# BOLI ORDERS

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

VOLUME 2

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# BOLI ORDERS

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# INTRODUCTORY NOTE

This second volume of BOLI ORDERS contains all of the known Final Orders of the Commissioner of the Oregon Bureau of Labor and Industries that were issued between July 31, 1980, and March 5, 1982.

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

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

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



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**In the Matter of**

**WESTLAND INVESTMENT COMPANY, an Oregon corporation, dba Apartment Data Center, Respondent.**

Case Number 36-79

Final Order of the Commissioner

Mary Wendy Roberts

Issued July 31, 1980.

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## SYNOPSIS

Where Respondent's agent stated in a telephone inquiry by a male Complainant that females were preferred for an advertised position, which had the effect of dissuading Complainant from formally applying, and where Respondent's president testified to a preference for females, but failed to establish a bona fide occupational requirement, the Commissioner found that Respondent committed an unlawful employment practice in violation of ORS 659.030(1)(a). Under such circumstances, it was not necessary that Complainant formally apply, since he was already effectively excluded from consideration. The Commissioner awarded one month's lost pay of $650. ORS 659.010(2); 659.030(1)(a); 659.060(3).

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The contested case in the above-entitled matter came on regularly for hearing before Dale A. Price, designated as Presiding Officer in this matter by the Commissioner of the Bureau of Labor and Industries. The hearing was convened at 9:30 a.m. on October 9, 1979, in the Beaver Room of the Department of Fish and Wildlife Building, 506 S.W. Mill Street, Portland, Oregon, and continued through the same morning. Complainant Daniel Raphael was present and testified. The Bureau of Labor and Industries was represented by Michael J. Tedesco, Assistant Attorney General, and Respondent was represented by Fred Hoene, its president, and by Gary Grenley, Attorney at Law.

A Proposed Order by the Presiding Officer was issued in this matter on June 10, 1980. Exceptions thereto were filed by Fred Hoene, Respondent's president.

Having considered the entire record in this matter, I, Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries, hereby issue the following Findings of Fact, Ultimate Findings of Fact, Conclusions of Law, Opinion, and Order.

## FINDINGS OF FACT – PROCEDURAL

1) Respondent Westland Investment Company, dba Apartment Data Center, is an Oregon corporation and an employer subject to the provisions of ORS 659.010 through 659.110.

2) On or about September 11, 1978, Complainant filed a verified complaint with the Civil Rights Division of the Bureau of Labor and Industries alleging that Respondent had unlawfully discriminated against him in connection with his prospective employment by Respondent, because of his male sex.

3) Following the filing of Complainant's verified complaint, the Civil Rights Division investigated the allegations in the complaint and determined that substantial evidence existed to support these allegations.

4) Thereafter, the Civil Rights Division attempted to reach an informal resolution of the complaint through conference, conciliation, and negotiation, but was unsuccessful in these efforts.

**FINDINGS OF FACT – THE MERITS**

1) At all times material herein, Respondent operated a business specializing in finding tenants for vacant apartments. This business was operated under the name of "Apartment Data Center."

2) On August 27, 1978, Respondent placed the following classified advertisement in the "Help Wanted" section of The Sunday Oregonian, a newspaper:

> "Apartment Counselor Are you bored with your secretarial job and want to try sales? Do you like helping people solves problems (i.e. finding the right apt. to rent)? Do you like being paid according to what you accomplish (i.e. commission)? Would you like to be associated with an organization that is recognized as the best in its field (i.e. Apartment Data Center)? If you are enthusiastic, stable and want a career you can build on your own with a company that's going someplace, please call Barbara 297-2542."

3) On or about August 27, 1978, Complainant read the newspaper advertisement and called Barbara Jacobsen at the number listed therein.

4) Barbara Jacobsen was at all times material herein Respondent's employee and executive secretary. She worked at the front desk in Respondent's office answering telephone inquiries regarding prospective employment.

5) Ms. Jacobsen answered numerous inquiries prompted by the aforementioned newspaper advertisement. She does not recall Complainant's telephone inquiry nor specifically what she told him during that call.

6) It is not disputed and I find that during the course of her telephone conversation with Complainant on or about August 27, 1978, Ms. Jacobsen informed Complainant that Respondent preferred to hire women and that men could apply, but were not encouraged to do so.

7) On or about August 27, 1978, Complainant told a friend, Robert Cain, about his conversation with Ms. Jacobsen and asked Mr. Cain to make a similar inquiry. Mr. Cain call Ms. Jacobsen and was similarly discouraged from applying, although Ms. Jacobsen did not tell Mr. Cain that men were never hired.

8) Complainant did not apply for work with Respondent because of his belief that such an application would be futile in view of Respondent's expressed preference for female employees.

9) Fred Hoene is and was at all times material herein president of Respondent corporation. Hoene established Respondent's hiring policies operating at all times material herein. Because of his experience, Hoene believed that he got better production and greater longevity from female than from male employees, even though he had a male employee who performed satisfactorily. Hoene did not believe that his business would survive if he employed men exclusively. He therefore, had a strong preference for female salespersons.



10) The average commission paid to Respondent's salespersons in August of 1978 ranged from $600 to $700 per month.

11) Subsequent to his telephone conversation with Ms. Jacobsen, Complainant sought employment at several businesses in the Portland area, including but not limited to Tektronix Corporation and Good Samaritan Hospital.

12) After one month of seeking employment in the Portland area, Complainant moved to Seattle and became unavailable for employment by Respondent.

**ULTIMATE FINDINGS OF FACT**

1) Complainant, a male person, responded by telephone to a newspaper advertisement placed by Respondent concerning employment as a salesperson and was informed, by Respondent's executive secretary, that Respondent preferred to hire women. Complainant did not formally apply for work with Respondent because he believed that such an application would be a futile gesture, in view of Respondent's stated preference for female employees. The sex of the prospective applicant was one of the criteria used by Respondent to determine which prospective applicants would be encouraged to apply for the salesperson position(s) advertised in August 1978.

2) If the Respondent is found to have engaged in an unlawful employment practice as charged, Complainant should be compensated in the sum of $650, the amount halfway in the average commission range paid to Respondent's salespersons during the month between Complainant's employment inquiry to Respondent and his becoming unavailable for employment by Respondent.

**CONCLUSIONS OF LAW**

1) Apartment Data Center is and was at all times material herein an assumed business name for Respondent Westland Investment Company.

2) The actions and motives of Respondent's employee, Barbara Jacobsen, and its president, Fred Hoene, are properly imputed to Respondent.

3) The fact that Complainant did not formally apply for employment with Respondent does not preclude an action against Respondent under ORS 659.030.

4) Respondent's use herein of sex as a criterion in selecting prospective employees was an unlawful employment practice in violation of ORS 659.030 in that it discriminated against Complainant in connection with Complainant's sex.

5) The Commissioner of the Bureau of Labor and Industries has the authority to award monetary damages to Complainant herein under the facts and circumstances of this record, and the sum of money awarded as damages in the Order below is an appropriate award.

**OPINION**

The facts in this case are not in substantial dispute. Respondent does not deny a preference for female salespersons, nor does it deny that this preference was communicated to Complainant during Complainant's telephone inquiry about salesperson

employment. Respondent's president, Fred Hoene, expressed a strong preference for female salespersons in his testimony at hearing. Hoene stated that women tended to remain on the job longer and produce better than their male counterparts. Hoene further stated that he had noticed that men with the requisite level of aggressiveness for success in the sales position tended to stay on the job for only about three months. Hoene also testified that he currently had a man in a sales position who was performing well.

The presence of even a single successful male in Respondent's work force, in a position similar to the position here at issue, is sufficient to negate any suggestion that there exists a bona fide occupational requirement reasonably necessary to the Respondent's business which justifies the preferential hiring of females. Hoene's reference to aggressive males staying on the job for shorter periods of time than do aggressive females constitutes instead a classic sex stereotype of the sort which ORS 659.030 was designed to prohibit.

The central issue in this case is whether, as a matter of law, it is permissible to discourage an applicant of a certain sex from applying for a job without actually refusing to accept his or her application. At hearing, Respondent attempted to construe ORS 659.030 narrowly by suggesting that since no actual refusal to hire or bar from employment took place in this case, there was no unlawful employment practice.

Although federal case law is not binding upon this Forum, the reasoning used to interpret the closely parallel Title VII cases may be useful in our analysis of this fact pattern. In *McDonald v. General Mills, Inc.*, 387 F Supp 24, 37; 10 FEP 379, 384 (E.D. Calif. 1974), the court held that Complainant's failure to apply and be rejected for a job did not bar her Title VII action against Respondents where Complainant alleged that she was deterred from using the college placement center because of the employer's expressed preference for interviewing and hiring males. The Court added that "it can reasonably be assumed that plaintiff would believe application for the jobs would be a futile gesture." *Id* at 37, 10 FEP at 384.

Similarly, in the instant case, Complainant made the assumption that application for the job would be futile. Complainant did not have to complete the formal application procedure to protect his remedy under the law, as he was effectively excluded from fair consideration for employment by the imposition of sex as a criterion in the analysis of potential employees. His failure to formally apply for the job cannot excuse Respondent's admitted use of sex as a criterion in the selection of its salesperson.

**ORDER**

NOW, THEREFORE, as authorized by ORS 659.060(3) and 659.010(2), and in order to eliminate the effects of the unlawful practice found and to protect the rights of others similarly situated, Respondent is hereby ordered to:

1) Deliver to the Hearings Section of the Portland office of the Bureau of Labor and Industries, within 30 days of the date of execution of the Order in this case, a certified check payable to the Bureau of Labor and Industries in trust for DANIEL RAPHAEL in the gross amount of SIX HUNDRED FIFTY DOLLARS ($650), representing one month's back pay.

2) Take whatever steps are necessary to insure that potential applicants for the position of salesperson are not discouraged from applying by any sex-related criterion which is not a bona fide occupational requirement reasonably necessary to the normal operation of Respondent's business.



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**In the Matter of**
**TODD INVESTMENTS, INC.,**
**dba Dollar Rent-A-Car, Respondent.**

Case Number 42-79
Final Order of the Commissioner
Mary Wendy Roberts
Issued July 31, 1980.

**SYNOPSIS**

Where Respondent's manager thought that attractive young women counter agents would draw the largely male pool of potential customers, and was dissatisfied with the supervisor who hired the male Complainant as a counter agent; where Complainant was not warned prior to discharge that his paper work was unsatisfactory; and where some female agents, who had more trouble than Complainant with such duties, were given a longer time to master the paper work system, the Commissioner held that Complainant was discharged because of his sex, and awarded him $360 in lost wages. ORS 659.010(2) and (6); 659.030(1)(a); 659.060(3).

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The contested case in the above-entitled matter came on regularly for hearing before Dale A. Price, designated as Presiding Officer in this matter by the Commissioner of the Oregon Bureau of Labor and Industries. The hearing was convened at 9:30 a.m. on November 13, 1979, in Room 678 of the State Office Building, 1400 S.W. Fifth Avenue, Portland, Oregon. Complainant Michael Hurley was present. The Bureau of Labor and Industries was represented by Michael J. Tedesco, Assistant Attorney General, and Respondent was represented by Jeff Demeerleer, one of its managers. A Proposed Order by the Presiding Officer was issued in this matter on June 10, 1980. No exceptions were filed thereto.

Having fully considered the record in this matter, I, Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries, hereby make the following Findings of Fact, Ultimate Findings of Fact, Conclusions of Law, Opinion and Order.

**FINDINGS OF FACT – PROCEDURAL**

1) At all times material herein, Respondent Todd Investments, Inc., dba Dollar Rent-A-Car, was and is an employer subject to the provisions of ORS 659.010 through ORS 659.110.

2) On April 14, 1978, Complainant Michael Hurley filed a verified complaint with the Civil Rights Division of

the Bureau of Labor and Industries alleging that he had been and continued to be unlawfully discriminated against because of his sex in connection with his employment by Respondent.

3) Following the filing of the verified complaint, the Civil Rights Division investigated the allegations therein and determined that substantial evidence existed to support Complainant's allegation that he had been discharged by Respondent because of his sex.

4) Thereafter, the Civil Rights Division attempt to reach an informal resolution of the complaint through conference, conciliation and negotiation, but was unsuccessful in these efforts.

**FINDINGS OF FACT – THE MERITS**

1) In January 1978 Respondent placed a classified advertisement in a Portland newspaper soliciting applicants for the position of counter agent-management trainee.

2) Complainant, a male person, answered Respondent's advertisement and was hired by Respondent's acting manager, Joan Ulrich. Complainant began work at Respondent's Portland airport office in January 1978.

3) The duties of a counter agent-management trainee included renting automobiles to customers; accepting returned rental automobiles; and completing forms and reports incident to the rental or return of automobiles, including Daily Business Reports.

4) Ms. Ulrich testified, and I find, that most new counter agent-management trainees, including Complainant, had some difficulty mastering Respondent's Daily Business Report, because filling it out could involve reconciling numerous entries regarding rentals arranged by several different agents.

5) Ulrich's supervisor and manager of Respondent's Portland airport office, Jeff Demeerleer, instructed Ulrich to assist Complainant in mastering the paperwork incident to his job. However, some of Respondent's female counter agent-management trainees who had greater trouble than Complainant learning their documentation duties were allowed a longer period than Complainant to master the system.

6) Complainant was never reprimanded nor warned that his performance as a counter agent-management trainee was unsatisfactory.

7) Approximately 80 percent of Respondent's customers are male. Respondent's manager Demeerleer admitted, and I find, that he thought attractive young women employees might "draw" the largely male pool of potential customers.

8) When she hired Complainant, acting manager Ulrich was under instructions from her supervisor Jeff Demeerleer; from other of Respondent's managers, and from the owner of Respondent's Seattle business operation to hire attractive young women. Demeerleer was unhappy with Ulrich's decision to hire Complainant and instructed her to discharge Complainant after about two week's employment. Ulrich refused to discharge Complainant.

9) Three men other than Complainant worked for Respondent renting automobiles during times relevant to this matter. However, they were occasional substitutes rather than full-time counter agents.

10) Ulrich was discharged by Respondent in April 1978 for alleged misconduct.

11) Complainant was discharged by Respondent on April 7, 1978.

12) At the time of his discharge, Complainant was earning $120 per week. Despite reasonable efforts, Complainant earned no income from the time of his discharge until he found alternative employment three weeks later.

**ULTIMATE FINDINGS OF FACT**

1) Respondent's acting manager Joan Ulrich hired Complainant, a male person, as a counter agent-management trainee, even though she knew that Respondent's management favored attractive young women for the position.

2) Jeff Demeerleer, one of Respondent's managers and Ulrich's supervisor, disapproved of Ulrich hiring Complainant because of Complainant's male sex. He conveyed his disapproval to Ulrich and ordered her to discharge Complainant. Although she refused to do so, Respondent discharged Complainant on April 7, 1978.

3) Complainant's discharge was due in part to his problem with learning Respondent's system of documentation. However, Respondent's preference for attractive female counter agent-management trainees played a key role in Respondent's discharging Complainant.

4) Complainant's gross lost wages because of his discharge from Respondent's employ were $360, the salary he would have earned during the three weeks from the time of his discharge until, he found alternative employment.

**CONCLUSIONS OF LAW**

1) The actions, and motives for those actions, of Respondent's Portland airport office manager, Jeff Demeerleer, Respondent's other managers, and the owner of Respondent's Seattle business operation are properly imputed to Respondent.

2) Respondent committed an unlawful employment practice, as defined by ORS 659.030(1)(a), by discharging Complainant from employment because of his male sex.

3) The Commissioner of the Bureau of Labor and Industries has the authority to award monetary damages to Complainant under the facts and circumstances of this record, and the sum of money awarded as damages in the Order below is an appropriate award.

**OPINION**

There is more than substantial evidence in this case that Complainant was discharged from Respondent's employ because of his male sex. Respondent's Portland airport office manager, Jeff Demeerleer, thought attractive female employees would draw the largely male pool of potential customers. Demeerleer, along with several of Respondent's other managerial employees, instructed the acting manager of the Portland airport office to hire attractive female employees. Demeerleer disapproved of his acting manager instead hiring Complainant, a male, and ordered her to fire Complainant.

Respondent offered business reasons in defense of its discharging Complainant. Citing the presence of four competitors in Portland's airport, Respondent's manager described various "gimmicks" used or considered for use to draw potential customers to the Dollar Rent-A-Car counter. Among these "gimmicks" were flashing lights, robots, and attractive young female counter employees. Respondent's manager asserted that 80 percent of its customers were male and that he believed that these men would prefer to do business with attractive young women. The economic advantage Respondent hoped to achieve by implementing this line of logic does not rise to the imperative status of a business necessity; and there is clear and abundant law that an alleged customer preference for employees of a given sex cannot be deemed a bona fide occupational requirement reasonably necessary to the normal operation of Respondent's business.

Respondent also asserted in its defense that three other men worked renting automobiles during times relevant to this case. However, these men were not full-time counter agents; they only substituted for others on an occasional basis. Their existence cannot provide a defense, in light of the substantial and direct proof of Respondent's unlawful discrimination against Complainant because of Complainant's sex.

## ORDER

NOW, THEREFORE, as authorized by ORS 659.060(3) and 659.010(2) and in order to eliminate the effects of the unlawful practices found and to protect the rights of others similarly situated, Respondent is hereby ordered to:

1) Deliver to the Hearings Section of the Portland office of the Bureau of Labor and Industries, within 30 days of the execution of this Final Order, a certified check payable to the Bureau of Labor and Industries in trust for MICHAEL HURLEY in the gross amount of THREE HUNDRED SIXTY DOLLARS ($360), representing the wages Complainant lost due to Respondent's unlawful employment practice found above.

2) Take whatever steps are necessary to insure that no employee is discharged on the basis of his or her sex.

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**In the Matter of**

**OREGON RURAL OPPORTUNITIES,**

**an Oregon corporation, and Armando Bravo, an individual,**

**Respondents.**

Case Number 41-78

Final Order of the Commissioner

Mary Wendy Roberts

Issued August 6, 1980.

## SYNOPSIS

Where Respondent terminated Complainant's employment because of poor performance and insubordination, and not because he assisted another person file a civil rights complaint or because he filed a civil rights complaint, the Commissioner found that the individual Respondent did not aid or abet the corporate Respondent commit an unlawful employment practice, and dismissed the specific charges. ORS 659.030(4) and (5); 659.060(3).

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The contested case in the above-entitled matter came on regularly for hearing before Glenda E. Anderson, designated as Presiding Officer in this matter by the Commissioner of the Oregon Bureau of Labor and Industries. The hearing was held on January 8, 1979, in Medford, Oregon. Michael J. Tedesco, Assistant Attorney General, represented the Bureau of Labor and Industries. Noreen Saltveit, Attorney at Law, represented Respondent Oregon Rural Opportunities. Complainant was present and testified.

Having fully considered the record in this matter, I, Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries, hereby make the following Findings of Fact, Ultimate Findings of Fact, Conclusions of Law, Opinion and Order.

## FINDINGS OF FACT – PROCEDURAL

1) Both parties stipulated that:

a) At all times material herein Respondent Oregon Rural Opportunities was an employer subject to the provisions of ORS 659.010 to 659.110; and,

b) At all times material herein Respondent Armando Bravo was a person subject to the provisions of ORS 659.010 to 659.110.

2) On September 3, 1975, Arthur Kraiman filed a verified complaint with the Civil Rights Division (CRD) of the Bureau of Labor and Industries, alleging that he had been and continued to be discriminated against in connection with his employment by Oregon Rural Opportunities and Armando Bravo, Respondents, because he assisted in a proceeding under ORS 659.010 to 659.110.

## FINDINGS OF FACT – THE MERITS

1) At all times material herein Respondent Oregon Rural Opportunities (hereinafter referred to as ORO) was a manpower agency serving migrant farmworkers in Oregon.

2) At all times material herein the Executive Director of ORO, based in Salem, was Gil Bazan. The Regional Manpower Officer for the region in which the Talent, Oregon, ORO office was located was Epifanio (Pete) Collazo. Collazo was also based in Salem. In the Talent ORO office was the Area Manager, Respondent Armando Bravo. Complainant Arthur Kraiman was Education Organizer; Leslie Picket was Office Assistant, and, until about August 30, 1975, Nancy Lynch was Intake Specialist. Bravo supervised Complainant, Picket and Lynch.

3) Complainant began working as Education Organizer for the Talent office on June 9, 1975. Lynch began her employment with that office on the same day.

4) In his July 1975 evaluation of Complainant's work, Bravo rated Complainant "average" in most areas. He did, however, criticize Complainant's lack of punctuality and Complainant's verbosity.

5) By September 1975, Bravo believed that Complainant's job performance was poor and that Complainant

had a negative attitude. Bravo felt that Complainant had not recruited any students, as was Complainant's job, and that Complainant wasn't really trying to do so. Bravo felt that Complainant usurped the Area Manager's job by becoming involved in ORO politics. Complainant's personality clashed with that of Bravo. Bravo did not have authority to discharge Complainant. Bravo communicated the problems with Complainant to Collazo and Bazan, who did have the power to discharge Complainant.

6) On or about August 30, 1975, Lynch was terminated from her employment with ORO.

7) On September 1, 1975, Lynch filed a complaint with CRD alleging that she had been discriminated against in connection with her employment because of her sex. Complainant had taken an active role in assisting Lynch with the filing of this complaint.

8) On the morning of September 2, 1975, the Talent ORO staff had a meeting concerning Lynch's termination. At this meeting, Complainant objected to her termination, citing a procedural defect.

9) Following the above-mentioned meeting, Lynch met with Complainant at the Talent ORO office. During that meeting, Complainant and Lynch made several telephone calls. Shortly thereafter, Joe Cowley, staff writer for the Medford Mail Tribune, a newspaper, arrived at the office and then left with Complainant and Lynch. Bravo observed these events. Cowley returned to the Talent ORO office later that day and asked Bravo about Lynch's termination. These event led Bravo to believe that Complainant had assisted Lynch in contacting the press concerning her termination.

10) Later on September 2, 1975, Complainant received a memo which read:

> "MEMO TO ART KRAIMAN FROM ARMANDO BRAVO:
>
> I have been advised by headquarters to give you this memo. You are ordered not to get involved with the matter regarding the termination of Nancy Lynch during your hours of work. This is the job of the Area Manager."

11) On September 3, 1975, Complainant filed a complaint with CRD alleging that Respondents had discriminated against him for assisting Lynch with her complaint.

12) Also on September 3, 1975, Complainant was informed that there would be a staff meeting at the Talent ORO office after 5 p.m. that day. Complainant knew that this was to be an important meeting with state ORO officials to discuss serious problems at the Talent office.

13) The Talent ORO office had been beset with personnel conflict which escalated with Lynch's termination. In addition, the office was extremely deficient in activities performance: it was offering virtually no client services. Because of these problems, Bazan had ordered special evaluations of each Talent Office staff member. He remained concerned about the Talent office's problems after receiving these evaluations, so he called the September 3, 1975, meeting of the Talent ORO staff and traveled to Talent to conduct it himself. His purpose for the meeting was to discuss the above problems with the Talent staff and to assess the entire Talent operation. He was prepared to close the Talent office if the staff did not convince him that its performance would improve. Bazan therefore considered the September 3rd meeting critical to the Talent operation.



14) Complainant informed Lynch of the September 3 meeting and, at her request, brought her to the meeting, even though she was no longer an ORO staff member.

15) When Complainant arrived at the Talent office, he said to Bazan that he had that day filed a discrimination complaint with the Bureau of Labor and Industries alleging that ORO had discriminated against him for assisting someone in filing a civil rights complaint.

16) At the time of Complainant's statement, Bazan was in a heated discussion with Linda Stevenson, Director of the Ashland Adult Learning Center, regarding a newspaper article concerning ORO in which Stevenson had been quoted. Neither Bazan nor Stevenson heard what Complainant said. Bazan's only "response" to Complainant was a perfunctory remark to the effect that Bazan would get to Complainant later.

17) The Talent ORO office was one room with large windows and glass doors at the front. It had no closable interior rooms. Because he wanted the meeting to be private and uninterrupted, Bazan directed that the doors be locked and the meeting be held at the back of the room. Bazan wanted to be able to discuss highly sensitive personnel matters without distraction.

18) When the doors to the Talent ORO office were locked they could not be opened from the outside or the inside. The Talent office doors were usually locked at 5 p.m. each workday.

19) Complainant asked Stevenson to remain at the meeting as an impartial witness. She declined.

20) Complainant objected to the locking of the doors and stated that he would not stay at the office if the doors were locked. Bazan asked him to stay. When Complainant reiterated his objection, Bazan informed him that if he left, he would be terminated from employment with ORO for insubordination.

21) Complainant left the Talent ORO office after Bazan's statement.

22) Complainant testified that he felt very threatened and intimidated by the locking of the doors. All of the Talent ORO staff members were present at the time, plus Stevenson, Lynch, Hortensia Gonzales, Director Coordinator of ORO's Education Division in Salem, and a student. Only Lynch and Complainant testified that they felt threatened. Even Stevenson, who had just finished a highly charged discussion with Bazan, did not feel threatened.

23) After Complainant's departure, Bazan conducted the planned meeting without Complainant's participation.

24) Bazan told Bravo that Complainant was terminated as of September 3, 1975. He did, however, direct Bravo to give Complainant the opportunity to offer his input on the problems at the Talent office. If Complainant were to respond to this opportunity, Bazan felt he might reinstate him.

25) On September 4, 1975, Complainant appeared at the Talent ORO office. While Complainant was in the office, Bravo was also there, but occupied talking with Collazo. As Complainant left, Bravo asked him to return for a discussion, but Complainant did not return.

26) Complainant received notice of his termination by telephone later on the morning of September 4, 1975. He later received a written notice indicating that his employment had been terminated for "insubordination and failure to comply with direct orders."

27) Neither Bravo nor Bazan knew, when Bazan terminated Complainant, that Complainant had assisted Lynch in filing Lynch's complaint. In fact, no substantial evidence was offered that they even knew of Lynch's complaint when Complainant was terminated. There is no substantial evidence that Bravo knew of Complainant's assistance when he saw Complainant on September 4, 1975.

28) The Talent ORO office was closed in December 1975.

29) Because of Bazan's demeanor at hearing and the internal consistency and unqualified nature of his testimony, contrasted with Complainant's equivocal testimony and argumentative manner, I found Bazan's testimony more credible than that of Complainant and hence accorded it greater weight.

**ULTIMATE FINDINGS OF FACT**

1) Gil Bazan, Executive Director of ORO, and Armando Bravo, Area Manager of the Talent ORO office, reasonably believed that Complainant's job performance as Education Organizer at the Talent ORO office was deficient.

2) Complainant failed to obey Bazan's reasonable order that Complainant remain at the September 3, 1975, meeting of the Talent ORO staff. This was a very important meeting at which the participation of the Talent ORO staff was crucial.

3) Complainant assisted Nancy Lynch in the filing of Lynch's September 1, 1975, civil rights complaint.

4) Neither Bazan or Bravo knew, when Complainant was terminated, that Complainant had assisted Lynch with Lynch's complaint.

5) Complainant was terminated by Bazan for insubordination and poor job performance on September 3, 1975.

**CONCLUSIONS OF LAW**

1) Respondent ORO did not terminate Complainant because he had assisted in a proceeding under ORS 659.010 to 659.110. Respondent ORO therefore did not violate ORS 659.030 as charged in terminating Complainant.

2) Respondent Bravo did not terminate Complainant, or aid, abet, incite the doing of any act forbidden under ORS 659.010 to 659.110 or attempt to do so in connection with the termination of Complainant. Respondent Bravo therefore did not violate ORS 659.030 as charged in connection with Complainant's termination.

**OPINION**

The issue in this matter is whether Complainant was terminated because he had assisted in the filing of a civil rights complaint. I have concluded that he was not, and that he was instead terminated because of deficient job performance and failure to obey an order to attend an important staff meeting.



The key question in resolving this issue was whether Respondents knew, when Complainant was terminated, that Complainant had assisted Lynch in her filing of a civil rights complaint. The Agency offered the following circumstantial evidence of such knowledge:

1) The September 2, 1975, memo from Bravo to Complainant was offered as evidence of Respondent's knowledge of Complainant's assistance and Respondent's retaliation against Complainant therefore. Yet the memo merely forbids Complainant from becoming involved in the matter concerning Lynch's termination during working hours. It does not attempt to restrict his non-worktime activities. Moreover, the memo's reference to the termination matter as the job of the Area Manager supports the inference the memo was intended to curb Complainant's activities such as his procedural protest and his contact with a newspaperman earlier that day. As no reference is made in the memo to assisting with Lynch's civil rights complaint, I cannot assume, as the Agency urges, that the "matter regarding the termination of Nancy Lynch" referred to in the memo relates to her civil rights complaint rather than the staff meeting protest or the media contact.

2) Bazan's remark after Complainant's announcement that he had filed a civil rights complaint alleging that ORO had discriminated against him for assisting someone in filing a civil rights complaint is offered to show Bazan's knowledge of that assistance. Yet Bazan testified that he did not hear Complainant's announcement. As Bazan was in the middle of a heated conversation with Ms. Stevenson, who also did not hear Complainant's announcement, it is entirely reasonable to infer that Bazan did not pay attention to what Complainant said, and that Bazan's remark was a perfunctory comment of a general postponing nature which responded to Complainant's proximity, perhaps even to an awareness that Complainant had spoken, but not to the substance of Complainant's announcement. I rely here not only upon Bazan's testimony, but to Stevenson's statement that she did not hear Complainant's announcement. After all, even Complainant regarded Stevenson as an impartial witness to the events at the meeting. I conclude that Complainant did make his announcement, but that Bazan was too engrossed in his conversation with Stevenson to focus upon, or hear, what Complainant said.

The above conclusions are based in part upon my assessment of the credibility of two witnesses who offered conflicting testimony on this and other issues: Gil Bazan and Complainant. Bazan offered a clear, unequivocal account of the events herein at issue. Because of his demeanor at hearing and the internal consistency of his testimony (as well as corroboration on some points), I find Bazan's testimony more credible than that of Complainant and therefore give it more weight.

Without the interpretation of the September 3 memo or Bazan's remark which the Agency asserts, there is only bare speculative evidence that either Bazan or Bravo knew that

Complainant had assisted Lynch when Bazan terminated Complainant. Without such knowledge, neither Bravo nor Bazan could have retaliated against Complainant for such assistance. Absent substantial evidence of such retaliation, the Agency's case must fail.

**ORDER**

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

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**In the Matter of**
**RODERICK ENTERPRISES, INC.,**
**an Oregon corporation, Respondent.**

Case Number 23-79
Final Order of the Commissioner
Mary Wendy Roberts
Issued August 29, 1980.

**SYNOPSIS**

Finding that a supervisor assigned black Complainant extra work because of her race, and that Complainant's co-workers subjected her to racially motivated comment and attempted to discredit her because of her race, the Commissioner found that a single admonition by Respondent to the supervisor and a co-worker was neither adequate nor timely corrective action, and that Respondent thus discriminated against Complainant on the basis of race. Complainant's discharge based on patient abuse was not racially motivated. The Commissioner awarded Complainant $400 for mental suffering damages from the on-the-job racial harassment, but made no award for wage loss or emotional distress resulting from the termination. ORS 659.010(2); 659.030(1)(a); 659.060(3).

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The above entitled matter came on regularly for hearing before Dale A. Price, designated as Presiding Officer by the Commissioner of the Oregon Bureau of Labor and Industries. The hearing was held in the Commission Room of the Oregon State Fish and Wildlife Department Building, 506 SW Mill Street, Portland, Oregon, on July 24, 1979. Complainant was present. The Bureau of Labor and Industries was represented by Michael J. Tedesco, Assistant Attorney General, and Respondent was represented by Thomas Gish, Attorney at Law.

Having considered the entire record, I, Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries, hereby make the following Findings of Fact, Ultimate Findings of Fact, Conclusions of Law, Opinion and Order.

**FINDINGS OF FACT – PROCEDURAL**

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

2) On December 8, 1977, Gerry J. Coulson filed a verified complaint with the Civil Rights Division of the Bureau of Labor and Industries alleging that she had been and continued to be discriminated against in connection with her employment by Respondent on the basis of her race and color.

3) Subsequent to the filing of the aforementioned complaint, the Civil Rights Division investigated the allegations contained therein and determined that substantial evidence existed to support the allegations of the complaint.

4) Thereafter, the Civil Rights Division attempted to reach an informal resolution of the complaint through conference, conciliation, and negotiation, but was unsuccessful in these efforts.

**FINDINGS OF FACT – THE MERITS**

1) At all times material herein Respondent Roderick Enterprises operated Powellhurst Nursing Home (hereinafter referred to as Powellhurst).

2) In November 1976, Complainant, a black female, was hired as a nurse aide at Powellhurst.

3) Each Powellhurst nurse aide was responsible for basic patient care in a given work area.

4) While employed as a nurse aide at Powellhurst, Complainant was supervised by various Directors of Nursing Services (DNS) and charge nurses. Among these supervisors was charge nurse Agnes Hurley.

5) During Complainant's employment, Powellhurst was very often short-staffed due to high employee turnover and absenteeism. When this occurred, the practice at Powellhurst was to assign extra duty to available staff on a rotating basis. Hurley, however, consistently assigned extra duty to Complainant rather than rotating it among all available staff.

6) Hurley was biased against Complainant due to her race. This was at least part of her reason for consistently assigning Complainant extra duty.

7) Hurley's employment at Powellhurst was terminated on September 15, 1977, for reasons which did not relate to her treatment of Complainant.

8) Some of Complainant's co-workers disapproved of Complainant's associating with a white male friend. These co-workers made repeated efforts to discredit Complainant in Respondent's eyes by frequently falsely accusing her of rule violations, reporting her every small actual deviation from Respondent's policy or rules, and making racially-motivated comments in her presence. The only such co-worker identified by name in the record is nurse aid Carol Longhoffer.

9) Longhoffer took several medical leaves of absence during her employment with Respondent and was on such a leave when the Complainant was terminated by Respondent.

10) From the testimony of Powellhurst charge nurse Gladys Pruitt, I infer that the racially-motivated comments and reports impacting Complainant started soon after Complainant began working for Respondent and continued throughout her employment. I also find that Hurley's frequent assignment of extra duty to Complainant started by at least the spring of 1977 (when Complainant reported it to Powellhurst Administrator K. Eric Schessler) and continued until Hurley's termination on September 15, 1977.

11) Administrator Schessler was made aware of racist overtones in staff interactions at Powellhurst by a report from Complainant concerning Hurley, and a report from charge nurse Pruitt and his own observation concerning Longhoffer and other staff. Schessler admits, and I find, that he had knowledge of racial harassment of Complainant as early as the spring of 1977.

12) Schessler spoke with Hurley within 24 hours of Complainant's report and with Longhoffer at some unspecified time, admonishing each that he would not tolerate racism at Powellhurst. Schessler continued thereafter to allow Hurley to supervise Complainant and Longhoffer to interact with Complainant because he felt his warning to each would be sufficient to deter further manifestations of their racism.

13) Both Hurley and Longhoffer (as well as other staff) continued their racially-motivated actions concerning Complainant despite Schessler's admonitions.

14) On September 22, 1977, Complainant received a written evaluation by DNS Nettie Boddie, which rated her performance "average" in all respects except "dependability," in which she was rated "average" to "above average."

15) During her employment at Powellhurst, Complainant received a verbal warning from Respondent for allegedly smoking marijuana just before or during work. She also received a verbal warning for using profanity while engaging in a loud fight with another aide in a Powellhurst hall in the fall of 1977.

16) During the spring or summer of 1977, Complainant's work section was often in disarray and smelled because Complainant was not completing her work on time. Administrator Schessler was aware of and warned Complainant about this problem.

17) At least part of the reason Complainant did not complete her work on time was the extra work assigned her until Hurley's termination on September 15, 1977.

18) On November 9, 1977, Complainant was given a written warning by DNS Betty Delgado for watching television in a patient's room. Complainant accepted this warning and promised to try to do better.

19) On December 2, 1977, Complainant was given a written warning by charge nurse Nancy Hayes for leaving her section unattended and refusing an order. Complainant did not accept this warning citing alleged (racial) prejudice by Hayes. On March 16, 1978, Hayes was discharged by Respondent for insubordination and lying. Administrator Schessler believed that Hayes had severe emotional problems.

20) Complainant worked at Powellhurst on Saturday, December 3, 1977. One of the patients in her work area was Margaret Ostby.

21) Complainant did not work on Sunday, December 4, 1977. On that day, Ostby left the nursing home with her daughter for a short time. After patient Ostby's return, nurse aide Jeri Markle noticed bruises on Ms. Ostby's right arm. Markle asked Ostby how she became bruised. Ostby replied that Gerry Coulson (Complainant) had grabbed her arm and squeezed or pinched it because Ostby had her call light on and wanted to be put to bed.



22) Immediately thereafter, Markle reported Ostby's allegation to charge nurse John Bates. Bates inspected the bruises and talked with Ostby, who told him the same story she had told Markle. Bates reported his allegations to DNS Delgado. When DNS Delgado talked with Ostby the next day, December 5th, Ostby reiterated the same allegation.

23) After being informed of Ostby's bruises and allegation, Administrator Schessler himself spoke with Ostby, who repeated the same allegation. He considered charge nurse Bates' report. Thereafter, Schessler instructed DNS Delgado to terminate Complainant's employment.

24) Ostby had not alleged abuse by Powellhurst staff before or evidenced dislike for Complainant.

25) Elderly patients can bruise easily even with normal care. However, Ostby's bruises were of definite color and serious appearance.

26) Bruises sometimes do not appear until some time after the action which causes them.

27) Schessler was acutely aware of the nursing home's special fiduciary duty to care for its patients. He was also aware that the nursing home industry is regulated and that serious penalties could result if he continued the employment of an employee who had abused a patient. He considered patient abuse one of the most (if not the most) serious allegations that could be made against an employee. Because of this special responsibility, dire potential liability, and the gravity of patient abuse, Schessler had a policy of terminating staff responsible for any substantiated patient abuse. He considered Ostby's allegation substantiated by her reiteration of the same allegation to Markle, Bates, Delgado, and himself. He had a policy of taking a patient's word over the word of a staff member, if the patient was alert and did not have a lot to gain by the statement he or she made. Schessler considered Ostby alert and knew of nothing she could gain by accusing Complainant.

28) Complainant was discharged by DNS Delgado on December 5, 1977. Delgado cited Complainant's alleged abuse of patient Ostby as the reason for her termination. Complainant responded in writing that she did not abuse Ostby and that she was sabotaged by co-workers.

29) Complainant cried strenuously when she was discharged and was seriously upset for at least two weeks thereafter. Her stomach ached and she consulted two doctors, one of whom opined that she had a nervous stomach.

30) There is no evidence or allegation that Schessler, Pruitt, Boddie, Markle, Bates, or Delgado were racially biased in their interaction with or perception of Complainant.

## ULTIMATE FINDINGS OF FACT

1) From at least the spring of 1977 to September 15, 1977, Powellhurst charge nurse Agnes Hurley consistently assigned extra duty to Complainant, a black nurse aide, rather than rotating extra duty assignments among

all available nurse aides, due to Complainant's race.

2) Throughout her employment at Powellhurst between November 1976 and December 5, 1977, Complainant was subjected to frequent racial harassment in the form of denigrating racial comments, false accusations, and reports of Complainant's every small infraction by some of her co-workers. Administrator Schessler knew of this harassment by at least the spring of 1977 and admonished one perpetrator at an unspecified time. The harassment continued until Complainant's discharge.

3) Complainant was terminated by Respondent on December 5, 1977, because of alleged abuse of a patient plus work performance problems and alleged rule violations. The alleged abuse was the immediate reason for her termination.

4) Complainant's work performance problems may have been caused by the extra work assigned her by Hurley. The allegation of marijuana smoking may have been made because of Complainant's race. Charge nurse Hayes' written warning to Complainant may have been motivated by Hayes' racial prejudice or emotional instability. Complainant's fight with another aide may have been a result of the racist overtones at Powellhurst.

5) Respondent did, however, cite two reasons for terminating Complainant which were not a result of racism: the November 9, 1977, written warning of a rule violation and patient Ostby's allegation that Complainant had abused her. The allegation was the immediate reason for Complainant's termination. Complainant accepted the November 9th warning as valid, and there is no allegation or evidence that it was related to Complainant's race. Ostby, an alert patient with no reason to falsely accuse Complainant, consistently alleged to four people in four different conversations that Complainant had abused her. There is no evidence that Ostby or the four staff persons to whom she repeated her allegations were racially biased.

6) In light of the special standard of care imposed upon nursing homes and the liability for violation thereof; the seriousness of patient abuse; Schessler's policy of terminating staff responsible for any substantiated patient abuse; patient Ostby's alertness and lack of motive to falsely accuse Complainant; and the lack of evidence that either the allegation of patient abuse or the November 9, 1977, written warning of misconduct were tainted by staff racism, the alleged patient abuse combined with the recent written warning by itself constitutes legitimate and sufficient non-discriminatory reason for terminating Complainant.

7) Complainant suffered humiliation and mental anguish because of the racial harassment to which she was subjected during her employment at Powellhurst.

## CONCLUSIONS OF LAW

1) The actions, and motivations for those actions, of K. Eric Schessler, Administrator of Respondent's Powellhurst Nursing Home, and other employees at Powellhurst, are properly imputed to Respondent.

2) Respondent's failure to stop its supervisory employee Agnes Hurley's harassment of Complainant by assigning Complainant extra duty because of her race constitutes discrimination against Complainant in the conditions or privileges of employment and thereby violates ORS 659.030 (1)(a).

3) The single admonition by Schessler of one non-supervisory employee does not by itself constitute sufficient appropriate corrective action against racial harassment of Complainant by non-supervisory Powellhurst staff of which Mr. Schessler had knowledge. By failing to take sufficient appropriate corrective action against racial harassment, Respondent discriminated against Complainant in the conditions or privileges of employment and violated ORS 659.030(1)(a).

4) Respondent did not discharge Complainant because of her race or color and therefore did not violate ORS 659.030(1)(a) in its termination of Complainant as charged.

5) As a matter of law, I can infer that Complainant suffered humiliation and mental anguish from the frequent racial harassment to which Complainant was subjected by one supervisor and co-workers at Powellhurst for at least 10 or more months.

6) The Commissioner of the Bureau of Labor and Industries has the authority to award monetary damages to Complainant herein under the facts and circumstances of this record, and the sum of money awarded as damages in the Order below is an appropriate award.

## OPINION

Complainant worked in an environment in which at least some of her co-workers made frequent comments to her relating to her race. The one example offered of the specific content of those comments was that some expressed disapproval of Complainant having a white male friend. In addition, because of Complainant's race, some of her co-workers falsely accused her of rule violations and reported her every actual infraction, however small. Finally, until September 1977, Complainant was subjected to different treatment because of her race by supervisor Agnes Hurley, who assigned extra duty to Complainant instead of rotating it between all available nurse aides.

Respondent's administrator Schessler knew by at least the spring of 1977 that Complainant was being subjected to these manifestations of staff racism. Although he admonished each named offender once that he would not tolerate continued racist actions, he did not succeed in stopping racially-motivated treatment of Complainant by them or other Powellhurst staff.

It is well established in federal law that Respondent is responsible for the acts of its supervisory employees, with respect to racial harassment on the job, regardless of whether the acts complained of were forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence. I adopt this interpretation. Respondent is liable for the failure of Schessler to stop supervisor Hurley's racial harassment of Complainant during her employment at Powellhurst.

Respondent is also responsible for its non-supervisory employees' acts of racial harassment in the workplace if it

knew or should have know of the harassment. Administrator Schessler knew of the harassment of Complainant by some of her co-workers by at least the spring of 1977. Respondent has shown that Mr. Schessler took some corrective action by admonishing at an unspecified time a person he considered a perpetrator. However, a single admonition does not by itself constitute appropriate or sufficient corrective action if harassment continues. In addition, Respondent did not offer proof that this admonition was timely. Respondent's responsibility for its non-supervisory employees' harassment of Complainant is therefore not rebutted.

Respondent did not, however, violate ORS 659.030 in terminating Complainant. Several of the problems which lead Administrator Schessler to consider terminating Complainant may have been directly or indirectly related to staff racism. But the immediate reason for Complainant's termination, alleged patient abuse, plus Complainant's recent and admittedly valid written warning for a rule violation, constitute by themselves legitimate and sufficient reasons for Complainant's termination; and neither is related to Complainant's race. The only question posed for this Forum by the alleged patient abuse was not whether Complainant actually abused Ostby, but whether Administrator Schessler had adequate reason to believe that Complainant abused Ostby when he ordered her termination. Should Schessler have further investigated Ostby's allegation, given his knowledge of racial harassment of Complainant by Powellhurst staff and the Complainant's allegation of sabotage? Given the seriousness of patient abuse, the nursing home's special responsibility as trustee of its patients' well-being, the substantial potential penalties for violating this trust, and the fact that the patient was considered an alert person with no reason to falsely accuse Complainant, and who repeated the same allegation to each of four interviewers, the questioning of Ostby by four staff members including Administrator Schessler on four different occasions constituted adequate investigation of Ostby' allegation and formed a reasonable basis for Schessler to believe that Complainant had abused Ostby.

The last question to be resolved in this matter is what are Complainant's damages. The back pay damages sought pertain only to a violation in the termination of Complainant, of which I have not found substantial evidence. Complainant also seeks damages for mental anguish suffered due to racial harassment at Powellhurst. All the evidence of her anguish offered at hearing concerns suffering caused by her termination. Because I have no substantial evidence that her termination was a violation of ORS 659.030, I cannot award her damages for suffering occasioned by it.

According to the Court of Appeals in *Fred Meyer v. Bureau of Labor,* 39 Or App 253, 265, 592 P2d 564 (1979), *rev den* 287 Or 129 (1979), where there is a scant record on the nature and extent of mental suffering, yet evidence of substantial harassment based upon race, the inference that Complainant suffered humiliation as a consequence is reasonable. In this case, although there is virtually no



evidence concerning the nature and extent of Complainant's mental anguish before she was terminated, there is substantial evidence of continuing attempts by one supervisor and co-workers to in several ways denigrate Complainant due to her race for a period of at least 10 or more months. This evidence compels the conclusion that Complainant suffered from the indignity of the inference inherent in racial harassment that she was inferior due to her race.

Having thereby established Complainant's right to compensation for mental suffering, I award her damages in the amount of $400. While I would otherwise make a larger award, I arrived at this amount by considering the fact that the Agency offered no direct evidence of the nature or extent of Complainant's suffering during her employment or of Respondent's bad faith in failing to stop its staff's racist actions.

**ORDER**

NOW THEREFORE, as provided by ORS 659.060(3) and 659.010(2) and in order to eliminate the effects of the unlawful practices found and to protect the rights of other persons similarly situated, Respondent is hereby ordered to:

1) Deliver to the Hearings Section of the Portland office of the Bureau of Labor and Industries, within thirty days of the execution of this Order, a certified check payable to the Bureau of Labor and Industries in trust for Gerry Coulson in the amount of FOUR HUNDRED DOLLARS ($400), as compensation for her humiliation and mental anguish caused by Respondent's discrimination against her because of her race.

2) Cease and desist from any action or inaction which might allow racial harassment to occur in an employment setting over which Respondent has control.

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**In the Matter of**
**Civil Service Board of The**
**CITY OF PORTLAND,**
**Respondent.**

Case Number 04-79
Final Order of the Commissioner
Mary Wendy Roberts
Issued October 21, 1980.

**SYNOPSIS**

Where Respondent public employer removed 31-year-old Complainant from the eligible list for appointment to the position of Firefighter solely on the basis of having passed his 31st birthday; where Respondent's Charter conflicted with state law prohibiting age discrimination; and where being under age 31 or 32 did not qualify as a bona fide occupational requirement for Firefighter, the Commissioner held that Respondent violated ORS 659.030 (1)(a). The Commissioner ordered Respondent to appoint Complainant to the next available Firefighter position at the seniority, compensation, and benefit levels he would have attained had he not been unlawfully removed from consideration due to his age, and to ensure that future applicants not be

disqualified based on age. ORS 211.710; 659.010(2); 659.015; 659.028; 659.030(1)(a); 659.060(3).

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The above entitled matter came on regularly for hearing before Dale A. Price, designated as Presiding Officer by the Commissioner of the Oregon Bureau of Labor and Industries. The hearing was convened at 9:30 a.m. on July 11, 1979, in Room 12 of the State Office Building in Portland, Oregon, and continued through the afternoon of July 12, 1979.

The Bureau of Labor and Industries was represented by Michael J. Tedesco, Assistant Attorney General. The Respondent, the Civil Service Board of the City of Portland, was represented by Richard A. Braman, of its attorneys. The Complainant, Tylan J. Peters, was present and testified.

Having considered the entire record, I, Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries, hereby make the following Ruling Upon Motion, Findings of Fact, Ultimate Findings of Fact, Conclusions of Law, Opinion, and Order.

## RULING UPON MOTION

Subsequent to the adjournment of the hearing in this matter, counsel for Respondent submitted a written motion to reconvene the hearing for the purpose of offering a compilation of evidence already received. I have the evidence before me and can analyze said evidence without compilations and summaries beyond those offered at the hearing and in exceptions to the Proposed Order. Respondent's motion is hereby denied.

## FINDINGS OF FACT – PROCEDURAL

1) At all times material herein, Respondent, the Civil Service Board of the City of Portland, was a public employer in the State of Oregon and, as such, subject to the provisions of ORS 659.010 through 659.110

2) On January 11, 1978, the Complainant, Tylan J. Peters, filed a verified complaint with the Civil Rights Division of the Bureau of Labor and Industries alleging that the Respondent had refused to hire him for the position of Fire Fighter because of his age.

3) Following the filing of the aforementioned complaint, the Civil Rights Division investigated the allegations in the complaint and determined that substantial evidence existed to support these allegations.

4) Thereafter, the Civil Rights Division attempted to reach a settlement of the complaint through conference, conciliation and negotiation, but was unsuccessful in these efforts.

## FINDINGS OF FACT – THE MERITS

1) The essence of the business of the Portland Fire Bureau is to provide Portland with protection from fire. Public safety is a major factor in the conduct of this work.

2) Complainant is a United States citizen who served in the US Armed Forces during wartime, from September of 1965 through April of 1969, when he was honorably discharged.

3) On or about June 28, 1977, Complainant submitted to Respondent an application for the position of Fire Fighter with the Portland Fire Bureau.

4) Pursuant to his application, Complainant took oral, written, and physical capability examinations during 1977 and was found fully qualified for the position of Fire Fighter.

5) Having successfully completed the above-mentioned examinations, Complainant was given an overall score of 86.58 and was ranked number 47 on the Fire Fighters Eligible List of September 27, 1977.

6) At times material herein, when there was a Fire Fighter opening, if the highest ranked applicant on the Fire Fighters Eligible List passed a routine physical examination, that person was offered appointment as a Fire Fighter.

7) On October 13, 1977, Complainant reached the age of 31 years and was immediately removed by Respondent from the 1977 Fire Fighters Eligible List pursuant to Respondent's interpretation of the Portland City Charter Section 4-106.

8) Portland City Charter Section 4-106 sets a maximum age limit of 31 years for a "hoseman" appointee who, as a United States citizen, served honorably in the US Armed Forces during wartime.

9) At all times material herein, Respondent has used the term "firefighter" in lieu of the term "hoseman" used in City Charter Section 4-106.

10) Respondent hired about 75 persons from the September 1977 Fire Fighters Eligible List upon which Complainant was ranked number 47. Of the 100 persons from that list who were "considered" and "available," 19 were "removed for age."

11) Because Complainant had been removed from the September 1977 Fire Fighters Eligible List, he was not given the physical examination mentioned in Finding of Fact 6 above, nor offered appointment as a Fire Fighter for the next vacancy occurring after all persons ranked above him on the Fire Fighters Eligible List had been disqualified due to the physical examination or offered appointment.

12) After the hearing on this matter, judicial action specified that the exact age limit set by City Charter Section 4-106 was the 32nd birthday. *Kelly v. City of Portland et al.*, 41 Or App 185, 597 P2d 1316 (1979). Because Complainant had been removed from the Fire Fighters Eligible List before his 32nd birthday, Complainant was then given the routine pre-appointment physical examination, which he passed.

13) Firefighting is an extremely arduous occupation requiring above average physical capabilities. Firefighters should be in top physical condition.

14) There is a general direct relationship between advancing chronological age and deteriorating physical condition and the related incidence, in Fire Fighters, of disabling injuries. However, top physical condition often postpones degenerative physical changes due to aging.

15) Degenerative physical changes due to aging do not often begin as early as 31 or 32 years of age.

16) Chronological age alone is a crude measure of the physical condition of a particular individual, as the aging process varies from individual to individual.

17) Functional age or some other individualized measure is more

accurate than chronological age alone in measuring physical condition.

18) A thorough, rigorous, regularly-conducted physical examination would be an adequate method of determining functional age for purposes of measuring physical condition to separate those physically qualified from those physically unqualified for the job of Fire Fighter.

19) It would have cost approximately 3/10ths of one percent of the 1979 Fire Bureau budget to conduct such physical examinations on every Portland Fire Bureau Fire Fighter in 1979. It would have cost 6/100ths of one percent of the 1979 Fire Bureau budget to conduct such examinations in 1979 on the 100 persons considered and available for Fire Fighter appointments from the 1977 Fire Fighters Eligible List.

20) The job of Fire Fighter involves a team as opposed to individual effort. The risk that one person's error or physical defect would produce tragic results, including those which could imperil public safety, is far less in a joint effort than in an individual effort, because no one person bears the responsibility for the entire effort.

21) Fire Fighters of the Portland Fire Bureau are offered, as a benefit of employment, a disability plan which is funded by the Fire and Police Disability and Retirement Fund.

## ULTIMATE FINDINGS OF FACT

1) At all times material herein, Complainant was fully qualified for the position of Portland Fire Bureau Fire Fighter and was recognized as so qualified by Respondent's placing his name on the 1977 Fire Fighter Eligible List.

2) Respondent subsequently removed Complainant from the Fire Fighters Eligible List solely, and admittedly, because he attained the age of 31 years.

3) Once an applicant is placed on the Fire Fighters Eligible List, two events must occur before that applicant is appointed as a Fire Fighter:

a. There must be a Fire Fighter opening and no one ranked above the applicant remaining on the Fire Fighter Eligible List; and

b. The applicant must pass a routine pre-appointment physical examination.

In Complainant's case both these events occurred. Therefore, Complainant would have been appointed to the position of Fire Fighter by Respondent in 1977, but for his age.

4) Because firefighting requires a high degree of physical fitness, appointing physically fit persons to be Fire Fighters is reasonably necessary to firefighting, the essence of the Portland Fire Bureau's business.

5) Although there is a general direct relationship between advancing chronological age and deteriorating physical condition, chronological age alone is but a crude measure of the physical condition of a particular individual.

6) There is no factual basis for believing that all or substantially all individuals who have passed their 31st or 32nd birthdays would be unable to perform the job of Fire Fighter safely and efficiently.



7) Screening Fire Fighter applicants on an individualized basis to differentiate between physically qualified and unqualified applicants is not impossible. In fact, the degenerative effects of the aging process in a particular individual would be better detected by individual screening through, for example, a thorough, rigorous, regularly-conducted physical examination than by mere consideration of chronological age.

8) Screening Fire Fighter applicants on an individualized basis to differentiate between the physically qualified and unqualified applicants is not highly impractical.

9) The disability plan offered to Portland Fire Bureau Fire Fighters is an employee benefit plan.

## CONCLUSIONS OF LAW

1) Section 4-106 of the Portland City Charter is a public statute of the State of Oregon under ORS 211.710 and is to be construed in its ordinary and usual sense. Under this rule, 31 years of age is the maximum acceptable age for a war veteran Fire Fighter applicant.

2) Respondent misapplied Section 4-106 of the Portland City Charter when it removed Complainant's name from the 1977 Fire Fighters Eligible List upon his 31st birthday. Section 4-106 did not require that Complainant's name be removed from the Fire Fighters Eligible List until his 32nd birthday.

3) Furthermore, as a statute which is clearly intended to prevail over contrary local provisions and which does not intrude upon the local community's freedom to choose its own political form, ORS 659.030 is constitutional and must prevail where in conflict with the Portland City Charter Section 4-106.

4) The Respondent's removal of Complainant's name from the 1977 Fire Fighters Eligible List due to Complainant's age constitutes a violation of that provision of ORS 659.030(1)(a) which prohibits a refusal to hire because of age.

5) Being under the age of 31 or 32 years does not constitute a bona fide occupational requirement for Fire Fighter appointees reasonably necessary to the normal operation of the Portland Fire Bureau's business.

6) ORS 659.028 prohibits consideration of the solvency of the Fire and Police Disability and Retirement Fund, which finances Fire Fighter disability benefits, as an excuse for Respondent's failure to hire Complainant.

## OPINION

This opinion will discuss Respondent's third, second, and first affirmative defenses, in that order.

### Respondent's Third Affirmative Defense

In answer to the Agency's Specific Charges, Respondent offers the affirmative defense that if enforcing Portland City Charter Section 4-106 is deemed to be a violation of ORS 659.030, then ORS 659.030 is an intervention into the structure and procedures of the City of Portland, which is unjustified by a statewide concern in safeguarding the interests of persons or entities affected by Charter Section 4-106. As such, Respondent alleges that ORS 659.030 is prohibited by the provisions in Article I, Section 21; Article IV, Section 1(5); and Article XI,

Section 2 of the Constitution of Oregon.

1) Article I, Section 21 prohibits, in part, the making of laws impairing the obligation of contracts. This section cannot be construed to operate as an excuse for employers to violate statutes designed for the public good under the general guise of freedom to contract. To assume otherwise would render all laws relating to employment null and void, which cannot be the intent of the Legislature.

2) Article IV, Section 1(5) reserves initiative and referendum powers to the qualified voters of each municipality and district as to all local, special, and municipal legislation. The manner of exercising these powers is to be provided by general laws, but cities may provide the manner of exercising those powers as to their municipal legislation.

3) Article XI, Section 2 provides, in pertinent part, that the Legislative Assembly shall not enact, amend or repeal any charter or act of incorporation for any municipality, city or town. Legal voters of every city and town are granted power to enact and amend their municipal charter subject to the Constitution and criminal laws of the State of Oregon.

The relationship between a city charter provision and a state statute, where in apparent conflict, has been well defined by the Oregon Supreme Court in the companion cases *City of La Grande v. Public Employee Retirement Board* and *City of Astoria v. Public Employee Retirement Board,* cited jointly as 281 Or 137, 576 P2d 1204, *rehearing* 284 Or 173, 586 P2d 765 (1978).

In these cases, the court held that the first issue is whether the local rule is in truth compatible with the legislative policy. In the instant matter, they are in direct conflict. The second issue is whether the state law is addressed primarily to a concern of the state with the modes of local government or to substantive social, economic or other regulatory objectives. In the instant case, the statute prohibiting discrimination in employment based upon age is clearly a substantive social objective. (*See* ORS 659.015 and 659.030.)

The court further held that although the Constitution reserved to local entities the power to establish rules for the mode and manner of local government, cities sometimes place into their charters specific actions on substantive matters that are unrelated to the city's governmental processes. Portland City Charter Section 4-106 is such a substantive provision, not a matter concerning the structure or procedure of local government.

In conclusion, the Court held that

> "a general law addressed primarily to substantive social, economic or other regulatory objectives of the state prevails over contrary policies preferred by some local governments if it is clearly intended to do so, unless the law is shown to be irreconcilable with the local community's freedom to chose its own political form . . ." (*Id.* at 156.)

ORS 659.030 is clearly intended to prevail over contrary local provisions (*see* ORS 659.015), and it does not intrude upon the local community's freedom to choose its own political form. Accordingly, ORS 659.030 is constitutional and must prevail where in conflict with local provisions such as City Charter Section 4-106. Respondent's defense fails.



**Respondent's Second Affirmative Defense**

In answer to the Agency's Specific Charges, Respondent offers the affirmative defense that the age limit provisions contained in City Charter Section 4-106 are particular, specialized and specific in their directions and must prevail over the general provisions of ORS 659.030. Respondent contends that Charter Section 4-106 must therefore be considered an exception to ORS 659.030.

Clearly the legislative policy to encourage the providing of employment to citizens of all ages (articulated in ORS 659.015) must not be deemed to be thwarted merely by the inclusion of a specific age limit in a local governmental provision. Where state and local law conflict, the issue of whether the subject matter is substantive/social or structural/procedural is the controlling issue. (*See* discussion under Third Affirmative Defense, *supra.*) Age limits for employment are substantive social matters. ORS 659.030 must prevail over the conflicting City Charter provision. Respondent's defense fails.

**Respondent's First Affirmative Defense**

In answer to the Agency's Specific Charges, Respondent contends that the age limits contained in Portland City Charter Section 4-106 constitute a bona fide occupational requirement (hereinafter referred to as a BFOR) reasonably necessary to the normal operation of Portland Fire Bureau, and that compliance therewith does not therefore constitute an unlawful employment practice under ORS 659.030.

In my Amended Final Order in *In the Matter of Clackamas County Fire District No. 1,* 1 BOLI 244 (1980), I specified a substantive test for a BFOR defense made in cases involving considerations of public safety. As applied in the instant case, this test is:

(1) Is hiring physically fit Fire Fighters reasonably necessary to the essence of the Portland Fire Bureau's business? If so,

(2) (a) Is there a factual basis for believing that all or substantially all individuals who have passed their 31st or 32nd birthdays would be unable to perform the job of Fire Fighter safely and efficiently; or

(b) Would it be impossible or highly impractical to screen applicants on an individual basis to differentiate physically qualified from physically unqualified applicants?

In the instant case, I have found that the essence of the Portland Fire Bureau's business is to provide Portland with protection from fire and that hiring physically fit persons as Fire Fighters is reasonably necessary to this objective.

Part two of the above test asks first whether Respondent had a factual basis for believing that all or substantially all of the persons past their 31st or 32nd birthdays would be unable to perform safely and efficiently the job of Fire Fighter. The answer is no. Respondent has failed to prove more than a general relationship between aging and physical deterioration; there is no substantial evidence on the record that

the 31st or 32nd birthday should be the maximum age limit for Fire Fighter appointees.

Part two of the above test provides an alternative method for the Respondent to carry its burden of proof by establishing the impossibility or great impracticality of differentiating the qualified from the unqualified by individual screening. Differentiation through an individualized testing procedure such as a thorough, regularly-conducted physical examination is possible. Respondent claims this is impractical due to monetary cost. Respondent has offered proof that in 1979, such physical examinations for all Portland Fire Bureau Fire Fighters, not just applicants, would have cost approximately 3/10ths of one percent of the Fire Bureau's entire 1979 budget. 1979 physical examinations of the nineteen persons removed for age and the other 81 persons on the 1977 Fire Fighters Eligible List who were considered and available would have cost barely 6/100ths of one percent of the 1979 Fire Bureau budget. Expending such a scant percentage of its annual budget to ascertain actual physical condition, a crucial factor in a Fire Fighter's ability to perform his or her duties, hardly seems highly impractical. In fact, given the importance of Fire Fighter fitness, such expenditures seem highly desirable. In addition, Respondent has failed to consider the positive budgetary effect of the likely savings in reduced disability payments because of fewer unfit Fire Fighters. This would offset to at least some degree the cost of medical examinations. Respondent's financial reasons for not administering routine thorough physical examinations are far less than compelling.

Respondent also contends that individual screening of applicants would be highly impractical and impair the ability of the Fire and Police Disability and Retirement Fund to meet its contractual obligations to its members. Due to the alleged correlation between the chronological age of Fire Fighters and increasing disabilities, financing the Fund, which pays Fire Fighter disability benefits, would allegedly be placed in jeopardy by the increase in disability claims which would result, Respondent claims, from hiring older Fire Fighters. Even if it were based upon correct factual assumptions, this defense would fail, as ORS 659.028 specifically prohibits consideration of an employee benefit plan as an excuse for failure to hire an individual. The Portland Fire Bureau disability plan is an employee benefit plan. Respondent argues that a disability plan is not embraced by this statute because the statute gives a few examples of employee benefit plans which do not specifically include a disability plan. However, the statute nonetheless clearly applies to all bona fide employee benefit plans; the introductory phrase "such as" which precedes the examples cited demonstrates that the examples are not meant to be an exclusive list of such plans.

Respondent's first affirmative defense fails.

**ORDER**

NOW, THEREFORE, as authorized by ORS 659.060(3) and 659.010(2) and in order to eliminate the effects of the unlawful practices found and to protect the rights of others similarly situated, Respondent is hereby ordered to:

1) Offer Tylan J. Peters appointment to the next available position as Fire Fighter with the Portland Fire Bureau, at the seniority, compensation and benefits levels he would have attained had he been appointed on the date when the next appointee ranked below him on the 1977 Fire Fighters Eligible List was appointed.

2) Within 20 days of the date of this Order, provide me with proof of the Fire Fighters Eligible List rank and date of appointment of the above-mentioned latter appointee, and specification of the compensation and benefits levels at which Complainant will be placed upon appointment.

3) Take whatever steps are necessary to ensure that each future applicant for the position of Portland Fire Bureau Fire Fighter is not disqualified solely because of his or her age.

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**In the Matter of**

**DEE WESCOTT,**

**Sole Proprietor of Wescott's Auto Restyling, Respondent.**

Case Number 32-79

Final Order of the Commissioner

Mary Wendy Roberts

Issued October 31, 1980.

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**SYNOPSIS**

Where one Complainant, who alleged he was discharged in retaliation for his safety concerns, was terminated for failure to comply with plant rules after written warnings; and where a second Complainant, who alleged he was discharged for filing a civil rights complaint, was terminated for failure to comply with plant rules, insubordination, and improper job attitude, the Commissioner held that Respondent did not violate ORS 654.062(5) or 659.030. ORS 654.062(5)(a); 659.030 (1)(d); 659.060(3).

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The above entitled matter came on regularly for hearing before Dale A. Price, designated as Presiding Officer by the Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was convened at 9:30 a.m. on November 29, 1979, in room 678 of the State Office Building, 1400 S.W. Fifth Avenue, Portland, Oregon, and continued throughout that day and a portion of the following day.

The Bureau of Labor and Industries was represented by Michael J. Tedesco, Assistant Attorney General. Respondent was present and was represented by Leonard York.

Complainants were present and testified.

Having considered the entire record, I, Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries, hereby make the following Rulings Upon Motions, Findings of Fact, Ultimate Findings of Fact, Conclusions of Law, Opinion and Order.

## RULINGS UPON MOTIONS

1) At the outset of the hearing in this matter, the Bureau of Labor and Industries, through its counsel, moved to consolidate the proceedings relating to the two Complainants, Robert Butler and Homer Campbell. This motion was granted and the consolidated proceedings enumerated as above.

2) After hearing, the Respondent moved to dismiss the Specific Charges upon various grounds. I do not rule upon this motion, as it is rendered moot by my disposition of this matter herein.

## FINDINGS OF FACT – PROCEDURAL

1) By stipulation of counsel at the outset of the hearing it was agreed that the Specific Charges relating to Complainant Campbell are amended to exclude charges under ORS chapter 654 and to include only the allegation that Complainant Campbell was discharged in retaliation for filing a civil rights complaint.

2) By stipulation of counsel it was determined at the outset of the hearing in this matter that Dee Wescott is the sole proprietor of Wescott's Auto Restyling, and that as such he is the sole proper Respondent in this matter.

3) At all times material herein, Respondent Dee Wescott was and is the owner and operator of Wescott's Auto Restyling, which does business in Oregon and employs one or more persons, and as such is an employer subject to the provisions of ORS 659.010 through 659.110 and 654.062.

4) On September 7, 1977, Complainant Butler filed a verified complaint with the Civil Rights Division of the Bureau of Labor and Industries alleging that he had been and continued to be discriminated against in connection with his employment by the Respondent. On October 18, 1977, and on or about October 31, 1977, Complainant Campbell filed verified complaints with Civil Rights Division of the Bureau of Labor and Industries alleging that he had been and continued to be discriminated against in connection with his employment by the Respondent.

5) Subsequent to the filing of the aforementioned verified complaints, the Civil Rights Division investigated the allegations in the complaints and determined that substantial evidence existed to support these allegations.

6) Thereafter, the Civil Rights Division attempted to reach a settlement of these cases through conference, conciliation and negotiation, but was unsuccessful in these efforts.

## FINDINGS OF FACT – THE MERITS

Respondent's business, Wescott's Auto Restyling, builds fiberglass car bodies and parts.

### Complainant Robert Butler

1) Complainant Butler was employed by the Respondent on April 30, 1975, and remained in Respondent's employ until August 31, 1977. During his employment by Respondent, Complainant Butler first worked as a mold builder, then temporarily as a foreman, and again later as a mold builder.



2) During June of 1977, Respondent hired Al Davis as General Manager for Respondent's business. Davis' duties included communication with employees regarding the implementation of certain plant rules and coordination of the various phases of auto body and auto part construction. Davis is now deceased.

3) During the Spring of 1977, Complainant Butler spoke with Respondent about alleged clutter in work spaces. Complainant Butler was dissatisfied with Respondent's efforts to clean up the work area, the condition of which Complainant Butler believed to pose a hazard to himself and to other workers. In June of 1977, Complainant Butler filed an anonymous complaint with the Accident Prevention Division (APD) of the Oregon Workers' Compensation Board alleging certain safety hazards at Respondent's plant. Neither Complainant Butler nor the APD revealed to the Respondent the identity of the person who filed the complaint. There is no substantial evidence that Respondent knew that Complainant Butler had filed the complaint.

4) On June 24, 1977, the APD conducted an inspection of Wescott's Auto Restyling plant. On or about August 2, 1977, the APD issued a Citation and Notice of Penalty to Respondent. Respondent appealed the fine imposed by the APD and was afforded the opportunity for a hearing before the Workers' Compensation Division.

5) On August 29, 1977, Complainant Butler petitioned the APD to intervene as a third party in Respondent's hearing. The APD received Complainant Butler's petition to intervene on or about August 30, 1977, and promptly forwarded it to the Workers' Compensation Division.

6) On or about August 30, 1977, Leslie Golding, an employee of Respondent, received a telephone call from a person attempting to notify Complainant Butler that he had been granted status as a third party in Respondent's forthcoming hearing. As Mr. Golding was unable to locate Complainant Butler, he took a written message for Complainant Butler, which he attached to the slot in an area near Respondent's time clock where Complainant Butler kept his time card. Golding believed that this call was from the APD. In later attesting to the call, Golding could only approximate its date.

7) Golding's demeanor at hearing was haughty, flippant, and impetuous. His responses to queries of counsel did not reflect the serious deliberate consideration which is requisite to reliable testimony. Therefore, Golding's testimony was afforded little weight concerning contested issues in this matter.

8) After and as a result of the APD inspection on June 24, 1977, Respondent promulgated certain plant rules, dated July 15, 1977. These rules provided, in relevant part:

> "WORK HOURS
>
> "Each employee is expected to work 40 hours per week. Each employee will work consistent hours as agreed upon between employee and management. In

general, work hours will be scheduled between 7:00 A.M. and 6:00 P.M. Each employee must punch out on the time clock for a minimum half hour lunch break.

"EMPLOYEE PRIVILEGES

"Personal projects may be done one at a time on weekends, but cannot be stored in the buildings or in the common areas in between buildings where pathways can be blocked or narrowed. Employees will not work on projects during coffee breaks or during lunch break. Employees must pay for materials used. Deadline for removal of excess personal property from the premises is July 30, 1977.

"TERMINATION OF EMPLOYMENT

"Consistent work below standard, failure to observe safety rules or cleanliness standards, chronic lateness or absenteeism, poor attitude, or any other infraction of rules can lead to termination. The first warning will be verbal, the second in writing, and the third may be termination. A worker may be terminated for any infraction of the rules following a written notice."

These rules were placed in employees' pay envelopes in mid-July, 1977. Robert Lee, a part-time employee at all times material herein, testified and I find that he received the plant rules in his pay envelope. In addition, Respondent directed his supervisor, Davis, to distribute and to read the rules to all employees on July 15, 1977. A written statement from Davis confirms and I find that he did so. The Respondent, Lee and Golding testified and I find that the same rules were posted in the employee lunchroom where Complainant Butler occasionally spent time.

It is conceivable that the rules were accidentally excluded from Complainant Butler's pay envelope; that Davis neglected to speak to Complainant Butler about the rules; or that Complainant Butler did not see the rules posted in the lunchroom, but it is highly unlikely that Complainant Butler was omitted from all three forms of notice of these rules. Accordingly, I find that Complainant Butler did receive notice of the plant rules in July of 1977.

9) Complainant Butler had several items of personal property stored on Respondent's premises during July 1977.

10) In August 1977, Davis gave Complainant Butler two verbal warnings about Complainant Butler's lack of punctuality and poor work attendance.

11) On August 12, 1977, Complainant Butler was given a written warning and a copy of the plant rules. The rules which Respondent deemed Complainant Butler to have then violated were underlined. These violations included failure to work a 40 hour week, and failure to remove personal property from the work area. Complainant Butler was invited to discuss these warnings and rule violations with Respondent, but he chose not to do so.

12) On August 26, 1977, while on vacation, Complainant Butler visited Respondent's plant and spent about two hours visiting with co-workers. Complainant Butler left the plant without removing his personal property, which was finally removed on or about September 15, 1977, several days after his termination.

13) On August 30, 1977, Respondent mailed a letter of termination to Complainant Butler. This termination letter cited Complainant Butler's failure to work a 40 hour week during the week following his written warning to do so, and his failure to remove personal property, consisting of parts for a Karmen Ghia automobile, parts for a Volkswagen automobile, parts for a Scout automobile, and other engine parts.

**Complainant Homer Campbell**

1) Complainant Campbell was employed by Respondent on March 14, 1974, and was involuntarily discharged on October 29, 1977. During his employment with Respondent, Complainant Campbell was engaged in various aspects of the construction of fiberglass auto bodies and parts thereof. Complainant Campbell was an expert craftsman in his field and performed some training tasks for inexperienced employees. He at times also performed supervisory functions.

2) During June of 1977, Respondent hired Al Davis as General Manager to supervise employees. Mr. Campbell was subordinate to Mr. Davis in the chain of command. Davis and Complainant Campbell did not get along well. They had a personality conflict and potentially overlapping responsibilities. Complainant Campbell believed his technical knowledge to be superior to Davis' and checked with Respondent before obeying certain of Davis' orders.

3) On or about September 26, 1977, Complainant Campbell presented to Respondent a letter in which he protested certain alleged safety hazards in Respondent's plant.

4) During September of 1977, Complainant Campbell sought a job description from Respondent in order to clarify his role within Respondent's work force. On or about September 29, 1977, Respondent issued said job description.

5) On September 23, 1977, Respondent issued the following written warning notice to Complainant Campbell:

"Notice of Employee Violation of Rules

"Date: September 23, 1977

"Issued to: Homer Campbell

"Issued by: Dee Wescott

"Reason for Written Notice: Failure to observe safety regulations and lack of applidation (sic) to work.

"Homer, as you know, one of the things we were cited for by the Compliance Officer in our recent APD inspection was that a bench grinder was 'not secured at its location.' The citation has been posted on the wall in the employee room for six weeks or more and has been thoroughly discussed.

"I was much surprised yesterday when you were absent and I went into the Model A assembly area, of which you are in charge, to find that the bench grinder, which we had bolted down at the time of the inspection, was no longer bolted down. I presume that either you or Mel, who was under you (sic)

supervision, removed the bolts to install a vise and neglected to bolt the grinder down. Either way, it was your responsibility. You have been using the equipment 'not secured' and you have been training Gary to use that equipment and you have done nothing to correct the situation.

"We are observing safety rules. You must correct all known violations of safety regulations in the area of which you are in charge if you can remedy the situation easily; otherwise you must notify the management.

"In addition to this, I feel that you have not been directing all of your energy to the best interests of the business during working hours.

"Dee Wescott

"Delivered by s/ A.T. Davis

"Received by _____"

6) Throughout October 1977, the friction between Complainant Campbell and Mr. Davis worsened. This had a deleterious effect upon Complainant Campbell's work. Complainant Campbell flatly refused some of Respondent Davis' orders and manifested a negative and insubordinate attitude on the job.

7) On October 10, 1977, Respondent issued the following written warning notice to Complainant.

"WRITTEN NOTICE OF UNSATISFACTORY WORK

"Date: October 10, 1977

"Issued to: Homer Campbell

"Issued by: Dee Wescott

"Homer:

"I have just spent the weekend sorting parts – throwing away parts that have been laid up with putty that will not cure, parts with air bubbles in them, parts that have incomplete edges, dry lay-up, and parts that either have not been trimmed or have been trimmed so far they cannot be used and have to be thrown away.*

"You have made no secret of the resentment you have towards Al Davis and Karl Wescott and your lack of cooperation with them is apparent.

"Some weeks ago you were put in charge of instructing new people as they came in. The evidence of poor parts shows that you have not done an adequate job in this area and in one specific incident you refused to show a new employee a procedure he was instructed by me to learn from you.

"I feel that your public criticizing of the posted rules and regulations, your attitude toward Karl Wescott and Al Davis, your lack of positive drive towards management's goals, long breaks, and personal phone calls reflects an attitude that will no longer be tolerated.

"If you cannot approach your job as working supervisor with enthusiasm and if during the next week we do not get good quality and quantity of parts from the laminating crew, I will replace you with someone who can produce results I want.

*Of four grill shells built last week only one was usable, a 75% throwaway rate. There was one deck lid inner with no edges, two door outer panels with air bubbles, one door panel with uncured putty, one deck lid outer with bad putty and air bubbles, plus many other bad parts - just last week.

"Delivered by: _____

"I hereby acknowledge receipt of the written notice, not necessarily the agreement with the content.

"s/Homer L. Campbell

"(Employee Signature)"

8) On October 29, 1977, Respondent issued the following termination notice to Complainant.

"Mr. Homer L. Campbell

"4335 NE 73rd

"Portland, Oregon 97218

"Re: Termination Notice: Effective October 29, 5 p.m.

"Dear Mr. Campbell:

"Please be advised that your employment with Wescott's Auto Restyling is hereby terminated as of the time and date hereinabove referenced.

"Briefly stated, the reasons for your termination are as follows:

"1. Insubordination, in that you failed to perform an assigned task as directed by management.

"2. Improper Job Attitude, that you have and are displaying a hostile attitude toward management on each occasion of constructive direction.

"3. Flagrant violation and abuse of the Employee Rules and Regulations on numerous occasions.

"4. Entering false information on company records.

"We are aware that you have, presently pending before the Oregon Bureau of Labor, allegations of discrimination, and we further wish to inform you that we have informed that appropriate Division that we are taking this action.

"In the event you desire to discuss any one of the hereinabove reasons with myself, please let me know and I shall schedule a time and place convenient to discuss the reasons in greater detail. Also please recall that you owe us certain amounts of money for personal obligations to me, and we shall expect you to continue to honor that commitment.

"Sincerely yours,

"Dee E. Wescott, Owner

"Wescott's Auto Restyling"

9) Complainant Campbell filed his first complaint with the Bureau of Labor and Industries on October 18, 1977, after his second written warning notice and prior to his termination. This complaint alleged that Respondent had retaliated against Complainant Campbell because he had opposed safety hazards. It is not disputed that Respondent knew that Complainant Campbell had filed this complaint when Respondent discharged Mr. Campbell.

10) Complainant Campbell was discharged, after adequate notice from Respondent, for his continuing violations of plant rules, insubordination and poor job attitude, and not due to his filing a civil rights complaint. I make no

finding as to whether Complainant Campbell falsified company records as alleged in his termination notice.

## ULTIMATE FINDINGS OF FACT

### Robert Butler

Complainant Butler was a competent employee of Respondent who observed certain alleged safety hazards at Respondent's plant. Complainant Butler was dissatisfied with Respondent's efforts to remedy the alleged safety hazards. He filed a report with the APD of the Oregon Workers' Compensation Board. APD inspected Respondent's plant and found certain safety violations. After the inspection by APD, Respondent published plant rules intended, in part, to remove the safety hazards noted in the aforementioned inspection. Complainant Butler received notice of these rules. Even after Complainant Butler received two written notices of his violations of the plant rules, he failed to comply with them. Complainant Butler was then discharged solely for his failure to comply with plant rules and not due to his filing a complaint with the APD of the Workers' Compensation Board.

### Homer Campbell

Complainant Campbell was a skilled craftsman in Respondent's employ, who performed certain supervisory and training functions prior to Al Davis' appointment as General Manager. There was considerable friction between Complainant Campbell and Davis as a consequence of personality conflict, ill-defined roles and the greater technical skill of Complainant Campbell juxtaposed against the greater authority of Davis. This friction resulted in Complainant Campbell's refusal to adhere to the chain of command. He frequently went around Davis to speak directly to Respondent. In addition Complainant Campbell flatly refused certain orders given by Davis and manifested a negative and insubordinate attitude on the job. Complainant Campbell was discharged solely for violations of the plant rules, insubordination, and improper job attitude, and not due to his filing a civil rights complaint.

## CONCLUSIONS OF LAW

1) As sole proprietor of Wescott's Auto Restyling, Dee Wescott is the sole proper Respondent in this matter.

2) Respondent's discharge of Complainant Butler for the reasons found herein does not constitute a violation of ORS 654.062(5).

3) Respondent's discharge of Complainant Campbell for the reasons found herein does not constitute a violation of ORS 659.030.

## OPINION

### Robert Butler

Complainant Butler testified that he did not receive a copy of the Respondent's plant rules when they were promulgated in July 1977; that he did not see the plant rules posted in Respondent's employee lunch room; that General Manager Davis did not read the plant rules to him; that he did not receive verbal warning of his violations of the said rules; and that he did not receive one written warning of his violations of the plant rules given him on August 12, 1977.

Davis, now deceased, provided written statements regarding Complainant Butler's employment which were derived from his observation of



Complainant Butler while Davis was General Manager for Respondent. In this statement, Davis mentioned his first visit to Complainant Butler at his work location and stated that he then conveyed to Complainant Butler the new "work policies" which, it is not disputed, were the aforementioned plant rules. Davis, Respondent Wescott, and the other plant employees who testified at hearing uniformly stated that plant rules were placed in the July pay envelopes of Respondent's employees. Davis' written statement goes on to describe Complainant Butler as "one of the most negligent of people in regard to hours of work performed and ignoring the starting time daily." Davis' statement described two verbal warnings given by him to Complainant Butler regarding Complainant Butler's work schedule and attendance. Davis' statement describes Complainant Butler's replies as rude and vulgar and indicative of no intent to permanently correct his work behavior to conform to the plant rules. In general, Complainant Butler would have us believe that Respondent's well corroborated efforts to give him notice of the plant rules, through six separate processes, did not accomplish the goal; that he received no notice of the said rules; and that Respondent's citing of his alleged violations of said rules in his termination letter was a mere pretextual guise for Respondent's alleged true motive of revenge for Complainant Butler's filing a complaint of alleged safety hazards.

It is conceivable that one or two of Respondent's efforts to give Complainant Butler notice of the plant rules might have gone awry. However, in the context of testimony of fellow employees and the written statement of Davis, it is extremely unlikely that Complainant Butler could have been excluded from all six corroborated efforts to give him notice of the plant rules in July and early August of 1977. I must conclude that Complainant Butler was, at times material herein, aware of the plant rules.

Complainant Butler testified that Davis never gave him corrective suggestions or warnings. This contradicts Davis' written statement. Complainant Butler testified that he received no plant rules or safety rules nor was he told of their existence. This is contrary to the overwhelming weight of evidence. Complainant Butler testified that Respondent never told him to remove his personal projects from the premises between June and August of 1977, yet Respondent and other witnesses testified to the contrary. In general Complainant Butler's testimony has been impeached upon several key grounds, and I must deem his testimony self-serving and not to be afforded great weight in the resolution of matters here at issue.

Complainant Butler's letter of termination, dated August 30, 1977, cited several grounds for his dismissal, including failure to work 40 hours per week and failure to remove personal projects from around buildings. These actions constitute violations of Respondent's plant rules and constitute reasonable cause for dismissing an employee who remains in violation after repeated warnings. Complainant Butler does not dispute his failure to work a 40 hour week, nor does he deny that he had personal projects stored in and around the plant.

Complainant Butler was in receipt of the plant rules at times material herein and was aware of the rule prohibiting the storage of personal projects in the buildings or in the common areas between the buildings where pathways could be blocked or narrowed. Complainant Butler made no attempt to comply with the rule regarding work hours nor did he attempt to comply with the rule regulating personal projects. In view of the above, I must conclude that Respondent's stated reasons for the termination of Complainant Butler were not pretextual.

I next address the issue of Respondent's state of mind at times material herein. Although Respondent did have some good cause to discharge Complainant Butler, if it can be established that Respondent knew that Complainant Butler had filed the aforementioned safety complaint and that such knowledge played a key role in Respondent's decision to discharge Complainant Butler, then Respondent has committed an unlawful act. ORS 654.062(5)(a) states that:

> "No person shall bar or discharge from employment or otherwise discriminate against any employee or prospective employee because such employee opposed any practice forbidden by ORS 654.001 through ORS 654.295, made any complaint or instituted or caused to be instituted any proceeding under or regarding ORS 654.001 through ORS 654.295."

A normal construction of this statute must deem the word "because" to demand knowledge and action upon that knowledge with retaliatory intent. Intent, being a state of mind, is rarely susceptible of direct proof, but must be inferred from the facts of a given case. The Agency relies upon the testimony of Respondent's former employee, Leslie Golding, to establish that Respondent knew of Complainant Butler's petition for status as a third party intervenor in Respondent's appeal from the Accident Prevention Division findings and to establish that Respondent's son, Karl Wescott, knew that Complainant Butler had filed the original complaint with the APD. Golding was involuntarily discharged by Respondent. Golding's demeanor and testimony suggested an absence of the type of deliberate rational analysis upon which reasonable persons rely in the conduct of their ordinary affairs. While awaiting his turn to testify, Mr. Golding carried on a running conversation in whispered tones with others in the audience at hearing. While testifying, Golding exhibited a brash, impulsive demeanor which was channeled, with some difficulty, into more or less direct responses to questions of counsel. When questioned on cross-examination, Golding altered his testimony regarding the location in which he placed a certain message for Complainant Butler. An exhibit evidences an interview with former employee Joe Vanderburg who, in response to heavily leading questions from a civil rights investigator, stated that Respondent knew that Complainant Butler had filed the APD complaint. Vanderburg offered no explanation for why he believed that Respondent knew, which renders his statement a mere opinion in response to a leading question. I cannot afford any substantial weight to the testimony of Golding or Vanderburg in the resolution of the issues here at hand.



I cannot permit the close proximity in time of the events discussed herein to stand alone as sufficient evidence of a causal connection between the filing by Complainant Butler of a safety complaint and his termination from Respondent's employ. The evidence offered by the Agency is entirely circumstantial and without sufficient corroboration to permit the inference that Complainants' filing of a safety complaint was a key factor, or even a factor, in Respondent's decision to discharge him. The Agency has failed to carry its burden of proof in the matter of Complainant Butler.

**Homer Campbell**

The Agency case regarding Complainant Campbell is predicated upon related, but different grounds. The Amended Specific Charges regarding Complainant Campbell allege that Respondent violated ORS 659.030(1)(d) which states:

> "(1) For the purposes of ORS 659.010 through ORS 659.110 and ORS 659.400 through ORS 659.435, it is an unlawful employment practice:
>
> "* * *
>
> "d) for an employer . . . to discharge, expel or otherwise discriminate against any person because he has opposed any practice forbidden by this section or because he has filed a complaint, testified or assisted in any proceeding under ORS 659.010 through ORS 659.110 or ORS 659.400 through ORS 659.435 or has attempted to do so."

It is not disputed that Respondent knew that Complainant Campbell had filed a complaint with the Civil Rights Division of the Bureau of Labor and Industries. At issue here is whether this knowledge, and an intent to retaliate for Complainant Campbell's filing said complaint, played a key role in Respondent's decision to discharge Complainant Campbell.

Complainant Campbell admittedly received notice of the plant rules promulgated in July of 1977 and admittedly received certain written warnings of rules which Respondent deemed Complainant Campbell to be violating. These same alleged rule violations were the stated reasons for Complainant Campbell's discharge. In an effort to determine whether Complainant Campbell was in fact discharged in retaliation for his filing of a civil rights complaint, I must consider whether the reasons stated for his termination were pretextual. A consideration of the chronology of events in 1977 will facilitate analysis of this question. In June of 1977, Respondent hired Al Davis as General Manager. Davis and Complainant Campbell experienced immediate and considerable conflict based upon diverse personalities, disparate abilities and ill-defined work assignments. Complainant Campbell did not readily accept Davis' authority, and at times ignored Davis' orders or "went over" Davis to consult Respondent about a given issue. On September 23, 1977, Respondent issued to Complainant Campbell a written "Notice of Employee Violation of Rules" citing Complainant Campbell's failure to observe safety regulations and lack of application to his work. On September

26, 1977, Complainant Campbell presented a letter to Respondent in which he complained of certain alleged safety hazards in the plant. Late in September 1977, Complainant Campbell sought and obtained a job description from Respondent, but the friction between Complainant Campbell and Davis was not eased by the issuance of said description. This friction had a deleterious effect on Complainant Campbell's work. On October 10, 1977, Respondent issued a second written warning notice of unsatisfactory work to Complainant Campbell citing poor work quality, resentment toward Davis, and a poor work attitude. This warning contained a threat to replace Complainant Campbell if he did not improve. On October 18, 1977, Complainant Campbell filed a complaint with the Civil Rights Division of the Bureau of Labor and Industries alleging that he had been retaliated against for opposing safety hazards. On October 29, 1977, Respondent issued a written "termination notice" to Complainant Campbell citing insubordination, improper job attitude, violations of company rules, and falsification of company records as reasons for the discharge. On October 31, 1977, Complainant Campbell filed a second complaint with the Civil Rights Division alleging that he had been discharged because of his filing the first such complaint on October 18, 1977.

It is clear that Complainant Campbell's problems adjusting to the presence of Al Davis as General Manager were evident to Respondent in September of 1977. The friction between Davis and Complainant Campbell was a primary cause of the increased employment problems which Complainant Campbell experienced during September and October of 1977. It is significant that Complainant Campbell had received a written warning on September 23, 1977, three days prior to his submission of a letter of complaint about alleged safety hazards. Complainant Campbell's reluctance to accept Davis' authority could clearly be deemed insubordination or improper job attitude.

A fair consideration of this complex fact pattern requires that I avoid the temptation to infer that a chronological sequence of events can establish a causal relation between those events without substantial corroborating evidence. Complainant Campbell filed a civil rights complaint on October 18, 1977, and received notice of his involuntary discharge on October 29, 1977. This sequence of events does not, by itself, establish that Complainant Campbell was fired because he filed the complaint. Such circumstantial evidence is particularly inadequate in a case such as this where there was substantial, undisputed and well-documented dissatisfaction with several aspects of Complainant Campbell's work at a time prior to Complainant Campbell's filing his civil rights complaint. In the absence of direct substantial evidence to support a circumstantial inference offered by a bare sequence of events, I cannot find that Respondent's reasons for discharging Complainant Campbell were pretextual. The Agency has failed to carry its burden of proof, and the allegations contained in its Amended Specific Charges have not been substantiated by the evidence.



## ORDER

NOW, THEREFORE, the Respondent not having been found to have engaged in unlawful practices charged, the Specific Charges and the Complaints against the Respondent in this matter are hereby dismissed according to the provisions of ORS 659.060(3)

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**In the Matter of**
**Bureau of Police of the**
**CITY OF PORTLAND**
**and the City of Portland Civil Service Board, Respondents.**

Case Numbers 57-78 and 58-78
Final Order of the Commissioner
Mary Wendy Roberts
Issued December 4, 1980.

## SYNOPSIS

The Commissioner found that two female Complainants were victims of Respondent public employer's unlawful employment practices of limiting police officer appointments through a sex segregated work force and of having a minimum height requirement which disparately impacted females. The Commissioner found one was a victim of Respondent's practice of limiting police officer appointments to under 30 years of age, interpreting a statutory exception against Respondent, and rejected Respondent's defenses involving laches, misnaming of Respondent, late notice, statutory conflict, and failure to exhaust administrative remedy. Both Complainants were Police Bureau employees who experienced frustration and mental suffering from repeated rejection for police officer positions for which they were qualified. The Commissioner awarded mental suffering of $500 to one and $1,000 to the other, and awarded both the difference between their actual earnings and the earnings they would have made as police officers if they had not been unlawfully rejected. ORS 659.010(2), (6) and (12); 659.026(1), (2), (3), and (4)(f); former 659.030(1) and 659.030(1)(a); 659.050(1); 659.060(1) and (3).

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The above-entitled matter came on regularly for hearing before Richard D. Albright, designated as Presiding Officer in this matter by the Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was convened May 7, 1979, at 9:30 a.m. in the Commission Room of the Department of Fish and Wildlife Building, 506 S.W. Mill Street, Portland, Oregon. The hearing concluded on the afternoon of May 8, 1979.

The Bureau of Labor and Industries was represented by Michael J. Tedesco, Assistant Attorney General. Respondents the Bureau of Police of the City of Portland and the City of Portland Civil Service Board were represented by Richard A. Braman, Senior Deputy City Attorney. The Complainants were present and testified. Also present was Etta Creech, Hearings Clerk.

Having fully considered the entire record in this matter, I, Mary Wendy Roberts, Commissioner of the Bureau

of Labor and Industries, hereby make the following Findings of Fact, Ultimate Findings of Fact, Conclusions of Law, Opinion and Order.

NOTE: This matter was originally set as two separate cases, but all parties agreed that they would be consolidated into one hearing and one Order due to the similarities in the two complaints. The areas where the cases may differ are identified by naming the particular Complainant involved.

## FINDINGS OF FACT – PROCEDURAL

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

2) On or about January 19, 1973, Robin Day Magnuson filed a verified complaint with the Civil Rights Division of the Bureau of Labor and Industries alleging that she had been discriminated against in connection with her employment because of her sex.

3) On or about January 15, 1973, Ingrid M. Lewis filed a verified complaint with the Civil Rights Division of the Bureau of Labor and Industries alleging that she had been discriminated against in connection with her employment because of her sex.

4) Following the filing of the aforementioned verified complaints, the Civil Rights Division investigated the allegations contained therein and determined that substantial evidence existed in support of each of the Complainant's allegations.

5) Thereafter, the Civil Rights Division attempted to reach a settlement of these cases through conference, conciliation and persuasion but was unsuccessful in these efforts.

6) Respondent Civil Service Board was not specifically named as a respondent in these matters prior to the issuing of the Specific Charges herein. Respondent Civil Service Board has not shown that it was prejudiced by this fact or that it took reasonable steps to prevent the prejudice it alleges.

7) Respondents' counsel received the final Specific Charges concerning Complainant Magnuson (dated March 19, 1979) six days before hearing. However, they were sent to him by restricted certified mail over one month before hearing. Respondents' counsel was not at his office when three postal deliveries were attempted, nor did he subsequently claim the Charges at the post office. When the Charges were returned unclaimed to the Department of Justice, they were immediately hand-delivered to Respondents' counsel.

8) Respondents made no effort to locate Nancy Bennett, Director of the Public Employment Program during Complainants' employment as policewoman aides. Respondents have not shown that their case was prejudiced by her absence.

9) Both parties stipulated at hearing that there were a number of people in the Respondent Bureau of Police who were helpful to Complainants in their attempts to become police officers.

## FINDINGS OF FACT – THE MERITS

1) Respondent City of Portland Civil Service Board promulgates rules and policy governing employment of persons by the City of Portland. It is responsible for recruitment, classification and examination work concerning applicants for city employment. It is formally independent of the Portland City Council, which administers the City of Portland and is responsible for Respondent Bureau of Police.



The Personnel Director for the City of Portland and the Secretary of the Civil Service Board are the same person. That person works for both the Civil Service Board and the City of Portland, overseeing the functions of the Board's office and the city's Bureau of Personnel, which are housed together. Richard Braman of the Office of the City Attorney represents both Respondents.

2) Until January 1, 1973, there were two sworn police officer classifications within Respondent Bureau of Police: one entitled "policewoman" and one entitled "police patrolman". The policewoman classification was for females only; the police patrolman classification was for males only.

The work of policewomen and police patrolmen was substantially the same, except that policewomen worked almost solely with women and children. Requirements for the two classifications varied in that policewoman applicants had to be between the ages of 21 and 35, at least 5'2" tall, and graduates of a four-year college with a social science major or equivalent experience and education, while police patrolman applicants had to be between the ages of 21 and 30, (unless veterans), at least 5'9" tall, and have completed 90 quarter hours of a liberal arts college curriculum or complete two years of such within the first four years of police work. Policewoman and police patrolman pay scales were the same.

At times material herein, there were approximately 650 to 700 total sworn police officers working for Respondent Bureau of Police, of which 20 to 30 were policewomen.

3) In order to be appointed a police patrolman or policewoman, an applicant had to first pass an examination. For both classifications, a written test was weighted as 60% of the examination and an oral interview was weighted at 40%. The subject matter of the examinations was described in pertinent announcements as, for police patrolmen, "reasoning ability, general intelligence, ability to understand written material and aptitude for police work" and, for policewomen, the same as police patrolmen plus "knowledge of problems, causes, and treatment of social maladjustments of women and children in urban centers; ability to effectively express ideas orally (and in writing) . . . judgment, tact, emotional maturity. . ." The police patrolman examination also had a qualifying physical agility test.

Applicants who passed these examinations were ranked by their scores thereon and placed in order of that rank on the classification's Eligible List. When a vacancy occurred and all persons ranked above an applicant on the classification's Eligible List had been offered appointment or disqualified, that applicant was given medical and psychological tests and a background check and, if found suitable, appointed as a sworn officer of the pertinent classification.

4) On December 31, 1970, Respondent Civil Service Board closed

the policewoman examination and froze the Eligible List for the classification, as the list had enough applicants on it to fill anticipated vacancies. The examination remained closed and the list frozen until January 1, 1973, when the classification was abolished.

5) The police patrolman examination was open, and persons applied for and were appointed as police patrolmen during this time. These persons were all male.

6) Complainants Magnuson and Lewis are female.

7) In August of 1971, Complainant Magnuson went to Captain Elizabeth Mumford, head of the Women's Protective Division, the subdivision of Respondent Bureau of Police where most policewomen were assigned, to inquire about obtaining police officer work. Complainant Magnuson had been informed by the Civil Service Office that the policewoman examination was closed and that she could not take the police patrolman examination because of her sex.

8) At the suggestion of Captain Mumford, Complainant Magnuson decided to pursue her interest in a law enforcement career by working toward a Master's Degree under the federal Law Enforcement Assistance Program. Her degree program, which she completed in 1973, included considerable course work in the criminal justice field.

9) On December 14, 1971, Complainant Magnuson started work as a policewoman aide assigned to the Women's Protective Division. Her position was funded by the Public Employment Program (PEP), a federal program designed to further careers through training and eventual placement in permanent positions. Upon becoming a policewoman aide, Complainant Magnuson was advised by various police personnel that with the training and experience gained in her PEP position, she should be able to become a sworn officer. She met all of the requirements for policewoman applicants cited in Finding of Fact 2 above, and possessed all other ascertainable qualifications listed on the policewoman examination notice.

10) Complainant Magnuson worked as a policewoman (later police officer) aide until mid-1975. During this time, she served warrants, apprehended juveniles, conducted child abuse investigations alone and other investigations with a police officer, testified in court, worked on the placement of children in shelter homes, did interviews, wrote reports, and assisted other divisions in the Respondent Police Bureau when a woman was requested. Her work was like that of a sworn officer except that she did not make arrests, use or carry a weapon, or do undercover work. Her work was basically the same as that of a policewoman.

11) Complainant Magnuson's performance as a policewoman (and police officer) aide was excellent.

12) Employment as a policewoman (and police officer) aide offered no job security, as the federal funding involved was unstable. Complainant Magnuson was repeatedly notified of termination due pending expiration of funds for her position and had to repeatedly press for extension of her position.



13) Funding for Complainant Magnuson's police officer aide position terminated on July 1, 1975, at which time she was appointed as a staff assistant, another PEP position.

14) From August of 1971 until January 1, 1973, Complainant Magnuson tried continuously and vigorously to become a sworn police officer. She asked the Civil Service Office, the Personnel Bureau, and her supervisor numerous times when the policewoman examination would be open. She was assured that it would be open in a few months.

15) On January 1, 1973, the policewoman and police patrol classifications expired and were replaced by the police officer classification. Requirements for this classification were that applicants be between the ages of 21 and 30 (unless military veterans), at least 5'9" tall, and possess the education which had been required of police patrolman applicants. There was no gender requirement. The examination for this classification was described in the pertinent announcement in the same language as the examination for police patrolman had been described, including a physical agility test.

16) Complainant Magnuson was shorter than the minimum height requirement of 5'9" and therefore was not allowed to apply for the police officer position. (She also exceeded the maximum age.)

17) Between 1971 and 1974, 96.6 percent of the adult female population in the United States between ages 18 and 24 was under 5'9" in height, and 97.7 percent of the adult female population in the United States between ages 25 and 34 was under 5'9" in height. Both Complainants were between the ages of 18 and 34 between 1971 and 1974. Between 1971 and 1974, 39.0 percent of the adult male population in the United States between ages 18 and 24 was under 5'9" in height, and 40.1 percent of the adult male population in the United States between ages 25 and 34 was under 5'9" in height.

18) A person's height is not a reliable indicator of capability to perform safely and efficiently as a police officer.

19) Some of Respondent Bureau of Police's command officers strongly supported the minimum height requirement.

20) On August 6, 1973, the Police Officer announcement was revised, pursuant to earlier action of Respondent Civil Service Board, to remove the 5'9" minimum height requirement.

21) Immediately thereafter, Complainant tried to apply for work as a Police Officer. She was not allowed to apply because she had passed her 30th birthday (and was not a military veteran). Complainant Magnuson was born on November 8, 1942.

22) Age is not a reliable indicator of an individual's capacity to perform. The relationship between age and capacity to perform varies widely from individual to individual.

23) Thereafter, Complainant Magnuson continued her attempts to apply for the position of police officer.

24) On April 16, 1974, Respondent Civil Service Board, pursuant to [illegible] quests from Complainant M[illegible] a and various Police Bure[illegible] ply agreed to waive the age [illegible] for which barred Complainant [illegible]

from applying for the position of police officer.

25) Immediately thereafter, Complainant Magnuson applied for police officer work. She took the police officer examination, which she passed. (She passed the physical agility portion on the second of the two attempts routinely made.) Complainant Magnuson was then placed on the Police Officer Eligible List and, pursuant to her ranking thereon, was appointed as a Police Officer on October 30, 1975. She continued to work as a police officer for Respondent Bureau of Police as of the date of hearing in this matter.

26) Between August 1971, when she began her efforts to become a sworn police officer, and April 1974, when the age requirement was waived for her, Complainant Magnuson experienced continuous frustration because she expended so much time and effort in obtaining education and training for police officer work and in trying to apply therefor, only to be thwarted by, first of all, a closed category defined by sex, then a height requirement, and finally an age requirement. She also experienced considerable mental distress at the unstable nature of her aide position and the constant specter of unemployment.

27) Complainant Lewis received her Bachelor of Arts degree in political science and criminology in 1971. Thereafter, she attempted to apply for policewoman work with Respondent Bureau of Police. She was told at the office of Respondent Civil Service Board that the policewoman examination was closed.

28) On December 14, 1971, Complainant Lewis started work as a policewoman aide assigned to the Women's Protective Division of Respondent Bureau of Police. Her position was the same as that of Complainant Magnuson and was also funded through the Public Employment Program.

29) Complainant Lewis met all of the requirements for policewoman applicants cited in Finding of Fact 2 above, and possessed all other ascertainable qualifications listed on the policewoman examination announcement.

30) Complainant Lewis performed the duties described in Finding of Fact 10 above. Her work was basically the same as that of a policewoman and she performed it excellently.

31) From the start of her employment as a policewoman aide, Complainant Lewis expressed to Captain Mumford and others in Respondent Bureau of Police her strong desire to become a policewoman. She had become a policewoman aide in order to obtain training which would put her in a better position to become a sworn officer. While she was a policewoman aide, Complainant Lewis made repeated inquiries about applying for the policewoman examination to Respondent Police Bureau and the office of the Civil Service Board, but she was never allowed to do so because the examination remained closed.

32) Complainant Lewis is less than 5'9" tall.

33) In January of 1973, when the policewoman classification expired and was replaced by the police officer classification, Complainant Lewis went to the Civil Service office to apply for the position of police officer and was told that she did not meet the 5'9" height requirement and therefore could not apply.



34) Complainant Lewis did not formally challenge the minimum height requirement before the Civil Service Board. There is no evidence that she knew or should have known of any formal procedure which may have existed for formal review by the Civil Service Board of the application of its rules.

35) The Civil Service Board had not ever waived the minimum height requirement for police officers.

36) Complainant Lewis continued to attempt to apply for the position of police officer. Becoming increasingly frustrated and discouraged, however, she also began to look for law enforcement work elsewhere.

37) When the police officer announcement deleting the minimum height requirement was issued on August 6, 1973, Complainant Lewis had already been offered what she perceived to be a better criminal justice position elsewhere. She accepted that position rather than applying for police officer work with Respondent Bureau of Police because she had become discouraged at the prospects of ever actually being appointed as a police officer with Respondent Bureau of Police and because of the immediate opportunities offered by the alternate position.

38) Complainant Lewis terminated her employment as a police officer aide with Respondent Bureau of Police and began work in the criminal justice field with the Clackamas County Corrections Division on September 17, 1973.

39) Between December 1971, when she began work as a policewoman aide, and September 17, 1973, when she terminated her employment with Respondent Bureau of Police, Complainant Lewis experienced continuous frustration because she expended so much time and effort in obtaining education and training for police officer work and in trying to take the necessary examination, only to be thwarted by first her gender and then her height. She was also distressed at the lack of job security in her policewoman aide work.

## ULTIMATE FINDINGS OF FACT

1) Until January 1, 1973, Respondent Civil Service Board maintained separate classifications for male and female sworn police officers for Respondent Bureau of Police. Male officers were classified as police patrolmen and female officers were classified as policewomen. Requirements varied for each position, but the pay scales for each were the same. The work of each position was substantially the same, although policewomen worked primarily with women and children.

2) Between August 1971 and January 1, 1973, Complainant Magnuson, a female, attempted repeatedly to apply for the position of policewoman for Respondent Bureau of Police but was barred from doing so by Respondent Civil Service Board.

3) Between December 1971 and January 1, 1973, Complainant Lewis, a female, attempted repeatedly to apply for the position of policewoman for

Respondent Bureau of Police but was barred from doing so by Respondent Civil Service Board.

4) Respondent Civil Service Board did not accept applications for policewoman during the above-mentioned time period because it believed that it had enough applications to meet anticipated demand for policewoman appointees. It did accept applications for police policeman.

5) During the above-mentioned time period, the number of total slots for policewomen for Respondent Bureau of Police was severely limited, with vastly greater police patrolman slots than policewoman slots.

6) Complainants Magnuson and Lewis were both qualified to become policewomen for Respondent Bureau of Police on December 14, 1971, and during their employment as policewoman aides for Respondent Bureau of Police.

7) Between January 1, 1973, and August 6, 1973, both Complainants Magnuson and Lewis attempted to apply for the position of police officer for Respondent Bureau of Police but were barred from doing so by Respondent Civil Service Board because they were less than 5'9" tall, the minimum height for police officer applicants and because Complainant Magnuson exceeded the maximum age for police officer applicants.

8) The above-mentioned minimum height requirement had a grossly disparate impact upon female applicants for the position of police officer.

9) Between August 6, 1973, and April 14, 1974, Complainant Magnuson attempted repeatedly to apply for the position of police officer for Respondent Bureau of Police, but was barred from doing so by Respondent Civil Service Board because she had passed her thirtieth birthday and therefore exceeded the maximum age for police officer applicants.

10) Height or chronological age is a crude measure of the fitness of a particular individual to perform the duties of a police officer safely and efficiently.

11) There is no factual basis for believing that all or substantially all individuals who are under 5'9" in height or past their thirtieth birthday would be unable to perform the job of police officer safely and efficiently.

12) No factual basis was presented for believing that screening police officer applicants on an individual basis to differentiate between qualified and unqualified applicants, rather than barring persons who do not meet the given minimum height or maximum age requirements, would be either impossible or highly impractical.

13) If Respondents committed the unlawful acts charged, Complainants were deprived thereby of the difference between what they have each earned in the employ of Respondent Bureau of Police and what they would have earned had they been appointed as policewomen on December 14, 1971, the date they began work as policewoman aides for Respondent Bureau of Police. Complainant Magnuson has also been deprived of seniority and benefit levels which she would have accrued had she been appointed policewoman on December 14, 1971.

14) Complainant Magnuson suffered continuous and marked frustration between August 1971, when she began attempting to apply for policewoman work, and April 16, 1974, when the final barrier to her application was waived by Respondent Civil Service Board, because of Respondents' barring her from applying for employment as a sworn officer due to first her sex and then her age.

15) Complainant Lewis suffered continuous and marked frustration between December 1971 and August 1973 due to Respondents' barring her from applying for employment as a sworn officer because of her sex.

## CONCLUSIONS OF LAW

### Procedural

1) The City of Portland Civil Service Board is properly named a respondent herein.

2) ORS 659.026 and 659.030 were not preempted by provisions of the Portland City Charter during times material herein.

3) The Amended Specific Charges dated March 19, 1979, concerning the complaint of Robin Magnuson were properly considered served upon Respondents when mailed to Respondents' counsel by the Department of Justice.

4) Because the Administrative Determinations from the Agency's investigations are relevant to whether the Civil Rights Division determined that substantial evidence existed in support of the Complainants' allegations of discrimination, whether efforts to conciliate were made, and to Respondents' affirmative defense of laches, they are admitted into the record in this matter for the limited purposes of the above-stated matters, but not for the purpose of proving the truth of matters asserted in them.

5) The Commissioner of the Bureau of Labor and Industries has the authority to award monetary damages to the Complainants under the facts and circumstances of this record, and the sums of money awarded as damages in the order below are appropriate awards.

### The Merits

1) Respondent Civil Service Board committed an unlawful employment practice in violation of ORS 659.030 (1)(a) by maintaining separate sex segregated categories for sworn Bureau of Police officers in which male and female applicants were treated unequally, which barred Complainants Magnuson and Lewis from employment because of their sex.

2) Respondent Civil Service Board committed an unlawful employment practice in violation of ORS 659.030 (1)(a) by maintaining a minimum height requirement for sworn Bureau of Police officer applicants which had a disparate impact upon females and thereby barred Complainants from such employment because of their sex.

3) Being at least 5'9" tall does not constitute a bona fide occupational requirement for sworn Bureau of Police officer applicants reasonably necessary to the normal operation of the business of the Bureau of Police.

4) Respondent Civil Service Board committed an unlawful employment practice in violation of ORS 659.026 between October 4, 1973, and April 16, 1974, by maintaining a maximum age requirement for sworn Bureau of Police officer applicants, which barred

Complainant Magnuson from such employment because she had passed her thirtieth birthday.

5) Being under the age of 30 years does not constitute a bona fide occupational requirement for sworn Bureau of Police officer applicants reasonably necessary to the normal operation of the business of the Bureau of Police.

## OPINION

### I.

This opinion first considers the defenses Respondents made to the Specific Charges.

**A.** Respondents argue that the Agency has not proven that Complainant Magnuson was qualified to be a sworn officer before she passed the police officer examination. The only relevant question here is whether she was qualified in 1971, when she was first unlawfully barred from applying. The fact that Complainant Magnuson then met all ascertainable requirements for policewoman applicants and began her exemplary performance in work which was in most respects the same as that of a policewoman allows the inference that she was qualified to become a policewoman on December 14, 1971. That her commanding officer opined at hearing that she was "very well qualified" to become a sworn officer strengthens this inference. Respondents have offered in rebuttal only evidence that Complainant Magnuson had to take the physical agility portion of the police officer examination twice in 1974 in order to pass it. This has no bearing on whether she was qualified to become a policewoman in 1971, when there was no physical agility test for that position.

Similarly, Respondents argue that the Agency has not proven that Complainant Lewis was qualified for the job of policewoman. Again, the only relevant question here is whether she was qualified in 1971, when she was first unlawfully barred from applying. The fact that Complainant Lewis then met all ascertainable requirements for policewoman applicants and began her exemplary performance in work which was in most respects the same as that of a policewoman allows the inference that she too was qualified to become a policewoman on December 14, 1971. That her commanding officer opined at hearing that she too was "very well qualified" to become a sworn officer strengthens this inference. Respondents have offered in rebuttal only the vaguest of evidence that Complainant Lewis may have had an eye problem which may have prevented her from passing the necessary examination.

The Agency has shown as much concerning the qualifications of both Complainants as it can reasonably be expected to show under the circumstances: that each Complainant had a great interest in police officer work, each was bright, and each performed well in work which was very similar to sworn officer work. Respondents cannot successfully assert that the Agency must prove more when, by barring Complainants from taking the relevant examinations when they first attempted to do so in 1971, Respondents themselves barred Complainants from being able to conclusively demonstrate that they were qualified. The burden has shifted to the Respondents to show that Complainants were not qualified to become sworn officers, and Respondents have not done so.



Respondents further argue that the Agency must show that Complainant Lewis applied for police officer work. Respondents prohibited her from doing so between December of 1971 and August 6, 1973. That she did not apply thereafter is not relevant, for by that time she had been understandably discouraged from believing that she would ever be allowed to apply and so had sought and been offered criminal justice work elsewhere. Her acceptance of this alternative work does not excuse Respondents' actions in barring her from applying for police officer work up until that time.

Respondents argue that any back pay damages should accrue from the date Complainants would have been appointed if there had been no sex segregation in the sworn officer classifications when they first attempted to apply. Because this date could be named only as a result of pure speculation, any back pay damages will accrue from December 14, 1971, the date on which, having both been barred from applying for sworn officer work for which they were qualified, Complainants began their alternative employment as policewoman aides.

**B.** Respondents attempted to prove that being over 5'9" tall is a bona fide occupational requirement for police officers which is reasonably necessary to the normal operation of the Bureau of Police's business (BFOR). In support of this contention, Respondents introduced one 1973 study which shows a very general correlation between police officer height and being assaulted. However, upon close scrutiny that study proves inadequate and inconclusive for purposes of this matter because, for example, it did not include female police officers, and it showed a higher proportion of assaults for police officers between 5'10" - 5'10 1/2" than for police officers between 5'9"- 5'9 1/2" tall. Captain Mumford, a retired command officer, testified without equivocation that a woman under 5'9" tall could perform the duties of a sworn officer. The Mayor of Portland agreed with this position and persuaded Respondent Civil Service Board to eliminate the minimum height requirement entirely in 1973. The fact that Respondents have provided no evidence that police officers under 5'9" tall have experienced problems performing safely and efficiently since 1973 is very telling. I cannot come even close to concluding that a person's height is a reliable indicator of capability to perform safely and efficiently as a police officer. Respondents' height BFOR defense fails.

**C.** Respondents argue that Complainant Lewis failed to exhaust her administrative remedy by not appealing the minimum height restriction to the Civil Service Board. There is no statutory requirement that an aggrieved party pursue every possible administrative remedy before filing a complaint with the Bureau of Labor and Industries. Even if there were, Respondents have not shown that there was in fact a potential administrative remedy or that either Respondent availed itself of its many opportunities to apprise Complainant Lewis of the alleged remedy's existence. In fact, the minimum height requirement had never been waived

by the Civil Service Board. Respondents' argument fails.

**D.** Respondents have made no contention that being under age 30 is a bona fide occupational requirement for police officer appointees which is reasonably necessary to the normal operation of Bureau of Police business. Indeed, Respondent Magnuson would abnegate any such contention by her passing the police officer examination and her appointment and subsequent career as a police officer, all since her thirtieth birthday.

The Respondents do argue however that the age requirement in this matter was not an unlawful employment practice under the laws in effect at times material.

Respondents are correct in pointing out that until October 4, 1973, ORS 659.026(4)(f) offered an exception to the prohibition against age discrimination in the case of "policemen of a city who are classified as police officers". Age became the only remaining basis for Complainant Magnuson's allegations of discrimination on August 6, 1973, when the minimum height requirement for police officer applicants was deleted. Thus, between August 6 and October 4, 1973, it was not an unlawful employment practice for Respondents to bar Complainant Magnuson from employment by prohibiting her application because she had passed her 30th birthday. However, Respondents' liability for back pay damages during this two month period is not altered, as Complainant Magnuson was during this time suffering the continuing damages caused by having been previously barred from applying due to her sex.

As of October 4, 1973, ORS 659.026(1) provided an exception to its prohibition against age discrimination for "selection of employees on the basis of relevant statutory . . . requirements . . ." I cannot find that the provision imposing an age limit was a "relevant" statutory requirement when Respondent has provided no evidence that appointment age is relevant to selection of police officers capable of performing their duties. Furthermore, the Legislature could not have intended that a local public body could sidestep the statewide bar against age discrimination contained in ORS 659.026 by merely pointing to the existence of local provisions which discriminate on the basis of age. In any case, Respondents' liability for back pay damages is not altered, as Complainant Magnuson was after October 4, 1973, suffering the continuing damages caused by having been previously barred from applying due to her sex.

**E.** Respondents argue that if in 1971 a conflict existed between the general provisions of ORS 659.030 and the specific provisions of the Portland City Charter (which at least referred to the separate classifications of police patrolman and policewoman), Respondent Civil Service Board's action of complying with the City Charter was under apparent authority of law as it was construed at the time. The relevant constructions of the relationship between a city charter provision and a state statute, where in apparent conflict, have been made by the Oregon Supreme Court in *State ex rel Heinig v. Milwaukie et al,* 231 Or 473, 373 P2d 680 (1962) and the companion cases *City of La Grande v. Public Employees Retirement Board* and *City of Astoria v. Public Employees Retirement Board,* cited jointly as 281 Or 137, 576 P2d 1204, *rehearing* 284 Or 173, 586 P2d 765 (1978). Under either *Heinig* or *LaGrande/Astoria,* if ORS 659.030 conflicted with a city charter provision, ORS 659.030 would prevail because its subject matter was of general concern to the state as a whole (*Heinig* test) and concerned a substantive social objective (*La Grande/Astoria* test): the right of persons to be free from invidious discrimination in employment. Furthermore, ORS 659.030 is clearly designed to prevail over contrary local provisions, and it does not intrude upon the local community's freedom to choose its own political form (*La Grande/Astoria* test). The same rationale and conclusion would apply to any conflict between ORS 659.026 and the Portland City Charter. Respondents' argument fails.



**F.** Respondents allege the affirmative defense of laches, citing the amount of time which elapsed between the filing of the complaints herein and the determination by the Civil Rights Division that substantial evidence existed in support of Complainants' allegations.

Respondents allege that this passage of time prejudiced their defense in that one specified potential witness was absent thereafter. Respondents have failed to prove that they were prejudiced by the absence of this witness. They allege that as the director of the PEP program, the absent witness could have testified as to the circumstances of Complainants' employment for the Bureau of Police. Captain Mumford, Complainants' supervisor during their PEP employment, was in an optimal position to and did testify as to that employment. Unambiguous documents written by the missing witness have been made part of the record. Even if Respondents were prejudiced by this witness' absence, Respondents have not shown that this witness was unavailable. In fact, they made no efforts to locate her. The Specific Charges herein cannot be dismissed on the basis of this defense of laches, because the Respondents have shown neither an effort to locate the absent witness nor that her testimony would have added relevant new evidence to the record.

**G.** Respondents argue that they were not given timely notice of the Specific Charges herein, because their counsel did not receive the final Specific Charges concerning Complainant Magnuson (dated March 19, 1979) until six days before hearing. However, these charges were mailed to Respondents' counsel by restricted certified mail on April 3, 1979, over one month before hearing. Had Respondents' counsel then received the Charges, Respondents' notice thereof would have been timely. Respondents' counsel did not receive the Charges then, because he was not at his office on the three different occasions when postal deliveries were attempted and because he failed to claim the documents at the post office. (Once the Charges were returned unclaimed to the Department of Justice, that office immediately hand-delivered them to Respondents' counsel.)

Respondents cite an agency rule to support their contention that the Charges should not have been sent by

restricted certified mail. However, the rule cited merely provides that documents will be considered served upon mailing by regular mail. In permitting the use of a less-guaranteed form of mail service, this rule neither mandates its use nor prohibits use of the restricted certified service.

In any case, once mailed, the Charges are properly considered delivered unless the intended receiver shows that, through no fault of its own, it did not receive them. Such delivery constitutes service under ORS 659.060(1). As the failure of Respondents' counsel to take the reasonable action of claiming his mail constitutes fault, the final Specific Charges concerning Complainant Magnuson are properly considered delivered and served upon Respondents' counsel on April 3, 1979, when they were mailed. Respondents' allegations of untimely notice fail.

**H.** Respondents urge that Respondent Bureau of Police should not be "included" in my findings of unlawful conduct. In support of this contention, they argue that this matter concerns Civil Service Board conduct over which the Bureau of Police had no control. While it appears to be true that the Bureau of Police could not exert absolute control over the existence or enforcement of the discriminatory restrictions which this matter concerns, the Bureau of Police was apparently in a position to at least exert pressure to eliminate them or stop their enforcement. However, the evidence is inconclusive as to what actions could have been taken by whom within the Bureau of Police to oppose the discriminatory provisions or their enforcement, and the evidence is incomplete as to whether such actions were in fact taken. For example while there is a stipulation that "a number" of police employees were helpful to both Complainants in their attempts to become police officers, and there is documentary evidence of efforts by Bureau of Police personnel to urge the Civil Service Board to waive the age requirement for Complainant Magnuson, there is no evidence that the Bureau of Police itself did anything official or direct to urge the elimination of the height requirement for police officers. In fact, during times material, unnamed Bureau "command officers" strongly supported this requirement. Yet Portland Mayor Goldschmidt, in his capacity as Commissioner responsible for the Bureau of Police, was apparently the moving force behind the eventual elimination of the height requirement by the Civil Service Board. I must conclude that while Respondent Bureau of Police could be held liable for unlawful conduct if it failed to do whatever it could to eliminate or stop enforcement of discriminatory restrictions for its police officers, the evidence concerning this potential liability is too inconclusive or incomplete to be substantial evidence of such liability. Respondent Bureau of Police is therefore not included in my findings of unlawful conduct.

**I.** Respondents' urge that the Civil Service Board has been improperly named a respondent in this matter. This contention is based upon the fact that the Civil Service Board was not specified as a respondent in this matter prior to the issuing of the Specific Charges herein.

I find no evidence that the Legislature intended, as Respondents argue, that the respondent who is named in the Specific Charges (ORS 659.060(1)) must be exactly the same entity as the respondent against who substantial evidence of discrimination has been disclosed in the Civil Rights Division investigation (ORS 659.050(1)). Even if there were such a requirement, the fact that the Civil Service Board was not specifically named respondent in the Civil Rights Division Notices of Administrative Determination in this matter would not lead to dismissal of the Specific Charges, because neither of the Respondents herein has shown that it was prejudiced thereby.

Although the Civil Service Board is formally independent of the City of Portland, the entity of which Respondent Bureau of Police is part, that difference is not determinative of this particular question. There are important aspects of identity. The same attorney represents both the Civil Service Board and the City of Portland Bureau of Police. The same person heads the Civil Service Board staff and the City of Portland Bureau of Personnel. The Civil Service Board office and the Bureau of Personnel are housed together. The fact that key actors in this proceeding, speak for both respondents should have prevented any prejudice which could have been caused by the formal absence of one respondent from Civil Rights Division processes.

Both the City of Portland Bureau of Police and the Civil Service Board had knowledge sufficient to determine who the appropriate respondents were. Yet the Civil Service Board failed to request that it specifically be given an opportunity to protect its interests in the outcome of the investigation or conciliation processes of the Civil Rights Division, just as the Bureau of Police apparently failed to object during investigation or conciliation that it was not the only proper respondent or not an appropriate respondent at all. Neither party therefore can now be heard to allege that it was prejudiced, as both had opportunity to prevent or cure any such prejudice.

Respondent Civil Service Board specifically alleges prejudice in that it was not given an opportunity to enter into conciliation proceedings. Even were this true, ORS 659.050(1) does not mandate this opportunity; it says instead that this opportunity "may" occur.

Respondents have failed to prove a requirement that the Civil Service Board had to be specifically named as party respondent before the issuing of the Specific Charges in this matter, that they were prejudiced by the fact that the Civil Services Board was not so named, or that they took reasonable steps to prevent any such prejudice. Therefore, Respondents' defense that the Civil Service Board was improperly named respondent fails.

**J.** The Respondents urge reconsideration of the Presiding Officer's exclusion of two exhibits from the record. These exhibits are Notices of Administrative Determination by the Civil Rights Division in the matter herein. They were excluded on the basis of irrelevance.

Although they are relevant, as Respondent asserts, to the question of what entity was named respondent by the Civil Rights Division determination,

that question itself is not relevant. (See discussion I. above.) However, they are relevant to whether the Civil Rights Division determined that substantial evidence existed in support of the Complainants' allegations of discrimination (Finding of Fact Procedural 4 above), whether efforts to conciliate were made (Finding of Fact Procedural 5 above), and to Respondents' affirmative defense of laches. The Notices of Administrative Determination are therefore admitted into the record in this matter for the limited purposes of the above-stated matters, but not for the purpose of proving the truth of matters asserted in them.

I have awarded monetary damages to each Complainant to help compensate for mental suffering which Respondents' unlawful acts caused. Both Complainants suffered continuous frustration over a substantial period of time because they were being thwarted from even applying for the careers they had chosen and, through their education and training, prepared for. Each was thwarted repeatedly as each tried repeatedly to apply for sworn officer work. Complainant Magnuson was barred first because of a sex classification, then because of her height, and finally because of her age. Complainant Lewis was barred because of a sex classification and then because of her height. Both expended enormous amounts of time and energy preparing and trying to applying for police officer careers, and the frustration each felt must have been proportional to the resources they had devoted to this pursuit. In addition, because they were barred from applying for policewoman work and because they wanted to put themselves in the best possible positions to eventually become sworn officers, they took policewoman aide positions which were funded on an unstable basis.

Consequently, they had to endure the specter of unemployment. None of Complainants' suffering would have occurred had they not been barred from applying for policewoman work and police officer work due to their sex and, in Complainant Magnuson's case, age. Complainant Magnuson was continuously frustrated between August 1971, when she was first barred from applying, and April 1974, when Respondent Civil Service Board finally agreed to waive the maximum age limit for her. The acts of Respondents which led to her frustration were unlawful between August 1971 and August 1973 and from October 1973, to April 1974. Complainant Lewis was continuously frustrated between December 1971 and August 6, 1973, when the minimum height requirement was abolished (and by which time she had become so discouraged that she had obtained work elsewhere). The amounts of the monetary awards were determined by considering the above facts concerning the duration and continuity of Complainants' respective suffering and in recognition of the frustration which can be and in this case was caused by discrimination based upon sex.

## ORDER

NOW, THEREFORE, as authorized by ORS 659.060(3) and 659.010 (2) and in order to eliminate the effects of the unlawful practices found and to protect the rights of others similarly



situated, Respondent Civil Service Board is ordered to:

1) Within thirty days of the date of this Order, meet with Michael Tedesco, Assistant Attorney General, or his representative, and stipulate as to the following facts:

a) The amount of compensation earned by Robin Magnuson in her employment by Respondent Bureau of Police between December 14, 1971, and the date of this order;

b) The amount of compensation which Robin Magnuson would have earned in her employment by Respondent Bureau of Police between December 14, 1971, and the date of this Order had she been appointed policewoman on December 14, 1971;

c) The seniority rights and benefits which would have accrued as of the date of this Order had Robin Magnuson been appointed policewoman on December 14, 1971, and served as a sworn officer since that date;

d) The amount of compensation earned by Ingrid Lewis in her employment by Respondent Bureau of Police between December 14, 1971, and September 17, 1973; and,

e) The amount of compensation which Ingrid Lewis would have earned in her employment by Respondent Bureau of Police between December 14, 1971, and September 17, 1973, had she been appointed policewoman on December 14, 1971.

2) Within sixty days of the date of this order, deliver to the Hearings Unit of the Portland office of the Bureau of Labor and Industries a certified check payable to the Bureau of Labor and Industries in trust for Robin Day Magnuson in an amount equal to the difference between amounts 1b and 1a above, minus any appropriate legal deductions, representing pay which Complainant Magnuson would have earned but for Respondents' unlawful acts, plus $1000.00 as damages for her pain and suffering caused by those acts.

3) Award Complainant Magnuson the seniority rights and benefits which would have accrued had she been appointed policewoman on December 14, 1971, and served as a sworn officer since that date.

4) Within sixty days of the date of this order, deliver to the Hearings Unit of the Portland office of the Bureau of Labor and Industries a certified check payable to the Bureau of Labor and Industries in trust for Ingrid Lewis in an amount equal to the difference between amounts 1e and 1d above, minus any appropriate legal deductions, representing pay which Complainant Lewis would have earned but for Respondents' unlawful acts, plus $500.00 as damages for her pain and suffering caused by those acts.

5) Cease and desist from barring persons from applying from employment as police officers for Respondent Bureau of Police because of their sex or age.

The Respondent Bureau of Police not having been found to have engaged in any unlawful practice charged, the Specific Charges and the Complaint which were filed against the Respondent Bureau of Police are hereby dismissed with regard to the Respondent Bureau of Police only, according to the provisions of ORS 659.060(3).

**In the Matter of**
**JEFFREY BRADY,**
**Dentist, Respondent.**

Case Number 02-79
Final Order of the Commissioner
Mary Wendy Roberts
Issued December 23, 1980.

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## SYNOPSIS

Complainant was rejected for employment as a dental technician by Respondent employer based on her sex where she applied, was qualified, was not hired, and a less qualified male was hired, and where Respondent maintained an all male work force during times material. The Commissioner awarded Complainant $3,707 as lost wages, and found no evidence of mental suffering. ORS 659.010(2), 659.030(1)(a), 659.060(3).

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The above-entitled matter came on regularly for hearing before Neil H. Running, designated as Presiding Officer by the Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was convened at 9:30 a.m. on April 11, 1979, in the State Office Building, 1400 S.W. Fifth Avenue, Portland, Oregon. The Bureau of Labor and Industries was represented by Randolph B. Harris, Assistant Attorney General. Respondent was represented by Burton J. Fallgren, Attorney at Law. Complainant was present and testified.

Having fully considered the entire record in this matter, I, Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries, hereby make the following Ruling on Motion, Findings of Fact, Ultimate Findings of Fact, Conclusions of Law, Opinion, and Order.

## RULING ON MOTION

At the beginning of the hearing, Respondent made a motion to dismiss the complaint and Specific Charges, alleging that the Bureau of Labor and Industries failed to make a prompt investigation of the charges and that such delay was discriminatory, burdensome and retaliatory against Respondent. A ruling on this motion was reserved to allow Respondent to demonstrate how the alleged delay had adversely affected his ability to adequately respond to the charges herein. Upon reviewing the record, I have determined that Respondent failed to so demonstrate, and the motion is accordingly denied.

## FINDINGS OF FACT – PROCEDURAL

1) On or about December 10, 1976, Complainant Charlotte I. Lehde filed a verified complaint with the Civil Rights Division of the Bureau of Labor and Industries alleging that Respondent had discriminated, and continued to discriminate, against her in connection with her prospective employment by Respondent because of her sex.

2) Following the filing of the aforementioned complaint, the Civil Rights Division investigated the allegations contained therein and determined that substantial evidence existed in support of Complainant's allegations.

3) Thereafter, the Civil Rights Division attempted to reach a settlement of the complaint through conference, conciliation and persuasion but was unsuccessful in these efforts.



## FINDINGS OF FACT – THE MERITS

1) Respondent is a doctor of dental medicine engaged in the practice of dentistry and operates a dental laboratory in the state of Oregon. Respondent utilizes the services of one or more employees in this business.

2) Complainant is a female person.

3) On June 11, 1976, Complainant received the degree of Associate of Applied Science in Dental Technology from Portland Community College. Her two years of study leading to that degree had included, but were not limited to, laboratory training and study of procedures relating to dentures. In June 1976, Complainant passed the Recognized Graduate Examination of the National Board for Certification of Dental Technicians.

4) Starting the latter part of June 1976, Complainant applied for employment as a dental technician at various dental laboratories in the Portland area. On July 10, 1976, she appeared at Respondent's Portland dental office in search of employment as a dental technician in Respondent's dental laboratory. She was accompanied by Jan Withnell, a female friend. She completed and returned an application form. She talked with Fred Schmeer who, as foreman of Respondent's dental laboratory, was responsible for hiring employees for the laboratory. Complainant also visited Wendell DeLorme, a male friend who was employed in Respondent's dental laboratory. She never received a response to her application for employment.

5) The duties of the dental technicians working in Respondent's dental laboratory were to construct full and partial dentures. Complainant was qualified to perform these duties.

6) In the latter part of July 1976, Complainant made a second visit to Respondent's Portland dental office. The purpose of this visit was to inquire about the status of her July 10 application for employment. Because her July 10 application could not be located, Complainant completed and returned a second application. She never received a response to this application for employment.

7) In June 1976, Allen Alcock, a male person, applied for employment as a dental technician in Respondent's dental laboratory. Mr. Alcock had completed eight months of training in a dental technician school and had no other experience in dental technology. He was less qualified to perform the duties of a dental technician than Complainant.

8) Mr. Alcock was hired to work as a dental technician at Respondent's dental laboratory on a trial basis. He worked from the week of July 8, 1976, through the week of August 6, 1976. His salary was $168.50 per week. He was then laid off due to lack of work.

9) Soon thereafter, during the late summer or early fall of 1976, Mr. Schmeer telephoned Mr. Alcock and asked him to return to work at Respondent's dental laboratory. Mr. Alcock was still less qualified to perform the duties of a dental technician than

Complainant. Mr. Alcock declined because he had obtained other employment.

10) At the time he asked Mr. Alcock to return to work, Mr. Schmeer was fully aware that Complainant was better qualified than Mr. Alcock and that Complainant desired to be employed as a dental technician in Respondent's dental laboratory. Yet Complainant was not contacted concerning this or any other vacancy for a dental technician at Respondent's Portland dental laboratory.

11) Although he had never seen Complainant's application for employment, Respondent was personally aware, during the summer and fall of 1976, that she desired employment as a dental technician in his dental laboratory.

12) After she had made her second application for employment at Respondent's dental laboratory, Complainant continued to look for employment as a dental technician at other dental laboratories without success. She also went to Respondent's Portland dental office at least twice every month to seek employment and to visit Mr. DeLorme.

13) On or about December 10, 1976, during one of her visits to Respondent's office, Complainant confronted Respondent directly and requested consideration for employment. She was told, in response, to return at 9:00 the following morning for what would apparently be a test or tryout.

14) Upon reflection, Complainant decided not to return to Respondent's office as directed because she believed that the test or tryout would be designed to prevent her successful completion of it and that it would thereby be merely a pretext for disposing of her application. Instead, she filed her complaint with the Civil Rights Division of the Bureau of Labor and Industries.

15) During 1976, nineteen persons worked as dental technicians in the dental laboratory of Respondent's Portland dental office at one time or another. All of these persons were male. Respondent employed an average of five dental technicians in his Portland dental laboratory at any one time. Therefore, during 1976, approximately fourteen persons, all male, were hired as dental technicians in Respondent's Portland dental laboratory.

## ULTIMATE FINDINGS OF FACT

1) From about July 10, 1976, to December 10, 1976, Complainant, a female person applied, and was qualified, to work as a dental technician in the dental laboratory of Respondent's Portland dental office. When there was an opening for a dental technician in Respondent's dental laboratory during the late summer or early fall of 1976, Respondent's foreman Schmeer offered this work to a male person who was less qualified than Complainant, even though Mr. Schmeer knew that Complainant was better qualified, had applied and still desired to work as a dental technician in Respondent's dental laboratory. Respondent has not offered substantial evidence that Mr. Schmeer had a legitimate nondiscriminatory reason for failing to employ Complainant.

During 1976, Respondent, through foreman Schmeer, hired approximately fourteen persons, and employed nineteen persons, as dental technicians in his dental laboratory, all of whom were male. Respondent's maintenance of a sex-segregated dental technician work force in his dental laboratory, his offering a less qualified male person dental technician employment which Complainant sought and was qualified to perform, and his failure to prove the existence of legitimate nondiscriminatory reason for not hiring Complainant, compel the conclusion that Respondent failed to employ Complainant due to her sex.

2) Because Respondent failed to employ Complainant because of her sex, Complainant was damaged in the amount of $3,707.00. This amount was determined by multiplying $168.50, the weekly salary paid Allen Alcock, the less qualified male who was offered employment instead of Complainant, by 22 weeks, the time period during which Complainant attempted to obtain employment as a dental technician for Respondent.

3) There is insufficient evidence to support a finding that Complainant suffered humiliation, nervousness and anxiety as alleged in the Specific Charges.

4) Because Complainant has expressed her current unwillingness to work for Respondent, an order that she be reinstated to the next available dental technician position in Respondent's Portland dental laboratory, as requested in the Specific Charges, would not be appropriate.

## CONCLUSIONS OF LAW

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

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

3) The actions, and motivations for those actions, of Fred Schmeer, foreman of Respondent's dental laboratory in Respondent's Portland dental office, are properly imputed to Respondent.

4) Respondent's failure to employ Complainant as a dental technician due to her sex constitutes an unlawful employment practice, which violates ORS 659.030(1)(a).

5) Complainant's failure to appear for the requested test or tryout on December 10, 1976, ends the time period during which damages accrue, because there is no substantial evidence that Respondent discriminated against Complainant as charged after that date.

6) The Commissioner of the Bureau of Labor and Industries has the authority to award money damages to the Complainant herein under the facts and circumstances of this record; and the sum of money awarded as damages in the Order below is an appropriate award.

## OPINION

I have considered the following evidence and determined that in each instance it is irrelevant because it has not been related to any point herein at issue.

1) Respondent alleges that between July and December 1976, Complainant and other persons filed complaints with the Equal Employment Opportunity Commission and the

Bureau of Labor and Industries which charged Respondent with discrimination and which were subsequently dismissed. The mere alleged existence of these complaints and their dismissals on various grounds are not relevant to the determination of the validity of allegations contained in the complaint herein, which will stand or fall on their own merits. The same conclusion applies to Respondent's allegations that Complainant filed an unjust complaint with the Bureau of Labor and Industries against Pacific Dental Laboratory.

2) Respondent alleges that he employed a specified female person on occasion before 1976 and another specified female person after 1976. This scant allegation is irrelevant because it does not pertain to 1976, the year during which Respondent failed to employ Complainant.

3) Respondent's allegations concerning Mr. DeLorme and his employment, his relationship with Complainant, and his termination of employment have not been shown to be relevant to any fact herein at issue.

4) Respondent sought to introduce the contract of the Chemical Workers Union, to which Respondent is a party and by which the participating employees of Respondent are covered, under a statute which is not applicable to this proceeding. This contract has not been shown to be relevant to any fact herein at issue.

5) Respondent's allegations concerning the ratio of female to male employees in Respondent's entire dental office is irrelevant because it concerns more than Respondent's dental technicians, the work force at issue herein.

6) Respondent's allegation that in October 1976 Complainant was unable to do satisfactory work in the dental laboratory of Dr. Lawrence Bernard and was terminated after one week is not by itself relevant to any fact herein at issue. Respondent introduced no further evidence to relate this allegation to any fact at issue. It is ironic that Respondent would even attempt to contest Complainant's qualifications, as the existence of a sex-segregated dental technician work force at the time Respondent failed to employ Complainant suggests that her qualifications were then irrelevant to him: as a female, she would not have been hired in any case.

Testimony of Ms. Withnell as to the reaction of Respondent and his employees when Complainant and Ms. Withnell visited Respondent's dental office was considered and determined to be based upon mere opinion and speculation and therefore of no probative value.

There was a conflict at hearing as to whether Complainant asked Mr. Schmeer directly for a job. However, this conflict is moot, because Mr. Schmeer admitted at hearing that as of July 10, 1976, he knew Complainant was looking for work as a dental technician.

## ORDER

NOW, THEREFORE, as authorized by ORS 659.060(3) and 659.010 (2) and in order to eliminate the effects of unlawful practices found and to protect the rights of others similarly situated, the Respondent is ordered to:

1) Deliver to the Hearings Unit of the Portland office of the Bureau of Labor and Industries, within thirty (30) days of execution of this Final Order, a certified check payable to the Bureau of Labor and Industries in trust for Charlotte I. Lehde in the gross amount of Three Thousand Seven Hundred and Seven Dollars ($3,707.00), minus any appropriate legal deductions, representing back pay damages.

2) Cease and desist from discriminating on the basis of sex against any applicants for employment at the dental laboratory of Respondent's Portland dental office.

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**In the Matter of**

**MUTUAL WHOLESALE DRUG COMPANY,**

**an Oregon corporation, Respondent.**

Case Number 30-79

Final Order of the Commissioner

Mary Wendy Roberts

Issued January 19, 1981.

## SYNOPSIS

Two Complainants, aged 53 and 55 respectively, were among four outside salespersons laid off due to financial reverses. Finding that each Complainant had certain performance deficiencies, the Commissioner held that Respondent employer did not commit unlawful employment practices based on age in laying off the Complainants or in the later hire of other salespersons who happened to be younger. ORS 659.010(6); *former* 659.024(1) and (3); 659.030(1)(a); 659.060(3).

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The above-entitled matter came on regularly for hearing before Dale A. Price, designated as Presiding Officer by the Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was convened on November 16, 1979, and continued on November 19, 1979, and December 14, 1979.

Complainants were present. The Bureau of Labor and Industries was represented by Assistant Attorney General Thomas E. Twist, and Respondent was represented by R. Kenney Roberts, Attorney at Law.

Having considered the entire record and arguments of counsel, I, Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries, hereby make the following Findings of Fact, Ultimate Findings of Fact, Conclusions of Law, Opinion, and Order.

## FINDINGS OF FACT – PROCEDURAL

1) On or about April 29, 1977, Hobart Littlefield filed a verified complaint with the Civil Rights Division of the Bureau of Labor and Industries of the State of Oregon alleging that he had been discriminated against in the termination of his employment by Respondent because of his age.

2) On or about April 7, 1977, Roger Keesey filed a verified complaint with the Civil Rights Division of the Bureau of Labor and Industries of the

State of Oregon alleging that he had been discriminated against in the termination of his employment by Respondent because of his age.

3) Following the filing of the aforementioned complaints, the Civil Rights Division investigated the allegations contained therein and determined that substantial evidence existed in support of each Complainant's allegations.

4) Thereafter, the Civil Rights Division attempted to resolve the issues in each case through conference, conciliation and negotiation, but was unsuccessful in these efforts.

5) Respondent was, at times material herein, an Oregon corporation doing business in Oregon and employing several individuals in a variety of positions, including outside salesperson.

**FINDINGS OF FACT - THE MERITS**

1) The facts set out in the table below relating to employees on Respondent's outside sales staff, at times material herein, were agreed upon by stipulation at hearing.

2) At times material herein, Complainants were each between 18 and 65 years of age and as such were entitled to the protections against discrimination in discharge from employment which are offered by ORS 659.030 (1)(a).

3) At the times of their respective discharges from Respondent's employ in early 1977, Complainants Keesey and Littlefield had worked for

| EMPLOYEE | DOB | HIRE DATE | SALARY | SALARY[5] |
|---|---|---|---|---|
| Roger Keesey | 5/09/24 | 11/26/45 | $1250.00/month[2] | $13,992/year |
| Ken Lennie | 10/12/16 | 10/10/49 | $1250.00/month[2] | $13,992/year |
| Hobart Littlefield | 5/02/22 | 7/04/64 | $1208.34/month[2] | $13,320/year |
| Tom Paoschen | 12/25/42 | 2/01/76 | $1083.34/month[2] | $12,000/year |
| Bob Anderson | 7/31/28 | 5/05/54 | $1250.00/month[2] | $13,992/year |
| Ben Schwab | 6/28/28 | 5/01/64 | $1208.34/month[2] | $13,320/year |
| Fred Jennings | 1/16/41 | 1/31/77 | $1000.00/month[2] | |
| Linda Nicoll | 7/08/50 | 5/03/77 | $1000.00/month[3] | |
| Katy Biles | 1941 | 11/01/77 | $1000.00/month[3] | |
| Mary Dehart | 12/26/35 | 7/11/57[1] | $1000.00/month[4] | |

1. transferred to outside sales 9/1/77
2. effective 2/77
3. effective 11/1/77
4. effective 9/1/77
5. effective before 1/1/77



Respondent as outside salespersons for about 32 and 13 years, respectively.

4) During the pendency of their employment with the Respondent, Complainants performed in a generally satisfactory manner. Neither of them was outstanding, and neither received warnings for unsatisfactory performance.

5) During Complainants' employment between the years 1972 and 1977, Respondent encountered financial crises. These crises were precipitated largely by stiff competition from bigger drug companies and by dramatic increases in the cost of money borrowed for short term operating purposes.

6) In December of 1974, Respondent's Board of Directors hired an independent contractor, Henry Cohen of Monarch Associates, as a financial advisor. In 1976 Mr. Cohen presented a plan to Respondent to reduce Respondent's operating costs. This plan included a reduction in personnel.

7) Jim Neilson, Respondent's General Manager in 1976, was the individual charged by Respondent's Board of Directors with implementing the aforementioned reduction in operating costs. Pursuant to this reduction, in February 1977 Mr. Neilson directed Respondent's Sales Manager Lyle Chasse to recommend four of Respondent's seven outside salespersons for termination.

8) Mr. Chasse testified and I find that, in formulating his recommendation, Mr. Chasse decided which salespersons to retain, rather than which to discharge. Performance on new promotions, label programs and lines of merchandise were not factors in Mr. Chasse's decision. His primary concern was the probable number of accounts which Respondent would lose if a particular salesperson were terminated. Mr. Chasse had spent time in the sales territories talking with customers and obtaining reports of salesperson performance. He had telephone contact with other customers and had observed the sales personnel in sales meetings. Through these means, and his own subjective judgment, had ranked Respondent's outside sales personnel as follows: Messrs. Schwab, Anderson, Jennings, Lennie, Keesey, Littlefield, and Paoschen. He recommended termination of the latter four.

Mr. Chasse ranked Messrs. Schwab and Anderson highly because of their exceptional rapport with their customers and good sales ability. In Mr. Chasse's judgment, the loss of Mr. Schwab or Mr. Anderson would have led to a greater loss of business than the loss of either Complainant. Mr. Chasse's recommendation that Mr. Jennings be retained was based upon Mr. Jenning's domicile in the territory of Eastern Washington and Eastern Oregon which had proven too large for Mr. Keesey to handle while commuting from the Portland area.

9) Mr. Chasse made his recommendations to Mr. Neilson who concurred with them. Mr. Chasse then terminated the employment of the recommended four salespersons, including both Complainants, in March of 1977.

10) Although Mr. Chasse's recommendations were based primarily upon

the stated strengths of the salespersons retained, he was dissatisfied with certain aspects of the work of each terminated employee. Certain alleged problems of each Complainant were considered in his termination decision. These alleged problems included the following:

Complainant Littlefield:

1) reluctance to relocate to another territory.

2) weakened job performance due to stress induced by his wife's extended illness.

3) irregularity of calls upon certain client accounts

4) failure to gain sufficient understanding of new programs.

5) deteriorated attitude toward the company.

The Agency has established through testimony that Mr. Littlefield did not refuse to relocate to a different territory; that the irregularity of his calls was based upon a system derived from a former sales manager; and that he did sell several new programs. The Agency has not established that Mr. Littlefield's performance was not inhibited by his wife's illness or that his attitude toward the company was no worse than that of other salespeople. These two problems are legitimate non-discriminatory reasons for Mr. Littlefield's termination which have not been shown to be pretextual.

Complainant Keesey:

1) poor health, including persistent leg problems

2) reduced job effectiveness due to excessive consumption of alcohol

3) undisputed dissatisfaction with his salary and accompanying threat to quit Respondent's employ.

In late 1976, Mr. Keesey's leg problems indisputably led to his request that the size of his Eastern Oregon and Eastern Washington territory be reduced. This created a problem for Respondent, because Respondent contemplated reducing staff and enlarging sales territories.

Mr. Keesey testified that his drinking had never affected his work performance. Upon cross examination however he revealed that he had missed several weeks of work during his employment with Respondent because of his drinking. Sales Manager Chasse had heard at least one customer voice concern about Mr. Keesey's drinking.

It is not disputed that in January of 1977 Mr. Keesey expressed dissatisfaction with his salary and threatened to resign if he did not receive a raise within six months. I make no finding as to whether Mr. Keesey withdrew his threat to resign, but I do find that when Sales Manager Chasse decided who to recommend for discharge, he believed that Mr. Keesey still intended to resign.

The aforementioned problems of Mr. Keesey constitute legitimate non-discriminatory reasons for his discharge by Respondent which have not been shown to be pretextual.

11) The average age of Respondent's outside sales force prior to the four terminations discussed above was forty-seven years. The average age of the three salespersons retained was forty-three years. The average age of the salespersons discharged was fifty years.



12) After the termination's of Complainants, it became apparent to Respondent that the remaining three outside salespersons could not adequately cover the required sales territories. Respondent solved this problem by adding three individuals to the outside sales staff. Mary Dehart, a long-time employee, was transferred to the outside sales force in September of 1977. Linda Nicoll was hired on an hourly basis in May of 1977 and eventually placed on a salary in November of 1977. Cathy Biles was hired in November of 1977. The ages of these individuals at time of hire were as follows:

Mary Dehart - 41

Linda Nicoll - 26

Cathy Biles - 36

The hiring and transfer of these individuals were motivated by legitimate, nonpretextual business reasons rather than age.

## ULTIMATE FINDINGS OF FACT

Pursuant to a general reduction in personnel during a period of financial crisis, Complainants and others were discharged from Respondent's employ. Respondent's decision as to which outside salespersons to retain and which to discharge was based upon management prerogatives and legitimate business reasons.

Respondent's eventual hiring of salespersons younger than Complainants because it realized that three remaining salespersons could not cover its sales area does not constitute substantial evidence that age played a role in the respective termination's of Complainants. Age did not play a key, or any, role in Respondent's termination of Complainants.

## CONCLUSIONS OF LAW

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

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

3) The actions and motivations for those actions of Sales Manager Lyle Chasse and General Manager Jim Neilson are properly imputed to the Respondent.

4) The discharge of individuals who are between the ages of 18 and 65 years and who are older than the average of those retained in the employer's employ or those who are eventually hired to the same position is not, per se, a violation of ORS 639.030 where unrefuted legitimate non-discriminatory business-related reasons for the termination's and the subsequent hirings have been established by the employer and have not been shown to be pretextual. Respondent has therefore not violated ORS 659.030 as charged.

## OPINION

Resolution of issues in contention herein must turn upon consideration of the burdens of proof imposed upon the parties. The initial burden, to establish a prima facie case, falls upon the Agency, the party bringing this action. A prima facie case can he defined as a skeletal offering of proof containing at least some evidence in support of the

Agency's position on each element of the alleged violation. A helpful framework for analysis may be borrowed from federal case law interpreting the Federal Age Discrimination in Employment Act. (*See, e.g., Price v. Maryland Casualty Co.,* 561 F2d 609 (5th Cir 1977))

**Prima Facie Case**

The Agency did provide evidence that both Complainants were, at times material herein, between 18 and 65 years of age and as such were members of a class of individuals protected against discrimination because of their age.

The next element required is proof that Complainants were qualified for their work as outside salespersons for Respondent. At this point in the analysis, the Agency should be required only to show that Complainants were satisfactory employees. The length of service of each Complainant as Respondent's outside salesperson is sufficient to show at least minimally satisfactory competence. Mr. Keesey had been an outside salesperson with Respondent for about 32 years at the time of his discharge. Mr. Littlefield had been an outside salesperson with Respondent for about 13 years at the time of his discharge.

The final element in the Agency's prima facie case is a showing that the Complainants were discharged despite their qualifications for their jobs and that they were replaced by younger outside salespersons. It is not disputed that Complainants were discharged, nor is it disputed that younger individuals did subsequently cover all or part of the same sales territories that Complainants had covered.

The Agency having established its prima facie case, the burden of going forward with the evidence shifted to Respondent. Respondent then had to provide substantial evidence of legitimate non-discriminatory reasons for its actions; in this case for the discharge of the complaining members of a protected class. Respondent offered numerous reasons for the discharge of Complainants.

Respondent alleged that drastically deteriorated economic conditions made it necessary to discharge four out of seven outside salespersons and that the discharge decision was made on the basis of who were the most valuable salespersons. Respondent further alleged that Complainants had certain performance problems which were considered in the discharge decision. These constitute legitimate non-discriminatory reasons for terminating Complainants.

Having offered legitimate non-discriminatory reasons for the termination of Complainants, the Respondent discharged its burden of going forward with the evidence, and the ultimate burden of proof shifted to the Agency to show that the reasons set forth by the Respondent were pretextual and that the ages of Complainants played key roles in Respondent's decision to terminate their employment. Here again the various reasons for the termination's alleged by Respondent will be considered separately.

**1) Overall financial conditions of Respondent Company.**

It is not disputed that Respondent's weakening financial condition necessitated staff reductions. This fact does not in itself constitute a pretext for the discharge of Complainants.



**2) Potential loss of customers if certain salespersons were terminated.**

The Agency argued that Sales Manager Chasse had inadequate contact with either salespersons or customers to make such a judgment. Mr. Chasse had not been sales manager long, but he had traveled in some sales territories, spoken with some clients and heard reports of performance of salespersons. On these bases Mr. Chasse made reasoned subjective decisions about the ranking of salespersons. In *Cova vs. Coca Cola Bottling Co.,* 547 F2d 958 (8th Cir 1978), an analogous fact pattern was considered, and the court held that it was appropriate for the employers to rely upon the subjective explanation of the sales manager of the reasons for discharging certain workers where statistical evidence of age discrimination was inconclusive.

**3) Mr. Littlefield's alleged problems**

Mr. Littlefield's alleged unwillingness to move to a different sales territory has not been clearly established, nor has its clear nature as a pretext been determined. Mr. Littlefield's preference to keep his old territory was known to Respondent. The strain of coping with his wife's failing health assuredly had some impact upon Mr. Littlefield's work performance, in view of his testimony that he was under extreme emotional stress. This alleged reason for termination cannot be deemed pretextual, nor can it be afforded substantial weight, in the absence of specific evidence of how much effect it had upon Mr. Littlefield's performance.

Respondent also cited Mr. Littlefield's alleged failure to gain sufficient understanding of new programs. Respondent does not deny that Mr. Littlefield sold some new programs, but asserts that he was slow to learn these programs. There is inadequate testimony in contravention of this stated reason for termination.

Respondent alleged that Mr. Littlefield's attitude toward the Respondent and his job was only fair and that he was more concerned about Respondent's financial problems than were most of the outside salespersons. The comparison of states of mind such as attitudes toward Respondent is a difficult undertaking, but the evidence does not suggest that the Agency has shown this stated reason to be pretextual.

**4) Mr. Keesey's problems**

It is not disputed that Mr. Keesey had experienced persistent leg problems, which limited the amount of driving he could do. This led to his request that his territory be divided with another salesperson. When the budget reduction necessitated that each salesperson cover more territory, Mr. Keesey was not physically able to accommodate Respondent's needs. This reason for his discharge cannot be deemed pretextual.

Respondent cited Mr. Keesey's drinking as a factor reducing his job effectiveness. Mr. Keesey testified at one point that his drinking of alcohol never interfered with his work. He later testified that he had once missed two weeks work due to drinking and that he had missed six weeks work because of drinking alcohol over the course of employment with

Respondent. In addition, Sales Manager Chasse had received communication from at least one customer who was concerned about Mr. Keesey's health due to his drinking. This can not he deemed a pretext for Mr. Keesey's termination.

Mr. Keesey was dissatisfied with his salary, and he made his dissatisfaction known to Mr. Chasse and added a threat to quit within six months if he did not obtain more money. Mr. Keesey testified that he later withdrew this threat, but Mr. Chasse remembered no such withdrawal and at times material herein believed that Mr. Keesey would quit, in view of the unavailability of more money for salaries. I make no finding as to whether Mr. Keesey withdrew the threat, but I cannot find that consideration of Mr. Keesey's dissatisfaction with his salary is a pretextual reason for his discharge.

The Agency cited the retention of Mr. Jennings, who was substantially younger than Complainants, as evidence of age discrimination. Mr. Jennings lived in the vast Eastern Washington - Eastern Oregon territory which Mr. Keesey had asked to have help in covering. Because of his domicile within the territory, Mr. Jennings could cover the territory without driving back and forth from Western Oregon. This is a legitimate non-discriminatory reason for retaining Mr. Jennings instead of either Complainant.

The Agency's ultimate burden was to establish that age played a key role in Respondent's selection of who to discharge. The Agency has asserted that circumstantial evidence may be sufficient to support a finding of illegal discrimination. *Teamsters v. US*, 431 US 324 (1977). The Agency admitted that no direct evidence of discrimination exists on the record but relied upon the following statistics:

a. the average age of the seven salespersons before the termination's was 47 years,

b. the average age of the three salespersons retained was 43 years, and

c. the average age of the salesmen terminated was 50 years, and when Mr. Paoschen is not included, 55 years.

The Agency asks that the termination of Mr. Paoschen at age 34 be considered an aberration because of Respondent's dissatisfaction with Mr. Paoschen's work and thus ignored. It is evident from the record that Respondent expressed dissatisfaction with certain aspects of the work of each of the employees who were terminated. Therefore Mr. Paoschen should not be excluded from the statistical analysis. The seven year difference in average age of those terminated and those retained cannot be deemed of major significance as evidence of a pattern of unlawful discrimination.

It is true that salespersons hired in 1977 were considerably younger than the former average, and this might he deemed evidence of a pattern of discrimination if coupled with substantial corroborating evidence. Evidence counterbalancing these statistics is found in the observation that two of the three salespersons retained were 48 years of age, which is older than the average of all salespersons prior to any terminations.



A resolution of these conflicting assertions can be facilitated by consideration of federal case law. In *Teamsters v. US, supra*, the court held that a pattern and practice of discrimination is defined as repeated routines revealed by a combination of statistics and specific incidents. In the case at hand, we have some arguable statistical evidence but a complete absence of specific incidents for corroboration. The court further held that statistics might be rebutted by surrounding circumstances. Our record is replete with such surrounding circumstances in rebuttal of the Agency's statistical case.

The Agency has failed to establish that the age of each Complainant played a key, or any, role in the termination of his employment, and the Complaints and Specific Charges must be dismissed.

**ORDER**

NOW, THEREFORE, the Respondent not having been found to have engaged in any unlawful practice charged, the Specific Charges and the Complaint against the Respondent in each case are hereby dismissed under the provisions of ORS 659.060(3).

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**In the Matter of**
**Civil Service Board of The**
**CITY OF PORTLAND,**
**Respondent.**

Case Number 04-79

Addendum to Final Order of the Commissioner

Mary Wendy Roberts

Issued January 23, 1981.

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**SYNOPSIS**

Upon petition for reconsideration of the Commissioner's Order of October 21, 1980, *In the Matter of City of Portland,* 2 BOLI 21 (1980), as modified November 10, 1980, the Commissioner (1) acknowledged that Respondent had appointed Complainant in accordance with the Order; (2) clarified Respondent's duties to grant wages retroactively to reflect Complainant's new seniority date, and to use the seniority date in determining job assignments, length of service, contributions to the retirement system, vacation accrual and "bumping" rights; (3) awarded back pay in accordance with the appointment date; and (4) ruled that the Order of October 21, 1980, as modified, be regarded by Respondent as a guide in dealing with other firefighters situated similarly to Complainant. ORS 659.010(2); 659.030(1)(a); 659.060(3).

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The Order in the above-entitled matter, dated October 21, 1980, and modified on November 10, 1980, is hereby addended as follows:

On November 24, 1980, Respondent petitioned for reconsideration of the above-mentioned Order, stating that it is uncertain as to what specific acts are required to comply with paragraph (1) of the ORDER section of said Order. The purpose of this addendum is to resolve Respondent's uncertainty by explaining the Order's requirements more specifically.

To be more specific, I must first acknowledge that I have received official notice that Complainant was appointed by Respondent to a Fire Fighter position on December 21, 1979, and that Complainant would have been so appointed on June 21, 1978, but for Respondent's discrimination against him.

In its Petition for Reconsideration, Respondent first asks what consideration should be given to other Fire Fighters, whom Respondent names, who may be situated similarly to Complainant. My Order explicitly requires that Respondent take certain actions concerning Complainant (paragraphs 1 and 2) and future Fire Fighter applicants (paragraph 3). The Fire Fighters Respondent names fall into neither of the latter categories. Not having considered any charges of discrimination concerning those individuals, I have not required in this Order that Respondent take any actions concerning them. However, if these persons are in fact situated similarly to Complainant, this order may be regarded as guidance to Respondent as to how ORS 659.030 applies to their situation.

Respondent next asks to what "compensation and benefit levels" my Order of retroactive seniority for Complainant applies. It applies to all compensation and benefit levels which Complainant would have attained if Respondent had not unlawfully discriminated against him, *i.e.*, if he had been appointed Fire Fighter on June 21, 1978. Complainant's seniority is to be extended retroactively to June 21, 1978, and this date is to be considered his seniority date. This will have the following effects upon aspects of seniority identified by Respondent in its petition for Reconsideration:

**1) Automatic Wage Increases**

Complainant shall be granted an immediate wage increase reflecting his new seniority date. Complainant also shall be given retroactive pay totaling the amount of money he would have earned since his actual appointment on December 29, 1979, had he since then been paid at the rate he would have attained had he been appointed June 21, 1978. In order to comply with this provision, Respondent shall deliver to the Hearings Unit of the Portland office of the Bureau of Labor and Industries, within thirty days of the execution of this Addendum to the Order in this matter, a certified check payable to the Bureau of Labor and Industries in trust for Tylen J. Peters in the amount described in the previous sentence. Respondent shall at the same time provide the Office of the Commissioner of the Bureau of Labor and Industries with the wage information and calculations by which Respondent computed the latter amount of money.

**2) Job Assignments**

Complainant's June 21, 1978, seniority date will be used in determining his future job assignments.



**3) Eligibility for Disability Pensions and Retirement**

Respondent shall notify the Fire and Police Disability and Retirement System of Complainant's new seniority date and allow Complainant to make any contributions which he would have been required to make had he been hired on June 21, 1978.

**4) Promotional Examinations**

For purposes of Complainant's qualifying as an applicant in a civil service examination for a promotional classification and for purposes of calculating Complainant's grade points in such examinations, Complainant's June 21, 1978, seniority date shall be used to determine his length of service.

**5) Sick Leave and Vacation Time**

Complainant shall be credited with the vacation and sick leave time he would have earned had he been appointed Fire Fighter on June 21, 1978.

**6) Probation**

Complainant's new seniority date will have no effect upon his probation, since he has now completed probation.

**7) Layoff**

Complainant's June 21, 1978, seniority date shall be used to determine his order of layoff and his "bumping" rights.

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**In the Matter of**

**OREGON METALLURGICAL CORPORATION,**

**an Oregon corporation, Respondent.**

Case Number 12-79

Final Order of the Commissioner

Mary Wendy Roberts

Issued February 12, 1981.

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**SYNOPSIS**

Respondent employer committed an unlawful employment practice when its superintendent laid off Complainant due to frustration with the vague manner in which Complainant made safety complaints. Finding that Complainant would have been laid off four days later as the junior journeyman electrician due to a reduced need for journeyman electricians, the Commissioner limited his wage loss award to the 16 working hours occurring during those four days, or $151.04. The Commissioner ordered Respondent to cease discriminating against employees who make safety complaints. ORS 654.003; 654.062(1), (5)(a) and (b); 659.010(2); 659.060(3).

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The above-entitled matter came on regularly for hearing before Glenda E. Anderson, designated as Presiding Officer by the Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was held on June 22, 1979, in Albany, Oregon. The Bureau of Labor and Industries was represented by Michael J. Tedesco, Assistant Attorney General. Respondent Oregon Metallurgical Corporation was represented by Dean M.

Quick, Attorney at Law. Complainant James E. Ragland was present and testified.

Having fully considered the entire record in this matter, I, Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries, hereby make the following Findings of Fact, Ultimate Findings of Fact, Conclusions of Law, Opinion, and Order.

## FINDINGS OF FACT – PROCEDURAL

The parties stipulated to the veracity of paragraphs I and II of the Specific Charges, as set forth below:

1) At all times material herein Respondent Oregon Metallurgical Corporation was an employer subject to the provisions of ORS 659.010 to 659.110 and 654.062.

2) On or about February 28, 1978, James E. Ragland filed a verified complaint with the Civil Rights Division of the Bureau of Labor and Industries alleging that he had and continues to be discriminated against in connection with his employment by his then employer, the Respondent.

## FINDINGS OF FACT – THE MERITS

1) Respondent is a business which manufactures titanium metal. Respondent's production facility consists of two plants, known as the magnesium (mag) plant and the sponge plant, both of which were originally built in 1969-1970. The manufacture of titanium metal requires a continuous, cyclical flow of hot materials between the two plants. Titanium metal is produced in one plant, and the by-products of that process are transformed for reuse in the other plant. Due to the necessity of a steady flow of hot materials, both plants must operate continuously.

2) At times material herein, Michael Layman was the superintendent of Respondent's sponge plant, and Joe Barton was superintendent of Respondent's mag plant. Steven Stocks was superintendent of maintenance in the sponge plant. Mr. Stocks and Mr. Layman met frequently to discuss and project maintenance staffing needs. Mr. Stocks had authority to order layoff or recall of employees under his supervision.

3) During production, Respondent's maintenance crew, which includes electricians, performs routine preventive maintenance and responds to operational problems. Breakdowns or malfunctions in the operation are usually unpredictable and must be immediately repaired to maintain the continuous flow of hot materials.

4) At the time of hearing, Complainant had been a journeyman electrician for thirty years and had done recent course work in the National Electrical Code. On April 28, 1977, Complainant began work as a journeyman electrician on Respondent's sponge plant maintenance crew.

5) On or about October 9, 1977, there was an explosion in Respondent's sponge plant which caused extensive damage to the sponge plant and also damaged the mag plant.

6) On October 21, 1977, Respondent laid off Complainant and numerous other employees because of cessation of production due to the explosion.

7) After the explosion, Respondent decided to rebuild the damaged plants rather than build a new facility. Respondent began to "cleanup" and then "rebuild" the plants in preparation for eventually resuming production. Rebuilding involved substantial electrical repairs and reconstruction. Respondent's electricians switched from performing mostly maintenance work before the explosion to performing mostly construction work afterward.



8) Respondent ordered new equipment to replace equipment which had been damaged in the explosion. Equipment delivery problems during rebuilding caused Respondent to need the services of one additional journeyman electrician at the end of January 1978, during the last part of the rebuilding phase. Respondent decided to recall one of the journeyman electricians it had laid off after the explosion rather than to subcontract out the additional electrician work. As the first journeyman electrician on the recall list required by the electricians' union contract, Complainant was called back to work by Respondent on January 30, 1978.

9) Before the October 1977 explosion, Respondent's electricians worked rotating shifts. Each electrician worked one week on each shift, changing shifts and days off each week. Because there were three shifts a day during the seven workdays each week, there was always an electrician at Respondent's plants.

10) After the explosion, during cleanup and rebuilding, Respondent's electricians worked straight rather than rotating shifts. Each electrician worked between 8 a.m. and 5 p.m. from Monday through Friday, and there was no regular electrician coverage at night or on weekends. During cleanup and rebuild, all work performed outside of the above-described regular workweek was done on an overtime basis. Electricians were paid "time and a half" for overtime work.

11) During cleanup and rebuilding little or no overtime was necessary, because there were few breakdowns when the plants were not in production. However, if there were an electrical emergency when there was no or insufficient electrician coverage, Respondent "held over" an on-site electrician after the completion of his shift or "called in" an off-duty electrician. No matter how much time a called-in electrician worked, he was paid a minimum of four-and-one-half hours of straight time wage and one hour of overtime wage, or a total of six hours of hourly wage, for being called-in.

12) On February 10, 1978, Complainant made a verbal complaint alleging electrical safety code violations to Steven Stocks. As Respondent's superintendent of maintenance, Mr. Stocks was Complainant's ultimate supervisor. This verbal complaint constituted Step I of the grievance procedure outlined in the applicable union contract. Although Complainant had expressed concerns about electrical safety code violations to his immediate supervisors since he was hired, he had not formally grieved before.

13) Because there was no comment in response to his verbal complaint, Complainant initiated Step II of the grievance process by filing a written safety complaint with Mr. Stocks on February 13, 1978. Step II grievance must be answered by the employer. In

this written complaint, Complainant alleged that:

"11.6 Unlicensed people performing electrical work during the vacancy of my temporary layoff, 10-21-77 and continuing through 2-8-78.

"15.1 Electrical work not meeting minimun (sic) safty (sic) standards ORS 479.510 to 479.850.

"32 The Company's disregard for Authority having jurisdiction of the practical purpose of safe guarding of persons and property from hazards arising from the use of electricity. ORS 479.520."

He wrote that he sought:

"11.6 to be paid for every man hour violated... (From 10-21-77 to 2-9-78)

"15.1 The Company employ knowledgeable, qualified licensed SUPERVISING ELECTRICIAN as covered in Oregon Electrical Standards, rules 22-100 to 22-145.

"32 The Company agree not to fracture State and Federal Laws in the future."

Complainant genuinely believed that the allegations in his complaint were true.

14) In the next part of the grievance process, Complainant, Mr. Stocks and Ken Davis (another of Respondent's journeyman electricians, Complainant's union shop steward, and a member of the safety committee at Respondent's plants) met to discuss the grievance. Mr. Davis, who attended the meeting as union representative, was not involved in this grievance before this meeting.

The meeting, held on February 20, 1978, lasted about twenty minutes. Mr. Stocks asked Complainant to be more specific about how electrical work was not meeting minimum safety standards. Complainant replied that it was not his job to pinpoint problems, but rather to just bring to Mr. Stocks' attention the fact that unsafe practices were occurring. Rather than being more specific, Complainant repeated what he had alleged in writing, citing statutory provisions which include the entire state electrical code. Mr. Stocks became frustrated and angry because Complainant did not supply specific instances of violations. Mr. Stocks felt unable to investigate or correct a general complaint pertaining to the entire electrical code.

Mr. Stocks' required written answer to the grievance was:

"I cannot find where any unlicensed people are doing electrical work and if journeyman electricians or supervising electricians are doing sub-standard work, I have not been advised of such."

15) Safety was a common concern in Respondent's plants, as the manufacturing of titanium metal is a complex hazardous process. Safety complaints were not unusual. Although Respondent's maintenance employees didn't feel absolutely free to voice safety complaints themselves to supervisors, fearing potential pressure for doing so, they made many safety complaints to Mr. Davis, who then pursued the complaints himself. Because these complaints were usually handled on an informal oral basis between Mr. Davis and Mr. Stocks, few were put into writing. Mr. Davis voiced his own or other



complaints to Mr. Stocks and frequently argued with Mr. Stocks concerning the applicable interpretation of safety rules. Mr. Davis was recognized for his concern about safety and known as "Safety Sam" by Respondent's employees. No evidence was offered that Respondent retaliated against Mr. Davis (or any employee except Complainant) for safety activity.

16) On February 21, 1978, the day following Complainant's grievance meeting, Respondent's Personnel Department posted a notice of Complainant's layoff "due to a reduction in force", effective at the end of Complainant's shift on Friday, February 24, 1978. (The applicable union contract requires at least four days notice of layoff, and Mr. Stocks made a practice of not giving much more notice, for morale reasons.) Personnel posted this notice pursuant to direction from Mr. Stocks that one journeyman electrician be laid off at that date. Mr. Stocks did not specify to Personnel the identity of the electrician to be laid off; it was Personnel's task to determine, by applying the union contract, who would be laid off. Mr. Stocks assumed, however, that the electrician to be laid off would be Complainant, Respondent's least senior journeyman electrician.

17) At about midday February 22, 1978, Respondent's timekeeper notified Complainant that he was to leave Respondent's premises immediately. Mr. Stocks had made this order, after deciding that Complainant was aggravated from the previous day's meeting and that it was not safe to have such a disgruntled worker in the sponge plant.

18) Complainant left Respondent's sponge plant as ordered on February 22, 1978, and was paid through February 24, 1978. He was never recalled by Respondent and has not worked for Respondent since that time.

19) Complainant was earning $9.44 per hour when he was laid off by Respondent.

20) By the very end of February 1978, the rebuilding of Respondent's plants was sufficiently complete to allow Respondent to "start-up" some production on or about March 1. Start-up had to be gradual in order to get the materials back into flow. Starting up production was difficult because it required constant coordination of rebuilding and production processes. It was a time of fluctuation, with schedules and staffing needs changing. Final staffing actions were not taken therefore until the last possible minute. Respondent decided to continue to work its electricians on a straight shift basis, and to cover emergencies at night and on weekends by holding over or calling in an electrician and paying him on an overtime basis, during start-up. Respondent anticipated more emergencies during start-up than it had experienced during rebuild, but, given the limited production, it did not anticipate enough such emergencies to justify round-the-clock electrician coverage.

21) Respondent anticipated needing fewer electricians in the start-up phase than it had in the rebuilding phase, as the need for constant electrical construction ceased.

22) From March until June 1978, Respondent's operation was in transition from rebuilding to production. In June 1978, production start-up was

virtually complete. Respondent's electricians returned to rotating shifts.

23) Before Complainant's layoff, Carl Vincent, the lead man on Respondent's electrician crew, told Mr. Stocks that he wanted to downgrade to the status of journeyman electrician, as was his contractual right. This downgrade occurred soon after Complainant was laid off, when Respondent secured a replacement for Mr. Vincent. Mr. Vincent's return to journeyman status lessened the already nonexistent need for another journeyman electrician.

24) Respondent hired an apprentice electrician after Complainant was laid off, but the apprentice did not perform the same work as Complainant had.

25) The electricians on Respondent's maintenance crew accrued the following paid hours of work during February through June 1978:

| | Straight Time | Overtime |
|---|---|---|
| February | 903.75 | 30.5 |
| March | 935.5 | 84.75 |
| April | 781.5 | 120 |
| May | 902.5 | 95.65 |
| June | 940 | 91.25 |

Paid (rather than actual) overtime hours rose after February 1978 because, as expected, there were unpredictable electrical problems with the new production operation. Paid (rather than actual) straight time hours remained fairly steady (or dropped), as the regular electrician construction time decreased and left maintenance the only electrician work which was necessary on a regular basis. Actual straight time was less than paid straight time as emergency "call-ins", each resulting in at least 4 1/2 hours of paid straight time, increased. (Neither party offered direct evidence of how many actual overtime and straight hours the electricians worked during this period.)

26) The electricians remaining in the employ of Respondent's maintenance department after Complainant's layoff were able to adequately staff the scheduled shifts. To differing extents, depending upon their availability, they had to work overtime to staff the emergencies. Respondent could not have employed one more full-time journeyman electrician to cover its emergencies, however, as no one could know when they would occur.

27) Messrs. Barton, Layman, and Vincent had perceived that electricians were under-utilized before Complainant's layoff. Messrs. Layman, Barton and Stocks had discussed, since at least mid-February 1978, laying off an electrician at start-up, and Messrs. Layman and Barton had actually requested less electrician coverage as of the end of February 1978. Mr. Stocks had decided to layoff an electrician, but had not determined exactly when, at the time Complainant filed his written grievance on February 13, 1978. Mr. Barton believed that, even after Complainant's layoff, Respondent's electricians were not fully utilized.

## ULTIMATE FINDINGS OF FACT

1) After a major explosion at its production facility in October 1977, Respondent ceased production to clean up and rebuild its plants. Complainant, a journeyman electrician working for Respondent, was laid off, along with



many other employees. He was recalled on January 30, 1978.

2) Complainant made a verbal safety grievance to his ultimate supervisor, Steven Stocks, on February 10, 1978, which he restated in writing to Mr. Stocks on February 13, 1978. At a meeting on February 20, 1978, between Complainant, Mr. Stocks, and Ken Davis, a union representative, concerning this grievance, Mr. Stocks became angry at Complainant because Complainant would not make specific the very general portion of his complaint. As a result of this anger, Mr. Stocks felt some personal animus toward Complainant.

3) On February 21, 1978, pursuant to Mr. Stocks' direction to Respondent's Personnel Department to layoff one journeyman electrician, Complainant, Respondent's least senior electrician, was given notice that he would be laid off at the end of his shift on February 24, 1978. (This was the earliest possible effective date for his layoff, as union rule required at least four days notice before layoff.) Although he did not specify to Personnel which electrician would be laid off, Mr. Stocks assumed correctly that, pursuant to the applicable union contract, Complainant would be the electrician who would be laid off.

4) On February 22, 1978, at Mr. Stocks' direction, Complainant was asked to leave Respondent's premises at midday. Mr. Stocks issued this directive because he believed that Complainant was disgruntled due to the previous day's meeting and that it was unsafe to have an aggravated employee at work. Complainant was paid through February 24, 1978.

5) Respondent never recalled Complainant to work, and Complainant has not since worked for Respondent.

6) By February 28, 1978, Respondent's rebuilding operation was ready to begin the transition into starting up production again. During February 1978, Respondent's managers Barton and Layman had requested less electrician coverage as of the end of the month. Mr. Stocks agreed that there was not sufficient work for all existing journeyman electricians and planned to lay off one electrician. At this time, he also knew that the "lead man" for the electrician crew planned to downgrade to journeyman electrician and that this would give the electrician crew one more journeyman electrician.

7) Due to the under-utilization of its electricians, the reasonable projected overall decrease in work load of its journeyman electricians, and the projected downgrade of one supervisory electrician to journeyman electrician, Respondent would have laid off Complainant approximately at the end of his shift on Friday, February 28, 1978. Respondent instead laid off Complainant at the end of his shift on February 24, 1978, because Mr. Stocks was angry at Complainant's failure to make his safety complaint precise. Therefore, while Complainant's safety complaint played a key role in Mr. Stock's decision to lay off Complainant as of February 24, 1978, Respondent would have laid off Complainant due to current under-utilization, projected reduced work load and increased personnel as of February 28, 1978.

8) If Complainant had been laid off on February 28, 1978, instead of February 24, 1978, he would have been

able to work a total of sixteen additional straight time hours, on Monday, February 27, 1978, and Tuesday, February 28, 1978. At his rate of $9.44 per hour, he would have earned $151.04 during those two days.

## CONCLUSIONS OF LAW

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

2) The actions and motivations for those actions of Messrs. Barton, Layman, and Stocks cited herein are properly imputed to Respondent.

3) Respondent's laying off Complainant as of February 24, 1978, instead of February 28, 1978, due to Mr. Stocks' anger over the lack of specificity of Complainant's safety complaint constitutes discrimination against Complainant because Complainant made a complaint related to ORS 654.001 to 654.295. This discrimination constitutes a violation of ORS 654.062(5)(a).

4) Respondent's under-utilization of electricians, projected reduced electrician workload, and projected increase in electrician personnel constitute legitimate, nondiscriminatory, non-pretextual reasons for laying off an electrician. The fact that Respondent would have laid off Complainant for these reasons on February 28, 1978, limits the duration of the violation described in Conclusion of Law 3 above to the four days between the end of shift on February 24, 1978, and the end of shift on February 28, 1978.

5) The Commissioner of the Bureau of Labor and Industries of the State of Oregon has the authority to award monetary damages to Complainant under the facts and circumstances of this record, and the sum of money awarded as damages in the order below is an appropriate award.

## OPINION

There is but one issue in this matter: did Respondent lay off Complainant because Complainant made a safety complaint.

Two facts glaringly support the Agency's contention that Respondent did lay off Complainant because of his safety complaint. First, the layoff order was made by the very supervisor, Steven Stocks, with whom Complainant had formally discussed his safety complaint one day before. Second, during that discussion of Complainant's safety complaint the day before the layoff order, Mr. Stocks had become very angry with Complainant because of the lack of specificity of his safety complaint. The closeness in time of the discussion of the complaint and the layoff order, and Mr. Stocks' animus which was evidenced at the discussion, permit the inference of a cause-effect relationship between Complainant's complaint and his layoff, a causal relationship rooted in retaliation. It is precisely this relationship which is unlawful under ORS 654.062(5)(a).

In rebuttal, Respondent has offered evidence of legitimate, nondiscriminatory reasons for Complainant's layoff. Respondent has shown that not only Mr. Stocks, but two other managers and the electrician's immediate supervisor believed that Respondent's electricians were under-utilized by February 1978 and that there would definitely be insufficient work for all of the electricians by the end of February



1979, when Respondent's operation was to begin the gradual transition from construction to production. The schedule of electrician work load was projected to decrease during this transition, because production would require only maintenance, rather than also construction, on a scheduled basis. Only Respondent's coverage of electrical emergencies was expected to increase, because of the unknowns of new production activity. However, Respondent has proved that it could not have employed an additional electrician to cover such emergencies, as they were unpredictable and could occur at any time. Respondent's projections were reasonable, and therefore formed a legitimate basis for responsive action, including layoff.

What actually happened during the March-June 1978 transition period from full construction to full production? We only have figures on the paid, rather than actual, hours which Respondent's electricians worked. Paid scheduled hours remained relatively stable and actually dropped dramatically during April. Paid overtime hours tripled. Since an electrician was credited at least 4 1/2 scheduled hours and one overtime hour when he was called in for an emergency, and there were an increasing number of such call-ins, we can assume that actual hours worked were less than the paid hours. There was no substantial evidence that Respondent's electricians remaining after Complainant's layoff were not able to cover the electrical work during this period. Respondent's assertion that its projected work load justified laying off one electrician was not belied by what actually occurred.

In addition to a projected and actual decreasing need for scheduled electrician work, Respondent knew in February 1978 that the electricians' "lead man" had decided to downgrade to electrician, as was his contractual right, as soon as Respondent hired another supervisory electrician. This meant that Respondent would have one more electrician.

Reasonable projections of less schedule of electrician work and one more electrician to perform that work, coupled with managerial opinion that electricians were already under-utilized, constitute legitimate nondiscriminatory and non-pretextual reasons for laying off one electrician. The question thus becomes at what time did these legitimate nondiscriminatory reasons come into operation. Respondent's managers projected March 1, 1978, as the date for start-up of production and the date by which they wanted one less electrician. Messrs. Barton and Layman, who had no direct role in the decision to lay off Complainant on February 24, 1978, had asked for less electrician coverage as of the end of February 1978. The end of February was a marking point for the beginning of the transition from construction, and its particular staffing requirements, to production, with its quite different staffing needs. This transition was an uncertain time of flux between the demands of construction and the demands of production.

All this leads to the following conclusions. Respondent expected to lay off an electrician at the end of February 1978. Given the uncertainties involved in planning for the transition from construction to production, Respondent's

management did not expect to make a firm decision as to when to lay off the electrician until the last possible time. Before Respondent had decided exactly when to lay off the electrician, Mr. Stocks and Complainant had a heated discussion over the lack of specificity in Complainant's safety complaint. Because he was angry at Complainant's refusal to make his complaint more specific, Mr. Stocks laid off Complainant immediately. Mr. Stocks would have laid off Complainant effective four days later (at the end of shift on February 28, 1978) if Complainant had not made his complaint.

As a footnote, there can be no distinction in this matter between laying off a worker because he makes a safety complaint and laying off a worker because of the manner in which he makes his complaint. Much of Complainant's complaint was perplexingly general and therefore difficult to respond to. (Even at hearing, the exact nature of his complaint was not clear.) This lack of clarity or apparent willingness to clarify may render Mr. Stocks' frustration reasonable, but it does not justify his laying off Complainant immediately in response. ORS 654.062 (5)(a) would not effectively protect workers who make safety complaints from retaliation if those workers could be subjected to retaliation if the expression of their complaints were flawed. The legislative policy of encouraging workers to report safety problems (ORS 654.003), and of even directing that workers do so (ORS 654.062(1)), would be thwarted if workers feared retaliation due to the manner in which they expressed their complaints. (I do not herein deal with the unusual case in which a worker may express his or her complaint in an outrageous manner, as that clearly did not occur here.) ORS 654.062(5)(a) protects workers from retaliation for making any complaint which is related to safety as described in ORS 654.001 to 654.295.

## ORDER

NOW, THEREFORE, as authorized by ORS 659.060(3), 659.010(2), and 654.062(5)(b), and in order to eliminate the effects of the unlawful practices found, as well as to protect the lawful interests of others similarly situated, the Respondent is hereby ordered to:

1) Deliver to the Hearings Unit of the Portland office of the Bureau of Labor and Industries, within thirty days of the execution of the Final Order in this matter, a certified check payable to the Bureau of Labor and Industries in trust for James E. Ragland in the gross amount of ONE HUNDRED FIFTY-ONE DOLLARS AND FOUR CENTS ($151.04), representing compensatory damages for two days of work lost due to Respondent's unlawful acts against Complainant.

2) Cease and desist from discriminating against any employee because of the employee's safety complaint.

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**In the Matter of**
**DAY TRUCKING, INC.,**
**an Oregon corporation, Respondent.**

Case Number 34-79
Final Order of the Commissioner
Mary Wendy Roberts
Issued March 23, 1981.

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## SYNOPSIS

Respondent committed an unlawful employment practice in discharging Complainant, who had reported safety violations to the Accident Prevention Division of the Workers' Compensation Board. Complainant had previously made similar complaints to the corporate officer who fired him and who stated to the Employment Division that the reporting of alleged safety violations was the reason for the discharge. Finding that Complainant phoned the Bureau of Labor and Industries within two days of the discharge and returned questionnaires within two weeks and that the Bureau caused the filing of a formal administrative complaint more than 30 days after the discharge, the Commissioner denied a motion to dismiss, and awarded Complainant $2,832.32 in lost wages, plus $1,578.11 for mileage in connection with Complainant's job search. ORS 183.415(10); 654.062(5)(a), (b) and (c); 659.010(2); 659.040(1) and (4); 659.060(3).

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The above-entitled matter came on regularly for hearing before James R. Uerlings, designated as Presiding Officer in this matter by the Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was held at City Hall, Klamath Falls, Oregon, on September 20, 1979. The Bureau of Labor and Industries (hereinafter referred to as the Bureau) was represented by Michael J. Tedesco, Assistant Attorney General. The Respondent, Day Trucking, Inc., was represented by Hal Coe, Attorney at Law. The Complainant, Tom Amyx, was present and testified.

Having fully considered the record in this matter, I, Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries, hereby make the following Rulings Upon Motions, Findings of Fact, Ultimate Findings of Fact, Conclusions of Law, Opinion, and Order.

## RULINGS UPON MOTIONS

1) Respondent's request for a jury trial was denied by the Presiding Officer at hearing, because the Bureau is not required or authorized by statute to provide a jury trial in contested case proceedings.

2) Respondent's objections to exhibits and testimony, which were taken under advisement at hearing, are overruled, and said exhibits and testimony are received into the record.

3) Respondent's motion to dismiss these proceedings because of lack of Bureau jurisdiction due to an untimely complaint is denied for the reasons cited in the Conclusions of Law and Opinion below.

## FINDINGS OF FACT – PROCEDURAL

1) Counsel for the parties agreed to the following stipulations:

a) Admit into evidence the complaint which Complainant filed with the Civil Rights Division of the Bureau

under the provisions of ORS 654.062(5)(b).

b) Should the mechanical recording of the hearing be defective, due to the inadequacy of the tape recorder, the Proposed Findings of Fact of the Presiding Officer shall constitute the record of the hearing.

2) At all times material herein, Respondent was an Oregon corporation doing logging work in the State of Oregon and was an employer subject to the provisions of ORS 659.010 to 659.110 and 654.062.

3) On October 9, 1978, the date Respondent terminated Complainant's employment, Complainant had reasonable cause to believe that he had been discharged because he had reported on-the-job safety violations to the Accident Prevention Division of the Oregon Workers' Compensation Board.

4) On October 9 and 10, 1978, Complainant contacted the Bureau by telephone concerning his discharge.

5) On October 11, 1978, the Bureau sent Complainant an Intake Questionnaire and a "Complainant Questionnaire". The stated purpose of the questionnaires was to enable the Bureau to ascertain whether there was a basis for Complainant to file a "formal charge". Complainant completed these questionnaires on October 18, 1978, and returned them by mail to the Bureau. He alleged on these documents that he had been discharged from employment as a consequence of his reporting unsafe working conditions.

6) On November 2, 1978, the Bureau sent Complainant a letter with questions concerning his allegations.

7) On November 9, 1978, the Bureau sent Complainant a written complaint for him to review, sign, have notarized and return by mail by November 24, 1978.

8) On November 13, 1978, Complainant filed the signed and notarized (*i.e.* verified) complaint with the Bureau alleging that he had been discharged from his employment as a consequence of his complaint about safety hazards on the job. The Bureau received this complaint on November 16, 1978.

9) Even though he resided in Klamath Falls, Complainant had to deal with the Bureau's Portland office throughout the above-described process because it was the only Bureau office which accepted complaints.

10) Following the filing of Complainant's verified complaint, the Civil Rights Division of the Bureau investigated the allegations in the complaint and determined that substantial evidence existed to support those allegations.

11) Thereafter, the Civil Rights Division attempted to reach an informal resolution of this matter through conference, conciliation and persuasion, but was unsuccessful in these efforts.

12) In its exceptions to the Proposed Order in this matter, Respondent asserts that it has a right to receive a transcript and asks not only for such a transcript but also to be allowed to submit additional exceptions after reviewing it. ORS 183.415(10) specifically authorizes agencies to not transcribe the tape-recorded record of contested case hearings unless a transcript is requested for purposes of rehearing or court review. The Bureau has not transcribed the record herein. However, the tape recording of the hearing is available for review. Respondent made no request to review the record of this hearing before it filed its exceptions. Consequently, while it may yet review the tape-recorded record, it may not thereafter file additional exceptions, as its request to do so was not timely made.



13) Respondent asserts that since the Commissioner did not make a determination in this case within ninety days of receipt of the complaint, the complaint must be dismissed. Respondent cites as authority for this assertion ORS 654.062 (5)(c), which states:

> "Within 90 days after the receipt of a complaint filed under this subsection the Commissioner shall notify the complainant of his determination under paragraph (b) of this subsection."

This paragraph was enacted for the benefit of Complainant, not Respondent. It does not bestow any right upon Respondent. Respondent therefore lacks standing to assert any right or raise any issue under this paragraph.

**FINDINGS OF FACT – THE MERITS**

1) At all times material herein, Complainant was a qualified log truck driver.

2) Respondent employed Complainant as a log truck driver between August 30, 1978, and October 9, 1978.

3) Before October 5, 1978, Complainant made complaints to Ray Day, an officer of Respondent, about alleged on-the-job safety hazards.

4) Shortly before noon on Thursday, October 5, 1978, Complainant took the log truck he was operating for Respondent into Respondent's repair shop because of what Complainant believed to be safety defects in the truck's seat and the stake pin of the truck's log carrier. Complainant reported these problems to the only supervisory person available at the time, a bookkeeper named Paul Matthews, and requested that the truck be repaired.

5) Complainant's belief that safety defects existed was reasonable, and his report of such defects to the agent of Respondent was justified, in that the truck had a six inch bounce to the seat because of a defective cab mount and one of the stake pins of the log trailer was cracked.

6) When Complainant left the truck for repairs, he was not given a fixed time at which the truck would again be available for his use. Complainant did not have sufficient expertise to determine on his own how long it would take for the truck to be repaired.

7) Complainant did not ask permission to leave Respondent's premises while the repairs were being made, nor did he ask, before leaving the shop, when the repairs would be completed.

8) On the afternoon of the same day, Complainant contacted the Accident Prevention Division of the Oregon Workers' Compensation Board (hereinafter referred to as the APD) with safety complaints about Respondent's premises and equipment. The violations he alleged included those which concerned his truck's cab mount and stake pin and, in addition, a defective air hose and electrical problems in Respondent's repair shop.

9) On the evening of the same day, Complainant called Ray Day to determine if the truck repairs were completed. Respondent informed him that they were not.

10) Complainant did not appear for work on the morning of the next day, Friday, October 6, 1978.

11) The repairs to Complainants truck which Respondent's mechanic felt were necessary took one to three hours to complete, once the work began. Leo Martin, an employee of Respondent, completed them sometime during October 6, 1978.

12) Respondent did not contact or attempt to contact Complainant to inform him that the truck had been repaired and was available for his use.

13) Complainant testified, and I find, that he was ready and willing to return to work, and would have returned to work, as soon as repairs to his truck were completed, if he had been notified that they were completed.

14) Sometime between the afternoon of October 5, 1978, and the early evening of October 8, 1978, an inspector from the APD called Respondent and informed him that APD was going to conduct a safety inspection of Respondent's premises.

15) Complainant called Mr. Day again, on the evening of Sunday, October 8, 1978, from Lakeview, Oregon. In this conversation, Mr. Day told Complainant that he (Day) did not want someone working for him who made safety violation reports to "OSHA" (sic) regarding his employer.

16) Complainant appeared for work on Monday, October 9, 1978, at noon instead of at his regular reporting time approximately four to five hours earlier. He justifiably believed that his employment may have been terminated.

17) When Complainant appeared for work on October 9, 1978, Mr. Day informed him that Respondent no longer had a job for him.

18) The APD inspected Respondent's premises on that same day between 1:50 and 2:50 p.m. and found safety violations. However, the safety hazards concerning Complainant's truck, for which the complaint to the APD had been made in part, had been repaired by the time of the inspection. It is unclear whether any of the violations the APD found corresponded to the other complaints Complainant had made to the APD.

19) In October or November 1978, in response to Complainant's filing for unemployment compensation, Mr. Day wrote to the Employment Division of the State of Oregon stating that his reason for discharging Complainant was that Complainant had reported alleged safety violations concerning his truck and Respondent's shop to the APD.

20) All witnesses had some difficulty recalling the exact sequence of events in this matter due to the length of time since the incidents occurred. Complainant was a most credible witness.

21) Complainant moved to Lakeview, Oregon, after his termination by Respondent. This move was reasonable, as Lakeview was more centrally located to Complainant's work prospects.

22) Complainant earned $1,465.13 pay for the six weeks he was employed by Respondent. Complainant's average weekly wage from Respondent, therefore, was $244.19.



23) At the time of Complainant's discharge by Respondent, Respondent had 12 employees in the same position as Complainant, including Complainant. Between October 9, 1978, and January 1979, Respondent employed an average of 10 persons in the capacity in which Complainant had worked. Respondent testified that at least one of the two persons who left the employment of Respondent between October and January was laid off due to the seasonal nature of Respondent's business.

24) Had Complainant continued working for Respondent, he would have been the least senior of Respondent's employees between October 1978 and June 1979. Respondent customarily reduced its truck driving force during the winter months because of seasonal logging industry practices. In doing so, Respondent laid off employees in the reverse order of their seniority.

25) Complainant expected to be employed by Respondent for a total of 28 weeks between October 9, 1978, and June 4, 1979. This 28 week figure approximately represents the 34 weeks between the latter dates minus six weeks of layoff due to the seasonal logging practices. Respondent presented no evidence contradicting the Agency's evidence regarding this employment expectation, other than that which concerned the amount of time which Complainant allegedly would have been laid off due to the season and lack of seniority. Respondent admitted that Complainant would have worked at least until January 1, 1979, and would have restarted work by at least May 1, 1979, if he had not been discharged. Respondent also admitted, however, that the only probable layoff of Complainant would have been during March and April of 1979.

I find that Complainant's expectation of 28 weeks of employment by Respondent between October 9, 1978, and June 4, 1979, was reasonable. The 28 weeks of employment by Respondent at an average weekly wage of $244.19 would have earned Complainant gross wages of $6,837.32.

26) Complainant received $3,745 in unemployment compensation benefits from October 9, 1978, to June 4, 1979, when he again found employment. Complainant also received wages of $260.00 for one week of employment with Warner Mountain in January 1979.

27) Complainant made substantial efforts to mitigate lost wages by diligently searching for employment between October 9, 1978, and June 4, 1979. However, Complainant was not able to obtain permanent employment during this period of time.

28) Complainant incurred mileage expenses for 9,283 miles of driving in his attempt to find new employment. The federal Internal Revenue Code business mileage allowance specified by Agency counsel, $.17 per mile, can be used to compute the reasonable expense of this mileage. Upon that basis, Complainant expended $1,578.11 for mileage.

29) One document indicates that Complainant estimates that he additionally expended the sum of $4.00 per

meal for 42 meals during the time that he searched for employment. This would total $168.00. Other than this document, the Agency presented no evidence regarding the meal expenses and did not present any testimony indicating what basis was used to arrive at this figure. While it is reasonable to presume that meal expenses were incurred while Complainant was traveling to find work, Complainant is not entitled to reimbursement of the meal expenses, due to failure of specificity in the proof offered to support the claim therefor.

30) Complainant additionally estimated that he made 80 long distance calls at an average expense of $.70 per call during his search for employment. Based upon these figures Complainant expended $56.00 for said expense. Again the Agency did not present any other evidence as to how this figure was computed or to whom or for what purpose said calls were made. Complainant is not entitled to reimbursement for telephone expenses since sufficiently specific evidence was not produced to support the claim therefor.

## ULTIMATE FINDINGS OF FACT

1) On October 5, 1978, Complainant made a complaint to the Accident Prevention Division of the Oregon Workers' Compensation Board about alleged safety violations under ORS 654.010 by Respondent.

2) Respondent, through its officer Ray Day, discharged Complainant from its employ on October 9, 1978, because of Complainant's complaint to the APD, of which Respondent, through Mr. Day, had knowledge. (Though other reasons may have contributed to Respondent discharging Complainant, Complainant's complaint to the APD played at least a key role in his discharge.)

3) As a direct consequence of his discharge by Respondent, Complainant lost wages from October 9, 1978, through June 4, 1979, in the amount of $6,837.32. During this period, however, he received unemployment compensation totaling $3,745.00 and wages from temporary employment totaling $260.00.

4) As a direct consequence of his discharge by Respondent, Complainant incurred $1,578.11 in mileage expenses in his search for new employment.

5) Although Complainant made diligent good faith efforts to insure that the paperwork required by the Bureau to complete the process of filing a verified complaint was completed as quickly as possible, his verified complaint herein was filed with the Bureau more than 30 days after Complainant had reasonable cause to believe that a violation under ORS 654.062(5)(a) had occurred.

## CONCLUSIONS OF LAW

1) The Commissioner of the Bureau of Labor and Industries has jurisdiction of the parties and subject matter herein. The complaint filed with the Bureau by Complainant was timely within the meaning of ORS 654.062(5)(b) and 659.040.

2) The actions cited herein, and motivations for those actions, of Ray Day, officer of Respondent corporation, are properly imputed to Respondent.



3) Respondent's discharge of Complainant because Complainant made a complaint related to ORS 654.001 to 654.295 violated the provisions of ORS 654.062(5)(a).

4) The Commissioner of the Bureau of Labor and Industries has the authority to award money damages to Complainant under the facts and circumstances of this record, and the sum of money awarded as damages in the Order below is an appropriate award.

## OPINION

### I. Elements of the Violation

The record must contain substantial evidence of the following three elements in order to yield the conclusion that Respondent has violated ORS 654.062(5)(a):

1) A complaint made by Complainant under or related to ORS 654.001 to 654.295. The record clearly reflects that Complainant was an employee of Respondent who, on October 5, 1979, made a complaint to the Accident Prevention Division of the Oregon Workers' Compensation Board relating to ORS 654.010.

2) Respondent's discharge of Complainant. Respondent, through its officer Ray Day, discharged Complainant when Mr. Day told Complainant he was terminated. Mr. Day first intimated that Complainant was discharged in a telephone conversation on October 8, 1978, and made that intimation clear in a personal confrontation at Respondent's premises on October 9, 1978.

3) A direct causal relationship between Respondent's discharging Complainant and Complainant's APD complaint. The Agency has satisfied its burden of proof concerning this element by showing that:

a) Mr. Day received telephone notification of an impending APD inspection prior to discharging Complainant;

b) When Mr. Day talked to Complainant on the telephone thereafter, he told Complainant that he did not want anyone working for him who would report Respondent to the APD;

c) After he discharged Complainant, Mr. Day sent a written communication to the Oregon Employment Division concerning the reason for Complainant's discharge, which stated that Complainant was discharged because he had reported Respondent to the APD, alleging safety violations.

At hearing, Respondent attempted to carry its burden to rebut this evidence by asserting that Complainant was discharged because of his failure to appear for work after leaving his truck for repairs at Respondent's shop. This assertion is not credible, because on the two occasions when Complainant checked in with Mr. Day before he returned to work, Mr. Day did not direct that Complainant should come, or have come, to work. Even if we were to believe this assertion, in light of Respondent's admissions cited in paragraphs b and c above, we could not conclude that Complainant's absence played anything more than a minor role in his discharge. The admissions constitute substantial evidence of the requisite causal relationship between Respondent's discharge of Complainant and Complainant's APD complaint.

The record contains substantial evidence that Respondent has violated ORS 654.062(5)(a) in this matter.

**II. Timeliness of the Complainant's Complaint to the Bureau**

ORS 654.062(5)(b), in pertinent part, states that:

> "Any employee . . . who believes that he has been . . . discharged from employment . . . by any person in violation of . . . (ORS 654.062(5)) may, within 30 days after he has reasonable cause to believe that such a violation has occurred, file a complaint with the Commissioner of the Bureau of Labor and Industries alleging such discrimination under the provisions of ORS 659.040 . . . the commissioner shall process the complaint and case under the procedures, policies and remedies established by ORS 659.010 to 659.110 . . . in the same way and to the same extent that the complaint would be processed . . . if . . . (it) involved allegations . . . under . . . ORS 659.030."

Respondent moved to dismiss these proceedings, alleging that the Bureau lacks jurisdiction because the verified complaint herein was not filed within the 30 day period cited in ORS 654.062(5)(b).

Counsel for both parties stipulated at hearing that the record contains the complaint filed herein for purposes of ORS 654.062(5)(b). This verified complaint was not filed with the Bureau until five calendar days after the above-mentioned 30 day period had ended.

The argument in favor of Respondent's motion is that ORS 654.062(5)(b)'s 30 day period is a time limitation which is "jurisdictional" in the sense that failure to comply with it extinguishes the Commissioner's subject matter jurisdiction and that, because of this, it must be strictly construed and not extended for any reason. The argument in opposition to Respondent's motion is that this time limitation only means that a person who fails to comply with it is ordinarily barred from invoking the Commissioner's undoubted jurisdiction, but that the limitation can be flexibly construed and may be extended for equitable reasons. Schlei and Grossman, *Employment Discrimination Law* 861-862 (1976) and 224 (1979 Supplement).

For the following reasons, we believe that the Legislature did not intend to have ORS 654.062(5)(b) impose an absolute jurisdictional time requirement, and we therefore agree with the argument in opposition to Respondent's motion. First, the operative language in ORS 654.062(5)(b) is "may . . . within 30 days . . . file" (emphasis added). This is permissive, or what the Presiding Officer labeled "directory", rather than mandatory, language. In contrast, ORS 659.040, under whose provisions ORS 654.062(5)(b) specifically directs that the complaint shall be processed, states that:

> ". . . . A complaint filed pursuant to this section shall be filed no later than one year after the alleged unlawful employment practice."

This statute employs the mandatory language "shall".

Secondly, civil rights legislation, which is remedial in purpose, is entitled to the benefit of liberal construction, in order to give aggrieved persons the maximum benefit of the law. More specifically, the declaration of purpose of the Oregon Safe Employment Act contained in ORS 654.003 indicates the Oregon Legislature's clear intent to reduce occupational safety hazards by, in part, encouraging workers to reduce the number of such hazards. In order to effectuate this strong social and economic policy, ORS 654.062(5) protects workers who report safety hazards from employer retaliation therefor by forbidding and providing a sanction against such retaliation. This protective/remedial purpose would not be served, and the social and economic benefits of the protective statutory scheme of ORS chapter 654 would not be achieved, if the short 30 day filing period in ORS 654.062(5) were construed as an absolute requirement to which there could be no exception.

Because of the permissive language in ORS 654.062 and the mandatory language in ORS 659.040, and in order to best serve the stated legislative purpose underlying ORS 654.062, we view the 30 day period in ORS 654.062(5)(b) to be subject to equitable modification, and the one year time period in ORS 659.040 to be a strict and absolute jurisdictional requirement which cannot be modified.

While Complainant herein met the one year period of ORS 659.040, he failed to comply with the 30 day period of ORS 654.062(5)(b). Accordingly, this forum must address the question of whether there were circumstances to excuse the Complainant's failure to comply with the 30 day period. We conclude that there were.

First of all, the Agency has shown that the Complainant had good cause for not filing his complaint within 30 days. Complainant contacted the Bureau of Labor and Industries by telephone on October 9 and 10, 1978, immediately after his discharge, the event which gave rise to his allegations herein. In response, on October 11, 1978, the Bureau sent him two questionnaires to complete, in order to enable the Bureau to "establish a basis for filing a formal charge". Complainant completed these questionnaires on October 18, 1978, and returned them by mail to the Bureau. On November 2, 1978, the Bureau sent the Complainant a letter with questions concerning his allegations. On November 9, 1978, the Bureau sent him a written complaint for him to review, sign, and have notarized. The accompanying letter asked Complainant to return this by November 24, 1978. Complainant signed the document and had it notarized on November 13, 1978, and the Bureau's Portland office received it by mail on November 16, 1978. Only the signed and notarized document was filed after the 30 day period had elapsed.

Complainant made a diligent good faith effort to file his complaint promptly. Although he lived in Klamath Falls, he had to deal with the Bureau's Portland office, because it was the only Bureau office which accepted complaints. Complainant made very timely initial contact with the Bureau by telephone. The ensuing exchange of letters and telephone calls, to all of which Complainant responded in a prompt manner, was necessitated not by Complainant, but by the Bureau's procedures for transforming his verbal complaint into a final, verified written complaint.

ORS 654.062(5)(b), unlike ORS 659.040, requires only that a "complaint", not a "verified complaint", be filed within 30 days. "Complaint" is not defined by statute. Complainant made an initial verbal complaint well within 30 days and was not responsible for the fact that the Bureau did not translate this into what it considered an operative complaint until more than 30 days had elapsed. The chief obstacle to meeting the 30 day limitation was the 15 day lapse between Complainant's completing the questionnaires and the Bureau's response thereto. Indeed, the statutory requirement of only a "complaint", Complainant's prompt initial contact with the Bureau, and Complainant's prompt responses to subsequent requests by the Bureau could be construed as a constructive filing under ORS 654.062(5)(b).

In addition, the Bureau gave Complainant no notice of any 30 day deadline, and in fact gave the impression that Complainant had until November 24, 1978, to file a timely written complaint.

Respondent alleges that it was prejudiced by the five day delay in the filing of a verified complaint. Subsections (1) and (4) of ORS 659.040 contain the statutory provisions which are designed to prevent such prejudice to a respondent by insuring that the respondent is advised of a complaint of discrimination against it within a reasonable period of time. Subsection (1) provides for the one year filing period, and subsection (4) provides that the Commissioner will notify the respondent within 30 days after the charge has been filed. In this case, the complaint was filed within one year and the Bureau sent Respondent the requisite notice within one day of its receipt of the charge.

Respondent has thereby received the benefit of the law which was intended to prevent prejudice by the lapse of time. Despite this fact, Respondent claims prejudice in that Respondent's witnesses had poor recollections of the events at the time of hearing. However, the issue presented by the timeliness of the complaint concerns prejudice caused by the five day delay in filing, rather than prejudice caused by the entire time which elapsed prior to hearing. There is no evidence that the hearing would have been five days earlier if the complaint had been filed five days earlier, or that, even if the latter were true, five days would have made a difference in the memory of Respondent's witnesses. Respondent presented no evidence demonstrating prejudice as a result of the five day delay.

The failure to comply with the 30 day time period was not substantial; it was excused by Complainant's diligent good faith effort to comply and the Bureau's responsibility for delay; and it did not prejudice Respondent. There is ample reason to consider Complainant's complaint timely within the meaning of the law.

## ORDER

NOW, THEREFORE, as authorized by ORS 659.060(3), 659.010(2) and 654.062(5)(b), and in order to eliminate the effects of the unlawful practices found and to protect the rights of others similarly situated, Respondent is ordered to:



1) Deliver to the Hearings Unit of the Portland office of the Bureau of Labor and Industries, within 30 days of the execution of this Order, a certified check payable to the Bureau of Labor and Industries in trust for Thomas Amyx in the amount of $4,410.43, representing back pay and mileage expense damages resulting from Respondent's unlawful practices, less unemployment compensation received by Complainant and wages received by Complainant from temporary employment.

2) Take whatever steps are necessary to ensure that workers who complain about safety hazards in the future shall not have their right to work in any way prejudiced by such complaints.

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**In the Matter of**
**CITY OF DALLAS,**
**Oregon, Respondent.**

Case Number 24-79
Final Order of the Commissioner
Mary Wendy Roberts
Issued March 24, 1981.

## SYNOPSIS

Finding that female Complainant was hired as and performed the duties of police clerk dispatcher during her approximately five years with Respondent public employer, the Commissioner ruled that Respondent was not guilty of an unlawful employment practice based on sex in not compensating her as a police officer even though she was a sworn officer for certain purposes, performed some limited police officer duties, and had obtained a certificate of completion from a police academy. However, Respondent committed an unlawful employment practice based on sex by denying Complainant equal opportunity for hire as a police officer 18 months before she quit, where there was bias on the part of an interview panel and in crediting her experience and training. The Commissioner awarded Complainant $7,308 in wage loss, representing the difference between her earnings and that of a police officer, and ordered Respondent to cease discriminating against applicants for employment on the basis of sex. ORS 659.010(2); 659.030(1)(a); 659.060(3).

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The above-entitled matter came on regularly for hearing before Glenda E. Anderson, designated as Presiding Officer by the Commissioner of the Bureau of Labor and Industries. The hearing commenced on July 16, 1979, and continued on July 20, 1979, at the State Library in Salem, Oregon. Michael J. Tedesco, Assistant Attorney General, represented the Bureau of Labor and Industries. Kenneth E. Shetterly, Respondent's City Attorney, represented Respondent. Complainant, who was present and testified, was represented by William F. Greer, Attorney at Law.

Having fully considered the entire record in this matter, I, Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries, hereby make

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

## FINDINGS OF FACT – PROCEDURAL

1) In the Specific Charges, the office of the Attorney General described Respondent with the language "City of Dallas, Oregon and City of Dallas Police Department". Because the City of Dallas Police Department is merely a department of the City of Dallas, to include it in this description is unnecessary. In addition, this description has lead to the misapprehension that the City of Dallas Police Department has been named as a respondent in its own right. For these reasons, and with the agreement of the Office of the Attorney General, the City of Dallas Police Department has been deleted from the description of Respondent.

2) The parties have agreed that at all times material herein, Respondent was an is an employer subject to the provisions of ORS 659.010 to 659.110.

3) On or about July 29, 1976, Hazel Elizabeth Walch filed a verified complaint with the Civil Rights Division of the Bureau of Labor and Industries alleging that she had been and continued to be discriminated against on the basis of her sex in connection with her employment by Respondent.

4) Following the filing of the aforementioned complaint, the Civil Rights Division investigated the allegations contained therein and determined that substantial evidence existed in support of Complainant's allegation of Respondent's refusal to hire her on the basis of her sex, and that substantial evidence did not exist in support of Complainant's allegation of Respondent's discrimination in compensation on the basis of her sex.

5) Thereafter, the Civil Rights Division attempted to reach an informal resolution of this complaint through conference, conciliation and persuasion but was unsuccessful in these efforts.

6) Although the Civil Rights Division found no substantial evidence of unlawful compensation on the basis of sex, the Commissioner of the Bureau of Labor and Industries, on advice of the office of the Attorney General, incorporated this allegation into the matter by including it in the Specific Charges.

7) The Agency introduced evidence of what Complainant actually earned and what she would have earned as a Dallas police officer during times material herein. In response to Respondent's objection, the Presiding Officer specified that she would use these exhibits to compute any back pay damages unless Respondent submitted better evidence. The Respondent not having done so, Agency evidence has been used in the computation of back pay damages.

## FINDINGS OF FACT – THE MERITS

1) At all times material herein, the Dallas Police Department (hereinafter referred to as the DPD) was one of Respondent's seven departments. As Respondent's chief administrative officer, Howard D. Brandvold, Respondent's City Manager, was responsible for the organization and operation of all of Respondent's departments and its approximately 75 employees. The Chief of the DPD reported directly to Mr. Brandvold.



2) In 1972, Mr. Brandvold and Jim S. Greene, Chief of the DPD, decided and took action to create the first and only clerk dispatcher position in the DPD. The DPD needed a clerk dispatcher to do its increasingly complex clerical and recordkeeping work, to dispatch and to be consistently available in the DPD office during the day.

3) On May 10, 1972, after discussion with Mr. Brandvold, Chief Greene hired Complainant, a female for the above-mentioned clerk dispatcher position, pursuant to her February 8, 1972, application for clerk typist work. Complainant had been clerk dispatcher/matron for the Polk County Sheriff's Office for approximately three years between March 1968 and April 1972.

4) During Complainant's employment by Respondent, there were a maximum of twelve employees for the DPD: the Chief, three corporals and three sergeants, four patrol officers (one of whom was the Community Liaison Officer) and Complainant. At the time Complainant was hired, all DPD employees were male.

5) Chief Greene served as Chief of the DPD from April 1, 1952, to December 25, 1975. His duties included assigning work to and evaluating job performance of DPD employees, including Complainant, whom he directly supervised. He did not have authority to promote or reclassify DPD employees, raise or lower their pay, or hire or fire them, on his own. Nevertheless, under the "loose" structure of Respondent's city government during this time, most personnel decisions concerning the DPD were in fact left to Chief Greene's discretion, with Mr. Brandvold agreeing with Chief Greene's recommendations or actions before or after the fact.

6) Between the time Complainant was hired by Respondent and May 1975, there were no official job descriptions for DPD positions. There was none for Complainant's position until August 1976.

7) Complainant's duties as a clerk dispatcher included record-keeping, answering the telephone, taking over-the-counter and telephone complaints, dispatching, occasional matron work (being present during the interview of female suspects or victims), typing, filing, transcribing and other clerical work. She also served as court clerk after February 1973. Most of her work was performed in the DPD office or in court.

8) All of the above duties except matron and court clerk had been performed by Chief Greene or other police officers, if at all, before Complainant was hired.

9) Throughout her employment for Respondent, Complainant's job title was clerk dispatcher (also designated as clerk-typist or secretary-matron), and she was compensated at the rate of pay designated for this position.

10) Throughout her employment for Respondent, Complainant evidenced her strong desire to learn all she could about police service through education and training and to eventually become a police officer. However, there is no evidence that she applied for the at least three police officer openings which Respondent filled during Chief

Greene's tenure or any DPD police officer opening before May 16, 1975.

11) On May 25, 1972, Chief Greene commissioned Complainant as a police officer by appointing her a police officer and giving her the following Oath of Office:

> ". . . I will faithfully discharge the duties of my office as a Dallas Police Officer to the best of my ability, so help me God."

Chief Greene commissioned Complainant primarily because having "sworn officer" status would afford her lawful access to the confidential police records with which Complainant had to work in her capacity as clerk dispatcher. It was common in Oregon for clerical police department employees to be commissioned as police officers for this limited purpose. Mr. Brandvold was aware of Complainant's commissioning.

12) Between November 1972 and May 1975, under the direction of the Board on Police Standards and Training (hereinafter referred to as the BPST), Complainant completed 579 hours of education and training in law enforcement. Some of this training involved riding patrol with a police officer. Complainant completed most of the patrol portion of the training during off duty hours; all other training was done during her regular working hours. Part of this training went toward Complainant's education and certification as a police officer described in Findings of Fact 13 and 15 below. The remainder was performed as continuing education after her certification.

13) Between September 9, 1973, and October 26, 1973, Complainant attended 322 hours of law enforcement officer training at the BPST Police Academy at Camp Withycombe in Clackamas, Oregon. (These hours are included in the 579 hour figure cited in Finding of Fact 12 above.) Chief Greene had applied to BPST for her admission, and Mr. Brandvold had approved her attending. Chief Greene felt that the training would help Complainant evaluate the complaints which people brought to the DPD office. Complainant was paid her full-time clerk dispatcher wage by Respondent during her Academy training. She received very good grades and, on October 26, 1973, Complainant received her Certificate of Completion for having successfully finished the BPST Basic Curriculum for Law Enforcement Officers.

14) During September 1973, Chief Greene, with Mr. Brandvold's concurrence, issued to Complainant the skirt, jacket, cap, badges, and collar brass of a DPD police officer in order to identify her to the public as a DPD employee. Although she was not required to wear this uniform during her work hours, as were DPD police officers, Complainant did wear it while working.

In addition, Complainant obtained a firearm, handcuffs and case and a holster. She was not required to obtain, maintain, or wear these items, as were DPD police officers. Although she apparently kept these items with her at work, she did not consistently wear them. There is no evidence that she ever used them.

With Chief Greene's knowledge, Complainant kept a notebook of her daily activities. She was not required to do so, as were DPD police officers.



The DPD did not issue the notebook to her, as it did to its police officers.

15) On December 27, 1973, after completing her Police Academy training, BPST paper work and on-the-job training, Complainant was awarded a Basic Certificate from the BPST qualifying her as a Certified Police Officer under ORS 181.640.

16) After Complainant completed the above-described training and was certified, her work for the DPD changed, in that she began performing some of what were considered police officer tasks in addition to her clerk dispatcher functions. Despite this fact, she continued to be (and to be considered) primarily a clerk dispatcher.

17) DPD police officers are responsible for protecting life and property within the City of Dallas. At times material herein, their major duties included patrol work (usually performed alone) and crime prevention and investigation. They also made court appearances (as witnesses). Most work was performed outside of the DPD office, patrolling or investigating.

18) DPD police officers also spent approximately ten percent of their time writing and reading reports and letters, taking over the counter and telephone complaints, answering the telephone, and filing and retrieving information from manual and automated sources.

19) One DPD patrolman was designated the Community Liaison Officer. This person performed crime prevention and school public relations work, wrote reports and letters, and did relief patrol work.

20) Between December 27, 1973, and May 1975, Complainant performed the following police officer functions:

> Complainant issued at least one moving traffic citation (after observing a violation from the DPD office window rather than while on traffic control)
>
> Complainant handled the majority of the routine bad check complaints. This involved receiving the check and information from the complainant, making up a case file, sending a form letter to the suspect, doing follow-up work with banks and the suspect if necessary, and receiving and disbursing restitution.
>
> Complainant assisted DPD police officers responding to at least one sex crime by interviewing and taking statements from witness and victims and, when she was not on duty, accompanying (in another vehicle) the arresting officer.
>
> Complainant was trained and designated to participate with DPD police officer Ed Perkins an the Polk County Child Safety Team, which coordinated investigations of child abuse/neglect cases. She assisted DPD police officers in investigations and victim assistance in child abuse/neglect cases.

21) Complainant also aided people who came to the DPD office and evaluated over-the-counter complaints. She took information for reports, which required basic fact-gathering skills. On occasion, she operated a patrol car with a DPD police officer (usually while she was off duty) or to do errands for the DPD. The activities cited in this Finding of Fact involve quasi-clerk,

quasi-police officer work performed mostly in the DPD office.

22) Although she occasionally rode with a patrol officer, Complainant did not perform patrol duty as a police officer.

23) At no time during her employment with Respondent did Complainant spend more than twenty per cent of her work time performing police officer or quasi-police officer work.

24) Complainant also issued some parking citations, an action routinely performed by other non-police officer personnel who had been sworn for the specific purpose of issuing parking citations.

25) On April 2, 1975, counsel for Respondent's liability carrier filed an answer to a false arrest complaint against DPD police officer Lee Kadrmas, Complainant, and Respondent, which concerned an arrest that took place September 13, 1974. The answer referred to Complainant as a "duly appointed, qualified, and acting police officer(s)" of Respondent. The Respondent's answer was prepared by counsel for Respondent's liability carrier, who had only Complainant verify it. Respondent had entrusted its defense to this attorney through its contract with its liability carrier.

26) For jurisdictional purposes, all DPD police officers and Complainant were made Special Deputy Sheriffs for the Polk County Sheriff's Office on occasion. This status authorized Complainant issue citations and make arrests "in line with her police duties".

27) Generally, Complainant held herself out as a police officer to the community. For example, from her hiring until May 1975, she answered the DPD telephone as "Officer Walch".

28) Because of the small size of Respondent's city government, City Manager Brandvold was in regular contact with Complainant, both in-person and over the telephone. He was aware of references to Complainant as a police officer or policewoman. He allowed Chief Greene to commission Complainant and issue her a police officer badge and other equipment and allowed her participation in appropriate police training courses. He acquiesced to Complainant assuming some of the appearances of a police officer until May 1975, when a new chief was appointed for the DPD. Mr. Brandvold was hesitant to interfere with the DPD, as he had delegated to the DPD chief the responsibility of making sure DPD employees did their respective jobs.

29) Chief Greene did not order Complainant to assume the appearance of a police officer or assign her police officer work. Instead, at Complainant's initiative, she was allowed, with Chief Greene's acquiescence or permission, to assume the police officer appearances and perform the police officer duties described herein, as long as they did not prevent her performance of her clerk dispatcher duties.

30) When Complainant was out of the DPD office on break or doing work, another police officer or, if none was available, Respondent's Business Office dispatcher, did DPD dispatching and answered the DPD telephone. (*See* Finding of Fact 18 above.) When Complainant was absent on vacation or ill, the Business office dispatcher performed these duties.



31) Complainant worked a regular day shift Monday through Friday. The police officer who served full time as the DPD Community Liaison Officer usually worked the regular day shift, although he filled in on other shifts and on weekends as needed. Respondent's other police officers worked rotating shifts and days off.

32) About one year after Complainant completed her Police Academy training, Chief Greene requested that Mr. Brandvold change her job classification to police officer and increase her pay to that of a police officer. Mr. Brandvold refused this request, stating that Complainant was a clerk dispatcher and that there were no budgeted positions for more police officers.

When making this request, Chief Greene told Complainant that he would not assign her to cover tavern fights, which were common in Dallas. He did not suggest to Mr. Brandvold that Complainant be classified as a patrol officer, because he thought Mr. Brandvold would not agree, and he himself was not committed to the idea of having a woman as a patrol officer.

33) On August 27, 1974, Mr. Brandvold sent Chief Greene a letter documenting Mr. Brandvold's review of Complainant's application for on-the-job training in Assistant Police Administration. Mr. Brandvold's letter informed Chief Greene that there was no Dallas position open for an Assistant Police Administrator and that any on-the-job training for Complainant should be related to the clerical duties which she was hired to perform. The letter emphasized Mr. Brandvold's attitude that employees were encouraged to better their skills, but suggested that a course in record-keeping and public relations would be more appropriate for Complainant's position.

34) Donald Pursel assumed the position of Chief of the DPD about May 8, 1975. At this time, he instructed Complainant to cease performing any duties of a police officer and restricted her work to activities of a secretarial nature. She spent substantial work time implementing a new records system.

35) Complainant received performance appraisals on June 23, 1975, and April 23, 1976. On those appraisals, Complainant's job title was labeled "secretary". Complainant signed these documents and indicated that she agreed with their overall evaluations. At the time these appraisals were made, Complainant was no longer performing to a discernible extent, if at all, the police officer work she had performed before the appointment of Chief Pursel.

36) Roger Jordan was an intern to Respondent in 1973 while he completed his education. He served as Administrative Assistant to Respondent's City Manager during 1974-1975. During 1975, he was given the title of Personnel Officer and responsibility for handling some of Respondent's personnel functions. Mr. Jordan established Respondent's first formal system for recruitment and selection of personnel.

37) On May 16, 1975, Complainant applied for police officer work with Respondent in order to obtain a classification change. This application closely followed the installation of Chief Pursel and his change of Complainant's work.

38) On September 23, 1975, Complainant received a letter from Respondent informing her that she was eligible to take the written examination for a police officer vacancy.

39) Complainant met all of the qualifications stated on Respondent's notice of police officer position opening, dated October 1, 1975.

40) Administrative Assistant Jordan organized and oversaw the police officer selection process which was first used to fill the above-mentioned vacancy. (As noted in Finding of Fact 5, previous police officer selections had been made essentially by Respondent's Chief of Police.)

41) At the time of this vacancy, there had never been a female DPD police officer.

42) Approximately forty people filed applications for the above-mentioned police officer vacancy. After perusing their applications, Mr. Jordan and Chief Pursel narrowed this group to about 20 persons who were deemed eligible to take the written examination.

43) The written examination was devised and graded by the Local Government Personnel Institute of Salem, Oregon.

44) Administrative Assistant Jordan and Chief Pursel scored the completed applications of those candidates who passed the written examination. The factors considered were experience related to law enforcement (weighted at 20%); education (weighted at 20%); and the written examination score weighted at 20%). (Subsequent oral reviews were weighted at 40%) They assigned the following point totals to the top-ranking seven applicants who became the finalists:

| Cand. | 20% Exp. | 20% Educ. | 20% Test | Total Total |
|---|---|---|---|---|
| Complainant | 15 | 10 | 15.8 | 40.8 |
| Lockler | 18 | 15 | 14.4 | 47.4 |
| Wagner | 15 | 20 | 15 | 50 |
| Lorentino | 20 | 10 | 15.4 | 45.4 |
| Gilmore | 15 | 18 | 14.4 | 47.4 |
| Muller | 20 | 15 | 15.6 | 50.6 |
| Clark | 15 | 20 | 15 | 50 |

All of the above seven candidates except Complainant were male. These seven candidates were not ranked until the oral interviews were completed and graded.

45) The above seven candidates were then interviewed by the Oral interview Board, consisting of City Manager Brandvold, Chief Pursel, DPD police officer Leland Kadrmas, and administrative Assistant Jordan. All of the Board panelists were male.

46) Each of the Oral Board panelists asked each applicant the same predetermined four to five questions in an interview before the entire Board. Each panelist then graded each candidate on education, experience, attitude, public and employee relations, appearance and demeanor, expression, and overall impression. The interview scores for the candidates were then averaged, converted to a 40 point scale, and combined with the above scores for the following results:



| Cand. | 40% Interview | Total | Rank |
|---|---|---|---|
| Wagner | 33.6 | 83.6 | 1 |
| Muller | 32.49 | 83.09 | 2 |
| Clark | 32.67 | 82.67 | 3 |
| Lockler | 33.92 | 81.32 | 4 |
| Gilmore | 33.67 | 81.07 | 5 |
| Lorentino | 35.17 | 80.57 | 6 |
| Complainant | 33.03 | 73.83 | 7 |

47) The Board then eliminated the top-scoring three candidates and Mr. Lorentino from further consideration due to what Mr. Jordan called "overriding concerns" such as instability, aggressiveness, and inability to adjust to the DPD and to "fit" in Dallas. The fourth-ranking candidate, Rocky Lockler, therefore became the first choice of the Oral Interview Board.

48) The Oral interview Board certified Mr. Lockler, Mr. Gilmore and Complainant to Chief Pursel, in that order. Chief Pursel's policy was to hire the candidate the Board ranked first if his or her background check was satisfactory. Chief Pursel therefore hired Mr. Lockler.

49) Although technically, Chief Pursel could have hired any of the candidates certified to him, he would have had to justify not hiring the Board's first choice.

50) Throughout Complainant's employment by Respondent, and especially just after her certification and again after her application for the above-described police officer position, DPD police officers made general comments in and around the police department office expressing concern about their physical welfare if there were female DPD police officers. It was common knowledge at the DPD that at least two police officers (Kadrmas and Sims) did not want to work with a female police officer. Officer Kadrmas had reservations about a female police officer's effectiveness in the tavern fights which were so common in Dallas and as a back-up. An officer (unnamed) had stated that "if Beth Walch is hired as a police officer and does shift work, I'll quit".

51) Officer Kadrmas, a highly credible witness, admitted that he discriminated against Complainant in the selection process because she was a woman. In addition, he personally heard one of the Oral Interview Board panelists comment that Dallas was not ready for a woman police officer yet. (Although he is not sure which panelist made this comment, he is sure that it was made.) He communicated his reservations about female police officers to the Oral interview Board during the interview process. Officer Kadrmas does not believe that Complainant's application was seriously considered by the Oral interview Board.

Because of Officer Kadrmas' expression of bias to the Board, Administrative Assistant Jordan discussed Oregon civil rights law with the Board and told Chief Pursel, when conveying the names of the certified candidates to him, that there may have been illegal sex bias involved in the Board's operation.

52) Although Administrative Assistant Jordan tried to develop an objective selection process, many of the "objective" scores which determined who would be selected were based

upon subjective impressions and therefore subject to bias.

53) Scores which Mr. Jordan and Chief Pursel gave for experience, which counted as 20% of total scores, were not consistent. Mr. Jordan testified that in rating experience, they awarded 10 points per year of patrol officer experience (up to a maximum of twenty points). Related experience was pro-rated.

By September 1975, when Mr. Jordan and Chief Pursel rated the candidates, Complainant had three years of clerk dispatcher/matron experience with Polk County and four-and-one-third years experience in the same capacity with Respondent, the last 21 months of which had included performing the police officer work described above. She had also completed the 579 hours of training noted in Finding of Fact 12 above. For this experience she was credited only 15 points, the lowest number of points given to any finalist.

Candidate Gilmore was credited 15 points for one year of part-time police officer experience with the City of Monmouth. Candidate Clark was credited 15 points for six months of experience in 1973 as a working reserve officer. Candidate Muller, with 16 months of police officer experience with the City of Jefferson and Police Academy training, received 20 points, and Candidate Wagner, with six months of police officer experience with the City of Silverton and 1-1/2 years of peripherally related experience, received 15 points. As Respondent's file for this selection process includes the applications of all finalists except successful candidate Lockler, I do not have complete information concerning Mr. Lockler's background. However, I deduce from other evidence that he was credited 18 points for 1-1/4 to 1-1/2 years of police officer experience. (Mr. Lockler also had completed some Police Academy training.)

With 6-1/3 years of related experience (nearly two of which included some actual police officer experience and all of which involved work for law enforcement bodies) and 579 hours of police officer training, Complainant certainly should have received more than the 15 points candidate Clark received for a mere six months of 1973 working reserve officer experience or the 15 points candidate Gilmore received for one year of part-time police officer experience. In addition, using Mr. Jordan's 10 points per one year of actual full-time police officer experience scale, it is difficult to understand why successful candidate Lockler received 18, rather than 15, points for 1-1/4 to 1-1/2 years of police officer experience. Finally, there is no evidence that Complainant was credited for the fact that, unlike other candidates, for 4-1/3 years she had worked for the DPD and therefore was very familiar with its practices and procedures. In sum, by Mr. Jordan's stated point scale, Complainant was ranked low and other candidates high in the area of experience.

Given the above inconsistencies, I must conclude that Complainant was disadvantaged in the score which Mr. Jordan and Chief Pursel assigned to her experience. This represented 20% of her overall rating plus 1/7 of the oral interview scores which Mr. Jordan and Chief Pursel gave her. Given his testimony at hearing, it can also be assumed that Mr. Brandvold did not accord Complainant's police experience a rating reflecting the police officer experience which I have herein found.



54) In addition, one of the other seven components of the oral interview score was called "overall impression," a vague category which was not further defined for the Board and therefore susceptible to subjective definition by each Board panelist. In this category, Complainant's average score was 79.3 points, whereas the successful candidate Lockler scored 86.3 points. Complainant's average score in this category is the second lowest among the candidates. Given the anti-female bias which had been expressed by Officer Kadrmas to the Board and which was common knowledge at the DPD office (which all panelists except possibly Mr. Jordan frequented), I must conclude that Complainant's sex influenced the scores she received in this most subjective category. The extent to which this bias influenced these scores is of course impossible to determine.

55) Complainant had completed one year of work toward a 2 year associate degree in law enforcement. Mr. Lockler had obtained an associate degree in some field.

56) On October 22, 1975, Complainant received a letter from Respondent informing her that she was denied the position of police officer for which she had applied.

57) Complainant voluntarily resigned from Respondent's employ in good standing as of April 7, 1977. She obtained alternative employment as of May 30, 1977.

58) Between October 22, 1975, when Respondent notified Complainant that it had not hired her as a police officer, and April 7, 1977, the date of Complainant's termination from Respondent's employ, Complainant earned a total of $10,292.72. If Complainant had been employed by Respondent as a police officer during this time period, she would have earned $16,977.11. The difference between the latter two amounts is $6,634.39.

59) Between April 7, 1977, The date of Complainant's termination from respondent's employ, and May 30, 1977, the date Complainant obtained alternative employment, Complainant would have earned $1,840.89 if she had been employed by Respondent as a police officer, and $1,217.28 if she had been employed by Respondent as clerk dispatcher. The difference between the latter two amounts is $623.61.

Complainant suffered from nervous strain which manifested itself in trembling, fatigue, depressions and loss of weight, due to the stress of her voluntary attempts to do police officer work while she was in fact the DPD clerk dispatcher.

**ULTIMATE FINDINGS OF FACT**

1) Between May 10, 1972, when Respondent hired Complainant, and December 27, 1973, when Complainant received her BPST Certification as a police officer, Complainant worked as the DPD's clerk dispatcher, the capacity in which she had been hired, and did not perform police officer duties to a discernible extent, if at all.

2) Between December 27, 1973, when Complainant received her BPST

Certification as a Police Officer, and approximately May 8, 1975, when Respondent ordered Complainant to cease performing any police officer work, taken as a whole, Complainant's actual work for Respondent was not equal or substantially equal to the work performed by any DPD police officer.

3) Respondent did not allow Complainant to perform more police officer work, reclassify or pay her as a police officer, or promote or select her as a police officer, because Complainant was employed as Respondent's clerk dispatcher and did not apply to be reclassified, promoted or hired as a police officer when there was a police officer opening.

4) Complainant had applied and been hired by Respondent to be clerk dispatcher for the DPD. She had been commissioned as a police officer as a formality which would allow her access to confidential police records, a necessity for her clerk dispatcher work. During the above-stated time period, she worked primarily as a clerk dispatcher. She was allowed to wear a DPD uniform so that she would be identified by the public as a DPD employee. She acted as often and as much as possible upon her strong desire to learn about police service through education and training and to eventually become a police officer. She had been allowed to spend on and off duty time obtaining BPST certification as a police officer, and she was allowed to take further BPST training, because of her interest and because this training would aid her in evaluating over-the-counter complaints, which she took as clerk dispatcher. She was allowed to assume some appearances of a DPD police officer and was eventually allowed to spend as much as twenty per cent of her work time doing some kinds of police officer work. She did not perform patrol duty.

5) Respondent did not order Complainant to perform the police officer work she did; it acquiesced to her performance of such work on her own initiative, as long as it did not interfere with her clerk dispatcher duties. Complainant was not ever allowed to spend more than twenty per cent of her work time on police officer work or to perform patrol duty, which was a major police officer duty, because she was employed to be Respondent's clerk dispatcher, not a police officer. Even if Chief Greene and other DPD personnel had not been biased against female patrol officers, Complainant would not have performed patrol duty, because it would have interfered with her clerk dispatcher duties. Her clerk dispatcher duties continued to be primary because she had been hired to perform them, they had to be performed, and there was no one else employed to perform them – not because she was female.

6) There is no evidence that Complainant applied formally or informally to become a police officer during this time period or that she (or anyone else) sought her reclassification or promotion to police officer status, or her upgrade to police officer pay, when Respondent had a police officer opening. There is no evidence at all concerning the selection process by which the at least three police officer openings during this time period were filled. Although Complainant could have been discouraged from applying for those openings if they occurred after she became aware of Chief Greene's bias against female patrol officers, there is no assertion or evidence that she was in fact so discouraged.



7) Between approximately May 3, 1975, when Respondent ordered Complainant to cease performing any police officer work, and April 7, 1977, when Complainant terminated her employment, Respondent ordered Complainant to cease performing police officer duties and restricted her work to activities of a secretarial nature. Complainant did not perform police officer work to a discernible extent, if at all.

8) Between October 22, 1975, when Respondent notified Complainant that she had not been selected to become a DPD police officer, and May 39, 1977, when Complainant obtained alternative employment, Complainant's sex played a key role in Respondent's evaluation of her application and Respondent's failure to select her for this police officer opening.

9) In May 1975, Complainant had applied for police officer work with Respondent. Complainant was qualified for this work. In September 1975, when Respondent had a police officer opening, Complainant's applications were among those considered, and she became one of seven finalists for the opening. In evaluating her application, Respondent did not apply its experience criterion equally to all candidates and thereby underrated Complainant's experience and overrated that of other finalists. This affected at least twenty per cent of Complainant's rating. In addition Respondent based forty per cent of its appraisal of Complainant upon the subjective ratings of a Board which was at least in part aware of sex bias on the DPD police officer force and at least one member of which expressed his operative sex bias to the other Board members. Therefore at least sixty per cent of the appraisal of Complainant was tainted by bias against her sex, and that appraisal determined who was selected. In October 1975 Respondent selected a male for this police officer opening.

10) The difference between what Complainant actually earned (and would have earned had she not resigned) as Respondent's clerk dispatcher and what she would have earned as Respondent's police officer between October 1975 and May 30, 1977, is $7,308.00.

11) Although Complainant suffered strain due to her voluntary attempts to perform police officer work while she was the DPD's clerk dispatcher, no evidence was offered that she suffered mental anguish due to Respondent's failure to select her as a police officer because of her sex.

## CONCLUSIONS OF LAW

1) The Commissioner of the Bureau of Labor and industries has jurisdiction over the subject matter and the persons herein.

2) The actions, and motivations for those actions, of Respondent's employees Greene, Brandvold, Pursel, Kadrmas, and Jordan, and of counsel for Respondent's liability carrier, which are described herein, are properly imputed to Respondent.

3) Respondent's failure to accord Complainant the title, compensation, terms, conditions and privileges of

police officer employment between May 10, 1972, and May 30, 1977, does not constitute an unlawful employment practice under ORS 659.030 because this failure was due to the fact that Complainant was employed to be, and primarily was, a clerk dispatcher during this time, and between May 10, 1972, and May 16, 1975, did not apply to be promoted, reclassified or hired as a police officer when there was a police officer opening, and not due to her sex.

4) Respondent's failure to select Complainant for its police officer opening on October 22, 1975, because of her sex constitutes an unlawful employment practice under ORS 659.030 (1)(a).

5) The Commissioner of the Bureau of Labor and Industries has the authority to award money damages to the Complainant herein under the facts and circumstances of this record, and the sum of money awarded as damages in the Order below is an appropriate award.

The starting date for accrual of Complainant's compensatory back pay damages is the date Respondent notified Complainant of its failure to hire her as a police officer. The ending date is the date Complainant obtained alternative employment.

## OPINION

### 1. May 10, 1972, to April 7, 1977: Police Officer Status

Did Respondent deny Complainant equal employment opportunities with respect to her job title, compensation, terms, conditions and privileges of employment by failing to pay her as a police officer during her employment for Respondent as alleged? For the time period between May 10, 1972, when Respondent hired Complainant as a clerk dispatcher, and December 27, 1973, when Complainant received her BPST Police Officer Certification, and for the time period after May 8, 1975, when Respondent ordered Complainant to cease performing police officer work, the answer is no. During this time Complainant clearly performed clerk dispatcher, and not police officer work. The period at issue is from December 27, 1973, until May 8, 1975. During this time, I must conclude that Respondent did not unlawfully discriminate against Complainant as alleged because, first of all, Complainant never spent more than twenty per cent of her work time actually doing what the DPD called police officer work and, secondly, Complainant never performed patrol duty, a major DPD police officer function. She was not therefore in fact a police officer by DPD standards, and no comparative evidence that her work would be considered police officer work by standards of similar police departments was introduced.

The Agency argues however that, as of Complainant's certification and partial use as a police officer, she was entitled to police officer pay and the opportunity to function fully as a police officer and was denied such because of her sex. Respondent defends its failure to further treat Complainant as a police officer during this time by asserting that it was not due to her sex, but to the fact that Complainant had applied and been hired to be the DPD clerk dispatcher, that she never resigned this position and that Respondent continued to need a DPD clerk dispatcher.



For these reasons, Complainant continued to primarily perform clerk dispatcher duties. As long as she was the person working that position, she was responsible for performing its duties. It is important to note that complainant sought opportunities to learn how to be, and to work as, a police officer, but Chief Greene acquiesced to rather than ordered her police officer activity. And he acquiesced to that activity only as long as it did not interfere with Complainant's completion of her primary duties.

Chief Greene and other DPD personnel were biased against female patrol officers. However, we can infer that even without any bias, Chief Greene would not have allowed Complainant to perform patrol duty, because it would have required her being out of the DPD office and thereby interfered with her clerk dispatcher work.

If Complainant wanted to become a police officer for Respondent, she could have applied for reclassification, promotion or hire to that position when there was a police officer opening. Respondent was not obligated to reclassify Complainant as a police officer merely because she was qualified and wanted to become a police officer or because up to 1/5 of her time was spent performing some police officer functions. But had Complainant applied, Respondent would have been obligated to consider her qualifications and desire when filling a police officer opening. Although it can be inferred that Chief Greene would not have been amenable to hiring Complainant as a full-time police officer, because of his bias against females performing patrol work, there is absolutely no further evidence concerning the filling of the at least three police officer openings which occurred during Complainant's tenure under Chief Greene. There is no evidence that Complainant applied for these positions, and it is not alleged that Chief Greene's attitude discouraged Complainant from applying. The meager evidence would not begin to support a finding that Respondent unlawfully failed to hire or promote Complainant during this time.

The Agency intimates that no actual police officer openings need to have existed because if Complainant had been male, her duties would have been adjusted so that police officer and clerk dispatcher work would have been distributed among all DPD employees, including Complainant. It argues that before Complainant was hired, each DPD employee did some of each type of work and that DPD police officers routinely filled in for Complainant in answering the telephone and dispatching when she was temporarily absent. However, having hired a clerk dispatcher because it had determined that its increasingly complex operation required the services of a clerk dispatcher, Respondent was not obligated to later redistribute that clerk dispatcher's workload back to police officers, thereby mis-utilizing them, in order to use the clerk dispatcher in the manner she desired, was qualified for, and to some limited extent already was working.

Given the evidence, I must conclude that Complainant was not treated as a police officer because she was first and foremost working as the DPD's only clerk dispatcher and she did not apparently take the steps which

would have put her in a position to be considered for police officer openings. She functioned primarily as the DPD clerk dispatcher because that was what she was hired to be and that was what Respondent needed her to be. The steps which she took to become a police officer were incomplete: she could not transform herself into a DPD police officer by just her desire, training and part-time voluntary and unsolicited assumption of some police officer duties. Respondent did not have to consider her for hire, promotion, or reclassification as a police officer unless Respondent needed another police officer. Complainant continued to perform as a clerk dispatcher not because she was a female but because she was hired to perform these duties and because she did not resign this position or apply, as far as we know, to become a full-time DPD police officer during this time.

**2. October 22, 1975, to May 30, 1977: Police Officer Selection**

Did Respondent deny Complainant equal employment opportunities by failing to select her for its September 1975 police officer opening?

The Agency has offered prima facie evidence that Respondent discriminated against Complainant in making its selection by showing that Complainant is a female, that she applied and was qualified for a job for which Respondent was seeking applicants, and that a male applicant, rather than Complainant, was selected.

In rebuttal, Respondent has argued that it selected Rocky Lockler rather than Complainant because he was the better qualified candidate. If true, this would constitute a legitimate nondiscriminatory reason for not hiring Complainant. However, Respondent has failed to introduce the best evidence of Mr. Lockler's qualifications: his application, which Respondent used to initially rate the two areas in which Respondent alleges that Mr. Lockler was better qualified than Complainant: experience and education. This omission is especially odd because Respondent's file concerning its October 1973 selection of a police officer, includes the applications of all finalists for that position except Mr. Lockler. Consequently, I can find only that Mr. Lockler had 1 1/4 to 1 1/2 years of police officer experience; that he had completed a session at the Police Academy, and that he had an associate degree. This evidence alone is not sufficient to carry Respondent's burden of showing that Mr. Lockler was in fact better qualified than Complainant. The fact that Mr. Lockler scored better than Complainant on the initial experience and education ratings and on the ratings of the Oral Interview Board (which together comprise 80% of each applicant's rating), means little, given the subjectivity, inconsistency, and bias to which those ratings were susceptible. Respondent argues that any subjectivity, inconsistency or bias in the initial ratings or those of the Board was not determinative because those ratings did not actually determine the selection decision. However, one member of the Board did have the formal authority to make the final selection decision, and he felt bound to and did select the choice dictated by the initial ratings and those of the Board. Respondent therefore has failed to rebut the Agency's prima facie case of discrimination.



Even if Respondent had rebutted the Agency's prima facie case, the ultimate question would still be whether the reason offered by Respondent for selecting Mr. Lockler was a mere pretext for not selecting Complainant due to her sex. In other words, what was the motivation for failing to select Complainant? Given the fact that it is difficult if not impossible to measure the effect of admitted sex bias in the Board's assessment of Complainant, it is difficult to find that but for that bias, Complainant would have been selected. However, I do not have to make that finding. The test is whether Complainant's sex played a key role in Respondent's failure to hire her. If so, a sufficient causal connection between Complainant's gender and Respondent's failure to hire her has been established. *In the Matter of Polk County Education Service District,* 1 BOLI 280 (1980), *aff'd without opinion, Donaldson v. Polk County Education Service District,* 50 Or App 611, 625 P2d 1390 (1981). Certainly when one of the four members of the Board which made at least 40% of the selection decision admits operative sex bias, which he expressed to the Board, when Respondent failed to remove that panelist from the Board, when at least one other panelist may have shared that bias and three of the panelists knew of existence of sex bias among DPD officers, when applicant rating was subjective enough to allow operation of sex bias; and when scoring of a factor comprising another 20% of Complainant's rating undervalued Complainant and over-valued other finalists, I can and must find that Complainant's sex played at least a key role in Respondent's failure to hire her as a police officer in October 1975.

**3. Damages**

Complainant's accrual of back pay damages ended on May 30, 1977, when she began alternative employment. In accordance with well accepted mitigation of damages principles, the wages Complainant earned as the DPD's clerk dispatcher until April 7, 1977, have been subtracted from back pay damages she accrued until that date. Furthermore, the wages Complainant would have earned had she continued her clerk dispatcher employment until May 30, 1977, have been subtracted from back pay damages accrued between April 7, 1977, and May 30, 1977. Complainant had a duty to take reasonable steps to mitigate back pay damages. She fulfilled this duty until April 7, 1977, by earning clerk dispatcher wages. However, Respondent has presented evidence which shows that Complainant voluntarily terminated her clerk dispatcher employment on April 7, 1977, more than seven weeks before she began alternative employment. There is no evidence that Complainant received any employment compensation thereafter until May 30, 1977. It therefore must be inferred that Complainant's April 7 resignation ended her mitigation of damages. The Agency has not rebutted this inference with evidence that Complainant's termination was not in fact voluntary or that her continuation of clerk dispatcher employment until she began other work would not have been a reasonable action in mitigation. Accordingly, I must conclude that Complainant failed to mitigate back pay damages between

April 7, 1977, and May 30, 1977, and the sum of money Complainant could have earned in mitigation of damages during this time period must be subtracted from her back pay award.

Complainant was not awarded damages for mental anguish because there was no evidence that she suffered mental anguish due to those acts by Respondent which have been herein found to be unlawful. The evidence shows instead that Complainant suffered mental strain due to her own attempts to do police officer work when she was a clerk dispatcher, attempts which did not involve unlawful actions by Respondent and which, if made after approximately May 8, 1975, violated Chief Pursel's order and did not result in discernible, if any, police officer work. The evidence also alleges that Complainant suffered mental strain occasioned by her having filed a complaint with the Civil Rights Division, but mental suffering for this reason is not compensable. *School District No. 1 v. Nilsen*, 271 Or 461, 485, 534 P2d 1135 (1975). There was no evidence that Complainant suffered mental strain because Respondent failed to select her as a police officer, and this is the only type of mental suffering which would be compensable herein.

**ORDER**

NOW, THEREFORE, as authorized by ORS 659.060(3) and 659.010(2) and in order to eliminate the effects of unlawful practices found, as well as to protect the rights of others similarly situated, Respondent is ordered to:

1) Deliver to the Hearings Unit of the Bureau of Labor and Industries, within thirty days of the execution of the Final order in this matter, a certified check payable to the Bureau of Labor and Industries in trust for Hazel Elizabeth Walch in the amount of SEVEN THOUSAND THREE HUNDRED EIGHT DOLLARS, ($7,308.00), representing compensatory back pay damages for Respondent's unlawful practices, and

2) Cease and Desist from discriminating against any applicant for employment on the basis of sex.

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**In the Matter of**
**the CITY OF PORTLAND,**
**a political subdivision of the State of Oregon, Respondent.**

Case Number 29-78
Final Order of the Commissioner
Mary Wendy Roberts
Issued June 3, 1981.

**SYNOPSIS**

Female Complainant police records clerk performed the same job duties as a male police officer but was paid at a lesser rate by Respondent public employer because of her sex. Finding that Respondent negatively evaluated Complainant's performance and harassed, discredited, and humiliated her in retaliation for her opposition to discriminatory pay, the Commissioner awarded Complainant $19,288, with interest, in wage differential and $15,000 for mental anguish, pain and humiliation, and ordered Respondent to cease discriminating on the basis of sex and retaliating on the basis of opposition to unlawful practices. ORS 82.010; 652.210(1); 652.220(2)(a); 659.010(2) and (6); 659.022(2); 659.030(1)(a) and (d); 659.060(3); 659.121(1) and (4).



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The contested case in the above-entitled matter came on regularly for hearing before Glenda E. Anderson, designated as Presiding Officer by the Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing commenced on March 22, 1979, and continued through April 16, 1979, in the State Office Building and Department of Fish and Wildlife Building, Portland, Oregon.

The Bureau of Labor and Industries was represented by Thomas E. Twist, Assistant Attorney General. Respondent City of Portland was represented by Richard A. Braman, Senior Deputy City Attorney. Complainant Phyllis J. Potter was represented by Charles Merten, Attorney at Law.

Having fully considered the entire record in this matter, I, Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries, hereby make the following Findings of Fact, Ultimate Findings of Fact, Rulings on Motions, Conclusions of Law, Opinion, and Order.

**FINDINGS OF FACT – PROCEDURAL**

1) At all times material herein, Respondent was a municipality and a political subdivision of the State of Oregon, existing and duly organized as such under the laws of that state, which, in the State of Oregon, utilized the personal service of more than one employee, reserving the right to control the means by which such service was performed.

2) On or about July 21, 1976, Complainant filed a verified complaint with the Civil Rights Division of the Bureau of Labor and Industries alleging that Respondent had unlawfully discriminated against her in connection with her employment because of her sex. On or about December 6, 1976, Complainant filed an additional verified complaint with the Civil Rights Division alleging continuing unlawful discrimination against her by the Respondent in connection with her employment, because of her opposition to the discrimination alleged in her July 1976 complaint.

3) Following the filing of these verified complaints, the Civil Rights Division investigated the allegations in them and determined that substantial evidence existed to support those allegations.

4) Thereafter, the Civil Rights Division attempted to reach an informal resolution of the complaints through conference, conciliation and persuasion, but was unsuccessful in these efforts.

**FINDINGS OF FACT– THE MERITS**

**Equal Pay**

1) Complainant, a female, began employment at the Portland Bureau of Police, a subdivision of Respondent, on May 18, 1967, as a Police Records Clerk I in the Records Division. She had qualified for appointment to this classification by passing the Typist-

Clerk examination of the Civil Service Board of the City of Portland.

2) On October 2, 1970, Complainant qualified for appointment as a Police Records Clerk II (hereinafter referred to as PRC-II) by passing the Civil Service Board's PRC-II examination.

3) In July 1971, Complainant was appointed to the PRC-II classification and, because she ranked near the top of the classification's eligible list, she was given a choice of assignment to either the Central, East or North Precinct.

4) On July 15, 1971, Complainant was assigned, as a PRC-II, to work one of two daytime desk positions in the front office of the East Precinct. She was one of the first civilians, if not the first civilian, and the first female, to work at East Precinct. She worked in this capacity from July 15, 1971, until December 23, 1976.

5) All references herein to the East Precinct desk positions concern the positions during the daytime shift that Complainant worked (which was called "morning relief").

6) The primary role of each of the two front office desk positions at East Precinct was reception: to assist the numerous members of the public who came to or telephoned East Precinct with questions, requests, or complaints.

7) Before Complainant began working at East Precinct, two police officers were assigned to the two East Precinct desk positions on a regular full-time basis. Because each desk position had to be staffed each day, various other police officers were assigned to the positions part-time, when the full-time desk personnel were absent.

8) Before July 1971, Officer William Arata and an Officer Gellner, both male, were assigned on a regular full-time basis to the East Precinct desk positions.

9) In May of 1971, the Bureau of Police had decided to staff the East Precinct desk positions with one police officer and one PRC-II, rather than two police officers. This decision was based primarily upon budgetary considerations, rather than a determination that police officers were "over-filling" by performing essentially clerical tasks in the desk positions. Pursuant to this decision, Complainant replaced Officer Gellner when she came to work at East Precinct.

10) The replacement of a police officer by a PRC-II in one of East Precinct's two desk positions was not accompanied by a reallocation of tasks or duties between the two desk positions. Officers Arata and Gellner trained Complainant to perform, and Complainant did perform, all the duties, and take all the actual responsibilities, Officer Gellner had performed and taken while he was assigned to the desk position. Officer Arata continued to perform the duties and take the responsibilities he had previously performed and taken, taking the same share of the desk positions' workload when he worked with Complainant that he had taken when he worked with officer Gellner. The only difference occasioned by Complainant's replacing Officer Gellner was that Complainant picked up some minimal typing activities which are described in Finding of Fact 23 below.



11) At all times material herein, the persons working the two East Precinct desk positions were each referred to as the desk person, desk officer, or desk man.

12) Between July 15, 1971, and July 24, 1976, Complainant and Officer Arata were the two people who were assigned, on a regular full-time basis, to the two East Precinct desk positions. On July 24, 1976, Officer Arata, who had worked as an East Precinct desk person since the 1950's, retired and was replaced by Officer Bernard Schuette. Officer Schuette, a male, remained throughout the rest of Complainant's tenure as East Precinct desk person.

13) When Officer Arata or Schuette or Complainant was absent, he or she was replaced by a police officer rather than a PRC-II. (If one of the two desk persons on duty were temporarily absent, the remaining desk person would cover both desk positions) As the usual relief officer, Officer Schuette worked one of the East Precinct desk positions three or four days per week until his full-time assignment in July 1976.

14) During Complainant's tenure as desk person, the following changes affecting that position were made. Some equipment was added to or upgraded at the East Precinct front office. (For example, a direct emergency telephone line to the Radio Division which was located on both desk persons' desks was replaced by a centrex system on both desks; the teletype was removed and a computer terminal installed to send and retrieve police information; and a television monitor scanning the doors of the precinct building was added to one of the desk persons' desk.) In September of 1973, the precinct office moved from its location at S.E. Seventh and Alder Streets to a new facility at N.E. 47th and E. Burnside Streets. One interoffice memo attempted to alter a desk person responsibility. (*See* Finding of Fact 20 below.)

These changes similarly affected the skills, efforts and responsibilities of Complainant, Officer Arata and Officer Schuette. Despite these changes, the major duties of the East Precinct desk persons remained the same throughout the entire period Complainant worked in that capacity.

15) The East Precinct front office where the desk persons worked was very busy during the day, receiving a high volume of telephone calls and many civilians in person. In addition, since many of the support services for the entire precinct were performed by staff working in the front office, it was the focus of internal precinct activity.

16) The most important and time-consuming activity of the two East Precinct desk persons was answering the precinct's telephones. During Complainant's tenure as desk person, the two desk persons took between five and thirty telephone calls per hour from the general public, other Bureau of Police divisions, and other agencies.

The second most important and time-consuming activity of the two East Precinct desk persons was assisting the public at the precinct's front counter.

17) The in-person and telephone reception work cited in Finding of Fact 16 above usually involved the desk

person's taking and responding to reports or complaints of problems and requests for police service or information which concerned a very wide variety of situations or subjects. Some involved life-threatening emergencies to which an immediate and correct response by the desk person was essential. Some necessitated referral to appropriate police units or outside agencies.

If police service was requested, the desk person gathered information concerning the location and nature of the service requested. If the desk person determined that a police unit should be dispatched, the desk person notified the dispatcher. If information was requested, the desk person advised the requester of, explained, and interpreted, as necessary, applicable law, Bureau of Police policies and procedures, and police responsibilities and limitations, and apprised the requester of relevant available non-police services. In order to do this, the desk person often had to use various reference manuals, codes, etc. Most contacts with the public also involved the desk person interviewing the person in order to complete one of approximately fifteen different types of report forms, which the desk person then routed to the appropriate entity.

18) Complainant and Officer Arata or Schuette shared the responsibility of answering the East Precinct telephone, responding to persons at the front counter, and writing reports relating to those activities, as described in Findings of Fact 16 and 17 above. They spent the same amount of time, and responded to the same number of calls or persons at the counter, overall. Whichever desk person was most available at the time performed these activities.

Either Complainant or Officer Arata or Schuette might refer an individual at the counter or a telephone caller to the other desk person on duty if the other desk person had previous contact with the individual or caller, or if the other desk person had particular pertinent expertise. While all the situations handled by Complainant and Officer Arata or Schuette in their reception capacity were not identical, in substance they were equal overall. If Complainant did not handle a telephone call or counter contact herself, it was usually when, infrequently, the caller or person at the counter would only talk to a man. She occasionally would respond to an inquiry only after consulting her reference materials or fellow desk person. Overall, Complainant was able to answer questions asked, including those relating to law or police policy, at least as well as Officer Arata or Schuette.

In sum, Complainant and Officer Arata and Schuette were, overall, interchangeable in their reception and report-writing activities, and there was no difference in their telephone, counter or report-writing skills, efforts and responsibilities.

19) Complainant and Officers Arata and Schuette also checked in and out portable radios and vehicles to police personnel and maintained logs for such equipment; completed and filed radio cards for all calls requiring an officer to be dispatched to the scene or other pertinent information to be retained; answered requests for information or action from East Precinct district cars or other officers and relayed back information to same; read, coded, sorted, posted, removed and disposed of reports; sorted, stamped and distributed U.S. and inter-office mail; filed reports and correspondence; ordered, transported (within the precinct building) and distributed supplies; kept abreast of all current written information including several major reference materials); logged, sorted, and distributed criminal and civil subpoenas and notified officers of estovers or cancellations; took and routed court notice messages; wrote, distributed, filed and cleared vacant house watch notices; wrote and processed public service requests; maintained the copies and bulletin boards; read, analyzed, stamped and distributed or disregarded teletype information; received and logged evidentiary property; drove Bureau of Police vehicles occasionally to do work errands; straightened up the report writing room each morning after roll call; and performed miscellaneous duties which arose periodically such as labeling shelves and file drawers, reorganizing or tidying form or equipment storage areas, making file folders, assisting officers in locating equipment or forms they couldn't readily find, and training relief desk officers. At his own initiative and because he chose to come to work early, Officer Schuette tended to do the coding, posting, etc. of reports when he was a full-time desk person. He also somewhat neglected to straighten up the report writing room.

Complainant and Officers Arata and Schuette had the same duties in connection with each of these activities and, with the two exceptions noted above concerning Officer Schuette, shared the responsibility for, and spent the same time overall, accomplishing them.



20) After some date following the precinct office's move in September 1973, Complainant and Officers Arata and Schuette monitored security at East Precinct by watching a television monitor, which scanned the precinct's doors and operating controls at the desk to allow entry to authorized persons. The security monitor sat half on an East Precinct desk and half on the Traffic Division desk next to it. Responsibility for observing the monitor and safeguarding building security by initially determining who could enter rested with the desk person sitting at the East Precinct desk with the monitor. Whichever desk person was watching the monitor would consult the other desk person if something suspicious appeared on the monitor. Until September of 1976, Complainant regularly occupied the East Precinct desk with the monitor; thereafter the other desk person did. (However, the two East Precinct desks were considered interchangeable for the most part.)

Thus, until September of 1976, Complainant had the primary responsibility for monitoring building security at East Precinct, but both desk persons shared this responsibility if a problem was perceived.

On September 22, 1976, Larry Brown, the Captain of East Precinct, addressed the following memo to East Precinct desk personnel:

> "Since the internal security of this precinct is related directly to our closed circuit camera and door buzzer systems, the following

procedure will be implemented immediately:

"(1)The East Precinct desk located nearest the closed circuit T.V. monitor will normally be occupied by a sworn police officer, who will be responsible for operating the door buzzer systems.

"(2)In the absence of sworn personnel, the center desk will then be manned by non-sworn personnel, but only until such time as assigned sworn personnel are present"

Functionally, this memo articulated a distinction without a difference, as non-sworn personnel still were to (and did) assume the internal security responsibility whenever sworn personnel were absent. In addition, the fact that the memo was issued about two months after Complainant filed her first complaint with the Civil Rights Division raises at least the possibility that the memo was intended more to aid Respondent in answering the allegations of the complaint by creating the appearance of a difference in responsibility between Officer Schuette and Complainant, than to actually differentiate between the responsibilities of sworn and non-sworn desk persons. (*See also* Finding of Fact 12 in the Retaliation section below.) In any case, this memo was in effect only during the last three months of Complainant's employment as an East Precinct desk person.

21)Complainant and Officers Arata and Schuette attended training sessions pertinent to the desk function as their work schedules allowed. Overall, they attended approximately the same number of such classes.

Complainant and Officers Arata and Schuette each maintained copies of pertinent primary reference materials, such as the City Code and police manuals, which they were able to consult as necessary.

Complainant and Officers Arata and Schuette each knew, approximately, pertinent district boundaries. Complainant developed a boundary reference map, which was still being used by East Precinct desk personnel at the time of the hearing.

22)Complainant and Officers Arata and Schuette were each subject to potentially violent situations when dangerous persons came to the East Precinct counter. They shared the responsibility for dealing with these situations. During Complainant's six year tenure as desk person, dangerous counter situations occurred twice.

On one occasion, a man came to the counter with a rifle which had a bayonet attached to it. Complainant approached him at the counter and, at one point during her conversation with him, the man assumed a combat stance and began jabbing at the air, making movements to demonstrate the use of the bayonet. Following appropriate procedure for any desk person alone in such a situation, Complainant went to the back office and asked her superior, Sergeant Ron Corbett, to come to the counter to assist her, which he did. The man put the gun on the counter, and Complainant picked it up and moved it to a desk beyond the man's reach. The man was a Vietnam veteran suffering a mental disturbance. (Where the testimony of Sergeant Corbett and Complainant describing this incident differs, I find Complainant's testimony the more credible, due to Complainant's demeanor and personality and inconsistency in Sergeant Corbett's rendition.)



On the second occasion, a woman wearing a football helmet was loitering around the precinct's front door. Officer Schuette spoke with her and determined that she had suffered brain damage in an automobile accident. He invited her into the precinct and asked Complainant and one other female non-sworn Bureau of Police employee to detain the woman for about five minutes while he attempted to trace her identity. Complainant and the other employee did so. When the woman was again in Officer Schuette's custody, she hit him on his nose, apparently because of her mental condition.

23)There were some differences in the activities which Complainant, Officer Arata and Officer Schuette performed. For the most part, these differences consisted of an activity which was very minor in nature and/or time consumed, an activity performed infrequently, and/or a division of two similar tasks. These different activities were so minor that they constituted an insignificant part of the desk jobs and/or were performed interchangeably by Complainant, Officer Arata or Officer Schuette when the person responsible for them was absent.

a) Typing

Complainant spent five minutes per day typing the assignment sheet for morning relief officers. Officer Gellner had done this before Complainant became a desk person. Complainant spent twenty minutes per month typing the court schedule for morning relief officers. Officer Arata and then Schuette spent one to two hours per month completing monthly gasoline reports for the precinct vehicles. Officer Arata typed these reports.

Since Officer Schuette could not type at all, Complainant or Officer Arata occasionally typed some of his work as a favor. Since Complainant could type better than Officer Arata, she occasionally typed for him before a precinct secretary was hired in 1973. Before that secretary was hired, Complainant also did some typing for the precinct captain, but after that time, the secretary was responsible for the day administrative typing at the precinct. Complainant then did administrative typing very rarely and on an ad hoc basis. When Complainant typed for other East Precinct personnel, she did this in addition to, rather than in lieu of, her other desk work.

There was a floating typewriter in the front office for the use of Complainant and Officer Arata when they typed rather than hand wrote their own paperwork, which Complainant tended to do. Typing was a useful skill to any desk person in fulfilling his or her report-writing function. For the same purpose, it was useful to any East Precinct police officer, as evidenced by the presence of typewriters in the police officers' report writing room.

Overall, Complainant spent a very small amount of time typing, except during the above-mentioned period before 1973. Officer Arata spent less time typing than Complainant, and Officer Schuette did not type at all.

b) Other

Complainant maintained and submitted precinct time and attendance

records for payroll purposes, as Officer Gellner had done. Officers Arata and Schuette did not. Officer Arata occasionally filled the precinct oxygen tank at the fire station; Complainant did not.

Officers Arata and Schuette were required to qualify, and did qualify, at the Bureau's weapon firing range once per year. Complainant did not, although she was sent to use the range by her superior once. (*See* Finding of Fact 25 below.)

Officers Arata and Schuette were supposed to attend daily roll call and stand inspection, which Complainant was not. However, Officers Arata and Schuette were almost always able to avoid these activities because of their desk duties.

Officers Arata and Schuette could be called to render assistance on or work the street. Complainant could not. However, Officer Arata was called to work the street very rarely, if at all, when he was working as a desk person with Complainant. He was assigned to the street to cover the Rose Festival parade and a visit by President Ford, and twice he was called to take a shotgun or gas to a location, but, as far as this forum knows., only President Ford's visit took place between 1971 and 1976, the period herein at issue. Officer Schuette was called out onto the street only once when he was on duty as a desk person.

For legal reasons, only police officers were supposed to receive evidentiary property submitted at the counter. However, in fact, Complainant received and logged such property on occasion. There is no evidence concerning how frequently evidentiary property was submitted to the East Precinct desk persons, except that only a small percentage of all property submitted was evidentiary.

The Bureau of Police's formal "chain of command" dictated that the most senior police officer would be in charge of a precinct if all higher-ranking, command personnel were absent. Officer Arata or Schuette, but not Complainant, could have been in charge of the precinct if either were senior on such an occasion. However, this occasion rarely if ever occurred, as even when commanders were physically off the premises during their duty periods, they remained on duty and in charge of the precinct by radio.

Officer Arata or Schuette, but not Complainant, could make an arrest on a warrant. This would only occur if a person for which an arrest warrant had been issued presented himself or herself at the counter or if a person in custody were the subject of an arrest warrant for another crime. This occurred rarely. Officer Schuette, for example, only made three or four warrant arrests as a desk officer.

Officers Arata and Schuette were trained in first aid by the Bureau of Police. Complainant was not. However, the record contains evidence of only one instance in which a desk officer used this skill, and that instance consisted of applying mercurochrome.

Officer Arata or Schuette was responsible for keeping track of the key to the precinct's basement armory. Complainant was not. However, Officer Arata or Schuette used the key rarely if at all during times material, except to empty the armory humidifier, which took three minutes approximately once per month. A non-desk officer had primary responsibility for using the key to maintain the armory.

Officer Arata or Schuette could assist a police officer with a suspect in custody. No evidence was offered of incidents in which this occurred or concerning the frequency of occurrence. Complainant performed this activity if the suspect were a female who had to use the bathroom.

Due to her higher degree of skill, Complainant operated the computer terminal, entering queries as requested by police personnel and relaying back the answers to them, checking information she needed, and running the stolen vehicle list on the computer every day. However, Officers Arata and Schuette had access to and were not prohibited from using the computer. They avoided it because they did not like the computer; Officer Arata felt he was not "intelligent enough" to use it. Another police officer or Traffic Division non-sworn personnel operated the computer for the precinct if Complainant and the other desk person were not available.

24) The desk police officer was responsible for checking out potential security problems at the precinct, notifying a superior of the potential problem, or asking someone else to check it out. The record does not disclose what specific kind of security problems might occur. However, Complainant bore some responsibility for dealing with the only two such actual problems since 1950 which were described on the record, and neither desk person checked out the only potential problem cited in the record. (*See* Findings of Fact 22 above and 17 in the Retaliation section below.) That the desk police officer at East Precinct was not in a position to deal with security problems to any significant degree or with any significant frequency is evidenced by the fact that disabled officers and officers who had or wanted to avoid violence sought and were assigned to the East Precinct desk position on a relief and permanent basis. Furthermore, as Finding of Fact 25 below describes, neither Officer Arata or Schuette kept his gun with him while on duty (until after Complainant filed her complaint with the Civil Rights Division). The desk officer's position at East Precinct was considered "light duty" because it involved minimal exposure, or responsibility for responding, to hazard.

25) Bureau of Police officers are required to wear a firearm; PRC-II's are not. This distinction makes no meaningful difference, however, when applied to Officers Arata and Schuette and Complainant.

Officer Arata did not wear a firearm during times material herein. He usually did not even keep his firearm available; he kept it in his locker in another part of the precinct building unless, in his words, he was "under pressure" from a superior to keep his firearm at his desk. Such pressure was exerted infrequently. (The only other time he kept his firearm at his desk was just before his retirement, when he kept a gun he had received as a gift at his desk so he could show it off.) Although at least one superior did ask him to keep his gun in his desk, Officer Arata was never pressured to wear it. He was never officially reprimanded for not

having his gun at his desk or wearing it. In his 33 years as a police officer, Officer Arata never used or reached for a firearm. He used force (without a firearm) only once.

Officer Schuette did not wear a firearm when he worked as a desk person until after Complainant filed her complaint with the Civil Rights Division. Before her complaint, Officer Schuette, like Officer Arata, kept his firearm in his precinct locker when he was a desk person. He never used or drew a firearm while working as a desk person.

Soon after she began working as an East Precinct desk person, Complainant was given a revolver and ammunition by her superior, Lieutenant Lawrence Baker. Lieutenant Baker told her she could keep this firearm at her desk in case she ever needed it. Lieutenant Baker also made arrangements for Complainant to receive some instruction on the firearm's use. Complainant did not keep the weapon at her desk because Officer Arata did not do so. Complainant never used this weapon while working as a desk person. (The record contains sharply conflicting testimony as to the time at which and purpose for which Lieutenant Baker gave Complainant the weapon and ammunition. Because of Lieutenant Baker's demeanor while he testified at hearing, his interest in minimizing his professional embarrassment at the impropriety of his having given Complainant, a non-sworn employee, this weapon, and the inconsistencies in his testimony, and because of Complainant's clear, precise testimony on these events, which were very vivid and meaningful to her, the Presiding Officer found, and I agree, that Complainant's testimony was the most credible. Officer Noel Eck's failure to recall driving Complainant to the firing range for instruction, as Complainant testified that he did, does not impeach Complainant; such failure of memory is explained by the minor nature of this task to him and the passage of eight years. Officer Gritzmacher, also called to contradict Complainant's testimony concerning her weapon, ended up admitting in effect that Complainant's rendition of his activity concerning the weapon could be accurate.)

There was a shotgun in back of the teletype machine in the precinct's front Office during at least part of times material herein. Police officers, but not Complainant, were authorized to use it if necessary. It was never used during Complainant's employment.

In sum, Complainant, Officer Arata and Officer Schuette each had access to firearms which they were authorized to use in their work as desk persons if necessary. None of them had occasion to ever use firearms at all in the performance of their East Precinct desk position duties.

26) Officers Arata and Schuette neither supervised nor evaluated Complainant.

27) Officers Arata and Schuette wore uniforms when they worked as desk persons. Complainant did not.

28) At the request of their supervisor, in August of 1975, Complainant and Officer Arata, the two regular full-time desk persons at the time, each prepared a list describing what activities they then performed as desk persons. Although Complainant's list is more detailed and specific, the two lists are nearly identical in substance.



29) Complainant was evaluated in terms of the same duties as her fellow desk officer.

30) The physical working conditions of the East Precinct desk persons remained almost the same throughout Complainant's employment as an East Precinct desk person. Although there were several differences between the two successive East Precinct facilities during that time, the areas and room arrangement in which the desk persons worked were very similar in both locations. In both instances one side of the workspace was bordered by a counter at which the desk persons responded to individuals coming into the precinct. In both locations there were two identical desks, one for the police officer desk person and one for Complainant. At the Seventh and Alder precinct location, these two desks abutted each other; at the 47th and Burnside location, they were side-by-side, separated by about six feet. In both locations, the desk persons worked in very close proximity.

31) The physical working conditions for the East Precinct desk persons were virtually identical. The information and resource materials on the identical desks of the two desk persons, including the City Code and police manuals, were shared or, if there were copies for each desk, identical. The telephones were identical or shared. The report forms accessible to the desk persons were identical. The access to paper cutters, centrex, copiers, teletype and computer terminal was identical. A floating typewriter was available for the use of both desk persons. Only the television monitor sat on one desk and not the other, as explained in Findings of Fact 20 above. However, Complainant, Officer Arata, and Officer Schuette each sat at the desk with the monitor at different times.

32) As full-time East Precinct desk persons, Complainant and Officers Arata and Schuette worked forty hours, five days per week.

33) Where the testimony of Officer Arata and Officer Schuette differed, I found that of Officer Arata more credible, because of his demeanor and because he worked with Complainant more than Officer Schuette did.

34) Respondent's police officers, including Officers Arata and Schuette, received a base salary determined by the length of their time served as police officers, without regard to their assignment or education. All police officers received the same base salary after five years of service. Police officers received, in addition, compensation for overtime worked. Since some assignments involved more overtime hours than others, they generated more compensation than others.

35) Respondent's PRC-II's, including Complainant, also received a base salary determined by the length of their time served as PRC-II's, without regard to their assignment or education. All PRC-II's received the same base salary after one year of service.

36) While she worked as an East Precinct desk person, Complainant was compensated at the rate of pay for a PRC-II with her length of service, which is lower than the rate of pay at which Officer Arata or Schuette would

have been compensated had they had the same length of service.

37) Throughout Complainant's tenure as an East Precinct desk person, the quality of her work was at least satisfactory. (*See* Finding of Fact 15 in the Retaliation section below.)

38) On December 23, 1976, Complainant, at her request, was transferred to the Traffic Division of the Bureau of Police and, as of the time of hearing, was still working in that position.

After this transfer, Complainant worked as a PRC-II at the Traffic Division desk of the East Precinct front office, which abutted one of the desks of the East Precinct desk persons. She was working, therefore, with essentially the same precinct personnel and in the same physical location as before her transfer.

39) Male persons were allowed to apply for appointment to Respondent's PRC-II classification at all times material herein. Female persons were allowed to apply for appointment to Respondent's police officer classification as of 1973.

In October 1974, 492 of Respondent's 508 police officers, or 97%, were male. In July 1975, 480 of Respondent's 497 police officers, or 97%, were male. In July 1976, 450 of Respondent's 474 police officers, or 95%, were male.

In July 1974, one of Respondent's PRC-II's, or 4%, was male. In July, 1975, none of Respondent's PRC-II's were male. In July, 1976, none of Respondent's PRC-II's were male.

## FINDINGS OF FACT – THE MERITS: RETALIATION

1) Complainant received a Performance Evaluation Report dated March 18, 1975 from Sergeant Paul E. Rogers, one of her supervisors, for the period between October 1, 1974 and April 1, 1975. Complainant received superior ratings for the categories of "Quantity" (relating to the amount and timeliness of completed work) and "Personal Relations" (which included "getting along with fellow employees" and "meeting and handling the public"). She received competent marks in all other categories and an overall evaluation of "competent plus." These ratings were similar to those in the numerous prior evaluations she had received. On March 19, 1975, Complainant signed this evaluation, attesting that it had been discussed with her.

2) Also during March, 1975, an editorial criticizing the sex discrimination purportedly inherent in Respondent's program of replacing police officers with female civilian employees, and paying those civilians at a lower rate than the police officers they replaced, appeared in the current issue of *The Rap Sheet*. *The Rap Sheet* is the official publication of the Portland Police Association, the collection bargaining representative of Respondent's police officers, and the Oregon Council of Police Associations. *The Rap Sheet* circulates throughout Respondent's Bureau of Police, including East Precinct.

3) In response to the abovementioned editorial, Complainant wrote a letter to the editor of *The Rap Sheet* which pointed out the sex discrimination in the different rates of



compensation paid East Precinct civilian and police officer desk persons. Her letter was printed in the April, 1975 issued of *The Rap Sheet*. This issue was disseminated at or before the very beginning of April 1975. Immediately afterward, Complainant heard from her fellow employees that her letter had caused a great deal of debate and argument at East Precinct.

4) Captain Larry Brown was Captain of East Precinct when Complainant's letter appeared in *The Rap Sheet*. In that capacity, he was Complainant's direct ultimate supervisor until she transferred to the Traffic Division on December 23, 1976. Thereafter until Captain Brown's death on May 11, 1977, since Complain continued to be located in the East Precinct front office, she continued to be subject to Captain Brown, as the highest ranking and ever-present authority in the East Precinct building, even through he apparently did not have direct formal command over Traffic Division personnel.

5) Captain Brown was a totally authoritarian commander with an unpredictable, volatile disposition. He was very demanding. He could not tolerate anything he perceived as a challenge to his authority and was subject to outbursts which evidenced his caustic tongue and fiery temper. He often over-reacted to trivial problems or normal incidents which he felt were wrong. He was intensely involved in every aspect of East Precinct operation and often acted directly, rather than through the management pyramid. Complainant knew that as precinct captain, Captain Brown could make recommendations for personnel actions, and otherwise hurt or help the careers of his personnel, a great deal.

6) While she worked at East Precinct, Complainant saw Captain Brown daily. After March, 1975, all her contact with Captain Brown which concerned her work performance involved Captain Brown becoming very angry and excited, raising his voice and shouting at her. Complainant attempted to establish rapport with Captain Brown, but was unsuccessful in ever having a reasonable and constructive discussion with him about her job performance. Complainant feared that Captain Brown was retaliating against her letter to *The Rap Sheet*, and later, her complaint to the Civil Rights Division.

7) On April 20, 1975, Lieutenant Vern McCabe reviewed Complainant's March 18, 1975 evaluation and added to it the following comment:

> "Ms. Potter is overly conscientious if this is possible. It sometimes annoys co-workers and slows her activities."

Lieutenant McCabe's additional and adverse comment was never discussed with Complainant, and she had no knowledge of its existence until she inspected her personnel file sometime later. Complainant had never received any kind of similar criticism during her Bureau of Police employment. It was unusual for a Bureau of Police superior to add an adverse comment to an otherwise favorable evaluation.

Complainant was very upset by Lieutenant McCabe's addendum. She felt it was "underhanded." Knowing that if the addendum had been meant to help her improve her job performance, it would have been discussed with, or

at least shown to, her. Complainant believed that the addendum must have been added to discredit her. She feared it was an indication of what she could expect in future evaluations.

Lieutenant McCabe's explanation at hearing that he added these comments to defend Complainant, but that he does not remember why he thought this necessary, is not credible.

8) On or about April 29, 1975, Complainant was subjected to disciplinary action for the first time in her career with the Bureau of Police. The disciplinary action stemmed from an incident at the East Precinct front office, which occurred when Complainant was answering the telephone during a very busy period. Officer Leonard Vaught approached her and asked her to take custody of a found purse until the owner picked it up. Because she was trying to handle several telephone calls at once and because Officer Vaught's request did not involve an emergency, Complainant asked Officer Vaught to wait a moment. The clerk at the adjacent Traffic Division desk offered to and did take possession of the purse, and its owner claimed the purse later that day.

At the request of Sergeant Johnson, Officer Vaught wrote a report about this incident. (Sergeant Johnson testified that if he made this request, he did so at the order of Captain Brown "or someone else.") Later that day, Complainant was called into Captain Brown's office. Captain Brown told her that he had received a report from Officer Vaught concerning the incident which accused her of refusing to take the purse. After Complainant told Captain Brown what had happened, Captain Brown became very angry and repeatedly called her a liar. Before Complainant left work that day, Captain Brown informed her that she would be officially reprimanded for her behavior in this incident by Bruce Baker, Chief of the Bureau of Police.

Complainant subsequently did receive a written reprimand from Chief Baker. This formal reprimand was an unusually severe type of discipline for the action cited, even for Captain Brown. Complainant was very "ashamed . . . humiliated . . . and embarrassed" by the reprimand. She spent a lot of time crying at home and grieving over it. She could not sleep at night. The reprimand seemed to Complainant such "overwhelmingly unfair" harsh treatment for such a minor occurrence; she thought it was one more step toward firing her. This belief and the mental anguish it caused, nurtured by the subsequent events cited below, continued and increased throughout the rest of Complainant's East Precinct tenure.

In response to the reprimand, Complainant filed a union grievance. As a result of the grievance, there was a hearing. Even though Complainant was required to attend this hearing, her absence from work was charged against her accumulated vacation time. As a result of the hearing, the grievance was resolved in Complainant's favor, and the reprimand of Complainant was rescinded and was supposed to be expunged from her personnel files. Complainant received a letter from then Mayor Neil Goldschmidt apologizing for the unjust reprimand action and reinstating the vacation time charged for Complainant's attending



the hearing. The reprimand was not in fact expunged from Complainant's precinct personnel record until Complainant had an opportunity to remove it herself many months later. This expunction should have been performed by Complainant's supervisor, and it was Captain Brown's responsibility to make sure it was done.

9) On March 24, 1976, Complainant received her next Performance Evaluation Report, concerning the period from October 1, 1975, until April 1, 1976. Lieutenant Roger Haven, who wrote this evaluation, knew of Complainant's letter to *The Rap Sheet* when he wrote it. With its two "Weak" marks, its one "Improvement Needed" rating in the area of "Quantity," its critical narrative and overall evaluation of "Improvement Needed/Competent," this evaluation was less favorable than any previous evaluation Complainant had received during her employment with the Bureau of Police and a marked departure from evaluations as desk person. After discussing this evaluation with Lieutenant Haven and thereafter deciding that its criticisms were unfair and not constructive (in that no suggestions for future improvement were made), Complainant wrote and sent a rebuttal. This rebuttal, dated May 10, 1976, in part criticized Lieutenant Haven.

10) On May 22, 1976, Complainant received a memo from Captain Brown which instructed her to attend a meeting in his office on May 26, 1976. The memo included the following language:

> "Since this interview may involve the possibility of a disciplinary action, you are advised you have the option of arranging to have your Union representative present during this interview."

The union agreement to which Complainant was subject required that such notice of the right to have a union representative present be given to the subject of potential discipline, but not to a complaining party such as Complainant. It is not the Bureau of Police's practice to send such a notice to a complaining party. Complainant reasonably believed that "possibility of a disciplinary action" meant disciplinary action against her, since it was she who was advised of her right to have her union representative present.

Because of her reprimand experience the year before (*see* Finding of Fact 8 above) and because of the prospect of discipline by Captain Brown, Complainant suffered great anxiety concerning this meeting. She spent several sleepless nights thinking about it and cried a great deal at home. She had to calm herself shortly before the meeting by lying down in the precinct bathroom.

Respondent contends that this meeting was called to explore the allegations against Lieutenant Haven which Complainant had made in her rebuttal, and that Lieutenant Haven was the object to potential discipline. However, no mention of Lieutenant Haven was made in the May 22, 1976, memo notifying Complainant of the meeting. At the meeting, conducted with the meeting room door open, Captain Brown screamed and yelled loudly at Complainant about the April 29, 1976, evaluation and her rebuttal thereto. He made no recommendations as to how Complainant could improve her job performance. He did not

mention Lieutenant Haven for the first 15 minutes of the meeting. In his testimony regarding the meeting, Lieutenant Haven stated that Captain Brown regarded the meeting, and the prospect of actually disciplining Lieutenant Haven, as a "joke." Complainant was embarrassed because the open door allowed her co-workers to hear Captain Brown's ranting during the meeting. Afterward, she felt completely drained emotionally. Subsequently, Captain Brown recommended that no action be taken against Lieutenant Haven. Complainant was very distraught and worried because the whole incident seemed very unfair to her. Her insomnia and crying periods continued.

I find that neither Captain Brown nor Lieutenant Haven took seriously the possibility of disciplinary action against Lieutenant Haven, that the May 26, 1976, meeting was actually called to harass Complainant, and that both the prospect of the meeting and the events of the meeting did in fact harass Complainant.

11) Sergeant Ron Corbett, as Complainant's administrative sergeant, normally would have prepared Complainant's March 24, 1976, evaluation. However, Lieutenant Haven prepared it. Sergeant Corbett had given Complainant a very favorable evaluation on June 9, 1974. He did not want to write (and Lieutenant Haven feared he might not write) an evaluation critical of Complainant. Lieutenant Haven therefore took the task of writing this evaluation out of Sergeant Corbett's hands and wrote it himself. Lieutenant Haven did not write the evaluations of any of the other personnel under Sergeant Corbett's supervision.

12) Finding of Fact 20 in the Equal Pay Section above describes an interoffice memo from Captain Brown to the East Precinct desk personnel dated September 22, 1976, which attempted to distinguish between the internal security responsibility of "sworn police officer" desk persons (such as Officers Arata and Schuette) and "non-sworn" desk persons (such as Complainant). The distinction made in the memo was questionable, as I found in Finding of Fact 20 above, in that it made a distinction without a functional difference and because it was written soon after Complainant's first complaint to the Civil Rights Division. This timing raises at least the possibility that the memo was intended to respond to that complaint by creating the mere appearance of a difference in responsibility between Officer Schuette and the Complainant and by harassing Complainant.

13) The November 1976 issue of *The Rap Sheet,* published on or about November 1, 1976, contained two articles which made the following references to Complainant:

a) "A desk person at East is suing for equal pay, and if she wins the 'office girls' might well be out of work. Many of these desk jobs will provide good limited positions so that officers with a bad knee or a sore back could go back to work and get off the disability program." (Excerpted from an editorial.)

b) "There is presently a law suit where a civilian employee is demanding equal pay to that of a police officer for her desk duties." (Excerpted from "Blue serge giving way to gray flannel suits.")



14) In November 1976, Complainant received her next Performance Evaluation Report. This evaluation concerns the period from April 1, 1976, to October 1, 1976. It was written by Sergeant J. E. Cunningham after he had supervised Complainant for two months. Although the evaluation is dated November 1, 1976, Sergeant Cunningham signed it on November 12, 1976. Sergeant Cunningham knew of Complainant's complaint to the Civil Rights Division when he wrote the evaluation.

This evaluation is considerably less favorable than Complainant's previous evaluations. It includes four "Weak" marks, an "Improvement Needed" rating in "Personal Relations," a totally negative narrative, and an overall evaluation of "Improvement Needed/ Competent." The "Weak" and "Improvement Needed" ratings were given, with one exception, in different areas than similar ratings in Complainant's March 24, 1976, evaluation.

To conform with a Bureau of Police order that police officers keep a daily log and for his own benefit, Sergeant Cunningham kept a notebook concerning work events, purportedly of positive and negative incidents to which he could refer in doing employee evaluations. This pocket notebook contains five entries concerning Complainant, dated 9-29-76, 11-3-76, 11-12-76, 11-26-76, and 11-19-76 (signed 11-26-76), in that order. All are negative. All but one of these entries are dated after the date of Complainant's November 1976 evaluation, and only two entries are dated before the date Sergeant Cunningham signed that evaluation. The remaining entries are dated 5-29-78, 5-31-78, 3-23-79 (apparently made 11-21-79), 3-8-79, 3-16-79, 3-8-79, 3-27-79, and 3-30-79, in that order. None concern Complainant except the 3-30-79 entry, which notes that two persons reported that Complainant had contacted them about her job performance. The entries comprise a total of eight pages; the rest of the notebook (approximately 63 pages) is blank.

The notebook's entries concerning Complainant state that she left a complete sentence out of a three sentence memo and had to retype it; that she failed to check a distribution box on a report and became upset when criticized for this; that she failed to adequately specify the date and time on a document; that she failed to complete information on a report concerning the location of an occurrence; and that she paged a person whom she had been told was absent and that she had to be told several more times that the person was absent. Unlike the later entries, all entries concerning Complainant are made in the same color of ink and appear chronologically with no space gaps in the notebook between them. The last entry concerning Complainant notes a witness to the occurrence described.

Sergeant Cunningham contends that the five entries concerning Complainant in this notebook were the basis of his November 1976 evaluation of her. He admits that he did not observe Complainant's counter reception work very often.

In neither the evaluation itself nor during his discussion of the evaluation

with Complainant did Sergeant Cunningham give Complainant any specifics as to how she could improve her job performance. He initially refused to give Complainant a copy of this evaluation. He mentioned Complainant's complaint to the Civil Rights Division (after Complainant brought it up). Although she acknowledged in writing that she had received and discussed this evaluation, Complainant refused to sign it.

The lack of entries in Sergeant Cunningham's notebook, the 1-1/2 year gap between the 1976 entries concerning Complainant and the next entry, the appearance that the entries concerning Complainant in 1976 were all written at once, and the fact that all but one of the 1976 entries concerning Complainant are dated after her November 1976 evaluation all belie the contention that the notebook was Sergeant Cunningham's required daily log and that he kept it for use in formulating subsequent evaluations. At best, Sergeant Cunningham's notebook provides only scant evidence of Complainant's job performance as cited in her November 1976 evaluation. The five trivial, nit-picking incidents recorded in the notebook certainly do not support the absolute criticism of Complainant in the evaluation's narrative, nor its relatively low marks and ratings. The contents of the notebook (and the fact that Sergeant Cunningham strenuously objected at hearing to inspection of the notebook by opposing counsel) and the substance of testimony of both Complainant and Sergeant Cunningham himself support my conclusion that Sergeant Cunningham first decided that he would be giving Complainant a negative evaluation (or he had already done so) and then set out to document it with the notebook. The purpose of the notebook therefore was to build a case against Complainant rather than to provide a basis for formulating a subsequent evaluation.

Her November 1976 evaluation was based upon such insignificant incidents that it seemed to Complainant that Sergeant Cunningham was trying to find things wrong with her work. Complainant was so upset and worried about the unfairness and vagueness of this evaluation that she spent two days alone at the Oregon coast analyzing and responding to it. She then filed a detailed written rebuttal to the evaluation.

15) The quality of Complainant's work did not decline during her tenure as East Precinct desk person. The fact that she liked and was proud of her work was reflected in her good work product and habits. She was meticulous, thorough, conscientious, precise, accurate, and inquisitive. She was especially proficient at her reception duties. (Testimony contradictory to the Finding was not credible, as it came from witnesses who either were known to be overly critical, or who had a personal or professional interest in supporting Respondent's allegations.)

16) As Complainant knew when they were issued, the reprimand and the poor evaluations she received could be used to assist the Bureau of Police in discharging her.

17) Captain Brown's attitude toward Complainant is further evidenced by an incident which started when Complainant noticed on the television monitor that there was a brown paper bag by the back entrance to East Precinct. She stopped the monitor so that she and Officer Schuette could view the bag.

Officer Schuette started to go to see what the bag was. He was stopped by Captain Brown. When he told Captain Brown that he was checking a bag which Complainant thought could contain a bomb, Captain Brown ordered him to return to the front office and tell Complainant to check the bag because, Captain Brown said, she should begin earning the police officer salary which she wanted to be paid. Officer Schuette returned to the front office and conveyed Captain Brown's directive to her, without conveying Captain Brown's stated reason for the order. In response, Complainant went to Captain Brown's office where Sergeant Callaghan, her immediate superior, was and asked Sergeant Callaghan how to handle the situation. Captain Brown became very angry at Complainant; he seemed to believe that she was over-reacting. He told Complainant to go and get the bag. Sergeant Callaghan told Captain Brown that he, Sergeant Callaghan, was going to check the bag, which he cautiously did. It was someone's lunch. A member of the Bureau of Police bomb team later told Complainant that her actions in this incident were very appropriate. Captain Brown's actions in this incident left Complainant very upset and embarrassed.

18) Captain Brown knew of Complainant's July 21, 1976, complaint to the Civil Rights Division.

19) Several times, Complainant discussed her concerns that she was not being treated fairly or impartially evaluated and her fear of Captain Brown's retaliation against her because of her *Rap Sheet* letter and complaint to the Civil Rights Division with Lieutenant Chris Scoumperdis, then in charge of the Personnel Division of the Bureau of Police. Because Lieutenant Scoumperdis felt that such retaliation was a distinct possibility, he talked twice with Captain Brown about it. Captain Brown told him that he would not treat Complainant differently than other employees regardless of what had gone on, including Complainant's letter to *The Rap Sheet*.

20) All of the other PRC-II's assigned to precincts and the Traffic Division met and signed a petition to their union which protested Complainant's filing her July 21, 1976, complaint with the Civil Rights Division, because they resented her action and feared they would all lose their jobs or be replaced by police officers if Complainant prevailed. Complainant was not invited to or informed of the meeting at which this occurred.

21) Complainant was continuously subjected to other, more subtle but cumulatively significant reactions from Captain Brown and her immediate supervisors after her *Rap Sheet* letter was published. On innumerable occasions between April 1975 and December 23, 1976, she was singled out by her supervisors for petty criticism, negative innuendoes, and unnecessary duties. She continued to be subject to Captain Brown's outbursts until he died on May 11, 1977. All of this created a pervasively anxious work atmosphere for Complainant, since she never knew when she might again incur abuse from her supervisors.

22) Complainant would not have transferred to the Traffic Division if the above-cited negative actions had not occurred.

23) None of Complainant's supervisors when she worked as East Precinct desk person, from Captain Brown on down, ever told Complainant how to improve her job performance. They did not tell her how they wanted things done differently or talk with her about problems on-the-spot.

**FINDINGS OF FACT – DAMAGES**

1) Complainant was compensated according to Respondent's pay scale for PRC-II's while she worked as East Precinct desk person between July 15, 1971, and December 23, 1976. Her pay was determined solely by her length of tenure as a PRC-II, in the manner reflected in the exhibit showing PRC-II pay. She earned a total of approximately $44,652.00 during the latter time period.

2) Officers Arata and Schuette were compensated according to Respondent's pay scale for police officers while they worked as East Precinct desk persons between July 15, 1971, and December 23, 1976. Their pay was determined solely by their length of tenure as police officers, in the manner reflected in the exhibit showing police officer pay.

3) If Complainant had been compensated according to Respondent's pay scale for police officers while she worked as East Precinct desk person, she would have earned a total of approximately $63,850.00.

4) At the request of Complainant's counsel, S. Roy Moss, M.D, a psychiatrist, performed a psychiatric evaluation of Complainant on November 16, 1978. He formed certain opinions based upon his interview with Complainant and her husband. Dr. Moss Found that Complainant had no previous history of emotional problems requiring professional help and a good work history. He characterized Complainant's level of personal and professional adjustment prior to April 1975 as good in all respects. Complainant impressed him as "very hard-working, conscientious, organized, and attentive to detail," "honest," and "somewhat unsure of herself at times and feeling the need for support for her attitudes and opinions." He felt that Complainant had a "strong need for correctness" and a "strong sense of right and wrong" and that she was "thoughtful," "responsible," and "sensitive to the needs of others." He testified further that Complainant was intelligent and sensitive to unfair criticism rather than all criticism. Dr. Moss found "no evidence of disturbed thinking or inappropriate or over-dramatic emotions." Respondent did not offer its own expert testimony to rebut Dr. Moss's opinion.

I adopt Dr. Moss' above observations and his concluding expert opinion that Complainant had suffered (and still manifested the effects of) emotional strain and symptoms directly causally related to the continual stream of unfavorable evaluations, Captain Brown's outbursts, petty criticism, innuendoes, and unnecessary duties and other negative events described in Findings of Fact 6 through 23 in the above Retaliation section. More specifically, Complainant suffered a great deal of frustration, humiliation, fear, depression, anger, and other mental stress which continued, in gradually declining severity, at least up to the time of hearing in this matter. Her suffering was manifested through frequent crying spells (which were unusual for her), disruption of her social life and many marital difficulties. Her preoccupation with stress from her work situation interfered with Complainant's normal enjoyment of life; she was very unhappy; she questioned her competence and behavior and lost confidence in herself. The trauma of the incidents described in the above-noted Findings of Fact was enduring enough to bring tears to Complainant's eyes when the incidents were recalled at hearing.

5) In response to her mental suffering and, specifically, to resolve her conflicts concerning her desk person work (especially her fear of Captain Brown), Complainant sought support and other help from Respondent's Affirmative Action Officer, Lieutenant Scoumperdis, the National Organization of Women, the chaplain of the Bureau of Police, her private physician, and private and group mental health therapy. She underwent 1 1/2 years of psychotherapy at Lutheran Family Services before she transferred to the Traffic Division. For the first time in her life, she took prescribed tranquilizing medication.

**ULTIMATE FINDINGS OF FACT – EQUAL PAY**

1) Complainant, a female, worked one of two East Precinct day shift desk positions for the Bureau of Police, a subdivision of Respondent, between July 15, 1971, and December 23, 1976. William Arata, a male, worked the other East Precinct day shift desk position during this time until July 24, 1976. He was then replaced by Bernard Schuette, a male, who had previously been working the day shift desk position on a relief basis.

2) For the most part, Complainant, William Arata, and Bernard Schuette worked the same job. They shared the major responsibility of their job for reception and were essentially interchangeable therein. With minor exceptions, they shared the responsibility for and spent the same time accomplishing their other tasks. Theoretical differences in their responsibilities related only to responsibilities which were rarely if ever exercised. No significant distinction was made between the actual duties and responsibilities of Complainant, William Arata and Bernard Schuette. In conclusion, Complainant, William Arata and Bernard Schuette did substantially equal work, the performance of which required substantially equal skills, efforts, and responsibilities under similar working conditions.

3) During her employment as East Precinct desk person, Complainant was classified as a Police Records Clerk II and compensated according to the pay scale for that classification. During their employment as East Precinct desk persons, William Arata and Bernard Schuette were classified as police officers and compensated according to the pay scale for that classification. Complainant was compensated at a lower rate of pay than that paid either William Arata or Bernard Schuette.

4) The classification system which determined the compensation of

Complainant, Officer Arata and Officer Schuette was not a merit system within the meaning of ORS 652.220(2)(a).

5) At times material herein, virtually all (no less than 95%) of Respondent's police officers were male, and, with one exception in 1974, all of Respondent's PRC-II's were female.

6) The net effect of the circumstances set out in the Findings of Fact above was that Complainant was discriminated against in terms of her compensation because of her female sex.

## ULTIMATE FINDINGS OF FACT – RETALIATION

1) From April 1975, when the letter in which Complainant voiced her opposition to Respondent's sex discrimination in compensation was published in a publication disseminated throughout East Precinct and Complainant's precinct superiors and co-workers were thereby apprised of her opposition to this discrimination, Complainant was subjected by those superiors and co-workers, all employees of Respondent, to various kinds of negative actions in the following particulars:

a. Within three weeks of the publication of Complainant's letter, an adverse comment was added without Complainant's knowledge to a previously-issued favorable evaluation of Complainant. The purpose of this comment was to discredit Complainant.

b. Within four weeks of the publication of Complainant's letter, she was officially disciplined for the first time, receiving an unusually severe type of discipline in response to a trivial incident. The person who reported the alleged misconduct by Complainant which led to the discipline had been asked by his superior to make the report. After Complainant's reprimand was rescinded, Respondent failed to expunge the record of the discipline from Complainant's precinct personnel filed as ordered.

c. Complainant's next work evaluation, even more negative, was done by a superior who had taken the duty of evaluating Complainant from her more immediate superior because he feared that the immediate superior might give Complainant a favorable evaluation.

d. After Complainant responded to this evaluation, Captain Brown summoned Complainant to a meeting by a memo which was calculated to and did give Complainant the impression that she was the subject of potential discipline, which she was not. At this meeting, Complainant was harangued by Captain Brown.

e. Two months after Complainant filed her July 1976 complaint with the Civil Rights Division, Captain Brown made a theoretical distinction between the internal security responsibilities of Complainant and those of Officer Schuette.

f. Immediately after the dissemination throughout East Precinct of a publication which made two references to Complainant's complaint to the Civil Rights Division, Complainant received her next evaluation, her worst yet. The notebook of remarks upon which this evaluation was allegedly based was in fact merely a notebook mentioning five trivial incidents, which was used in a deliberate attempt to discredit Complainant.



g. After March 1975, all of Complainant's contact with Captain Brown concerning her work performance involved Captain Brown's directing loud, angry outbursts at Complainant. As evidenced in his statement to Officer Schuette in the bomb incident, Captain Brown harbored animus toward Complainant because of her opposition to Respondent's sex discrimination in compensation.

h. Complainant was singled out for other petty criticism, negative innuendoes, and unnecessary duties by her supervisors on numerous occasions between April 1975 and her transfer to the Traffic Division in December 1976. She was also subjected to the hostility of her co-workers, including her fellow PRC-II's after she filed her complaint with the Civil Rights Division, because they feared that her complaint might cost them their jobs.

2) In light of the close correlation in time between Complainant's letter opposing Respondent's sex discrimination in compensation and her first receipt of an adverse work evaluation; Captain Brown's animus toward Complainant because of this opposition; the withdrawal of the duty of evaluating Complainant from a supervisor who had given her a favorable evaluation in the past; and the facts that Complainant's suddenly adverse job evaluations were not based upon a decline in the quality of her work and that Complainant's superiors did not offer her suggestions as to how she could improve; Complainant's receipt of nothing but adverse job evaluations after the publication of her letter, her receipt of obviously unjust discipline, Captain Brown's haranguing of her in person and in writing and the continuous other negative actions against her by her supervisors must be seen as deliberate attempts to discredit and harass Complainant in retaliation for her April 1975 letter and her July 1976 complaint to the Civil Rights Division alleging Respondent's sex discrimination in compensation.

## ULTIMATE FINDINGS OF FACT – DAMAGES

1) If Complainant had been compensated according to Respondent's pay scale for police officers while she worked as East Precinct desk person, she would have earned a total of approximately $19,288.00 more than she in fact earned during that period.

2) As a direct and proximate result of the retaliation by Respondent described in the above Findings of Fact, Complainant suffered severe and continuing mental anguish and serious effects therefrom.

## RULINGS ON MOTIONS

1) At the instigation and expense of Respondent and/or the Civil Service Board of Portland, Biddle and Associates, Inc., a California based consulting firm, prepared a report entitled *"Final Report Investigation into P.J. Potter Case July 31, 1978"* (hereinafter referred to as the Biddle Report). This report is the product of the firm's study comparing the skills, efforts and responsibilities required of Respondent's police officer and PRC-II classifications in their work as desk persons. The report is based upon research conducted in April 1978 and the firm's prior research concerning police officer duties conducted in 1975.

The Biddle Report identifies 37 areas in which desk police officers and PRC-II's in general perform the same duties at the same levels of skill, effort and responsibility. It also identifies 24 areas in which desk police officers in general are supposed to have a higher or different level of skill, effort or responsibility than desk PRC-II's in general, and six areas in which desk PRC-II's in general are held to a higher or different degree of skill, effort or responsibility than desk police officers in general. In addition, it identifies 17 duties which desk police officers in general are supposed to perform that desk PRC-II's are not.

Careful analysis of the testimony of Officers Arata and Schuette and Complainant concerning the areas in which the Biddle Report identified different or higher levels of skill, effort or responsibility reveals that the Biddle Report does not accurately reflect the levels of skill, effort and responsibility at which Officers Arata and Schuette and Complainant performed, or the duties they performed, in their actual work at East Precinct. The gross inconsistency between the findings of the Biddle Report and what actually occurred at East Precinct during the times material herein can be explained by the following facts. The Biddle Report is based upon the comments of some desk PRC-II's and some desk Police officers and their superiors, rather than upon direct observation. Biddle and Associates, Inc. did not evaluate the accuracy of what these persons said or the applicability of their comments specifically to East Precinct. Officer Arata was not consulted at all and Complainant's input, obtained after misrepresentation to her of the purpose for which her comments were sought, was not accurately reflected in the Biddle Report. Although Officer Schuette was consulted, his testimony herein contradicts the report's findings in key areas. Furthermore, and crucially, the Biddle Report reflects more what the classifications were supposed to do rather than what they actually did. In sum, all the comparative sections of the Biddle Report show to this forum is that the East Precinct desk situation was not what the classification system intended.

At hearing, the Presiding Officer was asked to reserve ruling on the admissibility of the Biddle Report. Given its above-described flaws, I admit this report for the limited purpose of considering its Appendix G, entitled "Precinct Staffing Status," and Appendix H, entitled "Numbers of Police Officers and Police Records Clerks by Sex, By Year."

2) Respondent objected to the participation of Complainant's counsel in these proceedings. The attorney for Complainant has acted, in effect, as co-counsel with the Agency's counsel in propounding the Amended Specific Charges at and after hearing, but only to the extent of supporting and clarifying the Agency's case as presented by Agency counsel.

The right of Complainant to have her own counsel is derived from two more specific rights: 1) Complainant's right to become a party, and 2) a party's right to be represented by his or her own counsel.

With regard to Complainant's right to become a party: while The Attorney General's 1975 Model Rules of Procedure which govern this case do not specifically provide the opportunity for party status to persons with an interest in the outcome of the proceedings (as do the subsequent Model Rules), neither they nor the statutes upon which they are based specifically disallow such an opportunity. It is therefore within my discretion to permit it. In the interests of fairness, Complainant, as a person who has an inherent interest in the outcome of contested case proceedings concerning Specific Charges which are based upon her complaint, should be afforded the right to participate as a party in those proceedings. I do not reach the question of whether Complainant has full or limited party status, because her attorney has participated only in the limited manner described above.

With regard to a party's right to be represented by counsel in these proceedings: the Office of the Attorney General represents the Bureau of Labor and Industries, not the Complainant, in contested case proceedings stemming from a complaint filed with the Civil Rights Division of the Bureau. Naturally, the Bureau's case, based upon an administrative determination that substantive evidence supports the complainant's complaint, will usually converge, to a great extent, with the complainant's case. Nevertheless, the Attorney General cannot be charged with representing both the Bureau and the complainant, as the interests of the Bureau and of the complainant, as perceived by the Bureau and/or the complainant, conceivably can diverge. Therefore, if a party, such as Complainant herein, wishes to be represented by her own counsel, she may choose to be.

For the above reasons, Respondent's objection to the participation of Complainant's counsel is overruled.



## CONCLUSIONS OF LAW

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

2) The Amended Specific Charges herein were lawfully brought under ORS 659.030(1) rather than ORS 652.210 *et seq.* The exemption of state and local employers contained in ORS 652.210(1) is not available to Respondent in proceedings brought under either ORS 659.030(1) or 652.210 *et seq.*, as it was implicitly repealed by the enactment of the 1969 amendment to ORS 659.030(1). Respondent may assert any factually available defense which either does not discriminate on the basis of sex or have the effect of doing so, including the defense contained in ORS 652.220(2)(a) that wages were paid pursuant to a merit system which does not discriminate on the basis of sex.

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

4) Complainant was entitled to become a party in this proceeding and, as such, to be represented by her own counsel to support and clarify the case of the Bureau of Labor and Industries as presented by the Agency's counsel.

5) The actions, and motivations for those actions, described herein of Officers Arata, Schuette, Gellner, Eck, Gritzmacher, and Vaught; Sergeants

Rogers, Corbett, Cunningham, Callaghan and Johnson; Lieutenants Baker, McCabe, and Haven; Captain Larry Brown, Chief Bruce Baker, and Respondent's other employees, are properly imputed to Respondent.

6) Respondent committed an unlawful employment practice in violation of ORS 659.030(1)(a) by discriminating against Complainant in compensation because of Complainant's female sex in the following particular:

> From July 15, 1971, to December 23, 1976, Respondent compensated Complainant at a rate lower than that paid its male employees Arata or Schuette, even though Complainant performed substantially equal work, requiring substantially equal skill, effort and responsibility, under similar working conditions, to the work performed by Officers Arata and Schuette.

7) Respondent committed an unlawful employment practice in violation of ORS 659.030(1)(d) by discriminating against Complainant, from April of 1975 until May 11, 1977, by harassing, discrediting and otherwise retaliating against her because she opposed Respondent's unlawful employment practices set out in Conclusion of Law 6 above, and also, after July 21, 1976, because she had filed a complaint against Respondent with the Civil Rights Division of the Bureau of Labor and Industries alleging those unlawful practices.

8) ORS 659.121 does not limit the time period during which the Commissioner of the Bureau of Labor and Industries can award back pay damages.

9) The Commissioner of the Bureau of Labor and Industries has the authority to award money damages plus interest upon back pay accrued to Complainant herein under the facts and circumstances of this record, and the sums of money awarded as damages in the Order below and the interest awarded, are an appropriate award.

## OPINION

### I. ORS 652.210 *et seq.*, and 659.030(1)

Respondent argues, in effect, that because of the existence of ORS 652.210 *et seq.*, the Commissioner of the Bureau of Labor and Industries had no ability or jurisdiction to have commenced or conducted under ORS chapter 659 a proceeding such as this dealing with an equal pay complaint.

Under the broad coverage of ORS 659.030(1), an employer may not discriminate against an individual in employment generally. This statute prohibits discrimination in hiring, discharge, compensation, and in the terms, conditions or privileges of employment on the basis of race, religion, sex, national origin, marital status, age or several other characteristics. Employers covered by this statute include all state agencies, political subdivisions and municipalities. (ORS 659.010(6)).

ORS 652.210(1) is narrower in its coverage. It prohibits only discrimination based upon sex in the area of wages. It exempts from its proscription the state and any municipal corporation or political subdivision thereof having in force a civil service system based on merit (ORS 652.210(1)), and it provides a defense that wages were



paid pursuant to a merit system which does not discriminate on the basis of sex (ORS 652.220(2)(a)). ORS 652.210 *et seq.* were enacted in 1955 and have not been amended by the Legislature or interpreted by Oregon appellate courts since their enactment.

Obviously, the general area covered by ORS 659.030(1) overlaps with the coverage of ORS 652.220(1) in that both prohibit discrimination in compensation based upon sex. The Amended Specific Charges herein cite ORS 659.030(1) as their basis.

Respondent first argues that it is exempt from the operation of ORS 652.220(1) because it is a political subdivision of the state having in force a civil service system based on merit, and that it cannot be charged with a violation under ORS 659.030(1) which could not be successfully pursued, due to the latter exemption, under ORS 652.220(1).

The pertinent language in ORS 659.030(1) was enacted fourteen years after the enactment of ORS 652.220(1). ORS 659.030(1), as the later-enacted and broader of the two statutes, is silent on its relationship to ORS 652.220(1). The relevant legislative history of ORS 652.220 and 659.030(1), however, offers some elucidating evidence of legislative intent, which is relevant to their relationship.

ORS 652.220 may well have been enacted in part for a reason totally unrelated to the policy of eradicating sex discrimination so paramount in the later enactment of the relevant amendment to ORS 659.030(1). There is evidence that ORS 652.220 was enacted more to protect men, as presumed family breadwinners, from being put out of work by cheaper female labor, than to mandate equal pay for women. (*See* comments of Mr. Marr before the January 18, 1955, meeting of the Senate Labor and Industries Committee and comments of Senator Allen before the February 2, 1955, meeting of the same committee.)

In 1969, the Oregon Legislature, in enacting HB 1297, amended what is now ORS 659.030(1) by adding "sex" to the classes of people protected by its prohibition of discrimination. This amendment completed the evolution of the current language of this statute which is pertinent to this matter. As one of the main witnesses in support of this amendment, Senator Betty Roberts, at the April 23, 1969, meeting of the Senate Labor and Industries Committee, dwelt vividly upon her dominant target in supporting this bill: sex discrimination in the form of unequal pay for equal or comparable work. She also made it clear that HB 1297 should and would cover public employers, a group she had been told was particularly guilty of pay inequities based upon sex. No references to the existence of ORS 652.220(1) appear on the record.

The legislative history of HB 1297 supports the conclusion therefore that the Legislature was aware of, and therefore intended, by its enactment of HB 1297, the applicability of the bill to equal pay matters and, furthermore, the applicability of equal pay mandates to public employers.

In addition, there is strong statutory evidence in ORS 659.022 of the Legislature's intent that ORS 659.030(1) accomplish a broad remedial policy:

> "to encourage the fullest utilization of available manpower by

removing arbitrary standards of . . . sex . . . as a barrier to employment . . .; to insure human dignity of all people within this state, and protect their health, safety and morals from the consequences of intergroup hostility, tensions, and practices of discrimination of any kind based on . . . sex . . ."

The legislative history described above, and the breadth and strength of the latter statutory policy statement, persuade me that the plain language of ORS 659.030(1) and 659.010(6) prohibiting sex discrimination in employment compensation by political subdivisions and municipalities of this state should not be limited in the absence of a clear legislative directive made at the same time the relevant amendment to ORS 659.030(1) was enacted or afterward. If on the other hand, I were, in effect, to limit ORS 659. 030(1)'s prohibition against sex-discriminatory compensation practices to those perpetrated by employers covered by ORS 652.210(1), I would insulate what the Legislature has recognized as equally-harmful acts of sex-discriminatory compensation by public employers from the enforcement of ORS 659.030. This would have the anomalous effect of prohibiting compensation discrimination by public employers based upon any protected characteristic except sex. Accordingly, I conclude that ORS 659.030, where contradictory to ORS 652.210 *et seq.*, controls, even though ORS 659.030 is a more general statute, since ORS 659.030 is later in time and is part of a comprehensive policy intended to eradicate discrimination in employment by all employers. The 1969 amendments to ORS 659.030 acted as an implicit repeal of any existing statutory provision, including ORS 652.210(1), exempting a state or local governmental entity from the requirement of paying male and female workers the same compensation for the performance of substantially equal work. Since ORS 659.030(1) operates therefore without the exemption created by ORS 652.210(1), the Amended Specific Charges in this matter were properly brought and heard under ORS 659.030(1).

Respondent goes on to argue that because this proceeding has been brought under ORS chapter 659, Respondent is deprived of its ability to interpose the defenses set out in ORS 652.220(2), particularly the 652.220 (2)(a) defense for wages paid pursuant to a merit system which does not discriminate on the basis of sex. In fact, Respondent is free to interpose any defense factually available to it which either does not discriminate on the basis of sex or have the effect of discriminating on the basis of sex, including the defense stated in ORS 652.220(2)(a). The record however discloses that there was no "merit system." There was a compensation system based upon classification, and pay within a classification was based only upon time served. A male police officer's base pay was dependent only upon his continuing employment and his accumulation of more than five years of seniority. Given those two conditions, he received the same base pay as another police officer performing different work at a different level of competence who also had more than five years of seniority. Evaluations of



his job performance, or merit, had nothing to do with his compensation. A female PRC-II was similarly situated with regard to other PRC-II's. If she had reached her first anniversary of employment as a PRC-II, she received the same base pay as other PRC-II's regardless of her performance or further accumulated seniority. Nor was the pay differential herein accounted for by any comparison of the performance of the male and female comparators.

Even if Respondent were correct in equating its classification system with a merit system, the ORS 652.220(2)(a) defense would fail, as Respondent's classification system in effect did discriminate on the basis of sex herein, in maintaining two sex-segregated classifications with different rates of pay, when workers from each classification performed substantially equal work.

Accordingly, Respondent's arguments concerning, and defense under, ORS 652.220(2)(a) fail.

**II. Equal Pay Violation**

The best evidence concerning the equal pay allegations of this case is that which provides a detailed catalogue of what the key actors, Complainant and Officer Arata, actually did in their generalist work as East Precinct desk persons. (Officer Arata is the primary comparator to Complainant because he worked the East Precinct desk position with Complainant during most of her tenure in that position. As the person who replaced Officer Arata when he retired and, before that, the usual relief day desk person, Officer Schuette is the other, secondary, comparator.) Because Complainant and Officer Arata themselves were in the best position to offer this evidence, their testimony at hearing and their renditions of their of activities written at times material have been most closely scrutinized.

While the presentation of counsel for the Agency and Complainant dwelt on actual job performance, Respondent's defense focused upon the potential, or theoretical, responsibilities of the two job classifications involved. This matter does not turn on how the comparators were classified, but on how they were actually utilized. It involves a utilization situation which is becoming increasingly familiar in discrimination compensation cases based on gender. The male comparators worked a position which under- or misutilized persons of their classification, often because they were near retirement or disabled. The female comparator worked the same position, but it involved work which appears to have been beyond her clerical classification. She was over-utilized for her classification. Although the comparators were compensated according to their respective classifications, they did not work according to those classifications. Their actual work was substantially equal.

As police officers, Officers Arata and Schuette did have some theoretical responsibilities which Complainant did not have. Respondent's defense herein focused upon those responsibilities which Officers Arata and Schuette were supposed to carry out or be able to carry out because they were police officers. Yet Respondent failed, with the questionable exception of an exhibit concerning the security monitor, to introduce any written

evidence as to what Complainant, Officer Arata and Officer Schuette were specifically supposed to do as East Precinct desk persons. (The exhibit's attempt to distinguish between the security responsibilities of sworn police officers and non-sworn desk persons is of little or no probative value and can be viewed in part as another attempt to harass Complainant.) Testimony showed that the theoretical responsibilities which distinguished Complainant from Officers Arata and Schuette were seldom or never exercised. They therefore are not a lawful defense for the disparity in compensation between the comparators, because they do not concern work actually performed. Responsibility concerning firearms provides a pertinent example. Respondent's police officers in general have the responsibility of wearing, maintaining, and being able to use a firearm. They allegedly carry out a peace-keeping responsibility just by their presence with a uniform and weapon. Yet neither Officer Arata or Schuette, nor Complainant, had or exercised any particular responsibilities, as East Precinct desk persons, concerning firearms. If they had such responsibilities, they certainly would have kept their firearms available, even worn them, rather than keeping them in their lockers in another part of the precinct.

Respondent also attempted to show that Complainant could not perform certain duties, such as giving out certain kinds of technical information, completing certain kinds of reports, or receiving certain kinds of evidentiary property. These attempts were effectively rebutted in each instance by Complainant and/or some of Respondent's own witnesses.

In the particular case of the day East Precinct desk positions, the general distinctions between the work performed by the police officers and the Police Records Clerk II blurred almost completely. What actual differences there were between them were so minor as to be insignificant.

**III. Retaliation Violations**

According to Respondent's evaluations of Complainant's job performance, Complainant was a good employee until April 1975. Respondent offered no evidence of substance to the contrary except testimony of Sergeant Johnson. This testimony is not credible, because Sergeant Johnson was not Complainant's regular supervisor and because, according to Respondent's own witness, Sergeant Johnson was emotional, erratic, high-strung, and overly critical.

Suddenly, in April 1975 Complainant was treated by Respondent as a less competent employee, and this treatment deteriorated through the rest of her employment at East Precinct until Captain Brown died in May 1977. Complainant was the object of progressively worse performance evaluations; unfair discipline and threat of discipline; alteration of her previous good evaluation; an attempt to create the appearance that her job responsibility had been lessened; Captain Brown's vitriolic attacks; and petty criticism, negative innuendoes and unnecessary duties from her successive immediate supervisors. All of this created an inimical and fearful work atmosphere for Complainant.



The existence of several circumstances lead me to conclude that these incidents were retaliatory responses to Complainant's opposition to Respondent's discrimination in her compensation, rather than responses to a deterioration in Complainant's job performance. First, Respondent's first formal criticism of Complainant's job performance occurred immediately after Complainant's opposition to unequal pay surfaced. This criticism occurred after the yearly evaluation process had been completed and Complainant had received a favorable evaluation. This timing cannot be explained, therefore, by an actual deterioration in Complainant's job performance and has not been explained by any other circumstance, and so raises an inference of causality between the two events so close in time: Complainant's opposition and Respondent's subsequent action against Complainant. Secondly, none of Respondent's criticism of Complainant can be explained by deterioration of her job performance commensurate with the degree or nature of the criticism. Complainant's continued overall competence is attested to by the fact, for example, that Sergeant Cunningham could only cite five petty examples of Complainant's flaws in his 1976 notebook. Thirdly, Respondent did not criticize Complainant in ways which would have been appropriate responses to deteriorating job performance. For example, through her rebuttals to two negative evaluations and her questions in discussions of them, Complainant went to great lengths to determine the precise nature of the criticism of her work and was provided with superficial recitations of isolated and insignificant errors or omissions rather than constructive criticism or specific suggestions for improvement. The vague feedback she received was certainly not meant to help cure specific problems and had the effect of creating disharmony, distrust and misunderstanding. Fourthly, the fact that the duty of evaluating Complainant was taken from a person because of the fear that his evaluation might not be negative and Sergeant Cunningham's notebook buttress the contention that the process of evaluating Complainant was manipulated to produce a negative result and thereby to harass and discredit Complainant. Finally, there is substantial evidence of the retaliatory motive of Captain Larry Brown, the one person who was in a position to prevent or cause harassment of Complainant at East Precinct. Since Captain Brown is now deceased, it is difficult but not impossible to probe his state of mind at times material. Officer Schuette, Respondent's witness, admitted that Captain Brown evidenced what amounts to a retaliatory attitude toward Complainant when he told Officer Schuette to have Complainant undertake a dangerous task because she wanted police officer pay. And Sergeant Johnson, a witness extremely hostile to Complainant, admitted in effect that Captain Brown "or someone else" ordered him to tell Officer Vaught to write a report on Complainant concerning the minor purse incident. Captain Brown is the only person who logically could and would have given that order. This solicitation of action against Complainant supports the inference that the harassment of Complainant was purposeful, even malicious. Taken together, these

circumstances lead to the conclusion that Respondent did harass and attempt to discredit Complainant because of her opposition to Respondent's discrimination in her compensation.

**IV. Time Limit for Back Pay Accrual**

Respondent has raised the question of whether the time period during which the Commissioner can award back pay damages is limited. Respondent cited the statutory limitations contained in ORS 659.121(1) to support its contention that the back pay damage accrual period is not unlimited in this case. However, ORS 659.121 (1) applies only to a cause of action filed in circuit court. In fact, ORS 659.121(4) contains a clear statement of the Legislature's intent that "This section shall not be construed to limit or alter in any way the authority or power of the commissioner . . . ." Prior to the 1977 enactment of ORS 659.121, there was no limitation in ORS chapter 659 upon the length of time during which back pay damages could run. It is clear that ORS 659.121 does not now limit the Commissioner's authority to assess damages in either pre-enactment cases (such as this) or current cases brought under ORS chapter 659. The Commissioner is guided instead by the general statement in ORS 659.022(2) that the purpose of ORS chapter 659's provisions concerning employment discrimination is to provide "an adequate remedy for persons aggrieved by . . . acts of discrimination . . ."

**V. Interest on Back Pay Damages**

The purpose of an award of back pay in an employment discrimination case is not to punish the respondent but, rather, to make the complainant whole for monetary injury suffered because of the respondent's unlawful employment practices. To fully accomplish this purpose, a back pay award must include more than just the straight salary differential. To compensate a complainant for her or his loss of the use of the back pay to which she or he was entitled since it accrued, the back pay award must include prejudgment interest. Prejudgment interest on the back pay award beginning from the time 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.

In *In the Matter of Montgomery Ward and Company, Inc.,* 1 BOLI 62 (1976), the Commissioner of the Bureau of Labor and Industries awarded interest, computed on an annual basis, on the differential between compensation the Complainant would have received absent the unlawful discrimination and the salary he in fact received from another employer. Interest accrued and was awarded over a period in excess of three years predating the Final Order, This award and computation was not disturbed by the Oregon Court of Appeals or Supreme Court.

Analogous federal case law supports the award of prejudgment interest. In *Pettway v. American Cast Iron Pine Co.,* 494 F2d 211, 263 (1974 CA 5 Ala), where black employees sued their employer for back pay, *inter alia,* alleging racially discriminatory employment practices, the court recognized prejudgment interest as a necessary ingredient of a back pay award.



Following the lead established by *Pettway,* both courts in two separate sex discrimination in employment cases noted that the prejudgment interest remedy was not only desirable, but necessary to satisfy the make whole purpose of a back pay award. *See Willett v. Emory and Henry College,* 427 F Supp 631, 635 (1977 DC Va), and *Vant Hul v. City of Dell Rapids,* 462 F Supp 828, 833 (1978 DC SD).

Similarly, in *Patterson v. Youngstown Sheet and Tube Co.,* 475 F Supp 344, 355 (1979 ND Ind), a race-based employment discrimination case, the court found an award of prejudgment interest within the court's discretion, and appropriate to counteract the effects of rampant inflation during the full period the case was pending.

While duplicate awards were made for loss of interest and inflation in *Lewis v. Phillip Morris, Inc.,* 13 EPD P 11,350 p. 6167 (ED Va 1976), another court has noted the potentially repetitive effect of such an award, as a practical matter, since the interest factor and the inflation factor serve the same end, namely, compensation for financial loss over the time the back pay was wrongfully withheld. *See, Blake v. Califano,* 626 F2d 893, 895 n. 9 (1980).

Therefore, in this case, the award of prejudgment interest, as a supplement to the salary differential award, is designed to compensate Complainant for all elements of damage resulting from Respondent's continued deprivation of back pay, including those caused by general inflation.

Sovereign immunity has protected the federal government from awards of prejudgment interest in employment discrimination cases. *Blake v. Hoston,* 22 EPD P 30,603 p. 14,233 (DC Cir 1980). However, where the respondent was not the federal government, the court in *EEOC v. L.OC 2 P Litho. and Photoengravers* 1. v., 412 F Supp 530, 543 (1976), after relying on *Pettway* to support an award of prejudgment interest, calculated the rate of interest at six percent per annum simple interest to compensate for the tangible economic loss resulting from an unlawful employment practice.

Great latitude is noted in the design of the discretionary remedies adopted by the various courts in the cases mentioned above. Therefore, in following the example set in *Montgomery Ward* and by federal courts, this forum has adopted a synthesis of remedial schemes to serve as a full and fair method of compensation of Complainant and as a reflection of the relief requested by counsel for the Agency herein. Interest upon Complainant's back pay award will be computed as follows:

a. Six per cent on the monthly accrual of the differential between compensation received by Complainant and that paid to similarly situated male police officers during the period from August 1, 1971, to December 23, 1976, according to a record exhibit; plus,

b. Six per cent annually upon the accrued differential from December 24, 1976, to July 25, 1979.

c. Nine per cent annually from July 26, 1979, to the date Respondent

complies with paragraph number one of the Order below.

The above-specified rates of interest were the legal rates of interest contained in ORS 82.010 during the given accrual periods.

**VI. Mental Suffering Damages**

No evidence was presented herein that Respondent's equal pay violation, as distinct from Respondent's retaliation violation, caused Complainant mental anguish. All evidence of mental suffering related to times after March 1975, when the retaliatory incidents started, and referred causally back to the instances of retaliation. The mental suffering award herein, therefore, is compensation for mental suffering caused by Respondent's retaliation violations.

Retaliation by definition has as its purpose the infliction of some kind of injury. In the context of employment discrimination matters, this injury will most often include mental suffering. In this matter, there was substantial evidence of retaliation in the form of a deliberate attempt over time to harass Complainant by instilling fear in her and discrediting her work. Complainant perceived Respondent's retaliation as such and suffered a great deal of mental anguish because of it. The question before this forum was how to compensate Complainant for this mental suffering. The answer turned upon my assessment of Complainant's suffering. I considered the duration, severity, and effects of Complainant's suffering in making that assessment.

The duration of Complainant's suffering is significant. Retaliatory harassment began shortly after the publication of her letter in the April 1975 edition of *The Rap Sheet* and continued through her transfer to the Traffic Division on December 23, 1976, until at least Captain Brown's death in May 1977. While the harassment continued therefore at least 25 months, Complainant evidenced suffering later, when evaluated by Dr. Moss in November 1978 and at hearing in March and April 1979. While her suffering presumably declined in severity after May 1977, it was severe (as described below) for 25 months before that time and did continue to a discernible degree for a total of at least four years. Her emotional scars are of a long-lasting nature.

The severity of Complainant's suffering is a function of both the continuation and the degree of the harassment which caused it. The Findings of Fact describe multiple instances of official harassment in evaluation, discipline, etc. Each instance evidences an attempt to harass Complainant by seriously discrediting her work and undermining her entire career in the most official and therefore destructive manner possible. In addition, Complainant was frequently harassed by the retaliatory attitude of her highest level supervisor at the precinct. Captain Brown's taunt in the bomb incident and his constant loud and angry responses to Complainant are examples of the atmosphere Complainant had to endure whenever she encountered him concerning her work. Complainant also was singled out by her immediate supervisors for other petty criticism, negative innuendoes and unnecessary duties.



All of the above created a work atmosphere for Complainant pervaded with hostility and fear from which Complainant suffered immeasurably. She was especially vulnerable to abuse because of her strong desire to do her job well and her need for affirmation. Given this vulnerability, her belief that she was singled out for unjustified harassment concerning her job performance and the pervasively negative work atmosphere were particularly anguishing for Complainant. Her suffering was so great that it caused her to transfer away from the East Precinct desk position and work which she had liked and of which she had been proud.

The effects of Complainant's mental anguish appeared in all aspects of her life. Her confidence in herself and her personal relationships were undermined. Acknowledging the severity of her suffering, Complainant sought, for the first time, counseling treatment. She underwent one-and-one-half years of psychotherapy. She received medical treatment. In November 1978, a psychiatrist retained to evaluate Complainant found that she had suffered (and still manifested) emotional strain and symptoms directly caused by the above-described work atmosphere.

In conclusion, Complainant's mental suffering was sufficiently severe, manifest, and long-lasting to render an award of $15,000.00 appropriate, and in fact eminently reasonable, to compensate Complainant therefor and to serve the statutory purpose of eliminating employment discrimination.

**ORDER**

NOW, THEREFORE, as authorized by ORS 659.060(3) and 659.010 (2) and in order to eliminate the effects of the unlawful practices found, as well as to protect the lawful interests of others similarly situated, the Respondent is hereby ordered to:

1) Deliver to the Hearings Unit of the Portland office of the Bureau of Labor and Industries, within sixty days of the execution of this Final Order, a certified check payable to the Bureau of Labor and Industries in trust for Phyllis J. Potter in the amount of THIRTY-FOUR THOUSAND TWO HUNDRED EIGHTY-EIGHT DOLLARS ($34,288.00), plus interest upon $19,288.00 thereof computed as directed in the Opinion above. $19,288.00 of this award represents damages for wages lost by Complainant because of Respondent's unlawful employment practices set out above, and $15,000.00 of this award represents damages for the mental anguish, pain, and humiliation suffered by Complainant because of Respondent's unlawful employment practices set out above.

2) Within thirty days of the date of this Order, meet with Thomas E. Twist, Assistant Attorney General, or his representative, to compute and stipulate to the amount of interest accrued on the above back pay award. Respondent shall submit the computation of interest to the Hearings Unit when it pays such interest.

3) Cease and desist from discriminating in compensation against any employee on the basis of sex, or retaliating against any employee who has filed a complaint of discrimination.

**In the Matter of**
**JAMES D. HARING,**
**dba Drywall Specialty Supply,**
**Respondent.**

Case Number 15-79
Final Order of the Commissioner
Mary Wendy Roberts
Issued June 25, 1981.

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## SYNOPSIS

Respondent employer refused to reinstate Complainant, a compensably injured worker who had obtained a medical release to return to work. The Commissioner found that the refusal was not in retaliation for Complainant's invoking the Workers Compensation system, and dismissed the claim alleging a violation of ORS 659.415 for lack of jurisdiction because Respondent's action occurred before the statute provided that such a refusal was an unlawful employment practice. ORS 659.410; 659.415; 659.060(3).

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The above-entitled matter came on regularly for hearing before Neil H. Running, designated as Presiding Officer by the Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was convened at 9:30 a.m. on July 5, 1979, in the Labor and Industries Building in Salem, Oregon. The Bureau of Labor and Industries was represented by Randolph B. Harris, Assistant Attorney General, and Respondent was represented by Donald P Reiling, Attorney at Law. Complainant David L. Hadley was present and testified.

The Proposed Order of the Presiding Officer was issued on April 18, 1980.

On November 17, 1980, the Court of Appeals of the State of Oregon ruled in effect that the Commissioner of the Bureau of Labor and Industries has no jurisdiction to enforce ORS 659.415 with regard to acts which allegedly occurred before October 1979. On March 17, 1981, the Supreme Court of the State of Oregon denied the petition of the Bureau of Labor and Industries for review of the above-mentioned Court of Appeals decision. *Corvallis Disposal Co. v. Bureau of Labor and Industries,* 49 Or App 245, 619 P2d 663 (1980), *rev den* 290 Or 651 (1981).

Having fully considered the record in this matter and the above-mentioned judicial decisions, I, Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries, hereby make the following Findings of Fact, Ultimate Findings of Fact, Conclusions of Law, Opinion and Order.

## FINDINGS OF FACT – PROCEDURAL

1) On or about August 30, 1977, David L. Hadley filed a verified complaint with the Civil Rights Division of the Bureau of Labor and Industries alleging that he had been discriminated against by his former employer, Respondent, who, Complainant alleged, had not reinstated Complainant to his former job or available and suitable employment after Complainant had recovered from an on-the-job injury and demanded such reinstatement.

2) Following the filing of the aforementioned complaint, the Civil Rights Division investigated the allegations in the complaint and determined that substantial evidence existed to support those allegations.

3) Thereafter, the Civil Rights Division attempted to reach an informal resolution of the complaint through conference, conciliation and persuasion, but was unsuccessful in these efforts.

4) Both counsel stipulated that:

a. The correct designation of Respondent is James D. Haring, dba Drywall Specialty Supply;

b. Line 24, Paragraph 8 of page 3 of the Specific Charges is corrected to read "ORS 659.400 to ORS 659.435" (*emphasis added*);

c. The deposition of Complainant's chiropractic physician, LaVerne A. Saboe, is entered into evidence in lieu of his personal appearance.

5) After the hearing, Michael J. Tedesco, Assistant Attorney General replaced Randolph B. Harris as counsel for the Agency. Upon Mr. Tedesco's petition, the Commissioner reopened this matter to give Respondent, the Agency, and Complainant (then represented by Larry Coady, Attorney at Law) an opportunity to submit written statements concerning new information of possible relevance. Within the thirty days provided by the Commissioner for such submissions, only Respondent's counsel submitted a written statement, which has been admitted into the record.

## FINDINGS OF FACT – THE MERITS

1) At times material herein, Respondent did business under the name of Drywall Specialty Supply and employed six or more persons in that business.

2) On or about July 29, 1977, Respondent hired Complainant as a laborer.

3) On or about August 18, 1977, Complainant sustained an on-the-job back injury while working for Respondent.

4) The next day, Complainant consulted a duly-licensed chiropractic physician, LaVerne A. Saboe, who confirmed his injury. Dr. Saboe treated Complainant and Complainant returned to work.

5) Subsequently, Complainant either re-injured his back or aggravated his August 18 injury. As a result, on or about August 25, 1977, Complainant returned to Dr. Saboe. He received treatments and was kept off work for the next three work days due to his temporary back disability.

6) On August 29, 1977, Dr. Saboe issued a certificate which released Complainant to return to his regular work without restrictions.

7) Complainant presented himself ready for work to Respondent on the next day. Through his agents, Respondent refused to reinstate Complainant, informing him that Respondent believed that Complainant could not do his job without further injury. Respondent also advised him, and I find, there was no job available with Respondent which was suitable for Complainant.

8) Complainant started school on or about January 2, 1978.

9) Complainant filed a workers' compensation claim with the State Accident Insurance Fund, Respondent's

insurance carrier, seeking compensation for the time he was off work due to the latter injury. He received this compensation.

10) Respondent believed that a claim such as Complainant's workers' compensation claim would have little or no effect on Respondent's insurance rates, and Respondent was unconcerned that Complainant received compensation by this means for the work time he lost due to his injury.

**ULTIMATE FINDINGS OF FACT**

1) Complainant sustained a compensable injury while working for Respondent in August 1977.

2) Complainant's duly-licensed chiropractic physician issued a certificate approving Complainant's return to his regular employment with Respondent on August 29, 1977.

3) Complainant's presentation of himself, ready for work, the next day constitutes a demand for reinstatement. He was not reinstated by Respondent to his former position of employment, and there was no other available and suitable work with Respondent.

4) Complainant ceased being available for reinstatement by Respondent when Complainant began school on or about January 2, 1978.

5) Respondent did not refuse to reinstate Complainant because Complainant had applied for benefits under ORS 656. 001 to 656.794 and 656.802 to 656.824.

**CONCLUSIONS OF LAW**

1) At all times material herein, Respondent was an employer subject to the provisions of ORS 659.010 to 659.110 and ORS 659.400 to 659.435.

2) Because the Commissioner of the Bureau of Labor and Industries was not empowered to enforce ORS 659.415 at times material herein, the Commissioner has no jurisdiction over, and therefore must dismiss, those portions of the Complaint and Specific Charges herein which are based upon ORS 659.415.

3) Respondent did not discriminate against Complainant because Complainant applied for workers' compensation benefits under ORS 656.001 to 656.794 and 656.802 to 656.824. Respondent therefore did not violate ORS 659.410 as charged.

**OPINION**

The "act" of not reinstating Complainant, which the Specific Charges allege is unlawful under ORS 659.415, occurred on or about August 30, 1977, and continued until January 2, 1978. Oregon appellate courts have recently ruled that until the Oregon Legislature amended ORS 659.415 in October 1979, the Commissioner of the Bureau of Labor and Industries did not have jurisdiction to enforce ORS 659.415. Since the Commissioner therefore could not enforce ORS 659.415 with regard to acts which allegedly occurred before October 1979, as herein, those portions of the Complaint and the Specific Charges herein which are based upon ORS 659.415 must be dismissed.

Because this dismissal for lack of jurisdiction renders moot a determination of this matter on its merits, this Order includes only those substantive findings necessary to the conclusion that this matter does involve allegations governed by ORS 659.415 concerning times before October 1979.



**ORDER**

NOW, THEREFORE, the Respondent not having been found to have engaged in any unlawful practice charged under ORS 659.410, and the Commissioner not having jurisdiction over complaints made under ORS 659.415 at times material herein, the Specific Charges and the Complaint filed herein against Respondent are hereby dismissed according to the provisions of ORS 659.060(3).

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**In the Matter of**
**EDCO CORPORATION,**
**an Oregon corporation, Respondent.**

Case Number 39-79
Final Order of the Commissioner
Mary Wendy Roberts
Issued July 2, 1981.

**SYNOPSIS**

Respondent employer refused to reinstate Complainant, a compensably injured worker who had obtained a medical release to return to work. The Commissioner dismissed the failure-to-reinstate claim for lack of jurisdiction because Respondent's action occurred before the statute provided that such a refusal was an unlawful employment practice. ORS 659.415; 659.060(3).

The above-entitled matter came on regularly for hearing before Jon Wu, designated as Presiding Officer by the Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing commenced on September 25, 1979, at 9:30 a.m. at the Eugene City Council Chambers, 777 Pearl Street, Eugene, Oregon. The Bureau of Labor and Industries was represented by Michael J. Tedesco, Assistant Attorney General. Respondent Edco Corporation was represented by Steven Chez, Attorney at Law. Complainant Roland McClintock was present. Also present were Mark James and Evelyn Dumont, employees of Respondent, and Clarence S. Eklof and Fred J. Tawzel, witnesses for Complainant. The Proposed Order of the Presiding Officer was issued on May 30, 1980.

On November 17, 1980, the Court of Appeals of the State of Oregon ruled in effect that the Commissioner of the Bureau of Labor and Industries has no jurisdiction to enforce ORS 659.415 with regard to acts which allegedly occurred before October 1979. On March 17, 1981, the Supreme Court of the State of Oregon denied the petition of the Bureau of Labor and Industries for review of the above-mentioned Court of Appeals decision. *Corvallis Disposal Co. v. Bureau of Labor and Industries,* 49 Or App 245, 619 P2d 663 (1980), *rev den* 290 Or 651 (1981).

Having fully considered the record in this matter and the above-mentioned judicial decisions, I, Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries, hereby make the following Findings of Fact, Ultimate

Findings of Fact, Conclusions of Law, Opinion and Order.

## FINDINGS OF FACT – PROCEDURAL

On April 1, 1977, Roland McClintock filed a verified complaint with the Civil Rights Division of the Bureau of Labor and Industries alleging that he had been and continued to be discriminated against by his former employer, Respondent, who, Complainant alleged, had not reinstated Complainant to his former job or available and suitable employment after Complainant had recovered from an on-the-job injury and demanded such reinstatement.

## FINDINGS OF FACT – THE MERITS

1) At all times material herein, Respondent was an Oregon corporation which employed six or more persons in its business of manufacturing portable yarders or towers for use by logging companies.

2) On January 25, 1977, Respondent hired Complainant as a welder and laborer.

3) On January 29, 1977, Complainant sustained an on-the-job injury while working for Respondent.

4) On January 31, 1977, Complainant's duly-licensed physician ordered Complainant not to work for thirty days due to his injury.

5) On February 28, 1977, the same physician gave Complainant an unconditional release to return to work as of March 1, 1977.

6) On March 2, 1977, Complainant returned to work and presented his work release to Respondent's shop foreman, Mark James, who terminated him immediately.

7) Suitable work was available for Complainant in Respondent's shop at the time Complainant was terminated. Other suitable work became available at Respondent's plant after Complainant was terminated. Respondent did not offer Complainant reinstatement to any position.

8) Complainant found alternative employment elsewhere on September 12, 1977.

## ULTIMATE FINDINGS OF FACT

Complainant sustained a compensable injury while working for Respondent on January 29, 1977. On March 2, 1977, after he was no longer disabled by this injury, Complainant demanded that Respondent reinstate him to work. Respondent did not reinstate him to either his former work or other suitable work available at the time of his demand for reinstatement or thereafter. Complainant ceased being available for reinstatement when he began alternative employment on September 12, 1977.

## CONCLUSIONS OF LAW

1) At all times material herein, Respondent was an employer subject to the provisions of ORS 659.010 to 659.110 and 659.400 to 659.435.

2) The Complaint and Specific Charges herein allege that Respondent violated ORS 659.415. Because the Commissioner of the Bureau of Labor and Industries was not empowered to enforce ORS 659.415 at times material herein, the Commissioner has no jurisdiction over, and therefore must dismiss, the Complaint and Specific Charges herein.



## OPINION

The "act" of not reinstating Complainant, which the Specific Charges allege is unlawful under ORS 659.415, occurred between March 2, 1977, and September 12, 1977. Oregon appellate courts have recently ruled that until the Oregon Legislature amended ORS 659.415 in October 1979, the Commissioner of the Bureau of Labor and Industries did not have jurisdiction to enforce ORS 659.415. Since the Commissioner therefore could not enforce ORS 659.415 with regard to acts which allegedly occurred before October 1979, as herein, the Complaint and the Specific Charges herein must be dismissed.

Because this dismissal for lack of jurisdiction renders moot a determination of this matter on its merits, this Order includes only those substantive findings necessary to the conclusion that this matter does involve allegations governed by ORS 659.415 concerning times before October 1979.

## ORDER

NOW, THEREFORE, the Commissioner not having jurisdiction over complaints made under ORS 659.415 at times material herein, the Complaint and the Specific Charges filed herein against Respondent are hereby dismissed according to the provisions of ORS 659.060(3).

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**In the Matter of**

**the CITY OF CHILOQUIN,**

**a political subdivision of the State of Oregon, Respondent.**

Case Number 29-78

Final Order of the Commissioner

Mary Wendy Roberts

Issued August 12, 1981.

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## SYNOPSIS

Respondent public employer did not hire Complainant as a police dispatcher, despite her police dispatching experience, due to her nonattendance at the selection meeting and to the fact that she was single and living alone; it was not due to her prior back injury, a physical handicap. Consideration of her marital status was not unlawful at the time, and the Commissioner dismissed the Specific Charges of handicap discrimination. ORS 659.400 to 659.435; 659.060(3).

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The above-entitled matter came on regularly for hearing before James R. Uerlings, designated as Presiding Officer by the Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was held in the Commissioner's Hearing Room in the Klamath County Courthouse Annex, Klamath Falls, Oregon. The hearing commenced on November 13, 1979, and concluded on November 14, 1979. The Bureau of Labor and Industries was represented by Robert D. Bulkley, Jr., Assistant Attorney General. Respondent City of Chiloquin was represented by Robert Thomas, Attorney at Law.

Complainant Betty Jo Hawks, also known as Betty Jo Atkinson, was present and testified.

Having fully considered the entire record in this matter, I, Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries, hereby make the following Findings of Fact, Ultimate Finding of Fact, Conclusions of Law, Opinion, and Order.

## FINDINGS OF FACT – PROCEDURAL

1) On or about August 24, 1976, Betty Jo Hawks, known now as Betty Jo Atkinson, filed a verified complaint with the Civil Rights Division of the Bureau of Labor and Industries alleging that Respondent had discriminated against her because of her physical handicap in her attempt to obtain employment with Respondent.

2) Following the filing of the aforementioned verified complaint, the Civil Rights Division investigated the allegations in the complaint and determined that substantial evidence existed to support them.

3) Thereafter, the Civil Rights Division attempted to reach an informal resolution of the complaint through conference, conciliation and persuasion but was unsuccessful in these efforts.

4) Counsel for the Bureau of Labor and Industries and counsel for Respondent agreed to the following stipulations:

a. The Agency's prayer for damages of $7,500 for mental suffering was withdrawn.

b. The position for which Complainant applied was abolished on December 15, 1977.

c. The Agency is claiming back pay damages for Complainant for the period between August 16, 1976, and December 15, 1977.

d. Counsel for the Agency reviewed the issues of the *Herald and News* newspaper dated August 5 through 15, 1976. The August 16, 1976, issue was missing. No issue reviewed contained an advertisement for the position of police dispatcher for the City of Chiloquin in the "Help Wanted" column.

e. The position for which Complainant applied had a gross salary of $702.00 per month on August 16, 1976. Beginning with the third quarter of 1977, the salary increased to $744.12 per month, at which rate it remained until Respondent abolished the position.

f. The position for which Complainant applied had group accident and health insurance coverage which was valued at $24.75 per month from August 16, 1976, through October 15, 1977; $29.50 per month from October 15, 1977, until November 15, 1977; and $31.85 per month from November 15, 1977, until December 15, 1977. In addition, Respondent provided group life and accident insurance valued at $.55 per month from August 16, 1976, through December 15, 1977. The apartment which was a benefit of the position for which Complainant applied had a fair rental value of $150.00 per month from August 16, 1976, through December 15, 1977.

g. An exhibit represents what Complainant earned after she was rejected by Respondent. These earnings are to be subtracted from any award of back pay damages to Complainant.



h. Complainant received $92 per week in Comprehensive Education and Training Act (hereinafter CETA) benefits from August 16, 1976, through April 6, 1977. (The parties stipulated only to the amount received, not the amount thereof which should be deducted from any award of monetary damages, if any.)

i. Complainant received $2.40 per day as a travel allowance from CETA while attending Central Oregon Community College. (The parties did not stipulate whether this allowance should be deducted from any award of monetary damages.)

j. If Bobby David and Ann O'Neal were called to testify for Respondent, their testimony would be the same as that of Respondent's witnesses George Pohll, Ruby Hanan and Beth Pohll.

5) The following exhibits were received into the record after the close of testimony and before the record was closed on November 30, 1979:

a. A letter from the State Accident Insurance Fund to the Department of Justice regarding compensation paid Complainant.

b. A letter dated December 1, 1977, from the Mayor of Chiloquin to John M. Chatterton.

c. Certified mail receipts for the above-mentioned December 1, 1977, letter.

d. Mr. Chatterton's pay records from the City of Chiloquin.

6) Five Oregon State Employment Division applications, a job order, and the City of Chiloquin job application were received into evidence without objection by either party.

## FINDINGS OF FACT – THE MERITS

1) At all times material herein, Respondent was a political subdivision of the State of Oregon and a city which had six or more persons in its employ.

2) Respondent's police dispatcher position became vacant in early August 1976.

3) The duties of Respondent's police dispatcher included answering the telephone, communicating with police vehicles by radio, and, occasionally, handling female prisoners, assisting in the feeding of city jail prisoners, filing and typing. The job was simple. It required no previous experience and very little training, which was provided on-the-job by Respondent.

4) Respondent's police dispatcher was on duty five days a week for twenty-four hours per day, dispatching either from the police station or from an adjacent apartment which Respondent provided. Because the position required constant availability on an on-call basis for five days each week, Respondent wanted to have a second person available, and therefore preferred to hire a dispatcher who was living with someone. Respondent had had difficulties on two occasions when it hired single persons as dispatchers.

5) On August 9, 1976, Respondent's Chief of Police Harvey Graham notified Respondent that he was resigning effective September 1, 1976. Because Chief Graham was leaving, Respondent was not concerned about whether the person selected as police dispatcher would work well with Chief Graham.

6) Because its prior police dispatcher had been discharged and Chief Graham was resigning, Respondent had to hire a police dispatcher as soon as possible.

7) On August 10, 1976, Respondent filed a job order with the Klamath Falls office of the Oregon State Employment Division listing its police dispatcher opening. The order was written by an Employment Division employee on the basis of information which Respondent's representative supplied by telephone. It stated that the dispatcher position was "suitable for (a) couple."

8) Respondent's Police Commission was responsible for hiring Respondent's police personnel. (City of Chiloquin Ordinance 1-12.5 refers to Respondent's Police Commission as the "Police and Fire Committee." However since Respondent's witnesses referred to this body as the "Police Commission," this title will be used herein.) Respondent's City Council was responsible for confirmation of the person selected by the Police Commission.

9) Respondent's Police Commission convened a meeting on the evening of August 16, 1976, for the purpose of interviewing the police dispatcher applicants. Respondent's City Council wanted to hire a police dispatcher on at least a probationary basis at this meeting. To expedite the hiring process and because not all members of the Police Commission could attend this meeting, some members of Respondent's City Council attended the meeting.

10) Respondent's Police Commission and City Council wanted to personally interview all interested applicants for the police dispatcher position at the August 16, 1976, meeting. Chief Graham, who was responsible for taking applications for the position, was informed that personal interviews for the position would be conducted at the August 16, 1976, meeting.

11) Chief Graham was authorized by Respondent to interview applicants, describe the position's duties to them, accept applications, investigate the background and skills of the applicants, and report his findings and recommendations to Respondent's City Council and Police Commission.

12) On August 16, 1976, Complainant, an unmarried person, drove from her home in Bend to Klamath Falls to inquire about police jobs in the area. While in Klamath Falls, Complainant learned of Respondent's police dispatcher opening. Complainant drove back to Chiloquin to apply for this opening.

13) Upon arriving in Chiloquin, Complainant contacted Chief Graham. He interviewed Complainant and advised her that Respondent's Police Commission and City Council would be meeting that evening to interview applicants and make a selection decision for the police dispatcher opening.

14) Complainant told Chief Graham that she was not ready for an interview that evening and had other commitments in Bend. Chief Graham told Complainant that her presence at the meeting would probably not be necessary, although the Police Commission and City Council would prefer it. In Chief Graham's opinion, Complainant was the most qualified applicant, and he was confident that she would be hired. He conveyed his opinion to Complainant, and she left Chiloquin with the impression that she was hired. Chief Graham did not intend to convey the impression to Complainant that she was hired, as he did not have the authority to hire the police dispatcher.



15) Complainant had suffered a back injury in November 1973 while working as a dispatcher-matron for the Deschutes County Sheriff's Office. She had been treated for this injury and her condition had improved, but she was left with a residual back problem. Due to her injury and on the advice of her physician, Complainant had quit her position at the Deschutes County Sheriff's Office.

16) Complainant mentioned her back injury on her application for Respondent's police dispatcher opening. Complainant's back problem would not have affected her ability to perform radio communication or telephone duties for Respondent. It might have affected her ability to perform some other duties required of Respondent's police dispatcher, such as handling female prisoners or helping feed prisoners, if much lifting were involved.

17) On August 16, 1976, Respondent's Police Commission and City Council met for over four hours. Three applicants for the police dispatcher position attended this meeting. Two were married, and one was single. Complainant and John M. Chatterton, an applicant who was married, did not attend.

18) The members of Respondent's Police Commission and City Council who attended the August 16 meeting were George and Beth Pohll, Bobby David, Ruby Hanan, Ann O'Neal, Bill Hanan, and Chief Graham. Mr. Pohll was the Chairman of the Police Commission. Chief Graham was not a voting member of either the Police Commission or the City Council. Mr. Hanan was present only for a very short time at the end of the meeting and did not participate in the selection decision.

19) Chief Graham read the applications of all applicants for the police dispatcher position. He recommended both Complainant and Dean Walton, a married applicant who was present. However, Chief Graham's recommendations did not figure significantly in the selection decision, since Chief Graham and the City Council had ongoing differences of opinion on how to run and finance the Police Department, and since other persons who had been selected as police dispatcher in the past on Chief Graham's recommendation had had to be discharged.

20) The Commission and Council members also examined each application and interviewed the applicants who were present. Complainant's application was considered last and was passed over quickly. The Commission did not discuss the application of either Complainant or Mr. Chatterton in detail, because the Commission decided that since neither were present, they were not interested in the position. A secondary reason that Complainant was not seriously considered was that she was not married or part of a couple. The decision not to hire Complainant was based upon the latter two factors, despite Complainant's police dispatching experience, which was greater than that of the other applicants.

21) The Police Commission interviewed applicant Walton, the other candidate recommended by Chief Graham, and his wife and selected Mr. Walton.

22) After the review of all applications by the Commission and the Council and after the Commission had selected Mr. Walton, Police Commission member Bill Hanan, who had arrived late, mentioned that Complainant had suffered a back injury. Another Commissioner member, Mr. David, quickly informed Mr. Hanan and the rest of those present that no consideration could be given to Complainant's injury. Another Commission member, Ruby Hanan, opined that a back injury would not prevent a person from performing the duties of Respondent's dispatcher, and the other Commission members agreed.

23) Because of their other employment, the members of Respondent's Police Commission and City Council could not have taken time to reschedule (or continue) the August 16, 1976, meeting to interview Complainant.

24) Complainant was first notified of her rejection by a letter from Chief Graham dated August 17, 1976. The letter indicated that the reason for the Complainant's rejection was her back injury. It did not mention Respondent's actual reasons for Complainant's rejection: her absence from the August 16 meeting and her single status. Chief Graham had typed the letter himself, instead of having his secretary do so per his usual practice.

25) Chief Graham did not communicate in any manner with the other unsuccessful applicants.

26) At hearing, Chief Graham stated that Complainant's marital status and her absence from the August 16 meeting were additional reasons for her rejection.

27) The minutes of the August 16, 1976, meeting were apparently transcribed and then lost. No other contemporaneous record of that meeting or the matters considered at that meeting was produced at hearing or before the record closed.

28) On August 17, 1976, Mr. Walton began work as Respondent's police dispatcher. Within a few weeks, Respondent terminated Mr. Walton because of his unsatisfactory performance. Respondent then hired Mr. Chatterton. There is no evidence as to whether Respondent interviewed Mr. Chatterton before hiring him. He had no prior police dispatching experience, but found the job to be non-technical and had no difficulty performing his duties. Mr. Chatterton remained in the position until it was abolished by Respondent on December 15, 1977.

29) A few days after receiving the rejection letter from Chief Graham, Complainant went to Chiloquin to discuss her rejection with him. Chief Graham and Complainant went out to eat together. During or after the meal, Chief Graham advised Complainant to sue Respondent for discrimination in hiring based on her back injury.

30) Chief Graham was the only witness who testified that Complainant's back injury played any role in Respondent's decision not to hire her. His testimony was less credible than the conflicting testimony of the other witnesses, including the members of Respondent's Police Commission and City Council, because of Chief Graham's inconsistency, his admission of poor recall, his demeanor while testifying (as contrasted with that of the members of Respondent's Police Commission and City Council), the potential for his having misunderstood Respondent's actions, and the taint of his potential bias, as exemplified in part by the following facts:

a. Chief Graham admitted at hearing that Complainant's marital status and absence were also reasons for her rejection, but failed to mention those factors in explaining her rejection to her in his August 17, 1976, letter.

b. Chief Graham notified Complainant of her rejection by a method outside usual Police Department procedure.

c. At hearing, Chief Graham was unable to recall the purpose of his meeting with Complainant after her rejection.

d. Chief Graham admitted at hearing that his memory of the events at the August 16, 1976, meeting was poor.

e. Chief Graham had ongoing differences with Respondent and had resigned at the time of the August 16 meeting.

f. Chief Graham was not one of Respondent's decision-makers in the selection process and could have misunderstood Respondent's reasons for its decision not to hire Complainant.

## ULTIMATE FINDING OF FACT

1) Respondent, acting through its City Council and Police Commission, did not seriously consider or select Complainant for its police dispatcher opening on August 16, 1976, because Complainant was not present at its interview meeting and because Complainant was not part of a couple. Although Complainant's back injury was briefly mentioned at the interview meeting after Respondent had made its selection decision, neither this injury nor Complainant's resulting back problem played a role in Respondent's decision.

## CONCLUSIONS OF LAW

1) At all times material herein, Respondent was an employer subject to the provisions of ORS 659.010 to 659.110 and 659.400 to 659.435.

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

3) The actions, and motivations for those actions, of Respondent's City Council and Police Commission described herein are properly imputed to Respondent.

4) Respondent's failure to hire Complainant as its police dispatcher on August 16, 1976, was not an unlawful employment practice as charged, since this failure to hire was not based on Complainant's back injury or resulting back problem, a physical handicap.

## OPINION

### 1. The Conflict In Testimony

My decision in this matter depends largely upon whether I believe the testimony presented by Respondent, or the conflicting testimony presented by the Agency, on the question of why Respondent's Police Commission and City Council did not select Complainant as police dispatcher. For the reasons set forth above, particularly in Finding of Fact 30, I adopt the Presiding

Officer's conclusion that the testimony of Respondent's witnesses was more credible, and I therefore believe their testimony. The Agency has not met its burden of showing that Complainant's physical handicap played (at least) a key role in Respondent's selection decision.

**2. Marital Status**

The record indicates that Respondent preferred to hire a dispatcher who lived with another person, in order to have a potential relief person on the five days each week during which the dispatcher was on call constantly. It was not necessary to determine whether this was in fact a preference for a married applicant, as this case involved allegations of discrimination on the basis of physical handicap and not on the basis of marital status. The reason why neither the Agency nor this forum considered the possibility of marital status discrimination was that, at the time of the events in question, employment discrimination based upon marital status was not yet unlawful under Oregon law.

**3. Complainant's Qualifications**

Respondent introduced detailed evidence of Complainant's qualifications for dispatching. She indeed did have technical experience which could have been helpful if she had become Respondent's police dispatcher. However, for the following reasons, I have not found that Complainant was the best qualified, or even a qualified, applicant for Respondent's dispatching position. First, Respondent's dispatching job was so simple that prior experience and training, no matter how relevant, were not required. In addition, no matter how impressive her background, Complainant lacked one quality which Respondent at least preferred: she was not part of a couple.

This strong preference was legitimate in light of the duty time requirements of the position and the state of the law at the time. Furthermore, Complainant was not available to be interviewed when Respondent had to make its selection decision. Therefore, although Complainant had the most extensive experience related to dispatching in general, Respondent did not require such experience and, due to Complainant's absence at the August 16, 1976, selection meeting and her living situation, as well as the existence of at least one other applicant who was married and present at meeting and who had also been recommended by Chief Graham, Respondent did not consider Complainant qualified, in the broad sense of that word, (and certainly not the best qualified applicant) for Respondent's dispatcher opening.

**ORDER**

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

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**In the Matter of**

**CHASE BAG COMPANY,**

**a Delaware corporation doing business in Oregon, Respondent.**

Case Number 48-79

Final Order of the Commissioner

Mary Wendy Roberts

Issued September 17, 1981.

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**SYNOPSIS**

Respondent employer discharged Complainant for failure to adhere to Respondent's call-in rule, and not because he utilized the workers' compensation system or because he had a physical handicap (a fused knee). The Commissioner dismissed the Agency's allegation that Respondent refused to reinstate Complainant, a compensably injured worker who had obtained a medical release to return to work, because the release occurred before the statute provided that such a refusal was an unlawful employment practice. ORS 659.410; 659.415; 659.425; 659.060(3).

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The above-entitled contested case came on regularly for hearing before Dale A. Price, designated as Presiding Officer by the Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing commenced at 9:30 a.m. on November 27, 1979, in Room 773 of the State Office Building, 1400 S.W. Fifth Avenue, Portland, Oregon, and concluded on November 30, 1979, in Room 678 of the same building.

The Bureau of Labor and Industries was represented by Michael Tedesco, Assistant Attorney General. Respondent Chase Bag Company was represented by H. B. Mikkelson, Respondent's Portland Plant Manager, and R. H. Leland, Attorney at Law and Respondent's Vice President/ Secretary. Complainant Ralph Patterson was present and testified.

The Proposed Order of the Presiding Officer was issued on September 30, 1980.

On November 17, 1980, the Court of Appeals of the State of Oregon ruled in effect that the Commissioner of the Bureau of Labor and Industries has no jurisdiction to enforce ORS 659.415 with regard to acts which allegedly occurred before October 1979. On March 17, 1981, the Supreme Court of the State of Oregon denied the petition of the Bureau of Labor and Industries for review of the above-mentioned Court of Appeals decision. *Corvallis Disposal Co. v. Bureau of Labor and Industries,* 49 Or App 245, 619 P2d 663 (1980), *rev den* 290 Or 651 (1981).

Having fully considered the record in this matter and the above-mentioned judicial decisions, I, Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries, hereby make the following Findings of Fact, Ultimate Findings of Fact, Conclusions of Law, Ruling Upon Motions, Opinion, and Order.

**FINDINGS OF FACT – PROCEDURAL**

1) On December 29, 1976, Ralph Patterson filed a verified complaint with the Civil Rights Division of the Bureau of Labor and Industries alleging that Respondent discriminated against him

in connection with his employment by Respondent because of his on-the-job injury.

2) Following the filing of the aforementioned verified complaint, the Civil Rights Division investigated the allegations in the complaint and determined that substantial evidence existed to support these allegations.

3) Thereafter, the Civil Rights Division attempted to reach an informal resolution of the complaint through conference, conciliation and persuasion, but was unsuccessful in these efforts.

**FINDINGS OF FACT – THE MERITS**

1) At all times material herein, Respondent was a Delaware corporation manufacturing burlap bags in Oregon. In this business, Respondent employed six or more persons.

2) Complainant has a fused knee which, in some contexts, could be deemed a physical handicap.

3) On or about September 2, 1976, Respondent hired Complainant to operate a baling machine at its Portland plant. This job involved placing stacks of bags on the machine and, after the machine had compressed the stacks and wrapped them with wire, sliding the baled bags off the machine and onto a conveyor belt.

4) Respondent was aware of Complainant's knee problem when Respondent hired Complainant. Initially, Complainant's supervisor, Tim Sipe, was concerned about Complainant's fused knee, but after Complainant had been on the job for about two weeks, Mr. Sipe was satisfied that Complainant was physically able to do the work.

5) Complainant's work performance was "good for a new employee" for the first three weeks of his employment and dropped off somewhat thereafter. Complainant had difficulty meeting production standards.

6) Mr. Sipe spoke to Complainant on several occasions to offer suggestions as to how Complainant could improve his production, but these discussions did not constitute warnings of sub-standard performance. At no time was Complainant given a written or oral warning about sub-standard work performance.

7) Before November 4, 1976, Complainant was tardy reporting to work several times and was absent from work two or three times. Complainant received no written or oral warnings for tardiness or absenteeism.

8) On or about November 4, 1976, Complainant sustained an on-the-job injury while operating a baling machine.

9) Price Gripekoven, M.D., a duly-licensed physician, treated Complainant for this injury on November 4, November 19, November 23, and December 6, 1976.

On November 4, 1976, Dr. Gripekoven recommended that Complainant not return to work for two weeks. The next day, Complainant went to Respondent's plant office in person to report his injury and Dr. Gripekoven's recommendation and to complete Respondent's insurance forms.

After his November 19, 1976, visit to Dr. Gripekoven, Complainant called Respondent's plant office and told Bill Barrett, Respondent's Personnel Manager, that he would be unable to return to work for an indefinite period of time.

After his November 23, 1976, visit to Dr. Gripekoven, Complainant called Respondent's plant office and told Mr. Barrett that Dr. Gripekoven estimated that Complainant would be able to return to work in about one week.

After his December 6, 1976, visit to Dr. Gripekoven, Complainant called Respondent's plant office on or about Friday, December 10, 1976, and told Mr. Barrett that he had obtained a release from Dr. Gripekoven to return to work on December 13, 1976. Mr. Barrett turned Complainant's call over to Mr. Sipe, who notified Complainant that he had discharged Complainant, effective December 3, 1976, after consultation with Mr. Barrett, because of Complainant's failure to call in weekly while off-the-job. Respondent's Termination of Employment Form indicated that the reason for Complainant's termination was absenteeism.

10) On December 13, 1976, Complainant appeared at Respondent's plant, presented his medical release, and asked to return to his regular job. Respondent denied Complainant reinstatement due to Complainant's previous discharge on December 3, 1976.

11) Complainant was disabled from work due to his on-the-job injury from the time of the injury until December 13, 1976.

12) Complainant applied for and received Workers' Compensation benefits during the above-mentioned disability period.

13) Respondent had written "House Rules" in effect at all times material herein. Rule number three stated:

> "When you can't come to work, please notify this company by telephone."

No additional written rules existed governing telephone contact by injured workers who were off-the-job. Complainant's visit to Respondent after his first visit to Dr. Gripekoven and his calls to Mr. Barrett after his second, third, and fourth visits to Dr. Gripekoven constitute adherence to Respondent's House Rule number three as Complainant reasonably understood it.

14) Complainant became unavailable for reinstatement by Respondent on April 1, 1978.

**ULTIMATE FINDINGS OF FACT**

1) Complainant was employed by Respondent to operate a baling machine.

2) Complainant received no verbal or written warnings of unsatisfactory performance or of punctuality or attendance problems during his employment by Respondent.

3) Complainant incurred a compensable injury while working for Respondent on or about November 4, 1976, and was disabled from the time of that injury to December 13, 1976.

4) Complainant reported the progress of his recovery to Respondent in accordance with his reasonable understanding of Respondent's written policy.

5) When Complainant recovered from his injury, he obtained from his duly-licensed physician and presented to Respondent a release approving his

return to regular work and demanded reinstatement to his job.

6) Respondent discharged Complainant and denied him reinstatement because of Complainant's failure to call Respondent weekly during his disability.

7) Complainant ceased being available for reinstatement by Respondent on April 1, 1978.

8) Respondent did not deny Complainant reinstatement because Complainant had applied for Workers' Compensation benefits or because of Complainant's fused knee.

## CONCLUSIONS OF LAW

1) At all times material herein, Respondent was an employer subject to the provisions of ORS 659.010 to 659.110 and 659.400 to 659.435.

2) Because the Commissioner of the Bureau of Labor and Industries was not empowered to enforce ORS 659.415 at times material herein, the Commissioner has no jurisdiction over, and therefore must dismiss, those portions of the complaint and Specific Charges herein which are based upon ORS 659.415.

3) The Commissioner of the Bureau of Labor and Industries of the State of Oregon has jurisdiction over the persons and subject matter herein related to the allegations based upon ORS 659.410 and 659.425.

4) The actions, and motivations for those actions, of Mr. Sipe, Mr. Barrett and Mr. Mikkelson described herein are properly imputed to Respondent.

5) Respondent did not discriminate against Complainant because Complainant applied for Workers' Compensation benefits under ORS 656.001 to 656.794 and 656.802 to 656.824. Respondent therefore did not violate ORS 659.410 as charged.

6) Respondent did not discriminate against Complainant because of Complainant's fused knee. Respondent therefore did not violate ORS 659.425 as charged.

## RULING UPON MOTIONS

In its closing argument, Respondent asked for reconsideration of rulings by the Presiding Officer which excluded or limited evidence concerning Complainant's prior work experience and living conditions, alleged conciliation attempts, Respondent's alleged affirmative action programs for handicapped workers, and Respondent's past and present policies and practices on discharge for failure to call in when absent. Respondent argued that such evidence was relevant. Respondent also asked for dismissal of the complaint and Specific Charges due to laches. However, even without considering Respondent's argument, the above evidence Respondent seeks to have admitted, or the above defense it seeks to assert, I have found, in effect, in Respondent's favor, *i.e.*, that there is no substantial evidence that Respondent committed the unlawful practices charged and that the Commissioner lacks jurisdiction over parts of the complaint. Respondent's requests are therefore moot and need not be ruled upon.

## OPINION

### 1. ORS 659.415

The "act" of not reinstating Complainant which the Specific Charges allege is unlawful under ORS 659.415 allegedly occurred on or about



December 13, 1976, and allegedly continued until April 1, 1978, when Complainant became unavailable for reinstatement. Oregon appellate Courts have recently ruled that until the Oregon Legislature amended ORS 659.415 in October 1979, the Commissioner of the Bureau of Labor and industries did not have jurisdiction to enforce ORS 659.415. Since the Commissioner therefore could not enforce ORS 659.415 with regard to acts which allegedly occurred before October 1979, as herein, those portions of the complaint and the Specific Charges herein which are based upon ORS 659.415 must be dismissed.

Because this dismissal for lack of jurisdiction renders moot a determination on the merits of the allegations based upon ORS 659.415, this Order includes only those substantive findings necessary to the conclusion that this matter does involve allegations governed by ORS 659.415 concerning times before October 1979 and those substantive findings related to allegations based upon ORS 659.410 and 659.425.

### 2. ORS 659.425

At times material, ORS 659.425 prohibited discrimination against an employee because of that employee's physical handicap, unless the employer could show that the handicap prevented the performance of the employee's work. Complainant has a fused knee which might in some contexts be a physical handicap. Respondent was aware of Complainant's knee problem, but hired Complainant anyway. There is no evidence to suggest that Respondent later changed its attitude to one of intolerance for Complainant's knee problem. Complainant's physical handicap was not a factor in his termination from Respondent's employ.

## ORDER

NOW, THEREFORE, the Respondent not having been found to have engaged in any unlawful practice charged under ORS 659.410 or 659.425, and the Commissioner not having jurisdiction over complaints made under ORS 659.415 at times material herein, the Specific Charges and the complaint filed herein against Respondent are hereby dismissed according to the provisions of ORS 659.060(3).

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**In the Matter of**

**JELD-WEN, INC.,**

**an Oregon corporation, Respondent.**

Case Number 73-80

Final Order of the Commissioner

Mary Wendy Roberts

Issued September 17, 1981.

## SYNOPSIS

Respondent discharged female Complainant from a production line job because of repeated socializing on the job and leaving her work station early, and not because of her sex. Others, both male and female, conformed to Respondent employer's policy of limiting social conversation during work

hours and not leaving their work stations until the quitting bell. The Commissioner dismissed the specific charges. ORS 659.030(1); 659.060(3).

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The above-entitled matter came on regularly for hearing before Robert L. Chapman, designated as Presiding Officer by the Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing commenced on October 28, 1980, in the Annex of the Klamath County Courthouse and concluded on October 29, 1980, in the same location.

The Bureau of Labor and Industries was represented by Michael Tedesco, Assistant Attorney General. Respondent Jeld-Wen, Inc., was represented by Jonathan T. Harnish, Attorney at Law. Complainant Karen Kasper was present and testified.

Having fully considered the entire record in this matter, I, Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries, hereby make the following Findings of Fact, Ultimate Findings of Fact, Conclusions of Law, Opinion and Order.

## FINDINGS OF FACT – PROCEDURAL

1) On January 15, 1979, Karen Kasper filed a verified complaint with the Civil Rights Division of the Bureau of Labor and Industries alleging that she had been discriminated against in connection with her employment by Respondent because of her sex.

2) Following the filing of the aforementioned verified complaint, the Civil Rights Division investigated the allegations in the complaint and determined that substantial evidence existed to support these allegations.

3) Thereafter, the Civil Rights Division attempted to reach an informal resolution of the complaint through conference, conciliation, and persuasion, but was unsuccessful in these efforts.

4) There are no written stipulations. During the course of the hearing, the parties stipulated to various facts, and the same are incorporated in the body of these findings without reference thereto.

## FINDINGS OF FACT – THE MERITS

1) At all time material herein, Respondent was a corporation engaged in processing various types of lumber for use in the construction of windows, doors and framing. Pursuant to this purpose, Respondent engaged the personal service of one or more employees, reserving the right to control the means by which such service was performed.

2) At all times material herein, Complainant, a female, was employed by Respondent in its rip and cut department. During these times, the jobs within the rip and cut department were basically three-fold, in ascending order of their seniority and skill requirements: sorter, back rip operator, and cutter. Back rip operators, Complainant's position at the time of her discharge, were expected to help the sorters when there was no work for the back rip operators.

3) Complainant was employed by Respondent during 1976, initially as a sorter. She was promoted to a back rip operator position after bidding for it. She was selected for that position over a number of other bidders, all of whom were male. As a sorter, Complainant had worked for several supervisors, and she continued to have the same supervisors after her promotion to back rip operator. Complainant was a superior worker.



4) During times material herein, Complainant was supervised by Craig McGeary, Greg Milani, and Kelly Krahn. They were in turn supervised by Bob Turner. The plant manager was Vern Otting. Mr. McGeary was the least capable staff supervisor; Mr. Milani and Mr. Krahn, although youthful, had at least experienced actual operations before being placed in managerial positions. All of the above-named supervisory personnel testified at the hearing. There was no indication that their relationships with Complainant were characterized by any improper motives, and they were reliable and credible witnesses.

5) A certain amount of job-related interaction was necessary between Respondent's employees. Necessary job-related discussions averaged not more than thirty seconds to one minute in duration and primarily involved questions about the disposition of particular types and pieces of wood. Employees had brief personal discussions during job-related discussions. Respondent's policy, as enunciated by supervisory personnel and Respondent's employee booklet *"You and Jeld-Wen"* dictated that such contacts were to be kept to a minimum during the actual periods of production. Complainant had received a copy of the above-named booklet when hired.

6) During production periods it was customary for employees to take brief, "unofficial" breaks for the purpose of stretching, relieving themselves, getting a drink of water, etc. Apparently, these breaks were taken with the approval of the supervisors, but, like the social interaction during discussions of job-related duties, they were not to be abused.

Respondent's policy prohibited employees from leaving their work stations before official breaks, lunch, and quitting time, which were signaled by a ringing bell. One employee, Jim Prater, a cutter, who testified at the hearing, had historically and customarily left his work station a few moments before the ringing of the bell. He felt he was justified in doing this because he did not take an "unofficial" break at any other time. However, about the same time Complainant was terminated, Respondent asked Mr. Prater to refrain from this practice, which he apparently did. Mr. Prater has worked for Respondent for 18 years.

7) Females comprised 19%, 21%, and 24% respectively of Respondent's rip and cut department for the years 1978, 1979, and 1980.

8) During times material herein, Complainant received several written reprimands and notes which were placed in her employment file. The notations primarily detail Complainant's socializing on the job, which Respondent felt was excessive, and leaving her work station early. One incident concerned her refusal to obey a supervisor's request, and another dealt with her engaging in "horseplay" with a water pistol. These two incidents played no part in the decision to discharge Complainant from Respondent's employment.

9) Respondent gave Complainant a written final warning on July 31, 1978, which contained several conditions, two of which stated that Complainant was not to socialize with the cutters while on the production line and that she was not to leave her work station early.

10) Complainant also received an oral warning regarding excessive socializing from Mr. Milani in early December 1978. Mr. Milani had assumed supervisory responsibility for the rip and cut department in October 1972 from Mr. McGeary. Mr. Milani reviewed Complainant's file prior to the oral warning and was concerned about her excessive socializing and leaving her work station early.

11) On the day of her termination, Complainant, by prior agreement, was to meet Mr. Krahn in the department lunchroom during the noon break to purchase a cradle from him. Without Mr. Milani's consent or instruction, she left her work station approximately five minutes early and was observed and questioned by Mr. Milani. Mr. Milani reviewed this information and Complainant's file history with Mr. Turner, and they decided to discharge her.

12) On behalf of Complainant, male co-workers James Prater, Robert Gray, and Monte Duell, all cutters, testified that they felt that Complainant did not socialize excessively and that she was treated differently than other female employees, but could be no more descriptive or provide any other definite evidence to support their opinions.

13) On behalf of the Respondent, female workers Jerri Fairless, Katrina Loffer, Evelyn Cox and Alice Mueller, also cutters, testified that in their opinion, Complainant received treatment no different from that accorded other employees at the plant.

14) After her discharge, Complainant filed an application for unemployment compensation and checked thereupon a box which indicated that she had been terminated for "a labor dispute." On March 26, 1978, Complainant also filed charges with the National Labor Relations Board alleging retaliatory discharge for her union organization activities and coercive questioning regarding her union benefits. No evidence concerning these allegations was offered at this hearing.

## ULTIMATE FINDINGS OF FACT

Respondent did not discharge Complainant from its employ on December 21, 1978, because of her sex, but, instead, because of Complainants excessive socializing on the job and her leaving her work station early.

## CONCLUSIONS OF LAW

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

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

3) Respondent's discharging Complainant was not an unlawful employment practice as charged, since it was not based upon her sex.

## OPINION

This record is devoid of any evidence, save the bald opinions of Complainant and three co-workers, that Complainant was treated differently from any other employee of Respondent, male or female. I am unable to find any evidence in this record to support the contention that Respondent acted in violation of ORS 659.030(1) as charged in its dealings with Complainant.

## ORDER

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

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**In the Matter of**

**FRED MCKEE,**

**dba The Grove Restaurant,**
**Respondent.**

Case Number 93-80

Final Order of the Commissioner

Mary Wendy Roberts

Issued September 17, 1981.

## SYNOPSIS

Complainant alleged that Respondent employer refused to reinstate Complainant, a compensably injured worker who had obtained a medical release to return to work. The Commissioner dismissed the claim for lack of jurisdiction because the release occurred before the statute provided that such a refusal was an unlawful employment practice. ORS 659.415; 659.060(3).

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The above-entitled matter came on regularly for hearing before Dale A. Price, designated as Presiding Officer by the Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing commenced on September 30, 1980, in the Auditorium of the Portland Water Bureau Building, 510 S.W. Montgomery Street, Portland, Oregon, and concluded on the same day in the same location.

The Bureau of Labor and Industries was represented by Daryl D. Wilson, Assistant Attorney General. Respondent Fred McKee was represented by William Whitely, Attorney at Law. Complainant J. Marschell Caton was present and testified.

On November 17, 1980, the Court of Appeals of the State of Oregon ruled in effect that the Commissioner of the Bureau of Labor and Industries has no jurisdiction to enforce ORS 659.415 with regard to acts which allegedly occurred before October 1979. On March 17, 1981, the Supreme Court of the State of Oregon denied the petition of the Bureau of Labor and Industries for review of the above-mentioned Court of Appeals decision. *Corvallis Disposal Co. v. Bureau of Labor and Industries*, 49 Or App 245, 619 P2d 663 (1980), *rev den* 290 Or 651 (1981).

Having fully considered the entire record in this matter and the above-mentioned judicial decisions, I, Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries, hereby make the following Findings of

Fact, Ultimate Findings of Fact, Conclusions of Law, Opinion, and Order.

**FINDINGS OF FACT – PROCEDURAL**

1) On September 10, 1979, J. Marschell Caton filed a verified complaint with the Civil Rights Division of the Bureau of Labor and Industries alleging that she had been and continued to be discriminated against in connection with her employment by Respondent in that Respondent had not reinstated her after she had recovered from an on-the-job injury.

2) Following the filing of the aforementioned verified complaint, the Civil Rights Division investigated the allegations in the complaint and determined that substantial evidence existed to support these allegations.

3) Thereafter, the Civil Rights Division attempted to reach an informal resolution of the complaint through conference, conciliation, and persuasion, but was unsuccessful in these efforts.

**FINDINGS OF FACT – THE MERITS**

1) The parties stipulated, and I find, that at all times material herein, Respondent did business as The Grove Restaurant.

2) The parties stipulated, and I find, that from April 1979 through August 20, 1979, Respondent employed Complainant as a bartender.

3) On or about August 20, 1979, Complainant sustained an on-the-job injury while working for Respondent.

4) Later the same day, after finishing her work shift, Complainant was treated for her injury at the emergency room at Sunnyside Kaiser Hospital and released. A duly-licensed physician at the hospital directed her to refrain from working between August 20-23, 1979.

5) Still later the same day, Complainant returned to Respondent's restaurant and informed Respondent that she would be unable to work until about August 24, 1979. Respondent informed her that if she did not appear for work the next day, she "was done." Although she had documentation from the hospital to substantiate her inability to work until August 24, Complainant did not show it to Respondent.

6) During the next few days, when her injury worsened, Complainant returned to the hospital, where her arm was placed in a cast. A duly-licensed physician informed Complainant that she would be unable to return to work until about September 17, 1979.

7) Complainant's cast was removed on September 17, 1979, and she was released to work by a duly-licensed physician. Having recovered from her injury, Complainant began part-time work for a different employer on the same day. She obtained alternative full-time employment on February 2, 1980.

8) At no time after her injury did Complainant present to Respondent a release from a duly-licensed physician certifying her recovery from her injury or otherwise notify Respondent that she was no longer disabled from work.

9) At no time after her injury did Complainant demand reinstatement to her former job or to available and suitable work for Respondent.

**ULTIMATE FINDINGS OF FACT**

On or about August 20, 1979, Complainant sustained a compensable injury while working for Respondent and was disabled by this injury until September 17, 1979. At no time after she had recovered did Complainant notify Respondent that she was able to resume the duties of her regular work or demand that Respondent reinstate her.



**CONCLUSIONS OF LAW**

1) The parties stipulated and I conclude that, at all times material herein, Respondent was an employer subject to the provisions of ORS 659.010 to 659.110 and 659.400 to 659.435.

2) The complaint and Specific Charges herein allege that Respondent violated ORS 659.415. Because the Commissioner of the Bureau of Labor and Industries was not empowered to enforce ORS 659.415 at times material herein, the Commissioner has no jurisdiction over, and therefore must dismiss, the complaint and Specific Charges herein.

**OPINION**

The "act" of not reinstating Complainant, which the Specific Charges allege is unlawful under ORS 659.415, occurred, if at all, on September 17, 1979, when Complainant had recovered from her injury. This "act" ceased on the same day, when Complainant, not having sought reinstatement by Respondent, began working elsewhere. Oregon appellate courts have recently ruled that until the Oregon Legislature amended ORS 659.415 in October 1979, the Commissioner of the Bureau of Labor and Industries did not have jurisdiction to enforce ORS 659.415. Since the Commissioner therefore could not enforce ORS 659.415 with regard to acts which allegedly occurred before October 1979, as herein, the complaint and the Specific Charges herein must be dismissed.

Because this dismissal for lack of jurisdiction renders moot a determination of this matter on its merits, this Order includes only those substantive findings necessary to the conclusion that this matter does involve allegations governed by ORS 659.415 concerning times before October 1979.

**ORDER**

NOW, THEREFORE, the Commissioner not having jurisdiction over complaints made under ORS 659.415 at times material herein, the complaint and the Specific Charges filed herein against Respondent are hereby dismissed according to the provisions of ORS 659.060(3).

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**In the Matter of**

**BARKER MOTORS, INC.,**

**an Oregon corporation, Respondent.**

Case Number 72-79

Final Order of the Commissioner

Mary Wendy Roberts

Issued October 6, 1981.

**SYNOPSIS**

Where Respondent's stated nondiscriminatory reason for Complainant's discharge (poor grooming) was a pretext, Respondent attempted to get Complainant's on-the-job injury

covered by its group health insurer, and Respondent frustrated Complainant's workers' compensation insurance claim, the Commissioner found that Complainant was discharged because he applied for workers' compensation benefits. The Commissioner awarded Complainant $15,053.73 in lost wages, and ordered Respondent to cease discriminating against employees seeking workers' compensation benefits. ORS 659.010 (2); 659.410; 659.060(3).

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The above-entitled contested case came on regularly for hearing before Jon Wu, designated as Presiding Officer in this matter by the Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing commenced on January 15, 1980, in the Lecture Room of the Eugene Public Library, 100 West 13th Avenue, Eugene, Oregon, and concluded on the same day. The Bureau of Labor and Industries was represented by Douglas R. Andres, Assistant Attorney General. Respondent Barker Motors, Inc., was represented by Donald A. Gallagher, Attorney at Law. Complainant, Leroy J. Coleman, was present and testified. The following persons were also present and testified: Richard J. Rementeria, Harold I Kezer, Ronald Kerbs, Raymond C. Davis, Oren W. Taylor, and Guy Freeman.

Having fully considered the entire record in this matter, I, Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries, hereby make the following Findings of Fact, Ultimate Findings of Fact, Conclusions of Law, Evidentiary Ruling, Opinion, and Order.

## FINDINGS OF FACT – PROCEDURAL

1) On June 5, 1978, Leroy J. Coleman filed a verified complaint with the Civil Rights Division of the Bureau of Labor and Industries alleging that he had been discriminated against in connection with his employment by Respondent as a consequence of his application for workers' compensation benefits.

2) Following the filing of the aforementioned verified complaint, the Civil Rights Division investigated the allegations in the complaint and determined that substantial evidence existed to support those allegations.

3) Thereafter, the Civil Rights Division attempted to reach an informal resolution of the complaint through conference, conciliation and persuasion, but was unsuccessful in those efforts.

4) The Agency and Respondent stipulated that accrual of back pay damages, if any, would end in mid-November 1978.

## FINDINGS OF FACT – THE MERITS

1) At all times material herein, Respondent was an Oregon corporation engaged in the business of selling new and used vehicles in Eugene, Oregon. In this business, Respondent had six or more persons in its employ.

2) In January 1971, Respondent hired Complainant as a car salesman. Complainant was an experienced car salesman, having sold new and used cars for various automobile dealers for over six years at the time Respondent hired him.

3) With the exception of a brief period in April 1974, Complainant worked for Respondent continuously until he suffered a work-related injury on October 24, 1976.



4) On May 26, 1972, Respondent issued a notice instructing its supervisors to enforce Respondent's personal appearance standards governing hair length, sideburns, mustaches, and beards and goatees. The notice included a provision prohibiting sideburns which extended below "a point drawn on a line between the cheek bone and the bottom of the ear lobe." At the time the notice was issued, Complainant's grooming complied with the latter provision.

5) Throughout 1974, 1975, and 1976, Complainant's sideburns usually extended below his ear lobes in violation of Respondent's personal appearance standards. They were long and substantial enough that they must have been grown over time. They were of substantially the same condition and length, extending well below Complainant's ear lobes in obvious and flagrant violation of Respondent's standards, throughout Complainant's employment in 1975 and 1976.

6) On several occasions, Guy Freeman, Respondent's Sales Manager at all times material herein, asked Complainant to trim his sideburns. Sometimes Complainant complied with Mr. Freeman's request, and sometimes he did not. Complainant was never disciplined for his non-compliance.

7) On or about October 24, 1976, Complainant suffered a back injury at work. Although Complainant worked a little after October 24, 1976, he was unable to work for approximately one-and-one-half months in 1976 and approximately ten working days in January 1977 because of this injury. Complainant incurred approximately $6,000.00 in medical expenses as a result of this injury.

8) Richard Rementeria, Respondent's General Manager and owner in part, sent Complainant to Respondent's group health insurer for compensation for his injury-related expenses. Respondent did not want Complainant to file a workers' compensation claim. Respondent feared that it would be required to pay increased workers' compensation premiums if Complainant filed such a claim.

9) Complainant sought compensation from Respondent's group health insurer, but was rejected because his injury was incurred at work. Consequently, Complainant asked Respondent for a workers' compensation claim form. Respondent provided Complainant with the requested form only after Complainant had repeated his request. Complainant submitted a claim for workers' compensation benefits to Respondent on or about December 31, 1976.

10) On February 9, 1977, Respondent's workers' compensation insurer notified Complainant that his workers' compensation claim was denied because Complainant's condition did not arise out of his employment. This denial was based upon Respondent's assertion on the claim form that Respondent doubted the validity of Complainant's claim because, Respondent alleged, Complainant had reported his injury "late" and had a "history of back problems". Respondent had answered many of the other questions on the employer portion of

the claim form in an inaccurate or incomplete fashion.

11) Complainant requested a review of the above-mentioned denial of workers' compensation benefits. Pursuant to this review, the Workers' Compensation Board of the State of Oregon awarded approximately $6,000.00 to Complainant for his October 24, 1976, injury. This award was based upon the Workers' Compensation Board's conclusion that Complainant's injury did arise out of his employment.

12) On or about January 11, 1977, Complainant returned to work. At that time, he was no longer disabled from performing his work duties, but his workers' compensation claim was still pending. At that time his sideburns extended below his ear lobes and were substantially identical to their length during the preceding year.

13) When Complainant returned to work, Respondent's management received him poorly and implied that his injury was not genuine. Also, Respondent demanded that Complainant trim his sideburns. Complainant ignored Respondent's demand, as he had in the past, and did not trim his sideburns.

14) When Complainant appeared for his third day of work, on January 13, 1977, Mr. Rementeria discharged him. The reason Mr. Rementeria provided for discharging Complainant was Complainant's failure to comply with Respondent's grooming policy.

15) As a direct result of his sudden discharge, Complainant felt general worry, during the twelve days until he found employment, as to how he would support himself and his family. This general worry did not significantly impair Complainant's activities or cause him to lose sleep.

16) During the course of Complainant's employment by Respondent, other employees, a mechanic and two salespersons, violated Respondent's grooming policy and were not discharged. Another of Respondent's employees, a mechanic named Oren Taylor, filed a workers' compensation claim one year before Complainant filed his claim. Mr. Taylor was awarded approximately $40,000 in workers' compensation benefits and was not discharged. None of Respondent's employees other than Complainant both violated Respondent's grooming standards and filed a workers' compensation claim.

17) Because Complainant worked on a commission basis for Respondent, his compensation fluctuated. He received a percentage of Respondent's gross profit on the new and used cars he sold. His average gross monthly earnings were $1,442.42 in 1972; $1,762.33 in 1973; $1,506.58 in 1974; $1,641.08 in 1975; and $2,427.19 for the ten-and-one-half months he worked in 1976. His total gross earnings were $17,309.00 in 1972; $21,148.00 in 1973; $18,079.00 in 1974; $19,693.00 in 1975; and $25,485.51 in 1976.

18) Complainant was Respondent's top salesperson in sales and earnings for two years before he was discharged. Respondent continually employed an average of ten salespersons between 1975 and 1978.

19) Respondent's gross profits on vehicles sold during the fiscal years for which evidence was produced were:



| | |
|---|---|
| New veh. - 1976 | $436,673.00 |
| Used veh.- 1976 | $308,641.00 |
| Total - 1976 | $745,314.00 |
| New veh. - 1977 | $425,857.00 |
| Used veh.- 1977 | $277,423.00 |
| Total - 1977 | $703,280.00 |
| New veh. - 1978 | $477,594.00 |
| Used veh.- 1978 | $277,276.00 |
| Total - 1978 | $754,870.00 |

20) During his final year of employment with Respondent, Complainant experienced more and more repeat sales (sales to former customers) and referrals from former customers.

21) Twelve days after Respondent discharged him, Complainant obtained employment as a car salesman at Grant AMC, Inc., in Eugene, Oregon. Complainant worked for Grant AMC for twenty-two-and-one-half months, until mid-November 1978. He was compensated on a commission basis, and he earned a total of $20,772.15 in 1977 and $18,785.90 in 1978. His average monthly earnings for the approximately eleven months he worked for Grant AMC in 1977 were $1,888.38. his average monthly earnings for the eleven-and-one-half months he worked for Grant AMC in 1978 were $1,633.56.

22) After his employment at Grant AMC, Inc., Complainant worked for Stiles Datsun as a car salesman. He was compensated on a commission basis and began to earn as much as or more than he earned while in Respondent's employ.

23) Where Respondent's evidence conflicted with Complainant's testimony, Complainant's testimony was more credible and, accordingly, was assigned greater weight. Mr. Rementeria's testimony was impeached in part by photographic exhibits. In other respects, Mr. Rementeria's testimony was vague and was contradicted by unbiased witnesses such as Mr. Kerbs and Mr. Davis. Mr. Freeman's testimony was also vague.

## ULTIMATE FINDINGS OF FACT

1) On or about December 31, 1976, Complainant applied for workers' compensation benefits for an on-the-job injury he had sustained while working as a car salesman for Respondent on or about October 24, 1976. Respondent had continually frustrated the filing of this claim, and subsequently frustrated the granting of benefits, in obvious reluctance to have Complainant successfully avail himself of the workers' compensation mechanism.

2) Throughout the two years preceding the aforementioned application, Complainant had worn long sideburns in obvious and flagrant violation of Respondent's personal appearance standards. Respondent had no significant objection to, or disciplined Complainant for, his non-compliance with these standards.

3) When Complainant returned to work after filing his application for workers' compensation benefits and recovering from his injury, his sideburns were substantially identical to his sideburns during the preceding year and violated Respondent's standards. As he had done before, Complainant ignored Respondent's direction that he trim his sideburns.

4) Three days after Complainant returned to work, Respondent discharged him, allegedly because Complainant was not complying with Respondent's personal appearance standards.

5) Respondent had not discharged other employees who had violated its personal appearance standards.

6) Respondent's real reason for discharging Complainant was Complainant's application for workers' compensation benefits.

7) Until mid-November 1978, Complainant did not earn as much as he would have if he had continued in Respondent's employ. From his discharge until mid-November 1978, Complainant earned $39,558.05. Had he been employed by Respondent during the same time period, Complainant would have earned at least as much per month as his average monthly earnings during 1976, his last year of employment with Respondent, or a total of a least $54,611.78. As a direct result of being discharged by Respondent, therefore, Complainant suffered a loss of earnings in the amount of $15,053.73, the difference between the latter two figures.

8) Complainant's general worrying in response to his discharge cannot properly be termed mental anguish.

## CONCLUSIONS OF LAW

1) At all times material herein, Respondent was an employer subject to the provisions of ORS 659.010 to 659.110 and 659.400 to 659.435.

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

3) At all times material herein, Richard Rementeria was an agent of Respondent with authority to discharge Respondent's employees. The actions, and motivations for those actions, of Richard Rementeria described herein are properly imputed to Respondent.

4) Respondent's discharge of Complainant because Complainant had applied for benefits provided for in ORS 656.001 to 656.794 and 656.802 to 656.824 discriminated against Complainant with respect to the tenure, terms and conditions of his employment, and therefore was an unlawful employment practice which violated ORS 659.410.

5) The Commissioner of the Bureau of Labor and Industries has the authority to award money damages to Complainant under the facts and circumstances of this record, and the sum of money awarded as damages in the Order below is an appropriate award.

## EVIDENTIARY RULING

Eleven exhibits are photographs of Complainant which were taken at approximately quarterly intervals during the last two-and-one-half years of Complainant's employment with Respondent. At hearing, counsel for Respondent objected to the admission of these exhibits. Respondent's objection was based upon the fact that the photographs were not taken when Complainant was actually at work. The Presiding officer reserved ruling upon this objection.



According to ORS chapter 183, the law governing this contested case hearing, evidence of a type commonly relied upon by reasonably prudent persons in the conduct of their serious affairs is admissible.

The eleven exhibits accurately depict Complainant's sideburns at the time each photograph was taken. Each photograph reveals that Complainant had sideburns which covered enough of Complainant's face, and were of sufficient length, extending well below his ear lobes to his jawbone, to be more on the order of "mutton chops". The photographs were introduced to demonstrate that Complainant had not complied with Respondent's standards concerning facial hair during his last years in Respondent's employ.

Implicit in Respondent's objection is the contention that the state of Complainant's facial hair when he was not at work does not demonstrate the state of Complainant's facial hair when he was at work, *i.e.*, whether Complainant violated a policy concerning facial hair which only applied while Complainant was at work. This contention is erroneous. Complainant worked for Respondent continuously during the period during which the photographs were taken. The long sideburns depicted in the photographs must have been cultivated over time. Complainant therefore could not have had the facial hair depicted on the days each photograph was taken without having had facial hair which violated Respondent's standards for a least some working days before each photograph. After examining the exhibits, a reasonably prudent person would conclude that even if Complainant shaved off his facial hair immediately after each photograph (which is unlikely, given the fact that each 1975 and 1976 photograph depicts virtually identical sideburns, and which Complainant denies), the photographs show that on at least eleven occasions, Complainant's facial hair violated Respondent's personal appearance standards on at least some working days preceding the taking of the photograph. For this reason, the fact that these photographs were not taken while Complainant was actually working does not render them inadmissible. Respondent's objection is overruled, and the eleven photographs are hereby admitted into the record on this matter.

## OPINION

### 1. ORS 659.410

Under ORS 659.410, it is an unlawful employment practice for an employer to discriminate against an employee with respect to tenure, terms or conditions of employment because the employee has applied for workers' compensation benefits. In this matter, the evidence is undisputed that Complainant's employment was terminated following his application for workers' compensation benefits.

Respondent contended, however, that Complainant was discharged because of his failure to comply with Respondent's personal appearance standards rather than because he filed a workers' compensation claim. Specifically, Respondent alleged that at the time of Complainant's termination, the length of his sideburns violated Respondent's personal appearance standards; that Respondent gave

Complainant an opportunity to trim his sideburns to comply with the standards; and that Complainant failed and/or refused to comply.

The Agency conceded that the length of Complainant's sideburns at the time he was discharged violated Respondent's personal appearance standards. However, the Agency contended that the length of Complainant's sideburns at the time he was terminated was virtually the same as in previous years and that the grooming violation was merely a pretext for terminating complainant. The Agency maintained that Respondent's real reason for terminating Complainant was Complainant's submission of a workers' compensation claim.

Respondent attempted to refute the Agency's pretext allegation by producing from its witnesses testimony that Complainant had previously always complied with requests to cut his sideburns; that Respondent had enforced its grooming policy in the past; and that Complainant's application for workers' compensation benefits was not the reason for his termination.

As discussed below, the evidence as a whole does not support Respondent's contentions.

**A. Respondent Frustrated Complainant's Workers' Compensation Claim**

Respondent was obviously reluctant for Complainant to collect benefits for his injury through the workers' compensation mechanism. Fearing higher workers' compensation insurance premiums, Respondent first directed Complainant to its group health rather than workers' compensation insurer.

Respondent later hesitated to provide Complainant with a workers' compensation claim form, and Complainant had to repeat his request therefor. Respondent then filled out the employer's portion of the claim form in an incomplete and inaccurate fashion, causing its insurer to deny Complainant's workers' compensation claim, a claim which was later held to be valid.

By itself, the fact that Respondent did not discharge a mechanic who had applied for workers' compensation benefits one year before Complainant and received a $40,000.00 award is not probative of any issue in this matter.

**B. Respondent Did Not Discharge Complainant or Other Employees or Discipline Complainant for Non-Compliance with its Appearance Standards Before Complainant Filed His Workers' Compensation Claim**

Photographic exhibits show that in 1974, Complainant violated Respondent's grooming policy regarding sideburns and that in 1975 and 1976, Complainant's violation of the same policy was clear cut and blatant. The pictures of Complainant dated August 1975, December 1975, April 1976, and July 1976, as well as those generally dated 1976 or summer of 1976, each show Complainant wearing sideburns extending well below his ear lobes. Respondent suggested that the photographs show only that Complainant violated the policy in the past, but not that the violations were continuous or that Complainant refused or failed to trim his sideburns when asked. However, it is evident from the photographs and from Complainant's testimony that the sideburns were not grown instantly during off hours, weekends or vacations. They were cultivated over time and were of substantially the same condition and length through out Complainant's employment in 1975 and 1976. The testimony of Harold Kezer and Raymond Davis supported the photographic exhibits and Complainant's testimony.



One of Respondent's former employees, Mr. Kezer, established that Complainant's sideburns were long when Complainant was discharged. In Mr. Kezer's opinion, Complainant had been permitted previously to violate Respondent's grooming policy without suffering any consequences because Complainant had done so for years and was a "super salesman."

Raymond C. Davis, formerly a salesman for Respondent, characterized Complainant's sideburns as below his ear lobes and "kind of" long all the time. Mr. Davis also testified that he knew of no other employee who was discharged for violating Respondent's grooming policy.

Ronald Kerbs, a salesman for Respondent for twenty-one years, testified that no one was actually discharged for non-compliance with Respondent's grooming policy, but that perhaps two persons had left by mutual agreement after disputes over that policy.

Guy Freeman, Respondent's Sales Manager, testified that he could not specifically remember telling Complainant to cut his sideburns just before Complainant was discharged, but that he probably did. Mr. Freeman's testimony was vague and does not support Respondent's contention that Complainant was fired for failure to comply with Respondent's grooming policy.

Respondent's General Manager and owner in part, Rementeria, testified that Complainant had not been discharged for his sideburn violations in the past because Complainant was a strong salesman. Mr. Rementeria admitted that he had not personally discharged other employees for refusing the comply with Respondent's grooming policy. He testified that some employees had been discharged for such non-compliance, but was unable to provide their names. Mr. Rementeria's testimony was non-specific and was contradicted by unbiased witnesses, and therefore given less weight than the uninterested testimony of Mr. Kerbs and Mr. Davis, both of whom were unable to recall any other of Respondent's employees being discharged for grooming violations.

All the above evidence compels the conclusion that until Complainant filed his workers' compensation claim, Respondent acquiesced to his non-compliance with its personal appearance standards.

Respondent's defense that it subsequently discharged Complainant because he had failed, for no more than three days, to comply with those standards simply contains too many contradictions, inaccuracies and unbelievable elements to constitute anything but a pretext for its real reason for discharging Complainant. Respondent's continued frustration of Complainant's workers' compensation claim, the closeness in time of Complainant's discharge and Complainant's return to work after recovery and

application for workers' compensation benefits, and the fact Respondent had discharged neither Complainant nor other employees for, in Complainant's case, virtually identical non-compliance in the past with its personal appearance standards establish that Respondent in fact discharged Complainant because he had applied for workers' compensation benefits.

**2. Back Pay Award**

An employee such as Complainant who has been discharged upon an unlawful discriminatory motive is entitled to the difference, if any, between his actual earnings subsequent to discharge and the earnings which he would have received had he continued in the employer's employ.

Respondent argues that Complainant's average monthly earnings in his last year of employment for Respondent are not an appropriate measure of what he would have earned had he continued in Respondent's employ.

Because Complainant's earnings while working for Respondent fluctuated, the best representation of his earnings at the time of discharge is provided by his average monthly earnings during 1976, the year preceding his discharge: $2,427.19.

Complainant's average monthly earnings while working for his next employer were $1,888.38 in 1977 and $1,633.56 in 1978. Both of these figures are substantially less than Complainant's average monthly salary during 1976, and the 1978 figure is even less than Complainant's 1975 average monthly salary of $1,641.08.

Complainant's 1976 monthly earning rate is an appropriate measure of what Complainant would have earned had he been employed by Respondent in 1977 and 1978 because:

a. Overall, Complainant's earnings increased steadily during his employment with Respondent.

b. Complainant was experiencing more repeat sales and an ever increasing number of referrals at the time Respondent discharged him.

c. Respondent's aggregate gross profits were reasonably consistent for 1976, 1977, and 1978, and Respondent's salespersons were paid a percentage of the gross profit upon the salesperson's sales.

Complainant's average 1976 monthly salary is in fact probably a conservative estimate of what he would have subsequently earned, given the above fact and the general inflationary rise in earning figures.

For the above reasons, and lacking substantial evidence to the contrary, the Commissioner has inferred that Complainant would have earned compensation at a monthly rate equal to or greater than that which he earned during this last year of employment with Respondent and has therefore projected Complainant's average monthly earnings for 1976 over the twenty-two-and-one-half month back pay liability period in 1977 and 1978.

**3. Mental Suffering Award**

In order to determine first whether Complainant suffered mental anguish and, if so, the appropriate amount of compensation therefor, the Commissioner examined the duration, severity, and effects of what Complainant felt in response to Respondent's unlawful actions. The brief duration, lack of severity, and lack of manifestations of Complainant's negative mental reaction compel the conclusion that that reaction was mild and cannot properly be termed mental anguish. The Agency's prayer for damages for Complainant's alleged "pain, suffering, humiliation, and mental distress" is therefore denied.

**ORDER**

NOW, THEREFORE, as authorized by ORS 659.060(3) and 659.010(2) and in order to eliminate the effects of the unlawful practices found, as well as to protect the lawful interests of others similarly situated, Respondent is hereby ordered to:

1) Deliver to the Hearings Unit of the Portland office of the Bureau of Labor and Industries, within sixty days of the execution of this Order, a certified check payable to the Bureau of Labor and Industries in trust for Leroy J. Coleman in the amount of Fifteen Thousand Fifty-Three Dollars and Seventy-Three Cents ($15,053.73). This amount represents damages for wages Complainant lost because of Respondent's unlawful employment practices set out above.

2) Cease and desist from discriminating against any employee who seeks workers' compensation benefits.

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**In the Matter of**

**VENEER SERVICES, INC.,**

**dba Conifer Plywood Company,**

**Respondent.**

Case Number 46-79

Final Order of the Commissioner

Mary Wendy Roberts

Issued December 2, 1981.

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**SYNOPSIS**

Respondent altered Complainant's job duties, subjected him to unusually close supervision, and was predisposed to discharge him on reduced grounds in retaliation for Complainant's safety and health complaints regarding smoke and dust at his work station. Finding that Complainant was not insubordinate in not returning immediately to an area fraught with safety hazards, but rather was only temporarily withdrawing from the area as a constructive complaint of safety violations, the Commissioner awarded Complainant $19,914 in back pay and ordered Respondent not to discriminate against employees due to safety complaints. ORS 654.005(5); 654.062(5)(a) and (b); 659.010(2); 659.060(3).

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The above-entitled matter came on regularly for hearing before Jon Wu, designated as Presiding Officer by Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was held at the Eugene Public Library, 100 West 13th Avenue, Eugene, Oregon, on November 8, 1979. The Bureau of Labor and Industries was represented by Michael J. Tedesco,

Assistant Attorney General. Respondent Veneer Services, Inc., dba Conifer Plywood Company, was represented by James Jagger, Attorney at Law. Complainant Edward D. Wiggins was present and testified.

Having considered the entire record in this matter, I, Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries of the State of Oregon, hereby make the following Findings of Fact, Ultimate Findings of Fact, Conclusions of Law, Opinion and Order.

## FINDINGS OF FACT -- PROCEDURAL

1) On or about September 23, 1977, Edward D. Wiggins filed a verified complaint with the Civil Rights Division of the Bureau of Labor and Industries alleging that he had been and continued to be discriminated against in connection with his employment by Respondent because Respondent terminated his employment in retaliation for his complaints of safety violations.

2) Following the filing of the aforementioned verified complaint, the Civil Rights Division investigated the allegations in the complaint and determined that substantial evidence existed to support these allegations.

## FINDINGS OF FACT -- THE MERITS

1) At all times material herein, Respondent utilized the personal service of one or more employees and reserved the right to control the means by which such service was performed.

2) At all times material herein, Respondent was an Oregon Corporation engaged in the plywood manufacturing business.

3) Complainant was hired by Respondent's predecessor in interest on approximately January 23, 1973. His duties were to assist in the operation of a wood products drying machine. He retained that position after Respondent's acquisition and continued operation of the factory in which Complainant worked. In approximately September 1976, Complainant successfully bid for and was subsequently transferred to a position as a glue mix operator, which involved different duties than those of his previous position.

4) The glue mix operators' duties and the location of their work stations at Respondent's plant exposed the glue mix operators to unlawful concentrations of smoke and dust, against which Respondent failed to provide adequate protection. The inadequate protection Respondent provided consisted of unapproved surgical masks; unapproved, incorrectly stored, dusty respirator devices, with no written program or instruction on the selection, uses, storage, and maintenance of such devices. Complainant complained to Respondent of smoke and dust concentrations and the lack of adequate protection against these hazards at his work station.

5) Approximately six weeks prior to Complainant's termination, Respondent implemented a policy requiring one worker to operate two glue mixing machines. Previously, Respondent maintained a separate glue mix operator position for each of the machines. As a result, Complainant assumed responsibility for the operation of two glue mixing machines rather than just one. Under the new system, Complainant's exposure to smoke and dust



was increased because he was required to spend longer periods of time at his work station without a break. The frequency of his complaints to Respondent about working conditions increased. Respondent assured Complainant that remedial measures would be taken, but in fact no adequate measures were taken at the time.

6) Complainant developed breathing difficulties, at least partially as a result of exposure to smoke and dust at his work station. He consulted Peter Cary, M.D., about his breathing problem on August 24 and 31 and September 14, 1977. In a letter to Respondent's manager dated September 14, Dr. Cary verified Complainants respiratory problems and recommended his transfer to an area where he would not suffer from respiratory inhalation problems. No later than September 8, 1977, however, Respondent had actual notice of Complainant's respiratory problem, since on that date Respondent filed a State Accident Insurance Fund Worker's and Employer's Report of Occupational Injury or Disease concerning Complainant's work-related respiratory injury.

7) Prior to the date of Complainant's termination, it had been Respondent's policy to allow glue mix operators to take their own breaks anytime when the glue mixing machinery was operating in an automatic phase of the mixing process. Breaks became more difficult for Complainant to arrange after he became responsible for two machines rather than one, but arranging sufficient breaks was still possible prior to the date of his termination. On the date of Complainant's termination, September 19, 1977, Respondent altered its break policy to provide that Complainant take only scheduled breaks and only when relieved by another employee. Under the new relief system, Complainant took breaks only when a relief worker substituted for him even if neither of the glue mixing machines was in a phase which required human attention. Under the new break system Complainant was forced to remain at his work station at times when he could have sought respite from the smoke and dust. Due to the more stringent conditions, Gerald Ingram, Complainant's immediate supervisor, did not expect Complainant to be able to last even one entire shift at his work station and predicted Complainant's failure to comply with the new policy in conversation with another employee, Robert Wygle, early on the morning of Complainant's termination.

8) On the afternoon of September 19, 1977, Complainant left his work station in order to escape a higher than usual smoke concentration which was causing him breathing pain. Both glue mixing machines were engaged in an automatic phase of the mixing process and required no immediate human attention.

9) Soon thereafter, Mr. Ingram sought and found Complainant in an employees' lunchroom. Mr. Ingram ordered Complainant to return to his work station immediately. Complainant responded that he would do so shortly rather than immediately, because he was experiencing breathing pain as a result of the high smoke concentration and needed a break. Mr. Ingram warned Complainant to return to his work station two or three times, and when Complainant continued to

refuse, Mr. Ingram immediately terminated Complainant's employment with Respondent, because of Complainant's failure to return to his work station when so directed.

10) As a direct result of Respondent's discharge of Complainant from employment, Complainant was unemployed for a total of 80 weeks between the date of his termination, September 19, 1977, and the date he was hired by another employer at a comparable rate, March 25, 1979.

11) During that time, Complainant diligently searched for employment without success from September 1977 to March 1979, when he finally located comparable employment.

12) Complainant obtained interim employment at wages slightly below those he earned in Respondent's employ for a period of one month between June 15 and July 18, 1978. His total wages for this employment were $1,388.23.

13) Complainant received unemployment benefits totaling $2912.00 for periods between September 1977 and March 1978, and September 1978 and March 1979.

14) Complainant's earnings while in Respondent's employ varied considerably from one quarterly period to the next. Complainant's average weekly wage of $302.68 will therefore be used to compute any damage award made to Complainant.

## ULTIMATE FINDINGS OF FACT

1) Complainant made actual complaints of safety hazards to Respondent on many occasions as early as six months prior to his termination. On the date of Complainant's termination he made a constructive complaint of safety hazards by his failure to immediately return to work when asked to do so by his supervisor.

2) Respondent was predisposed to terminate Complainant because of Complainant's complaints of safety violations and retaliated against Complainant's complaints of safety violations by creating a new work situation with which it was difficult for Complainant to comply. Respondent terminated Complainant because of its predisposition and because of Complainant's constructive complaint of safety violations made on September 19, 1977.

3) Complainant is entitled to receive back pay damages for the time he missed work due to Respondent's unlawful discharge, less appropriate legal deductions and mitigating sums. Mitigating sums, in this case, include unemployment compensation.

Therefore damages will be measured by the total back pay accrued between September 1977 and March 1979, minus any appropriate legal deductions and wages earned or received as unemployment benefits during the above-cited time period.

| | |
|---|---|
| Total back pay for 80 weeks @ $308.68 / week | $24,214.40 |
| Less Earned Income | -1,338.23 |
| Less Unemployment Benefits | -2,912.00 |
| Total | $19,914.17 |

## CONCLUSIONS OF LAW

1) At all times material herein, Respondent was an employer subject to the provisions of ORS 659.010 to 659.110 and 654.062. At times material herein, Complainant was an employee as defined by ORS 654.005(5).



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

3) The actions, and motivations for the actions, of Mr. Ingram, Complainant's immediate supervisor and Respondent's employee, are properly imputed to Respondent.

4) Respondent committed an unlawful employment practice, as defined by ORS 654.062(5)(a), in that Respondent discriminated against Complainant by discharging him from employment because Complainant made actual and constructive complaints related to ORS 654.001 to 654.295.

5) The Commissioner of the Bureau of Labor and Industries has the authority to award money damages to the Complainant herein under the facts and circumstances of this record, and the sum of money awarded as damages in the Order below is an appropriate award.

## OPINION

The primary issue presented is whether Complainant's discharge from employment was substantially a retaliatory measure by Respondent for Complainant's complaints of safety violations. I have concluded that Respondent's motivation was substantially retaliatory, that its termination of Complainant constituted unlawful discrimination and that Complainant is entitled to damages as computed above.

Oregon law provides that no employee shall be discriminated against in retaliation for complaints about safety violations. ORS 654.062(5)(a). Discharge from employment is but one example of unlawful discrimination under this statute. There can be other forms, including discriminatory alteration of job duties, unusually close supervision, or predisposition to terminate upon reduced grounds. The evidence indicates that Respondent has discriminated against Complainant in each of the latter ways.

Respondent argued that Complainant was terminated for insubordination after refusing to return to the "glue loft," his work station. While Complainant did fail to return to the work station immediately, his failure cannot be viewed out of context. Complainant had a history of complaints about smoke and dust concentrations in the glue loft and was increasingly vociferous in these complaints after Respondent's system shift from two glue mix operators to one per two machines lengthened the duration of Complainant's exposure to smoke and dust at his work station. On September 8, 1977, Respondent documented its knowledge of Complainant's medical problem with smoke and dust by classifying Complainant's condition as an "injury or disease" on a State Accident Insurance Fund claim form. Complainant's ailment was described thereon as "hurts to breathe around smoke and dust."

Complainant's complaints were well founded, as is indicated by the undisputed evidence of Respondent's subsequent citation for smoke and dust safety violations by the Accident Prevention Division of the State of Oregon Workers' Compensation Department. Viewed in its totality, the

prevailing situation in Respondent's plant was one in which safety and health violations existed. Complainant was known to be particularly affected thereby and had complained thereof, yet was subjected to increased and prolonged exposure because of a change in plant operation policy.

Respondent's witness, Ronald Murphy, the General Manager of Conifer Plywood Co., explained that the shift from two glue mix operators to one was supposed to be an economy maneuver. Respondent also argued that the subsequent implementation of the "scheduled break" system was a response to Complainant's inability to efficiently operate both machines on his own under the prior system of self-scheduled breaks. Mr. Murphy testified that Respondent's motive in keeping the mixing machines running continuously was the elimination of inefficiency arising from Complainant's taking breaks during automatic phases of the mixing process. There is no evidence to support Respondent's conclusion that furnishing relief labor to tend a machine which, at the time in question, required no tending was a move calculated to increase efficiency.

Further militating against Respondent's position is the fact that Mr. Ingram, Complainant's immediate supervisor, expected that Complainant would be unable to satisfy the standards created by the scheduled break policy. Robert Wygle, another employee of Respondent, testified that Mr. Ingram told him on the day the new policy was put into effect, the same day Complainant was terminated, that he did not expect Complainant to last out the work shift. Mr. Ingram obviously did not expect the new break system to work efficiently. Instituting a policy which could reasonably be expected to cause an employee to be terminated or to quit is usually not efficient. Where an employer creates new systems which it knows cannot succeed in producing the stated result, the logical inference is that the move was designed to retaliate against the affected employee.

The evidence shows that Mr. Ingram was predisposed to terminate Complainant. When he encountered Complainant in the lunchroom away from his duty station, he was aware of Complainant's breathing difficulties. Complainant testified that he had complained to Mr. Ingram of his problems on several occasions, and that the contents of Dr. Peter Cary's letter suggesting limiting Complainant's exposure to smoke and dust had been revealed both to Mr. Ingram and to Frank Galusha, Mr. Ingram's superior. It is improbable that Mr. Ingram would choose to order Complainant back to his work station as he did unless a retaliatory motive existed. The evidence is that during the encounter in the lunchroom, Complainant made it known to Mr. Ingram that he was suffering from breathing the smoke in the glue loft and that his condition and the advice of his doctor dictated that he take at least a brief respite. Mr. Ingram's response was not to sympathize or to inspect the situation as one would ordinarily expect of a supervisor. Rather, it was to terminate Complainant on the pretext of insubordination. Respondent deliberately created a situation in which Complainant was expected to fall short of his assigned



duties or to refuse to perform them. This situation was created in retaliation for Complainant's complaints about safety violations. Termination for temporary failure to perform assigned duties under such circumstances is unlawful discrimination.

The purpose of the prohibition against discrimination in retaliation for safety complaints is to provide a means for employees to bring safety problems to the attention of the employer without fear of retribution. The employer is given the benefit of the employee's first-hand knowledge of conditions and an opportunity to correct defects. In the instant case, the record indicates that rather than acting upon Complainant's complaints to adequately remedy defects, Respondent adopted an attitude of disdain toward Complainant. The Complainant's safety complaints were amply justified by the defective conditions prevailing in Respondent's plant, the complaints were reasonably voiced by Complainant, and the complaints were the primary factor in Respondent's predisposition to terminate Complainant and Respondent's actual termination of Complainant.

Outright insubordination by an employee would ordinarily justify termination. But a failure by Complainant to immediately return to an area fraught with documented safety hazards does not constitute insubordination but, rather, should be characterized as a constructive complaint of safety violations. The law proscribing unsafe working conditions would be meaningless if employees were subject to termination for taking breaks from exposure to unsafe conditions. Indeed, the strongest complaint an employee can register is his or her temporary withdrawal from an unsafe area. In fact, Complainant had already exercised other reasonable means to protest the unsafe conditions and was left with little or no alternative means of protecting himself other than removing himself from the work station.

Respondent argued that because Complainant intended to return to the glue loft, his withdrawal from work was merely temporary and therefore not a constructive complaint of a safety violation. This argument is neither reasonable nor persuasive. According to such argument, an employer would be precluded from terminating an employee who flatly refused to enter the work area, while it would be permitted to terminate an employee whose withdrawal was merely temporary. The purpose of ORS 654.062 would be defeated by such a rule.

In *Pintok vs. Employment Division*, 32 Or App 273, 573 P2d 773 (1978), unemployment benefits were denied to an employee who had been terminated for refusal to return to work. The employee had asserted that his refusal was a constructive complaint of safety violations concerning ventilation and protection from smoke and fumes. In holding that the benefits were rightfully denied, the Court of Appeals noted that ventilation was adequate and that approved respirator devices were available to the employee. In the instant case, the situation was quite different. Ventilation of the glue loft was inadequate. Complainant, although provided with a respirator device at his insistence, was not instructed as to its storage, use, or maintenance.

Complainant testified that it worked poorly at best, clogged rapidly and was uncomfortable to use. Further, Respondent continued to provide unapproved surgical masks, despite the fact that these were inadequate. Unlike *Pintok,* the constructive complaint in the instant case was well founded.

The Agency has shown that following his termination by Respondent on September 19, 1977, Complainant did not secure comparable employment until March 25, 1979. Complainant can be awarded damages for wages he lost during this time unless Complainant failed to mitigate those damages. It is Respondents' burden to prove such a failure. *Hegler v. Board of Education,* 447 F2d 1078 (3rd Cir 1971); *Sparks v Griffith,* 460 F2d 433 (5th Cir 1972); *Kaplan v IATSE,* 525 F2d 1354 (9th Cir 1975); *Sanester v. United Airlines, Inc.,* 633 F2d 864 (9th Cir 1980). Respondent has not presented substantial evidence (or any evidence) that Complainant failed to mitigate these damages, i.e., that Complainant failed to use reasonable care and diligence in seeking employment and that jobs were available which, with reasonable diligence, Complainant could have discovered and for which Complainant was qualified. Because Respondent has not met its above-stated burden, Complainant is entitled to receive back pay between September 1977 and March 1979. Any amount he earned in temporary employment during this time must be deducted from his award.

**ORDER**

NOW, THEREFORE, as authorized by ORS 654.062(5)(b), 659.060(3) and 659.010(2) and in order to eliminate the effects of the unlawful practices found, as well as to protect the lawful interests of other similarly situated, Respondent is ordered to:

1) Deliver to the Hearings Unit of the Portland Office of the Bureau of Labor and Industries, within sixty (60) days of the execution of the Final Order in this matter, a certified check payable to the Bureau of Labor and Industries in trust for Edward W. Wiggins in the gross amount of $19,914.17 representing back pay damages resulting from Respondent's unlawful practices, less unemployment compensation received by Complainant and wages received by Complainant from temporary employment.

2) Ensure that workers who complain about safety hazards in the future shall not have their right to work in any way prejudiced by such complainants.

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**In the Matter of**

**ARDEN-MAYFAIR, INC.,**

**a Delaware corporation, and Joint Labor Management Retail Clerks Local 201 Health, Welfare and Dental Trust, Respondents.**

Case Number 16-80

Final Order of the Commissioner

Mary Wendy Roberts

Issued December 23, 1981.

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**SYNOPSIS**

Complainant was denied coverage for pregnancy disability under an insurance policy administered by Respondent trust and paid for by Respondent employer in accordance with a collective bargaining agreement. The Commissioner ruled that such a denial was an unlawful employment practice based on sex. Finding that an arbitration provision of the policy need not be exhausted when unlawful discrimination was involved, the Commissioner awarded Complainant the maximum disability benefit under the policy, plus a three months premium Complainant paid while she was off work, for a total of $2,622.60, and ordered Respondents to cease discriminating against workers based on sex, pregnancy and childbirth. ORS 659.010(2) and (11); 659.020(1); 659.029; 659.030(1)(a) and (e), 659.060(3).

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The above-entitled matter came on regularly for hearing before Jon Wu, designated as Presiding Officer by Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries. The hearing was held in the Gallery Room at the Eugene Public Library, 100 West 13th Avenue, Eugene, Oregon, on April 17, 1980.

The Bureau of Labor and Industries was represented by Michael J. Tedesco, Assistant Attorney General. Respondent Arden-Mayfair, Inc. was represented by its Regional Manager, Gary Cook. Respondent Joint Labor Management Retail Clerks Local 201 Health, Welfare and Dental Trust was represented through written argument subsequent to the hearing by Morton H. Zalutsky, Attorney at Law. Complainant Bonnie Mager was present and testified.

Having considered the entire record in this matter, I, Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries of the State of Oregon, hereby make the following Findings of Fact, Ultimate Findings of Fact, Conclusions of Law, Opinion, and Order.

**FINDINGS OF FACT – PROCEDURAL**

1) At all times material herein Respondent Arden-Mayfair, Inc., hereinafter called Respondent Mayfair, was and is an employer subject to the provisions of ORS 659.010 to 659.110.

2) At all times material herein, Respondent Joint Labor Management Retail Clerks Local 201 Health, Welfare and Dental Trust, hereinafter called Trust, was and is an entity which may be subject to the provisions of ORS 659.010 and 659.110.

3) On December 1, 1978, Bonnie Mager filed a verified complaint with the Civil Rights Division of the Bureau of Labor and Industries alleging that she had been and continued to be

discriminated against because of her sex by Respondent Mayfair.

4) Following the filing of the aforementioned verified complaint, the Civil Rights Division investigated the allegations in the complaint and determined that substantial evidence existed to support these allegations.

5) Upon the conclusion of the investigation, it appeared to the Commissioner of the Bureau of Labor and Industries that an additional person should be named as a respondent in the complaint and Respondent Trust was added thereto.

6) Upon the conclusion of the investigation, the Civil Rights Division attempted to reach an informal resolution of the complaint through conference, conciliation, and persuasion, but was unsuccessful in these efforts.

**FINDINGS OF FACTS – THE MERITS**

1) At all times material herein, Respondent Mayfair was a Delaware corporation doing business in Oregon consisting of retailing groceries and consumer goods.

2) At all times material herein, Respondent Trust was a legal entity established by agreement between Respondent Mayfair and other employers and the union for the employees, and was administered by an equal number of employer and union representatives for the purpose of providing payment of premiums of insurance policies for disability and for medical and dental benefits for employees.

3) On October 17, 1976, Complainant Bonnie Mager was hired by Respondent Mayfair as a retail clerk and thereupon became eligible for insurance coverage paid for by Respondent Trust.

4) Complainant became pregnant in late 1977. The Complainant then requested a 26 week leave of absence on April 7, 1978, pursuant to the advice of her doctor. Complainant also requested disability benefits because of her pregnancy.

5) On April 14, 1978, Respondent Mayfair granted Complainant's request for a leave of absence to be effective from April 16, 1978, to October 15, 1978.

6) The insurance policy paid for by Respondent Trust excludes payments of weekly income benefits for disability due to pregnancy. Weekly benefits for disability are two-thirds of a beneficiary's basic weekly earnings for a maximum of 26 weeks.

7) On May 3, 1978, Complainant's claim for weekly income benefits was denied by the insurance company involved on the ground that such benefits were not payable under the policy for disability due to pregnancy.

8) The insurance premiums are paid two months in advance. Complainant's premium was paid up to and including June 1978 at the time she began her leave of absence.

9) Complainant's baby was due in mid-July. Thus to avoid interruption of the medical coverage, complainant paid for the coverage herself for July, August, and September.

10) The monthly cost for the medical coverage was $59.10, and Complainant paid a total of $177.30. These payments would have been waived had Complainant been allowed the disability benefits. Also, these payments would not have been included in Complainant's taxable income and therefore not subject to legal deductions, such as SAIF.

11) Complainant's average weekly earnings in the six week period prior to her leave of absence were $141.07.

12) No substantial evidence was presented that persons similarly situated to Complainant had experienced sex discrimination by Respondent

**ULTIMATE FINDINGS OF FACT**

1) On April 7, 1978, Complainant requested a leave of absence because of disability due to pregnancy. She also requested disability benefits.

2) Respondent Mayfair granted the leave of absence, and left up to Respondent Trust the issue of disability benefits.

3) Disability benefits were denied to Complainant on the ground that the disability was due to pregnancy and therefore not covered.

4) As a direct result of the denial of disability benefits, Complainant lost the following amounts:

- Average Weekly Income was $141.07; maximum benefits equaled $141.07 times 2/3, or $94.05; total maximum benefits equals $94.05 times 26 weeks, or $2445.30.
- Medical insurance premiums paid by Complainant was $177.30.

Total due Complainant equals $2445.30 plus $177.30, or $2622.60.

**CONCLUSIONS OF LAW**

1) Respondent Trust is not an employer under ORS 659.101 to 659.110, but did aid, abet, incite, compel or coerce the doing of an act forbidden under ORS 659.010 to 659.110.

2) Respondent Mayfair is an employer under ORS 659.010 to 659.110 and did aid or abet the doing of an act forbidden under those statutes.

3) The failure of both Respondents to ensure employment-related treatment that was the same as other persons not so affected but similar in their ability or inability to work by reason of physical condition to Complainant, a woman affected by pregnancy, constitutes discrimination on the basis of sex, which violates ORS 659.029 and 659.030(1).

4) The discrimination on the basis of sex by Respondent Mayfair was not the result of a bona fide occupational requirement reasonably necessary to the normal operation of its business.

5) The Commissioner of the Bureau of Labor and Industries has the authority to award money damages to the Complainant herein under the facts and circumstances of this record, and the sum of money awarded as damages in the Order below is an appropriate sum.

**OPINION**

Neither Respondent disputes that Complainant was discriminated against on the basis of sex, or that Complainant suffered damages awarded herein. Each Respondent, however, contends that it is not liable for the damages.

Respondent Mayfair urges that its hands were bound, and that discrimination resulted from a bona fide occupational requirement. Their theory is that under the collective bargaining agreement, Respondent Mayfair

lacked control over Respondent Trust through no fault of Respondent Mayfair.

The facts do not support the position of Respondent Mayfair. The collective bargaining agreement does require the employer to make payments to the Trust for medical, dental and disability benefits, and prescribes certain minimum rates of pay, but it also expressly permits the payment of additional wages and benefits. Nor does the Trust Agreement, which the employer was required to enter by the terms of the collective bargaining agreement, preclude the employer from providing benefits in addition to those provided through the Trust.

Respondent Mayfair also contends that the National Labor Relations Act (NLRA) and the Taft-Hartly Act prohibit its paying benefits to Complainant. The NLRA prohibits an employer from paying or withholding benefits as an inducement to employees to refrain from organizing or joining a labor union. NLRA § 8(a)(1). The Taft-Hartly Act similarly proscribes the providing by an employer of any thing of value to any employee for the purpose of influencing the rights of employees to organize and bargain collectively. Labor Management Relations Act, 1947, § 302(a)(3).

Neither the NLRA nor the Taft-Hartly Act are applicable to this case. Oregon law requires that an employer not discriminate on the basis of sex in the compensation or in the terms, conditions, or privileges of employment. ORS 659.030(1)(e) further forbids any person from aiding or abetting in such discrimination. Accordingly, to comply with Oregon law, Respondent Mayfair is required to supplement the benefits provided by Respondent Trust in order not to discriminate or aid in the discrimination against Complainant on the basis of her sex.

Respondent Trust urges that it is not liable to Complainant for the damages she suffered. Its primary argument is that ORS 659.030(1)(a) prohibits an employer from discriminating in the privileges of employment, and that the Trust is not an employer as defined in ORS 659.010(6). This contention is correct. However, ORS 659.030(1)(e) provides that it is an unlawful employment practice:

> "For any person, whether an employer or an employee, to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under ORS 659.010 to 659.110."

It can be argued that the phrase, "whether an employer or an employee," excludes the application of statute to Respondent Trust. However, in view of the general policy against discrimination in ORS 659.020(1), and since ORS 659.010(11) defines "person" to include trustees, the better construction of the phrase is that it is exemplary rather than limiting. Thus, in paying premiums on a discriminatory policy, Respondent Trust did aid Respondent Mayfair in the discrimination against Complainant.

Respondent Trust also argues that it cannot be held liable because Complainant did not follow the Trust's claims procedure. Under that procedure, a dissatisfied employee is required to request a hearing before the Board of Trustees. If the employee is dissatisfied with the decision of the Board, she may request arbitration. Complainant asserts she was not informed of her right to request a hearing before the Board of Trustees.



There is arguably some support for Respondent Trust's position. In *Republic Street Corporation v. Maddox*, 369 US 650, 85 SCt 614 (1965), the U.S. Supreme Court held that:

> "As a general rule in cases to which federal law applies, federal labor policy requires that individual employees wishing to assert contract grievances must attempt use of the contract grievance procedure agreed upon by employer and union as a mode of redress * * *." 379 US at 652.

However, cases brought under the provisions of ORS chapter 659 involving enforcement of civil rights, and not involving disputes as to overtime and severance pay are not subject to the *Maddox* rule. Instead, regardless of whether Complainant was informed of her right to request a hearing, the rule set forth in *Alexander v. Gardner-Denver Co.*, 415 US 36, 94 SCt 1011 (1974) relating to Title VII, the federal counterpart of ORS chapter 659 applies. Where civil rights are concerned, an aggrieved person may seek redress without regard to exhaustion of contract grievances procedures:

> "We think, therefore, that the federal policy favoring arbitration of labor disputes and the federal policy against discriminatory employment practices can best be accommodated by permitting an employee to pursue fully both his remedy under the grievance arbitration clause of a collective bargaining agreement and his cause of action under Title VII." 415 US at 59.

The final issue to be resolved is Complainant's prayer that

> "the Commissioner of the Bureau of Labor and Industries require the Respondent to take steps to ascertain the number and to identify persons similarly situated . . . Further, that the Commissioner of the Bureau of Labor and Industries notify all similarly situated persons of their right to seek any benefits which may have been denied them because of unlawful discrimination."

Complainant testified that the personnel manager for Respondent Mayfair said "he had never heard of such a thing (persons similarly situated)." Complainant did not identify any other individuals similarly situated nor was evidence brought forward to establish a class.

## ORDER

NOW, THEREFORE, as authorized by ORS 659.060(3) and in order to eliminate the effects of the unlawful practices found, as well as to protect the lawful interests of others who may be similarly situated, the Respondents are hereby ordered to:

1) Deliver to the Hearings Unit of the Portland office of the Bureau of Labor and Industries, within Sixty (60) days of the execution of the Final Order in this matter, a certified check payable to the Bureau of Labor and Industries in trust for Bonnie Mager in the amount of Two Thousand Six Hundred Twenty-Two Dollars and Sixty Cents, ($2,622.60). Two Thousand Four Hundred Forty-Five Dollars and

Thirty Cents represents loss of disability benefits. One Hundred Seventy Seven Dollars and Thirty Cents represents reimbursement for self-paid insurance premiums.

2) Cease and desist from discriminating against workers based on sex and specifically, due to pregnancy or childbirth.

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**In the Matter of**
**WEST COAST TRUCK LINES, INC.**
**an Oregon corporation,**
**Respondent.**

Case numbers 48-78 and 55-78
Final Order of the Commissioner
Mary Wendy Roberts
Issued December 29, 1981.

## SYNOPSIS

Two female Complainants performed jobs requiring the same skill, effort, and responsibility as higher compensated males, and Respondent employer accorded female employees lesser job titles, compensation, and benefits than males because of their sex. The Commissioner found that Complainants were victims of Respondent's unlawful employment practice. When one Complainant quit after she protested the unequal pay, and Respondent refused to bring her up to parity and continued the unequal compensation based on sex, the Commissioner ruled that Respondent created an intolerable working condition, and that Complainant's resignation was a constructive discharge. The Commissioner awarded that Complainant $19,852 in lost wages and insurance coverage. Because Respondent discharged the second Complainant in retaliation for her opposition to the unequal compensation, the Commissioner awarded the Complainant $20,079 in lost wages and $3,000 for mental anguish. The Commissioner ordered Respondent to make the Final Order part of each Complainant's personnel file, and to cease discriminating against its employees on the basis of sex. ORS 652.220; 659.010(2) and (6); former 659.030(1) and (4); 659.060(3).

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The above-entitled matter came on regularly for hearing before John Wu, designated as Presiding Officer by the Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was commenced on October 26, 1979, in the Lecture Room of the Eugene Public Library, 100 West 13th Avenue, Eugene, Oregon, and concluded on November 2, 1979, in the same location.

The Bureau of Labor and Industries was represented by Rudolph S. Westerband, Assistant Attorney General. Respondent West Coast Truck Lines, Inc. was represented by Phil Cass, Attorney at Law. Complainants Mary Margaret McGuire and Judith Cazimero were present and testified.

Having considered the entire record in this matter, I, Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries, hereby make the following Findings of Fact, Ultimate Findings of Fact, Conclusions of Law, Opinion, and Order.



## FINDINGS OF FACT – PROCEDURAL

1) On or about January 16, 1976, Mary Margaret McGuire filed a verified complaint with the Civil Rights Division of the Bureau of Labor and Industries alleging that Respondent had discriminated and continued to discriminate against her in connection with her employment by Respondent because of her sex.

2) On January 19, 1976, Judith Cazimero filed a verified complaint with the Civil Rights Division of the Bureau of Labor and Industries alleging that Respondent had discriminated and continued to discriminate against her in connection with her employment by Respondent because of her sex.

3) Following the filing of the aforementioned verified complaints, the Civil Rights Division investigated the allegations in the complaints and determined that substantial evidence existed to support these allegations.

4) Thereafter, the Civil Rights Division attempted to reach an informal resolution of the complaints through conference, conciliation, and persuasion but was unsuccessful in these efforts.

## FINDINGS OF FACT – THE MERITS

1) At all times material herein, Respondent was an Oregon corporation engaged in the business of interstate trucking. In this business, Respondent utilized the personal service of one or more employees in the State of Oregon and reserved the right to control the means by which such service was performed.

2) On May 13, 1974, Respondent hired Complainant Cazimero, a female, as a statistics clerk, on a permanent basis, to perform clerical duties related to the maintenance of business records in Respondent's Eugene, Oregon, office. Complainant Cazimero's starting salary was $400 per month.

3) In June 1974, Complainant Cazimero completed a two year course of study in accounting at Lane County Community College and was awarded an Associate of Science degree. On the basis of Complainant Cazimero's academic record, she was selected Wall Street Journal Business Student of the Year. Because of complainant Cazimero's high academic standing, Jim Evans, one of her professors, had referred Complainant Cazimero to Respondent.

4) By November 1, 1974, Complainant Cazimero's work had expanded to include both clerical and accounting duties. On November 1, 1974, Respondent changed Complainant Cazimero's job title to Project Clerk, a clerical designation. Her pay was raised to $475 per month. This raise was not intended to compensate Complainant Cazimero for the denial of insurance benefits described in Finding of Fact 25 below. Complainant Cazimero's job title was changed subsequently to Accounting Aide, a clerical designation, and her salary was increased to $525 per month beginning June 1, 1975. Her job duties remained substantively the same or increased between November 1, 1974, and January 23, 1976, the date of her resignation.

5) The clerical duties Complainant Cazimero performed between November 1, 1974, and January 23, 1976, included:

a) Preparation of Respondent's ledger and general journal. This required Complainant Cazimero to review the ledger at the end of each month with either Stan Dornath, Respondent's Senior Accountant, or William Koerner, Respondent's Comptroller. Complainant Cazimero and either Mr. Dornath or Mr. Koerner researched account balance abnormalities and made adjustments as required. Complainant Cazimero and either Mr. Dornath or Mr. Koerner made monthly entries to the expense paid portion of prepaid accounts and/or to the equipment obligation accounts. Complainant Cazimero and either Mr. Dornath or Mr. Koerner balanced the general ledger and made year-end closing and adjusting entries.

b) Complainant Cazimero prepared the daily, monthly, and year-to-date cash activity reports and the daily accounts receivable and daily accounts payable activity reports by herself.

c) Complainant Cazimero performed back-up work for the accounts payable and accounts receivable department including, among other things:

(1) posting accounts payable and receivable to a subsidiary ledger;

(2) coding accounts payable to general ledger accounts;

(3) recording entries manually and for a computer to the accounts payable and receivable ledger, cash receipt journals and disbursement ledger;

(4) writing checks to pay bills;

(5) balancing accounts payable and receivable and disbursements ledgers;

(6) making phone calls to verify invoices; and,

(7) reconciling accounts receivable balances in a subsidiary ledger before entering them on the computer system.

6) The duties Complainant Cazimero performed between November, 1974, and January 23, 1976, which required some degree of accounting skill and judgment included:

a) Preparation of the asset register. This required Complainant Cazimero to make up a sheet on each new asset, determine its life and salvage value, and compute depreciation over the life of the asset. Complainant Cazimero performed this duty by herself.

b) Preparation of depreciation schedules. This required Complainant Cazimero to compute asset depreciation by the bank method, by account number, on a monthly basis for use in monthly journal entries and year-end work. Complainant Cazimero also computed asset depreciation by the tax method for tax purposes. Complainant Cazimero performed this duty by herself.

c) Preparation of the monthly operating statement with Mr. Dornath. This required Complainant Cazimero to post figures from the ledger to the statement, to compute monthly and year-to-date accounts, to compute per mile and percentage figures, to make and distribute copies, and to determine and make footnotes on unusual activity.

d) Preparation of investment credits. This required Complainant Cazimero to compute and determine investment credit on newly acquired assets and to compute investment credit carry-over and carry-back for tax purposes. Complainant Cazimero performed this duty by herself.

e) Preparation of the schedule of gains and losses. This required Complainant Cazimero to determine gain or loss on disposed of assets and to prepare the schedule to support this information for tax purposes. Complainant Cazimero performed this duty by herself.

f) Preparation of the schedule of bad debts. This required Complainant Cazimero to prepare a schedule of accounts to be written off at year-end to support journal entries. Complainant Cazimero performed this duty by herself.

7) Additional duties Complainant Cazimero performed between November 1, 1974, and. January 23, 1976, included:

a) Preparation of monthly computations for determining inventory of fuel, tire parts, etc., and assisting in preparing the shop inventory of parts and tires on one occasion.

b) Reconciliation of bank statements with the general ledger, including organizing checks and determining outstanding checks, deposits or other items in transit. Mr. Dornath independently performed this same duty.

c) Ordering and distributing credit cards for use by Respondent's truck drivers for fuel, oil, etc.

d) Computing workers' compensation, state and federal unemployment and other deductions for use in journal entries, payroll, and tax reports.

e) Reviewing schedules and tax statements from prior years to determine the appropriate tax rate and preparing a schedule for accrual entries to the general journal.

f) Making phone calls on past due accounts before Respondent hired a Collections Manager.

g) Familiarizing herself with pertinent new tax information and updating Respondent's tax guides and other tax information at Mr. Koerner's request.

h) Miscellaneous duties including research; filing; making copies; mailing; typing; preparing point graphs; break even analysis graphs, and cost reports; reconciling Union oil statements. These duties took about 10 percent of Complainant Cazimero's time.

8) Between November 1, 1974, and January 23, 1976, Complainant Cazimero was capable of and did perform some of Mr. Dornath's duties if he was absent including:

a) Writing checks for real property leases and contract purchases.

b) Helping set up a schedule to determine the current portion, the long-term portion, and the interest portion for use in monthly journal entries and for Interstate Commerce Commission (hereinafter ICC) use.

9) Between November 1, 1974, and January 23, 1976, Complainant Cazimero assisted others in the following additional duties:

a) Posting and balancing the payroll journal and reports, and writing checks for the payroll department.

b) Performing clerical and non-clerical functions and procedures for the billing department as a back-up during the absence of Earl Alvestad, Respondent's Traffic Manager (*See* Finding of Fact 48 below).

c) Working with Mr. Dornath on chip billing; that is, matching bills of lading and weight slips and entering them on computer print-outs when necessary.

d) Working with Mr. Dornath on Federal Highway Use Tax Reports, including truck classification as to type and weight capacity, and setting up entries for distributing cost over the appropriate period of time,

e) Working with Mr. Dornath on setting up schedules of prepaid taxes and licenses for use in journal entries, to spread the prepaid accounts over the period of time covered by each item.

f) Working with Mr. Dornath, Mr. Koerner, and Clifford Hinds on the various reports and schedules required for the 1975 ICC report. Complainant Cazimero worked on completion of pages 19, 20, 21, 24, 25, 35, 36, 37, 37A, 41, 64, 72, 73, and 81 of the 1975 ICC report and typed both the 1974 and 1975 ICC reports.

g) Working with Mr. Dornath and Mr. Koerner to amend the 1975 ICC report. This was necessitated by a $35,000 mathematical error made by Mr. Hinds in the original report, which Complainant Cazimero had discovered.

h) Complainant Cazimero's work noted in sections c, d, e, f, and g above was independent and in conjunction with Mr. Dornath, rather than under his immediate supervision and direction.

10) The work Complainant Cazimero performed preparing the asset register, the schedule of gains and losses, the investment credits, and the bad debts and depreciation schedules had been performed by a firm of certified public accountants on contract with Respondent before Complainant Cazimero assumed these duties.

11) Respondent was subject to monetary penalty if some of the documents which Complainant Cazimero prepared were submitted late.

12) Complainant Cazimero had no prior supervisory duties and no prior work experience related to her work for Respondent.

13) Complainant Cazimero required minimal supervision in the performance of her duties for Respondent, especially after November 1, 1974.

14) Expert testimony indicated, and I find, that Complainant Cazimero's work generally, and specifically the preparation of the ICC report (in this case prepared by Complainant Cazimero and Messrs.. Dornath, Koerner, and Hinds), would be properly characterized as non-clerical, junior staff accountant work.

15) On December 22, 1974, Respondent hired Clifford Hinds, a male, on a temporary basis to perform duties related to Respondent's year-end work. Mr. Hinds was given the title of Accounting Intern, a non-clerical title.



16) At the time Respondent hired him, Mr. Hinds was in the third quarter of his last year of a four year course of study leading to a Bachelor of Arts (B.A..) degree in accounting. Mr. Hinds was referred to Respondent by one of his professors because of his good grades.

17) Mr. Hinds' salary throughout his employment by Respondent was $600 per month. This was lower than the amount indicated in the personnel manual for his classification. His salary was based upon his temporary and student status and was recommended to Respondent by the professor who referred him to Respondent. He was also paid time-and-one-half for overtime.

18) Mr. Hinds' duties were mixed, in that some were clerical in nature while others required accounting skill and judgment. Essentially, Mr. Hinds was primarily responsible for:

a) Preparation of the ICC report with Mr. Dornath, Mr. Koerner, and Complainant Cazimero. Respondent was subject to a $250 per day penalty if this report was submitted late.

b) Preparation of a Public Utilities Commission report, including the devising of a sampling method to compensate for incomplete data.

c) Preparation of property tax returns for property held by Respondent.

d) Providing assistance in the preparation of tax accrual forms and financial statements of income for tax deferrals.

e) Preparation of state apportionment formulas for use by accountants.

18) Complainant Cazimero trained Mr. Hinds in the use of Respondent's monthly operating statement and other procedures.

19) Mr. Hinds had no supervisory duties, and his prior job-related work experience consisted of bookkeeping for an automobile dealership owned by his family.

20) Mr. Hinds required minimal supervision while he worked for Respondent.

21) While Mr. Hinds had more formal education than Complainant Cazimero, he was still a student while he worked for Respondent. The work Mr. Hinds performed, therefore, did not specifically require a B.A. degree. With the exception of preparation of tax returns and accruals, most of the work Mr. Hinds performed was not particularly difficult, technical, or sophisticated.

22) Expert testimony indicated, and I find, that Mr. Hinds' work as a whole would be properly characterized as non-clerical, junior staff accountant work.

23) Mr. Hinds left Respondent's employ on March 21, 1975.

24) Complainant Cazimero and Mr. Hinds worked in the same office setting and experienced similar working conditions.

25) At the time Complainant Cazimero was hired, she was divorced and solely responsible for two dependents. Since Complainant Cazimero was unmarried, Respondent provided health insurance for her and her dependents. However, when Complainant Cazimero remarried in August 1974, Respondent canceled her dependents' health insurance. At the direction of Respondent's President, Ed Barton, married female employees

including Complainant Cazimero were denied spousal and dependent insurance coverage. If the female employee, upon petition, could demonstrate to Mr. Barton's satisfaction that she was solely responsible for the support of her family, she would be given dependent insurance coverage. Mr. Barton exercised unfettered discretion in granting or denying insurance coverage to families of married female employees. According to its terms, the policy provided health insurance coverage for regular full-time employees and their spouses and dependents free of charge, without qualification. Married, female employees were required by Mr. Barton to inaccurately complete the insurance application form to show no spouse or dependents so coverage to them would not be issued. All male employees were provided with free insurance for their spouses and/or dependents without petition or action by Mr. Barton.

26) Between August 1974 and December 15, 1978, Complainant Cazimero purchased alternate insurance coverage costing $1,677.35 in premiums. In addition, Complainant Cazimero incurred medical expenses in the amount of $2,805.73. These expenses were not covered by Complainant Cazimero's alternate insurance, but would have been paid under Respondents insurance plan but for Respondent's denial of spousal and dependent coverage to Complainant Cazimero. Complainant Cazimero's total alternate insurance and medical costs were $4,483.08 between August 1974 and December 15, 1978.

27) Prior to July 1975, Respondent maintained no written guidelines or criteria for setting initial salaries or for determining the minimum requirements for appointment to and successful performance of jobs.

In July 1975, Respondent made effective a personnel manual composed by Mr. Koerner. The manual created job titles and classifications, salary ranges for each job title and minimum requirements for appointment to, and successful performance of, each job title, as determined by Mr. Koerner. The manual did not provide job descriptions setting forth duties or responsibilities. In fact, duties of the various job titles at Respondent's Eugene, Oregon, office were flexible, based on Respondent's needs and management discretion. For this reason, persons having one title often performed the work normally included in another job title. Because the manual was not strictly followed in assigning job titles or rates of pay, actual titles and rates of pay did not always correspond to those set by the manual.

At least one of Respondent's employees, Complainant McGuire, was unaware of the existence of the manual, and Complainant Cazimero had no knowledge of its contents.

28) Respondent had no employees titled Junior Staff Accountant during times material. However, Respondent's personnel manual, the only written source of such information, states, and I find, that Respondent would have paid its Junior Staff Accountants $800 per month as starting salary and classified them as non-clerical, supervisory personnel.

29) On or about September 1, 1974, Mr. Koerner had promised Complainant Cazimero that within one year her salary would be increased to at least $700 per month and her job title would be changed to Cost Accountant, a job title which predated Respondent's personnel manual and, in September 1974, was a non-clerical position.

In the fall of 1975, Complainant Cazimero's salary was still only $525 per month. In spite of his promise to Complainant Cazimero, Mr. Koerner intended to keep her at clerical pay and job title.

30) Because of her authorized access to payroll records, Complainant Cazimero knew that Respondent's male office employees were paid much more than its female office employees. (See Finding of Fact 69 below) She was also aware that her salary was $75 per month less than Mr. Hinds' had been.

31) In connection with Respondent's year-end work, Complainant Cazimero was required to work 226 1/2 hours overtime between October 1, 1975, and January 23, 1976, for which she was paid time-and-one-half. Complainant Cazimero worked 56 1/2 of these overtime hours between January 1, 1976, and January 15, 1976.

Because Respondent failed to change Complainant Cazimero's job title to Cost Accountant and pay her accordingly as promised, because a male employee had earned more than Complainant Cazimero for substantially equal work, because Respondent's male employees were paid much more than its female employees, and because Complainant Cazimero had been denied insurance benefits based on her sex, she reasonably concluded that her sex had limited her compensation and opportunities with Respondent in the past and would continue to limit her compensation and opportunities with Respondent in the future. Due to this realization and to the fact that the unusual amount of overtime Complainant Cazimero was required to work at year-end had begun to affect her family life, Complainant Cazimero sought out Mr. Koerner in January 1976 to discuss these problems. Mr. Koerner refused Complainant Cazimero's request that her salary be increased commensurate to her duties and responsibilities. Complainant Cazimero then brought her dissatisfactions to the attention of Respondent's President Barton, who also refused to increase her salary. As a result of all these circumstances, Complainant Cazimero's working conditions became intolerable to her.

32) Because her working conditions had become intolerable to her, Complainant Cazimero resigned on January 23, 1976.

33) For several reasons, Complainant Cazimero's testimony and documentary evidence regarding her job duties are more credible than the characterizations of her job duties provided by Mr. Hinds and Mr. Koerner. Complainant Cazimero was the person most familiar with the actual duties of her job and the skills, efforts, and responsibilities required to perform those duties. Her description of her job duties was supported by the expert testimony of Mr. Evans. Mr. Hinds' testimony is of questionable credibility, since he characterized Complainant's duties as menial and clerical while inflating his concept of his own importance to Respondent. (For instance,

he assumed the job title of Deputy Comptroller while his official job title was Accounting Intern.) Mr. Koerner's testimony on the lack of substantial equality in the job duties of Complainant Cazimero and Mr. Hinds is of questionable credibility. Mr. Koerner indicated that Complainant Cazimero's job was strictly clerical while the facts show this was not the case. Mr. Koerner also indicated that Mr. Hinds supervised Complainant Cazimero on the ICC report, which is not accurate: Complainant Cazimero went to Mr. Dornath or Mr. Koerner with her questions, not to Mr. Hinds. Finally, Mr. Koerner's testimony is of questionable credibility since it attempted to justify, by denial, his deception of Complainant Cazimero about her future prospects with Respondent.

For the above reasons, considerable weight was given not only to the expert testimony of Mr. Evans, but also to Complainant Cazimero's testimony and documentary evidence concerning her actual work, rather than to the testimony on that subject provided by Mr. Hinds and Mr. Koerner.

34) If Complainant Cazimero had been paid $800 per month from November 1, 1974, to December 31, 1975, she would have earned $11,200. In fact, she earned $8,133.68 during that time, for a difference of $3,066.32.

35) After her resignation on January 23, 1976, Complainant Cazimero exercised reasonable diligence to find alternative employment. She held various jobs until December 15, 1978, when she became unavailable for work by virtue of pregnancy related disabilities. At no time after her resignation until December 15, 1978, did Complainant Cazimero earn as much from her employment as she would have earned in the employ of Respondent at her last rate of pay or at $800 per month. From January 1, 1976, to December 15, 1978, Complainant actually earned, including unemployment benefits, a total of $16,097.13. At the rate of $800 per month, she would have earned during this period a total of $28,400, for a difference of $12,302.87.

36) At all times material herein, Respondent was a member of two tariff bureaus, one in Portland, Oregon, and the other in Salt Lake City, Utah. A tariff bureau is comprised of several trucking companies which convene at docket meetings to formulate policies on rates and other matters pertinent to their operation. These policies are then submitted to the ICC for review and, where necessary, approval.

37) As used herein, a tariff catalog is a voluminous price catalog used by Respondent to determine the rates it charges its customers for having various commodities shipped.

38) For purposes of this Order "management (position)" means an executive job classification and salary level, which is exempt from the overtime requirements of the Fair Labor Standards Act, Section 13 (a)(1); 29 USC 206, 207, and 213(a); and 29 EFR 541.201.

39) On November 1,1972, Respondent hired Complainant McGuire, a female, to work as a billing clerk in Respondent's Eugene, Oregon, office. Complainant McGuire's duties were clerical in nature. Her initial rate of pay was $400 per month.



40) In March 1973, Respondent transferred Complainant McGuire to Respondent's Traffic Department to work as Earl Alvestad's assistant. Mr. Alvestad's job title was Traffic Manager. Complainant McGuire's new job title was Rate Clerk, a clerical designation.

41) As Rate Clerk, Complainant McGuire performed rating functions which include:

a) Quoting prices of leads to Respondent's customers;

b) Quoting prices to Respondents branch offices in Oregon and elsewhere, because only Respondent's Eugene office had access to interstate tariff information and the expertise necessary to use the tariff catalog;

c) Providing information for computer runs;

d) Maintaining a chart of delinquent accounts; and,

e) Auditing and adjusting rating errors.

42) By June 1, 1974, Complainant McGuire had mastered her job duties and routinely performed all rating functions with minimal supervision by Mr. Alvestad. By this time Complainant McGuire also had assumed some of Mr. Alvestad's supervisory duties, such as training and supervision of clerical employees.

43) On June 1, 1974, Complainant McGuire's job title was changed to Chief Rate Clerk, a clerical designation, and her pay was increased to $500 per month.

44) After June 1, 1974, Complainant McGuire and Mr. Alvestad were Respondent's only employees with responsibility for making rate quotations derived from the tariff catalog. For that reason, Respondent would not permit both Complainant McGuire and Mr. Alvestad to be away from the office at the same time for any reason.

45) On September 1, 1974, Complainant McGuire's pay was increased to $600 per month. She continued to be classified as clerical.

46) By the summer of 1975, Mr. Alvestad realized Complainant McGuire's usefulness to Respondent and wanted to encourage and reward her by creating a job title suitable to the duties she performed. It was also Mr. Alvestad's intention to train Complainant McGuire to attend docket meetings as Respondent's official representative, so that by November 1, 1975, Complainant McGuire would be fully trained to substitute for Mr. Alvestad in his job duties. The type of job title Mr. Alvestad had in mind for Complainant McGuire normally would have been classified as management by Respondent.

47) In June 1975, Mr. Alvestad advised Complainant McGuire of his plan to provide her with additional training and to reclassify her job as management by November 1, 1975. He told her that due to his ill health, he needed someone to attend out-of-town docket meetings, and it was his intention that Complainant McGuire's new responsibilities would include regular attendance at docket meetings in Salt Lake City, Utah. Mr. Alvestad also informed Complainant McGuire she would attend docket meetings in Portland, Oregon.

48) During the first week of August 1975, Mr. Alvestad suffered a severe heart attack and was unable to return

to work until October 1, 1975. Between October 1, 1975, and October 15, 1975, Mr. Alvestad worked part-time, but due to medical complications he was absent from work again between October 15,1975, and November 1, 1975.

49) Before Mr. Alvestad's incapacitation, Complainant McGuire shared responsibility for rating work with him. After Mr. Alvestad's heart attack and in his absences Complainant McGuire assumed full responsibility for rating work. She even handled customers normally regarded as special and therefore previously handled only by Mr. Alvestad.

50) In addition to the increased responsibility Complainant McGuire assumed because of Mr. Alvestad's absence, she also handled the heightened demands of Respondent's peak period between July and November. This period, referred to by Respondent in 1975 as the "crunch" because it coincided with Mr. Alvestad's illness, involved an increased number of requests for rate quotations and an increase in duties attendant thereto.

51) In or about August 1975, Respondent's President Ed Barton, Dean Barton (Ed Barton's son and Respondent's vice-president), and Rick Kelly, Respondent's Commerce Director, met to determine who would attend docket meetings as Respondent's representative on a temporary basis during Mr. Alvestad's ill health and absences. Mr. Kelly was asked to assume this duty. Mr. Kelly declined because of the extent of his responsibilities as Commerce Director. However, he recommended that Complainant McGuire be authorized to attend docket meetings, since, given Complainant McGuire's rating experience and familiarity with tariffs, she was, in his opinion, the best qualified person in Respondent's employ other than Mr. Alvestad. Mr. Barton refused to authorize Complainant McGuire's attendance for two reasons, each stereotypically relating to her sex: Complainant McGuire would be required to drive from the docket meetings alone at night, which would be inappropriate for a lady; and the foul language normally spoken by the men at docket meetings would be offensive to a lady. Mr. Barton did not mention any legitimate non-discriminatory reason for not authorizing Complainant McGuire to attend docket meetings.

52) Women often attended docket meetings.

53) Mr. Koerner observed Complainant McGuire's work performance particularly during Mr. Alvestad's absence and the "crunch" it created, and, in August 1975, advised Complainant McGuire of his intention to reward her for her work. Complainant McGuire was due for a regular yearly pay increase of $100 per month on September 1, 1975. Mr. Koerner suggested an additional $100 per month raise effective September 1, 1975. The double raise would have moved Complainant McGuire from a clerical classification to management. Mr. Barton vetoed the double raise and promotion of Complainant McGuire to management status. Consequently, on September 1, 1975, Complainant McGuire received only her regular yearly salary increase of $100 per month to $700 per month and her job



title and clerical status were not changed.

54) After September 1, 1975, Complainant McGuire visited Mr. Alvestad during his absence from work to discuss Mr. Barton's decision not to, in effect, reclassify Complainant McGuire's job as management. In the absence of any reasonable explanation for that decision, Complainant McGuire began to fear that her sex might be a barrier to further advancement in Respondent's employ.

55) While Mr. Alvestad was at work part-time after October 1, 1975, he attended a meeting convened by Ed Barton, with Ed Barton, Mr. Koerner, and Dean Barton. The purpose of the meeting was to decide how to deal with the "crunch" created by Mr. Alvestad's absences due to illness. It was determined that an official assistant was required to back up Mr. Alvestad in the event of future absences. Even though Mr. Alvestad originally intended Complainant McGuire to fill this role as of November 1, 1975, her candidacy for the position was rejected by Ed Barton, on the grounds that he did not want a woman representing Respondent in that capacity. Instead, it was determined that a male would be hired to fill the position. Mr. Alvestad warned those attending the meeting that Complainant McGuire would probably resign if she discovered their intention to hire a male for the position. In response, Dean Barton suggested that Complainant McGuire's knowledge of rating functions be obtained from her at the earliest opportunity.

56) After the above-mentioned meeting, Mr. Alvestad informed Complainant McGuire of Ed Barton's decision not to make her Assistant Traffic Manager because of her sex. Being thus aware that the plans of both Mr. Koerner and Mr. Alvestad had been vetoed by Ed Barton, because of considerations of sex, Complainant McGuire complained to Mr. Alvestad that she was being victimized by Respondent due to her sex and that it was unfair to deny her advancement and salary increases on that basis.

57) On several separate occasions between October 1, 1975, and January 12, 1976, Complainant McGuire voiced to Mr. Alvestad, Mr. Koerner, and Ed Barton her opposition to Respondent's employment practices based on sex.

58) On October 13, 1975, Respondent hired Don Soderquist for a newly-created position titled Credit Manager. In fact, Mr. Soderquist was hired, pursuant to Dean Barton's suggestion cited in Finding of Fact 55 above, to obtain Complainant McGuire's knowledge of rating functions, in anticipation of his assuming the job of Assistant Traffic Manager. From the date of Mr. Soderquist's initial employment until Complainant McGuire's termination, Mr. Soderquist sat next to her each afternoon. During that time Complainant McGuire trained Mr. Soderquist to perform her duties and responsibilities in the same manner she had been trained for these duties in 1973 by Mr. Alvestad. Since she was required to train Mr. Soderquist in all her functions, Complainant McGuire concluded that Respondent hired Mr. Soderquist to fill the role formerly envisioned by Mr. Alvestad as the substitute for the Traffic Manager and which had been

discussed at the meeting described in Finding of Fact 55 above.

59) Mr. Soderquist's initial rate of pay was $850 per month.

60) On January 9, 1976, Mr. Alvestad informed Complainant McGuire that, according to Ed Barton, complaints had been received from Respondent's customers about Complainant McGuire's attitude. Complainant McGuire vigorously denied that such complaints had been made. She told Mr. Alvestad that she understood now how Respondent would be rid of her. Mr. Alvestad advised Complainant McGuire to accept her clerical pay and job status without further comment, or it was likely she would be fired.

61) At no time before January 9, 1976, had Complainant McGuire been informed of customer complaints about her attitude.

62) Complainant McGuire arranged a meeting with Ed Barton on January 12, 1976, to discuss the alleged customer complaints. When Complainant McGuire asked Mr. Barton to tell her who the complaining customers were, Mr. Barton refused to tell her either who they were or disclose the particulars of any alleged complaint. Instead, Mr. Barton insisted that Complainant McGuire change her alleged bad attitude "or else." Complainant McGuire denied having a bad attitude and denied the existence of customer complaints, and on that basis refused to agree to change her attitude. Complainant McGuire asked Mr. Barton why he had denied her the Assistant Traffic Manager position when she had been recommended for it by Mr. Alvestad and, in effect, by Mr. Koerner. Mr. Barton explained that men at docket meetings used foul language which would offend a lady; that he had never seen a woman at a docket meeting and he would not want his wife to attend; and finally, that he did not want a woman representing his company in an official capacity at docket meetings.

63) Complainant McGuire was discharged on January 12, 1976, at the direction of Ed Barton, for the stated reason of the alleged customer complaints and Complainant McGuire's alleged bad attitude.

64) On February 1, 1976, Mr. Soderquist assumed the duties (and only the duties) Complainant McGuire had performed, except for her supervision of clerical employees. Like Complainant McGuire, Mr. Soderquist did not attend docket meetings. Since the duties performed by Mr. Soderquist were substantially the same as (but less than) those performed by Complainant McGuire, they required substantially the same skills, efforts and responsibilities. Mr. Soderquist experienced working conditions similar to those Complainant McGuire had experienced. Mr. Soderquist was given the title of Assistant Traffic Manager Trainee. Mr. Soderquist was paid more than Complainant McGuire and given managerial job status, while Complainant McGuire's job status had been clerical.

65) On February 13, 1976, Mr. Soderquist's pay was raised to $900 per month; on June 1, 1977, to $1015 per month; and on June 1, 1978, to $1090 per month. Mr. Soderquist quit working for Respondent on September 1, 1978. When he left his employment with Respondent, Mr. Soderquist was working in the same capacity as when he had started.



66) I find that Mr. Soderquist was hired in accordance with Ed Barton's directions to learn Complainant McGuire's job so she could be fired. This finding is supported by the following facts:

a) Mr. Barton refused to allow the recommendation of Messrs. Alvestad, Kelly, and Koerner to promote Complainant McGuire.

b) At an October 1975 meeting Dean Barton suggested that a man be hired as Assistant Traffic Manager to learn Complainant McGuire's duties.

c) Complainant McGuire trained Mr. Soderquist in her duties.

d) Mr. Soderquist assumed Complainant McGuire's duties after her termination under the job title of Assistant Traffic Manager Trainee, a management rather than clerical designation.

Complainant McGuire's "bad attitude" was no more than her vocal opposition to Mr. Barton's sex discrimination and a pretext to fire her so that she could be replaced by a male.

67) Because of Respondent's denial of spousal and dependent insurance coverage to married female employees as described in Finding of Fact 25 above, Complainant McGuire was denied health insurance coverage for her spouse during her employment by Respondent. Complainant McGuire suffered no monetary damage due to this denial.

68) At all times during Complainant McGuire's employment with Respondent, Ed Barton, as Respondent's president, maintained and exercised total control of Respondent's employment policies and practices, including those concerning employee wages, job classifications and titles, promotions, and benefits. In exercising this control, Mr. Barton consistently and intentionally considered the sex of employees. Because of his unfettered control, other women in Respondent's employ besides Complainants McGuire and Cazimero were also victims of Mr. Barton's attitude concerning the place of women in his business. One example is Theresa Stults. In the summer of 1975, the job of Safety and Commerce Director, which had been held by Mr. Kelly, was separated into two distinct positions as a result of Respondent's growth and the increased and unmanageable workload of Mr. Kelly. Mr. Kelly continued as Commerce Director after the separation of functions, which created a vacant position of Safety Director. Respondent sought applicants for the vacant position. Mr. Kelly recommended to Mr. Barton that Respondent's employee Theresa Stults be promoted to the vacancy. Ms. Stults was classified at the time as a Stenographer B and was paid $450 per month. He considered her to be the most qualified person to fill the vacancy, because for a considerable time she had been performing all of the day-to-day duties of Safety and Commerce Director in Mr. Kelly's absence. For example, in addition to performing all the other duties of Safety and Commerce Director except attending ICC hearings, Ms. Stults regularly prepared Respondent's petitions for filing with the ICC (a Commerce Director function) which were in the nature of pleadings or legal memoranda setting

forth Respondent's opposition to a competitor's petition for authority to do business in the regions serviced by Respondent. In addition, Ms. Stults occasionally represented Respondent at counsel's table (a Safety Director function) during trials in state court on insurance claims, to which the Respondent was a party or had a direct interest in the outcome of the proceeding.

Mr. Barton refused to even consider Ms. Stults for the position of Safety Director on the grounds that in his view a female could not properly interact with Respondent's truck drivers, who, for the most part, were males. On August 4, 1975, Respondent hired a man, Mike H. Hurliman, as Safety Director at a salary of $1,200 per month. Mr. Hurliman had no previous experience in the area of safety. Mr. Hurliman was trained in the safety function by Mr. Kelly and Ms. Stults. The events described in the cases of Complainants McGuire and Cazimero and Ms. Stults indicate a pattern of discriminatory treatment of females by Respondent. In all three cases, females were denied advancement, equal pay and/or benefits upon the direction of Ed Barton.

69) Examination of the status and pay of all Respondent's Eugene office employees evidences a pattern of unequal treatment of female employees by Respondent. Between January 1, 1975, and June 13 1976, Respondent employed a total of 34 female employees and 17 male employees at its Eugene office. All male employees were classified and paid by Respondent as management, regardless of job duties. All but two female employees were classified and paid by Respondent as clerical, regardless of job duties. The two female employees classified and paid as management were Dorothy Donaldson and Sharon Brickley. Both were office supervisors. Ms. Donaldson was given management status on July 15, 1975. From 1969 to July 15, 1975, Ms. Brickley was Respondent's only female employee with managerial status. As of January 1, 1975, and January 1, 1976, the average salary of Respondent's full-time permanent male employees was more than twice the average salary of its full-time permanent female employees.

70) Testimony and documentary evidence presented by and on behalf of Complainant McGuire are more credible than the testimony of Ed Barton concerning customer complaints and Complainant McGuire's bad attitude. The credibility of Mr. Barton's testimony is questionable due to his belief in female inferiority in the business world. Evidence of this attitude is found in his refusal to promote Complainant McGuire and Ms. Stults, his refusal to allow Complainant McGuire to attend docket meetings, his denial of insurance benefits to Complainants McGuire and Cazimero and other female employees, and his refusal to pay Complainant Cazimero a salary equal to her male co-worker, all based on considerations of sex. Mr. Barton's testimony about customer complaints concerning Complainant McGuire's attitude is of questionable credibility since, if any complaints were received, they were not of sufficient importance to justify her immediate firing (until after Mr. Soderquist was fully trained and ready to replace her).



71) From June 1, 1974, the date Complainant McGuire began rating duties, until January 1, 1976, Complainant McGuire earned $13,017.18 in Respondent's employ. If Complainant McGuire had received Mr. Soderquist's starting rate of pay of $850 per month, she would have earned $16,150.

72) At all times material herein after her discharge by Respondent, Complainant McGuire exercised reasonable diligence to find alternative employment and to mitigate her damages, except during two months in the spring of 1977 (to facilitate her move to Seattle) and during one month in 1979 (to move to California). At no time from her discharge by Respondent until the date of hearing did Complainant find regular full-time employment in rating or in any other field which paid as much as the salary Respondent paid Mr. Soderquist.

73) From January 1, 1970, to October 29, 1979, the date of hearing, Complainant McGuire earned $26,123.30 from unemployment benefits and employment at the following locations:

- 1976 - West Coast Truck Lines, Inc., Eugene, Oregon; Hall Hoagey Hauling Co., Eugene, Oregon; Sonny Tavern, Springfield, Oregon.
- 1977 - Truck n Travel, Coburg, Oregon; Northwest Steel Rolling Mills, Inc., Seattle.
- 1978 - Northwest Steel Rolling Mills, Inc., Seattle.
- 1979 - Northwest Steel Rolling Mills, Inc., Seattle; Bank of America, Stanford, California.

At Mr. Soderquist's rate of pay during this period, including pay increases, Complainant McGuire would have earned $45,960.

74) Before August 1975, Complainant McGuire had no reason to foresee her imminent termination from employment. She had been singled out by Mr. Alvestad for training in work involving a much higher degree of responsibility, skill and effort. She had regularly received salary increases, which ultimately raised her monthly pay from $400 to $700 per month. Mr. Alvestad had informed her of his plan to move her up to management by November 1, 1975. Mr. Koerner had followed suit with actions to effect a salary increase for Complainant McGuire which would have resulted in her promotion to management on September 1, 1975. Until the working day preceding her discharge, Complainant McGuire had not received any warning concerning the quality of her work performance. Indeed, because of her work performance, she had enjoyed a working relationship with Mr. Alvestad which, by the summer of 1975, had become a close friendship characterized by mutual respect and admiration. By the summer of 1975, Complainant McGuire had every reason to believe that she had embarked upon a career with Respondent as an executive in the transportation industry.

Complainant McGuire's discovery that her sex barred such a career and would limit her to a clerical status with Respondent came as a shock in the fall of 1975. The effects of that

discovery were protracted and severe. Complainant McGuire's close friendship with Mr. Alvestad ended due to his inability to convince Respondent to promote her. She became conscious that her sex was a career barrier with the Respondent's company and severely restricted her marketability in the area of expertise she had developed. That consciousness both affected her financial security and her family relations. Furthermore, Complainant McGuire was given no reason before October 1975 to expect that by January 12, 1976, she would have been made the object of Respondent's deliberate misrepresentations. Nor, did she imagine she would be required by Respondent to train her male replacement, or that she would be discharged by Respondent, as a result of Respondent's prejudicial stereotypes regarding women in the workplace. As a consequence of all the above, the period from September 1975 through January 12, 1976, was one of continual emotional anguish for Complainant McGuire. Complainant McGuire's demeanor at the hearing made it clear, and I find, that she still suffered and would continue to suffer emotional trauma due to Respondent's attitude about her sex and resulting actions summarized above.

75) Following Complainant McGuire's termination, her husband, Paul McGuire, decided to change careers. His new career choice necessitated his return to school and that he relocate for that training. His decision was based in part upon a preexisting interest in a new career and in part as a result of Complainant McGuire's termination and his desire to obtain skills which would enable him to embark upon a more lucrative career. Except during the period of time of this second move, Complainant McGuire diligently and continuously sought reemployment and endeavored to mitigate her damages.

76) The Agency has not established that the expenses Complainant McGuire incurred as a result of moving to Seattle were reasonable or necessary for her mitigation of damages.

**ULTIMATE FINDINGS OF FACT**

1) The actions of Ed Barton, Dean Barton, William Koerner, Earl Alvestad, and Rick Kelly described were performed within the scope and course of their employment duties.

2) Between November 1, 1974, and January 23, 1976, Complainant Cazimero, a female, performed work of a mixed character for Respondent. Her work included both clerical duties and non-clerical duties which required at least some degree of accounting skill and judgment. Her work was actually junior staff accountant work.

Between December 22, 1974, and March 21, 1975, Clifford Hinds, a male, also performed work of a mixed character for Respondent. His work, while not identical to Complainant's, also included both clerical duties and non-clerical duties which required some degree of accounting skill and judgment. His work was also actually junior staff accountant work.

Complainant Cazimero and Mr. Hinds performed substantially equal work for Respondent, the performance of which required substantially equal skill, effort, and responsibility under similar working conditions.



3) Between November 1, 1974, and January 23, 1976, Complainant Cazimero's job titles were classified as clerical, while Mr. Hinds was titled Accounting Intern, a non-clerical title, and while Respondent classified its junior staff accountant job title as supervisory. Complainant was paid less than Mr. Hinds, and had been paid less than the starting salary Respondent would have paid any employee titled Junior Staff Accountant. Complainant Cazimero therefore was given job titles and pay during this time which were not commensurate with her duties and responsibilities.

4) At times material herein, Respondent classified all of its male employees in its Eugene office as management, regardless of their job duties. At the same time, Respondent classified virtually all of its female employees in the same office as clerical, regardless of their job duties. The average salary of Respondent's male employees in its Eugene office was more than twice that of its female employees in the same office.

5) Also, because of Complainant Cazimero's sex, Respondent denied her, between August 1974 and January 23, 1976, the spousal and dependent health insurance which Respondent provided its male employees.

6) The net effect of the circumstances set out in Ultimate Findings of Fact 1 to 5 above was that Complainant Cazimero was discriminated against in her job title, compensation, and benefits by Respondent because of her sex.

7) Respondent's purported reasons for Complainant Cazimero's pay level and job title – that she performed and was qualified to perform only clerical work – was a pretext for discriminating against Complainant Cazimero because of her sex.

8) Because of Respondents policies and practices limiting the employment status and opportunities, compensation, and benefits of female employees (including Complainant Cazimero), Complainant Cazimero reasonably concluded that because of her sex, her career with Respondent would continue to be limited to clerical status. Such clerical status included pay which was not commensurate to her work and fewer health insurance benefits than male co-workers. Prompted by this conclusion and the overtime hours required of her, Complainant Cazimero requested a pay raise which was denied. The deliberate acts of Respondent in denying Complainant Cazimero equal benefits and a salary commensurate with her duties; in refusing to grant Complainant Cazimero a salary increase after she had requested it; and Respondent's intent to keep her at a clerical status, despite promises otherwise, all because of her sex, directly and foreseeably made Complainant Cazimero's working conditions intolerable to her. Complainant Cazimero was forced to resign to escape those conditions and their adverse effects.

9) A reasonable person in Complainant Cazimero's place would have felt compelled to resign under the circumstances.

10) But for Respondent's policies and practices limiting employment status, opportunities, compensation and benefits of female employees

because of their sex, Complainant Cazimero would have earned at least $800 per month, the starting salary of any of Respondent's employees titled Junior Staff Accountant, for the work she performed for Respondent between November 1, 1974, and January 23, 1976, and thereafter until December 15, 1978, or a total of $39,600. Instead, she earned $24,230.81, or $15,369.19 less. But for the same policies and practices, Complainant Cazimero would not have incurred health insurance and medical costs of $4,483.08 between August 1974 and December 15, 1978.

11) Between June 1, 1974, and January 12, 1976, Complainant McGuire, a female, performed substantially the same work, the performance of which required substantially equal skill, effort, and responsibility under similar working conditions, as her male successor, Don Soderquist. The only difference in their work was that Complainant had supervisory duties which Mr. Soderquist did not have.

12) Between June 1, 1974, and January 12, 1976, Complainant McGuire's job title and pay were classified as clerical, while Mr. Soderquist's were classified as management. Complainant was paid less than Mr. Soderquist. Complainant McGuire, therefore, was given a job title and pay during this time which were not commensurate with her work duties and responsibilities.

13) Complainant McGuire's lower rate of pay was the result of Respondent's attitude towards women in business, which was reflected in discriminatory employment policies and practices.

14) Also because of Complainant McGuire's sex, Respondent denied her the spousal health insurance which Respondent provided its male employees during her employment with Respondent.

15) The net effect of the circumstances set out in Ultimate Findings of Fact 11 to 14 and 4 above was that Complainant McGuire was discriminated against in her job title, compensation, and benefits by Respondent because of her sex.

16) Respondent discharged Complainant McGuire on January 12, 1976, when Mr. Soderquist, whom Respondent had hired to replace Complainant McGuire in accordance with Ed Barton's directives concerning the place of women in his business, was trained and ready to assume Complainant McGuire's duties. Respondent's discharge of Complainant was also in retaliation for her vocal opposition to Respondent's discriminatory employment practices.

17) Respondent's purported reason for discharging Complainant McGuire, her alleged bad attitude which resulted in customer complaints, was a pretext for retaliating against Complainant McGuire for her opposition to Respondent's sex discrimination.

18) Complainant McGuire diligently sought to mitigate her damages from the time of her discharge until the date of hearing, but she did not find permanent employment that paid as much as she would have earned in Mr. Soderquist's job with Respondent.

19) Since September 1975, Complainant McGuire has suffered humiliation, distress, and mental anguish as a direct result of Respondent's discrimination against her because of her sex, which caused Complainant McGuire to lose her "promotion," her financial security, her job, her friendship with Mr. Alvestad, and threatened her marriage.

20) If Complainant McGuire had been paid the same as her male successor between June 1, 1974, and October 29, 1979, the date of hearing, she would have earned $62,110. In fact, she earned $39,140.48, for a difference of $22,969.52.

Complainant took three months off work to move during this time. $2,890, calculated at $900 per month for two months in 1977 and $1,090 for one month in 1979 (Mr. Soderquist's rate of pay at those time), is deducted from the above-cited difference, for a total pay loss of $20,079.52 due to Respondent's discrimination against Complainant McGuire because of her sex.

## CONCLUSIONS OF LAW

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

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

3) The actions, and motivations for those actions, of Ed Barton, Dean Barton, William Koerner, Earl Alvestad, and Rick Kelly, described herein, are properly imputed to Respondent.

4) Respondent committed an unlawful employment practice in violation of what was at times material ORS 659.030(1), and what is now ORS 659.030(1)(a), by discriminating against Complainant Cazimero in compensation because of her sex in the following particulars:

a) From November 1, 1974, to January 23, 1976, Respondent paid Complainant Cazimero less for her junior staff accountant work than Respondent paid Respondent's male employee Hinds for his junior staff accountant work, between December 22, 1974, and March 21, 1975, even though Complainant Cazimero performed work which was substantially equal to that of Mr. Hinds, requiring substantially equal skill, effort, and responsibility under similar working conditions.

b) During the same time period, Respondent paid Complainant Cazimero less for her junior staff accountant work than it would have paid any employee titled "Junior Staff Accountant."

5) Respondent committed an unlawful employment practice in violation of what was at times material ORS 659.030(1), and what is now ORS 659.030(1)(a), by discriminating against Complainant Cazimero in the terms, conditions, and privileges of her employment because of her sex in the following particulars:

a) From November 1, 1974, to January 23, 1976, Respondent classified Complainant Cazimero's job titles as clerical while giving Mr. Hinds a non-clerical title and while Complainant Cazimero performed the work of a junior staff accountant, a supervisory title.

b) From August 1974 to January 23, 1976, Respondent denied Complainant Cazimero free spousal and dependent health insurance because

of her female sex, while providing such coverage to all male employees.

6) Respondent committed an unlawful employment practice in violation of what was at all times material ORS 659.030(1), and what is now ORS 659.030(1)(a), by constructively discharging Complainant Cazimero from employment because of her sex in the following particular: Respondent's deliberate and unlawful employment practices described in Conclusions of Law 4 and 5 above, and Complainant Cazimero's reasonable conclusion that such practices would continue made Complainant Cazimero's working conditions intolerable and thereby compelled her to resign from Respondent's employ on January 23, 1976.

7) The decision of the Employment Division of the State of Oregon to deny Complainant Cazimero unemployment benefits due to the circumstances of the termination of her employment by Respondent does not collaterally estop adjudication in this forum of the issue of Complainant Cazimero's constructive discharge by Respondent.

8) Respondent committed an unlawful employment practice in violation of what was at times material ORS 659-030(1), and what is now ORS 659.030(1)(a), by discriminating against Complainant McGuire in compensation and in the terms, conditions, and privileges of her employment because of her sex in the following particulars:

a) From June 1, 1974, to January 12, 1976, Respondent paid Complainant McGuire less for her work than Respondent paid her male successor for his work. Respondent classified Complainant McGuire as clerical while classifying her male successor as management, even though Complainant McGuire performed work which was substantially the same as that of her male successor, requiring substantially equal skill, effort, and responsibility under similar working conditions.

b) During all Complainant McGuire's employment with Respondent, Respondent denied her free spousal health insurance because of her sex, while providing such coverage to all male employees.

9) Respondent committed an unlawful employment practice in violation of what was at times material ORS 659.030(4), and what is now ORS 659.030(1)(d), by discharging Complainant McGuire because she had opposed Respondent's unlawful employment practice described in Conclusion of Law 8 above.

10) The Commissioner of the Bureau of Labor and Industries has the authority to award money damages to Complainants under the facts and circumstances of this record, and the sums of money awarded as damages in the Order below are appropriate awards. Because Complainant McGuire diligently continued to seek employment and mitigate her damages after her move to Seattle, that move does not stop the accrual of Complainant McGuire's back pay damages.

## OPINION

1) Both Respondent and the Agency analyzed the relation between the Federal Civil Rights Act of 1964, 42 USC 1976 § 2000 *et seq.*, and the Equal Pay Act of 1963, 29 USC § 206(d), on the one hand, and ORS 659.030 and 652.220, Oregon's employment discrimination and "comparable work" statutes, respectively, on the other hand.



ORS 659.030 is a broad remedial statute. It makes discrimination on the basis of sex unlawful not only in compensation but in all employment decisions. Its direct federal counterpart, Title VII of the Civil Rights Act of 1964, 42 USC § 2000 *et seq.*, also makes discrimination on the same basis described in ORS 659.030 unlawful in all areas of employment.

Coextensive with Title VII is the Federal Equal Pay Act of 1963, 29 USC § 206(d). This and the state companion statute, ORS 652.220, require equal pay for substantially equal work.

Title VII and ORS 659.030 speak to numerous employment practices other than compensation, including for example, hiring, promotion, demotion and discharge. The breadth of ORS 659.030 allows complainants complete remediation of the multiple discriminatory practices they experienced due to their sex. Because of the limited state of Oregon case law available, the copious federal litigation in this area is instructive when discriminatory employment practices and appropriate re-mediation are considered. Both federal and state case precedent are compatible with the long established tradition of the Bureau of Labor and Industries in deciding matters concerning discriminatory employment practices on the basis of sex.

2) The basic factual question in these cases alleging different treatment of individual complainants on the basis of their sex is what was Respondent's actual motivation for its treatment of Complainants. Answering this question necessitates ascertaining the states of mind of Respondent's actors, with those actors as the only source of direct evidence. Seldom will the individual different treatment case be decided upon the basis of direct evidence of discrimination, for although many employers will have mixed motivations, few will ever admit to being motivated or affected in the least by the sex of their employees. For this reason, as the US District Court for Oregon pointed out in *Gates v. Georgia-Pacific Corporation,* 326 F Supp 397, 399 (1970), *aff'd* 492 F2d 292 (9th Cir 1974), direct evidence of discrimination is virtually impossible to produce. Given this fact, courts have undertaken careful scrutiny of employers explanations for basic inconsistencies and illogic, and have placed heavy reliance on circumstantial evidence, which is often offered in the form of statistics reflecting the employers treatment of the complainant's class in general, to infer an employer's actual intent for its treatment of the individual complaints. *See McDonnell Douglas Corp., v. Green,* 411 US 792 (1973); *Olson v. Philco-Ford,* 531 F2d 474 (10th Cir 1976); *King v. Yellow Freight System, Inc.,* 523 F2d 879 (8th Cir 1975); and *Bolton v. Murray Envelope Corp.,* 493 F2d 191, 193-194 (5th Cir 1974). The Oregon Supreme Court has recognized the place of evidence of the employer's overall treatment of the complainant's class in the individual complainant case. In *School District No. 1 v. Nilsen,* 262 Or 559, 570, 499 P2d 1309 (1972), the court stated that:

"The scope of inquiry under the specific charges of discrimination is sufficiently broad to require inquiry into past conduct of the district generally in relation to blacks, because proof of past discrimination against blacks would lend credence to complainant's specific charges of discrimination against her."

Because of the normal dearth of direct evidence of discrimination (even though there was some such evidence herein), the significance of circumstantial evidence in statistics or other probative forms, and the significance of the employer's overall treatment of the complainant's class, this forum has taken into consideration the evidence herein concerning Respondent's treatment of female employees generally in concluding that the individuals controlling the employment decisions and actions of Respondent, especially Ed Barton, allowed antiquated stereotypes of men and women to unlawfully prejudice its decisions.

3) Respondent relied on *Mt. Healthy City School District Board of Education v. Doyle,* 429 US 274 (1977) to support its discharge of Complainant McGuire based upon her alleged bad attitude. In *Mt. Healthy,* the employer established a legitimate reason for the discharge in addition to another reason which restricted the employee's First Amendment Rights. Complainant McGuire's case does not involve the exercise of First Amendment rights. The alleged conduct in question, Complainant's bad attitude, did not play a key, or any, role in Respondent's decision to discharge Complainant McGuire. Rather, Respondent was motivated solely by the desire to replace Complainant McGuire with a male employee who, due to his sex, would qualify for the position of Assistant Traffic Manager. For the latter reasons, *Mt. Healthy* is inapplicable to this matter.

4) According to federal case law interpreting Title VII, 42 USC § 1976 *et seq.,* which is virtually identical to Oregon statutory law herein applicable, the circumstances of serial or successor employment may lawfully lead to a conclusion of unlawful discrimination in compensation, as well as job status and title, because of sex, and may be utilized in determining damages therefore. *DiSalvo v. Kansas City Chamber of Commerce,* 568 F2d 593, 13 EPD P11,378 (8th Cir 1978); *Brennan v. Victoria Bank and Trust Company,* 493 F2d 896 (5th Cir 1974); *Hodgson v. Behrens Drug Company,* 475 F2d 1041 (5th Cir), *cert. den.,* 417 US 196 (1973).

"The fact that . . . (the employees compared) were not employed at the same time is immaterial because Title VII . . . does not require that jobs being compared be performed simultaneously but encompasses situations where an employee of one sex is hired for a particular job to replace an employee of the opposite sex, . . . Furthermore, the fact that . . . (the comparison) had broader experience, greater . . . skills or owned . . . equipment is immaterial because the crucial issue is not what skills are possessed, but whether the duties actually performed require or utilize those additional skills . . ." *DiSalvo v. Kansas City Chamber of Commerce, supra,* 13 EPD paragraph 11378, at page 6262.



I adopt this holding in interpreting ORS 659.030. Mr. Soderquist is an appropriate male comparator to Complainant McGuire because, as McGuire's successor, he performed substantially the same work that she had performed.

5) Complainant Cazimero was the victim of unlawful employment discrimination in employment compensation, terms, conditions, and privileges based upon her sex. The Agency asserts that this discrimination forced Complainant Cazimero to resign and that, consequently, Respondent "constructively discharged" Complainant Cazimero.

The general rule, which this forum adopts, is that if an

"employer deliberately makes an employee's working conditions so intolerable that the employee is forced into an involuntary resignation, then the employer has encompassed a constructive discharge . . ."

*Young v. Southwestern Savings and Loan Association,* 509 F2d 140, 144, (5th Cir 1975). What does "deliberately" mean? There is some instructive case law that in order to constitute a constructive discharge, the employer's imposition of the intolerable working conditions must be done with the purpose of forcing the employee to resign. *Muller v. United States Steel Corporation,* 509 F2d 923, 929 (10th Cir), *cert. denied,* 423 US 825 (1975). This forum, however, agrees with more persuasive authority which has rejected this stringent test requiring an employer's intent to rid itself of an employee. Instead of attempting to ascertain the state of mind of an employer, this forum analyzes an alleged constructive discharge by focusing upon the conditions imposed. *Bourgue v. Powell Electrical Manufacturing Company,* 617 F2d 61, 65 (5th Cir 1980); *Calcote v. Texas Educational Foundation,* 578 F2d 95, 97-98 (5th Cir 1978); and *Young, supra,* 509 F2d at 144. To find a constructive discharge, this forum must be satisfied that "working conditions . . . so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign" caused the employee to resign and that the conditions were imposed by the deliberate, or intentional, actions or policies of the employer. *Alicea Rosado v. Garcia Santiago,* 562 F2d 114, 119 (1st Cir 1977); *Calcote, supra,* 578 F2d at 97-98; and EEOC Decision 172-2062 (June 22, 1972).

One case cited above also holds that sex discrimination manifesting itself in the form of unequal pay alone cannot be sufficient to support a finding of constructive discharge. *Bourgue, supra,* 671 F2d at 65-66. This conclusion does not apply to this matter, because this matter involves not only unequal pay, but also unequal job title and status, unequal insurance benefits, and, exacerbating the unequal pay and classification, Respondent's broken promise to make commensurate Complainant Cazimero's pay and title and specific refusal, finally, to make her pay commensurate, all resulting from Respondents discriminatory policies.

The final rule concerning constructive discharge is that if there has been a constructive discharge, an employer is liable for any unlawful conduct involved therein as if the employer had formally discharged the employee. *Young, supra*, 509 F2d at 144.

The application to this matter of the above-stated two-pronged test for ascertaining whether an employee has been constructively discharged can be summarized as follows. Before she resigned, Complainant Cazimero endured unequal pay and job title for over one year and unequal insurance for one and one-half years. When these conditions had continued for one-and-one-third years Mr. Koerner and Respondent's president Barton then refused Complainant Cazimero even a raise in pay. This occurred despite the fact that she had been working extremely hard for Respondent. Complainant Cazimero's working conditions became so intolerable that she felt compelled to resign. Given the above-described circumstances not only limiting Complainant Cazimero's title, pay and benefits, but also, according to Complainant Cazimero's reasonable conclusion, her future opportunities with Respondent, all because of her sex, a reasonable person in her place would have felt forced to do the same. The above-described working conditions were imposed by the deliberate, or intentional, acts of employees of Respondent. Complainant Cazimero's resignation was a direct and foreseeable response to these working conditions and constitutes a constructive discharge by Respondent.

Because Respondent constructively discharged Complainant Cazimero, her back pay accrual period does not end with her termination from Respondent's employ, but continues until December 15, 1978, when she became unable to work.

6) Respondent contends that the doctrine of collateral estoppel should be applied in this case to bar adjudication of the issue of Complainant Cazimero's constructive discharge. Respondent's contention is based on Respondent's belief that the issue of constructive discharge of Complainant Cazimero was previously adjudicated by the Employment Division of the State of Oregon. Respondent urges the Bureau of Labor and Industries to adopt the findings of the Employment Division, or at least to give considerable weight to those findings in reaching a decision in the case at hand.

As Respondent notes in support of its assertion of collateral estoppel, the doctrine was developed by the courts to avoid harassment of successful litigants and to promote judicial economy. *Bahler v. Fletcher,* 257 Or 1, 474 P2d 329 (1970). However, assuming for the moment that the doctrine of collateral estoppel is applicable in an administrative forum, before the doctrine can be applied, its elements must be satisfied. The party asserting collateral estoppel assumes the burden of proving that in the case in question, issues are presented which are identical to issues already adjudicated between the same parties in connection with a different claim or cause of action. Davis, *Administrative Law Text* 360 (1972). Even if the issues appear to be identical, the party asserting collateral estoppel must also prove that the issues were determined on the merits in the prior proceeding. *State Farm v. Century Home Components Inc.,* 275 Or 97, 550 P2d 1185 (1976). To do so the asserting party must place sufficient evidence in the record to enable the forum to determine that the elements of collateral estoppel are satisfied. Such evidence includes not only the prior judgment as offered by Respondent, but also sufficient portions of the record, including pleadings, exhibits and the reporter's transcript of the testimony and proceedings, to enable the forum to ascertain with the requisite degree of certainty whether the issue was actually decided and necessary to the judgment in the prior action. *Eazor Express Inc. v. General Teamsters Local 326,* 388 F Supp 1264 (1975). If the materials submitted are inadequate to permit the forum to ascertain an identity of issue, the matters decided, or the basis for the decision in the prior action, then the party seeking estoppel can not prevail.



As pointed out in *Burnett v. Western Pacific Ins. Co.,* 255 Or 547, 469 P2d 602 (1970), the judgment order or the pleadings of the prior action alone are insufficient. Rather, the forum must examine the evidence to see if the facts were fully adjudicated in the first case. In this case, Respondent has relied on only the Findings of Fact of the Employment Division hearings referee to support its claim for collateral estoppel. The record herein contains no transcript, pleadings, exhibits or other materials from the prior proceedings. (From the hearing referee's findings alone, it appears that the issue in the case before the Employment Division was Complainant Cazimero's entitlement to unemployment benefits based on the circumstances of the termination of her employment by Respondent. On the other hand, the issue in the present case is Complainant Cazimero's entitlement to back pay damages based on the circumstances of her constructive discharge by Respondent. Although the factual circumstances giving rise to the claims are identical, the legal issues appear to be quite different.) Due to the inadequacy of the record, I am unable to determine with any degree of certainty an identity of issues or parties.

Even if the issues and parties were identical I remain unconvinced that Complainant Cazimero had a full and fair opportunity to contest the issue of constructive discharge in the first action. The failure of Complainant Cazimero to obtain representation by counsel at the Employment Division hearing (even though Respondent was represented by counsel) indicates either a lack of incentive to prosecute her claim or a lack of understanding of the possible repercussions (in a case such as the instant one) that might result from an adverse decision at the previous hearing. Presumably, the amount of unemployment benefits in question was not sufficiently large to motivate Complainant Cazimero to bear the expense of private counsel. In any event, it is apparent that Complainant Cazimero was unable to adequately prosecute her Employment Division claim herself due to her lack of legal training and her lack of understanding of employment discrimination law. In these circumstances, and due to the cursory nature of Employment Division hearings, I am unconvinced that Complainant Cazimero's claim of

constructive discharge received a full and fair hearing on the merits by the Employment Division so as to preclude a rehearing of the claim in this forum. *Lewis v. International Business Machines Corp.,* 393 F Supp 305 (1974).

The fairness considerations inherent in the doctrine of collateral estoppel also dictate against its application in this case. The issue of constructive discharge is only a small part of the case at hand, but the factual circumstances upon which the constructive discharge claim is based were elements of proof necessary to the case as a whole. In these circumstances Respondent is not suffering from the harassment of relitigation of this issue since the items of evidence constituting proof of constructive discharge are integral to the case as a whole and would be necessary of proof in this forum even without the constructive discharge claim. *State Farm, supra,* 275 Or 97.

It is acceptable for administrative agencies to give final effect to the decisions of other agencies. Davis, *Administrative Law Text* 360-61 (1972). However, such action should be taken only when the requirements of the doctrine of collateral estoppel are satisfied. In this case, Respondent has not offered sufficient evidence to enable this forum to determine an identity of issues or parties, nor has Respondent convinced this forum that Complainant Cazimero had a full and fair opportunity to develop her claim of constructive discharge on the merits in the Employment Division hearing. Therefore, Complainant Cazimero is not collaterally estopped from adjudication of her claim of constructive discharge as it relates to her back pay damages.

7) The Commissioner of the Bureau of Labor and Industries has jurisdiction to award monetary damages, and it is within her discretion to fashion a remedy to adequately compensate employees victimized by unlawful discriminatory employment practices. ORS 659.010(2)(a). In the case of Complainant Cazimero, a mere computation of the pay differential between Complainant Cazimero and Mr. Hinds would not be adequate. Mr. Hinds was not hired until Complainant Cazimero had already been performing, for nearly two months, duties substantially equal to those Mr. Hinds performed. In addition, while Complainant Cazimero's rate of pay was depressed by Respondent's sex discrimination, Mr. Hinds' rate of pay, even though greater than Complainant Cazimero's, was depressed since he was a temporary employee, a student, and was paid the rate recommended by the teacher who referred him to Respondent, rather than a rate based upon the duties he performed. Therefore, it would be unreasonable to fashion a remedy that calculated Complainant Cazimero's entitlement according to Mr. Hinds' depressed salary. If Mr. Hinds and Complainant Cazimero had been compensated in accordance with the pay structure set out in Respondent's personnel manual in July 1975, both would have been paid at least $800 per month, the starting rate of pay for the junior accountant staff work they actually performed. Therefore, $800 per month is used heroin as the rate of pay Complainant Cazimero would have received but for Respondent's sex discrimination.



8) The purpose of back pay awards is to make an aggrieved person whole for the monetary injuries that person suffered because of an employer's unlawful employment practices. An award of interest on the back pay award is justified to compensate Complainants fully for the effects of not having had the use of the back pay since it accrued. *In the Matter of City of Portland,* 2 BOLI 110, 142-144 (1981). The same rational justifies awarding Complainant Cazimero interest on her health insurance and medical costs. The sums expended by Complainant Cazimero for these costs would have been available for her use but for Respondent's discriminatory actions. Therefore, interest at the legal rate, as computed below, will be added to Complainants' awards:

A) Complainant Cazimero

(1) Six per cent annually on the monthly accrual of the difference between compensation received by Complainant Cazimero and $800 per month between November 1, 1974, and December 15, 1978; plus,

(2) Six per cent annually upon the accrued differential from December 15, 1978, to July 25, 1979; plus,

(3) Nine per cent annually upon the accrued differential from July 25, 1979, until the date Respondent complies with paragraph 1 of the Order below. If the legal rate of interest is changed before such time, the new rate will be charged annually upon the accrued differential from the effective date of the new rate until Respondent complies with paragraph 1 of the Order below; plus,

(4) The above rates on the above-named accrual bases for the above-named time periods on Complainant Cazimero's medical and health insurance costs.

B) Complainant McGuire

(1) Six per cent annually on the monthly accrual of the difference between compensation received by Complainant McGuire and $850.00 per month between June 1, 1974, and January 1, 1976; plus,

(2) Six per cent annually upon the monthly accrual of the difference between compensation received by Complainant McGuire and compensation received by Mr. Soderquist between January 2, 1976, and September 1, 1978; plus,

(3) Six per cent annually upon the monthly accrual of the difference between compensation received by Complainant McGuire and $1090 per month between September 2, 1978, and July 25, 1979; plus,

(4) Nine per cent annually upon the monthly accrual of the difference between compensation received by Complainant McGuire and $1090 per month from July 25, 1979, to October 29, 1979.

(5) Nine per cent annually upon the accrued differential from October 29, 1979, to the date Respondent complies with paragraph 2 of the Order below. If the legal rate of interest is changed before such time, the new rate will be charged annually upon the accrued differential from the effective date of the new rate until Respondent

complies with paragraph 2 of the Order below.

9) It is also within the Commissioner's power to award monetary damages for mental suffering where a complainant has suffered humiliation, distress, and mental suffering because of respondent's treatment based on sex. Complainant McGuire experienced such suffering on a severe and continual basis between September 1975 and January 12, 1976, and less frequently and severely since the latter date. The suffering was in response to the loss of her promotion, her job, her financial security, her friendship with Mr. Alvestad, and the threat all this posed to her marriage, which were all the direct result of Respondent's discrimination against her on the basis of sex. The award of $3,000 to compensate Complainant McGuire for this mental suffering is reasonable and appropriate to serve the statutory purpose of eliminating the effects of the unlawful employment practices found and protecting the rights of Complainant McGuire. ORS 659.010(2)(a).

10) Respondent argued that in a civil case involving a prayer for compensatory damages for mental suffering, the parties are entitled to a jury trial. This is an administrative forum, and the protection of a jury is inapplicable. It is within the jurisdiction and discretion of the Commissioner to award compensatory damages based upon a record complied, as herein, in connection with a contested case proceeding occurring under the provisions of ORS chapter 183.

## ORDER

NOW, THEREFORE, as authorized by ORS 659.030(3) and 659.010(2) and in order to eliminate the effects of the unlawful practices found, as well as to protect the lawful interests of others similarly situated, Respondent is hereby ordered to:

1) Deliver to the Hearings Unit of the Portland Office of the Bureau of Labor and Industries, within sixty days of the execution of this Order, a certified check payable to the Bureau of Labor and Industries in trust for Judith Cazimero in the amount of NINETEEN THOUSAND EIGHT HUNDRED FIFTY-TWO DOLLARS AND TWENTY-SEVEN CENTS plus interest, computed as directed in the Opinion above, representing damages for wages and insurance coverage lost because of Respondent's unlawful employment practices set out above.

2) Deliver to the Hearings Unit of the Portland Office of the Bureau of Labor and Industries, within sixty days of the execution of this Order, a certified check payable to the Bureau of Labor and Industries in trust for Mary Margaret McGuire in the amount of TWENTY THREE THOUSAND SEVENTY-NINE DOLLARS AND FIFTY-TWO CENTS. Interest computed as directed in the opinion above should be on $20,079.52 of this award, which represents damages for wages lost by Complainant McGuire because of Respondent's unlawful employment practices set out above. No interest is allowed for the $3,000 of this award, which represents damages for the mental anguish, pain, and humiliation suffered by Complainant McGuire because of Respondent's unlawful employment practices set out above.

3) Within thirty days of the date of this order, meet with Rudolph S. Westerband, Assistant Attorney General, or his representative, to compute interest accrued on the above awards. Respondent shall submit the computation of interest to the Bureau's Hearings Unit when it pays such interest.

4) Make a copy of this Order a permanent part of any personnel records it maintains concerning the employment of Judith Cazimero and Mary Margaret McGuire and furnish such copy to anyone making inquiry concerning either of their work performances for Respondent.

5) Cease and desist from discriminating against its employees on the basis of sex.



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**In the Matter of**
**TREPLEX, INC.,**
**an Oregon corporation,**
**Respondent.**

Case Number 33-80
Final Order of the Commissioner
Mary Wendy Roberts
Issued January 18, 1982.

## SYNOPSIS

Respondent discharged the three oldest of its 11 millwrights, including the 52-year-old Complainant, and replaced them with employees 15 to 20 years younger. Where nothing indicated that Complainant was terminated for cause, the Commissioner ruled that Respondent committed an unlawful employment practice, awarded Complainant $26,605 in lost wages, and ordered Respondent to cease discriminating in employment because of age. On reconsideration, the Commissioner ruled that it was not excusable neglect for Respondent counsel's to fail to ascertain whether a motion for continuance had been granted; the Commissioner refused to set aside a Default Order, which issued when Respondent and counsel missed the scheduled hearing. ORS 18.160, 183.415, 183.425, 183.440(1), 659.010(2) and (6), 659.022; 659.030, 659.040, 659.060(2) and (3); 659.100(4).

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The above-entitled matter came on regularly for hearing before Jon Wu, designated as Presiding Officer by Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing commenced on June 17, 1980, at 9:30 a.m. in the Eugene Public Library, 100 West 13th Street, Eugene, Oregon. The Bureau of Labor and Industries was represented by Douglas R. Andres, Assistant Attorney General. No one appeared for Respondent Treplex, Inc., although the records reflect representation by Sherman B. Kellar, Attorney at Law. Complainant Leonard Wettengel was present and testified.

On September 23, 1980, oral arguments were heard on a Motion for Reconsideration of Respondent's Motion Requesting Reopening of a Contested Hearing (hereafter referred to as Motion for Reconsideration). Arguments commenced in Room 1578 of the Federal Office Building, 1220 S.W. Third

Avenue, Portland, Oregon, at 2:30 p.m. The Bureau of Labor and Industries was represented by Douglas R. Andres. Respondent Treplex, Inc., was represented by substitute counsel, Richard E. Miller, Attorney at Law. Sherman B. Kellar, former counsel for Respondent, was present and testified.

Having fully considered the entire record in this matter, I, Mary Wendy Roberts, make the following Ruling Upon Motions, Findings of Fact, Ultimate Findings of Fact, Conclusions of Law, Opinion, and Order.

**RULING UPON MOTIONS**

On July 11, 1980, Respondent's attorney Sherman B. Kellar filed a motion for Reopening and Continuation of Hearing, which was held on June 17, 1980. An order denying said motion was entered August 1, 1980.

On August 14, 1980, Mr. Kellar filed the above-mentioned Motion for Reconsideration.

The Commissioner has the authority to file complaints (ORS 659.040), to require hearings (ORS 659.060), and to accept motions and issue intermediate rulings thereon (ORS 183.415). Inherent in this authority is the power to postpone or refuse to postpone scheduled hearings. The authority of the Commissioner as set forth may be delegated (ORS 659.060). It therefore follows that the Presiding Officer may rule on motions and require the movant to determine the status of the motion.

Mr. Kellar requested the continuance because he thought he lacked the authority to compel the attendance of one Fred DuLong, a material witness. Mr. DuLong had plans to be in Coos Bay, Oregon, on the date of the contested hearing. Mr. Kellar testified that he did not wish to subpoena the material witness and take the risk of turning a friendly witness into a hostile witness. There is no substantial evidence that Mr. DuLong would be a turncoat witness.

Mr. Kellar further testified that he did not know how to issue a subpoena and there were other pressing matters. One such pressing matter was a security offering involving the purchase of apartments.

The testimony of Mr. Kellar is not compelling because by his own admission that he had read, well in advance of the first time that the matter was scheduled for a contested hearing, the Oregon Revised Statutes regarding Civil Rights, Unlawful Employment Practices and Administrative Procedures. Those statutes generally provide the parties to a contested case the right to compel attendance of material witnesses. ORS 659.100(4), 659.060(2), 183.425 and 183.440. The Attorney General's Model Rules of Procedure, adopted by the Bureau of Labor and Industries, also authorized the issuance of subpoenas. A trier of fact in his or her discretion may give deference to a young and inexperienced lawyer. Mr. Kellar, however, practiced eighteen years prior to September 3, 1980: the first two years in Colorado and the last sixteen years in Oregon. Also of no small consequence is Mr. Kellar's admission that he is a trial lawyer. The latitude which may be granted to an inexperienced lawyer is not justified in this case because of Mr. Kellar's many years experience as a trial lawyer. Because of



this experience, his failure to familiarize himself with applicable statutes and procedures is not an acceptable excuse for his failure to appear at a scheduled hearing.

Counsel for Respondent contends that the policy of the state is to allow a full hearing on the merits of every case, be it administrative or otherwise. While the contention may be well taken, there is not evidence to overcome the requirements specified in ORS 18.160.

ORS 18.160 states:

> "The court may, in its discretion, and upon such terms as may be just, at any time within one year after notice thereof, relieve a party from a judgment, decree, order or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect."

Were Respondent able to show mistake, inadvertence, surprise or excusable neglect it would be proper for the Commissioner, in her discretion, to set aside the default against Respondent. The only element of the statute at issue in this case is whether Mr. Kellar's failure to appear at the June 17, 1980, hearing was excusable neglect. Both the Assistant Attorney General and Respondent have drawn this forum's attention to a number of cases which discuss excusable versus inexcusable neglect.

Respondent relies heavily on *Morrell v. County of Lane,* 35 Or App 793, 582 P2d 847(1978), in support of the contention of excusable neglect. In that case the court determined that when counsel unfamiliar with the rules of local practice acted contrary to statute, but consistent with actual local practice, his acts were excusable neglect within the meaning of ORS 18.160.

The facts in this case, however, are not squarely on point with *Morrell.* It is true that Mr. Kellar had not previously argued a contested case before the Bureau of Labor and Industries. His lack of familiarity with the procedures of the Bureau, though, was evidently due in part to his failure to adequately familiarize himself with applicable statutes and Oregon administrative rules, and in part due to his failure to exercise due care in ascertaining whether his original Motion for Continuance had been granted. Further, Mr. Kellar did not act in a fashion consistent with actual practice.

ORS 659.060(2) states specifically that all proceedings before the Commissioner shall be in conformity with ORS 183.310 to 183.500. ORS 183.440(1) provides, in relevant part:

> "The agency shall issue subpoenas to any party to a contested case upon request upon a showing of general relevance and reasonable scope of evidence sought."

Had Mr. Kellar consulted the statutes, he would have discovered the above cited provisions.

The second factor negating the idea of excusable neglect is that Mr. Kellar, by his own admission, made no effort to determine whether his Motion for Continuance had been granted. According to Respondent's counsel, Mr. Kellar went so far as to advise Respondent's General Manager that an

employee who had been subpoenaed by the Bureau of Labor and Industries need not answer the subpoena because there would not be a hearing. Such conduct by Mr. Kellar cannot be viewed as excusable neglect under the relevant statute.

In further support of the propriety of a default in this case is *Roper v. Neet*, 32 Or App 219, 573 P2d 765 (1978). The Oregon Court of Appeals specified that:

> "Where a default judgment results from the failure of defendants' attorney to appear for trail at a scheduled time of which he is aware, it is not an abuse of discretion for the trial court to refuse to set aside the default." *Id.* at 221.

Respondent argues that it did not receive proper notice of the hearing. An agency is required to personally serve or serve by registered or certified mail a notice of the time and place of a hearing. The formal notice of the June 17, 1980, hearing was served by certified mail on June 12, 1980. Counsel had actual notice of the hearing May 23, 1980, because he and the Assistant Attorney General had mutually agreed to this date after the postponement of the first hearing. Further, Mr. Kellar had requested a continuance of the hearing which supports the existence of actual notice.

The affidavit of Mr. Kellar in support of the Motion for Continuance does not mention purported defects in the issuance of proper notice. The only basis for the motion is that a material witness was unavailable. No proof of any effort to compel the attendance of the witness or any attempts to offer deposition testimony of the witness was offered. The actual notice, together with the formal notice, are sufficient.

Respondent urges that it was improper for the Bureau to take a default without first ascertaining that Respondent had no intention to appear. Mr. Kellar testified that the Assistant Attorney General did call and ask if he intended to appear and Mr. Kellar said, "No."

The final theories advanced by Respondent in support of it Motion to Reconsider are as follows:

1) Counsel for the Bureau should have explained to the Presiding Officer that Respondent's failure to appear was due to a misunderstanding of the administrative procedures.

2) Counsel for the Bureau should have disclosed to the Presiding Officer the existence of a witness whose testimony, if believed, would be exculpatory.

Respondent contends that Mr. Kellar did not understand the administrative procedures because the procedural rules were uncertain. That the applicable laws in this case are sufficiently clear is discussed above in this Ruling. Moreover, it is incumbent upon counsel to determine the status of the law and the rules of procedure. Respondent cannot reasonably expect advice from its adversary.

The material witness had apparently told the Assistant Attorney General that he was Complainant's supervisor and that he laid off Complainant without knowing the age of Complainant. No compelling authority was cited in support of the argument that an obligation exists to disclose possible exculpatory testimony in a civil administrative proceeding.



Having considered the record and testimony presented regarding Respondent's motions, the Default Order entered in the Order of August 1, 1980, shall remain in effect.

## FINDINGS OF FACT – PROCEDURAL

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

2) On January 10, 1979, Leonard Wettengel filed a verified complaint with the Civil Rights Division of the Bureau of Labor and Industries alleging that the Respondent discriminated against him in connection with his employment because of his age.

3) Following the filing of the aforementioned verified complaint, the Civil Rights Division investigated the allegations in the complaint and determined that substantial evidence existed to support the allegations.

4) Thereafter, the Civil Rights Division attempted to reach an informal resolution of the complaint through conference, conciliation, and persuasion, but was unsuccessful in these efforts.

## FINDINGS OF FACT – THE MERITS

1) At all times material herein, Respondent was an Oregon corporation engaged in the manufacture of plywood.

2) Complainant was born in 1926.

3) Complainant was hired on July 28, 1978, as a millwright responsible for the maintenance of Respondent's plant equipment. Complainant was paid $9.06 per hour and $13.59 per hour for overtime. Complainant worked an average of 48 hours per week. The millwrights were given a $0.90 per hour raise beginning June 1, 1979.

4) Complainant had 20 years experience in machinery maintenance. Among other things, he owned a sheet metal shop for 14 ½ years and he also worked for Respondent's predecessor for 4 ½ years.

5) Complainant was laid off on December 1, 1978, when he was 52 years old.

6) Respondent discharged three millwrights out of 11, including Complainant, during the material times.

7) Kenneth Chestnut, age 52, was laid off on January 13, 1979. His replacement was a man in his 30's. Harvey Baines, over 50 years of age, was also laid off in January 1979. His replacement was also a man in his 30's.

8) The discharged millwrights were the oldest of the eleven. Complainant testified, and I find, that "no other old workers were kept."

9) No complaints or criticisms from the employer preceded Mr. Wettengel's discharge or the other discharges.

10)Tom Skaggs, a former employee for Respondent who worked with Complainant, testified, and I find, that Complainant's knowledge and performance was superior to retained employees.

11)Complainant received unemployment benefits of $119.00 a week for 26 weeks from December 15, 1978, until June 15, 1979, for a total of $3,094.00.

12) Respondent closed its plant on October 26, 1979. Although the plant was re-opened approximately three weeks later, and the employees at the time of the closure were invited back, their return was subject to a cut in pay of $1.00 per hour.

13) But for Respondent's unlawful employment practice, Complainant would have been employed by Respondent from December 1, 1978, (the date of his lay-off) until October 26, 1979, and from approximately November 19, 1979, until June 15, 1980.

14) Other than unemployment compensation, Complainant earned a total of $7,445.60 between the termination and June 15, 1980, from The Branding Iron and Weather Beaters, Inc.

**ULTIMATE FINDINGS OF FACT**

1) Respondent discharged Complainant because of his age.

2) Other workers for Respondent who were not members of Complainant's age group were not similarly discharged.

3) As a direct result of the wrongful discharge of Complainant, Complainant lost the following amounts:

| | |
|---|---|
| DECEMBER 1, 1978 - MAY 31, 1979 | |
| $ 9.06 per hr x 40 hrs per/wk | $ 362.40 |
| $13.59 per hr x 8 OT hrs per/ wk | 108.72 |
| | $471.12 |
| 26 weeks x $471.12/week | $12,249.12 |
| JUNE 1, 1979 - OCTOBER 26, 1979 | |
| $ 9.90 per hr x 40 hrs/wk | $396.00 |
| $14.82 per hr x 8 OT hrs/wk | 118.56 |
| | $514.56 |
| 21 wks, 2 days x$514.56/wk | $11,011.58 |
| NOVEMBER 1, 1979 - JUNE 15, 1980 | |
| $ 8.90/hr x 40 hrs/wk | $356.00 |
| $13.35/hr x 8 OT hrs/wk | 106.80 |
| | $462.80 |
| 30 weeks x $462.80/week | $13,884.00 |
| GROSS DAMAGES: | $37,144.70 |
| LESS: | |
| * Unemployment Benefits Rec.- | $3,094.00 |
| * The Branding Iron | 1,110.99 |
| * Weather Beaters | 6,334.61 |
| | $10,539.60 |
| COMPLAINANT'S TOTAL LOST WAGES : | $26,605.10 |

**CONCLUSIONS OF LAW**

1) Respondent is an employer subject to the provisions of ORS 659.010 to 659.110.

2) Complainant is a protected worker between 18 and 65 years of age.

3) The termination of Complainant's employment by Respondent was in violation of ORS 659.022 and 659.030.

4) The Commissioner of the Bureau of Labor and Industries has the authority to award money damages to the Complainant herein under the facts and circumstances of this record, and the sum of money awarded as damages in the Order below is an appropriate award.

**OPINION**

The substantial evidence in this case is that Complainant's employment with Respondent was terminated solely because of his age. The Bureau of Labor and Industries showed by competent evidence that Complainant was 52 years old at the time he was terminated. Of the 11 millwrights under the employ of Respondent, two other millwrights who were about the same age as Complainant were also terminated. Furthermore, two subsequent replacements were men in their thirties. There was nothing to indicate that Complainant was terminated for cause.



An employer who has committed an unlawful employment practice is liable for lost wages unless it has established that the complainant has refused a bona fide offer of employment, or reinstatement, or has obtained a better paying job. *United States v. US Steel Corporation,* 520 F2d 1043 (5th Cir 1975). The testimony of Complainant and an exhibit establish that Complainant diligently sought replacement work. Other exhibits establish that he diligently mitigated his damages.

Out-of-pocket expenses related to health insurance premiums incurred by an aggrieved party are sometimes recoverable. *School District No. 1 v. Nilsen,* 271 Or 465, 534 P2d 1135 (1975). However, the Respondent must be given adequate notice of claim. Thus, where damages related to health insurance premiums are sought, the complaint must so allege. Complainant did not allege loss of health insurance coverage and therefore is not entitled to reimbursement of moneys paid for the same.

Although alleged, there was no substantial evidence of pain, humiliation, suffering or loss of human dignity experienced by Complainant as a result of the wrongful employment practice. No amount may be awarded.

On October 26, 1981, counsel for the Bureau submitted arguments in the form of a Supplemental Authority, arguing that unemployment insurance should not be deducted from the Complainant's gross back pay award. While these arguments regarding this issue are persuasive, I must agree with Respondent's counsel that the arguments were not timely filed. Since Complainant had the opportunity to present this argument at the June 15, 1980, hearing, as well as in subsequent memoranda, but failed to do so, unemployment compensation has been deducted from Complainant's gross back pay award.

**ORDER**

NOW, THEREFORE, as authorized by ORS 659.060(3) and in order to eliminate the effects of the unlawful practices found, as well as to protect the lawful interests of others similarly situated, the Respondent is hereby ordered to:

1) Deliver to the Hearings Unit of the Portland office of the Bureau of Labor and Industries within sixty (60) days of the execution of the Final Order in this matter, a certified check payable to the Bureau of Labor and Industries in trust for Leonard Wettengel in the gross amount of TWENTY-SIX THOUSAND SIX HUNDRED FIVE DOLLARS AND TEN CENTS ($26,605.10), representing compensatory damages for the unlawful termination of employment due to age.

2) Cease and desist from discriminating against any individual in the terms of employment because of age.

**In the Matter of**

**EMPLOYMENT DIVISION**

**of the Department of Human Resources of the State of Oregon, Respondent.**

Case Number 60-79

Final Order of the Commissioner

Mary Wendy Roberts

Issued January 19, 1982.

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## SYNOPSIS

Black Complainant was reprimanded when he deliberately did not follow the instructions of his supervisor. He was later evaluated in a similar manner to other employees for the purpose of a work force reduction. The Commissioner ruled that Respondent public employer did not commit an unlawful employment practice based on Complainant's race or color or because he has opposed discriminatory practices of Respondent. The Commissioner dismissed the specific charges against Respondent. ORS 659.030(1)(a) and (d); 659.060(3).

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The above-entitled matter came on regularly for hearing before Andrew H. Josephson, designated as Presiding Officer by Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing commenced on May 14, 1980, in the Commission Room of the Department of Fish and Wildlife, 506 S.W. Mill, Portland, Oregon, and continued through the same morning. The Bureau of Labor and Industries was represented by Marva F. Graham, Attorney at Law. Respondent Employment Division of the Department of Human Resources of the State of Oregon was represented by Josephine Hawthorne, Assistant Attorney General. Complainant George Whitney was present and testified.

Having fully considered the entire record in this matter, I, Mary Wendy Roberts, make the following Rulings Upon Motions, Findings of Fact, Ultimate Findings of Fact, Conclusions of Law, Opinion, and Order.

## RULINGS UPON MOTIONS

Prior to the hearing a motion was filed on behalf of Respondent Employment Division to amend the Specific Charges in the following particulars:

1) To strike paragraph VI (a) and (b) of the Specific Charges. At the beginning of the hearing the partied stipulated to this amendment and it was allowed.

2) To strike paragraphs VII (a) and (b) of the Specific Charges. The Agency objected to this amendment, and the ruling was reserved to allow the presentation of evidence on this matter during the hearing. After reviewing the evidence and pertinent law this amendment is allowed. This amendment is allowed to conform with the Oregon Supreme Court's directive which resulted in the Employment Relations Board's May 25, 1978, rulings on this matter.

## FINDINGS OF FACT – PROCEDURAL

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

2) On July 19, 1974, George Whitney filed a verified complaint with the Civil Rights Division of the Bureau of Labor and Industries alleging that he had been and continued to be discriminated against in connection with his employment by Respondent, on the basis of his race and color and because he had opposed discriminatory employment practices of Respondent.

3) Following the filing of the aforementioned verified complaint, the Civil Rights Division investigated the allegations in the complaint and determined that substantial evidence existed to support these allegations.

4) Thereafter, the Civil Rights Division attempted to reach an informal resolution of the complaint through conference, conciliation, and persuasion, but was unsuccessful in these efforts.

## FINDINGS OF FACT – THE MERITS

1) At all times material herein, Respondent was an administrative agency of the State of Oregon which administers employment services for the State of Oregon.

2) Complainant is a black person.

3) Complainant began working for Respondent on May 19, 1970. He was assigned to Respondent's Portland Office as an ES-Specialist I. On December 21, 1970, Complainant transferred to Respondent's Salem office. At that time his title was Manpower Specialist I. On June 1, 1971, he became a Manpower Specialist II and on March 1, 1972, he became an Administrative Assistant III. Complainant was promoted to the position of Program Executive I at Respondent's Salem Office on July 1, 1972.

4) As Program Executive I, Complainant's duties were to supervise and carry out Respondent's equal employment opportunity program. This included evaluating local office records and operations for compliance with federal, state and Division policies, assisting local offices in referring persons with possible complaints about job discrimination to appropriate governmental agencies, formulating and recommending solutions to problems in the field of intergroup relations, informing managers of any discriminatory patterns, and recommending remedial actions.

5) On April 19, 1974, Complainant received a verbal complaint of discrimination from Ms. Grace Amos, a black woman employed at Respondent's Portland Office. Chalmer Jones, State Ombudsman, had advised Ms. Amos to contact Complainant.

6) On April 22, 1974, Complainant received a phone call from Mr. Jones requesting that complainant review Ms. Amos' problems. The Complainant informed Mr. Jones that he planned to speak with Ross Morgan, Respondent's Administrator and Complainant's superior, concerning Ms. Amos' problem and to request permission from him to go to Portland to investigate it. Mr. Jones did not have the authority to instruct Complainant to investigate the complaint personally.

7) Complainant and Mr. Morgan met during the morning of April 22, 1974. Complainant requested permission from Mr. Morgan to go to Portland to investigate Ms. Amos' complaint. They also discussed Complainant's request to implement complaint procedures outlined in the Regional Manpower Bulletin numbers 33-73 and 34-73. Mr. Morgan informed

Complainant that he felt that existing procedures were adequate. Mr. Morgan concluded by informing Complainant that he would discuss with Leonard Systma, Respondent's Supervisor of Field Operations, Complainant's request to investigate Ms. Amos's complaint and would inform Complainant of their decision.

8) During the afternoon of April 22, 1974, Mr. Morgan informed Complainant that line supervisors would handle the complaint of Ms. Amos and that he was not to become involved in the complaint of Ms. Amos.

9) Rather than informing Ms. Amos of his supervisor's. decision on the handling of her concerns or recommending other avenues of relief available to her, Complainant decided to go to Portland to investigate her complaint, knowing that such action was in direct violation of Mr. Morgan's instructions. On April 23, 1974, Complainant investigated the complaint in Portland and wrote a report concerning his investigation. The report was dated April 26, 1974, and it was submitted to Paul Stellmacher, Respondent's Supervisor of E. S. Technical Support.

10) Complainant received a written reprimand from Mr. Morgan dated April 24, 1974, which stated that Complainant had violated a direct order not to become involved with the Amos case. No action beyond filing this reprimand in his personnel file was taken against Complainant.

11) Complainant's yearly performance appraisal was written on May 1, 1974, by his immediate supervisor Marilyn Todd. Ms. Todd gave the Complainant a B rating. She would have given the Complainant an A rating if he had not received the April 24, 1974, letter of reprimand. Ms. Todd had the authority to give Complainant an A rating even though he had received the reprimand.

12) On December 23, 1970, Eldon Cone, Respondent's Deputy Administrator, requested a special meritorious salary increase for Complainant. Complainant has received other meritorious salary increases during his employment with Respondent.

13) In June of 1974, a budget reduction forced Respondent to lay off or demote some of its employees. Employee service credits determined the order of layoff and "bumping" rights. Service credits were computed by averaging each employee's performance appraisal score and adding 1/12th of a point for each month of service in the employee's current position. Bumping is the system which allows an employee to avoid layoff by taking a voluntary demotion to a position for which the employee is qualified if the employee has more service credits than the employee currently working the position. A particular position can be excluded from the bumping and layoff system if, for example, it requires unique skills, but an agency must be able to develop very solid justification for deviating from the regular order of layoff.

14) Mr. Cone approached Complainant and asked if Complainant could cite reasons to support the exclusion of his position from the bumping and layoff system. Complainant was the only employee affected by the bumping and layoff system to be offered the opportunity to supply reasons to support exclusion from the bumping and layoff procedures. Complainant replied that he did not want to assist in developing exclusion status because he wanted to be treated like the other individuals.

15) Complainant received twelve service credits. Individuals with more credits had the right to bump Complainant since his position was not excluded. Complainant then had the choice of being laid off or bumping into another position. Complainant accepted a demotion in lieu of layoff. His new position was Administrative Assistant III in the Coos Bay local office. Complainant's salary remained at $1,007.00 a month. Complainant received moving expenses since his demotion and transfer request was prompted by a reduction in the work force. The demotion and transfer became effective on July 1, 1974. On September 1, 1974, Complainant was reinstated into the position of Program Executive I at the Coos Bay local office.

16) Co-workers with higher or lower service credits than Complainant were affected by the work force reduction. Two individuals with lower service credit points than Complainant were not affected by the layoff, since their positions were excluded.

## ULTIMATE FINDINGS OF FACT

1) As of July 1, 1972, Complainant was working as a Program Executive I in Respondent's Salem Office supervising and carrying out Respondent's equal employment opportunity program. On April 19, 1974, Complainant, a black person, received a complaint of discrimination from Ms. Grace Amos, a black woman employed at Respondent's Portland Office. She asked Complainant to investigate her complaint. On April 22, 1974, Chalmer Jones, State Ombudsman, also asked Complainant to investigate the complaint of Ms. Amos. Neither individual had the authority to instruct Complainant to investigate the complaint.

2) Complainant requested permission to investigate the complaint from Ross Morgan, Respondent's Administrator and Complainant's supervisor. Mr. Morgan instructed Complainant not to investigate the complaint.

3) Complainant decided to and did investigate Ms. Amos' complaint with full knowledge that he was not following Mr. Morgan's instruction.

4) Complainant received a letter of reprimand from Mr. Morgan on April 24, 1974. The letter of reprimand was issued because Complainant knowingly disobeyed a direct instruction of a supervisor. The reprimand was not issued because Complainant was aiding an individual in a discrimination complaint or because of Complainant's race or color.

5) Complainant received a B rating on his May 1, 1974, performance evaluation. Ms. Todd, Complainant's supervisor who did the evaluation, took into consideration Complainant's letter of reprimand, but she had the authority to issue an A performance appraisal if she felt it appropriate.

6) In work force reduction, layoffs and bumping rights are determined by an employee's service credits. A position can be excluded from the layoff and bumping system if it requires unique skills and is given exclusion status. Complainant's job description does not indicate that particular skills

were need to hold that position. Complainant's position was not excluded, because other employees met the basic job requirements.

7) On July 1, 1974, when Respondent reduced its work force due to a budget cut, Complainant took a voluntary demotion in lieu of a layoff. He became an Administrative Assistant III in Respondent's Coos Bay office. His salary remained at $1007.00 per month. Complainant was reinstated to his former position of Program Executive I at Respondent's Coos Bay office on September 1, 1974.

## CONCLUSIONS OF LAW

1) The actions, and motivations for those actions, of Respondent's supervisors, including Eldon Cone, Ross Morgan, and Marilyn Todd, are properly imputed to Respondent.

2) Respondent's reprimand and demotion of Complainant to Administrative Assistant III does not violate ORS 659.030(1)(a), because it does not constitute discrimination in terms and conditions of employment against Complainant because of his race or color.

3) Respondent's reprimand and demotion of Complainant to Administrative Assistant III does not violate ORS 659.030(1)(d), because it does not constitute discrimination against Complainant because he opposed practices forbidden by ORS 659.010 to 659.110 and 659.400 to 659.435.

## OPINION

The Agency has failed to prove that Complainant was discriminated against in connection with his employment by Respondent on the basis of his race or color or because he has opposed discriminatory practices of Respondent.

The Specific Charges focus upon two primary events. The Specific Charges allege that Complainant received a letter of reprimand after he interceded in a dispute involving Grace Amos, a black employee working in Respondent's Portland office. Complainant has not met his burden of proving that the reprimand was issued for any reason other than his violation of a direct order of his supervisor. The Specific Charges also allege that Complainant was given a choice of being laid off or accepting a demotion, while other employees of Respondent with fewer service credits than Complainant were not demoted or laid off. Respondent has substantiated that both of these actions were based upon legitimate non-discriminatory reasons.

Complainant was Respondent's equal employment opportunity specialist. Complainant dealt with many issues of discrimination, including complaints from within the Employment Division. Complainant learned about the complaint of Ms. Amos by speaking with her and with Mr. Jones, the State Ombudsman. Neither individual had the authority to instruct Complainant to investigate the complaint. Complainant asked Ross Morgan, Respondent's Administrator, for permission to investigate the case. After Mr. Morgan had an opportunity to look into the situation, he informed Complainant that line supervisors would handle it and that Complainant was not to become involved.

Complainant decided to and did investigate Ms. Amos' complaint with full knowledge that he was not following



his supervisor's instructions. On April 24, 1974, Mr. Morgan issued a letter of reprimand to Complainant because Complainant had deliberately violated his instructions.

Marilyn Todd, Complainant's immediate supervisor, wrote Complainant's annual report of performance appraisal on May 1, 1974. She took into consideration the letter of reprimand when she gave Complainant a B rating. Ms. Todd could have given Complainant an A rating if she had felt it appropriate after taking into consideration the reprimand.

Respondent was faced with a budget reduction. For the purpose of determining layoff status, each employee's service credits were computed. Service credits were the annual performance appraisal score plus the length of service in a particular job classification. Complainant had twelve service credits.

Respondent had the authority to exclude a particular position from the layoff and bumping process. The exclusion shielded the individual working in that position from the work force reduction and bumping system notwithstanding the individuals service credits. Respondent took into consideration the unique skills needed to perform a job when deciding whether to exclude it. Complainants position was not excluded. Two positions filled by individuals with fewer service credits than Complainant were excluded. Individuals with both more and less service credits than Complainant did not have their positions excluded and were affected by layoff procedures. Complainant refused the opportunity to demonstrate that his position was unique. Management determined Complainant's position was not sufficiently unique to justify exclusion. Complainant took a voluntary demotion but his salary remained the same. Complainant transferred to the Respondent's Coos Bay field office as an Administrative Assistant III on July 1, 1974. On September 1, 1974, Complainant was promoted back to Program Executive I.

Respondent has adequately demonstrated that Complainant's reprimand was based on the fact that he deliberately did not follow the instructions of his supervisor. Respondent has also demonstrated that Complainant was evaluated in a similar manner as other employees for the purpose of the work force reduction.

## ORDER

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

**In the Matter of**

**UNION PACIFIC RAILROAD COMPANY, a Utah corporation doing business in Oregon, Respondent.**

Case Number 54-79

Final Order of the Commissioner

Mary Wendy Roberts

Issued January 25, 1982.

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## SYNOPSIS

When confronted with weekend work, Complainant refused to work on Saturday, his Sabbath. Respondent committed an unlawful employment practice based on religion when it refused to allow Complainant to work on the day following the Saturday Sabbath. Finding that Respondent had determined before the weekend work confrontation to fire Complainant on Monday due to sub-standard performance, the Commissioner awarded Complainant one day's pay, $48.32, and ordered Respondent to insure that no employee would be discharged based on religion. ORS 659.010(2); 659.030(1)(a); 659.060(3).

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The above-entitled matter came on regularly for hearing before Dale A. Price, designated as Presiding Officer by Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was held on January 3, 1980, in Room 678 of the State Office Building, 1400 S.W. Fifth Avenue, Portland, Oregon. The Bureau of Labor and Industries was represented by Douglas R. Andres, Assistant Attorney General. Respondent was represented by Carolyn L. Larson, Attorney at Law. Complainant Kevin E. Moore was present and testified.

Having considered the entire record, I, Mary Wendy Roberts, hereby make the following Findings of Fact, Ultimate Finding of Fact, Conclusions of Law, Opinion, and Order.

## FINDINGS OF FACT – PROCEDURAL

1) At times material herein, the Respondent was a Utah corporation doing business and employing more than one person in Oregon and, as such, subject to the provisions of ORS 659.010 to 659.110.

2) On March 17, 1977, Kevin E. Moore filed a verified complaint with the Civil Rights Division of the Bureau of Labor and Industries alleging that he had been and continued to be discriminated against in connection with his employment by the Respondent because of his religion.

3) Subsequent to the filing of Mr. Moore's complaint, the Civil Rights Division conducted a thorough investigation of the allegations contained in said complaint, and did determine that there existed substantial evidence in support of the allegations.

4) Subsequent to the aforementioned determination in this case, the Civil Rights Division did attempt to settle the matters at issue by conference, conciliation and persuasion, but was unsuccessful in these efforts.

## FINDINGS OF FACT – THE MERITS

1) Complainant was, at times material herein, a sincere Seventh Day Adventist, whose Sabbath was observed from sundown on Friday through sundown on Saturday.



Seventh Day Adventist's consider it a sin to work on their day of Sabbath.

2) Complainant was hired by Respondent on February 14, 1977, as an Assistant Signalman. His duties included, but were not limited to, digging ditches, laying cables, installing signal boxes and stringing wire.

3) Complainant's initial assignment was at the Hinkle hump yard in Hermiston, Oregon. A hump yard is a railroad car sorting area wherein cars are pushed over a hump and switched onto various tracks. Complainant assisted in laying signal cables in trenches under the supervision of Signalman George Schisler. Laying cables involves removal of cable from reels, separation of cable strands, reading of labels, location of stakes, and set up of proper connections to each piece of equipment. Mr. Schisler was under considerable time pressure to complete the task of laying cable at Hinkle.

4) In addition to Complainant, Mr. Schisler supervised two other assistant signalmen, Phillip Friend and "Jim M." Complainant and Mr. Friend had trouble with some aspects of laying cables, including locating the stakes which marked connection points. Mr. Schisler testified that he screamed at Complainant and Mr. Friend about their inability to do the job and he eventually complained to Signal Foreman Jack Brangham and Assistant Foreman Leo Karnowski about his problems with Mr. Friend and Complainant, stating that he had no time to "baby-sit" and that he was overworking himself and Jim M. due to inadequacies of Complainant and Mr. Friend. Mr. Brangham supervised Mr. Schisler, Mr. Karnowski, Gene Mitchell, and Ron Hinckley.

5) Subsequent to his receipt of complaints from Mr. Schisler, Mr. Brangham observed Complainant and others in the performance of their duties and concurred with Mr. Schisler's analysis of Complainant's performance laying cables at the Hinkle hump yard. Complainant's problems included inability to get cables to the right places with proper labels. Mr. Brangham testified that he would have discharged Complainant on or about Friday, March 4, 1977, at Hinkle, but for the rush job of straightening track at Nolin, Oregon, which was to be completed the following week.

6) Mr. Brangham testified that in early March 1977 his assistant foreman and Mr. Schisler complained that Complainant "wasn't doing the work."

7) At Nolin, early in the week of March 7, 1977, Mr. Brangham discovered that Complainant was having trouble stringing wire without kinking or crossing it. Mr. Brangham directed Complainant to dig holes instead of stringing wire, because kinked or crossed wire can cause wire breakage or incorrect signals.

8) On or about March 9, 1977, Mr. Brangham spoke to Assistant Signal Engineer, Glen Balcom, about unsatisfactory work performance of Complainant and others. Mr. Balcom directed Mr. Brangham to talk to Complainant and, if his work did not improve, to discharge him sometime before the expiration of his probationary period on or about April 7, 1977. Mr. Brangham discussed Complainant's unsatisfactory work performance with him. Mr. Balcom's testimony indicated that he

expected Mr. Brangham to discharge Complainant and others shortly after their conversation on March 9, 1977.

9) Complainant's performance at Nolin did not improve measurably between March 9 and March 11, 1977.

10) Enroute from the Nolin job site on Friday, March 11, 1977, Mr. Brangham announced that the crew would have to work during the weekend in order to complete the project on schedule. Complainant responded that he was unable to work on Saturday, March 12, 1977, because of his Saturday Sabbath as a Seventh Day Adventist. Mr. Brangham informed Complainant that if he could not work on Saturday, then there was no reason for him to work on Sunday, since he was going to "let him go" anyway. Complainant was discharged from his employment by Mr. Brangham on Friday, March 11, 1977, and he did not work subsequently for Respondent.

## ULTIMATE FINDING OF FACT

Complainant was hired as an Assistant Signalman by Respondent during a particularly busy period in Respondent's business. Because of the time pressure to complete jobs, Complainant's supervisors were unable to give him the close supervision which would be desirable for a new employee. Complainant's job performance in laying cable at the Hinkle yard and in stringing wire at the Nolin, Oregon, job site was beneath acceptable standards. Signal Foreman Jack Brangham had decided to discharge Complainant effective on or about March 14, 1977, and had cleared his discharge with Assistant Signal Engineer Glen Balcom, prior to March 11, 1977. On March 11, 1977, Mr. Brangham announced that the Nolin crew, of which Complainant was a part, would work during the weekend of March 12 and 13. When Complainant informed Mr. Brangham of his inability to work on Saturday, due to his Sabbath as a Seventh Day Adventist, Mr. Brangham informed Complainant that he need not report to work on Sunday, March 13, 1977, if he were unable to work on Saturday, March 12, 1977. Mr. Brangham's action usurped Complainant's right to work on Sunday, March 13, 1977, because of Complainant's unwillingness to work on Saturday, March 12, 1977. Although Complainant would have been discharged effective March 14, 1977, he did lose one day's pay due to Respondent's unlawful action in depriving him of Sunday's work because of his religion and its Saturday Sabbath.

## CONCLUSIONS OF LAW

1) The actions and motives for those actions of Respondent's Signal Foreman Jack Brangham are properly imputed to the Respondent.

2) Respondent's disqualification of Complainant from working on Sunday, March 13, 1977, due to his unwillingness to work on his Sabbath, Saturday, March 12, 1977, constitutes a failure to accommodate Complainant's religious needs and as such is a violation of ORS 659.030.

3) The Commissioner of the Bureau of Labor and Industries has the authority to award monetary damages to the Complainant under the facts and circumstances of this record, and the sum of money awarded as damages in the order below is an appropriate award.



## OPINION

Complainant was initially employed by Respondent on February 14, 1977, to work as an Assistant Signalman in the "hump yard" at Hermiston, Oregon, where he worked for about three weeks. His duties included digging ditches, laying cables, installing signal boxes and related assemblies. Signalman George Schisler was Complainant's supervisor for the work at Hinkle hump yard. Mr. Schisler supervised two others, "Jim M." and Phillip Friend, besides Complainant during this period. Mr. Schisler was under pressure to complete the laying of cables in a short period of time, and, as a result, he was unable to give Complainant and Mr. Friend all the help new workers would ideally receive. Mr. Schisler was frustrated with the problems experienced by Complainant and Mr. Friend as they attempted to learn their jobs while he attempted to meet his deadlines.

After about three weeks, on or about March 7, 1977, Complainant was transferred to a job at Nolin where a crew was assigned to straighten the track to enable AMTRAK to travel at a higher rate of speed. This project was to last only about one week. At this location Complainant was assigned to move telephone poles, dig posts holes and generally assist the signalmen. Jack Brangham was the Respondent's signal foreman, and he was the overall supervisor above Complainant and others. Mr. Brangham received complaints from an assistant foreman and from George Schisler about Complainant not doing his job sometime in early March of 1977 in the Hinkle area. Mr. Brangham observed Complainant's work at Hinkle and discovered that Complainant couldn't keep the cables straight and correctly labeled. Mr. Brangham gave orders to Leo C. Karnowski, Gene D. Mitchell, Ron L. Hinckley, and George Schisler, each of whom were supervisors at the Nolin project.

Because of Complainant's problems stringing wire at Nolin, Mr. Brangham sent him to dig holes. Mr. Brangham testified that Complainant was unable to do the other work normally assigned to assistant signalmen. Due to the time pressure for completion of the Nolin job, Mr. Brangham planned to have his crew work through the weekend of March 12 and March 13, 1977. When Mr. Brangham informed the crew of his plans for the weekend, Complainant informed him that he would be unable to work on Saturday because of his Seventh Day Adventist religion, which observes its Sabbath from sundown Friday until sundown Saturday. Mr. Brangham told Complainant not to bother coming to work on Sunday if he couldn't work on Saturday. Complainant's employment was effectively involuntarily terminated by Respondent on Friday, March 11, 1977, and he was not subsequently rehired.

It is well established in federal case law that an employer has an affirmative duty to make reasonable accommodation for religious observances of sincere believers among its employees to the extent that such accommodation does not cause undue hardship in the conduct of the employer's business. *See, e.g., Transworld Airlines v. Hardison*, 432 US 63, 14 FEP 1696 (1977). Although federal court decisions are

not binding upon this forum, their rational is helpful as a framework for resolution of matters at issue before us.

The Agency's initial burden was to establish a prima facie case of unlawful discrimination based upon Complainant's religion. It is not disputed that Complainant was employed by Respondent at times material herein, nor is the sincerity of Complainant's religious conviction or the traditional Saturday Sabbath for Seventh Day Adventist's at issue. The parties agree that Complainant was told not to come to work on Sunday, March 13, 1977, or thereafter if he was unable to work on Saturday, March 12, 1977. The Agency did carry its initial burden of proof.

In defense, Respondent asserted that Complainant was discharged solely because of unsatisfactory work performance. George Schisler, who supervised Complainant, testified that at Hinkle, Complainant was unable to correctly lay cables or to locate marking stakes and that Mr. Schisler complained to Foreman Brangham and Assistant Foreman Karnowski about problems with Complainant and his coworker, Phillip Friend. Mr. Schisler told his superiors, in reference to Complainant and Mr. Friend, that he did not have time to "baby-sit"; that he needed more help; and that he was being forced to overwork himself and "Jim M.", who was the only other capable worker he had. Mr. Schisler's testimony revealed that he wasn't surprised to hear that Complainant was discharged and that he assumed that the discharge was a result of Complainant's inabilities. Although no written warnings were given to Complainant, Respondent's policy did not call for written warnings during probationary periods.

Signal Foreman Jack Brangham received complaints about Complainant not doing his work from Mr. Schisler and Assistant Foreman Karnowski. These complaints and his own observation of Complainant's work in early March 1977 led him to conclude that Complainant should not be allowed to finish his probationary period because of his inability to get signal cables to the right places with the right labels on them or to string wires straight without kinking or crossing. On or about March 9, 1977, Mr. Brangham spoke to Assistant Signal Engineer Glen Balcom about firing Complainant at the end of the week when the rush job at Nolin was to be completed. Mr. Balcom had heard complaints about the work of Complainant and others. Early in the week beginning March 7, 1977, Mr. Balcom instructed Mr. Brangham to talk to Complainant and to discharge him before the end of his sixty day probationary period if his performance did not improve. Mr. Balcom testified that he expected Mr. Brangham to discharge Complainant "right away." The Nolin job was to conclude on or about March 13, 1977. Mr. Brangham stated his intention to terminate Complainant's employment after this job was completed. He further stated that, but for the rush job at Nolin, he would have discharged Complainant from Hinkle on Friday, March 11. Respondent has carried its initial burden to show that its asserted reasons for terminating Complainant's employment were not unlawfully discriminatory.



The remaining issue is whether Respondent could have accommodated Complainant's valid religious needs without undue hardship. Respondent's duty to accommodate is not obviated by its dissatisfaction with Complainant's work performance. The evidence suggests that Mr. Brangham had decided to discharge Complainant before the issue of religion arose. This does not release Respondent from its duty to treat Complainant in a lawful manner while he remained in its employ. Respondent presented no evidence to suggest that any undue hardship would have been visited upon Respondent had it allowed Complainant his Saturday Sabbath and then allowed him to work Sunday before discharging him. The conclusion is unavoidable: but for his religion, Complainant would have been allowed to work Sunday, March 13, 1977. Respondent's failure to accommodate Complainant's sincerely held religious beliefs does constitute a violation of ORS 659.030.

The appropriate remedy in this case must be fashioned in light of all the circumstances surrounding Complainant's termination. The consistent testimony of three layers of supervisors above Complainant established that he would have been discharged on or about March 13, 1977. Because of the Respondent's unlawful action, Complainant has been deprived of one day's pay, or $48.32, for which he must be compensated.

Because Complainant was hired during a busy period for the signalmen in Respondent's employ, a general sense of equity might suggest that Complainant should have received more thorough training and closer supervision at the outset to give him a fair chance to master the intricacies of cable laying and wire stringing. This general sense of equity has no relevance to our inquiry. Respondent had no duty to thoroughly train new employees. If it chooses to retain only those who master the requisite skills without supervision and direction, it has the right to do so without peril of violating ORS 659.030. It is unfortunate that Complainant was hired during a busy period when training was limited, but there is no justification for an intrusion into management prerogatives in this case.

## ORDER

NOW, THEREFORE, as authorized by ORS 659.060(3) and 659.010(2), and in order to eliminate the effects of the unlawful practices found and to protect the rights of others similarly situated, the Respondent is hereby ordered to:

1) Deliver to the Hearings Unit of the Portland office of the Bureau of Labor and Industries, within Sixty (60) days of the date of execution of the Final Order in this matter, a voucher payable to the Bureau of Labor and Industries in trust for Kevin E. Moore in the gross amount of FORTY-EIGHT DOLLARS AND THIRTY-TWO CENTS ($48.32), less legal deductions for federal and state income taxes and Railroad Retirement Tax, representing the wages the Complainant lost due to Respondent's unlawful employment practice found above.

2) Take whatever steps are necessary to insure that no employee is discharged on the basis of his or her religion.

**In the Matter of**
**SPEAR BEVERAGE COMPANY,**
**an Oregon corporation,**
**Respondent.**

Case Number 03-80
Final Order of the Commissioner
Mary Wendy Roberts
Issued February 17, 1982.

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## SYNOPSIS

Respondent discharged Complainant, an injured worker, because he had applied for Oregon Worker's Compensation benefits, and thereby committed an unlawful employment practice. The Commissioner dismissed a claim that Respondent failed to reinstate Complainant for lack of jurisdiction because Respondent's action occurred before the statute provided that such a failure was an unlawful employment practice. The Commissioner awarded Complainant $1072 in lost wages and $1500 in mental suffering based upon fear, anxiety, embarrassment, loss of human dignity, and familial tension caused by the unemployed Complainant's inability to support his family. The Commissioner refused to deduct unemployment compensation Complainant received from the lost wages. ORS 659.010(2); 659.410; 659.415; 659.060(3).

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The above-entitled matter came on regularly for hearing before Andrew H. Josephson, designated as Presiding Officer by Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was held on April 29, 1980, in the Oregon Room of the Oregon Mutual Savings Bank, 234 S.W. Broadway, Portland, Oregon. The Bureau of Labor and Industries was represented by Douglas R. Andres, Assistant Attorney General. Respondent Spear Beverage Company was represented by Jack C. Griffin, Office Manager. Complainant Edward N. Jeremiah was present and testified.

On November 17, 1980, the Court of Appeals of the State of Oregon ruled in effect that the Commissioner of the Bureau of Labor and Industries has no jurisdiction to enforce ORS 659.415 with regard to acts which allegedly occurred before October 1979. On March 17, 1981, the Supreme Court of the State of Oregon denied the petition of the Bureau of Labor and Industries for review of the above-mentioned Court of Appeals decision. *Corvallis Disposal Co. v. Bureau of Labor and Industries,* 49 Or App 245, 619 P2d 663 (1980), *rev den* 290 Or 651 (1981).

Having fully considered the entire record in this matter and the above-mentioned judicial decisions, I, Mary Wendy Roberts, make the following Findings of Fact, Ultimate Findings of Fact, Conclusions of Law, Opinion, and Order.

## FINDINGS OF FACT – PROCEDURAL

1) On or about January 5, 1979, Edward N. Jeremiah filed a verified complaint with the Civil Rights Division of the Bureau of Labor and Industries alleging that he had been and continued to be discriminated against in connection with his employment by Respondent, in that Respondent refused to reinstate him to his former position of employment or to available



and suitable employment after he had presented an unrestricted medical release. In the alternative, it was alleged that Respondent discharged Complainant because Complainant applied for benefits or invoked or utilized the procedures provided for in ORS 656.001 to 656.795 and 656.802 to 656.824 or 659.400 to 659.435.

2) Following the filing of the aforementioned verified complaint, the Civil Rights Division investigated the allegations in the complaint and determined that substantial evidence existed to support these allegations.

3) Thereafter, the Civil Rights Division attempted to reach an informal resolution of the complaint through conference, conciliation and persuasion, but was unsuccessful in these efforts.

## FINDINGS OF FACTS – THE MERITS

1) At all times material herein, Respondent was an Oregon corporation engaged in the business of recycling bottles and cans. In that business, Respondent had six or more persons in its employ.

2) On March 27, 1978, Respondent hired Complainant as a recycler.

3) On or about October 23, 1978, Complainant sustained an injury during the course and within the scope of his employment by Respondent.

4) Complainant applied for and received workers' compensation benefits for his October 23, 1978, injury.

5) At all times material herein, Theresa Fitzgerald, Complainant's supervisor, directed Respondent's recycling crew, of which Complainant was a member, to perform its work in a substantially different and safer manner when safety inspectors were present. Ms. Fitzgerald directed the recycling crew to resume its usual, less safe, recycling methods after the safety inspector left Respondent's premises.

6) During Complainant's absence from work due to his injury, Ms. Fitzgerald told the other members of Respondent's recycling crew that Ms. Fitzgerald thought that Complainant's injury was stupid and careless, even though Ms. Fitzgerald and other recycling crew members under her specific direction performed their recycling duties in substantially the same manner as Complainant performed them when he was injured.

7) After Complainant was injured and before December 29, 1978, Ms. Fitzgerald informed the members of the recycling crew under her supervision in general terms that workers' compensation insurance premiums cost Respondent a lot of money and that the premium costs would increase if further injuries were claimed.

8) Rhonda Young was a member of Respondent's recycling crew. At some time during Ms. Young's employment by Respondent and before Complainant was injured, Ms. Young suffered an on-the-job injury. She filed a workers' compensation claim for this injury. Ms. Fitzgerald warned Ms. Young and other members of Respondent's recycling crew including Complainant's wife, Susan Jeremiah, that if Ms. Young filed another workers' compensation claim, she would be terminated.

9) Complainant received a medical release from his duly licensed treating physician which authorized

Complainant to return to work without restriction effective December 11, 1978. Complainant notified Ms. Fitzgerald of this release during the week of December 4, 1978.

10) During Complainant's recovery from his injury, Respondent's recycling production decreased and its need for staff decreased accordingly. Therefore, even though Complainant was able to return to work on December 11, 1978, neither his former position or other suitable work with Respondent was available as of that date, and Ms. Fitzgerald placed Complainant on layoff status effective December 11, 1978. Respondent hired no new employee to replace Complainant in the recycling unit between the time Complainant notified Ms. Fitzgerald of his release and December 29, 1978.

11) In or about June 1978, Ms. Fitzgerald had composed a list of recycling crew members, listing each employee's date of hire. Ms. Fitzgerald had circulated the list (entitled "Seniority List") among the recycling crew members, stating at that time that the list was to be used to determine layoff order in case of work force reductions.

12) At least one recycling crew member included on the seniority list with less seniority than Complainant, Haru Johnson, was still employed by Respondent when Complainant was released to return to work on December 11, 1978. Rather than laying off Haru Johnson, Respondent laid off Complainant since he was already off work due to his injury.

13) Ms. Fitzgerald contacted Complainant and asked him to return to work temporarily on December 22, 1978. Complainant worked three hours that day and was paid $12.00 (or $4.00 per hour) therefore, even though his rate of pay with Respondent had been $5.35 per hour at the time of his injury and for the preceding six months. Respondent had not told Complainant that he would receive a lower rate of pay for his December 22, 1978, work.

14) Respondent called Complainant to work again on December 29, 1978. On that date, Complainant asked Ms. Fitzgerald to pay him the difference between his previous rate of pay and the amount he had received on December 22, 1978, for the work he had performed that day. Ms. Fitzgerald refused to pay Complainant any more than the $12.00 he had already been paid. Ms. Fitzgerald and Complainant discussed the matter and could not reach an understanding. Complainant requested an opportunity to discuss the problem with Respondent's owner, Mr. Spear. Complainant went to Mr. Spear's office but Mr. Spear was not available. Complainant then went to the lunch room to wait until he could see Mr. Spear. Before Complainant had the opportunity to speak with Mr. Spear, Ms. Fitzgerald appeared in the lunchroom and terminated Complainant's employment for the stated reason of insubordination. Complainant responded to this termination with some profane language.

15) Despite Complainant's reasonable diligent efforts, he earned no income from the date of his discharge, December 29, 1978, until he found alternative employment on February 1, 1979.

16) If Complainant had been employed by Respondent between December 29, 1978, and February 1, 1979, and had been paid $5.35 per hour, he would have worked eight hours per day for twenty-one days, earning a total of $898.00.

17) For the first sixty-two working days of Complainant's alternative employment, Complainant was paid $5.00 per hour for the eight hours he worked each day, which was $.35 per hour less than he was paid by Respondent at the time of his injury. He therefore earned $173.60 less during this time than he would have earned in Respondent's employ.

18) As a direct result of his termination and resultant unemployment between December 29, 1978, and February 1, 1979, Complainant was unable to economically support his household. For this reason, his pregnant wife was forced to continue working for Respondent during this time, even though her physician instructed her not to do so. Ms. Jeremiah was experiencing medical difficulty with her pregnancy, including hemorrhaging. Her continued employment, with its potentially dangerous effects upon her pregnancy, caused both Mr. and Mr. Jeremiah extreme fear and anxiety. In addition, as a direct result of his termination and subsequent unemployment, Complainant could not afford to have his home heating oil tank filled for two to three weeks during the winter of 1979. Complainant's family was forced to live without heat during this time and suffered from the cold each day, especially during the ice storms of January 1979. The third direct result of Complainant's termination and subsequent unemployment between December 29, 1978, and February 1, 1979, was that Complainant was unable to pay his creditors, who proceeded to hound him and his family. Because of these problems cause by his termination and resulting unemployment, Complainant and his family suffered a great deal of fear, anxiety, embarrassment, and loss of human dignity constantly between December 29, 1978, and February 1, 1979, which created extreme tension within the family.

19) Other than Complainant, Respondent called only one witness to testify at hearing: Jack Griffin, Respondent's Office Manager. Mr. Griffin was hired in August 1978, after Ms. Fitzgerald made and circulated the "Seniority List." Mr. Griffin had no first-hand knowledge of the other events in question. Complainant's witnesses were more credible than Mr. Griffin because of their first-hand knowledge of at least some of those events.

**ULTIMATE FINDINGS OF FACT**

1) Complainant sustained a compensable injury while working for Respondent on or about October 23, 1979.

2) Complainant's duly-licensed physician issued a certificate approving Complainant's return to employment without restriction effective December 11, 1978.

3) Complainant's notification to Respondent that Complainant was released to work as of December 11, 1979, constitutes a demand for reinstatement. He was not reinstated by Respondent to his former position or any other suitable position because neither was available, due to Respondent's decreasing need for staff, when Complainant sought reinstatement or

thereafter until at least the time Complainant was terminated.

4) Complainant ceased being available for reinstatement by Respondent when Complainant obtained other employment on February 1, 1979.

5) Respondent was predisposed to terminate injured employees who filed for workers' compensation benefits, as indicated by Findings of Fact 6, 7, 8, 12, and 14 above.

6) Respondent's agent, Theresa Fitzgerald, precipitated an argument with Complainant, thereby creating a pretext to fire him, by paying him without warning a rate lower than it had been paying him for his work, by refusing to adequately explain the different rate of pay, and by discharging Complainant before he had the opportunity to discuss the matter with Respondent's owner.

7) Complainant's workers' compensation claim played at least a key role in his discharge, due to Respondent's predisposition to terminate a worker who had filed a workers' compensation claim. Respondent did not prove the existence of a legitimate non-discriminatory reason for discharging Complainant.

8) Complainant's net loss of compensation due to having been discharged by Respondent totals $1072.40, which represents $898.80 in lost wages from December 29, 1978, and February 1, 1979, plus $173.60 representing the difference between what Complainant earned and what he would have earned in Respondent's employ during the first 62 days of his alternative employment.

9) Respondent's discharge of Complainant caused Complainant to be unable to support his household between December 29, 1978, and February 1, 1979, which caused Complainant to suffer constant fear, anxiety, embarrassment, loss of human dignity and familial tension during this time.

## CONCLUSIONS OF LAW

1) At all times material herein, Respondent was an employer subject to the provisions of ORS 659.010 to 659.110 and ORS 659.400 to 659.435.

2) The Commissioner of the Bureau of Labor and Industries of the State of Oregon has jurisdiction over the persons and the subject matter relating to the alleged violation of ORS 659.410 herein.

3) Because the Commissioner of the Bureau of Labor and Industries was not empowered to enforce ORS 659.415 at times material herein, the Commissioner has no jurisdiction over, and therefore must dismiss, those portions of the Complaint and Specific Charges herein which are based upon ORS 659.415.

4) The actions, and motivations for those actions, of Ms. Fitzgerald described herein are properly imputed to Respondent.

5) Respondent discharged Complainant because Complainant had applied for benefits provided for in ORS 656.001 to 656.794 and 656.802 to 656.824. This constitutes discrimination against Complainant with respect to the terms and conditions of his employment which is an unlawful employment practice in violation of ORS 659.410.



6) The Commissioner of the Bureau of Labor and Industries has the authority to award money damages to Complainant herein under the facts and circumstances of this record, and the sum of money awarded as damages in the Order below is an appropriate. award.

## OPINION

### 1. The Alleged Violation of ORS 659.415

The "act" of not reinstating Complainant, which the Specific Charges allege is unlawful under ORS 659.415, occurred on December 11, 1978, and continued until Complainant found alternative employment on February 1, 1979. Oregon appellate courts have ruled that until the Oregon Legislature amended ORS 659.415 in October 1979 the Commissioner of the Bureau of Labor and Industries did not have jurisdiction to enforce ORS 659.415. Since the Commissioner therefore could not enforce ORS 659.415 with regard to acts which allegedly occurred before October 1979, as herein, those portions of the Complaint and the Specific Charges herein which are based upon ORS 659.415 must be dismissed.

### 2. The "Seniority List"

Three witnesses testified that Ms. Fitzgerald, their supervisor, indicated that Respondent's "Seniority List" would be used to determine the order of layoffs. Respondent's witness specifically accepted the testimony that the "Seniority List" would be used for layoffs but testified that Ms. Fitzgerald had no authority to so state, since the list was used only to determine vacation priority. The Presiding Officer believed the three employee witnesses because Respondent's witness did not offer any other reasonable criteria for layoff order and because he found Complainant's witnesses more credible because, as explained in Finding of Fact 19 above, Mr. Griffin was not employed by Respondent at the time of the incident and no other witnesses with direct knowledge of the event were called to testify.

### 3. Complainant's Discharge

Respondent alleges that Complainant was insubordinate in his inquiries concerning the reduction of his rate of pay. Given the fact that Respondent paid Complainant at a lower rate for his December 22, 1978, work with no warning, Complainant's discussing this change with Ms. Fitzgerald and, receiving no answer which was satisfactory to him, seeking to further discuss the matter with Respondent's owner were reasonable acts. Respondent has not shown that it had a legitimate nondiscriminatory reason for discharging Complainant.

### 4. Deduction of Unemployment Compensation

Oregon law does not require the Commissioner of the Bureau of Labor and Industries to deduct unemployment compensation from a damage award of back wages. Unemployment insurance was created only to provide a substitute income from public funds and is not intended to be a source for paying damages to a worker who has been wronged by an unlawful employment practice. *McPherson v. Employment Division,* 285 Or 541, 556 P2d. 381 (1979). Unemployment benefits are collateral benefits to the employee only and are not designed to reduce

the employer's liability for the consequences of unlawful employment practices.

## ORDER

NOW, THEREFORE, the Commissioner not having jurisdiction over complaints made under ORS 659.415 at times material herein, those portions of the Complaint and Specific Charges herein which allege a violation of ORS 659.415 are hereby dismissed, according to the provisions of ORS 659.060(3); but,

As authorized by ORS 659.060(3) and 659.010(2) and in order to eliminate the effects of the practices found to be unlawful under ORS 659.410, as well as to protect the lawful interests of others similarly situated, Respondent is hereby ordered to:

1) Deliver to the Hearings Unit of the Portland Office of the Bureau of Labor and Industries, within thirty days of the execution of the Final Order in this matter, a certified check payable to the Bureau of Labor and Industries in trust for Edward N. Jeremiah in the amount of TWO THOUSAND FIVE HUNDRED SEVENTY-TWO DOLLARS AND FORTY CENTS ($2572.40), representing $1072.40 in back pay compensation and $1500.00 in compensation for Complainant's mental suffering.

2) Cease and desist from discharging any employee because that employee has applied for workers' compensation benefits or invoked or utilized the procedures provided for in ORS 656.001 to 656.794 and ORS 656.802 to 656.824.

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**In the Matter of**

**LANE COUNTY YOUTH CARE CENTER, INC., an Oregon corporation, Respondent.**

Case Number 01-80

Final Order of the Commissioner

Mary Wendy Roberts

Issued February 22, 1982.

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## SYNOPSIS

Respondent would not allow male Complainant to work overnight in a female juvenile residential facility unaccompanied by a female worker, but did allow female group workers to work overnight in male juvenile residences unaccompanied by male workers. Respondent committed an unlawful employment practice in discharging male Complainant in retaliation for his opposition to different treatment based on sex when he refused a shift transfer, and by advising prospective employers that he had been fired for insubordination. Respondent did not establish that the "same sex" standard for female clients was justified as reasonably necessary to the rehabilitative essence of its business, did not establish that all or substantially all males could not adequately perform group worker duties alone in an opposite sex residence, and did not provide evidence that it had explored alternatives with lesser discriminatory impact. The Commissioner awarded Complainant $5102 in lost wages, and ordered Respondent to cease discriminating on the basis of sex, expunge insubordination from Complainant's personnel record, and advise future references that he was



fired in violation of statute. ORS 659.010(2); 659.030(1)(a) and (d); 659.060(3).

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The above-entitled matter came on regularly for hearing before Dale A. Price, designated as Presiding Officer by Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing commenced on June 30, 1980, in the conference room of the Eugene Public Library, 300 West Thirteenth Street, Eugene, Oregon, and concluded on July 1, 1980, in the same location. The Bureau of Labor and Industries was represented by Douglas R. Andres, Assistant Attorney General. Respondent Lane County Youth Care Center, Inc., was represented by Lawrence Shaw, Attorney at Law. Complainant Charles Howell was present and testified.

Having fully considered the entire record in this matter, I, Mary Wendy Roberts, make the following Findings of Fact, Ultimate Findings of Fact, Conclusions of Law, Opinion, and Order.

## FINDINGS OF FACT – PROCEDURAL

1) On November 28, 1978, Charles Howell filed a verified complaint with the Civil Rights Division of the Bureau of Labor and Industries alleging that he had been and continued to be discriminated against in connection with his employment by the Respondent because of his sex.

2) Following the filing of the aforementioned verified complaint, the Civil Rights Division investigated the allegations in the complaint and determined that substantial evidence existed to support these allegations.

3) During the hearing in this matter, the parties stipulated to the following facts:

a) Complainant is a black male initially employed by Respondent in January 1977 as a groupworker. He was terminated on October 2, 1978. Complainant was the only male group worker in the girls' home in August and September 1978.

b) The girls' home employed five groupworkers and ten student volunteers during the period of Complainant's employment. Two of the student volunteers were male.

c) Respondent, a private nonprofit corporation incorporated in Oregon, employed groupworkers in three group homes at the time of the complaint, two for males from age 14 to 17 and one for females 14 to 17. These group homes are designed to assist in the rehabilitation of children committed by the courts to the custody of the State of Oregon Children's Services Division.

d) From January 1977 until July 6, 1978, Complainant's supervisor was Tom English. Thereafter, Complainant's supervisor was Ardice Mick.

e) A policy was in effect at the time of the complaint that required male groupworkers working the overnight shift at the girls' home to have a female companion with them.

f) Complainant refused to accept a schedule change on September 25, 1978.

g) Complainant was discharged for the stated reason of insubordination on October 2, 1978, by executive

director John Foito on the recommendation of his supervisor, Ardice Mick.

h) Complainant was the only employee terminated by Respondent between January 1, 1977, and January 1, 1979, for the stated reason of misconduct.

i) Complainant made, signed and filed a complaint with the Civil Rights Division on November 28, 1978. The Civil Rights Division made an administrative determination of "substantial evidence of unlawful discrimination on the basis of sex" on August 6, 1978.

**FINDINGS OF FACT – THE MERITS**

1) At all times material herein, Respondent utilized the personal service of one or more employees and reserved the right to control the means by which such service was performed.

2) Complainant began work as a groupworker for Respondent in January 1977. Complainant was an experienced groupworker hired by Respondent to provide encouragement, direction, emotional support, protection, guidance, control and discipline to juvenile females placed in Respondent's facility. He was hired on the condition that he would complete a course of study to obtain his Bachelor degree.

3) At all times material herein, Respondent was a private non-profit Oregon corporation engaged in the rehabilitation of children committed by the courts to the custody of the State of Oregon Children's Services Division.

4) Respondent operated three residential care facilities for juveniles: two boys homes and Val Halla Girls' Home, where Complainant was employed. Respondent's clients were referred to Respondent's residential care facilities by the Lane County Children Services Division, hereinafter LCCSD, which in turn was charged with the placement of juveniles committed by the courts to the custody of the State of Oregon's Children's Services Division. The LCCSD was Respondent's sole source of clients.

5) As a related duty, LCCSD monitored the quality of care provided to juveniles by residential care facilities such as Respondent's Val Halla Girls' Home. To monitor Respondent's Val Halla Girls' Home, representatives of LCCSD, Respondent's Board of Directors, and the State of Oregon's Children's Services Division conducted a Program Issues Review beginning in April 1978, and continuing through the times material herein. Due to its concern for the quality of care being provided by Respondent, on at least one occasion, LCCSD threatened to stop referring clients to Respondent and, for a two week period during the Program Issues Review, LCCSD actually suspended client referrals to Respondent. The review investigated Respondent's supervision of its female clients during daytime school programs and during evening programs, among other things. At the conclusion of the review certain policy changes were implemented by Respondent that met with the satisfaction of review representatives and referrals to Respondent were resumed.

6) The LCCSD was concerned by Respondent's policy which permitted male groupworkers, or volunteers and students of either sex, to work overnight shifts alone in the girls' home. By way of the aforementioned Program



Issues Review and by informal suggestions to Respondent's Board of Directors between April and September 1978, LCCSD informed Respondent of its concern and its desire for Respondent to reevaluate this policy. The State of Oregon Children's Services Division recommended but did not mandate same sex coverage as the State of Oregon Children's Services Division recognized that potential employment discrimination based on sex could result from the implementation of a same sex or double coverage policy.

7) Other concerns of LCCSD, which potentially could have resulted in LCCSD's termination of client referrals to Respondent, included poor cooperation and a lack of teamwork among staff members and staff disapproval of the appointment in July 1978 of Ardice Mick as Supervisor/Counselor of Respondent's residential care facilities.

8) Pursuant to the suggestion of LCCSD, on September 12, 1978, Respondent's Board of Directors instructed Ms. Mick to provide a female relief worker to accompany male groupworkers on overnight assignments in the girls' home. Female groupworkers were not required by Respondent's policy to be accompanied by a male relief person when working overnight shifts in the girls' home or in the homes for boys operated by Respondent.

9) Respondent's policy preventing the use of unaccompanied male groupworkers on overnight shifts in the girls' home reflected Respondent's and LCCSD's fear that accusations of invasions of privacy and sexual misconduct would be voiced by Respondent's female clients against Respondent's male groupworkers since the duties of overnight groupworkers included bed checks and coping with emergencies, which occasionally involve supervision of female clients in various stages of undress. In addition, female clients have occasionally sought to attract attention by exhibitionist displays of their bodies in front of male groupworkers. For example, twice during Complainant's tenure as a groupworker, he had been accused and exonerated of charges of sexual misconduct on the job. These problems were resolved within the framework of the Respondent's counseling program.

10) Scheduling work times for groupworkers at Respondent's girls' home was a function delegated to the Supervisor/Counselor during 1978. No formal procedure was established for scheduling, and previous practice led groupworkers to believe that senior groupworkers had first choice of schedules if their choices did not conflict with other program needs.

11) During August 1978, groupworker Jill Harrington left Respondent's employ. Complainant, as next senior groupworker, asked Ms. Mick, then current Supervisor/Counselor, to be assigned Ms. Harrington's work schedule, which included two overnight shifts. Ms. Mick agreed to Complainant's request but cautioned him that two unaccompanied overnight shifts might cause a problem due to the female clients' recurring accusations of invasions of privacy or sexual misconduct by male groupworkers. Ms. Mick temporarily provided a female individual to share the overnight shifts with Complainant, at no extra expense to

Respondent, from a pool of students and volunteers.

12) At Respondent's personnel committee meeting on August 30, 1978, Ms. Mick asked the committee to hire a relief person to work the night shift in place of Complainant on Friday nights. Ms. Mick asked for a female replacement rather than a person to provide double coverage with Complainant due to the budgetary problems which arose from Ms. Mick's attempts to comply with Respondent's double coverage policy on overnight shifts worked by males. As a non-profit corporation, Respondent operated within a tight budget and had limited funds to implement LCCSD's suggestions. The personnel committee agreed to Ms. Mick's request, and at a staff meeting on September 5, 1978, Ms. Mick announced that a relief worker would be hired in place of Complainant for the Friday overnight shift. Complainant was present at both of these meetings, but he did not object to the actions of the personnel committee or the actions of Ms. Mick.

13) On or about September 11, 1978, Complainant began a two week vacation. During Complainant's absence, Ms. Mick published a new work schedule assigning Complainant a new schedule which included a swing shift on Thursdays and eliminated Complainant's Friday overnight shift.

14) On September 25, 1978, the day following Complainant's return from vacation, another staff meeting was held at Respondent's girls' home. At this meeting Complainant objected to the schedule change arranged by Ms. Mick. Complainant's objection to the scheduling change stemmed from his disappointment at being eliminated from the Friday overnight shift and a conflict between the proposed Thursday swing shift and a school class Complainant was taking on Thursdays. Complainant demanded that Ms. Mick reinstate Complainant's previous schedule including the two overnight shifts and informed Ms. Mick that if she refused, she would be forced to fire him and he would sue Respondent's Board of Directors.

15) Subsequent to the September 25, 1978, meeting and before September 29, 1978, Ms. Mick offered to rearrange Complainant's schedule to accommodate his class attendance on Thursdays. Complainant refused her offer. On or about September 29, 1978, Ms. Mick related Complainant's refusal to comply with the new schedule to Respondent's Executive Director, John Foito. Mr. Foito decided to terminate Complainant's employment due to insubordination. He instructed Ms. Mick to document Complainant's acts of insubordination, which she did in the form of a letter to Mr. Foito dated September 29, 1978. The letter included Ms. Mick's recommendation to terminate Complainant. The incidents of Complainant's insubordination documented by Ms. Mick included his refusal to comply with the schedule change, his disapproval of Ms. Mick's selection as Supervisor/Counselor in July 1978, his resistance of her authority throughout the remainder of his employment with Respondent, and his tardiness in submission of monthly progress reports, among other things. The letter also documented a conversation between Complainant and Ms. Mick in which Ms. Mick solicited Complainant's opinion of her work. Complainant stated he believed her selection as Supervisor/Counselor to be a mistake and said he would do what he could to substantiate his opinion.



16) With Mr. Foito's approval, Ms. Mick wrote to Complainant on September 29, 1978, listing some of the reasons mentioned in Finding of Fact 15, and terminated Complainant's employment as of October 2, 1978.

17) Complainant's attitude about work began to deteriorate in July 1978, when Ms. Mick was appointed as Supervisor/Counselor, but Complainant was able to continue work in a strained relationship with Ms. Mick until the imposition of Respondent's double coverage policy resulted in the change of Complainant's schedule.

18) Complainant began alternate employment on June 6, 1979. Between his date of termination on October 2, 1978, to June 6, 1979, if Complainant had remained in Respondent's employ he would have earned $5,850.75 as calculated below:

| | |
|---|---|
| October-December 1978 | |
| 3 months x $699.00/month | $2,097.00 |
| January-May 1979 | |
| 5 months x $715.00/month | 3,575.00 |
| June 1-6, 1979 | |
| .25 month x $715.00/month | 178.75 |
| TOTAL | $5,850.75 |

19) During the period between his termination on October 2, 1978, and June 6, 1979, Complainant received $748.02 in compensation from the National Guard.

20) Following his termination from Respondent's employ, Complainant received job references from Respondent which referred to his discharge for insubordination.

## ULTIMATE FINDINGS OF FACT

1) At all times material herein, Respondent implemented a double coverage policy which required either an unaccompanied female groupworker on the overnight shifts in the girls' home or a female to accompany a male groupworker during the overnight shifts in Respondent's girls' home. No such restriction was enforced against groupworkers of either sex in Respondent's boys' homes where male or female groupworkers were permitted to work the overnight shifts unaccompanied.

2) Respondent has shown that unfounded accusations of sexual misconduct against at least one male employee have occurred in the past. Unfounded accusations against one male groupworker which were successfully resolved within Respondent's program are insufficient to show that all or substantially all males would be unable to adequately perform the job of overnight counselor alone in the girls' home, particularly where those males are experienced juvenile counselors.

The essence of Respondent's business was rehabilitation of juveniles, not the absolute protection of its clients' privacy. Protection of privacy did play a part in the care and supervision Respondent provided to its female clients. However, Respondent failed to recognize any similar obligations to protect the privacy of its male clients. Under these circumstances, where Respondent has created and applied a stereotypical double standard, the privacy issue is devoid of any real significance

as an aspect of the rehabilitative essence of Respondent's business.

Respondent failed to explore acceptable alternatives to double coverage scheduling which would have satisfied Respondent's purpose with less discriminatory impact on employees.

3) Complainant opposed the supervision of Ms. Mick at the time of her appointment to the position of Supervisor-Counselor. However, Complainant's attitude did not reach the level of insubordination until Respondent's double coverage overnight policy resulted in Complainant's schedule change. Complainant's opposition to the overnight policy as it affected his working conditions played a key role in his discharge.

4) As a result of his discharge, Complainant lost $5,850.75 in earnings between October 2, 1978, and June 6, 1979, the date he began alternative employment. Complainant earned $748.02 to mitigate his damages during this period.

## CONCLUSIONS OF LAW

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

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

3) The actions, and motivations for those actions, of Ms. Mick, Mr. Foito, and Respondent's personnel committee and Board of Directors cited herein are properly imputed to Respondent.

4) Respondent's double coverage policy discriminated between male and female groupworkers in the terms, conditions and privileges of employment on the basis of their sex. The enforcement of this policy as it related to Complainant constituted an unlawful employment practice in violation of ORS 659.030(1)(a).

5) Respondent has failed to justify this unlawful employment practice as a bona fide occupational requirement since Respondent has not proved the three elements of the defense:

a) Respondent has not proved the policy was reasonably necessary to the rehabilitative essence or the normal operation of its business in all its residential care facilities, since the policy was applied only to groupworkers of the male sex in the girls' home. Respondent's privacy argument failed since the same sex policy was not enforced to protect its clients' privacy, but only to avoid accusations of sexual misconduct in the girls' home. No concern for the privacy of Respondent's male clients was evidenced since female groupworkers were permitted to work the overnight shift in Respondent's boys' homes unaccompanied.

Respondent's business crisis argument failed to show the same sex policy was necessary to the continued operation of its business since the State of Oregon Children's Services Division recommendation upon which Respondent relied recognized the discriminatory potential of such a policy and, therefore, suggested but did not mandate its application in Respondent's girls' home;

b) Respondent has not proved that all or substantially all males could not adequately perform alone on the overnight shift, but only that unjustified accusations have occurred against a male groupworker in the past;

c) Respondent has failed to provide evidence that it explored acceptable alternatives to the discriminatory policy which would reasonably accomplish the same business purpose with a lesser discriminatory impact on employees, even though this practice was encouraged by LCCSD.

6) Respondent's discharge of Complainant because he opposed the discriminatory policy implemented by Respondent was an unlawful employment practice in violation of ORS 659.030(1)(d). Respondent discharged Complainant, in major part, because Complainant opposed and refused to comply with Respondent's discriminatory double coverage scheduling policy.

7) The Commissioner of the Bureau of Labor and Industries has the authority to award money damages to the Complainant herein, under the facts and circumstances of this record, and the sum of money awarded as damages in the Order below is an appropriate award.

8) The Commissioner of the Bureau of Labor and Industries has the authority to issue a cease and desist order requiring Respondent under the facts and circumstances of this record to read, purge and expunge all statements or documents in its possession indicating that Complainant was discharged for insubordination, and to order Respondent Lane County Youth Care Center to respond to all future requests for job references with a good faith and factually accurate appraisal of Complainant's performance as a groupworker and indicate that Complainant's employment was terminated due to his opposition to sexually discriminatory policies and practices implemented by his employer in violation of ORS 659.030(1)(d).



## OPINION

### 1. Prima Facie Case

The parties have stipulated that Respondent had a policy in effect at the time of the complaint which required male groupworkers working the overnight shift at the girls' home to have a female companion with them. Women working the overnight shift in the boys' homes which Respondent also operated were not required to have a male companion present. This staffing policy imposed different terms conditions and privileges of employment for male groupworkers working in the girls' home solely because of their sex, and constituted prima facie evidence of a violation of ORS 659.030(1)(a). The Agency successfully carried its initial burden of proof.

### 2. Bona Fide Occupational Requirement (hereinafter BFOR)

Respondent's defense focused upon ORS 659.030(1)(a).

> " * * * However, discrimination is not an unlawful employment practice if such discrimination results from a bona fide occupational requirement reasonably necessary to the normal operation of the employer's business."

The central issue for resolution in this case is whether the facts, as found herein, are sufficient to establish Respondent's defense as set forth in ORS 659.030(1)(a). The parties have cited several sources in Oregon and federal case law.

In *School District No. 1 Multnomah County v. Nilsen*, 271 Or 461, 534 P2d 1135 (1975), the court held that a BFOR analysis should be performed with reference to the facts of each case and that the party asserting a BFOR defense has the burden of proving the defense by a preponderance of the evidence.

In *Diaz v. Pan American World Airways*, 422 F2d 385, 388 (5th Cir 1971), the court held that an employer could rely upon the bona fide occupational qualification (hereinafter BFOQ) defense only by proving that all or substantially all members of the protected class would be unable to safely and efficiently perform the duties of the job involved. The court also held that the defense would suffice only where the essence of an employer's business would be undermined by not having members of one sex only in a certain job. The Court further held that customer preference could be considered only when based upon an employee's inability to perform primary functions or services offered by the employer.

In *Weeks v. Southern Bell Telephone and Telegraph Company*, 408 F2d 228 (5th Cir 1969), the court held that the defendant must be held to a heavy burden of proof to avail itself of the BFOQ defense. The test propounded by the court demanded that the defendant have reasonable cause to believe, meaning a factual basis for believing, that all or substantially all members of the protected class would be unable to perform the duties of the job safely and efficiently.

In *Roberson v. Lorillard Corporation*, 444 F2d 791 (4th Cir 1971), the court held that, where a prima facie case of discrimination has been established, the employer must prove the existence of a business purpose sufficiently compelling to override the impact of the discriminatory policy. In addition, the employer was required to prove that the challenged practice did effectively carry out its purpose and that there existed no available acceptable alternative which could better accomplish the same purpose or accomplish it as well with lesser differential impact upon employees.

In *In the Matter of Clackamas County Fire District No.1*, 1 BOLI 244 (1980), the Commissioner of the Bureau of Labor and Industries agreed with this instructive federal case law and articulated the three part test of the BFOR defense which is described in Conclusion of Law 5 above. This Order was upheld by the Oregon appellate courts.

In *Dothard v. Rawlinson*, 433 US 321, 336, n. 23, 97 S Ct 2720, 2730 n. 23, 53 LEd2d 786, 801 n. 23 (1977), the court held that the BFOQ defense was meant to be an extremely narrow exception to the general prohibition against discrimination. This case involved an all male maximum security prison in Alabama. Appellant was a female corrections counselor who objected to being excluded from a job which would have placed her in contact with the inmates in a dormitory living situation. The court noted that conditions of confinement in Alabama State prisons were characterized by "rampant violence and a jungle atmosphere," and that, in view of the dormitory living situation, understaffing and lack of segregation of sex offenders, the presence of a female corrections counselor would pose substantial security problems directly linked to her female sex. The court held that it was reasonable to assume that sex offenders would strike again if given the chance, and that the essence of the job, the maintenance of security, would be threatened by the presence of a female in the position of corrections counselor. The BFOQ defense prevailed in this case.



*Dothard* is distinguishable from the case at hand because in *Dothard* the concern was the personal safety of the guard and the security of the prison, while in the case at hand, the defense focuses upon potential invasions of privacy of clients, the possibility of accusations of sexual molestation of clients, and the influence of these factors upon Respondent's continued ability to attract client referrals from the Lane County Children's Services Division. Further, Respondent has nullified this defense by applying it to only the girls' facilities.

In *Sutton v. National Distillers Products Company*, 445 F Supp 1319 (SD Ohio 1978), the court held that there was no unlawful discrimination against a female plant security guard who was relocated within the plant against her wishes to eliminate the invasions of privacy incident to "pat down" searches of male employees exiting the plant.

In *City of Philadelphia v. Pennsylvania Human Resources Commission*, 300 A2d 97, 5 EPD 8,535 (1973) , the court held that where supervisors who shared housing with clients were required to be of the same sex as their clients in the juvenile ward, a BFOQ existed. The court reasoned that body searches were occasionally necessary on the ward and that such searches conducted by members of the opposite sex could lead to emotional damage to the juvenile. The court cited the necessity to supervisors to gain the confidence of the juveniles in holding that same sex supervision was crucial to the successful performance of the job.

In *Stonecipher v. Wisconsin D.I.L.H.R.*, 12 EPD 10, 979 (1976), the court addressed the issue of alleged sex discrimination in a county juvenile shelter home where persons of the same sex as the juveniles were hired as supervisors. The employer asserted the need for a sexually balanced staff to provide role models, the personal nature of counseling and the juveniles' right to privacy as reasons for the hiring policy. In addition, the employer cited the need for "bed checks" and the need for same sex supervision of girls with past sexual traumas. The court held in favor of the employer by granting a BFOQ based upon these concerns.

In *City of Philadelphia* and *Stonecipher*, the same sex policy was applied to both male and female workers in creating the BFOQ. In contract, in the case at hand, the policy was applied only to male workers in the girls' home. Protection of the privacy of Respondent' clients was a part of Respondent's obligation to them, but since Respondent has failed to demonstrate that the double cover age policy was required to protect the privacy of all its clients in all its homes, Respondent's BFOR defense must fail.

As an additional aspect of its defense, the Respondent argued that its dependent relationship with LCCSD made adherence to LCCSD's

suggestions a practical necessity. Respondent's business was totally dependent on LCCSD client referrals, and Respondent maintained that failure to abide by LCCSD policy recommendations would result in termination of client referrals and closure of Respondent's business. Even if this were the case, Respondent's unlawful policy and actions cannot be excused by a potential business crisis inherent in its adherence to statutory mandate. In fact, however, LCCSD never mandated the double coverage policy but only recommended it, realizing the potential for sex discrimination problems. In any case, nothing in the LCCSD recommendation prevented Respondent from applying the double coverage policy in a non-discriminatory way to both male and female employees in all its group homes.

The BFOR defense also requires that no acceptable alternative exist which would accomplish the same business purpose equally well with lesser discriminatory impact on employees. In this case, two such alternatives have been suggested. The Bureau of Labor and Industries points out in its closing argument that expert testimony indicated that by hiring only experienced personnel for the overnight shifts Respondent could have minimized the risk of detrimental effects resulting from client accusations. The *Sutton* case suggests the alternative of scheduling Complainant for overnight shifts in the boys' homes so that the double coverage policy was in effect throughout Respondent's organization. Yet, while these two alternatives readily come to mind, Respondent failed to even investigate suitable alternatives, electing to discharge Complainant instead.

Respondent has failed to establish three elements of the BFOR defense, and therefore this is not a proper case in which to recognize a BFOR for groupworkers. This is not meant to imply that a BFOR would not be appropriate where the elements of the defense were satisfied and where a facially discriminatory double coverage policy was evenhandedly applied to male and female workers alike.

**3. Insubordination**

Respondent's discriminatory scheduling policy and practices played a key role in elevating Complainant's bad attitude toward the supervision of Ms. Mick to the level of outright defiance and insubordination. The evidence does not suggest that Complainant would have been discharged for the other reasons cited by Ms. Mick alone, since these conditions had been ongoing since Ms. Mick's appointment, without Complainant's discharge. Complainant's discharge was triggered by his objection to Respondent's discriminatory practices as they were applied to him.

**4. Damages**

The proper calculation of damages is the difference between what Complainant would have earned but for Respondent's unlawful employment practice and what he actually earned. Complainant received $748.02 from the National Guard.

On the question of whether unemployment compensation received by Complainant should be deducted from the award for back wages, I am relying on *McPherson v. Employment Division,* 285 Or 541, 556 P2d 381 (1979) in finding that it should not. Unemployment compensation was created only to provide a substitute income from public funds and is not intended to be a source for paying damages to a worker who has been wronged by an employer's unlawful employment practice. Unemployment benefits to the employee are not designed to be used to reduce the employer's liability for the consequences of its unlawful practices.



**ORDER**

NOW, THEREFORE, as authorized by ORS 659.060(3) and 659.010(2) and in order to eliminate the effects of the unlawful practices found, as well as to protect the lawful interests of others similarly situated, the Respondent is hereby ordered to:

1) Deliver to the Hearings Unit of the Portland office of the Bureau of Labor and Industries, within sixty (60) days of the execution of this order, a certified check payable to the Bureau of Labor and Industries in trust for Charles Howell in the gross amount of FIVE THOUSAND ONE HUNDRED TWO DOLLARS AND SEVENTY-THREE CENTS ($5,102.73) representing damages for back pay.

2) Cease and desist from discrimination in the terms, conditions and privileges of employment based upon sex.

3) Purge and expunge Complainant's employment record of statements and documents indicating that Complainant was terminated for insubordination, and respond to all future requests for job references with a good faith and factually accurate appraisal of Complainant's performance as a groupworker, and indicate that Complainant's employment was terminated due to his opposition to a sexually discriminatory policy implemented by Respondent in violation of ORS 659.030(1)(d).

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**In the Matter of**
**KIRSTEN CORPORATION,**
**Respondent.**

Case Number 25-80
Final Order of the Commissioner
Mary Wendy Roberts
Issued February 23, 1982.

**SYNOPSIS**

Respondent discharged black Complainant for confronting her supervisor contrary to the manager's direct order after the manager had investigated the source of ongoing tension between the supervisor and Complainant, who had formerly been supervisor. The Commissioner found that the supervisor's utterance of a racial epithet was a single isolated instance that did not constitute racial harassment, and that the manager took immediate corrective action in any event by sending the supervisor home for the day. The Commissioner found that Complainant was discharged for legitimate non-discriminatory reasons, and dismissed the Specific Charges. ORS 659.010(2); 659.030(1)(a); 659.060(3).

The above-entitled matter came on regularly for a contested case hearing before Dale A. Price, who was designated as Presiding Officer in this matter by Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries. The hearing was convened at 9:30 a.m. on May 22, 1980, in Room 1578 of the Federal Office Building, 1220 S.W. Third Avenue, Portland, Oregon, and continued through the afternoon of the same day. The Bureau of Labor and Industries was represented by Michael J. Tedesco, Assistant Attorney General. Respondent was represented by Herb Underdahl, president of Kirsten Corporation. Complainant was present and testified.

Having fully considered the evidence on the record and arguments of counsel, I, Mary Wendy Roberts, make the following Findings of Fact, Ultimate Findings of Fact, Conclusions of Law, Opinion, and Order.

## FINDINGS OF FACT – PROCEDURAL

1) At all times material herein, the Kirsten Corporation was an employer within the State of Oregon and as such was subject to the provisions of ORS 659.010 through 659.110.

2) On July 18, 1979, Myree Jackson filed a verified complaint with the Civil Rights Division of the Bureau of Labor and Industries alleging that she had been and continued to be discriminated against in connection with her employment by the Respondent on the basis of her race and color.

3) Subsequent to the filing of Ms. Jackson's complaint, the Civil Rights Division investigated the allegations in the complaint and determined that substantial evidence existed to support these allegations.

4) Subsequent to the investigation of the allegations contained in Ms. Jackson's complaint, the Civil Rights Division attempted to reach an informal resolution of the complaint through conference, conciliation and persuasion, but was unsuccessful in these efforts.

## FINDINGS OF FACT – THE MERITS

1) Complainant is a dark skinned individual of Negro ancestry.

2) Respondent was, at all times material herein, in the business of plating citizens' band radio antennae and did business as American Plating Company and Columbia American Plating Company.

3) Complainant was employed on Respondent's production line on three separate occasions. On the second occasion of her employment, Complainant was supervisor of the production line. On the third occasion of her employment, which is the subject of our consideration in this case, she was employed as a helper on the production line. On this third occasion, between June 21 and July 11, 1979, a Caucasian, Janet Woods, was supervisor of the production line and was Complainant's direct supervisor.

4) Ms. Woods was an excellent worker who was highly valued by Respondent as a great asset to the company. Ms. Woods' work product was deemed superior to Complainant's, which was deemed adequate.

5) During the first few days following June 21, 1979, it became evident to their co-workers that Complainant and Ms. Woods were experiencing some tension between themselves while working on the production line. Some co-workers went to Mr. Heitzman and sought his aid to quell arguments between Complainant and Ms. Woods.



6) In response to the aforementioned request from co-workers, Mr. Heitzman directed Ms. Pat Peterson, a senior production line worker, to instruct Complainant to get along with her supervisor, Ms. Woods. Ms. Peterson did so instruct Complainant.

7) Following the aforementioned complaints to Mr. Heitzman and Ms. Peterson's instructions to Complainant, Ms. Woods and Complainant continued to have trouble getting along while working together on the production line. Both Complainant and Ms. Woods tended to consult Ms. Peterson about production line problems rather than to cooperate fully with each other, as would have been most efficient because of their close working relationship.

8) The sources of the tension between Ms. Woods and Complainant were several. Complainant stated and I find that Ms. Woods feared that Complainant was after her job as supervisor. Ms. Woods complained that Complainant was taking too long on breaks and was not holding up her end of the production line. Respondent's president believed and I find that Complainant resented the role of helper after having been supervisor on the same production line during an earlier period of employment. The tension was not based on race.

9) On or about July 11, 1979, Ms. Woods complained to Mr. Heitzman about Complainant's alleged long breaks, "bumming" of cigarettes, and failure to hold up her end of the production line. Ms. Woods asked that Mr. Heitzman not tell Complainant that she had come to him to discuss Complainant's alleged inadequacies.

10) Later on the same day, Mr. Heitzman confronted Complainant with Ms. Woods' allegations. Complainant denied the validity of these allegations. During her first and second periods of employment, Complainant had routinely denied other allegations of this nature. During his first meeting of July 11, 1979, with Complainant, Mr. Heitzman reminded her that Ms. Woods was her supervisor and directed her to obey Ms. Woods without argument. At this same meeting, Mr. Heitzman instructed Complainant not to confront Ms. Woods regarding these allegations, but to get along with Ms. Woods and let the situation "cool off."

11) Immediately following her first discussion with Mr. Heitzman on July 11, 1979, Complainant returned to work on the line and mentioned to Ms. Woods that Mr. Heitzman had spoken to her about complaints he had received about them not getting along on the line. Complainant's comments provoked the anger of Ms. Woods. Her discussion of the complaints with Ms. Woods directly controverted Mr. Heitzman's order. Within a few minutes of Complainant's return to the line, Ms. Woods stomped off the line and called Complainant a "nigger." Complainant endured no discernible pain and suffering as a result of Ms. Wood's outburst. Complainant continued to work on the production line after Ms. Woods left.

12) After leaving the line, Ms. Woods went directly to Mr. Heitzman's

office in a state of outrage and told Mr. Heitzman that either Complainant or Ms. Woods herself would have to leave Respondent's employ. Upon learning of Ms. Woods comment, Mr. Heitzman directed Ms. Woods to refrain from racial slurs in the future. Mr. Heitzman sent Ms. Woods home for the day to cool off while he considered what to do.

13) Within two hours after Ms. Woods' departure on July 11, 1979, Complainant went to Mr. Heitzman's office, where he told her that she was to shut down the production line early that afternoon because she was involuntarily discharged effective the same afternoon for disobeying his order to avoid confrontation with her supervisor. Complainant was given her paycheck and left Respondent's plant on the afternoon of July 11, 1979. Complainant was not subsequently rehired by Respondent.

## ULTIMATE FINDINGS OF FACT

During her third period of employment with Respondent, Complainant, a black woman, worked as a production line helper after having been production line supervisor during her second period of employment. Complainant and her supervisor, a Caucasian, could not resolve their disagreements as to respective roles and appropriate behaviors on the line. No evidence of racist behavior by Ms. Woods was evidenced prior to the July 11, 1979 incident. Their differences concerned work habits and personality problems. These disagreements were not caused by race. Respondent had other black employees during this period of time and there was no evidence presented Ms. Woods experienced any conflicts with any other employee in the company. Complainant was instructed by Respondent's senior worker, Pat Peterson, and later by their foreman to obey her supervisor's orders and to not precipitate conflict. Despite these warnings, Complainant confronted her supervisor regarding certain sensitive issues, not involving race and color, and her supervisor became irate, called her a "nigger" and told Respondent's foreman that either she or Complainant had to leave. Respondent rated Complainant's supervisor as a much better worker that Complainant and decided on that basis, and because of Complainant's disobedience of an order, to discharge her from its employ.

## CONCLUSIONS OF LAW

1) Respondent is responsible for the actions of its foreman and supervisor, who are its agents.

2) The utterance of one racial slur on a single occasion by one employee within the premises of Respondent's plant does not constitute racial harassment or failure to maintain an environment free from racism by Respondent, when Respondent immediately took timely, appropriate corrective action.

3) The termination of the employment of a black employee subsequent to her dispute with a white employee, who was retained in the Respondent's employ, does not by itself constitute evidence of different treatment based upon the races and colors of said employees, where Respondent's foreman had given each employee an opportunity to explain her perception of the conflict.



## OPINION

Complainant was discharged by Respondent from her third period of employment with Respondent's citizens' band antennae production line. During her second employment period, Complainant had been in charge of the production line on which she worked, but during her third period she worked as a helper under Caucasian supervisor Janet Woods. During this third period there was tension between Complainant and Janet Woods. Complainant hypothesized that Janet Woods believed Complainant resented working as a helper and was trying to take over as supervisor. There was an aura of distrust which led both Complainant and Janet Woods to consult Pat Peterson, a more experienced worker, rather than to cooperate fully with each other in resolution of production line problems.

Within a few days of Complainant's return to work during the third period, the tension between Complainant and Ms. Woods was observed by some other workers on the production line, who reported the tension to foreman Mike Heitzman. Mr. Heitzman directed Pat Peterson, a senior worker, to instruct the Complainant to get along with Ms. Woods, who was her supervisor. Despite Ms. Peterson's entreaties, the tension persisted and on or about July 11, 1979, Ms. Woods went to Mike Heitzman to complain about Complainant's allegedly long breaks, borrowing of cigarettes and not keeping up her end of the production line. Shortly after Ms. Woods' visit, Complainant went to Mr. Heitzman's office where she denied each of Ms. Woods' allegations. Complainant returned to her work place and within a few minutes Ms. Woods stomped off the production line, called Complainant a "nigger" and went to see Mr. Heitzman, who sent her home for the rest of the day to cool off after exhorting her not to use epithets based upon race.

About one-half hour after Ms. Woods' departure, Complainant went to Mr. Heitzman's office where Mr. Heitzman told her to close down the line early and go home because production had slowed during this, her third period of employment, and she was not getting along with Ms. Woods, who Mr. Heitzman stated was a much superior worker to Complainant. Mr. Heitzman's action constituted an involuntary discharge of Complainant.

Several issues remain for resolution. At the time when Mr. Heitzman first called Complainant to his office, did he direct her not to confront Ms. Woods with the substance of their conversation? Did Complainant confront Ms. Woods? Did Respondent breach its duty to maintain a work environment free from racial harassment? Did Respondent's alleged failure to investigate Complainant's side of the controversy constitute different treatment because of Complainant's race and color? Did Complainant's race and color play a key role in Respondent's decision to terminate her employment?

**1. Did Mr. Heitzman direct Complainant not to confront Ms. Woods about Ms. Woods' complaints about Complainant?**

It is not disputed that Complainant spoke to Ms. Woods after meeting with Mr. Heitzman, nor is it disputed that said conversation precipitated Ms. Woods anger and departure from the

work site. What is disputed is whether Complainant acted in direct contravention of Mr. Heitzman's alleged order to avoid confrontation with Ms. Woods and whether she was discharged for this alleged disobedience.

Complainant testified that Mr. Heitzman never told her not to talk to Ms. Woods about Ms. Woods' complaints to Mr. Heitzman regarding Complainant. She testified that she was instructed that Ms. Woods was her supervisor and that she was to obey Ms Wood's orders and not to argue with her.

Mr. Heitzman testified that he told Complainant not to confront Ms. Woods upon her return to the production line; that yelling occurred within a few minutes of Complainant's return to the line; that Ms. Woods stormed into his office threatening to quit; and that he discharged Complainant later on the same day for disobeying his order. Respondent's president, Herb Underdahl, corroborated Mr. Heitzman's testimony. Additional corroboration is found in Mr. Heitzman's earlier undisputed direction to Complainant through Pat Peterson. This earlier conversation sometime in late June 1979 was an attempt by Mr. Heitzman to alleviate reported tension between Ms. Woods and Complainant by having Ms. Peterson remind Complainant that Ms. Woods was her supervisor and direct her to obey Ms. Woods' orders and to not argue with Ms. Woods. In the context of this earlier instruction we can infer that Mr. Heitzman's conversation with Complainant on or about July 11, 1979, included a similar exhortation as Respondent alleged.

**2. Did Complainant confront Ms. Woods in contravention of Mr. Heitzman's order?**

Complainant returned to the line after her conversation with Mr. Heitzman on or about July 11, 1979. It is not disputed that Complainant spoke to Ms. Woods about her conversation with Mr. Heitzman. Complainant testified that she mentioned it "in conversation." Ms. Woods did not testify. Within a few minutes of Complainant's return to the production line, Ms. Woods stomped off the line directing a racial slur at Complainant. From these facts, we may infer that Complainant disobeyed Mr. Heitzman's order, and that said disobedience was the cause of her dismissal.

**3. Did Respondent breach its duty to maintain a work environment free from racial harassment?**

In *In the Matter of Roderick Enterprises, Inc.*, 2 BOLI 14 (1980), the Commissioner of the Bureau of Labor and Industries articulated a strict standard of liability for racial harassment: an employer is responsible for the acts of its supervisory employees with respect to racial harassment on the job, regardless of whether the specific acts complained of were forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence.

Under this standard, Respondent is responsible for the acts of supervisor Woods which constitute racial harassment. The utterance of a racial epithet can constitute racial harassment. However, in this isolated instance, one verbal epithet uttered on a single occasion by one person, the employer must be allowed to abnegate its



responsibility by showing that it took appropriate timely corrective action. Respondent's foreman did just that when he reproached supervisor Woods and sent her home. By his doing so, Respondent fulfilled its duty to take positive action where necessary to maintain an environment free from racism. There is no evidence that the occurrence of this racial epithet caused Complainant pain and suffering for which a damage award would be appropriate. There is evidence that neither the epithet, nor any alleged racist attitude on the part of the supervisor who uttered it, caused Complainant's termination. As discussion under section 5 below relates, Respondent terminated Complainant for legitimate non- discriminatory reasons.

**4. Did Respondent's alleged failure to investigate Complainant's side of controversy constitute different treatment because of Complainant's race?**

Mr. Heitzman had received complaints from plant workers regarding the tension between Ms. Woods and Complainant. His initial effort to quell this tension involved sending Pat Peterson to direct Complainant to get along with Ms. Woods. Because Complainant had occupied Ms. Woods' position during a prior period of employment, it was difficult for Complainant to accept her new role as helper. On or about July 11, 1979, Mr. Heitzman listened to Ms. Woods' complaints about Complainant. On the same day he listened to Complainant's side of the story. His investigation into one side of the story was no more thorough than into the other. Upon hearing both sides of the conflict, Mr. Heitzman reminded Complainant of her duty to obey Ms. Woods and directed her to avoid confrontation with Ms. Woods and to let things "cool down." It was Complainant's disregard for Mr. Heitzman's instruction to avoid confrontation which gave rise to her dismissal.

Finally the Agency asserted that, in the context of Ms. Woods' racial slur, Respondent had a duty to fully investigate the possibility of a racial motive behind that tension between the two women. It is very unlikely that a single utterance in anger without any hint of an on-going racist atmosphere is adequate to give rise to a duty to conduct an elaborate investigation into potential discrimination.

**5. Did Complainant's race and color play a Key Role in her termination from Respondent's employ?**

Respondent's president, Mr. Underdahl, and foreman, Mr. Heitzman, were well acquainted with Complainant. They had hired her three times. Mr. Underdahl and Mr. Heitzman had a high regard for the quality of Ms. Woods' work and considered Complainant's work satisfactory, but not of the high quality of Ms. Woods'. Mr. Underdahl postulated that it was difficult for Complainant to work as a helper to Ms. Woods, having formerly performed Ms. Woods' job. When it became obvious that Ms. Woods and Complainant could not get along, Mr. Heitzman was forced to choose between them. His preference for Ms. Woods' work quality, combined with Complainant's disobedience of his order to not confront Ms. Woods, made the decision to discharge Complainant a reasonable exercise of management

prerogative not tainted by racism or by the tolerance of racism.

**ORDER**

NOW, THEREFORE, because the evidence presented at hearing is inadequate to prove the allegations contained in the Specific Charges filed in this matter, it is hereby ordered that the Specific Charges and the Complaint in this matter be dismissed.

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**In the Matter of**
**ALL SEASON INSULATION COMPANY, INC.,**
**Respondent.**

Case Number 05-81
Final Order of the Commissioner
Mary Wendy Roberts
Issued February 23, 1982.

**SYNOPSIS**

Wage Claimant was Respondent's employee, based on Respondent's ability to control the details of Claimant's window installing work, to control who performed the work, and control of all materials and tools used, in addition to Claimant's perception that, as to window installation, he was an employee. Claimant was an independent contractor when he did sales work, and the Commissioner had no jurisdiction over the $122 sales commissions owed by Respondent. Respondent owed Complainant $775 in unpaid wages for work as an employee installing storm windows and unpaid reimbursable expenses (gas). The Commissioner declined to impose civil penalty wages due to Respondent's financial condition. ORS 652.140; 652.150; 652.310(2); 652.320(9); 652.330; 652.332(3).

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The above-entitled contested case came on regularly for hearing before Leslie Sorensen-Jolink, designated as Presiding Officer by Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was held on September 11, 1981, in the South Room of Harris Hall at the Lane County Courthouse, Eugene, Oregon. The Bureau of Labor and Industries did not appear at the hearing. Claimant Robert Siller presented his wage claim. John Flynn, the president, general manager and major stockholder of the Respondent, presented Respondent's defense.

Having fully considered the entire record in this matter, I, Mary Wendy Roberts, make the following Findings of Fact, Ultimate Findings of Fact, Conclusions of Law, Opinion, and Order.

**FINDINGS OF FACT – PROCEDURAL**

1) On May 7, 1981, Robert Siller (hereinafter referred to as the Claimant) filed a wage claim with the Wage and Hour Division of the Bureau of Labor and Industries alleging that Respondent All Season Insulation Company, Inc. (hereinafter referred to as the Employer) was his former employer and that the Employer failed to pay wages due to him.



2) On May 7, 1981, the Claimant assigned all wages due him under his claim to the Commissioner of the Bureau of Labor and Industries in trust for the Claimant.

3) On June 15, 1981, the Claimant authorized, in writing, the Bureau of Labor and Industries to process his wage claim against the Employer by means of the administrative process provided for in ORS 652.310 to 652.405.

4) On June 24, 1981, the Administrator of the Wage and Hour Division issued and served upon the Claimant and the Employer an Order of Determination which found that the Employer owed the Claimant $892.26 in unpaid wages plus interest thereon. In addition, the Order of Determination found that the Employer owed the Claimant $1338.30 as penalty wages plus interest thereon.

5) Thereafter, the Employer filed with the Wage and Hour Division an answer to the above-mentioned Order of Determination denying the wage claim by affirmatively alleging that the Claimant had been its independent contractor rather than its employee. In addition, the answer affirmatively alleged that the Employer had incurred no liability for penalty wages because the Employer was financially unable to pay the Claimant the compensation due at the time it accrued.

6) The Agency did not appear at the hearing on this matter. The Claimant, however, did appear. Having previously read *"Wage Claim Hearing Information"* (Bureau of Labor and Industries; January, 1980) and the explanation of the wage claim hearing process contained in an exhibit, and having reviewed to his satisfaction the Employer's answer to the Order of Determination and having been aware of the defenses raised therein, the Claimant declared that he was prepared to present his claim, which he did. He testified, questioned the one opposing witness, and presented argument. In addition, the Presiding Officer very thoroughly questioned both the Claimant and Mr. Flynn, who were also the only witnesses at the hearing. Because the Claimant and the Employer offered only one documentary exhibit at the hearing and referred to many documents which were not available at the hearing, the Presiding Officer also allowed the Claimant and the Employer ten days after the hearing to submit further documentary evidence and directed that they produce the following documents, if either possessed or could discover them:

(a) Any W-4 "Employee's Withholding Allowance Certificate" completed by the Claimant while he worked for the Employer.

(b) A copy of the written contract the Employer made with its salespeople, especially any such document signed by the Claimant.

(c) The names and addresses of the Employer's two window installers other than the Claimant during times material.

(d) The checks, or stubs of checks, which the Claimant received from the Employer for his installation work and the jobs described in Finding of Fact 7 below.

(e) Any of the Employer's payroll records illustrating the Claimant's alleged independent contractor status.

The Presiding Officer instructed the Claimant and Mr. Flynn to submit to each other a copy of evidence submitted during the ten days after hearing. The Claimant and Mr. Flynn were allowed five days to object to evidence offered.

Claimant timely submitted seven exhibits. Employer timely submitted seventeen exhibits. These documents have been admitted into the record since neither Claimant nor Employer raised any objection to their admission.

Because the Agency did not appear at the hearing, no documents from the file on this claim maintained by the Wage and Hour Division were offered into evidence. For this reason, the Presiding Officer, on October 26, 1981, contacted Wage and Hour Division Compliance Specialist Donna Fleming, who worked on this matter, to ascertain some procedural facts. Ms. Fleming referred the Presiding Officer to the above-mentioned Wage and Hour Division file rather than attempting to answer the questions asked from memory. The Presiding Officer then examined the Wage and Hour Division file on this claim and entered into the record the following documents therefrom:

- A copy of the "Wage Claim Form" dated May 7, 1981.
- Claimant's Calendar for December 1980, and January through March 1981.
- A Copy of the "Wage Transcription and Computation Sheet" prepared by the Wage and Hour Division.
- A copy of a letter from Ms. Fleming to Claimant dated June 5, 1981.
- A copy of the "Decision to Implement Administrative Process" signed by the Claimant on June 15, 1981.
- A copy of a letter from Ms. Fleming to the Claimant dated July 16, 1981.

The Presiding Officer did not consider any of the other contents of the Wage and Hour Division file for this claim in formulating the Order.

The Presiding Officer compared all of the copies noted above with the originals of them and found the copies to be true and accurate copies of the originals. Copies of these documents have been sent to the Claimant and the Employer.

The Presiding Officer also admitted into the record *"Wage Claim Hearing Information"* (Bureau of Labor and Industries; January, 1980). Both the Claimant and the Employer have received copies of this document.

This all having been done, and the Agency not having requested a reconvenement of the hearing for the purpose of presenting further evidence or argument, I, Mary Wendy Roberts, conclude that this wage claim has been adequately presented and therefore that the record in this matter is closed.

**FINDINGS OF FACT – THE MERITS**

1) At all times material, the Employer was a corporation which had engaged in its primary business activity of selling and installing building insulation for, as of the time of hearing, six years and which had more recently



also engaged in selling and installing storm windows. At all times material, the Employer was incorporated in the State of Oregon based in Eugene, Oregon, and engaged the personal services of one or more employees in the State of Oregon.

2) When the Employer first began selling storm windows, the Employer contracted with a window company which both manufactured and installed the windows for which the Employer had obtained orders. Later, and at all times material, the Employer contracted with a window company to manufacturer, and with other persons to install, the windows for which the Employer had received orders.

3) The Employer sold and installed storm windows in the following manner: The Employer's salespeople dealt initially with a prospective customer. If the customer decided to order storm windows, the salesperson did the overall window measuring. The Employer then sent another person, whom it regarded as an independent contractor, to take precise window measurements. The Employer next placed the window order with a window manufacturer. When the windows had been made, Mr. Flynn picked them up at the manufacturer's factory and took them to the Employer's shop. The Employer's installers picked up the windows at the shop and installed them.

4) At all times material, John Flynn was the president, general manager and major stockholder of the Employer.

5) At times material herein, the Employer had five to six workers whom it considered employees, most of whom were insulation installers. One of these workers, Ed Olsen, was a supervisor. The Employer also had five to six workers whom it considered independent contractors, including two salespeople, two or three window installers, and Richard Borke, the Employer 's business manager.

6) The Claimant originally worked for the Employer as a salesman. Like all of the Employer 's salespeople, the Claimant was an independent contractor, rather than an employee, while he worked in his sales capacity. The Claimant was paid on a commission-only basis for his sales work.

7) During the last two months of 1980 and the first week of 1981, because he was making few sales, the Claimant performed the following carpentry work for the Employer:

11-4-80: The Claimant cut an opening in a wall frame and installed a door.

12-18-80: The Claimant repaired holes in window frames.

1-6/7-81: The Claimant removed and replaced a folding stairwell, replaced a window, and adjusted doors. The Claimant vented a dryer.

The Claimant billed the Employer, and was paid, a lump sum for each above-described "job." The Claimant admits, and so this forum finds, that the Claimant was an independent contractor rather than an employee of the Employer on the above-described jobs.

8) The Employer had two storm window installers who were not keeping up with the window installation work load and who were "not clean on the job." The Employer used this phrase to describe the installer's

personal hygiene and work habits. From time to time, because of these problems, Mr. Olsen installed, or helped install, storm windows and "reworked" unsatisfactory window installation work.

9) During the Claimant's entire working relationship with the Employer, the Employer regarded the Claimant as a competent, reliable worker who was "clean on the job."

10) The Employer's sales manager mentioned to the Claimant that the Employer was looking for another storm window installer. The Claimant had not installed storm windows before. In order to ascertain what was involved in installing storm windows and to assist, the Claimant spent fourteen hours on three jobs on December 19, 22, and 23, 1980, installing storm windows with Mr. Olsen. Mr. Olsen showed the Claimant generally how the Employer installed storm windows.

After he had worked with Mr. Olsen, the Claimant went to Mr. Borke, who was in charge of all the Employer's jobs. Because of the Employer's problems with its two window installers and because the Claimant's sales work was in a slump and the Claimant had a good work reputation with the Employer, Mr. Borke asked the Claimant if he would install windows for the Employer .

11) The Claimant assented to this offer. Mr. Borke and the Claimant agreed upon the Claimant's fixed rate of compensation. The agreement of Mr. Borke and the Claimant was verbal, simple, informal and never reduced to writing. There are no written records concerning it. The agreement did not explicitly or directly specify whether the Claimant was to be an independent contractor or employee of the Employer.

12) The Claimant understood that he was hired as a window installer as an employee, rather than as an independent contractor. This understanding was based upon the Claimant's belief that he and Mr. Borke had agreed that he was to be paid on a per hour rather than per unit (window) installed basis. The Claimant believed that his hourly wage was to be $7.00.

13) Mr. Borke no longer works for the Employer. The Employer was not successful in its attempts to contact Mr. Borke concerning this matter. The Employer 's only witness in this matter, Mr. Flynn, was not present when Mr. Borke and the Claimant made their agreement concerning the Claimant's window installation work. Mr. Flynn does not know if Mr. Borke agreed to hire the Claimant as an employee, but if Mr. Borke did, it was a departure from the Employer's usual practice. (*See* Finding of Fact 5 above.) Mr. Flynn was never apprised of any such agreement and has never considered the Claimant an employee of the Employer.

14) During times material, the Employer considered its two other storm window installers independent contractors who were retained on a job-by-job basis and paid per unit installed. The Employer testified that this was common practice in the weatherization industry. The Claimant had no contract with nor was he aware of these other installers. The Claimant was also not aware that it was common practice in the industry to retain storm window installers on an independent contractor basis.



15) The Employer had a written contract with its salespeople which, among other things, specifically referred to those persons' independent contractor status. The Employer had no such written contract with its window installers.

16) After his agreement with Mr. Borke, the Claimant did his first storm window installation for the Employer on January 13, 1981.

17) Installing storm windows is usually simple work. The major difficulty is the physical awkwardness of handling large windows. The Claimant used the following equipment and tools: a truck (to carry the windows), ladders, electric drills, weather-stripping tape, and a socket (to drive screws into the windows). After his agreement with Mr. Borke, the Claimant used the Employer's truck (which had special racks to carry the windows), ladders, drill and tape. For his own convenience, the Claimant carried a small socket which he had purchased.

18) The Claimant had no regular work schedule for his window installation work for the Employer. He installed windows only when the Employer asked him to do so, on a job-by-job basis. The Employer did not guarantee the Claimant any minimum amount of window installation work. The Claimant understood, and this forum finds, that the Employer could have stopped giving him installation work at any time. At the same time, the Claimant had no obligation to be available to the Employer for window installation work. He did, however, make himself available to the Employer because he did not seek or perform paid work for anyone but the Employer while he did window installation work for the Employer. The Claimant continued his sales work for the Employer after he started installing windows. He reported to the Employer in person for sales work every day on which he was not installing windows.

19) The Claimant's window installation work for the Employer was intermittent.

20) The Employer did not give the Claimant detailed instructions before a window installation job unless there were something special to be done.

21) The Employer never stated any expectation to the Claimant as to how long it should take to perform a window installation job.

22) The Claimant reported on the status of an installation job when he returned to the Employer's shop during or after the job. Mr. Borke routinely checked the finished work of the Employer's window installers on every job before the Employer billed the customer.

23) The Claimant believed, and this forum finds, that the Employer had ultimate responsibility for the storm window installations. The Claimant tried his best to work out installation problems, but he always consulted the Employer (usually Mr. Borke) for a final decision on particular problems, such as ill-fitting windows. During such consultations, Mr. Borke would usually suggest a solution and ask if the Claimant agreed. Most often, both agreed on the solution which was used.

24) The Claimant determined the time during which he would perform a window installation job, taking into consideration the information the Employer gave him as to the customer's time preference, if any. Other than asking the Claimant to heed any such customer preference, the Employer had no control over the Claimant's time.

25) The Claimant believed that he had to do (and he did) the Employer's window installation work himself or with the help of whomever the Employer designated and that he could not contract with another person or company to perform the work.

26) After his agreement with Mr. Borke, the Claimant worked alone on most window installation jobs.

27) The Claimant wore no uniform while installing storm windows.

28) The Claimant kept track of and submitted to the Employer what he considered his work time on window installation jobs: from his departure from the Employer's shop to his return there. The Claimant did not punch a time clock (to note his starting and ending work times).

29) The people whom the Employer regarded as its employees normally punched in and out of work on the Employer's time clock and filled out daily cards describing the work they had performed that day.

30) The Claimant's billing statements for his window installation work cited the nature of the work performed and the amount of time worked, but not a rate of compensation or a total amount of compensation due.

31) The Claimant did not complete a W-4 "Employee's Withholding Allowance Certificate," a US tax form, for the Employer at any time.

32) The Claimant performed his last window installation work for the Employer on March 3, 1981. The Employer did not call the Claimant for further installation work after that job.

33. The Employer has not paid the Claimant for any of the Claimant's window installation work except a job the Claimant did in Portland, Oregon, on January 20 to 22, 1981. This Portland work was subject to the agreement the Claimant made with Mr. Borke concerning the Claimant's window installation work. On February 2, 1981, the Employer paid the claimant $188.75 for the 34 hours the Claimant worked on this job. The Employer paid for the Portland work from the same account from which it paid the Claimant for two of the non-window installation jobs the Claimant performed for the Employer as an independent contractor in late December 1980 and early January 1981. (*See* Finding of Fact 7) The Employer's payment to the Claimant for the Portland work was not by payroll check. The Employer made no deductions from this payment for federal or state tax withholding, federal Social Security or any other purpose.

34) The Employer paid the Claimant for his Portland work because the Employer was paid by the customer for that job.

35) The Employer routinely provided gasoline for the truck which the Claimant used to install windows. The Claimant, however, paid $5.00 to put gasoline in that truck on February 18, 1981. The Claimant has asked the Employer to reimburse him for that expense but the Employer has not done so. On one other occasion when the Claimant put gasoline in the Employer's truck, the Employer did reimburse the Claimant.



36) In compliance with federal law, the Employer had the people whom it regarded as employees complete a W-4, "Employee's Withholding Allowance Certificate." The Employer set up a payroll schedule for state and federal tax withholding, federal Social Security, state workers' compensation and insurance deductions for people it regarded as its employees. The Employer paid these people once each month by payroll check, with an advance in the middle of the month. The above-named deductions were made from the gross amount of pay, and paychecks were in the amount of the resulting net pay. (The Claimant was not aware of this pay schedule.)

37) The Employer offered free health insurance only to the people whom it regarded as employees. The Claimant did not know this and was never offered such insurance.

38) This wage claim is for the following work and expenses, which the Claimant performed or incurred for the Employer:

A. Window Installation Work

| | |
|---|---|
| Dec. 19, 22, 23, 1980: | 14.0 hrs |
| Jan. 13, 16, 19, 28, 29, 1981: | 32.5 hrs |
| Feb. 2, 3, 4, 5, 6, 9, 18, 19, 25, 27, 1981: | 62.5 hrs |
| Mar. 3, 1981: | 1.0 hr |
| | 110.0 hrs |
| 110.0 hours at $7/hr | = $770.00 |

B. Sales

| | |
|---|---|
| Feb. 1981: 10% Commission on Sale of $1222.60 | = $122.26 |

C. Expense

| | |
|---|---|
| Feb. 18, 1981 gas purchased by The Claimant | = $ 5.00 |
| TOTAL | = $897.26 |

39) The Employer has not paid the Claimant for any of the work or expense detailed in Finding of Fact 38 above. The Employer agrees that it owes the Claimant $770.00 for window installation work and $122.26 in a commission, even though the Employer asserts that wages for window installation work should be calculated on a per unit, not per hour, basis.

40) The Employer owes the Claimant the $897.26 described in Finding of Fact 38 above.

41) Despite its diligent efforts, the Employer has not been able to collect money due it for certain jobs. For this reason, the Employer has not been able to pay some of its debts, including the sum cited in Finding of Fact 40 above due to the Claimant, and monies owed to its other two window installers. The Employer is currently making efforts to collect its accounts receivable. If these efforts fail, the Employer believes that it will have to initiate bankruptcy proceedings. The Employer wants to pay the Claimant the money due the Claimant but has not been able to do so for the above-cited reasons.

## ULTIMATE FINDINGS OF FACT

1) The Claimant performed three types of work for the Employer between December 19, 1980, and March 3, 1981: sales work, carpentry jobs, and installation of storm windows. As a salesman and carpenter, the Claimant agrees that he was an independent contractor. This matter concerns

whether the Claimant was an employee or independent contractor of the Employer in his window installation work.

2) The agreement between the Claimant and the Employer concerning window installation work was oral, simple, and never evidenced in writing. It was made by the Claimant and Richard Borke, who no longer works for the Employer and was not present at the hearing. Whether the Claimant was to be an independent contractor or an employee of the Employer was not explicitly and directly addressed in the agreement. The perceptions of the parties as to whether the Claimant was an employee or independent contractor differed. The Employer believed that the Claimant was an independent contractor and treated the Claimant as it treated the workers it regarded as its independent contractors, rather than as it treated the workers it regarded as its employees. The Claimant acquiesced to this treatment, not realizing it was the treatment which the Employer accorded the people it called independent contractors. The Claimant believed that he was an employee of the Employer.

3) In fact, the Employer could and did exert control over the details of how the Claimant performed his window installation work, who performed the Claimant's window installation work, and what tools, equipment and materials the Claimant used to perform his window installation work. At the same time, the Employer did not (at least by itself) control how often the Claimant worked and when the work relationship with the Claimant could terminate, whether the Claimant worked for others while working for the Employer, or the Claimant's particular hours of work.

4) The Claimant and Mr. Borke did agree to pay the Claimant at a fixed rate for the Claimant's services.

5) The Employer has not paid and owes the Claimant $770.00 for 110 hours of window installation work and $5.00 for the Claimant's unreimbursed fuel expense, both of which sums constitute wages for window installation work which the Claimant performed for the Employer between December 19, 1980, and March 3, 1981. The Employer also owes the Claimant $122.26 in sales commissions.

6) The Employer's failure to pay the Claimant the $775.00 in wages and the $122.26 in sales commissions which it owes the Claimant is based upon the Employer's financial inability to pay these sums to the Claimant at the time they accrued.

## CONCLUSIONS OF LAW

1) At all times material, the Employer was an the employer subject to the provisions of ORS 652.310 to 652.405, 652.140, and 652.150.

2) At all times material, the Claimant was an independent contractor, not an employee, in his sales work for the Employer and, as such, was not subject to the provisions of ORS 652.310 to 652.405, 652.140, and 652.150.

3) At all times material, because the Employer had the right to control and direct the details and methods of the Claimant's work itself, even though the Employer did not have the exclusive right to control several of the circumstances of the performance of that work, the Claimant was an employee rather than an independent contractor in his storm window installation work for the Employer. As such, the Claimant was subject to the provisions of ORS 652.310 to 652.405, 652.140, and 652.150.

4) The Commissioner of the Bureau of Labor and Industries of the State of Oregon has jurisdiction over the persons and subject matter herein relating to the Claimant's work as a storm window installer. The Commissioner does not have jurisdiction over the persons and subject matter relating to the Claimant's sales work for the Employer and therefore cannot enforce a wage claim for compensation the Claimant earned as a salesman for the Employer.

5) A job-related expense the Claimant incurred for fuel which the Employer routinely provided, and for which the Employer had reimbursed the Claimant on one other occasion, is properly included in a wage claim under ORS chapter 652.

6) The actions, and motivations for those actions, of Mr. Borke, Mr. Olsen, and Mr. Flynn are properly imputed to the Employer .

7) The Employer's failure to pay the Claimant the $775.00 in earned and unpaid wages immediately following the termination of the Claimant's employment constitutes a violation of ORS 652.140.

8) Because the Employer has shown its financial inability to pay the $775.00 in wages which the Employer owes the Claimant at the time those wages accrued, the Employer avoids liability for penalty wages under ORS 652.150.

9) The Commissioner of the Bureau of Labor and Industries has the authority to order the Employer to pay the $775.00 in earned and unpaid wages it owes the Claimant under the facts and circumstances of this record.

## OPINION

### 1) The Claim for Storm Window Installation Wages

The Claimant and the Employer do not disagree upon the facts in the Findings of Fact above. They do disagree, however, upon the legal question of whether the Claimant's storm window installation work was done as an independent contractor or as an employee. This is a crucial question because the Commissioner of the Bureau of Labor and Industries is empowered to determine the validity of, attempt to adjust and seek collection of only the wage claim of an employee. For that reason, this forum has no jurisdiction to enforce the Claimant's wage claim if he was not an employee of the Employer.

ORS 652.310(2) contains the applicable definition of "employee." For a worker to be considered an employee, the employer must have agreed to pay, or have paid, the employee at a fixed rate for the worker's personal services. Finding of Fact 11 above establishes that this requirement was met herein.

ORS 652.310(2) does not affirmatively define "employee" farther. However, it twice specifies, with limited exceptions, that an independent contractor is not an employee. Nowhere does Oregon statutory law define "independent contractor" for purposes of wage claim law. For that reason, this forum has looked to Oregon case law

to ascertain the legal distinction between an employee and an independent contractor.

Oregon case law like federal case law has consistently stated that no pat formula exists to decide whether a worker is an employee or an independent contractor. Oregon case law has held consistently that the primary question in distinguishing between an employee and an independent contractor is to what extent the employer has the right to control and direct the details and manner of performance of the worker's work. This question focuses upon the existence, rather than the actual exercise, of such a right. It also focuses upon control over the manner and means of accomplishing a result, rather than the result itself (i.e. control over how work will be done rather than just what work will be done). If the answer to the above question establishes that the worker is the subordinate party, depending upon the employer's business, the worker is an employee rather than an independent contractor. *Bowser v. State Industrial Accident Commission,* 182 Or 42, 185 P2d 891 (1947); *Butts v. State Industrial Accident Commission,* 193 Or 417, 239 P2d 238 (1951); *Herer Jones Company v. State Tax Commission,* 247 Or 404, 430 P2d 998 (1967); and *Oremus v. The Oregonian Publishing Company et al and Leibrand,* 11 Or App 444, 503 P2d 722 (1972), *rev den* (1973).

To determine the amount of control the Employer herein had over the Claimant, this forum has considered the following questions and answers.

a) Did the Employer have the right to detail how the Claimant would perform his work, or did the Claimant use his own methods, with the Employer having no control except as to the ultimate result?

Because the record reveals no explicit agreement as to this right, this forum must look to what actually occurred between the Claimant and the Employer. The Claimant's window installation work was simple, usually not involving very much detail. However, before the Claimant started installing windows by himself, the Employer's supervisor did generally show the Claimant how the Employer did the installation work, and the Employer did give the Claimant more detailed instruction if the job so necessitated. The Claimant reported to the Employer on the status of a job during or just after the job. If the Claimant had a problem, he consulted with the Employer and they came to a mutually agreeable solution. The Employer routinely checked the Claimant's work when a job was finished. All the above facts lead to the conclusion that, to the extent the window installation process was variable, the Employer could and did exert control over the details of how the Claimant performed his work.

b) Did the Employer retain the Claimant for a relatively long or indefinite time period or on a job-by-job basis, and did the Employer retain the Claimant on a full or part time basis or intermittently?

The Employer retained the Claimant on a job-by-job basis, calling the Claimant with a specific job assignment whenever the Employer had the work and wished to assign it to the Claimant. The Employer did not guarantee the Claimant any minimum amount of work, and the Claimant did not guarantee his availability to work (although in fact he made himself available). Either the Employer or the Claimant could terminate at will their window installation work relationship. (In fact, the relationship ended when the Employer simply stopped calling the Claimant with assignments.) The Claimant actually worked intermittently for the Employer, doing 110 hours of work during the 2 ½ month time period material herein. All the above facts lead to the conclusion that neither the Employer nor the Claimant alone, but rather both of them, could control the frequency and duration of the Claimant's work for the Employer.

c) Could the Claimant employ workers to perform, or help perform, the Claimant's work for the Employer?

The record reveals no specification of the answer to this question in the agreement between the Claimant and the Employer. The Claimant believed that he could not employ workers, and in fact, if the Claimant needed help, other employees or contractors of the Employer controlled who performed the Claimant's work.

d) Could the Claimant have performed work for others while working as a storm window installer for the Employer?

Again, the record includes no evidence that the agreement between the Claimant and the Employer addressed this question. The Claimant did not provide or try to provide services for compensation for others during the time herein relevant because he wanted to make himself available to the Employer. There is no evidence that the Employer had the right, or attempted, to control whether the Claimant worked for others while working as a window installer for the Employer. The Claimant in fact did have another "paying" job: he continued to work as a salesman for the Employer.

e) Who furnished the equipment, tools and materials the Claimant used in his window installation work?

The Employer furnished the windows, truck, electric drills, ladders, and weatherization tape which the Claimant used. The Claimant furnished only a socket, a piece of equipment he wished to retain for his own convenience. The Employer controlled, therefore, what tools the Claimant used to do his window installation work.

f) Who determined the Claimant's particular hours of work?

The Claimant determined when he would perform the job assigned to him, taking into account any customer preference. The Employer never articulated any expectation to the Claimant as to how long it should take the Claimant to do a job. The Employer did not, then, exert control over the timing of the Claimant's work (beyond asking him to heed customer preference), and there is no evidence that the Employer had a right to exert such control.

No objective evidence exists in the record as to whether the Claimant and Mr. Borke intended that the agreement between the Employer and the Claimant would establish an the employer - employee relationship or an the employer - independent contractor

relationship. Accordingly, this forum has considered the following questions and answers relating to how the Employer and the Claimant treated the relationship, as evidence of their perception of their agreement.

g) Was the Claimant's former work relationship with the Employer that of an employee or an independent contractor?

The Claimant had been, and continued to be during his window installation work, a salesman and occasional carpenter for the Employer. In both these jobs, the Claimant was an independent contractor.

h) Was the Claimant's window installation work the same as or similar to work done by the Employer's employees or by the Employer's independent contractors?

The Employer retained two other persons to do work identical to the Claimant's installation work, who, as far as the Employer was concerned, were retained as independent contractors. The only window installer the Employer regarded as an employee during times material was supervisor Olsen. He performed this function when the Employer's installers could not keep up with the work load or when their work was not satisfactory.

i) Was it common practice in the Employer's industry to retain window installers as independent contractor's or as employees?

It was common practice in the weatherization industry to consider window installers independent contractors.

j) Was the Claimant to be paid by the hour or by the unit of work performed?

The Claimant believed that he was to be paid by the hour, while the Employer believed that he was to be paid by the unit of work, as were the Employer's other window installers. In fact, the Claimant apparently was not paid by the hour on the one window installation job for which he was actually paid. Having worked 34 hours, the Claimant was paid $188.75. No hourly rate multiplied by 34 hours equals $188.75. The Claimant does not object to the amount of this payment. It is interesting to note that the Employer does not contest the amount of the Claimant's wage claim, which, as the Employer knows, was computed by the Claimant on a wage per hour basis. The Employer has asserted that the figure could be computed on a per window basis, but has offered no such computation.

While believing that he was to be paid by the hour, the Claimant acquiesced to a payment which was not by the hour. While believing that the Claimant was to be paid by the unit of work, the Employer agrees to an amount due which was calculated on a per hour basis. Because of this apparent contradiction, this forum must conclude that neither party has a perception of how the Claimant's pay was to be calculated, which this forum should consider in deciding whether the Claimant was an independent contractor or an employee. (Having concluded that the Claimant was an employee, however, this forum determines $7.00 per hour as the Claimant's wage, because the Employer agreed with the total wage figure which was computed using that rate.)



k) Was the Claimant treated like the Employer's employees or independent contractors with regard to the more tangential circumstances of his work?

The Claimant did not have to, and did not, punch in and out of work on the Employer's time clock or complete daily cards describing work, as did the people the Employer regarded as employees. The Claimant did not complete a W-4 "Employee's Withholding Allowance Certificate" as did the people the Employer believed were employees. The Claimant did not seek or receive the health insurance which the people the Employer treated as its employees received.

On the one occasion when he was paid for window installation work, the Claimant was paid from the same account (and by the same check) as he was for the non-installation work, which the Claimant admits he performed as an independent contractor. This payment was not by payroll check, and no tax or Social Security withholding, or any other deductions were made from that check.

Because of the above answers to questions (g) through (k), it is obvious that the Employer treated the Claimant as it treated workers it regarded as its independent contractors rather than as it treated the workers it regarded as its employees. Although the Claimant acquiesced to this treatment, there is no evidence that he was aware of the conclusion stated in the previous sentence. It is most likely that the Employer, who also had no written evidence of the language of Mr. Borke's agreement with the Claimant, believed that the Claimant was an independent contractor. Equally likely is the conclusion that the Claimant, who had first-hand knowledge of the language of Mr. Borke's agreement with him but who could have understood the import of such language differently than Mr. Borke, believed that he was an employee. He was not aware, however, of how the Employer treated its perceived employees. The conclusion of this forum is that, since the perceptions of the parties as to the relevant nature of their agreement reasonably differed, the objective criteria set out in the questions and answers (a) through (f) above must determine whether the Claimant was in fact an employee or independent contractor.

The answers to questions (a) through (f) above demonstrate that the relationship of the Employer and the Claimant had characteristics of both an the employer-employee relationship and an employer-independent contractor relationship. The Employer could and did exert control over

a) the details of how the Claimant performed his work,

c) who performed the Claimant's work, and

e) what the Claimant used to perform his work.

On the other hand, the Employer did not control, and there is no evidence that the Employer could have controlled,

b) how often the Claimant worked and when the work relationship could terminate,

d) whether the Claimant worked for others while working for the

Employer or whether the Claimant had other paying work, or

f) the Claimant's particular hours of work.

However, the fact that the answers to questions (a) through (f) line up evenly on each side of the controversy does not result in a draw. The most determinative of these must be the answers to questions (a), (c) and (e), as they concern the right to control the methods of the Claimant's work itself, rather than the right to control a circumstance relating to that work (such as time and frequency/duration of the subject work or the existence of other work). For this reason, this forum has found that in his storm window installation, the claimant was, despite the Employer's perception to the contrary, an employee.

**2. The Claim for the Sales Commission**

Included in this wage claim is a claim for $122.26, an unpaid ten per cent commission on one of the Claimant's sales. In his sales work for the Employer, the Claimant was admittedly an independent contractor rather than an employee. Because only the wage claim of an employee can be enforced by this forum, this commission cannot properly be made part of this wage claim or this Order.

**3. The Claim for the Gasoline Expense**

The Employer routinely supplied the gasoline for its truck, which the Claimant used when he installed windows for the Employer. On at least two occasions, however, the Claimant supplied gasoline for the truck. On one of these occasions, the Employer reimbursed the Claimant for the cost of the gasoline. On the other occasion, February 18, 1981, the Employer did not reimburse the Claimant.

Oregon law provides that the Commissioner of the Bureau of Labor and Industries has authority to enforce wage claims, which are defined in ORS 652.320(9) as "an employee's claim . . . for compensation for the employee's own personal services." It is the policy of the Bureau of Labor and Industries that unpaid job-related expenses can be included in a wage claim if there has been an explicit agreement between the parties that the employer would pay for such expenses or if the employer in fact does pay other such expenses. In this matter, there is no evidence that the Employer explicitly agreed to reimburse the Claimant for gasoline. However, the Employer did usually provide the gasoline which the Claimant used, and the Employer did reimburse the Claimant for gasoline for the truck on another occasion. For these reasons, this forum regards the $5.00 cost of gasoline which the Claimant purchased on February 18, 1981, as a reimbursable expense and properly part of this wage claim and, therefore, this Order.

**4. Interest Accrual**

The Claimant worked his last job for the Employer on March 3, 1981. The Employer has not called the Claimant to do window installation work since that date. March 3, 1984, is therefore considered the Claimant's termination date. Since the Claimant's window installation wages were due immediately upon the Claimant's termination, interest on those unpaid wages accrues from April 1, 1981, the first day of the month following the Claimant's termination, at the rate of 9 per cent per annum.



**ORDER**

NOW, THEREFORE, as authorized by ORS 652.332, I, Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries hereby orders All Season Insulation Company, Inc. to deliver to the Hearings Unit of the Portland office of the Bureau of Labor and Industries, within sixty days of the execution of the Final Order in this matter, a certified check payable to the Bureau of Labor and Industries in trust for Robert Siller in the amount of Seven Hundred and Seventy Five Dollars ($775.00), representing unpaid wages, plus interest thereon at the rate of nine per cent per annum from April 1, 1981, until paid.

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**In the Matter of**

**GODFATHER'S PIZZERIA, INC.,**

**an Oregon corporation, and Colleen Anthony, Respondents.**

Case Number 04-81

Final Order of the Commissioner

Mary Wendy Roberts

Issued March 5, 1982.

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**SYNOPSIS**

Finding that Claimant was an employee and not an independent contractor, the Commissioner found that the individual Respondent willfully failed to pay Claimant for his final pay period. Once Claimant proved that he performed work for which he was not compensated, it was up to Respondent to produce accurate and complete evidence of pay figures and work times. Because Respondent failed to meet that burden, the Commissioner awarded Claimant $281.25 in unpaid wages and $1050 in civil penalty wages. ORS 45.250(1)(b); 652.140(2); 652.150; 652.160; 652.332; 652.610(3); OAR 839-01-015(2); 839-01-035.

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The above-entitled contested case came on regularly for hearing before Leslie Sorensen-Jolink, designated as Presiding Officer by the Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was held on September 24, 1981, October 7, 1981, and October 20, 1981, in Room 311 of the State Office Building, 1400 S.W. Fifth Ave, Portland, Oregon. The Bureau of Labor and Industries was represented by Victor

Levy, Assistant Attorney General. Employers Colleen Anthony and Godfather's Pizzeria, Inc. were represented by Alan Viewig, Attorney at Law. Claimant Mark Brittell was present and testified.

Having fully considered the entire record in this matter, I, Mary Wendy Commissioner of the Bureau of Labor and Industries, hereby make the Findings of Fact, Ultimate Findings of Fact, Conclusions of Law, Rulings, Opinion and Order.

## FINDINGS OF FACT – PROCEDURAL

1) On May 21, 1980, Mark Brittell (hereinafter referred to as the Claimant) filed a wage claim with the Wage and Hour Division of the Bureau of Labor and Industries alleging that Colleen Anthony and Godfather's Pizzeria, Inc. (hereinafter referred to as the Employer) were his former employer and the Employer had failed to pay wages due to him.

2) On May 21, 1980, the Claimant assigned all wages due him under his claim to the Commissioner of the Bureau of Labor and Industries in trust for the Claimant.

3) On December 3, 1980, the Administrator of the Wage and Hour Division issued an Order of Determination, which found that the Employer owed the claimant $276.25 in unpaid wages plus interest thereon. In addition, the Order of Determination found that the employer owed the Claimant $1036.00 in penalty wages plus interest thereon. This Order of Determination was served upon the Claimant on December 11, 1980, and upon the Employer on January 2, 1981.

4) Thereafter, the Employer filed with the Wage and Hour Division a request for hearing in this matter and an answer to the above-mentioned Order of Determination denying the wage claim by alleging that the Claimant was paid on or about June 4, 1980, by the Employer, and that the Employer was not liable for any wages still due and owing, an affirmative defense, and denying each and every material allegation in the Order of Determination.

5) The Bureau of Labor and Industries duly served the parties and the Claimant with Notices of the Time and Place of Hearing for the first day of hearing and the subsequent two reconvenements and a Designation of the Presiding Officer.

6) When the hearing on this matter began, the parties stipulated to the veracity of the statement in pertinent part, that "the true and correct employer, for purposes of this proceeding, is and should be Colleen Anthony," because Godfather's Pizzeria, Inc. "did not properly come into existence or operate in fact as a corporation." All parties, through their counsel, consented to amendment of the pleadings herein to add Colleen Anthony as an employer. Accordingly this forum has amended the pleadings to name as the Employer "Colleen Anthony, and Godfather's Pizzeria, Inc., an Oregon corporation."

7) The parties also stipulated that if the Claimant found to be entitled to any wages and penalty wages herein, Colleen Anthony and Godfather's Pizzeria, Inc., an Oregon corporation, are jointly and severally liable therefore.

8) During the hearing, counsel for the Agency sought amendment of the Order Determination to conform to the proof that the work time which this wage claim concerns totaled 56.25 (rather than 55.25) hours. This change would have the effect also amending the total amount of unpaid wages which the Order of Determination found due to $281.25. The Employer did not object to this request, and it was granted.



9) During the hearing, the Agency offered as evidence a deposition of Colleen Anthony which the Agency had taken on September 9, 1981, in preparation for this hearing. Employer objected to the admission of this deposition. ORS 45.250(1)(b) states, as a specific rule of evidence, that at a trial, hearing of a motion, or interlocutory proceeding, a deposition may be used against any party for any purpose. This administrative forum follows the more relaxed and general standard that evidence of a type commonly relied upon by reasonably prudent persons in the conduct of their serious affairs is admissible. OAR 839-01-035. Under either the general administrative standard or the specific civil standard, the Employer's deposition is admissible. For that reason, her deposition is admitted without limitation.

10) Before commencement of the hearing, the Agency asked the Employer, and the Employer agreed, to produce certain relevant documents in the Employer's possession. When, during the first day of hearing, the Employer sought admission of many documents which the Employer had not provided to the Agency, the Agency requested a recess of the hearing in order to examine those documents and ascertain whether or not to request a continuation of the hearing to a later date in order to allow the Agency to fully review the contents of the documents. The Employer did not object to this request. Accordingly, the Presiding Officer recessed the hearing to allow time for lunch and cursory examination of the documents by the Agency. The Presiding Officer left the hearing room after instructing those remaining that, because the hearing room's doors were locked, no one would be able to enter it after the last person left without first obtaining and using a key from the Hearings Unit.

Counsel for the Employer, Mr. Viewig, spread an array of documents on the conference table of the hearing room which was shared throughout the hearing by counsel for both parties, Ms. Anthony, the Claimant, each witness (while testifying), the Presiding Officer, and the Hearing Clerk. Included among these documents was a list written by Mr. Viewig purportedly detailing the documents which the Employer had just produced. Counsel for the Agency, Mr. Levy, noticed that the documents produced included a series of similar documents.

Soon thereafter, and before Mr. Levy began examining the documents, the Employer, Mr. Viewig, the Claimant, Mr. Levy and everyone else in the hearing roam departed for lunch. Mr. Levy and the Claimant returned to the room after eating and began perusing the documents the Employer had produced. Mr. Levy noted that all but one of the series of documents he had earlier noticed were gone. When Mr. Viewig and the Employer returned to the room, Mr. Levy asked Mr. Viewig about the absence of the other

documents in the series, labeled on Viewig's list as "Write it once Copies 1 Jan –> 15 June–11 slips 8 1/2" X 11." The one remaining document in this series has become an exhibit. At this point, the Claimant, the Employer, Mr. Viewig, Mr. Levy, witnesses, the Presiding Officer and the Hearing Clerk searched for but did not locate the ten missing documents. Mr. Viewig insists that he left these documents on the hearing table, and all of the persons listed above deny removing the documents from that table. The Presiding Officer knows of no other person who entered the hearing room at times material. Accordingly, this forum has been unable to ascertain what happened to the missing documents.

The missing ten documents were purportedly just like the remaining exhibit except that they concerned the Employer's ten other two-week pay periods between January 1 - June 15, 1980. Each document allegedly showed, for a given pay period, all the payroll information shown on the remaining exhibit for all of the Employer's employees. The Employer claims that she used these documents to reconstruct the Claimant's Individual Earnings Record for 1980. The Employer admits that a master and carbons of each of the missing documents originally existed, but asserts that due to theft and loans to other public agencies, the missing documents were the last renditions of all the information thereon which the Employer possessed. The Employer later moved to dismiss this wage claim due to the loss of these documents. The ruling upon this motion appears in item 1 of the RULINGS Section below.

11) On September 15, 1981, at the request of the Agency, the Commissioner of the Bureau of Labor and Industries issued a subpoena ad testificandum to Mike Medici commanding him to appear at the hearing and remain until testimony closed unless he was sooner discharged. Mr. Medici appeared at the first day of hearing. When the hearing was continued, the Presiding Officer reminded Mr. Medici that the subpoena remained in effect for the reconvenement of the hearing. Mr. Medici was subsequently advised by the Claimant of the time and place of the reconvenement, and Mr. Levy left messages detailing this information for Mr. Medici at his home and his place of work. Mr. Medici did not appear at the reconvenement of the hearing. Upon the Agency's request and with no objection by the Employer, the Presiding Officer kept the record in this matter open for seven days after the reconvenement (second day) of the hearing to allow the Agency to make a request for another reconvenement in order to hear Mr. Medici's testimony, if the Agency could locate Medici.

The Agency located Mr. Medici and timely requested reconvenement of the hearing for the limited purpose of adducing Mr. Medici's testimony. The Presiding Officer granted this request. At the second reconvenement, the Employer objected strenuously to the second reconvenement, stating that it was improper because the parties had already given their closing arguments, the Agency previously had been afforded an opportunity to present all its evidence, and the second reconvenement was a surprise to the Employer.



The Presiding Officer overruled this objection and denied the Employer's motion to adjourn the hearing without receiving Mr. Medici's testimony because:

a. the Employer was apprised of the Agency's potential request for reconvenement before the Employer gave its closing argument and made no objection to the possible reconvenement at that time.

b. both parties were (to be) given an opportunity to present supplementary closing argument after Mr. Medici's testimony, and the Employer did not avail itself of this opportunity.

c. the Agency made diligent efforts to secure Mr. Medici's presence at the second day of hearing and, because he did not appear, was not able to present all of its evidence.

d. the second reconvenement should not have been a surprise to the Employer since the Presiding Officer made it clear at the close of the second day of hearing that she would entertain a request for such a reconvenement if it were made within seven days of the second day of hearing.

## FINDINGS OF FACT – THE MERITS

1) At all times material herein, the Employer owned and operated a restaurant named Godfather's Pizzeria (hereinafter the Pizzeria) located at 4439 S.W. Beaverton-Hillsdale Highway in Portland, Oregon. In this business, the Employer employed one or more persons in the State of Oregon.

2) During times material herein, the Pizzeria was operated in a very informal manner. There were no firm routines, standard operating procedures or rules. Nothing was done the same way each time it was done.

3) The Claimant has worked for the Employer twice: first during the Summer of 1979 and then from early January 1980 until May 8, 1980.

4) The Claimant resigned from his Summer 1979 employment with the employer after he had a fight with a co-worker named Mike Varisco.

5) During his second period of employment with the Employer, which this matter concerns, the Claimant performed a bit of every job at the Pizzeria, including cooking, shopping, and cleaning. The Claimant was "quasi-manager" at the Pizzeria, working toward managing the restaurant.

On several occasions in 1980, the Claimant also delivered supplies to and cleaned the Employer's other place of business, a tavern in Portland.

6) During his 1980 employment by the Employer, the Claimant's regular of pay was between $4.00 and $5.00 per hour. No later than April 16, 1980, that rate was $5.00 per hour.

7) During the Claimant's 1980 employment, the Employer paid the Claimant a gross basis as an independent contractor, with no tax, Social Security, workers' compensation or other employee deductions withheld from his pay and forwarded to the appropriate authorities.

8) The Employer's scheduled paydays for its employees were on the fifth and twentieth of each month. The pay on the fifth of each month was for the work performed from the sixteenth through the end of the previous month, and the pay on the twentieth of each month was for the work performed

from the first through the fifteenth of that month. Actual paydays were often one to three days after the scheduled paydays.

9) The Claimant did not have a set work schedule. As quasi-manager of the Pizzeria, he was on its premises at many different times of day rather than during just one particular "shift." He recorded the hours he worked on a time card. Each time card covered one 15 day pay period. The Employer had custody of employee time cards and retained custody of the Claimant's time cards until these proceedings.

In the record are copies of all of the Claimant's time cards for 1980 except the one for January 16 to 30, 1980, which is missing. The Claimant made some of the entries on his time cards using the Employer's time clock and made others by hand. The Employer did not always pay for all the time indicated on an employee's time card, because the Employer paid only for actual shift time. Since the Claimant had no discernible shifts, the Employer, for the most part, paid the Claimant for all time indicated on his time cards.

10) The Employer's method of paying the Claimant varied. The Employer usually paid the Claimant by check (which the Employer sometimes cashed for the Claimant herself) and sometimes by cash. When the Claimant was paid in cash, or when the employer cashed the Claimant's paycheck, the Claimant signed a receipt stating that he had worked "x" hours at "x" rate for "x" amount of wages. When the Claimant was paid by check, he usually also received a stub-like record of payment attached to the check. That stub had blank spaces for detailing hours and days worked, rate of pay, earnings components, deductions and net pay. The Claimant retained none of these stubs. When the Claimant was paid by check, he always had to endorse the back of the check in order to negotiate it, whether cashing it through the Employer, bank or some other entity.

11) The Claimant usually initiated payment of his wages himself by going to the Employer and requesting the wages.

12) The Employer paid the Claimant the following amounts in wages:

a. $120.57 for the January 16-31, 1980, pay period by check dated February 5, 1980.

b. $165.95 for the February 1-15, 1980, pay period by check dated February 15, 1980.

c. $148.81 for the February 16-29, 1980, pay period by check dated February 29, 1980.

d. $150.94 for the March 1-15, 1980, pay period by check dated March-15, 1980.

e. $342.50 for the March 16-31, 1980, pay period by check dated March 31, 1980.

f. $132.00 for the April 1-15, 1980, pay period by cash as evidenced by receipt dated April 18, 1980.

13) All of the above noted checks bear the Claimant's endorsement on the back of the check.

14) No other canceled checks or receipts were introduced to evidence payments to the Claimant of other wages during his 1980 employment.



The Employer introduced a check as alleged payment to the Claimant for wages for the April 16-30, 1980, pay period, but this check was not signed. by the payor (the Employer), endorsed by the payee (the Claimant), or processed through a bank. It could not have been negotiated and therefore did not function as a paycheck to the Claimant.

15) On January 19, 1980, the Claimant borrowed $275.00 from the Employer to purchase a car. This personal loan is recorded on a piece of paper, a copy of which is an exhibit. The Claimant and the Employer agreed that the Claimant would pay back this loan by paying the Employer between $25.00 and $50.00 each pay period. (They did not specify an exact amount.) Excluding the salary advances noted in Findings of Fact 18 and 19 below, this was the only loan the Claimant received from the Employer during the Claimant's 1980 employment by the Employer.

16) Within two weeks after borrowing $275.00 from the Employer, the Claimant started to repay this loan by paying between $25.00 and $40.00 to the Employer in connection with the receipt of his February 5, 1980, paycheck. He made subsequent payments on the car loan in connection with subsequent paychecks. Although the Claimant cannot now remember the amounts of those payments, he knew during his employment in 1980 what amounts he had repaid the Employer for the car loan.

17) On at least eight occasions in 1980, the Claimant took salary advances, hereinafter referred to as "draws", on his next paycheck. Normally, the Claimant took such draws when he needed money to pay his bills, often when his paycheck was late. The procedure the Claimant followed in taking a draw was to obtain permission from the Employer to take the draw; write the date, amount of the draw and his signature on a plain piece of paper; put this piece of paper, a "draw slip", in the till of the Pizzeria's cash register; and take the amount of money noted an the draw slip out of the same till. The Claimant never took a draw without the Employer's permission.

18) Eight exhibits are draw slips from the Claimant to the Employer.

a. On February 6, 1980, the Claimant drew $80.00 on the wages due him on his January 16-31, 1980, time card. The Claimant had not received his paycheck due on February 5, 1980.

b. On February 18, 1980, the Claimant drew $50.00 an the wages due him on his February 1-15, 1980, time card. On February 20, 1980, the Claimant drew $25.00 an the wages due him on the same time card. On February 22, 1980, the Claimant drew $30.00 on the wages due him on the same time card.

c. On April 11, 1980, the Claimant drew $50.00 on the wages due him on his April 1-15, 1980, time card.

d. On April 24, 1980, the Claimant drew $25.00 on the wages due him on his April 16-30, 1980, time card. On April 25, 1980, the Claimant drew $56.25 on the wages due him on the same time card. On May 7, 1980, the Claimant drew $25.00 on the wages due him on the same time card. All of

these draws were taken in lieu of receiving those amounts by the pay date on May 5, 1980.

19) It is possible that the Claimant took more draws than those noted

20) The Claimant repaid to the Employer each of the draws he took, except those taken in lieu of receiving their amounts by the pay due on May 5, 1980, when the Claimant received subsequent paychecks. Sometimes the Employer deducted the amount of the draw before paying the Claimant; other times, the Employer paid Claimant all wages due and the Claimant then repaid the draw amount to the Employer in cash.

21) The Claimant never asked for or received back from the Employer any slips or other receipts for his repayments of draws.

22) The Claimant kept no written records of amounts he received from, paid to, or owed to the Employer during his employment. He kept such records in his head. He recorded in his memory the amounts he paid back to the Employer on his draws and his car loan. The Claimant's memory of figures and minor, tangential, unclear or complex events material herein has dimmed since times material, but his mental records were accurate when he made them.

The Claimant never saw the Employer record his car loan payments or his payments on his draws.

23) The draw and car loan arrangement between the Claimant and the Employer was primarily a cash operation which the Claimant would settle, except for his running balance on the car loan, every one or two pay periods. He would compute settlement amounts according to his mental records. The Employer and the Claimant had no disagreements during the Claimant's 1980 employment over the amounts the Claimant and the Employer owed each other.

24) In order to pay for the Employer's business purchases (such as supplies, coin or bill change, or one-time services), the Claimant used money from the Pizzeria's cash register till. The Claimant always put some document in the till noting any money he had taken out of the till.

25) On May 8, 1980, because he felt he could no longer be employed under the "stress and confusion" in his work for the Employer, and in light of the Employer's "disregard" for his "loyalty as an employee," the Claimant decided to resign from his employment with the Employer. He left the Pizzeria, went home and, through his mother, wrote a letter of resignation. In that letter, which was effective immediately, the Claimant asked to be paid for his work performed from May 1 to 8, 1980, on or before May 20, 1980 (the usual payday), and stated that the amount of wages due was $281.25. The Claimant requested in his letter that the Employer send those wages to the address which he designated in the letter. He lived at that address. The Claimant returned to the Pizzeria on May 8, 1980, and the gave the head waitress his keys, his time card for May 1 to 8, 1980, and his letter of resignation. The Employer received these items.

26) At the time of his resignation, the Claimant had not received a paycheck due May 5, 1980, for his work of April 16 to 30, 1980. He had worked 87 hours between April 16 to 30, for which he was to be paid $435.00 at his regular rate of $5.00 per hour or, according to the Employer's figures, $369.75, or $4.25 per hour. (The only possible explanation on the record for the latter reduced rate of pay was an "L" appearing on the pay record after the entry of 87 hours for the April 16 to 30, 1980, pay period. There is no evidence of what the "L" means.)

In his letter of resignation, the Claimant did not ask the Employer for April 16 to 30, 1980, wages because he had decided to, and did, forego them in order to pay back all the money he owed the Employer: the balance of the $275.00 car loan made on January 19, 1980, the draws taken on April 24 and 25 and May 7, 1980, and any other draws outstanding.

At the time, the Claimant accurately knew what he owed the Employer on the car loan and on his outstanding draws, and therefore was able to ascertain the wages due on his April 16 to 30, 1980, time card (whether $435.00 or $369.75) were greater than the total amount of money he owed the Employer. Although he believed that he lost money on this exchange, the Claimant did not press for any of his April 16 to 30, 1980, pay because he was angry, upset and most anxious to have no further contact with the Employer.

27) The Claimant never received a paycheck or cash wages for his work performed between April 16 to 30, 1980. He thereby repaid all of his outstanding draws and the balance due on his $275.00 car loan to the Employer.



28) The Claimant's last day of work for the Employer was May 8, 1980.

29) In his letter of resignation, the Claimant had also informed the Employer that he would file a wage claim with the Bureau of Labor and Industries if he had not received $281.25 in wages due by May 20, 1980. He did not receive that amount, or any wages for his May 1 to 8, 1980, work by May 20, 1980. On May 21, 1980, the Claimant filed the instant wage claim with the Bureau. (*See* Procedural Finding of Fact 1 above.)

30) On June 2, 1980, not having received wages for his May 1 to 8, 1980, work and having become discouraged about collecting these wages through the Bureau's process, the Claimant went to the Pizzeria to try to obtain these wages. The Employer was not on the premises. A waitress decided to, and did, pay the Claimant $281.25 from the money in the Pizzeria's cash register till. In exchange, the Claimant gave the waitress a handwritten receipt, a copy of which is in the record. The Claimant has not returned to the Pizzeria since June 2, 1980.

31) Later on June 2, 1980, when the Employer discovered what the above mentioned waitress had done, the Employer contacted the police and sought the waitress's arrest for misuse of funds from the till. When the waitress contacted the Claimant and informed him of the Employer's action, the Claimant had a friend, Mike Varisco, take the $281.25 and return it to the Employer in order to prevent the waitress's arrest. The Claimant had Mr. Varisco do this because the Claimant still wanted to avoid seeing the Employer. When Mr. Varisco returned the

$281.25 to the Employer, the Employer did not return the receipt for that amount, which the Claimant had left in the register when he received the $281.25 earlier that day.

32) The Claimant has never been paid the $281.25 since Mr. Varisco returned it to the Employer on June 2, 1980, or any wages for his May 1 to 8, 1980, work. The receipt for $281.25 which the Claimant wrote on June 2, 1980, and left in the Pizzeria's till was not returned to him on June 2, 1980, or at any time thereafter until the Agency's counsel obtained it from the Employer in preparation for this hearing.

33) The Employer knew at times material that it owed the Claimant $281.25 in wages and voluntarily chose not to pay him, thereby willfully failing to pay those wages.

34) The Claimant's rate of pay at termination was $5.00 per hour, and during May 1980, the last month he worked for the Employer, the Claimant averaged seven hours of work per calendar day. His average daily gross wage at the time of his termination, therefore, was $35.00.

35) Several other public agencies have been examining the Employer's records for times material herein.

36) This forum has considered the testimony of Kenneth deGroot, offered by the Employer to corroborate her assertion that she paid the Claimant $281.25 or about June 4, 1980, and has accorded it little weight. Mr. deGroot's manner was hesitant when he was testifying, and he admitted that he worked for he Employer and that he had a long standing personal relationship with her.

37) The Employer's testimony has been impeached in the following ways, which are fully explained in the Opinion below. The Claimant's testimony has not been effectively impeached.

The Employer asserted that in all 1980 pay periods during which the Claimant worked except two, the Employer made deductions from the Claimant's pay for federal and state tax, Social Security and workers' compensation withholding. The Claimant asserts that the Employer did not deduct for such purposes, but paid him an a gross basis, as an independent contractor, throughout his 1980 employment.

The Employer is legally responsible for maintaining, and therefore is e likely than the Claimant to have, records to verify her above assertion. If the Employer withheld amounts from the Claimant's pay for the above stated purposes, the Employer had to keep, submit to or receive from the Internal Service, the Oregon Department of Revenue, the Employers workers' compensation insurer or the federal Social Security Administration some documents in connection with such withholding. (For example, US Form W-4: "Employee's Withholding Allowance Certificate.") No such "external" corroborating records were offered into the record herein. The Employer, further, admits that he has never sent the Claimant a 1980 US Form W-2: "Wage and Tax Statement," which had to be sent, according to federal law, to any employee from whose wages the Employer made, or could have made, tax withholding deductions in 1980.



The Employer has provided only two exhibits to corroborate her assertions concerning the purposes of her deductions from the Claimant's pay. These exhibits are both the Employer's internal pay records. One exhibit is the Employer's reconstructed version of her Individual Earnings Record for the Claimant's 1980 work. The other exhibit details the Individual Earnings Records for all her employees during one 1980 pay period.

There are many gaps, inconsistencies and inaccuracies in the reconstructed version. The Employer has provided no canceled paycheck or time card concerning the Claimant's January 16 to 31, 1980, work, even though she admits he worked during this time and asserts that she paid him by check therefor. The Employer has provided no proof that she paid the Claimant the $332.50 in cash noted in the exhibit for the Claimant's April 1 to 15, 1980, work. The entry on that exhibit stating that the Employer paid the Claimant for his April 16 to 30, 1980, work is untrue. The entry stating that the Employer paid the Claimant $281.25 for his May 1 to 8, 1980, work is called into question by the impeachment of the Employer's assertion that the Claimant returned the payout receipt to the Employer when the Employer made that payment; the impeachment of Mr. deGroot, who offered the only "independent" evidence introduced to corroborate this payment; and the fact that the Employer's calculation of the alleged $281.25 payment deviated completely from the Employer's alleged past practices concerning withholding and draw deductions.

The pertinent part of the second exhibit is rendered suspicious by the fact that where all other entries on that exhibit are carbon originals, the entry concerning the Claimant is a pencil original. The Employer admits that the entry concerning the Claimant on that exhibit (which is introduced to corroborate the similar entry on the first exhibit) was added to the bottom of the second exhibit at a time after the rest of the document had been completed. This ad hoc entry plus the reconstructed nature of the first exhibit raises the possibility that the pertinent entries on both exhibits were fabricated. This possibility is strengthened by the fact that, in contradiction to her entries on the first exhibit, the Employer stated in her May 7, 1981, affidavit and her September 9, 1981, deposition concerning this matter that she paid the Claimant, in effect, as an independent contractor (i.e., making no employee withholding deductions). These statements pertained to the Claimant's 1980 employment. (*See* the Opinion below.)

For all the above reasons, and because the Agency has provided a possible alternative theory of the purpose of the deductions made from the Claimant's pay during 1980, this forum has found the testimony of the Claimant more believable than that of the Employer on this important point.

The Employer is discredited not only by the flaws in these exhibits, but also by:

a. the Employer's testimony that she returned repaid draw slips to the drawer when in fact she failed and even refused to do so.

b. the Employer's testimony in her affidavit that she did not pay the

Claimant his May 1 to 8, 1980, wages until approximately June 4, 1980, because she did not have his address, which she later admitted, in effect, was not true.

c. the Employer's testimony at hearing that she did not pay the Claimant his May 1 to 8, 1980, wages before June 4 or 5, 1980, because she disputed entries on his May 1 to 8 time card. This forum disbelieves that testimony because the Employer failed, upon direct questioning, to mention any dispute in either deposition or in her statements in her affidavit which concerned the identical point, and because the reasons the Employer gave for disputing the time cards are themselves inconsistent or inaccurate. (*See* the Opinion below.)

d. The Employer's demeanor at hearing, when her voice changed from her normal tone to a higher pitched, weak and fading tone which sounded insincere, uneasy and untruthful whenever the Employer answered questions directly concerning matters at issue herein.

Although the Employer attacked the accuracy and completeness of the Claimant's memory of minor, tangential, unclear or complex details concerning this matter, the Employer did not discredit the Claimant's memory as to the major and simple points herein at issue. In addition, the fact that the Claimant's current memory of his mental records herein relevant has dimmed since times material does not impeach the accuracy of those records when they were made.

For all of the above reasons, this forum has found the Claimant to be more credible than the Employer and has therefore believed the Claimant's testimony rather than the Employer's testimony where the differences between them could not be reconciled.

## ULTIMATE FINDINGS OF FACT

1) The Claimant worked for the Employer as quasi-manager of the Employer's restaurant from early January 1980 to May 8, 1980.

2) During this employment, the Claimant took at least $341.25 in authorized salary advances and received a $275.00 personal loan from the Employer. By making periodic payments on these debts in connection with his twice-monthly receipt of pay from the Employer, and waiving receipt of all pay due for his May 16 to 30, 1980, work, the Claimant repaid all salary advances he had taken from the Employer and the entire personal loan from the Employer.

3) When he terminated his work for the Employer, the Claimant had accrued $281.25 in gross unpaid and earned wages. In his letter of resignation, the Claimant directed the Employer to pay him those wages by sending $281.25 to the Claimant's address, which he specified in that letter.

4) The Employer willfully failed to pay the Claimant all or any part of the $281.25 in earned wages, and still owes the Claimant those wages.

5) This forum has found the Claimant to be more credible than the Employer and has therefore believed the Claimant's testimony (and the Agency's assertions) rather than the Employer's assertions, where the differences between them could not be reconciled.



6) If the Employer is liable for penalty wages, they total $1050.00, a sum computed by multiplying the Claimant's average daily wage at termination of $35.00 by 30 days, the maximum period during which penalty wages accrue.

## CONCLUSIONS OF LAW

1) At all times material, the Employer was an employer subject to the provisions of ORS 652.110 to 652.200 and ORS 652.310 to 652.405.

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

3) Once a wage claimant has proved that he or she performed work for which he or she was not properly compensated, the burden of proof shifts to the employer to produce accurate and complete evidence as to exact pay figures or work times.

4) The Employer's failure to pay the Claimant $281.25 in earned and unpaid wages forty-eight hours after the termination of the Claimant's employment constitutes a violation of ORS 652.140.

5) Because the Employer willfully failed to pay the Claimant $281.25 in earned and unpaid wages, the Claimant's wages continued from the due date thereof at the same rate for thirty days in accordance with the mandate of ORS 652.150.

6) The Commissioner of the Bureau of Labor and Industries has the authority to order the Employer to pay the Claimant $281.25 in earned and unpaid wages and $1050.00 in penalty wages, plus interest on both sums, under the facts and circumstances of this record.

7) Colleen Anthony and Godfather's Pizzeria, Inc., an Oregon corporation, are jointly and severally liable for the earned and unpaid wages, the penalty wages, and the interest thereon, which the Commissioner has below ordered them to pay.

## RULINGS

1) During the hearing, the Employer moved to dismiss this wage claim due to the loss of the documents discussed in Procedural Finding of Fact 9 above. The Employer claimed that she had been required to, and had, delivered these documents to the Agency and that they had disappeared while in the Agency's sole custody. The Employer asserted that her defense in this matter had been prejudiced by the loss.

This forum does not dispute that such documents could have impacted its assessment of the Employer's credibility. If they had appeared to be valid records corroborating the withholding deductions noted on another exhibit, they could have buttressed the Employer's contention that she paid the Claimant as an employee during most of his 1980 employment. If the missing documents were flawed, as was one exhibit, or if they did not show the withholding deductions shown on another, they would have impeached the latter exhibit and the Employer. This forum has no way of knowing whether the loss of these documents prejudices the case of the Employer or that of the Agency.

The Employer's motion to dismiss is denied for the following reasons:

a) If these documents were as crucial to her case as the Employer asserts, the Employer should have, reasonably, kept a copy of each of them or retrieved a set of the documents which it had loaned to another public agency.

b) The Employer was not ordered to produce those documents. The Employer agreed to do so. Counsel for the Employer spread the documents produced all over a table used by every person at the hearing. The documents were not handed to the Agency or retained by the Agency. When, later, the Agency began inspection of all the documents the Employer had offered, the subject documents were gone. The Agency, therefore, never took sole possession of the missing documents and, accordingly, was not responsible for those documents.

Because the Employer did not take reasonable steps to retain the information contained in the missing documents, because the Employer agreed to produce the documents for the Agency, and because the Agency was not responsible for the missing documents, the Employer cannot benefit from the absence of the information in those documents by obtaining a dismissal of this wage claim.

2) During the hearing, the Agency sought to limit the evidence offered by the Employer to that which pertained to the contents of the Employer's answer. The Agency asserted that the Employer's answer did not plead any set off against the wages which the Order of Determination cited as due to the Claimant. The Agency argued, further, that the Employer's answer pled no defense to the Employer's failure to pay the Claimant his final wages until at least June 4, 1980.

OAR 839-01-015(2) requires that an employer file a written answer to an Order of Determination which includes an admission or denial of each factual matter alleged and a statement of each affirmative defense the employer may claim. This rule further provides that "failure to raise a particular defense in the 'Answer' shall be deemed a waiver of such defense" and that "evidence shall not be taken at the contested case hearing on any factual or legal issue not raised in the . . . 'Answer'."

In paragraph II. of her answer, the Employer alleged that:

> "Employee was paid on or about 4 June 1980 by employer and employer is not liable for any wages still due and owing,
>
> "an affirmative defense."

The meaning of the language in the second clause of the above quoted sentence is not clear, but it could be construed to refer to the alleged offset, in the form of unpaid salary advances, against any wages due. For this reason, this forum allowed the Employer to introduce, and has considered, evidence concerning salary advances allegedly still due from the Claimant.

Although the Employer did not plead or later assert the affirmative defense to penalty wages which ORS 652.150 provides, the Employer did deny implicitly, in her general denial in paragraph III. of her answer, the Order of Determination's statement that the Employer willfully failed to pay the claimant's final wages and therefore is liable for penalty wages. For this reason, this forum allowed the Employer to introduce, and has considered, evidence concerning the Employer's reasons for not paying the Claimant his final wages.



## OPINION

### 1. DID THE EMPLOYER PAY THE CLAIMANT $281.25 ON OR ABOUT JUNE 4, 1980?

The main issue which had to be resolved in this matter was whether or not the Employer paid the Claimant the $281.25 which is the subject of this wage claim on or about June 4, 1980. The employer asserts that she did, and the Claimant asserts that she did not.

Under no circumstances could both of these assertions be accurate. Either the Employer or the Claimant must be mistaken or prevaricating. The only way to determine which assertion is correct is to assess the credibility of the Employer and the Claimant, by examining the likelihood of mistake, the internal consistency of the assertions of the Agency and those of the Employer, and the demeanor of the Claimant and the Employer at hearing. Having realized this, both parties have offered a great deal of evidence attacking the credibility of either the Employer or the Claimant. The almost total lack of structure in the Employer's business practices which are relevant herein, and the absence of contemporaneous records of those practices from the record herein, have made analysis of the evidence relating to credibility tortuously detailed and complex. Many apparent inconsistencies in both the Claimant's and the Employer's testimony are explained by the lack of consistency in the practices the testimony concerned rather than inaccuracy. The remainder of this section of the Opinion in this Order is a summary of the most fruitful inquiries into the credibility of the Claimant and the Employer.

#### A. Was either the Claimant or the Employer mistaken concerning the alleged $281.25 payment on or about June 4, 1980?

Much of the Employer 's evidence relating to the Claimant's credibility attacks the accuracy and completeness of the Claimant's memory, rather than his truthfulness. The Employer has established by such evidence that, at the times of hearing in September and October 1981, the Claimant's memory of the events herein material, all of which took place during the first six months of 1980, approximately 1 1/2 years before the hearing, was not necessarily accurate or complete. However, that evidence relates to details which are not central to the substantive issues herein and to details concerning which a clear answer was impossible, given the complexity or confusion of the circumstances involved. This evidence of the Claimant's inaccurate or incomplete memory concerning minor, tangential, unclear or complex details does not discredit the Claimant's memory as to major and simple matters. The question of whether the Claimant received the sum at issue herein on June 4 (or at any time after June 2), 1980, is a major and simple question. The Employer has not adduced evidence which leads this forum to conclude that the Claimant forgot or mistook the answer to this question.

The evidence in this matter has shown that the Claimant cannot now cite all the relevant salary and debt figures from his independent memory. It has also shown that the Claimant kept

all his salary and debt figures concerning his employment with the Employer in his head and not in writing. The Employer argues that the Claimant's lack of independent recall at this time of mental records of salary and debt figures the Claimant made about 1½ years ago impeaches the accuracy of the Claimant's mental records at the time they were made. This forum has found that the accuracy of the Claimant's current memory of those mental records is irrelevant to the accuracy of those records when they were made. For example, the fact that the Claimant cannot now cite exactly how much of the car loan he repaid does not impeach his testimony that his record of that figure was accurate when he made such repayment.

There has been no allegation that the Employer forgot or made a mistake as to whether she paid the Claimant the sum at issue. However, in explaining why her statements in her affidavit and deposition differed in several key respects from testimony she gave at the hearing, the Employer stated that at the times the affidavit and deposition were made, she had forgotten certain details about which she had subsequently refreshed her memory. Among those "details" were the very existence of the Claimant's letter of resignation and whether or not the Employer had treated the Claimant as independent contractor for pay purposes throughout his 1980 employment. Even if such a major lapse in the Employer's memory had occurred, it would not explain the assertion by the Employer, and one of her witnesses, that a major event did take place, if in fact it did not.

Given the fact that mistake cannot explain the opposite assertions of the Claimant and the Employer on the question of whether the Claimant has been paid his final wages, this forum must examine the possibility that either the Claimant or the Employer is not telling the truth. The following examination of the credibility of the Claimant and the Employer is made within that context.

**B. Examination of the consistency of the assertions by the Agency and the Employer concerning major points herein.**

1) Was the Claimant treated, for pay purposes, as an independent contractor or an employee during his 1980 employment by the Employer?

If, as the Employer asserts, the Claimant was treated as an employee for pay purposes during all but two of his 1980 pay periods in the Employer's employ, then the employer withheld, for payment to the proper authorities, money from the Claimant's gross pay for state and federal taxes, Social Security and workers' compensation. If, as the Agency asserts, the Claimant was treated as an independent contractor for pay purposes during all his 1980 pay periods in the Employer's employ, money was not withheld for those purposes.

One exhibit is a rendition of a document which, according to the Employer, is the Claimant's "Individual Earning Record" for his 1980 employment with the Employer. It was prepared by the Employer. This document purports to show, for each 1980 pay period during which the Claimant worked for the Employer, the hours



and number of days he worked, his rate of pay, the regular and gross pay he earned, any deductions made from the gross pay, the resultant net pay, and the number of the check, if any, by which the Claimant was paid. The exhibit reflects the Employer's assertion that, except for the pay periods between March 16, 1980, and April 15, 1980, she paid the Claimant as an employee. Is the exhibit accurate?

Other exhibits include most of the Claimant's time cards for his 1980 work for the Employer. Neither party has challenged the accuracy of the time cards concerning work pre-dating May 1, 1980. These exhibits corroborate all the "hours worked" entries on the questioned exhibit except for the entry concerning the January 16 to 31 pay period, for which there is no time card in evidence. The Employer, who had custody of these time cards until these proceedings, has offered no reason for the absence of this time card. The questioned exhibit represents that the Claimant did work for the Employer between January 16 to 31, 1980.

The Agency did not challenge the rates of pay shown on the exhibit for the February or March 1980 pay periods.

The Employer has produced checks from the Employer to the Claimant which clarify and corroborate that the Claimant was paid the figures shown in parentheses in the "Net Pay" column of the questioned exhibit for the January 16 through March 15, 1980, pay periods and was paid the one figure in that column for the March 16 to 31 pay period. All of these checks were endorsed by the Claimant, and the Agency has not disputed that the amounts of these checks were actually paid to the Claimant.

Beyond the above noted hours of work, rate of pay, and pay figures, the figures in the questioned exhibit are not corroborated by clear or independent evidence or the agreement of the Agency.

a) The Agency's interpretation of the deductions represented in the exhibit.

The exhibit shows figures labeled as employee withholding deductions for state, and federal taxes, Social Security and workers' compensation purposes and deductions for "draws." Given the accuracy of the hours of work, rate of pay, and amount of pay figures shown on the exhibit for the February and March 1980 pay periods, the deductions shown on the exhibit for these periods must have been made for some purpose. The Agency argues that these deductions were not employee withholding deductions, but instead were repayments of salary advances (draws) the Claimant had taken, and that the amounts noted in the "MISC." (Miscellaneous) column on the exhibit as "draw, . . ." deductions were instead most probably repayments on the $275.00 car loan that the Claimant had received from the Employer on January 19, 1980. This argument was not offered as an absolute assertion, but rather as a possible explanation for the deductions reflected on the exhibit.

The Claimant admits that he took $105.00 in draws on the wages for work he performed during the February and March 1980 pay periods, for which the figures on the exhibit concerning hours worked, rate of pay and

pay amounts are undisputed. The exhibit shows a $315.55 difference between the Claimant's earned ("REG") pay and his actual pay for these periods. (The regular rather than gross pay figure is examined in order to avoid confusion concerning meal figures which, according to the exhibit, were added to the Claimant's regular pay to yield his gross pay, and then deducted from the gross pay to yield net pay. The meal figures, therefore, can be ignored because they had no net relevant net arithmetic effect herein.) According to the agency's argument, $105.00 of that difference is for amounts deducted to repay the Claimant's draws and the rest, $210.00, must be what was deducted to repay the Claimant's car loan to the Employer. This all amounts to an assertion that, with the wages he earned for work performed in February and March 1980, the Claimant repaid the employer $315.00 of the $380.00 in total debt (both salary draws and the car loan) the Claimant owed the Employer as of those pay periods.

If the above assertion is accurate, the Claimant owed the Employer, at the time of his May 8, 1980, termination, no more than $65.00 for the car loan and a maximum of $156.25 for draws he took in April and May 1980, or a total of $221.25. The Claimant asserts that, in order to pay back this total debt to the Employer at the time he resigned, the Claimant did not ask for, or receive, pay for his April 16 to 30 work which was worth, according to the exhibit , $369.75 in regular pay. Asserting that he was able, with his mental records, to accurately assess the total debt he owed the Employer at the time of his resignation, and acknowledging that he lost money on the above-cited forfeiture, the Claimant explained that he was so angry and upset with the Employer at the time of his resignation, when he decided not to seek his April 16 to 30 pay, that he simply wanted to terminate all contact with her, even if it meant losing money. The additional possible explanation for the difference between the amount the Claimant forfeited and the amount he owed is based upon the Claimant's statement that the draw slips in record, which the Employer produced, may not show all the draws the Claimant took. If there were more draws, the Claimant had more total debt to the Employer, and the amount the Claimant lost by his forfeiture was, accordingly, less than indicated above.

Since the Claimant kept only mental records, he cannot be precise now about pay figures, especially those about which the Employer has submitted no records. However, federal law firmly places the burden of proof on employers, not wage claimants, to produce accurate and complete work time and pay figures, once the claimant has proved that he or she performed work for which he or she was not properly compensated. *Anderson v. Mt. Clemens Pottery Company;* 328 US 680 (1947). This forum adopts this policy. This forum will not penalize the Claimant for not keeping written payroll records which would allow him to have a current record of pertinent figures, and this forum has agreed with the Claimant's assertion that his mental records were accurate and complete when made, even if they are not now, absent proof to the contrary by the Employer.



Taking into consideration the Claimant's inability to offer specific independent figures concerning draw and loan repayments and the lack of standard practices in the Employer's business, this forum has concluded that the Agency's above theory of the purpose of the deductions shown on the exhibit is within the realm of possibility. The exhibit, therefore, does not discredit the Claimant because it does not disprove his assertion that he was paid as an independent contractor during all his 1980 employment with the Employer.

b) The Employer's interpretation of the deductions represented in the exhibit.

The Employer asserts that the deductions were in fact the amounts she withheld from the Claimant's pay for the purposes stated on the exhibit. The Employer submits, as documentary proof of this assertion, the exhibit, which is a reconstruction of her own internal payroll records.

If the Employer were in fact withholding amounts for tax, workers' compensation, and Social Security purposes, as she claims, she would have had to maintain, submit to or receive from the Internal Revenue Service, the Oregon Department of Revenue, her workers' compensation insurer, or the Social Security Administration some documents in connection with such withholdings. As an obvious example, in order to even know how to withhold for tax purposes, the Employer would have had to maintain a US Form W-4: "Employee's Withholding Allowance Certificate," completed and signed by the Claimant. In addition, she would have been required to send the Claimant a US Form W-2: "'Wage and Tax Statement" at the beginning of 1981 for his 1980 work for her. There is no Form W-4 in evidence, and the Employer has admitted that she never sent the Claimant a Form W-2.

The fact that no such "external" documentary proof of withholding is in evidence makes the exhibit the Employer's primary proof of employee withholding, and therefore this forum's focus in appraising the existence of such withholding.

The lack of such basic "external" documents, which the Employer should have generated, also discredits and renders suspect the Employer's assertions reflected on the exhibit that she made employee withholding deductions from the Claimant's 1980 pay.

In addition to not submitting "external" documentary proof of withholding, the Employer has not submitted certain basic "internal" business records to corroborate some of the figures on the exhibit.

1) The Employer has not produced check number 414 by which, according to the exhibit, she paid the Claimant for his January 16 to 31, 1980, work. The Employer has also failed to produce a time card for the Claimant's work during that period.

2) The Employer has produced no pay check, or other receipt, in the amount of the $332.50, which the exhibit asserts the Employer paid the Claimant for his April 1 to 15, 1980, work. Instead, for the April 1 to 15 period, the Employer has produced a "receipt" showing payment of $132.00 for the hours the Claimant worked

between April 9 to 15, 1980, and a slip evidencing $175.00 "paid out" to the Claimant from, presumably, the Employer's till on an unspecified date. The Employer alleges that the "paid-out" slip represents a $175.00 salary draw the Claimant took and that, therefore, the two exhibits evidence total payment to the Claimant, in effect, for his wages due for the April 1 to 15, 1980, work period. The Employer's allegation is flawed in that, even if the $175.00 were a draw, $175.00 plus $132.00 does not total $332.50, the amount the Employer paid the Claimant, according to the questioned exhibit. In addition, there is no entry of repayment of a $175.00 draw, while there are entries of all other draw repayments the Employer alleges were made. Finally, the language of the "paid-out" slip supports the possibility that it was a slip evidencing that the Claimant took $175.00 from the till to pay business expenses of the Employer, a common occurrence. In any case, the Employer has produced no record of paying the Claimant $332.50, and no credible record of paying him more than $132.00, for his April 1 to 15, 1980, work.

3) The Employer has produced a paycheck by which, she claims, she paid the Claimant the sum noted on the questioned exhibit for his work between April 16 to 30, 1980. There is no evidence that the Claimant negotiated, or could have negotiated, this check.

If the Claimant had negotiated this check through any entity but the Employer, the check ultimately would have been processed through a bank, and bank markings would appear on the check. In addition, standard commercial paper practice would have required that the signature of the payor (the Employer) appear on the check, and the endorsement of the payee (the Claimant) appear an the back of the check.

If the Claimant had negotiated this check through the Employer, he would have endorsed the back of the check. The Employer and the Claimant agreed, and the Claimant's other paychecks in evidence demonstrate, that an employee who cashed a paycheck through the Employer was required to endorse the back of the check, so that the check itself would function as the Employer's receipt, whether or not the Employer actually processed it through its bank.

The Employer has not signed the check. The Claimant has not endorsed the check. There are no bank markings on the check. The inevitable conclusion is that the check could never have been, and was not, negotiated. The Claimant asserts that he was never paid for his April 16 to 30, 1980, work (and that he forfeited such pay to repay the balance of his debts to the Employer). The Employer admits that she has no direct recollection of paying the Claimant for this work period, but bases the assertion that she did pay him for this period upon the existence of the check.

For all the above reasons, this forum concludes that the Employer did not pay the Claimant for the work he performed between April 16 to 30, 1980, by or through the check or at all. The entry on the questioned exhibit stating that the Claimant was paid $266.46 through that check is not true.



4) The Employer has produced a copy of a receipt signed by the Claimant and dated June 2, 1980, to corroborate the entry on the questioned exhibit stating that the Employer paid the Claimant $281.25 for his May 1 to 8, 1980, work. This is the very payment which is at issue in this matter.

The receipt is dated two or three days before, according to the Employer, the Employer paid the Claimant $281.25 in cash. The Claimant explains that he signed it on June 2, 1980, when he did, in fact, receive $281.25 from a waitress at the Pizzeria, who paid the Claimant from the Employer's till. However, the Claimant asserts, and the Employer agrees, that when, a few hours later, the Employer made a complaint to the police against the waitress and the waitress's arrest was imminent, the Claimant had a friend return the $281.25 to the Employer.

The Employer states that she did not retain the receipt after the $281.25 was returned. She assumes that the receipt was returned by the Claimant's friend to the Claimant because, according to the Employer, the Claimant resubmitted the receipt to her when she paid him on June 4 or 5, 1980.

The Claimant, on the other hand, claims that the receipt was never returned to him after the $281.25 was returned to the Employer an June 2, 1980. He claims that the Employer must have retained it because the Employer produced it for purposes of this proceeding.

The official report of William Bennington, the police officer who responded to the Employer's complaint against the waitress who paid the Claimant on June 2, 1980, states, in closing, that "Compl. (the Employer) is keeping all records as evidence."

The Employer argues that this report should not be admitted into evidence or given much weight because Officer Bennington was not called by the Agency to testify concerning his report. OAR 839-01-035 provides that evidence of type commonly relied upon by reasonably prudent persons in the conduct of their serious affairs is admissible. I have admitted this record because it attests, on its face, to being a contemporaneous and official recording of relevant events perceived by an officer of the Portland Bureau of Police in the course of his work, and is therefore admissible under the standard enunciated in OAR 839-01-035.

The only language in Officer Bennington's report to which I must consider attaching some weight is the above quoted statement. In deciding how much weight to give this statement, I must ascertain how certain I can be of its pertinent meaning, i.e. was the original of the receipt one of the "records" Officer Bennington was referred to in this statement. Given the fact that Officer Bennington did not testify as to the answer, I examine the language of the report itself. First, the only record which the report elsewhere cites is the original of the receipt. Second, the receipt, as a direct attestation to the very transaction which Officer Bennington was investigating, is certainly the most logical document to be described as (a) "records" and "evidence." Third, Officer Bennington's note states that "all" records were retained by the Employer. Since he was

aware of the existence of the receipt and since it is most logically described as a record, this forum can infer that the receipt was included in Officer Bennington's reference in his report to "all records." For this reason, this forum concludes that Officer Bennington meant by his above-cited note that the original of the receipt was kept by the Employer on June 2, 1980, and attaches sufficient weight to this note to consider the Employer's assertion to the contrary discredited.

The Employer produced a witness, Mr. deGroot, who testified that he was present at the Employer's alleged meeting with the Claimant on June 4 or 5, 1980, and that he saw the Employer and the Claimant exchange money and a slip of paper. Mr. deGroot further stated that the Claimant came to the Employer's office at the Pizzeria, threw a slip of paper on her desk, and said that he wanted his money. The Claimant flatly denies the occurrence of this meeting or exchange or ever having seen the witness before the hearing. This forum has given little weight to this witness because of his demeanor while testifying and his close relationship to the Employer.

Finally, the Employer has made no explanation to this forum of why, after (according to the questioned exhibit) she had made some deductions from the Claimant's paychecks for all but one work period during his 1980 employment, she made no deductions of any kind from his pay for May 1 to 8, 1980.

The impeachment of the Employer's assertion that the Claimant returned the receipt to her on June 4 or 5, 1980, so that it could function as a receipt for her alleged payment to him on that date, of $281.25; the little weight this forum gives to the only "independent" evidence introduced to corroborate that payment; and the Employer's failure to explain why the calculation of that alleged payment deviated drastically from her past practice call into question the accuracy of the entry on the questioned exhibit (and on another exhibit) that the Employer paid the Claimant $281.25 on June 4 or 5, 1980.

5) The questioned exhibit, along with the Claimant's paychecks, shows that the Employer deducted each alleged draw which the Claimant repaid from a paycheck before issuing that paycheck to the Claimant. The amount of the paycheck, therefore, equaled the Claimant's net pay minus the amount of the alleged draw repaid. This fact is inconsistent with the Employer's own testimony that she did not deduct from the Claimant's final pay the draws which she alleges the Claimant still owed her at the time because she knew that she could not lawfully do so. It does not make sense that if the Employer had repeatedly made such deductions before, she would not do this again when she had her final opportunity to do so. In addition, her statement of the law involved is inaccurate: an employer may deduct an advance of wages it has made to an employee when the employer pays the employee those wages.

The above inconsistency renders suspect the Employer's assertion that deductions in the questioned exhibit's "Miscellaneous" column were for repayments of draws or that the Employer paid the Claimant the sum of $281.25 for his May 1 to 15, 1984, work.



6) The Employer asserts in the questioned exhibit that she paid the Claimant as an independent contractor only for two 1980 pay periods: March 16 to 31 and April 1 to 15. The Claimant states that the Employer paid him on this basis throughout his 1980 employment.

On pages 12 and 13 of her September 9, 1981, deposition taken by Mr. Levy, the Employer, speaking within the general context of the Claimant's 1980 employment, stated that she paid the Claimant on a gross, contract labor basis. In her May 7, 1981, affidavit concerning this matter, the Employer stated that she hired the Claimant sometime around March of 1980 and, in effect, paid him as an independent contractor.

The Employer testified at hearing that she had thought at the time she made her affidavit that the Claimant had resigned his employment with her in March 1980, after a fight with a co-worker named Mike Varisco, and had been rehired a few days later. The Employer asserts that she was referring in her affidavit to this alleged March 1980 "rehiring" of the Claimant. Because the Claimant denies that he ever resigned or was rehired by the Employer in March 1980; because nothing on the record, including the Claimant's March 1980 time cards, indicates that the Claimant resigned or was rehired in March 1980; and because the Employer's testimony concerning the circumstances of the Claimant's alleged March 1980 resignation corresponds exactly with the circumstances of the Claimant's admitted resignation in September 1979, this forum has inferred that the Employer confused, in her affidavit, the Claimant's actual January 1980 hiring and perceived it to have occurred in March 1980 instead. Given this inference, the Employer meant, in her affidavit, that she hired the Claimant sometime around January of 1980 and, in effect, paid him as an independent contractor.

In her deposition and, by inference, in her affidavit for this proceeding, the Employer contradicted her assertion in the questioned exhibit and at hearing that she paid the Claimant as an employee during all his 1980 employment except for his March 16 to April 15 work. This contradiction impeaches both the exhibit and the Employer, as well as discrediting the Employer's substantive claim at hearing concerning the Claimant's pay status.

7) The Employer admits that the questioned exhibit is not the Claimant's (master or carbon) Individual Earnings Record. The Employer claims she had to reconstruct the document from her monthly payroll records because the original master document was stolen and its carbons unavailable. This reconstruction renders possible the Agency's assertion that the questioned exhibit is in fact a post hoc fabrication to support the Employer's position in this matter.

The Employer argues that it is unrealistic to think that she would have fabricated the exhibit just to avoid paying the Claimant $281.25. This forum agrees. This proceeding involves the Employer's exposure to substantially more liability than $281.25, given the plea for penalty wages and interest. In addition, counsel for both parties, and

the Employer herself, alluded at and in deposition to the fact that several other public agencies have been examining the Employer's pay records for times herein material, such as the questioned exhibit. Fabrication could have also served purposes relating to such examinations.

Finally, the Employer admits that she added the entry concerning the Claimant on the Earnings Records, which is meant to corroborate part of the questioned exhibit after the Earnings Records had been completed. This raises the possibility that the entry concerning the Claimant on the all Earnings Records was also a post hoc fabrication.

Fabrication of the questioned exhibit and the pertinent entry on the Earnings Records could have coincided with the alleged "reconstruction" of the questioned exhibit, and could have been undertaken to serve the Employer's purposes concerning and beyond this proceeding.

The above-described gaps, inconsistencies, and inaccuracies in the questioned exhibit; the suspicious nature of the pertinent entry on the Earnings Records, the only payroll record of the Employer introduced to corroborate the pay figures reflected in the questioned exhibit; the absence of corroborating "external" records; plus the conflicting statements made by the Employer in her affidavit, deposition, and testimony at hearing concerning the Claimant's 1980 pay status, impeach the questioned exhibit and the Employer's assertion that the deductions made from the Claimant's 1980 pay were for the purposes noted on the exhibit. The Agency's assertion that the deductions made from the Claimant's 1980 pay were not for employee withholding but for debt repayments is at least possible. For these reasons, this forum has found the testimony of the Claimant more credible than that of the Employer on this important question.

2. Who kept the Claimant's draw slips once he had repaid the draws they evidenced?

The Employer had custody of the Claimant's draw slips for draws which had not been repaid. The Claimant and another former employee of the Employer allege that the Employer never returned to them, even upon specific request, draw slips for draws which they had repaid. The Employer, on the other hand, states that she returned draw slips for repaid draws. She introduced a draw slip and an itemization of payroll deductions showing that the draw had been repaid by deduction, in order to illustrate her latter statement. The Employer also introduced a document which she says was a draw slip for a draw repaid by the Claimant when he was paid for his April 1 to 15, 1980, work. However, the Employer's very presentation of these alleged draw slips negates her statement: the Employer did not explain how she happened to have the slips in her possession if she returned every draw slip to the drawer when the draw was repaid.

Mike Medici, witness for the Agency, stated that not only had the Employer not returned draw slips to him when he repaid them, but that, after he requested that the Employer return the slips, the Employer had refused to do so. Mr. Medici also



testified that the Employer made deductions from his final paycheck for draws which the Employer alleged Mr. Medici had taken and for which the Employer claimed she had just found draw slips. The Employer also refused to produce these draw slips.

The Employer's failure and even refusal to return repaid draw slips contradicts her own statements that she returned these slips. This further discredits the Employer. In addition, the Employer's above-cited actions concerning Mr. Midici, which the Employer has not denied, evidence her inaccurate record-keeping for pay purposes and raise the possibility that the Employer has manipulated the draw "system" to fabricate draw debts.

3. Why did the Employer fail to pay the Claimant for his May 1 to 8, 1980, work until at least June 4, 1981?

The Employer's version of the events which led the Claimant to seek payment from her on June 2, 1980, cast more doubt upon the Employer's veracity. The Claimant, in his May 8, 1980, resignation letter, asked to be paid $281.25 by no later than May 20, 1980. ORS 652.140 requires that the Employer pay him within forty-eight hours of his May 8, 1980, resignation. The Employer failed to comply with either the Claimant's request or the law's requirement.

The Employer stated repeatedly during the second day of hearing that one of the reasons she failed to pay the Claimant his May 1 to 8, 1980, wages until June 4 or 5, 1980, was that she disputed the accuracy of some of the work hours the Claimant had noted on his time card for the work period. Her alleged dispute was based upon the Claimant's having written, rather than used the Employer's time clock to imprint, several entries; his having noted working hours on the time card which the Employer found odd; and his having noted on the time card time at the Employer's tavern which she felt was excessive, in light of his limited duties there. However, there is no evidence that the Employer had questioned the hours which the Claimant had previously written rather than imprinted on his time cards; the Employer admitted that, as quasi-manager or manager in training, the Claimant was an the Pizzeria's premises and working at many different times of day, and he had no set work schedule; and the Employer admitted that the Claimant cleaned the tavern on several occasions, a task which could have taken more time than the Claimant's usual delivery duties at the tavern.

Moreover, in testifying on exactly the same topic, i.e., why she did not pay the Claimant his May 1 to 8, 1980, wages until June 4 or 5, 1980 (if at all), in her May 7, 1981, affidavit and her September 9, 1981, deposition, the Employer failed to even mention that she disputed the work hours the Claimant claimed on his time card. This forum disbelieves the Employer's explanation that she forgot about her dispute until the time of hearing.

In her affidavit, the Employer stated only that she did not pay the Claimant before June 4 or 5 because she did not have a good address for him. The Employer admitted at hearing that this was not at all a reason for her failure to pay the Claimant. She attempted to explain the inaccuracy of her prior

statement by asserting that at the time of the affidavit, she had forgotten about the Claimant's resignation letter, which states clearly the address to which the Claimant directed that his payment be sent. The Employer did not explain the fact that, in her affidavit, she had not mentioned the other reasons she cited at hearing for failing to pay the Claimant.

For the above reasons, this forum finds that the Employer deliberately prevaricated on her affidavit and disbelieves her assertion that she had, or believed she had, valid reasons for disputing the Claimant's May 1 to 8, 1980, work records.

**C. Demeanor at Hearing**

Finally, this forum considers the Presiding Officer's appraisal of the credibility of the Employer and the Claimant as reflected in their demeanor at hearing. The Claimant impressed the Presiding Officer as articulate, precise, respectful, and responsive. His tone of voice, the rhythm of his answers, and his gaze were steady. His demeanor, in sum, was most credible. The Employer impressed the Presiding Officer during parts of the hearing as relaxed and forthright. However, the Presiding Officer also noted, repeatedly, that each time the Employer answered a question which focused upon the issues in controversy herein wherein her position differs diametrically from the Claimant's, her voice changed from her normal tone to a higher pitched, fading tone which did not sound sincere. The tone, to which the Presiding Officer listened carefully the many occasions she heard it, sounded weak and uneasy, as if the Employer were not being entirely truthful and were attempting to sound truthful. The Presiding Officer especially noted this tone when the Employer was answering questions concerning her alleged payment to the Claimant of $281.25 on or about June 5, 1980. For this reason, the Employer impressed the Presiding officer as less credible than the Claimant. The subjective impression of the Presiding Officer, while not determinative of the credibility issue herein, certainly must be taken into account in reaching a conclusion as to whether the Claimant or the Employer is to be believed herein.

Based upon all the conclusions noted above in Section 1 of this Opinion, this forum has found the Claimant to be more credible than the Employer and has therefore believed his testimony that the Employer never paid him for his May 1 to 8, 1980, work.

**2. SETOFFS AGAINST THE WAGES DUE**

The Employer has asserted that the Claimant owes it $275.00 for the car loan the Claimant took on January 19, 1980, and $341.25 in unpaid salary advances the Claimant took (evidenced by the draw slips). The Agency has asserted that the Claimant repaid the Employer part of the $275.00 loan during his employment and the rest of that loan, plus all outstanding salary advances, by waiving receipt of his wages for May 16 to 31, 1980.

Because this forum has found the Claimant to be more credible than the Employer, and because the Employer's allegation that she paid the Claimant his May 16 to 31, 1980, wages has been shown to be untrue, this forum believes the Claimant's assertion that he has repaid the Employer for all salary advances the Claimant took and for all of his personal loan. (Whether or not the Claimant owed the Employer any part of the personal loan is actually irrelevant to this setoff question, as ORS 652.610(3) prohibits deducting, or setting off, a balance due on a personal loan from (against) wages due.)

**3. PENALTY WAGES**

ORS 652.140(2) provides that when an employee terminates his employment with less than forty-eight hours' notice, all his earned and unpaid wages must be paid forty-eight hours after the termination. ORS 652.150 provides that if the employer willfully does not pay the final wages, as mandated in ORS 652.140, the employer must, as a penalty, continue to pay the wages of the employee from the due date thereof until the wages are paid or action therefor is commenced, but in no case for more than thirty days. ORS 652.140 provides only one defense to non-payment of final wages: the employer's financial inability to pay the wages at the time they accrued. Finally, ORS 652.160 provides that if the employer disputes the final wages due, the employer must pay, without condition and within the timelines of ORS 652.140, all wages which the employer concedes are due to the claimant.

This forum has found that the Employer has failed to pay the Claimant $281.25 in final wages due him after his resignation. The Employer has not alleged any financial inability to pay those wages. However, during the second day of hearing, the Employer alleged that she disputed some of the work hours noted on the Claimant's pertinent time card and therefore did not know how much to pay the Claimant. The Employer further alleged that she was unable to reach the Claimant to discuss this dispute.

If such a dispute did exist, ORS 652.160 required that the Employer still pay the Claimant the wages earned during the work hours which the Employer did not dispute. Although it was clear from the Employer's testimony at hearing that she did not allege that she disputed all the hours noted on the time card, the Employer introduced no evidence as to how many of those hours she believed the Claimant had actually worked and therefore what amount of wages she conceded to be due. In any case, the Employer paid the Claimant no final wages at all.

Because the reasons the Employer gave at hearing for disputing the Claimant's final pay amount were not valid, and because the Employer did not even mention any such dispute in pertinent statements in her affidavit or deposition, in her pleadings herein, or at any time before the second day of hearing, this forum disbelieves the Employer's assertion that such a dispute actually existed at times material. Even if this forum believed the Employer's assertion that she disputed some of the final wages the Claimant said were due, this forum would have to award penalty wages, since the Employer paid no final wages for the hours she did not dispute.

Accordingly, the Employer must pay to the Claimant, in addition to the wages due, penalty wages in the amount of the Claimant's average daily

wage at the time of his termination (computed from his wages for May 1980, the last month of his employment) multiplied by thirty days.

**ORDER**

NOW, THEREFORE, as authorized by ORS 652.332, the Commissioner of the Bureau of Labor and Industries hereby orders Colleen Anthony and Godfather's Pizzeria, Inc., an Oregon corporation, to pay to the Bureau of Labor and Industries, in trust for Mark Brittell, the amount of ONE THOUSAND THREE HUNDRED THIRTY-ONE DOLLARS AND TWENTY FIVE CENTS, ($1331.25), representing $281.25 in unpaid and earned wages and $1050.00 in penalty wages; plus interest thereon at nine per cent per annum, for the period of June 1, 1980, until paid on $281.25, and for the period of July 1, 1980, until paid on 1050.00. This payment must be delivered to the Hearings Unit of the Bureau of Labor and Industries, Room 309, 1400 S.W. Fifth Ave., Portland, 97201.