OF FACT – THE MERITS

1) At times material until on or about May 17, 2003, P&P Performance, Inc. was an Oregon corporation conducting business at 523 S. Baker Street in McMinnville, Oregon, under the assumed business name of Mi Ranchito Restaurant. Respondent was P&P Performance, Inc.'s president and registered agent until the corporation was administratively dissolved on December 26, 2003. Respondent was registered with the Oregon Corporations Division as Mi Ranchito Restaurant's authorized representative.

2) At times material, La Sierra Nevada Family Restaurant was the duly registered assumed business name of Maria Magdalena Bermudez whose principal place of business was located at 553 N. Front Street, Woodburn, Oregon. Bermudez was registered with the Oregon Corporations Division as La Sierra Nevada Family Restaurant's authorized representative.

3) At times material until in or around May 2003, Respondent managed Mi Ranchito Restaurant located at 523 S. Baker Street in McMinnville, Oregon. At times material until in or around June 2004, Respondent managed La Sierra Nevada Family Restaurant at 553 N. Front Street, Woodburn, Oregon.

4) On or about May 1, 2002, Respondent hired Claimant Quijada to work as a cook at Mi Ranchito Restaurant. On her wage claim form she stated that

Respondent agreed to pay her $6.50 per hour. Respondent appeared to her as the "one in charge" and told her that Paulino (phonetic), the other cook, was his partner.

5) Respondent paid Claimant Quijada in cash every two weeks. For the two week period beginning November 1 through November 15, 2002, Quijada worked 63.25 hours and was not paid for her work. She also received no pay for the 50.25 hours she worked during the period beginning December 16 through December 30, 2002. Before she quit her employment, Quijada asked Respondent to pay her several times without success. Respondent gave Quijada a money order in the amount of $280 after she filed a wage claim with BOLI.

6) Based on Claimant Quijada's representations, the Agency determined that Quijada worked approximately 110.5 hours and earned approximately $718.25 at the $6.50 per hour minimum wage rate between November 1 and December 30, 2002. She received $280 and is still owed $438.25.

7) On or about March 11, 2004, Respondent hired Claimant Jacinto as a cook for La Sierra Nevada Family Restaurant. Jacinto also worked as a cashier and waitress when business was slow. On her wage claim form, Jacinto stated that Respondent agreed to pay her $450 every two weeks and $7 per hour for every "extra hour" she worked. She was scheduled to work eight hours per day, but often worked more hours.

8) Respondent paid Claimant Jacinto $325 in cash as wages for her first two weeks of employment. She received no wages for the hours she worked thereafter in March, April and May 2002. She continued working during that period because Respondent promised that she would eventually receive the wages. Jacinto documented her hours in a "little notebook" that she used when she filled out the Agency's wage claim calendar. She had heard of Maria Magdalena Bermudez but had never met her.

9) On or about April 12, 2004, Respondent prepared and signed a letter on letterhead that stated in pertinent part:

> "To Whom It May Concern:
>
> "This letter is to certify that Lucia Vargas [Jacinto] is currently working for La Sierra Restaurant. Her employment began on March 12, 2004. She works five days per week from 10:30 am – 2:30 pm and 4:30 pm – 7:00 pm. The days of the week can be varied but the hours remain the same. Her salary is $900.00 per month and she is paid twice a month. If you have any further questions, please feel free to contact me at the number listed above or at my cell phone (971)237-9642.
>
> "Sincerely,
>
> "Jorge Lopez, Manager"

Although the letterhead uses the name "La Sierra Mexican Restaurant," the address underneath the name is "553 N. Front St., Woodburn, OR 97071," which is the same address that Mary Magdalena Bermudez listed as her principal place of business when she registered her business name, "La Sierra Nevada Family Restaurant," with the Secretary of State. The Agency sent the notices of Claimants' wage claims to the business name and address registered by Bermudez and issued a subsequent Order of Determination asserting that Respondent was a sole proprietor "dba La Sierra Nevada Family Restaurant." Claimant Jacinto's wage claim form does not show an address for her employer, but Clamant Ruiz's wage claim form has "Calle Front" written in the space marked "DIRECCION DEL NEGOCIO" and "Woodburn, OR 97071" written in the spaces designated "Ciudad," "Estado," and "Codigo postal."

10) Claimant Jacinto's wage claim calendar shows she worked 486.5 hours, including overtime hours between March 11 and May 21, 2004. Calculated at $7.05 per hour, Jacinto earned $3,660.71. Respondent paid Jacinto $325, leaving a total of $3,335.71 still owing in unpaid wages, including overtime.

11) On or about May 29, 2004, Respondent hired Claimant Ruiz as a cashier and waitress for La Sierra Nevada Family Restaurant. On the wage claim form, Ruiz stated that Respondent agreed to pay her $40 per day.

12) Claimant Ruiz's wage claim calendar shows she worked 106.5 hours between May 29 and July 11, 2004. Calculated at $7.05 per hour, Ruiz earned wages totaling $750.83. Ruiz was paid nothing for the hours she worked and is still owed $750.83 in unpaid wages.

13) On August 27, 2003, the Agency sent a "Notice of Wage Claim" to "Mi Ranchito Restaurant" alleging unpaid wages on Claimant Quijada's behalf. On September 12, 2004, Agency compliance specialist Wojtyla sent a demand letter to P&P Performance, Inc. dba Mi Ranchito Restaurant, "Attn: Jorge Lopez," stating that penalties on the unpaid wage amounts had accrued and that unless the wages were paid by September 26, 2003, the Agency planned to pursue the matter by issuing an Order of Determination. Wojtyla contacted Respondent by telephone three times in February 2004. At that time, Respondent acknowledged he had hired Quijada and agreed to pay the unpaid wages in installments. Other than making a $280 payment to Quijada, Respondent did not follow through with the agreement and Quijada received nothing on the remaining amount owing.

14) On August 16, 2004, the Agency sent a "Notice of Wage Claim" to "La Sierra Nevada Family Restaurant" alleging unpaid wages on Claimant Jacinto's behalf. On September 14, 2004, the

Agency sent a "Notice of Wage Claim" to "La Sierra Nevada Family Restaurant" alleging unpaid wages on Claimant Ruiz's behalf. Neither notice mentioned Respondent's name. Wojtyla did not contact Respondent in any manner after Claimants Jacinto and Ruiz filed their wage claims.

ULTIMATE FINDINGS OF FACT

1) Respondent was the president and registered agent of P&P Performance, Inc., an Oregon corporation that conducted business in McMinnville, Oregon, from in or around May 2001 until in or around May 2003, under the assumed business name of Mi Ranchito Restaurant.

2) As P&P Performance, Inc.'s agent, Respondent hired Claimant Quijada to perform work at Mi Ranchito Restaurant between May 1 and December 31, 2002.

3) The state minimum wage during 2002 was $6.50 per hour.

4) Claimant Quijada was not paid for all of the hours she worked and is owed $438.25.

5) At times material, Mary Magdalena Bermudez conducted business under the assumed business name of La Sierra Nevada Family Restaurant located at 553 N. Front Street, Woodburn, Oregon.

6) Respondent was a manager when he hired Claimants Jacinto and Ruiz to perform work at La Sierra Nevada Restaurant.

7) The state minimum wage during 2004 was $7.05 per hour.

8) Claimant Jacinto was not paid for all of the work she performed between March 11 and May 21, 2004, and is owed $3,335.71.

9) Claimant Ruiz was not paid for all of the work she performed between May 29 and July 11, 2004, and is owed $750.83.

10) Respondent is not responsible for the wages owed to Claimants Quijada, Jacinto, and Ruiz.

CONCLUSIONS OF LAW

1) At times material, Respondent was not Claimants' employer for the purposes of ORS 652.110 to 652.200 and 652.310 to 652.405, and did not employ Claimants for the purposes of ORS 653.055, and therefore is not liable for Claimants' unpaid wages.

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

3) Under the facts and circumstances of this record, and according to the applicable law, the Commissioner of the Bureau of Labor and Industries has the authority to dismiss the Claimants' wage claims and the Agency's Orders of Determination.

OPINION

Respondent failed to appear at hearing and the forum found Respondent in default pursuant to OAR 839-050-0330. Consequently, the Agency was required

to establish a prima facie case on the record to support the allegations in its charging documents. *In the Matter of Barbara Blair*, 24 BOLI 89, 96 (2002).

WAGE CLAIMS

The Agency's prima facie case must include credible evidence of the following elements: 1) Respondent employed Claimants during the wage claim periods claimed; 2) the pay rate upon which Respondent and Claimants agreed, if it exceeded the minimum wage; 3) Claimants performed work for which they were not properly compensated; and 4) the amount and extent of work Claimants performed for Respondent. *In the Matter of Troy Melquist*, 27 BOLI 171, 180 (2006). There is credible evidence to show Claimants performed work for which they were not properly compensated and the amount and extent of the work they performed. The evidence was not refuted. Additionally, the amounts alleged in the Orders of Determination were based on the applicable minimum wage rate and not on a wage agreement between Respondent and Claimants. The only issue is whether Respondent employed Claimants and therefore is liable for the unpaid wages owed to each of them. Although Claimants perceived that Respondent was their employer based on their dealings with him, the Agency presented evidence that shows otherwise.

MI RANCHITO RESTAURANT – CLAIMANT QUIJADA

Undisputed evidence in the form of a Corporations Division document shows that P&P Performance, Inc., a duly registered Oregon corporation, was conducting business under the assumed business name of Mi Ranchito Restaurant during the time Claimant Quijada worked at the restaurant. The document also shows Respondent was the president and registered agent of P&P Performance, Inc. Evidence also shows the Agency sent a demand letter on Claimant Quijada's behalf to P&P Performance, Inc. dba Mi Ranchito Restaurant, "Attn: Jorge Lopez" and then, inexplicably, issued Order of Determination No. 03-2780 that named Respondent, individually, as a sole proprietor, and alleged Respondent was Quijada's employer during the wage claim period.

The Agency did not allege and there is no evidence in the record that shows Respondent was a successor to the corporation. Rather, in its closing argument, the Agency maintained that Respondent is personally liable for the corporate obligation because he did not observe the "appropriate corporate formalities." The Agency, however, did not allege and did not seek to amend its pleading to include that particular theory of recovery. Moreover, Oregon courts have consistently held that disregarding a legally established corporate entity is an extraordinary measure subject to specific conditions and limitations,

including proof that a shareholder acted improperly and that the improper conduct caused the corporation to fail in its obligation to creditors. *See Amfac Foods, Inc. v. International Systems & Controls Corporation*, 294 Or 94, 108-09, 654 P2d 1092, 1101-02 (1982) ("We state the exception to the rule [of shareholder immunity] as follows: When a plaintiff seeks to collect a corporate debt from a shareholder by virtue of the shareholder's control over the debtor corporation rather than on some other theory, the plaintiff must allege and prove not only that the debtor corporation was under the actual control of the shareholder but also that the plaintiff's inability to collect from the corporation resulted from some form of improper conduct[1] on the part of the shareholder").

In this case, the Agency did not allege that P&P Performance, Inc. was under Respondent's actual control or that Claimant's inability to recover wages from the corporation resulted from improper conduct on Respondent's part. Instead, the Agency alleged only that Respondent was doing business under the assumed business name of Mi Ranchito Restaurant and was solely liable for Claimant Quijada's unpaid wages. Curiously, in this default case, the Agency introduced the evidence that established P&P Performance, Inc.'s culpability in connection with the wage claim. While there may be some merit to the Agency's claim that Respondent ignored "corporate formalities," the Agency was required to "keep the theories of recovery scrupulously segregated" in its pleading and set forth the facts pertaining to Respondent's conduct that purportedly resulted in his loss of shareholder immunity. *Id*. at 104, 1098. The Agency did not plead facts or put on any evidence pertaining to Respondent's misconduct or the corporation's failure to observe corporate formalities. Consequently, in light of evidence showing that Respondent was acting as an agent for the corporation during times material to Claimant Quijada's wage claim and not as a sole proprietor, and in the absence of evidence that would relieve Respondent of his shareholder immunity, the forum finds the Agency failed to establish that Respondent employed Claimant Quijada. The forum concludes therefore that Respondent is not individually liable for Claimant Quijada's unpaid wages.

LA SIERRA NEVADA FAMILY RESTAURANT – CLAIMANTS JACINTO AND RUIZ

In this case, the Agency introduced a Corporations Division document that showed Maria Magdalena Bermudez was conducting business under the assumed business name of La Sierra Nevada Family Restaurant at the same address and during the

[1] In *Amfac*, the Court gave examples of "improper conduct" that included inadequate capitalization, "milking," and misrepresentation, none of which the Agency alleged in this case.

same period Claimants Jacinto and Ruiz performed work for which they were not paid.[2] Moreover, the Agency introduced additional evidence of a letter Respondent prepared on the restaurant's letterhead, apparently on Claimant Jacinto's behalf, in which Respondent identified himself as the restaurant's manager.[3] Despite this evidence, the Agency alleged Respondent was a sole proprietor doing business under the assumed business name of La Sierra Nevada Family Restaurant. The Agency offered no other evidence or rationale for naming Respondent other than Claimants' testimony that they believed Respondent owned the restaurant. However, Claimants' subjective belief is not determinative in this case.

The Oregon Supreme Court has held that the purpose of ORS chapter 648 (the statutes governing assumed business names) is to protect the public by requiring "disclosure by registration of names and locations of persons doing business under an assumed name in order that members of the public may know the identity of those with whom they do business." *Photo & Sound Company v. Corvallis*, 291 Or 105, 108-109, 628 P2d 733, 735 (1981). In a footnote, the Court added that "It has generally been held that the object of assumed name registration is to give the public information about the persons with whom they deal and to afford protection against fraud and deceit." *Id*. at 109, 735. Here, the identity of the restaurant owner was disclosed in accordance with statutory registration requirements and, for the purpose of this case, is determinative.

In light of the evidence that Bermudez was the registered owner of the restaurant during all times material, the forum finds the Agency failed to establish that Respondent employed Claimants Jacinto and Ruiz and therefore concludes Respondent is not liable for Claimants' unpaid wages.

AGENCY'S EXCEPTIONS

The Agency objects to the forum's findings and conclusion that Respondent was not the true owner of the restaurants responsible for the Claimants' unpaid wages in this case. The Agency's exceptions ignore the documentary evidence that supports that fact and, instead, raise new issues or simply reiterate the Agency's closing argument at hearing.

First, the Agency's post hearing suggestion that Respondent is an "unscrupulous employer" who created "sham registrations" to avoid paying wages to "deserving employees" is not relevant to this case. The Agency did not allege sham entities in its pleading and, in any event, introduced no evidence to support such a claim. The forum will not consider the Agency's argument on issues not

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[2] See Proposed Finding of Fact – The Merits 2.

[3] See Proposed Finding of Fact – The Merits 9.

properly raised and proved at hearing.

Second, the Agency's contention that Respondent's name appeared on "the business license" is not supported by documentary evidence in the record. One, the Agency does not state on which business license Respondent's name appears. Two, although they would have been relatively easy to obtain through city, county or state records, the Agency did not introduce the business licenses or restaurant permits for Mi Ranchito Restaurant or La Sierra Nevada Family Restaurant. In fact, the Agency did not introduce any evidence documenting ownership, such as, rent, utilities, or vendor invoices. Other than the Claimants' subjective belief, the Agency had no other basis for alleging Respondent employed Claimants as a sole proprietor.

Third, Respondent's statements that he owed two Claimants some money do not constitute an admission that he was their employer. Managers and corporate officers sometimes speak in first person singular when speaking on an entity's behalf. In light of documentary evidence showing he was acting as an agent for a corporation and another individual, the forum infers that Respondent was acting as such when he acknowledged owing some money to two Claimants. With respect to Claimant Jacinto, evidence shows Respondent identified himself as the manager of the restaurant located at 553 N. Front Street, Woodburn, Oregon, the same restaurant that employed Jacinto.[4] Notably, both of the Agency's Orders of Determination were served on P&P Performance, Inc., "Attn: Jorge Lopez," the corporate president, even though Lopez was named individually as a sole proprietor in each of the Orders.

Fourth, in its exceptions the Agency infers by the forum's use of the word "irrefutably" that the forum considers the business registration evidence "conclusive proof of who the employer was." That was not the forum's conclusion or intent. The forum concluded that the business registration evidence determined the employment relationships in this case and not Claimants' subjective belief.[5] The Agency produced no evidence that the business registrations were a sham or subterfuge to conceal an unlawful purpose. In the absence of such evidence, the forum will not disregard a duly registered corporation

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[4] Although the restaurant letterhead showed the name "La Sierra Mexican Restaurant," and Respondent used the name "La Sierra Restaurant" in the letter's text, the Corporation Division's business registration records show that the restaurant registered as "La Sierra Nevada Family Restaurant" is located at the same address shown on the letterhead - 553 N. Front Street, Woodburn, Oregon.

[5] To eliminate confusion, the forum has deleted the word "irrefutably" from the sentence referencing Maria Bermudez's assumed business name registration.

or assumed business name verifying ownership.

The Agency was required in this default case to make a prima facie showing that Respondent employed Claimants. Instead, the record includes evidence that conflicts with the Agency's contention and was not supplemented with evidence showing why the duly registered owners should be disregarded. Consequently, the Agency did not make the requisite showing that Respondent employed Claimants.

The Agency's exceptions are **DENIED**.

ORDER

NOW, THEREFORE, as Respondent has been found not liable for Claimants' wages, the Commissioner of the Bureau of Labor and Industries hereby orders that Order of Determination No. 03-2780 and Order of Determination No. 04-3008 against Jorge Lopez be and is hereby dismissed.

In the Matter of

SUE DANA,

Case No. 42-06

Final Order of Commissioner Dan Gardner

Issued September 26, 2006

SYNOPSIS

Respondent employed Claimant to clean houses at the agreed rate of $100 per house. Claimant cleaned four houses over a nine day period and worked 73 hours. At the minimum wage rate of $7.25 per hour, Claimant earned $529.25 and was paid $100. Respondent was ordered to pay the balance due of $429.25 in unpaid, due and owing wages. Respondent's failure to pay was willful and Respondent was ordered to pay $1,740 in penalty wages. Respondent was also ordered to pay a civil penalty of $1,740 based on Respondent's failure to pay Claimant at least the minimum wage rate for the hours Claimant worked. ORS 652.140; ORS 652.150; ORS 653.055; ORS 653.025.

The above-entitled case came on regularly for hearing before Linda A. Lohr, designated as Administrative Law Judge ("ALJ") by

Dan Gardner, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on August 29, 2006, in the W.W. Gregg Hearing Room of the Bureau of Labor and Industries, located at 800 NE Oregon Street, Portland, Oregon.

Patrick Plaza, an Agency employee, represented the Bureau of Labor and Industries ("BOLI" or "the Agency"). Maria Luisa Cayetano ("Claimant") was present throughout the hearing and was not represented by counsel. Sue Dana ("Respondent") failed to appear for hearing in person or through counsel. Terry Rogers, a certified Spanish interpreter, was present throughout the hearing and interpreted the entire proceeding for the benefit of Claimant and interpreted her testimony during the hearing.

The Agency called Maria Luisa Cayetano, Claimant; Adriana Julian, Claimant's friend; and Stan Wojtyla, BOLI Wage and Hour Division compliance specialist as witnesses.

The forum received as evidence:

a) Administrative exhibits X-1 through X-8;

b) Agency exhibits A-1 through A-13 (filed with the Agency's case summary).

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

FINDINGS OF FACT – PROCEDURAL

1) On August 1, 2005, Claimant filed a wage claim with the Agency alleging Respondent had employed her from April 28 to May 10, 2005, and failed to pay her wages for hours she worked during that period.

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

3) On December 8, 2005, the Agency issued Order of Determination No. 05-2316. In the Order, the Agency alleged Respondent had employed Claimant during the period April 28 through May 10, 2005, failed to pay her for all hours worked in that period, and was liable to her for $429.25 in unpaid wages, plus interest. The Agency also alleged Respondent's failure to pay all of Claimant's wages when due was willful and Respondent was liable to her for $1,740 as penalty wages, plus interest. In addition to the penalty wages, the Agency alleged Respondent paid Claimant less than the wages to which she was entitled under ORS 653.010 to 653.261 and was therefore liable to her for $1,740 as civil penalties pursuant to ORS 653.055(1)(b), plus interest. The Order gave Respondent 20 days to pay the sums, request an ad-

ministrative hearing and submit an answer to the charges, or demand a trial in a court of law.

4) On December 28, 2005, Respondent filed an answer that stated, in pertinent part:

> "I deny that Maria Luisa Cayetano earned $520.25 at the rate of $7.25 per hour during period of April 28-05 through May 10, 2005.
>
> "The truth is she shared some residential cleaning with Sue Dana at 4 locations for a total of $360.00 (her share), which $100 has been paid.
>
> "I (S.D.) would like Maria to receive her portion, but Maria was not paid because Sue Dana was not able to collect the remaining money from the person who offered us this cleaning job and is not to be found.
>
> "Also, Sue Dana had an injury which has delayed her ability to pay out of her own resources.
>
> "Maria was not an employee, but did share the job with Sue.
>
> "I am requesting a hearing unless we can settle this in accordance with my figures. I do not believe I should be fined penalties or interest on any of the money Maria earned (Sue Dana's figures.)"

5) On July 18, 2006, the Agency submitted a request for hearing. On July 19, 2006, the Hearings Unit issued a Notice of Hearing stating the hearing would commence at 1 p.m. on August 29, 2006. With the Notice of Hearing, the forum included copies of the Orders of Determination, a language notice, a Servicemembers Civil Relief Act notification, and copies of the Summary of Contested Case Rights and Procedures and the Contested Case Hearing Rules, OAR 839-050-0000 to 839-050-0440.

6) On August 4, 2006, the Agency filed a motion to amend the Order of Determination and a motion for summary judgment based on the proposed amendment. Both motions were later withdrawn on August 11, 2006.

7) On August 16, 2006, the ALJ ordered the Agency and Respondent each to submit a case summary that included: a list of all persons to be called as witnesses; identification and copies of all documents to be offered into evidence; and, for the Agency only, a brief statement of the elements of the claim and any wage and penalty calculations. The ALJ ordered the participants to submit their case summaries by August 23, 2006, and notified them of the possible sanctions for failure to comply with the case summary order.

8) On August 23, 2006, the Agency timely filed a case summary. Respondent did not file a case summary.

9) Respondent did not appear at the time and place set for hearing and no one appeared on her behalf. The ALJ found Respon-

dent to be in default, and commenced the hearing.

10) At the start of hearing, the Agency waived the ALJ's recitation of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

11) The ALJ issued a proposed order on September 13, 2006, that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. Neither Respondent nor the Agency filed exceptions.

FINDINGS OF FACT – THE MERITS

1) At times material, Respondent was an individual conducting a housecleaning business.

2) On or about April 13, 2005, Claimant was a passenger in a car that was involved in a car accident. Following the accident, Respondent, a passerby, stopped her car and offered Claimant assistance. Claimant spoke little English and Respondent spoke little Spanish, but they exchanged telephone numbers. Very soon thereafter Respondent called Claimant and asked if she was currently employed. When Claimant told Respondent she was not employed, Respondent offered her a job cleaning houses. Respondent wanted Claimant to start work immediately, but Claimant could not start until she arranged for child care. Respondent called or stopped by Claimant's home daily until Claimant finally found a babysitter she could afford and started working for Respondent.

3) Claimant's first work day was April 28, 2003. Respondent drove Claimant to and from work each day that Claimant worked because Claimant did not have a car or driver's license. Respondent drove a pick-up truck with a canopy that was filled with cleaning supplies.

4) Respondent told Claimant she would pay her $100 for each house Claimant cleaned. Between April 28 and May 10, 2005, Claimant cleaned three houses in Molalla and one house in Canby, Oregon. Claimant kept a written record of the hours she worked on each house on a personal calendar at home so she would later know how much she owed her babysitter. Claimant recorded that she worked the following hours for Respondent in 2005: April 28 - 8 hours; April 29 - 8 hours; May 2 - 9 hours; May 3 - 8 hours; May 4 - 10 hours; May 5 - 5 hours; May 6 - 8 hours; May 9 - 9 hours; May 10 - 8 hours. Claimant did not keep her personal calendar after she replaced it at the end of 2005.

5) All of the houses Claimant cleaned were unoccupied when she cleaned them. The first house she cleaned was already rented, but the renters had not moved in yet. All of the houses were very dirty and required heavy duty cleaning. On one occasion, painters were on site painting the interior walls while Claimant cleaned. Claimant cleaned the houses according to Respondent's instructions and

with the cleaning supplies and equipment that Respondent provided. Claimant washed walls, windows, and floors. When Respondent observed Claimant "mopping" the floors, she told Claimant the kitchen and bathroom floors were to be cleaned by hand only, which required that Claimant clean while on her knees, using her hands and a rag. Claimant also cleaned the kitchen cupboards, kitchen and bathroom sinks, toilets, bathtub, stove, refrigerator, and oven in each house. Respondent provided a step ladder for Claimant to use while she cleaned the light fixtures and changed the light bulbs in each house. Claimant "deep cleaned" each house according to Respondent's specifications. Respondent periodically checked on Claimant's work. Sometimes Respondent praised her work and other times asked her to re-do a particular room or task.

6) After she cleaned four houses, Claimant asked Respondent for her wages so she could pay her babysitter. Respondent promised to pay her and asked Claimant if she would be interested in cleaning offices and restaurants for Respondent. Claimant told her that she could not continue working for Respondent unless she received her wages for the houses she had already cleaned, because she could not afford child care unless she was paid and she could not work "for free." Respondent made excuses for not paying Claimant and Claimant did not work for Respondent again after May 10, 2005.

7) After she quit working for Respondent, Claimant called Respondent several times and asked for her wages. At first, Respondent told her the "company" was going to pay Respondent "on Friday" and promised that Claimant would receive her wages when the company paid Respondent. In or around June 2005, Respondent went to Claimant's home and gave her $100 in cash. She claimed she could not pay more because she was still waiting to be paid. Claimant's friend, Adriana Julian, who is fluent in Spanish and English, intervened at Claimant's request. Julian spoke to Respondent several times on the telephone and Respondent acknowledged that she hired Claimant to clean houses, that Claimant cleaned four houses, and that she owed Claimant money for cleaning those houses. Each time Julian called her, Respondent apologized and said she would pay Claimant, even if it was "out of her own pocket," but she failed to follow through with her promises to pay. After several calls, Julian told Claimant that it was "obvious" Respondent did not intend to pay her wages.

8) Respondent left Claimant several telephone messages in response to Claimant's inquiries about her wages. Claimant usually deleted the messages after she listened to them, but decided to tape record the last message with Julian's assistance. Using a

"micro" cassette recorder, Julian recorded the telephone message that said in pertinent part:

> "Hi Maria, this is Sue. I got your messages. I told you that I was trying to get the money from the property management company they haven't really paid anybody. When they pay me I will pay you as soon as I get the money. I'm sorry that you don't believe me but there's nothing I can do about that. I haven't got my money either and I've called them and said even if you just paid for Maria that's fine I won't even take my money if they're not going to pay me, but if they do not pay me before you have to go on your trip I will make sure somehow you get your money okay. So just hang in there I'm working on it. In the meantime, I'm just trying to survive myself, so ummm there's nothing I can do about it until then. Ummm, I'm sorry you misunderstood me but I've told you over and over that she just hasn't paid me. So, I hope this is, obviously isn't gonna come between our friendship because I'm sorry this has happened, but there's nothing I can do about it. My number again is 503-761-0745. Take care. You will get your money. One way or another I will get your money to you. I'm working on that end if they don't pay me then I will pay you. I'll find a way to pay you. Anyway, take care. Bye Bye."

9) Once she determined that collecting her wages from Respondent was futile, Claimant went to "El Programa Hispano" on East Burnside to seek assistance. Claimant told the staff about the problem she had collecting her wages from Respondent and was given a wage claim form to fill out and send to BOLI.

10) During BOLI's wage claim investigation, Respondent acknowledged she met Claimant after witnessing a car accident involving Claimant. Although she denied "employing" Claimant, she admitted she offered her a job "helping" Respondent clean houses and offered to pay her "half" of what Respondent made on each house. When she made a written request for hearing after BOLI issued an Order of Determination, Respondent stated, in pertinent part, in her answer:

> "[Claimant] <u>shared</u> some residential cleaning with Sue Dana at 4 locations for a total of $360.00 (her share), which $100 has been paid.
>
> "I (S.D.) would like Maria to receive her portion, but Maria was not paid because Sue Dana was not able to collect the remaining money from the person who offered us this cleaning job and is not to be found.
>
> "Also, Sue Dana had an injury which has delayed her ability to pay out of her <u>own</u> resources. Maria was not an employee, but <u>did</u> <u>share</u> the job with Sue."

11) Claimant worked 73 hours between April 28 and May 10, 2005. Calculated at $7.25 per hour, Claimant earned $529.25. Respondent paid Claimant $100, leaving a total of $429.25 still owing in unpaid wages.

12) On August 18, 2006, BOLI's Wage and Hour Division sent a letter to Respondent notifying her that Claimant had filed a wage claim against her and demanding payment of $429.25 in unpaid wages at the minimum wage rate of $7.25 per hour from April 28 to May 10, 2005.

13) All of the witnesses testified credibly.

ULTIMATE FINDINGS OF FACT

1) At times material, Respondent conducted business in Oregon and employed one or more persons in the operation of that business.

2) Respondent employed Claimant from April 28 through May 10, 2005.

3) At times material, the state minimum wage was $7.25 per hour.

4) Between April 28 and May 10, 2005, Claimant worked 73 hours for Respondent.

5) Claimant quit her employment with Respondent on May 10, 2005.

6) From April 28 through May 10, 2005, Claimant earned $529.25 and Respondent paid her only $100 for the work she performed.

7) On August 18, 2006, BOLI's Wage and Hour Division sent Respondent a written notice of nonpayment of wages on Claimant's behalf. Respondent did not pay Claimant any additional wages in response to BOLI's notice.

8) Respondent owes Claimant $429.25 in due and unpaid wages.

9) Respondent willfully failed to pay Claimant the $429.25 in earned, due and payable wages. Respondent has not paid the wages owed and more than 30 days have elapsed from the date the wages were due.

10) Penalty wages for Claimant, computed pursuant to ORS 652.150, equal $1,740.

11) Respondent paid Claimant less than the minimum wage to which she was entitled and civil penalties, computed pursuant to ORS 652.150, equal $1,740.

CONCLUSIONS OF LAW

1) At all times material herein, Respondent was an employer and Claimant was an employee subject to the provisions of ORS 652.110 to 652.200, 652.310 to 652.405, and ORS 653.010 to 261.

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

3) Respondent violated ORS 652.140(2) by failing to pay Claimant all wages earned and

unpaid after she quit Respondent's employment.

4) Respondent is liable for penalty wages under ORS 652.150 for willfully failing to pay all wages or compensation earned and due to Claimant when her employment terminated, as provided in ORS 652.140(2).

5) Respondent is liable for civil penalties under ORS 653.055 for failing to pay Claimant the minimum wage to which she was entitled pursuant to ORS 653.025.

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

OPINION

Respondent failed to appear at hearing and the forum found Respondent in default pursuant to OAR 839-050-0330. Consequently, the Agency was required to establish a prima facie case on the record to support the allegations in its charging documents. *In the Matter of Barbara Blair*, 24 BOLI 89, 96 (2002). When making factual findings, the forum may consider unsworn assertions contained in a defaulting respondent's answer, but those assertions are overcome whenever controverted by other credible evidence. *Id*.

WAGE CLAIM

The Agency's prima facie case must include credible evidence of the following elements: 1) Respondent employed Claimant during the wage claim period claimed; 2) the pay rate upon which Respondent and Claimant agreed, if it exceeded the minimum wage; 3) Claimant performed work for which she was not properly compensated; and 4) the amount and extent of work Claimant performed for Respondent. *Id*.

A. Respondent employed Claimant.

Respondent's unsworn assertion in her answer that Claimant was not an employee, but rather "shared some residential cleaning" jobs with Respondent was controverted by credible evidence in the record. First, Claimant's credible testimony that Respondent, a stranger to Claimant, approached her following a car accident and almost immediately thereafter offered her a job cleaning houses at the rate of $100 per house was substantiated by Respondent's admissions to the Agency investigator. Second, Claimant credibly testified that Respondent told her what hours to work and provided transportation to and from the job sites which consisted of four unoccupied houses. Third, Claimant credibly testified that Respondent told her how to perform the tasks she was assigned and provided Claimant all of the cleaning equipment she needed to perform those tasks. There is no evidence that Respondent "shared" the

tasks with Claimant or even that she was present on the job sites except to direct and control Claimant's work. Based on Claimant's credible testimony and Respondent's admissions, in the answer and to the Agency investigator, the forum concludes Respondent employed Claimant.

B. Claimant was entitled to at least the minimum wage rate for any work she performed for Respondent.

Credible evidence shows Respondent and Claimant agreed on a pay rate - $100 per house – a rate which, when calculated based on Claimant's actual work hours, is less than the 2005 minimum wage rate of $7.25 per hour. Respondent was required to pay Claimant at least $7.25 per hour for the hours she worked between April 28 and May 10, 2005.

C. Claimant performed work for which she was not properly compensated.

Respondent admitted and evidence shows Claimant did not receive all of the wages she earned for the work she performed between April 28 and May 10, 2005.

D. Claimant maintained an independent record of her work hours that established the amount and extent of the work she performed.

When, as in this default case, a respondent produces no record of dates or hours worked, the forum may rely on a wage claimant's credible testimony to show the amount and extent of the work performed. *Barbara Blair*, 24 BOLI at 97. Here, Claimant credibly testified that she kept a written record of her work hours in order to track the amount she owed for childcare while she worked. When she filed her wage claim, she relied on her record to show the dates and hours she worked for Respondent. The forum accepts Claimant's record that established she worked 73 hours, earning a total of $529.25 when computed at $7.25 per hour. Respondent paid Claimant $100 and has paid nothing further to date. Respondent owes Claimant $429.25.

PENALTY WAGES - ORS 652.150

The forum may award penalty wages when it determines that a respondent's failure to pay wages was willful. Willfulness does not imply or require blame, malice, or moral delinquency. A respondent commits an act or omission "willfully" if the respondent acts or fails to act intentionally, as a free agent, and with knowledge of what is being done or not done. *Sabin v. Willamette Western Corp.*, 276 Or 1083, 557 P2d 1344 (1976).

Respondent's telephone message to Claimant and her subsequent admissions to the Agency investigator and in her answer demonstrate that Respondent knew Claimant was owed wages for the house cleaning work she performed at Respon-

dent's behest. Respondent's claim that Claimant could not be paid until Respondent was paid by a third party was not credible and, in any event, is not a defense. There is no evidence that Respondent was acting other than intentionally and as a free agent. Consequently, Respondent is liable to Claimant for penalty wages in the amount of $1,740.

CIVIL PENALTIES - ORS 653.055

If an employer pays an employee "less than the wages to which an employee is entitled under ORS 653.010 to 653.161," the forum may award civil penalties to the employee. ORS 653.055. The Agency alleged Respondent failed to pay Claimant a rate equal to at least the 2005 minimum wage rate for the hours Claimant worked between April 28 and May 10, 2005. Oregon's minimum wage requirements are included under ORS 653.025 and are within the range of wage entitlements encompassed by ORS 653.055. The Agency presented sufficient evidence to show Respondent failed to pay Claimant the minimum wage rate required under ORS 653.025 for each hour that Claimant worked for Respondent. Respondent is therefore liable to Claimant for $1,740 in civil penalties as provided in ORS 652.150 ($7.25 x 8 hours per day x 30 days). See ORS 653.055(1)(b).

ORDER

NOW, THEREFORE, as authorized by ORS 652.332, and as payment of the unpaid wages, penalty wages, and civil penalties, Respondent **Sue Dana** is hereby ordered to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 1045 State Office Building, 800 NE Oregon Street, Portland, Oregon 97232-2180, the following:

> A certified check payable to the Bureau of Labor and Industries, in trust for Claimant Maria Luisa Cayetano, in the amount of THREE THOUSAND NINE HUNDRED NINE DOLLARS AND TWENTY FIVE CENTS ($3,909.25), less appropriate lawful deductions, representing $429.25 in gross earned, unpaid, due and payable wages, $1,740 in penalty wages, and $1,740 in civil penalties, plus interest at the legal rate on the sum of $429.25 from June 1, 2005, until paid, and interest at the legal rate on the sum of $3,480 from July 1, 2005, until paid.

In the Matter of

TALLON KUSTOM EQUIP, LLC,

Case No. 11-05

Final Order of Commissioner Dan Gardner

Issued October 20, 2006

SYNOPSIS

Respondent failed to pay one wage claimant all wages earned and unpaid at the time he quit his employment with Respondent, including overtime wages, in violation of ORS 652.140(2). The forum ordered Respondent to pay the wages owed, penalty wages, pursuant to ORS 652.150, civil penalties, pursuant to ORS 653.055(1)(b), and interest on the wages owed and penalty amounts. The forum dismissed a second wage claimant's claim for unpaid wages based on the lack of credible evidence establishing a prima facie case. ORS 652.140; ORS 652.150; ORS 653.055; ORS 653.261; OAR 839-020-0030(1).

The above-entitled case came on regularly for hearing before Linda A. Lohr, designated as Administrative Law Judge ("ALJ") by Dan Gardner, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on July 25, 2006, in the W.W. Gregg Hearing Room of the Bureau of Labor and Industries, located at 800 NE Oregon Street, Portland, Oregon.

Jeffrey C. Burgess, an Agency employee, represented the Bureau of Labor and Industries ("BOLI" or "the Agency"). Matthew Mace Bracken ("Claimant Bracken") and David D. Delker ("Claimant Delker") were present throughout the hearing and were not represented by counsel. Tallon Kustom Equip., LLC ("Respondent") failed to appear for hearing through counsel or an authorized representative and was held in default.

In addition to Claimants, the Agency called the following witnesses: John Hernandez, bus driver (telephonic); Kristy Gilkeson, Claimant Bracken's friend; and Stan Wojtyla, Wage and Hour Division compliance specialist.

The forum received as evidence:

a) Administrative exhibits X-1 through X-15;

b) Agency exhibits A-1 through A-22 (filed with the Agency's case summary).

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

FINDINGS OF FACT – PROCEDURAL

1) On February 18, 2004, Claimant Bracken filed a wage claim form on which he stated that Respondent had employed him from January 14 through January 30, 2004, and failed to pay him any wages for the hours he worked in that time period.

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

3) On March 19, 2004, Claimant Delker filed a wage claim form on which he stated that Respondent had employed him from January 16 through March 9, 2004, and failed to pay him any wages for the hours he worked in that time period.

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

5) On June 18, 2004, the Agency issued Order of Determination No. 04-0735. The Agency alleged Respondent had employed Claimant Bracken during the period January 14 to January 30, 2004, at the rate of $18 per hour and Claimant Delker during the period January 14 to January 30, 2004, at the rate of $7.05 per hour. Additionally, the Agency alleged Respondent willfully failed to pay Claimants any of the wages they were owed for the hours they worked during those periods and more than thirty days have elapsed since the wages became due and owing pursuant to ORS 652.140, and Respondent therefore owed Claimants the earned and unpaid wages, along with penalty wages of $4,320 (Bracken) and $1,692 (Delker), plus interest on the unpaid wage and penalty amounts. The Order of Determination gave Respondent 20 days to pay the sums, request an administrative hearing and submit an answer to the charges, or demand a trial in a court of law. A true copy of the Order of Determination was served on Casey Tallon, Respondent's "managing agent."

6) On July 21, 2004, Respondent, through counsel Richard W. Todd, timely filed an answer denying that wages were owed and alleging that Respondent was "financially unable to pay any wages or compensation at the time they accrued" and that Claimants were at all times material "subcontractors of the Employer and not employees." Respondent requested a hearing.

7) On March 22, 2006, the Agency requested a hearing. On March 27, 2006, the Hearings Unit issued a Notice of Hearing stating the hearing would commence at 9 a.m. on May 16, 2006. With the Notice of Hearing, the forum included a copy of the Order of Determination, a language notice, a Servicemembers Civil Relief Act notification, and copies of the Summary of Contested Case Rights and Procedures and the

Contested Case Hearing Rules, OAR 839-050-0000 to 839-050-0440.

8) On April 12, 2006, the hearing was reset to begin at 9 a.m. on May 31, 2006, following Respondent's unopposed request for postponement.

9) On April 12, 2006, the ALJ ordered the Agency and Respondent each to submit a case summary that included: lists of all persons to be called as witnesses; identification and copies of all documents to be offered into evidence; a statement of any agreed or stipulated facts; and a brief statement of the elements of the claim and any wage and penalty calculations (for the Agency only). The ALJ ordered the participants to submit their case summaries by May 22, 2006, and notified them of the possible sanctions for failure to comply with the case summary order.

10) On May 22, 2006, the Agency and Respondent timely filed case summaries.

11) On May 23, 2006, the Agency filed a motion to amend the Order of Determination to increase the amount of wages owed Claimant Delker, reflecting the number of hours he worked and the agreed upon hourly rate, and to include overtime wages for both Claimants. The Agency's motion included an additional allegation that Respondent failed to pay Claimants overtime wages pursuant to OAR 839-020-0030(1) and was liable for civil penalties under ORS 653.055(1)(b). The motion was unopposed and on June 6, 2006, the ALJ granted the motion and amended the Order of Determination accordingly.

12) On May 23, 2006, the Agency filed a motion to postpone the hearing based on Claimant Bracken's out-of-state travel plans on the scheduled hearing date. Respondent did not oppose the motion and the hearing was rescheduled to begin on July 25, 2006.

13) Respondent did not appear at the time and place set for hearing and no one appeared on its behalf or advised the ALJ of any reason for the failure to appear. The ALJ ruled that Respondent was in default, having been properly served with the Notice of Hearing, and having failed to appear at the hearing.

14) The Agency waived the ALJ's recitation of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

15) After the hearing concluded on July 25, 2006, the Hearings Unit received a "Notice of Withdrawal of Attorney for Respondent" ("Notice") dated July 21, 2006, and signed by Richard W. Todd. Along with the Notice was a letter from Todd dated June 29, 2004 that stated in pertinent part:

> "Dear Judge Lohr:
>
> "Casey Tallon, President of Tallon Kustom Equipment, LLC and myself agreed that I could withdraw as attorney for the

> Respondent in the above-entitled matter. Accordingly, I have submitted a Notice of Withdrawal of Counsel to relieve my obligation to be present at the upcoming hearing.
>
> "My understanding of the Rules was that a Motion and Order was not required. However, if that is not the case, I will appear at the hearing and request to be relieved at that time."

The letter and the Notice were mailed to the Salem BOLI office and were not sent to the Hearings Unit in Portland until July 28, 2006.

16) The ALJ issued a proposed order on September 18, 2006, that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. Respondent did not file exceptions. The Agency filed exceptions that are addressed in the opinion section of this Final Order.

FINDINGS OF FACT – THE MERITS

1) At times material, Respondent was a duly registered Oregon limited liability company engaged in constructing custom motorcycle frames and parts and employed one or more persons in Oregon.

2) At times material, Casey Tallon was Respondent's owner and managing member.

3) On or about December 31, 2003, Claimant Bracken and Casey Tallon discussed Respondent's custom motorcycle business at a New Year's Eve party and exchanged telephone numbers. At Tallon's invitation, Bracken stopped by the motorcycle shop later in the week and Tallon showed him his drawings for custom frames. Bracken accepted Tallon's offer to construct motorcycle frames at Respondent's shop and gave his previous employer two weeks notice. Claimant Bracken began working for Respondent as a tube bender on January 14, 2004.

4) Claimant Bracken's primary job was to make custom motorcycle frames, which included bending tubes and lathing. Tallon agreed to pay Bracken 10 percent of the selling price for each frame Bracken constructed. The selling price for each frame was $545.50. Later, Tallon also agreed to pay Bracken $120 per day for those days that he performed work other than frame construction.

5) The first two days he worked, January 14-15, Claimant Bracken did not construct any motorcycle frames. Instead, Tallon provided some on-the-job training and gave him instructions on how to use the shop equipment. During the training period, Bracken performed some work, including helping Tallon clean up the shop. There was no agreement about how Bracken would be paid for the work he performed during the first two days of his employment. Bracken worked a total of 18 hours for both days.

6) In addition to the 18 hours he spent training and cleaning the

shop, for the week ending January 17, 2004, Claimant Bracken worked an additional 20 hours constructing 5 motorcycle frames. By the first week's end, Bracken had worked a total of 38 hours.

7) For the week ending January 24, 2004, Claimant Bracken spent 35 hours over a 4 day period constructing 8 motorcycle frames. He also worked an additional 26 hours during the last 3 days of the week performing miscellaneous work, such as "grinding and cutting out neck pieces." In total, Bracken worked 61 hours from January 18 through January 24, 2004.

8) From January 25 through January 30, 2004, Bracken worked 34 hours over a four day period performing miscellaneous work for Respondent. Bracken did not construct any motorcycle frames during that week.

9) At Tallon's request, Bracken maintained a contemporaneous record of his work hours in a little notebook that showed the hours he worked and the number of motorcycle frames he constructed.

10) Tallon provided Claimant Bracken with the tools and equipment he needed to perform his job and told Bracken what hours to work. He also told Bracken "what to build and how to build it." Bracken was not working for anyone else at the time and had quit another job to work for Respondent.

11) Every day that he worked for Respondent, Claimant Bracken drove from Vancouver, Washington, to Respondent's shop in Estacada, Oregon. His commute was approximately 80 miles round trip and he paid for his own gas to get to and from work. When Bracken asked for his wages, Tallon told him he had to wait until he was paid by his customers before he could pay Bracken. On or about January 30, 2004, Bracken told Tallon that he could not afford to continue driving back and forth to work unless he received his wages for the hours he had already worked. Tallon told Bracken that he had a customer who wanted a "custom stretched out chopper frame" and if Bracken helped him construct the frame, they could deliver the frame together, the "guy would cut him a $1,290 check," and Tallon would pay Bracken from the proceeds. Bracken agreed. After the job was completed, he and Tallon made the delivery and picked up the check. Tallon dropped Bracken off at the shop and went to the bank to cash the check. When Tallon returned to the shop, he made excuses for why he did not have Bracken's wages and told him he would pay him "tomorrow." Bracken did not believe him and did not return to work the next day.

12) For the week ending January 17, 2004, Claimant Bracken worked 38 hours and earned $399.40 ($54.50 x 5 pieces, plus 18 hours x $7.05, the minimum wage rate).

13) For purposes of calculating overtime, Claimant

Bracken's regular rate of pay for the week ending January 24, 2004, was $13.05 per hour - total earnings during that week ($796) divided by hours worked that week (61).[1] His overtime rate was $19.58 for each hour in excess of 40 hours, which is one and one-half times the regular rate of $13.05.[2] Bracken earned $522 at $13.50 per hour for 40 hours and $411.18 at $19.58 per hour for 21 hours of overtime, totaling $933.18 for the 61 hours he worked during the week ending January 24, 2004.

14) From January 25 through January 30, 2004, Bracken worked 34 hours and earned $480 ($120 daily rate x 4 days). Respondent has not paid Bracken anything for the hours Bracken worked.

15) Claimant Bracken's last day of work was January 30, 2004. When he quit, Respondent owed him $1,812.58, including overtime, for the hours he performed work for Respondent.

16) Claimant Bracken's testimony was generally credible and corroborated by Casey Tallon's admissions that he agreed to pay Bracken a piece rate to construct motorcycle frames, that Bracken worked on 13 frames "from January 20 to January 29," and that Bracken was not paid for the work he performed. Bracken's testimony was also corroborated by Gilkeson's credible testimony that Bracken began working for Respondent on January 14, 2004, and was promised 10 percent of the selling price of each motorcycle frame. The forum credited Bracken's testimony on all key issues.

17) Claimant Delker started working for Respondent at or near the end of Claimant Bracken's employment. Delker needed a job and had "hung around" Respondent's shop "hoping for work" until Tallon hired him to do miscellaneous shop work, including some "buffing," sanding, and grinding motorcycle parts. There was no wage agreement between Delker and Respondent when Delker started working.

18) When he filed his wage claim in March 2004, Claimant Delker included a handwritten statement that said, in pertinent part:

> "My name is David Delker and prior to January of 2004 I knew Casey Tallon on a friendly basis.
>
> "At the time I met Casey Tallon, I knew he made custom motorcycles. We discussed the process ideas etc.
>
> "Needing work I approached Casey Tallon about a job[,] however as he had just fired a guy by the name of Mace, Casey asked me if I wanted a job. He informed me that he had

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[1] Bracken's total earnings were computed by multiplying $54.50 by 8 pieces ($436) and $120 per day by 3 days ($360) and adding those sums together for a total of $796. OAR 839-020-0030(2)(b).

[2] OAR 839-020-0030(3)(b).

> been paying (Mace) $125.00 a day to fabricate parts. No further mention of wage was discussed until mid-February when Casey informed me when I inquired about being paid, that I would be paid in a week. At this time he informed me that my pay would be calculated at $14.00 hr. My wage claim is based on this and my total hours worked, all hours over 40 hours I did not figure at time and a half because overtime was never discussed between Casey and myself [sic].
>
> "I believe at this time that Casey Tallon never planned to pay me or anyone else who has worked for him – he simply holds out paying until the person gets tired of working without pay, then he fires them."

19) During the wage claim investigation, Claimant Delker provided BOLI with a handwritten one page record of his work hours. He recorded that he worked 21.5 hours for the week beginning on January 14 and ending January 17, 2004; 54.5 hours for the week ending January 24, 2004; 63.5 hours for the week ending January 31, 2004; 55.5 hours for the week ending February 7, 2004; 59 hours for the week ending February 14, 2004; 43 hours for the week ending February 21, 2004; 55.5 hours for the week ending February 28, 2004; and 48 hours for the week ending March 6, 2004.

20) Claimant Delker's testimony that he began working for Respondent on January 14, 2004, conflicts with his statement on the wage claim form that his first work day was January 16, 2004, and is contradicted by his written statement that "Casey [Tallon] offered [him] a job" after Respondent "fired" Claimant Bracken. Bracken's credible testimony that his last day of work was January 30, 2004, was corroborated by Tallon's admission that Bracken had worked on 13 frames as late as January 29, 2004. Consequently, if Delker's statement is true that he began working for Respondent after Bracken left his employment, then his representation to BOLI that he worked 130.5 hours between January 14 and January 30, 2004, must be false. On the other hand, if Delker's record of work hours accurately reflects the actual hours he worked, then his written statement that he began working for Respondent after Bracken was purportedly "fired" must be false. Both representations cannot be true. The forum finds Bracken's testimony that Delker started working for Respondent near the end of Bracken's employment more credible than either of Delker's representations. Moreover, Delker's claim that he worked what amounts to 400.5 hours without pay before he quit his job is unbelievable. The forum credited Delker's testimony only when it was supported by credible evidence or an admission by Respondent.

21) The remaining witnesses gave credible testimony.

22) On March 2, 2004, BOLI sent Respondent a "Notice of Wage Claim" stating that Claimant Bracken had filed a wage claim claiming unpaid minimum and overtime wages totaling $1,011.78 and gas expenses of $70 from January 14 to January 30, 2004. On March 22, 2004, BOLI sent a similar letter to Respondent stating that Claimant Delker was claiming unpaid wages totaling $4,935 at the rate of $14 per hour from January 14 to March 9, 2004. On May 7, 2004, BOLI compliance specialist Wojtyla sent a demand letter to Respondent by certified mail stating that Respondent owed a total of $6,622.28 in wages and $5,052 in penalty wages and gave Respondent the opportunity either to pay the wages and penalties or provide appropriate records if Respondent disputed the claims.

23) On May 24, 2004, Respondent, through Casey Tallon, sent a letter to BOLI that stated in pertinent part:

> "I apologize for not responding earlier. As I told the representative that called I was under the impression that the Bureau of Labor and Industries were not involved in dealings with independent contractors.
>
> "In regards to Mr. Bracken –
>
> "My company, Tallon Kustom Equip., LLC, contracted with Mr. Bracken in January for services including tube bending, fabrication of engine plates and necks for 13 aftermarket Yamaha motorcycle frames. He told me that he had experience with general metal fabrication, and that what we needed him to do was not a problem at all. We agreed that he could work in the shop and use some of the shop equipment because he currently did not have any equipment or a shop of his own. We also agreed to pay him $50 per frame that he completed and that he would be paid when the orders were shipped out and paid for (most of our products are shipped COD). We never agreed to pay an hourly wage of any sort. He worked on 13 frames from January 20 to January 29. He completed the bending of the frame tubes, 5 frame necks and 9 sets of engine plates. Mr. Bracken then asked to be paid. I told him again that he would be paid after they were completed, shipped out and I received the payment for them. He got upset, told me that I should be welding them up, and subsequently left. When I started to assemble the frames in order to weld them, it became apparent that only 3 out of the 13 had been correctly bent. [Four] of the frames had to be completely scrapped and 6 of them needed extensive reworking in order to be viable. [Six] of the 9 frame necks were done correctly. [Five] of them had to be thrown out. In addition, he hadn't completed the grinding of the engine plates.

Approximately 1 week after Mr. Bracken left I received several threatening phone calls from him stating that, 'If you don't pay up you and your family will be sorry, I know where you live,' and 'you don't know who you're messing with, you better watch your back.' I didn't appreciate the threatening phone calls and told him so. I also told him again that I would let him know when I had been paid for the frames so he could come [*sic*] pick up his money.

"Of the 13 frames that he worked on only 3 were completed correctly. It took several months to complete the welding and fabrications work on the 6 other frames that were viable. [Four] frames had to be thrown out because they were beyond repair. I am sending the tracking #s for the frames that were sent out, two of which I still haven't received payment for. They were all Yamaha frames, which is noted on the invoices and tracking information.

" * * * * *

"I am willing to pay Mr. Bracken $50 for the 3 frames that he completed correctly and $30 for each of the 6 frames that were partially done which comes to a total of $330. When I receive payment for the last 2 frames there will be a check waiting at the shop for Mr. Bracken, or if the Bureau of Labor and Industries prefers, I can send the check to them. I do not have Mr. Bracken's SSN, which I was planning on getting from him when he picked up his check.

"In regards to Mr. Delker –

"I am assuming that Mr. Delker is the person I know only as 'Dave.' He was a vagrant who hung around the shop and occasionally asked Mr. Robin Dean (the person who rents the other half of the shop) and myself to do odd jobs for cash. He was receiving his mail here for a time. I would let him sweep the floor, grind parts, and do polishing work, etc., and would pay him in cash the same day. Mr. Dean found him in the shop one evening after shop hours smoking marijuana. Mr. Delker had also been drinking and there was an argument. Mr. Dean told him that he was not allowed on the premises without someone else there under any circumstances. After that altercation (I can't remember the exact date, but approximately first week of March) he was grinding some parts for me and purposely directed the sparks towards Mr. Dean's Corvette which was parked inside the shop at the time, causing damage to the windshield and paint on the hood of the car. He also kicked the exhaust pipes of the car, bending them down. Mr. Dean has said the damage would be approximately $2000-$2500 to repair and would be happy to supply a statement and pictures if necessary. Neither Mr. Dean nor

myself have any idea where Mr. Delker is currently residing. Since Mr. Delker does not seem to have a permanent residence, and it is unlikely that Mr. Dean will ever be able to recover any money from him to fix the car, my company, Tallon Kustom Equip., LLC will be ultimately responsible for the damage done to Mr. Dean's car.

"I do not know why Mr. Delker decided to go to the Bureau of Labor and Industries with this claim, but it is completely false. It is my belief that he got the idea after seeing the letter regarding Mr. Bracken, because he was present when I received it.

"I do not believe I owe Mr. Delker any money whatsoever.

" * * * * *

"Again, I apologize for the delay in responding – I would be happy to provide any other information the Bureau of Labor and Industries would like in resolving this matter.

"Sincerely,

"Casey Tallon[,] Tallon Kustom Equip., LLC"

ULTIMATE FINDINGS OF FACT

1) At times material, Respondent conducted business in Oregon and employed one or more persons in the operation of that business.

2) Respondent, through its owner and managing member Casey Tallon, employed Claimant Bracken from January 14 through January 30, 2004.

3) Respondent and Claimant Bracken agreed to a piece rate of $54.50 for each motorcycle frame Bracken constructed and $120 per day for miscellaneous shop work that did not include constructing motorcycle frames.

4) Respondent and Claimant Bracken had no wage agreement for Bracken's first two days (18 hours) of employment that included on-the-job training and clean-up work in Respondent's shop.

5) At times material, the state minimum wage was $7.05 per hour.

6) For the week ending January 17, 2004, Claimant Bracken worked 38 hours and earned $399.40 (18 hours @ $7.05 per hour and 5 pieces @ $54.50 per piece).

7) For the week ending January 24, 2004, Claimant Bracken worked 61 hours and earned $933.18 (40 hours @ $13.05 per hour and 21 hours of overtime @ $19.58 per hour).

8) For the week ending January 30, 2004, Claimant Bracken worked 34 hours over a four day period and earned $480 (4 days @ $120 per day).

9) Claimant Bracken quit his employment with Respondent on January 30, 2004.

10) From January 14 through January 30, 2004, Claimant Bracken earned a total of

$1,812.58 and Respondent failed to pay Bracken that amount when he quit his employment.

11) On March 2, 2004, BOLI's Wage and Hour Division sent Respondent a written notice of nonpayment of wages on Claimant Bracken's behalf. Respondent did not pay Claimant Bracken any wages in response to BOLI's notice and, to date, has not paid the wages earned and due.

12) Respondent owes Claimant Bracken $1,812.58 in due and unpaid wages.

13) Respondent willfully failed to pay Claimant Bracken the $1,812.58 in earned, due and payable wages and more than 30 days have elapsed from the date the wages were due.

14) For purposes of calculating penalty wages, Claimant Bracken's hourly rate was $13.63 per hour ($1,812.58 - total amount earned during wage claim period - divided by 133 - total hours worked).

15) Penalty wages for Claimant Bracken, computed pursuant to ORS 652.150, equal $3,271 ($13.63 x 8 hours per day x 30 days, rounded to the nearest dollar).

16) Respondent failed to pay Claimant Bracken the overtime wages to which he was entitled under OAR 839-020-0030(1), and civil penalties, computed pursuant to ORS 652.150, equal $3,271.

17) Respondent, through its owner and managing member Casey Tallon, employed Claimant Delker in or around January 2004.

18) There is no credible evidence from which the forum can determine the number of hours Claimant Delker worked or how much, if anything, he was paid.

CONCLUSIONS OF LAW

1) At all times material herein, Respondent was an employer and Claimants Bracken and Delker were employees subject to the provisions of ORS 652.110 to 652.200, 652.310 to 652.405, and ORS 653.010 to 653.261.

2) The actions, inaction, and statements of Casey Tallon are properly imputed to Respondent.

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

4) Respondent violated ORS 652.140(2) by failing to pay Claimant Bracken all wages earned and unpaid after he quit Respondent's employment.

5) Respondent is liable for penalty wages under ORS 652.150 for willfully failing to pay all wages or compensation earned and due to Claimant Bracken when his employment terminated, as provided in ORS 652.140(2).

6) Respondent is liable for civil penalties under ORS 653.055 for failing to pay Claimant Bracken the overtime wages to which he

was entitled pursuant to OAR 839-020-0030(1).

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

8) Under the facts and circumstances of this record, and according to the applicable law, the Commissioner of the Bureau of Labor and Industries has the authority to dismiss Claimant Delker's wage claim and that portion of the Agency's Order of Determination filed against Respondent that pertains to Claimant Delker's wage claim.

OPINION

Respondent failed to appear at hearing and the forum found Respondent in default pursuant to OAR 839-050-0330. Consequently, the Agency was required to establish a prima facie case on the record to support the allegations in its charging documents. *In the Matter of Barbara Blair*, 24 BOLI 89, 96 (2002). When making factual findings, the forum may consider unsworn assertions contained in a defaulting respondent's answer, but those assertions are overcome whenever controverted by other credible evidence. *Id*.

WAGE CLAIM

The Agency's prima facie case must include credible evidence of the following elements: 1) Respondent employed Claimants during the wage claim period claimed; 2) the pay rate upon which Respondent and Claimants agreed, if it exceeded the minimum wage; 3) Claimants performed work for which they were not properly compensated; and 4) the amount and extent of work Claimants performed for Respondent. *Id*.

A. Respondent employed Claimants.

Respondent's unsworn assertion in its answer that Claimants were independent contractors is overcome by credible evidence in the record establishing that both Claimants were Respondent's employees during the wage claim periods.

B. Respondent agreed to pay Claimant Bracken a piece rate and, alternatively, a fixed daily rate for the days he did not perform piece work. Claimant Delker was entitled to minimum wage for the hours he performed work for Respondent.

Claimant Bracken's credible testimony that Respondent agreed to pay him a piece rate for each motorcycle frame he constructed and a fixed rate of $120 per day on the days Bracken performed miscellaneous work only was bolstered in part by Respondent's

admission and was sufficient to establish that Respondent agreed to a wage rate that exceeded the minimum wage rate. The forum concludes that Bracken is entitled to receive wages in the agreed upon amount. The forum also concludes that Bracken was entitled to the minimum wage of $7.05 per hour for the hours he worked during the first two days he was employed without a wage agreement.

Claimant Delker's testimony alone was not sufficiently reliable to allow the forum to conclude that Respondent agreed to pay Delker $14 per hour as the Agency alleged. However, Delker was entitled to receive the minimum wage rate of $7.05 per hour for any hours he performed work for Respondent.

C. Claimant Bracken performed work for which he was not properly compensated.

Respondent admitted and credible evidence shows Claimant Bracken did not receive all of the wages he earned for the work he performed between January 14 and January 30, 2004.

D. There is insufficient evidence to conclude Claimant Delker performed work for which he was not properly compensated.

A respondent's unsworn assertions are not considered when controverted by credible evidence. In this case, however, Claimant Delker's testimony alone was not sufficiently reliable to controvert Casey Tallon's statement that Delker occasionally asked Tallon if he could do "odd jobs for cash" and that he "let [Delker] sweep the floor, grind parts, and do polishing work, etc., and would pay him in cash the same day." Tallon readily admitted that he did not pay Claimant Bracken for the piece work he performed and his admission in that case lends some credence to his claim that Delker's wage claim was "completely false." Bracken credibly testified that near the end of his employment, he observed Delker "buffing and stuff," but he did not have personal knowledge of the hours Delker worked or of the amount or whether Delker was paid for his work. Absent any corroboration of his claim that he was not paid wages, Delker's inconsistent statements and exaggerated work hours preclude a finding that Delker worked any hours for which he was not properly compensated. The Agency has not established a necessary element of its prima facie case as it pertains to Claimant Delker and, accordingly, Claimant Delker's wage claim is hereby dismissed.

E. Claimant Bracken credibly established the amount and extent of the work he performed.

When, as in this default case, a respondent produces no record of dates or hours worked, the forum may rely on a wage claimant's credible testimony to show the amount and extent of the work performed. *Barbara*

Blair, 24 BOLI at 97. Here, Claimant Bracken credibly testified that he kept a written record of his work hours in a "little notebook" at Tallon's request. When he filed his wage claim, he relied on his record to show the dates and hours he worked for Respondent. The forum accepts Bracken's record that established he worked 133 hours, 21 of which were overtime hours, earning wages totaling $1,812.58. Respondent has paid Bracken nothing to date and owes him $1,812.58.

PENALTY WAGES - ORS 652.150

The forum may award penalty wages when it determines that a respondent's failure to pay wages was willful. Willfulness does not imply or require blame, malice, or moral delinquency. A respondent commits an act or omission "willfully" if the respondent acts or fails to act intentionally, as a free agent, and with knowledge of what is being done or not done. *Sabin v. Willamette Western Corp.*, 276 Or 1083, 557 P2d 1344 (1976).

Casey Tallon's admission that Respondent did not pay Claimant Bracken for the work he performed demonstrates that Respondent knew Bracken performed the work and was owed wages. Tallon's unsworn assertion that Bracken's work did not meet his expectations and that he could not pay Bracken because he had not received payment from the customers to whom the motorcycle frames were shipped is not a defense. In his initial response to the wage claim, Tallon stated he told Bracken he would "let him know when [he] had been paid for the frames so [Bracken] could come pick up his money." His admission is sufficient to show that Respondent acted intentionally and as a free agent. Consequently, Respondent is liable to Claimant for penalty wages in the amount of $3,271 ($13.63 x 8 hours per day x 30 days).

CIVIL PENALTIES - ORS 653.055

If an employer pays an employee "less than the wages to which an employee is entitled under ORS 653.010 to 653.161," the forum may award civil penalties to the employee. ORS 653.055. The Agency alleged Respondent failed to pay Claimant Bracken overtime for the hours he worked in excess of 40 hours during the week ending January 24, 2004. The Commissioner's rules governing overtime requirements were promulgated pursuant to ORS 653.261 and are within the range of wage entitlements encompassed by ORS 653.055. The Agency presented sufficient evidence to show Respondent failed to pay Bracken at one and one-half times his regular rate of pay for the hours he worked in excess of 40 hours per week as required under OAR 839-020-0030(1). Respondent is therefore liable to Claimant for $3,271 in civil penalties, computed pursuant to ORS 652.150 ($13.63 x 8 hours per day

x 30 days). *See* ORS 653.055(1)(b).

AGENCY'S EXCEPTIONS

In its exceptions, the Agency requests that the forum reconsider the dismissal of Claimant Delker's wage claim. In order to reconsider and reverse its decision, the forum would have to find that the Agency presented sufficient credible evidence to support each element of its prima facie case and that is not the case here. Claimant Delker was found to be not credible on the issue of when and how many hours he worked in January 2004 and this forum has long applied ORS 10.095(3) which states: "That a witness false in one part of the testimony of the witness is to be distrusted in other parts." *In the Matter of Dan Cyr Enterprises*, 11 BOLI 172, 179 (1993). Delker's claim that he worked 130.5 hours from January 14 through January 30, 2004, was controverted by credible evidence showing that, but for a day or two, he did not work for Respondent in January 2004. By his own written statement, he did not start working for Respondent until after Claimant Bracken left Respondent's employ which was on January 30, 2004. His false claim for wages in January 2004 is enough to deem his other testimony untrustworthy, including his claim that he was not paid for the hours he worked.

The Agency argues that Delker's testimony was "bolstered by the fact that he limited his claim to straight-time wages only." The fact that Delker limited his claim to straight time wages does not improve his credibility. Delker represented to the Agency that he had worked 99 overtime hours between January 14 and March 6, 2004.[3] He claimed Respondent promised him $14 per hour which at the time of his wage claim amounted to $2,079 in unpaid overtime wages ($21 per hour overtime rate x 99 hours of overtime). Even at the minimum wage rate of $7.05 per hour, he would have been entitled to $1,047.42 in overtime wages had his wage claim been found credible ($10.58 per hour overtime rate x 99 hours of overtime). It is unbelievable that Claimant Delker would forego overtime wages for legitimate overtime hours worked, particularly at the purported overtime rate of $21 per hour, just as it is unbelievable that he worked over 400 hours, including 99 overtime hours, without pay before he quit his job. Finally, even if Respondent had admitted in its answer that Delker was not paid any wages for the work he performed, the forum cannot award damages based on mere speculation. Delker's testimony was not trustworthy and the hours he claimed were not substantiated independently by other credible evidence. Thus, there is no credible evidence from which the forum can rely to determine the hours Delker worked "as a matter of just and reasonable inference." *See In the Matter of G & G Gutters, Inc.*, 23 BOLI 135, 145 (2002)(When an employer fails to produce records of the hours and dates worked by

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[3] See Finding of Fact – The Merits 19

an employee, the commissioner may rely on the agency's evidence, including the employee's *credible* testimony, "to show the amount and extent of the employee's work as a matter of just and reasonable inference," and "may then award damages to the employee, even though the result be only approximate").

For the reasons stated above, the Agency's exceptions are **DENIED**.

ORDER

NOW, THEREFORE, as authorized by ORS 652.332, and as payment of the unpaid wages, penalty wages, and civil penalties, Respondent **Tallon Kustom Equip. LLC** is hereby ordered to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 1045 State Office Building, 800 NE Oregon Street, Portland, Oregon 97232-2180, the following:

> A certified check payable to the Bureau of Labor and Industries, in trust for Claimant Matthew Mace Bracken, in the amount of EIGHT THOUSAND THREE HUNDRED FIFTY FOUR DOLLARS AND FIFTY EIGHT CENTS ($8,354.58), less appropriate lawful deductions, representing $1,812.58 in gross earned, unpaid, due and payable wages, $3,271 in penalty wages, and $3,271 in civil penalties, plus interest at the legal rate on the sum of $1,812.58 from March 1, 2004, until paid, and interest at the legal rate on the sum of $6,542 from April 1, 2004, until paid.

FURTHERMORE, as Respondent has been found not to owe Claimant David Delker wages, the Commissioner of the Bureau of Labor and Industries hereby orders that David Delker's wage claim against **Tallon Kustom Equip. LLC** be and is hereby dismissed.

In the Matter of

LABOR READY NORTHWEST, INC.

Case No. 77-04

Final Order of Commissioner Dan Gardner

Issued January 4, 2007

SYNOPSIS

Respondent was a subcontractor that provided workers to perform manual labor for another contractor on a public works project. Respondent initially paid fifteen workers less than the applicable prevailing wage rate, committing four violations of *former* ORS 279.350(1). Respondent also failed to post the prevailing wage rate on the project in violation of *former* ORS 279.350(4). Respondent intentionally failed to post the prevailing rate as required by *former* ORS 279.350(4), and the Commissioner placed Respondent

on the list of contractors or subcontractors ineligible to receive any contract or subcontract for public works for three years. The Commissioner also assessed $25,000 in civil penalties based on Respondent's four violations of *former* ORS 279.350(1) and single violation of *former* ORS 279.350(4). *Former* ORS 279.348(3) and (5), *former* ORS 279.350(1), *former* ORS 279.350(4), *former* ORS 279.361(1), *former* ORS 279.370(1); *former* OAR 839-016-0033(1), *former* OAR 839-016-0035(1), *former* OAR 839-016-0085(1)(c), *former* OAR 839-016-0520, *former* OAR 839-016-0530(3)(a) & (b), *former* OAR 839-016-0540(3)(a).

The above-entitled case came on regularly for hearing before Alan McCullough, designated as Administrative Law Judge ("ALJ") by Dan Gardner, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on June 20-21, 2006, in the W. W. Gregg Hearings Room, 1045 State Office Building, Portland, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by Jeffrey C. Burgess, an employee of the Agency. Respondent was represented by David J. Sweeney, attorney at law. Danielle Coverrubias, Respondent's paralegal services manager, was present during the hearing as the person designated to assist in Respondent's case.

The Agency called the following witnesses: Dylan Morgan, BOLI Wage and Hour Division Compliance Specialist; Susan Wooley, BOLI Prevailing Wage Rate Technical Assistance Coordinator; and Michael Garrison, Respondent's Hillsboro, Oregon branch manager.

Respondent called the following witnesses: Ivy Finnegan, Labor Ready's prevailing wage administrator; and Michael Garrison.

The forum received into evidence:

a) Administrative exhibits X-1 through X-9;

b) Agency exhibits A-1 through A-46 (submitted prior to hearing);

c) Respondent exhibits R-2 through R-35 (submitted prior to hearing), and R-36 (submitted at hearing).

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

FINDINGS OF FACT – PROCEDURAL

1) On October 26, 2005, the Agency issued a Notice of Intent to Place on List of Ineligibles and to Assess Civil Penalties in the

amount of $25,000 in which it made the following charges against Respondent:

"1. Respondent entered into contracts or subcontracts to perform a public works for the Hillsboro School District involving construction, reconstruction and/or major renovation. The public works was known as the Hillsboro High School #4 Liberty HS Project (the 'Public Works'). The Public Works was located in Hillsboro, Washington County, Oregon.

"2. The Public Works was being conducted by Hillsboro School District 1J and consisted of construction, reconstruction and/or major renovation. The Public Works was not regulated under the federal Davis-Bacon Act and cost in excess of $25,000. The Public Works was subject to regulation under Oregon's prevailing wage rate laws (ORS 279.348 *et seq.)* and was first advertised for bid on November 14, 2000.

3. Failure or Refusal to Pay Prevailing Wages. Respondent provided Laborers on the Public Works. Respondent failed or refused to pay four employees approximately $1,334.90 in prevailing wages between approximately July 7, 2003 and July 28, 2003. The employees were David Becker, Jason Harris, Richard Thompson and Margarito Martinez. This is in violation of ORS 279.350 and OAR 839-016-0035. **CIVIL PENALTY of $20,000**. Four (4) violations ($5,000 per violation) – ORS 279.370, OAR 839-016-0530(3)(a) and 839-016-0540(3)(a).

"4. Failure to Post Prevailing Wage Rate. Respondent intentionally failed to keep the prevailing wage rates for the Public Works project posted in a conspicuous and accessible place in or about the Public Works project. This is a violation of ORS 279.350(4) and OAR 839-016-0033. **CIVIL PENALTY of $5,000** against Respondent. One (1) violation – ORS 279.370 and OAR 839-016-0530(3)(b).

"5. Placement on List of Ineligibles. Respondent, and any firm, corporation, partnership or association in which it had a financial interest should be placed on the list of those ineligible to receive contracts or subcontracts for public works for a period of three years pursuant to ORS 279.361 and OAR 839-016-0085, based on Respondent's intentional failure or refusal to post the prevailing wage rates as previously alleged herein.

"6. Aggravating Factors. Respondent has had the opportunity to comply with the rules and laws regulating prevailing wage rates on public works and compliance would not have been difficult. Respondent's violations were serious and repetitious, and resulted in significant underpayment of wages to multiple

employees. Respondent's violations were ongoing. Respondent knew, or should have known, of its violations. Respondent was advised that it had failed to pay the prevailing rate of wage and that its employees were engaged in work on a public works, but Respondent never posted the prevailing wage rate as previously alleged herein. OAR 839-016-0520."

2) The Notice of Intent instructed Respondent that it was required to make a written request for a contested case hearing within 20 days of the date on which it received the Notice if Respondent wished to exercise its right to a hearing.

3) The Agency served the Notice of Intent on Respondent's registered agent on October 28, 2005.

4) Respondent, through counsel, filed an answer and request for hearing on November 8, 2005.

5) The Agency filed a request for hearing with the Hearings Unit on March 17, 2006.

6) On March 21, 2006, the Hearings Unit served Respondent with: a) a Notice of Hearing that set the hearing for June 20, 2006; b) a Summary of Contested Case Rights and Procedures containing the information required by ORS 183.413; c) a complete copy of the Agency's administrative rules regarding the contested case hearing process; and d) a copy of the Notice of Intent.

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

8) On September 5, 2006, the ALJ issued a proposed order that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance.

9) On September 11, 2006, Respondent moved for an extension of time to file exceptions and requested a copy of the mechanical recording of the hearing. The Agency did not object, and the forum granted Respondent and the Agency an additional ten working days after receipt of the mechanical record to file exceptions.

10) On October 2, 2006, Respondent timely filed exceptions. Respondent's exceptions are discussed in the Opinion section of this Final Order.

FINDINGS OF FACT – THE MERITS

1) At all times material herein, Respondent Labor Ready Northwest, Inc. was a foreign corporation based in Washington that was registered with the Oregon Corporations Division to perform work within the state of Oregon. At all times material herein, Respondent was a licensed contractor with the State of Oregon Construction Contractor's Board.

2) Respondent's corporate office is in Tacoma, Washington. At all times material herein, Respondent administered Oregon prevailing wage rate jobs through its Tacoma office by ensuring that employees were paid the required rates, that certified payroll reports were processed, that posting was done, and that Respondent notifies BOLI every time Respondent is "onsite" on a prevailing wage rate job.

3) On November 14, 2000, Hillsboro School District 1J ("Hillsboro 1J") first advertised the "Hillsboro High School #4 Liberty HS DB# 43188" job ("Liberty HS project") for bid. The job involved constructing a new high school. On "1/2001," Hillsboro 1J awarded the project contract to Robinson Construction Co. ("Robinson"), in the amount of $37,549,800. The contract was not subject to the Federal Davis-Bacon Act.

4) Hillsboro 1J subsequently issued an "Invitation to Bid", with bids open until March 3, 2003, for "Equipment and Furnishings For Liberty High School." The Invitation to Bid cover letter stated, among other things, that "[t]he provisions of Oregon Revised Statutes 279.348 to 279.365, relating to prevailing wage rates, are applicable to work under this Contract." The contract was to furnish the high school that Robinson had constructed. Hillsboro 1J subsequently disputed that the furnishing of Liberty HS required the payment of the prevailing wage rate.

5) On March 11, 2003, Hillsboro 1J accepted a bid from the School Specialty Group ("School Specialty") to provide equipment and furnishings for the Liberty HS project. School Specialty's bid was in the amount of $1,516,787.10. School Specialty then contracted with JBH Installation ("JBH") to receive and set the furniture and equipment in place, assembling the furniture as necessary.

6) Hillsboro 1J failed to include within the specifications for the equipment and furnishing of the Liberty HS project a provision setting forth that the contractor must pay a prevailing wage rate fee to the Bureau of Labor and Industries. Hillsboro 1J also failed to include within the contract for the equipment and furnishing of the Liberty HS project a provision requiring that workers will be paid the prevailing wage rate.

7) On July 7, 2003, Bud Hart of JBH placed a job order with Respondent's Hillsboro branch to provide four workers to do the work of "moving furniture" at Liberty High School for a period of "6-10 weeks."

8) On July 7, 2003, Michael Garrison was branch manager of Respondent's Hillsboro branch. He was a relatively new employee, having been initially employed by Respondent on or about May 1, 2003, as an account representative in Respondent's Beaverton, Oregon office and promoted to branch manager in Respondent's Hillsboro office around the end of May 2003.

9) Garrison received some training from a "training branch manager" when he became manager. A "small section" was devoted to prevailing wage. He was told that construction paid for by the government should be prevailing wage. He was not told that Respondent was required to post the prevailing wage rate at public works jobsites to which it sent workers.

10) As Hillsboro branch manager, Garrison came to work at 5:30 a.m. and dispatched employees to Respondent's customers. After 9:30 a.m., he usually left the office and did sales, site visits, and met with customers.

11) Garrison dispatched four workers to the Liberty HS project on July 7, 2003. One of Respondent's customer service representatives pointed out that since the Liberty HS project was a school, Garrison should check out whether the job was subject to prevailing wage rate by visiting the job site. After dispatching the workers, Garrison called Bud Hart, who assured him that the job was not a prevailing wage rate job. On the same day, Garrison visited the Liberty HS project job site. He observed that construction had just been finished[1] and asked Phil, JBH's job site supervisor ("Phil") if the job was a prevailing wage rate job. Phil told him it was not because there was no construction project, and that construction had been completed, the permit to use the building had been issued, and the keys had been turned in. Garrison also called Robinson Construction and was told that the construction was complete, that the permit to use the building had been issued, and the keys had been turned in.

12) During his July 7 visit to the Liberty HS project, Garrison observed Respondent's workers unloading trucks and putting desks and chairs together with screwdrivers and wrenches. The desks and chairs had to be assembled inside the school because they wouldn't fit through the doors when assembled. Garrison did not see Respondent's workers attaching anything to the building.

13) Garrison completed a "Job Site Evaluation Report" after

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[1] The following is Garrison's pertinent testimony on this issue:

> "It looked brand new, completed. * * * I remember looking around and not finding any construction going on. In my mind, that was what you looked for prevailing wage with construction, and I didn't see any. The school looked completed to me. * * * I don't recall seeing any [Robinson pickups]; I know that there was one of the big storage bins out in the garage or out in the parking lot, but there was no Robinson employees working, nobody I could talk to or see or anything like that. That's why when I received that information from both Bud and Phil that the project was complete, that's why it wasn't prevailing wage, it made sense to me. The project looked completed to me."

visiting the Liberty HS project on July 7, 2003. Garrison's pertinent notes are printed below in italics:

> "Customer Name: *JBH Installations*
> Person Interviewed: *Phil*
> Job Site Address: *Liberty High School*
> Nature of Operations (Describe service or finished product): *Office Supplies Installation*
> What type of work will Labor Ready workers be doing at this site? *Moving*
> Number of Labor Ready workers at site: *4*
> **REMARKS:** Are your observations consistent with the customer's responses? *Double check this is not prevailing wage. Per Phil*

14) Later on July 7, 2003, Garrison called Bud Hart, Phil's supervisor at JBH. Hart told him that JBH's work on the Liberty HS project was not subject to the prevailing wage rate.

15) The Liberty HS project was the first prevailing wage rate job to which Garrison dispatched workers on Respondent's behalf.

16) Respondent's workers on the Liberty HS project performed work that was properly classified as Group 1 Laborers, with a basic hourly pay rate of $20.44 and a fringe benefit of $7.85 per hour, for a total of $28.29 per hour.

17) On the Liberty HS project, Respondent used daily work tickets to track its workers' hours and paid its workers by the day, either by check or voucher.

18) The week of July 7-11, 2003, employees dispatched by Garrison worked the following dates and hours on the Liberty HS project:

> **July 7:** David Becker (8), Chris Darr (8), Todd Jordan (8), Richard Thompson (8).
> **July 8:** David Becker (8), Chris Darr (8), Todd Jordan (8), Richard Thompson (8).
> **July 9:** David Becker (8), Chris Darr (8), Todd Jordan (8), Richard Thompson (8).
> **July 10:** Nicholas Crews (8), Todd Jordan (8), Margarito Martinez (2), Johnny Redman (6), Alfredo Rodriguez (2), Carl Sperber (6).
> **July 11:** Nicholas Crews (8), Todd Jordan (8), Carl Sperber (8), Richard Thompson (8).

Respondent paid each worker $6.90 per hour for each hour worked.

19) Becker received his first pay for the Liberty HS project on July 7, 2003, via check #1128173291 for $47.10. Calculated at $28.29 per hour, Becker earned $226.32 in wages on July 7, 2003.

20) Thompson received his first pay for the Liberty HS project on July 7, 2003, via check #1128173292 for $47.10. Calculated at $28.29 per hour, Becker earned $226.32 in wages on July 7, 2003.

21) Martinez received his first pay for the Liberty HS project on July 10, 2003, via voucher #03266000000000 for $11.00. Calculated at $28.29 per hour, Martinez earned $56.58 in wages on July 10, 2003.

22) The week of July 14-18, 2003, employees dispatched by Garrison worked the following

dates and hours on the Liberty HS project:

> **July 14:** Scott Clason (8), Rich Hardy (8), Jason Harris (8), Todd Jordan (8). **July 15:** Scott Clason (8), Rich Hardy (8), Todd Jordan (8), Ramiro Sanchez (8). **July 16:** Scott Clason (8), Rich Hardy (8), Todd Jordan (8), Gregory Coggin (8). **July 17:** Scott Clason (8), Rich Hardy (8), Todd Jordan (8), Gregory Coggin (8). **July 18:** Scott Clason (8), Rich Hardy (8), Todd Jordan (8), Gregory Coggin (8).

Respondent paid each worker $6.90 for each hour worked.

23) Harris received his first pay for the Liberty HS project on July 14, 2003, in via voucher #48240000000000 for $42.00. Calculated at $28.29 per hour, Harris earned $226.32 in wages on July 14, 2003.

24) The week of July 21-25, 2003, employees dispatched by Garrison worked the following dates and hours on the Liberty HS project:

> **July 21:** Scott Clason (8), Gregory Coggin (8), Rich Hardy (8), Todd Jordan (8). **July 22:** Gregory Coggin (8), Rich Hardy (8), Todd Jordan (8), Catherine Ross (8). **July 23:** Scott Clason (8), Rich Hardy (8), Todd Jordan (8), Gregory Coggin (8). **July 24:** Scott Clason (8), Gregory Coggin (8), Rich Hardy (8), Todd Jordan (8), Catherine Ross (8). **July 25:** Scott Clason (8), Rich Hardy (8), Todd Jordan (8), Gregory Coggin (8).

Respondent paid each worker $6.90 for each hour worked.

25) On July 23, 2003, Todd Jordan, one of Respondent's employees on the Liberty HS project, told Garrison that the Liberty HS project was a prevailing wage rate job. Jordan told Garrison he had obtained this information by using the internet to contact BOLI. Jordan gave Garrison the phone number of Dana Woodward, an employee in BOLI's Prevailing Wage Unit, and told Garrison to call BOLI as soon as possible.

26) Immediately after speaking with Jordan, Garrison visited the Liberty HS project and spoke with Phil. Garrison again asked Phil if the job was prevailing wage, and if not, why not. Once more, Phil told him that the project was not prevailing wage because JBH was a vendor, not a contractor. Garrison returned to his office and called Woodward. He did not reach her, but left a message.

27) On July 24, 2003, Garrison called Woodward again. On July 25, 2003, he entered the following note into Respondent's computer to memorialize his conversation with Woodward:

> "7/24/03 I CALLED AND SPOKE WITH DANA LATE IN THE DAY. SHE HAD BEEN IN A MEETING THE ENTIRE DAY. AFTER SPEAKING WITH HER, I WAS TOLD THAT LIBERTY HIGHSCHOOL [sic] WOULD BE PREVAILING WAGE. WHEN I ASKED FOR SOMETHING IN

WRITING THAT I COULD TAKE TO JBH TO SHOW THERE [sic] PROJECT WAS PREVAILING WAGE. DANA ASKED ME TO EMAIL THE SITUATION TO HERE [sic]. I EMAILED THE SITUATION OVER TO HERE AND RECEIVED HERE [sic] RESPONCE [sic] ON 7/25/03. DANA REQUESTED FURTHER INFORMATION."

28) The next day, Garrison again visited the Liberty HS project and spoke once more with Phil, who provided him with "the list showing [JBH was] a vendor not a subcontractor." Garrison then telephoned Robinson Construction again, and a representative from Robinson told him "the school was completed. The keys were turned over and the occupency [sic] permit was issued." Garrison e-mailed Woodward with this information and left a message asking her to call him if she had any questions.

29) A printout of e-mail communications between Garrison and Dana Woodward on July 24-25, 2003, contained in BOLI's investigative file, shows the following communications took place:[2]

"'1128 – Branch' <1128-BR@laborready.com> 7/24/2003 2:37:31 PM>>>
Dana, I have workers furnishing Liberty Highschool [sic]. The issue of prevailing wage has been brought to my attention. I have spoke [sic] with Phil (Site Supervisor) and he has assured me that this is not a prevailing wage job. Phil explained that his company JBH Installations is a vendor Hispeaking [sic] with you it is my understanding that this is a prevailing wage job. Can you please clarify this for me?

"Sincerely,
Michael Garrison
Labor Ready
Hillsboro Branch Manager"

* * * * * * * * * *

"From: Dana Woodward [mailto:Dana.Woodward@state.or.us.]
Sent: Thu 7/24/2003 3:11 PM
To: 1128 – Branch
Cc:
Subject: Re: PREVAILING WAGE QUESTION

"Hi Michael

"I received your email. I do have a couple additional questions. Can you tell me the name of the prime contractor for this project? And if possible, can you tell me the name of the original project?

"Thanks,

"Dana Woodward
Administrative Specialist
PREVAILING WAGE RATE Unit
Wage and Hour Division-Portland Office
(503) 731-4723"

* * * * * * * * * *

"From: '1128 – Branch' <1128-BR@laborready.com>
To: 'Dana Woodward' <Dana.Woodward@state.or.us>
Date: 7/25/2003 6:38:41 AM
Subject: RE: PREVAILING WAGE QUESTION

"I will try and get that for you this morning.

"Michael G."

* * * * * * * * * *

[2] The e-mail communications have been rearranged chronologically.

"From: '1128 – Branch' <1128-BR@laborready.com>
To: 'Dana Woodward' <Dana.Woodward@state.or.us>
Date: 7/25/2003 10:08:29 AM
Subject: RE: PREVAILING WAGE QUESTION

"Dana, here is the information that I was able to obtain.

"Project: Liberty Highschool [sic] or Hill High #4
General Contractor: Robinson Construction Co.
Project Status: Complete (Keys turned over/School Open/Occupency [sic] Permit Issued)

"Our Customer is JBH Installations. My contact is the Project Manager (Phil) at Liberty Highschool [sic]. I spoke with him again today. He assured me again (Third Time) that this project is not prevailing wage due to the fact that they are a vendor not a contractor. He gave me a copy of the Preject [sic] by Design Vendor & Shipping Detail Report that shows them as a vendor for Project by Design. I will attach a copy of the Vendor & Shipping Detail Report. Please feel free to call me anytime on my Cell Phone (971-506-4077) if you have any further question [sic].

"Thank you for your time.

"Michael Garrison
Hillsboro Branch Manager"

30) On July 25, 2003, Garrison entered the following single note into Respondent's computer:[3]

"7/25/03 I CALLED BUD BACK TO LET HIM KNOW THAT I DID NOT HEAR FROM DANA. I ALSO WANTED TO KNOW IF HE HAD HEARD FROM HER. BUD INFORMED ME THAT HIS LEGAL OFFICE IS WORKING ON IT. HE ALSO EXPLAINED THAT HE HAD SPOKE [sic] WITH DANA AND THAT SHE WAS NOT VERY RECEPTIVE TO WHAT BUD WAS TRYING TO EXPLAIN TO HER. HE WAS NOT VERY PLEASED WITH THE SITUATION. HE AGAIN SAID THAT THIS IS NOT PREVAILING WAGE. HE TOLD ME THAT HIS LEGAL OFFICE CONFIRMED THAT IT WAS NOT PREVAILING WAGE. HE TOLD ME THAT HE NEEDED THE WORKERS ON MONDAY. HE WANTED TO KNOW IF I WAS GOING TO SERVICE HIM OR NOT. IF NOT HE WOULD TAKE THE BUSINESS ELSEWHERE. **** BASED ON THE FACT THAT DANA DID NOT PROVIDE ME WITH ANYTHING IN WRITING AFTER TWO REQUEST [sic] I DECIDED TO SERVICE JBH ON MONDAY. I DID NOT FEEL IT WAS THE RIGHT CHOOSE [sic] TO NOT SERVICE THEM BASED ON DANA'S OPINION ONLY. I WILL FOLLOW UP WITH HER FIRST THING MONDAY MORNING. ***** MICHAEL GARRISON"

31) On July 25, 2003, Garrison entered the following additional notes into Respondent's computer as a single entry:[4]

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[3] The forum concludes that this was a single entry because there is a single date – "07/25/03" – printed in a column to the left of the note that corresponds to the note.

[4] The forum concludes that this was a single entry because there is a single date – "07/25/03" – printed in a col-

"7/25/03 DANA CALLED ME TO LET ME KNOW THAT JBH INSTALLATION SHOULD BE PAYING PREVAILING WAGE. DANA TOLD ME THAT SHE CONFIRMED THIS WITH THE HILLSBORO SCHOOL DISTRICT.
7/25/03 I CALLED BUD HEART[5] TO LET HIM KNOW THE LATEST NEWS. I EXPLAINED THAT DANA AT BOLI TOLD ME THAT THIS IS PREVAILING WAGE. I ALSO EXPLIANED [sic] THAT SHE CHECKED WITH THE SCHOOL BOARD. BUD INSISTED THAT THIS JOB IS NOT PREVAILING WAGE BECAUSE THEY ARE A VENDOR NOT A CONTRACTOR.
7/25/03 I CALLED DANA AGAIN AND LET HER KNOW THE RESPONCE [sic] I RECIEVED [sic] FROM BUD HEART. SHE WAS VERY SURE THAT THIS JOB WAS PREVAILING WAGE. I ALSO GAVE HER BUD HEART[']S PHONE NUMBER. DANA TOLD ME THAT SHE WOULD WORK ON THIS RIGHT AFTER LUNCH. SHE WAS GOING TO ATTACH A LETTER TO THE EMAIL WHEN SHE REPLIED BACK TO ME. THIS WOULD GIVE ME SOMETHING I CAN GIVE TO JBH WITHOUT GIVING THE EMPLOYEES['] NAME.
7/25/03 I THEN CALLED BUD HEART BACK TO LET HIM KNOW THAT I WAS GETTING A LETTER FROM DATA [sic] STATING THAT THIS WAS A PREVAILING WAGE JOB. I ASSURED HIM I WOULD SEND IT TO HIM VIA EMAIL AS SOON AS I GOT IT. HIS EMAIL IS JBHINSTALLATIONS@AOL.COM.
7/25/03 I NEVER RECEIVED AN EMAIL FROM DANA. I TRIED TO CALL HER OFFICE BUT SHE HAD LEFT FOR THE WEEKEND. I ASKED TO SPEAK TO SOMEONE ELSE IN THE OFFICE THAT COULD HELP ME WITH THIS ISSUE. I WAS TOLD THAT HIDI[6] WAS THE ONLY ONE LEFT BUT SHE WAS ON HERE [sic] PHONE. I ASKED TO HOLD. THE RECP. SAID WAIT SHE JUST GOT OFF HERE [sic] PHONE AND THEN FORWARDED ME TO HIDI. I THEN GOT HIDI'S VOICE MAIL. I EXPLAINED WHO I WAS AND THAT I REALLY NEEDED TO SPEAK TO SOMEONE ABOUT THIS ISSUE. THIS WAS AT 3:55 PM. I KNOW HIDI GOT OFF AT 4PM BECAUSE THE RECP. TOLD ME SO. IT IS CURRENTLY 5:14P AND I STILL HAVE NOT RECIEVED [sic] ANYTHING FROM B.O.L.I. NO EMAIL OR PHONE CALL. DANA HAS MY CELL NUMBER AS WELL AS MY OFFICE NUMBER.
7/25/03 I CALLED BUD BACK TO LET H"

32) On July 25, 2003, Dana Woodward mailed a letter to Garrison that contained the following text:

"July 25, 2003

"Sent Via Email: 1128-BR@laborready.com (Michael Garrison)

umn to the left of the note that corresponds to the series of notes.

[5] This individual's last name was spelled both as "Hart" and "Heart" in exhibits received into the record and there was no evidence indicating the correct spelling.

[6] There is no evidence in the record to indicate the identity of "HIDI."

"Michael Garrison
Labor Ready
Hillsboro Branch Manager

"Dear Mr. Garrison:

"This letter [is] in response to your email received yesterday, July 24, 2003. You indicated that JBH Installations has contracted with Labor Ready to have employees 'furnishing' Liberty High School. The site supervisor for JBH Installations indicated that this contract is not subject to prevailing wage rate requirements because he is [a] vendor.

"The fact that JBH Installations is considered a 'vendor' is irrelevant to whether or not the contract is subject to the prevailing wage rate requirements. What is relevant is whether the contract is a 'public works' contract subject to the prevailing wage rate provision. If so, what is the type of work being performed?

"The term 'public works' refers to the construction, reconstruction, major renovation or painting carried on or contracted for the public agency.

"If the project primarily serves the public interest, then it is 'by of [sic] for' a public agency even if the property involved is not owned by the agency. (ORS 279.348(3); OAR 839-016-0004(19)

"In this case, information received from the Hillsboro School District indicates that this is a small portion of the larger contract called 'Liberty High School #4', which is subject to the prevailing wage rate provisions.

"This leaves the remaining question, what duties are the employees performing on the job site? Pursuant to OAR 839-016-004(27), the term 'worker' means a person employed on a public works project and whose duties are manual or physical in nature (including those workers who use tools or who are performing the work of a trade), as distinguished from mental, professional or managerial. The term worker includes apprentices, trainees and any person employed or working on a public works project in a trade or occupation for which the commissioner has determined a prevailing rate of wage.

"In a phone conversation this afternoon, Bud Hart, JBH Installations indicated that the Labor Ready employees are unloading furniture. Because Labor Ready's employees are performing work on a job site subject to the PWR requirements and the duties are manual or physical in nature, the prevailing wage rate requirements do apply.

"If you have any additional questions regarding this matter, please call (503)731-7423."

33) On July 25, 2003, Hannah Wood, on behalf of Woodward, signed and mailed a letter to Garrison that contained the following text:

"July 25, 2003

"Sent Via Email:
1128BR@laborready.com (Michael Garrison)

"Michael Garrison
Labor Ready
Hillsboro Branch Manager

"Dear Mr. Garrison:

"This letter is in response to your email received July 24, 2003. You indicated that JBH Installations has contracted with Labor Ready to have employees 'furnish' Liberty

High School. The site supervisor for JBH Installations claims that as a vendor, the work being performed by JBH employees is not subject to prevailing wage.

"The fact that JBH Installations is considered a 'vendor' is irrelevant to whether or not the contract is subject to prevailing wage rate requirements. What is relevant is whether the contract is a 'public works' contract subject to the prevailing wage rate provisions. According to Hillsboro School District, their contract with JBH Installations is part of a larger ongoing project called 'Liberty High School #4.'

"Because this project was bid in November 2000 the July 2000 rates are in effect. It is my understanding that the employees in question are unloading furniture, moving it and installing it in the building. This type of work is classified under the Laborers and Material Movers classification which is paid at a rate of $20.44 base rate and a fringe rate of $7.85 for this project. If the employees are assembling furniture and attaching it to the floor, wall or ceiling, the correct classification would be Carpenters 1 at a rate of $23.94 base and $7.92 fringe.

"If you have any additional questions regarding this matter you may contact me at (503)731-4723."

BOLI faxed Wood's letter to Respondent on July 28, 2003, at "13:30." The letter also shows that Respondent's office faxed it to someone else on "07-28-03" at "17:14." Garrison remained in his office until 5:14 p.m. on July 25, 2003, but did not receive Wood's or Woodward's July 25, 2003, letters by e-mail on July 25, 2003. He received the letters in the mail on July 28, 2003.

34) On August 28, 2003, Garrison entered the following single note into Respondent's computer:[7]

"7/28/03 WE RECEIVED A LETTER FROM THE B.O.L.I. STATING THAT THE JOBSITE AT LIBERTY HIGHSCHOOL IS PREVAILING WAGE. ONCE I RECEIVED THE LETTER I MADE COPIES AND TOOK A COPY OUT TO THE JOBSITE AND GAVE IT TO PHIL. PHIL TOLD ME THAT I WOULD HALF [sic] TO CALL BUD HEART. PHIL DID NOT FEEL THAT BUD WOULD USE LABOR READY ANYMORE. HE DID NOT SAY IT QUITE THAT WAY BUT I GOT THE MESSAGE JUST THE SAME. 7/28/03 3:11PM I TRIED TO CALL BUD HEART ON HIS CELL PHONE BUT NO BODY [sic] ANSWERED. I COULD NOT LEAVE A MESSAGE. I WILL TRY BACK LATER. MG"

35) Garrison's computer notes were based on handwritten notes and accurately reflect the communications conveyed in the notes.

36) At all times material, Garrison's e-mail address was 1128-BR@laborready.com.

37) On July 28, 2003, employees dispatched by Garrison worked the following hours on the

[7] The forum concludes that this was a single entry because there is a single date – "08/28/03" – printed in a column to the left of the note that corresponds to the note.

Liberty HS project: Scott Clason (8), Gregory Coggin (8), Rich Hardy (8), Todd Jordan (7), Catherine Ross (8). They were paid $6.90 per hour for that day's work.

38) On July 29, 2003, Garrison began paying the prevailing wage rate to Respondent's workers on the Liberty HS project. Garrison did not start paying until after he received Woodward's letter stating that the Liberty HS project was a prevailing wage rate job because JBH did not agree that the job was a prevailing wage rate job and Garrison wanted written confirmation to show JBH.[8]

39) Respondent paid its workers on the Liberty HS project the correct prevailing wage rate of $28.29 per hour from July 29 through September 11, 2003, the last day that Respondent dispatched workers to the Liberty HS project.

40) On August 5, 2003, Respondent issued back pay checks to all its workers who had performed work on the Liberty HS project between July 7 and July 28, 2003. Respondent calculated back pay at the rate of $21.39 per hour, the difference between the correct prevailing wage rate of $28.29 per hour and $6.90 per hour, the amount initially paid by Respondent to its workers. The amount on each check was the actual amount underpaid to each worker.[9] Some workers were issued multiple checks because each check was intended as back

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[8] Garrison testified as follows, in response to Burgess's question:

Burgess: "It appears that, with respect to these entries, that as of the time that these phone calls came in that she had already determined that information [that the Liberty HS project was a prevailing wage job].

Garrison: "It wasn't that cut and dried, unfortunately. She said that she checked with the school district but Bud Hart told me he checked with the school district. Bud was telling me it wasn't prevailing wage; Dana was telling me it was. So that's why I requested it in writing from Dana so that I could give it to Bud so that I had something from BOLI, in writing, saying I'm sorry but this is the way it's going to go because I was stuck in the middle and there's a note in there referring to the fact that I felt stuck in the middle because I had a customer that had the same argument that Dana had. And all I asked from Dana was something in writing stating that it was prevailing wage, and I was ready to rock and roll. And it took several days for her to get that to me. The day she got it to me, we immediately started paying prevailing wage and everything started rolling that way. That's all I was waiting for."

[9] Whether or not Martinez ultimately *received* all wages due was disputed. However, the Agency did not seek to debar Respondent based on the allegation that Respondent intentionally failed or refused to pay Martinez all the wages he was owed. Since the Agency's only allegation regarding Martinez was undisputed -- that Martinez was not initially paid prevailing wages for 2 hours that he worked on July 10, 2003 – and it was undisputed that Respondent *issued* checks for the full amounts Martinez had earned, it is not necessary for the forum to resolve the issue of whether or not he was ultimately paid all wages due.

pay for work performed in separate weeks. In total, Respondent's employees worked a total of 497 hours on the Liberty HS project from July 7 through July 28, 2003, and were underpaid the amount of $10,630.83.

41) Respondent issued these checks before JBH paid Respondent for the back wages due to the Respondent's workers.

42) Once Respondent issued the back pay checks, Garrison and other employees at Respondent's Hillsboro branch office tried to telephone every worker to whom a back pay check or checks had been issued to let them know that a back pay check or checks had been issued and to ask them to come into the branch office to pick up their checks.

43) On August 5 and 8, 2003, Respondent's corporate headquarters completed certified payroll reports for Respondent's workers on the Liberty HS project. The reports reflected "restitution" payments made to those workers for the work they performed prior to July 29, 2003.

44) Respondent and Garrison both make more money if Respondent's workers are paid prevailing wage rate.

45) During the time that Respondent's workers were employed at the Liberty HS project, Garrison did not post the prevailing wage rates, even after he learned the Liberty HS project was a prevailing wage rate job. This was because he was unaware of Respondent's obligation to post the rates. No one else employed by Respondent posted the prevailing wage rates applicable to Respondent's workers at the Liberty HS project.

46) JBH did not post the prevailing wage rates on the Liberty HS project.

47) In November 2003, Dylan Morgan, a compliance specialist in BOLI's Prevailing Wage Rate unit, began an investigation to determine whether Respondent had paid the prevailing wage rate on the Liberty HS project. On November 26, 2003, Morgan wrote a letter to Respondent's corporate headquarters that stated, in pertinent part:

> "RE: Hillsboro High School #4, Liberty High School
> No.: 03-2736
>
> "Dear Employer:
>
> "This office is responsible for the administration and enforcement of Oregon's prevailing wage rate * * * regulations[.] In this regard we regularly receive information from the public, employees, and associates regarding possible violations of the statutes and rules the Bureau enforces.
>
> "* * * * *
>
> "The Bureau has received information that your company has failed to pay the correct prevailing wage rates for all employees on the above named project. An investigation is being conducted regarding all your employees who worked on this project.
>
> "Pursuant to the investigation, the Bureau requests that you supply any and all time cards, time records and payroll records for all

persons who performed work for your company in relation to this project. These records must include hours worked each day, rates of pay, wages paid, withholdings made, job descriptions, last known addresses, and phone numbers. You must also include copies (front and back) of all cancelled checks paid to the employees in relation to this project. The job description information should include specific descriptions of the work performed by each worker.

"In addition, if you paid fringes to a third party trust, plan, fund, or program (such as vacation, holiday, medical, pension, etc.), please provide the hourly rate paid to each program and copies (front and back) of canceled checks showing payments to the fund.

"Please submit the above information to the Bureau's Portland address no later than December 15, 2003. Failure to respond will result in additional enforcement action according to the PWR laws."

48) On December 1, 2003, Charlene Baldwin, Respondent's Prevailing Wage Administrator,[10] wrote a letter responding to Morgan in which she stated:

"Dear Mr. Morgan:

"I received a letter from you today informing us that we are in violation of prevailing wage regulation of underpaying the workers that worked on the above project. We did underpay them. But we did do a restitution back in August. I have requested the cancelled checks from our A/P department. It can take up to 6 weeks to receive those items. I have, also, requested that the Hillsboro branch send all of the work tickets for that project to my attention immediately. Once I have received any of the requested information I will forward it on to you.

"I will do all in my power to get all information to you as soon as possible."

49) Subsequently, either Baldwin or Ivy Finnegan, Respondent's current Prevailing Wage supervisor, sent records to Morgan that were responsive to his request. The records included certified payroll reports, daily work tickets, and copies of the front and back sides of paychecks made out to workers for the work performed by Respondent's employees at the Liberty HS project.

50) Morgan examined Respondent's records and compiled a 28 page wage transcription summarizing the records. He concluded that all but six of Respondent's workers – David Becker, Jason Harris, Todd Jordan, Patrick Lake, Margarito Martinez, and Richard Thompson -- had been fully paid. He also concluded that Respondent had issued checks to Becker, Harris, Martinez, and Thompson, for the full amounts of back pay owed, but due to time elapsed, they had "dropped off the map" and never received their paychecks.

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[10] The forum infers that Baldwin was Respondent's Prevailing Wage Administrator at the time because she signed the letter and the words "Prevailing Wage Administrator" are typed under her signature.

51) On April 23, 2004, Morgan sent a letter to Marlisa Adams, Respondent's corporate treasury assistant, that stated:

"RE: Liberty High School; Hillsboro School District 1J
No.03-2736

"Dear Ms. Adams:

"The Bureau has completed its review of the payroll documents pertaining to work performed on the above-referenced prevailing wage rate project. Wage transcriptions have been prepared and attached for your review. Some individuals who performed work for Labor Ready under the direction of JBH Installations, Inc. on this project were improperly paid; their names and the amounts due to each appear below.

Employee	Gross Unpaid Wages
David Becker	$ 513.36
Jason Harris	$ 397.44
Todd Jordan	$ 55.20
Patrick Lake	$ 452.64
Margarito Martinez	$ 56.58
Richard Thompson	$ 684.48

"For two workers, Todd Jordan and Patrick Lake, documentation was not provided showing proof of payment. Mr. Jordan is owed $55.20 for wages earned on July 9, 2003. Mr. Lake is owed $452.64 for the week ending August 16, 2003. The remaining amounts shown reflect payments which were either not made to the worker or which never cleared Labor Ready's account.

"Absent additional documentation or information, the amounts listed above should be sent to the Bureau's Portland office by May 7, 2004. Your payments should be made to the order of the worker for the total amount due, less legal withholdings on taxable amounts. At this point the Bureau is not pursuing liquidated damages, however, you should be aware that addition [sic] action to collect these wages may result in the assessment of liquidated damages.

"Please feel free to contact me at the number listed below with any questions you may have.

"Sincerely,

"Dylan Morgan
Compliance Specialist
Wage & Hour Division
503-731-4785

"encl. Wage Transcriptions

"cc: (letter only)
Hillsboro School District 1J"

52) On May 5, 2004, Marlisa Adams, from Respondent's Treasury Department sent a letter to Morgan that stated:

"RE: Liberty High School; Hillsboro School District 1J
No.03-2736

"Dear Mr. Morgan:

"I have completed the required research into the payments requested by your division. I have included along with the payment, the canceled checks for Patrick Lake and Todd Jordan.

"As per our conversation, Patrick Lakes' original checks were voided and reissued on September 8, 2003.

"Here's the breakdown for the total amount remitted:

Employee	Gross Unpaid Wages	Net Wages
David Becker	$513.36	$433.63
Jason Harris	$397.44	$272.96
Margarito Martinez	$ 56.58	$ 52.21
Richard Thompson	$684.48	$576.10
Totals	$1651.86	$1334.90

"If you require any additional documentation or information in regards to your request, please don't hesitate to contact me. I appreciate your patience in this matter.

"Sincerely,

"Marlisa Adams
Treasury Department
(800)610-8920 x8586

"enc. Remittance
Copies of checks"

Adams enclosed a check in the amount of $1334.90 made out to the Bureau of Labor and Industries, as well as cancelled checks showing payments to Lake and Jordan.

53) As a result of Adams's May 5, 2004, letter and its enclosures, Morgan concluded that Lake and Jordan had "ultimately been fully compensated" for all the work they performed on the Liberty HS project, and that Becker, Harris, Martinez, and Thompson had "not been fully compensated" for their work on the Liberty HS project.

54) Morgan, through the Bureau's Fiscal Unit, caused checks to be issued in the following amounts after receiving Adams's letter: David Becker - $513.36; Jason Harris - $397.44; Richard Thompson - $684.48. On May 25, 2004, Morgan mailed these checks, along with cover letters and itemized statements of deductions provided by Adams, to Becker, Harris, and Thompson. Morgan did not cause a check to be issued to Martinez because he was unable to locate Martinez. Instead, Morgan requested BOLI's Fiscal Unit to deposit $52.21 in BOLI's "Lost Claimant Account."

55) On June 26, 2003, the Oregon Court of Appeals issued an opinion in the case of *Labor Ready Northwest, Inc. v. Bureau of Labor and Industries,* 188 Or App 346, 71 P3d 559 (2003), *rev den* 336 Or 534, 88 P3d 280 (2004) ("Labor Ready #1). One of the issues before the court was whether Labor Ready Northwest, Inc., as a subcontractor, was required to post prevailing wage rates on a prevailing wage rate job to which it dispatched workers. The court held "ORS 279.350(4) requires every contractor and subcontractor engaged in a public project to personally initially post the prevailing wage and to maintain that posting throughout the course of its employees' work on the project." *Id.* at 369, 572. Respondent appealed the court's decision to the Oregon Supreme

Court, which denied review on May 5, 2004.

56) On September 9, 2003, Timothy Adams, president and then general counsel of Labor Ready, sent an e-mail to Siobhan Rischman, Finnegan's boss, and Todd Gilman, one of Labor Ready's corporate attorneys, on the subject of "Oregon posting of prevailing wage." In pertinent part, the e-mail stated:

> "As you may know, the Oregon Court of Appeals recently rejected BOLI's order of disbarment. The court agreed with our position that inadvertent errors do not form a basis for disbarment under the statute. BOLI has appealed this ruling, but we are fairly confident their appeal will be unsuccessful.
>
> "However, the court did agree with BOLI that each subcontractor, including Labor Ready, has an affirmative duty to post the required prevailing wage schedule at each PV jobsite. Although this creates the absurd result of many identical postings on each jobsite, that's the law and we are going to have to deal with it.
>
> "I would appreciate it if you two could put your heads together and come up with a process that ensures compliance with this requirement in Oregon."

57) On September 15, 2003, Gilman e-mailed an "action plan" to Rischman that was designed to assure compliance with Oregon prevailing wage rate posting requirements. In pertinent part, the e-mail stated:

> "Oregon Prevailing Wage Compliance
>
> "GOALS
>
> "(1) Comply with ORS 279.350(4) by training OR operations.
>
> "(2) Avoid disbarment for "intentional violation" of ORS 279.350(4) by having an affirmative policy that complies with the law.
>
> "(3) Be able to prove compliance, by posting a Labor Ready labeled rate sheet, and making a record of when and where posted.
>
> "ACTIONS:
>
> "(1) Creation of an OR only PREVAILING WAGES intrasite. Include the basic guidelines that have been in-force for some time.
>
> "(2) Instructions to Branch Managers/CSRs on complying with the posting requirements.
>
> Get the rate sheet form [sic] the customer.
>
> Copy of rate sheet on Labor Ready Letter head, or copy rate sheet with business card, or attach card to rate sheet.
>
> Post this LR identified rate sheet at the job site. (Post next to the rate sheet posted by the general contractor. Ensure the rate sheets match.) Keep an exact copy of what you posted in the customer file,

with a note of when and where it was posted.

On later job site visits, ensure that the posting is still there.

"(3) Contact PW/Legal depts. If customer protests a posting by Labor Ready.

"(4) Also put the statute on the intranet site.

"(5) Assign as a training to all current OR DMs/BMs/CSRs.

"(6) Assign as a training to all future hires in OR."

Gilman, Rischman, and Ivy Finnegan, Respondent's prevailing wage administrator, all approved this plan.

58) On September 27, 2003, Rischman sent an e-mail to Respondent's "IT" department requesting that Gilman's "action plan" be implemented.

59) On October 24, 2003, Rischman met with Brad McKnight from Respondent's IT department to discuss putting BOLI's powerpoint presentation on Labor Ready's Prevailing Wage department's intranet site. (Testimony of Finnegan; Exhibit R-24)

60) On November 25, 2003, the notes from Rischman's October 24, 2003, meeting with McKnight were added to Rischman's September 27, 2003, request to Labor Ready's IT department.

61) On January 28, 2004, Finnegan sent an e-mail to Siobhan Hanna[11] that stated:

"Just to outline the possible Oregon changes that need to be made. It seems that all the OR branches are up to date on submitting the BOLI notification. So, once the notification and rate sheet are sent to corporate the appropriate processor would make a copy of the rate sheet on LRR letterhead and overnight this back to the branch for posting on site. I have some additional thoughts I wanted to run by you. Should someone sign the letterhead before sending it off to the branch? Do you think that would be necessary? Should we have the customer acknowledge it somehow at the job site? If the customer protests, as Todd mentioned could happen, what would be the protocol for that? Should they be forwarded to Legal? How can we be assured that after the rate sheet is submitted to us and then sent back to the branch for posting that it is actually posted. If this process would ensure avoiding debarment we would need something to finalize the act. That way we know it's done. Also, would one of us handle this whole piece or would be [sic] keep flipping it around each week like we are now.

---

[11] Rischman's last name had changed to Hanna.

"Just a few thoughts to ponder. I will make sure that we include the finalized version of this process on the separate piece for OR for the intranet site? I like the idea of each CSR/BM doing a training. :) We will get together next week and start pounding that out for the other states.

"Let me know what you need…"

62) On April 13, 2004, Hanna sent an e-mail to Gilman that read, in pertinent part:

"Hi Todd,

"Well, believe it or not, MIS has begun work on the site as detailed below. Part of the requirement was to post the statute on the intranet site, any chance you have that?

"It's the last piece I need and we will be able to roll out. I've also made it to the final draft of the PW on line training module."

On April 14, 2004, Gilman sent an e-mail back to Hanna with a copy of Oregon posting law attached.

63) On April 12, 2004, Hanna met with McKnight and Sue Van Dyken, another Labor Ready employee in "development," to "further discuss putting an Oregon BOIL [sic] (Bureau of Labor and Industries) web page on the Prevailing Wage department's web site."

64) As of May 3, 2004, Respondent's corporate office established intranet training for its Oregon employees on the subject of Oregon's prevailing wage posting requirement. Respondent's Oregon employees and employees in Labor Ready's prevailing wage group have access to the intranet site. Respondent's intranet page entitled "Oregon BOLI" contains the following information and policy statement:

"Processing of Oregon Prevailing Wage work requires Labor Ready to comply with some state specific guidelines. This site is intended to provide the following:

Oregon specific BOLI information

Instructions for posting of rate sheet on all Oregon Prevailing Wage job sites

Oregon statute relating to the posting of rate sheets on all job sites

"**Oregon Prevailing Wage Rate Sheet Posting Requirement**

"When staffing a prevailing wage job site in the state of Oregon the following process must be followed:

Obtain the current rate sheet from your customer

Fax to the corporate Prevailing Wage Department

Corporate Prevailing Wage Department will review rate sheet, transfer it to Labor Ready Prevailing Wage letterhead and send it back to your branch immediately via certified mail.

Upon receipt this rate sheet must be posted on the job site next to the sheet posted by the general contractor. Attach a branch manager business card to the rate sheet prior to posting. Keep an exact copy of what you posted in the customer file, with a note of when and where it was posted.

Contact the corporate Legal/PW Department if any customer protests the posting by Labor Ready.

Make a follow up visit to be sure the posting is still there.

"Statute Form

"Oregon BOLI powerpoint presentation

"Please contact the corporate PW department with any questions.

Questions about the PWW Website?

Email: intranet@laborready.com"

65) An intranet user who clicks on "Statute Form" is linked to another page that contains Oregon's laws that regulate posting on prevailing wage rate jobs.

66) An intranet user who clicks on "Oregon BOLI powerpoint presentation" is linked to a powerpoint presentation created by BOLI in 2002 that explains Oregon prevailing wage rate rules and regulations.

67) When Respondent's local branches call corporate headquarters and state that they have a new prevailing wage rate job, corporate tells them they have to complete a BOLI notice form and post on site.

68) Garrison was a forthright witness and, with one exception, the forum found his testimony to be credible. When cross examined by Respondent, he testified that he and Woodward were trying to work together on July 24 and 25 to determine if the Liberty HS project was a prevailing wage rate job, but Woodward never "made it clear" that the Liberty HS project was a prevailing wage rate job, although she "believed" it was. Four different contemporaneous computer notes made by Garrison on July 25, 2003, reveal no ambiguity in Woodward's or Garrison's minds at that time about whether the job was subject to the prevailing wage rate. The first states "Dana called me to let me know that JBH Installation should be paying prevailing wage." The second states "I explained [to Bud Heart] that Dana at BOLI told me that this is prevailing wage." The third states "I called Dana again * * * She was very sure that this job was prevailing wage." The fourth states "I then called Bud Heart back to let him know that I was getting a letter from [Dana] stating that this was a prevailing wage job." Garrison's testimony also shows that the primary reason he wanted a letter from BOLI was to help him with the customer relations problem he was having with JBH due to JBH's contention that the job was not a prevailing wage job. An example of Garrison's testimony supporting that conclu-

sion was -- "I just needed something on BOLI letterhead that said 'yes, it's prevailing wage' so that I can go out there and be credible when I talk to my customers."

69) Morgan, Finnegan, and Wooley were credible witnesses and the forum has credited their testimony in its entirety.

70) On November 28, 2005, the Commissioner issued a Final Order on Reconsideration in consolidated cases ## 122-01 and 149-01. In both cases, the Agency charged that Respondent had violated provisions of Oregon's prevailing wage rate laws. The Commissioner's Final Order included several conclusions of law. One of the Commissioner's conclusions was that Respondent committed five violations of *former* ORS 279.350(1) in 2000 by failing to pay the prevailing rate of wage to five workers while providing manual labor as a subcontractor on a public works (Cornelius Project) and one violation by failing to pay the prevailing rate of wage to a single worker while providing manual labor as a subcontractor on a second public works (Central Project). The Commissioner ordered Respondent to pay $15,000 in civil penalties for the Cornelius violations ($3,000 per violation) and $5,000 in civil penalties for the Central violation. Another of the Commissioner's conclusions was that Respondent committed two violations of *former* ORS 279.350(4) in 2000 by failing to post the prevailing wage rates while providing manual labor as a subcontractor on two public works (Cornelius and Central Projects). Respondent appealed the Commissioner's Final Order to the Oregon Court of Appeals, assigning error to the Commissioner's determinations that: (1) Respondent intentionally failed to pay its worker the prevailing wage rate on the Central Project; (2) Respondent intentionally failed to post and keep posted the prevailing wage rate at the Cornelius job site; and (3) Respondent should be debarred for one year. Respondent did not assign error to the Commissioner's conclusions that Respondent failed to pay the prevailing wage rate to six workers or that Respondent failed to post. On September 27, 2006, the Oregon Court of Appeals affirmed the Commissioner's Final Order. *In the Matter of Labor Ready Northwest,* 27 BOLI 83 (2005), 208 Or App 195 (2006), *petition for recon. filed.* ("Labor Ready #2)

71) On December 13, 2001, the Commissioner issued a Final Order in case 31-01, a case in which the Agency charged that Respondent had violated provisions of Oregon's prevailing wage rate laws. The Final Order included several conclusions of law. One of the Commissioner's conclusions was that Respondent committed eight violations of *former* ORS 279.350(1) by failing to pay the prevailing rate of wage to six workers in 1998 while providing manual labor as a subcontractor on a public works (New Bend Middle School Project). The Commissioner ordered Respondent to pay $12,000 in civil

penalties ($1,500 per violation). Another of the Commissioner's conclusions was that Respondent committed one violation of *former* ORS 279.350(4) by failing to post the prevailing wage rates on the same project. The Commissioner assessed $2,000 in civil penalties based on Respondent's violation of *former* ORS 279.350(4). On appeal, Respondent did not assign error to the Commissioner's conclusion that Respondent committed eight violations of *former* ORS 279.350(1), and the court upheld the Commissioner's conclusion that Respondent committed one violation of *former* ORS 279.350(4). *Labor Ready #1.*[12]

ULTIMATE FINDINGS OF FACT

1) At all times material herein, Respondent Labor Ready Northwest, Inc. was a foreign corporation based in Washington that was registered with the Oregon Corporations Division to perform work within the state of Oregon.

2) On November 14, 2000, Hillsboro School District 1J first advertised the Liberty High School project, a public works project not subject to the Federal Davis-Bacon Act that involved constructing a new high school. The project contract was awarded to Robinson Construction Co. in the amount of $37,549,800.

3) On March 11, 2003, Hillsboro 1J accepted a bid from the School Specialty Group, in the amount of $1,516,787.10, to provide equipment and furnishings for Liberty High School. School Specialty then contracted with JBH Installation to receive and set the furniture and equipment in place, assembling the furniture as necessary.

4) On July 7, 2003, JBH Installation placed a job order with Respondent's Hillsboro branch to provide four workers to move furniture at Liberty High School.

5) On July 7, 2003, Respondent's Hillsboro office dispatched four workers to the Liberty HS project. From July 7 through July 28, 2003, Respondent dispatched 15 workers to the Liberty HS project. Respondent's workers performed the tasks of unloading furniture from trucks, taking them into the school, and putting desks and chairs together with screwdrivers and wrenches.

6) On the Liberty HS project, Respondent paid its workers by the day. From July 7 through July 28, 2003, Respondent paid each of its 15 workers $6.90 per hour for all work performed. David Becker, Jason Harris, Richard Thompson, and Margarito Martinez were among those workers; the four were underpaid a total of $1,334.90.

7) Respondent's workers on the Liberty HS project performed work that was properly classified as Group 1 Laborers, with a basic hourly pay rate of $20.44 and a

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[12] This is the same case referred to in Finding of Fact 55 – The Merits, *supra*.

fringe benefit of $7.85 per hour, for a total of $28.29 per hour.

8) On July 25, 2003, BOLI orally notified Garrison, Respondent's Hillsboro branch manager, that the Liberty HS project was a prevailing wage rate job. On July 28, 2003, Garrison received written notice from BOLI confirming that the Liberty HS project was a prevailing wage rate job.

9) On July 29, 2003, Respondent began paying its workers on the Liberty HS project the correct prevailing wage rate of $28.29 per hour (basic hourly rate of $20.44 + fringe benefit of $7.85 per hour) on July 29, 2003, and continued paying its workers the correct prevailing wage rate through September 11, 2003, the last day that Respondent dispatched workers to that project.

10) On August 5, 2003, Respondent issued back pay checks to all its workers who had performed work on the Liberty HS project from July 7 through July 28, 2003. The amount on each check was the actual amount underpaid to each worker, calculated at $21.39 per hour ($28.29 per hour earned *minus* $6.90 already paid).

11) Respondent did not post the prevailing wage rates applicable to Respondent's workers at the Liberty HS project at any time while Respondent's workers were employed at the project.

12) On May 5, 2004, Respondent sent a check to BOLI in the amount of $1334.90 as a result of BOLI's determination that Respondent had issued checks to Becker, Harris, and Thompson, and Martinez for the full amount of back pay owed, but that the four workers had never received their checks because of Respondent's inability to locate them.

CONCLUSIONS OF LAW

1) The Liberty HS project was a public works project that was not regulated under the Davis-Bacon Act for which the contract price exceeded $25,000, and Respondent was a subcontractor that employed workers on the project. *Former* ORS 279.348(3),[13] *former* ORS 279.357(1)(a), *former* OAR 839-016-0004(30).[14]

2) Respondent initially paid its workers, including David Becker, Jason Harris, Margarito Martinez, and Richard Thompson, less than the prevailing wage rate for work performed from July 7 through July 28, 2003. This constitutes four violations of *former* ORS 279.350(1) and *former* OAR 839-016-0035.

3) Respondent did not post or keep posted the prevailing rates of wage for the Liberty HS project, constituting one violation of *former* ORS 279.350(4) and *former* OAR 839-016-0033.

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[13] Effective March 1, 2005, ORS chapter 279 was reorganized and *former* ORS 279.005 to 279.833 and 279.990 were repealed or renumbered.

[14] Effective July 2005, *former* OAR 839-016-000 *et seq* was renumbered as OAR 839-025-000 *et seq.*

4) The Commissioner's imposition of civil penalties for Respondent's four violations of *former* ORS 279.350(1) and *former* OAR 839-016-0035 and one violation of *former* ORS 279.350(4) and *former* OAR 839-016-0033 is an appropriate exercise of his discretion. *Former* ORS 279.370(1); *former* OAR 839-016-0530(3)(b); *former* OAR 839-016-0540(3)(a).

5) Respondent's failure to post the prevailing rates of wage on the Liberty HS project was intentional. When the Commissioner determines that a contractor or subcontractor has intentionally failed or refused to post the prevailing rates of wage as required by *former* ORS 279.350(4), the contractor, subcontractor or any firm, corporation, partnership or association in which the contractor or subcontractor has a financial interest shall be ineligible, for a period not to exceed three years from the date of publication of the name of the contractor or subcontractor on the ineligible list ("List") maintained by the Commissioner, to receive any contract or subcontract for public works. The Commissioner's decision to place Respondent on that List for three years based on Respondent's intentional failure to post the prevailing rates of wage as required by *former* ORS 279.361 is an appropriate exercise of his discretion.

OPINION

RESPONDENT FAILED TO PAY THE PREVAILING WAGE RATE

The Agency alleged that Respondent violated ORS 279.350 by failing to pay the prevailing wage rate to four workers – David Becker, Jason Harris, Margarito Martinez, and Richard Thompson – on the Liberty HS project. *Former* ORS 279.350(1) required payment of the prevailing rate of wage on public works contracts. To establish a violation of that statute in this case, the Agency must prove: (1) The project at issue was a public work, as that term was defined in *former* ORS 279.348(3)[15]; (2) Respondent was a subcontractor that employed workers on the public works project whose duties were manual or physical in nature; and (3) Respondent failed to pay four workers -- Becker, Harris, Martinez, and Thompson at least the prevailing rate of wage for each hour worked on the project. *See In the Matter of William George Allmendinger*, 21 BOLI 151, 169-70 (2000).

A. <u>The Liberty HS project was a public works.</u>

Former ORS 279.348(3)[16] provided that:

> "'Public works' includes, but is not limited to, roads, highways,

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[15] Presently renumbered as ORS 279C.800(5).

[16] Presently renumbered as ORS 279C.800(5).

> buildings, structures and improvements of all types, the construction, reconstruction, major renovation or painting of which is carried on or contracted for by any public agency to serve the public interest but does not include the reconstruction or renovation of privately owned property which is leased by a public agency."

Former ORS 279.348(5)[17] provided:

> "'Public agency' means the State of Oregon or any political subdivision thereof or any county, city, district, authority, public corporation or entity and any of their instrumentalities organized and existing under law or charter."

Hillsboro School District 1J is a public agency that entered into two separate contracts, with two separate contractors, to build and provide equipment and furnishings for Liberty High School. The first contract was with Robinson Construction Co., in 2001, in the amount of $37,549,800, to build Liberty High School. The second contract was with School Specialty Group, in 2003, in the amount of $1,516,78.10, to provide equipment and furnishings for the high school. School Specialty contracted with JBH Installation to receive and set the furniture and equipment in place, and JBH in turn contracted with Respondent to provide the labor needed to set the furniture in place and assemble it as needed.

"Construction," as used in *former* ORS 279.348(3), is defined in *former* OAR 839-016-004(5) as "the initial construction of buildings and other structures[.]" Robinson's work, which involved building an entire public high school while under contract with a public agency, fits within this definition, and the forum concludes that Robinson's work was on a "public works" as defined in *former* ORS 279.348(5).

Although Robinson had completed its construction by the time School Specialty, through JBH and Respondent, commenced delivering and assembling furniture at Liberty High School, the Liberty HS project remained a "public works." The forum bases this conclusion on three factors. First, the District itself believed that the work performed under this contract was subject to the prevailing wage rate, stating in the cover letter to its Invitation to Bid for "Equipment and Furnishings For Liberty High School" that "[t]he provisions of Oregon Revised Statutes 279.348 to 279.365, relating to prevailing wage rates, are applicable to work under this Contract." Second, the work was performed in the same building that Robinson had just constructed, with no significant break in time between the end of construction and the installation of furniture. Third, the work performed by JBH and Respondent's workers was in fact the completion of the same project that Robinson

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[17] Presently renumbered as ORS 279C.800(4).

had begun. In support of this conclusion, the Commissioner takes notice that the public high school constructed by Robinson was unusable for the purpose for which it was intended without the equipment and furniture that Respondent's workers carried into the high school and assembled.

B. Respondent was a subcontractor that employed workers on the Liberty HS project whose duties were manual or physical in nature.

It is undisputed that School Specialty contracted with JBH to deliver and install furniture pursuant to School's contract with the District and the JBH paid Respondent to provide employees to perform that task. This makes Respondent a subcontractor. *Former* OAR 839-016-0004(29) defined "worker" as "a person employed on a public works project and whose duties are manual or physical in nature[.]" From July 7 through September 11, 2003, Respondent's employees, including Becker, Harris, Martinez, and Thompson, moved and assembled furniture using screwdrivers and wrenches at the Liberty HS project. Moving and assembling furniture with hand tools are both "manual" and "physical" duties that were performed by persons employed by Respondent on a public works project.

C. Respondent failed to pay four workers at least the prevailing rate of wage for each hour worked on the Liberty HS project.

The Agency presented credible evidence, in the form of Morgan's testimony and BOLI's Prevailing Wage Rate book in effect when the Liberty HS project was first advertised for bid, that Respondent's workers were properly classified as Laborers, Group 1, and that the prevailing wage rate for workers in that category was a $20.44 basic hourly rate and a $7.85 per hour fringe benefit. Respondent paid its workers by the day on the Liberty HS project, and the evidence is undisputed that all four workers -- Becker, Harris, Martinez, and Thompson -- were initially paid $6.90 per hour, $21.39 per hour less than the prevailing wage rate, and that Respondent did not issue back pay checks to make up the difference until August 5, 2003.

RESPONDENT'S LIABILITY

On the Liberty HS project, Respondent paid its workers by the day. On their first day of work, Harris, Thompson, and Becker each worked eight hours and earned $226.32 (8 hours x $28.29). On their first day of work, they were paid $42.00, $47.10, and $47.10, respectively. They were similarly underpaid on every other day they worked through July 28, 2003. Martinez worked two hours on July 10, 2003, his first and only day of work through July 28, 2003, and earned $56.58 (2 hours x $28.29).

That same day, he was paid $11.00. Respondent issued back pay checks to all four workers on August 5, 2003, but Harris, Thompson, and Becker did not receive them until May 2004, and Martinez had still not received his back pay check by the time of hearing due to the inability of Respondent and BOLI to locate him. Respondent's failure to pay the prevailing rate of wage to Becker, Harris, Martinez, and Thompson when it first issued paychecks to them constitutes four violations of *former* ORS 279.350(1) and *former* OAR 839-016-0035. *See North Marion School District v. Acstar Insurance Co.,* 205 Or App 484, 494, 136 P3d 42, 47 (2006) (prevailing wage requirement in *former* ORS 279.350 is violated by tendering checks to workers less than the prevailing wage rate).

CIVIL PENALTY

The Commissioner may assess a civil penalty of up to $5,000 for each violation of *former* ORS 279.350(1). *Former* ORS 279.370(1); *former* OAR 839-016-0540(1). In this case, the Agency cited *former* OAR 839-016-0540(3)(a) as partial authority for the $20,000 in civil penalties it proposed to assess for Respondent's four violations. That rule, stated below, set a minimum civil penalty for a first violation of *former* ORS 279.350(1):

> "(3) Notwithstanding any other section of this rule, when the commissioner determines to assess a civil penalty for a violation of ORS 279.350 regarding the payment of the prevailing rate of wage, the minimum civil penalty will be calculated as follows:
>
> "(a) An equal amount of the unpaid wages or $1,000, whichever is less, for the first violation[.]"

As noted, this rule established a minimum, not an upper limit, on the Commissioner's authority to determine an appropriate civil penalty.[18] In determining an appropriate penalty, the forum must also consider any aggravating circumstances alleged and proved by the Agency, any mitigating circumstances, and prior final orders. *In the Matter of Harkcom Pacific, Inc.,* 27 BOLI 62, 77 (2005). When seeking more than the minimum civil penalty, the Agency must establish aggravating circumstances to justify the increased amount. *In the Matter of Design N Mind,* 27 BOLI 32, 44 (2005).

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[18] *See, e.g., In the Matter of Harkcom Pacific, Inc.,* 27 BOLI 62, 77 (2005) ($2,000 civil penalty assessed for each of respondent's seven "first" violations of ORS 279.350(1)); *In the Matter of Labor Ready Northwest, Inc.,* 22 BOLI 245, 283 (2001), *reversed in part, Labor Ready Northwest, Inc. v. Bureau of Labor and Industries,* 188 Or App 346, 71 P3d 559 (2003), *rev den* 336 Or 534, 88 P3d 280 (2004) ($1,500 civil penalty assessed for each of respondent's eight "first" violations of ORS 279.350(1)); *In the Matter of Johnson Builders, Inc.,* 21 BOLI 103, 124 (2000) ($2,000 civil penalty assessed for each of respondent's three "first" violations of ORS 279.350(1)).

A. Aggravating Circumstances

Former OAR 839-016-0520 set out the following criteria for the Commissioner to consider in determining the amount of civil penalty:

> "1) The commissioner shall consider the following mitigating and aggravating circumstances when determining the amount of any civil penalty to be assessed against a contractor, subcontractor or contracting agency and shall cite those the commissioner finds to be applicable:
>
> "(a) The actions of the contractor, subcontractor or contracting agency in responding to previous violations of statutes and rules;
>
> "(b) Prior violations, if any, of statutes and rules;
>
> "(c) The opportunity and degree of difficulty to comply;
>
> "(d) The magnitude and seriousness of the violation;
>
> "(e) Whether the contractor, subcontractor or contracting agency knew or should have known of the violation.
>
> "(2) It shall be the responsibility of the contractor, subcontractor or contracting agency to provide the commissioner with evidence of any mitigating circumstances set out in section (1) of this rule.
>
> "(3) In arriving at the actual amount of the civil penalty, the commissioner shall consider the amount of the underpayment of wages, if any, in violation of any statute or rule.
>
> "(4) Notwithstanding any other section of this rule, the commissioner shall consider all mitigating circumstances presented by the contractor, subcontractor or contracting agency for the purpose of reducing the amount of the civil penalty to be assessed."

There are several aggravating circumstances in this case.

1. Respondent's prior violations of statutes and rules.

Respondent has committed 14 prior violations of *former* ORS 279.350(1), eight in 1998 and six in 2000 for which civil penalties were assessed.[19] These 14 violations were litigated at two different contested case hearings and Final Orders issued in both. Respondent filed appeals in both cases, but did not assign error to the assessment of civil penalties for those 14 violations. In its exceptions, Respondent contends that these violations should not be considered because of their remoteness in time and because the cases were on appeal. Respondent's exceptions are DENIED for two reasons. First, when he elects to do so, the Commissioner is capable of writing a rule that explicitly provides for disregarding past violations based on their remoteness in time. *See former* OAR 839-016-0540(2) ("For purposes of this rule 'repeated

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[19] *See* Findings of Fact – The Merits 70, 71, *supra*.

violations' means violations of a provision of law or rule which has been violated on more than one project within two years of the date of the most recent violation.") The Commissioner has not elected to do so with regard to *former* OAR 839-016-0520(1)(b).[20] Second, in *Labor Ready #1* and *Labor Ready #2,* Respondent did not assign error on appeal to the Commissioner's determinations that Respondent committed 14 violations of *former* ORS 279.350(1).

2. Opportunity and degree of difficulty to comply.

In its exceptions, Respondent argued that "The Labor Ready manager exercised extraordinary diligence in dealing with BOLI to determine whether prevailing wage rates applied." The forum agrees that Garrison, Labor Ready's manager, exchanged numerous phone calls and e-mails with BOLI on this subject. However, Garrison's own contemporaneous notes demonstrate that Dana Woodward, BOLI's representative, told Garrison in two different phone conversations[21] on July 25, 2003, that the Liberty HS project was a prevailing wage rate job, and that Garrison even communicated that fact to JBH that same day. In pertinent part, Garrison wrote:

> "7/25/03 DANA CALLED ME TO LET ME KNOW THAT JBH INSTALLATION SHOULD BE PAYING PREVAILING WAGE. DANA TOLD ME THAT SHE CONFIRMED THIS WITH THE HILLSBORO SCHOOL DISTRICT.
>
> "7/25/03 I CALLED BUD HEART TO LET HIM KNOW THE LATEST NEWS. I EXPLAINED THAT DANA AT BOLI TOLD ME THAT THIS IS PREVAILING WAGE. I ALSO EXPLIANED [sic] THAT SHE CHECKED WITH THE SCHOOL BOARD. BUD INSISTED THAT THIS JOB IS NOT PREVAILING WAGE BECAUSE THEY ARE A VENDOR NOT A CONTRACTOR.
>
> "7/25/03 I CALLED DANA AGAIN AND LET HER KNOW THE RESPONCE [sic] I RECIEVED [sic] FROM BUD HEART. SHE WAS VERY SURE THAT THIS JOB WAS PREVAILING WAGE. I ALSO GAVE HER BUD HEART['']S PHONE NUMBER. DANA TOLD ME THAT SHE WOULD WORK ON THIS RIGHT AFTER LUNCH. SHE WAS GOING TO ATTACH A LETTER TO THE EMAIL WHEN SHE REPLIED BACK TO ME. THIS WOULD GIVE ME SOMETHING I CAN GIVE TO JBH WITHOUT

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[20] The current rule, OAR 839-025-0520(1)(b), is identical.

[21] The Agency attempted to prove that it provided Respondent with two written statements, via e-mail, on July 25, 2003, confirming that the Liberty HS project was a prevailing wage rate job. However, the Agency's proof failed because one of the statements contains an incorrect e-mail address for Garrison, Garrison credibly testified that he did not receive the other on July 25, and the Agency did not call any witness to confirm that the e-mail had in fact been sent or that an "e-mail version" of it existed in the Agency's files.

GIVING THE EMPLOYEES[']NAME."

"7/25/03 I THEN CALLED BUD HEART BACK TO LET HIM KNOW THAT I WAS GETTING A LETTER FROM DATA [sic] STATING THAT THIS WAS A PREVAILING WAGE JOB. I ASSURED HIM I WOULD SEND IT TO HIM VIA EMAIL AS SOON AS I GOT IT. HIS EMAIL IS JBHINSTALLATIONS@AOL.COM."

"7/25/03 I CALLED BUD BACK TO LET HIM KNOW THAT I DID NOT HEAR FROM DANA. I ALSO WANTED TO KNOW IF HE HAD HEARD FROM HER. BUD INFORMED ME THAT HIS LEGAL OFFICE IS WORKING ON IT. HE ALSO EXPLAINED THAT HE HAD SPOKE [sic] WITH DANA AND THAT SHE WAS NOT VERY RECEPTIVE TO WHAT BUD WAS TRYING TO EXPLAIN TO HER. HE WAS NOT VERY PLEASED WITH THE SITUATION. HE AGAIN SAID THAT THIS IS NOT PREVAILING WAGE. HE TOLD ME THAT HIS LEGAL OFFICE CONFIRMED THAT IT WAS NOT PREVAILING WAGE. HE TOLD ME THAT HE NEEDED THE WORKERS ON MONDAY. HE WANTED TO KNOW IF I WAS GOING TO SERVICE HIM OR NOT. IF NOT HE WOULD TAKE THE BUSINESS ELSEWHERE. **** BASED ON THE FACT THAT DANA DID NOT PROVIDE ME WITH ANYTHING IN WRITING AFTER TWO REQUEST [sic] I DECIDED TO SERVICE JBH ON MONDAY. I DID NOT FEEL IT WAS THE RIGHT CHOOSE [sic] TO NOT SERVICE THEM BASED ON DANA'S OPINION ONLY. I WILL FOLLOW UP WITH HER FIRST THING MONDAY MORNING. ***** MICHAEL GARRISON"

These notes do not reflect any uncertainty on Garrison's part, as of July 25, 2003, as to whether or not the Liberty HS project was a prevailing wage rate job. Rather, they show that he understood the project was a prevailing wage rate job, that he communicated that fact to JBH, and that he sought written confirmation from BOLI's representative so he could provide an official confirmation to JBH, Respondent's unhappy client. Despite this knowledge, Garrison continued to pay Respondent's workers $6.90 per hour on July 28, 2003, using the excuse that he had not received written confirmation from BOLI. Respondent, through Garrison, had the opportunity to comply with the law on July 28, 2003, and elected not to do so. This constitutes an aggravating circumstance.

3. Magnitude and seriousness of Respondent's violations.

Former OAR 839-016-0520(1)(d) required the Commissioner to consider "[t]he magnitude and seriousness of the violation" in determining the amount of a civil penalty. In the proposed opinion, the ALJ found that Respondent's violations were aggravated by their "seriousness" and "substantial magnitude." Respondent excepted to the conclusive nature of the ALJ's finding, correctly pointing out that the ALJ had concluded the violation was serious simply because the violations, if intentional, require the Commissioner to debar Respondent.

In *former* ORS 279.349, the Legislature set forth four specific purposes for the prevailing wage rate law. The second purpose was "[t]o recognize that local participation in publicly financed construction and family wage income and benefits are essential to the protection of community standards." *Former* ORS 279.349(2). To carry out that purpose, *former* ORS 279.350(1) required that "[t]he hourly rate of wage to be paid by any contractor or subcontractor to workers upon all public works shall not be less than the prevailing rate of wage[.]" This requirement goes to the very heart of the Legislative policy expressed in *former* ORS 279.349(2). As a result, the commissioner considers violations of *former* ORS 279.350(1) to be a serious matter. In determining the magnitude, the forum considers the following facts:

(1) Over a three week period, Respondent initially underpaid 15 workers the total amount of $10,630.83;[22]

(2) In making the underpayments, Respondent only paid its workers $6.90 per hour instead of $28.29 per hour, the applicable prevailing wage rate; and

(3) As a direct result of Respondent's initial underpayment, three of Respondent's workers did not receive their back pay until 10 months after they earned that pay.

Based on these facts, the forum concludes that Respondent's violations were of substantial magnitude.

B. <u>Mitigating circumstances.</u>

There are three mitigating circumstances. First, credible evidence shows that Garrison, Respondent's manager, made a diligent effort to determine if the Liberty HS project was a prevailing wage rate job on the first day that Respondent dispatched workers to the job site. Second, Respondent issued back pay checks to all underpaid workers within a week after BOLI informed Respondent that the Liberty HS project was a prevailing wage rate job. Third, Respondent promptly sent BOLI a check to cover back pay to Decker, Harris, Martinez, and Thompson when BOLI's investigator informed Respondent that the earlier paychecks issued to those four individuals had not cleared.

C. <u>Amount Of Civil Penalty.</u>

Although mitigating circumstances are present, they are considerably outweighed by the gravity of the aggravating circumstances. In LRNW #1, the Commissioner imposed a $1,500 civil penalty for each of Respondent's eight violations of *former* ORS 279.350(1) on the New Bend

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[22] The forum also considers this dollar amount under *former* OAR 839-016-0520(3), which required the commissioner to consider the amount of underpayment of wages, if any, in arriving at the actual amount of a civil penalty.

Middle School Project. In LRNW #2, the Commissioner imposed a $3,000 civil penalty for each of Respondent's five violations of *former* ORS 279.350(1) on the Cornelius Project and a $5,000 civil penalty for Respondent's violation of *former* ORS 279.350(1) on the Central Project. In this case, an appropriate assessment is a $5,000 civil penalty for each of Respondent's four violations, for a total of $20,000.

RESPONDENT FAILED TO POST THE PREVAILING WAGE RATE

Michael Garrison, Respondent's Hillsboro branch manager, testified that he did not post or keep posted any prevailing wage rates on the Liberty HS project, and there was no evidence that anyone else posted or kept them posted on Respondent's behalf. If someone else had posted on Respondent's behalf, Respondent presumably would have called them to testify as a witness and Respondent did not do so. Accordingly, the forum concludes that Respondent committed one violation of *former* ORS 279.350(4) and *former* OAR 839-016-0033.

CIVIL PENALTY

A. Aggravating Circumstances

There are several aggravating factors in this case.

1. Respondent's prior violations of statutes and rules.

Respondent committed three prior violations of *former* ORS 279.350(4) on the New Middle School, Cornelius, and Central Projects. *Labor Ready #1, Labor Ready #2.*

2. Opportunity and degree of difficulty to comply.

Respondent had ample opportunity to comply, as Garrison, Respondent's branch manager, could have posted the prevailing wage rate for Respondent's workers on any of one of his visits to the Liberty HS project. Had Garrison posted on or soon after July 25, 2003, the date he acquired actual knowledge that the Liberty HS project was a prevailing wage rate job, that act would have been a potentially mitigating circumstance. There was no evidence that posting posed any degree of difficulty for Respondent, and there was no dispute that Garrison knew that Respondent's workers were properly classified as Group 1 Laborers.[23] Respondent contends in its exceptions that "[a]s a practical matter, posting is never 'difficult' unless, for example, the work place is on a cliff or under water." The forum declines to explore the universe of circumstances that might make it difficult for a contractor or subcontractor to post and reaffirms that, in this case, there is no evidence that posting posed any degree of difficulty for Respondent.

3. Magnitude and seriousness of Respondent's violation.

The requirement that every contractor or subcontractor post the prevailing wage rates for its

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[23] *See Findings of Fact* 15, 39 – The Merits, *supra.*

employees promotes the statutory purpose of assuring compliance by informing employees of the rate of pay they should be receiving. *LRNW #1* at 369. When contractors or subcontractors do not post, this directly undermines the Legislature's intent of ensuring that workers on public works be paid the prevailing wage rate. Consequently, the forum considers failure to post to be a serious matter. In determining the magnitude, the forum considers the following facts:

(1) Respondent did not provide its workers with any way of finding out they were being underpaid due to its failure to post or otherwise inform its workers of the prevailing wage rate they were entitled to receive;[24]

(2) Respondent still did not post when it learned the Liberty HS project was a prevailing wage rate job;

(3) Over a three week period, Respondent initially underpaid 15 workers the total amount of $10,630.83.[25] Respondent's workers were unaware of this underpayment primarily because of Respondent's failure to post, and three of Respondent's workers – Becker, Thompson, and Harris – did not become aware of the underpayment until 10 months later due to the fact that they were no longer working for Respondent when Respondent finally began paying the prevailing wage.

Based on these facts, the forum concludes that Respondent's violations are of substantial magnitude.

4. <u>Respondent knew or should have known of its violation.</u>

On June 26, 2003, two weeks before Respondent dispatched workers to the Liberty HS project and one month before Respondent, through its branch manager Garrison, learned that the Liberty HS project was a prevailing wage rate job, the Oregon Court of Appeals issued an opinion in a case involving this very issue in which Respondent was a party. In that case, Respondent argued the position that ORS 279.350(4) "does not require every subcontractor and contractor to independently post the prevailing wage rates." *Labor Ready Northwest*, 188 Or App at 368. ("LRNW #1") The court held that "ORS 279.350(4) requires every contractor and subcontractor engaged in a public

[24] Respondent's argument in its exception that this fact is "simply another way of saying that the Respondent did not post" ignores the fact that Respondent could have informed its workers, orally or in writing, of the correct wage without actually posting the wages. Respondent did provide that information to some of its workers, albeit constructively, when it issued back pay checks and when it began paying its workers the correct rate.

[25] *See* fn 20, *supra*.

project to personally initially post the prevailing wage and to maintain that posting throughout the course of its employees' work on the project." *Id* at 369. Despite this unequivocal statement of Oregon's prevailing wage rate posting requirement, Garrison's credible testimony that Respondent had not trained him on the posting requirement, and that he would have posted, had he been aware of the law, leads the forum to conclude that Respondent failed to inform Garrison of the posting requirement at any time prior to September 11, 2003, the last day Respondent's workers were employed on the Liberty HS project.[26] In fact, there is no evidence in the record that Respondent took any action to develop a consistent policy with regard to Oregon's posting requirements until September 9, 2003, and that the actual policy was not posted on Respondent's intranet and available to Respondent's Oregon employees until May 3, 2004. Under these circumstances, the forum concludes that Respondent knew of the posting requirement and that Garrison should have and would have known of the violation, had Respondent provided him with any training on the posting requirement.

[26] There was no evidence as to the actual date that Garrison, who was still employed as branch manager of Respondent's Hillsboro office at the time of the hearing, learned of the posting requirement.

B. <u>Mitigating Circumstances</u>

Respondent's subsequent development of intranet training for its Oregon employees on Oregon prevailing wage rate law and its posting requirements is a mitigating circumstance. However, in this case it is offset by the fact that Respondent did not train Garrison, its branch manager, on Oregon's posting requirement at any time prior to September 11, 2003, despite the Court of Appeals' June 26, 2003, decision in *Labor Ready #1*.

C. <u>Amount Of Civil Penalty.</u>

The Agency sought a $5,000 civil penalty for Respondent's single violation of *former* ORS 279.350(4). In LRNW #1, the Commissioner imposed a $2,000 civil penalty for Respondent's first violation of *former* ORS 279.350(4). In LRNW #2, the Commissioner imposed a $4,000 civil penalty for Respondent's second violation and a $5,000 civil penalty for Respondent's third violation of *former* ORS 279.350(4). Considering the number of aggravating circumstances and absence of any mitigating circumstances, the forum concludes that $5,000 is an appropriate penalty.

PLACEMENT ON THE LIST OF INELIGIBLES

The Agency seeks to debar[27] Respondent for three years based on the charge that Respondent's

[27] In this Order, "debar" and "debarment" are synonymous with placement on the List of Ineligibles.

undisputed failure to post the prevailing wage rates on the Liberty HS project as required by *former* ORS 279.350(4) was "intentional."

LIABILITY OF RESPONDENT

Former ORS 279.361 provided that when a subcontractor "intentionally" fails or refuses to post the prevailing wage rates as required by *former* ORS 279.350(4), the subcontractor and any firm in which the subcontractor has a financial interest shall be placed on the list of persons ineligible to receive contracts or subcontracts for public works for a period not to exceed three years. The forum has already concluded that Respondent failed to post the applicable prevailing wage rates on the Liberty HS project. The only question is whether that failure was "intentional." If so, the Commissioner is required to place Respondent on the List of Ineligibles.

Respondent, through Garrison, knew that its workers would be performing manual and physical duties on a high school when its workers were initially dispatched to the Liberty HS project. In the first few days that Respondent's workers were employed at the Liberty HS project, Garrison was proactive in attempting to determine if Respondent needed to pay the prevailing wage rate. He spoke with two managers employed by JBH and with Robinson's office, and was assured by Robinson that construction was complete and by JBH that the work was not subject to the prevailing wage rate because JBH was a "vendor." Although Garrison could have called BOLI for a definitive answer, under the circumstances, the forum concludes that Respondent did not intentionally fail to post before July 25, 2003, for the reason that Garrison, who as branch manager was responsible for the posting, did not know that the job was a prevailing wage rate job.

On July 23, 2003, Garrison was notified by one of Respondent's workers that the Liberty HS project, according to BOLI, was a prevailing wage rate job. Garrison again was proactive in attempting to clarify whether the Liberty HS project was in fact a job on which Respondent was required to pay its workers the prevailing wage rate. On July 25, Dana Woodward, an employee in BOLI's Prevailing Wage unit, told Garrison that she was sure the Liberty HS project was a prevailing wage rate job and that she would send him written confirmation. Garrison received the written confirmation from Woodward on July 28. On July 29, he began paying Respondent's workers at the rate of $28.29 per hour, the prevailing wage rate for workers classified as Group 1 Laborers, and the correct classification for Respondent's workers. On August 5, he caused back pay checks to be issued in the full amounts owed to all 15 of Respondent's workers who were owed back pay as a result of Respondent's failure to pay them the prevailing wage rate for work performed on the Liberty HS project

prior to July 29. On August 5 and 8, Respondent's corporate headquarters completed certified payroll reports for Respondent's workers on the Liberty HS project to reflect "restitution" payments made to those workers for the work they performed prior to July 29, 2003. At that point, Garrison and Respondent's corporate headquarters had actual knowledge that work was being performed on a prevailing wage rate job in Oregon. However, Respondent, through Garrison or another employee or agent, failed to take the critical step at issue in this case – posting the prevailing wage rate applicable to Respondent's workers on the Liberty HS project job site. This step was not taken because Garrison did not know that Oregon law required posting, and Garrison did not know that Oregon law required posting because Respondent gave him no training on this subject.

In *Labor Ready #1*, the court held that, under *former* ORS 279.350(4), a "negligent or otherwise inadvertent failure" to post the prevailing wage rate is insufficient to require debarment, and that a "heightened level of culpability [must] be proven before an employer [can] be debarred." *Labor Ready Northwest*, 188 Or App at 366. Applying that standard, the court concluded that, even though Labor Ready Northwest made no attempt to post, its failure to post the applicable prevailing wage rate was not "intentional" within the meaning of ORS 279.361(1) "for either of two reasons. First, [Labor Ready Northwest] acted from a good-faith, albeit legally mistaken, belief that the posting in the general contractor's shack obviated any need for petitioner itself to post. * * * Thus, there was no conscious choice on petitioner's behalf not to perform a known duty. Second, as noted, [Labor Ready Northwest] was mistaken as to the correct prevailing wage for its employees' work; thus, it did not know the correct rate and, consequently, did not elect not to post *that* rate." *Id* at 366.

The exculpatory circumstances found in *Labor Ready Northwest* are absent in this case. After July 28, 2003, both Garrison and Respondent's corporate office knew that the Liberty HS project was a prevailing wage rate job, the correct classification for Respondent's workers, and the correct prevailing wage rate that applied to those workers. No evidence was presented to show that anyone else had posted the prevailing wage rate or that Garrison or Respondent believed that anyone else had posted the prevailing wage rate. Garrison may have been ignorant of the legal requirement to post because of Respondent's failure to apprise him of that requirement, but Garrison's ignorance of the law does not provide a defense for Respondent. Only a month before Respondent dispatched its first workers, the Court of Appeals held that Respondent specifically and all other subcontractors engaged on a project for which there is a contract for a public work

were required to individually post and keep posted the prevailing wage rates. *Id.* at 569. Inexplicably, Respondent's corporate office failed to inform Garrison, its branch manager, of this legal requirement, even after it became aware that its Hillsboro branch had underpaid workers on a prevailing wage rate job and issued restitution checks. Despite this red flag, Respondent's corporate office did nothing else to make certain that Respondent was in compliance with Oregon prevailing wage rate law regarding posting on the Liberty HS project. Ironically, Garrison credibly testified that he would have posted, had he but known that Oregon law required posting on prevailing wage rate jobs. Under these circumstances, the forum concludes that Respondent intentionally failed to post the prevailing wage rates as required by *former* ORS 279.350(4) on the Liberty HS project.

LENGTH OF DEBARMENT.

The Commissioner is required to debar Respondent based on its intentional failure to post the prevailing wage rate on the Liberty HS project. The only question is the length of the debarment.

Former ORS 279.361 provided that debarment shall be for "a period not to exceed three years." Although that statute and the Agency's administrative rules interpreting it do not explicitly authorize the forum to consider mitigating factors in determining the length of a debarment, the commissioner has held that mitigating factors may be considered in determining whether the debarment of a contractor or subcontractor should last less than the maximum three-year period allowed by law. *See In the Matter of Larson Construction Co., Inc.*, 22 BOLI 118, 165 (2001); *In the Matter of Keith Testerman*, 20 BOLI 112, 129 (2000); *In the Matter of Southern Oregon Flagging, Inc.*, 18 BOLI 138, 169 (1999); *In the Matter of Intermountain Plastics*, 7 BOLI 142, 160 (1988). Aggravating factors may also be considered. *See, e.g., Testerman* at 129. The aggravating circumstances considered may include those set out in *former* OAR 839-016-0520(1).

Aggravating circumstances include: the magnitude and seriousness of the violation -- 15 workers were initially underpaid a total of $10,630.83; at least three workers remained unpaid for ten months; Respondent's failure to post despite ample opportunity to comply and the relative ease of compliance; Respondent's failure to train its manager of Oregon's prevailing wage posting requirement, despite clear direction from the Oregon Court of Appeals; Respondent's failure to post despite its corporate headquarters having knowledge that the Liberty HS project was a prevailing wage rate job; and Respondent's three prior violations of *former* ORS 279.350(4) in the previous five years, including one intentional violation.

Mitigating circumstances include Respondent's prompt

issuance of checks to the 15 workers once Respondent learned the Liberty HS project was a prevailing wage rate job and Respondent's development of a corporate policy and intranet training site for Oregon employees on the subject of Oregon prevailing wage rate laws, including the posting requirement. The former is partially abated by the fact that three workers did not receive their checks until 10 months after the wages were earned. The latter is abated because Respondent did not even begin developing its policy and intranet training site until two and one half months after the Court of Appeals decided the *Labor Ready* case.

In *Labor Ready #2*, Respondent was debarred for one year based on its intentional violation of *former* ORS 279.350(4). Considering all the aggravating and mitigating circumstances, three years is an appropriate period of debarment in this case.

RESPONDENT'S AFFIRMATIVE DEFENSES

In its answer, Respondent asserted two affirmative defenses – that the Agency's action is barred by the applicable statute of limitations and by laches. Respondent did not cite an applicable statute of limitations at hearing and the forum is unaware of any statute of limitations that applies to this proceeding. To prevail on the defense of laches, Respondent must prove three elements: (1) there was an unreasonable delay by the agency; (2) the agency had full knowledge of facts that would have allowed it to avoid the unreasonable delay; and (3) the unreasonable delay resulted in such prejudice to respondent that it would be inequitable to afford the relief sought by the agency. The mere passage of time is not sufficient to invoke the equitable doctrine of laches. Respondent must prove that it suffered actual prejudice attributable to the passage of time. *In the Matter of Staff, Inc.,* 16 BOLI 97, 122-23 (1997). Respondent did not prove any of these elements.

RESPONDENT'S EXCEPTIONS

Respondent filed 15 exceptions to the proposed order. Those exceptions are discussed below.

A. Exception 1.

Respondent excepted to Proposed Finding of Fact 6 -- The Merits, stating it should have contained the following relevant facts: "Hillsboro 1J disputed that the furnishing of Liberty HAS project required the payment of the prevailing wage rate." Respondent's exception is GRANTED. The requested language has been included in Finding of Fact 4 – The Merits.

B. Exception 2.

Respondent excepted to Proposed Finding of Fact 70 -- The Merits, stating it should have contained the following relevant facts: "the Court held that a 'heightened degree of culpability' must be proven before an employer can be debarred. The Court held that an employer cannot be debarred for

a negligent failure to pay or post the prevailing wage rate." Respondent's exception is DENIED because the subjects of the finding in question are violations subject to civil penalties, not debarment.

C. Exception 3.

Respondent excepted to the forum's failure to include a Proposed Finding of Fact containing the following language: "[T]he case of *Labor Ready Northwest, Inc. v. Bureau of Labor and Industries* was on appeal until an appellate judgment was entered May 5, 2004. During the period of time the case was on appeal, the opinion issued therein was not binding on either the Agency or Labor Ready. (Exhibit 70 R-36, BOLI website press release dated May 10, 2006, paragraph 5.)" Respondent cites no legal authority to support its exception. In fact, Respondent is in record in this case as having taken the opposite position. On September 9, 2003, Respondent's general counsel and corporate president Timothy Adams sent an e-mail on the subject of "Oregon posting of prevailing wage" in which he stated, with regard to the Court of Appeals decision in *Labor Ready #1*:

> "[T]he court did agree with BOLI that each subcontractor, including Labor Ready, has an affirmative duty to post the required prevailing wage schedule at each PV jobsite. Although this creates the absurd result of many identical postings on each jobsite, **that's the law** and we are going to have to deal with it." (emphasis added)

To the extent the second sentence of Respondent's exception implies that Respondent was entitled as a matter of law to rely on its own interpretation of *former* ORS 279.350(4) – which was that as a subcontractor, it was not required to post, despite the decision of the Oregon Court of Appeals' opinion to the contrary, until its appellate rights were exhausted -- Respondent's exception is DENIED. The forum has added a sentence to Finding of Fact 55 – The Merits that contains the gist of the first sentence of Respondent's exception. The forum takes official notice that the referenced press release states: "Gardner noted that while the appeal [of a court decision concerning the application of the state's prevailing wage rate law] is pending, the [Circuit Court] judge's decision is not binding on the agency's interpretation in that case or in any other cases." This an incorrect statement of the law and Respondent has not articulated how this statement provides a legal defense, if any, to Respondent that would make the statement relevant to this case.

D. Exception 4.

Respondent excepted to the ALJ's credibility finding concerning Michael Garrison that found Garrison to be credible "with one exception." Respondent stated that Garrison's testimony should have been considered credible in its entirety. Respondent's excep-

tion is DENIED, and Finding of Fact 68 – The Merits, has been rewritten to address Respondent's exception.

E. Exception 5.

Respondent excepted to the reference in Proposed Finding of Fact 70 -- The Merits to a Final Order issued by the Commissioner on November 28, 2005, in a previous prevailing wage rate case involving Respondent. Respondent's exception was based on the fact that that case was on appeal, and that the reference to the Order was therefore "legally inappropriate." That case was decided by the Oregon Court of Appeals and a decision issued on September 27, 2006. *Labor Ready Northwest, Inc. v. Bureau of Labor and Industries*, 208 Or App 195 (2006), *petition for recon. filed*. Respondent cites no legal authority in support of its argument. Respondent's exception is DENIED.

F. Exception 6.

Respondent excepted to the part of Proposed Conclusion of Law #2 that concludes that Margarito Martinez was paid less than the prevailing wage rate for work performed from July 7, through July 28, 2003. That Conclusion has been rewritten in response to Respondent's exception.

G. Exception 7.

Respondent excepted to Proposed Conclusion of Law #5 in its entirety, stating that the Respondent's "failure to post prevailing rates of wage was unintentional given the legal standard set forth in *Labor Ready Northwest, Inc. v. Bureau of Labor and Industries*, 188 Or App 346 (2003)." This part of Respondent's exception is DENIED. Respondent also disputed the statement that the Commissioner "must place Respondent on the List of Ineligibles for a period not to exceed three years, noting that the period of debarment can be less than three years. The forum has reworded its Conclusion of Law in response to the latter part of Respondent's exception.

H. Exception 8.

Respondent excepted to the portion of the Proposed Opinion that states that Hillsboro 1J believed that the work performed by Respondent's workers was subject to the prevailing wage rate. In support of its position, Respondent cites an *after-the-fact* interview with and letter from Orville Alleman, Hillsboro 1J's Director of Construction Management, that were offered and admitted as evidence. Although Alleman may have taken this position that the work performed was not subject the prevailing wage rate after the work was completed and BOLI commenced its investigation, the forum finds that Hillsboro 1J's Invitation to Bid, which states that "[t]he provisions of Oregon Revised Statutes 279.348 to 279.365, relating to prevailing wage rates, are applicable to work under this Contract" is a more reliable indicator of Hillsboro 1J's belief as to the applicability of Oregon's prevailing wage rate laws to the Liberty HS

project because of its contemporaneous nature.

I. Exception 9.

Respondent excepted to all the aggravating circumstances cited by the ALJ in support of the proposed civil penalties of $5,000 for each violation of *former* ORS 279.350(1). In response, the section of the Proposed Opinion discussing aggravating circumstances has been rewritten to provide greater clarification.

J. Exception 10.

Respondent excepted to the amount of civil penalties assessed for Respondent's violations of *former* ORS 279.350(1), characterizing them as "staggering" and a "mockery of discretion" in light of the facts. Respondent proposes that it be assessed civil penalties in the amount of the actual gross unpaid wages, which amounts to $1,651.86. Respondent's exception is DENIED. This is the third case in which Respondent has been assessed civil penalties for violating the same statute. In *Labor Ready #1*, Respondent was assessed $1,500 per violation for eight violations. In *Labor Ready #2,* Respondent was assessed $3,000 per violation for five violations, and $5,000 for a single violation on another project that involved underpayment of $34.50. Respondent's prior violations, coupled with the other aggravating circumstances, makes a civil penalty of $5,000 per violation, for a total of $20,000, an appropriate assessment.

K. Exception 11.

Respondent excepted to all the aggravating circumstances cited by the ALJ in support of the proposed civil penalty for Respondent's violation of *former* ORS 279.350(4). In response, the section of the proposed opinion discussing aggravating circumstances has been rewritten to provide greater clarification.

L. Exception 12.

Respondent excepted to the ALJ's conclusion that Respondent's failure to train Garrison, its branch manager, on Oregon's posting requirement at any time prior to September 11, 2003, offset Respondent's subsequent development of intranet training for its Oregon employees on Oregon prevailing wage rate law. Respondent based its exception on the reasons set forth in Exception 3. Respondent's exception is DENIED.

M. Exception 13.

Respondent excepted to the ALJ's proposed debarment of Respondent, arguing that "there is simply no evidence that Labor Ready 'intentionally' failed to post." Based on the facts of this case, the forum's conclusion that Respondent "intentionally" failed to post is consistent with the standard set by the Court of Appeals in *Labor Ready #1*. Respondent's exception is DENIED.

N. Exception 14.

Respondent excepted to the proposed length of debarment. Under the circumstances, the pro-

posed length of debarment is an appropriate exercise of the Commissioner's discretion. Respondent's exception is DENIED.

O. Exception 15.

Respondent excepted to the content and conclusions of the "Proposed Order," specifically objecting to the "consecutive sequencing of any debarment period." In response, the forum has modified the ALJ's proposed order.

ORDER

NOW, THEREFORE, as authorized by *former* ORS 279.361, the Commissioner of the Bureau of Labor and Industries hereby orders that, based on its intentional failure to post the prevailing wage rates as required by *former* ORS 279.350(4) on the Liberty HS project, Respondent **Labor Ready Northwest, Inc.** or any firm, corporation, partnership, or association in which it has a financial interest shall be ineligible to receive any contract or subcontract for public works for three years from the date of publication of their names on the list of those ineligible to receive such contracts that is maintained and published by the Commissioner of the Bureau of Labor and Industries. This period of ineligibility shall be in addition to any other period of ineligibility imposed as a result of a separate proceeding by the Commissioner of the Bureau of Labor and Industries against Respondent.

FURTHERMORE, as authorized by *former* ORS 279.370, and as payment of the penalties assessed as a result of its violations of *former* ORS 279.350(1), *former* ORS 279.350(4), *former* OAR 839-016-0033, and *former* OAR 839-016-0035, the Commissioner of the Bureau of Labor and Industries hereby orders **Labor Ready Northwest, Inc.**, to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 1045 State Office Building, 800 NE Oregon Street, Portland, Oregon 97232-2180, the following:

> A certified check payable to the Bureau of Labor and Industries in the amount of TWENTY FIVE THOUSAND DOLLARS ($25,000), plus interest at the legal rate on that sum between the date ten days after the issuance of the final order and the date Respondent **Labor Ready Northwest, Inc.** complies with the Final Order.

In the Matter of

LABOR READY NORTHWEST, INC.

Case No. 49-05

Final Order of Commissioner Dan Gardner

Issued January 17, 2007

SYNOPSIS

Respondent was a subcontractor that provided workers to perform manual labor for another contractor on a public works project. Respondent paid three workers less than the applicable prevailing wage rates throughout their employment, committing three violations of *former* ORS 279.350(1). Respondent also failed to post the prevailing wage rates on the project in violation of *former* ORS 279.350(4). Respondent intentionally failed to pay the prevailing rates of wage and intentionally failed to post the prevailing wage rates on the project. The Commissioner assessed $20,000 in civil penalties based on Respondent's three violations of *former* ORS 279.350(1) and single violation of *former* ORS 279.350(4). The Commissioner also placed Respondent on the list of contractors or subcontractors ineligible to receive any contract or subcontract for public works for three years. *Former* ORS 279.348(3) and (5), *former* ORS 279.350(1), *former* ORS 279.350(4), *former* ORS 279.361(1), *former* ORS 279.370(1); *former* OAR 839-016-0033(1), *former* OAR 839-016-0035(1), *former* OAR 839-016-0085(1)(c), *former* OAR 839-016-0520, *former* OAR 839-016-0530(3)(a) & (b), *former* OAR 839-016-0540(3)(a).

The above-entitled case came on regularly for hearing before Alan McCullough, designated as Administrative Law Judge ("ALJ") by Dan Gardner, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on July 11, 2006, in the offices of the Community Services Consortium, 545 SW 2nd Street, 2nd floor, Corvallis, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by Jeffrey C. Burgess, an employee of the Agency. Respondent was represented by David J. Sweeney, attorney at law. Danielle Coverrubias, Respondent's paralegal services manager, was present during the hearing as the person designated to assist the presentation of Respondent's case.

The Agency called the following witnesses: Gerhard Taeubel, BOLI Wage and Hour Division Compliance Specialist in BOLI's Prevailing Wage Rate unit; and James Rand and Charles Woods, former Respondent employees.

Respondent called the following witnesses: Ivy Finnegan, Respondent's prevailing wage administrator; Alma Casarez, Respondent's current Salem branch manager, and Susie Barrera, a customer service representative in Respondent's Salem branch office.

The forum received into evidence:

a) Administrative exhibits X-1 through X-16;

b) Agency exhibits A-1 through A-17 (submitted prior to hearing);

c) Respondent exhibits R-1, R-2, and R-5 through R-9 (submitted prior to hearing).

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

FINDINGS OF FACT – PROCEDURAL

1) On October 11, 2005, the Agency issued a Notice of Intent to Place on List of Ineligibles and to Assess Civil Penalties in the amount of $20,000 in which it made the following charges against Respondent:

"1. At all times material herein, Respondent performed work within the state of Oregon.

"2. Respondent entered into contracts or subcontracts to perform a public works for the City of Adair Village, Oregon involving construction, reconstruction and/or major renovation. The public works was known as the Hospital Hill Reservoir Roofing Project (the 'Public Works'). The Public Works was located in Adair Village, Benton County, Oregon.

"3. The Public Works was being conducted by the City of Adair Village and consisted of construction, reconstruction and/or major renovation. The Public Works was not regulated under the federal Davis-Bacon Act and cost in excess of $25,000. The Public Works was subject to regulation under Oregon's prevailing wage rate laws (ORS 279.348 *et seq.)* and was first advertised for bid on June 25, 2004.

"4. <u>Intentional Failure or Refusal to Pay Prevailing Wages.</u> Respondent provided Cement Masonry, Carpentry, Ironwork and Equipment Operating on the Public Works. Respondent intentionally failed or refused to pay three employees approximately $762.85 in prevailing wages between approximately September 29, 2004 and October 15, 2004. The employees were James Rand, Charles Woods and Dimitri Kitterman. This is in violation of ORS 279.350 and OAR 839-016-0035. **CIVIL PENALTY of $15,000**. Three (3) violations ($5,000 per viola-

tion) – ORS 279.370, OAR 839-016-0530(3)(a) and 839-016-0540(3)(a).

"5. Failure to Post Prevailing Wage Rate. Respondent intentionally failed to keep the prevailing wage rates for the Public Works project posted in a conspicuous and accessible place in or about the Public Works project. This is a violation of ORS 279.350(4) and OAR 839-016-0033. **CIVIL PENALTY of $5,000** against Respondent. One (1) violation – ORS 279.370 and OAR 839-016-0530(3)(b).

"6. Placement on List of Ineligibles. Respondent, and any firm, corporation, partnership or association in which it had a financial interest should be placed on the list of those ineligible to receive contracts or subcontracts for public works for a period of three years pursuant to ORS 279.361 and OAR 839-016-0085, based on the following:

"Respondent intentionally failed or refused to pay the prevailing rate of wage to its workers as previously alleged herein.

"Respondent has intentionally failed or refused to post the prevailing wage rate as previously alleged herein.

"7. Aggravating Factors. Respondent has had the opportunity to comply with the rules and laws regulating prevailing wage rates on public works and compliance would not have been difficult. Respondent's violations were serious and repetitious, and resulted in significant underpayment of wages to multiple employees. Respondent's violations have been ongoing. Respondent knew, or should have known, of its violations. Respondent was advised that it had failed to pay the prevailing rate of wage and continued its failure to pay the correct wage for the Work. OAR 839-016-0520."

2) The Notice of Intent instructed Respondent that it was required to make a written request for a contested case hearing within 20 days of the date on which it received the Notice if Respondent wished to exercise its right to a hearing.

3) The Agency served the Notice of Intent on Respondent's registered agent on October 13, 2005.

4) Respondent, through counsel, filed an answer and request for hearing on October 27, 2005.

5) The Agency filed a request for hearing with the Hearings Unit on March 23, 2006.

6) On March 23, 2006, the Hearings Unit served Respondent with: a) a Notice of Hearing that set the hearing for June 6, 2006; b) a Summary of Contested Case Rights and Procedures containing the information required by ORS 183.413; c) a complete copy of the Agency's administrative rules regarding the contested case

hearing process; and d) a copy of the Notice of Intent.

7) On April 5, 2006, Respondent filed a motion to postpone the hearing based on the unavailability of a key witness at the time set for hearing. The Agency did not object and the ALJ granted Respondent's motion and reset the hearing to begin on July 11, 2006, at the same location.

8) At the outset of the hearing, pursuant to ORS 183.415(7), the ALJ verbally advised the Agency and counsel for Respondent of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

9) Respondent objected to the forum taking official notice of prior adjudicatory actions against Respondent. Respondent's objection is overruled.

10) On September 14, 2006, the ALJ issued a proposed order that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance.

9) On September 20, 2006, Respondent moved for an extension of time to file exceptions and requested a copy of the mechanical recording of the hearing. The Agency did not object, and the forum granted Respondent and the Agency an additional twenty working days after receipt of the mechanical record to file exceptions.

10) On October 19, 2006, the Agency timely filed exceptions. On October 19, 2006, Respondent timely filed exceptions. These exceptions are discussed in the Opinion section of this Final Order.

FINDINGS OF FACT – THE MERITS

1) At all times material herein, Respondent Labor Ready Northwest, Inc. was a foreign corporation based in Washington that was registered with the Oregon Corporations Division to perform work within the state of Oregon. At all times material herein, Respondent was a licensed contractor with the State of Oregon Construction Contractor's Board. Respondent is in the business of providing temporary labor.

2) At all times material herein, Respondent's corporate offices in Tacoma, Washington, administered prevailing wage rate jobs to which Respondent's Oregon branch offices dispatched workers. This included ensuring that employees were paid the required rates, that certified payroll reports were processed, and that posting was done on job sites.

3) On June 25, 2004, the City of Adair Village ("Adair Village"), a public agency, first advertised the "Hospital Hill Reservoir Roof Project" ("the Project") for bid. The job involved constructing a "free-span metal building and roof" over an existing reservoir in Benton County, Oregon, which is in Region 4 in BOLI's Prevailing Wage Rate book. On August 14, 2004, Adair Village awarded the project

contract to Taylor Site Development, Inc. ("Taylor") in the amount of $107,475. The contract was not subject to the Federal Davis-Bacon Act.

4) Taylor contracted with Hicorp Steel Building, Inc. ("Hicorp") to perform site clearing, concrete work, and roof framing on the Project.

5) Hicorp, through George Frauendiener, Hicorp's president, hired James Rand and Charles Woods to work on the Project. Rand, a journeyman carpenter, began work on the Project on September 20, 2004, and acted as Hicorp's foreman. Woods, a carpenter and equipment operator, began work on the Project on September 21, 2004.

6) Rand and Woods worked exclusively for Hicorp on the Project through September 28, 2004.

7) On September 29, 2004, Frauendiener told Woods and Rand that they would no longer be working for Hicorp because Hicorp could not provide proof of workers compensation insurance and did not have a contractor's license. Frauendiener instructed them go to Respondent's Salem office, telling them that they would now be working for "Labor Ready" on the same job.

8) On September 29, 2004, Sue Frauendiener, Hicorp's secretary, called Respondent's Salem office and spoke with Alma Casarez, a customer service representative employed by Respondent, about using Respondent's services to complete Hicorp's work at the Project. Frauendiener told Casarez that the job was a prevailing wage rate job, that all power equipment had been removed from the job, and that Hicorp's workers "were out there as laborers only." Casarez asked Frauendiener to fax the applicable prevailing wage rate sheet so Casarez could determine the appropriate job classification for Respondent's workers. In response, Frauendiener faxed pages 52 and 53 of the Appendix of BOLI's January 2004 Prevailing Wage Rate booklet to Casarez. These faxes were transmitted from Hicorp at 11:59 a.m. and 11:41 a.m., respectively, on September 29, 2004.

9) At all times material, Respondent's Salem office relied on information from its clients to determine the correct prevailing wage rate for its workers on prevailing wage rate jobs.

10) Pages 52 and 53 of the Appendix of BOLI's January 2004 Prevailing Wage Rate booklet specify the basic hourly wage rate and fringe benefit for Laborers. The Appendix lists five classifications of Laborers -- Groups 1 through 5 -- and sets out the pay rates and job duties performed by each classification. Group 1 is the highest paid classification ($21.42 basic hourly rate + $8.90 fringe benefit = $30.32 per hour). Group 5 is the lowest paid classification ($18.75 basic hourly rate + $8.90 fringe benefit = $27.65 per hour). On page 52, Sue Frauendiener underlined the words "Group 5

18.75 8.90."[1] and wrote her initials next to the underline. On page 53, she circled the following words:

> "Group 5
>
> Clean up Laborer (building only)***
> Demolition, Wrecking & Moving (building only)***
> Flagger
>
> ***Laborers can tear off roofs, clean up or handle roofing material only when at least one new story is added or in demolition work, where no re-roofing will occur."

11) Workers classified as Group 5 Laborers generally perform cleanup.

12) In response to Frauendiener's fax, Casarez prepared a one-page document entitled "Confirmation of Billing Services" that stated Respondent's terms for providing workers to Hicorp. Among other things, the agreement included the following statements:

> "Customer: Hicorp Steel Building Attn: Sue
>
> "The hourly rate is based on the usage of workers who will be working under the
>
> Workers' Compensation Description of: 3004
>
> Regular Hourly Rate (straight time): $47.41 = P. Wage Job
>
> **Hospital Hill Res./Adair Village Job #0801-218621**
>
> **(O.T. after 8 hours & all Saturday & Sunday on P.Wage Job)**
>
> **4 Hr. Minimum billing on each worker ordered**
>
> Overtime Rate 1.5 times straight time as per Oregon law.
>
> **Labor Ready is responsible for all required employer's costs. These costs have been calculated within the above bill rate.**
>
> - Worker's Compensation Insurance
> - F.I.C.A. & Medicare Contributions and Deposits
> - State and Federal Unemployment Insurance
> - Recruiting, Advertising and Administration Costs
> - Employee Payrolling and Funding
> - Liability Insurance
> - Unemployment Claims and Filings
> - Employment State and Federal Tax Deposits"

13) Casarez faxed the "Confirmation of Billing Services" to Frauendiener for her signature. Frauendiener signed and dated it and faxed it back to Casarez on September 29, 2004, at "16:00."

14) Rand became Respondent's employee on September 29, 2004, and worked from 7 a.m. – 3 p.m. that day on the Project.

15) Woods worked with Rand on the Project as Hicorp's employee on September 29, 2004, from 7 a.m. – 3:30 p.m. Woods became Respondent's

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[1] These words appear in a chart that shows the basic hourly wage rate and fringe benefit for the five Laborer classifications.

employee on September 30, 2004.

16) Mark Hance was Respondent's Salem office branch manager in September and October 2004. His responsibilities included visiting prevailing wage rate job sites to which Respondent's workers had been dispatched, posting the applicable prevailing wage rates, and preparing a written job site evaluation.

17) Neither Hance nor any other employee of Respondent visited the Project between September 29 and October 15, 2004, and Respondent does not have a written jobsite evaluation for the Project.

18) From September 29 through October 15, 2004, Rand worked the dates and hours listed below, performing the duties listed after each date:

9/29/04: 7½ hours concrete form assembly
9/30/04: 8 hours concrete form assembly
10/1/04: 7½ hours concrete form assembly
10/4/04: 8 hours concrete form assembly
10/5/04: 8 hours resetting form assembly
10/6/04: 8 hours resetting form assembly
10/7/04: 8 hours concrete form assembly
10/8/04: 4 hours concrete form assembly
10/12/04: 8 hours poured concrete & finished
10/14/04: 8 hours concrete form work
10/15/04: 4 hours concrete form work

Respondent classified Rand as a Group 5 Laborer and initially paid him $27.65 per hour ($18.75 hourly rate + $8.90 fringe benefit) for all his work.

19) From September 29 through October 15, 2004, Woods worked the dates and hours listed below, performing the duties listed after each date:

9/29/04: 8 hours excavation loading site debris
9/30/04: 8 hours site excavation
10/1/04: 7½ hours site excavation
10/4/04: 2 hours site excavation; 6 hours concrete form assembly
10/5/04: 8 hours concrete form assembly
10/6/04: 8 hours concrete form assembly
10/7/04: 8 hours concrete form assembly
10/8/04: 4 hours concrete form assembly
10/12/04: 8 hours concrete finishing
10/14/04: 8 hours excavation – back fill
10/15/04: 4 hours concrete form work

While excavating, Woods operated a 10,000 lb. tracked excavator. Respondent classified Woods as a Group 5 Laborer and initially paid him $27.65 per hour ($18.75 hourly rate + $8.90 fringe benefit) for all his work.

20) Dimitri Kitterman was employed by Respondent on October 8 and 12, 2004, on the Project, working eight hours each day. He assisted in setting forms, shooting grade, tying rebar, pouring, and finishing concrete. Respondent classified Kitterman

as a Group 5 Laborer and initially paid him $27.65 per hour ($18.75 hourly rate + $8.90 fringe benefit) for all his work.

21) Respondent issued separate checks to Rand, Woods, and Kitterman for each day that they worked to compensate them for each separate day's labor.

22) The Carpenter, Group 1 classification in Region 4 in BOLI's January 2004 Prevailing Wage Rate booklet lists a number of types of work associated with that classification, including: "Auto. Nailing Machine, Carpenters, Form Strippers, Manhole Builders, Non-irritating Insulation, and Cabinet & Shelving Installers (wood or steel)."

23) The Cement Mason, Group 1 classification in Region 4 in BOLI's January 2004 Prevailing Wage Rate booklet lists a number of types of work associated with that classification, including: "Cement Masons, finishing, hand chipping, patching, grouting, end pointing, screed setting, plugging, filling bolt holes, dry packing, setting curb forms, planks, stakes, lines and grades. Grinding of concrete done as preparatory to patching or when done to produce a finished concrete product."

24) The Ironworker classification in Region 4 in BOLI's January 2004 Prevailing Wage Rate booklet lists several types of work associated with that classification, including: "Structural, Reinforcing, Ornamental, Riggers, Signal men."

25) The Power Equipment Operator II classification in Region 4 in BOLI's January 2004 Prevailing Wage Rate booklet lists a number of types of work associated with that classification, including "Excavator."

26) The appropriate classifications for the work performed by Rand, Woods, and Kitterman on the Project were Carpenter I (concrete forms), Power Equipment Operator II (excavation), Cement Mason (concrete pour and finish), and Ironworker (tying rebar). The applicable prevailing wage rates for these classifications were:

Classification	Basic Hourly Rate	Fringe Benefit	Total
Carpenter 1	$25.69	$11.58	$37.27
Power Equipment Operator II	$22.61	$ 6.45	$29.06
Cement Mason	$22.47	$ 9.29	$31.76
Ironworker	$27.82	$12.46	$40.28

27) About a week after they became Respondent's employees, Rand and Woods made their first visit to Respondent's Salem office for the purpose of picking up their paychecks.[2] During their visit, they told Susie Barrera, one of Respondent's customer service representatives, that they were operating power equipment, tying rebar, and building forms. They complained that they had been underpaid.

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[2] There is no evidence in the record as to the exact date that Rand and Woods first visited Respondent's office.

28) In response, Barrera called Hicorp to determine what job duties were being performed by Rand and Woods and spoke with George Frauendiener. As a result of her conversation, she concluded that Rand and Woods were misclassified as general laborers. After her conversation, she looked in Respondent's office copy of BOLI's Prevailing Wage Rate booklet to determine their appropriate classification and concluded they should be classified as Laborer, Group 1. She then told Woods that Hicorp told her that all power equipment was being taken off the job and that Respondent's employees would be performing general labor only. In response, Woods told her this information was not accurate and that Barrera might want to investigate.

29) The Laborer, Group 1 classification in Region 4 in BOLI's January 2004 Prevailing Wage Rate booklet lists a number of types of work associated with that classification, including: "Asphalt Spreader; Batch Weighman; Broomer; Brush Burner/Cutter; Car & Truck Loader; Carpenter Tender; Change-House Man; Chipper Operator; Choker Setter; Clean up Laborer; Curing, Concrete; Demolition, wrecking, moving (Industrial); Driller Assistant; Dry-shack Man; Dumpers, road oiling crew; Dumpman for Grading crew; Elevator Feeder; Erosion Control Specialist; Fine Grader; Fire Watch; Form Stripper; General Laborer; Guardrail, Median Rail; Leverman or Aggregate Spreader; Loading Spotter; Material Yard Man; Powderman Assistant; Railroad Track Laborer; Ribbon Setter; Rip Rap Man (Hand Placed); Road Pump Tender/Mover; Scaffold Tender; Sewer Laborer; Signalman; Skipman; Sloper; Sprayman; Stake Chaser; Stockpiler; Tie Back Shoring; Timber Faller/Bucker (Hand Labor); Toolroom Man (Job Site); Traffic Control Supervisor (Certified); Weight-Man Crusher; and Wood Fence Builder." In some cases, "Form Stripping" involves stripping forms from concrete.

30) On October 1, 2004, Respondent created invoice #75471123 in which it billed Hicorp for $1,801.59, based on a total of 38 hours worked by Rand and Woods at the rate of $47.41 per hour.

31) On October 8, 2004, Respondent created invoice #76141123 in which it billed Hicorp for $3,792.80, based on a total of 80 hours worked by Rand, Woods, and Kitterman at the rate of $47.41 per hour.

32) On October 13, 2004, Respondent created two certified payroll reports for the Project in which it certified, among other things, that: (a) it employed Rand on September 29-30, October 1, and October 4-8, 2004; (b) it employed Wood on September 30, October 1, and October 4-8, 2004; (c) it employed Kitterman on October 8, 2004; (d) Rand, Wood, and Kitterman were paid $18.75 per hour (base rate of pay) plus $8.90 (hourly fringe benefit amounts paid as wages); and (e)

their "Work Classification Group #" was "Laborer, Group 5."

33) On October 15, 2004, Respondent created invoice #76821123 in which it billed Hicorp for $2,465.32, based on a total of 52 hours worked by Rand and Woods at the rate of $47.41 per hour.

34) Respondent created a certified payroll report[3] for the Project in which it certified, among other things, that: (a) it employed Woods on October 12, and October 14-15, 2004; (b) it employed Rand on October 11-12, and October 14-15, 2004; (c) it employed Kitterman on October 12, 2004; (d) Rand, Wood, and Kitterman were paid $18.75 per hour (base rate of pay) plus $8.90 (hourly fringe benefit amounts paid as wages); and (e) their "Work Classification Group #" was "Laborer, Group 5."

35) On October 28, 2004, Respondent created three certified payroll reports for the Project. All three had the word "CORRECTION" typed on them.

In the first report, Respondent certified, among other things, that: (a) it employed Rand on September 29-30, and October 1, 2004; (b) it employed Woods on September 30, and October 1, 2004; (c) it employed Kitterman on October 8, 2004; (d) Rand, Wood, and Kitterman were paid $18.75 per hour (base rate of pay) plus $8.90 (hourly fringe benefit amounts paid as wages); and (e) their "Work Classification Group #" was "Laborer, Group 1."

In the second report, Respondent certified, among other things, that: (a) it employed Rand and Woods on October 4-8, 2004; (b) it employed Kitterman on October 8, 2004; (c) Rand, Woods, and Kitterman were paid $18.75 per hour (base rate of pay) plus $8.90 (hourly fringe benefit amounts paid as wages); and (d) their "Work Classification Group #" was "Laborer, Group 1."

In the third report, Respondent certified, among other things, that: (a) it employed Rand on October 11-12, and October 14-15, 2004; (b) it employed Woods on October 12 and 15, 2004; (c) it employed Kitterman on October 12, 2004; (d) Rand, Wood, and Kitterman were paid $18.75 per hour (base rate of pay) plus $8.90 (hourly fringe benefit amounts paid as wages); and (e) their "Work Classification Group #" was "Laborer, Group 1."

36) On October 29, 2004, Respondent created invoice #78191123 in which it billed Hicorp for $703.61, based on a total of 12.91 hours worked by Rand (7.27 hours), Woods (4.23 hours), and Kitterman (1.41 hours) at the rate of $54.50 per hour. The invoice contained the notations: "**JOB LOCATION**: Back Pay for JC#3" and **JOB ADDRESS**: Hospitol [sic] Hill Reserver [sic]."

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[3] The certified, dated page that accompanied the previous two certified payroll reports is not part of the record and there is no evidence as to the specific date this certified payroll report was created.

37) On October 29, 2004, Respondent created invoice #78201123 in which it billed Hicorp for $63.63, based on a total of 1.15 hours worked by Woods at the rate of $55.33 per hour. The invoice contained the notations: "**JOB LOCATION**: Back Pay for JC#3" and **JOB ADDRESS**: Hospitol [sic] Hill Resovor [sic]."

38) On November 2, 2004, Respondent created two certified payroll reports. Both had the word "Restitution" handwritten or typed on them.

In the first report, Respondent certified, among other things that: (a) it employed Rand (7.27 hours), Woods (4.23 hours), and Kitterman (1.41 hours) for the pay period beginning "10/23/04" and ending "10/29/04"; (b) Rand, Wood, and Kitterman were paid $21.42 per hour (base rate of pay) plus $8.90 (hourly fringe benefit amounts paid as wages); and (c) their "Work Classification Group #" was "Laborer, Group 1."

In the second report, Respondent certified, among other things that: (a) it employed Woods for the pay period beginning "10/23/04" and ending "10/29/04" for 1.15 hours; (b) Woods was paid $22.61 per hour (base rate of pay) plus $6.45 (hourly fringe benefit amounts paid as wages); and (c) his "Work Classification Group #" was "Power Equipment Operator II."

39) On October 27, 2004, James Rand filed a wage claim with BOLI's Wage & Hour Division in which he alleged that he had worked for "HI CORP Steel Build Inc." from 9/20/04 through 10/15/04, that he had been paid $2087.58, and that he was still owed $1285.72 in earned and unpaid wages. That same day, Rand filed a "Prevailing Wage Rate Complaint Form" with BOLI's Prevailing Wage Unit alleging he had not been paid from his work for "HI CORP STEEL" for work performed from "9-20 through 9-29-04" and he was underpaid for his work "from 9-30 through 10/12" at the rate of $27.65 per hour.

40) On October 27, 2004, Charles Woods filed a wage claim with BOLI's Wage & Hour Division in which he alleged he had worked for "HI Corp Steel Buildings Inc." from 9/21/04 through 10/15/04. The same day, Woods also filed a "Prevailing Wage Rate Complaint Form" with BOLI's Prevailing Wage Unit alleging he had had not been paid for his work for "Hi Corp Steel" for work performed from "9/21/04 through 9/30/04" and he was underpaid for his work "from 10/1/04 to 10/12/04" at the rate of $27.65 per hour.

41) Along with their wage claims, Rand and Woods provided a handwritten log that accurately showed the number of hours they worked each day and the type of work they performed.

42) Hicorp had not paid Rand and Woods anything for their work at the time Rand and Wood filed their complaints with BOLI.

43) Rand's and Woods's complaints were assigned for investigation to Gerhard Taeubel, a compliance specialist in BOLI's Prevailing Wage unit. At the time, Taeubel had worked in BOLI's Prevailing Wage unit for four years. Taeubel sent a letter to Hicorp on November 2, 2004, in which he requested the following documents:

> "A list of names of employees who worked for [Hicorp] between September 20, 2004 and October 15, 2004, including their last known addresses and phone numbers.
>
> "Complete daily time cards or time sheets for each employee who worked on this project from September 20, 2004 through the most current week of week performed on this project.
>
> "Complete payroll records showing gross wages earned and itemized deductions made from all wages for all employees who worked on this project from September 2, 2004 through the most current week of work performed on this project.
>
> "A complete set of certified payrolls filed beginning on September 20, 2004, through the most current week of work performed on this project.
>
> "A detailed description of the actual duties performed for each classification identified on your certified payroll reports.
>
> "A description of where and how you post(ed) the prevailing wage rates, and fringe benefit information if applicable, upon the public works site.
>
> "A copy of your subcontract, including scope of work."

Taeubel sent this letter to Hicorp instead of Respondent because the complaints named Hicorp as the employer. At the time, Taeubel believed there was a joint employment relationship between Hicorp and Respondent based on a signed written statement that had been submitted by Rand and Woods at the time they filed their wage claims.

44) In response, Hicorp sent a number of documents to Taeubel, including invoices from Respondent, certified payroll records, corrected certified payroll records, and back pay records. Taeubel had already determined that Rand, Woods, and Kitterman had been misclassified as Laborers. From the records provided by Hicorp and information provided by Rand and Woods concerning their hours worked and duties performed, Taeubel determined that additional wages were still owed to Rand, Woods, and Kitterman for work performed from September 29 through October 15, 2004.

45) On November 17, 2004, Taeubel sent another letter to Hicorp, in which he stated the following:

> "Thank you for submitting copies of the payroll records, which included pay statements from Labor Ready as well as

certified payroll reports, for the [Hospital Hill Project]. While reviewing these documents, I noticed that most of the workers were classified and paid as laborers (the exception being a relatively small amount of hours paid as power equipment operator). My understanding of the project, however, is that the actual work consisted largely of building and setting concrete forms, tying rebar, and pouring and finishing concrete. The work classifications appropriate to these tasks are carpenter, ironworker, and cement mason, respectively.

"Consequently, I have recalculated the wages earned by the three workers during the period September 29, 2004, through October 15, 2004, based on the prevailing wage rates for carpenter, ironworker, and cement mason. The results are as follows:

"Dimitri Kitterman

Wages Earned

8 hours @ $40.28 =	$322.24 (rebar)
8 hours @ $31.76 = (concrete pour)	$254.08
	$576.32
Paid by Labor Ready -	$485.15
Wages Owed	$ 91.17

"James Rand

Wages Earned

71 hours @ $37.27 = (building forms)	$2,646.17
8 hours @ $31.76 = (concrete pour)	$ 254.08
	$2,900.25
Paid by Labor Ready -	$2,501.56
Wages Owed	$ 398.69

"Charles Woods

Wages Earned

25.5 hours @ $29.06 = (excavation/backfill)	$ 741.03
38.0 hours @ $23.27 = (building forms)	$1,416.26
8.0 hours @ $31.76 = (concrete pour)	$ 254.08
	$2,411.37
Paid by Labor Ready -	$2,138.65
Wages Owed	$ 272.72

"If you disagree with the number of hours assigned to each type of work, it is necessary that you submit detailed time records demonstrating the hours spent by each worker in the performance of the various classifications of work.

"In addition to the underpayment of prevailing wages, my investigation of this project indicates that:

- the prevailing wage rates were not posted at the job site, as required by ORS 279.350(4) and OAR 839-016-0033; and
- certified payroll reports were not filed with the contracting agency, as required by ORS 279.354(2) and OAR 839-016-0010(3).

"At this time, I am requesting that Hicorp Steel Buildings submit paychecks, made out to the individual workers, to the Bureau in the amounts listed above (less any lawful deductions). In addition, please sign and return to me, along with the payments, the enclosed compliance agreement. The Bureau utilizes such agreements to ensure that

contractors are familiar with their obligations under the state's prevailing wage regulations.

"Your response to this letter should arrive in this office by **November 26, 2004.** As I noted in my earlier correspondence, violations of the prevailing wage regulations are a serious matter. Failure to respond may result in further action to collect any unpaid wages, liquidated damages, and civil penalties, as well as any other enforcement actions permissible under the law.

"Thank you for your cooperation. If you have any questions, you can reach me at 503-872-6728."

46) Respondent, through Barrera, responded to Taeubel's letter. On December 6, 2004, Barrera sent a fax to Taeubel, enclosing copies of three checks issued to Woods, Rand, and Kitterman on November 19, 2004, along with statements of itemized deductions. The checks were issued in the gross amounts of $272.88 (Woods), $398.71 (Rand), and $91.26 (Kitterman). This constituted full payment of the back wages that Respondent owed to Woods, Rand, and Kitterman.

POSTING

47) Respondent's corporate office has an intranet site for its Oregon employees. Casarez was aware of this intranet site in September 2004. Respondent's intranet page entitled "Oregon BOLI" contained the following information and policy statements:

"Processing of Oregon Prevailing Wage work requires Labor Ready to comply with some state specific guidelines. This site is intended to provide the following:

- Oregon specific BOLI information
- Instructions for posting of rate sheet on all Oregon Prevailing Wage job sites
- Oregon statute relating to the posting of rate sheets on all job sites

"Oregon Prevailing Wage Rate Sheet Posting Requirement

"When staffing a prevailing wage job site in the state of Oregon the following process must be followed:

- Obtain the current rate sheet from your customer
- Fax to the corporate Prevailing Wage Department
- Corporate Prevailing Wage Department will review rate sheet, transfer it to Labor Ready Prevailing Wage letterhead and send it back to your branch immediately via certified mail.
- Upon receipt this rate sheet must be posted on the job site next to

the sheet posted by the general contractor. Attach a branch manager business card to the rate sheet prior to posting. Keep an exact copy of what you posted in the customer file, with a note of when and where it was posted.

- Contact the corporate Legal/PW Department if any customer protests the posting by Labor Ready.
- Make a follow up visit to be sure the posting is still there.

"Statute Form

"Oregon BOLI powerpoint presentation

"Please contact the corporate PW department with any questions.

"**Questions about the PWW Website?**

"**Email:** intranet@laborready.com"

48) An intranet user who clicks on "Statute Form" is linked to another page that contains Oregon's laws that regulate posting on prevailing wage rate jobs.

49) An intranet user who clicks on "Oregon BOLI powerpoint presentation" is linked to a powerpoint presentation created by BOLI in 2002 that explains Oregon prevailing wage rate rules and regulations.

50) In September and October 2004, Respondent's corporate policy and procedures regarding posting on prevailing wage rate job sites was the same as the policy and procedures stated under the heading "**Oregon Prevailing Wage Rate Sheet Posting Requirement**" on Respondent's intranet page entitled "Oregon BOLI."

51) On September 29, 2004, Casarez faxed a copy of Hicorp's rate sheet to Respondent's Prevailing Wage Department in Tacoma. On the cover sheet, Casarez made the following notation:

> "Please review this job and fax us a rate sheet so we could post at job site as soon as possible. Thank you, Alma."

52) On October 15, 2004, Respondent's Prevailing Wage Unit returned the rate sheet by certified mail to Respondent's Salem office. The rate sheet was reduced in size and Respondent's letterhead appeared at the top of the sheet.

53) The jobsite at the Hospital Hill Project was approximately 84 feet long and 67 feet 8 inches wide. There was a chain link fence around the property, and there was no structure on the property other than the concrete reservoir itself. During the time that Rand, Woods, and Kitterman worked on the Project, the only sign posted anywhere on the Project was a notice that read: "City of Adair Village – No Trespassing."

54) Respondent did not post the applicable prevailing wage rates on the Project and no one from Respondent ever visited the Project to see if the rates were posted.

CREDIBILITY FINDINGS

55) Finnegan and Taeubel were credible witnesses and their testimony has been credited in its entirety.

56) Woods testified by telephone, answering questions directly and without hesitation on both direct and cross examination. His testimony was internally consistent and there was no evidence that he was biased against Respondent. He was not impeached on cross examination. The forum has credited Woods's testimony that he never saw a prevailing wage rate posting on the Project because of his overall credibility, his presence on the Project job site for 11 days -- including the day Respondent allegedly posted the rates, the relatively small size of the job site and lack of structures on the job site that would have made any posting apparent, and Casarez's and Barrera's lack of credibility on this issue. However, the forum did not believe his testimony that his initial rate of pay was $17 per hour because this figure was inconsistent with prior written statements he made to BOLI and with payroll records provided by Respondent that the forum has found to be reliable. The forum has credited the remainder of his testimony.

57) Rand testified by telephone. Like Woods, he testified that Respondent only paid him $17 per hour at first, which was contrary to his prior written statements and to Respondent's reliable payroll records. Unlike Woods, Rand expressed considerable bitterness about being underpaid, through his answer and in the tone of his voice, and conveyed the sentiment that he took strong personal offense that Respondent did not pay him the correct prevailing wage rate until a little more than a month after he last worked for Respondent. He was argumentative with Respondent's attorney during cross examination. At one point during cross examination, when he perceived that Respondent's counsel was attempting to point out a contradiction in his testimony, Rand became extremely combative. He tried to back off from his prior written statement that "Labor Ready has agreed to properly compensate us at the appropriate scale for the work we performed, and to seek compensation from Mr. Frauendiener" and claim that Respondent had only agreed to "take it under consideration." He testified that he informed Respondent's office, when he and Woods visited it to pick up their first paychecks, that one of the jobs he had been doing was pouring concrete. His own written record, however, shows he did not pour concrete until October 12, 2004, which would have been at a least a week after this visit. Finally, he also testified that he signed his "Statement of Circum-

stances" after he filed his prevailing wage rate claim, when the date of the document showed he signed it the same day as his prevailing wage rate complaint and wage claim. In short, he seemed determined to paint Respondent in as bad a light as possible. Based on Rand's inconsistencies and demeanor, the forum has concluded that he bore a grudge against Respondent and that his testimony was biased because of it. The forum has only credited his testimony when it was uncontradicted or corroborated by other credible evidence.

58) Alma Casarez is Respondent's current branch manager in Salem and had worked for Respondent for nine years at the time of hearing. In the fall of 2004, she was a customer service representative in Respondent's Salem office. She maintained a pleasant, calm demeanor while testifying, responding directly to questions, and did not become argumentative or defensive during a rigorous cross examination. Her testimony regarding Respondent's corporate procedures and policies related to prevailing wage rate jobs was internally consistent and consistent with Respondent's written policies and has been credited in its entirety. Her testimony regarding her interactions with Hicorp was also credible, as was her testimony concerning her inability to locate Mark Hance, Respondent's Salem branch manager at the time Respondent employed workers at the Project.

In contrast, Casarez's testimony regarding the posting of the Project was not credible. She testified that on September 29, 2004, she took a copy of the rate sheet that Hicorp had faxed to her, put it on Respondent's letterhead, and inserted it in a plastic sheet for posting. She testified that she gave it to Mark Hance, Respondent's Salem branch manager, to post at the Project because Hance was going out to Adair Village later <u>that morning</u>. She testified that she took this action to avoid the delay caused by Respondent's corporate policy of returning posting-ready rate sheets by certified mail after branch offices faxed them to Respondent's corporate office. She further testified that Hance returned to the office that afternoon and said he had posted it, but that he had not seen any workers at the Project. The forum has disbelieved this testimony for several reasons. First, Respondent's exhibits show that Hicorp faxed the rate sheets to Casarez at 11:41 a.m. and 11:59 a.m. on September 29, 2004. These transmission times establish that it would have been impossible for Hance to have taken the rate sheets to Adair Village in the morning. Second, Casarez wrote on the cover sheet of her fax to Respondent's corporate headquarters on September 29, 2004, to which she attached the rate sheets provided by Hicorp -- "Please review this rate and fax us a rate sheet so we could post at job site as soon as possible." Since it was Respondent's corporate policy to "send [the rate

sheet] back to your branch as soon as possible," there would have been no reason for Casarez to write this note if Hance had already posted the rate sheet at the Project. Third, Casarez asserted that Hance told her he saw no one at the Project on September 29, 2004, whereas undisputed evidence shows that both Rand and Woods worked at the Project that day, from 7 a.m. – 3 p.m. and from 7 a.m. – 3:30 p.m., respectively. Fourth, both Rand and Woods credibly testified that no one from Respondent's office ever visited the Project. Fifth, both Rand and Woods credibly testified that they never saw any posting of the prevailing wage rates on the Project, and that they would have seen a posting, inasmuch as the only structures on the Project were the reservoir itself and the fence around it, on which was fastened a "No Trespassing" sign.

59) At the time of hearing, Barrera had been a customer service representative for Respondent in its Salem branch office for five years. Like Casarez, her testimony regarding corporate procedures and policies related to prevailing wage rate jobs was internally consistent and consistent with Respondent's written policies and has been credited in its entirety. However, Barrera's testimony about Casarez's preparation of the rate sheet and Hance's posting was almost identical to that given by Casarez, and the forum has discredited it for the same reasons. In addition, her testimony that she changed Rand's and Woods's classification and pay rates to Laborer, Group 1 after their complaints that they were being underpaid was not credible because it conflicted with Respondent's certified payroll reports, which showed that Rand and Woods were not reclassified and paid as Laborers, Group 1, until October 28 or November 2, 2004.[4]

OFFICIAL NOTICE

60) On December 13, 2001, the Commissioner issued a Final Order in case no. 31-01, a case in which the Agency charged that Respondent had violated provisions of Oregon's prevailing wage rate laws. The Final Order included several conclusions of law. One conclusion was that Respondent had committed eight violations of *former* ORS 279.350(1) in 1998 on the New Bend Middle School Project, a public works, by failing to pay workers the prevailing wage rate. The Commissioner assessed civil penalties of $1,500 for each of the eight violations. Another conclusion was that Respondent committed one violation of *former* ORS 279.350(4) on the same project by failing to post the prevailing wage rates. The Commissioner assessed a civil penalty of $2,000 for this violation. The Commissioner also concluded that Respondent had intentionally failed to pay and post the prevailing wage rate and ordered Respondent to be placed on the

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[4] *See* Findings of Fact 31, 33-34, 38 – The Merits, *supra*.

list of those ineligible to receive any contract or subcontract for public works. Respondent appealed the case to the Oregon Court of Appeals, challenging the debarment, the assessment of a $2,000 civil penalty based on Respondent's failure to post, and the forum's rejection of Respondent's estoppel defense to the imposition of any sanctions. Respondent did not assign error to the Commissioner's conclusion that Respondent committed eight violations of *former* ORS 279.350(1). On June 26, 2003, the Oregon Court of Appeals issued a decision in which it reversed Respondent's debarment, but sustained the forum's imposition of a civil penalty based on Respondent's failure to post. Specifically, the court held that "ORS 279.350(4) requires every contractor and subcontractor engaged in a public project to personally initially post the prevailing wage and to maintain that posting throughout the course of its employees' work on the project." *Labor Ready Northwest, Inc. v. Bureau of Labor and Industries,* 188 Or App 346, 71 P3d 559 (2003), *rev den* 336 Or 534, 88 P3d 280 (2004). ("LRNW #1")

61) On November 28, 2005, the Commissioner issued a Final Order on Reconsideration in consolidated cases nos. 122-01 and 149-01. In both cases, the Agency charged that Respondent had violated provisions of Oregon's prevailing wage rate laws. The Commissioner's Final Order included several conclusions of law. One of the Commissioner's conclusions was that Respondent committed five violations of *former* ORS 279.350(1) in 2000 on the Cornelius Project, a public works, by failing to pay the prevailing rate of wage to five workers, and an additional violation of *former* ORS 279.350(1) in 2000 by failing to pay the prevailing rate of wage to a single worker on the Central Project, another public works. The Commissioner ordered Respondent to pay $15,000 in civil penalties for the Cornelius violations ($3,000 per violation) and $5,000 in civil penalties for the Central violation. Another of the Commissioner's conclusions was that Respondent committed two violations of *former* ORS 279.350(4) by failing to post the prevailing wage rates on the Cornelius and Central Projects. The Commissioner ordered Respondent to pay $4,000 in civil penalties for the Cornelius violation and $5,000 in civil penalties for the Central violation. The Commissioner also ordered Respondent to be placed on the list of those ineligible to receive any contract or subcontract for public works for one year based on the conclusion that Respondent intentionally failed to pay the prevailing wage rate to its one worker on the Cornelius Project and intentionally failed to post the Cornelius Project. Respondent appealed the Commissioner's Final Order to the Oregon Court of Appeals, assigning error to the Commissioner's determinations that: (1) Respondent intentionally failed to pay its worker the prevailing wage rate on the Cornelius Project; (2) Re-

spondent intentionally failed to post and keep posted the prevailing wage rate at the Cornelius job site; and (3) Respondent should be debarred for one year. Respondent did not assign error to the Commissioner's conclusions that Respondent failed to pay the prevailing wage rate to six workers, that Respondent failed to post, or to the civil penalties assessed for those violations. On September 27, 2006, the Oregon Court of Appeals issued a written decision affirming the Commissioner's Final Order. *In the Matter of Labor Ready Northwest,* 27 BOLI 83 (2005), 208 Or App 195 (2006), *petition for recon. filed.* ("Labor Ready #2)

62) On January 4, 2007, the Commissioner issued a Final Order in case no. 77-04. In that case, the Agency charged that Respondent had violated provisions of Oregon's prevailing wage rate laws. The Commissioner's Final Order included several conclusions of law. One of the Commissioner's conclusions was that Respondent committed four violations of *former* ORS 279.350(1) in 2003 on the Liberty High School Project, a public works, by failing to pay the prevailing rate of wage to four workers. The Commissioner ordered Respondent to pay $20,000 in civil penalties for the four violations. The Commissioner also concluded that Respondent committed one violation of *former* ORS 279.350(4) by failing to post the prevailing wage rates on the Liberty High School Project and ordered Respondent to pay $5,000 in civil penalties. The Commissioner also ordered Respondent to be placed on the list of those ineligible to receive any contract or subcontract for public works for three years based on the conclusion that Respondent intentionally failed to post the Liberty High School Project. ("LRNW #3)

ULTIMATE FINDINGS OF FACT

1) At all times material herein, Respondent Labor Ready Northwest, Inc. was a foreign corporation based in Washington that was registered with the Oregon Corporations Division to perform work within the state of Oregon.

2) On June 25, 2004, the City of Adair Village, a public agency, first advertised the Project for bid. The Project involved constructing a "free-span metal building and roof" over an existing reservoir in Benton County, Oregon. On August 14, 2004, Adair Village awarded the project contract to Taylor, in the amount of $107,475.

3) The prevailing wage rates printed in BOLI's January 2004 Prevailing Wage Rate booklet applied to the Project.

4) Taylor contracted with Hicorp to perform site clearing, concrete work, and roof framing on the Project. Hicorp hired James Rand and Charles Woods to work on the Project.

5) On September 29, 2004, Hicorp contracted with Respondent's Salem branch office to provide workers on the Project.

Hicorp's representative told Respondent that the workers would be performing prevailing wage rate work that was appropriately classified as Laborer, Group 5, and that all power equipment had been removed from the job.

6) Rand became Respondent's employee on September 29, 2004, and Woods became Respondent's employee on September 30, 2004. Both worked for Respondent on the Project through October 15, 2004, performing work that properly fit in the classifications of Carpenter I, Power Equipment Operator II (Woods only), Cement Mason, and Ironworker.

7) About a week after Rand and Woods began working for Respondent, they informed Respondent's Salem office that they were operating power equipment, tying rebar, and building forms, and they complained that they were being underpaid. Respondent's representative Barrera called Hicorp and was told that all power equipment was being taken off the job and that Respondent's employees would be performing general labor only. After consulting BOLI's Prevailing Wage Rate booklet, Barrera decided that Rand and Woods were appropriately classified as Laborers, Group 1. Barrera shared this information with Woods, who told her the information provided by Hicorp was not accurate and suggested she investigate.

8) Dimitri Kitterman was employed by Respondent on the Project on October 8 and 12, 2004, performing work that properly fit in the classifications of Carpenter I, Cement Mason, and Ironworker.

9) Respondent classified Rand, Woods, and Kitterman as Laborers, Group 5, throughout their work on the Project, and paid them $27.65 per hour ($18.75 per hour hourly rate + $8.90 fringe benefit).

10) Respondent did not post the prevailing wage rates applicable to Respondent's workers at the Project at any time while Respondent's workers were employed at the project.

11) On October 28, 2004, Respondent reclassified Rand, Woods, and Kitterman as Laborers, Group 1.

12) On or about November 2, 2004, Respondent issued back pay checks to Rand and Kitterman for amounts that reflected the difference between the pay they initially received and the pay they would have received, had they been classified as Laborers, Group 1, instead of Laborers, Group 5.

13) On or about November 2, 2004, Respondent issued back pay checks to Woods for amounts that reflected the difference between the pay he initially received and the pay he would have received, had he been classified as Laborer, Group 1, and Power Equipment Operator II, instead of Laborer, Group 5.

14) On November 17, 2004, BOLI sent a letter to Hicorp in

which it notified Hicorp that Rand, Woods, and Kitterman had been underpaid $398.69, $272.72, and $91.17 in gross wages, respectively, because Respondent had misclassified and paid them as laborers.

15) On November 19, 2004, Respondent issued back pay checks to Rand, Woods, and Kitterman in the respective gross amounts of $398.69, $272.72, and $91.26.

CONCLUSIONS OF LAW

1) The Hospital Hill Project was a public works project that was not regulated under the Davis-Bacon Act for which the contract price exceeded $25,000, and Respondent was a subcontractor that employed workers on the project. *Former* ORS 279.348(3),[5] *former* ORS 279.357(1)(a), *former* OAR 839-016-0004(30).[6]

2) Respondent paid its workers, including James Rand, Charles Woods, and Dimitri Kitterman, less than the prevailing rates of wage for work they performed on the Project from September 29 through October 15, 2004. This constitutes three violations of *former* ORS 279.350(1) and *former* OAR 839-016-0035.

3) Respondent did not post or keep posted the prevailing wage rates for the Project, constituting one violation of *former* ORS 279.350(4) and *former* OAR 839-016-0033.

4) The Commissioner's imposition of civil penalties for Respondent's three violations of *former* ORS 279.350(1) and *former* OAR 839-016-0035 and one violation of *former* ORS 279.350(4) and *former* OAR 839-016-0033 is an appropriate exercise of his discretion. *Former* ORS 279.370(1); *former* OAR 839-016-0530(3)(b); *former* OAR 839-016-0540(3)(a).

5) Respondent intentionally failed to pay the prevailing rates of wage on the Project. When the Commissioner determines that a contractor or subcontractor has intentionally failed or refused to pay the prevailing rate of wage, the contractor, subcontractor or any firm, corporation, partnership or association in which the contractor or subcontractor has a financial interest shall be ineligible, for a period not to exceed three years from the date of publication of the name of the contractor or subcontractor on the ineligible list ("List") maintained by the Commissioner, to receive any contract or subcontract for public works. The Commissioner's decision to place Respondent on the List for three years based on Respondent's intentional failure to pay the prevailing wage rate to its three workers is an appropriate exercise of his discretion. *Former* ORS 279.361(1).

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[5] Effective March 1, 2005, ORS chapter 279 was reorganized and *former* ORS 279.005 to 279.833 and 279.990 were repealed or renumbered.

[6] Effective July 2005, *former* OAR 839-016-000 *et seq* was renumbered as OAR 839-025-000 *et seq.*

6) Respondent intentionally failed to post the prevailing wage rates on the Project. When the Commissioner determines that a contractor or subcontractor has intentionally failed or refused to post the prevailing wage rate as required by *former* ORS 279.350(1), the contractor, subcontractor or any firm, corporation, partnership or association in which the contractor or subcontractor has a financial interest shall be ineligible, for a period not to exceed three years from the date of publication of the name of the contractor or subcontractor on the ineligible list maintained by the Commissioner, to receive any contract or subcontract for public works. The Commissioner's decision to place Respondent on the List for three years based on Respondent's intentional failure to post the prevailing wage rate is an appropriate exercise of his discretion. *Former* ORS 279.361(1).

OPINION

RESPONDENT FAILED TO PAY THE PREVAILING WAGE RATE

A. The Project was a public works.

Former ORS 279.348(3) provided that:

> "'Public works' includes, but is not limited to, roads, highways, buildings, structures and improvements of all types, the construction, reconstruction, major renovation or painting of which is carried on or contracted for by any public agency to serve the public interest but does not include the reconstruction or renovation of privately owned property which is leased by a public agency."

Former ORS 279.348(5) provided:

> "'Public agency' means the State of Oregon or any political subdivision thereof or any county, city, district, authority, public corporation or entity and any of their instrumentalities organized and existing under law or charter."

"Construction," as used in *former* ORS 279.348(3), was defined in *former* OAR 839-016-004(5) as "the initial construction of buildings and other structures, or additions thereto[.]" The work on the Project consisted of building concrete footings and a roof over an existing reservoir, which meets the definition of "additions" to "other structures," and the forum concludes that Respondent's workers performed labor on a "public works" as defined in *former* ORS 279.348(5).

B. Respondent was a subcontractor that employed workers on the Project whose duties were manual or physical in nature.

It is undisputed that Taylor subcontracted with Hicorp to perform work on the Project, and that Hicorp paid Respondent to provide employees to perform Hicorp's work on the Project. This makes Respondent a subcontractor. *Former* OAR 839-016-0004(29) defined "worker" as "a person employed on a public works project and whose duties

are manual or physical in nature[.]" From September 29 through October 15, 2004, Respondent's employees performed work that included operating power equipment, building concrete forms, tying rebar, pouring and finishing concrete, and dismantling concrete forms. These are all "manual" and "physical" duties that were performed by persons employed by Respondent on a public works project.

C. Respondent failed to pay three workers at least the prevailing rate of wage for each hour worked on the Project.

Former ORS 279.350(1) required contractors and subcontractors upon all public works to pay their workers "no less than the prevailing rate of wage for an hour's work in the same trade or occupation in the locality where such labor is performed." That rate is set out, by statute and administrative rule, in BOLI's Prevailing Wage Rate book. *Former* ORS 279.359(1), *former* OAR 839-016-0035(1). In this case, Respondent issued separate paychecks to its three workers for each day that they worked. There are a number of exhibits in the record, all created by Respondent, that document payment of wages to Rand, Woods, and Kitterman. They range from a summary of checks issued, with itemized deductions, to certified payroll reports, and consistently report two salient facts -- that Rand, Woods, and Kitterman were initially paid $27.65 per hour ($18.75 per hour + $8.90 fringe benefit) for all the work that they performed, and that Respondent classified them as Laborers, Group 5, throughout their employment on the Project.

The same records also show that approximately two weeks after the job ended, Respondent issued back pay checks to compensate Rand, Woods, and Kitterman for the difference between the pay they received and what they would have been paid if classified as Laborers, Group 1 (Rand, Woods, and Kitterman), and Power Equipment Operator II (Woods).[7]

About the same time, unbeknownst to Respondent, BOLI's Prevailing Wage Unit was conducting an investigation of the prevailing wage complaints and wage claims filed by Rand and Woods. Taeubel, an experienced compliance specialist in BOLI's Prevailing Wage Unit, reviewed the records provided by Hicorp, Rand, and Woods. After comparing the work actually performed with the classification descriptions

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[7] There is no evidence in the record to establish the exact date Respondent issued these back pay checks. The forum concludes issuance occurred approximately two weeks after the job ended based on three facts: (1) Respondent's workers last worked on the Project on October 15, 2004; (2) On November 2, 2004, Respondent created two certified payroll reports reflecting the described back pay; and (3) Four days earlier, on October 29, 2004, Respondent billed Hicorp for a corresponding amount of "back pay."

in BOLI's January 2004 Prevailing Wage Rate book, Taeubel concluded that Rand, Woods, and Kitterman had been misclassified as Laborers and underpaid as a result.[8] At hearing, this conclusion was bolstered by Rand's and Woods's credible testimony describing the work they performed on Project and the dates and hours they performed that work, the published descriptions of types of work performed by workers in the classification of Laborer, Carpenter I, Power Equipment Operator II, Cement Mason, and Ironworker in BOLI's January 2004 Prevailing Wage Rate book, and the published rates of pay for work performed in those classifications.

On November 17, 2004, Taeubel sent a letter to Hicorp in which he summarized the results of his investigation. In that letter, Taeubel stated that Rand, Woods, and Kitterman had been underpaid due to Respondent's failure to classify them properly as Carpenter, Ironworker, and Cement Mason, all higher paid classifications than Laborer, Group 1. Taeubel specifically set out the hours worked by each worker in each classification, calculated the amount of wages owed, and requested payment of those wages. In response, on November 19, 2004, Respondent issued back pay checks to Rand, Woods, and Kitterman in the amounts sought by Taeubel.

In summary, the preponderance of the evidence shows that: (1) Respondent misclassified Rand, Woods, and Kitterman as Laborers, Group 5, throughout their work on the Project; (2) While Rand, Woods, and Kitterman were employed by Respondent, Respondent issued daily paychecks to them, calculating their pay at the rate of $27.65 per hour, the prevailing wage rate for Laborer, Group 5; (3) Throughout their work on the Project, Rand, Woods, and Kitterman performed work that was properly classified as Carpenter 1, Power Equipment Operator II, Cement Mason, or Ironworker, all classifications that had a higher prevailing wage rate than $27.65 per hour; and (4) Respondent did not pay Rand, Woods, and Kitterman all the wages they earned until November 19, 2004, slightly more than a month after their last day of work. The prevailing wage requirement in *former* ORS 279.350 is violated when a contractor or subcontractor upon a public works tenders checks to workers less than the prevailing wage rate for an hour's work in the same trade or occupation in the locality where such labor is performed. *See North Marion School District v. Acstar Insurance Co.,* 205 Or App 484, 494, 136 P3d 42, 47 (2006). Respondent tendered multiple checks to Rand, Woods, and Kitterman in which their wages were calculated at the

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[8] The prevailing wage rates on the Project for Carpenter 1, Power Equipment Operator II, Cement Mason, and Ironworker were all higher than the prevailing wage rate for Laborer, Group 5. *See* Findings of Fact 10, 26 – The Merits.

Laborer, Group 5 rate, which was less than the prevailing wage rates for their trades in Region 4. This constitutes three violations of *former* ORS 279.350(1) and *former* OAR 839-016-0035. The question of whether Respondent's failure to pay the prevailing wage rate was "intentional" is discussed later in this Opinion.

CIVIL PENALTY – FAILURE TO PAY THE PREVAILING WAGE RATE

The Commissioner may assess a civil penalty of up to $5,000 for each violation of *former* ORS 279.350(1). *Former* ORS 279.370(1); *former* OAR 839-016-0540(1). In this case, the Agency cited *former* OAR 839-016-0540(3)(a) as partial authority for the $15,000 in civil penalties it proposed to assess for Respondent's three violations. That rule, stated below, set a minimum civil penalty for a first violation of *former* ORS 279.350(1):

> "(3) Notwithstanding any other section of this rule, when the commissioner determines to assess a civil penalty for a violation of ORS 279.350 regarding the payment of the prevailing rate of wage, the minimum civil penalty will be calculated as follows:
>
> "(a) An equal amount of the unpaid wages or $1,000, whichever is less, for the first violation[.]"

As noted, this rule established a minimum, not an upper limit, on the Commissioner's authority to determine an appropriate civil penalty.[9] In determining an appropriate penalty, the forum must also consider any aggravating circumstances alleged and proved by the Agency, any mitigating circumstances, and prior final orders. *In the Matter of Harkcom Pacific, Inc.,* 27 BOLI 62, 77 (2005). When seeking more than the minimum civil penalty, the Agency must establish aggravating circumstances to justify the increased amount. *In the Matter of Design N Mind,* 27 BOLI 32, 44 (2005).

A. Aggravating Circumstances

Former OAR 839-016-0520 set out the following criteria for the Commissioner to consider in determining the amount of civil penalty:

> "(1) The commissioner shall consider the following mitigating and aggravating circumstances when determining the amount of any civil

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[9] *See, e.g., In the Matter of Harkcom Pacific, Inc.,* 27 BOLI 62, 77 (2005) ($2,000 civil penalty assessed for each of respondent's seven "first" violations of ORS 279.350(1)); *In the Matter of Labor Ready Northwest, Inc.,* 22 BOLI 245, 283 (2001), *reversed in part, Labor Ready Northwest, Inc. v. Bureau of Labor and Industries,* 188 Or App 346, 71 P3d 559 (2003), *rev den* 336 Or 534, 88 P3d 280 (2004) ($1,500 civil penalty assessed for each of respondent's eight "first" violations of ORS 279.350(1)); *In the Matter of Johnson Builders, Inc.,* 21 BOLI 103, 124 (2000) ($2,000 civil penalty assessed for each of respondent's three "first" violations of ORS 279.350(1)).

penalty to be assessed against a contractor, subcontractor or contracting agency and shall cite those the commissioner finds to be applicable:

"(a) The actions of the contractor, subcontractor or contracting agency in responding to previous violations of statutes and rules;

"(b) Prior violations, if any, of statutes and rules;

"(c) The opportunity and degree of difficulty to comply;

"(d) The magnitude and seriousness of the violation;

"(e) Whether the contractor, subcontractor or contracting agency knew or should have known of the violation.

"(2) It shall be the responsibility of the contractor, subcontractor or contracting agency to provide the commissioner with evidence of any mitigating circumstances set out in section (1) of this rule.

"(3) In arriving at the actual amount of the civil penalty, the commissioner shall consider the amount of the underpayment of wages, if any, in violation of any statute or rule.

"(4) Notwithstanding any other section of this rule, the commissioner shall consider all mitigating circumstances presented by the contractor, subcontractor or contracting agency for the purpose of reducing the amount of the civil penalty to be assessed."

There are several aggravating circumstances in this case.

1. Respondent's prior violations of statutes and rules.

Respondent has committed 18 prior violations of *former* ORS 279.350(1), eight in 1998 on the New Bend Middle School Project, six in 2000 on the Cornelius and Central Projects, and four in 2003 on the Liberty High School Project.

2. Opportunity and degree of difficulty to comply.

About a week after they started work, Rand and Woods visited Respondent's office for the first time to pick up their paychecks. At that time they described the duties they were performing and complained they were underpaid. In response, Barrera telephoned Hicorp and talked to Hicorp's president. As a result of that conversation and her review of BOLI's Prevailing Wage Rate booklet, Barrera concluded that the work being performed by Rand and Woods was in a higher classification than Laborer, Group 5, the classification originally specified by Hicorp, and that Rand and Woods should be paid as Laborers, Group 1. When Barrera told Woods of her conclusion, he disagreed and suggested she investigate. However, Barrera did not visit the job site or take any other action to determine the actual work that Rand and Woods were performing, despite her apparent conclusion that Hicorp had misstated the classification of the work to be performed on the Pro-

ject when Hicorp first contracted for Respondent's services. Furthermore, despite Barrera's conclusion that Rand and Woods should be paid in the higher classification as Laborers, Group 1, there was no evidence that she took any action, at any time during their employment, to see that they were reclassified and paid at the Laborer, Group 1 rate. In sum, Respondent had opportunities to correct their initial error that would not have been difficult to pursue, but failed to take advantage of them.

3. Magnitude and seriousness of Respondent's violations.

Former OAR 839-016-0520(1)(d) required the Commissioner to consider "[t]he magnitude and seriousness of the violation" in determining the amount of a civil penalty. In *former* ORS 279.349, the Legislature set forth four specific purposes for the prevailing wage rate law. The second purpose was "[t]o recognize that local participation in publicly financed construction and family wage income and benefits are essential to the protection of community standards." *Former* ORS 279.349(2). To carry out that purpose, *former* ORS 279.350(1) required that "[t]he hourly rate of wage to be paid by any contractor or subcontractor to workers upon all public works shall not be less than the prevailing rate of wage[.]" This requirement goes to the very heart of the Legislative policy expressed in *former* ORS 279.349(2). As a result, the commissioner considers violations of *former* ORS 279.350(1) to be a serious matter. In determining the magnitude, the forum considers the following facts:

(1) Over a two week period, Respondent initially underpaid its three workers the total amount of $1,529.82;[10]

(2) In making the underpayments, Respondent paid its three workers $27.65 per hour instead of one of four applicable prevailing wage rates that ranged from $29.06 per hour to $40.28 per hour;

(3) Respondent's workers did not receive their back pay until 5-7 weeks after that pay was due.[11]

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[10] The forum calculated this sum by adding the back pay wages Respondent billed to Hicorp on October 29, 2004, to the unpaid wages calculated by Taeubel in his letter of November 17, 2004. *See* Findings of Fact 36, 37, 46 – The Merits, *supra*.

[11] *See* ORS 652.120(1), which provides that "[e]very employer shall establish and maintain a regular payday, at which date all employees shall be paid the wages due and owing to them." Respondent's practice was to pay wages on the same day they were earned. Rand and Woods, who were respectively hired on September 29 and 30, 2004, did not receive their full back pay until sometime after November 19, 2004, the date on which Respondent mailed final back pay wages to Rand, Woods, and Kitterman.

Based on these facts, the forum concludes that Respondent's violations were of moderate magnitude.

B. Mitigating circumstances.

There are two mitigating circumstances. First, Respondent issued partial back pay checks to Rand, Woods, and Kitterman two weeks after their last day of work on the Project. Second, Respondent issued back pay checks to all three workers immediately after BOLI notified Hicorp that Rand, Wood, and Kitterman had been misclassified and underpaid for their work.

C. Amount Of Civil Penalty.

Although mitigating circumstances are present, they are outweighed by the aggravating circumstances, particularly the number of prior violations and Respondent's failure to visit the jobsite to determine the type of work being performed by its workers. In LRNW #1, the Commissioner imposed a $1,500 civil penalty for each of Respondent's eight violations of *former* ORS 279.350(1) on the New Bend Middle School Project. In LRNW #2, the Commissioner imposed a $3,000 civil penalty for each of Respondent's five violations of *former* ORS 279.350(1) on the Cornelius Project and a $5,000 civil penalty for Respondent's violation of *former* ORS 279.350(1) on the Central Project. In LRNW #3, the Commissioner imposed a $5,000 civil penalty for each of Respondent's four violations of *former* ORS 279.350(1) on the Liberty High School Project. In this case, an appropriate assessment is a $5,000 civil penalty for each of Respondent's three violations, for a total of $15,000.

RESPONDENT FAILED TO POST THE PREVAILING WAGE RATE

The Agency alleged that Respondent violated *former* ORS 279.350(4) and *former* OAR 839-016-0033 in that Respondent "intentionally failed or refused to keep the prevailing wage rates for the [Hospital Hill Project] posted in a conspicuous and accessible place in or about the [Hospital Hill Project]." Respondent denied this allegation in its Answer. *Former* ORS 279.350(4) provided:

> "Every contractor or subcontractor engaged on a project for which there is a contract for a public work shall keep the prevailing wage rates for that project posted in a conspicuous and accessible place in or about the project. Contractors and subcontractors shall be furnished copies of these wage rates by the commissioner without charge."

Former OAR 839-016-0033(1) provided:

> "Contractors shall post the prevailing wage rates applicable to the project in a conspicuous place at the site of work. The posting shall be easily accessible to employees working on the project."

The Oregon Court of Appeals has determined that *former* ORS 279.350(4) "requires every con-

tractor and subcontractor engaged in a public project to personally initially post the prevailing wage and to maintain that posting throughout the course of its employees' work on the project." *Labor Ready Northwest*, *Inc. v. Bureau of Labor and Industries*, 188 Or App at 369.

At hearing, the Agency built its case around the testimony of Rand and Woods, both who testified that they never saw the prevailing wage rates posted at the Project and that they never saw anyone from Respondent's business at the Project. In rebuttal, Respondent presented testimony by Casarez and Barrera concerning Casarez's actions with regard to posting the Project and statements made by Hance, Respondent's branch manager at the time, to Casarez and Barrera concerning actions he took to post the Project. Consequently, resolution of this issue rests on the forum's assessment of the credibility of these four witnesses.

The forum has already determined that Rand's and Woods's testimony on this issue was truthful.[12] The forum also concludes, based on the relatively small size of the jobsite, Rand's and Woods's daily presence on the Project, and the existence of only two structures on the jobsite – the concrete reservoir itself and the chain link fence around it – that Rand and Woods would have seen the posted rates, had Respondent posted them "in a conspicuous and accessible place in or about" the Project.

In contrast, the forum has found that Casarez's and Barrera's testimony regarding posting was not believable. There are a number of reasons for this conclusion, all set out in Findings of Fact 58 & 59 – The Merits and in the forum's response to Respondent's Exception 6 at the end of this Opinion. There is no other credible evidence in the record that supports a conclusion that Respondent posted the prevailing wage rates on the Project.

In conclusion, the Agency proved its posting allegation by a preponderance of the evidence through the credible testimony of Rand and Woods. Respondent offered no credible rebuttal evidence, and the forum concludes that Respondent did not post the prevailing wage rates on the Project or keep them posted, thereby committing one violation of *former* ORS 279.350(4) and *former* OAR 839-016-0033. The question of whether Respondent's failure to post the prevailing wage rate was "intentional" is discussed later in this Opinion.

CIVIL PENALTY

A. Aggravating Circumstances

There are several aggravating factors in this case.

1. Respondent's prior violations of statutes and rules.

Respondent committed four prior violations of *former* ORS 279.350(4) on the New Middle

[12] *See* Findings of Fact 56, 57 – The Merits, *supra*.

School, Cornelius, Central, and Liberty High School Projects. *Labor Ready #1, Labor Ready #2, Labor Ready #3.*

2. Opportunity and degree of difficulty to comply.

Respondent had ample opportunity to comply. Respondent's Salem branch office and Respondent's corporate office were aware of Oregon's prevailing wage rate posting requirement. Casarez even followed Respondent's corporate policy by faxing the rate sheet provided by Hicorp to Respondent's corporate headquarters in Tacoma, Washington, on September 29, 2004, the first day that Respondent employed a worker on the Project. However, according to Finnegan, Respondent's corporate prevailing wage rate administrator, Respondent's corporate headquarters did not mail a posting-ready rate sheet to the Salem branch office until October 15, 2004, the last day that Respondent employed workers on the Project. The forum notes that, even if Respondent had timely posted the rate sheet provided by Hicorp, Respondent still would have violated *former* ORS 279.350(4) because it did not contain the prevailing wage rates that applied to Respondent's workers.

No evidence was presented to show that it would have been difficult for Respondent to post. The forum takes judicial notice that Adair Village is not far from Salem. There was a chain link fence around the reservoir at the Project upon which the rates could have been posted. In fact, Adair Village had posted a "No Trespassing" sign on that very fence.

3. Magnitude and seriousness of Respondent's violation.

The requirement that every contractor or subcontractor post the prevailing wage rates for its employees promotes the statutory purpose of assuring compliance by informing employees of the rate of pay they should be receiving. *LRNW #1* at 369. When contractors or subcontractors do not post, this directly undermines the Legislature's intent of ensuring that workers on public works be paid the prevailing wage rate. Consequently, the forum considers failure to post to be a serious matter. In determining the magnitude, the forum considers the following facts:

(1) Over a two week period, Respondent underpaid its three workers the total amount of $1,529.82;

(2) Two of the workers, Rand and Woods, knew they were being underpaid and filed complaints with BOLI that resulted in all three workers receiving their full back pay a little more than one month after their last day of work;

(3) Respondent's corporate office did not provide its Salem office with a posting ready rate sheet until the last day that Rand and Woods worked on the Project, and after Kitterman had already completed his employment with Respondent -- more than two weeks after

Respondent's Salem office provided Respondent's corporate office with the requisite paperwork.

Based on these facts, the forum concludes that Respondent's violations are of moderate magnitude.

4. Respondent knew or should have known of its violation.

The evidence was undisputed that Respondent's corporate and Salem offices knew that Oregon law required Respondent to post the prevailing wage rates on all public works projects to which it dispatched workers, and that both offices knew that Respondent was employing workers on the Project beginning September 29, 2004. Despite this knowledge, Respondent's Salem office did not post and Respondent's corporate office did not provide the means for Respondent's Salem office to timely post. Consequently, the forum concludes that Respondent knew or should have known of its violation.

B. Mitigating Circumstances

Respondent's development of intranet training for its Oregon employees on Oregon prevailing wage rate law and its posting requirements that includes corporate procedures and policies for posting is a mitigating circumstance. However, in this case it was rendered moot by the fact that Respondent's corporate office did not even mail a posting-ready rate sheet to its Salem office until October 15, 2004, 17 days after Casarez faxed it, and the last day that Respondent employed workers on the Project.

C. Amount Of Civil Penalty.

The Agency sought a $5,000 civil penalty for Respondent's single violation of *former* ORS 279.350(4). In LRNW #1, the Commissioner imposed a $2,000 civil penalty for Respondent's first violation of *former* ORS 279.350(4). In LRNW #2, the Commissioner imposed a $4,000 civil penalty for Respondent's second violation and a $5,000 civil penalty for Respondent's third violation of *former* ORS 279.350(4). In LRNW #3, the Commissioner imposed a $5,000 civil penalty for Respondent's fourth violation of *former* ORS 279.350(4). Considering the number of aggravating circumstances and absence of any mitigating circumstances, the forum concludes that $5,000 is an appropriate penalty.

PLACEMENT ON THE LIST OF INELIGIBLES

The Agency seeks to debar[13] Respondent for three years based two separate charges -- that Respondent intentionally failed or refused to pay the applicable prevailing wage rates, and that Respondent intentionally failed or refused to post the prevailing wage rates on the Project. Each charge, if proven, is grounds for

[13] In this Order, "debar" and "debarment" are synonymous with placement on the List of Ineligibles.

debarment. *Former* ORS 279.361(1).

RESPONDENT'S FAILURE TO PAY THE PREVAILING WAGE RATE WAS INTENTIONAL

Former ORS 279.361(1) provided:

> "When the Commissioner of the Bureau of Labor and Industries, in accordance with the provisions of ORS chapter 183, determines that a * * * subcontractor has intentionally failed or refused to pay the prevailing rate of wage to workers employed upon public works * * *, the * * * subcontractor * * * shall be ineligible for a period not to exceed three years from the date of publication of the name of the * * * subcontractor on the ineligible list as provided in this section to receive any contract or subcontract for public works. * * *"

Former ORS 279.348(1) defined the phrase "prevailing rate of wage" as follows:

> "'Prevailing rate of wage' means the rate of hourly wage, including all fringe benefits under subsection (4) of this section, paid in the locality to the majority of workers employed on projects of similar character in the same trade or occupation, as determined by the Commissioner of the Bureau of Labor and Industries. * * *"

The forum has already determined that Respondent failed to pay the prevailing rate of wage as required by *former* ORS 279.350(1). It must now determine whether that failure was "intentional."

The Oregon Court of Appeals has determined that, under *former* ORS 279.361, to "intentionally" fail to pay the prevailing rate of wage "the employer must either consciously choose not to determine the prevailing wage or know the prevailing wage but consciously choose not to pay it." *Labor Ready Northwest*, *Inc. v. Bureau of Labor and Industries*, 188 Or App at 364 ("LRNW #1"). The focus is on what the employer intentionally failed or refused to do, not what the employer intentionally did. *Id.* at 359. The inclusion of the word "intentionally" in *former* ORS 279.361(1) implies a "culpable mental state," indicating that debarment should not be "triggered by merely innocent, or even negligent, failure to pay." *Id. at* 360. This requires an assessment of an employer's state of mind at the time that its employees were not paid the prevailing wage in order to determine whether the employer "intentionally" failed or refused to pay the prevailing wage.

In LRNW #1, Respondent misclassified eight workers and paid them less than the prevailing wage as a result. The forum found that, without calling BOLI, Respondent could not have known the correct prevailing wage for the workers because the classification corresponding to their job duties was published only in

an internal BOLI document. Consequently, Respondent had no reason to believe that it had misclassified and underpaid its workers until a BOLI investigator contacted Respondent after Respondent's workers were no longer employed on the jobsite. The Commissioner concluded that Respondent's underpayment constituted an intentional failure to pay the prevailing wage and issued a Final Order debarring Respondent. The Court of Appeals reversed the Commissioner's determination, holding that Respondent's underpayment was based on a mistake and was therefore not intentional. *Id.* at 364.

This is an unusual case, in that Respondent's three workers performed work that fit into four distinct classifications -- Carpenter 1, Power Equipment Operator II, Cement Mason, and Ironworker -- during the two weeks that Respondent employed them. The evidence is undisputed that, one week into the workers' employment, Respondent believed that it should have been paying its workers at the higher rate for Laborer, Group 1, but there was no evidence that Respondent had contemporaneous knowledge of the correct prevailing wage rates for the classifications of Carpenter 1, Power Equipment Operator II, Cement Mason, and Ironworker, and consciously chose not to pay those rates. However, whether or not Respondent consciously chose not to determine those prevailing wage rates is a different matter. In this case, the forum considers the following factors in making that determination:

> 1. The circumstances of the Project that were known by Respondent's employees;
>
> 2. When Respondent's employees acquired that knowledge;
>
> 3. The action or failure to take action by Respondent's employees in response to that knowledge;
>
> 4. Reason or reasons, if any were given, for the action or failure to take action by Respondent's employees.

The knowledge possessed by, action taken by, and failure to take action by Respondent's employees are imputed to Respondent.

On September 29, 2004, Respondent, through Casarez, learned from Sue Frauendiener, Hicorp's secretary, that the Hospital Hill Project was a prevailing wage rate project. Frauendiener also told Casarez that all power equipment had been removed from the job and that Hicorp's workers "were out there as laborers only." Casarez asked Frauendiener to fax the applicable prevailing wage rate sheet so Casarez could determine the appropriate job classification for Respondent's workers. In response, Frauendiener faxed the rate sheet for Laborer, indicating that Respondent's workers fit into the classification of Laborer, Group 5. Respondent did not visit the job site and relied on Frauendiener's representation to

pay Rand and Woods $27.65 per hour, the prevailing wage rate for Laborer, Group 5, during the first week of their employment.

Rand and Woods first communicated with Respondent's office about a week after they became Respondent's employees, when they came to pick up their paychecks. During their visit, they told Barrera, one of Respondent's customer service representatives, that they were operating power equipment, tying rebar, and building forms. They complained that they had been underpaid. In response, Barrera contacted Hicorp. Barrera's testimony on this matter on direct examination is reprinted below:

> Q: "After [Rand and Woods] were sent out on the job, did they raise questions about the rates they were being paid?
>
> A: "They didn't raise questions until approximately about a week or so after. They would come in once a week to get paid.
>
> Q: "Okay, and based on those questions, did you investigate as to whether or not their rates should be changed?
>
> A: "I did call * * * the actual Hicorp Steel Building [and] spoke to a gentleman there; I believe George was the person, in regards to adjusting the rates due to that they had been providing heavy equipment operation so they had been moving equipment so that's when we decided to change the rates for them because they had been specified only to do general labor.
>
> Q: "Did you also change the Laborer Group rate at that time?
>
> A: "From Laborer, Group 5, to Group 1.
>
> Q: "Okay. And why did you do that?
>
> A: "The Laborer skills within the groups were different from what we were told they were doing.
>
> Q: "And did you ascertain yourself what those new rates should be?
>
> A: "I went through, a little bit through the actual documentation, yes.
>
> Q: "When you say documentation, do you have a prevailing wage rate book there at the branch?
>
> A: "Yes, and also through the rates that the customer [itself] provided for us.
>
> Q: "And did you look at the prevailing wage rate book to try to determine what an appropriate rate would be?
>
> A: "Yes."

Testimony by Barrera and Woods further established that Barrera then told Woods that Hicorp had told her that all power equipment was being taken off the job and that Respondent's employees would be performing general labor only, and Woods responded by telling her this information was not

accurate and she might want to investigate.

Barrera's and Woods's testimony established several points about Respondent's "state of mind" after Barrera's conversations with Rand, Woods, and George at Hicorp. First, Barrera believed that either Woods or Rand had been performing the duties of a power equipment operator on the Project. Second, she believed that they had been misclassified and the duties they were performing fit into the higher paying Laborer, Group 1 classification. Third, she believed Rand and Woods should be paid at the higher Laborer, Group 1 rate. Fourth, she had received information from Rand and Woods that they had been operating power equipment, tying rebar, and building forms on the Project and that they were not performing general labor as Frauendiener had represented. This evidence establishes that Barrera had actual knowledge that Respondent had misclassified and had been underpaying its workers and that she was told by Respondent's workers that they were doing work that was not in the Laborer classification. Armed with this knowledge, Barrera and Respondent failed to take any subsequent action to "investigate" or otherwise verify the actual job duties that Rand, Woods, and Kitterman were performing and continued to pay them as Laborers, Group 5, the lowest classification possible. There is no evidence in the record as to a reason or reasons why Barrera and Respondent failed to take any additional action and no evidence that Barrera and Respondent failed to take any additional action because of a "mistake."[14] Rather, the evidence is that Respondent recklessly disregarded facts and circumstances that would have led a reasonable employer to make a further inquiry to determine if workers it employed upon a public work were being paid correctly. This amounts to a conscious choice on Respondent's part not to determine the prevailing wage and a corresponding intentional failure to pay the prevailing rates of wage to its three workers.

RESPONDENT'S FAILURE TO POST THE PREVAILING WAGE RATES WAS INTENTIONAL

Former ORS 279.361(1) provided:

> "When the Commissioner of the Bureau of Labor and Industries, in accordance with the provisions of ORS chapter 183, determines that a * * * subcontractor has intentionally failed or refused to post the prevailing rates as required by ORS 279.350(4), the * * * subcontractor * * * shall be

[14] The forum does not believe that unquestioning acceptance of a client's word for the type of work Respondent's workers would be performing, after the client had earlier misstated the type of work those same workers would be performing, and after those workers had notified Respondent that they were performing a higher paid classification of work, is the kind of "mistake" contemplated by the Court of Appeals in LRNW #1.

> ineligible for a period not to exceed three years from the date of publication of the name of the * * * subcontractor on the ineligible list as provided in this section to receive any contract or subcontract for public works. * * *"

The forum has already determined that Respondent failed to post the prevailing rates of wage as required by *former* ORS 279.350(4). The only question is whether that failure was "intentional." If so, the Commissioner is required to place Respondent on the List of Ineligibles. Again, the forum focuses on what Respondent failed to do, not what Respondent did.

On June 26, 2003, in a case involving Respondent, the Oregon Court of Appeals held that subcontractors were required to post the prevailing wage rates at all public works on which they employed workers. LRNW #1. On May 5, 2004, the Supreme Court denied review of the same case. *Id.* As a result, at the time Respondent sent workers to the Project, there can be no question that Respondent knew that it was required to post all prevailing wage rate jobs. There is no dispute that Respondent, through Casarez, knew the Project was a prevailing wage rate job on September 29, 2004, the first day Respondent employed a worker on that project, that she knew Oregon law required employers to post, and that she knew Respondent's corporate posting policy. When Casarez faxed the rate sheet to Respondent's corporate office on September 29, 2004, Respondent's corporate office also learned that Respondent's Salem branch office was employing workers on a prevailing wage rate job.

In response, Respondent failed to post any prevailing wage rates at the Project and Respondent's corporate office did not even mail a posting-ready rate sheet to its Salem office until October 15, 2004, the last day Respondent employed workers on the Project. Respondent gave no reason for its failure to post, but instead argued that it did post, an argument that the forum did not believe.

Although Respondent may have had a mistaken belief as to the correct prevailing wage rates for Rand, Woods, and Kitterman, this does not save Respondent from debarment. Unlike LRNW #1, where Respondent had no way of knowing the correct prevailing wage for the workers because the classification corresponding to their job duties was published only in an internal BOLI document, there is no dispute in this case about the classification of work that Rand, Woods, and Kitterman performed, or that the classification could have been determined by observing the workers and reading BOLI's Prevailing Wage Rate booklet. All subcontractors and contractors on prevailing wage rate jobs are accountable for knowing the classifications of work performed by their employees. The fact that Respondent is a temporary em-

ployment agency and has no supervisory workers on the job site does not relieve it of the same obligation. If Respondent had any doubt about the appropriate classifications for its workers, it could have fulfilled its posting obligation by simply posting the entire Prevailing Wage Rate booklet that Barrera testified was in Respondent's office. Under these circumstances, Respondent's failure to take any action whatsoever to post amounts to a conscious and intentional choice not to post the prevailing wage rates as required by *former* ORS 279.350(4).

LENGTH OF DEBARMENT

Former ORS 279.361 provided that debarment shall be for "a period not to exceed three years." Although that statute and the Agency's administrative rules interpreting it do not explicitly authorize the forum to consider mitigating factors in determining the length of a debarment, the commissioner has held that mitigating factors may be considered in determining whether the debarment of a contractor or subcontractor should last less than the maximum three-year period allowed by law. *See In the Matter of Larson Construction Co., Inc.*, 22 BOLI 118, 165 (2001); *In the Matter of Keith Testerman*, 20 BOLI 112, 129 (2000); *In the Matter of Southern Oregon Flagging, Inc*., 18 BOLI 138, 169 (1999); *In the Matter of Intermountain Plastics*, 7 BOLI 142, 160 (1988).[15] Aggravating factors may also be considered. *See, e.g., Testerman* at 129. The aggravating circumstances considered may include those set out in OAR 839-016-0520(1).

Aggravating circumstances in this case include: (1) Respondent's eight prior violations of *former* ORS 279.350(1) on the New Bend Middle School public works project; (2) Respondent's five prior violations of *former* ORS 279.350(1) on the Cornelius Project; (3) Respondent's single prior violation of *former* ORS 279.350(1) on the Central Project; (4) Respondent's four prior violations of *former* ORS 279.350(1) on the Liberty High School Project; and (5) Respondent's four prior violations of *former* ORS 279.350(4) on New Bend Middle School, Cornelius, Central, and Liberty High School Projects.

In mitigation, the forum considers that Respondent: (1) has paid back wages in full to three workers on the Hospital Hill Project; and (2) has created an intranet site where its Oregon employees can review Oregon's posting requirements.

The forum finds that three years is an appropriate period of debarment based on Respondent's intentional failure to pay the prevailing rate of wage to three workers employed on the Hospital Hill Project. Three years is also

[15] *Compare In the Matter of Larson Construction Co., Inc.,* 17 BOLI 54, 76 (1998), where the commissioner held that mitigating factors may not be considered in the "initial determination of whether to debar a subcontractor."

an appropriate period of debarment based on Respondent's intentional failure to post the prevailing wage rates as required by *former* ORS 279.350(4) on the Hospital Hill Project. The forum would impose the same three-year debarment for either violation independently but chooses, in its discretion, to run the two three-year debarment periods concurrently rather than consecutively.

RESPONDENT'S EXCEPTIONS

A. Exceptions 1, 2, & 3.

Respondent excepted to Proposed Findings of Fact 17, 53, and 54 -- The Merits in which the ALJ found that no employees of Respondent visited the jobsite and the Respondent did not post the jobsite. Respondent based its exceptions on the contention that Barrera and Casarez were credible witnesses, and that their testimony that Mark Hance visited and posted the jobsite should be believed. Respondent also contended that Rand's testimony concerning Respondent's failure to post should not be believed because the forum found his testimony unbelievable in other areas. The ALJ's credibility findings are supported by the record, and Rand's testimony was credited on this issue because it was supported by the credible testimony of Woods. Respondent's exceptions are DENIED.

B. Exception 4.

Respondent argues that the forum should include the following Finding of Fact after Proposed Finding of Fact 52 -- The Merits: "[N]one of Respondent's employees, whether at its corporate headquarters, or its branch employees Casarez and Barrera, intended not to post the prevailing wage information at the Adair job site." Whether or not Respondent or any its employees posted or did not post the prevailing wages at the Adair job site is a factual question that is answered in Findings of Fact 53 and 54 -- The Merits. Whether or not this failure was "intended" is a legal question that is appropriately addressed in the Conclusions of Law.[16] Respondent's exception is DENIED.

C. Exception 5.

Respondent excepted to Proposed Finding of Fact 56 -- The Merits in which the ALJ credited Woods' testimony and discredited testimony by Casarez and Barrera on the posting issue. The ALJ's credibility finding is supported by the record. Respondent's exception is DENIED.

D. Exception 6.

Respondent excepted to Proposed Finding of Fact 58 -- The Merits in which the ALJ discredited Casarez's testimony regarding the posting of the Project. Respondent contends that

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[16] *Compare In the Matter of Labor Ready Northwest, Inc.,* 22 BOLI 245 (2001); *In the Matter of Labor Ready Northwest, Inc.,* 27 BOLI 83 (2005) (the "intentionality" of Respondent's failure to post was an issue in both cases, and in both cases "intentionality" is not addressed in the Findings of Fact, but in the Conclusions of Law).

"[t]he forum's credibility finding is unsupported." Respondent advanced several arguments in support of its exception. Respondent's arguments are addressed in this section and Finding of Fact 58 has also been modified to delete one point.

First, Respondent argues that Casarez had little motivation to testify falsely, and if, *arguendo*, there was a failure to post it rests with Mark Hance. The forum did conclude that it was Hance's responsibility to post and that he failed to do so. The forum also notes that Casarez is currently Respondent's branch manager, as well as a longtime employee of Respondent, and infers that Respondent's potential debarment for three years could directly affect her job.

Second, Respondent contends that Casarez's testimony, coupled with Exhibits R-1 and R-2 "conclusively demonstrates the Casarez sent Hi-Corp the rate sheets" before 11:41 and 11:59 on September 29, 2004. The forum disagrees with Respondent's assessment of Casarez's testimony and the two exhibits for the following reasons that are in addition to or expand on the reasoning in Finding of Fact 58 – The Merits:

a) The first step in Respondent's corporate posting policy, which Casarez testified she was aware of on September 29, 2004, is to "[o]btain the current rate sheet from your customer." Respondent suggests that Casarez instead first sent a rate sheet to Hicorp.

b) Casarez testified that R-1 is the rate sheet she received by fax from Sue at Hicorp in response to Casarez's request that Sue send her a rate sheet. Casarez did not testify, as Respondent suggests, that R-1 was the same document Casarez had earlier faxed to Hicorp.

c) R-7, a document that Casarez faxed to Labor Ready corporate and that Casarez testified was "more than likely from our fax," bears a date imprint from Casarez's fax machine.

d) Casarez testified that she faxed R-2, Respondent's "Confirmation of Billing Services," to Hicorp on September 29, 2004, and that Sue Frauendiener signed and dated it and faxed it back to her. That document bears a date imprint from Casarez's fax machine, as well as a date and time from Hicorp's fax machine.

e) Page 2 of R-8 is another document that Casarez testified she faxed to Labor Ready corporate on September 29, 2004. It also bears a date imprint from Casarez's fax machine.

f) R-1, the rate sheet Casarez testified she received from Hicorp, is conspicuously missing a date imprint from Casarez's fax machine.

g) Although Respondent's corporate policy concerning

posting on prevailing wage rate jobs, posted on Respondent's intranet site, requires Respondent's employees to "[k]eep an exact copy of what you posted in the customer file, with a note of what and where it was posted," Respondent was unable to produce a copy of the alleged posting.

Third, Respondent contends that Casarez's note on her fax to Labor Ready corporate stating "[p]lease review this rate and fax us a rate sheet so we could post at job site as soon as possible" is merely an indicator of Casarez's compliance with Respondent's posting policies. Respondent's intranet posting policy states that after its branch office faxes the current rate sheet to corporate, then "Corporate Prevailing Wage Department will review rate sheet, transfer it to Labor Ready Prevailing Wage Department letterhead **and send it back to your branch immediately via certified mail**." (emphasis added) Since Casarez already knew that corporate would be reviewing the rate sheet and immediately returning it for posting, the urgency of her message seems incongruous, especially given Respondent's assertion that it had already satisfied Oregon's posting requirement at that time.

Fourth, Respondent contends that the fact that Woods and Rand did not see Hance on the Project on September 29, 2004, does not undermine Casarez's or Barrera's credibility. Respondent is partially correct. Although the forum still does not believe that Hance posted, it is possible that he may have told Casarez and Barrera that (1) he posted and (2) that no one was there when he posted. However, the forum finds it more likely that Hance did not make these statements to them, which does undermine their credibility.

Fifth, Respondent objects to the forum's statement that Casarez's credibility was affected by the lack of evidence that Casarez had ever taken the initiative to prepare a rate sheet for immediate posting on any other occasion. In response, the forum has deleted this statement in Finding of Fact 58 – The Merits.

Respondent's exception as to the forum's finding on Casarez's credibility is DENIED.

E. <u>Exception 7.</u>

Respondent excepted to Proposed Finding of Fact 59 -- The Merits in which the ALJ discredited Barrera's testimony regarding the posting of the Project. Respondent based its exceptions on the arguments set forth in Exception 6. Respondent's exception is DENIED for the same reasons that Exception 6 was denied.

F. <u>Exception 8.</u>

Respondent objected to Proposed Ultimate Finding of Fact 9 regarding the posting of the prevailing wage rates for the reasons set forth in Exceptions 4, 6 and 7. Respondent's exception is DENIED for reasons stated in the forum's response to Exceptions 4, 6 and 7.

G. Exception 9.

Respondent excepted the forum's third Proposed Conclusion of Law in which the ALJ concluded that Respondent did not post or keep posted the prevailing wage rates posted on the Project. Respondent's exception is DENIED.

H. Exception 10.

Respondent excepted to the ALJ's reliance on the credibility of Rand and Woods and lack of credibility of Casarez and Barrera in the Proposed Opinion in the discussion of Respondent's failure to post. Respondent's exception is DENIED.

I. Exception 11.

Respondent excepts to the forum's failure to include "[l]anguage such as the following:"

> "An additional basis for the forum to conclude that the heightened standard for debarment was not met in this case, was the forum's conclusion that the Bureau has not demonstrated by the preponderance of evidence that any of Labor Ready employees in this matter intentionally failed to post the prevailing wage rate as that standard is set forth in *Labor Ready Northwest*."

The forum has granted the Agency's exception to the ALJ's conclusion that Respondent did not intentionally fail to post. Implicit in that conclusion is an acknowledgment that the Agency proved its allegation by a preponderance of evidence. *See Gallant v. Board of Medical Examiners,* 159 Or App 175, 180 (1999) (ORS 183.450(5), which sets forth the standard of proof in administrative hearings, prescribes the preponderance of evidence standard of proof in contested cases). Respondent's exception is DENIED.

THE AGENCY'S EXCEPTIONS

The Agency excepted to the forum's conclusions that Respondent's failures to pay the prevailing wage rate and failure to post were not "intentional" and did not subject Respondent to debarment. The Agency's exceptions are GRANTED for reasons stated in the Opinion.

ORDER

NOW, THEREFORE, as authorized by *former* ORS 279.361, the Commissioner of the Bureau of Labor and Industries hereby orders that, based on its intentional failure to pay the prevailing rates of wage on the Hospital Hill Project and intentional failure to post the prevailing wage rates as required by *former* ORS 279.350(4) on the Hospital Hill Project, Respondent **Labor Ready Northwest, Inc.** or any firm, corporation, partnership, or association in which it has a financial interest shall be ineligible to receive any contract or subcontract for public works for three years from the date of publication of their names on the list of those ineligible to receive such contracts that is maintained and published by the Commissioner of the Bureau of Labor and Industries. This

period of ineligibility shall be in addition to any other period of ineligibility imposed as a result of a separate proceeding by the Commissioner of the Bureau of Labor and Industries against Respondent.

NOW, THEREFORE, as authorized by *former* ORS 279.370, and as payment of the penalties assessed as a result of its violations of *former* ORS 279.350(1), *former* ORS 279.350(4), *former* OAR 839-016-0033, and *former* OAR 839-016-0035, the Commissioner of the Bureau of Labor and Industries hereby orders **Labor Ready Northwest, Inc.**, to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 1045 State Office Building, 800 NE Oregon Street, Portland, Oregon 97232-2180, the following:

> A certified check payable to the Bureau of Labor and Industries in the amount of TWENTY THOUSAND DOLLARS ($20,000), plus interest at the legal rate on that sum between the date ten days after the issuance of the final order and the date Respondent **Labor Ready Northwest, Inc.** complies with the Final Order.

In the Matter of

BASILIO PIATKOFF, Natalia Piatkoff, and Northwest Resources, Inc.

Case No. 20-06

Final Order of Commissioner Dan Gardner

Issued February 9, 2007

SYNOPSIS

The Commissioner found that Respondents Natalia Piatkoff ("N. Piatkoff") and Northwest Resources, Inc. ("Northwest") failed to provide three workers with written statements of their rights and remedies or to execute written agreements with them, committing three violations each of ORS 658.440(1)(f) and ORS 658.440(1)(g); that Respondents N. Piatkoff and Northwest violated ORS 658.440(1)(d) by subcontracting a tree planting contract to Basilio Piatkoff ("B. Piatkoff") in which subcontracting was a violation of an express provision of that contract; that Respondents N. Piatkoff and Northwest acted as a farm labor contractor without a license, in violation of ORS 658.410; that Respondents violated ORS 658.440(3)(b) by falsely misrepresenting to persons the conditions of a contract; and that N. Piatkoff and B. Piatkoff engaged in a course of misconduct, as defined in OAR 839-015-

0520(m) with persons with whom they conducted business. The Commissioner assessed $2,000 each for the six violations of ORS 658.440(1)(f) & (g); $4,000 for two violations of ORS 658.440(3)(b); and $1,000 for the violation of ORS 658.440(1)(d), for a total of $17,000. The Commissioner further found that the evidence did not support the Agency's allegations `that Respondents violated OAR 839-015-0520(3)(o) by failing to promptly satisfy levied judgments; that Respondents engaged in a sham or subterfuge in their license application as defined in OAR 839-015-0142; or that B. Piatkoff had an ownership interest in Northwest. The Commissioner found that Respondents lacked the requisite character, competence and reliability to be farm labor contractors and denied their license application. ORS 658.405, ORS 658.410, ORS 658.415, ORS 658.417, ORS 658.420, ORS 658.425, ORS 658.435, ORS 658.440, ORS 658.445, ORS 658.453; OAR 839-015-0004, OAR 839-015-0125, OAR 839-015-0135, OAR 839-015-0140 through OAR 839-015-0155, OAR 839-015-0165, OAR 839-015-0310, OAR 839-015-0350, OAR 839-015-0360, OAR 839-015-0505 through OAR 839-015-0520.

The above-entitled case came on regularly for hearing before Alan McCullough, designated as Administrative Law Judge ("ALJ") by Dan Gardner, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on September 25 and 26, 2006, at BOLI's office located at 3865 Wolverine St. NE, E-1, Salem, Oregon. On October 5, 2006, the ALJ reconvened the hearing by telephone for the sole purpose of allowing the Agency to redeliver rebuttal to Respondent's closing argument after the ALJ determined that the Agency's original rebuttal argument had not been recorded.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by case presenter Jeffrey C. Burgess, an employee of the Agency. Respondents Basilio and Natalia Piatkoff were both present throughout the hearing. Respondents Basilio and Natalia Piatkoff and Respondent Northwest Resources, Inc. were represented by Mary Kim Wood, attorney at law.

The Agency called the following witnesses: Ed Sifuentez, a compliance officer with the U. S. Department of Labor (telephonic); Jim Carr, chief forester for Menasha Forest Products (telephonic); Keith Cunningham, former attorney at the Oregon Law Center (telephonic); Stan Wojtyla, BOLI compliance specialist; Basilio and Natalia Piatkoff, Respondents; Javier Garrido Martinez, former Respondent employee; and Salomon Velasco Mendoza, another former Respondent employee. Terry Rogers, an Oregon Certified Court Interpreter, translated the testimony of Javier Garrido Martinez and Salomon

Velasco Mendoza, both Spanish-speaking witnesses.

Respondent called the following witnesses: Basilio and Natalia Piatkoff, Respondents; David Hernandez, a former employee of Basilio Piatkoff; and Jorge Garcia, another former employee of Basilio Piatkoff.

The forum received into evidence:

a) Administrative exhibits X-1 through X-6 (submitted or generated prior to hearing) and X-7 (created after hearing);

b) Agency exhibits A-1 through A-30 (submitted prior to hearing), with the exception of pages 13-19 of A-7, and A-31 (submitted at hearing);

c) Respondent exhibits R-1 through R-9 (submitted prior to hearing); and

d) Exhibits Z-1 and Z-2 (created after hearing).

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

FINDINGS OF FACT – PROCEDURAL

1) On February 23, 2006, the Agency issued a Notice of Intent to Deny Applications and Refuse to Renew Farm/Forest Labor Contractor Licenses and to Assess Civil Penalties in which the Commissioner proposed to deny the applications and refuse to renew Respondents' Farm/Forest Labor Contractor licenses and indorsements for which Respondents submitted applications and to assess civil penalties in the amount of $22,000, based on the following allegations:

> "(1) The Agency has conducted an investigation of Respondents' character, competence and reliability, and determined that Respondents are ineligible for farm/forest labor contractor and employee indorsements pursuant to ORS 658.420 and OAR 839-015-0140(1) and 839-015-0520, and determined further that Respondents are to be assessed civil penalties as set forth below pursuant to ORS 653.256 and 658.453 and OAR 839-015-0505 through 839-015-0512 and 839-020-1010 for the following reasons:
>
> "(a) Respondents failed to furnish workers with statements of worker's rights and remedies (forms WH-151) in violation of ORS 658.440(1)(f) and OAR 839-015-0310, 839-015-0508 and 839-015-0520. 3 Violations. Civil Penalties of $6,000.00;
>
> "(b) Respondents failed to execute written agreements with workers (forms WH-153) in violation of ORS 658.440(1)(g) and OAR 839-015-0360, 839-015-0508 and 839-015-0520. 3 Violations. Civil Penalties of $6,000.00.

"(c) Respondents willfully made or caused to be made false, fraudulent or misleading representations, or published or circulated false, fraudulent or misleading information concerning the terms, conditions or existence of employment, including but not limited to submitting false, fraudulent or misleading forms WH-151 and WH-153 to the Agency in violation of ORS 658.440(3)(b) and OAR 839-015-0508 and 839-015-0520. 2 Violations. Civil Penalties of $4,000.00.

"(d) Respondents failed to comply with the terms and provisions of legal and valid agreements or contracts entered into in Respondents' capacity as farm/forest labor contractors in violation of ORS 658.440(1)(d) OAR 839-015-0508(1)(f) and 839-015-0520, specifically by subcontracting work to BP Reforestation, Inc. in violation of a contract with Menasha Forest Products Corporation. One Violation. Civil Penalty of $2,000.00.

"(e) Respondents acted as farm or forest labor contractors without a license in violation of ORS 658.410, 658.440 and 658.445 and OAR 839-015-0125 and OAR 839-0520(1)(i), specifically by bidding or submitting a contract offer to Menasha Forest Products Corporation on or about November 22, 2004, activity for which an Oregon farm/forest labor contractor license is required;

"(f) Respondents failed to provide workers with adequate rest breaks in violation of ORS 653.256 and 653.261 and OAR 839-020-0050 and OAR 839-020-1010. 4 Violations. Civil Penalties of $4,000.00.

"(g) Upon information and belief, Respondent Basilio Piatkoff and/or Respondent Natalia Piatkoff have an ownership and/or management interest in Respondent Northwest Resources, Inc.

"(h) Respondents' actions as alleged above demonstrate a course of misconduct in relations with workers and others with whom Respondents conduct business. OAR 839-015-0520(3)(m).

"(i) Respondent Basilio Piatkoff has used his wife, Natalia Piatkoff and Northwest Resources, Inc. as his agents and to perpetrate a sham or subterfuge in anticipation of the inability of BP Reforestation, Inc. to renew its farm/forest labor contractor license, within the meaning of OAR 839-015-0142, in violation of ORS 658.440(3)(a).

"(k) Respondent Basilio Piatkoff has failed to pay all debts owed including debts to the Oregon Department of Revenue, and, therefore, Respondents' applications for farm/forest labor contractor licenses should be denied and the Commissioner should refuse to renew Respondents'

current licenses as provided in ORS 658.420 and OAR 839-015-0520(3)(o).

"(2) Each violation set forth above is attended by one or more of the following aggravating circumstances, which have been considered in determining whether to grant or deny Respondents' application to renew farm/forest labor contractor licenses and indorsements: Respondents took insufficient measures to prevent or correct the violations. The violations are serious and of great magnitude. Respondents knew or should have known of the violations.

2) The Notice of Intent instructed Respondents that they were required to make a written request for a contested case hearing within 20 days of the date on which they received the Notice if Respondents wished to exercise their rights to a hearing.

3) Respondents, through counsel, filed an answer and request for hearing on March 27, 2006.

4) The Agency filed a request for hearing with the Hearings Unit on July 24, 2006.

5) On July 25, 2006, the Hearings Unit served Respondents with: a) a Notice of Hearing that set the hearing for September 26, 2006; b) a Summary of Contested Case Rights and Procedures containing the information required by ORS 183.413; c) a complete copy of the Agency's administrative rules regarding the contested case hearing process; and d) a copy of the Notice of Intent.

6) At the outset of the hearing, pursuant to ORS 183.415(7), the ALJ verbally advised the Agency and counsel for Respondent of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

7) At the close of the evidentiary part of the hearing, and prior to closing arguments, the Agency moved to amend its charges to delete paragraph (1)(f) and to change paragraph (1)(i) to read: "(i) Respondents Basilio Piatkoff and Natalia Piatkoff have used Northwest Resources, Inc. as their agent to perpetrate a sham or subterfuge within the meaning of OAR 839-015-0142, in violation of ORS 658.440(3)(a)." Respondents did not object and the ALJ **GRANTED** the Agency's motion.

8) At hearing, the Agency moved to substitute substituted two-sided copies of exhibits A-23, A-24, A-25, and A-26 for the Agency's original exhibits submitted with its case summary because the back page had not been copied on the original exhibits. Respondent did not object and the Agency's motion was **GRANTED**.

9) The ALJ issued a proposed order on November 17, 2006, that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. The Agency filed

exceptions on November 27, 2006. Those exceptions are discussed in the Opinion section of this Final Order.

FINDINGS OF FACT – THE MERITS

1) Respondent Basilio Piatkoff ("B. Piatkoff") was licensed with BOLI as a farm/forest labor contractor as a sole proprietor with the business name of "BP Reforestation" from July 20, 1994, through December 31, 2004.

2) At some point in 2004, B. Piatkoff decided to stop doing business as BP Reforestation and to focus on running a construction business. His wife, Natalia Piatkoff ("N. Piatkoff"), decided to go into the reforestation business. B. Piatkoff, who speaks Spanish and English, agreed to help her in running the new business.

3) On November 18, 2004, Northwest Resources, Inc. ("Northwest") registered as a corporation with the Corporations Division of the Oregon Secretary of State. Northwest listed "Natalia Piatkoff" as its president and registered agent and "Basiho Piatkoff" as its secretary. "Basiho" Piatkoff and Respondent B Piatkoff are the same person.

4) Sometime prior to November 22, 2004, B. Piatkoff, acting on behalf of N. Piatkoff and Northwest, bid on a tree planting contract with Menasha Forest Products Corporation ("Menasha"). B. Piatkoff and BP Reforestation had been awarded tree planting contracts with Menasha in prior years. On November 22, 2004, N. Piatkoff and Northwest entered into "Tree Planting Contract B-2005." The terms of the contract included the following:[1]

> "DATE: November 22, 2004
>
> "MFPC: MENASHA FOREST PRODUCTS CORPORATION
> a Delaware Corporation
> PO Box 588, North Bend,
> Oregon 97459
>
> "CONTRACTOR: NORTHWEST RESOURCES, INC.
> 8135 River Road Northeast,
> Keizer, OR 97303
>
> "* * * * *
>
> "D. Contractor agrees to begin work hereunder on or immediately after **December 15, 2004** (weather permitting, and provided seedlings are delivered to Menasha Forest Products Corporation), and carry on said work in a diligent and workmanlike manner, and complete such work on or before **April 1, 2005.**
>
> "* * * * *
>
> "K. This agreement shall not be assignable in whole or in part, by operation of law or otherwise, except upon written consent of MFPC. Any attempted assignment or

[1] The italicized language represents handwritten signatures by Carr, B. Piatkoff, N. Piatkoff, and Jorge Garcia. The words "Chief Forester," "Contractor Rep," and "Contractor" are all handwritten.

subcontract without written approval by MFPC shall void this agreement.

"**8. FINAL AGREEMENT**

"This document is the entire and complete agreement of the parties. It supersedes and replaces all prior written and oral representations and agreements made or existing between the parties regarding this Agreement. No modification or supplement to this Agreement shall be binding unless it is in writing and signed by MFPC and Contractor.

"**IN WITNESS WHEREOF,** the parties hereto have executed this agreement as of the day and year first above written.

"Menasha Forest Products Corporation
By: *Jim Carr*
Its: *Chief Forester*

"Northwest Resources, Inc.
By: *B. Piatkoff N. Piatkoff*
Its: *Contractor Rep Contractor*

"Contractor Foreman:
#1 *Jorge Garcia*"

5) On December 7, 2004, N. Piatkoff filed her initial application with BOLI for a farm/forest labor contractor's license. She listed 8135 River Rd NE, Keizer, OR 97303 as her home address. She stated that her "business entity" was "Northwest Resources, Inc.," a corporation, that she owned "100%" of Northwest, and that no other persons had a financial interest in Northwest. Question number 26 on the application asked "Will you be using vehicles in the operation of this farm/forest labor contracting business?" The question gave the applicant the option of checking "YES" or "NO" and stated "(If yes, you must complete and submit the enclosed Vehicle Information Sheet with this application.)" N. Piatkoff checked "Yes." Included with her application was BOLI's "Farm Labor Contractor's Vehicle Information Sheet," which asks applicants to list information concerning "vehicles [that] will be used in the operation of the contractor's business or to transport workers." N. Piatkoff listed one vehicle, a 2002 Ford "Econ E350 SUPR," and stated that Northwest was its registered owner and that it would be used to transport workers.

6) On December 7, 2004, B. Piatkoff filed an application with BOLI for a farm/forest labor employee indorsement. He listed his home address as 8135 River Rd N, Keizer, OR 97303. He checked "corporation" as the type of "business entity," and wrote "Northwest Resources, Inc." as the "business name," stating that Natalia Piatkoff, address 8135 River Rd N, Keizer, OR 97303, was the only person with a financial interest in Northwest Resources, Inc. With his application, he included a "Sponsorship Statement For Employee Of F/FLC Contractor" that was signed by Natalia Piatkoff on November 19, 2004.

7) On December 7, 2004, BOLI issued a farm/forest labor

contractor temporary permit to N. Piatkoff and a farm/forest labor contractor temporary permit with employee indorsement to B. Piatkoff. Both permits expired on February 6, 2005. On February 4, 2005, BOLI issued farm/forest labor contractor license #9717 to N. Piatkoff and Northwest Resources, Inc. with an expiration date of 12/31/05. The same day, BOLI issued farm/forest labor contractor license #9718 with employee indorsement to B. Piatkoff, with an expiration date of 12/31/05.

8) Through December 31, 2004, B. Piatkoff was not under investigation by BOLI for any violations of any statutes or administrative rules enforced by BOLI.

9) In 2004, B. Piatkoff applied for a compliance letter with the Oregon Department of Revenue ("DOR"). DOR issued a Certificate of Compliance on November 23, 2004, contingent on a payment plan. B. Piatkoff submitted a DOR Certificate of Compliance with his December 7, 2004, application to BOLI. B. Piatkoff sent in one payment after the issuance of the Certificate of Compliance, but made no additional payments through September 26, 2005. As of September 26, 2005, he had not been in compliance with his DOR payment plan since April 15, 2005, and DOR would not have issued a Certificate of Compliance to B. Piatkoff, he had applied at that time, unless he made payments that brought him into compliance. That debt was subsequently paid in full.

10) On December 15, 2004, N. Piatkoff, for Northwest Resources, Inc., and B. Piatkoff, for BP Reforestation, signed an agreement that contained the following language:[2]

"Sub-Contract Agreement

"This contract made between Northwest Resources, Inc. (general contractor) and BP Reforestation (sub-contractor) on this day of *12-15-04* applies to the following terms.

"1. Sub-contractor will finish job in timely manner as issued by Northwest Resources, Inc. unless it is not possible because of uncontrollable situations by the subcontractor.

"2. If the job is not finished in a timely manner Northwest Resources, Inc. can and will hire other sub-contractors to finish the job resulting in a back charge to the sub-contractor.

"3. Sub-contractor does not have the right to hire other sub-contractors to complete work unless authorized by North Resources, Inc.

"4. Sub contractor will pay insurance coverage/payroll taxes for all its employees.

"5. Sub-contractor is liable for all insurance coverage to the date they work.

---

[2] Italicized words are handwritten.

"6. This is a master contract and voids all other contracts between Northwest Resources, Inc. and sub contractor.

"7. Work is to be performed at the following location(s):

"*Menasha Land as Instructed by Menasha*
Total Trees to plant about 120,000 tree seedlings.
17¢ per tree seedling.

"9. Amount for the value of the work will be:

_____
Dollars and _____cents.

"10. Work shall be started on *12-17-04* and completed by *12-31-04*."

11) Menasha never consented to Northwest entering into a subcontract with BP Reforestation to perform work on Northwest's contract to plant trees for Menasha.

12) On January 3, 2005, the 2002 Ford van listed in N. Piatkoff's application for a farm/forest labor contractor license was driven from Salem towards Coos Bay by Leobarto Velazquez. The van had the words "BP Reforestation" painted on the driver's door. The van had seven passengers – Salomon Velasco Mendoza, Francisco Rios Sanchez, Juan Carlos Rios, Manual Perez, Javier Garrido Martinez, Roberto Alanis Alvarez, and Bejarno Valintin. All occupants of the van had been dispatched to plant trees on Tree Planting Contract B-2005 as employees of Northwest. Francisco Rios Sanchez, Juan Carlos Rios, Manual Perez, and Javier Garrido Martinez had never before worked for BP Reforestation or Northwest Resources, Inc.

13) About 6 a.m., the van went off the road seven miles east of Reedsport. Leobarto Velazquez and Juan Carlos Rios were killed and the other six passengers were taken to Lower Umpqua Hospital.

14) When N. Piatkoff submitted her application for a farm labor contractor license and at the time of the accident, the 2002 van was registered to B. Piatkoff.

15) At all times material herein, Respondents B. Piatkoff and N. Piatkoff had an office next to the house in which they lived. They used that office to conduct business for BP Reforestation and Northwest Resources, Inc.

16) Northwest performed work on the Menasha contract through March 2005. While working on the Menasha contract, Northwest employed at least five workers – Jorge Garcia, Jose Bazan, Salomon Velasco Mendoza, Leobardo Velasquez, and Valintin Bejarno – who had worked on the same contract in December 2004 as employees of BP Reforestation.

17) In January 2005, Ed Sifuentez, a compliance officer for the U.S. Department of Labor ("USDOL"), interviewed B. Piatkoff regarding the van accident. At that time, B. Piatkoff gave him copies of WH-151S forms and WH-153S forms that purportedly

had been furnished to and signed by Juan Carlos Rios, Valentin Bejarano, Manuel Perez R., Leobardo Velazquez, Roberto Alaniz A., Salomon Velasco, Javier Martinez, and Francisco Sanchez Rios.

18) During the interview, B. Piatkoff told Sifuentez that Northwest Resources, Inc. bid on and was awarded the Menasha contract.

19) A WH-151 is a two page, 8½" x 11" form published by BOLI pursuant to ORS 658.440(1)(f)(I), ORS 658.440(1)(g) and OAR 839-015-0310, which require a farm labor contractor to furnish workers with a written statement of rights and remedies in the English language and any other language used by the farm labor contractor to communicate with the workers. BOLI also publishes form WH-151S, which is a Spanish translation of form WH-151. A farm labor contractor's use of form WH-151 or WH-151S (if Spanish is the language used by the farm labor contractor to communicate with the workers), properly executed, satisfies a contractor's obligation under ORS 658.440(1)(f)(I) and OAR 839-015-0310. Both forms contain lines for an "Employee signature," a "Printed Name," and "Date Received."

20) A WH-153 is a two page, 8½" x 11" form published by BOLI pursuant to ORS 658.440(1)(f)(A)-(H), ORS 658.440(1)(g), and OAR 839-015-0360, which require a farm labor contractor to furnish workers with a written statement of the terms and conditions of employment and to execute a written agreement between the worker and the farm labor contractor. BOLI also publishes form WH-153S, which is a Spanish translation of form WH-153. A farm labor contractor's use of form WH-153 or WH-153S (if Spanish is the language used by the farm labor contractor to communicate with the workers), properly executed, satisfies a contractor's obligations under ORS 658.440(1)(f)(A)-(H), ORS 658.440(1)(g), and OAR 839-015-0360. Both forms contain lines for an "Employee" signature, "Printed Name of Employee," an "Employer" signature, and a "Date."

21) Form WH-153 contains the following language: [3]

> "Agreement Between Contractor and Worker (TO BE EXECUTED BY BOTH PARTIES)
>
> The EMPLOYER and the WORKER mutually agree as follows:
>
> **Rate of Pay –** This job will be paid at the following rate (rate per hour or piece-work rate).
>
> _____
> Hourly rate
>
> _____
> Piece-work rate
>
> **Bonus -**☐ There will be no bonuses.

[3] The format has been altered to fit in this order.

☐ Bonuses will be given under the following conditions:_____

Personal Loans - ☐ No personal loans will be given.

☐ Personal loans will be made under the following conditions:
_____
_____

Housing, Health and Day Care Services - ☐ Housing, health and day care services are not provided.

☐ Housing, health and/or day care services are provided under the following conditions. (Only the fair market value of housing may be deducted from wages.)
_____
_____

Employment Conditions

Your employment under this agreement will begin on this date: _____
Your working hours and days are as follows:
_____
_____
Special conditions, if any:
_____
_____

Equipment and Clothing - ☐ Necessary equipment and clothing must be provided by each worker. Housing, health and day care services are not provided. Necessary equipment and clothing for this job is:_____

☐ Necessary equipment and clothing may be purchased or borrowed from the employer. The prices and/or conditions for obtaining equipment and clothing are as follows:
_____
_____
_____

Labor Dispute - ☐ There is no labor dispute at the work site.

☐ There is a labor dispute at the work site.

Owner of Operations – For this job, the owner of the land or operation is:

Name and address:_____
_____
_____
_____

The parties agree that worker rights and remedies enumerated on Form WH-151, Rights of Workers, are incorporated in this agreement by reference, and a copy thereof is attached hereto.

☐ Other working conditions:
_____
_____

The parties further agree that this contract includes the provisions of the Service Contract Act (41 U.S.C. § 351-401), if applicable.

Signatures of parties:

_____
Employer **Employee**

_____
Date Printed Name of Employee"

22) The WH-153S contains the following language under the

paragraph entitled "Employment Conditions:

> "Condiciones de empleo
>
> Bajo este contrato el trabajo comenzar á el (fecha) _____ y terminará aproximademente el (fecha):
>
> _____
>
> Sus horas y días de trabajo son:
>
> _____
>
> Condiciones especiales (si las hay):_____"

This language is translated as:

> "Conditions of Employment
>
> Under this contract the job will begin on (date)_____and will end on about (date):
>
> _____
>
> Your work days and hours are:
>
> _____
>
> Special conditions (if any):_____
> _____"

23) The WH-151S and WH-153 forms that B. Piatkoff gave to Sifuentez were reduced so that all four pages of the two forms were printed on one side of an 8½" x 11" sheet of paper.

24) On February 8, 2005, Enrique Hidalgo, a public service representative employed in BOLI's Wage and Hour Division, visited the office of BP Reforestation and Northwest Resources, Inc. and spoke with N. Piatkoff. Hidalgo asked her to provide copies of Northwest Resources, Inc.'s contracts with Menasha, as well as the WH-151 and WH-153 forms for all employees who worked or were currently working on the contract.

25) On February 10, 2005, B. Piatkoff and N. Piatkoff visited Hidalgo at BOLI's Salem office. The Piatkoffs brought a copy of a subcontract between Northwest Resources, Inc. and BP Reforestation, but N. Piatkoff told Hidalgo that she forgot a copy of the contract with Menasha. The Piatkoffs gave Hidalgo copies of WH-151S and WH-153S forms that had been purportedly furnished to and signed by Heraclio Miranda Perez, Martin Ochoat, Jorge Garcia, Jaime Garcia, Valentin Bejarano, Manuel Perez R., Francisco Sanchez Rios, Javier Gonzalez, Juan C. Saldana, Leobardo Velazquez, Salomon Velasco, Hector Alvarez, David Arreguin Mereno, Gonzalo Garcia, Efren Garcia, Marton Garcia, Eugenio Gonzalez, Raul Perez R., Juventino Gonzales Reyes, and Javier Martinez.

26) The WH-151S and WH-153S forms that the Piatkoffs gave to Hidalgo were reduced so that all four pages of the two forms were printed on one side of an 8½" x 11" sheet of paper.

27) On August 11, 2005, Wojtyla sent a letter to N. Piatkoff and Northwest Resources, Inc., that stated:

> "Pursuant to ORS 651.050, 651.120, and 658.407 the Bureau of Labor and Industries has the authority to investigate

compliance of wage and hour and farm labor contractor laws.

"Please send the original WH-151's (Rights of Workers) and WH-153's (Agreement between Contractor and Worker) for Javier Garrido Martinez and Roberto Alaniz Alvarez. Both men were involved in the vehicle accident on 01-03-05.

"If you wish you can physically bring in the original and get a receipt or simply send by mail the original forms.

"Also, please send a copy of the contract your company had with Menasha Corporation during the time of the accident.

"Thank you for your cooperation.

"If you have any questions, please feel free to call me."

28) In response to Wojtyla's request, Respondents provided copies of WH-151S forms and WH-153S forms that had been purportedly furnished to and signed by Juan Carlos Rios, Valentin Bejarano, Manuel Perez R., Leobardo Velazquez, Roberto Alaniz A., Salomon Velasco, Javier Martinez, and Francisco Sanchez Rios. The WH-151S and WH-153 forms that Respondents gave to Wojtyla were reduced so that all four pages of the two forms were printed on one side of an 8½" x 11" sheet of paper.

29) Wojtyla never received any original WH-151 or WH-153 forms from Respondents in response to his August 11, 2005, request, and Respondents did not provide Wojtyla with a copy of the contract with Menasha.

30) On August 12, 2005, Wojtyla sent a second letter to Northwest Resources, Inc., to N. Piatkoff's attention, that stated:

"When you and Basilio Paitkoff [sic] met with Enrique Hidalgo on 02-08-05 you left with him some WH-151's [sic] (Worker Rights) and WH-153's [sic] (Agreement between Contractor and Worker). He understood these to be the remainder of the crew that worked on or around 01-03-05.

"In reviewing the records I am unable to find the afore mentioned [sic] forms for the following individuals: Martin Maldonado, Hector Olivera, Ezequiel Gonzalez, Ruben Gonzalez, Jorge Villasenor Medrano, Miguel Lopez Martinez, Manuel Mejia Eusebio, Olayo Rojas Martin, Eloy Sandoval Lascares, and Jorge Villa.

"Please submit, by 08-26-05, the WH-151's [sic] and WH-153's [sic] for the above mentioned individuals.

"The names mentioned are identical to how they are identified in your 01-01-05 to 01-31-05 certified payroll report.

"If you have any questions, please feel free to call me."

31) In response, Respondents sent 12 WH-151S and WH-153S forms to Wojtyla that had been purportedly furnished to and signed by Martin Maldonado,

Ezquiel Gonzalez, Ruben Gonzalez, Jorge Villasenor, Miguel Lopez Martinez, Manuel Mejia, Martin Olayo Rojas, Sundoval Luscarez Eloy, Jorge Villa R., Hector Alvarez, Roberto Alaniz, and Javier Martinez. The WH-151S and WH-153S forms that Respondents provided were reduced so that all four pages of the two forms were printed on one side of an 8½" x 11" sheet of paper.

32) The reduced size print on the WH-151S and WH-153S forms Respondents gave to Sifuentez, Hidalgo, and Wojtyla is difficult to read without a magnifying glass and substantial portions of the print are completely illegible.

33) In December 2004 and January 2005, Respondents furnished WH-151S and WH-153S forms to workers in the same "four on one" reduced format.

34) None of the WH-153S forms provided by Respondents provided the name and address of Menasha, the owner of the operations where Respondents' workers would be working. Instead, Respondent wrote either (1) "BP Reforestation, 8135 River Rd N., Keizer, OR 97303, fax (503)390-1587, (503)580-8302," (2) "NWR," (3) "NWR, 8135 River Rd N., Keizer, OR 97303, fax (503)390-1587, (503)580-8302," (4) "NWR, 8135 River Rd, Keizer, OR 97303," or (5) "Northwest Resources, Inc., 8135 River Rd N., Keizer, OR 97303, fax (503)390-1587, (503)580-8302" in the section of the WH-153S that asked for the name and address of the owner of the land or operation for the job to be performed."

35) None of the WH-153S forms that Respondents gave to Sifuentez and Hidalgo state the date that the recipient worker's employment would begin.

36) Many of the WH-153S forms provided by Respondents are missing an employer's signature and the employee's printed name. Many of the WH-151S forms provided by Respondents are missing the employee's printed name and are undated.

37) The WH-151S and WH-153S forms that B. Piatkoff gave to Sifuentez that were purportedly furnished to and signed by Juan Carlos Rios were actually signed, at B. Piatkoff's direction, by family members of Juan Carlos Rios after he died in the van accident.

38) Javier Martinez had never met B. Piatkoff before the afternoon of January 3, 2005, when B. Piatkoff drove to Coos Bay after the accident, picked up Martinez, Salomon Velasco, and one or two other workers and drove them back to Salem.

39) Respondents provided three different "four on one" WH-151S and WH-153S forms with Javier Martinez's name on them. The first, given to Sifuentez in January 2005, has nothing written in the section of the WH-153S entitled "Condiciones de empleo;" has the name "BP Reforestation" handwritten under the section entitled "Dueño de la propriedad;" bears B. Piatkoff's signature; and

has a handwritten date of "1-2-05." The second, given to Hidalgo in February 2005, has "Plantor Penos" handwritten in the section entitled "Condiciones de empleo;" the name "BP Reforestation" handwritten under the section entitled "Dueño de la propriedad;" bears B. Piatkoff's signature; and has a handwritten date of "12-29-04." The third, given to Wojtyla in August 2005, has handwritten dates of "1-2-05" and "3-20-05" but nothing else handwritten in the section entitled "Condiciones de empleo;" has the name "NWR" handwritten under the section entitled "Dueño de la propriedad;" bears N. Piatkoff's signature; and is dated "1-2-05."

40) Javier Martinez's signature does not match the signature of "Javier Martinez" on any of the three WH-151S's and WH-153S's provided by Respondents.

41) Javier Martinez signed some employment related forms for Respondents after the van accident on January 3, 2005. Respondents did not give a WH-151S or WH-153S to Martinez and Martinez did not sign the any of the WH-151S or WH-153S forms given to the Agency or the US-DOL by Respondents.

42) Respondents provided three different "four on one" WH-151S and WH-153S forms with the name of "Roberto Alaniz A" on them. The first, given to Sifuentez in January 2005, has nothing written in the section of the WH-153S entitled "Condiciones de empleo;" the name "BP Reforestation" handwritten under the section entitled "Dueño de la propriedad;" bears B. Piatkoff's signature and the signature "Roberto Alaniz A;" and has a handwritten date that appears to be "12-17-04" and looks as though it was handwritten over another date. There is no writing on the WH-151S or WH-153S in the places provided for the employee to print his name. The second, given to Hidalgo in February 2005, has a handwritten date of "12-31-04" handwritten in the section entitled "Condiciones de empleo;" the name "BP Reforestation" handwritten under the section entitled "Dueño de la propriedad;" bears B. Piatkoff's signature and the signature "Roberto Alaniz A;" and has a handwritten date that appears to be "12-17-04" that has been handwritten over another date. The third, given to Wojtyla in August 2005, has handwritten dates of "1-2-05" and "3-20-05" but nothing else handwritten in the section entitled "Condiciones de empleo;" the name "NWR" handwritten under the section entitled "Dueño de la propriedad;" bears N. Piatkoff's signature; and has the handwritten date of "1-2-05."

43) Roberto Alanis's signature does not match the signature of "Roberto Alaniz A" on any of the three WH-151S's and WH-153S's provided by Respondents. He spells and signs "Alanis" with an "s," not a "z."

44) Roberto Alanis worked for BP Reforestation on the Menasha contract in December 2004. Toward the end of December 2004, after working several days

on the Menasha contract, Leobardo Velasquez gave him some employment-related forms at the motel where BP Reforestation's crew was staying while working on the Menasha contract. He was not given and did not sign a WH-151S or WH-153S related to his work on that contract, either while he was employed by B. Piatkoff and BP Reforestation in December 2004 or in relationship to his prospective employment[4] with N. Piatkoff and Northwest. He did not sign any of the WH-151S or WH-153S forms given to the Agency or the U.S. Department of Labor by Respondents.

45) On January 3, 2006, BOLI sent a letter to N. Piatkoff and B. Piatkoff stating:

> "We are in receipt of your renewal applications for a farm labor license. However, because an investigation is currently being conducted relating to your farm labor contracting operations, a license is not being issued at this time.
>
> "Pursuant to ORS 183.430(1), your renewal license will not be deemed to expire until the Bureau has issued a final order granting or denying the renewal."

46) Sifuentez, Carr, Cunningham, Wojtyla, Garcia, and Hernandez were credible witnesses.

47) Javier Martinez testified that he never received or signed the WH-151S and WH-153 forms provided by Respondents and the forum believed his testimony for several reasons. First, he credibly testified that he never met B. Piatkoff until January 3, 2005. Second, Respondents provided three different sets of forms purporting to bear his signature, all dated prior to January 3, 2005. Third, his printed name on the forms does not match his handwriting exemplar. Fourth, the testimony of B. Piatkoff and N. Piatkoff regarding the creation of the WH-151S and WH-153S forms provided to the Agency was not reliable. The forum has credited Martinez's testimony concerning the WH-151S and WH-153S forms purporting to contain his signature in its entirety.

48) Salomon Velasco Mendoza denied signing an affidavit that was provided to the Agency by his personal attorney and offered and accepted as evidence and denied that at least one of the statements in the affidavit was true. He did acknowledge signing an affidavit in English that was written by his attorney and was translated to him. He further denied signing the WH-151S and WH-153S forms purporting to bear his signature. Because of the confusion regarding the affidavit,

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[4] Although Alvarez was recruited and hired by Northwest, he was not able to actually perform any reforestation activities for Northwest, presumably because of the injuries he suffered in the January 3, 2005, van accident while he was on the way to his first day of work for Northwest, his new employer.

the forum has not relied on Mendoza's testimony.

49) Natalia Piatkoff was not a credible witness for several reasons. First, her testimony was evasive on the key issue of why she didn't provide the Agency with originals of WH-151S and WH-153S forms.[5] Second, her de-

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[5] The following testimony is an example of her evasiveness.

Q. "What happened to the originals? [WH-151s and WH-153s]

A. "Some might have been given to them; some I kept. There was a lot of confusion at that time about what I had is what I gave to, I forgot his name.

Q. "Enrique? Stan?

A. "Yeah.

Q. "Stan or Enrique?

A. "The last time I gave information was to Stan.

Q. "Okay.

A. "I remember his name. Enrique or Ramirez, I'm not sure which one; I remember him coming to the house but I can't remember which one he was.

"* * * * *

Q. "What happened to the full size copies or originals?

A. "Well, that's what I was trying to explain. We took the full size copies and shrunk them down and that was the original because I didn't know you weren't able to do that. So I thought it would be fine to do that to save on paperwork.

"* * * * *

Q. "So are you saying that the originals are lost or destroyed?

A. "I'm saying what you're looking at was the original ones. We didn't have any that were made on 8½ x 11.

Q. "The ones the employees signed were on this four on one?

A. "Yes.

"* * * * *

Q. "If what you're saying is correct, there are originals someplace, right, that have the original signatures?

A. "We should have them.

Q. "You should have them?

A. "Yes.

Q. "Why have you not provided them in response to the request for originals?

A. "I thought I did provide all the information they requested.

Q. "Mr. Wojtyla sent you a letter, it's been marked as Exhibit 14?

A. "14?

Q. "Did you receive a copy of this letter?

A. "I remember something.

Q. "Okay. And this second paragraph says 'please send the original WH-151 and WH-153s?

A. "Umhum.

Q. "But you didn't, did you?

A. "I gave what I had on hand and, as far as I can remember, I thought I gave them everything. Whatever information was asked of me I either faxed or brought in.

Q. "So you're saying that you gave the originals to Mr. Wojtyla?

meanor demonstrated a casual attitude towards the proceedings – during much of her testimony on direct examination by the Agency she was chewing bubble gum, blowing bubbles, and audibly popping them. Third, she answered some questions in a cute manner that seemed deliberately contrived in an attempt to deceive the forum. Fourth, she stated on her farm labor contractor application that the 2002 van that was subsequently wrecked was registered to Northwest, when it was in fact registered to B. Piatkoff. Given that N. Piatkoff was the corporate president of Northwest, a corporation she had created just prior to the time she filed her farm labor contractor application, the forum finds it unbelievable that she would not have been aware of Northwest's corporate assets at the time of filing her farm labor contractor application. The forum has only credited her testimony when it was uncontested or supported by other credible evidence in the record.

50) Basilio Piatkoff admitted that, after the death of Juan Carlos Rios, he had the Rios's family sign and date Rios's name to a WH-151S and WH-153S. In an attempt to complete the deception, B. Piatkoff himself then signed the WH-153S. Subsequently, Respondents Piatkoff attempted to pass these off to BOLI and the U.S. Department of Labor as documents bearing the actual signature of Juan Carlos Rios. Based on this intentional deception, with one exception, the forum has only credited B. Piatkoff's testimony when it was uncontested or supported by other credible evidence in the record. That exception is B. Piatkoff's testimony that his debt to DOR was satisfied in early fall of 2005. The forum believes that testimony because the Agency presented no evidence that B. Piatkoff was out of compliance with DOR after September 26, 2005, and should have been able to do so, had B. Piatkoff been out of compliance after that date, by the same means – obtaining a statement from a DOR representative -- that it established that B. Piatkoff was out of compliance from April through September 26, 2005.

ULTIMATE FINDINGS OF FACT

1) At all times material, B. Piatkoff and N. Piatkoff were husband and wife and lived in the same residence.

2) B. Piatkoff was licensed with BOLI as a farm/forest labor contractor as a sole proprietor with the business name of "BP Reforestation" from July 20, 1994, through December 31, 2004.

3) Prior to November 22, 2004, B. Piatkoff bid on a tree planting contract with Menasha Forest Products Corporation on behalf of Northwest Resources, Inc., a corporation whose president and sole owner was N. Piatkoff. On November 22, 2004, Northwest signed a tree planting

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A. "I don't remember, but if it was requested, I probably did. It's been a long time."

contract with Menasha. The contract included a prohibition against subcontracting without the prior approval of Menasha.

4) On December 7, 2004, N. Piatkoff filed an application with BOLI for a new farm/forest labor contractor's license. Her application included statements that her "business entity" was "Northwest Resources, Inc.," a corporation, and that she owned "100%" of Northwest.

5) On December 7, 2004, B. Piatkoff filed an application with BOLI for a farm/forest labor employee indorsement.

6) On December 7, 2004, BOLI issued a farm/forest labor contractor temporary permit to N. Piatkoff and a farm/forest labor contractor temporary permit with employee indorsement to B. Piatkoff. On February 4, 2005, BOLI issued farm/forest labor contractor licenses to N. Piatkoff and Northwest Resources, Inc. with an expiration date of 12/31/05, and a farm/forest labor contractor license with employee indorsement to B. Piatkoff, with an expiration date of 12/31/05.

7) Through December 31, 2004, B. Piatkoff was not under investigation by BOLI for any violations of any statutes or administrative rules enforced by BOLI and was in compliance with the Oregon Department of Revenue, contingent on meeting a payment plan. B. Piatkoff was not in compliance with the payment plan for approximately five months in 2005.

8) On December 15, 2004, Northwest and B. Piatkoff entered into a subcontract for BP Reforestation to perform tree planting work for Northwest between 12-17-04 and 12-31-04 on the Menasha contract.

9) Menasha did not consent to Northwest entering into a subcontract with BP Reforestation to perform work on Northwest's contract to plant trees for Menasha.

10) At all times material herein, Respondents B. Piatkoff and N. Piatkoff conducted business out of the same office next to the house in which they lived.

11) At all times material, N. Piatkoff owned 100% of Northwest and relied on B. Piatkoff to help her manage Northwest's reforestation activities.

12) Juan Carlos Rios, Robert Alanis Alvarez, and Javier Garrido Martinez were all hired by Northwest to plant trees on the Menasha contract. Respondents did not give WH-151S or WH-153S forms to them.

13) B. Piatkoff and N. Piatkoff gave a number of WH-151S and WH-153 forms to Ed Sifuentez, USDOL compliance officer, and Enrique Hidalgo and Stan Wojtyla, BOLI compliance specialists, in response to their requests for those documents. These forms included forms purportedly given to and signed by Juan Carlos Rios, Robert Alanis Alvarez, and Javier Garrido Martinez. Juan Carlos Rios, Robert Alanis Alvarez, and Javier Garrido

Martinez did not sign or receive the forms.

14) The WH-151S and WH-153S forms that Respondents provided to their workers were reduced in size so as to be entirely illegible or only legible with the aid of a magnifying glass.

15) All of the WH-153S forms provided by Respondents stated that Respondents owned the land or operation where Respondents' workers would be planting trees.

CONCLUSIONS OF LAW

1) The Commissioner of the Oregon Bureau of Labor and Industries has jurisdiction over the subject matter and of the Respondents herein. ORS 658.405 to 658.503 and ORS 653.305 to 653.370.

2) N. Piatkoff and Northwest Resources, Inc. ("Northwest") violated ORS 658.410 and OAR 839-015-0125 by bidding on a reforestation contract with Menasha Forest Products Corporation, through B. Piatkoff, prior to December 7, 2004.

3) Respondents N. Piatkoff and Northwest committed three violations of ORS 658.440(1)(f) and OAR 839-015-0310 by failing to furnish statements of worker's rights and remedies to Juan Carlos Rios, Robert Alanis Alvarez, and Javier Garrido Martinez. Respondent B. Piatkoff committed one violation of ORS 658.440(1)(f) and OAR 839-015-0310 by failing to furnish statements of worker's rights and remedies to Robert Alanis Alvarez.

4) Respondents N. Piatkoff and Northwest committed three violations of ORS 658.440(1)(g) and OAR 839-015-0360 by failing to execute written agreements with Juan Carlos Rios, Robert Alanis Alvarez, and Javier Garrido Martinez. Respondent B. Piatkoff committed one violation of ORS 658.440(1)(g) and OAR 839-015-0360 by failing to execute a written agreement with Robert Alanis Alvarez.

5) Respondents N. Piatkoff and Northwest violated ORS 658.440(3)(b) by falsely representing to their workers and USDOL and Agency representatives that Respondents owned the land or operation where Respondents' workers would be planting trees.

6) Respondents N. Piatkoff and Northwest violated ORS 658.440(1)(b) by subcontracting work to BP Reforestation in violation of a legal and valid contract with Menasha Forest Products Corporation that was entered into in their capacity as a farm labor contractor.

7) Under the facts and circumstances of this record, and according to the applicable law, the Commissioner of the Bureau of Labor and Industries is authorized to assess civil penalties against Respondents. ORS 658.453(1)(c) and (e).

8) Northwest's and N. Piatkoff's violations of ORS 658.410, 658.440(1)(f), ORS 658.440(1)(g),

OAR 839-015-125, OAR 839-015-310, and OAR 839-015-360, their misconduct under OAR 839-015-0520(3)(o), and willful violation of the subcontracting provision of the Menasha contract demonstrate that their character, competence, and reliability makes them unfit to act as farm labor contractors. B. Piatkoff's violations of ORS 658.440(1)(f), ORS 658.440(1)(g), OAR 839-015-0310, and OAR 839-015-0360, his misconduct under OAR 839-015-0520(3)(o), his willful violation of the subcontracting provision of the Menasha contract, and his untimeliness in paying his debt to DOR, demonstrate that his character, competence, and reliability makes him unfit to act as farm labor contractor.

OPINION

RESPONDENTS FAILED TO PROVIDE WRITTEN STATEMENTS OF WORKER'S RIGHTS AND REMEDIES (WH-151S) AND TO EXECUTE WRITTEN AGREEMENTS (WH-153S)

The Agency alleged that "Respondents" committed three violations of ORS 658.440(1)(f) and OAR 839-015-0310 by failing to provide a written statement of the worker's rights and remedies to three workers -- Juan Carlos Rios, Robert Alanis Alvarez, and Javier Garrido Martinez. The Agency further alleged that Respondents failed to execute written agreements with the same three workers in violation of ORS 658.440(1)(g) and OAR 839-015-0360.

ORS 658.440(1)(f) and (g) provide:

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

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

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

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

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

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

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

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

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

employed by the farm labor contractor.

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

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

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

OAR 839-015-0310 provides:

"(1) Every Farm and Forest Labor Contractor must furnish each worker with a written statement of the worker's rights and remedies under the Worker's Compensation Law, the Farm and Forest Labor Contractor Law, and Federal Service Contracts Act, The Federal and Oregon Minimum Wage Laws, Oregon Wage Collection Laws, Unemployment Compensation Laws, and Civil Rights laws. The form must be written in English and in the language used by the contractor to communicate with the workers.

"(2) The form must be given to the workers at the time they are hired, recruited or solicited by the contractor or at the time they are supplied to another by the contractor, whichever occurs first.

"(3) The Commissioner has prepared Form WH-151 for use by contractors in complying with this rule. The form is in English and Spanish and is available at any office of the Bureau of Labor and Industries."

OAR 839-015-0360 provides:

"(1) Farm and forest labor contractors are required to file information relating to work agreements between the farm and forest labor contractors and their workers with the bureau.

"(2) The commissioner has developed Form WH-153 that, in conjunction with Form WH-151, Statement of Workers Rights and Remedies, may be used to comply with this rule. Farm and forest labor contractors may use any form for filing the information so long as it contains all the elements of Form WH-153 and Form WH-151.

"(3) Farm and forest labor contractors must file the form or forms used to comply with this

rule with the bureau at the same time that the contractors apply for a license renewal.

"(4) Farm and forest labor contractors are required to furnish their workers with a written statement disclosing the terms and conditions of employment, including all the elements contained in Form WH-151 and if they employ workers, to execute a written agreement with their workers prior to the starting of work. The written agreement must provide for all the elements contained in Form WH-153. A copy of the agreement and the disclosure statement must be furnished to the workers in English and in any other language used to communicate with the workers. The disclosing statement must be provided to the workers at the time they are hired, recruited or solicited or at the time they are supplied to another by that contractor, whichever occurs first. A copy of the agreement must be furnished to workers prior to the workers starting work.

There is no dispute that the three workers were hired by Respondent Northwest to work on the Menasha contract, that Alvarez was employed by B. Piatkoff on the same contract before he became Northwest's employee, and that Rios, Martinez, and Alvarez spoke only Spanish. Consequently, Respondents were respectively obligated to provide Rios, Martinez, and Alvarez with WH-151S and WH-153S forms[6] at the time they were hired, recruited, or solicited.

In response to the Agency's request for original WH-151 and WH-153 forms, Respondents gave the Agency copies of a number of reduced WH-151S and WH-153S forms that were purportedly given to the workers named on the forms.

One of the forms bears the names of "Juan Carlos R" and "Jauan Carlos" and is signed by B. Piatkoff. At hearing, B. Piatkoff admitted that he asked Rios's family to sign Rios's name to the forms after Rios's death. The forum infers from this admission that Rios, who died on the way to his first day of work for Northwest, was never given a WH-151S or WH-153S.

Three of the forms have Javier Martinez's name and purported signature on them. One is dated December 29, 2004, and the other two are dated January 2, 2005. One of the two dated January 2, 2005, is signed by N. Piatkoff, and the other is signed by the signature of B. Piatkoff; one has the name of "BP Reforestation" written on it and other has "NWR" written on it. The information written on the three WH-153S forms in the section entitled "Condiciones de empleo" also differs in each form – one has nothing written on it, the second bears the

[6] The WH-151S and WH-153S forms are the WH-151 and WH-153 forms translated into Spanish.

date "12-31-04" and the words "Plantor Penos," and the third contains the dates "1-2-05" and "3-20-05," but nothing else.

Another three forms bear the name of "Robert Alaniz." B. Piatkoff employed Alanis on the Menasha contract from December 17-31, 2004, and Northwest employed Alanis on the Menasha contract beginning January 3, 2005. The first form has the name "BP Reforestation" handwritten on it with B. Piatkoff's signature; the signature "Roberto Alaniz A;" and a handwritten date that appears to be "12-17-04" and looks as though it was handwritten over another date. The second also has the name "BP Reforestation" handwritten on it with B. Piatkoff's signature, the signature "Roberto Alaniz A;" and a handwritten date of that appears to be "12-17-04" that has been handwritten over another date. The third has the name "NWR" handwritten on it and is signed by N. Piatkoff and dated "1-2-05."

The Agency provided credible testimony by Martinez that he never met B. Piatkoff before January 3, 2005, that Respondents never gave him WH-151S or WH-153S forms, and that he did not sign the forms provided by Respondents. The Agency provided credible testimony by Wojtyla that included a handwriting exemplar from Roberto Alanis Alvarez and established that Alvarez signed his name as "Alanis," not "Alaniz." This evidence is not overcome by the fact that Alanis's Oregon Identification Card spells his name as "Alaniz" for the reason that Alanis did not print the card and the information that Alanis presumably provided to obtain his card is not in the record to show how Alanis wrote his name. The Agency also provided an uncontested affidavit from Alanis stating that he worked for B. Piatkoff on the Menasha contract in December 2004 and that he did not sign any of the WH-151S or WH-153S forms provided to the Agency by Respondents. The Agency also established that it twice requested the **original** WH-151s and WH-153s and Respondents failed to provide them, a failure that Respondents did not explain at hearing.

In conclusion, the forum concludes that Respondents Northwest and N. Piatkoff never provided WH-151S or WH-153S forms to Juan Carlos Rios, Robert Alanis Alvarez, and Javier Garrido Martinez, constituting three violations of ORS 658.440(1)(f) and three violations of ORS 658.440(1)(g), and Respondent B. Piatkoff never provided WH-151S or WH-153S forms to Robert Alanis Alvarez while Alvarez worked for B. Piatkoff on the Menasha contract in December 2004, constituting one violation of ORS 658.440(1)(f) and one violation of ORS 658.440(1)(g).

CIVIL PENALTIES

ORS 658.453 and OAR 839-015-0508(g) & (h) authorize the Commissioner to assess civil penalties of up to $2,000 for each violation of ORS 658.440(1)(f) & (1)(g). In determining appropriate

civil penalties, the forum considers aggravating and mitigating circumstances. *In the Matter of Rodrigo Ayala Ochoa, revised final order on reconsideration,* 25 BOLI 12, 51 (2003), *affirmed without opinion, Ochoa v. Bureau of Labor and Industries,* 196 Or App 639, (2004). Aggravating and mitigating circumstances include:

> "(a) The history of the contractor or other person in taking all necessary measures to prevent or correct violations of statutes or rules;
>
> "(b) Prior violations, if any, of statutes or rules;
>
> "(c) The magnitude and seriousness of the violation;
>
> "(d) Whether the contractor or other person knew or should have known of the violation."

OAR 839-015-0510(1); *In the Matter of Tomas Benitez,* 19 BOLI 142, 159 (2000). It is the responsibility of the contractor or other person to provide the commissioner any mitigating evidence concerning the amount of the civil penalty to be imposed. OAR 839-015-0510(2). In calculating a civil penalty, the commissioner must also consider "the amount of money or valuables, if any, taken from employees or subcontractors by the contractor or other person in violation of any statute or rule." OAR 839-015-0510(3).

There is no evidence that Respondents took any actions to ensure their workers were provided WH-151S and WH-153S forms with the required information required by ORS 658.440(1)(f) & (g). Although Respondents provided the Agency with a number of forms, at least three had signatures that were not those of the workers. Respondents' failed attempt to deceive the Agency, together with Respondents' unwillingness to provide original documents and alterations and inconsistencies in the forms provided by Respondents, makes the forum question whether other WH-151S and WH-153S forms provided by Respondent also contained worker's signatures that were not genuine. To compound matters, even if the forum assumes that Respondents provided WH-151S and WH-153S forms to all its other workers, Respondents reduced the forms to one quarter of their original size **before** providing them to their workers. As a result, the print on all those forms is either illegible or nearly microscopic. Furthermore, not a single WH-153S states Menasha's name and address, which is required by ORS 658.440(1)(f)(G). In summary, there is no credible evidence that Respondents took any steps to prevent violations of ORS 658.440(1)(f) & (g). In fact, they appear to have done just the opposite.

There is no evidence of any prior violations by Respondents.

Violations of ORS 658.440(1)(f) & (g) are serious matters that "go to the heart of farm labor contractor statutes" because they deny workers the ability to protect themselves in the

event of a dispute. *In the Matter of Paul Washburn,* 17 BOLI 212, 225 (1998). The magnitude of Respondents' violations is enhanced because of the fabricated signatures on Respondents' documents, Respondents' deliberate attempt to deceive the agency, Respondents' failure to provide all the information regarding terms and conditions of employment required by statute to any of its workers, and by Respondents' failure to provide its workers with a WH-151S or WH-153S that was legible.

Finally, there is no question that Respondents knew of the violations. Respondents deliberately shrunk the forms, and both N. Piatkoff and B. Piatkoff signed documents on which the workers' signatures were forged. B. Piatkoff further admitted that he directed the family of Juan Carlos Rios to sign Rios's name to a WH-151S and a WH-153S **after** Rios's death.

The only mitigating factor is a lack of evidence showing that Respondents' violations caused any person to suffer a monetary loss.[7]

Under these circumstances, $2,000 is an appropriate civil penalty for each violation. The Agency alleged six violations, and the forum has concluded there were eight violations, six by N. Piatkoff and Northwest (Rios, Martinez, and Alvarez), and two by B. Piatkoff (Alvarez). However, the civil penalties assessed cannot exceed those alleged in the Notice of Intent. Although the Notice uses the general term "Respondents" in alleging the subject violations, the forum finds that the main thrust of the Agency's allegations with regard to the Menasha contract is directed at Respondents N. Piatkoff and Northwest. Consequently, the forum assesses $12,000 in civil penalties ($2,000 x six violations) based on the six violations committed by N. Piatkoff and Northwest. Respondents N. Piatkoff and Northwest are jointly and severally liable for those civil penalties. OAR 839-015-0135(1)(c).

RESPONDENTS VIOLATED ORS 658.440(3)(B)

The Agency alleges that "Respondents willfully made or caused to be made false, fraudulent or misleading representations, or published or circulated false, fraudulent or misleading representation concerning the terms, conditions or existence of employment, including but not limited to submitting false, fraudulent or misleading forms WH-151 and WH-153 to the Agency in violation of ORS 658.440(3)(b)[.]"

ORS 658.440(3)(b) provides:

"(3) A person acting as a farm labor contractor, or applying for a license to act as a farm labor contractor, may not:

"* * * * *

[7] *See In the Matter of Tomas Benitez,* 19 BOLI 142, 160 (2000) (it is a mitigating factor that a respondent's violations of the farm labor contracting statutes did not cause any person to suffer a monetary loss).

> "(b) Willfully make or cause to be made to any person any false, fraudulent or misleading representation, or publish or circulate any false, fraudulent or misleading information concerning the terms, condition or existence of employment at any place or by any person."

For the purposes of ORS 658.440(3)(b), "false" generally means that the questioned representation is untrue. *In the Matter of Leonard Williams,* 8 BOLI 57, 74 (1989) (interpreting *former* ORS 658.440(2)(b), which has since been renumbered as ORS 658.440(3)(b)). "Willfully" means "action undertaken with actual knowledge of a thing to be done" or "action undertaken by a person who should have known the thing to be done or omitted." OAR 839-015-0505(1). In this case, one of the terms and conditions of employment included the identity and address of the owner/operator of the property where Respondents' workers would be planting trees. On the Agency's WH-153S forms, Respondent was required to provide the name and address of the owner of the land or operation. Instead of stating the correct name and address, Respondents wrote in their own name and address on every WH-153S form that Respondents gave to the Agency,[8] making a "false representation" on every form. Respondents' violations were "willful" because Respondents knew the name and address of the owner of the land, but instead chose to write their own name and address. The forum infers that Respondents' knew Menasha's address, based on the fact that B. Piatkoff had performed other contracts for Menasha in prior years. Respondents made this false representation to all of their workers except for Rios, Alvarez, and Martinez, who were never given WH-153S forms. Respondents also circulated "false information" to Sifuentez, Hidalgo, and Wojtyla by providing them with copies of the WH-153S forms containing the false representation made to its workers. Respondents' workers, Sifuentez, Hidalgo, and Wojtyla all fit within the meaning of the phrase "any person." In summary, Respondents committed at least 20 separate violations with respect to their workers and three violations with respect to Sifuentez, Hidalgo, and Wojtyla.

CIVIL PENALTIES

Respondents' violations are aggravated by the fact that there is no evidence they made any attempt to comply with the statute. There is no evidence of any prior violations. The seriousness is low because there is no evidence that any workers were unaware of or misunderstood where they would be working, that they would be working on land owned by someone other than Respondents, that any worker suffered any loss as a result of Respondents' false representation, or that Respondents intended to deceive USDOL or the Agency as to the identity and ad-

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[8] *See* Finding of Fact -- The Merits 34, *supra*.

dress of Menasha. However, the magnitude is high because of the sheer number of violations. Respondents also knew of the violations. The pertinent question on the WH-153S is clearly phrased, and B. Piatkoff, who signed many of the WH-153S forms and presumably filled them out, testified that he speaks Spanish. There are no mitigating circumstances. The Agency alleged two violations and sought a $2,000 civil penalty for each. The forum finds that figure to be appropriate and assesses $4,000 in civil penalties for two violations of ORS 658.440(3)(b).

RESPONDENTS N. PIATKOFF AND NORTHWEST VIOLATED ORS 658.440(1)(D) BY SUBCONTRACTING THE MENASHA CONTRACT TO BP REFORESTATION

ORS 658.440(1)(d) requires "each person acting as a farm labor contractor" to "[c]omply with the terms and provisions of all legal and valid agreements or contracts entered into in the contractor's capacity as a farm labor contractor."

The Agency alleged that "Respondents" violated ORS 658.440(1)(d) by subcontracting work to BP Reforestation, Inc. The following relevant facts are undisputed:

(1) N. Piatkoff and Northwest entered into a contract with Menasha to plant trees and B. Piatkoff signed the contract in the capacity of "contractor rep."

(2) N. Piatkoff and Northwest Resources, Inc. entered into a subcontract with B. Piatkoff and "BP Reforestation" for BP Reforestation to plant "about 120,000 tree seedlings" on the Menasha contract;

(3) The subcontract specified that work would start on December 17, 2004, and was to be "completed by" December 31, 2004;

(4) B. Piatkoff and BP Reforestation performed the work specified in the subcontract.

To prove its allegation, the Agency also needed to establish, by a preponderance of the evidence, that the contract between N. Piatkoff and Northwest Resources, Inc. and Menasha prohibited subcontracting. Respondents disputed that the contract prohibited subcontracting. In the alternative, Respondents argued that, if subcontracting was prohibited without prior approval, Menasha had approved the subcontract.

Respondents acknowledged that the contract between Northwest and Menasha contained a provision (paragraph **6.K.**) prohibiting Northwest from assigning or subcontracting the work without Menasha's written consent. Respondents argued that this did not prove the contract prohibited subcontracting, reasoning that the Agency only offered pages 3 and 12 of the contract into evidence, and there might have been other provisions in the contract that qualified the subcontracting provi-

sion. Respondents' argument fails for the reason that it was in Respondents' power to produce the entire contract to prove their point, and Respondents did not do so, despite an earlier request for a copy of the contract from Wojtyla, and further knowing from the Agency's case summary that the Agency intended to offer only a portion of the contract into evidence. If Respondents intended to prove that the Menasha contract contained language that qualified paragraph **6.K.**, Respondent should have produced the entire contract. Respondent did not do so and the forum concludes that the Menasha contract prohibited Northwest and N. Piatkoff from subcontracting the work without written approval from Menasha.

Jim Carr, chief forester for Menasha and the person who signed the subject contract between N. Piatkoff, Northwest Resources, Inc., and Menasha, credibly testified that Menasha never approved the subcontract to BP Reforestation or any other entity. B. Piatkoff testified that Mark Olson, Menasha's "main contact" with Respondents, orally approved the subcontract. However, Respondents did not call Olson as a witness to corroborate B. Piatkoff's testimony and did not produce "written approval" of the subcontract from Menasha. Based on B. Piatkoff's lack of credibility and Carr's credible testimony, the forum concludes that Menasha did not approve the subcontract, and that Respondents N. Piatkoff and Northwest violated ORS 658.440(1)(d).

CIVIL PENALTIES

This violation is aggravated by Respondents' deception of Menasha, in that Menasha was unaware that a different business entity than the one it contracted with was performing work on its tree planting contract in December 2004. However, the magnitude and seriousness of the violation are low because there is no evidence that the contract violation in any way affected the performance of the contract. N. Piatkoff and B. Piatkoff both signed the Menasha contract and their signatures appear page 12 of the contract, the same page as the paragraph prohibiting subcontracting. N. Piatkoff and B. Piatkoff also both signed the subcontract agreement. Accordingly, the forum must conclude that they both knew they were violating the Menasha contract. There is no evidence that Respondents previously violated ORS 658.440(1)(d) or that anyone suffered any monetary loss as a result of the contract violation.

The forum has found violations of ORS 658.440(1)(d) and issued civil penalties in three prior cases. In the first case, respondents entered into a consent order with the Agency in which respondents agreed to notify the Agency on a monthly basis whenever respondents used a subcontractor on a forestation contract. Respondents failed on nine occasions to timely notify the Agency of its subcontracting and the commissioner

imposed a civil penalty of $500 for each violation but did not cite any aggravating or mitigating circumstances in the Final Order. *In the Matter of Robert Gonzalez,* 12 BOLI 181, 201 (1994). In the second case, respondent failed to comply with the terms and conditions of a contract with the USFS by failing to show up at prework meetings. Respondent failed to begin work on the contract, and the contract was terminated by default. The forum found the magnitude and seriousness of the violation to be moderate. Noting that the Agency had presented no other evidence of aggravating circumstances, the commissioner imposed a $500 civil penalty. *In the Matter of Tolya Meneyev,* 14 BOLI 6, 14 (1995). In the most recent case, respondents' contract with the BLM was terminated because two respondents failed to complete work on the contract within the required 30 days and because they had not obtained an Oregon farm/forest labor contractor license. The forum found the violation was aggravated by the fact that work on the BLM contract was not completed, either by respondents or their subcontractors, and the fact that the subcontractor's work was substandard. The commissioner assessed a civil penalty of $1,000 against each respondent. *In the Matter of Charles Hurt,* 18 BOLI 265, 276-77 (1999).

In its Notice of Intent, the Agency asked that a civil penalty of $2,000 be assessed for Respondents' violation of ORS 658.440(1)(d). Considering the aggravating and mitigating circumstances and the three cases cited in the previous paragraph, the forum concludes that $1,000 is an appropriate civil penalty. Respondents N. Piatkoff and Northwest are jointly and severally liable for those civil penalties. OAR 839-01500135(1)(c).

RESPONDENTS N. PIATKOFF & NORTHWEST ACTED AS FARM OR FARM LABOR CONTRACTORS WITHOUT A LICENSE IN VIOLATION OF ORS 658.410

The forum has already concluded that B. Piatkoff bid on the Menasha tree planting contract while acting as an agent for N. Piatkoff and Northwest, and that the bid was made before N. Piatkoff and Northwest were licensed as farm labor contractors. ORS 658.410(1) prohibits any person from acting as a farm labor contractor "without a valid license in the person's possession issued to the person by the Commissioner of the Bureau of Labor and Industries." "Farm labor contractor" includes any person "who bids or submits prices on contract offers" on activities that include "the planting * * * of trees and seedlings." ORS 658.405(4). By using B. Piatkoff as its agent to bid on a contract while they were unlicensed, N. Piatkoff and Northwest violated ORS 658.410. No civil penalties are assessed because none were sought by the Agency.

RESPONDENT B. PIATKOFF HAS NOT TAKEN AN ACTION DESCRIBED IN OAR 839-015-0520(3)(O)

The Agency alleged that B. Piatkoff "has failed to pay all debts owed including debts to the Oregon Department of Revenue, and, therefore, Respondents' applications for farm/forest labor contractor licenses should be denied and the Commissioner should refuse to renew Respondents' current licenses as provided in ORS 658.420 and OAR 839-015-0520(3)(o)." OAR 839-015-0520(3)(o) provides:

> "(3) The following actions of a farm or forest labor contractor license applicant or licensee or an agent of the license applicant or licensee demonstrate that the applicant's or the licensee's character, reliability or competence make the applicant or licensee unfit to act as a farm or forest labor contractor:
>
> "* * * * *
>
> "(o) Failure to promptly satisfy any or all judgments levied against the applicant/licensee[.]"

Undisputed evidence established that B. Piatkoff obtained a certificate of compliance from DOR, contingent on a payment plan for a debt owed to DOR, for the purpose of obtaining his farm labor contractor license in December 2004. Undisputed evidence further established that B. Piatkoff was out of compliance with the payment plan from April 2005 through at least September 26, 2005. However, no evidence was presented that an actual judgment was entered on the debt. As no judgment was shown to exist, the forum cannot conclude that B. Piatkoff failed "to promptly satisfy any or all judgments levied against" him.

SHAM OR SUBTERFUGE

The Agency alleged that Respondents Basilio Piatkoff and Natalia Piatkoff have used Northwest Resources, Inc. as their agent to perpetrate a sham or subterfuge within the meaning of OAR 839-015-0142, in violation of ORS 658.440(3)(a). This allegation goes to the Agency's proposed license denial and refusal to renew the licenses of Respondents. The Agency has promulgated a rule related to licensing and evidence of sham or subterfuge. In pertinent part, OAR 839-015-0142 provides:

> "(2) The Bureau may refuse to license or renew the license of any applicant where there is evidence of sham or subterfuge in the identity of the applying entity. The Bureau will regard as prima facie evidence of sham or subterfuge mere changes in business form in anticipation of or subsequent to denial, suspension, revocation or refusal to renew a license, where a relative by blood or marriage, or a person presently employed in an occupation, other than an occupation with a licensed farm or forest labor contractor,

makes application, including a renewal application, for a license and one or more of the following factors are present:

"(a) A lack of adequate consideration or value given for the former business or its property;

"(b) The use of the same real property, fixtures or equipment or use of a business name similar to that of the former business;

"(c) A time period of less than one year elapsed between the former entity's receipt of notice of the Bureau's intent to deny, suspend, revoke or refuse to renew its license or application and the license application by the new business;

"(d) A person financially interested in any capacity in the former business has a financial interest in any capacity in the new business;

"(e) Assets or capital of the former business are commingled with assets or capital of the new business;

"(f) The amount of capitalization is inadequate to meet current obligations of the new business; or

"(g) The formalities of a partnership or a corporation are disregarded by the new business when such business is a partnership or corporation."

"Sham" means to act intentionally so as to give a false impression." *In the Matter of Manuel Galan, Jr.,* 17 BOLI 112, 137 (1998), *affirmed without opinion, Galan v. Bureau of Labor and Industries,* 167 Or App 259 (2000), *rev den* 332 Or 137, 27 P3d 1043 (2001). "Subterfuge" means "deception by artifice or stratagem in order to conceal, escape, or evade." *Id.* The purpose of the inquiry set out in the rule is to uncover mere changes in business form that indicate that the entity now making application is really the same entity that anticipated a negative licensing action or actually suffered a denied, suspended, revoked or refuse license while doing business in a different form. *Id.* Accordingly, the forum's inquiry must focus on the time that Northwest first applied for a farm/forest labor contractor license. That was in December 2004, when N. Piatkoff and Northwest made their application and B. Piatkoff decided to let his BP Reforestation farm labor contractor license lapse and instead apply for a farm/forest labor contractor employee indorsement under the sponsorship of N. Piatkoff and Northwest. The evidence is undisputed that B. Piatkoff and N. Piatkoff have been married at all times material. However, at that point, the Agency's case breaks down. Part of the Agency's prima facie case is to show that N. Piatkoff and Northwest applied for their license "in anticipation of or subsequent to denial, suspension, revocation or refusal to renew [B. Piatkoff's] li-

cense." Although the Agency charged that N. Piatkoff went into business because B. Piatkoff was aware of factors that would cause him to lose his license, the record contains nothing more than speculation to support that charge. B. Piatkoff testified that he decided to get out of the farm labor contractor business and focus on construction, but agreed to help his wife Natalia when she decided she wanted to see if she could successfully carry on a farm labor contractor business. B. Piatkoff further testified that he knew of no reason in December 2004 why his farm labor contractor license would not have been renewed. This testimony was supported by the unequivocal testimony by Wojtyla, the Agency compliance specialist assigned to the case that B. Piatkoff was not under investigation for any violations of Oregon's farm labor contractor statutes in December 2004, and the fact that B. Piatkoff's license was renewed, although in a different status. There is also no evidence of the amount of B. Piatkoff's debt to DOR or his personal financial status in 2004, other than the mere fact that an unpaid debt existed, to support the Agency's theory that B. Piatkoff's debt to DOR might have made him believe he would no longer be able to meet the Agency's licensing criteria. Since there is no evidence in support of an element of the Agency's prima facie case, the Agency's charge must fail and it is not necessary for the forum to determine whether there is evidence to support the existence of factors OAR 839-015-0142(2)(a) – (g).

N. PIATKOFF WAS THE SOLE OWNER OF NORTHWEST & B. PIATKOFF ASSISTED IN THE MANAGEMENT OF NORTHWEST

The Agency alleged that B. Piatkoff "and/or" N. Piatkoff had an ownership "and/or" management interest in Northwest, but did not cite a specific statute or rule that such interests, if they existed, would violate. However, if B. Piatkoff had an ownership interest in Northwest, this would affect N. Piatkoff's ability to be licensed, since N. Piatkoff represented herself as the "100%" owner of Northwest on her application[9] and OAR 839-015-0520(3)(h) provides that "willful misrepresentation, false statement or concealment in the application for a license" is an action that "make[s] an applicant * * * unfit to act as a farm or forest labor contractor."

The Agency established the following facts in support of its allegation: (1) B. Piatkoff agreed to and did assist N. Piatkoff in the management of Northwest by bidding on the Menasha contract and transporting Northwest's workers

[9] Question 20 on the application directs applicants to "List full names, addresses, and telephone numbers of all persons financially interested, whether as partners, shareholders, profit-sharers, associates or members in the applicant's proposed operations as a labor contractor, together with the amount or percentage of the respective interest of each."

from Coos Bay to Salem after the van wreck; (2) B. Piatkoff was the corporate secretary of Northwest; (3) B. Piatkoff and Northwest operate from a common office space, an office next to B. Piatkoff and N. Piatkoff's house; (4) The Menasha contract was one that B. Piatkoff had performed in previous years; (5) Northwest subcontracted the Menasha contract to B. Piatkoff for two weeks; and (6) Northwest used B. Piatkoff's van on January 3, 2005, to transport workers, and there was no evidence that Northwest paid B. Piatkoff any consideration for the use of the van that day.

On the other hand, Corporation Division records show that that Northwest was properly incorporated, and no other evidence was offered to show that B. Piatkoff had made an investment in Northwest or was entitled to a share of the profits. For example, N. Piatkoff testified that Northwest's workers used tools, but no testimony was solicited regarding the ownership of those tools.

Ownership is the "state, relation, or fact of being an owner**:** lawful claim or title." *Webster's Third New Int'l Dictionary 612 (unabridged ed 2002).* "Owner" means "one that owns**:** one that has the legal or rightful title whether the possessor or not." *Id.* In this context, "own" means "to have or hold as property or appurtenance**:** have a rightful title to, whether legal or natural**:** POSSESS." *Id.* In this case, there is no evidence of what claim or title, if any, that Northwest's use of B. Piatkoff's van conferred on B. Piatkoff. Consequently, the forum concludes that the Agency has failed to prove, by a preponderance of the evidence, that B. Piatkoff had an ownership interest in Northwest.

RESPONDENTS N. PIATKOFF AND B. PIATKOFF ENGAGED IN A COURSE OF MISCONDUCT IN RELATIONS WITH WORKERS AND OTHERS WITH WHOM THEY CONDUCTED BUSINESSS

The Agency alleged that Respondents engaged in "[a] course of misconduct in relations with workers and others with whom Respondents conduct business" as set forth in OAR 839-015-0520(3)(m), based on Respondents' actions alleged in paragraphs (1)(a) – (g) in the Agency's Notice of Intent. The Agency does not seek a civil penalty for this alleged violation. However, "a course of misconduct" as set forth in OAR 839-015-0520(3)(m) is grounds for denying a license. OAR 839-015-0520(3)(m) provides:

> "(3) The following actions of a farm or forest labor contractor license applicant or licensee or an agent of the license applicant or licensee demonstrate that the applicant's or the licensee's character, reliability or competence make the applicant or licensee unfit to act as a farm or forest labor contractor:
>
> "* * * * *

> "(m) A course of misconduct in relations with workers, farmers and others with whom the person conducts business[.]"

The forum must therefore determine if the actions alleged in paragraphs (1)(a) – (g) in the Agency's Notice of Intent fit within the definition of "misconduct."

In order to give effect to the intent of the Agency in enacting OAR 839-015-0520(3)(m), the forum must first determine the meaning of the word "misconduct." To do that, the forum uses the *PGE*[10] template for statutory interpretation. *See Abu-Adas v. Employment Department,* 325 Or 480, 485 (1997) (in determining the meaning of an administrative rule, court's role is the same as its role in determining the meaning of a statute).

Under *PGE*, the forum must attempt to discern the Agency's intent. *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610 (1993). The forum's inquiry begins with an examination of the text and context of the rule. Context includes other provisions of the same rule, other related rules, the statute pursuant to which the rule was created, and other related statutes. *Abu-Adas* at 485. "Misconduct" is not defined in OAR 839-015-000 *et seq*, the Agency's rules interpreting those statutes, or in ORS chapter 658, the statutes regulating farm/forest labor contractors in Oregon. In addition, it has not been defined in any of the commissioner's previous Final Orders. Furthermore, the Agency did not propound a specific definition for "misconduct" at hearing, other than to allege that the Respondents' alleged actions constituted misconduct. Because "misconduct" is not defined anywhere in the rule, related rules, or related statutes and it is a word of common usage, the forum relies on its plain, natural and ordinary meaning. *In the Matter of Elisha, Inc.,* 25 BOLI 125, 148-49 (2004), *aff'd without opinion, Elisha, Inc. v. Bureau of Labor and Industries,* 198 Or App 285 (2005), *citing Young v. State of Oregon,* 161 Or App 32, 36, *rev den* 329 Or 447 (1999). In determining that meaning, the forum turns once more to *Webster's*.

Webster's contains several definitions for "misconduct." They include:

> "**1 :** mismanagement especially of governmental or military responsibilities ~ was charged with misconduct of the war> **2 :** intentional wrongdoing : deliberate violation of a rule of law or standard of behavior especially by a government official **:** MALFEASANCE <one of his district judges has been removed from the bench . . . for official ~ H.H.Martin><indicted on two counts of bribe taking and three of ~ --*Time*> **3 a :** bad conduct **:** improper behavior <was fined for misconduct on the field> **b :** sexual immorality; *esp* **:** ADULTERY

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[10] *PGE v. Bureau of Labor and Industries,* 317 Or 606, 610-612 (1993).

<charged her husband with ~>"

Webster's at 1443. In the context of OAR 839-015-0520(3)(m), the forum concludes that the "plain, natural and ordinary meaning" of "misconduct" is "bad conduct, improper behavior." Relying on this definition, the forum also concludes that a farm labor contractor's violation of any Oregon farm labor contractor laws or BOLI's administrative rules interpreting those laws is *per se* misconduct within the meaning of OAR 839-015-0520(3)(m) so long as the violation involves relations with "workers, farmers and others" with whom the farm labor contractor conducts business. A "course of misconduct" is a series of acts, each of which constitute misconduct. *Webster's at* 522.

The forum has concluded that there is a preponderance of evidence to support four of the allegations contained in paragraphs (1)(a) – (g) in the Agency's Notice of Intent. Those allegations are: (1) failure to furnish three workers with statement of workers rights and remedies (WH-151S) forms; (2) failure to execute written agreements with three workers (WH-153S); (3) acting as a farm labor contractor without a license; and (4) failure to comply with terms and provisions of a contract entered into in Respondents' capacity as farm/forest labor contractors. In total, Respondents committed eight distinct violations of Oregon's farm labor contractor laws. Each of these violations is related to Respondents' relations with workers or "others" with whom Respondents conducted business. Consequently, each violation constitutes *per se* misconduct. In turn, Respondents' eight distinct acts of misconduct constitute a series of acts and a "course of misconduct" within the meaning of OAR 839-015-0520(3)(m).

RESPONDENTS' CHARACTER, COMPETENCE, AND RELIABILITY MAKE THEM UNFIT TO ACT AS FARM/FOREST LABOR CONTRACTORS

ORS 658.420 provides, in pertinent part:

> "(1) The Commissioner of the Bureau of Labor and Industries shall conduct an investigation of each applicant's character, competence and reliability, and of any other matter relating to the manner and method by which the applicant proposes to conduct and has conducted operations as a farm labor contractor."

ORS 658.445 provides, in pertinent part:

> "The Commissioner of the Bureau of Labor and Industries may revoke, suspend or refuse to renew a license to act as a labor contractor* * * if:
>
> "(1) The licensee or agent has violated or failed to comply with any provision of ORS 658.405 to 658.503 and 658.991 (2) and (3); or
>
> "* * * * *

"(3) The licensee's character, reliability or competence makes the licensee unfit to act as a farm labor contractor."

The Agency has promulgated a rule that explains the meaning of the terms "character," "competence," and "reliability." OAR 839-015-0145 provides, in pertinent part:

"The character, competence and reliability contemplated by ORS 658.405 to 658.475 and these rules includes, but is not limited to, consideration of:

"(1) A person's record of conduct in relations with workers, farmers and others with whom the person conducts business.

"(2) A person's reliability in adhering to the terms and conditions of any contract or agreement between the person and those with whom the person conducts business.

"(3) A person's timeliness in paying all debts owed, including advances and wages.

"* * * * *

"(7) Whether a person has violated any provision of ORS 658.405 to 658.503 or these rules.

"* * * * *

"(13) Whether a person has made a willful misrepresentation, false statement or concealment in the application for a license."

OAR 839-015-0520(1) describes the circumstances under which the Commissioner "may propose to deny or refuse to renew a license application or to suspend or revoke a license." Those circumstances include:

"(a) Making a misrepresentation, false statement or certification or willfully concealing information on the license application;

"* * * * *

"(d) Assisting an unlicensed person to act as a farm or forest labor contractor;

* * * * *

"(i) Acting as a farm or forest labor contractor without a license."

OAR 839-015-0520(3) describes actions by a farm labor contractor that "demonstrate that the applicant's or the licensee's character, reliability or competence make the applicant or licensee unfit to act as a farm or forest labor contractor." Those actions include:

"(a) Violations of any section of ORS 658.405 to 658.485;

"* * * * *

"(c) Willful violation of the terms and conditions of any work agreement or contract;

"* * * * *

(h) Willful misrepresentation, false statement or concealment in the application for a license;

"* * * * *

> "(m) A course of misconduct in relations with workers, farmers and others with whom the person conducts business;
>
> "(n) Failure to pay all debts owed, including advances and wages, in a timely manner[.]"

"Willfully" is defined in OAR 839-015-0505(1) to mean:

> "action undertaken with actual knowledge of a thing to be done or omitted or action undertaken by a person who should have known the thing to be done or omitted. A person 'should have known the thing to be done or omitted' if the person has knowledge of facts or circumstances which, with reasonably diligent inquiry, would place the person on notice of the thing to be done or omitted to be done. A person acts knowingly or willfully if the person has the means to inform himself or herself but elects not to do so. For purposes of this rule, the farm labor contractor, forest labor contractor or any person acting as a farm or forest labor contractor is presumed to know the affairs of their business operations relating to farm or forest labor contracting."

The forum relies on the aforementioned rules and statutes in determining whether Respondents should be denied a license to conduct business in Oregon as farm/forest labor contractors.

A. <u>Basilio Piatkoff.</u>

Four of the criteria in OAR 839-015-0145 relating to character, competence and reliability apply to B. Piatkoff and demonstrate that he is unfit to act as a farm labor contractor. First, he engaged in a course of misconduct by entering into a subcontract with N. Piatkoff and Northwest that he knew was in violation of the Menasha contract[11] and by not giving WH-151S and WH-153S forms to Roberto Alanis Alvarez when Alvarez was employed by BP Reforestation. OAR 839-015-0145(1). Second, he demonstrated his unreliability in adhering to the terms and conditions of a contract between himself and someone with whom he conducted business by violating the subcontracting provision of the Menasha contract. OAR 839-015-0145(2). Third, although he eventually paid his debt to DOR, he was untimely in doing so. OAR 839-015-0145(3). Fourth, he violated ORS 658.440(1)(f) & (g) with regard to Roberto Alanis Alvarez by not giving WH-151S and WH-153S forms to Alvarez when Alvarez was employed by BP Reforestation. OAR 839-015-0145(7).

Under OAR 839-015-0520(3), the same actions demonstrate that B. Piatkoff's character, com-

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[11] The forum concludes that he had knowledge because he signed the Menasha contract containing the prohibition against subcontracting and shortly thereafter entered into the subcontract with his wife, Natalia.

petence and reliability make him unfit to act as a farm or forest labor contractor. OAR 839-015-0520(3)(a), (c), (m), and (n). Each one of those actions separately demonstrates that he is unfit to act as a farm labor contractor.

B. N. Piatkoff and Northwest Resources, Inc.

N. Piatkoff and Northwest are jointly licensed, so the status of Northwest's license hinges on the actions taken by N. Piatkoff on her own behalf or on behalf of Northwest. ORS 658.410(2)(d), OAR 839-015-0135(1)(c).

Three of the criteria in OAR 839-015-0145 relating to character, competence and reliability apply to N. Piatkoff and demonstrate that she and Northwest are unfit to act as farm labor contractors. First, she engaged in a course of misconduct by entering into a subcontract with N. Piatkoff and Northwest that she knew was in violation of the Menasha contract[12] and by committing three violations of ORS 658.440(1)(f) and three violations of ORS 658.440(1)(g) OAR 839-015-0145(1). Second, N. Piatkoff and Northwest demonstrated unreliability in adhering to the terms and conditions of a contract between themselves and someone with whom they conducted business by violating the subcontracting provision of the Menasha contract. OAR 839-015-0145(2). Third, N. Piatkoff and Northwest committed three violations of ORS 658.440(1)(f), three violations of ORS 658.440(1)(g), one violation of ORS 658.410, and two violations of ORS 658.440(3)(b). OAR 839-015-0145(7).

Under OAR 839-015-0520(3), these same actions independently demonstrate that N. Piatkoff's and Northwest's character, competence and reliability make them unfit to act as a farm or forest labor contractor. OAR 839-015-0520(3)(a), (c), (f), and (m).

THE AGENCY'S EXCEPTIONS

The Agency filed exceptions relating to the ALJ's proposed interpretation and application of OAR 839-015-0520(3)(m) to Respondents' actions and the ALJ's failure to incorporate Respondents' violation of ORS 658.440(3)(b) as a basis for evaluating Respondents' character, competence, and reliability. The Agency's exceptions are **GRANTED**. The forum has rewritten the Opinion in response to those exceptions.

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[12] OAR 839-015-0505, which defines "willfully," creates a presumption that all farm labor contractors "know the affairs of their business operations relating to farm or forest labor contracting."

ORDER

NOW, THEREFORE, as authorized by ORS 658.453, and as payment of the penalties assessed for violations of ORS 658.440(1)(d), ORS 658.440(1)(f), ORS 658.440(1)(g), and ORS 658.440(3)(b), the Commissioner of the Bureau of Labor and Industries hereby orders **Natalia Piatkoff** and **Northwest Resources, Inc.** to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 1045 State Office Building, 800 NE Oregon Street, Portland, Oregon 97232-2180, a certified check payable to the Bureau of Labor and Industries in the amount of SEVENTEEN THOUSAND DOLLARS ($17,000), plus any interest thereon that accrues at the legal rate between the date ten days after the issuance of the Final Order and the date Respondents comply with the Final Order.

FURTHERMORE, the Commissioner of the Bureau of Labor and Industries hereby denies **Natalia Piatkoff, Northwest Resources, Inc.,** and **Basilio Piatkoff** each a license to act as a farm labor contractor, effective on the date of the Final Order. **Natalia Piatkoff, Northwest Resources, Inc.,** and **Basilio Piatkoff** are each prevented from reapplying for a license for three years from the date of this denial, in accordance with ORS 658.445 and OAR 839-015-0520.

In the Matter of

MAM PROPERTIES, LLC

Case Nos. 27-06 & 28-06

Final Order of Commissioner Dan Gardner

Issued February 9, 2007

SYNOPSIS

Respondent MAM Properties, LLC, employed Claimant from November 8, 2004 through April 3, 2005, at two agreed wage rates for two different shifts, one of which was lower than the minimum wage. Respondent was ordered to pay Claimant $6,761.11 in unpaid, due, and owing wages. Respondent's failure to pay the wages was willful, and Respondent was ordered to pay Claimant $1,742 in penalty wages. Respondent was ordered to pay Claimant another $1,742 as a civil penalty because Respondent's failure to pay the wages included a failure to pay the minimum wage and overtime wages. Respondent was also ordered to pay civil penalties in the amount of $34,000 as a result of its single violation of ORS 653.045(2), its 11 violations of OAR 839-020-0012, its 11 violations of ORS 653.025 and OAR 839-020-0010, and its 11 violations of ORS 653.261 and OAR 839-020-0030. ORS 652.140(1), ORS 652.150, ORS 653.045, ORS 653.055, ORS 653.256; OAR 839-020-0004(33), OAR

839-020-0010, OAR 839-020-0012, OAR 839-020-0030; OAR 839-020-0083, OAR 839-020-1020.

The above-entitled case came on regularly for hearing before Alan McCullough, designated as Administrative Law Judge ("ALJ") by Dan Gardner, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on December 12, 2006, at the Salem office of the Bureau of Labor and Industries, located at 3865 Wolverine NE, Building E, Salem, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by case presenter Patrick Plaza, an employee of the Agency. Wage claimant Rosita Blair ("Claimant") was present throughout the hearing and was not represented by counsel. Respondent MAM Properties, LLC, did not appear at the hearing and was held in default.

The Agency called the following witnesses: Claimant; Katy Bayless, BOLI Wage and Hour Division compliance specialist; and Vee Souryamat, Administrative Specialist, BOLI Wage and Hour Division.

The forum received into evidence:

a) Administrative exhibits X-1 through X-11 (submitted or generated prior to hearing); and

b) Agency exhibits A-1 through A-30 (submitted prior to hearing).

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

FINDINGS OF FACT – PROCEDURAL

1) On April 18, 2005, Claimant filed a wage claim with the Agency alleging that Respondents MAM Properties and Chris Washington had employed her and failed to pay wages earned and due to her.

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

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

4) On August 17, 2005, the Agency issued Order of Determination No. 05-1111 based upon the wage claim filed by Claimant and the Agency's investigation. The Order of Determination alleged that Respondents Christine Dean Washington ("Washington"), Sunburst II, LLC, and MAM Properties, LLC, had employed Claimant from November 8, 2004, through April 3, 2005, and owed a total of $7,720.04 in unpaid wages, $1,744.80 in penalty wages, and $1,744.80 in civil penalties, plus interest, and required that, within 20 days, Respondent either pay these

sums in trust to the Agency, request an administrative hearing and submit an answer to the charges, or demand a trial in a court of law.

5) Washington was served with the Order of Determination on September 6, 2005. On October 10, 2005, Washington filed an answer and request for hearing. Her answer stated only: "I have additional information to show that she did not work these hours and that she is not entitled to any wages except the $364.00." On October 24, 2005, Washington filed a letter granting her the authority to act as the authorized representative for MAM Properties, LLC, in this matter.

6) On October 2, 2005, the Agency issued a Notice of Intent in which MAM Properties, LLC, was named as the Respondent. The Agency sought $34,000 in civil penalties based on the following allegations:

> "Failure to Provide Pay-Stubs to Employees. During the period of November 8, 2004 through April 3, 2005 Respondent employed Rosita Blair as a non-exempt employee. Respondent paid Claimant every two weeks by check. None of these payments were accompanied by an itemized statement showing, among other required information: gross earnings; amount and description of any deduction from gross earnings; total number of hours worked during that pay period; the rate of pay; the net amount paid; and the time period covered by the payment. This is in violation of ORS 653.045(3) and OAR 839-020-0012. **CIVIL PENALTY OF $11,000.** 11 Violations – ORS 653.256 and OAR 839-020-1010(1)(g).
>
> "Failure to Make and Keep Required Records Available For Inspection. On May 19, 2005, Agency Compliance Specialist Tim Malloy [sic] requested from Respondent, records related to Claimant's employment. Specifically, Malloy [sic] asked for a record of hours worked each day, total hours worked each work week, weekly straight time earnings due, weekly overtime compensation due, dates of payment, pay periods covered and total paid for the period of November 2, 2004 through April 3, 2005 Respondent failed to make and keep any such work records available for inspection in response to this request, or subsequent requests. This is a violation of ORS 653.045(2) and OAR 839-020-0083(3). **CIVIL PENALTY OF $1,000.00.** 1 Violation – ORS 653.256 and OAR 839-020-1010(1)(f).
>
> "Failure to Pay Minimum Wages. During each of the eleven pay periods occurring between November 8, 2004 through April 3, 2005, Respondent paid Claimant less than the wages to which she was entitled by failing to pay the appropriate minimum wage in effect at the time for all hours

worked. During this period of time Claimant worked approximately fifty-five (55) 24-hour shifts for which she was paid only $100.00 per shift. In 2004 Oregon's minimum wage was $7.05 per hour and effective January 1, 2005 it was increased to $7.25 per hour. Based on the number of hours Claimant actually worked on these particular shifts, Claimant was paid less than the minimum wages to which she was entitled during each pay period. This is a violation of ORS 653.025 and OAR 839-020-0010(1). **CIVIL PENALTY OF $11,000.00.** 11 Violations – ORS 653.256(1) and OAR 839-020-1010(1)(b).

"Failure to Pay Overtime Wages. During each of the eleven pay periods occurring between November 8, 2004 through April 3, 2005, Respondent paid Claimant less than the wages she was entitled to by failing to pay overtime for all hours worked over 40 in a seven-day work week. Claimant consistently worked more than 40 hours in the seven-day work weeks comprising each of these pay periods and was entitled to overtime wages that were never paid. This is a violation of ORS 653.261 and OAR 839-020-0030. **CIVIL PENALTY OF $11,000.00.** 11 Violations – ORS 653.256 and OAR 839-020-1010(1)(b).

"Aggravating Factors: Each violation set forth above is attended by one or more of the following aggravating circumstances, which have been considered pursuant to OAR 839-020-1020 in determining the amount of the penalty: Respondent knew, or should have known, of the violations set forth above and compliance with the laws would not have been difficult. Respondent failed to take appropriate remedial measures to ensure these violations did not occur. These violations have resulted in Claimant not being properly paid over $7,000.00 in earned wages. Respondent's failure to comply with the law has deprived Claimant of her rights to receive and be privy to legally required information regarding her pay. Respondent's failure to keep and maintain the required records and make them available when requested has deprived the Agency of information necessary to determine if claimant was properly paid for all hours worked and made the Agency's investigation into this matter much more difficult and time-consuming. These violations are quite serious and of great magnitude."

7) On October 20, 2005, Christine Dean Washington filed an answer and request for hearing in response to the Agency's Notice of Intent, along with a letter granting her the authority to act as the authorized representative for MAM Properties, LLC, in this matter. In her answer, she disputed the assessment of civil penalties. Among other things, she denied that Molloy and BOLI ever asked

that she provide documentation related to paying Claimant, denied that Claimant ever worked overtime hours, denied that Claimant did not receive minimum wage, and alleged that Respondent "has adequate records that meet and exceed ORS 653.045(2) and OAR 839-020-083(3) guidelines."

8) On October 26, 2006, the Agency filed a "BOLI Request for Hearing" with the forum regarding its Order of Determination and Notice of Intent.

9) On October 27, 2006, the Hearings Unit issued a Notice of Hearing to Respondent, the Agency, and Claimant stating the time and place of the hearing as 10 a.m., December 12, 2006, at BOLI's Salem office. Together with the Notice of Hearing, the forum sent a copy of the Order of Determination, a copy of the Notice of Intent, a document entitled "Summary of Contested Case Rights and Procedures" containing the information required by ORS 183.413, and a copy of the forum's contested case hearings rules, OAR 839-050-000 to 839-050-0440.

10) On October 31, 2006, the Agency filed a motion to consolidate both cases for hearing and to delete Christine Dean Washington and Sunburst II, LLC, as Respondents from the Agency's Order of Determination. Respondent did not object and the ALJ granted the Agency's motions on November 14, 2006.

11) At 10 a.m. on December 12, 2006, Respondent had not yet appeared at the hearing and no one had contacted the Agency case presenter, the ALJ, or the Hearings Unit to state that Respondent would not be making an appearance. By 10:30 a.m., Respondent had still not appeared and the ALJ declared Respondent in default and commenced the hearing.

12) At hearing, the Agency moved to amend the Order of Determination to reduce the amount of unpaid wages sought to $6,393.54 based on the Agency's recalculations of the amount of unpaid wages due and owing to Claimant. The ALJ granted the Agency's motion.

13) After the hearing, the ALJ made an *ex parte* telephone call to the Agency case presenter and asked if the Agency would stipulate that Respondent paid Claimant in full for all hours worked, calculated at the rates Respondent agreed to pay Claimant ($100 for 24 hour shifts and $8 per hour for 4 hour shifts), including a $50 payment for Claimant's single 12 hour shift. The Agency stipulated to that fact.

14) The ALJ issued a proposed order on January 12, 2007, that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. No exceptions were filed.

FINDINGS OF FACT – THE MERITS

1) In 2004, the minimum wage in Oregon was $7.05 per hour. In

2005, the minimum wage in Oregon was $7.25 per hour.

2) At all times material herein, Respondent MAM Properties, LLC ("Respondent") was a limited liability company doing business in Salem, Oregon, that engaged the personal services of one or more employees, including Claimant. Christine Dean Washington was its registered agent and sole manager/member. Respondent's registration with the Corporation Division lists Respondent's "principal place of business" as 4042 Gardner Rd SE, Salem, OR 97302.

3) In November 2004, Washington interviewed Claimant and hired her to work as a caregiver at an adult foster care home located at 4042 Gardner Rd. SE in Salem, Oregon. Claimant was hired to work two different shifts, a four hour shift in which she would be assisting another caregiver, and a 24 hour shift, in which she would be a primary caregiver. Washington agreed to pay Claimant $8 per hour for every four hour shift Claimant worked and $100 for every 24 hour shift that Claimant worked.

4) Claimant's first day of work for Respondent was November 8, 2004, a Monday, and her last day was April 3, 2005.

5) Respondent did not provide Claimant with an itemized statement of earnings or any other document showing the hours worked by Claimant; rate of pay; amount and description of deductions, if any; net amount paid after deductions; or the pay period for which the payment was made at any time when Respondent paid Claimant.

6) During her 24 hour shifts, Claimant was never able to sleep more than two hours without interruption.

7) Throughout her employment, Claimant completed weekly time sheets provided by Washington. On the time sheets, Claimant recorded the dates, days of the week, and number of hours she worked, then submitted her time sheets to Washington. Claimant copied her timesheets before submitting them to Washington and provided a copy of her timesheets to the Agency.

8) During her employment with Respondent, Claimant worked the following shifts, total hours, and overtime hours per week:

Week Ending	24 hr. shifts/ hrs. worked	4 hr. shifts/ hrs. worked	Total Hrs. worked	OT Hrs.
Nov. 14, 2004	2/48	3/14[1]	62	20
Nov. 21, 2004	2/48	1/4	52	12
Nov. 28, 2004	1/24	4/16	40	0
Dec. 5, 2004	3/72	4/16	88	48
Dec. 12, 2004	3/72	4/16	88	48
Dec. 19, 2004	2/48	3/12	60	20
Dec. 26, 2004	3/72	1/4	76	36
Jan. 2, 2005	1/24	3/12	36	0
Jan. 9, 2005	4/96	0	96	56
Jan. 16, 2005	2/48	1/4	52	12
Jan. 23, 2005	2/48	0	48	8
Jan. 30, 2005	2/48	2/8	56	16
Feb. 6, 2005	3/72	0	72	32
Feb. 13, 2005	3/72	0	72	32
Feb. 20, 2005	3/72	0	72	32
Feb. 27, 2005	4/96	0	96	56
March 6, 2005	5/120	0	120	80
March 13, 2005	5/108[2]	0	108	68
March 20, 2005	4/96	2/8	104	64
March 27, 2005	3/72	2/8	80	40
April 3, 2005	2/48	1/3	51	11
Totals	59/1404	31/125	1529	691

[1] Includes one 6 hour shift.

[2] Includes one 12 hour shift.

9) Claimant earned a total of $13,611.11 while in Respondent's employ, calculated as follows:

Week Ending	Earned at min. wage[1]	Earned at $8/hr.	OT hours worked	OT earned & OT rate[2]
Nov. 14, 2004:	$ 338.40	$ 112.00	22	$ 80.08 ($3.64)
Nov. 21, 2004:	$ 338.40	$ 32.00	12	$ 42.72 ($3.56)
Nov. 28, 2004:	$ 169.20	$ 128.00	0	$ 0.00
Dec. 5, 2004:	$ 507.60	$ 128.00	48	$ 173.28 ($3.61)
Dec. 12, 2004:	$ 507.60	$ 128.00	48	$ 173.28 ($3.61)
Dec. 19, 2004:	$ 338.40	$ 96.00	20	$ 72.40 ($3.62)
Dec. 26, 2004:	$ 507.60	$ 32.00	36	$ 127.80 ($3.55)
Jan. 2, 2005:	$ 169.20	$ 96.00	0	$ 0.00
Jan. 9, 2005:	$ 696.00	$ 0.00	56	$ 203.28 ($3.63)
Jan. 16, 2005:	$ 348.00	$ 32.00	12	$ 43.80 ($3.65)
Jan. 23, 2005:	$ 348.00	$ 0.00	8	$ 29.04 ($3.63)
Jan. 30, 2005:	$ 348.00	$ 64.00	16	$ 58.88 ($3.68)
Feb. 6, 2005:	$ 522.00	$ 0.00	32	$ 116.16 ($3.63)
Feb. 13, 2005:	$ 522.00	$ 0.00	32	$ 116.16 ($3.63)
Feb. 20, 2005:	$ 522.00	$ 0.00	32	$ 116.16 ($3.63)
Feb. 27, 2005:	$ 696.00	$ 0.00	56	$ 203.28 ($3.63)
March 6, 2005:	$ 870.00	$ 0.00	80	$ 290.40 ($3.63)
March 13, 2005:	$ 783.00	$ 0.00	68	$ 246.84 ($3.63)
March 20, 2005:	$ 696.00	$ 64.00	64	$ 233.60 ($3.65)
March 27, 2005:	$ 522.00	$ 64.00	40	$ 146.40 ($3.66)
April 3, 2005:	$ 348.00	$ 24.00	11	$ 40.15 ($3.65)
Totals	$10097.40	$1000.00	691	$2513.71

[1] Hours through December 31, 2004, calculated at $7.05 per hour; hours after January 1, 2005 calculated at $7.25 per hour.

[2] The overtime rate shown is 50% of Claimant's weighted weekly wage, calculated by totaling Claimant's weekly earnings, dividing that sum by the total hours worked by Claimant, then multiplying that sum by 50%. For example, the week ending November 13, 2004, Claimant worked two 24 hour shifts, two 4 hours shifts, and one 6 hour shift, earning $338.40 (48 hours x $7.05 per hour) and $112.00 (14 hours x $8 per hour). $338.40 + $112.00 = $450.40; $450.40 ÷ 62 hours = $7.27; $7.27 x .50 = $3.64 per hour.

10) Respondent paid Claimant every other Friday afternoon throughout Claimant's employment. Respondent paid Claimant both by check and in cash for her work at the agreed upon rates of $8 per hour for all four hour shifts worked and $100 for every 24 hour shift worked. During Claimant's employment, there were at least eleven payroll periods in which Claimant was not paid overtime or the minimum wage.

11) During Claimant's employment, Respondent issued two paychecks to Claimant that bounced, causing Claimant to file her wage claim. Those checks were in the respective amounts of $364 and $962.50. After Claimant left Respondent's employment, she was eventually able to cash Respondent's NSF check for $962.50.

12) Claimant's last day of work for Respondent was April 3, 2005. After that, Washington discharged Claimant by removing her name from Respondent's work schedule and telling Claimant she would mail her final check to her. Including the two checks that bounced but were later made good, Respondent paid Claimant in full for all hours worked at the agreed upon rates of $8 per hour for all 4 hour shifts and $100 for all 24 hour shifts. In total, Respondent paid Claimant $6,850, calculated as follows:

a) 58 x 24 hour shifts at $100 = $5800

b) 1 x 12 hour shift at $50 = $50

c) 125 hours at $8 per hour = $1,000

d) $5800 + $50 + $1,000 = $6,850

13) Respondent owes Claimant $6,761.11 in unpaid, due and owing wages ($13,611.11 earned - $6,850 paid = $6,761.11 owed).

14) When Claimant initially filed her wage claim on April 18, 2005, she complained that she was owed $1690.50 in unpaid wages, based on the two bounced checks for $364 and $962.50 and Respondent's failure to pay her $364 for the work she performed from March 22-27, 2005.

15) On May 2, 2005, BOLI's Wage & Hour Division mailed a letter entitled "Notice of Wage Claim" to Respondent. In part, the letter read:

> "You are hereby notified that ROSITA G BLAIR has filed a wage claim with the Bureau of Labor and Industries alleging:
>
> "Unpaid regular wages of $1,690.50 at the rates of $8.00 per day and $100.00 per day from February 01, 2005 to March 27, 2005.
>
> "IF THE CLAIM IS CORRECT, you are required to IMMEDIATELY make a negotiable check or money order payable to the claimant for the amount of wages claimed, less deductions required by law, and send

it to the Bureau of Labor and Industries at the above address."

16) On May 12, 2005, BOLI received a response from Respondent. The response included a copy of BOLI's May 2, 2005, letter and a copy of a purported letter to Claimant dated April 27, 2005, that read as follows:

"4/27/05

"RE: Contract work for Summerset Estates

"Rose, the state finished there [sic] investigation into the complaints and have [sic] been able to substantiate neglect during your shift in a particular incident. I have enclosed your final check.

"I appreciate your hard work.

"Thanks

"Chris Dean Washington, MAM Properties LLC"

17) On May 16, 2005, Washington faxed a letter to BOLI that read as follows:

"May 16, 2005

"Attn: Erika Martinez

"RE: Summerset Estates/Rosita Blair Reference. 05-1111

"I had faxed you on May 12, 2005 in regards to this claim. I received notice from the bank that Rose has cashed her check in the amount of $962.50 Check #2570. I can not get a copy of the front and back yet, I will be able to print it by tomorrow am. I will fax you a copy.

"Thanks

"Chris Dean Washington"

18) Tim Molloy, a BOLI Wage & Hour Division compliance specialist, was assigned to investigate Claimant's wage claim. On May 19, 2005, he mailed a letter to Washington at 4042 Gardner Rd. SE, Salem, OR 97302 that referenced "Claimant: Rosita G. Blair." In part, the letter read:

"Oregon Revised Statute 653.045 and the Oregon Administrative Rule 839-020-0080 require employers to maintain and preserve certain employee time and payroll records. These records must be kept for two years and made available to the bureau upon request. The bureau may assess a civil penalty of $1,000.00 for failing to maintain and preserve required payroll and other records, and an additional $1,000.00 civil penalty for failing to provide these records as required.

"Please send a record of the actual hours worked each day, total hours worked each week, weekly straight time earnings due, weekly overtime compensation due, dates of payment, pay period covered and total paid, for the time period 11-02-04 through 04-03-05.

"* * * * *

"Please respond, in writing, by 06-09-05, with the requested records or offer a settlement

that the claimant might accept."

19) On June 9, 2005, Molloy mailed a follow-up letter to Washington. In part, the letter read:

"Please be advised that Oregon Revised Statute 653.045 and the Oregon Administrative Rule 839-020-0080 require employers to maintain and preserve certain employee time and payroll records. These records must be kept for two years and made available to the bureau upon request. The bureau may assess a civil penalty of $1,000.00 for failing to maintain and preserve required payroll and other records, and an additional $1,000.00 civil penalty for failing to provide these records as required.

"* * * * *

"I would prefer to resolve this matter prior to litigation. However, without your cooperation, this is not possible. You may stop this action by responding no later than **June 20, 2005** with the appropriate records and information pertinent to this matter. Be aware that if you do not provide the requested records, I will make a determination of wages owed based upon the documents at hand."

The letter was mailed certified, attention Chris Washington, to the 4042 Gardner Rd SE address. The letter was received and signed for on June 15, 2005.

20) On June 14, 2005, Washington faxed eight of Claimant's time sheets to the Agency covering the weeks ending January 23, 2005; January 30, 2005; February 6, 2005; February 20, 2005; March 6, 2005; March 13, 2005; March 20, 2005; and March 27, 2005. The time sheets showed the dates and hours worked by Claimant.

21) On June 22, 2005, Molloy sent another certified letter to Washington that referenced Claimant's wage claim. Washington received the letter on June 24, 2005. The letter read:

"Dear Chris Washington:

"Attached to this letter is a history of the Bureaus [sic] attempt to collect all of the documents needed to resolve this case. You have produced some of them but I am still missing many of the documents that we spoke about. They are listed below:

"1. The employee claims that check number 4372 (DATE: March 25, 2005) came back non sufficient funds. You told me she cashed it and it went through and that you would send me a copy of a bank statement indicating this.

"2. Claimant states she should have received a second check. The amount of wages should be the same as the above mentioned check. You said she has been paid and that you would provide me proof of this.

"3. Claimant states she started working for you on November 2, 2004. You stated that this date is incorrect. You said you would send me documents proving a later starting date.

"We have given you **ample time**. If I do not receive the above stated items by June 28, 2005, I will determine a final amount owed to the claimant.

"This figure will be based on the information given to me by the claimant. The final amount owed will also be higher than what the claimant is asking because:

"1. The payment schedule of $100 per 24 hour shift will not be used to calculate wages. Instead, 24 hour shift work will be considered 24 hours worked (Example: $7.25 x 24 - **$173.76** amount owned [sic] per 24 hour shift).

"2. All hours worked in excess of 40 per workweek will be at time and a half.

"3. I will be looking at the total hours worked from the date of hired [sic].

"As I have stated before, it is my obligation to investigate claims and to ensure that state labor laws and rules are followed properly. This includes minimum wage rules and regulations. If these rules and regulations are not followed, it is my responsibility to collect all wages owed to the former employee.

"If we proceed to a court hearing the obligation to keep records of daily weekly hours of work will be at the forefront. Courts in similar cases have ruled that it is the responsibility of the employer to control the workforce. At the first notice of an employee not meeting your expectations you had the responsibility to terminate the employee.

"Oregon Revised Statute 653.045 and the Oregon Administrative Rule 839-020-0080 require employers to maintain and preserve certain employee time and payroll records. These records must be kept for two years and made available to the bureau upon request. The bureau may assess a civil penalty of $1,000.00 for failing to maintain and preserve required payroll and other records, and an additional $1,000.00 civil penalty for failing to provide these records as required.

"We expect to receive a certified check for **$728.00** (two pay checks each = $364) by June 28, 2005 or supply us me [sic] with the above listed documents. In addition to the wages owed, penalty wages and attorney fees have accrued.

"If you have any further questions, feel free to call me."

22) On June 29, 2005, Washington faxed a letter dated June 26, 2005, to Molloy in which she stated:

"RE: Rosita Blair

"I have attached the following timesheet: 3/21/05-3/27/05 These hours have not been paid. In the amount of $332.00.

"The other amount of $364.00 for the dates of 3/15/05-3/20/05 she was issued a check from Sunburst account Ck #4372 dated 3/21/05. This has been negotiated, I have ordered a copy.

"In conclusion, Rose is owed $332.00.

"Chris"

Washington attached copies of Claimant's time cards for the weeks ending March 20 and March 27, 2005.

23) In early July, 2005, Molloy left BOLI's employment and Claimant's wage claim was reassigned to BOLI Wage & Hour Division compliance specialist Katy Bayless. On July 6, 2005, Bayless sent a certified letter to Washington that referenced Claimant's wage claim. Washington received the letter on July 8, 2005. In part, the letter read:

"Dear Employer:

Since you have not responded to our letter of June 22, 2005 with sufficient evidence to prove your position, it has become necessary to begin the Administrative Process. We will soon serve upon you an Order of Determination and ultimately a judgment in this matter.

"You are advised that as of this date, in addition to the $2,230.00 in wages owed, penalty wages have accrued to the amount of $3,840.00. This amount does not include interest or attorney fees.

"Please provide a daily work record for Rosita G. Blair. If you do not have such a record, there may be civil penalties of $2,000.00 assessed.

"Please be advised the [sic] Oregon Revised Statute 653.045 and Oregon Administrative Rule 839-020-0080 requires [sic] employers to maintain and preserve certain employee time and payroll records. These records must be kept for two years and made available to the bureau upon request. The bureau will assess a civil penalty of $1,000.00 for failing to maintain and preserve required payroll and other records, and an additional $1,000.00 civil penalty for failing to provide these records as required.

"We would prefer to resolve this matter prior to litigation. However, without your cooperation, this is not possible. You may stop this action by responding no later than July 20, 2005 with payment or, if you dispute the claim, with the appropriate records and/or information pertinent to this matter.

"Please send a check or information to our Salem office. If you have any questions,

please feel free to contact me at the address or phone number listed below."

24) On or about September 9, 2005, Washington sent a check for $364.00 to Bayless that was intended as a check for unpaid wages to Claimant. Imprinted on the check were the words: "MAM PROPERTIES, LLC, 4042 Gardener Rd., Salem, OR 97302, TEL: 503-362-6590."

25) Penalty wages for Claimant under ORS 652.150 are computed as follows:[1] $10,097.40 earned at minimum wage of $7.05 per hour or $7.25 per hour + $1,000 earned at $8 per hour = $11,097.40. $11,097.40 ÷ 1,529 hours worked = average wage of $7.26 per hour. $7.26 x 8 hours x 30 days = $1,742.40, rounded to $1,742.[2]

26) Civil penalties under ORS 653.055 are computed in the same manner as penalty wages under ORS 652.150 and equal $1,742.

27) Claimant, Bayless, and Souryamat were all credible witnesses.

ULTIMATE FINDINGS OF FACT

1) In 2004, the minimum wage in Oregon was $7.05 per hour. In 2005, the minimum wage in Oregon was $7.25 per hour.

2) At all times material herein, Respondent MAM Properties, LLC was a limited liability company doing business in Salem, Oregon, that employed Claimant.

3) In November 2004, Respondent, through its managing member Washington, hired Claimant to work as a caregiver at an adult foster care home located at 4042 Gardner Rd. SE in Salem, Oregon. Washington agreed to pay Claimant $8 per hour for every four hour shift and $100 for every 24 hour shift that Claimant worked.

4) Claimant worked for Respondent from November 8, 2004, through April 3, 2005.

5) Respondent paid Claimant every two weeks throughout her employment. Respondent never gave Claimant an itemized statement of earnings or any other document showing the hours worked by Claimant; rate of pay; amount and description of deductions, if any; net amount paid after deductions; or the pay period for which Claimant was paid.

6) Claimant worked 1404 hours for which she was entitled to be paid the minimum wage and 125 hours for which she was entitled to be paid $8 per hour, for a

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[1] *See In the Matter of Westland Resources, Inc.,* 23 BOLI 276, 282 (2002) (where more than one wage rate is paid during the wage claim period, penalty wages are computed by taking the total earned during the wage claim period, dividing that figure by the total number of hours worked during the wage claim period, multiplying that figure by eight hours, and multiplying again by 30 days).

[2] *See In the Matter of Staff, Inc.,* 16 BOLI 97, 119 (1997) (pursuant to agency policy, penalty wages are rounded off to the nearest dollar).

total of 1529 hours. Of those hours, 691 were overtime hours for which Claimant was entitled to be paid time and a half. Claimant worked eleven payroll periods in which she was entitled to be paid minimum wage and overtime and Respondent did not pay her either minimum wage or overtime.

7) Claimant earned a total of $13,611.11 while in Respondent's employ and was only paid $6,850, leaving $6,761.11 in unpaid, due, and owing wages.

8) On May 2, 2005, BOLI's Wage & Hour Division made a written demand to Respondent, on Claimant's behalf, for unpaid wages of $1,690. On June 22, 2005, BOLI's Wage & Hour Division made another written demand to Respondent, on Claimant's behalf, for $728 in unpaid wages. On July 6, 2005, BOLI's Wage & Hour Division made a written demand to Respondent, on Claimant's behalf, for unpaid regular wages of $2,230. On August 17, 2005, the Agency issued Order of Determination No. 05-1111 based upon the wage claim filed by Claimant and the Agency's investigation. The Order of Determination alleged that Respondent employed Claimant from November 8, 2004, through April 3, 2005, and owed a total of $7,720.04 in unpaid wages, and demanded that Respondent pay the wages or request a hearing.

9) On May 19, 2005, BOLI's Wage & Hour Division mailed a letter to Respondent in which it requested that Respondent provide, by June 9, 2005, a record of the actual hours worked each day and total hours per week by Claimant, weekly straight time earnings due, weekly overtime compensation due, pay periods covered, and total wages paid from November 2, 2004, through April 3, 2005. On July 6, 2005, BOLI's Wage & Hour Division mailed a follow-up letter to Respondent that asked Respondent to provide a daily work record for Claimant.

10) In response to these letters, Respondent provided only copies of Claimant's weekly time sheets reflecting work Claimant performed over the eight week period beginning January 17, 2005, and ending March 27, 2005. The only information contained on the time sheets was Claimant's name, the days of the week and corresponding dates, the time Claimant started work during her 24 hour shifts, and the time Claimant started and ended work on the days she worked four hour shifts.

11) Penalty wages for Claimant under ORS 652.150 equal $1,742.

12) Civil penalties under ORS 653.055 equal $1,742.

CONCLUSIONS OF LAW

1) At all times material herein, Respondent was an employer and Claimant was an employee subject to the provisions of ORS 652.110 to 652.200, ORS 652.310 to 652.405, and ORS 653.010 to 653.261.

2) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the subject matter and Respondent herein. ORS 653.025, ORS 653.256, ORS 653.261, ORS 652.310 to 652.405.

3) Respondent violated ORS 652.140(1) by failing to pay to Claimant Rosita Blair all wages earned and unpaid not later than April 4, 2005. Respondent owes Claimant $6,761.11 in unpaid, due, and owing wages.

4) Respondent's failure to pay Claimant all wages due and owing was willful and Respondent owes Claimant $1,742 in penalty wages. ORS 652.150.

5) Respondent failed to pay Claimant the minimum wage and overtime wages to which Claimant was entitled, in violation of ORS 653.025, ORS 653.261, and OAR 839-020-0030, and is liable to Claimant for $1,742 in civil penalties. ORS 653.055.

6) On 11 occasions when Claimant was paid, Respondent willfully failed to provide Claimant with a written itemized statement including the elements required by OAR 839-020-0012(1), constituting 11 violations of OAR 839-020-0012(1).

7) Respondent willfully failed to make 13 of Claimant's time cards available for inspection by BOLI in violation of ORS 653.045(2) and OAR 839-020-0083(3).

8) On 11 occasions when Claimant was paid, Respondent willfully failed to pay Claimant the minimum wage for all hours worked, constituting 11 violations of ORS 653.025 and OAR 839-020-010(1).

9) On 11 occasions when Claimant was paid, Respondent willfully failed to pay Claimant overtime wages for all hours worked in excess of 40 hours per week, constituting 11 violations of ORS 653.261 and OAR 839-020-0030.

10) The Commissioner has the authority to assess civil penalties for willful violations of ORS 653.025, ORS 653.045, ORS 653.261, OAR 839-0010(1), OAR 839-0012(1), OAR 839-020-0030, and OAR 839-020-0083(3). The imposition of $34,000 in civil penalties is an appropriate exercise of the Commissioner's discretion. ORS 653.256.

OPINION

DEFAULT

When a Respondent defaults, the agency needs only to establish a prima facie case to support the allegations in its charging document in order to prevail. *In the Matter of Okechi Village & Health Center,* 27 BOLI 156, 161 (2006). Unsworn and unsubstantiated assertions contained in a Respondent's answer may be considered, but are overcome whenever they are contradicted by other credible evidence in the record. *In the Matter of Bukovina Express,* 27 BOLI 184, 199 (2006).

CLAIMANT'S WAGE CLAIM

To establish Claimant's wage claim in a default, the Agency must present credible evidence of the following: 1) Respondent employed Claimant; 2) The pay rate upon which Respondent and Claimant agreed, if it exceeded the minimum wage; 3) Claimant performed work for which she was not properly compensated; and 4) The amount and extent of work Claimant performed for Respondent. *In the Matter of Captain Hooks, LLC,* 27 BOLI 211, 222 (2006).

RESPONDENT EMPLOYED CLAIMANT

Respondent and Claimant agree that Respondent was a limited liability company and an Oregon employer and that Respondent employed Claimant at an adult foster care home in Salem, Oregon.

AGREED RATES OF PAY

Claimant worked two different shifts while employed by Respondent. One shift was 24 hours long, and the other was only four hours long. Respondent and Claimant agree that Respondent agreed to pay Claimant $100 for every 24 hour shift and $8 per hour for every four shift that Claimant worked.

CLAIMANT PERFORMED WORK FOR WHICH SHE WAS NOT PROPERLY COMPENSATED

The Agency stipulated that Claimant was paid for all hours worked at the rate that Respondent agreed to pay her, and there is no evidence that Respondent paid her any more than that sum. However, Claimant was entitled to far more. For her 24 hour shifts, she was paid only $4.17 per hour ($100 divided by 24 hours = $4.17), far below the minimum wage to which she was legally entitled.[3] In addition, Claimant's credible testimony established that she worked a large number of overtime hours and that she did not receive any overtime pay.

THE AMOUNT AND EXTENT OF WORK CLAIMANT PERFORMED FOR RESPONDENT

The final element of the Agency's case requires proof of the amount and extent of work performed by the claimant. In this case, the Agency provided copies of all of Claimant's weekly time sheets on which Claimant wrote a contemporaneous record of her hours worked that Respondent relied upon to compute her pay. Those time sheets establish that Claimant worked 1529 hours in total -- 1404 hours on 24 hour shifts and 125 hours on four hour shifts.[4] Of those hours, 691 were overtime hours. During the 24 hour shifts, Claimant was never

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[3] *See In the Matter of Adesina Adeniji,* 25 BOLI 162, 170 (2004) (an agreement to pay at a fixed rate includes the statutory requirement to pay the minimum wage, and an employee's compensation, however calculated, must result in the employee being paid at the least the minimum wage for all hours worked).

[4] *See* Finding of Fact 8 -- The Merits.

able to sleep for more than two hours without interruption, and there was no express or implied agreement between Respondent and Claimant regarding excluding a bona fide regularly scheduled sleeping period from hours worked. *See* OAR 839-020-0042(2). Consequently, Claimant is entitled to be paid the minimum wage for all 24 hours of her 24 hour shifts. Because there was no evidence that Respondent had an established workweek, the forum has computed Claimant's overtime pay based on a workweek that began on Monday, the first day of the week that Claimant began work and the first day within the scope of her wage claim.[5] Claimant earned a total of $13,611.11 and was paid only $6,850, leaving unpaid, due and owing wages in the amount of $6,761.11.[6]

CLAIMANT IS OWED $1,742 IN PENALTY WAGES

The forum may award penalty wages where a respondent's failure to pay wages was willful. Willfulness does not imply or require blame, malice, or moral delinquency. Rather, a respondent commits an act or omission "willfully" if he or she acts (or fails to act) intentionally, as a free agent, and with knowledge of what is being done or not done. *Sabin v. Willamette Western Corp.*, 276 Or 1083, 557 P2d 1344 (1976). It is undisputed that: (1) Respondent, through Washington, knowingly agreed to pay Claimant a wage for working a 24 hour shift that was substantially below Oregon's minimum wage; (2) Respondent, through Washington, was aware of the total hours that Claimant worked; (3) Respondent, through Washington, knowingly paid Claimant a wage for working a 24 hour shift that was substantially below Oregon's minimum wage; and (4) Respondent, through Washington, failed to pay Claimant overtime wages for any week in which Claimant worked overtime. There is no evidence that Washington, Respondent's agent, acted other than as a free agent in underpaying Claimant. Finally, the Agency

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[5] *Cf. In the Matter of Burrito Boy, Inc.,* 16 BOLI 1, 13 (1997) (where there was no evidence that respondent had an established work week – that is, a period of seven consecutive 24 hour periods commencing on a particular day – for purposes of computing claimant's overtime, the forum followed agency policy of considering the work week to begin on the day claimant commenced work in the pay period in question).

[6] At hearing, the Agency amended its Order of Determination to reduce the amount of unpaid wages sought to $6,393.54, based on the Agency's recalculations. However, evidence presented by the Agency showed that Claimant was owed the greater amount of $6,761.11. When credible evidence establishes a wage claimant is owed wages exceeding those alleged in the charging or amended charging document, the Commissioner has the authority to award the greater amount of unpaid wages. *In the Matter of John M. Sanford, Inc.,* 26 BOLI 72, 86 (2004), *amended* 26 BOLI 110 (2004).

provided documentary and testimonial evidence that it made the written demand required by ORS 652.150 for Claimant's wages in the amount of $7,720.04.[7] Consequently, the forum assesses the penalty wages in the manner provided for in ORS 652.150 (hourly rate - $7.26 x eight hours per day x 30 days = $1,742).

CLAIMANT IS OWED $1,742 IN CIVIL PENALTIES UNDER ORS 653.055

In its Order of Determination, the Agency alleged that Claimant is entitled to a civil penalty of $1,742 based on Respondent's failure to pay Claimant "the wages to which Claimant was entitled under ORS 653.010 to 653.261." ORS 653.055 provides that the forum may award civil penalties to an employee when his or her employer pays that employee less than the wages to which he or she is entitled under ORS 653.010 to 653.261. "Willfulness" is not an element.[8] Here, Claimant was not paid the minimum wage for the work she performed in her 24 hour shifts and was not paid overtime wages for any work she performed in excess of 40 hours in a work week. The statutory requirement to pay the minimum wage is found in ORS 653.025, and the separate requirement to pay overtime wages is contained in ORS 653.261 and OAR 839-020-0030, the Agency rule interpreting ORS 653.261. As both of these statutes fall within the range of statutes set out in ORS 653.055, Respondent's failure to pay the minimum wage and overtime wages to Claimant entitles Claimant to a civil penalty, in addition to the penalty wages awarded under ORS 652.150. The civil penalty is computed in the same manner as ORS 652.150 penalty wages (hourly rate - $7.26 x eight hours per day x 30 days = $1,742).

RESPONDENT VIOLATED OAR 839-020-0012 BY FAILING TO PROVIDE ITEMIZED STATEMENTS TO CLAIMANT

The Agency alleged that Respondent violated ORS 653.045(3) and OAR 839-020-0012 on each of the 11 occasions that Respondent paid Claimant by failing to accompany its payment with an itemized statement showing "gross earnings; amount and description of any deduction from gross earnings; total number of hours worked during that pay period; the rate of pay; the net amount paid; and the time period covered by the payment." The statute and rule contain different requirements and the forum addresses them separately.

ORS 653.045(3) requires employers to "supply each of the employer's employees with itemized statements of amounts and purposes of deductions in the manner provided in ORS

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[7] *See In the Matter of Captain Hooks, LLC,* 27 BOLI 211, 224 (2006) (the Agency's Order of Determination constitutes a written notice of nonpayment).

[8] *Id.* at 225.

652.610." In order to prevail, the agency must provide credible evidence that (1) respondent made wage payments to claimants; (2) respondent made deductions from claimants' wage payments; and (3) respondent did not provide the itemized statement required by ORS 652.610 at the time respondent made the wage payments. *In the Matter of Gary Lee Lucas,* 26 BOLI 198, 215 (2005). There was no evidence presented to show that Respondent ever took any deductions from Claimant's pay. Consequently, the forum finds that Respondent did not violate ORS 653.045(3).

In contrast, OAR 839-020-0012(1) requires employers to furnish employees with a comprehensive "written itemized statement of earnings" whenever "the employee receives a compensation payment from the employer." The itemization of deductions required by ORS 653.045(3) is only one of the required elements. To comply with OAR 839-020-0012(1), the statement must include:

> "(a) The total gross payment being made;
>
> "(b) The amount and a brief description of each and every deduction from the gross payment;
>
> "(c) The total number of hours worked during the time covered by the gross payment;
>
> "(d) The rate of pay;
>
> "(e) If the worker is paid on a piece rate, the number of pieces done and the rate of pay per piece done;
>
> "(f) The net amount paid after any deductions;
>
> "(g) The employer's name, address and telephone number;
>
> "(h) The pay period for which the payment is made."

The elements set out in subsections (a), (c), (d), and (h) are the same as the elements the Agency alleged were missing from Respondent's itemized statements. The Agency used the credible testimony of Claimant to establish that she received 11 "compensation payments," *i.e.* wage payments, from Respondent and that Respondent never gave her any kind of itemized statement with her wage payments. Based on this evidence, the forum concludes that Respondent committed 11 violations of OAR 839-020-0012.

The Agency sought a $1,000 civil penalty for each violation of OAR 839-020-0012. The Commissioner may assess a civil penalty against "any person who willfully violates" OAR 839-020-0012. ORS 653.256. "Willfully" is defined in OAR 839-020-0004(33) as follows:

> "'Willfully' means knowingly. An action is done knowingly when it is undertaken with actual knowledge of a thing to be done or omitted or action undertaken by a person who should have known the thing to be done or omitted. A person

> 'should have known the thing to be done or omitted' if the person has knowledge of facts or circumstances which, with reasonably diligent inquiry, would place the person on notice of the thing to be done or omitted to be done. A person acts willfully if the person has the means to inform himself or herself but elects not to do so. For purposes of these rules, the employer is presumed to know the requirements of ORS 653.010 to 653.261 and these rules."

In this case, the action in question was Respondent's failure to provide Claimant with an itemized statement each of the 11 times that Claimant was paid. Pursuant to 839-020-0004(33), Respondent is presumed to have known the requirements of OAR 839-020-0012. Based on this presumption, the forum finds that Respondent willfully violated OAR 839-020-0012 on 11 occasions.

CIVIL PENALTIES

In determining the appropriate civil penalties, the forum may consider the aggravating and mitigating factors set out in OAR 839-020-1020. Those factors are set out below:

> "(a) The history of the employer in taking all necessary measures to prevent or correct violations of statutes or rules;
>
> "(b) Prior violations, if any, of statutes or rules;
>
> "(c) The magnitude and seriousness of the violation;
>
> "(d) Whether the employer knew or should have known of the violation;
>
> "(e) The opportunity and degree of difficulty to comply;
>
> "(f) Whether the employers' action or inaction has resulted in the loss of a substantive right of an employee."

It is the employer's responsibility to provide the Commissioner with any mitigating evidence concerning the amount of civil penalties to be assessed. OAR 839-020-1020(2); *In the Matter of Alphabet House,* 24 BOLI 262, 283 (2003).

A. Aggravating circumstances.

The Agency alleged and presented credible evidence of several aggravating circumstances.

First, Respondent knew, or should have known, of the violations. Although there was no evidence presented that Respondent, through Washington, had actual knowledge of the requirements of OAR 839-020-0012 when Claimant was paid, Respondent, as an employer, still had a duty to know the laws that regulate employment in Oregon. *In the Matter of Okechi Village & Health Center,* 27 BOLI 156, 169 (2006). Accordingly, the forum finds that Respondent should have known, of the violations. OAR 839-020-1020(1)(d).

Second, it would not have been difficult for Respondent to comply with the requirements of OAR 839-020-0012. There is no evidence that Respondent was

impeded in any manner from creating itemized statements to give to Claimant when she was paid. OAR 839-020-1020(1)(e).

Third, there is no evidence that Respondent took any measures to ensure that these violations did not occur. OAR 839-020-1020(1)(a).

Fourth, Respondent's failure to comply with the law deprived Claimant of her rights to receive and be privy to legally required information regarding her pay. OAR 839-020-1020(1)(f).

Fifth, Respondent's failure to provide Claimant with itemized statements was a serious violation because it potentially affected her substantive rights, in that one of the purposes of the statute is to afford workers an opportunity to verify that they have been paid correctly for all hours worked. OAR 839-020-1020(1)(c); *In the Matter of Rodrigo Ayala Ochoa,* 25 BOLI 12, 52 (2003), *affirmed without opinion*, 196 Or App 639 (2004). Respondent's violations were of substantial magnitude because: (1) the number of violations – 11; and (2) an indirect result of the violations was that Claimant was underpaid by nearly $7,000; a fact she was unaware of until BOLI commenced its investigation.

B. <u>Mitigating circumstances.</u>

There are no mitigating circumstances.

C. <u>Amount of civil penalties.</u>

The Commissioner is authorized to assess a civil penalty "not to exceed $1,000" for each violation of OAR 839-020-0012. Based on the aggravating circumstances, the forum finds that $1,000 per violation, for a total of $11,000, is an appropriate civil penalty.

RESPONDENT VIOLATED ORS 653.045(2)

The Agency alleged that Respondent violated ORS 653.045(2) and OAR 839-020-0083(3) by failing to make and keep the following work records available for inspection in response to the Agency's May 19, 2005, request:

> "[A] record of hours worked each day, total hours worked each work week, weekly straight time earnings due, weekly overtime compensation due, dates of payment, pay periods covered and total paid for the period of November 2, 2004 through April 3, 2005."

ORS 653.045(2) provides that "[e]ach employer shall keep the records required by subsection (1) of this section open for inspection or transcription by the commissioner or the commissioner's designee at any reasonable time." In turn, ORS 653.045(1) includes the requirement that employers shall:

> "[M]ake and keep available to the Commissioner * * * for not less than two years a record or records containing:
>
> "* * * * *

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

"* * * * *."

OAR 839-020-0083(3) interprets ORS 653.045(2) to require that "[a]ll records required to be preserved and maintained by these rules shall be made available for inspections and transcription by the Commissioner or duly authorized representative of the Commissioner."

As stated above, one of the records requested by the Agency was "the actual hours worked each week" by Claimant. Claimant worked 21 weeks for Respondent. Each week she recorded her hours on a weekly time sheet, which she then copied before giving the originals to Respondent. In response to the Agency's request, Respondent provided only eight of Claimant's 21 weekly time sheets. The remaining 13 weekly time sheets in the record were provided by Claimant. The presence of these 21 weekly time sheets in the record shows that Respondent **made** a record of the actual hours worked per week by Claimant. However, Respondent violated ORS 653.045(3) by failing to make the records available to the Commissioner for inspection in response to Molloy's May 19, 2005, written request. The forum further infers that Respondent failed to keep the other 13 weekly time sheets available for inspection. Had Respondent kept these records, it would have provided them when it provided the other eight weekly time sheets.[9] Respondent's failure to keep and make these 13 weekly time sheets available to the Commissioner for inspection is a violation of ORS 653.045(2). Pursuant to 839-020-0004(33), Respondent is presumed to have known the requirements of ORS 653.045(2), and there is undisputed evidence that Respondent received the Agency's request for Claimant's weekly time sheets. Accordingly, the forum finds that Respondent's violation of ORS 653.045(2) was willful.

CIVIL PENALTIES

The Agency sought to assess a $1,000 civil penalty for Respondent's violation of ORS 653.045(2). In determining the appropriate civil penalties, the forum considers the following aggravating and mitigating factors.

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[9] *Cf. In the Matter of Okechi Village & Health Center,* 27 BOLI 156, 168-69 (2006) (where the hearing record included evidence that respondent maintained and provided the agency with a record of claimant's actual work hours, including his original time cards, but despite the agency's repeated requests and ample opportunity to do so, respondent failed to make a second claimant's payroll records available for the agency's inspection, the forum inferred that respondent did not make records pertaining to the second claimant or it would have provided them when it provided the first claimant's payroll records).

A. Aggravating circumstances.

The Agency alleged and presented credible evidence of several aggravating circumstances.

First, Respondent knew, or should have known, of the violations. Respondent received the Agency's request for records and did not provide all the requested records. In the Agency's request, Respondent was further notified that failure to maintain and provide those records was a violation of Oregon law and BOLI's administrative rules. OAR 839-020-1020(1)(d).

Second, it would not have been difficult for Respondent to comply with the requirements of ORS 653.045(2). Respondent kept and provided copies of 8 of Claimant's weekly time sheets and there is no evidence that Respondent was impeded in any manner from keeping and providing the other 13 to the Agency in response to its request. OAR 839-020-1020(1)(e).

Third, there is no evidence that Respondent took any measures to ensure that these violations did not occur. OAR 839-020-1020(1)(a).

Fourth, Respondent's failure to keep and provide all of Claimant's weekly time sheets was a serious violation because it potentially affected Claimant's substantive rights, in that one of the purposes of the statute is to afford give BOLI the opportunity to verify that employees have been paid correctly for all hours worked. OAR 839-020-1020(1)(c); *Ochoa* at 52. Respondent's violation was of substantial magnitude because: (1) the number of time sheets Respondent failed to keep and provide – 13; and (2) Respondent's failure to keep and provide these records made the Agency's investigation of Claimant's wage claim much more difficult and time consuming.

B. Mitigating circumstances.

There are no mitigating circumstances.

C. Amount of civil penalties.

The Commissioner is authorized to assess a civil penalty "not to exceed $1,000" for each violation of ORS 653.045(2). ORS 653.256. Based on the aggravating circumstances, the forum finds that the $1,000 civil penalty sought by the Agency is an appropriate assessment.

RESPONDENT COMMITTED 11 VIOLATIONS OF ORS 653.025 AND OAR 839-020-0010

The Agency alleged that Respondent violated ORS 653.025 and OAR 839-020-0010(1) by failing to pay Claimant at least the applicable minimum wage for all hours worked on each of the 11 occasions that Respondent paid Claimant.

ORS 653.025 provides, in pertinent part, that "no employer shall employ or agree to employ any employee at wages computed at a rate lower than * * * a rate adjusted for inflation [for years after 2003]." OAR 839-020-0010(1) requires employers to pay

employees "no less than the applicable minimum wage for all hours worked." In 2004, Oregon's minimum wage was $7.05 per hour, and in 2005 it was $7.25 per hour.

Claimant's weekly time sheets show that she worked at least one 24 hour shift during each week of her employment. Throughout her employment, she was paid only $100 for each 24 hour shift, which equals a wage of $4.17 per hour ($100 divided by 24 hours = $4.17). This was less than the minimum wage in 2004 and 2005. Because Respondent agreed to pay Claimant $8 per hour for her shorter shifts, Claimant was entitled to that higher rate of pay for those hours and the forum does not consider the pay she received for her shorter shifts in determining whether Claimant was paid the minimum wage for all hours worked. As Claimant worked at least one 24 hour shift during each week of her employment for which she was not paid the minimum wage, it necessarily follows that she was not paid the minimum wage during any of her 11 bi-weekly payroll periods. Respondent's failure to pay Claimant at least the minimum wage during 11 pay periods constitutes 11 violations of ORS 653.025 and OAR 839-020-0010(1). Respondent knowingly agreed to pay Claimant less than the minimum wage for her 24 hour shifts, paid her less than the minimum wage for each those shifts, and Respondent is presumed to know the law. Accordingly, the forum finds that Respondent's 11 violations were willful.

CIVIL PENALTIES

The Agency sought to assess a $1,000 civil penalty for each of Respondent's 11 violations of ORS 653.025 and OAR 839-010-0010(1). In determining the appropriate civil penalties, the forum considers the following aggravating and mitigating factors.

A. Aggravating circumstances.

The Agency alleged and presented credible evidence of several aggravating circumstances.

First, Respondent knew or should have known of the violations. Respondent is presumed to know the minimum wage, yet agreed to pay Claimant $100 for each 24 hour shift and paid Claimant that amount. OAR 839-020-1020(1)(d).

Second, Respondent relied on Claimant's weekly time sheets, which contained an accurate account of the number of hours that Claimant worked during her 4 hour and 24 hour shifts, to compute Claimant's pay. Consequently, Respondent had an opportunity to comply with the requirements of ORS 653.025 and OAR 839-010-0010(1) each time Claimant was paid, but failed to do so. OAR 839-020-1020(1)(e).

Third, there is no evidence that Respondent took any measures to ensure that these violations did not occur. OAR 839-020-1020(1)(a).

Fourth, Respondent's failure to pay Claimant the minimum wage was a serious violation because it affected Claimant's substantive right to be paid the minimum wage. The 11 violations were of great magnitude because: (1) Claimant was underpaid approximately $3 per hour[10] during a total of 1404 hours worked;[11] (2) Claimant was underpaid a total of $6,761.11; and (3) Two of Claimant's checks bounced and were only made good after she left Respondent's employment. OAR 839-020-1020(1)(c).

B. Mitigating circumstances.

There are no mitigating circumstances.

C. Amount of civil penalties.

The Commissioner is authorized to assess a civil penalty "not to exceed $1,000" for each violation of ORS 653.025 and OAR 839-020-0010(1). ORS 653.256. Based on the aggravating circumstances, the forum finds that $1,000 per violation, for a total of $11,000, is an appropriate civil penalty.

RESPONDENT COMMITTED 11 VIOLATIONS OF ORS 653.261 AND OAR 839-020-0030

The Agency alleged that Respondent violated ORS 653.261 and OAR 839-020-0030 by failing to pay Claimant overtime for all hours worked over 40 in each seven-day work week on each of the 11 occasions that Respondent paid Claimant.

ORS 653.261(1) provides, in pertinent part:

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

Pursuant to ORS 653.261, the Commissioner has promulgated OAR 839-020-0030, an administrative rule regulating payment of overtime wages. In pertinent part, that rule provides:

> "(1) * * * [A]ll work performed in excess of forty (40) hours per week must be paid for at the rate of not less than one and one-half times the regular rate of pay when computed without benefits of commissions, overrides, spiffs,

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[10] This figure does not include computation for overtime wages.

[11] *See* Finding of Fact 8 -- The Merits, *supra*.

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

The forum has already determined that Claimant worked in excess of 40 hours per week in 19 of the 21 weeks that she was employed by Respondent, that Respondent paid her every two weeks during 11 pay periods, and that Respondent never paid Claimant any overtime pay. Since the two weeks in which Claimant did not work overtime were not consecutive,[12] the forum also concludes that Respondent earned overtime pay in all 11 pay periods. By not paying Claimant overtime in any of the 11 pay periods in which she earned overtime pay, Respondent committed 11 violations of ORS 653.261 and OAR 839-020-0030(1). Respondent was aware of the number of overtime hours Claimant worked each week and should have known it was required to pay Claimant overtime wages, yet failed to do so. Accordingly, the forum finds that Respondent's 11 violations were willful.

CIVIL PENALTIES

The Agency sought to assess a $1,000 civil penalty for each of Respondent's 11 violations of ORS 653.025 and OAR 839-010-0010(1). In determining the appropriate civil penalties, the forum considers the following aggravating and mitigating factors.

A. Aggravating circumstances.

The Agency alleged and presented credible evidence of several aggravating circumstances.

First, Respondent knew or should have known of the violations. Respondent is presumed to know the law, yet failed to pay Claimant any overtime wages despite having knowledge of the exact number of hours Claimant worked each week. OAR 839-020-1020(1)(d).

Second, Respondent relied on Claimant's weekly time sheets, which contained an accurate account of the number of hours that Claimant worked during her 4 hour and 24 hour shifts, to compute Claimant's pay. Consequently, Respondent had an opportunity to comply with the requirements of ORS 653.261 and OAR 839-010-0030 each time Claimant was paid, but failed to do so. OAR 839-020-1020(1)(e).

Third, there is no evidence that Respondent took any measures to ensure that these violations did not occur. OAR 839-020-1020(1)(a).

Fourth, Respondent's failure to pay Claimant overtime wages was a serious violation because it affected Claimant's substantive right to be paid overtime wages. The 11 violations were of great magnitude because Claimant was not paid for 691 hours of overtime worked, resulting in unpaid overtime wages in the amount of $2513.71. OAR 839-020-1020(1)(c).

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[12] *See* Finding of Fact 8 -- The Merits, *supra*.

B. Mitigating circumstances.

There are no mitigating circumstances.

C. Amount of civil penalties.

The Commissioner is authorized to assess a civil penalty "not to exceed $1,000" for each violation of ORS 653.261 and OAR 839-020-0030. ORS 653.256. Based on the aggravating circumstances, the forum finds that $1,000 per violation, for a total of $11,000, is an appropriate civil penalty.

ORDER

NOW, THEREFORE, as authorized by ORS 652.140(1), ORS 652.150, ORS 653.055, and ORS 652.332 and as payment of the unpaid wages, penalty wages, and a civil penalty, the Commissioner of the Bureau of Labor and Industries hereby orders Respondent **MAM Properties, LLC** to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 1045 State Office Building, 800 NE Oregon Street, Portland, Oregon 97232-2180, the following:

> A certified check payable to the Bureau of Labor and Industries in trust for Claimant Rosita G. Blair, in the amount of TEN THOUSAND TWENTY FIVE DOLLARS AND ELEVEN CENTS ($10,025.11), less appropriate lawful deductions, representing $6,761.11 in gross earned, unpaid, due and payable wages, plus interest at the legal rate on that sum from May 1, 2005, until paid; $1,742 in penalty wages, plus interest at the legal rate on that sum from June 1, 2005, until paid; and $1,742 as a civil penalty, plus interest at the legal rate on that sum from June 1, 2005, until paid.

NOW, THEREFORE, as authorized by ORS 653.256, and as payment of the civil penalties assessed as a result of its violations of ORS 653.045 (2), OAR 839-020-0012, ORS 653.025, OAR 839-020-0010, ORS 653.261, and OAR 839-020-0030, the Commissioner of the Bureau of Labor and Industries hereby orders Respondent **MAM Properties, LLC,** to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 1045 State Office Building, 800 NE Oregon Street, Portland, Oregon 97232-2180, the following:

> A certified check payable to the Bureau of Labor and Industries in the amount of THIRTY FOUR THOUSAND ($34,000), plus any interest that accrues at the legal rate on that amount from a date ten days after issuance of the Final Order and the date Respondent **MAM Properties, LLC,** complies with the Final Order.

In the Matter of

GORDY'S TRUCK STOP, LLC

Case No. 03-05

Final Order of Commissioner Dan Gardner

Issued February 28, 2007

SYNOPSIS

The Agency established by a preponderance of credible evidence that Respondent, through its principal, Gordon Wanek, subjected Complainant to offensive and unwelcome sexual conduct that created a hostile and intimidating work environment, in violation of ORS 659A.030(1)(b). The Agency also established that Respondent's principal intentionally created intolerable working conditions because of Complainant's sex and that her subsequent resignation was a constructive discharge, in violation of ORS 659A.030(1)(a). The forum concluded that Respondent is liable for Wanek's unlawful conduct and awarded Complainant $20,000 in mental suffering damages and $10,200 in back wages. ORS 659A.030; OAR 839-005-0030.

The above-entitled case came on regularly for hearing before Linda A. Lohr, designated as Administrative Law Judge ("ALJ") by Dan Gardner, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on August 16, 2005, in the Oregon Employment Department Conference Room located at 1645 NE Forbes Road, Suite 100, Bend, Oregon.

Cynthia L. Domas, an employee of the Agency, represented the Bureau of Labor and Industries ("BOLI" or "the Agency"). Bonnie Wilcox ("Complainant") was present throughout the hearing and was not represented by counsel. Jennifer S. Wells, Attorney at Law, represented Gordy's Truck Stop LLC ("Respondent"). Gordon ("Gordy") Wanek, Respondent's managing member and owner, was present throughout the hearing.

The Agency called as witnesses: Bonnie Wilcox, Complainant; Randy Graves, Deschutes County Sheriff's Deputy; Robin Brown, Roy Harris, Debra Harris, and Terry Short, Respondent's former employees; Tracy Davidson, Complainant's companion; and Kerry Johnson, BOLI senior civil rights investigator.

Respondent called as witnesses: Gordon Wanek, Respondent's managing member and owner; Robert Troy, Respondent's former employee; and Shelly Drinnen, Respondent's former employee.

The forum received as evidence:

a) Administrative exhibits X-1 through X-13;

b) Agency exhibits A-1 through A-8 (submitted prior to hearing) and A-10 (submitted during hearing);

c) Respondent exhibits R-2 and R-3 (submitted during hearing).

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

FINDINGS OF FACT – PROCEDURAL

1) On or about May 10, 2003, Complainant filed a verified complaint with the Agency's Civil Rights Division ("CRD") alleging she was the victim of Respondent's unlawful employment practices. After investigation and review, the CRD found substantial evidence supporting the allegations of the complaint.

2) On May 20, 2005, the Agency submitted Formal Charges to the forum alleging Respondent, through owner Gordon Wanek, discriminated against Complainant by directing unwelcome physical and/or verbal sexual advances toward her because of her gender and to which submission was implicitly made a term or condition of employment or that were sufficiently severe or pervasive to have the effect of creating a hostile, intimidating, or offensive working environment for Complainant, in violation of ORS 659A.030(1)(b). The Agency also alleged Complainant was compelled to quit her employment due to the intolerable working conditions created by Respondent, in violation of ORS 659A.030(1)(a). The Agency requested a hearing.

3) On May 24, 2005, the forum served Formal Charges on Respondent accompanied by the following: a) a Notice of Hearing stating the hearing would begin at 9 a.m. on October 4, 2005, in Bend, Oregon; b) a language notice; c) a Servicemembers Civil Relief Act Notification; d) a Summary of Contested Case Rights and Procedures containing the information required by ORS 183.413; e) a complete copy of the Agency's administrative rules regarding the contested case process; and f) a separate copy of the specific administrative rule regarding responsive pleadings.

4) On June 13, 2005, Respondent, through counsel, timely filed an answer to the Formal Charges. (Exhibit X-4)

5) On June 14, 2005, the forum reset the hearing for August 16, 2005, based on Respondent's request for postponement dated June 13, 2005, and the participants' agreement to move the hearing back to August.

6) On June 14, 2005, the forum ordered the Agency and Respondent each to submit a case summary including: a list of all persons to be called as witnesses; identification and copies of all documents to be offered into

evidence; a brief statement of the elements of the claim (for the Agency only); a brief statement of any defenses to the claim (for Respondent only); a statement of any agreed or stipulated facts; and any damage calculations (for the Agency only). The ALJ ordered the participants to submit case summaries by August 5, 2005, and notified them of the possible sanctions for failure to comply with the case summary order.

7) The Agency and Respondent timely filed case summaries.

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

9) The ALJ issued a proposed order on August 23, 2006, that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. Respondent timely filed exceptions which are addressed in the Opinion section of this Final Order.

FINDINGS OF FACT – THE MERITS

1) At times material herein, Respondent Gordy's Truck Stop LLC was a limited liability company conducting business in La Pine, Oregon, as a truck stop and restaurant, and was an employer utilizing the personal services of one or more persons.

2) At times material, Gordon Wanek was Respondent's owner and managing member. Wanek supervised the business and all its employees, including Terry Short, Respondent's day and swing shift manager.

3) Complainant worked as a prep/line cook for Respondent from July 25, 2002, until January 3, 2003.

4) Respondent's regular restaurant hours were 6 a.m. to 10 p.m., seven days per week. Complainant worked the 6 a.m. to 2 p.m. shift, 40 hours per week, earning $8.50 per hour.

5) On January 3, 2003, Complainant was talking on her cell phone to her roommate, Tracy Davidson, while taking a mid-morning break during her regular work shift. At that time, Wanek and maintenance man, Robert Troy, were leaving the restaurant to take some garbage to the dump. Complainant was standing on the sidewalk outside the restaurant when Wanek walked by Complainant on his way to his truck. As he passed her, he lightly squeezed her left breast and startled her. She exclaimed, "What are you doing?" and he replied, "I'm feeling you up." She had almost slipped off the curb and she said to him, "you almost made me fall." Wanek said nothing and continued toward his truck and left. Complainant told Davidson, "He just grabbed my tit."

6) Complainant's co-worker, Robin Brown, was getting some trash bags from an area near

Complainant when he heard her say, "What are you doing?" Complainant looked quite upset and Brown asked her what was wrong. She responded, "You saw, you know what's wrong." He observed that Wanek had been standing close to her, but he did not see Wanek touch Complainant or hear Wanek's response to her question.

7) Complainant attempted to find Short, her immediate supervisor, to report the incident. Short had left the restaurant earlier and Complainant called Short at her residence. She told Short that Wanek had "grabbed" her breast. Complainant was very upset and Short did not know how to help her. Respondent did not have a sexual harassment policy that Short knew of and Short advised Complainant to call the police and BOLI.

8) After she reported the incident to Short, Complainant called the Deschutes County Sheriff's Office and made a complaint against Wanek on January 3, 2003. Deputy Randy Graves investigated the complaint the same day and interviewed Complainant, Short, Brown and Wanek, who admitted he had touched Complainant. The next day, Graves interviewed Troy. Deputy Graves took notes during each interview and on January 4, 2003, typed up a report that stated in pertinent part:

"NARRATIVE:

"On 1-3-03 contact was made with Bonnie Wilcox [Complainant] regarding a sexual harassment complaint. The sexual harassment took place at Gordy's Truck Stop. Wilcox was taking a break and talking on her cell phone. Wilcox was taking her break near the back door located on the south side of the business. As per Wilcox, while she was talking on her cell phone, Gordon Wanek the owner of Gordy's walked out of the business and as Wanek past [sic] Wilcox, Wanek touched Wilcox with a light pinch contact with his fingers on Wilcox's left breast. Wilcox advised Wanek touched her under her left arm and on her left side of her breast. Wilcox received no injuries from Wanek's light pinch contact. Wilcox said when Wanek touched her it took her by surprise and Wilcox said to Wanek, 'what are you doing?' Wanek then replied 'I'm feeling you up.' Wilcox then told Wanek 'you almost made me fall.' Wanek then walked off. Wilcox said [sic] attempted to contact her boss Terri Short but Short had already left work for home. Wilcox contacted Short at her residence and told Short what had taken place, and that she was no longer going to work at Gordy's due to Wanek's contact with her.

"Wilcox only had two possible witnesses to what had taken place at Gordy's, a Robin and Bob who also are employees at Gordy's Truck Stop. Contact was made with Terri Short to get more information on

Robin and Bob so that they could be contacted for statements. Short advised the two subject names were Robin Brown and Robert Troy. At the time of contact Short advised that Wilcox had contacted her to report what had taken place at Gordy's.

"Contact was made with Robin Brown a possible witness to this complaint, the contact was made on 1-3-03 at 3:40 p.m. Brown said in substance that he was getting trash bags from a cupboard near Wilcox and after picking up the trash bags he started to turn around, as Brown turned he heard Wilcox say 'what are you doing?' Brown said Wanek was standing about six inches from Wilcox when he turned but never observed Wanek touch Wilcox and never heard Wanek say anything to Wilcox. Brown then walked back into the building.

"The suspect in this case Gordon Wanek was contacted on 1-3-03 at 4:44 p.m. Wanek said in substance that he was leaving the business after picking up garbage as he walked out Wilcox was at the back door talking on her cell phone, as he walked past [sic] Wilcox he used one finger and poked Wilcox in the side. Wanek said he only used one finger poking Wilcox in the ribs on Wilcox's left side and approximately four to six inches from her breast. Wanek said Wilcox said to him 'what are you doing?' Wanek replied 'what do you think I'm feeling you up or something,' Wanek advised he then walked out to his pick up and left. Wanek said he never had any intention of touching Wilcox's breast; he just poked Wilcox as a friendly gesture.

"Contact was made with Robert Troy one of the possible witnesses on 1-4-03 at 9:41 a.m. Troy said in substance that he and Gordon had been loading garbage into Gordon's pick up. As Troy and Gordon left they walked past [sic] Wilcox who was outside the back door talking on her cell phone. As Troy and Gordon walked past [sic] Wilcox, Troy heard Gordon say something to Wilcox as he walked past [sic] but did not here [sic] what it was, they continued on out to the pickup and left. Troy advised he never observed Wanek touch Wilcox at any time.

"This case will be referred to the Deschutes County D.A.'s office for review.

"Case closed. End of report."

The Deschutes County D.A.'s office ultimately declined the case and Deputy Graves closed his file on February 24, 2005.

9) Complainant finished her shift on January 3, 2003, although Wanek's conduct was "eating [her] up" because she thought "he was getting away with something." She did not go back to work thereafter because she was too uncomfortable. After her initial

shock and upset, she became angry and believed she had no other alternative but to quit her job.

10) Usually an outgoing and "bubbly" person, Complainant became wary and appeared "standoffish" to her former co-workers. She felt isolated from those she had befriended at work who still worked for Respondent and perceived that she was the "talk of the town" because friends and even strangers off the street asked her about the incident. She filed for unemployment benefits but had difficulty finding a job. She sent out numerous applications and interviewed at local restaurants, but could not get a job. Complainant remained upset about the incident and her subsequent unemployment for six to eight months after she left Respondent's employ.

11) At or around the end of July 2003, Complainant found a job at Pozzi Windows working 40 hours per week and earning $9-9.50 per hour. After working two eight hour days, she quit her employment at Pozzi Windows and began another job search. Complainant had difficulty finding new employment so she moved to Idaho on or about October 3, 2003.

12) After Complainant filed a civil rights complaint in May 2003, BOLI notified Respondent and requested a "complete written response to the allegations." On June 13, 2003, Respondent, through Wanek, submitted a response, stating:

> "On January 3, 2003, I was walking through the area where the prep cooks are stationed along with Robert Troy. Bonnie Wilcox, a prep cook, was blocking my path. As I tried to get around her I raised my arms to make room to squeeze by her. She asked, "Are you trying to touch my breast." I replied, "I was only trying to squeeze by you."
>
> "Robert Troy witnessed the incident and will verify that I did not touch her.
>
> "Bonnie Wilcox has sworn that Robyn Brown heard this exchange. Robin Brown was not even in the area at the time this incident occurred and did not hear this exchange.
>
> "Bonnie Wilcox has sworn that she immediately reported this incident to Terry Short, the restaurant manager, but Terry Short was not in the restaurant that day because it was her day off.
>
> "I feel that Bonnie Wilcox wanted to quit her job because of personal reasons and was looking for an excuse to quit and also get unemployment. I did not do anything wrong and will fight this defamation of my character."

In a later letter to BOLI, dated July 21, 2003, Wanek, stated:

> "I'm a seventy two year old man who is about 5'5". I have never been arrested or even received a traffic ticket while living here in Oregon these

past 21 years. I have a spotless record. Ms. Wilcox is about 5'8'' or 5'9" and weight [sic] 350 to 400 pounds. Everything Ms. Wilcox has said is a lie. I have a witness who saw what happened and has stated that I did not do any of the actions she is accusing me of. Her witness stated that he did not see or hear what happened. I did not see her on the phone at any time and there is no phone is [sic] the kitchen. All Ms. Wilcox wanted is unemployment because she is in the foster care program. My final statement is that I did not do anything wrong and I have proved that."

13) Wanek squeezed supervisor Short's arm every time he talked to her and occasionally commented that he would "rape her if [she] didn't take his money for a meal." Although Short never observed Wanek touching anyone else inappropriately, some of the female employees complained to her that Wanek made "inappropriate" comments. At least one employee told Short that she did not want to "go to the dump" with Wanek because she did not want to be alone with him in his truck. Other female employees complained about doing "garbage runs" with Wanek and said they did not like being "hugged" by him. When Respondent's assistant manager, Debra Harris, suggested to Wanek that a newly hired hostess was not performing her work very well, Wanek responded, "yeah, but look at her tits." On another occasion, Roy Harris, Debra Harris's husband, was doing paperwork for Respondent in Wanek's office when he saw Wanek make a "lewd gesture" toward employee Christy Wallace. Wanek made a "hip and pelvic thrust" movement toward Wallace that she did not see because her back was turned.

14) La Pine, Oregon, is a small community with a population of around 18-20,000 people. Wanek owns substantial property in La Pine and leases the property to local businesses. His holdings include two strip malls in La Pine with approximately 33 business lessees and a strip mall in Redmond with approximately 8 business lessees. Wanek previously co-owned a carpet store with former partner and friend Robert Troy.

15) Complainant's testimony was reasonably straightforward and not impeached in any way. The only disputed facts are whether Wanek touched Complainant's breast and whether the touch was purposeful. Complainant's account of the incident was more believable than Wanek's different versions because it did not change over time and was consistent with her emotional reaction and subsequent conduct which were corroborated by other credible evidence. The forum credits Complainant's testimony in its entirety.

16) Gordon Wanek's testimony on key issues was not believable. In his initial story to Deputy Graves, Wanek admitted touching Complainant "in a

friendly gesture" by "poking her in the ribs." He also told Graves that Complainant was talking on her cell phone at the time and after he poked her, she said to him, "What are you doing?" He acknowledged to Graves that his response to Complainant was, "What do you think, I'm feeling you up or something." In his position statement to BOLI, he denied doing anything to her and stated that he "did not see her on the phone at any time and there is no phone in the kitchen." At hearing, he emphatically stated that he "never touched her" at all. His contrary statements cannot both be true. The forum concludes that neither is true. Consequently, the forum disbelieved Wanek's testimony unless it was a statement against interest or corroborated by credible evidence.

17) Robert Troy's testimony that he did not see Wanek touch Complainant was consistent with his previous statement to Deputy Graves. However, his bias as Wanek's former business partner and friend surfaced when Troy testified that Complainant was sitting in the break room drinking coffee when he and Wanek left for the garbage dump. His testimony was contrary to his prior statement to Deputy Graves that Complainant was "outside the back door talking on her cell phone" when Wanek and Troy walked by her and that he heard Wanek "say something" to Complainant but did not hear what was said. Consequently, the forum discredited Troy's testimony in its entirety.

18) Terry Short's testimony was credible. She had no apparent bias toward Respondent or Complainant and testified only to facts within her knowledge and recollection. She was not impeached in any way and the forum credits her testimony in its entirety.

19) Deputy Graves was a credible witness. His testimony was consistent with the contemporaneous notes he kept in the course of his duty as a deputy sheriff and the forum credits his testimony in its entirety.

20) Debra Harris's testimony was credible. She demonstrated no particular bias toward or against Respondent or Complainant and testified to facts within her knowledge and recollection. The forum credits her testimony in its entirety.

21) Roy Harris's testimony was credible. He and his wife, Debra Harris, worked for Respondent at times material and he demonstrated no bias toward or against Respondent or Complainant. He recounted only his firsthand observations and his testimony that he saw Wanek make a lewd gesture toward a female employee was completely believable. He acknowledged that the employee, Christy Wallace, was not aware of the gesture at the time and that the incident occurred in August 2002. The forum credits his testimony in its entirety.

22) Despite her previous close relationship with Complainant, Tracy Davidson's testimony

was not unduly biased. Her testimony that she was talking to Complainant by telephone when Complainant told her that "Gordy just grabbed [her] tit" was believable and corroborated by Complainant's cell phone records showing she had made a call to Davidson during the relevant time period. Davidson's testimony that Complainant cried and became emotional about the incident and that her upset lasted 6 to 8 months thereafter was also credible and corroborated by other credible witness testimony. Davidson also credibly testified that Complainant was shocked that Wanek laughed it off as a joke and later became distrustful of others and withdrawn. According to Davidson, local townspeople asked Davidson and Complainant about the incident which upset and humiliated Complainant. Davidson's testimony was believable and not impeached in any way and the forum credited her testimony in its entirety.

23) Robin Brown's testimony was credible. His memory was poor due to the passage of time, but he acknowledged that his statement to Deputy Graves was closer in time to the incident and the more accurate account of what he observed in January 2003. The forum credited his testimony to the extent that it was reasonably consistent with his prior statement to Graves.

24) Shelley Drinnen testified that Wanek never touched her or made inappropriate comments to her while she was employed by Respondent. However, despite the opportunity to do so, Drinnen did not controvert Short's and D. Harris's testimony that she asked them not to send her on "garbage runs" with Wanek because she did not want to be alone with him in his truck and did not like Wanek "hugging" her. The forum gave her testimony weight only when it was consistent with other credible evidence.

ULTIMATE FINDINGS OF FACT

1) At times material herein, Respondent conducted a business in Oregon and was an employer utilizing the personal services of one or more persons.

2) At times material herein, Respondent employed Complainant, a female, as a prep/line cook.

3) On January 3, 2003, Gordon Wanek, Respondent's owner and managing member, purposely and knowingly squeezed Complainant's breast and told her he was "feeling her up" while she was on a break during her regular work hours.

4) Wanek's conduct was offensive and unwelcome to Complainant.

5) Other female employees found Wanek's behavior toward them offensive.

6) Respondent had no written sexual harassment policy.

7) Wanek's conduct toward Complainant was based on her gender and created working conditions so intolerable that a

reasonable person in Complainant's position would have resigned under those conditions.

8) Wanek knew or should have known that Complainant was substantially certain to leave her employment as a result of those working conditions.

9) Complainant left her employment with Respondent on January 3, 2003, because of the intolerable working conditions created by Respondent.

10) Complainant found replacement employment with Pozzi Windows on or about August 1, 2003, for 40 hours per week at $9-9.50 per hour. After working two eight hour days, Complainant voluntarily quit her replacement employment.

11) By leaving Respondent's employ, Complainant lost wages from January 4 to August 1, 2003, a period of 30 weeks at $8.50 per hour, 40 hours per week, for a total of $10,200.

12) Wanek's conduct toward Complainant caused her to suffer emotional distress, characterized by shock, anger, embarrassment, and emotional upset that extended over a six to eight month period.

CONCLUSIONS OF LAW

1) At times material herein, Respondent was an employer subject to the provisions of ORS 659A.010 to ORS 659A.030 and ORS 659A.800 to ORS 659A.865.

2) The actions, inaction, statements, and motivation of Gordon Wanek are properly imputed to Respondent.

3) The Commissioner of the Bureau of Labor and Industries has jurisdiction of the persons and of the subject matter herein and the authority to eliminate the effects of any unlawful employment practices found. ORS 659A.800 to ORS 659A.865.

4) By subjecting Complainant to unwelcome sexual conduct directed toward her because of her gender that was sufficiently severe to alter her work conditions and create a hostile, intimidating, and offensive work environment, Respondent discriminated against Complainant on the basis of sex, contrary to the provisions of OAR 839-005-0030 and in violation of ORS 659A.030(1)(b).

5) By intentionally creating and maintaining discriminatory working conditions based on Complainant's gender that were so intolerable Complainant was compelled to leave her employment, Respondent constructively discharged Complainant and committed an unlawful employment practice in violation of ORS 659A.030(1)(a) and OAR 839-005-0035.

6) Pursuant to ORS 659A.850, the Commissioner of the Bureau of Labor and Industries has the authority under the facts and circumstances of this case to award Complainant lost wages resulting from Respondent's unlawful employment practice and to award money damages for emotional distress sustained and to protect

the right of Complainant and others similarly situated. The sum of money awarded and the other actions required of Respondent in the Order below are an appropriate exercise of that authority.

OPINION

The Agency alleged Respondent, through its proxy, Gordon Wanek, unlawfully discriminated against Complainant because of her gender by subjecting her to unwelcome sexual conduct that was implicitly a condition of her employment and sufficiently severe or pervasive to have the effect of creating a hostile work environment. The Agency further alleged Respondent intentionally created or maintained working conditions so intolerable that Complainant was forced to quit her employment. The Agency seeks a $13,000 judgment for Complainant's loss of income and $20,000 in mental suffering damages against Respondent.

SEXUAL HARASSMENT

To establish sexual harassment, the Agency is required to prove the following elements: (1) Respondent was an employer subject to ORS 659A.001 to 659A.030; (2) Respondent employed Complainant; (3) Complainant is a member of a protected class (sex); (4) Respondent, through its proxy, engaged in unwelcome conduct (verbal or physical) directed at Complainant because of her sex; (5) the unwelcome conduct was sufficiently severe or pervasive to have the purpose or effect of creating a hostile, intimidating or offensive work environment; and (6) Complainant was harmed by the unwelcome conduct. *In the Matter of Robb Wochnick*, 25 BOLI 265, 282 (2004); OAR 839-005-0030(1). The first three elements are not disputed. Additionally, Gordon Wanek's status as Respondent's owner and managing member is not at issue. As Respondent's corporate officer, Wanek's conduct is properly imputed to Respondent and Respondent is strictly liable for any unlawful harassment found herein. *See* OAR 839-005-0030(3)("[a]n employer is liable for harassment when the harasser's rank is sufficiently high that the harasser is the employer's proxy, for example, the respondent's president, owner, partner or corporate officer").

A. Unwelcome Sexual Conduct

Complainant credibly testified that during a break at work, Respondent's owner Gordon Wanek, squeezed her left breast and stated he was "feeling her up." Wanek's emphatic claim at hearing that he "never touched" Complainant was contradicted by Deputy Graves's credible testimony that Wanek told Graves during an investigative interview, conducted on the same day the incident occurred, that he "poked" Complainant in the side "four to six inches" from her breast. Wanek also told Graves that when Complainant asked him what he was doing, he responded, "What do you think, I'm feeling you up or something." Wanek's contradic-

tions bolster Complainant's credible account of the incident which did not vary over time and remained unembellished. Moreover, her conduct immediately following the incident was consistent with someone who has been subjected to offensive sexual conduct. Her co-worker, Robin Brown, observed that she looked "upset" immediately after the incident. Her supervisor, Terry Short, observed that Complainant was "very upset" when she reported the incident to Short on the same day it happened. Additionally, Complainant contacted law enforcement almost immediately after she spoke with Short. There is no plausible reason why Complainant would have taken such action if Wanek "never touched her" as he now contends.

The same facts that establish Complainant was subjected to verbal and physical sexual conduct also show that Complainant neither welcomed nor invited such conduct. Complainant credibly testified that she was talking on her cell phone while on a break and was so startled by Wanek's hand on her breast that she almost fell off the curb where she was standing. Moreover, his hand on her breast and response that he was "feeling her up" upset her to the extent that she contacted her supervisor, filed a police report, and quit her job on the same day it happened. Those facts are sufficient to establish that Wanek's sexual contact was neither welcome nor consensual.

Finally, the forum can reasonably infer by Wanek's specific actions, *i.e.*, touching a particularly intimate part of Complainant's body and telling her he was "feeling her up," that his conduct was directed toward Complainant because of her sex. Terry Short credibly testified that she had received complaints about Wanek from other female employees who were uncomfortable accompanying him alone on "garbage runs" and who did not like the way he "hugged" them. Wanek's comment to Short ("Yeah, but just look at her tits") when Short pointed out one female employee's work performance problems further demonstrates his conduct was part of an overall pattern of sexually aggressive behavior based on gender. Absent any evidence that Wanek treated male employees in a similar fashion, the forum concludes that but for Complainant's sex, she would not have been subjected to Wanek's offensive sexual conduct.

B. <u>Hostile, Intimidating, or Offensive Work Environment</u>

The standard for determining whether conduct is sufficiently severe or pervasive to have created a hostile, intimidating or offensive working environment is from the objective standpoint of a reasonable person in Complainant's particular circumstances. *Robb Wochnik*, 25 BOLI at 285; OAR 839-005-0030(2).

In making that determination, the forum looks at the totality of

the circumstances, *i.e.*, the nature of the conduct and its context, the frequency of the conduct, its severity or pervasiveness, whether it is physically threatening or humiliating, and whether it unreasonably interferes with an employee's work performance. 25 BOLI at 265; *see also In the Matter of Executive Transport, Inc.*, 17 BOLI 81, 93 (1998). Although this case involves an isolated incident, the conduct, when viewed in light of the particular circumstances, was sufficiently severe to have created a hostile work environment and altered Complainant's working conditions.[1] Credible evidence shows Wanek's conduct was well beyond the good natured horseplay he initially represented to law enforcement. He purposely touched Complainant on an intimate part of her body without her consent. He not only squeezed her breast, he told her he was "feeling her up." As business owner and Complainant's ultimate supervisor, Wanek was directly responsible for Complainant's job and regular paycheck. Her dependence on him for her livelihood made her susceptible to the terms and conditions he implied by his overt sexual conduct. Respondent had no sexual harassment policies in place and the most that supervisor Short could do for Complainant was to recommend that she call the police and BOLI. With no remediation, Complainant was placed in the untenable position of choosing between a regular paycheck and the likelihood that Wanek's cavalier and unsolicited liberties would continue.

Notably, the Oregon Court of Appeals in *Cantua v. Creager*[2] recognized that "state and federal statutes [that] prohibit unwelcome sexual conduct in the workplace * * * show a strong public policy against nonconsensual sexual advances toward employees. That public policy indicates that nonconsensual sexual contact with one's employees is quite reprehensible." Although, for whatever reason, the sheriff's investigation did not result in criminal charges, Wanek subjected himself to possible criminal liability by purposely squeezing Complainant's breast without her consent. *See* ORS 163.415 (defining sexual abuse in the third degree); ORS 163.305(6) (defining "sexual contact"); *State v. Woodley*, 306 Or 458, 462-63 (1988) (describing the test for intimate sexual contact under ORS 163.415 and 163.425).

Evidence shows Complainant herself believed Wanek's conduct toward her was hostile and sexually abusive. The forum finds that any reasonable person in her circumstances would have believed the same. Consequently, based on the totality of circumstances established herein, the forum has

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[1] The U.S. Supreme Court noted in *Clark County School District v. Breeden*, 532 US 268, 271 (2001) that unless "extremely serious," isolated incidents will not amount to a "discriminatory change in the terms and conditions of employment."

[2] 169 Or App 81, 85 (2000).

determined that Wanek's conduct, subjectively and objectively, at best, was inappropriate, demeaning, and discrimination based on sex, and, at worst, constituted sexual abuse. By any description, it was unlawful and created a hostile, humiliating, and intimidating work environment that significantly altered Complainant's working conditions.

CONSTRUCTIVE DISCHARGE

This forum has consistently held that if an employer imposes objectively intolerable working conditions, *i.e.*, that a reasonable person in Complainant's position would have resigned under those conditions, the employee's resignation due to those conditions is a constructive discharge. *In the Matter of Executive Transport, Inc.*, 17 BOLI 81, 95 (1998). Respondent is liable for a constructive discharge if Wanek 1) intentionally created or maintained discriminatory working conditions related to Complainant's gender that were 2) so intolerable that a reasonable person in Complainant's circumstances would have resigned because of them; 3) Respondent desired to cause Complainant to leave her employment as a result, or knew or should have known that Complainant was certain, or substantially certain, to leave employment as a result of the working conditions; and 4) Complainant left her employment as a result of those working conditions. *Robb Wochnik*, 25 BOLI at 287; OAR 839-005-0035.

The forum has already found that 1) Wanek knowingly and purposely engaged in conduct that was 2) objectively intolerable, 3) Wanek knew or should have known that Complainant was substantially certain to leave because of the particular conduct, and 4) Complainant had no other recourse and, in fact, left her employment because of Wanek's conduct. The forum therefore concludes that Respondent, through its proxy, Wanek, constructively discharged Complainant.

DAMAGES

1. Back Pay

The commissioner has the authority to fashion a remedy adequate to eliminate the effects of unlawful employment practices. When, as here, a complainant is constructively discharged on the basis of sex, that remedy properly includes an award of back pay. *Executive Transport, Inc*., 17 BOLI at 96. Additionally, this forum has consistently held that the purpose of back pay awards in employment discrimination cases is to compensate a complainant for the loss of wages and benefits the complainant would have received but for the respondent's unlawful employment practices. *In the Matter of Emerald Steel Fabricators, Inc*., 27 BOLI 242, 277 (2006), *appeal pending*.

Here, the Agency established that Complainant lost wages from January 4 until on or about August 1, 2003, because she was constructively discharged based on

her gender. Credible evidence shows Complainant used reasonable diligence seeking employment while receiving unemployment benefits and that she found employment at Pozzi Windows in or around the end of July 2003 at a higher pay rate than the $8.50 per hour she earned while in Respondent's employ. Although she voluntarily quit two days after she began her new employment, she is only entitled to back wages for the interim period she was unemployed before she accepted the Pozzi Windows job. *See In the Matter of Northwest Pizza, Inc*., 25 BOLI 79, 88 (2004)(a complainant's right to back wages is cut off when the complainant obtains replacement employment for a similar duration and with similar hours and hourly wages as respondent's job). In this case, Complainant acknowledged that the job she accepted in July 2003 was for a similar duration and with similar hours and hourly wages as her job with Respondent.

Consequently, the forum has determined that Complainant would have earned approximately $10,200 between January 4 and August 1, 2003, the date she obtained replacement employment at Pozzi Windows. Respondent owes Complainant $10,200 for the wages she lost due to Respondent's unlawful employment practice.

2. Mental Suffering

In determining a mental suffering award, the forum considers the type of discriminatory conduct, and the duration, frequency, and severity of the conduct. *Emerald Steel Fabricators*, 27 BOLI at 278. The actual amount depends on the facts presented by each complainant. A complainant's testimony, if believed, is sufficient to support a claim for mental suffering damages. *Id.*

Based on her credible testimony and the testimony of other credible witnesses who observed Complainant following her constructive discharge, the forum finds Complainant suffered emotional distress as a direct result of Respondent's unlawful employment practice. Credible evidence shows she was shocked and humiliated by Wanek's overt sexual conduct and that she became distrustful and withdrew from her normal social contacts, which was contrary to her usually outgoing nature. The forum has determined that Wanek's behavior was tantamount to sexual abuse and his status as Respondent's owner gave Complainant no choice but to leave her employment which affected Complainant financially and emotionally for at least six months after her constructive discharge. While relatively short lived, Complainant's distress was caused by a particularly egregious form of sexual harassment perpetrated by the person who controlled her livelihood. Consequently, the forum awards Complainant $20,000 in damages to help offset the suffering caused by Respondent's unlawful employment practice committed through its proxy, Gordon Wanek.

EXCEPTIONS

Respondent timely filed exceptions to the following areas of the proposed order:

1. Findings of Fact – The Merits

Respondent challenges numerous factual findings on the ground that they were based on "irrelevant hearsay and character evidence" that should not have been allowed and that the inclusion of such evidence in the factual findings "violates due process" and Oregon Evidence Code provisions. Specifically, Respondent contends that whatever witnesses Short, Debra Harris, and Roy Harris experienced, observed, or were told by other employees related to Respondent, was irrelevant and constituted inadmissible character evidence because those witnesses "had no personal knowledge of the events asserted as a basis for this claim." Respondent's argument has no merit.

First, while the forum may draw on the Oregon Evidence Code for guidance in a matter not addressed in this forum's contested case hearing rules, these proceedings are not governed by the Oregon Evidence Code. *In the Matter of United Grocers*, 7 BOLI 1, 2 (1987).

Second, comparative evidence related to a complainant's protected class and a respondent's prior acts related to the nature of the offense are relevant in discrimination cases alleging different or unequal treatment. *See In the Matter of Howard Lee*, 13 BOLI 281, 292 (1994)("In the context of discrimination law, where the nature of the offense is that it was motivated by the victim's membership in a protected class, the manner in which other members of that class have allegedly been treated is clearly relevant to the inquiry. To the extent that comparative evidence relating to the protected class at issue may also reflect prior bad acts by respondent, the evidence will not be excluded for that reason"). *See also In the Matter of Dunkin' Donuts*, 8 BOLI 175, 178-79 (1989)("[T]he manner in which other members of [a statutorily protected class] have been treated is crucial to the inquiry [into discrimination allegations], and thus relevant * * * Comparator evidence is common in employment discrimination cases").

In this case, credible evidence established that Respondent made inappropriate comments or gestures to other female employees and that some of those employees complained to Short and D. Harris on several occasions about Respondent's inappropriate hugging on "garbage runs." That evidence is relevant to whether Respondent touched Complainant's breast deliberately or accidentally and was properly considered by the forum. Contrary to Respondent's contention, neither Short's nor Harris's testimony was impeached by Christy Davis's June 3, 2004, statement, written well over a year after Complainant filed a civil

rights complaint against Respondent, or by Shelley Drinnen's statement, written on the same date. Neither denied previously complaining to Short or D. Harris about Respondent's conduct and their subsequent written statements and Drinnen's subsequent testimony do not negate Short's and D. Harris's credible testimony. In this forum, an ALJ's credibility findings are accorded substantial deference and absent convincing reasons for rejecting those findings, they are not disturbed. *In the Matter of Robb Wochnick*, 25 BOLI 265, 290 (2002), *citing In the Matter of Staff, Inc.*, 16 BOLI 97, 117 (1997).

Respondent's assertion that the factual finding pertaining to Respondent's "assets" in paragraph 11 is "not related to this case" and "has no place in this opinion" has no merit. That finding establishes Respondent's pecuniary interest in most of the business community in La Pine, a small town with barely 20,000 residents, which lends credence to Complainant's testimony that she had difficulty finding a job for over seven months after her constructive discharge. Moreover, Respondent's apparent omnipresence in the community validates Complainant's perception that she was the "talk of the town" which contributed to the emotional distress she suffered as a result of Respondent's unlawful practices. For those reasons, Respondent's exceptions to paragraphs 10, 11, 17, and 21 of the findings of fact in the proposed order are **DENIED**.

2. Ultimate Findings of Fact – The Merits

Respondent disputes the finding in paragraph 11 that Complainant lost wages "from January [4] to August 1, 2003, a period of 30 weeks at $8.50 per hour, 40 hours per week," because "it fails to recognize that Complainant received unemployment compensation over that period of time." Additionally, Respondent contends the back wages award does not include a reduction for lawful withholdings.

It is well established in this forum that unemployment benefits received by a complainant are not deducted from a back pay award. *In the Matter of Mark & Linda McClaskey*, 17 BOLI 254, 273 (1998). *See also In the Matter of German Auto Parts, Inc.*, 9 BOLI 110, 131 (1990), *aff'd German Auto Parts v. Bureau of Labor and Ind.*, 111 Or App 522, 826 P2d 1026 (1992)("It is not the public policy of the State of Oregon to encourage or reward the weighing of costs and benefits of discrimination. The Bureau of Labor and Industries is charged with eliminating and preventing discrimination in employment. To allow private employers to offset unemployment compensation benefits in cases of employment discrimination would encourage and subsidize their unlawful practices"). Consequently, the forum was not required to consider Complainant's unemployment benefits when determining the lost wage amount.

Additionally, contrary to Respondent's contention, the order requiring Respondent to pay lost wages allows for "lawful deductions," which necessarily include required tax withholdings. For those reasons, Respondent's exception to paragraph 11 of the ultimate findings of fact in the proposed order is **DENIED**.

3. Order

Respondent asserts there is "no legal basis for the interest" on Complainant's established wage loss, which the forum computed at the legal rate from September 1, 2003, until paid. Additionally, Respondent contends the passage of time between the hearing date and the proposed order precludes an accrued interest award.

This forum has long held that "an award of interest on [a] back pay award is justified to compensate [a] complainant fully for the effect of not having had use of the back pay since it accrued." *In the Matter of C & V, Inc.*, 3 BOLI 152, 163 (1982), *citing In the Matter of City of Portland*, 2 BOLI 110, 142-44 (1981)("Prejudgment interest on the back pay award beginning from the complainant's initial injury and continuing through the resolution of the case and payment of the back pay award are means of addressing generally the effects of the complainant's not having had the back pay since it accrued"). Moreover, in the *City of Portland* case, the forum noted that in a prior BOLI case, "interest accrued and was awarded over a period in excess of three years predating the Final Order" and that "the award and computation were not disturbed by the Oregon Court of Appeals or Supreme Court."[3] In a much later case, interest accrued and was awarded for a period of four years predating the final order. *See In the Matter of Body Imaging, P.C.*, 17 BOLI 162, 191 (1998), *Order on Reconsideration, aff'd in part*, *rev'd in part*, *Body Imaging, P.C. and Paul Meunier, M.D. v. Bureau of Labor and Industries*, 166 Or App 54, 999 P2d 475 (2000). The forum is not aware of any case in which the commissioner abated prejudgment interest on a back wage award due to the length of the proceeding. For that reason, Respondent's exception to the order requiring accrued interest is **DENIED**.

However, the forum notes that in this case the ALJ erroneously computed interest on Complainant's lost wages from September 1, 2003, until paid, instead of from the date Complainant was constructively discharged. Consequently, the forum has recomputed the interest on Complainant's back pay award as follows: 1) Interest at the legal rate on the monthly accrual of wages Complainant would have

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[3] *In the Matter of Montgomery Ward and Company, Inc.*, 1 BOLI 62 (1976), *rev'd*, *Montgomery Ward v. Bureau of Labor*, 28 Or App 747, 561 P2d 637, *rev'd and remanded*, 280 Or 163, 570 P2d 859 (1977), *order on remand*, 1 BOLI 100 (1978), *aff'd as modified, Montgomery Ward v. Bureau of Labor*, 42 Or App 159, 600 P2d 542 (1979).

earned between January 4 and August 1, 2003, and 2) interest at the legal rate on the accrued lost wages of $10,200 from August 1, 2003, until paid.

ORDER

NOW, THEREFORE, as authorized by ORS 659A.850(2) and ORS 659A.850(4), and to eliminate the effects of Respondent's violation of ORS 659A.030 and as payment of the damages awarded, the Commissioner of the Bureau of Labor and Industries hereby orders **Gordy's Truck Stop LLC** to:

Deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 1045 State Office Building, 800 NE Oregon Street, Portland, Oregon 97232-2180, a certified check payable to the Bureau of Labor and Industries **in trust for Complainant Bonnie Wilcox** in the amount of:

1) TEN THOUSAND TWO HUNDRED DOLLARS ($10,200), less lawful deductions, representing income lost by Bonnie Wilcox between January 4 and August 1, 2003, as a result of Respondent's unlawful practice found herein; plus,

2) Interest at the legal rate on the monthly accrual of wages lost between January 4 and August 1, 2003;

3) Interest at the legal rate on the sum of $10,200 from August 1, 2003, until paid; plus,

4) TWENTY THOUSAND DOLLARS ($20,000), representing compensatory damages for mental distress Bonnie Wilcox suffered as a result of Respondent's unlawful practice found herein; plus,

5) Interest at the legal rate on the sum of $20,000 from the date of the Final Order until Respondent complies herein; and,

6) Cease and desist from discriminating against any employee based upon the employee's gender.

In the Matter of

TREES, INC.,

Case No. 56-04

Final Order of Commissioner Dan Gardner

Issued February 28, 2007

SYNOPSIS

The Agency established by a preponderance of credible evidence that Respondent demoted Complainant because he reported and opposed a workplace safety hazard. Accordingly, the forum awarded Complainant $3,007.08 in lost wages and $30,000 in mental suffering damages. ORS 654.062(5)(a); ORS 659.030(1)(f); OAR 839-004-0001.

The above-entitled case came on regularly for hearing before Linda A. Lohr, designated as Administrative Law Judge ("ALJ") by Dan Gardner, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on September 27-29, 2005, in the Bureau of Labor and Industries Conference Room, located at 3865 Wolverine Street NE, Bldg. E-1, Salem, Oregon.

Cynthia Domas, an employee of the Agency, represented the Bureau of Labor and Industries ("BOLI" or "the Agency"). Michael Nolan, Jr. ("Complainant") was present throughout the hearing and was not represented by counsel. Douglas S. Parker, Attorney at Law, and his co-counsel, Matthew Lysne, represented Trees, Inc. ("Respondent"). Michael Hebert was present throughout the hearing as Respondent's corporate representative.

The Agency called the following witnesses: Complainant; Jack Larson, former Respondent employee; Miguel Bustamante, former BOLI Civil Rights Intake Officer/Investigator; Steven Walberg, former Respondent employee; Mike Hebert, Respondent employee; and Angela Nolan, Complainant's wife.

Respondent called the following witnesses: Mike Hebert, Respondent employee; Tony Feldman, Respondent employee; Bill Horn, former Respondent employee; Jeofrey Jackson, Respondent employee; Jason Swarm, Respondent employee; and Kelly MacDonald, Local 659 business manager.

The forum received as evidence:

a) Administrative exhibits X-1 through X-31;

b) Agency exhibits A-1 through A-17, A-20 through A-22, A-25 through A-27 (submitted prior to hearing), A-28, A-31 and A-32 (submitted at hearing).

c) Respondent exhibits R-7 through R-15, R-23 (submitted prior to hearing), and R-26 through R-28 (submitted at hearing).

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

FINDINGS OF FACT – PROCEDURAL

1) On November 4, 2003, Complainant filed a verified complaint with the Agency's Civil Rights Division ("CRD") alleging he was the victim of Respondent's unlawful employment practices in that Respondent demoted him in retaliation for opposing and investigating a safety hazard in the workplace. After investigation and review, the CRD issued a Notice of Substantial Evidence Determination finding substantial evidence supporting Complainant's allegations.

2) On May 24, 2005, the Agency submitted Formal Charges to the forum alleging that Respondent discriminated against Complainant by demoting him shortly after he reported a workplace safety violation, in violation of ORS 654.062(5). The Agency further alleged that Complainant suffered lost income and experienced mental, emotional and physical suffering as effects of Respondent's unlawful employment practice. The Agency also requested a hearing.

3) On June 3, 2005, the forum served the Formal Charges on Respondent along with the following: a Notice of Hearing setting forth September 27, 2005, at 9:30 a.m. in Salem, Oregon, as the date and place of the hearing; a language notice; a Servicemembers Civil Relief Act notification; a notice of Contested Case Rights and Procedures containing the information required by ORS 183.413; a complete copy of the Agency's administrative rules regarding the contested case process; and a separate copy of the specific administrative rule regarding responsive pleadings.

4) On June 23, 2005, Respondent, through counsel, timely filed an answer to the Formal Charges.

5) On July 18, 2005, the forum ordered the Agency and Respondent each to submit a case summary including: lists of all persons to be called as witnesses; identification and copies of all documents to be offered into evidence; a brief statement of the elements of the claim (for the Agency only); a brief statement of any defenses to the claim (for Respondent only); a statement of any agreed or stipulated facts; and any damages calculations (for the Agency only). The ALJ ordered the participants to submit case summaries by September 16, 2005, and notified them of the possible sanctions for failure to comply with the case summary order.

6) On July 18, 2005, the forum issued a Protective Order governing the classification, acquisition, and use of Complainant's medical records throughout the proceeding in response to the Agency's motion and Respondent's statement of non-opposition to the motion.

7) On July 27, 2005, the Agency submitted Complainant's medical records to the forum for an *in camera* inspection. After inspection, the forum released all of the medical records to Respondent.

8) On September 19, 2005, the forum granted the Agency's September 7, 2005, motion for discovery after considering Respondent's timely filed responses.

9) The Agency and Respondent timely filed case summaries after the due date was extended to September 21, 2005.

10) On September 23, 2005, the Agency filed a "Response to Respondent's Case Summary." The Agency objected to Respondent's "attempt to include matters that were not set forth in Respondent's Answer" and further stated:

"1. Respondent appears to be alleging estoppel in Item B on page 4 of the Case Summary. A copy of Respondent's Case Summary is attached as Exhibit A. That defense is not mentioned in Respondent's Answer. A copy of Respondent's Answer is attached as Exhibit B. Therefore, Respondent should not be allowed to present evidence on that issue since it was not raised in Respondent's Answer.

"2. Respondent alleges for the first time in its Case Summary (Item D on page 6) that Plaintiff's subsequent conduct was cause for removing him from his management position. Respondent cannot allege this matter for the first time in a Case Summary if it has not been alleged in the Answer. Respondent should not be allowed to present evidence on this issue.

"3. Attached as Exhibit C is Respondent's Response pursuant to Interim Order on Discovery dated September 22, 2005 and signed by Matthew J. Lysne. The aforementioned matters are not included in Exhibit C."

11) On September 23, 2005, the Agency filed a supplemental case summary.

12) On September 26, 2005, the Agency filed a request to add a tape recording to its exhibit list. The Agency stated that Respondent already had a copy of the tape and that a transcript of part of the tape was already added to the exhibit list in its supplemental case summary.

13) On September 27, 2005, the date of hearing, the Hearings Unit received Respondent's Reply to Agency's Response to Case Summary, Cross-Objection to Agency's Case Summary, and Motion to Amend Answer.

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

14) The ALJ issued a proposed order on August 8, 2006, that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. The Agency and Respondent timely filed exceptions which are addressed in the Opinion section of this Final Order.

FINDINGS OF FACT – THE MERITS

1) At times material herein, Respondent was a duly registered corporation that employed at least one person in Oregon. (Entire Record)

2) At times material herein, Complainant worked for Respondent as a foreman for a two man bucket crew. He started with Respondent in 1988 as a groundman, worked several years as a journeyman tree trimmer, and was promoted to foreman in 1994. Throughout his employment and

at times material herein, Complainant was a union shop steward.

3) Respondent's job classifications and wages are governed by a collective bargaining agreement ("Agreement") between Respondent and Local Union 659 of the International Brotherhood of Electrical Workers ("IBEW" or "the Union"). Generally, foremen supervise two to five person crews that can include a flagger, groundman, and apprentice and journeyman tree trimmers. Bucket crews use mechanical buckets to access tree limbs and climbing crews use ropes to ascend and descend trees. Foremen deal with customers, *i.e.*, power companies and power company customers, who are usually homeowners or businesses; handle paperwork; and, in accordance with the collective bargaining agreement, supervise the flaggers, groundmen, and tree trimmers. Flaggers are used wherever they are needed and primarily are responsible for flagging traffic. Sometimes they handle brush between flagging duties, but they are not permitted to climb trees. Groundmen "drag brush" and "pull hangers." Hangers are tree branches that get stuck in the trees after they have been cut. Groundmen are not permitted to climb trees or use aerial equipment. Groundmen earn more per hour than flaggers. Tree trimmers are trained to climb and trim trees and are not permitted to work alone in a tree, especially near charged power lines. Only certified journeyman tree trimmers are permitted to trim trees that are less than 10 feet from charged power lines.

4) Primary power lines are insulated, run "pole to pole," and carry the most voltage. Secondary power lines run from "power pole to house" and carry less voltage. Cable television and phone lines are not the same as "energized power lines," but in the interest of safety, all lines are considered hazardous by Respondent's tree trimmers. A "hazardous tree" is one that is directly under or is growing less than 10 feet away from a power line.

5) Aerial rescue training is conducted in conjunction with monthly safety training meetings. Training occurs more than 10 feet from "energized conducted areas" and tree trimming is not performed during the training. The rescue exercise consists of three people, foreman, trimmer and either a groundman or apprentice. Rescue exercises are not done on roadside projects because it would tie up traffic. During an actual aerial rescue near a roadside, flaggers may be asked to make phone calls but are not involved in rescue exercises because they are usually working on roadside projects. Groundmen participate in aerial rescues as ground support by calling 911 or by pulling ropes away from the tree trimmer. During training exercises, groundmen practice working with the ropes from the ground.

6) On or about September 26, 2003, journeyman tree trimmer

Jason Swarm told Complainant that he had "gotten into an argument with Tiffany Hebert," the foreman of a crew working in Corvallis, Oregon, and that she had ordered a flagger to climb and trim a tree that was under a primary power line. Tiffany Hebert was Swarm's foreman and the wife of Complainant's supervisor, Mike Hebert. The flagger, Don Thing, was from foreman Bill Horn's crew and had no training or experience climbing and trimming trees. Swarm was upset and wanted a face to face meeting with Complainant. He asked Complainant why a flagger was allowed up in a tree. After some additional telephone contact, Complainant met with Swarm in person to discuss Swarm's concerns. Complainant's shop location at that time was in Scio, Oregon. His bucket crew consisted of journeyman tree trimmer Jack Larson who was present when Swarm first contacted Complainant.

7) On or about September 30, 2003, Complainant received another report about the Corvallis incident from journeyman tree trimmer Steve Walberg. Walberg and Thing lived in adjoining towns and carpooled to work each day. Walberg told Complainant that Thing had told him Tiffany Hebert had ordered him to climb a tree and trim some branches so she could "see what he had in him." He also said that Thing told him he had put on climbing gear and trimmed a few branches on a tree that extended within 10 feet of power lines. Walberg told Complainant that Thing had stated he was not aware he needed to be "certified and qualified" to trim trees. Walberg reported Thing's statements to Complainant because Complainant was a shop steward and shop stewards deal with safety issues. Walberg believed that Thing had been put in danger and that the incident was a violation of safety rules and the collective bargaining agreement.

8) On or about October 1, 2003, Complainant contacted the Union Hall and told Ron Johnson, a Union representative, about the reports he had received from the two journeymen. Johnson told him to look into the allegations and give Union business manager Tom Ellis a report on October 6, 2003, the date Ellis would be back in the office.

9) On or about October 1, 2003, Complainant told his supervisor, Mike Hebert, that he was conducting a safety investigation at the Union's behest based on employee reports that foreman Tiffany Hebert had allowed a flagger to climb and trim a tree near charged power lines in Corvallis. Hebert already knew about the incident from his wife, Tiffany, and immediately became defensive when Complainant detailed the information reported by the employees. Hebert did not believe the incident constituted a safety violation and told Complainant that his wife "wasn't that stupid." Hebert also told him that "we all break the rules." Complainant told Hebert that he was preparing a report to give to Tom Ellis on October 6. Hebert subse-

quently called Tiffany's supervisor, Tony Feldman, and warned him that there was "trouble in his area." Hebert told Feldman that "the Union" had called and told him "two employees had reported a "safety violation."

10) On or about October 1, 2003, Complainant called Feldman and gave him the same information he gave Hebert. Feldman told Complainant he already knew about the allegations and repeated Hebert's words that "everybody breaks the rules." Feldman told Complainant that he did not intend to pursue any action against Tiffany. Complainant asked if the tree was on the Pacific Power and Light ("PP&L") list of hazardous trees and Feldman confirmed that it was. Complainant told Feldman he would be making a report to the Union on October 6.

11) During his investigation, Complainant separately interviewed some of the crew involved in the Corvallis incident, including Tiffany Hebert, Thing, Swarm, and Horn. Tiffany acknowledged that she asked Thing to climb and trim a tree but only as part of a "training exercise." She told him the flagger was only eight feet off the ground but acknowledged the tree was on the PP&L list of trees to be trimmed and that some of the limbs "may have been around ten feet from the power line." Thing told Complainant that he climbed and trimmed a tree and that "Tiffany said to him, 'Oh get up there, let's see what you can do.'" He also told Complainant that the limbs were within 10 feet of primary lines. Horn told Complainant that he was sitting in his truck doing paperwork at the time of the incident and did not want to "get involved." Complainant kept notes of his interviews in a "Daytimer" that he later used to draft his report to the Union on or about October 5, 2003.

12) Around 8 a.m. on October 6, 2003, Complainant arrived "at the Scio yard" with Larson to "pick up a truck" per Mike Hebert's instructions. Previously, on September 30, 2003, Hebert had given the crew a three day notice to make the move to the Lyons, Oregon, shop. When Complainant and Larson arrived, they learned that someone else had already picked up the truck and that plans had changed. Hebert approached Complainant and told him he was being demoted to tree trimmer and to "get all your stuff off the truck." Complainant became very upset after Hebert refused to tell him why he was being demoted and he accused Hebert of retaliating against him as a result of the Corvallis investigation involving Hebert's wife. After exchanging heated words with Hebert, he called Hebert's "boss" Dwayne Pope, PP&L's forester Jay Neil, and the Union to protest his demotion. That same day, Hebert moved Complainant to a tree trimmer position on a "two man" bucket crew with foreman Ron Kator. Larson was assigned to a different crew. Both crews moved to Lyons about one week later. Randy Wellborn replaced Complainant as foreman of

the bucket crew and Randy Muravez was promoted from tree trimmer to foreman of Wellborn's climbing crew. At that time, Hebert planned to move his Scio crews to Lyons when the Scio "circuit" was completed, but not all at the same time. One crew had already moved to the Lyons shop and other crews did not move until later in October.

13) On or about October 6, 2003, Complainant filed a Union grievance. Kelly MacDonald, assistant business manager for IBEW, Local 659, conducted an investigation and concluded that Tiffany Hebert was in violation of Respondent's safety rules and the collective bargaining agreement. Thereafter, MacDonald gave Tiffany Hebert a verbal reprimand. On October 16, 2003, MacDonald sent a letter to Respondent's Division Manager that stated in pertinent part:

> "In accordance with Article IV, Section 4.14 of the Working Agreement between Trees, Inc. and IBEW Local Union 659 enclosed is a grievance filed by myself representing Mr. Michael J. Nolan.
>
> "The grievance should be self-explanatory.
>
> "I will await your reply in this matter."

MacDonald attached a "Notice of Grievance" dated October 6, 2003. Under the section calling for the "nature of the grievance and circumstances out of which it arose," MacDonald stated: "Journeyman Tree Trimmer Foreman was discriminated against for giving evidence with respect to an alleged violation of this Agreement," specifically, "Article 4, Section 9, Article 4, Section 14 and all other Sections that may apply."

14) Article 4, Section 9 of the Agreement states, in pertinent part:

> "Under no circumstances shall the Employer dismiss or otherwise discriminate against an employee for making a complaint or giving evidence with respect to any alleged violation of this Agreement."

Article 4, Section 14 of the Agreement states, in pertinent part:

> "The Company shall have the right to exercise customary and regular functions of management, including the right to hire, suspend, discharge, discipline, promote, demote, or transfer employees for just cause. However, the right of the Union to bring a grievance alleging abuse of these rights is recognized."

Article 7, Section 11 of the Agreement states, in pertinent part:

> "It is understood that the Groundman will not climb or use aerial equipment.
>
> "The Flagger/Brush Handler's job, primarily, is to flag traffic and is only to be used as a brush handler, intermittently, between flagging duties."

The understanding that a groundman "will not climb or use aerial equipment" is related to safety issues and compensation matters.

15) The Agreement includes a grievance procedure that states, in pertinent part:

> "4.15 Any grievance which may arise between Union or any of its members and Company with respect to the interpretation or application of any of the terms of this Agreement and with respect to such matters as the alleged discriminatory or arbitrary discharge or discipline of an individual employee, shall be determined by the procedure set forth in the following Sections.
>
> "4.15.1 As the initial step in the adjustment of a grievance, it shall be presented to the Supervisor by the Union Shop Steward or in the absence of a Shop Steward, by an authorized Union Representative (not later than twenty (20) calendar days after the date of the action complained of, or the date the employee became aware of the incident which is the basis of the grievance). The Supervisor shall make his reply within eight (8) business days to the authorized person presenting the grievance. The Supervisor and the Shop Steward or Business Representative shall state the reasons in writing as to why they have been unable to resolve the grievance at this level, when and if it becomes necessary to refer to the next step of the grievance procedure.
>
> "4.15.2 If a grievance is not settled satisfactorily under Section 4.15.1, it shall be presented in writing by the Union to the District Manager within eight (8) business days, following receipt of the Supervisor's reply, setting forth the following:
>
> (a) a statement of the nature of grievance and the facts upon which it is based;
>
> (b) the Section or Sections of this Agreement, if any, relied upon as being applicable thereto;
>
> (c) the remedy or correction which is desired.
>
> "The District Manager shall reply in writing within eight (8) business days after the receipt setting forth the Company's position on the grievance. The District Manager and the Business Representative shall state the reasons in writing as to why they have been unable to resolve the grievance at this level, when and if it becomes necessary to refer to the next step of the grievance procedure.
>
> "4.15.3 If no satisfactory settlement is arrived at under Section 4.15.2, either party may within twenty-one (21) calendar days, request that the

grievance be referred to arbitration.

"4.15.4 An Arbitration Board shall be appointed on each occasion that a grievance is submitted to arbitration. The Board shall be composed of three (3) members, one to be appointed by the Union, one to be appointed by the Company. At the earliest convenience of the representatives, after their appointment, they shall meet for the purpose of selecting the third member who will serve as Chairman of the Board. In the event the parties are unable to agree on a person to act as a third member (within five (5) working days), they shall jointly request the Director of Federal Mediation and Conciliation Service or the American Arbitration Association to submit a list of five (5) persons qualified to act as a third member.

"The Board shall hold such hearings and shall consider such evidence as to it appears necessary and proper. The decision of a majority of the members of the Board shall be final and binding on Company and Union and the aggrieved employee, if any, provided that such decision does not in any way add to, disregard, or modify any of the provisions of this Agreement.

"The Company and the Union shall each bear the expense of its own representatives. The expense of the third party shall be borne by equally by the Company and the Union.

"Either party may call any employee as a witness in any proceeding before the Arbitration Board, and if the employee is on duty, the Company agrees to release such employee from duty so he may appear as a witness."

16) To bolster his grievance, Complainant continued to gather information about the Corvallis incident. On one occasion, Swarm came to Complainant's home and they discussed Complainant's demotion. Complainant's wife, who met Swarm for the first time on that occasion, observed that both were "scared for their jobs" and concerned about whether they should be discussing the events leading to the demotion.

17) On or about October 31, 2003, Tony Feldman told Walberg and Thing they were laid off due to budget cuts. On or about November 2, 2003, Complainant interviewed Walberg and Thing and tape recorded their statements. Subsequently, Walberg and Thing prepared or dictated written statements that they signed and dated on November 4, 2003. In the statements, Walberg and Thing described their perceptions of events that occurred before they were laid off. In his account of the week following his contact with Complainant about the Corvallis incident, Walberg stated, in pertinent part:

"The following week in Corvallis, at Pilkington yard, I saw acts of hostility toward me. The facts where [*sic*]: rumors that I'm a snitch, written words

left on my truck and broken bottles wedged under my truck tires. I believe that I was being retaliated [*sic*] by the crews in question, because they knew the seriousness of the offense.

"Friday October 10th I went to the supervisor Tony Feldman at 7:44 a.m. to inform him what was happened [*sic*]. Tony said: that I should have not called the union and get things stirred up. I said that I did not call the union. Tony told me that I'm a liar and asked if I would put it in writing about not calling the union. Tony continued: if you and Mike Nolan didn't get together to report Tiffany Hebert on a safety violation this wouldn't had [*sic*] happened. I'm not going to have anybody disrupt my yard and the rest of my workers; I'm going to get rid of the problem. Then I said, Tony this is not right. Tony replied it's not my problem but yours, so deal with it and pay the price! After these words from Tony I felt that my safety and my job was [*sic*] in jeopardy after reporting a safety issue, and get discriminated by my supervisor.

"Monday October 13th called Mike Nolan for some advice. Mike told me that if he can he would help me and get back to me.

"Tuesday October 14th Mike called me; there would be a union representative at the Pilkington yard first thing in the morning, Wednesday the 15th.

"Wednesday morning October 15th the union representative Kelly McDonald was there and said to all workers that this animosity [*sic*]. Harassment is a safety issue and will not be tolerable [*sic*] at all by anybody at any time.

"Friday October 17th after work, Don Thing noticed my truck taillight was smashed.

"Monday morning October 20th before work I told Tony Feldman about my smashed taillight. Tony told me to call my union representative if I have a problem. Hearing these words from Tony Feldman, my supervisor from Trees, Inc., I know that Tony would not help me and has denied me of a safe working environment, and the animosity against me. I called the union, and left several messages for Kelly McDonald. My calls were never returned. The next day Tuesday, October 2[1st] I called Tom Ellis from the union. Tom said that he will take care of this. Kelly McDonald called me to inform me that he will be there today for a meeting at the workshop at 4:30 p.m.

"Kelly came to the yard and talked to all workers for the second time and told them clearly that there are other ways to handling situations then [*sic*] in the form like destroying property. This is a safety issue at the workplace if we can not keep our minds on what we doing [*sic*]; workers

> can be killed or injured. There will be penalties if caught physical damage [*sic*] or animosity at the workplace. Kelly talked with Tony and me after the meeting, Tony agreed with Kelly to pay for the taillight that was damaged on work property. After a few days Tony gave me a new truck taillight.
>
> "Friday October 31st Tony Feldman came to the work site at 1:36 where I was working. Tony told me that he had to lay me off because of budget cuts. I will receive my final check today." (internal quotations omitted)

Walberg sought Complainant's help when he prepared his statement. He knew that Complainant planned to file a BOLI civil rights complaint and Walberg was preparing to do the same.[1]

18) Thing's account of the Corvallis incident and subsequent events, signed on November 4, 2003, states, in pertinent part:

> "At the job area, Friday September 26, at 1280 19th street, Corvallis, Oregon [*sic*]. In, the backyard where the work order was to be performed [*sic*]. After 10:00 am break time, Tiffany told Don to put some climbing gear on. Tiffany instructed Don not to wear spures [*sic*], then pointed out the tree to be climbed. Tiffany wanted to see what Don had in him, and Tiffany told Don: let me see what you got.
>
> "Bill Horn, the foreman of Don, said to Tiffany: What are you doing???? Tiffany said: I want to see what Don's got. Bill had no response on that, Tiffany said to Don, go and trim the tree.
>
> "Tiffany gave no instructions to Don, just climb the tree and I will walk you through it. Don did comply with the order, and climbed the tree, about 15 foot [*sic*] in the tree. Don put a lifeline around a branch as Tiffany told him. Don's thoughts were, what ever they say I will do out of respect. I do what I'm told. Tiffany at this time told Don how to tie a repailing [*sic*] knot. Tiffany then gave Don instructions to repaile [*sic*] down to a several branch's [*sic*] that needed to be cut. Diameter was about 3 to 4 inches. Tiffany said to Don, be sure you pull the branch at the same time you saw, the branch Tiffany was talking about was within 10 foot [*sic*] of power line. Don cut several branches, as told by Tiffany, then was instructed to come down by Tiffany.
>
> "At the time Don came down out of the tree, Tiffany said to Bill Horn: My guy Don is done before your guy Jason. Bill had no comment on what Tiffany just said. Don took off the gear. Don continued the job as a ground man dragging and

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[1] Complainant filed his BOLI complaint on the same day Walberg signed his statement. There is no record evidence that Walberg filed a civil rights complaint with BOLI.

chipping brush and waited for further orders.

"Wednesday October 1st 2003, Tiffany had a telephone conversation, after the call Tiffany said: FUCKING A, SOMEONE TURNED ME IN TO THE HALL!!!!!!!

"Tiffany approached Don and said: I hate to ask you this. Don: Then don't. Tiffany walked away . . . Jason came to Don and said: Let's say how it happened. Don: I don't live in lala land . . .

"Tiffany came by, after Jason left and said to Don: Don't listen to what Jason says to you. Don: Thank you very much. That was the end of the conversation.

"Don was home the evening of Wednesday October 1st 2003. Don received a phone call from somebody who did not say his name. The voice on the phone told Don: YOUR [*sic*] DONE, PICK UP YOUR PAYCHECK! Don: Wow, a rumor gets esculated [sic] when it leaves the original mouths. Don recognized now after hearing what the voice said to him as Mike Hebert. Mike: yeah, but you know, you have to watch what you say; it could come back around and harm you. You're a hard worker; I want to keep you around. Just be careful who you talk to, like Mike Nolan. Mike Nolan is not trust worthy and will stab you in the back.

"Don: I never met the guy. I like my work. Mike: you don't have to do what you don't want to. Don: do you have something for me? Mike: I was just kidding. The telephone conversation was ended.

"Don went to work on Thursday October 2nd 2003. Tiffany approached Don before lunch with a paper, and told Don: SIGN THIS!!! Don asked Tiffany what the paper was. Tiffany said: this is for the training exercise in the back yard on September 26th 2003, at 1280 19th Street, Corvallis, Oregon. Don at this time was thinking about the telephone conversation from Mike Hebert. Don knew that his job was at risk. Don signed the paper ordered by Tiffany.

"On Friday October 31st 2003, after work, Don and Steven where [sic] sitting in Steven's truck. Tony Feldman, the supervisor, approached the truck on the passenger side and told Don: I have to lay you off, because of budget costs. Tony told Don to come back Monday November 3rd to receive the final Paycheck from that week just worked with the 2 hour show up time for Monday. Don asked Tony if the retro pay as a ground man will be on the final check too. Tony said to Don: yes.

"Steven Walberg was a witness of this conversation between Tony and Don." (internal quotations omitted)

During his taped interview, Thing acknowledged to Complainant that Tiffany Hebert ordered him to climb and cut tree branches within 10 feet of a "primary distribution line." When Complainant asked him if he believed he was discriminated against and laid off because he did not "say what [Respondent] wanted [him] to say," Thing said, "Yes, I do." Complainant concluded the interview, stating: "Don, I do appreciate your time and effort and I hope to see you back on union payroll very soon and I am going to conclude this interview at this time and Don thank you for your time."

19) Thing provided Complainant with his pay stub for the week ending September 27, 2003, that shows Thing was paid $10.59 per hour (flagger wages) for groundman work he performed during that pay period. Although Complainant believed Thing was improperly paid, he did not file a grievance on Thing's behalf because Thing asked him not to.

20) On or about December 6, 2003, at Complainant's request, the Union's Executive Board ("E-Board") met to determine whether to refer Complainant's grievance to arbitration. During the meeting, Complainant submitted evidence to support his grievance, including the statements Walberg and Thing signed on November 4, 2003. To support his decision to demote Complainant, Mike Hebert had previously told the Union that Complainant had 14 unexcused absences. He also told them Complainant "could promote to foreman again." The E-Board declined to refer Complainant's grievance to arbitration. The Union dropped Complainant's grievance because "they didn't think they could win it on the merits."

21) After Complainant filed a BOLI complaint in November 2003, Mike Hebert responded to the allegations by letter dated December 10, 2003, that stated in pertinent part:

> "In response to Mr. Nolan's being [*sic*] demoted from a Foreman to a Trimmer position [*sic*]. This was a decision that was already in the works well before Mr. Nolan's investigation; his reasons of my actions are per [*sic*] speculation on his part. I decided to give another Foreman that had been running a climb crew through 2 winters Mr. Nolan's Ariel lift truck and chipper. This was not a disciplinary action what so ever. Mr. Nolan was bumped back to a Trimmer's position not demoted. I had made the decision to restructure my crews when the circuit being worked in the town of Scio, OR was complete. Perhaps it was bad timing on my part, but it had to be done before all my crews moved to Lyons, OR to start a new circuit. If I failed to do it at this time I would have had to pay per diem to some employees.
>
> "Part of my job as a General Foreman is to structure my crews to run as efficient as

> possible. To give my customer the most out of their money, make my company money and to keep my employees happy in the process [*sic*]. Sometimes I have to make decisions that are not agreed on by my employees or even myself, but that's business."

In the letter, he described Complainant's work performance as "top notch" and Complainant as "an asset to the trade" and stated he had told Complainant that "the opportunity to become a Foreman again still exists."

22) In early 2004, Hebert prepared a chronology of events that precipitated crew changes and the demotion. He placed the document in Complainant's file and gave it to BOLI. In his chronology, he stated that he had to "bump a current foreman" and he "could not base it on production numbers. They fluctuate." He "could not base it on audits. They fluctuate." Therefore, he "researched all foremen" and "[Complainant's] past performance caught up with him." Hebert further stated that he promoted Randy Muravez to foreman of the climbing crew because "Randy was a stronger climber than [Complainant]" and "for production that's a big plus." Hebert stated he had "never had any past problems or discipline with [Randy,] he never has missed work" and "if Randy did not work out I could offer the crew to [Complainant]." In early February 2004, Hebert told the BOLI investigator that his decision to demote Complainant was based on "attendance and past discipline." He told the investigator that Complainant had 14 unexcused absences. Hebert gave the investigator a copy of an attendance record illustrating Complainant's "very poor attendance" and claimed Complainant was in jail "in April or May because of a fight."

23) The attendance record Mike Hebert provided to the Union and BOLI shows 14 absences designated as "U" for unexcused. Nine of the absences were actually excused or were designated holidays. One of the absences designated as "U" was dated March 20, 2003, and circled with a handwritten noted that stated "court for fighting. Excused Prearranged." Hebert wrote the note on the attendance record sometime after Complainant was demoted. Complainant was not in court or jail for fighting that day or any other day in 2003. Although Hebert knew during the BOLI investigation that Complainant had fewer absences "than he thought," he did not tell the BOLI investigator there were inaccuracies in the attendance record.

24) Complainant had previously signed a statement on March 25, 2003, agreeing that he had missed work on prior occasions without notifying Respondent before or during the absences. He agreed that, henceforth, either he or an immediate family member would notify Respondent of unanticipated absences and that he was subject to disciplinary action if he failed to

"abide by these stipulations." On May 27, 2003, Complainant received a "final written warning" and a 3 day suspension for failing to contact a supervisor during an unscheduled absence. The absence was ultimately excused because Complainant was home with his pregnant wife who gave birth on June 6, 2003. Complainant had one unexcused absence after he signed the March 25 agreement and before he was demoted. Respondent took no action against Complainant for that absence.

25) Complainant received a commendation by letter dated April 17, 2003, from Respondent's corporate president Brian Delaney that stated, in pertinent part:

> "Dear Michael,
>
> "Trees, Inc. has always taken pride in its outstanding employees. Our employees are professionals who provide a service to our communities, exceeding customer expectations every day. I received a letter from a PacifiCorp customer. She commended you **and your crew** for an outstanding job performance. I want to express my appreciation as well.
>
> "Quality requires the commitment of all of our team members and your extra effort reflects this commitment to quality. With your help, our vision **to be the first choice of our customer** will be a reality. Thanks again for your extra effort."

Throughout his employment, Complainant consistently received high scores on the quarterly audits and statistics summaries. The "Quarterly Tree Crew Audit" is conducted by PacifiCorp Vegetation Management for quality control purposes. Without satisfactory audits, PP&L can discontinue contracts. During an audit, a designated forester checks the quality of the cuts and equipment upkeep, among other things. Complainant's total score for the quarter ending March 13, 2003, was 100 percent. Complainant's total score for the quarter ending September 13, 2003, was 100 percent and Complainant's production was rated the "6th best of the (16) crews operating in the Willamette area."

26) After his grievance was dropped, Complainant filed a complaint with the National Labor Relations Board ("NLRB") against Respondent and against Kelly MacDonald alleging MacDonald failed his duty of fair representation. MacDonald was "unhappy" with Complainant for filing the complaint and although it had been withdrawn in or around Spring 2004, he was still unhappy with Complainant at the time of hearing.

27) On or about February 9, 2004, Mike Hebert accompanied Don Thing to the Union Hall. Thing had been unemployed since his October 2003 lay-off. He told Kelly MacDonald that his "ultimate goal" was to "get back on the books" so he could get a job. Thing made and signed two

statements that were typed by a notary in MacDonald's presence. The first statement, dated February 9, 2004, said in pertinent part:

> "At the job site Fri Sept 26 2003 at 1280 19th St in Corvallis Oregon [sic]. During break I bravely bugged Tiffany Hebert to let me show her how an Islander climbs trees. At the end of our break I saw Tiffany walking to her truck so I ran over to her and asked if she was gonna give me a chance to show her what I got.
>
> "She then had me grab her gears and follow her to the house. In the back of the house she showed me how to strap on my gears & life line and asked me if I know how to tie a rappelling knot. I said no, she then asked what Corey showed me while she tied a rappelling [knot] as I watched. After 2nd time she had me try a rappelling knot on the ground before climbing.
>
> "Up on the tree about 15 to 20 feet I put my lifeline around a branch as Tiffany said so and rappelled down to a lower branch where I could squat and smack her hand high-five.
>
> "She then told me which branch to cut one at a time, 4 branches total no more, looking up I saw cable for TV I asked Jason next branch over, cuz he also was watching about wires he said, your far from power lines, only cable TV & phone lines were close but not touching my branches. Tiffany told me to come down I was done I wanted more rush but I did what I was told cuz of respect.
>
> "On the ground Tiffany looked at Bill Horn & said my guy is done before your guy smiling. I took off Tiffany's gears put them in her truck and a grounds man [*sic*].
>
> "Day after Tiffany brought me a paper to sign for the training of my climbing.
>
> "Tiffany asked Jason during break if he knew or he himself turned her in to the Hall. Jason swears up and down he did not do such a thing. She walked away and Jason and I were piling brush next to the chipper. Jason began to ask me over & over if I told someone about what happened. Telling him no and I expressed my temper was rising cus I felt like a target so he dropped it and Tiffany heard our talk and told me to ignore him.
>
> "Mike Hebert called me giving me a message to call Mike Nolan. He asked what was going on and if I was talking lies & rumors. I told him no. Mike told me who to call and I need to call him. He than said he has no anger towards me or his wife Tony also. I asked if he had some for me cuz I thought per diem was still behind and not my check like Mike Nolan says."

The second statement, also dated February 9, 2004, said in pertinent part:

> "Statements Mike Nolan took from me was half a page only and it was recorded on tape. 2-3 days later Steve Wahlberg called saying Mike Nolan needs my statements to make correct typing errors and notarized and I will get them back.
>
> "To this day I have not gotten back my papers. The statements I have since read is very insulting and not true. Things were added on and extra page of lies."

After Thing signed the statements, MacDonald had him sign the "Union books" and in less than one week Thing was dispatched to Respondent for work on a job site in Lincoln City.

28) Thing has a prior record on file with Marion County Circuit Court that shows he was convicted of a felony in March 2002 and a crime involving dishonesty in July 2002.

29) On or about the same day Thing went to the Union Hall, Tony Feldman went to Swarm's work site and showed him a document Complainant had filed with the Union that included statements Swarm made to Complainant after the Corvallis incident. After questioning Swarm about the document, Feldman accompanied Swarm to the Union Hall where they met with Kelly MacDonald. MacDonald typed up two statements that Swarm signed before a notary. The first statement, dated February 10, 2004, stated in pertinent part:

> "Mike Nolan gave me Jason Swarm a call at 10:08 am on Tuesday or Wednesday. Nolan told me he had heard Don the groundman had been in a tree trimming near the power lines and pulling overhang. I responded to Mike Nolan stating that he was only in the tree about 8' to 10' maximum. Mike Nolan then responded saying that he referring to Don Thing, 'wasn't anywhere near the lines?" I then told Mike Nolan, 'No he wasn't anywhere near the lines.' Mike Nolan then said 'was any part of his body, or limbs near or within 10'. I told him, 'NO'. Mike Nolan asked me then, 'why was he in the tree.' I said, 'I'm guessing the general standard.' (I was irritated by his persistence. He cut into what I was saying at the time and told me to tell Don to call him and hung up.
>
> "Mike Nolan has a habit from my experience of cutting into a conversation before a person can finish."

The second statement, also dated February 10, 2004, stated in pertinent part:

> "No conversation went on with Mike Nolan and I on Friday, September 26th 2003 about an alleged safety violation with Don the groundman. Mike Nolan did call me and asked me questions on the following week about Don and a tree he climbed in. In the statement that Mike Nolan presented to the Union Hall was false and

> did not fit the one and only conversation that we had. I wrote out a statement of our conversation on another sheet of paper."

Swarm remained in Respondent's employ and at the time of hearing was still "technically" employed.

30) Complainant's BOLI complaint and NLRB complaint against MacDonald were investigated "simultaneously" in February 2004. Mike Hebert and Tony Feldman were present when Thing and Swarm signed their February 2004 statements. Prior to or during that time, Hebert shared some of the "BOLI documents" with MacDonald. MacDonald believed that the February 2004 statements "refuted" Thing's November 11, 2003, statement and Complainant's report to the Union summarizing Swarm's prior statements. MacDonald used the February 2004 statements to defend himself against Complainant's NLRB complaint.

31) On February 25, 2004, Complainant sustained a compensable injury and received time loss payments until he became medically stationary on June 1, 2005. His worker's compensation claim closed on June 23, 2005. Complainant has not returned to work since his injury. When his claim closed, the Worker's Compensation Board deemed Complainant 29 percent disabled. Complainant was released for "modified" work, but has been disabled from performing tree trimmer work since his work injury.

32) Throughout his employment as a tree trimmer, Complainant was a certified arborist and licensed commercial pesticide applicator. After his work injury, Complainant continued to maintain his professional membership in the International Society of Arboriculture ($145 in 2004), his arborist certification ($145 in 2004), and his pesticide applicator's license ($50 for 2004; $50 for 2005). Complainant paid for his licenses and certification out of his own pocket.

33) In March 2004, Complainant sent a letter to PP&L alleging Respondent had ordered him to supervise other public utility companies at PP&L's expense. He alleged he was expected to charge the costs of equipment and personnel used on other accounts to PP&L's account. Following his lengthy contentions, and as explanation for the letter, Complainant stated in part:

> "The reason I come forward now is that Mike Allen, Dwayne Pope and Mike Hebert have went [*sic*] back on their word and promises.
>
> "I was demoted when Mike Hebert's wife was involved in an incident where she made a flagger, Don Thing, climb a tree in a back yard in Corvallis. I, Mike Nolan, being shop steward for this area was asked by Local 659 to look in to these allegations. After talking to employees that were there, and Tiffany Hebert herself, everyone told me the same story that it in fact took

place and that three journeyman watched as the flagger trimmed under a primary distribution line that was on PP&L's list to be trimmed. Tiffany Hebert gave the order and Don Thing was being paid flaggers rate.

"The whole inquiry was completed by Thursday, October 2nd, I was to wait and give all findings to Tom Ellis on Monday the sixth of October for Tom was out of the office till then.

"On Monday, October 6th Mike Hebert demoted me to a trimmer slot and told me not to use the phone on his time. I asked Mike Hebert four times why he was demoting me and he finally said, 'I just don't want you running a crew.' I explained to him that I had no accidents, no injury's [*sic*], that I was number six out of sixteen crews, was an I.S.A. certified arborist, as well as a utility specialist. He said that he did not care and put Randy Walburn [*sic*] in as foreman in my place who has no herbicide license, no CPR, no I.S.A., no I.S.A. Utility and has had two DUII's. That's when I knew that it was personal and I was being singled out because of his wife's allegations against her (misconduct). I know [*sic*] longer feel I need to keep this information to myself. One day out of five was devoted to other companies at your expense. On all time sheets, my name and employee number is listed as supervisor on these accounts.

"I swear the above to be the true [*sic*] and will go before any inquiry and testify to this information. I have evidence to prove my statement and will present it at your request."

Complainant also made specific allegations about Mike Hebert and other employees to PP&L's forester Jay Neil.

34) Complainant was distraught, angry and upset following his demotion. His relationship with his family changed as he became "more absorbed and focused" on the circumstances involved in his demotion. He became detached from his family and less patient with his children. Although he had been demoted from area supervisor to foreman a few years before, the reason for this demotion was more upsetting because it was for "reporting safety concerns" and previously he had won an award for safety. He felt degraded and belittled by Respondent. The demotion negatively impacted his relationship with his co-workers, some of whom perceived he was "stirring up shit." Consequently, he worried about the reasons behind the demotion and its financial effects "every day, every hour" and those worries adversely affected the quality of his home life and professional relationships.

35) Complainant earned $23.87 per hour as a foreman. Complainant was paid $20.63 per hour after he was demoted to tree

trimmer. Complainant's rate as a tree trimmer was $3.24 ($6.48 overtime rate) less than his earnings as a foreman. Between October 6, 2003, and February 28, 2004, Complainant lost $3,007.08 in wages as a consequence of his demotion.

36) Complainant's testimony was credible. His account of key facts remained consistent and was corroborated by most of the witnesses. His testimony that he reported a safety issue on October 1, 2003, to supervisors Mike Hebert and Tony Feldman and that the issue, involving Hebert's wife, Tiffany, was reported to the Union, was corroborated by Mike Hebert and Feldman. Moreover, neither Tiffany Hebert nor Don Thing appeared at hearing to contradict Complainant's testimony that during his investigation of the incident both acknowledged that Tiffany had asked Thing, a flagger, to climb and trim a tree near a power line on or about September 26, 2003. Also, Complainant's account of his demotion at the start of his shift on October 6, 2003, was substantially similar to Mike Hebert's version and corroborated by credible witness testimony. Although there were some questions raised about precise dates and times certain phone calls were received or made, any apparent inconsistencies were adequately explained and, in any event, were minor and not material to any issue. Overall, Complainant's testimony was trustworthy and the forum has credited it in its entirety.

37) Angela Nolan's testimony was credible despite a natural bias as Complainant's wife. She testified only to her personal knowledge and did not embellish her observations in any way. Her testimony that she first met Jason Swarm when he came by the house to pick up a tool belt after Complainant was demoted and that she overheard Swarm, Complainant and Jack Larson discussing the demotion and their concerns about their jobs was credible and the forum accepts it as fact. Moreover, her testimony that Complainant was distraught and upset after he was demoted and that his "absorption" with the way he perceived he was treated by Respondent negatively impacted his family life was credible and not impeached in any way. The forum credits Angela Nolan's testimony in its entirety.

38) Jack Larson's testimony generally was credible. He readily admitted a close friendship with Complainant that the forum weighed carefully when considering his testimony. His memory for dates was poor, but his recollection of the general time period and the events he observed was consistent and not contradicted. His testimony that he was present when Swarm called Complainant to report the Corvallis incident was convincing and bolstered by other credible evidence. The forum credits Larson's testimony in its entirety.

39) Steven Walberg's testimony was credible. As a tree trimmer for 21 years, he demon-

strated knowledge of safety procedures and expressed genuine concerns about the ramifications of unsafe working conditions. He testified only to his knowledge and observations with no embellishment and his testimony was not contradicted. He was not impeached in any way and the forum credits his testimony in its entirety.

40) Mike Hebert's testimony was internally inconsistent, self serving and was not substantiated by credible evidence. Moreover, as Respondent's corporate representative, Hebert was present throughout the hearing and his testimony demonstrated he was influenced by other testimony he heard at the hearing. For instance, after the Agency investigator testified and was excused from the hearing, Hebert acknowledged he told the Union that Complainant was demoted because he had 14 unexcused absences. On cross-examination, he testified that Complainant had only five unexcused absences and thereafter advised the BOLI investigator "there were not as many absences as [he] thought." That testimony was contradicted by the Agency investigator who appeared later in rebuttal and credibly testified that Hebert presented the attendance record showing 14 unexcused absences without qualification and claimed Complainant's "very poor" attendance was the reason Complainant was demoted. Hebert's testimony was not believable and the forum gave it no weight unless it was a statement against interest or corroborated by other credible evidence.

41) Kelly MacDonald readily acknowledged that he remained "unhappy" with Complainant for having filed an NLRB complaint and his apparent unhappiness influenced his testimony in large part. His bias surfaced when he initially testified that following his investigation of the Corvallis incident, he concluded that the collective bargaining agreement provision which prohibits a groundman from climbing trees "was not being abused." He further stated that he found that "Don Thing was cutting limbs pertinent to [the crew's] job assignment" and that if he "had found a case where Thing had been used sporadically day in, day out, to do tree trimming work it would have been a different scenario." This testimony was contradicted by his actions and his subsequent testimony that the forum found believable because it was corroborated by other credible evidence.

First, unequivocal evidence shows that following his investigation, MacDonald filed a formal grievance against Respondent on Complainant's behalf. MacDonald's grievance, dated October 16, 2006, alleged that Complainant had been discriminated against for "giving evidence with respect to an alleged violation of this Agreement."

Second, MacDonald testified on cross-examination that he interviewed Tiffany Hebert and her crew on or about October 13,

2003, and was told that Don Thing had climbed a tree and cut three or four limbs around the "distribution level." He also testified that Tiffany Hebert told him that the incident was part of an aerial training exercise and that "Thing was being trained in tree top rescue." He further stated that Jason Swarm told him that he was in a tree "adjacent" to Don Thing and that following the interviews, he "quoted to Tiffany about not having a groundman climb trees." MacDonald's description of the discussions he had with Tiffany Hebert and her crew was consistent with Complainant's description of his interviews with Tiffany Hebert, Swarm, and other crew members. Although he gave a diluted version of his "quote to Tiffany" about groundmen climbing trees, his testimony sufficiently affirms Complainant's and the BOLI investigator's credible testimony that MacDonald told them he had given Tiffany a "verbal reprimand" for the violation. Tiffany Hebert did not appear at hearing to contradict any of those statements. The forum therefore infers that her testimony would not have been substantively different.

Third, on cross-examination, MacDonald testified that the collective bargaining agreement provision that prohibits groundmen from climbing trees was "for safety reasons" as well as addressing compensation. That testimony also is contrary to his initial testimony that he had determined the collective bargaining agreement provision had not been abused.

Finally, MacDonald's testimony that Swarm and Thing "volunteered" to recant or deny their previous statements to Complainant is not believable. His own testimony shows Mike Hebert and Tony Feldman brought Thing and Swarm to the Union Hall where they signed the February 2004 statements that discredited Complainant's safety concerns - the crux of Complainant's complaints filed against Respondent and the Union. The forum infers that It was not mere coincidence that Thing was immediately given a job and Swarm managed to hang on to his job following their execution of notarized statements that Respondent and the Union believed, albeit misguidedly, would aid their dubious positions. For all of the reasons set forth herein, the forum credited MacDonald's testimony only when it was consistent with or corroborated by other credible evidence.

42) Tony Feldman's testimony was not credible. His bias as a Respondent employee was profoundly evident by his demeanor and the prepared responses he gave to anticipated questions. Some of his testimony was given, literally, "tongue in cheek." Feldman's demeanor was relatively neutral when he testified to collateral facts. However, he noticeably and repeatedly rolled his tongue against the inside of his cheek immediately preceding and intermittently during his testimony about key issues, such as his account of the "investigation" he conducted following Complainant's safety complaint and what

he was told by the Corvallis crew during that investigation. His testimony that Complainant told him he found "no violation" of safety procedures during his investigation of the Corvallis incident was not only punctuated by his tongue physically in cheek, it was contradicted by Feldman's subsequent admission, albeit somewhat vague, that Complainant had asked him to conduct a "safety meeting" reiterating company policy involving groundmen climbing trees and "to do something in response to [the situation]." Unless it was corroborated by other credible evidence or a statement against interest, Feldman's testimony was given no weight.

43) Bill Horn's testimony was internally inconsistent. Initially he stated the first thing he observed when he left his truck to join the crew was Don Thing up in a tree and "everybody else on the ground watching him and explaining to him what to do and all that stuff." When specifically asked about Swarm's whereabouts, he stated Swarm was in the tree with Thing but that he couldn't "think clearly exactly where [Swarm] was at" in the tree. Later, while describing the safety conditions at the time, Horn stated he observed that Thing was in the tree "all tied down and everything and Tiffany and Jason [Swarm] were just showing him that that's how it's done, climbing trees and stuff like that, and to see if he would really like to do it for his future." On cross examination, Horn stated he did not see Swarm trimming the tree before Thing climbed the tree because when he arrived on the scene, Thing was already up in the tree and Swarm "was on his way down" from the tree. Later still, Horn stated Swarm was 15 feet up observing Thing who was only 10 feet up in the tree. During his testimony, Horn's breathing was uneven and he appeared nervous. His testimony was punctuated with uncertainty and he appeared to struggle to remember what he was supposed to say. Overall, his testimony was unreliable. However, his statement that Tiffany Hebert told him she "put Thing in the tree" to see how he would do was consistent with other credible evidence. Moreover, his observation that Thing was in a tree in climbing gear was corroborated by other eye witnesses. The forum credited Horn's testimony only when it was consistent with or corroborated by other credible evidence.

44) Jeofrey Jackson's testimony was similar in character to other Respondent witnesses. His apparent intent was to demonstrate that Complainant's report of unsafe practices was not well founded. At one point, he acknowledged that Thing was in a hazardous tree and cut some branches, because "they wanted him to get the feel of cutting branches in an awkward position." However, that testimony was inconsistent with his and other witness testimony that Thing's presence in the tree was part of a training exercise and that no trimming takes place during train-

ing exercises.[2] His overall description of the Corvallis incident conflicts with the version Tiffany Hebert and Swarm told Complainant and MacDonald during the initial investigation. For instance, Jackson testified that "another guy was up in the tree trimming" and "was pretty much done trimming the tree around the primary lines" when Thing climbed the tree. Complainant credibly testified that Thing told him he was alone in the tree. MacDonald credibly testified that Swarm told him he was in a tree "adjacent" to the tree Thing climbed. Given the conflicting versions and Jackson's evident bias as a current Respondent employee, the forum gave Jackson's testimony weight only when it was corroborated by other credible evidence.

45) Jason Swarm was a reluctant witness. When asked on direct examination if Respondent currently employed him, he responded, "technically." When asked on cross examination what he meant by "technically," he refused to answer. He eventually stated, albeit hesitantly, that he was currently seeking part time work at a gas station. He was otherwise unresponsive about his employment status with Respondent. By his attitude and demeanor, the forum inferred he was under pressure to testify on Respondent's behalf. Moreover, he testified that in February 2004, his supervisor (Tony Feldman) came to his work site to ask him about statements attributed to Swarm that Complainant previously had given to the Union. According to Swarm, he and Feldman went to the Union Hall to "document" that Swarm "did not write that falsified letter."[3] He testified that he and Feldman met with Kelly MacDonald and that Don Thing was present at the Union Hall when Swarm made a "notarized statement" denying he talked to Complainant on September 26, 2003, about the Corvallis incident. In the statement, he claimed to have talked to Complainant the following week and that Complainant's notes describing the "one and only conversation" he had with Complainant were "false." Swarm's testimony and the two sworn statements he made at the Union Hall in February 2004 were contradicted by Complainant's credible testimony and telephone records that establish Swarm talked to Complainant at least four times on September 26, 2003, and several times thereafter. When he was confronted with Complainant's telephone records on cross-examination, Swarm admitted he had talked to Complainant on September 26, but had "no recollection of the Corvallis issue coming up."

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[2] *See* Finding of Fact – The Merits 5.

[3] There is no record evidence that Complainant gave the Union a letter purportedly written by Swarm. The record shows the "letter" was actually Complainant's report to the Union that chronicled his investigation and included summaries of his interviews with Swarm.

Complainant's wife testified that Swarm was in her home after Complainant was demoted and he and Complainant were "scared" about their jobs. Her credible testimony supplies a plausible explanation for Swarm's attempt to distance himself from Complainant after Feldman confronted him with the Union report summarizing Swarm's statements to Complainant. While the forum falls short of finding that Respondent conditioned Swarm's continued employment on his willingness to discredit Complainant's safety investigation which was the subject of a BOLI complaint, the forum infers, based on the record herein, that Swarm's testimony was significantly influenced by his apparent uncertainty about his job security with Respondent. The forum therefore has only credited Swarm's testimony when it was consistent with other credible evidence in the record.

46) Don Thing's two statements, signed and notarized on February 9, 2004, are not credible. First, the Agency introduced impeachment evidence showing Thing was recently convicted of a felony and a second crime involving dishonesty. Although the record establishes Thing was available, he did not appear and explain the circumstances of his prior convictions. Second, Thing's "sworn" statements recanting his prior statements to Complainant apparently were made in exchange for a job. MacDonald testified that Thing's "ultimate goal" when he appeared at the Union Hall that day was to "get on the books and get a job." MacDonald also testified that Respondent's supervisor Mike Hebert accompanied Thing and that after Thing signed the statements, Thing was listed on the Union books and within one week was dispatched to Respondent for a job in Lincoln City. Thing did not appear at hearing to explain the discrepancies between his prior statements, including a taped interview, and his subsequent notarized statements. For those reasons, the forum has discredited Thing's February 2004 statements.

47) Miguel Bustamante was a credible witness. His testimony was straightforward and he readily acknowledged that he relied on his file notes to refresh his memory of interviews he conducted during the civil rights investigation. He was not impeached in any way and the forum credits his testimony in its entirety.

ULTIMATE FINDINGS OF FACT

1) At times material herein, Respondent was a corporation conducting business in Oregon and has employed Complainant since 1988.

2) At times material herein, Complainant was a bucket crew foreman and union shop steward.

3) On October 1, 2003, after receiving two complaints from other employees, Complainant reported to his supervisor Mike Hebert that crew foreman Tiffany Hebert had permitted flagger Don Thing to climb and trim a tree near charged power lines in violation of

Respondent's workplace safety standards and the collective bargaining agreement. Hebert already knew about the incident and did not agree that it was a safety issue. He became defensive and told Complainant that his wife "was not that stupid" and that "everyone breaks the rules" occasionally. Complainant told Hebert that he was asked by the union to file a report with his findings on October 6. After Complainant left, Hebert called Tiffany Hebert's supervisor, Tony Feldman, and warned him "there was trouble in his area."

4) After talking to Hebert, Complainant contacted supervisor Tony Feldman and told him about the employee complaints involving Tiffany Hebert and Don Thing. Feldman already knew about the incident and parroted Hebert's response. He told Complainant that he did not intend to pursue any action against Tiffany Hebert and warned Complainant not to pursue the issue.

5) Complainant subsequently interviewed Tiffany Hebert, who acknowledged that she asked Thing to climb and trim a tree and that some limbs may have been near a power line. He also interviewed Don Thing, who told him that Tiffany told him to climb the tree and that the limbs were within 10 feet of primary lines. Complainant interviewed other employees who were present at the site on the day of the incident, including Bill Horn, who did not want to be involved, and Jason Swarm, who originally reported the incident.

6) On or about 6, 2003, Complainant faxed a report to the union. His report documented his investigation through October 2, 2003, including his interviews with T. Hebert, Swarm, Thing, and Horn.

7) On October 6, 2003, Mike Hebert demoted Complainant from foreman to tree trimmer and moved Complainant to a different crew. On the same day, Complainant filed a grievance with the union.

8) On October 8, 2003, Complainant filed a supplemental report with the union that included information about the October 6 events.

9) The union's assistant business manager Kelly MacDonald looked into Complainant's grievance and concluded that T. Hebert violated Respondent's safety rules and the collective bargaining agreement. He subsequently gave her a verbal reprimand and by letter dated October 16, 2003, notified Respondent that he was filing a grievance on Complainant's behalf. A "Notice of Grievance" was attached to the letter and stated that Complainant was "discriminated against for giving evidence with respect to an alleged violation of this Agreement." MacDonald cited the applicable collective bargaining agreement provisions, including those that pertained to safety standards.

10) On or about October 31, 2003, Tony Feldman told tree trimmer Steve Walberg and flagger Don Thing that they were laid off due to budget cuts. Tree trimmer Jason Swarm was not laid off.

11) On or about November 2, 2003, Complainant interviewed Walberg and Thing and tape recorded their statements. On the same date, Complainant filed a BOLI civil rights complaint against Respondent. Later, Walberg and Thing prepared or dictated written statements that they signed on November 4, 2003. Complainant submitted both statements to the union's E-Board as support for his grievance.

12) On or about December 6, 2003, the E-Board met to determine whether to grant Complainant's request for arbitration of his grievance. Mike Hebert told the union representatives that Complainant was demoted for poor attendance and disciplinary reasons, including 14 unexcused absences the previous year. The E-Board declined to refer Complainant's grievance to arbitration and dropped or withdrew their grievance on Complainant's behalf.

13) Complainant had five unexcused absences prior to October 6, 2003. He had signed a statement on March 25, 2003, agreeing that he had missed work on prior occasions and agreed that he was subject to discipline if he did not follow certain guidelines. Complainant had one unexcused absence in mid-July 2003 after he signed the March 25 statement and before he was demoted. He was not disciplined for the mid-July absence.

14) After Complainant filed his BOLI complaint in November 2003, Mike Hebert told a BOLI representative that his decision to demote Complainant was based on Complainant's "attendance and past discipline," including 14 unexcused absences. Hebert knew at that time that Complainant had only five unexcused absences. Hebert described Complainant's work performance as "top notch" and Complainant as "an asset to the trade."

15) After his grievance was dropped, Complainant filed NLRB complaints against Respondent and Kelly MacDonald. Complainant alleged MacDonald failed his duty of fair representation. MacDonald was upset with Complainant for filing the complaint and even though the complaint was subsequently withdrawn in spring 2004, MacDonald was still upset with Complainant at the time of hearing.

16) On or about February 9, 2004, Mike Hebert accompanied Don Thing to the Union Hall to meet with MacDonald. Thing had been unemployed since his October lay-off and his "ultimate goal" was to "get back on the books" so he could get a job. After signing two notarized statements retracting his November 4, 2003, statements, Thing signed the "union books" and Respondent put him back to work within a week. On or about the same day, Tony Feldman accompanied Jason

Swarm to the Union Hall after showing Swarm a copy of Complainant's report to the Union that summarized Swarm's statements to Complainant after the Corvallis incident. Swarm signed two notarized statements denying he made any statements to Complainant. Swarm remained in Respondent's employ and at the time of hearing was still "technically" employed by Respondent.

17) MacDonald used the notarized statements of both Swarm and Thing to defend the NLRB complaint and also gave them to the BOLI investigator because he thought they were relevant to the case.

18) Complainant lost wages of $3007.08 and suffered significant emotional distress as a consequence of his demotion.

CONCLUSIONS OF LAW

1) At times material, Respondent was a corporation subject to the provisions of ORS 654.062 and ORS chapter 659A, and Complainant was an employee as defined in ORS 654.005(4).

2) The actions, inaction, and motivations of Mike Hebert are properly imputed to Respondent.

3) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the persons and subject matter herein and the authority to eliminate the effects of any unlawful employment practices found. ORS 654.062(6)(a) and ORS 659A.800 to ORS 659A.850.

4) Respondent violated ORS 654.062(5)(a) and OAR 839-004-0004 by demoting Complainant because he opposed and reported unsafe working conditions.

5) Pursuant to ORS 659A.850, the Commissioner of the Bureau of Labor and Industries has the authority under the facts and circumstances of this case to award Complainant lost wages and benefits resulting from Respondent's unlawful employment practice and to award money damages for emotional distress sustained and to protect the rights of the Complainant and others similarly situated. The sum of money awarded and the other actions required of Respondent in the Order below are an appropriate exercise of that authority.

OPINION

The Agency alleges Respondent engaged in an unlawful employment practice by demoting Complainant because he complained about or opposed practices related to the Oregon Safe Employment Act (OSEA). As damages for Respondent's alleged unlawful employment practice, the Agency seeks back wages of $3,007.08, out of pocket expenses totaling $422, and mental suffering damages of $30,000 on Complainant's behalf.

ORS 654.062 provides, in pertinent part:

> "(5) It is an unlawful employment practice for any person to bar or discharge from employment or otherwise discriminate against any employee or pro-

spective employee because the employee or prospective employee has:

(a) Opposed any practice forbidden by ORS 654.001 to 654.295 and 654.750 to 654.780;

(b) Made any complaint * * * under or related to ORS 654.001 to 654.295 and 654.750 to 654.780[.]"

ORS 654.062(6)(a) provides that allegations of unlawful employment practices under ORS chapter 654 shall be processed "in the same manner and to the same extent that the complaint would be processed if the complaint involved allegations of unlawful employment practices under ORS 659A.030(1)(f)," an anti-retaliation statute.

A violation of ORS 659A.030(1)(f) is established by evidence that shows a complainant opposed an unlawful practice, the respondent subjected the complainant to an adverse employment action, and there is a causal connection between the complainant's opposition and the respondent's adverse action. *In the Matter of Robb Wochnik*, 25 BOLI 175, 196 (2004). Consequently, to prevail in this case, the Agency was required to prove by a preponderance of credible evidence that: (1) Complainant was an employee who complained about or opposed a practice forbidden under or related to the OSEA; (2) Respondent subjected Complainant to an adverse employment action; and (3) there is a causal connection between Respondent's adverse employment action and Complainant's opposition to practices forbidden under or related to OSEA. ORS 654.062(5)(a), 654.062(6)(a), ORS 659A.030(1)(f), and OAR 839-004-0001. *See also In the Matter of Tomkins Industries, Inc.*, 17 BOLI 192, 206 (1998), *citing Butler v. Department of Corrections*, 138 Or App 190, 202 (1995) ("[W]e hold that, in order to prove [a] claim [under ORS 654.062(5)(a)], plaintiff needed to establish only that he was subject to an unlawful employment practice [*i.e.*, retaliation] because he made a complaint related to unsafe working conditions").[4]

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[4] This case overrules the forum's prior misstatement of the elements *In the Matter of Logan International Ltd.*, 26 BOLI 254, 282 (2005). Except for "mixed motive" cases, the Oregon Court of Appeals and this forum, with the exception of *Logan*, have consistently determined that the elements of a prima facie case for retaliation include proof of a causal connection between the protected activity and adverse action. See *Hardie v. Legacy Health System*, 167 Or App 425 (2000); *Lansford v. Georgetown Manor*, 192 Or App 261 (2004); *Chase v. Vernam*, 199 Or App 129 (2005); *Butler v. Department of Corrections*, 138 Or App 190 (1995); *Kirkwood v. Western Hyway Oil Co.*, 204 Or App 287 (2006); *Jensen v. Medley*, 170 Or App 42 (2000); *Boynton-Burns v. University of Oregon*, 197 Or App 373 (2005).

A. <u>Complainant was an employee who complained about or opposed a practice forbidden under or related to the OSEA.</u>

The Agency and Respondent agree that Complainant was Respondent's employee for 18 years and at material times was a crew foreman and union shop steward until on or about October 6, 2003. Additionally, supervisors Mike Hebert and Tony Feldman agree that Complainant told them (1) he had received complaints from two employees that Tiffany Hebert, Mike Hebert's wife and Tony Feldman's foreman, ordered Don Thing, an untrained and unqualified person, to climb and trim a tree that was located under primary power lines ["the Corvallis incident"] and (2) he was investigating the complaints at the Union's request.

Eyewitness testimony unequivocally placed Thing in a hazardous tree, dressed in climbing gear, and trimming branches near a primary power line on the day in question. Respondent's legal theory that there were no unsafe conditions since "nothing unsafe happened" according to their eyewitnesses is misguided. Whether Thing actually was near a primary power line or whether he cut tree limbs or a few small branches is irrelevant. To prove a violation of ORS 654.062(5)(a), the Agency need not establish that Complainant opposed conditions that actually violated a statute or rule. The Agency need only prove that Complainant was discriminated against for expressing safety concerns "under or related to" the OSEA. *In the Matter of Rogue Valley Fire Protection*, 26 BOLI 172, 183 (2005). *See also Yeager v. Providence Health System Oregon*, 195 Or App 134, 141-42 (2004), *quoting McQuary v. Bel Air Convalescent Home, Inc.*, 69 Or App 107, 111-12 (1984) ("Statutes which protect employes against retaliation do not require that the alleged violation which the employe claims be ultimately proved. *See, e.g.* * * * ORS 654.0625(5) (protects any employe who makes a complaint under the [OSEA] * * *.")). In this case, however, the Agency proved through MacDonald's testimony that Thing was permitted to engage in an activity that was in violation of Respondent's safety practices and the collective bargaining agreement. A preponderance of credible evidence shows those facts were brought to Complainant's attention in his capacity as Union steward. Complainant thereafter reported those facts to two of Respondent's supervisors and expressed his concern about the reported unsafe conditions. That fact is not in dispute. For that reason, the forum concludes that Complainant reported and opposed unsafe working conditions to Respondent that were under or related to OSEA.

B. <u>Respondent demoted Complainant</u>

Respondent does not dispute that Complainant was demoted

from his foreman position to tree trimmer on October 6, 2003, or that Complainant's hourly pay rate was reduced by $3.24 per hour as a result of the demotion. The forum concludes the demotion was an adverse employment action taken against Complainant by Respondent.

C. <u>Complainant was demoted because he complained about or opposed practices forbidden under or related to the OSEA.</u>

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

Additionally, the Oregon Court of Appeals held that when relying on "mere temporal proximity" between the protected action and the allegedly retaliatory employment decision to indirectly establish a causal connection, the "events must be 'very close' in time." *Id.* at 381, *citing Clark County School District v Breeden*, 532 US 268, 273 (2001). In this case, Complainant was demoted less than three business days after he reported unsafe working conditions to Respondent's supervisors Hebert and Feldman, and the Union. By any standard, the proximity in time is close enough that the forum may and does in fact infer causation.[5]

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[5] Some examples of how close in time is considered "very close" may be found in *Thomas v. City of Beaverton*, 379 F3d 802, 812 (2004) wherein the Ninth Circuit held that a causal link can be inferred from timing alone when there is a close proximity between the protected activity and the alleged retaliation. In *Thomas*, the Court determined seven weeks was sufficient to establish a causal link and was consistent with its previous cases holding "that events occurring within similar intervals of time are sufficiently proximate to support an inference of causation," *citing Yartzhoff v. Thomas*, 809 F2d 1371, 1376 (9th Cir. 1987) (causation was inferred when adverse employment action occurred less than three

Additionally, the preponderance of credible evidence established that Respondent's alleged reason for demoting Complainant was patently false. Hebert's contention at hearing that he found it necessary to "bump" a foreman in order to fulfill a "promise" to place another foreman on a bucket crew and that he chose to bump Complainant because of his "past" attendance and disciplinary record was contradicted by his own testimony and prior statements.

First, he admitted he promoted a less experienced tree trimmer to foreman to replace the foreman who replaced Complainant, which negates the implication that he could not put the other foreman on a bucket crew without first "bumping" a foreman back to trimmer.

Second, he admitted Complainant's attendance record was not as poor as he had previously represented to the Union and BOLI. In fact, documentary evidence established that Complainant's attendance problems, which were significantly less than Hebert represented, had resolved months before his demotion. Moreover, other than the previously resolved attendance problems, Complainant had no disciplinary record whatsoever. In fact, Complainant's employment record shows he consistently received perfect scores on customer audits for quality and production, and, during the time he was having so-called attendance problems that allegedly affected his production, he received a commendation from the company president for his "outstanding job performance."

Third, in his initial position statement to BOLI in early December 2003, Hebert declared that Complainant was "top notch" and an "asset to the trade" and insinuated that he bumped Complainant back to trimmer because of a previous decision to "restructure" his crews for efficiency reasons and if his employees do not agree with his decisions, "that's business." Later, in early February 2004, at the same time he and Feldman were questioning Swarm and Thing about their prior statements to Complainant, Hebert told BOLI that his decision to demote Complainant was based on Complainant's "very poor" attendance and disciplinary record. He presented BOLI with a chronology that included the statement that Complainant's "past caught up with him" and resulted in Hebert targeting Complainant for demotion.

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months after the protected activity) and *Miller v. Fairchild Indus., Inc.*, 797 F2d 727, 731-32 (9th Cir. 1986) (adequate evidence of a causal link when the retaliatory action occurred less than two months after the protected activity). *Cf Clark County School District v Breeden*, 532 US 268, 273 (2001) (20 month lapse between the protected activity and the alleged retaliatory employment action was not close enough to establish a causal connection, and, in fact, the length of time showed no causal connection at all).

Because Hebert's various explanations for demoting Complainant proved false, the forum may reasonably infer that Hebert was concocting explanations to conceal a discriminatory motive for the demotion, which was to retaliate against Complainant for his pursuit of the truth about a safety issue implicating Hebert's wife.[6]

Given the close proximity of events and Hebert's false explanations, the forum concludes that the Agency established by a preponderance of credible evidence a causal connection between Respondent's decision to demote Complainant and his opposition to unsafe practices.

DAMAGES

A. Back Pay

Back pay awards are intended to compensate a complainant for the loss of wages and benefits the complainant would have received but for the respondent's unlawful discrimination. The awards are calculated to make a complainant whole for injuries suffered as a result of the discrimination. *In the Matter of H.R. Satterfield*, 22 BOLI 198, 210 (2001). Here, the Agency proved that Complainant's demotion resulted in a $3.24 per hour decrease in his pay, including a $6.48 decrease in overtime pay, beginning October 6, 2003. The Agency also proved that as a result of the demotion, Complainant lost $1,542 in wages from October 6 through December 2003, and $1,464.60 in wages from January 1 through February 28, 2004. The Agency's back pay calculation took into account that Complainant received time loss benefits after he suffered a compensable injury on February 28, 2004, and thereafter was found to be permanently disabled from performing his job duties as a tree trimmer. *See In the Matter of Dandelion Enterprises, Inc.*, 14 BOLI 133, 148 (1995) (the effects of a respondent's unlawful employment practice do not include lost wages when a complainant is receiving time loss benefits for an on-the-job injury and unable to seek replacement employment). Accordingly, prior to February 28, 2004, Complainant would have earned an additional $3,007.08 but for Respondent's retaliatory demotion. The forum concludes that Respondent owes Complainant lost wages totaling $3,007.08 for the wages he lost due to the unlawful employment practices found herein.

B. Out of Pocket Expenses

This forum has consistently held that economic loss that is directly attributable to an unlawful practice is recoverable from a respondent as a means to eliminate the effects of any unlawful practice found, including actual expenses. *In the Matter of Southern Oregon Subway, Inc.*, 25 BOLI

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[6] *See Reeves v. Sanderson Plumbing Products*, 530 US 133, 147 (2000) ("In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose.")

217, 242 (2004). At hearing, the Agency and Respondent stipulated to an exhibit that summarized Complainant's claim for out of pocket expenses totaling $412 that accrued after he was demoted. The evidence introduced at hearing shows Complainant paid $22 for a commercial pesticide applicator recertification course in December 2003 and $145 for his certified arborist recertification in 2005. His testimony that he paid $145 for his certified arborist recertification in 2004 was not refuted. Also, his testimony that he paid $50 in 2004 and $50 in 2005 to renew his commercial pesticide applicator license was not refuted. However, the Agency presented no evidence that shows Complainant's expenses were directly attributable to the unlawful employment practice found, *i.e.*, Complainant's demotion. Absent evidence showing that Respondent's actions caused Complainant to incur those out of pocket expenses, the forum concludes that Complainant's expenses are not recoverable from Respondent.

C. <u>Mental Suffering</u>

The Agency seeks mental suffering damages in the amount of $30,000 on Complainant's behalf. In determining a mental suffering award, the Commissioner considers the type of discriminatory conduct, and the duration, frequency, and pervasiveness of the conduct. *In the Matter of Barrett Business Services, Inc.*, 22 BOLI 77, 96 (2001). The actual amount depends on the facts presented by each complainant. A complainant's testimony, if believed, is sufficient to support a claim for mental suffering damages. *Id.* at 96. Moreover, respondents must take complainants as they find them. *In the Matter of Courtesy Express, Inc.*, 8 BOLI 139, 148 (1989).

Based on the record herein, and Complainant's demeanor and testimony in particular, the forum finds Respondent's retaliatory action against Complainant caused Complainant to suffer significant emotional distress. Credible evidence established that Complainant had been employed by Respondent for 18 years - since he was approximately 19 years old - and he was proud of his foreman position. He took his responsibilities as a Union shop steward seriously. When he reported a perceived safety hazard to two supervisors and the Union, he believed "it would be acted upon immediately" by Respondent. Instead, his concerns were met with resistance from the supervisors, followed by an abrupt demotion to tree trimmer. His testimony that he was completely focused on the demotion and its cause and effects was bolstered by his wife's credible testimony that, given the circumstances of the demotion, Complainant feared for his job and was upset to the point of distraction. This ultimately adversely affected his family life. He had less patience with his young children and appeared "distracted" and "distant" from the family because he was more "absorbed" and "focused" on

the events surrounding the demotion. In his words, he "worried about it every day, every hour." His wife, whom the forum has found to be a credible witness, observed this focus and that he was distraught and upset and suffered a diminished sense of self esteem after the demotion. Based on the evidence presented, the forum awards Complainant $30,000, the amount sought, as compensation for the suffering caused by Respondent's unlawful employment practice in violation of ORS 654.062(5)(1).

D. Favorable Letter of Reference

In addition to damages, the Agency seeks on Complainant's behalf "a favorable letter of reference from respondent." Under ORS 659A 850(4)(a), the Commissioner may issue an order requiring that Respondent:

> "[p]erform an act or series of acts designated in the order that are reasonably calculated to carry out the purposes of [ORS chapter 659A], to eliminate the effects of the unlawful practice that the respondent is found to have engaged in, and to protect the rights of the complainant and other persons similarly situated."

The Agency established no link between a favorable letter of reference and Complainant's unlawful demotion. While the Commissioner may award non-economic as well as economic damages, the damages sought must be attributable to the unlawful practice found. In this case, the Agency neither alleged nor proffered any evidence that Complainant was unlawfully terminated. In fact, there is no evidence in the record that Complainant ever voluntarily or involuntarily left his employment with Respondent. The Agency offered no evidence and made no argument to support Complainant's request for a favorable reference letter as a means of redress for his unlawful demotion. Consequently, the forum concludes that a favorable reference letter in this case is not reasonably calculated to eliminate the effects of the unlawful demotion and is outside the scope of non-economic remedies available to Complainant.[7]

RESPONDENT'S EXCEPTIONS

Respondent contends the ALJ ignored "critical evidence" regarding Complainant's safety investigation, objects to the ALJ's credibility findings, disputes the ALJ's findings and conclusions

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[7] Complainant could have sought reinstatement to his former supervisory position as an appropriate remedy for unlawful demotion. *See In the Matter of West Linn School District, 3JT*, 10 BOLI 45, 64 (1991)(When the complainant was demoted and transferred to a different work location because he reported a health violation to OR-OSHA, the commissioner ordered the respondent to reinstate the complainant to his former position, "with all pay, benefits, privileges and seniority as if he had continued in that position and classification from [the date of his demotion]).

regarding Complainant's complaint about unlawful practices and Respondent's reasons for demoting Complainant, and requests that Complainant's emotional distress award be "reduced in whole or in considerable part due to [Complainant's] unspeakably poor behavior following his behavior [sic]."

1. Complainant's Safety Investigation

Respondent's assertion that Complainant "told Mr. Hebert on October 2 that he had concluded there had been no safety problem in Corvallis on September 26" is not substantiated by any credible evidence. Respondent asserts Complainant's credibility is affected by inconsistencies in his "story about how he heard about the Corvallis incident" and by the omission of his October 2, 2003, telephone conversation with Mike Hebert in his report to the Union.

First, Respondent makes much ado about how and when Complainant was told about the Corvallis incident. Respondent did not dispute that the incident occurred or that Complainant reported what he had heard to Hebert. The sole issue in this case was whether Hebert demoted Complainant shortly thereafter because Complainant made an issue about safety problems involving Hebert's wife. Any inconsistencies about the precise time and place Complainant talked to Jason Swarm are irrelevant and overcome by Swarm's admission on cross-examination that he talked to Complainant more than once on September 26 as Complainant contended. Moreover, Respondent's suggestion that Complainant lacks credibility because he "did nothing at that time in response to [Swarm's complaint] * * * despite his acknowledged responsibility as a shop steward to immediately respond to and act on reports of safety violations" ignores uncontroverted evidence showing that Complainant was demoted less than six business days from the date he was first told about the incident and less than three business days after he reported the incident to Hebert.

Second, Complainant's telephone records establish that he talked to several crewmembers involved in the Corvallis incident on October 2, 2003, as well as Hebert. Complainant credibly testified that he did not include his conversation with Hebert in his report to the Union because his focus was on the investigation and those crewmembers who were interviewed as part of the investigation. Complainant denies he told Hebert on October 2 that he had found no safety violations. Only Complainant and Hebert know what they talked about that day. However, based on the entire record herein, the forum has determined that it is more likely than not that Complainant informed Hebert he was filing his report with the Union on October 5 or 6 and Hebert, who knew the underlying facts about the incident, perceived the report was not favorable to Respondent; hence, Complainant's demotion on Octo-

ber 6, 2003. There is no credible evidence that leads to any other conclusion and Respondent's exception is therefore **DENIED**.

2. Credibility Findings

Respondent objects to the ALJ's "heavy reliance on demeanor observations when the veracity of a particular witness otherwise was largely unassailable." Quoting from a footnote in *Koskela v. Willamette Industries, Inc.*,[8] Respondent contends that "the value of demeanor evidence may be overrated * * * [and] some empirical studies suggest that the observation of demeanor *diminishes* rather than enhances the accuracy of credibility judgments." (emphasis supplied by Respondent) Notably, Respondent did not complete the quote or put it into context with the case. First, the primary issue in *Koskela* was whether a workers' compensation claimant is entitled to an evidentiary hearing on all claim closure issues, including the permanent total disability ("PTD") determination that occurs after "the worker already has been determined to be compensably disabled." The Court held that "due process principles do not entitle a claimant to present evidence through in-hearing testimony rather than through written reports and sworn affidavits [when determining the extent of permanent disability in a workers' compensation case]." In its reasoning, the Court distinguished cases involving claim closure issues from those involving disputes of historical fact, stating:

> "[N]either claimant nor the dissenting opinions satisfactorily demonstrate the extent to which the PTD determination turns on a claimant's credibility or that the credibility assessment cannot be made reliably without live testimony. To make the case for the importance of live testimony, the argument must be not only that credibility is central to the decision, but that a *demeanor-based* credibility determination is essential to the integrity of the decision. *To be sure, personal demeanor provides insight into credibility, especially when the dispute involves competing versions of historical facts, such as two witnesses' differing memories of an event*. That reality leads appellate courts generally to defer on credibility matters to factfinders who had the opportunity to 'see and hear' the witness testify. However, as Judge Richardson aptly observed some years back, demeanor is only one of many considerations that *may*, in a given case, bear on the weight to give to a witness's statements; meaningful credibility assessments can be and often are made on the basis of written evidence alone." (second emphasis added) (footnote omitted)[9]

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[8] 159 Or App 229, 247 n. 14 (1999).

[9] *Id*. at 246-47.

Second, although the Court stated in its footnote that demeanor evidence may be overestimated and observed certain empirical studies on demeanor, the Court concluded by stating:

> "For present purposes, we do not need to take sides in that debate. It should be enough to observe that classic credibility contests are those in which two individuals relate competing accounts of an historical event and there is no record of the event except their memories."[10]

Third, and more importantly, in 2000, the Oregon Supreme Court reversed the Court of Appeals decision in *Koskela* and held that a permanently totally injured worker's interest in receiving PTD benefits, "which are intended to restore permanently injured workers to economic self-sufficiency through lifetime wage-replacement benefits," is great, and a worker seeking those benefits has a right to procedural due process that includes an oral evidentiary hearing during the claim closure process. *Koskela v. Willamette Industries, Inc.*, 331 Or 362, 379-82 (2000). Citing the U. S. Supreme Court in *Califano v. Yamasaki*[11] and *Goldberg v. Kelley*,[12] respectively, the Court stated, in pertinent part:

> "In situations requiring the decision-maker to apply a broad standard that includes subjective assessments of, among other things, a person's credibility and veracity, due process requires 'personal contact between the recipient and the person who decides his case. * * * What is more, when, as here, the decision-maker must resolve factual disputes involving credibility and veracity, due process requires an opportunity for at least some kind of an oral evidentiary hearing."

Thus, if the Court of Appeals is correct that "the argument [for live testimony] must be not only that credibility is central to the decision, but that a *demeanor-based* credibility determination is essential to the integrity of the decision," the Oregon Supreme Court squarely confirmed that demeanor-based credibility findings are integral to the fact-finding process in all cases of factual disputes involving credibility and veracity.[13]

In this case, the testimony of Respondent's witnesses was far from "largely unassailable" and

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[10] *Id*. at 247 n. 14.

[11] 442 US 682, 697 (1979).

[12] 397 US 254, 268 (1970).

[13] This forum does not hold that demeanor may be evaluated only by live testimony. Key to determining credibility is what a witness says and how the witness says it, and even if a witness testifies by telephone, "the audible indicia of a witness' demeanor are sufficient for [an ALJ] to make an adequate judgment as to believability." *Babcock v. Employment Division*, 72 Or App 486, 490 (1985).

was evaluated by both objective and subjective criteria. The ALJ properly gave less weight to those witnesses whose demeanor did not reflect the serious, deliberate consideration that is requisite to reliable testimony. In this forum, an ALJ's credibility findings are accorded substantial deference and absent convincing reasons for rejecting those findings, they are not disturbed. *In the Matter of Robb Wochnick*, 25 BOLI 265, 290 (2002), *citing In the Matter of Staff, Inc.*, 16 BOLI 97, 117 (1997). Respondent proffered no convincing reason for disturbing the ALJ's credibility findings and its exceptions to the findings are **DENIED**.

3. Exceptions to Legal Conclusions and Opinion Pertaining to Complainant's Complaint and Demotion

Respondent asserts that Complainant was not "in active opposition or reporting of alleged unsafe working practices" after October 2, 2003, and that the "cause/temporal chain of events" was broken on that date. Additionally, Respondent asserts that "Hebert determined to demote Complainant by September 26 for valid business reasons and that he delayed making an announcement of this so long as his crews were 'shopping' near Scio." Respondent's assertions rely solely on Hebert's testimony which the forum has deemed not credible. As already discussed herein, there is no convincing reason to disturb the ALJ's credibility findings. Respondent's exceptions are thus **DENIED**.

4. Damage Award

In its exception to the emotional distress damage award, Respondent urges the forum to reduce or eliminate the award based on Complainant's "unspeakably poor behavior" after he was demoted from his supervisory position. His behavior included accusing his supervisor of illegal conduct and contacting a customer about specific misconduct on Respondent's part. While not condoning "retaliation" of any kind, the forum finds Complainant's actions, albeit impulsive, reflected his state of mind at that time. Rather than negating the emotional distress award, his unseemly actions illustrate his extreme angst at being demoted for reporting and investigating a safety concern which was an intrinsic part of his job. Although Complainant's actions reflect a troubled spirit, this forum has consistently held that "employers must take employees as they find them." *Wochnick*, 25 BOLI at 290, *citing In the Matter of Entrada Lodge, Inc.*, 24 BOLI 125, 154 (2003); *See also In the Matter of the Loyal Order of Moose,* 13 BOLI 1, 12-13 (1994) and *In the Matter of Allied Computerized Credit & Collections*, 9 BOLI 206, 217-18 (1991).

Complainant's allegations of wrongdoing were fairly specific, including names and details that are readily verifiable. While somewhat extreme, the forum finds Complainant's actions were

a reaction to his unlawful demotion and absent any credible evidence that his specific allegations about Respondent were patently false the forum affirms the award for emotional distress damages in the amount of $30,000. Respondent's exception to the emotional distress award is hereby **DENIED**.

AGENCY'S EXCEPTIONS

The Agency correctly points out that the forum did not address all of the relief sought in the Formal Charges, specifically, the Agency's request that Respondent give Complainant a favorable letter of reference. The forum has corrected that deficiency by addressing that issue in the damages section of this opinion.

ORDER

NOW, THEREFORE, as authorized by ORS 659A.850(2) and ORS 659A.850(4), to eliminate the effect of Respondent's unlawful employment practices, and as payment of the damages assessed for its violation of ORS 654.062(5)(a), the Commissioner of the Bureau of Labor and Industries hereby orders **Trees, Inc.** to

1) Deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 1045 State Office Building, 800 NE Oregon Street, Portland, Oregon 97232-2180, a certified check payable to the Bureau of Labor and Industries **in trust for Complainant Michael Nolan** in the amount of:

a) THREE THOUSAND SEVEN DOLLARS AND EIGHT CENTS ($3007.08), less lawful deductions, representing wages lost by Michael Nolan between October 6, 2003, and February 28, 2004, as a result of Respondent's unlawful practice found herein; plus

b) Interest at the legal rate on the sum of $3,007.08 from March 28, 2004, until paid; plus

c) THIRTY THOUSAND DOLLARS ($30,000), representing compensatory damages for the mental suffering Complainant experienced as a result of Respondent's unlawful employment practice; plus

d) Interest at the legal rate on the sum of $30,000 from the date of the final order until paid.

e) Cease and desist from discriminating against any person based upon the person's opposition to unlawful employment practices.

In the Matter of

WINCO FOODS, INC., WinCo Holdings, Inc. and WinCo Foods, LLC.

Case No. 53-04

Final Order of Commissioner Dan Gardner

Issued May 2, 2007

SYNOPSIS

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

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

Jeffrey C. Burgess, an employee of the Agency, represented the Bureau of Labor and Industries ("BOLI" or "the Agency"). Jammie Iverson ("Complainant") was present throughout the hearing. Attorneys Tamara E. Russell, Erin Truax, and Alyssa Tormala represented WinCo Foods, Inc., WinCo Holdings, Inc., and WinCo Foods, LLC (collectively referred to herein as "Respondent"). Wayne Duncan was present throughout the hearing as Respondent's corporate representative.

The Agency called as witnesses: Jammie Iverson, Complainant; Stephen "Van" Roper (telephonic), Complainant's health care provider; Richard Drawson (telephonic), Respondent's employee; Bradley Iverson, Complainant's husband; and Wayne Duncan, Respondent's

Woodburn Distribution Center warehouse manager.

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

The forum received as evidence:

a) Administrative exhibits X-1 through X-29 (generated prior to, during, or after hearing);

b) Agency exhibits A-1 through A-5, A-8 through A-10, A-12, A-13, A-16 through A-19 (submitted prior to hearing), and A-22 through A-24 (submitted during hearing);

c) Respondent exhibits R-1 through R-5 (submitted prior to hearing).

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

FINDINGS OF FACT – PROCEDURAL

1) On January 17, 2003, Complainant filed a verified complaint with the Agency's Civil Rights Division ("CRD") alleging unlawful employment practices committed by Respondent after Respondent terminated her on December 23, 2002. After investigation and review, the CRD issued a Notice of Substantial Evidence Determination on December 30, 2003, finding substantial evidence supporting the allegations in the complaint.

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

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

of the specific administrative rule regarding responsive pleadings.

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

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

6) On February 22, 2005, the forum ordered the Agency and Respondent each to submit a case summary including: lists of all persons to be called as witnesses; identification and copies of all documents to be offered into evidence; a brief statement of the elements of the claim (for the Agency only); a brief statement of any defenses to the claim (for Respondent only); a statement of any agreed or stipulated facts; and any damage calculations (for the Agency only). The ALJ ordered the participants to submit the case summaries by March 18, 2005, and notified them of the possible sanctions for failure to comply with the case summary order.

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

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

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

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

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

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

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

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

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

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

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

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

FINDINGS OF FACT – THE MERITS

1) At all times material herein, Respondent was a company comprised of separate corporations and an LLC doing business

in Oregon as WinCo Foods and was an employer that employed 25 or more persons in Oregon for each working day during each of 20 or more calendar workweeks in the year in which Complainant took intermittent family leave or in the year immediately preceding the year in which Complainant took intermittent family leave.

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

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

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

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

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

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

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

> "This letter is to inform you of your rights for protection under the Family Medical Leave Act (F.M.L.A.).
>
> "1. Provided that you qualify for a protected leave, the requested leave will be counted against your annual F.M.L.A. entitlement. Dates requested are 09/06/01 & Intermittently thereafter. (12 week maximum annual entitlement)
>
> "2. *Enclosed you will find a medical certification form that must be completed by your attending physician. To activate your rights under a protected leave you must furnish this medical certification of your serious health condition. You must furnish this certification by 09/26/01.* Failure to return this certification by the date listed will result in denial of FMLA protection and your absence could be considered unexcused, which may result in disciplinary action up to and including termination. (Please be advised that if your medical provider fails to comply with this request, FMLA coverage still may be denied.) If you feel that you cannot comply with the deadline given, please contact our office immediately. WinCo assumes NO responsibility or liability regarding the return of FMLA documents to the Corporate Office/Benefits Department. Employees who return these documents to their respective store management to be returned in the WinCo mail do so at their own risk. If local store management fails to send in such documents, or if they fail to send them in within the required time frame, WinCo bears no responsibility. Please return by U.S. certified mail if you desire proof of delivery.
>
> "We will require that you exhaust your sick and vacation pay for your own serious health condition and will require you to exhaust your vacation pay for the care of an immediate family member.
>
> " * * * * *
>
> "Prior to your return to work our office will require a 'fitness-for-duty' medical narrative from

> your treating physician."[1] (italics added)

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

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

> "This letter is to inform you that we have determined that you do qualify for protections under the FMLA and/or State Leave Laws.
>
> "According to the physician's certification you have provided, we have applied FMLA and/or State Leave Law protections to your intermittent absence on <u>09/06/01 and intermittently thereafter</u>. We will count this time against your annual entitlement, not to exceed 12 weeks. *You will be required to submit a Dr's note for each subsequent absence relating to this condition listing the exact dates you are required to be absent and confirming that it is for the condition described in the physician's certification that you have provided*.
>
> "Please remember that you will be required to exhaust your sick and vacation pay for your own serious health condition and we will require you to exhaust your vacation pay for the care of an immediate family member." (italics added)

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

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

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[1] The record shows Respondent was covered under the federal Family Medical Leave Act ("FMLA") and the OFLA. Although all of Respondent's documentation refers to FMLA, the Commissioner has jurisdiction to enforce only OFLA.

in the physician's certification that you have provided.

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

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

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

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

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

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

Complainant knew and understood Respondent's sick leave policy.

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

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

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

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

> "Day shift 5 a.m. – 3 p.m. I will start at 4:30 a.m.
>
> "Graveyard shift 9 p.m. – 7 a.m. I will start at 9 p.m. and work until 7:30 a.m.
>
> "J-me Iverson"

Kintz wrote the following on Complainant's typewritten schedule:

> "3-14-02
>
> "J-me was instructed to follow this work schedule for start and finish times. Any changing of such [schedule] needs to be pre-approved by her supervisor.
>
> "M. Kintz"

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

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

13) Duncan did not care if Complainant worked the day or night shift and she was permitted to make her own weekly schedule showing which shifts she planned to work each day. However, he expected her to pick the shift she wanted to work each day and "stick to it" because he did not know if employees were tardy or "not there" when they changed their start times without telling him. Prior to the March 1 meeting, Complainant was accustomed to changing her shift when she

needed to adjust her schedule without seeking prior approval. Sometimes she posted her changes on the "net" where she assumed others would notice. After Complainant's March 14 tardy, Duncan told her that she was not to change the shifts she chose each week without first obtaining his permission.

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

> "On March 1, 2002 I covered the new attendance policy with hourly employees in a meeting. Every employee at the meeting received a copy of the new policy. [Complainant] was one of the employees that attended the meeting. Mike Kintz, day-shift supervisor, also attended the meeting.
>
> "On March 14th I again talked to [Complainant] about being tardy and about start times, and any changes to her schedule had to be authorized by a supervisor. Mike Kintz also had the same conversation with [Complainant] on the 14th.
>
> "[Complainant] was tardy returning from lunch on April 1, 2, 8, 9, and 10. She also changed her start time on April 6th without authorization.
>
> "On April 18, I called [Complainant] into my office to discuss her attendance issues. She had Pete Tucker (hourly employee) as a witness per her request. [Complainant] was very defensive about her attendance problems. She said she didn't understand the policy and felt like I was picking on her. [Complainant] didn't agree that being late from lunch was a tardy and she would refuse to sign any kind of write-up. I went over the attendance policy again with [Complainant]. I told [Complainant] I would count all five tardy days as one incident. I asked [Complainant] if she understood the policy and if not, now was the time to asked [sic] questions. [Complainant] said she had no questions and she understood but it still was unfair.
>
> "When questioned about changing her start time on April 6, [Complainant said she came in early due to day light savings time. [Complainant's] start time was preset for 21:00, she would have had to start at 20:00 to be 1 hour early, and she clocked in at 20:15. [Complainant] said she told Don Johnson (swing shift supervisor) she had clocked in at 20:15 and he said it was ok. Don didn't work on that day and had no recollection of a conversation between him and [Complainant]. I could not find any supervisor that told [Complainant] it was ok. [Complainant] also told Jennifer Poe that Don said it was ok that she started at that time."

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

> "On Wednesday May 29th I needed to address a discipline issue with Jammie. I had Mike Kintz (shift supervisor) and Pete Tucker (hourly employee) (whom Jammie had requested in our last meeting) present at this meeting. Jammie received a written warning on April 23rd for failure to follow the attendance policy: tardies, start times, lunches, breaks, etc. On May 23rd Jammie started her shift one hour before the agreed start time without a supervisor's authorization. Jammie signed a statement on March 14th stating she would not change her start time without prior authorization from a supervisor.
>
> "I showed Jammie the statement she signed agreeing to a specific start time. After discussing the issues Jammie stated she did in fact change her schedule without supervisors [sic] permission. Jammie wrote herself in on the vacation log as starting at a different time and thought it would be ok.
>
> "After the meeting, (approximately 10 minutes) Jammie came back into my office and said she was having another panic attack. She said she could not breathe and was hyperventilating and had chest pains. She said she needed to go to her doctor but could not drive. I called 911. After examining Jammie, the E.M.T. told her it was up to her if she wanted to go to the hospital. If not he recommended she have someone drive her home and she could follow up with her own doctor. Mike Kintz and Pete Tucker were still in my office at that time.
>
> "The meeting with Jammie was very professional. Jammie was upset at the end of the meeting but understood."

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

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

> "Conversation in Wayne Duncan's office with J-Me Iverson, Pete Tucker, Wayne Duncan, and myself, Mike Kintz.
>
> "At around 7:50 a.m. we began to speak to J-Me about her work schedule and her unauthorized changing of her start times. The conversation with Wayne was very professional

and low keyed. At no time did the discussion get out of hand or personal. Pete Tucker was present at a previous meeting with J-Me and she was asked if it was ok for him to participate this time. J-Me was in agreement to have Pete present.

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

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

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

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

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

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

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

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

17) Respondent's attendance policy included a code system that assigned points to each absence ("A"), incomplete shift ("I") or tardy ("T"). Certain absences were assigned "zero points" and included medical absences coded as: industrial injuries ("II"), federal family leave ("FM"), Oregon family leave ("OM"), and California family leave ("CM"). Funeral leave ("LF"), jury duty leave ("LJ"), military leave ("LM"), and personal leave ("LP") also were assigned zero points. Holidays, personal days, suspensions, and vacations also were assigned zero points. All other absences, including those for illness other than the designated medical leaves, were assigned three points per absence. Incomplete shifts and tardies, unless for otherwise protected reasons, were assigned two points per incident. According to Respondent's policy, 9 points in 3 months or 15 points in 12 months was excessive and employees who accrued excessive points were subject to discipline, suspension, or termination. All absences for any reason for each employee were documented by the appropriate code on an annual "Attendance Record Calendar." The points accrued one year back from the last absence, incomplete shift or tardy. Duncan supervised 23 supervisors and six different shifts and, unless an absence, tardy, or incomplete shift was based on a protected status, he did not examine underlying reasons when calculating points: "an absence is an absence, and a tardy is a tardy."

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

"Jammie Iverson #92543

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

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

"Please be advised that any further incidents of attendance or other violations of policies

and procedures could result in progressive discipline up to and including immediate termination of your employment with WinCo Foods."

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

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

> "Examples of gross misconduct that could result in immediate suspension and/or discharge, but these are not all inclusive, are as follows"
>
> "1. Dishonesty
>
> " * * * * *
>
> "Falsification of Company records or any fraudulent act or statement related to company business."

Complainant read and signed the company personnel policies.

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

8/6/02, 8/14/02, 8/18/02, 8/27/02." The note was signed by family nurse practitioner Van Roper. Respondent found the note inadequate and asked Complainant for additional documentation. According to Complainant's medical records, on September 9, 2002, Complainant had an appointment with Roper and gave him a copy of a memo dated September 4, 2002, that was addressed to Jennifer Poe and written by Ray Sagarik, HR Benefits Department in Boise, Idaho. The memo stated in pertinent part:

> "Hi Jennifer!
>
> "I just wanted to let you know that we did receive a fax from Jammie Iverson this morning (it was faxed to our offices yesterday). However, after going over it with Karen, she has some concerns about the language that was used and so we are going to request that Jammie submit a new Dr's note. The note which she provided said 'Patient has intermittent migraines per her medical record.' That is already known and is not under debate. It goes on to say 'Dates missed documented in Record 07/28/02, 08/06/02, 08/14/02, 08/18/02, [and] 08/27/02.' Karen feels that this is not sufficient as it does not indicate that Jammie was excused from work by her physician only that they have documented that she did not go to work on those dates.
>
> "I am sending a letter to Jammie today indicating that she will have until 09/14/02 to submit a Dr's note which explicitly excuses her from work on those dates. If we do not receive the required note by 09/14/02 then FMLA protections will be denied for those dates.
>
> "Just wanted to give you a heads-up. If you wish to pass this information along to Jammie to give her some advance notice, you may. As mentioned above, the letter explaining our request will go out in the mail today. I'll CC a copy for you and Wayne.
>
> "If you have any questions, please let me know. Thanks for your help on this! – Ray"

On the memo presented at hearing, Complainant had handwritten: "Attn: Van Roper * * * Could you please fax me a doc's note that says I am excused from work because of migraines for 7/28, 8/6, 8/14, 8/18, 8/27. The sooner I get this taken care of the better * * * Thanks for your attention to this." Complainant's medical records include a chart note prepared by Roper that states in pertinent part:

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

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

Thereafter, Respondent received a note, dated September 9, 2002, and signed by Van Roper, that stated, "Please excuse Jammie from work due to H/A's 7/28/02, 8/6, 8/14, 8/27 and 9/9.[2] Other than her appointment with Van Roper on September 9, Complainant's medical records show that Complainant did not seek any medical attention for migraines after July 19, 2002.

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

> "This letter is to inform you that we have determined that you do qualify for protections under the FMLA and/or State Leave Laws.
>
> "According to the physician's certification you have provided, we have applied FMLA and/or State Leave Law protections to your intermittent absences on 07/28/02, 08/06/02, 08/14/02, & 08/27/02.[3] We will count this time against your annual entitlement, not to exceed 12 weeks. **Please remember, you are still required to follow WinCo's attendance policy, which includes notifying management that you are unable to work at least two hours prior to the beginning [of] your scheduled shift.[4] When notifying store**

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[2] Ray Sagarik's September 4, 2002, memo stated that verification was also needed for 8/18/02 but this date does not appear in Van Roper's note of September 9, 2002.

[3] *See supra* note 2. Nothing in the record shows whether Complainant's 8/18/02 absence was designated as OFLA leave or as an unprotected absence.

[4] The Forum notes that on its face, the policy requiring notice at least two hours before the beginning of a scheduled shift violates OFLA. *See* OAR 839-009-0250(3) ("When taking OFLA leave in an unanticipated or emergency situation, an employee must give verbal or written notice within 24 hours of commencement of the leave. This notice may be given by any other person on behalf of an employee taking unanticipated OFLA leave." *See also In the Matter of NES Companies LP*, 24 BOLI 68, 88 n.7 (2002)("The forum notes that an employer's notice policies, as practiced, may not be more oner-

management, you are required to specify whether or not the absence is due to this condition. In addition, in order for your absence to protected by the FMLA, you are required to submit a Dr's note for each subsequent absence relating to this condition listing the exact dates you are required to be absent and confirming that it is for the condition described in the physician's certification that you have provided.

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

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

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

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

"2. *Enclosed you will find a medical certification form that must be completed by your attending physician. To activate your rights under a protected leave you must furnish this medical certification of your serious health condition. You must furnish this certification by 10/07/02.* Failure to return this certification by the date listed will result in denial of FMLA protection and your absence could be considered unexcused, which may result in disciplinary action up to and including termination. (Please be advised that if your medical provider fails to comply with this request, FMLA coverage still may be denied.) If you feel that you cannot comply with the deadline given, please contact our office immediately. WinCo assumes NO responsibility or liability regarding the return of FMLA documents to the Corporate Office/Benefits Department. Employees who return these documents to their respective store management

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ous than OFLA's 24 hour oral notice requirement * * *"). Although a difference of two hours may not seem significant in Complainant's situation, Respondent's call-in policy had the effect of requiring her to determine whether she would develop a migraine at least two hours before the beginning of her shift. Given that her early shift started at 4:30 a.m., Respondent's call in policy would require her to assess her situation prior to 2:30 a.m. It appears from this record, however, that Respondent did not enforce its call in policy against Complainant even when they might have. *See supra* notes 6 and 7.

to be returned in the WinCo mail, do so at their own risk. If local store management fails to send in such documents, or if they fail to send them in within the required time frame, WinCo bears no responsibility. Please return by U.S. certified mail if you desire proof of delivery.

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

" * * * * *

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

24) On September 24, 2002, Respondent sent Complainant a letter that stated in pertinent part:

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

"According to the physician's certification you have provided, we have applied FMLA and/or State Leave Law protections to your intermittent absence on 09/09/02. We will count this time against your annual entitlement, not to exceed 12 weeks. Please remember, you are still required to follow WinCo's attendance policy, which includes notifying management that you are unable to work at least two hours prior to the beginning [of] your scheduled shift.[5] When notifying store management, you are required to specify whether or not the absence is due to this condition. In addition, in order for your absence to be protected by the FMLA, you are required to submit a Dr's note for each subsequent absence relating to this condition listing the exact dates you are required to be absent and confirming that it is for the condition described in the physician's certification that you have provided.

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

25) In October 2002, Complainant provided Respondent with medical certification of her continued need for intermittent OFLA leave. The form included the "Employee/Family Medical Leave Request" combined with the completed "Certification of Physician or Practitioner" signed by Van Roper on September 26, 2002. Complainant signed the form on October 2, 2002. The anticipated frequency of absences due to migraine headaches was listed as "approx 2-4 times a

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[5] *See supra* note 4.

month." By letter dated October 8, 2002, Respondent approved her request for intermittent leave, including her absences on September 18 and 21, 2002. Complainant's OFLA leave, along with other absences, was documented each time in an Attendance Incident Record and signed by Complainant and the supervisor initiating the record.

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

> "It has recently been brought to my attention that a decision has been made on your part that I will be required to reapply and submit paperwork regarding my intermittent FMLA/OFLA certification every time I miss any hours of work due to my documented health condition, as the result of some form of doubt or evidence suggesting that I do not have a legitimate serious health condition. I have provided WinCo Inc., through you, every form of medical documentation and certification as required by law as well as those provided by your own request. I am, at this time, requesting an explanation from WinCo Foods as well as yourself, as to the nature of these claims and what legal authority you feel that you have to require what I consider to be excessive and unnecessary 'hoops' that I have been and continue to be made to jump through, when all of the documentation that I have provided to you satisfies every law and rule of the FMLA/OFLA guidelines, according to the Oregon Labor Division and the Civil Rights Department. I have been trying to be as cooperative as possible with your requests, but this latest request is over and above anything that should be asked of me. If the information I have un-officially [sic] received is in error, please let me know as soon as is convenient, as this situation is causing me undo [sic] stress that is only adding to the problems that I have been having with my health. Your attention to this matter is appreciated. * * * I am requesting your answer in writing as I feel that this is the only way I can be sure that your response is official."

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

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

"I am curious how you can require me to provide documentation on this date for something I did not know anything about. If I would not have called Mr. Sagarik about this situation, I would still be in the dark about it. I have supplied and conformed to every stipulation that was required of me, per the form sent by Mr. Sagarik dated 9-24-02. According to Mr. Sagarik, the conversation between yourself and Mr. Duncan occurred on either 9-10-02 or 9-11-02. Are you now putting stipulations on past occurrences? I do not understand how I can supply you and Mr. Sagarik with every document asked for and then find out that you are requiring more information for an occurrence that should and is already covered, this even according to your own office. I have to assume that the paperwork that is being sent to me is official and accurate, but now, how can I be sure if I am complying with your requests, if I don't even know what your requests are. If this is a new stipulation you are requiring of me, please inform me in writing of this so I can be sure of what policies are being created in my situation. According to the Oregon Labor Department/Civil Rights Division [sic], WinCo as a company may require certification every 30 days only. The exception is if the company has some sort of reasonable doubt and then the company (WinCo) is required to pay for any recertification and any expenses that go along with it. With the overwhelming amount of documentation that I have provided you, I don't understand where the doubt arises, but if this is the case, it still is no basis for denying my OFLA/FMLA request for 9/17/9/18 which has been fully certified and documented by my physician to your office.

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

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

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

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

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

"As of September 9 of this year, it has been explained to

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

"As a Product Auditor, when I started this position there were no set rules for schedule or shift. Wayne Duncan told me that I was responsible for auditing every selecting employee in a six week period. I was able to do that with ease and Wayne soon added that I needed to audit every store as well, both in perishable and grocery. This came after a claim by Don Kellogg that I was not auditing in perishable, although the audits and paperwork clearly show that I was on a daily basis. Wayne then added the task of keeping track of the number of times a store or employee had been audited so he could have easy access to that data in the event of a dispute from a store or employee. I have continually altered my work times or the way I audit at the whim of Wayne Duncan and other supervisors as needed, but suddenly, I began to get disciplined for my varying start times, all of this after I was approved for FMLA. I could see a clear change in attitude to-

ward me since that time. Let me make you aware that as of the time I have taken this job, the warehouse selecting pool has close to doubled and yet I still manage to audit every selector, every store at least twice and I have implemented a checks and balances system to keep track of Supervisor's audits at Wayne's request because a certain supervisor (Don Kellogg) seemed unable to return audits as Wayne required. Wayne then added to my job that all supervisors would supply me with a list of 4-5 target audit employee's [sic] that would need to be audited on a more frequent basis and soon some of those lists grew to 10-15 employees. These lists include each supervisor, each shift, and each department. I have accepted and handled these responsibilities as a challenge and have never failed to meet those standards, even while fighting my illness. I do three times the work at half the pay than any other employee who has done warehouse audits and have never once let that affect my dedication and pride in doing my job.

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

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

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

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

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

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

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

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

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

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

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

28) Complainant's letters to Sagarik, Stinger and Long referring to Complainant's contacts with the Bureau of Labor and In-

dustries prior to her filing a civil rights complaint were sent to Respondent's headquarters on October 1, 2002. There is nothing in the record establishing Respondent knew about the questionnaire Complainant submitted to BOLI before Complainant filed a verified civil rights complaint on January 17, 2003.

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

> "On October 28, 2002, I had a conversation with Jammie about the way she was setting up her audits for outbound loads in the warehouse. I told Jammie I had received complaints from supervisors and other employees about her always auditing at Dick Drawson's (warehouse loader) door. It appeared she was auditing at this door more frequently than other loaders [sic] doors. Jammie got defensive; she accused Mike Kintz (shift supervisor) and me of harassment. I asked Jammie if she could select her audits in a different manner, one in which she would not spend more time at one particular door. Jammie was very argumentative and said she was doing audits the correct way, what I wanted her to do was wrong. She stated that she has done more audits than anybody else and I should be complementing [sic] her on the good job she does, instead I was questioning her. I told Jammie I would review her process for auditing but for now I didn't want her auditing at Dick Drawson's door. Later that morning I talked to Jammie and Robin (audit helper). I assigned them a door centrally located in the warehouse to do audits, and Robin was to transport the orders to be audited back and forth.
>
> "On October 30, 2002 Robin Marcum (audit helper) approached me concerned about the changes. He was concerned that being at one door would not give him the ability to spot check all orders on the dock. Moving around the dock he was able to catch other mistakes. Robin stated he knew Jammie was spending more time at Drawson's door than she should, but asked why Jammie just was not disciplined."

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

reported seeing Complainant on the Oregon coast with Drawson while Complainant was on sick leave. When Duncan asked Complainant about the report, Complainant denied it and attributed the report to rumors in the warehouse. Duncan again reminded Complainant of the sick leave policy requirements. Duncan later notified Roger Cochell in Human Resources that he had received complaints from employees that gave him cause to suspect Complainant was abusing Respondent's sick leave policy. Cochell directed Respondent's Loss Prevention director Shannon Poe to conduct video surveillance of Complainant's activities on days she called in sick and was unable to work. Poe assigned Corey Olson, a Loss Prevention employee for over five years, to videotape Complainant during her regular work hours whenever she called in sick. Olson first videotaped Complainant in September or October 2002. He followed Complainant to a WinCo store on Lancaster Drive in Salem and videotaped her with the store's "in store" camcorder as she shopped for 45 or 50 minutes "around 3 p.m." On October 22, 2002, using a different video camera, Olson videotaped Complainant leaving the bank with her husband. Complainant's Attendance Incident Record shows she left work at 6:45 a.m. that day because she had a migraine. Olson videotaped Complainant again on November 14, 2002, while she was leaving Toys R Us at 2:54 p.m. The attendance record for that day shows Complainant "Called sick at 3:45 a.m. 11-13-02 * * * called @ 3:55 a.m. sick (won't be in today) 11-14-02."[6] At the bottom of the "explanation" section, Complainant wrote: "Both days I called in I specified I had a migraine: * FMLA *." On December 17, 2002, Olson videotaped Complainant and her husband leaving Carl's Jr. at 1:25 p.m. and leaving Costco at 2:15 p.m. Complainant also picked up her children from school that day around 2:30 p.m. Complainant's attendance record shows she "called at 3:30 a.m. with a really bad headache – not coming in for 12/17/02 shift."[7] Olson gave the tapes to Poe.

31) On December 23, 2002, Duncan and Shannon Poe met with Complainant to question her about her activities while on sick leave. Poe asked Complainant about the sick leave policy. She stated she was aware of the policy, knew she needed to be at home while on sick leave, and that Duncan had "covered it" with her. When Poe asked about her activities on specific dates she had called in sick, Complainant denied she left the house on those dates

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

[7] Calling in at 3:30 a.m. for a 4:30 a.m. shift would have violated Respondent's call-in requirement. *See supra* note 6.

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

> "This letter is to inform you that you are being discharged from employment immediately for violation of the Company Personnel policy Article XV.1 Dishonesty and XV.3; falsification of company records or any false statement related to company business and for violation of the Distribution Center and office working conditions and wage policies Article N.8. Employees alleging illness should be either at home, at a doctor's appointment or at a health care facility approved by a provider. Employees engaging in contrary activities while alleging sickness will be subject to disciplinary action up to and including discharge.
>
> "You were scheduled for work on 12/17/02 but called in sick indicating you were unavailable for work. Your conduct during your scheduled working hours violates the aforementioned sick leave/attendance policy."

32) Respondent's sick leave policy applied to any use of sick leave. Ronald Beckel was terminated in July 2001 after he called in sick for two days and was videotaped doing recreational activities at Sand Lake while using non-OFLA related sick leave. He was fired because he was dishonest about his activities on those days. Chris Wilson, a union employee, was terminated in 2003 after he called in sick with a migraine headache and later was caught on videotape engaging in recreational activities while using OFLA related sick leave on those days. He also was dishonest about his activities on the days he called in sick. Tyler Strunk was terminated in 2003 after he called in sick for four days and was videotaped engaging in recrea-

tional activities at Detroit Lake. He was dishonest about his activities while using non-OFLA related sick leave on those days. Jeffrey Miller was also terminated in 2003 for dishonesty about his activities while on OFLA related sick leave. He was videotaped by a workers' compensation insurance company at Respondent's request based on two witness complaints about his misuse of sick leave. Rob Hallman was suspended after witnesses observed him roofing his house while using sick leave and later reported Hallman's activities to management. Hallman was not terminated because he was honest about his activities when Respondent confronted him with the witness complaints.

33) Complainant was "very upset" when Respondent terminated her. She was "really depressed" because the discharge occurred just before the Christmas holidays and put a "damper" on the family celebration. She enjoyed her job and was earning $14.26 per hour at termination. Her "two income" family was immediately affected by the reduction to one income and she had to use credit cards to purchase Christmas gifts. Her belief that "doing a good job pays off" was "ruined" and she could not understand what she "had done wrong to be treated this way." Complainant applied for unemployment benefits and decided to go back to school. She applied for several jobs while receiving unemployment benefits. In 2003, Complainant earned $3,759.51 while working part time for J.C. Penney Portrait Studio. When she quit her job with Penney's in May 2004, she had earned an additional estimated $1,500, working one to two hours per day, up to five hours per week. In June 2004, she began attending Chemeketa Community College full time. She first studied photography and graphic arts and has "just started working on courses in the medical field." Complainant has not suffered from a migraine headache since Respondent terminated her in December 2002. She is generally a positive person and her spirits have improved. She is happy to be attending school. Her husband is still employed by Respondent and recently they encouraged his brother to apply for employment with Respondent.

34) Complainant's testimony was not wholly credible. Although she eventually acknowledged key facts, she denied those that tended to negatively impact her case until she was confronted with documentary evidence that established otherwise. For instance, when at hearing she viewed the videotape of her activities on November 14, 2002, she readily acknowledged that it showed her leaving Toys R Us and picking up her child from school during work hours, but adamantly denied that she was using sick leave that day. As support for her claim, she pointed to Respondent's computer printout listing personnel notes that did not include an entry for that date. On cross-examination, she was forced to acknowledge that the printout showed a file note

entry for November 13, 2002, that was in fact documenting an "Attendance Incident Record" showing Complainant called in sick on November 13 and 14 for migraine headaches. Moreover, the attendance record included a note in her own handwriting stating: "Both days [November 13-14] I called in I specified I had a migraine: * FMLA *." Complainant's tendency to back track on her testimony was also evidenced by her statement that she was not "concerned about being taped" and still would have gone out to lunch on December 17, 2002, because she did not believe her activities that day violated Respondent's sick leave policy. She then testified that she had gone out "quite a few times" while on sick leave and only when prompted modified her testimony that it was later on in the afternoons that she "went to baseball games" on days she called in sick. She further maintained that, except for her activities on December 17, 2002, she had never left her house before 3 p.m. while on sick leave. Much later in her testimony she admitted that she was shopping on November 14, 2002, while using her sick leave. Complainant admitted, and the forum accepts as fact, that (1) she knew about and understood Respondent's sick leave policy; (2) she previously had been told about complaints Respondent received about her "contrary" activities while on sick leave and was warned about the consequences of engaging in such activities while on sick leave; (3) on December 17, 2002, while on sick leave, she went Christmas shopping, ate in a fast food restaurant and picked up her children from school; and (4) she asked to see the surveillance video before she admitted her activities on that day. Overall, Complainant's testimony was not reliable and the forum credited it only when it was an admission, statement against interest, or corroborated by other credible evidence.

35) Van Roper's testimony that he was Complainant's health care provider and that he examined her at times material was not impeached. Although he testified he was a certified family nurse practitioner, he acknowledged during cross-examination that he was not currently licensed in Oregon. Respondent did not question his credentials during the period Complainant used OFLA leave or at any time thereafter and the forum finds his qualifications are not at issue and his testimony that he was not licensed in Oregon does not affect his overall credibility.[8] Roper's testimony that he treated Complainant for migraines and wrote notes for her employer in August and September was credible. The forum has credited his testimony as it pertains to his personal knowledge of her condition and his role as health care provider of record.

36) Bradley Iverson's testimony was generally credible. Although he had an obvious bias

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[8] *See* discussion *infra* Agency's Exceptions.

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

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

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

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

40) Corey Olson's testimony was generally credible. He ac-

knowledged the flaws with the videotape and testified to only those events he observed first-hand. His testimony was not slanted toward or against Respondent or Complainant. He was not impeached in any way and the forum credits his testimony in its entirety.

41) Roger Cochell's testimony was credible. He acknowledged that he did not view the videotape but relied on Duncan's representations that the tape showed Complainant engaging in "contrary activities" while on OFLA leave and that she denied engaging in those activities until she was told about the tape. His testimony that he decided to terminate Complainant's employment based on Duncan's representations and that Respondent did not seek a second medical opinion because Complainant's actions alone violated company policies was credible. He credibly testified that Complainant was not terminated because she contacted the human resources department with questions or because she used OFLA leave. Cochell also credibly testified that he wrote the sick leave policy and that neither the employees nor the unions ever questioned the language or the meaning of "contrary activities." Cochell was not impeached in any way and the forum credits his testimony in its entirety.

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

ULTIMATE FINDINGS OF FACT

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

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

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

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

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

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

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

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

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

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

10) When Respondent granted the OFLA leave it notified Complainant in writing that after each absence due to migraines she was required to provide a doctor's note "listing the exact dates [she was] required to be absent and confirming that it is for the conditions described in [her] physician's certification." Each time she was absent due to migraines she provided the required notes and was approved each time for OFLA leave.

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

12) Prior to March 2002, Respondent was lax about disciplining employees who changed their schedule without permission or punched in late from lunch. On March 1, 2002, Respondent's management conducted a meet-

ing for hourly employees to advise them that it was "tightening up" its attendance policy pertaining to start times and lunch time tardies for hourly employees. Complainant attended the meeting and understood that Respondent was tightening up the attendance rules. Complainant had recurring attendance problems before the March 1 meeting, but had not been regularly disciplined.

13) On May 31, 2002, Complainant was suspended for three days after accruing 15 points in twelve months. Complainant was assessed 3 points per day under Respondent's attendance policy for being out sick on May 31, 2001 and February 12 and 25, 2002. None of those absences were for migraines. Complainant was 30 minutes tardy on March 14, 2002 and was counseled but no points were assessed. Complainant was tardy returning from lunch on April 1, 2, 8, 9 and 10, 2002, but Respondent assessed only 2 points for all of the April tardy dates. Complainant changed her starting time for work on April 6, 2002, without permission but no points were assessed. On May 29, 2002, following a meeting with managers about her attendance, Complainant complained of shortness of breath and chest pains. Management called 911 and when an ambulance arrived at the work site, the ambulance attendant gave Complainant several options. Complainant chose to be taken to a hospital. Respondent assessed 2 points for an incomplete shift on May 29 and 3 points for an absence on May 30. None of the absences were due to migraines.

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

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

needed, including her additional absences on September 18 and 21, 2002.

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

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

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

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

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

CONCLUSIONS OF LAW

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

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

3) The actions, inaction, and motivations of Wayne Duncan and

Roger Cochell properly are imputed to Respondent.

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

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

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

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

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

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

OPINION

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

The Agency alleges Respondent denied Complainant OFLA leave to which she was entitled by

requiring her to submit medical verification for each period of OFLA leave taken in July and August 2002, by failing to instead obtain the opinion of a second health care provider if Respondent doubted Complainant's request for OFLA leave, and by applying its sick leave policy requiring employees to be at home or at a health care facility while on sick leave to Complainant while she was on OFLA leave.

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

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

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

A. <u>Unlawful Denial of OFLA Leave – ORS 659A.183</u>

Under the OFLA, it is an unlawful employment practice for an employer to deny an eligible employee leave to recover from or seek treatment for a serious health condition "in the manner required by ORS 659A.150 to 659A.186." To establish a prima facie case, the Agency must show that: 1) Respondent was a covered employer as defined in ORS 659A.153(1); 2) Complainant was an eligible employee, i.e., she was employed by a covered employer at least 180 calendar days immediately preceding the date her medical leave began; 3) Complainant had a "serious health condition" as defined in OAR 839-009-0210(14)(e); 4) Complainant used or would have used OFLA leave to recover from or seek treatment for her serious health condition; and 5) Respondent did not allow Complainant to use OFLA leave to which she was entitled in the manner required by ORS 659A.150 to 659A.186. *In the Matter of Gordy's Truck Stop LLC*, 26 BOLI 234, 247 2005); *In the Matter of Magno-Humphries, Inc.*, 25 BOLI 175, 192 (2004), *citing In the Matter of Centennial School District*, 18 BOLI 176, 192-93 (1999).

Respondent does not dispute that it was a covered employer or that Complainant was an eligible employee. Also, Respondent admitted Complainant sometimes suffered from migraine headaches during her employment, that it approved and granted Complainant's requests for intermittent OFLA leave based on her migraines, and that it never doubted the medical basis for the requested leave. Despite its answer denying

Complainant had a serious health condition, Respondent did not refute in any way evidence at hearing that demonstrated Complainant had chronic migraines that were episodic and for which she received periodic treatment. Consequently, the forum concludes Complainant had a serious health condition for OFLA purposes. OAR 839-009-0210(14)(e). The only remaining issue in dispute is whether Respondent denied Complainant use of OFLA leave to which she was entitled in the manner required by law. The entire record shows that Complainant requested and received intermittent leave for migraine headaches from September 2001 through December 2002. In its pleading, the Agency alleged that by requiring Complainant to provide a doctor's note each time she returned from OFLA leave, Respondent constructively denied Complainant leave to which she was otherwise entitled. The Agency also alleged that Respondent's sick leave policy requiring employees to either be at home, in a medical facility, or engaged in medically related activities while using sick leave violated OFLA provisions.

1. Medical Verification

ORS 659A.168(1) permits an employer to request medical verification of an employee's need for medical leave and "subsequent medical verification on a reasonable basis."[9] The Agency has promulgated a rule that interprets "reasonable basis" as "no more often than every 30 days." OAR 839-009-0260(6). Undisputed evidence shows Respondent twice asked Complainant to provide medical verification of her need for OFLA leave, as contemplated in ORS 659A.168(1), once in September 2001 and again in September 2002.[10] Each time, Complainant, through her health care provider, provided medical verification that included: the health care provider's name, type of medical practice and specialization; Complainant's "diagnosis" and the date the condition commenced; the beginning date of Complainant's more recent incapacity; whether the leave was to be taken intermittently or on a reduced leave schedule; the probable duration of the leave and frequency of absences; the regimen of treatment required, including the number of visits, the general nature of the regimen, and probable duration; the nature of the treatment provided by other health care providers; and whether Complainant was unable to perform work of any kind on the

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

[10] See Findings of Fact – The Merits 7 & 23.

requested leave dates or able to perform the essential job functions on those dates. Based on Complainant's health care provider's responses to the questions on the medical certification form, Respondent approved her request for intermittent leave in 2001 and again in 2002.[11]

The Agency contends and Respondent disputes that Respondent violated OFLA medical verification provisions by requiring Complainant to provide an additional doctor's note stating dates and reasons for absences in July and August 2002 when she returned from intermittent leave and an additional medical verification in September 2002. Undisputed evidence shows Respondent sent Complainant a form letter after she requested leave in September 2001, and each time she was absent for migraines thereafter, that she was required to submit a doctor's note following "each subsequent absence relating to this condition listing the exact dates you are required to be absent and confirming that it is for the condition described in the [initial] physician's certification that you have provided." Respondent's policy requiring a doctor's note after each absence was applicable to all employees returning from OFLA related sick leave.[12] A leave policy requiring an employee to provide medical verification after each OFLA related absence may run afoul of OFLA rules when, as in some cases of intermittent leave, absence occurs more frequently than every 30 days. Exceptions to the rule are when 1) circumstances described in the previous medical verification have changed significantly or 2) the employer receives information that casts doubt on the employee's stated reason for the absence.[13] OAR 839-009-0260(6)(a)&(b). The fo-

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

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

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

rum finds that the record as a whole in this case demonstrates that Complainant's circumstances and condition changed significantly by mid-August 2002.

Credible evidence established that in September 2001, Complainant's absences due to migraines were anticipated to occur one to two times per month. Her personnel records show that from September through December 2001, Complainant invoked intermittent OFLA leave three times and missed approximately four work days due to migraine headaches. From January 1 through June 2002, Complainant used OFLA leave for migraine headaches five times and missed approximately eight work days altogether. On August 19, 2002, after she used OFLA leave 8 times and missed 13 work days altogether during a five week period from July 10 to August 18, 2002, Respondent asked her to provide a doctor's note verifying that her absences on July 28, August 6, August 14, and August 18 were OFLA related.[14] In or around September 9, 2002, Complainant's health care provider provided information that verified Complainant's absences, including additional absences on August 27 and September 9, were due to "H/A's" and indicated that it was time for an OFLA leave update. Thereafter, Respondent requested medical verification confirming her need for intermittent OFLA leave for her migraine headaches, including the anticipated duration of leave and anticipated absences. Based on the renewed medical verification form from Complainant's health care provider indicating that, as of September 2002, the "probable duration of leaves and frequency of absences" was "approx. 2-4 times per month," Respondent approved the 2002 intermittent leave request. All of those facts indicate that Complainant's migraine headaches steadily worsened in July and August 2002 and the frequency of her absences increased significantly. The Agency's rule does not limit Respondent's ability to seek subsequent medical verification under those circumstances. OAR 839-0009-0260(6)(a). Indeed, Respondent's request for an additional doctor's note led to a renewed medical verification that substantiated Complainant's need for intermittent leave on a more frequent basis. Notably, Respondent, in the meantime, was receiving reports that Complainant was observed engaging in activities, such as attending ball games and going to the coast while using her sick leave. By the end of September 2002, Complainant's supervisor had reminded her of the sick leave policy at least twice and placed her on video surveillance. Those circumstances also constitute an exception to the 30 day limitation on seeking subsequent medical verification. OAR 839-0009-0260(6)(b). Based on all of those facts, the forum concludes that Respondent's request

[14] Her absence on July 10 was approved as OFLA related prior to the absences in July and August.

for additional medical verification complied with OAR 839-0009-0260(6) and Respondent did not constructively deny Complainant OFLA leave by seeking subsequent medical verification in August and September 2002 as the Agency alleged.

2. Respondent's Sick Leave Policy

Respondent's sick leave policy required employees to either be at home, in a medical facility, or engaged in medically related activities while using sick leave. The policy was applicable to all uses of sick leave, including those related to OFLA covered conditions and on the job injuries. Additionally, Respondent required employees on OFLA leave to exhaust their sick leave. Although there was testimony that Complainant took no leave without pay during her employment, there is no evidence showing when or if Complainant had exhausted her sick leave benefits during her use of intermittent OFLA leave.

The Agency argued that Respondent's sick leave policy was Draconian and essentially placed Complainant under "house arrest" but failed to address how the policy conflicts with OFLA provisions. OAR 839-009-0210 (14) defines a "serious health condition," as it most aptly pertains to Complainant, as a condition "(e) [t]hat results in a period of incapacity or treatment for a chronic serious health condition that requires periodic visits for treatment by a health care provider, continues over an extended period of time, and may cause episodic rather than a continuing period of incapacity, such as asthma, diabetes or epilepsy." Respondent's sick leave benefits are conditioned upon its employees actually being incapacitated from performing their job duties for medical reasons. In this case, Complainant's supervisor received a report from another employee that Complainant attended a ball game while using sick leave and reminded her that she was obliged to follow Respondent's sick leave policy. After Complainant denied a second report from another employee that Complainant was observed on the coast with a co-worker while on sick leave, Respondent placed her on video surveillance. On December 17, 2002, one of the two dates for which the date and time of the videotaping is in the record, Respondent's security department employee videotaped Complainant eating in a fast food restaurant, Christmas shopping and picking up her child from school while on sick leave for migraines.[15] Evidence shows

[15] Videotapes recorded on four separate days were referenced on the record. No definite date was provided as to one and no information as to whether Complainant was scheduled to work or called in sick. No time was given for one recorded on October 22, 2002; nor was evidence offered whether Complainant was scheduled to work on either of the days the videotapes were recorded. For these reasons the forum has not relied on those videotapes as evidence. On November 14, 2002, the third date on which a videotape was recorded,

Respondent's supervisory personnel relied only on that particular videotape when it decided to terminate Complainant. The Agency argued that Respondent's reliance on the videotape was "unreasonable" and that Respondent was required to obtain clarification from Complainant's health care provider about her condition on that day before making an employment decision adverse to Complainant.

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

B. <u>Retaliation or Discrimination – OAR 839-009-0320(3)</u>

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

To establish a prima facie case of retaliation or discrimination for

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Complainant reportedly called in sick at 3:55 am. Although it is not made explicit in the record, Complainant was apparently scheduled to work the 4:30 am to 3 pm shift that day and was videotaped in a store at 2:54 pm, six minutes before she apparently would have been off work had she worked her shift. On the fourth day videotape was recorded, December 17, 2002, Complainant reportedly called in sick at 3:30 am; apparently, although again not made explicit in the record, she was scheduled to work the 4:30 am to 3 pm shift. Complainant was videotaped at 1:25 pm that day as she left a fast food restaurant. There is no evidence showing when she arrived at the restaurant, but according to her testimony, she ate lunch at the restaurant before doing some Christmas shopping and picking up her children from school.

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

1. Complainant engaged in a protected right under OFLA.

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

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

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

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

Proof of a causal connection may be established through evidence that shows Respondent knowingly and purposefully discriminated against Complainant because she engaged in protected activity ["specific intent" test] or by showing that Respondent treated Complainant differently than her co-workers who were not engaged in the same protected activity ["different treatment" test]. *In the Matter of Roseburg Forest Products*, 20 BOLI 8, 28-31 (2000); OAR 839-005-0010(1). While specific intent may be established by direct evidence of a respondent's discriminatory motive, it may also be shown through circumstantial evidence. *See In the Matter of Wal-Mart Stores, Inc.*, 24 BOLI 37, 61 (2002), *citing In the Matter of Sierra Vista Care Center*, 9 BOLI 281, 296-97 (1991) ("[E]vidence includes inferences. There may be more than one inference to be drawn from the basic fact found; it is [the] Forum's task to decide which inference to draw. Thus, the absence of direct evidence of [respondent's] specific intent is not determinative because such intent may be shown by the circumstantial evidence referred to herein"). (citations omitted) *See also Boynton-Burns v. University of Oregon*, 197 Or App 373, 380-381, 105 P3d 893, 897-898 (2005), *quoting DeCintio v. Westchester County Medical Center*, 821 F2d 111, 115 (2d Cir), *cert. den.* 484 U.S. 965,

108 S.Ct. 455 (1987)("Proof of a causal connection can be established [1] *indirectly*, by showing that the protected activity was followed closely by discriminatory treatment or through other evidence such as disparate treatment of fellow employees who engaged in similar conduct, or [2] *directly*, through evidence of retaliatory animus directed against a [complainant] by the [respondent]"). The Agency, at all times, has the burden of proving that Complainant was terminated or otherwise discriminated against for unlawful reasons. *Wal-Mart* at 61.

MEDICAL VERIFICATION FOR USE OF INTERMITTENT LEAVE

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

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

RESPONDENT'S ATTENDANCE POLICY

Complainant began working for Respondent in January 1999 as a product auditor. Product auditors were allowed to set their own weekly work schedule depending on the "job needs" and Complainant's shifts varied. When Complainant started her position there were no set rules for schedule or shift and she altered her work times at her supervisor's request and, by her own testimony, for her own convenience as needed. Prior to March 2002, Respondent was lax about disciplining employees who changed their schedule without permission or punched in late from lunch. However, in March 2002, Respondent tightened up its

attendance policy pertaining to start times and lunch time tardies for hourly employees and gave all of its employees, including Complainant, notice of Respondent's intent to enforce its attendance policies. Even after that, Complainant's supervisor did not care if she worked the day or night shift and she was permitted to make her own weekly schedule showing which shifts she planned to work each day. He did expect her to pick the shift she wanted to work each day and "stick to it" because he did not know if employees were tardy or "not there" when they changed their start times without telling him. When Complainant was tardy on March 14, 2002, her supervisor reminded her of the new enforcement policy and told her that she was not to change the shifts she chose each week without first obtaining his permission. While it is not surprising that Complainant may have had some confusion about her schedule, given Respondent's previous laxity about enforcing its attendance policies, Complainant nevertheless admitted she was given notice along with the other employees that tardiness and unauthorized schedule changes would be no longer tolerated in the workplace after March 1, 2002. The Agency did not plead or introduce any evidence that other employees violated the "tightened up" attendance policy after March 2002 and were not disciplined in accordance with Respondent's policy. Although Complainant was suspended for three days after accruing 15 points in twelve months on May 31, 2002, none of those absences were for migraines.[16]

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

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

policy. Although she was counseled for attendance problems in April 2002, Complainant was not disciplined until May 31, 2002, after her attendance points reached the designated number in Respondent's attendance policy, and more than eight months after she requested OFLA leave.[17] Respondent had a history of not consistently enforcing its attendance policy and Product Auditors such as Complainant were previously allowed discretion in setting their own schedules, and that certainly could have caused Complainant confusion when Respondent began consistently enforcing the attendance policy. However, such confusion could have applied to any of Respondent's employees. Absent any evidence that the attendance policy was changed because Complainant invoked or used OFLA leave or that the attendance policy was not enforced against other employees, the forum concludes there is no causal connection between Complainant's invocation or use of OFLA and the application of Respondent's attendance policy to Complainant.

RESPONDENT'S TERMINATION OF COMPLAINANT

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

Undisputed evidence demonstrated that Complainant first denied her activities on December 17, 2002, but when told about the surveillance video that tracked her activities, she acknowledged that she did Christmas shopping, had lunch at Carl's Jr., and picked up her children from school during her regular work hours while on OFLA leave that day. She also acknowledged that she knew Respondent's sick leave policy prohibited such activity. At hear-

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

ing, she stated that she did not believe her conduct violated the policy but the forum was not persuaded because Complainant had no reason to lie to her employer if she did not believe she was violating the policy.

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

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

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

spondent's reasons for terminating Complainant were pretext for discrimination.

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

RESPONDENT'S EXCEPTIONS

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

AGENCY'S EXCEPTIONS

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

In its remaining exceptions, the Agency reiterates its argument at hearing that Complainant was terminated because she used OFLA leave stating that 1) Complainant's activities on the date she was videotaped in December 2002 were not "contrary activities" under a reasonable interpretation of Respondent's sick leave policy, 2) the timing of her termination, "a few weeks" after she wrote letters to Boise headquarters, is "solid circumstantial evidence of a retaliatory motive," and, alternatively, 3) "even if termination was in part due to dishonesty, if OFLA retaliation was a substantial factor in Respondent's decision to terminate Complainant, the Agency has made a sufficient showing."

First, Respondent's sick leave policy unambiguously states that an employee utilizing sick leave benefits "should be either at

home, at a doctor's appointment or at a health care facility approved by the provider, etc." and not "engaging in contrary activities while alleging sickness."[18] Credible evidence established that Complainant was not at home during a time she was using her sick leave benefits and she was not filling a prescription, at a doctor's appointment, or visiting a health care facility. While under some circumstances, eating in a restaurant, shopping, and picking up children from school may not be interpreted reasonably as "contrary activities,"[19] there is insufficient evidence to draw that conclusion in this case. Complainant testified that bright lights and noise aggravated her migraine symptoms and, arguably, under those circumstances, the activities that resulted in her discharge could be interpreted reasonably as inconsistent with recovering from a migraine headache. Moreover, the forum has concluded that Complainant interpreted her own activities as contrary to Respondent's sick leave policy because she was not forthright about them and, in fact, denied engaging in those activities.

While the forum is mindful that Respondent's policy is archaic and inflexible, the forum finds that it was not misapplied in this particular case. Employers are not required to provide paid sick leave benefits and when they do they can determine the parameters of its use, but only as long as the parameters do not interfere with or diminish an employee's OFLA rights, and are equally and consistently applied to all employees invoking their sick leave benefits. As a caveat, however, any sick leave policy that requires home confinement, except for outings related to the medical condition, ignores the reality that OFLA cov-

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

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

ers extended periods of recovery, not just a day or two, and not all serious medical conditions require complete bed rest and confinement.[20] In fact, in some cases, such as extended chemotherapy treatments or surgery requiring prolonged recuperation, bed rest or confinement may be, in fact, contraindicated. Consequently, a blanket home confinement sick leave policy runs the risk of interfering with or diminishing an employee's OFLA rights and exposes employers to potential liability. In any event, based on the merits of this case, the forum concludes that the Agency failed to prove by a preponderance of credible evidence that Respondent investigated Complainant differently or unreasonably or inconsistently applied the sick leave policy against her because she invoked and used OFLA provisions.

Second, the Agency's observation that the timing between Complainant's letters to corporate headquarters and her termination suggests a retaliatory motive ignores the preceding and intervening circumstances. The Oregon Court of Appeals has held that when relying on "mere temporal proximity" between the protected action and the allegedly retaliatory employment decision to indirectly establish a causal connection, the "events must be 'very close' in time." *Boynton-Burns v. University of Oregon*, 197 Or App 373, 381 (2005), *citing Clark County School District v Breeden*, 532 US 268, 273 (2001). In this case, Complainant was terminated almost three months after Respondent received letters from her inquiring about Respondent's request for medical verification. The proximity in time is marginal as to being close enough to infer causation.[21] Moreover, the record shows she had been counseled about the sick leave policy and videotaped beginning in September after Respondent received

[20] *See supra* note 16.

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

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

Third, the Agency suggests that even if dishonesty was a factor in Complainant's termination, she can still prevail on her discrimination claim "if OFLA retaliation was a substantial factor in Respondent's decision to terminate Complainant." In a mixed motive case, a complainant can prevail despite a respondent's legitimate reason for termination if the complainant shows he or she would not have been terminated absent the respondent's unlawful discriminatory motive. *See Hardie v. Legacy Health System*, 167 Or App 425, 435 (2000), *partially superseded by statute on other grounds* ("To prevail in a 'mixed motive' claim, a plaintiff must be able to show that he or she would not have been fired but for the unlawful discriminatory motive of the employer. * * * The crux of the standard, regardless of which phraseology is attached to it, is whether, in the absence of the discriminatory motive, the employee would have been treated differently" [internal quotes omitted]). However, assuming the mixed motive analysis applies to actions brought under OAR 839-009-0320, this is not a mixed motive case. The Agency alleged Respondent discharged Complainant on December 17, 2002, "because she invoked OFLA." Respondent denied that allegation. The pleadings and the evidence "present a simple either-or question" and do not give rise to a mixed motive analysis. *See McCall v. Dynic USA Corporation*, 138 Or App 1, 7-8 (1995)(when there is no allegation or defense of mixed motive and the issue involves one party alleging discrimination and the other contending there is no discrimination, the case is "a simple either-or" case). Beyond the bare proposition in the exceptions, there is nothing in the record that suggests the Agency was proceeding on a mixed motive theory. Consequently, the Agency is precluded from making that argument at this point in the proceeding. Additionally, even if there were allegations or a defense of mixed motive, there is no evidence that Respondent would have treated Complainant's dishonesty about her use of sick leave any differently if she had not invoked or utilized OFLA leave.

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

ORDER

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

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