

**In the Matter of  
NORTHWESTERN TITLE  
LOANS LLC, dba Northwest  
Title Loans,**

**Case No. 84-05**

**Final Order of Commissioner  
Dan Gardner**

**Issued March 28, 2008**

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**SYNOPSIS**

The Agency alleged that Respondent discharged Complainant because she reported activity or activities by Respondent that she reasonably believed to be criminal and because she initiated a civil proceeding against Respondent by filing a complaint with the Department of Consumer and Business Affairs ("DCBS"). The forum dismissed the charges based on findings that Respondent's behavior was not criminal and Complainant did not believe Respondent's activity was criminal and because Respondent did not know or believe that Complainant had contacted DCBS at the time Respondent discharged Complainant. ORS 659A.230, OAR 839-010-0110(2), OAR 839-010-0140(1)(b).

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The above-entitled case came on regularly for hearing before Alan McCullough, designated as Administrative Law Judge ("ALJ") by Dan Gardner, Commissioner of the Bureau of Labor and Indus-

tries for the State of Oregon. The hearing was held on December 11-13, 2007, at the Medford office of the Oregon Employment Department, located at 119 N. Oakdale Ave., Medford, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by Chet Nakada, case presenter, an employee of the Agency. Complainant Deborah McClure ("Complainant") was present throughout the hearing and was not represented by counsel. Northwestern Title Loans LLC, dba Northwest Title Loans ("Respondent") was represented by William E. Gaar, attorney at law. Steve Miller, Respondent's vice president of operations, was present throughout the hearing as the natural person designated by Respondent to assist in the presentation of its case pursuant to OAR 839-050-0150(3)(b).

The Agency called the following witnesses: Complainant; Steven Lamb, Complainant's domestic companion; Leslie Laing, Civil Rights Division senior investigator; Michael McCord, former field examiner for the Oregon Department of Consumer and Business Services ("DCBS") (telephonic); and Kristine Mastoris, Respondent's former employee (telephonic).

Respondent called as witnesses: Steve Miller; Michael Reed, Respondent's general counsel; Kari Callaway, Respondent's Oregon area manager (telephonic); and Sarah Hooper (formerly Sarah Yanez), former

Oregon area manager for Respondent (telephonic).

The forum received into evidence:

a) Administrative exhibits X-1 through X-33 (submitted or generated prior to and after the hearing).

b) Agency exhibits A-1 through A-32 (submitted prior to hearing); and A-34 (submitted after hearing at the ALJ's request). A-33 was offered, but not received.

c) Respondent exhibits R-1 through R-30 (submitted prior to hearing). R-31 was offered but not received.

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

**FINDINGS OF FACT – PROCEDURAL**

1) On March 8, 2004, Complainant filed a verified complaint with the Agency's Civil Rights Division alleging that Respondent discharged her "for invoking the workers' compensation system and for reporting criminal activity to the State Auditors office (whistleblowing)."

2) After investigation, the Agency issued a Notice of Substantial Evidence Determination on March 8, 2005, finding sub-

stantial evidence of an unlawful employment practice "on the basis that Complainant [was terminated because she] invoked the Workers' Compensation system and blew the whistle on activity that she believed to be criminal in nature."

3) On August 1, 2007, the Agency issued Formal Charges alleging that Respondent discriminated against Complainant in that:

a) "Respondent terminated Complainant because Complainant reported criminal activities or activities she reasonably believed to be criminal at her place of employment, \* \* \* constitut[ing] an unlawful employment practice in violation of ORS 659A.230 and OAR 839-01-0110(2)"; and

b) "In addition to or in the alternative to the [above-cited] violation \* \* \*, Respondent terminated Complainant because Complainant reported Respondent's business practices to an administrative agency, DCBS. Respondent's termination of employment in retaliation for initiating, in good faith, a civil proceeding, constitutes an unlawful employment practice in violation of ORS 659A.230 and OAR 839-01-0140(1)(b)."

The Agency alleged that Respondent's violations of the versions of ORS 725.618<sup>1</sup> and OAR 441-730-

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<sup>1</sup> The forum has been unable to find any statute numbered ORS 725.618 in Oregon Revised Statutes, but in-

0275(18) and (19) in effect as of July 1, 2001, constituted the criminal activities and business practices that Complainant reported. The Agency sought damages of “[l]ost wages, including but not limited to, lost benefits and out-of-pocket expenses, in an amount to be proven at hearing and estimated to be \$8,000” and \$30,000 for damages for “mental, emotional, and physical suffering.”

4) On August 2, 2007, the forum served the Formal Charges on Respondent, accompanied by the following: a) a Notice of Hearing setting forth October 17, 2007, in Medford, Oregon, as the time and place of the hearing in this matter; b) a Summary of Contested Case Rights and Procedures containing the information required by ORS 183.413; c) a complete copy of the Agency’s administrative rules regarding the contested case process; and d) a separate copy of the specific administrative rule regarding responsive pleadings.

5) On August 14, 2007, Respondent served interrogatories and a subpoena duces tecum and for deposition on Complainant.

6) On August 20, 2007, Respondent filed an answer and request for hearing through counsel William Gaar. Respondent also filed a motion to postpone the hearing based on the unavailability of a key witness on the date set

for hearing. The Agency did not object to Respondent’s motion and, on May 18, 2007, the ALJ granted Respondent’s motion for postponement.

7) On August 20, 2007, the Agency moved to quash Respondent’s subpoena to depose Complainant.

8) On August 21, 2007, the ALJ issued an interim order noting there was a jurisdictional issue in the case, in that the Agency’s Formal Charges alleged that the Agency issued a Substantial Evidence Determination setting forth its findings more than one year after Complainant filed her verified complaint, whereas ORS 659A.830(3) provides:

“Except as provided in subsection (4) of this section, all authority of the commissioner to conduct investigations or other proceedings to resolve a complaint filed under ORS 659A.820 ceases one year after the complaint is filed unless the commissioner has issued a finding of substantial evidence under ORS 659A.835 during the one-year period.”

To resolve this issue, the ALJ ordered the Agency to provide a copy of complainant’s verified complaint with a legible date stamp showing the date of filing and a copy of the Agency’s Substantial Evidence Determination and any other documentation that was issued showing the date the Agency issued it. The Agency subsequently provided documents showing that the complaint was

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fers, from the record as a whole, that the Agency intended to refer to ORS 725.615.

filed on March 8, 2004, and the Substantial Evidence Determination issued on March 8, 2005. On September 12, 2007, the ALJ issued an interim order concluding that the forum had jurisdiction to hear the case.

9) On August 27, 2007, the ALJ granted the Agency's motion to quash Respondent's subpoena to depose Complainant on the grounds that Respondent had not filed a motion to take Complainant's deposition nor demonstrated that other methods of discovery were so inadequate that Respondent would be substantially prejudiced by the denial of a motion to depose Complainant.

10) On August 28, 2007, the ALJ issued an interim order retracting his August 27 interim order quashing Respondent's subpoena to depose Complainant and gave Respondent until August 31, 2007, to respond to the Agency's motion. The interim order was based on the ALJ's recognition that the August 27 interim order was issued before Respondent had an opportunity to respond.

11) On September 13, 2007, Respondent filed a motion for a discovery order to depose Complainant, arguing that the Agency's "obfuscatory" responses to Respondent's interrogatories demonstrated the need for a deposition and further asserting that denial of Respondent's motion constituted reversible error based on *Bernard v. Board of Dental Examiners*, 2 Or App 22 (1970).

12) On September 18, 2007, the ALJ issued an amended ruling on the Agency's motion to quash Respondent's subpoena to depose Complainant. The ruling is reprinted below in its entirety.

"On August 20, 2007, the Agency moved to quash Respondent's subpoena to depose Complainant Deborah McClure. The Agency attached to its motion a copy of a '*Subpoena Duces Tecum and For Deposition to Complainant Deborah McClure*' commanding the appearance of Complainant McClure for a deposition on October 22, 2007, along with the production of nine categories of documents at the time of the deposition. The Agency's motion was based on OAR 839-050-0200(3), which states:

'Depositions are strongly disfavored and will be allowed only when the requesting participant demonstrates that other methods of discovery are so inadequate that the participant will be substantially prejudiced by the denial of a motion to depose a particular witness.'

"On August 27, 2007, I issued an Interim Order quashing the subpoena to depose Complainant. After an August 28, 2007, prehearing conference, I issued a ruling allowing Respondent to file a response to the Agency's motion. On August 31, 2007, Respondent filed a response to

the Agency's motion, together with a motion for a discovery order to depose Complainant McClure. On September 17, 2007, I conducted a prehearing conference with Mr. Nakada, the Agency case presenter assigned to this case and Ms. Lentzner, Respondent's counsel, to discuss this matter. This ruling considers the Agency's motion, Respondent's response, and Respondent's motion for a discovery order to depose Complainant.

"Respondent contends that it is entitled to depose Complainant as a matter of law, citing OAR 839-050-0200(9), ORCP 55(A), ORS 183.440(1), and *Bernard v. Board of Dental Examiners*, 2 Or App 22 (1970) in support of its argument. Respondent also contends that it will be substantially prejudiced if not allowed to depose Complainant based on the Agency's 'obfuscatory responses' to interrogatories.

"OAR 839-050-0200(9) provides:

'Unless limited by the administrative law judge, the participants may issue subpoenas in support of discovery. Counsel representing a party may issue subpoenas in the same manner as subpoenas are issued in civil actions, as set forth in the Oregon Rules of Civil Procedure. The administrative law judge may issue subpoenas

in support of discovery for any party not represented by counsel. The Bureau of Labor and Industries may apply to the circuit court to compel obedience to a subpoena.'

"ORCP 55(A) allows for subpoenas to be issued against:

'a person and may require the attendance of such person at a particular time and place to testify as a witness on behalf of a particular party therein mentioned or may require such person to produce books, papers, documents, or tangible things and permit inspection thereof at a particular time and place.'

"ORS 183.440(1) provides that '[a] party entitled to have witnesses on behalf of the party may have subpoenas issued by an attorney of record of the party, subscribed by the signature of the attorney.'

"Respondent argues that because its attorney has the authority to issue subpoenas for the purpose of discovery, and depositions are a form of discovery, then Respondent has the unconditional right, under BOLI's own hearing rules, to issue a subpoena to depose Complainant and to depose Complainant. The forum disagrees with Respondent's analysis.

"Under OAR 839-050-0200(9), counsel may issue a

subpoena in support of discovery. However, OAR 839-050-0200(3) creates an exception for depositions, providing that depositions will be allowed **only** when the requesting participant 'demonstrates that other methods of discovery are so inadequate that the participant will be substantially prejudiced by the denial of a motion to depose a particular witness.' This rule requires a party seeking a deposition to file a motion for a discovery order to depose a particular witness and to establish that substantial prejudice will occur if the deposition is not allowed.

"Respondent has met the first requirement by filing a motion for a discovery order to depose the Complainant. However, Respondent has not met the second requirement. Respondent seeks to depose Complainant 'to determine what her testimony will be at hearing.' Through interrogatories and a request for documents, Respondent has sought information and documents from the Agency. However, the record at this point shows that only two interrogatories have been propounded to Complainant, both related exclusively to her claim for damages. Complainant's responses are not part of Respondent's motion for a discovery order or otherwise in the record, so the forum has no way of evaluating the adequacy of her responses to those interrogatories.

"As a means of discovery, Respondent may prefer conducting a deposition to writing and serving interrogatories on the Agency and Complainant. However, OAR 839-050-0200(2)(a) specifically provides for interrogatories as a means of discovery, and the forum does not presume that a deposition is the only adequate means of determining what the Complainant's testimony will be at hearing. Respondent has not yet demonstrated that interrogatories to Complainant are such an inadequate means of determining what Complainant's testimony will be at hearing that Respondent will be substantially prejudiced by its inability to depose Complainant.

"Respondent cites *Bernard* for the proposition that 'a Hearings Officer's failure to allow the complaining witness to be deposed is reversible error.' However, *Bernard* can be distinguished from the present case. In *Bernard*, the Board of Dentistry sought to revoke a dentist's license to practice dentistry. At issue was the Board's refusal to allow the dentist's counsel to take the deposition of the Board's chief investigator who, under oath, had accused the dentist of fraud and misrepresentation. The court concluded that the dentist's counsel was entitled to take the deposition of the Board's chief investigator, but limited its holding in stating that:

'We hold only that the testimony of the complaining witness in a license revocation case is of such "general relevance" under ORS 183.440 as to entitle the accused to a subpoena thereunder.'

*Bernard* at 29. Because this is not a license revocation proceeding, the forum is not bound by the holding in *Bernard*.

"The forum **DENIES** Respondent's motion for a discovery order to take Complainant's deposition and **GRANTS** the Agency's motion to quash the subpoena issued by Respondent's counsel requiring Complainant to submit to a deposition.

"If Respondent decides to serve written interrogatories on Complainant and determines (1) that Complainant's responses are inadequate so that Respondent will be substantially prejudiced if not allowed to depose Complainant or (2) that Complainant is not responding in the timeline set out in OAR 839-050-0200(6), Respondent may renew its motion for a discovery order to depose Complainant.

"The Agency did not move to quash the portion of Respondent's subpoena requiring Complainant to appear and provide nine categories of documents and Complainant remains bound to present those documents as required

by subpoena. Should they choose to do so, Complainant and the Agency may provide the documents sought in the subpoena at any time previous to October 22, 2007, the date specified in the subpoena. If Complainant and the Agency choose this option, the documents should be sent directly to the office of Respondent's counsel."

**"IT IS SO ORDERED"**

13) On November 8, 2007, the Agency filed a letter stating that the parties had agreed in principal to settlement. On November 8, the Agency case presenter asked that the hearing be reset to give Respondent and the Agency an opportunity to finalize the settlement. Respondent did not object and the ALJ granted the motion, resetting the hearing to begin at 9:30 a.m. on December 11, 2007. On November 13, 2007, the ALJ issued an interim order confirming the postponement and new hearing date. In the same order, the ALJ ruled that persons served with subpoenas were ordered to honor that subpoena at the new hearing date and that it was the responsibility of Respondent and the Agency to send a copy of the ALJ's interim order containing this ruling to their respective witnesses.

14) The Agency and Respondent each submitted case summaries in the time ordered by the ALJ. Each also submitted supplemental case summaries. Respondent e-mailed its supplemental case summary to the

Agency on December 9, 2007, but the Agency did not receive it until Nakada arrived at the hearing.

15) At the outset of the hearing, Steve Miller and Michael Reed were both present. Respondent's counsel stated that they would both be witnesses and asked that they both be allowed to be present throughout the hearing. The ALJ ruled that either Miller or Reed could be present and the other would have to leave. Reed left the hearing room and thereafter was only present when he testified.

16) At hearing, the Agency moved to amend its Formal Charges to change the word "much" on page six, line two, to "must." Respondent did not object and the ALJ granted the motion.

17) At hearing, the Agency moved to amend its Formal Charges to allege that Complainant filed her complaint with the Civil Rights Division on March 8, 2004, instead of March 3, 2004. Respondent did not object and the ALJ granted the Agency's motion.

18) On December 19, 2007, the ALJ conducted a telephonic post-hearing conference with Gaar and Nakada regarding the submission of simultaneous post-hearing briefs. The ALJ ordered Respondent to submit a legal brief analyzing the application of the applicable law in this case to the facts and the Agency to submit a legal brief or, at the agency's option, a statement of agency policy analyzing the application of the applicable law in this case to the

facts. In addition, the ALJ ordered the Agency to submit copies of OAR 441-730-0275(18) and (19) that were in effect immediately prior to July 1, 2001, and any amendments to those rules in effect from July 1, 2001, until March 11, 2003. The Agency submitted the copies of OAR 441-730-0275(18) and (19) on December 27, 2007. The Agency and Respondent submitted post-hearing briefs on January 15, 2008.

19) On March 13, 2008, the ALJ issued a proposed order that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. The Agency filed exceptions on March 24, 2008. The Agency's exceptions are discussed at the end of the Opinion.

#### **FINDINGS OF FACT – THE MERITS**

##### **Oregon Statutes and Administrative Rules Governing Title Loans: 2001-2003**

1) At all times material, Oregon statutes regarding title loans were contained in ORS chapter 725. In ORS chapter 725, the Oregon legislature assigned regulatory authority over businesses making title loans to the Department of Consumer and Business Services ("DCBS"). In the 1999 edition of ORS, the chapter title of ORS chapter 725 was "Consumer Finance" and referred to title loans as "consumer" loans.

2) Effective March 22, 2001, the definition of "title loans" used by DCBS was contained in OAR

441-730-0010(17) and read as follows:

“(17) ‘Title loan’ means a loan primarily for personal, family or household purposes, other than a purchase money loan:

“(a) Made for a period of 60 days or less;

“(b) Secured by the title to a vehicle;

“(c) With a single payment payback;

“(d) Made by a person who is in the business of making Short-Term Personal Loans not including financial institutions or trust companies as defined in ORS 706.008; but,

“(e) Does not include a loan made for the purchase of a motor vehicle.”

In the same time period, OAR 441-730-0270 set out “Conditions Applicable to Short-Term Personal Loans,” which covered both title and payday loans. In pertinent part, those conditions were:

“(1) The following conditions apply to all Short-Term Personal Loan licensees

“\* \* \* \* \*

“(b) If a consumer can not pay off the loan on the due date, the lender may renew the loan no more than three times in compli-

ance with the provisions of subsection<sup>2</sup> of this section.

“\* \* \* \* \*

“(h) A Short-Term Personal Loan licensee may not make a loan to a consumer without forming a good faith belief that the consumer has the ability to repay the loan by considering factors including but not limited to: past experience with the borrower, the frequency with which the consumer routinely receives non-borrowed funds, the amount of those funds; and, the source of the funds that will be used to payback the loan if the consumer is not employed or receiving regular income. A licensee who meets the provision of section (2) of this rule will be deemed to be in compliance with this section.

“(i) A Short-Term Personal Loan licensee may not renew or extend a loan more than three times. If the consumer is unable to repay the loan after the third renewal or extension, the lender may not assess further charges, but may institute collection efforts to recover the balance of the loan.

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<sup>2</sup> The rule does not contain a cross reference after the word “subsection.”

Example

*A consumer borrows \$300 for two weeks on June 5 for a fee of \$45. The due date is June 19. On June 19, being unable to pay-off the loan, the consumer renews or extends the loan for another two weeks by paying the \$45 fee. The new due date is July 3. On July 3, the consumer is unable to pay-off the loan and renews or extends the loan a second time by paying another \$45. The new due date is July 17. On July 17 the consumer is unable to pay-off the loan and renews or extends the loan for a third time by paying another \$45 with a due date of July 31. On July 31 the consumer is unable to pay off the balance. The lender may not charge any additional interest fees or other charges, but may institute collection efforts.*

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“(k) If a Short-Term Loan licensee permits a borrower to renew or extend a loan after the due date, the extension or renewal shall be effective on the due date of the loan and no late charge shall be permitted.

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“(2) A licensee will be presumed to have complied with the provisions of subsection (h) of section 1 of this rule if the licensee:

“(a) Requires the consumer to produce the consumer’s current bank statement to evidence an active bank account and to enable the licensee to review the number of non-sufficient check charges and the dates of deposits;

“(b) Requires the consumer to produce the consumer’s most recent pay stub to evidence current employment, or requires the consumer to otherwise confirm the consumer’s source of funds for repayment of the loan;

“(c) Establishes the amount of salary or earnings and the date of the month on which compensation is paid or on which the consumer receives funds and solicits information on the number, amounts, and dates of maturity on outstanding loans;

“(d) Reviews a current driver’s license, utility bill or other evidence to confirm the address of the residence of the applicant; and,

“(e) Lends no more than 25% of the consumer’s monthly net income.

“(3) A licensee is not required to perform the due diligence in section (2) of this rule for every transaction, but may rely on prior experience, within 60 days, with repeat customers to take advantage of the presumption of

compliance and Subsection (h) of Section (1) of this rule.”

3) In 2001, the Oregon Legislature amended ORS chapter 725<sup>3</sup> by enacting SB 171, subsequently codified as ORS 725.600 through 725.625, that specifically regulated “title loans.” SB 171 became effective on July 1, 2001. The chapter title to ORS chapter 725 was also changed to “Consumer Finance; Title Loans” in the 2001 edition of Oregon Revised Statutes. In pertinent part, ORS 725.600 through 725.625 contained the following provisions:

“725.600 Definitions for ORS 725.600 to 725.625. As used in ORS 725.500 to 725.625:

“(3) ‘Title loan’ means a loan, other than a purchase money loan:

“(a)(A) Secured by the title to a motor vehicle, recreational vehicle, boat or mobile home;

(B)Made for a period of 60 days or less;

(C)With a single payment payback; and

(D)Made by a lender in the business of making title loans; or

“(b) That is secured, substantially equivalent to a title loan as defined in paragraph (a) of this subsection, and designated as a title loan by rule or order of the Director of the

Department of Consumer and Business Services.

**“725.605 good faith belief in consumer ability to repay.** A lender may not make a title loan to a consumer without forming a good faith belief that the consumer has the ability to repay the title loan. In forming a good faith belief, the lender shall consider factors adopted by the Director of the Department of Consumer and Business Services by rule. A lender that meets conditions adopted by the director by rule shall be deemed to be in compliance with this section.

“\* \* \* \* \*

**“725.615 Prohibited actions.** A lender in the business of making title loans may not:

“\* \* \* \* \*

“(6) Renew a loan that is secured by one title more than six times after the loan is first made[.]”

4) Effective December 26, 2001, DCBS adopted OAR 441-730-0275 and amended other Division 441 rules in response to the legislature’s enactment of ORS 725.600 through 725.625. In pertinent part, the amendments read as follows:

**“OAR 441-730-0010.** Definitions

“(16) “Title Loan means a loan as defined in §197(3) of Chapter 445, Oregon Laws 2001.

“\* \* \* \* \*

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<sup>3</sup> See Chapter 445, Oregon Laws 2001.

“(18) ‘A person is ‘in the business of making Short-Term personal loans’ that are Title Loans if the person meets the requirements of § 197(1) of Chapter 445, Oregon Laws 2001.

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“**OAR 441-730-0275.** Conditions Applicable to Short-Term Personal Loans that are Title Loans.

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“(18) In compliance with § 198 Chapter 445, Oregon Laws 2001, prior to making a loan, a Short-Term Personal Loan licensee making a Title Loan must form a good faith belief that the applicant has the ability to repay the Title Loan under consideration.

“(19) A Short-Term Personal Loan licensee making a Title Loan will be presumed to have complied with section 18 of this rule if the licensee:

“(a) Requires the applicant to evidence a source of funds to repay the loan such as pay stubs, bank statements or similar record or evidence of employment or income.

“(b) Establishes the amount of salary or earnings of the applicant and the date of the month on which compensation is received by the applicant or on which the applicant receives funds[.]

“(c) Solicits the applicant for information on the number, amounts and dates of maturity on outstanding loans on which the applicant is the a [sic] payor or guarantor.

“(d) Lends no more than 25% of the applicant’s monthly net income to an applicant that earns \$60,000 a year or less. This limitation does not apply to applicants with an income in excess of \$60,000 a year. If a loan is based upon anticipated receipt of funds from other sources, the licensee must so note in the file and may lend no more than 25% of the total anticipated funds received by the applicant during the loan period.

“(20) If the licensee has established a preexisting business relationship with the borrower in which the licensee has entered into a loan or loans within the previous 12 months that have been satisfactorily repaid in full, the licensee may rely on that preexisting relationship to form the good faith belief required under section (18) of this rule.”

In addition, OAR 441-730-0270 was amended so that its provisions only applied to “Payday Loans”<sup>4</sup> and no longer applied to “title loans.”

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<sup>4</sup> Effective December 6, 2001, DCBS defined “Payday loans” as “a loan of

5) At all times material, ORS 725.910 provided that DCBS could assess a civil penalty and revoke the license of any licensee who violated provisions of ORS chapter 725, but there was no provision in ORS chapter 725 stating that such violations were a felony or misdemeanor.

6) Violation of ORS 725.615 is not a crime.

7) At all times material, DCBS's definition of "renewal" was "granting a consumer the right to postpone repayment of a Short-Term Personal loan for a fee."<sup>5</sup>

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money to a borrower primarily for personal, family or household purposes:

"(a) Collateralized by a check(s) or bank draft(s) dated as of the date of the loan or later in the amount of the principal of the loan plus interest or deferral charges assessed by the lender;

"(b) With a single payment payback;

"(c) Made by a person who is in the business of making payday loans including making Short-Term Personal Loans which are collateralized by personal checks and made with the understanding that the lender will not process a check for an agreed to period of time, but not including financial institutions defined in ORS 706.008."

<sup>5</sup> The definition was contained in OAR 441-730-0010(13) prior to December 26, 2001, and in OAR 441-730-0010(12) after that date.

### **Complainant's Employment with Respondent and Her Termination**

8) At all times material, Respondent Northwestern Title Loans LLC was a domestic limited liability company doing business in Oregon under the assumed business name of Northwest Title Loans and employed one or more persons in the State of Oregon.

9) At all times material, Respondent was in the business of making 30-day title loans and operated about a dozen stores in Oregon. Steve Miller was in charge of Respondent's Oregon stores and employees throughout Complainant's employment. Miller has worked for Respondent since 1998 and was involved in Respondent's first store openings in Oregon.

10) Complainant was hired by Respondent on April 20, 2000, to work as assistant manager in Respondent's Medford store ("Medford") under the supervision of Chris Sears, Respondent's Medford manager. Throughout Complainant's employment with Respondent, only two persons were employed at the same time in Medford, a branch manager and assistant manager.

11) At all times material, Respondent's policy and procedure for evaluating loan applications was the following:

- i If a client brings in a pay stub, make a copy and put it in the file. Otherwise, don't ask for one.

- i See if the client has photo ID and that their vehicle title is free of all liens and encumbrances.
- i Inspect the client's vehicle, drive it forward and back to make sure it runs and that the transmission works, and evaluate the condition of the vehicle.
- i Ask the client if they are working, how much they earn, about their work history, and where they live and how long they've lived there.
- i Ask how much money the client wants to borrow.
- i Have the client fill out a loan application, which included a request for the client's income and payday.

Miller was trained in this procedure when Respondent hired him. Miller trained Sears, and Sears trained Complainant.

12) A major reason that Respondent did not require pay stubs is that a large number of its clients are independent contractors who do not have pay stubs.

13) Respondent's corporate policy has always been to have a good faith belief that consumers can repay loans. Respondent does not want to repossess cars, as they may lose money when they repossess cars.

14) In February 2001 Complainant was promoted to Medford store manager when Sears was

transferred to another store. Complainant worked in that position until she was fired.

15) In March 2001 Kari Callaway was hired as assistant manager in Medford and worked under Complainant's supervision until July 2001, when she was promoted to manager of Respondent's Springfield store.

16) At all times material herein, Michael Reed was Respondent's in-house corporate counsel. When SB 171 became law on July 1, 2001, Reed advised Respondent that there were two options – Respondent could either continue to use its existing procedures to evaluate a customer's loan application and form a good faith belief that customers could repay the loans or change its procedures to benefit from the presumption contained in the "safe harbor" provision of SB 171. Respondent elected to continue its existing procedures because Respondent believed the "safe harbor" provision was too limiting and "just basically forced customers to go down the road to our competitors."

17) On July 3, 2001, Miller distributed a memorandum addressed to "All Stores" on the subject of "Rule Changes as of 07/01/01." In pertinent part, it read:

"As of 07/02/01, no loan may be extended more than 6 times. All loans which currently exist as of that date may not be charged any more interest. Instead we will be

offering them the opportunity to pay their outstanding balance including any interest due up to 07/02/01 in three equal monthly installments. The computer will be reprogrammed to reflect these changes on Monday, but in the meanwhile credit memo off the interest that has accrued from 07/02/01 to the day they come in and then post their payment.

“On Monday, when a customer with over 6 flips pays, the computer will automatically freeze interest and give them an extension showing a payment equal to 1/3 of the total balance due in 30 days. With subsequent payments, if the customer pays the total payment due, they will be given an additional 30 days. If they do not pay their full payment, they will not be extended.”

18) On July 5, 2001, H. James Krueger, Program Manager of DCBS, Division of Finance and Corporate Securities, sent out a letter addressed to Oregon’s “Title Lenders.” In pertinent part, it stated:

“Re: New Title Loan Provisions

SB 171

“As you were previously notified SB 171 was passed by the Legislature and signed by the Governor. That bill amended Chapter 725 of the Oregon Revised Statutes and added provisions relating to Title Loans. Last week representatives of the Director met with

representatives of a licensee to clarify some issues that arose as a result of the new legislation. The purpose of this letter is to advise all Title Lenders of the direction we provided to the representatives of the licensee.

“At issue is what to be done if a consumer wants to renew a loan after July 1, 2001, that has already been renewed one or more times. If a consumer tries to renew a loan on or after July 1 and that loan has been renewed three times prior, the maximum of six renewals applies and the lender may only renew that loan three more times. If the loan had been renewed twice, the lender could permit 4 more renewals. If it had been renewed once, the lender could renew the loan five times. If the loan was due and had never before been renewed, the lender could renew the loan six times. Because the administrative rule limiting the loan renewals to three became effective on March 23, 2001, and assuming a 30-day loan maturity there should be no loans that had been renewed more than three times on or before July 1, 2001.

“A second issue which we discussed with the representatives of the licensee relates to the safe harbor provision of the rule which says a lender will be presumed to have made a determination that a loan could be paid back if the lender lends no more

than 25% of the income the consumer receives or expects to receive during the period of the loan. The period of the loan for title loans is 30 days. If lenders are relying on the safe harbor, they should not consider the possibility of the aggregate net income to be generated over 6 renewal periods when calculating the 25% net income amount. The whole intent of the rule and of the new legislation is to prevent consumers from getting caught in a cycle of debt that requires multiple renewals. Net monthly income should be the amount over a single loan repayment cycle without renewals.”

“contained<sup>6</sup> in the safe harbor provisions, there may well be other good grounds for making the determination of a consumer’s ability to repay a loan. Lenders should make a note of the grounds they use so that the examiner can see the thinking of the lender. If the lender has made a good faith effort to determine the ability of a consumer to repay a loan, they will be in compliance with the law.”

Reed was involved in the discussions with DCBS and Respondent received this letter.

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<sup>6</sup> The previous paragraph ends at the bottom of page one of Krueger’s letter and this paragraph begins in mid-sentence at the beginning of the second page of Krueger’s letter.

19) After July 1, 2001, Miller held meetings for Oregon’s store managers to discuss SB 171 and its requirements and implications. He repeatedly explained the “safe harbor” provision to Respondent’s Oregon employees, telling them that they didn’t have to follow that provision, that Respondent did not want them to follow it -- including the pay stub provision -- and that employees should continue to follow Respondent’s existing procedures.

20) On July 28, 2001, Complainant attended a manager’s meeting that was attended by all Oregon store managers or their assistants. At the meeting, Miller stated that Respondent’s computer was still having problems freezing interest after the maximum number of “flips”<sup>7</sup> and that managers should manually adjust the total if the computer did not freeze interest after six renewals by determining the interest charged after the sixth renewal and crediting it back. Miller also told managers that Respondent was continuing its existing policy of not asking for pay stubs and the managers did not have to have pay stubs in the customer’s files.

21) Complainant disagreed with Miller’s interpretation of the law and believed it was unlawful for Respondent not to require new customers to produce pay stubs. Accordingly, Complainant began requiring new customers to pro-

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<sup>7</sup> “Flips” was a word frequently used by the witnesses to mean a loan renewal.

duce pay stubs and stored them in the customer's file.

22) At all times material, ORS 725.312 required DCBS to conduct examinations of licensees "not more than 24 months apart" and gave DCBS the authority to conduct examinations "at other times as the director deems necessary." In 2001-02, DCBS regulated about 600 licensees. Rick Bihm and Mike McCord were DCBS's only field examiners. In practice, DCBS conducted examinations every 12-15 months, with examinations being more frequent if a licensee got a bad score.

23) When DCBS conducts field examinations, it issues a report that assigns a composite rating of "1" to "4" to the subject store. A "1" rating is "outstanding," with hardly anything wrong. A "2" is "satisfactory" – there may be some minor issues, but a customer usually not affected monetarily. "3" is a "fair" rating, and "4" is a "marginal" rating. Interest overcharges "take the score down drastically."

24) On October 18, 2001, Bihm conducted a routine examination of Respondent's Medford store. Bihm noted two problem areas in the examination -- original notes in two accounts had not been canceled and returned to borrowers, and refund checks had not been sent out timely to three borrowers -- and assigned a "2" rating.

25) On November 17, 2001, Complainant attended another store manager's meeting. At the

meeting, the subject again came up that Respondent's computer was not always freezing interest after six loan renewals. Steve Miller asked the managers to put the problems in writing and told them not to worry about DCBS exam scores.

26) Before and after SB 171 was passed, managers were always told at manager's meetings to not worry about DCBS exam scores so long as "the doors remained open."

27) At a subsequent manager's meeting, Miller told Respondent's Oregon store managers that he was going to hire an area manager and that anyone who was interested should let him know. Callaway was one of two managers who expressed interest. Complainant did not tell Miller that she was interested in the position. In January 2002, Callaway was promoted to the position of area manager, at which time she became Complainant's immediate supervisor. As area supervisor, Callaway visited the stores she supervised an average of once a month.

28) After Callaway became area manager, she heard that several store managers, including Complainant, were making negative comments about her. Callaway talked with Miller, then Complainant, about this issue and things improved.

29) When Callaway was promoted, Complainant and other store managers were disgruntled at Callaway's promotion. They

would occasionally call Hooper and complain. Complainant occasionally called Hooper instead of Callaway, bypassing the clear chain of command, and eventually Hooper told Complainant not to call her.

30) At all times material, Respondent was leasing computer software from a Florida company. At times, that company had difficulty modifying its software to comply with changes in the law affecting Respondent in the 22 different states in which Respondent conducted business. When SB 171 went into effect, the company had problems adapting Respondent's computer system to the six renewal limitation of SB 171. Because of this, the computer projected interest past the sixth renewal, even when no more interest was actually charged. As a result, Miller instructed Respondent's store managers to make manual corrections when necessary. After Callaway became area manager, she personally inspected and made manual corrections of store files. At some point after Complainant was discharged, Respondent acquired a new computer system and had no more problems with calculating interest correctly.

31) In February 2002, Complainant hired Kristine Mastoris as assistant manager. Mastoris worked in that position until Complainant's discharge, at which time Mastoris was promoted to branch manager.

32) On May 13, 2002, McCord conducted an examina-

tion of Respondent's Gresham office. On his findings, he noted that on one account "[a]lthough the computer is showing 0% interest on future payments from 5/3/01 forward, the receipt/ext agreement given to the borrower shows a continuation of interest. Please send a corrected receipt to the borrower (corrected during examination) and please advise how and when this will be corrected on future receipts." On the same account, the sixth renewal occurred on the 268<sup>th</sup> day after the original loan, yet McCord did not cite Respondent for charging interest that entire period of time.

33) From July to September 2002, Respondent held a contest among its northwest stores to see which stores could show the greatest increase in operating balance<sup>8</sup> and "lowest late %" of loans, offering a prize of leather office furniture to each winning store. On September 12, 2002, Respondent announced that Medford had won the prize for having the "lowest late %" of loans among its Northwest branches.

34) In September 2001, the Medford store operating balance was \$93,244.32. In July 2002, the Medford store operating balance was \$97,533.83. In September 2002, the Medford store operating balance was \$108,723.70.

35) In September 2002, Miller observed that Medford had

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<sup>8</sup> "Operating balance" is the amount of outstanding loans on a store's books at any given time.

not increased its volume proportionate to Respondent's other stores and was growing at a rate about 10% lower than other stores in Oregon. Since Medford's percentage of late payments was also lower than expected, he wondered if there was a correlation and instructed Callaway to conduct an internal audit of Medford and to observe Medford's customer procedure.

36) Callaway visited Medford, conducted an internal audit, and discovered that there were pay stubs in almost every client file. When Callaway told Miller this, Miller was displeased, as it violated Respondent's policy and Miller believed that requiring pay stubs was costing Respondent business, particularly with regard to self-employed persons who would not have a pay stub. Miller told Callaway to instruct Medford to stop requiring pay stubs, and Callaway told Complainant to stop requiring pay stubs.

37) After Callaway's audit of Medford, Miller became concerned that other stores might be requiring customers to produce pay stubs. Miller instructed Sarah Hooper, who had become promoted to area manager of Respondent's northern Oregon stores, to shop the stores that Callaway supervised, and Callaway to "shop" the stores Hooper supervised, to see if any other stores were requiring pay stubs as a condition of getting a loan. Callaway and Hooper did this, with Hooper "shopping" Medford. When she was "shopped," Com-

plainant told Hooper that income verification, like a pay stub, was required in order to get a loan. Complainant was the only person "shopped" who required a pay stub. Hooper reported Complainant's response to Callaway and Miller.

38) After the audit, Miller instructed Callaway to go to Medford and tell Complainant that Rod Aycox, Respondent's owner, had shopped her and was upset because Complainant had asked him to bring in a pay stub. Miller had instructed Callaway to tell Complainant that Aycox had shopped her because he thought it might make more of an impression. Callaway did this, and Complainant and Callaway talked about the law and Complainant and Mastoris's belief that they were required to have pay stubs in the file. Callaway told Complainant and Mastoris this was not corporate policy and that they were not to require prospective customers to bring in pay stubs. Callaway said it was Rod's company and they had to do what he said because it was his company. Callaway told Complainant that it was a violation of Respondent's policy to have pay stubs in a customer's file and to stop doing it.

39) Miller and Callaway did not consider discharging Complainant when she was "shopped" because "she was generally an excellent employee" and Miller's policy is to counsel employees before terminating them.

40) After Callaway's visit and counseling, Complainant and

Mastoris continued to ask customers for pay stubs, but no longer kept them in customer's files. At some point before Complainant was discharged, Callaway and Miller became aware of this continuing practice.

41) Complainant believed that Respondent was violating the law by not requiring pay stubs from customers and overcharging interest after six loan renewals. She did not believe that the violations were a crime, but did believe that they might cause trouble for Medford and cause her to lose her job. From her experience, Complainant knew that DCBS had regulatory authority over Respondent's business and had met Bihm during one of his prior exams at Medford. Based on these beliefs and knowledge, she telephoned DCBS in October 2002 and spoke with Dale Laswell, DCBS Program Manager at that time, about her concerns. Laswell told Complainant that Respondent had to have a pay stub in customer's files, that Respondent had to verify customers' income, whether through a pay stub or tax return or bank statement, that Respondent could not loan "more than 25%," and the interest was to freeze after the sixth payment. Laswell also told her that DCBS would audit Medford in the near future.

42) In October or November 2002, in the course of a five day, multi-store visit, Miller visited the Medford store. Complainant was off work that day, so Miller spoke with Mastoris, inspected loan files to see if copies of pay stubs were

still being put in files, and determined that pay stubs were no longer being put in files.

43) On December 3, 2002, Bihm visited Respondent's Medford office and conducted an examination. Complainant spoke with Bihm about her conversation with Laswell. Bihm asked if she would show him some accounts in which interest had not been frozen, and Complainant agreed to do this. As part of the exam, Bihm had Complainant fill out a questionnaire entitled "Payday Loan Questionnaire & Request Items." One of the questions asked "[m]aximum amount of loan in relation to (net or/gross) income." Complainant wrote in "Reasonable Amt," the answer Respondent's management had previously directed her to provide. Complainant showed him accounts in which interest had not been freezing and Bihm began his exam. Bihm asked Complainant and Mastoris questions during his exam and also called McCord and talked with McCord to see if they should examine another of Respondent's stores to see if there was a companywide problem. At the end of the exam, Bihm told Complainant it would be obvious to Respondent that Complainant had called DCBS, as he would not have known which accounts to audit if Complainant had not alerted him. Bihm also said he was giving Respondent a score of "4," and that he was taking the scoresheet with him to mail to Respondent after they had done another audit.

44) Bihm noted three problems areas in the examination. First, that Respondent had overcharged interest to 14 borrowers by not stopping interest after the "6<sup>th</sup> loan roll over." Second, that Respondent failed to obtain copies of two borrowers' employment pay stubs.<sup>9</sup> Third, that Respondent failed to honor a 30 days interest free offer made to a borrower.

45) In a page entitled "Examiner's Statistical Report," Bihm noted, among other things:

"Dale, this is the branch where the employee called to advise that the company is not getting checks stubs, exceeding the 25% rule, and exceeding the maximum 6 roll over rule. The manager offered many files where the interest should have been stopped, and all files were incorrect. Because they exceeded the maximum 6 roll over rule, I will rate this branch a 4 rating, just in case that we need to start building an example. The manager has brought these exceptions up to her District Manager, and was told just do what is expected, and they will deal with the

state. \* \* \* We need to make sure that all offices are corrected in Oregon. That means every account that is over 210 days old is review [sic] and refunded."

46) During Bihm's visit, Complainant followed company procedure by calling Callaway and telling her that Bihm was at the store, conducting an exam. Complainant told Callaway they were getting a low score, but that the results of the exam would be mailed to Complainant. Respondent's policy at the time was for store managers to notify their area manager that an exam had been conducted, and the area manager would then notify Miller. Callaway did not notify Miller.

47) Complainant did not tell anyone employed by Respondent, at any time during her employment, that she had made the report that initiated Bihm's December 3 examination.

48) Bihm's examination occurred at a time when Respondent would have expected an exam and Miller was not surprised to learn of the exam because he believed it was slightly overdue.

49) On December 24, 2002, Michael McCord, DCBS's other field examiner, conducted a "special" examination of Respondent's store located at 8128 SE Powell Blvd, Portland, Oregon. The purpose of McCord's examination was to see if the 210-day rollover problems Bihm found in the Medford exam were an isolated or statewide case. At that time,

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<sup>9</sup> Bihm's complete note read: "You failed to obtain a copy of the borrowers[] employment pay stub, which is required to form your good faith. Going forward, all borrowers must have a current pay stub in file. Once you have established a business relationship with the borrower, then you need to up date the pay stub every 12 months."

McCord was not aware that Complainant had contacted DCBS and asked them to audit her store. So far as McCord knew, the exam had nothing to do with Complainant, but was being conducted for the specific reason of determining whether consumers were being overcharged interest.

50) DCBS's most recent previous examinations of the Powell store had been conducted on April 30, 2001, and July 11, 2002. On April 30, 2001, Bihm conducted the examination and assigned a "1" rating, noting that the Powell store was not "complying with the safe harbor rule." On July 11, 2002, McCord conducted the examination and assigned a "2" rating, making no mention of the "safe harbor" provision in his examination report.

51) McCord wrote a report of his December 24, 2002, exam of the Powell store and assigned a "4" rating based on his finding that the branch had numerous accounts that "charged excessive finance charges." Specifically, the report noted:

"The maximum number of days allowed to collect interest would be 210. This represents the initial loan of 30 days plus a maximum of 6 renewals for 30 days each. Please refund the amounts shown as "interest variance" and reduce the interest rate to zero."

This was the same violation that Bihm had found in Respondent's Medford office.

52) In early March 2003, Complainant attempted to file a worker's compensation claim because of the carpal tunnel syndrome she was experiencing. Complainant asked Callaway for the name of Respondent's worker's compensation insurance carrier. During the conversation, Complainant told Callaway that Respondent was screwing its employees and cheating its customers.

53) Callaway contacted Miller after this conversation and told Miller what Complainant had said. Miller contacted Dan Gotch, his immediate supervisor, and discussed the situation. After talking with Gotch, Miller decided to discharge Complainant based on Complainant's statements to Callaway and Complainant's continuing violation of company policy.<sup>10</sup>

54) On March 11, 2003, Miller went to the Medford store

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<sup>10</sup> Miller's specific testimony was that this was the "last straw" for him, with Complainant "going behind my back, asking for the paychecks, going against company policy, then still asking for paychecks, even though they didn't put them in the file; it was just the last straw for me. She was negative about the company and I felt that anybody that thought we were cheating our customers, after we had counseled and counseled on all these changes that were going on and everything we were trying to do with DCBS and did it her way instead because she apparently knew more than we did, I just didn't want this employee any more."

for the express purpose of discharging Complainant. When Miller arrived, Complainant was at the store by herself. As soon as Mastoris arrived, Miller took Complainant aside and told her she wasn't happy with the company, that he wasn't happy with her, and that she was fired. Miller then asked Mastoris if she could run the store. Mastoris responded affirmatively, and Miller promoted her to manager "on the spot."

55) No one employed by Respondent had any knowledge that Complainant had called DCBS until Complainant's attorney mailed a letter on June 25, 2003, to Respondent's Human Resources Director stating:

"ORS 725.615(6) provides that a licensee may not renew a loan more than six times after the loan is first made. [Respondent's] computer did not freeze interest after six payments. Ms. McClure informed a State auditor of [Respondent's] noncompliance with the applicable law during a December 1, 2002 audit. Ms. McClure believes that her firing is in retaliation for blowing the whistle to the State auditor concerning [Respondent's] violation of the law."

56) At the time she was discharged, Complainant earned \$30,000 per year and Respondent paid 50 percent of her health insurance premium, which totaled \$1,285.96 per year.

57) Complainant liked her job and her discharge made her

very upset. Complainant had always worked and paid her own way, and it was the first time she had ever been fired. She suffered a loss of self esteem and feelings of shame when she was fired. She was "very, very down" for the first week after she was discharged. She had a hard time getting to sleep and began having nightmares that continued until January 2005, when she enrolled in a career college. At that time of hearing, Complainant and Lamb had lived together for 10 years, and they had a joint mortgage on the house they lived in and shared expenses. Complainant, who had been earning more than Lamb, was supported by Lamb, who only earned \$12 per hour, from the time of her discharge until June 2003. She felt humbled by having to be supported by Lamb. Complainant collected unemployment benefits from June 3, 2003, until February 2004, and searched for employment during that time. She attended a career college from January 2005 to September 2005, financing it with a student loan, and returned to the workforce in October 2005.

58) After her termination, Complainant did not look for work before April 24, 2003, when she underwent surgery on both hands for carpal tunnel syndrome. After her surgery, Complainant was unable to work until June 2003. After that, Complainant looked for work through classified ads but did not actually go out and look for work. She collected unemployment benefits from June 3, 2003, until February 2004. Her unem-

ployment benefits covered her house and COBRA payments.

59) In August 2003, Lamb's father, who had congenital heart disease and had been living in an assisted living facility, had a stroke and began deteriorating. At that time, he was also diagnosed with frontal lobe dementia. About the same time, Lamb's sister had surgery for colon cancer, then began chemotherapy. Between August 2003 and February 2004, when Lamb's father died, Complainant took care of Lamb's father. In February 2004, Lamb's sister was diagnosed with terminal cancer and chose to stay at home. From February 2004 until August 2004, when Lamb's sister entered a care facility, Complainant was the sister's primary caregiver. After Lamb's sister entered the care facility, Lamb received money from the sale of her trailer around September 2004. Lamb's sister died in October 2004. The time caring for Lamb's father and sister affected Complainant's ability to look for work.

60) Mastoris was fired three months after Complainant's discharge for not following company policy and for not projecting an image that was acceptable to Respondent.

61) From 2002 to April 2004, Respondent fired three employees besides Complainant and Mastoris – Laura Wilcox, Lynda Gugler, and Sue Ramsdell. Wilcox was fired for not following company policy and shirking work. Gugler and Ramsdell were fired for poor job performance.

#### CREDIBILITY FINDINGS

62) For the most part, Complainant testified in a candid manner, as exemplified by her admission that she did not believe that the loan policies that she complained about constituted a crime. She was not credible on two issues. First, she testified that she never talked or complained to Sara Hooper about Callaway's promotion, whereas Hooper credibly testified that Complainant did complain to her about Callaway's promotion. Second, she testified that she looked for work after June 3, 2003, but partially contradicted that testimony by acknowledging that she did not leave her house to look for work and that she was a primary caregiver for both Lamb's father and sister, then just the sister, from August 2003 until August 2004. The forum has credited Complainant's testimony except when it was contradicted by more credible testimony or her own testimony.

63) Laing is an experienced investigator who had been employed by BOLI for 18 years at the time of hearing and worked as a compliance specialist for BOLI's Wage and Hour Division before transferring to the position of senior investigator for the Civil Rights Division in 2003. Her testimony was straightforward and responsive to the questions asked of her on direct and cross examination. On cross examination she readily acknowledged not making several specific inquiries that may have elicited information relevant to her

investigation. She also testified that she did not recall investigating whether the activities that complainant complained about constituted a crime, that she had not read SB 171, and that she did not recall asking complainant why complainant thought that Respondent's behavior was criminal. Based on her demeanor and candor, the forum has credited her testimony in its entirety.

64) Lamb had a natural bias because of his long-term relationship with Complainant, as well as a financial interest in the outcome of the case,<sup>11</sup> but he did not attempt to downplay these factors in an attempt to bolster his credibility. His testimony was thoughtful, forthright, and internally consistent, and the forum has credited his testimony in its entirety.

65) Michael McCord's testimony was primarily related to his DCBS examinations, the authentication of Bihm's examination of Medford, and DCBS's procedures in general. The forum has credited his testimony in its entirety.

66) Sarah Hooper's testimony was forthright. She responded without hesitation to questions asked of her and did not hesitate to acknowledge her inability to answer some questions because of her lack of memory on the particular issue. Her testimony was internally consistent

and she was not impeached on cross examination. Hooper had been an Oregon area manager for Respondent during Complainant's employment and testified that she would have discharged Complainant earlier because of her disruptive behavior. However, Hooper herself was discharged by Respondent in 2006. Despite these potential biases, the forum found Hooper's testimony to be objective and has credited her testimony in its entirety.

67) Kristine Mastoris was promoted to take Complainant's position, then fired three months later and given no reason for her discharge. She testified that Medford had the "best store in Oregon as far as overall business," which the forum finds to be an unsupported exaggeration. She testified on direct that "we were told" the computers would be fixed and to manually write off the excess interest, but on cross examination testified that she didn't recall being told that, but only got a memo with this instruction after Complainant was fired. Like Complainant, she also believed that Respondent was violating the law by not requiring customers to provide pay stubs. Her testimony further demonstrated a bias towards Callaway.<sup>12</sup> The forum has only credited her testimony that was corroborated by other credible evidence.

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<sup>11</sup> He testified that he and Complainant share bank accounts and that if Complainant prevailed, they would share the proceeds "50-50."

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<sup>12</sup> She testified that "Kari acted very high and mighty or cocky, kind of like 'she's the boss' kind of thing. She was nice, but cocky."

68) Michael Reed, Respondent's in-house counsel at times material and an experienced attorney whose job experience includes eight and one-half years as an Oregon assistant attorney general, testified at length about SB 171, his interpretation of it and the administrative rules promulgated by DCBS interpreting that legislation, and his interactions with DCBS. Despite projecting an arrogant attitude, laughing at times when he described DCBS's interpretation of the rule -- as though no one who disagreed with his legal opinion could be taken seriously -- the forum has credited his testimony except for his unequivocal, unsupported testimony on direct examination that Respondent loses money on 9 out of 10 repossessions.<sup>13</sup>

69) Steve Miller, Respondent's manager who made the decision to discharge Complainant, was Respondent's vice president of operations at the time of hearing. His demeanor was relaxed and unruffled throughout his testimony, and he responded directly to questions asked on direct and cross examination. His testimony on key issues -- Respondent's policies and the reasons for Complainant's dis-

charge -- was consistent with other testimony that the forum has found credible on those same issues. His testimony was internally consistent and he was not impeached on any significant issue on cross examination. The forum has credited his testimony in its entirety.

70) Kari Callaway, Complainant's immediate supervisor at the time of Complainant's discharge, was Respondent's Oregon operations manager at the time of hearing. Her testimony was internally consistent and also consistent with Miller and Hooper's credible testimony. The forum found her to be a candid witness, as exemplified by her acknowledgment that she had no recollection of the date Complainant told her that Respondent was screwing employees and cheating customers or when she related these statements to Miller. The forum has credited her testimony in its entirety.

#### **ULTIMATE FINDINGS OF FACT**

1) At all times material, Respondent was an employer that used the personal services of one or more employees in the state of Oregon, reserving the right to control the means by which those services were performed.

2) Respondent employed Complainant in its Medford store from April 20, 2000, until March 11, 2003.

3) Respondent's business operations in Oregon were regulated by DCBS.

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<sup>13</sup> On direct, he testified "Nine times out of 10 if you repossess a car, you're losing money. It costs more to repossess it than the car is worth." On cross examination, he testified "I don't recall using the eight or nine out of 10 in that context. I wouldn't have any way to hone it down to that kind of a figure."

4) In October 2002, Complainant telephoned DCBS and expressed concerns that Respondent was violating the law by not requiring pay stubs from customers and charging interest after six loan renewals.

5) On December 3, 2002, DCBS conducted an examination of Respondent's Medford store. DCBS subsequently issued an exam report that was sent to Respondent. The report assigned a "Marginal" rating and noted that Respondent had overcharged interest to 14 borrowers by not stopping interest after six renewals and had failed to obtain copies of two borrowers' pay stubs.

6) The concerns expressed by Complainant were not criminal activity and Complainant did not believe Respondent's pay stub and loan renewal policies and practices constituted a crime.

7) On March 11, 2003, Respondent discharged Complainant because she made negative comments about Respondent's company and because she continued to violate Respondent's policy of not requiring customers to produce pay stubs as a condition of obtaining a loan.

8) Respondent did not learn that Complainant had complained to DCBS until June 2003.

#### **CONCLUSIONS OF LAW**

1) At times material, Respondent was an employer subject to the provisions of ORS 659A.230. ORS 659A.001(4).

2) The actions, inactions, statements, and motivations of Steve Miller are properly imputed to Respondent.

3) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the persons and subject matter herein and the authority to eliminate the effects of any unlawful employment practice found. ORS 659A.800; ORS 659A.830.

4) Complainant did not report criminal activity and did not believe she was reporting criminal activity. For these reasons, Respondent's discharge of Complainant did not violate the provision of ORS 659A.230(1) that prohibits an employer from discharging an employee because the employee reported criminal activity.

5) Respondent was unaware, at the time it discharged Complainant, that Complainant had initiated a civil proceeding. For this reason, Respondent's discharge of Complainant did not violate the provision of ORS 659A.230(1) that prohibits an employer from discharging an employee because the employee brought a civil proceeding.

6) Under ORS 659A.850(3), the Commissioner of the Bureau of Labor and Industries shall issue an order dismissing the charge and complaint against any respondent not found to have engaged in any unlawful practice charged.

OPINION

INTRODUCTION

The Agency alleged two theories of unlawful discrimination. First, that Respondent discharged Complainant in violation of ORS 659A.230 and OAR 839-010-0140(2) for reporting criminal activity. Second, that Respondent discharged Complainant in violation of ORS 659A.230 and OAR 839-010-0140(1)(b) for bringing a civil proceeding against Respondent. The Agency alleges that Complainant’s telephone call to DCBS, described in Finding of Fact 41 –The Merits, was both the report of criminal activity and the initiation of a civil proceeding as defined in ORS 659A.230, and the specific act that brought about Complainant’s discharge.

REPORTING CRIMINAL ACTIVITY

In relevant part, ORS 659A.230(1) provides that “[i]t is an unlawful employment practice for an employer to discharge \* \* \* an employee \* \* \* for the reason that the employee has in good faith reported criminal activity by any person \* \* \*.” This language protects employees who either in good faith report criminal activity or employees who in good faith report activity they believe to be criminal.

The Agency has promulgated rules interpreting ORS 659A.230(1). The rule in effect at the time of Complainant’s dis-

charge was *former* OAR 839-010-0110.<sup>14</sup> It read:

“An employee reporting criminal activity is protected by ORS 659A.230(1) and these rules if:

“(1) The employee reports to any person, orally or in writing, the criminal activity of any person;

“(2) The employee has in good faith reported activity the employee believed to be criminal, or caused criminal charges to be brought against any person. This can be done by either the complainant’s information or by a complaint, as defined in ORS 131.005(3) and (4);

“(3) The employee cooperated in good faith, whether or not under subpoena, in an investigation conducted by a law enforcement agency;

“(4) The employee testified in a criminal trial, whether or not under subpoena; or

“(5) The employer knows or believes that the employee engaged in the reporting acts described above.”

The Agency specifically alleged a violation of OAR 839-010-0140(2). That rule protected employees who in good faith reported activity that they believed to be criminal.

<sup>14</sup> OAR 839, Division 10, was amended effective January 1, 2008, and this rule became part of OAR 839-010-0100.

The Agency's case fails because Complainant did not report activity that she believed to be criminal. There is no evidence that Complainant believed that Respondent's activity was a crime. Complainant testified that she believed the interest overcharges and Respondent's pay stub policy she reported were unlawful, but did not believe they were a "crime." A crime carries with it the possibility of a prison sentence,<sup>15</sup> and there is no evidence that Complainant believed or told anyone else that she or anyone else could be sent to prison for participating in the in-

terest overcharges.<sup>16</sup> Notably, there was no evidence that a violation of any provision of ORS Chapter 725 is a felony or misdemeanor.

In its post-hearing brief, the Agency cited *In the Matter of Cleopatra's, Inc.*, 26 BOLI 125 (2005), in support of its case. In *Cleopatra's*, the complainant learned that the respondent had cancelled her health insurance without notifying her and had continued to withhold premiums from her paycheck for three months after cancellation. The complainant then told her manager that the continued payroll deductions were theft and that she expected reimbursement for what she believed were purloined funds. Although the respondent did not dispute the complainant's charge and reimbursed her for the full amount, she was discharged one week later. The forum concluded that complainant had a good faith belief that respondent had engaged in criminal activity and in fact reported activity by respondent that, if proven under the criminal law

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<sup>15</sup> ORS 161.515 provides:

"(1)A crime is an offense for which a sentence of imprisonment is authorized.

"(2)A crime is either a felony or a misdemeanor."

ORS 161.525 defines a "felony."

"Except as provided in ORS 161.585 and 161.705, a crime is a felony if it is so designated in any statute of this state or if a person convicted under a statute of this state may be sentenced to a maximum term of imprisonment of more than one year."

ORS 161.545 defines a "misdemeanor:"

"A crime is a misdemeanor if it is so designated in any statute of this state or if a person convicted thereof may be sentenced to a maximum term of imprisonment of not more than one year."

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<sup>16</sup> Although not dispositive of the case, the forum notes that there is no provision in ORS Chapter 725 or any other section of Oregon Revised Statutes that specifically designates violation of any provision of ORS Chapter 725 as a felony or misdemeanor. Also, McCord, a DCBS manager and the Agency's witness who testified as to SB 171 and the corresponding administrative rules promulgated by DCBS, testified that violation of ORS 725.615 is not a crime.

standard, constituted criminal activity. *Id.* at 134. *Cleopatra's* does not help the Agency because it is distinguishable from this case in two critical ways: (1) Complainant McClure lacked a good faith belief that respondent had engaged in criminal activity, and (2) The activity she reported to DCBS was not activity that, if proven under the criminal law standard, constituted criminal activity.

#### INITIATING A CIVIL PROCEEDING

ORS 659A.230(1) prohibits an employer from discharging an employee because the employee "has in good faith brought a civil proceeding against an employer." An employee "is considered to have initiated a civil proceeding when the employee has contacted an administrative agency the employee believes in good faith to have jurisdiction and the ability to sanction the employer." OAR 839-010-0140(1)(b). The employee is protected when the employee initiates a civil proceeding and "[t]he employer knows or believes that the employee has [initiated a] civil proceeding[.]" See also *In the Matter of Earth Sciences Technology*, 14 BOLI 115, 125 (1995), *affirmed without opinion*, *Earth Sciences Technology, v. Bureau of Labor and Industries*, 141 Or App 439, 917 P2d 1077 (1996).

Complainant was aware that DCBS was the regulatory agency that regularly conducted examinations of Respondent's stores and issued a written report containing the examination results. She initi-

ated a civil proceeding when she contacted Dale Laswell at DCBS and complained about Respondent's practices. As a result of Complainant's complaint, Laswell directed Rick Bihm, a DCBS field examiner, to conduct a special examination of Respondent's Medford store. Bihm conducted that investigation on December 3, 2002, and gave Respondent a "Marginal" rating based on problems he found and described in his examination report that mirrored Complainant's complaints to Laswell. However, Complainant testified that she told no one of her complaint to Laswell; there was no evidence that DCBS told Respondent that Complainant had contacted DCBS; and Miller, Respondent's manager who made the decision to discharge Complainant, credibly testified that he was not aware that Complainant had contacted DCBS before making that decision. Based on this evidence, the forum concludes that Respondent did not know or believe that Complainant had contacted DCBS when it discharged Complainant.

Even if there was evidence that Miller knew or believed that Complainant had contacted DCBS, Respondent would still prevail. Miller testified that Complainant was discharged because of her continuing violation of Respondent's policy of not asking customers for pay stubs, with the "last straw" being Complainant's negative comments about Respondent. Complainant acknowledged this behavior and her previous warnings for violating

Respondent's pay stub policy, and there is no comparator evidence that other non-whistleblowing employees engaged in these same behaviors and were not discharged.

Even the timing of Complainant's discharge does not aid the Agency's case. Complainant contacted DCBS in October 2002, DCBS conducted its inspection on December 3, 2002, and Complainant was discharged on March 11, 2003. The Oregon Court of Appeals has held that when relying on "mere temporal proximity" between the protected action and the allegedly retaliatory employment decision to indirectly establish a causal connection, the "events must be 'very close' in time." *Boynton-Burns v. University of Oregon*, 197 Or App 373, 381, 105 P3d 893, 897-898 (2005), citing *Clark County School District v Breeden*, 532 US 268, 273 (2001).<sup>17</sup> Under the facts in this case, the six and four month intervals separating Complainant's initial DCBS contact and DCBS's Medford examination from Complainant's discharge are too remote for the forum to infer causation from the timing of her discharge.

Because Respondent did not know or believe that Complainant made a report to DCBS, the forum concludes that Respondent could not have and did not discharge

Complainant based on her contact with DCBS.

## THE AGENCY'S EXCEPTIONS

### A. Exception 1.

The Agency argues that Miller and Callaway's testimony was not credible for two reasons.

First, the Agency argues that Miller's testimony was not credible because he testified that his policy is to counsel employees before terminating them and, contrary to this testimony, he did not counsel Kristine Mastoris prior to her termination. A review of the record shows that there was no documentary evidence presented by the Agency or Respondent or any attempt to elicit any testimony to show that Miller did or did not counsel Mastoris prior to her termination. Consequently, the Agency's exception must fail because there is no evidence in the record to support it.

Second, the Agency argues that Miller and Callaway were not credible based on their testimony that Respondent's Medford store was not growing at the rate of other Oregon stores. The Agency asserted the following:

"On pages 22 and 23 of the Proposed Order, the Forum concluded from Miller and Callaway's testimony that Complainant's store was not growing at a rate similar to other stores. This conclusion was unsupported by any documents to show lack of growth in the store Complainant managed or amount of growth for

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<sup>17</sup> See, e.g., *In the Matter of Trees, Inc.*, 28 BOLI 218, fn. 5 (2007) for examples of cases of how close in time is considered "very close."

other Respondent stores in similar markets. Complainant supplied the only documents to show the number of loans, average loan amount and totals (Agency Exhibit A-31). The unsupported theory Complainant was not growing the store enough was not mentioned until the hearing. Michael Reed responded to the Civil Rights Division during the initial investigation and did not mention Complainant was not growing the store at a rate similar to other stores (Agency Exhibits A-9 and A-11). If this were a credible reason for Complainant's termination then why was it not brought forward in Respondent's answer to the Agency's formal charges with the supporting documentation? Two of Respondent's managers testified to slow growth in the store Complainant managed but without any data to verify this assertion. Miller and Callaway's testimony on this issue was not credible."

The Agency's assertion that this evidence was not presented during the initial investigation or in Respondent's answer to the Agency's formal charges is correct. On March 8, 2004, Complainant filed her complaint with the Division. She alleged she was terminated for "invoking the worker's compensation system and for reporting criminal activity to the State Auditors Office (whistleblowing)." Her complaint contained no references to her job performance. A copy of that complaint was sent to Respondent,

and Reed, Respondent's in-house counsel, provided an initial response to the complaint on April 2, 2004, giving the following reasons for Complainant's termination:

"[Complainant] was terminated primarily because she voiced an extremely negative attitude toward the company, coupled with her repeated refusal to follow company policy."

On April 6, 2004, Laing requested additional information, but did not request any specific information regarding the growth rate of any of Respondent's Oregon offices during Complainant's tenure as manager. Reed responded in a letter dated April 28, 2004, that did not provide any additional reasons for Complainant's termination. On August 1, 2007, the Agency issued its Formal Charges. Like the complaint, the Formal Charges did not contain a specific allegation regarding the growth rate of Respondent's Medford office while Complainant was manager. Respondent's answer alleged that "Respondent terminated Complainant for consistently and repeatedly failing to follow company guidelines and policies for providing loans to Respondent's customers," but did not address the growth rate of the Medford office. Although an inference could be drawn that this evidence was not presented during the investigation or in the answer to the Formal Charges because Respondent invented it to support its case at hearing, the forum de-

clines to draw that inference for reasons discussed below.

First, Miller and Callaway's testimony did not contradict any prior statements made by Respondent. Rather, Respondent simply failed to address this issue before the hearing in its position statement and answer and there is no evidence that Miller or Callaway were interviewed by the Division or made any statements to the Division concerning this issue prior to giving testimony at the hearing.

Second, Respondent was not asked to address this issue during the investigation and was not required to in its answer. OAR 839-050-0130 provides that an answer "must include an admission or denial of each factual matter alleged in the charging document and a statement of each relevant defense to the allegations." As stated earlier, the store growth rate issue was not alleged in the Formal Charges. Therefore, Respondent was not required to admit or deny it in the answer. The forum does not consider it to be a "relevant defense" because it was not a reason for Complainant's termination and, other than as a credibility issue between Mastoris, Miller, and Callaway due to their conflicting testimony, was only relevant to show the context for the store inspection in which Callaway initially discovered Complainant was requiring pay stubs from Respondent's prospective clients. The issue arose only after Complainant and Callaway testified in the Agency's case-in-chief about the growth rate of the

Medford office and Respondent elicited testimony from Miller and Callaway to rebut that testimony.

Third, the reasons Respondent gave during the investigation for terminating Complainant are consistent with the evidence presented at hearing, including Complainant's own testimony that she engaged in the specific behaviors that Miller and Callaway testified caused Complainant to be terminated.

Fourth, the Agency did not present any credible evidence to show that the Miller and Callaway's testimony concerning the growth rate was untrue. It is true that Respondent presented no records to support Miller and Callaway's testimony about the growth rates. However, it is equally true that the Agency could have requested Respondent's records through pre-hearing discovery if it intended to show that the Medford office had a superior growth rate. There is no evidence that the Agency made such a request.

For all these reasons, the Agency's exceptions are overruled. The forum notes that, even if the forum disbelieved Miller and Callaway's testimony about the growth rate, the ultimate result would still be the same because a preponderance of the evidence establishes that: (1) the activity Complainant complained of was not criminal activity and Complainant did not believe it was criminal activity; and (2) Respondent did not know or believe that Complainant made a report to

DCBS and thereby initiated a civil proceeding.

**B. Exception 2.**

In footnote 10 of the Proposed Order, the ALJ quoted Miller's specific testimony concerning why he terminated Complainant. The Agency quotes part of the footnote and argues that Miller's statement that Complainant was "going behind my back" referred directly to her whistleblowing activity, in that "[i]f Miller terminated Complainant only for 'violating company policy' then he would have simply said something about Complainant ignoring a directive, not following directions or being insubordinate." To reach the conclusion sought by the Agency, the forum must draw an inference. When there is more than one inference to be drawn from the basic fact found; it is the forum's task to decide which inference to draw. *In the Matter of WINCO Foods, Inc.*, 28 BOLI 259, 300 (2007). This involves a consideration of all the evidence relevant to the issue under scrutiny. The overwhelming weight of the evidence supports the conclusion drawn by the ALJ – that Complainant's whistleblowing activity was not a factor in her termination – and the only evidence supporting the inference sought by the Agency is the Agency's speculation regarding the linguistic significance of the detail in Miller's testimony. The Agency's exception is overruled.

**C. Exception 3.**

In its third exception, the Agency argues that:

"Respondent first learned of Complainant's initiating a civil proceeding after the December 3, 2002 examination by DCBS and resulting marginal score. \* \* \* The Forum failed to recognize Respondent did not terminate Complainant immediately following the contact with DCBS because it was not practical during Respondent's busiest months of the year during and after the holiday season in December, January and February."

This exception fails because it is based on an inaccurate factual premise. Respondent did not learn that Complainant had called DCBS until June 25, 2003, long after Complainant had been terminated.<sup>18</sup> Without that knowledge, there can be no violation of the whistleblower statute. The Agency's exception is overruled.

**ORDER**

NOW, THEREFORE, as Respondent has been found not to have violated ORS 659A.230, OAR 839-010-0110(2), or OAR 839-010-0140(1)(b), the complaint and formal charges against Respondent are hereby dismissed according to the provisions of ORS 659A.850.

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<sup>18</sup> See Finding of Fact 55 – The Merits.

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**In the Matter of  
PETWORKS LLC**

**Case No. 44-07**

**Final Order of Commissioner  
Dan Gardner**

**Issued May 29, 2008**

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**SYNOPSIS**

Claimant worked 161 hours as an employee of Respondent between November 21 and December 19, 2005, including eight hours of overtime. Claimant was entitled to be paid the minimum wage of \$7.25 per hour, plus overtime wages at one and one-half times the regular rate of pay and was not paid any wages. Respondent was ordered to pay Claimant \$1,167.25 in unpaid, due and owing wages. Respondent's failure to pay the wages was willful, and Respondent was ordered to pay \$1,740.00 in penalty wages. Based on Respondent's failure to pay the minimum wage or overtime wages to Claimant, Respondent was ordered to pay a civil penalty of \$1,740.00. ORS 652.140(1), ORS 652.150, ORS 653.025, ORS 653.035, ORS 653.055, ORS 653.261; OAR 839-020-0004(17), OAR 839-020-0030, OAR 839-020-0035.

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The above-entitled case came on regularly for hearing before

Alan McCullough, designated as Administrative Law Judge ("ALJ") by Dan Gardner, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on April 22, 2008, at the office of the Oregon Employment Dept, located at 2075 Sheridan Ave., North Bend, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by Patrick Plaza, a case presenter employed by the Agency. Wage claimant Qynne McKibben ("Claimant") was present throughout the hearing and was not represented by counsel. Respondent did not appear at hearing and was held in default.

The Agency called as witnesses: Claimant, Sherry Eisenbarth, Christopher Partee, Kriston Robertson, Nikki Puckett, McClain Altman, Lawanda Haddott, Michael Slaska, and Margaret Pargeter (telephonic), Wage and Hour Division compliance specialist.

The forum received into evidence:

a) Administrative exhibits X-1 through X-9 (submitted or generated prior to hearing);

b) Agency exhibits A-1 through A-22 (submitted prior to hearing).

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

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

**FINDINGS OF FACT –  
PROCEDURAL**

1) On January 6, 2006, Claimant filed a wage claim with the Agency alleging that Respondent “Pet Works, LLC” had employed her and failed to pay wages earned and due to her. Specifically, Claimant alleged that she earned \$1,428.25 in gross wages, that she was paid \$20.00, and that she had received \$450.00 as the “dollar value of non-wage good, property or services \* \* \* received from employer: (rent, tools, meals, etc.).” At the time she filed her wage claim, Claimant assigned to the Commissioner of the Bureau of Labor and Industries, in trust for Claimant, all wages due from Respondent.

2) Claimant brought her wage claim within the statute of limitations.

3) On May 30, 2006, the Agency issued Order of Determination No. 06-0008 based upon the wage claim filed by Claimant. The Order of Determination alleged that claimant had been employed in Oregon by Respondent from August 8, 2005, to December 18, 2005, at the rate of \$7.25 per hour, and that “no part of which [had] been paid except the sum of \$470.00, leaving a balance due and owing in the sum of \$958.25.” The Order also alleged that Respondent willfully failed to pay those wages, that more than

30 days had elapsed since the wages became due and owing, that a written notice was sent to Respondent, that Claimant’s daily rate of pay was \$58.00 per day, and that Respondent owed Claimant \$1,740.00 in penalty wages. Finally, the Agency alleged that Respondent paid Claimant less than the wages to which she was entitled under ORS 653.010 to 653.261 and was therefore liable to Claimant for ORS 653.055(1)(b) civil penalties in the amount of \$1,740.00. The Order of Determination required that, within 20 days, Respondent either pay these sums in trust to the Agency, request an administrative hearing and submit an answer to the charges, or demand a trial in a court of law. The Order did not refer to overtime wages.

4) On June 15, 2006, Charlene Cuddy filed an answer on behalf of Petworks, LLC. Cuddy stated that Claimant never worked for her or Respondent and requested a hearing. On July 5, 2006, the Agency sent Cuddy a notice stating that her answer was insufficient because it was not filed by an attorney or authorized representative. On July 10, 2006, Petworks LLC sent a letter to the Agency authorizing Cuddy to represent Respondent.

5) On February 12, 2008, the Agency filed a “BOLI Request for Hearing” with the forum.

6) On February 22, 2008, the Hearings Unit issued a Notice of Hearing to Respondent, the Agency, and Claimant stating the time and place of the hearing as

April 22, 2008, at 9 a.m., at the office of the Oregon Employment Dept, 2075 Sheridan Avenue, Coos Bay, Oregon. Together with the Notice of Hearing, the forum sent a copy of the Order of Determination, a document entitled "Summary of Contested Case Rights and Procedures" containing the information required by ORS 183.413, a document entitled "Servicemembers Civil Relief Act (SCRA) Notification, and a copy of the forum's contested case hearings rules, OAR 839-050-000 to 839-050-0440.

7) On March 19, 2008, the ALJ issued an interim order noting that the hearing location was 2075 Sheridan Avenue, North Bend, Oregon.

8) On March 20, 2008, Cuddy filed another request for contested case hearing and answer in which she stated that Claimant has never been employed by Respondent.

10) On April 7, 2008, the Agency filed a motion to amend its Order of Determination to correct the caption spelling of Respondent's name from "Pet Works, LLC" to "Petworks, LLC" and increase the amount of unpaid wages sought from \$958.25 to \$987.25. On April 17, 2008, the ALJ issued an interim order granting the Agency's motion.

11) At the time set for hearing, Respondent did not appear and had not previously notified the forum that it would not appear. Pursuant to OAR 839-050-0330(2), the ALJ waited 30 min-

utes before commencing the hearing. When Respondent did not appear or contact the hearings unit by telephone during that time, the ALJ declared Respondent in default at 9:30 a.m. and commenced the hearing.

12) At the outset of the hearing, the ALJ explained the issues involved in the hearing, the matters to be proved, and the procedures governing the conduct of the hearing.

14) At the end of the evidentiary portion of the hearing, and before the Agency rested its case, the Agency moved to amend the Order of Determination to increase the amount of wages sought by \$450.00. The ALJ reserved ruling on the Agency's motion until the Proposed Order. The Agency's motion is **DENIED** for reasons stated in the Opinion.

15) On May 9, 2008, the ALJ issued a proposed order that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. No exceptions were filed.

#### **FINDINGS OF FACT – THE MERITS**

1) In 2005, Oregon's minimum wage rate was \$7.25 per hour.

2) In the spring of 2005, Charlene Cuddy acquired an ownership interest in Cuddly Critters, a pet store with locations in Coos Bay and North Bend.

3) In April 2005, Cuddy hired Claimant to work as an administrative assistant/manager in the

Cuddly Critter stores. Claimant did inventory and helped to organize offices in Cuddly's North Bend and Coos Bay stores. Claimant left Cuddly's employ that same month and was paid for all her work.

4) On August 8, 2005, Claimant was rehired by Cuddy and returned to work at Cuddly Critters as an administrative assistant. Claimant worked until August 19, 2005, working a total of 36 hours, then quit after Cuddy pushed her to the ground. Claimant was not paid for any of her work.

5) On August 25, 2005, Respondent Petworks LLC registered as a limited liability company with the Oregon Secretary of State, Corporation Division, designating Cuddy as its registered agent at the following address: "276 S 2<sup>nd</sup> Court., Coos Bay, Oregon 97420."

6) From August 25, 2005, through December 19, 2005, Respondent was a limited liability company doing business in Coos Bay, North Bend, and Reedsport, Oregon that employed one or more persons and had two members – Charlene Cuddy and Deanna Mason.

7) In November 2005, Cuddy rehired Claimant. Claimant and Cuddy did not discuss the rate that Claimant would be paid. Claimant's first day of work was November 21, a Monday. During her first week of work, Claimant painted signs for Respondent's stores on November 21, 22, 23, and 26. On November 27, she

trained to be manager of Respondent's new Reedsport store. In all, she worked a total of 33 hours during her first week of employment, earning \$239.25 in gross wages (33 hours x \$7.25 per hour).

8) During Claimant's employment with Respondent, Cuddy created weekly work schedules for Claimant and her other employees.

9) In the week beginning November 28, 2005, claimant worked as manager of Respondent's newly opened Reedsport store. Claimant worked with Chris Partee, another employee of Respondent, and worked eight hours each day on November 28-30 and December 2-4, for a total of 48 hours. She earned a total of \$377.00 (40 hours x \$7.25 per hour = \$290.00; 8 hours x \$7.25 per hour x 1.5 = \$87.00; \$290.00 + \$87 = \$377.00).

10) In the week beginning December 5, 2005, Claimant continued to manage Respondent's Reedsport store. Claimant worked eight hours each day on December 6-7 and 9-11, for a total of 40 hours. She earned a total of \$290.00 (40 hours x \$7.25 per hour = \$290.00).

11) In the week beginning December 12, 2005, Claimant continued to manage Respondent's Reedsport store on December 12-13 and 15, then worked at Respondent's Coos Bay store on December 17-18. Claimant worked eight hours each day, for a total of 40 hours. She

earned a total of \$290.00 (40 hours x \$7.25 per hour = \$290.00).

12) In total, Claimant earned \$1,167.25 in straight time wages (161 hours x \$7.25 per hour = \$1,167.25) and \$29.00 in overtime wages (8 hours x \$7.25 per hour x .5 = \$29.00) while employed by Respondent.

13) From November 21 through December 18, 2005, Claimant and Partee lived in a travel trailer owned by Cuddy, at Cuddy's request, when they worked in Reedsport. Cuddy's trailer had no running water and only half of it had electrical power. During this time, Claimant also worked at a video store in North Bend on the days she did not work in Reedsport. On those days, Claimant slept on a recliner at Cuddy's house in North Bend.

14) Cuddy did not ask Claimant to pay rent in exchange for sleeping in the trailer or at Cuddy's house. Cuddy and Claimant did not have an agreement that Respondent would deduct money from Claimant's wages in exchange for lodging. Claimant never signed a written agreement authorizing Cuddy to deduct money from her wages in payment for lodging.

15) While Complainant and Partee worked at the Reedsport store, they took \$20 as a "payout" from the till to buy food because they had no food and no money to buy food because Respondent had not paid them anything.

16) Claimant spent the night of December 18, 2005, sleeping at Cuddy's house. At that time, Respondent had not paid her anything for her work. The next morning, Cuddy was very upset at Claimant and yelled at her, telling Claimant she had to pick up her things and Hadnott's things that were also stored at Cuddy's house. Cuddy told her to "get out." Claimant asked for her wages, telling Cuddy she would file a complaint with the "labor board" if Cuddy didn't pay her. Cuddy hit her, threw her to the floor, and sat on her until she was pulled off by Partee, who was also staying at Cuddy's house. Claimant called the police and filed a police report. Claimant never worked again for Respondent.

17) Respondent did not pay any wages to Claimant at any time during her employment and has not paid any wages to Claimant since Claimant was discharged.

18) On January 20, 2006, the Agency mailed a "NOTICE OF WAGE CLAIM" to Respondent that was addressed to: "Charlene Cuddy, Pet Works, LLC, 276 S 2<sup>nd</sup> Court., Coos Bay, OR 97420." The notice read:

"NOTICE OF WAGE CLAIM"

"You are hereby notified that QYNNE MARIE MCKIBBEN has filed a wage claim with the Bureau of Labor and Industries alleging:

"Unpaid statutory minimum wages of \$958.25 at the rate of \$7.25 per hour from November

20, 2005 to December 18, 2005.

"IF THE CLAIM IS CORRECT, you are required to IMMEDIATELY make a negotiable check or money order payable to the claimant for the amounts of wages claimed, less deductions required by law, and send the payments to the Bureau of Labor and Industries at the above address.

"IF YOU DISPUTE THE CLAIM, complete the enclosed "Employer Response" form and return it together with the documentation which supports your position, as well as payment of any amounts which you concede are owed the claimant to the BUREAU OF LABOR AND INDUSTRIES within ten (10) days of the date of this Notice.

"If your response to the claim is not received on or before FEBRUARY 3, 2006, the Bureau may initiate action to collect these wages in addition to penalty wages, plus costs and attorney fees."

19) Respondent willfully failed to pay Claimant all earned, due, and payable wages not later than the end of the first business day after Claimant's discharge, and more than 30 days have elapsed from the date her wages were due.

20) Penalty wages are computed for Claimant, in accordance with ORS 652.150, by multiplying Claimant's hourly wage x 8 hours

x 30 days ( $\$7.25 \times 8 \times 30 = \$1,740.00$ ).

21) Civil penalties are computed for Claimant, in accordance with ORS 653.055, by multiplying Claimant's hourly wage x 8 hours x 30 days ( $\$7.25 \times 8 \times 30 = \$1,740.00$ ).

22) The Agency's witnesses were all credible.

#### **ULTIMATE FINDINGS OF FACT**

1) Beginning on August 25, 2005, and continuing throughout Claimant's employment, Respondent Petworks LLC did business in Oregon and employed one or more persons.

2) Respondent suffered or permitted Claimant to work from November 21, 2005, until December 19, 2005. Respondent discharged Claimant on December 19, 2005.

3) Claimant did not work for an agreed rate of pay and was entitled to be paid \$7.25 per hour, Oregon's minimum wage in 2005, for her work, plus overtime at the rate of \$10.88 per hour.

4) Claimant worked a total of 161 hours for Respondent, of which eight hours were overtime hours. Respondent paid Claimant \$10.00 for her work, leaving a total of \$1,167.25 in straight time unpaid wages and \$19.00 in overtime unpaid wages due and owing to her.

5) Respondent willfully failed to pay Claimant her earned, due, and payable wages not later than the end of the first business day

after Claimant was discharged and more than 30 days have elapsed since her wages were due. The Agency sent a written notice of Claimant's wage claim to Respondent in January 2006 and Respondent has not paid any of Claimant's unpaid wages. Penalty wages, computed in accordance with ORS 652.150, equal \$1,740.00

6) Respondent failed to pay the minimum wage or overtime wages earned by Claimant. Civil penalties, computed in accordance with ORS 653.055(1)(b), equal \$1,740.00.

### CONCLUSIONS OF LAW

1) Beginning August 25, 2005, Respondent Petworks LLC was an employer subject to the provisions of ORS 652.110 to 652.200, 652.310 to 652.405, and 653.010 to 653.261. Respondent employed Claimant Qynne McKibben to work from November 21, 2005, through December 18, 2005.

2) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the subject matter and the Respondent herein. ORS 652.310 to 652.414, ORS 653.040, ORS 653.256, ORS 653.261.

3) Respondent violated ORS 652.140(1) by failing to pay Claimant all wages earned and unpaid not later than the end of the first business day after Claimant's discharge. Respondent owes Claimant \$1,167.25 in unpaid, due and owing wages.

4) Respondent's failure to pay Claimant all wages due and owing was willful and Respondent owes Claimant \$1,740.00 in penalty wages. ORS 652.150.

5) Respondent is liable for a \$1,740.00 civil penalty to Claimant based on Respondent's failure to pay the minimum wage or overtime wages earned to Claimant. ORS 653.055.

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

### OPINION

#### INTRODUCTION

Respondent defaulted when it failed to make an appearance at the hearing. When a respondent defaults, the Agency must present a prima facie case on the record to support the allegations of its charging document in order to prevail. *In the Matter of Okechi Village & Health Center*, 27 BOLI 156, 161 (2006). This consists of credible evidence of the following: 1) Respondent employed Claimant; 2) The pay rate upon which Respondent and Claimant agreed, if it exceeded the minimum wage; 3) Claimant performed work for which she was not properly compensated; and 4) The amount and extent of work Claimant performed for Respondent. *In the Matter of*

*MAM Properties, LLC, 28 BOLI 172, 188 (2007).*

**THE AGENCY'S AMENDMENT TO INCREASE CLAIMANT'S WAGE CLAIM BY \$450**

At the conclusion of the evidentiary portion of the hearing, but before the Agency rested its case, the Agency moved to increase the wages sought in the Order of Determination by \$450.00. The Agency based its motion on the fact that the amount of wages sought in the Order of Determination was understated by \$450.00 because Claimant, on her wage claim form, had subtracted \$450.00 from her wages for a lodging and utilities deduction that was not allowed by Oregon law.

OAR 839-050-0140 governs amendments in BOLI contested case hearings. In pertinent part, it provides:

"(2)(a) Once the hearing commences, issues other than affirmative defenses not raised in the pleadings may be raised and evidence presented on such issues, provided there is express or implied consent of the participants. Consent will be implied when there is no objection to the introduction of such issues and evidence or when the participants address the issues. Any participant raising new issues must move the administrative law judge, before the close of the evidentiary portion of the hearing, to amend its pleading to conform to the evidence and to reflect issues presented. The admin-

istrative law judge may address and rule upon such issues in the Proposed Order."

The Agency presented evidence on Claimant's entitlement to an additional \$450.00 in wages, and raised the issue and moved to amend before the close of the evidentiary portion of the hearing. However, the forum must deny the Agency's motion because there could be no express or implied consent by Respondent due to Respondent's absence from the hearing.<sup>1</sup>

**CLAIMANT WAS EMPLOYED BY RESPONDENT**

In its Order of Determination, the Agency alleged that Claimant was employed by Respondent Petworks LLC from August 8 to December 19, 2005. In its answer, Respondent raised the defense that "claimant has **NEVER** been employed with PetWorks, LLC," but offered no evidence to support that claim.<sup>2</sup> Through Claimant's credible testimony, her contemporaneous

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<sup>1</sup> See *In the Matter of Salem Construction Company, Inc.*, 12 BOLI 78, 79 (1993) (The implied consent to evidence elicited at hearing without objection, on which a motion to amend to conform to the evidence is based, is absent in default cases).

<sup>2</sup> See *In the Matter of MAM Properties, LLC*, 28 BOLI 172, 187 (2007) (unsworn and unsubstantiated assertions contained in a respondent's answer may be considered, but are overcome whenever they are contradicted by other credible evidence in the record).

time records, and the credible testimony of other Agency witnesses, the Agency proved that Claimant was employed by Petworks LLC from November 21 until December 19, 2005. Claimant was not employed by Petworks LLC during her work from August 8 to August 19, 2005, because Petworks did not exist as a legal entity before August 25, 2005.<sup>3</sup>

#### **CLAIMANT WAS ENTITLED TO BE PAID THE MINIMUM WAGE**

Claimant testified that she and Respondent did not discuss the wage she would be paid for her work in November and December 2005. When there is no agreed upon rate of pay, an employer is required to pay at least the minimum wage. *In the Matter of Toni Kuchar*, 23 BOLI 265, 274 (2002). Pargeter, the Agency's compliance specialist, testified that the minimum wage rate in 2005 was \$7.25 per hour.

#### **CLAIMANT PERFORMED WORK FOR WHICH SHE WAS NOT PROPERLY COMPENSATED**

Claimant's credible testimony and contemporaneous time records established that she worked a total of 161 hours during the wage claim period. She was entitled to be paid at least \$7.25 per hour for every hour she worked, but received no pay whatsoever other than a share of the \$20 in till cash that she and Chris Partee used to buy food for themselves while they were staying in Re-

spondent's travel trailer while working at Reedsport store. This is far less than the amount she earned.

#### **THE AMOUNT AND EXTENT OF WORK CLAIMANT PERFORMED FOR RESPONDENT.**

The final element of the agency's prima facie case requires proof of the amount and extent of work performed by claimant. The agency's burden of proof can be met by producing sufficient evidence from which a just and reasonable inference may be drawn. A claimant's credible testimony may be sufficient evidence. *In the Matter of Ilya Simchuk*, 22 BOLI 186, 196 (2001). When the forum concludes that an employee was employed and improperly compensated, the burden shifts to the employer to produce evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence. *In the Matter of David Creager*, 17 BOLI 102, 109 (1998). In this case, Claimant provided a contemporaneous record of her work hours and credibly testified that it accurately reflected the hours she worked. This evidence was supported by the credible testimony of the Agency's other witnesses and established that Claimant worked a total of 161 hours, including eight hours of overtime. In contrast, Respondent provided no records or evidence whatsoever concerning the number of hours worked by Claimant other than the

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<sup>3</sup> See Finding of Fact #5 – The Merits.

unsworn, generic denial in its answer that it never employed Claimant. The forum concludes that Claimant worked a total of 161 hours, including eight overtime hours.

#### **WAGES OWED TO CLAIMANT**

The forum has concluded that Claimant earned a total of \$1,167.25 in straight time unpaid wages and \$29.00 in overtime unpaid wages while employed by Respondent. The only "wages" she received was a share of the \$20 in till cash that she and Chris Partee used to buy food. However, four issues remain before the forum can determine the amount of unpaid wages due and owing to Claimant.

**A. In a default case, the forum can award more unpaid wages than were sought in the Order of Determination when they are awarded as compensation for statutory wage violations alleged in the charging document.**

The Agency sought unpaid wages of \$987.25 in its amended Order of Determination. The forum has found that Claimant earned a total of \$1167.25 in straight time wages and \$29.00 in overtime wages, for a total of \$1196.25. As noted earlier, the Agency moved to amend its Order of Determination at hearing to increase the unpaid wages sought by \$450, for a total of \$1437.25, and the forum denied the motion because there was no express or implied consent by Respondent.

Despite this denial, the Claimant does not lack a remedy for any additional wages she may be entitled to in excess of \$987.25, assuming the forum finds she is entitled to those wages. In a 2002 default case involving a single wage claim, the forum held that the commissioner has the authority to award monetary damages, including penalty wages, exceeding those sought in the order of determination when they are awarded as compensation for statutory wage violations alleged in the charging document. *In the Matter of Westland Resources, Inc.*, 23 BOLI 276, 286 (2002). In *Westland*, the forum awarded more penalty wages than were sought in the Order of Determination based on evidence presented at hearing. *Id.* The same principle applies to earned, unpaid wages. The forum follows the precedent established in *Westland* and concludes that, despite denying the Agency's motion to amend, the forum may award all unpaid wages that fall within the scope of the statutory wage violations alleged in the charging document.

**B. Respondent is not entitled to a \$450.00 lodging deduction.**

On her wage claim form, Claimant deducted \$450.00. At hearing, she testified that she deducted the \$450.00 from her wage claim as a voluntary deduction for lodging and utilities provided by Respondent from November 21 through December 18, 2005. The forum has found that Claimant

and Respondent did not have an agreement that any money would be deducted from Claimant's wages to pay for lodging and utilities.

ORS 653.035(1) provides:

"Employers may deduct from the minimum wage to be paid employees under ORS 653.025 \* \* \*, the fair market value of lodging, meals or other facilities or services furnished by the employer for the private benefit of the employee."

OAR 839-020-0035(1) echoes the statute. OAR 839-020-0025(5) provides, in pertinent part, that "[t]he provisions of section (1) of this rule apply only when the following conditions are continuously met: (a) The employer has met the conditions of ORS 652.610(3)[.]" In turn, ORS 652.610(3) sets out additional requirements that must be satisfied before an employer can "deduct \* \* \* any portion of an employee's wages" and lists five circumstances in which deductions are allowed. Subsection (b) is the only circumstance applicable to this case. It allows deductions if they "are authorized in writing by the employee, are for the employee's benefit, and are recorded in the employer's books." OAR 839-020-0025(3) interprets ORS 652.610(3)(b) in the following language:

"In order for the employer to be able to claim credit toward the minimum wage for providing meals, lodging or other facili-

ties or services furnished to an employee, the deduction of these costs must have been authorized by the employee in writing, the deduction must have been for the private benefit of the employee, and the deduction must be recorded in the employer's books \* \* \* in accordance with the provisions of ORS 652.610."

There is no evidence that Claimant made a written authorization for Respondent to deduct expenses for lodging and utilities from her wages or that those deductions were recorded in Respondent's books. Accordingly, Respondent could not legally deduct those expenses from Claimant's wages and the forum will not subtract \$450.00 from Claimant's award of earned and unpaid wages.

**C. Claimant is not entitled to recoup her overtime wages.**

The Agency proved that Claimant worked eight overtime hours on December 4, 2005, earning one and one-half times her regular rate of pay, or an extra \$29.00, for her work that day. In its Order of Determination, the Agency sought recovery of Claimant's unpaid wages at the minimum wage rate of \$7.25 per hour and did not specifically cite ORS 652.261 or OAR 839-020-0300, the statute and rule requiring overtime pay, as a basis for the recovery of any unpaid wages.

ORS 183.415(2)(c) requires that the notice in a contested case

include “[a] reference to the particular sections of the statutes and rules involved.” The Oregon Court of Appeals has interpreted this language to require a citation to all administrative rules and statutes that are substantially relevant, as well as to the statutes and rules allegedly violated. *Drayton v. Department of Transportation*, 186 Or App 1, 62 P3d 430 (2003). ORS 653.261 gives the Commissioner the power to adopt rules requiring overtime pay “at a rate [no] higher than one and one-half times the regular rate of pay” after 40 hours of work in one week. The Commissioner has adopted rules requiring overtime pay. Those rules are set out in OAR 839-020-0030, which states that “all work performed in excess of forty (40) hours per week must be paid for at the rate of not less than one and one-half times the regular rate of pay \* \* \*.” There is no mention of ORS 653.261, OAR 839-020-0030, or the word “overtime” in the Agency’s Order of Determination in connection with Claimant’s earned, unpaid wages. Because the Agency’s Order of Determination lacks a citation to the overtime statute and rule allegedly violated, the forum may not award Claimant the \$29.00 in overtime wages that she earned. *In the Matter of Gary Lee Lucas*, 26 BOLI 198, 213 (2005).

**D. The \$20 “till” payout.**

The forum infers that Claimant and Partee split the \$20 they took as a till payout and credits the \$10 that Claimant received against the \$29 in overtime pay that the

Claimant earned but cannot recover because of the Agency’s insufficient pleading.

**E. Conclusion.**

Claimant is entitled to recover all her earned and unpaid wages except for the eight hours of overtime pay calculated at \$7.25 per hour x 8 hours x .5 = \$29.00. Those wages amount to \$1167.25.

**PENALTY WAGES**

An employer is liable for penalty wages when it willfully fails to pay any wages or compensation of any employee whose employment ceases. Willfulness does not imply or require blame, malice, wrong, perversion, or moral delinquency, but only requires that that which is done or omitted is intentionally done with knowledge of what is being done and that the actor or omittor be a free agent. *In the Matter of Carl Odoms*, 27 BOLI 232, 240-41 (2006).

In its answer, Respondent denied any willful failure to pay based on the assertion that Claimant was never its employee. This defense fails because the Agency proved that Claimant was Respondent’s employee. Claimant credibly testified that Cuddy, one of the Respondent LLC’s two members, set Claimant’s work schedule and was aware of the hours that Claimant worked, but paid Claimant nothing. This amounts to a willful failure to pay Claimant the wages she was owed.

ORS 652.150(2) provides that “[i]f the employee or a person on behalf of the employee sends a written notice of nonpayment, the penalty may not exceed 100 percent of the employee’s unpaid wages \* \* \* unless the employer fails to pay the full amount of the employee’s unpaid wages \* \* \* within 12 days after receiving the written notice.” On January 20, 2006, the Agency sent a “Notice of Wage Claim” to Cuddy, Respondent’s registered agent, at her correct address, alleging that Claimant was owed \$958.25 in unpaid wages. There is no evidence that Cuddy did not receive that Notice. By serving the Order of Determination, the Agency also gave written notice to Respondent of Claimant’s wage claim in this proceeding. Respondent paid no wages after receiving the Notice of Wage Claim or being served with the Order of Determination. Therefore, penalty wages are not limited to 100% of Claimant’s unpaid wages and are calculated pursuant to ORS 652.150(1). The forum calculates penalty wages for Claimant as follows: \$7.25 per hour x 8 hours x 30 days = \$1,740.00.

### **ORS 653.055 CIVIL PENALTIES**

In its Order of Determination, the Agency alleged that Claimant is entitled to a civil penalty of \$1,740.00 based on Respondent’s failure to pay Claimant “the wages to which Claimant was entitled under ORS 653.010 to 653.261.” ORS 653.055 provides that the forum may award civil penalties to an employee when his or her em-

ployer pays that employee less than the wages to which he or she is entitled under ORS 653.010 to 653.261. “Willfulness” is not an element. *In the Matter of Captain Hooks, LLP*, 27 BOLI 21, 225 (2006). Since Claimant did not work for an agreed rate of pay, she was entitled to be paid the minimum wage, including overtime wages for any work she performed in excess of 40 hours in a work week. She received only \$10 for 161 total hours of work, including eight hours of overtime.

The statutory requirement to pay the minimum wage is found in ORS 653.025, and the separate requirement to pay overtime wages is contained in ORS 653.261 and OAR 839-020-0030, the Agency rule interpreting ORS 653.261. As both of these statutes fall within the range of statutes set out in ORS 653.055, Respondent’s failure to pay the minimum wage and overtime wages to Claimant entitles Claimant to a civil penalty in addition to the penalty wages awarded under ORS 652.150. The civil penalty is computed in the same manner as ORS 652.150 penalty wages (\$7.25 per hour x 8 hours x 30 days = \$1,740.00).

### **ORDER**

NOW, THEREFORE, as authorized by ORS 652.332 and as payment of the unpaid wages, penalty wages, and civil penalties Respondent owes as a result of its violations of ORS 652.140(1), the Commissioner of the Bureau of Labor and Industries hereby or

ders **Petworks LLC** to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 1045 State Office Building, 800 NE Oregon Street, Portland, Oregon 97232-2180, the following:

(1) A certified check payable to the Bureau of Labor and Industries in trust for Qwynne McKibben in the amount of FOUR THOUSAND SIX HUNDRED FORTY SEVEN DOLLARS AND TWENTY FIVE CENTS (\$4,647.25), less appropriate lawful deductions, representing \$1,167.25 in gross earned, unpaid, due, and payable wages, \$1,740.00 in penalty wages, and \$1,740.00 in civil penalties, plus interest at the legal rate on the sum of \$1,167.25 from January 1, 2006, until paid, and interest at the legal rate on the sum of \$3,480.00 from February 1, 2006, until paid.

sufficiently reliable to support the number of work hours claimed or to determine the amount of wages Respondent owed to either wage claimant. Based on the lack of credible evidence establishing Respondent failed to pay the wage claimants all wages owed, the order of determination alleging unpaid wages, penalty wages, and civil penalties was dismissed. ORS 652.140; ORS 652.150; ORS 653.055; ORS 653.025.

The above-entitled case came on regularly for hearing before Linda A. Lohr, designated as Administrative Law Judge ("ALJ") by Brad Avakian, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on April 28, 2008, in the Bureau of Labor and Industries Conference Room, located at 3865 Wolverine NE, Bldg. E-1, Salem, Oregon.

Jeffrey Burgess, an Agency employee, represented the Bureau of Labor and Industries ("BOLI" or "Agency"). Agustin A. Garcia ("Claimant Garcia") was present throughout the hearing and was not represented by counsel. Francisco A. Campos ("Claimant Campos") was not present at the hearing. J. Guadalupe Campuzano-Cazares aka "Lupe" Campuzano-Cazares ("Respondent") failed to appear for hearing in person or through counsel.

The Agency called as witnesses: Dianne Hays-Hatch, Claimant Garcia's former employer; Amparo Arriaga, Claimant

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**In the Matter of  
J. GUADALUPE CAMPUZANO-  
CAZARES**

**Case No.59-06**

**Final Order of Commissioner  
Brad Avakian**

**Issued September 4, 2008**

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**SYNOPSIS**

Although credible evidence established that Respondent employed at least one of the two wage claimants, the evidence was not

Garcia's spouse; Claimant Garcia; Katy Bayless, BOLI Wage and Hour Division Compliance Specialist; and Philip Rheiner, U. S. Bureau of Land Management Law Enforcement Ranger.

The forum received as evidence:

- a) Administrative exhibits X-1 through X-7;
- b) Agency exhibits A-1 through A-19 (filed with the Agency's case summary).

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

#### **FINDINGS OF FACT – PROCEDURAL**

1) On August 16, 2005, Claimant Garcia filed a wage claim with the Agency alleging Respondent had employed him from September 5, 2004, through January 9, 2005, and failed to pay his wages for the hours he worked during that period. Garcia alleged he earned \$6,000 and that Respondent paid him \$990 during the wage claim period.

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

3) On August 16, 2005, a wage claim form and wage assignment were filed with the Agency on Claimant Campos's behalf alleging Respondent had employed Campos from October 2 through December 5, 2004, and failed to pay his wages for hours he worked during that period. The wage claim form included assertions that Campos earned \$2,500 and that Respondent paid him \$500 during the wage claim period.

4) On December 23, 2005, the Agency issued Order of Determination No. 05-2464. In the Order, the Agency alleged Respondent had employed Claimants during the period September 5, 2004, through January 15, 2005, failed to pay them for hours worked in that period, and was liable to them for \$12,233.58 in unpaid wages, plus interest. The Agency also alleged Respondent's failure to pay all of the wages when due was willful and Respondent was liable to each Claimant for \$3,432 as penalty wages, plus interest. In addition to the penalty wages, the Agency alleged Respondent paid Claimants less than the wages to which they were entitled under ORS 653.010 to 653.261 and was therefore liable to each Claimant for \$3,432 in civil penalties, pursuant to ORS 653.055(1)(b), plus interest. The Order gave Respondent 20 days to pay the sums, request an administrative hearing and submit an answer to the charges, or demand a trial in a court of law.

5) Respondent was personally served with the Order of Determination on December 29, 2005, at 509 S. River Street, Newberg, Oregon. On January 19, 2006, Respondent filed an answer that alleged in pertinent part:

"This answer and request for hearing regarding Order of Determination "#05-2464 in accordance with OAR 839-050-0110 [sic]. This contested hearing is to allow proof that the wages and penalties are not due the claimants in this case. Furthermore, to show that all monies due to labor performed were indeed paid in full. Also, the original claimant was not employed or contracted by myself. To wit, Francisco A. Campos, #05-2464 [sic]."

6) On February 20, 2008, the Agency submitted a request for hearing. On February 26, 2008, a Notice of Hearing issued from the Hearings Unit stating the hearing would commence at 9:30 a.m. on April 29, 2008. With the Notice of Hearing, the forum included copies of the Order of Determination, a language notice, a Service-members Civil Relief Act notification, and copies of the Summary of Contested Case Rights and Procedures and the Contested Case Hearing Rules, OAR 839-050-0000 to 839-050-0440. The Notice of Hearing was mailed to Respondent at the address denoted in the Agency's request for hearing: 509 S. River Road, Newberg, OR 97132. The mailing was not returned to the

Hearings Unit by the U.S. Post Office.

7) At the Agency's request, the Hearings Unit appointed court certified Spanish speaking interpreter Terry Rogers to interpret witness testimony during the hearing.

8) On March 20, 2008, the ALJ ordered the Agency and Respondent each to submit a case summary that included: a list of all persons to be called as witnesses; identification and copies of all documents to be offered into evidence; and, for the Agency only, a brief statement of the elements of the claim and any wage and penalty calculations. The ALJ ordered the participants to submit their case summaries by April 18, 2008, and notified them of the possible sanctions for failure to comply with the case summary order. On the same date, the ALJ issued a notice pertaining to fax filings and timelines.

9) The Hearings Unit mailed the case summary order and notice pertaining to fax filings and timelines to Respondent at 509 S. River Road, Newberg, OR 97132, and to 509 S. River Street, Newberg, OR 97132. Both mailings were returned to the Hearings Unit marked as "undeliverable as addressed."

10) The Agency timely submitted a case summary. Respondent did not submit a case summary.

11) Respondent did not appear at the time and place set for hearing and no one appeared on

his behalf or advised the ALJ of any reason for his failure to appear. The ALJ ruled that Respondent was in default, having been properly served with the Notice of Hearing and having failed to appear at the hearing.

12) At the start of hearing, the ALJ explained the issues involved in the hearing and the matters to be proved.

13) The ALJ issued a proposed order on June 17, 2008, that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. The proposed order was mailed to Respondent at 509 S. River Road, Newberg, OR 97132, and to 509 S. River Street, Newberg, OR 97132. Both mailings were returned to the Hearings Unit marked as “undeliverable as addressed.”<sup>1</sup> Respondent did not file exceptions to the proposed order. The Agency requested and was granted an extension of time until June 30, 2008, to file exceptions. The Agency timely filed exceptions that are addressed in the opinion section of this Final Order.

#### **FINDINGS OF FACT – THE MERITS**

1) At times material, Respondent was an individual who entered into three separate “negotiated cash sale contracts” with

the U.S. Bureau of Land Management (“BLM”) to purchase a set number of vine maples in the Tillamook forest. Respondent signed the first two contracts on October 12 and 14, 2004, and both contracts expired on October 28, 2004. Respondent purchased 150 trees under the first contract. The third contract began and ended in early January 2005.

2) Claimant Garcia met Respondent while he was living with Respondent’s cousin. Garcia was living with both of them in Newberg, Oregon, when Respondent hired Garcia to perform work as a laborer in or around September 2004. At first, Garcia worked for Respondent in the Newberg area. Later, Garcia and Respondent harvested vine maples in the Tillamook forest near Tillamook, Oregon, under the contracts Respondent had with the BLM.

3) Claimant Garcia’s name appears as a “helper” on the first contract in the “Special Stipulations” section, along with the names: “Francisco Campus,” “Carlos Campusano,” “Raul Campusa,” and “Gloria Arreola.”<sup>2</sup> Respondent is shown as the purchaser and his name appears as “J. Guadalupe Campusano Cazarres.” On the contract, Respondent’s address is listed as 23900 N. Highway 99W, Newberg, Oregon. When asked about

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<sup>1</sup> The proposed order also was mailed to an address that appeared on one of the Agency’s exhibits and that mailing was not returned to the Hearings Unit by the U.S. Post Office.

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<sup>2</sup> The Agency submitted an exhibit (A-15) that was a copy of a facsimile transmission and the names of “Francisco Campus” and “Raul Campusa” appear to be cut off from the margin.

the other names on the contract, Garcia told Wage and Hour compliance specialist Katy Bayless that Carlos Campuzano ("Campusano") was Respondent's son, Raul Campuzano ("Campusa") was Respondent's brother, and they were digging their own trees under the contract. Claimant Garcia's name also appears as a helper on the other two contracts.

4) While working for Respondent in 2004, Claimant Garcia did occasional landscaping projects for Dianne Hays-Hatch at her home. Respondent worked with Garcia on at least one occasion and told Hays-Hatch that Garcia was working for him in his nursery business, that his business was small, and that Garcia was a valued worker.

5) After Respondent obtained the BLM contract to harvest vine maples, Respondent and Garcia drove to and from the Tillamook forest in Respondent's truck. They spent their work days pulling up plants, rolling them into "little balls," and loading them on the truck. When the truck was loaded, they delivered the plants to "where they were to go."

6) After he filed a wage claim with BOLI in August 2005, Claimant Garcia told Bayless that Respondent told him he would pay him \$3,000 per month and "if they earned a lot," he would pay him \$4,000 per month. Garcia told Bayless that Respondent would give him \$50 or \$100 and tell him that he would get paid the full amount "next time." Garcia also told her that Respondent "al-

ways paid him in cash" and "always paid in advances, he never paid the wages," and if Garcia had bills or rent due, Respondent paid the bills and rent on his behalf.

7) In a later interview, Claimant Garcia told Bayless that he does not read or write, but can write numbers. Garcia told Bayless that he wrote down "his numbers" each day on a piece of paper to track the number of hours he worked for Respondent. He also told Bayless that after his wife wrote the numbers on the wage claim calendar they "threw away the paper." During the interview, Garcia told Bayless that he and Respondent left each morning at 4 a.m. and often did not return from work until 10 p.m. after working in the forest from 6 a.m. until 7 p.m.

8) During a telephone conversation in December 2005, Bayless asked Claimant Garcia if the hours he reported on the wage claim calendar included a lunch period and he said the lunch periods were "taken out" and the calendar showed work hours only. When Bayless asked Garcia if the 14 hours per day recorded in October included travel time, he told her that Respondent told him that his pay included travel time and that he understood that he was paid from the time they started in the morning until "the time that they got back and were done." He told her that they loaded the truck before they left in the morning and unloaded the truck at night when they returned. Garcia also told

her that they could dig up 100 to 200 trees per day and that altogether they dug up 2,000 trees to sell "bare root" and 6,000 trees that they planted in pots.

9) Claimant Garcia's wife, Amparo Arriaga, recorded the following weeks and hours in 2004 and 2005 on the wage claim calendar that was included with Garcia's wage claim:

**2004**

Week ending September 11 = 57 hours

Week ending September 18 = 44.5 hours

Week ending September 25 = 61 hours

Week ending October 2 = 34 hours

Week ending October 9 = 69 hours

Week ending October 16 = 80 hours

Week ending October 23 = 84 hours

Week ending October 30 = 84 hours

Week ending November 6 = 74 hours

Week ending November 13 = 72 hours

Week ending November 20 = 72 hours

Week ending November 27 = 72 hours

Week ending December 4 = 72 hours

Week ending December 11 = 72 hours

Week ending December 18 = 72 hours

Week ending December 25 = 72 hours

**2005**

Week ending January 1 = 84 hours

Week ending January 8 = 84 hours

Week ending January 15 = 84 hours

According to the wage claim calendar, Garcia worked 12 and 14 hour days, six or seven days per week from October through mid-January. During the weeks ending Saturday, December 25, 2004, and January 1, 2005, Garcia represented that he worked 12 hours per day, Monday through Saturday.

10) Winter solstice occurs some time between December 20 and December 23 each year in the Northern hemisphere. The winter solstice began on December 21 in 2004.

11) When she completed the wage claim investigation, Bayless determined that given the number of hours Claimant Garcia reported on the wage claim calendar, the \$3,000 per month wage agreement he claimed on the wage claim form amounted to less per hour than the 2004 and 2005

statutory minimum wage rates.<sup>3</sup> For that reason, she computed Garcia's wages owed by multiplying the hours he recorded on the wage claim calendar for 2004 by \$7.05 per hour, and the hours he recorded for 2005 by \$7.25 per hour. Bayless also used the 2004 and 2005 minimum wage rates when she computed Garcia's daily rate for the purpose of calculating penalty wages. Based on her investigation, Bayless determined that Garcia was exempt from overtime wages during the wage claim period.

12) Based on Claimant Garcia's representations on the wage claim calendar that was prepared by his wife at his request, Bayless concluded that Claimant Garcia worked 1,151.5 hours from September 5 through December 31, 2004, and earned \$8,118.08 based on the statutory minimum wage of \$7.05 per hour. She concluded that Garcia worked an additional 180 hours through

January 15, 2005, and earned \$1,305 based on the statutory minimum wage of \$7.25 per hour. After deducting the \$990 Garcia claimed he was paid by Respondent, Bayless determined that Garcia was owed \$8,433.08.

13) On or about August 15, 2005, Amparo Arriaga, Claimant Garcia's wife, filled out a wage claim form and wage claim calendar on Claimant Campos's behalf. Except for two days, the wage claim calendar represents that between October 12 and December 5, 2004, Campos worked the same hours, days, and weeks that Claimant Garcia worked. Campos's name is printed on the signature line of the wage claim form and on the wage assignment in what appears to be the same handwriting used to fill out the wage claim form.

14) On October 6, 2005, the Agency mailed a "NOTICE OF WAGE CLAIM" to Respondent at 509 S. River, Newberg, OR 97132 that stated in pertinent part:

"You are hereby notified that FRANCISCO A. CAMPOS has filed a wage claim with the Bureau of Labor and Industries alleging:

"Unpaid wages of \$2,500 at the rate of \$50 per day from October 12, 2004 to December 5, 2004.

"IF THE CLAIM IS CORRECT, you are required to IMMEDIATELY make a negotiable check or money order payable to the claimant for the amount of wages claimed, less deduc-

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<sup>3</sup> Pursuant to OAR 839-020-0004(29), "salary" means "a predetermined amount consisting all or part of the employee's compensation for each pay period of one week or longer (but not to exceed one month) and in no instance will be any amount less than required to be paid pursuant to ORS 653.025." Based on the number of hours Claimant Garcia reported on the wage claim calendar and the amount he claimed was the agreed upon rate, and according to the ALJ's computations, Garcia's hourly rate never went below \$8.33 per hour during each pay period, and was as high as \$18.46 per hour in September 2004.

tions required by law, and send it to the Bureau of Labor and Industries at the above address.

"IF YOU DISPUTE THE CLAIM, complete the enclosed 'Employer Response' form and return it together with the documentation that supports your position, as well as payment of any amount which you concede is owed the claimant to the Bureau of Labor and Industries within ten (10) days of the date of this Notice.

"If your response to the claim is not received on or before October 21, 2005, the Bureau may initiate action to collect these wages in addition to penalty wages, plus costs and attorney fees."

15) On October 25, 2004, Bayless sent Respondent a certified letter that stated in pertinent part:

"Since you have not responded to our letter of October 6, 2005, it has become necessary to begin the Administrative Process in which we will serve upon you an Order of Determination and ultimately a judgment in this matter.

"You are advised that as of this date, in addition to the \$12,021.33 in wages owed to Agustin A. Garcia and Francisco A. Campos, penalty wages have accrued to the amount of \$6,960.00. This amount does not include interest or attorney fees.

"Please provide a daily work records [sic] for both wage claimants. If you do not have such records, there may be civil penalties of \$2,000.00 assessed for each person. Please provide copies of the payroll records to show total amounts paid to the wage claimants."

16) On October 26, 2006, Bayless contacted Respondent by telephone and documented the conversation in a contact report. Bayless noted in her report that Respondent stated he had received a demand for unpaid wages based on Claimant Campos's claim, but did not know about Claimant Garcia's wage claim.<sup>4</sup> He stated that Campos never worked for him and that he thought Campos was related to Garcia's wife. Bayless also noted that Respondent told her that Garcia started working for him on October 10, 2004, worked "only for a few days," and that Respondent has not worked since he was involved in a car accident on January 18, 2005. Respondent told Bayless that he had no proof of payments he made to Garcia.

17) Bayless relied on the wage claim form and calendar Arriaga prepared to compute Claimant Campos's unpaid wages. Bayless concluded that Claimant Campos worked 610 hours from October 12 through

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<sup>4</sup> There is no evidence in the record that the Agency mailed a Notice of Wage Claim to Respondent pertaining to Claimant Garcia's wage claim.

December 5, 2004, and earned \$4,300.50 based on the statutory minimum wage of \$7.05 per hour. Based on Arriaga's representation on the wage claim form that Respondent paid Campos \$500, Bayless concluded that Respondent owed Campos \$3,800.50.

18) Claimant Garcia speaks Spanish and testified through a certified court interpreter. There were no objections to the interpreter's translations during the hearing and the forum finds the interpreter's translations accurate and reliable. With this in mind and taking into account the limitations, difficulties, and inaccuracies sometimes associated with translations, the forum finds Claimant Garcia's testimony about the amount he was paid and the hours he worked unreliable. His testimony about the amount Respondent paid him during the wage claim period was inconsistent with his prior statements to the Agency. During the wage claim investigation, Garcia told Bayless that Respondent always paid him advances of \$50 or \$100, always paid in cash, and paid his bills and rent as well. Although he stated on the wage claim form that Respondent paid him \$990 in wages, he testified at hearing that he was paid only \$50 in cash during his employment. In an apparent attempt to explain the remaining \$940, Garcia testified that Respondent told him he was "taking rent off his pay." However, there is no evidence Garcia gave that information to Bayless during the investigation. In fact, his prior statement to Bayless suggests

that he received more than one cash advance and that the cash amounts were over and above the rent and bills Respondent paid on Garcia's behalf. The Agency's suggestion that Garcia's contradictory testimony may be attributed to a language problem between Bayless and Garcia is not supported by any evidence in the record.

Additionally, Claimant Garcia's testimony that he was never told what the monthly rent was on the house he shared with Respondent was not convincing. If he knew Respondent was "taking rent off his pay," a reasonably prudent person would make some effort over a four and a half month period, if not from the outset, to find out how much Respondent intended to deduct from his monthly wages for rent. Furthermore, his testimony begs the question of how he arrived at the \$940 figure if he did not know how much rent Respondent was paying on his behalf. His certainty about the amount Respondent agreed to pay him monthly and that it included his travel time was not congruent with his vague understanding about what he owed in rent each month and how it was paid.

Finally, Claimant Garcia's wage claim calendar and testimony about the hours he worked were inconsistent with the information he provided on the wage claim form. In response to three different questions on the wage claim form, Garcia stated his last work day for Respondent was

January 9, 2005. On the wage claim calendar he submitted with the wage claim form, he claimed 72 additional hours between January 10 and January 15, 2005. He gave no testimony that accounts for the additional hours and there is no other evidence that supports his claim for additional hours. Although he claimed he maintained a contemporaneous record of his actual hours worked, he did not at any time provide that record to the Agency and, in fact, stated that he “threw away” the “piece of paper” on which he purportedly recorded his daily hours. Notably, he had the wherewithal to produce photographic evidence to support his claim that Respondent employed him to harvest vine maples, but could not produce the very evidence that presumably would have supported his claim for all of the hours he claimed he worked. Raising further questions about the hours he worked, Claimant Garcia claimed he worked 72 hours per week harvesting trees in November and December 2004 which contradicts other credible evidence showing that Respondent’s tree harvesting contracts allowed harvesting of a set number of trees for a finite period in October 2004 and a finite period in January 2005. Overall, Garcia’s testimony was unreliable and credited only when it was a statement against interest or corroborated by other credible evidence.

19) Amparo Arriaga’s testimony that Claimant Garcia, her husband, could not read or write

numbers and used “hatch marks” to track his work hours in “a notebook” was inconsistent with Claimant Garcia’s prior statement to Bayless that, although he cannot read or write, he knows how to write numbers and had written the numbers on a piece of paper that he threw away after Arriaga wrote the numbers on the wage claim calendar. Also, Arriaga acknowledged that she prepared Garcia’s and Campos’s wage claim forms, including the wage assignments, and although she testified that Campos signed the wage assignment, Campos’s name, printed once on the wage claim and twice on the wage assignment form, appears to be in the same handwriting Arriaga identified as her own.<sup>5</sup> For those reasons, Arriaga’s testimony was not reliable and was credited only when it was corroborated by credible evidence.

20) Bayless’s testimony was credible. Although her present recollection was not certain, and her conclusion that Claimant Gar-

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<sup>5</sup> The Agency filed an exception objecting to the forum “rendering an opinion about whether handwriting on the wage claim forms is genuine without an exemplar from [Claimant Campos].” Arriaga testified that she filled out the forms and she authenticated her handwriting. The handwriting on the forms and the purported Campos “signatures” are sufficiently similar that any reasonable person could conclude that they were written by the same person, Arriaga, with or without Campos’s knowledge and consent.

cia was exempt from overtime was not correct based on the information she had at the time,<sup>6</sup> she credibly testified that the contact reports entered into evidence were prepared during the investigation and were an accurate representation of what she was told by Respondent, Claimant Garcia, and others she interviewed during the investigation. To the extent that she testified earnestly to her knowledge and belief, Bayless's testimony was credited in its entirety.

21) Rheiner and Hays-Hatch were credible witnesses.

#### **ULTIMATE FINDINGS OF FACT**

1) At times material, Respondent was a person who employed one or more persons to perform work in Oregon.

2) Respondent employed Claimant Garcia as a laborer in Oregon sometime between September 2004 and January 2005.

3) In 2004, the state minimum wage was \$7.05 per hour and in 2005 it was \$7.25 per hour.

4) Respondent paid Claimant Garcia at least \$990 between September 2004 and January 2005.

5) There is insufficient reliable evidence with which to determine

the approximate number of hours Claimant Garcia worked for Respondent or how much he was paid for actual hours worked.

6) There is insufficient reliable evidence with which to determine whether Claimant Campos was employed by Respondent or, if so, approximately how many hours he may have worked for Respondent or what he may have been paid.

7) BOLI sent Respondent written notice of nonpayment of wages to Claimant Campos on October 6, 2005, before issuing an Order of Determination on February 17, 2006.

8) There is insufficient evidence to conclude that Respondent is liable for unpaid wages to either Claimant.

#### **CONCLUSIONS OF LAW**

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

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

3) Respondent is not liable for unpaid wages under ORS 652.140 for failure to pay Claimants any wages earned and unpaid after their employment terminated.

4) Respondent is not liable for penalty wages under ORS 652.150 for willful failure to pay

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<sup>6</sup> Evidence showed Claimant Garcia performed work as a laborer in a nursery and in the Tillamook forest and not as an agricultural employee as agriculture is defined in OAR 839-020-0004(3).

wages or compensation to Claimants as provided in ORS 652.140.

5) Respondent is not liable for civil penalties under ORS 653.055 for failing to pay Claimants the minimum wage pursuant to ORS 653.025. ORS 653.055.

6) Under the facts and circumstances of this record, and according to the applicable law, the Commissioner of the Bureau of Labor and Industries has the authority to dismiss the wage claims filed by Claimants Garcia and Campos. ORS 652.332.

#### OPINION

Respondent failed to appear at hearing and was declared in default pursuant to OAR 839-050-0330. When a respondent defaults, the Agency must establish a prima facie case on the record to support the allegations in its charging document. *In the Matter of Sue Dana*, 28 BOLI 22, 29 (2006). The forum may consider unsworn assertions contained in a defaulting respondent's answer when making factual findings, but those assertions are overcome whenever controverted by other credible evidence. *Id.*

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

work Claimants performed for Respondent. *Id.*

#### CLAIMANT GARCIA

The Agency presented sufficient credible evidence to support its contention that Respondent employed Claimant Garcia in late 2004. In his answer, Respondent acknowledged employing Garcia "for a few days," denied owing any wages, but, despite his obligation to maintain proper records, failed to produce any records showing the hours Garcia worked. *See In the Matter of Tina Davidson*, 16 BOLI 141, 148 (1997)(determining that it is the employer's duty to maintain an accurate record of an employee's time worked). The Agency therefore relied, in part, on Garcia's representations on the wage claim form and during the wage claim investigation to determine that Garcia performed work for which he was not properly compensated and that he was owed \$8,433.08 for 1,331.5 hours of work performed from September 5, 2004, through January 15, 2005, when computed at the minimum hourly wage rate.

In this forum a claimant is not penalized by an employer's failure to produce records of hours or dates worked. The forum may rely on credible evidence produced by the agency, including a claimant's credible testimony, to determine the amount and extent of the claimant's work "as a matter of just and reasonable inference" and "may then award damages \* \* \* even though the result may be only approximate." *In the Matter of Francisco Cisneros*, 21 BOLI

190, 213-214 (2001). A claimant is not denied recovery on the ground that the claimant is unable to prove the precise extent of uncompensated work *when the inability is based on an employer's failure to keep proper records in conformance with the employer's statutory duty.*

However, contrary to the Agency's contention in its exceptions to the proposed order, the forum need not "fashion a remedy" when a claimant claims to have maintained a contemporaneous record of the precise number of uncompensated hours worked. The only issue in such a case is whether the claimant's contemporaneous records and related testimony are credible. See *In the Matter of Stephanie Nichols*, 24 BOLI 107, 120 (2002)(when respondent did not keep the required record of claimant's work hours, the forum found claimant's contemporaneous records and testimony credible and relied on both to determine the amount and extent of claimant's work). The same holds true in a default case. See *In the Matter of G & G Gutters, Inc.*, 23 BOLI 135, 145 (2002)(when respondent did not appear at the hearing, but admitted in its answer that it employed claimants, the forum relied on the claimants' credible testimony and reliable contemporaneous records created by each claimant to determine the extent of the work they performed for respondent).

The only issue in this case was whether Claimant Garcia's testi-

mony and contemporaneous record he claimed he maintained were credible. Having found that Garcia's testimony was inconsistent with his prior statements to the Agency and that there is no credible evidence corroborating his testimony that he maintained a daily record of the actual hours he worked, the forum will not speculate or draw inferences about wages owed to Garcia. See *In the Matter of Burrito Boy, Inc.*, 16 BOLI 1, 12 (1997)(the forum will not speculate or draw inferences about wages owed based on insufficient or unreliable evidence). Absent any credible evidence showing Garcia was improperly compensated, or the extent to which he was not paid for approximate hours worked, the forum concludes that Respondent is not liable to Claimant Garcia for any unpaid wages. Moreover, absent a valid wage claim, the Agency's allegation that Respondent is liable for penalty wages under ORS 652.150 and civil penalties under ORS 653.045 fails.

#### **CLAIMANT CAMPOS**

Claimant Campos did not appear at the hearing and there is no evidence in the record that compliance specialist Bayless ever interviewed Campos about his wage claim or employment with Respondent. Furthermore, Arriaga's testimony that she prepared Campos's wage claim form and the forum's observation that there is a noticeable similarity between Campos's purported "signature" and Arriaga's handwriting raise a question about

whether Campos made the claim or was even aware that a wage claim had been prepared and filed on his behalf.<sup>7</sup> The only evidence addressing the issues raised in Campos's wage claim is Claimant Garcia's testimony and that was deemed not credible. For those reasons, the forum concludes that Respondent is not liable for any wages allegedly earned and owed to Campos and therefore is not liable for penalty wages or civil penalties as the Agency alleged.

### AGENCY'S EXCEPTIONS

The Agency's exceptions include objections to specific factual findings, certain credibility findings, and the ALJ's application of law to certain facts.

### Factual Findings

#### *Finding of Fact – The Merits 3*

The Agency's assertion that Claimant Campos's name appears in the "Special Stipulations" section of the first tree harvesting contract cannot be confirmed in the record. Although the Agency argues that "Francisco Campos is identified, but the letter 'o' in his last name is simply not closed at the top," the record shows that the letter is more similar to the "u" in Campusano and other similar names that appear on the document than it is to the "o" in the other names, including Carlos Campusano's name. For that reason, the forum cannot find as a matter of fact that Campos's name

appears on the document. Contrary to the Agency's argument, the tree harvesting contract does not conclusively establish that Respondent employed Campos.

Even if the Agency had established that Respondent employed Campos, there is no evidence the compliance specialist confirmed the wage claim by interviewing Campos at any time before or after the wage claim was filed. Campos did not fill out the wage claim form and there is no evidence he personally filed the form Arriaga prepared on his behalf. Campos did not appear as a witness at the hearing and no explanation was offered for his failure to appear. Other than uncorroborated and otherwise unreliable hearsay statements, there is no evidence showing the hours he allegedly worked or the amount Respondent allegedly paid. The Agency's exceptions regarding the factual finding and related findings about the lack of evidence supporting Campos's wage claim are **DENIED**.

#### *Finding of Fact – The Merits 5*

The Agency objects to the factual finding describing Claimant Garcia's job duties contending that the "testimony was that the claimants rolled the root balls of the vine maples into burlap" and that "they did not roll the vine maples into little balls." That particular finding is based on Garcia's testimony that his job was to "pull up plants, roll them in little balls that they come in, or that they put them in, and take them to the truck and once they were in

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<sup>7</sup> See Findings of Fact – The Merits 13 & 19.

the truck we would take them to where they were supposed to go.” However, for clarity, the reference to “little balls” in the factual finding has been modified with the addition of quotation marks indicating that the reference is verbatim. The Agency’s exception otherwise has no merit and is **DENIED**.

**Credibility Findings**

The Agency’s objections to the credibility findings primarily focused on those findings involving testimony the forum deemed implausible, inconsistent, or contradictory. Some of the Agency’s points regarding the findings related to implausibility were well taken and those findings were removed from the order. The credibility findings based on inconsistent or contradictory testimony were modified for clarity.

**ALJ’s Application of Law to Facts**

The Agency primarily argues that because Respondent never produced required time records and failed to appear at hearing, “some measure of deference for the [Claimants] seems appropriate.” The Agency cites long held principles that the forum recognized in the proposed order. For clarity, the opinion section of this order has been modified to distinguish this case from those cases involving a claimant whose inability to prove the precise extent of uncompensated work is because the employer failed to keep proper records pursuant to the employer’s statutory duty.

Having considered the Agency’s arguments, other than the modifications to the factual findings, credibility findings, and opinion section of this order, the Agency’s remaining exceptions are **DENIED**.

NOW, THEREFORE, as Respondent has been found not to owe Claimant Agustin Garcia wages, the Commissioner of the Bureau of Labor and Industries hereby orders that Agustin Garcia’s wage claim against **J. Guadalupe Campuzano-Cazares aka Lupe Guadalupe Campuzano-Cazares** be and is hereby dismissed.

FURTHERMORE, as Respondent has been found not to owe Claimant Francisco Campos wages, the Commissioner of the Bureau of Labor and Industries hereby orders that Francisco Campos’s wage claim against **J. Guadalupe Campuzano-Cazares aka Lupe Guadalupe Campuzano-Cazares** be and is hereby dismissed.

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**In the Matter of  
FORESTRY ACTION COMMITTEE OF THE ILLINOIS BASIN INTEREST GROUP**

**Case No. 25-07**

**Final Order of Commissioner  
Brad Avakian  
Issued October 31, 2008**

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**SYNOPSIS**

Respondent employed Claimant as a forestry technician at the rate of \$12 per hour. Claimant was not an independent contractor as Respondent claimed, but was an employee entitled to the agreed upon rate for all hours worked and one and one half times the agreed upon rate for those hours that exceeded 40 in a regular workweek. Respondent kept no records of the hours Claimant worked and the forum awarded her \$2,274 in unpaid wages based on her credible testimony concerning her pay rate and the amount and extent of work she performed. Respondent's failure to pay was willful and the forum ordered Respondent to pay \$2,880 in penalty wages in addition to the unpaid wages. ORS 652.140; ORS 652.150; ORS 653.010; ORS 653.261.

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The above-entitled case came on regularly for hearing before

Linda A. Lohr, designated as Administrative Law Judge ("ALJ") by Brad Avakian, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on August 12, 2008, in Room 4 of the Employment Department/Worksource Oregon, located at 119 N. Oakdale Avenue, Medford, Oregon.

Alan McCullough, an Agency employee, represented the Bureau of Labor and Industries ("BOLI" or "Agency"). Hazel Danene Reagan ("Claimant") was present throughout the hearing and was not represented by counsel. Forestry Action Committee of the Illinois Basin Interest Group ("Respondent") appeared through Susan Chapp, Respondent's executive director and authorized representative.

The Agency called as witnesses: Susan Chapp, Respondent's executive director; Claimant; and Margaret Pargeter, BOLI Wage and Hour Division Compliance Specialist.

Respondent called as witnesses: Kristine Miller, Respondent's former employee; Robin Wilson, Respondent's office manager; and Susan Chapp.

The forum received as evidence:

- a) Administrative exhibits X-1 through X-20;
- b) Agency exhibits A-1 through A-22, A-24 (filed with the Agency's case summary), A-25, and A-26 (submitted during the hearing).

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

**FINDINGS OF FACT –  
PROCEDURAL**

1) On October 13, 2005, Claimant filed a wage claim with the Agency alleging that Respondent had employed her from December 15, 2004, through May 20, 2005, that she earned \$2,200 between April 18 and May 18, 2005, and that Respondent failed to pay her the wages she earned for the hours she worked during that period.

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

3) On March 9, 2006, the Agency issued Order of Determination No. 05-3203. In the Order, the Agency alleged Respondent had employed Claimant during the period April 18 through May 18, 2005, failed to pay her for all hours worked in that period, and was liable to her for \$2,200 in unpaid wages, plus interest. The Agency also alleged Respondent's failure to pay all of the wages when due was willful and Respondent was liable to Claimant for \$3,300 as penalty wages, plus interest. The Order gave Re-

spondent 20 days to pay the sums, request an administrative hearing and submit an answer to the charges, or demand a trial in a court of law.

4) Respondent was served with the Order of Determination and thereafter, through counsel, timely filed an answer and requested a hearing. In its answer, Respondent denied the claimed rate of pay, the accuracy of the claimed work hours, and the amount claimed as unpaid wages. Respondent further denied that it willfully failed to pay Claimant because 1) "it was not financially able to do so," 2) "it had a valid reason to believe that the contested wages claimed by [Claimant] were not in fact, owed," and 3) "the amount of wages listed in the Order of Determination were not owed, or at least were not owed in the amount demanded." Respondent specifically contested the number of hours Claimant worked and the amount of pay per hour. As an affirmative defense, Respondent alleged Claimant was an independent contractor and not an employee as the Agency alleged.

5) On March 4, 2008, the Agency submitted a request for hearing. In the request, the Agency noted that on March 3, 2008, Respondent's counsel advised the Agency case presenter that he no longer represented Respondent. On March 13, 2008, the Hearings Unit issued a Notice of Hearing stating the hearing would commence at 9:00 a.m. on June 17, 2008. With the Notice of

Hearing, the forum included copies of the Order of Determination, a language notice, a Service-members Civil Relief Act notification, and copies of the Summary of Contested Case Rights and Procedures and the Contested Case Hearing Rules, OAR 839-050-0000 to 839-050-0440.

6) On March 20, 2008, the ALJ issued an order requiring Respondent to obtain counsel or file a letter authorizing a corporate officer or employee to represent Respondent at the hearing.

7) On March 27, 2008, Respondent's executive director timely filed a letter designating board member Robert Pelletier as Respondent's authorized representative.

8) On April 2, 2008, the ALJ ordered the Agency and Respondent each to submit a case summary that included: a list of all persons to be called as witnesses; identification and copies of all documents to be offered into evidence; and, for the Agency only, a brief statement of the elements of the claim and any wage and penalty calculations. The ALJ ordered the participants to submit their case summaries by June 6, 2008, and notified them of the possible sanctions for failure to comply with the case summary order.

9) On April 23, 2008, the Agency moved to postpone the hearing based on the Agency case presenter's involvement in a family member's wedding sched-

uled close to the hearing date. Based on the Agency's representation that Respondent had no objection to a postponement, the ALJ granted the Agency's motion and the hearing was reset to commence on August 12, 2008.

10) On July 14, 2008, Respondent notified the Hearings Unit that its authorized representative had been changed from Robert Pelletier to Respondent's executive director Susan Chapp.

11) On July 22, 2008, the Agency moved to amend the Order of Determination by interlineation to lower the amount of wages and penalty sought and to include a reference to overtime wages. Respondent did not file a response within the time allowed under the ALJ's interim order, and the Agency's motion was granted. The amended Order of Determination alleged that Respondent owed Claimant \$2,039.28 in unpaid wages and \$2,880 in penalty wages, and alleged a violation of overtime provisions.

12) The Agency and Respondent timely submitted case summaries.

13) On August 1, 2008, the Agency filed an addendum to its case summary.

14) On August 6, 2008, the Agency, with the ALJ's permission, filed a second addendum to its case summary by facsimile transmission, and mailed the original to the Hearings Unit for inclusion in the hearing record.

15) On August 7, 2008, the ALJ issued an addendum to the order granting the Agency's motion to amend. The addendum pointed out that although Respondent did not object to the Agency's amendment, the allegations were deemed denied for the purpose of hearing and Respondent was not required to file an amended answer.

16) At the start of hearing, the ALJ verbally advised the participants of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

17) The ALJ issued a proposed order on October 16, 2008, that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. Neither the Agency nor Respondent filed exceptions.

#### **FINDINGS OF FACT – THE MERITS**

1) At times material, Respondent was a domestic nonprofit corporation consisting of a volunteer citizen's committee that received funding through grant agreements from multiple sources to perform various projects, such as tree planting and weed control.

2) In August 2003, Respondent, through its executive director, Susan Chapp, signed a grant agreement with the Oregon Watershed Enhancement Board ("OWEB") to perform work on the Illinois Valley Riparian Tree Planting Project. OWEB granted Respondent funds of up to

\$79,765.00 for the two year project. The project's budget included \$2,520 per month for a 10-month tree planting project coordinator position and \$2,520 per month for a 12-month forestry technician position. The project completion and grant expiration date was June 30, 2005. To receive funds under the grant, Respondent was required to track its expenditure and submit records to OWEB showing what work was done on each project. To help meet that requirement, workers were asked to maintain a daily work log and turn it in to Respondent before receiving a paycheck. Chapp was the project manager for the entire project and signed the paychecks.

3) On December 15, 2004, Chapp hired Claimant as the tree planting project coordinator to finish up the OWEB tree planting project's second year. Claimant was hired to complete the previous coordinator's work after the coordinator left the position. Claimant had no experience in the field, but Chapp believed that Claimant's background in education was an asset to the position and she personally recruited Claimant who quit her jobs at a café and as a substitute school bus driver to work for Respondent.

4) Chapp agreed to pay Claimant \$2,200 per month and to pay her twice monthly.

5) Claimant's duties included office work and community outreach. Her work hours were from 8 a.m. to 4 p.m. Occasionally, she was required to attend and

participate in community meetings after her scheduled work hours. Respondent provided Claimant a cubicle with a desk, file cabinet, telephone, and computer. Respondent gave Claimant business cards to use and paid her mileage for using her car while performing outreach work. As project coordinator, Claimant performed data entry, prepared educational materials and used them for community outreach to schools, public landowners and the local community, made telephone calls, attended weekly board meetings, recruited volunteers to plant trees, sought volunteers and donations for an outreach potluck, published advertisements in newspapers, and posted fliers. Chapp was Claimant's immediate supervisor and any educational materials or advertisements that Claimant prepared were subject to Chapp's pre-approval. Claimant received her assignments during Monday morning meetings or through daily discussions with Chapp.

6) As part of the grant agreement, Chapp asked Claimant to maintain a daily work log and prepare a final report at the end of her tenure as the tree planting project coordinator. Claimant maintained a log from December 15, 2004, through April 15, 2005. On or about April 15, 2005, Claimant prepared and completed a final report and gave it to Chapp. Between December 2004 and April 2005, Respondent paid Claimant \$7,700 in wages and \$54.72 in mileage expenses. When her job ended April 15, 2005, Respondent still owed

Claimant wages totaling \$1,280 for her tree planting project coordinator work.

7) On or about April 18, 2005, Chapp asked Claimant to stay on and finish up the forestry technician position for 25 hours per week and fill the Onion Camp weed control coordinator position for 15 hours per week. Chapp offered Claimant \$12 per hour to perform both jobs and Claimant agreed to stay and work for that amount. Claimant replaced Mike Mitchell who had received \$2,200 per month as the forestry technician.

8) Claimant's work hours were from 8 a.m. to 4 p.m., Monday through Thursday, and from 9 a.m. to 4 p.m. on Fridays. Claimant worked in the office, but spent much of her time in the field monitoring tree growth. Chapp instructed Claimant to go through the tree planting files and determine which trees and property had not been monitored by the previous forestry technician. Chapp gave Claimant instructions about the monitoring process and gave her a GPS monitoring device and calibration tool to locate the trees and measure their growth. At Chapp's request, Claimant kept a record of her work hours so her hours would not exceed the number allotted each week for each position. Chapp told her to flex her time, if necessary, to avoid exceeding the allotted hours.

9) Between April and May 2005, Claimant had trouble obtaining her final paycheck from Respondent for her previous work

as the tree planting project coordinator. During that time, Chapp asked Claimant to manipulate the tree monitoring data and Claimant declined. For those reasons, Claimant decided to quit working for Respondent. Claimant's last work day was May 18, 2005. Shortly after she quit, Claimant turned in the GPS tracking device and calibration tool, along with a note reminding Chapp that Respondent had not yet paid her in full for her tree planting project coordinator work.

10) After Claimant quit, Chapp asked Kristine Miller to finish up where Claimant left off. Chapp used the remaining grant money budgeted for the forestry technician position to pay Miller. Miller worked 40 hours per week and received a check on June 10, 2005, for \$1,393.48 that included \$123.48 for expenses, and one on June 24, 2005, for \$1,270.

11) Sometime in June 2005, Claimant received a check from Respondent, dated June 10, 2005, for \$1,280, the amount Respondent owed Claimant for her work as tree planting project coordinator. Before paying Claimant, Chapp asked office manager Robin Wilson to generate a work log "for the funders." Although Wilson objected to creating the document, she understood the documentation was necessary before OWEB would furnish the money to pay Claimant. Wilson created a document that she knew was a false report.

12) From April 18 through May 18, 2005, Claimant worked

187 hours, including 5 overtime hours. Based on the agreed \$12 per hour wage rate, Claimant earned \$2,274 (\$12 per hour x 182 hours, plus the overtime rate of \$18 per hour x 5 hours).

13) On June 30, 2005, Claimant left a telephone message reminding Chapp that she was still owed wages for her forestry technician and weed control coordinator work. When Chapp failed to respond, Claimant hand delivered a letter dated July 22, 2005, to one of Respondent's board members, Bill Reid, in which Claimant requested that Respondent pay her for her work as forestry technician and weed control coordinator. When she received no response from Reid, she sent him another letter dated August 1, 2005, reiterating her request for wages and stating, in pertinent part:

"By law, I am supposed to be paid 5 days after my last day of work. I have been more than patient, and if I must resort to filing a complaint with the Bureau of Labor, I will also notify the funders for these two positions. As of this date, I have heard no word from the Director, or Board, concerning my pay. Please call and let me know when you receive this letter whether or not I need to file the paperwork I have already completed."

Claimant did not receive a response from Reid and did not receive her wages.

14) On or about August 23, 2005, Chapp sent Claimant a letter stating in pertinent part:

“On June 31<sup>st</sup> [sic], there was a brief phone message from you saying you had just realized it was the last day you could get paid from the Tree Planting Project and that you were coming in later. We made certain there was someone in the office all that day until 6 p.m. You did not come in. I assumed you had decided you were not owed any more money.

“At some later point, you gave a letter dated July 22<sup>nd</sup> to FAC board member Bill Reid. You then delivered another letter dated August 1<sup>st</sup>. Both letters indicated that you believed you still had money coming to you. This is an inaccurate assumption on your part.

“Your contract as Tree Planting Project Coordinator states that the last payment is contingent upon completion of stated duties. You did not complete those duties. Your draft final report had to be mostly rewritten by others. The volunteer data base was only half done. Someone else had to complete it. We paid you, not because you were due the money, but because we chose to land on the side of overpay rather than underpay.

“In your attempt to complete the Forestry Technician work, the monitorings you performed were incomplete, with many

blanks on the monitoring forms, so that the monitorings all had to be done again. You took some monitoring photos and put them in the computer but did not identify or label them, so they are useless. The final Forestry Technician pay is contingent on completion of duties. You did not complete the duties and you did not perform the work you did in a satisfactory manner.

“I offered you the position of Volunteer Weed Coordinator for Onion Camp because of your help in getting people to a weed meeting. However, there is no product from the job. There is no volunteer list and/or contact information put together by you. There is no documentation of any work you may or may not have done in this capacity.

“Due to your lack of performance and satisfactory product in all three job titles, as detailed in the job descriptions and contracts, the Forestry Action Committee does not owe you further pay. Indeed, due to your lack of performance, we were not required to give the final coordinator check at all.

“I hope this letter clarifies any lingering questions on your part.”

15) Claimant filed a wage claim on October 13, 2005.

16) On November 14, 2005, the Agency mailed a “NOTICE OF

WAGE CLAIM" to Respondent that stated in pertinent part:

"You are hereby notified that HAZEL D. REAGAN has filed a wage claim with the Bureau of Labor and Industries alleging:

"Unpaid wages of \$2,200 at the rate of \$12 per hour from April 18, 2005, to May 18, 2005.

"IF THE CLAIM IS CORRECT, you are required to IMMEDIATELY make a negotiable check or money order payable to the claimant for the amount of wages claimed, less deductions required by law, and send it to the Bureau of Labor and Industries at the above address.

"IF YOU DISPUTE THE CLAIM, complete the enclosed 'Employer Response' form and return it together with the documentation that supports your position, as well as payment of any amount which you concede is owed the claimant to the Bureau of Labor and Industries within ten (10) days of the date of this Notice.

"If your response to the claim is not received on or before November 29, 2005, the Bureau may initiate action to collect these wages in addition to penalty wages, plus costs and attorney fees."

17) On November 29, 2005, Respondent submitted a response through counsel disputing Claimant's wage claim, stating in pertinent part:

"Ms. Reagan voluntarily walked away from her work for Forestry Action Committee, she completely failed to perform a large amount of the work for which she had been hired, she breached the terms of her contract with Forestry Action Committee, she refused to communicate with the organization after leaving it, and in spite of all that, the organization has already paid her much more than she actually earned through her work for the organization. Accordingly, Forestry Action Committee must dispute her claim for wages."

Along with its response, Respondent submitted a completed Wage Claim Investigation/Employer Response form. On the form, Respondent stated Claimant was "hired as a contractor by the volunteer executive director S. Chapp," that the agreed upon rate of pay at hire was "\$2,200/month upon completion of specific tasks," and that the agreed upon rate at termination was the "same." In the response, Respondent stated that it did not keep a record of Claimant's work hours, explaining that Claimant was "hired & paid by the task." Chapp provided Respondent's counsel with all of the information contained in Respondent's response and the completed Wage Claim Investigation/Employer Response form.

18) In its answer to the Order of Determination, Respondent stated that for the period April 18 through May 18, 2005, Claimant

worked 143 hours. Regarding Claimant's agreed upon rate of pay, Respondent stated, in pertinent part:

"[T]here was no agreement at all with Ms. Reagan regarding an hourly rate of pay. Claimant was hired to perform specific tasks as an independent contractor, pursuant to the attached contract. The pay was to be based on her performance and completion of those tasks. She did not perform or complete the required tasks, and then she quit without telling anyone, by just leaving one day and not returning and without telling anyone that she was quitting.

"In actual fact, Ms. Reagan was an unsatisfactory employee, who did a poor job of performing the tasks she was hired to do. As a result of her poor job performance, if she had been paid by the hour, Forestry Action Committee would not have paid Ms. Reagan at the rate of \$10.00 per hour, which is the top of the pay range for comparable work. That high rate is only available to people that work for a longer time and show that their job performance exceeds expectations. That does not describe Ms. Reagan or the quality of work she performed for Forestry Action Committee.

" \* \* \* \* \*

"In summary, if Forestry Action Committee is required to pay anything further to Ms.

Reagan, then it objects to payment at any rate higher than \$8.00 per hour, which is what she would have been earning if she were being paid by the hour, based on her poor job performance, and based on the fact that the highest rate of pay for comparable work with this organization was \$10.00 per hour."

There were no signatures on the "attached contract." Chapp provided Respondent's counsel with all of the information contained in the answer.

19) In a letter dated August 23, 2006, that was sent to Respondent along with a copy to Claimant, the Internal Revenue Service ("IRS") held that Claimant was Respondent's employee in 2004 and 2005 and not an independent contractor under the federal guidelines. The letter was in response to "a Form SS-8 that was submitted to request a determination of employment status for Federal employment tax purposes." According to the letter, the IRS had solicited information from Respondent and Claimant, but had not received any information from Respondent. The letter states that the IRS determination was based on the application of law to the information presented or discovered during the course of the IRS investigation. Although the determination pertained only to Claimant's work relationship, the IRS emphasized that the ruling "may be applicable to any other individuals engaged by the Forestry Action Committee under

similar circumstances” and encouraged Respondent to comply with the determination by filing or amending its employment tax returns.

20) Following the IRS audit, Respondent paid all back taxes and reclassified some of its workers. Later, in a response to the Agency’s discovery request, Respondent stated “[w]e now understand the difference between an employee and a contractor, but we did not understand the legal distinction when [Claimant] was hired.”

21) On May 1, 2005, Respondent’s bank account had a beginning balance of \$13,787.27. The deposits for May totaled \$12,475 and the withdrawals totaled \$15,727.57. The ending balance on May 31, 2005, was \$10,534.70. In May 2005, Chapp signed checks on Respondent’s behalf for newspaper advertisements, phone bills, employee salaries, weed crew wages, and reimbursements for Chapp and her son. During that month, Chapp also signed a \$3,497.50 check to the National Forest Foundation for the mushroom project.

22) Claimant was a credible witness. Her testimony was straightforward and consistent with her prior statements to the Agency and other credible evidence in the record. Claimant’s testimony was not impeached in any way and is credited in its entirety.

23) Susan Chapp’s testimony conflicted with prior statements she made to the Agency during the wage claim investigation, contradicted other credible testimony, and was internally inconsistent. For example, she firmly denied paying anyone performing work comparable to Claimant’s the equivalent of \$12 per hour, but later retracted her testimony when confronted with Respondent’s records showing that employees in comparable positions were paid the equivalent of \$12 or more per hour, and in some cases, as much as \$16 per hour. Her testimony that Respondent’s “bottom” pay rate was \$10 per hour and that Respondent never paid anyone \$8 per hour conflicted with her earlier testimony and prior statement to the Agency that employees in positions comparable to Claimant’s were paid only \$8 per hour and if they performed well and competently, could receive an increase to \$10 per hour, which was “the top of the range for comparable work.”

Prior to hearing, Chapp told the Agency that the person hired to replace Claimant “was paid \$10 per hour, the same as we would have paid [Claimant] if she had been working as an employee.” During the hearing, when confronted with documentary evidence showing Claimant’s replacement was paid the equivalent of \$16 per hour to finish up the forestry technician job, Chapp acknowledged her prior statement was “inaccurate,” but insisted that Claimant’s replace-

ment received less than \$10 per hour because she had to work over 50 hours per week to meet the grant obligation. However, Kristine Miller credibly testified that she was hired to finish the forestry technician job for the remaining grant money and that she worked a 40-hour workweek. Miller's testimony that Respondent paid her \$2,540 to finish the job, equating to \$16 per hour for a 40-hour workweek, was corroborated by credible documentary evidence showing she was paid that amount.

Furthermore, Chapp's acknowledgement that Claimant was asked to stay on and finish up the forestry technician position after her first job with Respondent concluded, belied her statements and testimony that Claimant's work performance was unsatisfactory and that she was overpaid for her work as tree planting project coordinator. Absent any evidence Claimant was ever disciplined or rebuked for poor work performance and given Respondent's subsequent efforts to keep Claimant on the payroll, Chapp's unsubstantiated assertions are decidedly disingenuous.

Chapp's credibility was further undermined by her admission that she asked Robin Wilson to create a false record in order to comply with grant requirements. While Chapp's motives appeared driven by a sincere commitment to Respondent's community projects, they do not justify distorting facts to protect Respondent's interests. Her demonstrated bias and con-

flicting positions about Claimant's pay rate and work performance rendered her testimony unreliable overall. Consequently, it was credited only when it was an admission, statement against interest, or corroborated by credible evidence in the record.

24) Robin Wilson's testimony was not credible. Her admission that she created a false record at Chapp's behest in order to comply with grant requirements illustrates a willingness to fabricate if it serves Respondent's interests. Bias may be inferred by her acknowledgement that she and her family members were Respondent's longtime employees and that Respondent was her sole source of income. Her misguided loyalty also was evident when, several times during cross-examination, Wilson, visibly nervous, turned to Chapp for answers to particular questions. Overall, her testimony was not convincing and was credited only when it was an admission, statement against interest, or corroborated by credible evidence in the record.

25) Kristine Miller and Margaret Pargeter were credible witnesses.

#### **ULTIMATE FINDINGS OF FACT**

1) At times material, Respondent was a nonprofit corporation that employed one or more persons to perform work in Oregon.

2) Respondent employed Claimant as a forestry technician and weed control coordinator from April 18 through May 18, 2005.

3) Respondent agreed to pay Claimant \$12 per hour.

4) Between April 18 and May 18, 2005, Claimant worked 187 hours, 5 of which were hours that exceeded 40 hours in a given work week.

5) Claimant's last day of work was May 18, 2005.

6) From April 18 through May 18, 2005, Claimant earned \$2,274. Respondent did not pay Claimant any part of the wages earned and owes Claimant \$2,274 in due and unpaid wages.

7) On Claimant's behalf, BOLI sent Respondent written notice of nonpayment of wages on November 14, 2005, before issuing an Order of Determination on May 9, 2006.

8) Respondent willfully failed to pay Claimant \$2,274 in earned, due and payable wages. Respondent has not paid the wages owed and more than 30 days have elapsed from the date the wages were due.

9) Penalty wages for Claimant, computed pursuant to ORS 652.150, equal \$2,880.

**CONCLUSIONS OF LAW**

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

2) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the subject

matter and the Respondent herein. ORS 652.310 to 652.414.

3) Respondent violated ORS 652.140 by failing to pay Claimant all wages earned and unpaid after Claimant's employment terminated.

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

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

**OPINION**

The Agency was required to prove: 1) Respondent employed Claimant; 2) any pay rate upon which Respondent and Claimant agreed, if it exceeded the minimum wage; 3) Claimant performed work for which she was not properly compensated; and 4) the amount and extent of work Claimant performed for Respondent. *In the Matter of Sue Dana*, 28 BOLI 22, 29 (2006). Respondent had the burden of proving its affirmative defenses that Claimant was an independent contractor during the wage claim period and that, in the alternative, Respondent was financially unable to pay any wages owed when Claimant

quit working for Respondent. See *In the Matter of Gary Lee Lucas*, 26 BOLI 198, 210 (2005)(the defense of independent contractor is an affirmative one and a respondent bears the burden proof); see also *In the Matter of Captain Hooks, LLP*, 27 BOLI 211, 223 (2006)(claiming financial inability to pay wages at the time wages accrued is an affirmative defense). Respondent further contends that even if Claimant was an employee, she was not entitled to \$12 per hour, and her work performance “in all three job titles” was not satisfactory; therefore, Respondent owed her no further pay.

## UNPAID WAGES

### A. Employment Relationship

ORS 652.310(1) defines “employer” as:

“[A]ny person who in this state, directly or through an agent, engages personal services of one or more employees \* \* \*.”

ORS 652.310(2) defines “employee” as:

“[A]ny individual who otherwise than as copartner of the employer or as an independent contractor renders personal services wholly or partly in this state to an employer who pays or agrees to pay such individual at a fixed rate, based on the time spent in the performance of such services or on the number of operations accomplished, or quantity produced or handled.”

Respondent’s allegation that Claimant signed a contract and agreed to work as an independent contractor is not supported by credible evidence. Even if Respondent had produced a contract with Claimant’s signature, an “independent contractor agreement” is not controlling when determining whether a worker is an independent contractor. Rather, the forum looks at the totality of the circumstances to determine the actual working relationship. *In the Matter of The Alphabet House*, 24 BOLI 262, 278 (2003). Respondent’s argument that their mutual understanding factors into the totality of the circumstances has no merit. It matters not that a worker agrees, orally or in writing, to work as an independent contractor.<sup>1</sup> Intent does not control whether an employment relationship exists. *In the Matter of Ann L. Swanger*, 19 BOLI 42, 55 (1999).

The test for distinguishing an employee from an independent contractor requires full inquiry into the true “economic reality” of the employment relationship based on a particularized inquiry into the facts of each case. *In the Matter of Kilmore Enterprises*, 26 BOLI 111, 120 (2004). The forum considers five factors when determining the degree of economic dependency in any given case and no one factor is dispositive: (1) the degree of control

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<sup>1</sup> There is no credible evidence that Claimant agreed to work as an independent contractor.

exercised by the alleged employer; (2) the extent of the relative investments of the worker and alleged employer; (3) the degree to which the worker's opportunity for profit and loss is determined by the alleged employer; (4) the skill and initiative required in performing the job; and (5) the permanency of the relationship. *Id.*

Respondent does not dispute that after Claimant completed her tree planting project coordinator work, she continued to work for Respondent under the OWEB agreement, from April 18 until May 18, 2005. Although Respondent claimed Claimant was an independent contractor during that time, a preponderance of credible evidence established that Respondent's executive director, Susan Chapp, continued to direct and control Claimant's work throughout that period. Chapp established Claimant's pay rate and work hours, told her where and how to perform her job duties, and provided her with the equipment and tools necessary to carry out those duties. Chapp directed Claimant to record her work hours on a calendar to keep from exceeding the hours allotted for the forestry technician and weed coordinator jobs and expected her to maintain a work log documenting her tree monitoring activities. Generally, a worker who is required to comply with another person's instructions about when, where and how to perform services is an employee. Also, the fact that a worker is furnished with necessary tools and equipment to

perform required job duties tends to support the existence of an employment relationship.

Claimant had no previous forestry experience and there is no evidence she conducted her own business or possessed special skills that she agreed to provide to Respondent for a prescribed amount of money. In fact, credible evidence established that she left employment elsewhere to work exclusively for Respondent. Although her tenure with Respondent was limited by the terms of the OWEB agreement, impermanence of a particular job alone does not create an independent contractor relationship. *In the Matter of Triple A Construction LLC*, 23 BOLI 79, 93 (2002). The totality of the circumstances show Claimant was economically dependent on Respondent, her services were a necessary part of Respondent's business, and those services were performed in a manner consistent with an employer-employee relationship.

Prior to hearing, Respondent told the Agency that it "now understand[s] the difference between an employee and a contractor, but \* \* \* did not understand the legal distinction when [Claimant] was hired." Based on that understanding, Respondent paid back taxes that it owed to the state and reclassified its workers as employees. However, Respondent's argument that its misunderstanding mitigates the failure to pay Claimant's wages has no merit. Respondent at all times had a duty to know the laws

that regulate employment in this state. *In the Matter of Okechi Village and Health Center*, 27 BOLI 156, 169 (2006). Respondent's failure to understand the correct application of the law is not a defense. *In the Matter of Gary Lee Lucas*, 26 BOLI 198, 216 (2006). Claimant was Respondent's employee and the only remaining issues are the agreed upon wage rate, whether Claimant is owed any wages, and, if so, how much.

#### **B. Agreed Upon Rate**

Claimant credibly testified that Chapp asked her to finish up the forestry technician position and work as the weed control coordinator for \$12 per hour and that she agreed to perform those duties for that amount. Chapp's prior statements to the Agency and her testimony that "workers working in comparable jobs start at \$8 per hour" and that Respondent had "never agreed to pay Claimant at such a high rate" because it "does not and has never paid any other comparable workers at such a high rate" were deemed not credible.

First, Chapp contradicted her own testimony when she later testified that Respondent had never paid anyone less than \$10 per hour. Second, credible evidence showed that the person who previously filled the forestry technician position was paid \$2,200 per month and the person who replaced Claimant after she left was paid \$2,540 per month, which, when computed based on a 40 hour work week, amounts to more than \$12 per hour in both

cases. Third, Respondent, through Chapp, stated during the wage claim investigation that Claimant's pay rate was the same when her employment terminated as it was when it started - \$2,200 per month - which, when computed based on the hours Claimant worked between April 18 and May 18, 2005, including overtime hours, amounts to approximately \$12 per hour. Claimant's testimony that she was promised \$12 per hour was not impeached in any way and the forum finds Respondent agreed to pay Claimant that amount when it hired her for the forestry technician and weed control coordinator positions.

#### **C. Uncompensated Work**

In its answer, Respondent admitted Claimant worked at least 143 hours for which she was not compensated. Respondent's assertion that Claimant was not owed anything because she did not perform well and left before completing the work she was hired to perform is disingenuous and not a defense. If Respondent believed Claimant was not performing as expected, its recourse was to take disciplinary action or terminate her for poor work performance, if appropriate. Instead, credible evidence shows that after her purportedly unsatisfactory work performance as tree planting project coordinator, Claimant was asked to continue on as a forestry technician and weed control coordinator. Respondent's complaint that Claimant's work performance was unsatisfactory "in all three job

titles” has no merit. Even if the complaint was legitimate, Respondent cannot seek redress by refusing payment, after the fact, for hours Claimant actually worked. *In the Matter of Dan’s Ukiah Service*, 8 BOLI 96, 106 (1989). Respondent’s admission establishes unequivocally that Claimant performed work for which she was not properly compensated.

#### **D. Amount and Extent of Work Performed**

If the forum concludes that a claimant was employed and improperly compensated, as it did in this case, it becomes the burden of the respondent to come forward with the precise amount of work performed or evidence that negates the reasonableness of the inference to be drawn from the claimant’s evidence. *In the Matter of Graciela Vargas*, 16 BOLI 246, 253-54 (1998).

Here, Respondent acknowledged it kept no record of the days or hours Claimant worked. Claimant credibly testified that she recorded the dates and hours she worked on a calendar she maintained at Respondent’s behest. She produced a calendar that shows she worked 187 hours between April 18 and May 18, 2005, including 5 overtime hours, and includes notes of some of the activities she performed during that period. Despite the opportunity to do so, Respondent produced no evidence that controverts Claimant’s credible evidence. The forum, therefore, may rely on Claimant’s credible evidence

showing the hours she worked. Claimant’s credible testimony and contemporaneous documentation established she worked 187 hours for Respondent, including five overtime hours, and earned a total of \$2,274, based on the agreed upon rate of \$12 per hour (\$12 per hour x 182 hours, plus the overtime rate of \$18 per hour x 5 hours). Respondent admitted that it did not pay Claimant any wages for any of the hours she worked during the wage claim period and therefore owes Claimant \$2,274 in unpaid wages.

#### **PENALTY WAGES**

The forum may award penalty wages when it determines that a respondent’s failure to pay wages was willful. Willfulness does not imply or require blame, malice, or moral delinquency. A respondent commits an act or omission “willfully” if the respondent acts or fails to act intentionally, as a free agent, and with knowledge of what is being done or not done. *In the Matter of Sue Dana*, 28 BOLI 22, 30 (2006).

Respondent’s admission that Claimant worked at least 143 hours for which she was not compensated and that she was not paid because her performance in “all three job titles” was not satisfactory and Respondent owed “no further pay,” demonstrates the knowledge and intent necessary to establish that Respondent’s failure to pay was willful. Respondent’s claim that its failure to pay was based on a good faith belief, albeit erroneous, that Claimant was a contractor and not

entitled to any pay if she did not perform as expected is not a defense. Respondent's ignorance or misunderstanding of the law does not exempt it from a determination that it willfully failed to pay wages earned and due. *In the Matter of Toni Kuchar*, 23 BOLI 265, 275 (2002).

Respondent argued alternatively that it was financially unable to pay Claimant because the remaining grant money was used to pay Claimant's replacement and by the time she "later demanded payment, the organization had already spent the money that was originally available for that work, and it did not have any funds with which to pay when she later made her demand." An employer bears the burden of proving the affirmative defense of financial inability to pay wages at the time they accrue. *In the Matter of Captain Hooks, LLP*, 27 BOLI 211, 230 (2006).

Respondent does not contend the grant money was not available when Claimant's wages accrued. Instead, Respondent admits it had the money at the time, but chose to hire someone else to "finish the necessary work that [Claimant] had been responsible for, within the deadlines required by the grant contract, and to pay [Claimant's] replacement the remaining grant funds of \$2,200." Moreover, credible evidence shows Respondent was still operating its business and paid other workers and business expenses when Claimant's wages accrued. Financial inability to pay wages at

the time wages accrued does not exist when an employer continues to operate its business and chooses to pay certain debts and obligations rather than an employee's wages. *In the Matter of Elisha, Inc.*, 25 BOLI 125, 159 (2004). See also *In the Matter of Ashlanders Senior Foster Care, Inc.*, 14 BOLI 54, 81 (1995)(when respondent's business continued after claimant quit and respondent paid its other employees and other obligations at that time and thereafter, respondent failed to prove its defense); *In the Matter of Mary Stewart-Davis*, 13 BOLI 188, 201 (1994)(when respondent's business continued to operate after claimant quit and other employees and suppliers were paid, the allocation of available funds was respondent's choice and respondent failed to show its inability to pay claimant); and *In the Matter of Flavors Northwest*, 11 BOLI 215, 228 (1993)(a temporary shortage of cash does not constitute financial inability to pay when an employer continues to operate a business and chooses to pay certain obligations in preference to an employee's wages).

In this case, Respondent has multiple excuses for its failure to pay Claimant's wages, but none add up to a financial inability to pay wages when accrued. Respondent's apparent mismanagement of grant funds is not a valid defense. Based on credible evidence demonstrating Respondent's knowledge that Claimant worked during the wage claim period and its admission that she was not paid for those

hours because of its misguided belief that Claimant was not entitled to wages, and by acting as a free agent when it refused to pay Claimant the wages she earned even after it was informed that Claimant was an employee and not an independent contractor, Respondent acted willfully and is liable for penalty wages pursuant to ORS 652.150. Penalty wages are assessed and calculated in accordance with ORS 652.150 in the amount of \$2,880. This figure is computed by multiplying \$12 per hour by 8 hours per day multiplied by 30 days. See ORS 652.150 and OAR 839-001-0470(1)(c).

#### **ORDER**

NOW, THEREFORE, as authorized by ORS 652.332, and as payment of the unpaid wages, **Forestry Action Committee of the Illinois Basin Interest Group** is hereby ordered to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232-2162, the following:

A certified check payable to the Bureau of Labor and Industries, in trust for Claimant Hazel Danene Reagan, in the amount of FIVE THOUSAND ONE HUNDRED AND FIFTY FOUR DOLLARS (\$5,154), representing \$2,274 in gross earned, unpaid, due and payable wages, less appropriate lawful deductions, and \$2,880 in penalty wages, plus interest at the legal rate on the sum of \$2,274 from June 1, 2005, until paid and interest at the legal

rate on the sum of \$2,880 from July 1, 2005, until paid.

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**In the Matter of  
VILLAGE CAFÉ, INC.**

**Case No. 25-08**

**Final Order of Commissioner  
Brad Avakian  
Issued December 3, 2008**

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#### **SYNOPSIS**

Respondent employed four wage claimants in 2006 at the minimum wage of \$7.50 per hour and did not pay them all wages earned and due. Claimants were awarded a total of \$3,420.90 in unpaid wages. Respondent's failure to pay the wages was willful, and each claimant was awarded \$1,800.00 in penalty wages, for a total of \$7,200.00 in penalty wages. Based on Respondent's failure to pay Claimants the minimum wage, each claimant was also awarded \$1,800.00 as a civil penalty, for a total of \$7,200.00 in civil penalties. ORS 652.140(1) & (2), ORS 652.150, ORS 653.055(1)(b); OAR 839-010-0470.

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The above-entitled case came on regularly for hearing before Alan McCullough, designated as Administrative Law Judge ("ALJ") by Brad Avakian, Commissioner

of the Bureau of Labor and Industries ("BOLI") for the State of Oregon. The hearing was held on November 5, 2008, at BOLI's Eugene office located at 1400 Executive Parkway, Suite 200, Eugene, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by case presenter Jeffrey C. Burgess, an employee of the Agency. Claimants Huffman and Mears were present at the hearing until they finished testifying. Claimants Smith and Keller were not present at the hearing except during their telephonic testimony. Respondent did not appear at hearing and was held in default.

The Agency called the following witnesses: Fonda Smith (telephonic), Angela Keller (telephonic), Sue Huffman, and Pamela Mears, wage claimants; and Bernadette Yap-Sam, Wage & Hour Division compliance specialist.

The forum received into evidence:

a) Administrative exhibits X-1 through X-6 (submitted or generated prior to hearing); and

b) Agency exhibits A-1 through A-6 (submitted prior to hearing) and Agency exhibits A-7 and A-8 (submitted at hearing).

Having fully considered the entire record in this matter, I, Brad Avakian, Commissioner of the Bureau of Labor and Industries,

hereby make the following Findings of Fact (Procedural and on the Merits), Ultimate Findings of Fact, Conclusions of Law, Opinion, and Order.

#### **FINDINGS OF FACT – PROCEDURAL**

1) On December 11, 2006, Claimant Keller filed a wage claim with the Agency in which she alleged that Respondent had employed her and failed to pay wages earned and due to her. Along with her wage claim, Claimant Keller signed a BOLI form that assigned to the Commissioner of Labor and Industries, in trust for herself, all wages due from Respondent.

2) On January 11, 2007, Claimant Smith filed a wage claim with the Agency in which she alleged that Respondent had employed her and failed to pay wages earned and due to her. Along with her wage claim, Claimant Smith signed a BOLI form that assigned to the Commissioner of Labor and Industries, in trust for herself, all wages due from Respondent.

3) On January 22, 2007, Claimant Huffman filed a wage claim with the Agency in which she alleged that Respondent had employed her and failed to pay wages earned and due to her. Along with her wage claim, Claimant Huffman signed a BOLI form that assigned to the Commissioner of Labor and Industries, in trust for herself, all wages due from Respondent.

4) On February 13, 2007, Claimant Mears filed a wage claim with the Agency in which she alleged that Respondent had employed her and failed to pay wages earned and due to her. Along with her wage claim, Claimant Mears signed a BOLI form that assigned to the Commissioner of Labor and Industries, in trust for herself, all wages due from Respondent.

5) Claimants filed their wage claims within the statute of limitations.

6) On July 5, 2007, the Agency served Order of Determination No. 06-4278 on Respondent based upon the wage claim filed by Claimants Keller, Smith, Huffman, and Mears, and the Agency's investigation. The Order of Determination alleged that Respondent owed a total of \$3,562.40 in unpaid wages, plus interest;<sup>1</sup> \$7,200.00 in penalty wages pursuant to ORS 652.150, plus interest;<sup>2</sup> and \$7,200.00 in civil penalties pursuant to ORS 653.055(1)(b), plus interest;<sup>3</sup> and required that, within 20 days, Respondent either pay these sums in trust to the Agency, request an administrative hearing and submit

an answer to the charges, or demand a trial in a court of law.

7) On July 5, 2007, Respondent, through its subsequently designated authorized representative John Dahlberg,<sup>4</sup> filed an answer and request for hearing.

8) On September 22, 2008, the Hearings Unit issued a Notice of Hearing to Respondent, the Agency, and Claimants stating the time and place of the hearing as November 5, 2008, at 9:00 a.m., in Eugene, Oregon. Together with the Notice of Hearing, the forum sent a copy of the Order of Determination, a document entitled "Summary of Contested Case Rights and Procedures" containing the information required by ORS 183.413, a Servicemembers Civil Relief Act Notification, and a copy of the forum's contested case hearings rules, OAR 839-050-000 to 839-050-0440.

9) At the start of the hearing, Respondent had not appeared or notified the forum that it would not be appearing at the hearing. The ALJ waited 30 minutes past the time set for hearing before declaring Respondent in default and commencing the hearing.

10) At the start of the hearing, pursuant to ORS 183.415(7),

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<sup>1</sup> The Agency alleged the following amounts were due to each Claimant: Keller - \$580.00; Huffman - \$760.00; Mears - \$1,817.40; and Smith - \$405.00.

<sup>2</sup> The Agency alleged \$1,800.00 was due to each Claimant.

<sup>3</sup> The Agency alleged \$1,800.00 was due to each Claimant.

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<sup>4</sup> At the time Dahlberg filed the answer and request for hearing, Respondent did not designate him as its authorized representative. After BOLI issued a Notice of Insufficient Answer, Dahlberg filed a statement authorizing him to act as Respondent's authorized representative.

the ALJ orally advised the Agency of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

11) During closing argument, the Agency made separate motions to amend the Order of Determination to lower the number of hours worked in Huffman's and Mears's wage claim periods from 128 to 120 and 266 to 255, respectively. The ALJ granted both motions.

12) The ALJ issued a proposed order on November 17, 2008, that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. No exceptions were filed.

#### **FINDINGS OF FACT – THE MERITS**

1) Starting on May 2, 2006, and at all times material herein, Respondent Village Café, Inc. was an Oregon corporation doing business under the assumed business name of Village Café at 47691 Highway 58, Oakridge, Oregon. At that address, Respondent operated a café and a bar in the same building was open for business 24 hours a day.

2) At all times material herein, Respondent was an employer that suffered or permitted its employees, including Claimants, to work.

3) Claimant Smith went to work for Respondent in June 2006 as a waitress and bartender. She was hired by John Dahlberg, Respondent's corporate

secretary/treasurer, who agreed to pay her \$7.50 per hour. While employed by Respondent, Smith's usual work schedule was 11 a.m. to 7 p.m.

4) Claimant Smith worked eight hours each day for Respondent on November 8-11, 15-16, and November 22, 2006, for a total of 54 hours, earning \$405 in gross wages. She was not paid for any of those hours and November 22 was her last day of work. At the time of hearing, Respondent still had not paid her any wages for those 54 hours of work.

5) Respondent owes Claimant Smith \$405 in gross, unpaid wages.

6) Claimant Keller worked at the Village Café starting in 2004. She was hired as a waitress for Respondent when Respondent assumed ownership of the Village Café in May 2006. Keller was hired by John Dahlberg, who agreed to pay her \$7.50 per hour. While employed by Respondent, Keller's usual work schedule was 6 a.m. to 2 p.m.

7) Claimant Keller was paid all the wages she earned through October 20, 2006. After October 20, 2006, she worked eight hours each day for Respondent on October 21, October 25-28, November 1-4, and November 8-11, 2006, for a total of 104 hours, earning \$780 in gross wages. Keller was only paid \$200.00 of these wages. This occurred on November 12, 2006, when Dahlberg paid her \$200.00 and said he had no more money. Keller quit

because Respondent did not pay her. At the time of hearing, Respondent still had not paid her any additional wages.

8) Respondent owes Claimant Keller \$580 in gross, unpaid wages.

9) Claimant Huffman went to work for Respondent on May 14, 2006,<sup>5</sup> as a cook and waitress. She was hired by John Dahlberg, who agreed to pay her \$7.50 per hour. While employed by Respondent, Huffman worked the same shift as Keller, from 6 a.m. to 2 p.m.

10) Claimant Huffman was paid all the wages she earned through October 20, 2006. After October 20, 2006, she worked eight hours each day for Respondent on October 22, October 25-28, November 1-5, and November 8-12, 2006, for a total of 120 hours, earning a total of \$900 in gross wages. Huffman was only paid \$200.00 of these wages. This occurred on November 12, 2006, when Dahlberg paid Huffman \$200 and said he had no more money. Huffman quit because Respondent did not pay her. At the time of hearing, Respondent still had not paid her any additional wages.

11) Respondent owes Claimant Huffman \$700 in gross, unpaid wages.

12) Claimant Mears went to work for Respondent on August 12, 2006 as a waitress. She was hired by John Dahlberg, who agreed to pay her \$7.50 per hour. When first hired, she worked from 2p.m. to 10 p.m. Later, she began working from 10 p.m. to 6 a.m. as a waitress and cook.

13) Claimant Mears was paid all the wages she earned through October 10, 2006. After that date, she worked the following dates and hours for Respondent in October:

October 11-14: 32 hours

October 15-21: 33 hours

October 22-23: 16 hours

Mears quit Respondent's employment on October 24.

14) In October 2006, Respondent provided Claimant Mears with food and cigarettes valued at \$40.20. Mears expected to pay for these items.

15) On November 4, Respondent rehired Claimant Mears. In November 2006, Mears worked the following dates and hours for Respondent:

November 4-5: 16 hours

November 6-12: 35 hours

November 13-19: 56.5 hours

November 20: 8 hours

November 27-31: 24 hours

Mears was fired on November 23, but rehired again on November 27.

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<sup>5</sup> Huffman testified that she began work for Respondent on Mother's Day in 2006. The forum takes judicial notice that Mother's Day in 2006 was May 14.

16) In November 2006, Respondent provided Claimant Mears with food and cigarettes valued at \$87.00. Mears expected to pay for these items. Respondent also gave Mears \$15.00 from the till so Mears would have enough money to purchase a plumbing part for her residence.

17) In December 2006, Mears worked the following dates and hours for Respondent:

December 1-2:	6 hours
December 3-9:	39 hours
December 10:	8 hours

18) Claimant Mears quit Respondent's employment on December 11, 2006.

19) In December 2006, Respondent provided Claimant Mears with food and cigarettes valued at \$34.40. Mears expected to pay for these items.

20) Claimant Mears worked a total of 273.5 hours in the time period beginning October 11 and ending December 10, 2006. In total, she earned \$2,051.25 in gross wages, less \$176.60 for \$15.00 in cash, and food and cigarettes valued at \$161.60, leaving \$1,874.65 in unpaid, due, and owing wages.

21) Calculated at 255 hours x \$7.50 per hour,<sup>6</sup> Respondent owes Claimant Mears \$1,912.50 in gross wages, less \$176.60 for the food, cigarettes, and cash she received from Respondent in the

wage claim period, for a total of \$1,735.90 in gross, unpaid wages.

22) Respondent has not paid Claimant Mears any wages for the work she performed between October 11 and December 10, 2006.

23) On December 19, 2006, the Agency mailed a written "Notice of Wage Claim" to Respondent. In the Notice, the Agency stated that Claimant Keller had filed a wage claim with the Bureau of Labor and Industries alleging she was owed \$624.00 in unpaid statutory minimum wages.

24) On January 24, 2007, the Agency mailed a second written "Notice of Wage Claim" to Respondent. In the Notice, the Agency stated that Claimant Smith had filed a wage claim with the Bureau of Labor and Industries alleging she was owed \$405.00 in unpaid statutory minimum wages.

25) On February 7, 2007, the Agency mailed a third written "Notice of Wage Claim" to Respondent. In the Notice, the Agency stated that Claimant Huffman had filed a wage claim with the Bureau of Labor and Industries alleging she was owed \$700.00 in unpaid statutory minimum wages.

26) On February 22, 2007, the Agency mailed a fourth written "Notice of Wage Claim" to Respondent. In the Notice, the Agency stated that Claimant Mears had filed a wage claim with the Bureau of Labor and Industries alleging she was owed

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<sup>6</sup> See Procedural Finding of Fact #11.

\$1,532.50 in unpaid statutory minimum wages.

27) Penalty wages are computed for all four claimants as follows: \$7.50 per hour x 8 hours = \$60 x 30 days = \$1,800.00.

28) In 2006, Oregon's minimum wage was \$7.50 per hour.

29) Respondent paid all four Claimants less than the minimum wage to which Claimants were entitled under ORS 653.025.

30) Civil penalties under ORS 653.055(1)(b) are computed for all four claimants as follows: \$7.50 per hour x 8 hours = \$60 x 30 days = \$1,800.

31) Smith, Keller, Huffman, Mears, and Yap-Sam were credible witnesses.

#### ULTIMATE FINDINGS OF FACT

1) During all times material herein, Respondent was an Oregon employer that suffered or permitted Claimants Smith, Keller, Huffman, and Mears to work.

3) Claimant Smith worked for Respondent from June 2006 through November 22, 2006, at the minimum wage rate of \$7.50 per hour. She worked 54 hours in the time period from November 8 to November 22, 2006, her last day of work, earning \$405.00 in gross wages. She was not paid for those hours of work, leaving \$405.00 in unpaid, due, and owing wages.

4) On January 24, 2007, the Agency mailed a written notice to Respondent stating that Claimant Smith had filed a wage claim with

the Bureau of Labor and Industries alleging she was owed \$405.00 in unpaid statutory minimum wages and demanding payment of those wages. At the time of hearing, Respondent had not paid any additional wages.

5) Respondent willfully failed to pay Claimant Smith \$405.00 in earned, due, and owing wages.

6) Claimant Keller worked for Respondent from May 2006 through November 11, 2006, at the minimum wage rate of \$7.50 per hour. She worked 104 hours in the time period from October 21 to November 11, 2006, her last day of work, earning \$780.00 in gross wages. She was only paid \$200.00 for those hours of work, leaving \$580.00 in unpaid, due, and owing wages.

7) On December 19, 2006, the Agency mailed a written notice to Respondent stating that Claimant Keller had filed a wage claim with the Bureau of Labor and Industries alleging she was owed \$624.00 in unpaid statutory minimum wages and demanding payment of those wages. At the time of hearing, Respondent had not paid any additional wages.

8) Respondent willfully failed to pay Claimant Keller \$580.00 in earned, due, and owing wages.

9) Claimant Huffman worked for Respondent from May 2006 through November 12, 2006, at the minimum wage rate of \$7.50 per hour. She worked 120 hours in the time period from October 22 to November 12, 2006, her last day of work, earning \$900.00 in

gross wages. She was only paid \$200.00 for those hours of work, leaving \$700.00 in unpaid, due, and owing wages.

10) On February 7, 2007, the Agency mailed a written notice to Respondent stating that Claimant Huffman had filed a wage claim with the Bureau of Labor and Industries alleging she was owed \$700.00 in unpaid statutory minimum wages and demanding payment of those wages. At the time of hearing, Respondent had not paid any additional wages.

11) Respondent willfully failed to pay Claimant Huffman \$700.00 in earned, due, and owing wages.

12) Claimant Mears worked for Respondent from August 2006 through December 10, 2006, at the minimum wage rate of \$7.50 per hour. She worked a total of 273.5 hours in the time period beginning October 11 and ending December 10, 2006, her last day of work, earning \$2,051.25 in gross wages. In this time period, Respondent gave her \$15.00 in cash, and food and cigarettes valued at \$161.60, leaving \$1,874.65 in unpaid, due, and owing wages.

13) On February 22, 2007, the Agency mailed a written notice to Respondent stating that Claimant Mears had filed a wage claim with the Bureau of Labor and Industries alleging she was owed \$1,532.50 in unpaid statutory minimum wages and demanding payment of those wages. At the time of hearing, Respondent had not paid any additional wages.

14) Respondent willfully failed to pay Claimant Mears \$1,874.65 in earned, due, and owing wages.

15) ORS 652.150 penalty wages are computed for all four Claimants as follows: \$7.50 per hour x 8 hours = \$60.00 x 30 days = \$1,800.00.

16) Respondent paid all four Claimants less than the minimum wage to which Claimants were entitled under ORS 653.025. Civil penalties under ORS 653.055(1)(b) are computed for all four Claimants as follows: \$7.50 per hour x 8 hours = \$60.00 x 30 days = \$1,800.00.

### CONCLUSIONS OF LAW

1) During all times material herein, Respondent was an employer and Claimants Smith, Keller, Huffman, and Mears were employees subject to the provisions of ORS 652.110 to 652.200, 652.310 to 652.405, and 653.010 to 653.261. During all times material, Respondent employed Claimants.

2) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the subject matter and the Respondent herein. ORS 652.310 to 652.414, ORS 653.040, ORS 653.256, ORS 653.261.

3) Respondent violated ORS 652.140(2) by failing to pay Claimants Smith, Keller, Huffman, and Mears all wages earned and owing within five days after they voluntarily left their employment, excluding Saturdays, Sundays

and holidays. Respondent owes unpaid, due and owing wages to Claimants in the following amounts: Claimant Smith - \$405.00; Claimant Keller - \$580.00; Claimant Huffman - \$700.00; and Claimant Mears - \$1,735.90.

4) Respondent's willful failure to pay the unpaid, due and owing wages to Claimants Smith, Keller, Huffman, and Mears makes Respondent liable to pay \$1,800.00 in penalty wages to each Claimant, for a total of \$7,200.00 in penalty wages. ORS 652.150.

5) Respondent paid Claimants Smith, Keller, Huffman, and Mears less than the wages to which they were entitled under ORS 653.010 to 653.261 by failing to pay them Oregon's minimum wage for all hours worked and is liable to pay a civil penalty in the amount of \$1,800.00 to each Claimant, for a total of \$7,200.00 in civil penalties. ORS 653.055(1)(b).

6) Under the facts and circumstances of this record, and according to the law applicable to this matter, the Commissioner of the Bureau of Labor and Industries has the authority to order Respondent to pay Claimants Smith, Keller, Huffman, and Mears their earned, unpaid, due and owing wages, plus penalty wages and civil penalties, plus interest on all sums until paid. ORS 652.332.

#### OPINION

In its Order of Determination, the Agency seeks unpaid wages, penalty wages, and civil penalties for each of the four wage claim-

ants. Respondent filed an answer and request for hearing, but defaulted by failing to appear at the hearing. Consequently, the Agency needs only to establish a prima facie case supporting the allegations of the charging document in order to prevail. *In the Matter of MAM Properties, LLC*, 28 BOLI 172, 187 (2007). The forum may consider any unsworn and unsubstantiated assertions contained in respondent's answer, but those assertions are overcome whenever they are contradicted by other credible evidence in the record. *Id*

#### UNPAID WAGES

A prima facie case for unpaid wages consists of credible evidence of the following elements: 1) respondent employed claimants during the wage claim period claimed; 2) the pay rate upon which respondent and claimants agreed, if it exceeded the minimum wage; 3) claimants performed work for which they were not properly compensated; and 4) the amount and extent of work each claimant performed for respondent. *In the Matter of Sue Dana*, 28 BOLI 22, 29 (2006).

The Agency relied on the testimony of the four Claimants and documentary evidence showing the hours they worked before and during the wage claim periods to prove its case. In its investigation, the Agency requested that, if Respondent disputed the claims, Respondent provide any documentation it had supporting its position. In response, Respondent produced no evidence except

for the unsworn assertions in the answer filed on its behalf by John Dahlberg. In pertinent part, those assertions were that: (1) Claimants Keller and Huffman quit on October 27, 2006; (2) Mears was never employed by Respondent; and (3) the claims are “totally invalid.” Respondent’s assertions were all contradicted by credible evidence produced by the Agency and the forum gives them no weight whatsoever.

When an employer produces no records of hours or dates worked by the wage claimant, the commissioner may rely on evidence presented by the Agency, including credible testimony by a claimant, to show the amount and extent of work performed by the claimant. *In the Matter of Stan Lynch*, 23 BOLI 34, 44 (2002). As discussed below, the forum has relied on the credible testimony of each Claimant, as well as supporting documentation, to determine that Claimants are owed wages and the amount owed to each.

#### **A. Claimant Keller**

Claimant Keller credibly testified that she was employed by Respondent both before and during her wage claim period. This testimony was supported by a statement of itemized deductions created by Respondent showing that Keller worked for Respondent for the period beginning “10/7/2006” and ending “10/20/2006” and that she had earned \$5,415.00 in gross wages in the “year to date.” In addition, Claimants Smith and Huffman

credibly testified that Keller was employed by Respondent in 2006.

There is no dispute that Keller’s wage rate was \$7.50 per hour.

The Agency established the number of hours Keller worked in her wage claim period by offering a calendar created by Keller on the Agency’s form WH-127<sup>7</sup> when she filed her wage claim. Keller credibly testified that she maintained a contemporaneous record of the hours she worked on a home calendar, that the hours she recorded on the WH-127 were the same as those on her home calendar, and that those hours were an accurate record of the hours she worked. Keller’s calendar shows that she worked 104 hours during her wage claim period. At \$7.50 per hour, she earned \$780.00. Keller credibly testified that she was only paid \$200.00, leaving \$580.00 in unpaid, due, and owing wages.

#### **B. Claimant Smith**

Claimant Smith credibly testified that she was employed by Respondent during her wage claim period. This testimony was supported by five statements of itemized deductions created by Respondent showing that Smith worked for Respondent from “6/17/2006” to “6/30/2006” and

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<sup>7</sup> A WH-127 is a blank monthly calendar on which wage claimants are instructed to record their hours worked during their wage claim period when they file a wage claim with the Bureau of Labor and Industries.

from "8/26/2006" through "10/20/2006," and that she had earned \$3,750.00 in gross wages in the "year to date." In addition, Claimants Keller and Mears credibly testified that Smith was employed by Respondent in 2006.

There is no dispute that Smith's wage rate was \$7.50 per hour.

The Agency established the number of hours Smith worked in her wage claim period by providing Respondent's timecard on which Smith recorded her hours while working for Respondent, complemented by Smith's testimony that the timecard was an accurate record of the hours she worked. That timecard shows that she worked 54 hours during her wage claim period. At \$7.50 per hour, she earned \$405.00. Smith credibly testified that she was paid nothing for this work, leaving \$405.00 in unpaid, due, and owing wages.

#### **C. Claimant Huffman**

Claimant Huffman credibly testified that she was employed by Respondent during her wage claim period. This testimony was supported by a statement of itemized deductions created by Respondent showing that Huffman worked for Respondent from "10/7/2006" to "10/20/2006," and that she had earned \$4,897.50 in gross wages in the "year to date." In addition, Claimants Smith and Keller credibly testified that Huffman was employed by Respondent in 2006.

There is no dispute that Huffman's wage rate was \$7.50 per hour.

The Agency established the number of hours Huffman worked in her wage claim period by providing Huffman's home calendar on which Huffman had contemporaneously noted her daily work schedule and hours worked for Respondent in October and November 2006. Huffman credibly testified that those hours were accurate. Huffman's calendar shows that she worked 120 hours during her wage claim period. At \$7.50 per hour, she earned \$900.00. Huffman credibly testified that she was only paid \$200.00, leaving \$700.00 in unpaid, due, and owing wages.

#### **D. Claimant Mears**

Claimant Mears credibly testified that she was employed by Respondent from August 2006 through December 10, 2006. This testimony was supported by a statement of itemized deductions created by Respondent showing that Mears worked for Respondent from "9/9/2006" to "9/22/2006," as well as copies of two of Respondent's timecards on which Mears recorded the hours she worked in November and December 2006. In addition, Claimants Smith, Keller, and Huffman credibly testified that Mears was employed by Respondent in 2006.

There is no dispute that Mears's wage rate was \$7.50 per hour.

The Agency established the number of hours Mears worked in her wage claim period by providing a WH-127 form on which Mears wrote the days and hours that she worked and the two timecards on which Mears recorded her hours while working for Respondent. Mears credibly testified that she worked the hours shown on the calendar and timecards. Although some of the handwriting on the WH-127 and timecards is difficult to read, the forum concludes from the record as a whole that Mears worked a total of 273.5 hours during her wage claim period. At \$7.50 per hour, she earned \$2,051.25 in gross wages. She was paid nothing. However, during the wage claim period Respondent gave Mears \$15.00 in cash, and food and cigarettes valued at \$161.60, leaving \$1,874.65 in unpaid, due, and owing wages (\$2,051.25 - \$176.60 = \$1,874.65).

The forum notes that Mears worked 56.5 hours in the week beginning Sunday, November 13, 2006,<sup>8</sup> a schedule that would appear to entitle Mears to 16.5 hours of overtime pay. However, the forum does not award overtime pay because the Agency did not include a request for overtime pay for Mears in the Order of Determination.<sup>9</sup>

Although \$1,874.65 in unpaid, due, and owing wages was owed to Mears when she left Respondent's employment, the forum can only award \$1,735.90. In a default case, the charging document sets a limit on the damages that the forum can award. *In the Matter of Majestic Construction*, 19 BOLI 59, 62 (1999). In the Order of Determination, the Agency requested \$1,817.40 in unpaid wages for Mears, based on 266 hours of work at \$7.50 per hour, less \$177.60 as an offset for the cash, food, and cigarettes Respondent provided to Mears. At hearing, the Agency amended its Order of Determination to reduce the number of hours worked by Mears from 266 to 255. Because of that amendment, the forum is limited to awarding 255 hours of unpaid wages at \$7.50 per hour, or \$1,912.50, less an offset of \$176.60 for the cash, food, and cigarettes Respondent provided to Mears. In total, the forum awards Mears \$1,735.90 in unpaid, due, and owing wages.

#### **PENALTY WAGES**

The forum may award penalty wages when a respondent's failure to pay wages is willful. Willfulness does not imply or require blame, malice, or moral delinquency. Rather, a respon-

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<sup>8</sup> The WH-127 that Mears completed is formatted so that Sunday is the first day of every workweek.

<sup>9</sup> See *In the Matter of Gary Lee Lucas*, 26 BOLI 198, 213 (2005) (the forum rejected the Agency's claim for

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overtime pay when the Order of Determination did not cite ORS 653.261 or OAR 839-020-0030, the statute and rule requiring overtime pay, and contained no mention that overtime was a factor in computing wages due to two wage claimants).

dent commits an act or omission willfully if he or she acts, or fails to act, intentionally, as a free agent, and with knowledge of what is being done or not done. *MAM Properties, LLC*, at 189 (2007).

In this case, Respondent's agent Dahlberg hired all four Claimants and also paid them. All four Claimants filled out timecards provided by Respondent and were paid on the basis of those timecards. There is no credible evidence that Respondent was unaware of the hours that Claimants worked, or that Dahlberg acted other than voluntarily or as a free agent in failing to pay all four Claimants their unpaid, due, and owing wages when they left Respondent's employment.

ORS 652.150(2) provides that if the employee or person acting on behalf of the employee fails to send a written notice of nonpayment of wages, penalty wages "may not exceed 100 percent of the employee's unpaid wages." If a written notice is sent and the employer pays the full amount of wages within 12 days after receiving the notice, penalty wages "may not exceed 100 percent of the employee's unpaid wages." In this case, the Agency sent written notices on behalf of all four Claimants and Respondent has paid nothing. Consequently, the forum computes penalty wages using the formula provided in ORS 652.150: 8 hours x \$7.50 (Claimant's hourly wage) x 30 days = \$1,800.00 in penalty wages owed to each Claimant.

### CIVIL PENALTIES

Under ORS 653.055(1), an employer who pays an employee less than the minimum wage is liable to the employee for civil penalties that are computed in the same manner as penalty wages under ORS 652.150. *Id.*, at 190; *Cornier v. Paul Tulacz, DVM PC*, 176 Or App 245 (2001). A *per se* violation occurs when an employee's wage rate is the minimum wage, the employee is not paid all wages earned, due, and owing under ORS 652.140(1) or 652.140(2), and no statutory exception applies.<sup>10</sup>

The wage rate for all four Claimants was \$7.50, the statutory minimum wage in Oregon in 2006. None of the Claimants were paid all wages earned, due, and owing under ORS 652.140(1) or 652.140(2), and no statutory exception applies that would excuse Respondent from paying the minimum wage to Claimants. Accordingly, each Claimant is entitled to a civil penalty of \$1,800.00 (8 hours x \$7.50 x 30 days = \$1,800.00).

### ORDER

NOW, THEREFORE, as authorized by ORS 652.332 and as payment of the unpaid wages, penalty wages, and civil penalties

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<sup>10</sup> An example of a statutory exception is ORS 653.035, which provides that employers may deduct from the minimum wage "the fair market value of lodging, meals, other facilities or services furnished by the employer for the private benefit of the employee."

Respondent owes as a result of its violations of ORS 652.140(1), ORS 652.140(2), and ORS 653.055(1)(b), the Commissioner of the Bureau of Labor and Industries hereby orders **Village Café, Inc.** to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 1045 State Office Building, 800 NE Oregon Street, Portland, Oregon 97232-2180, the following:

(1) A certified check payable to the Bureau of Labor and Industries in trust for Claimant Fonda Mae Smith in the amount of FOUR THOUSAND FIVE DOLLARS (\$4,005.00), less appropriate lawful deductions, representing \$405.00 in gross earned, unpaid, due and payable wages; \$1,800.00 in penalty wages; and \$1,800.00 as a civil penalty; plus interest at the legal rate on the sum of \$405.00 from December 1, 2006, until paid, and interest at the legal rate on the sum of \$3,600.00 from January 1, 2007, until paid.

(2) A certified check payable to the Bureau of Labor and Industries in trust for Claimant Angie Alma Keller in the amount of FOUR THOUSAND ONE HUNDRED EIGHTY DOLLARS (\$4,180.00), less appropriate lawful deductions, representing \$580.00 in gross earned, unpaid, due and payable wages; \$1,800.00 in penalty wages; and \$1,800.00 as a civil penalty; plus interest at the legal

rate on the sum of \$580.00 from December 1, 2006, until paid, and interest at the legal rate on the sum of \$3,600.00 from January 1, 2007, until paid.

(3) A certified check payable to the Bureau of Labor and Industries in trust for Claimant Sue Ellen Huffman in the amount of FOUR THOUSAND THREE HUNDRED DOLLARS (\$4,300.00), less appropriate lawful deductions, representing \$700.00 in gross earned, unpaid, due and payable wages; \$1,800.00 in penalty wages; and \$1,800.00 as a civil penalty; plus interest at the legal rate on the sum of \$700.00 from December 1, 2006, until paid, and interest at the legal rate on the sum of \$3,600.00 from January 1, 2007, until paid.

(4) A certified check payable to the Bureau of Labor and Industries in trust for Claimant Pamela Mears in the amount of FIVE THOUSAND THREE HUNDRED THIRTY-FIVE DOLLARS AND NINETY CENTS (\$5,335.90), less appropriate lawful deductions, representing \$1,735.90 in gross earned, unpaid, due and payable wages; \$1,800.00 in penalty wages; and \$1,800.00 as a civil penalty; plus interest at the legal rate on the sum of \$1,735.90 from January 1, 2007, until paid, and interest at the legal rate on the sum of \$3,600.00 from February 1, 2007, until paid.

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**In the Matter of  
CENTRAL CITY CONCERN**

**Case No. 66-08**

**Final Order of Commissioner  
Brad Avakian  
Issued March 3, 2009**

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**SYNOPSIS**

The Agency correctly determined that Requester's Rose Quarter Project was subject to the prevailing wage rate laws if it entered into an agreement to accept public funds after July 1, 2007, and that the affordable housing exemption in ORS 279C.810(2)(d) does not apply to the Project. ORS 279C.800, ORS 279C.810, ORS 279C.840, OAR 839-025-0004(24).

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The above-entitled case came on regularly for hearing before Linda A. Lohr, designated as Administrative Law Judge ("ALJ") by Brad Avakian, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on November 4, 2008, in the W. W. Gregg Hearing Room, located at 800 NE Oregon Street, Portland, Oregon.

Assistant Attorney General Johanna Matanich and Patrick Plaza, an Agency employee, represented the Bureau of Labor and

Industries ("BOLI" or "Agency"). Attorney Amanda Gamblin represented Central City Concern ("Requester").

Requester called as witnesses: Gerhard Taeubel, BOLI Wage and Hour Division Compliance Specialist; Traci Manning, Central City Concern Housing Director; Craig Kelley, Project Manager; and Christine Hammond, Wage and Hour Division Administrator.

The forum received as evidence:

- a) Administrative exhibits X-1 through X-35, and X-36 through X-38 (received post-hearing);
- b) Agency exhibits A-1 through A-23 (submitted prior to hearing); and
- c) Requester exhibits R-1 through R-12 (submitted prior to hearing).

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

**FINDINGS OF FACT –  
PROCEDURAL**

1) On February 5, 2008, Requester submitted a request for a determination about whether Requester's proposed Rose Quarter Housing Project would be a public works on which payment of the prevailing wage rate would be re-

quired under ORS 279C.840. Requester provided a list of the sources and uses of the public and private financing awarded prior to and after July 1, 2007, along with copies of the loan and grant agreements between Requester and public funders and a reservation of funding letter from the Oregon Housing and Community Services Development Department ("OHCS"), dated December 6, 2007.

2) On April 7, 2008, the Agency issued a determination concluding that the Rose Quarter Housing Project will be subject to the prevailing wage rate laws if Requester or the Rose City Housing LLC enters into an agreement with OHCS for a commitment of public funds to support the Project.<sup>1</sup> The Agency concluded that the project is "intended to be privately owned" and over \$750,000 in public funds will be used to fund the project; therefore, the definition of a "public works" under ORS 279C.800(6)(a)(B), as amended effective July 1, 2007, applies to the project if OHCS commits funds to the project. The Agency further concluded that the project is a mixed use development that does not meet the definition of "residential construction" under ORS 279C.810(2)(d)(D) or OAR 839-025-0004(24). Requester was given 21 days to contest the

Agency's determination and request an administrative hearing.

3) Requester was served with the determination and thereafter timely requested a hearing.

4) On August 8, 2008, the Hearings Unit issued a Notice of Hearing stating the hearing would commence at 9:00 a.m. on November 4, 2008. The Notice of Hearing included copies of the Agency's determination, a language notice, a Servicemembers Civil Relief Act notification, and copies of the Summary of Contested Case Rights and Procedures and the Contested Case Hearing Rules, OAR 839-050-0000 to 839-050-0445.

5) On August 25, 2008, the ALJ issued an order amending the Notice of Hearing to change the party designation from Respondent to Requester, and to delete the paragraph referring to "the Order of Determination" and replace it with a paragraph referring to "the Agency's Determination."

6) On August 25, 2008, the ALJ issued an order requiring Requester to submit a written statement identifying all of Requester's reasons for contesting the Agency's determination. The order also required the Agency to submit copies of the determination, all materials Requester provided to support its request for a determination, and any other materials the Agency relied upon to reach its determination. The ALJ ordered the participants to submit the statement and documents by September 12, 2008,

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<sup>1</sup> When the Agency issued its determination, OHCS had announced its intent to fund the Project with public funds, but had not entered into any agreement committing the funds.

and notified them of the possible sanctions for failure to comply with the order.

7) The Agency timely submitted the requested documents, marked as Agency exhibits A-1 through A-23, and the ALJ admitted them into the record as exhibits.

8) Requester timely filed a statement, along with declarations signed by three witnesses, to show "what information BOLI had in its possession, over and above what Central City Concern sent to BOLI related to the project, when it made its April 7, 2008, determination" and that it establishes "the clear legislative intent [of the 2007 amendments to prevailing wage rate laws] to exempt affordable housing projects like the Rose Quarter project." Requester's stated reasons for contesting the determination were 1) that the definition of residential construction required the Agency to "separate the commercial component of a mixed use project from the residential component and apply prevailing wage laws only if, and to the extent that, each component separately fails to meet the standard," 2) the Agency must rely on the Portland City Code to define "residential construction" when doing so furthers legislative intent "and that code allows five-over-one mixed use residential housing," and 3) the Agency "must divide the project into its respective commercial and residential components and apply prevailing wage laws to each only if they separately meet the standard."

Requester stated that because it had not yet received discovery from the Agency, "it may add to or alter the information submitted before or at the hearing scheduled to begin on November 4, 2008." Requester's statement and documents, marked as Requester's exhibits R-1 through R-3, were admitted into the record as exhibits.

9) On October 7, 2008, the ALJ issued an order scheduling a prehearing conference for October 21, 2008.

10) On October 17, 2008, the Agency and Requester each submitted a list of persons they intended to call as witnesses and statements describing proposed testimony.

11) On October 17, 2008, the Agency, through counsel, filed a motion for summary judgment.

12) On October 20, 2008, Requester moved for an extension of time until October 27, 2008, to file a response to the Agency's motion for summary judgment. The Agency did not object and on October 21, 2008, the ALJ granted the motion.

13) On October 21, 2008, the ALJ issued a public records request advisory to the Agency and Requester.

14) On October 22, 2008, following the October 21 prehearing conference, the ALJ issued an order proposing stipulations for consideration by the participants.

15) Requester timely opposed the ALJ's proposed

stipulations and offered a modified version. The Agency did not object to Requester's modifications and the ALJ issued an order summarizing the prehearing conference which included the stipulations made by the participants.

16) Requester timely filed a response to the Agency's motion for summary judgment. On October 28, 2008, the Agency filed a document stating that it intended to file a reply to Requester's response on or before October 30, 2008. By letter dated October 29, 2008, Requester objected to the Agency filing a "reply" brief. The Agency's reply crossed in the mail and was filed on October 29, 2008.

17) On October 31, 2008, the ALJ issued an order denying the Agency's motion for summary judgment.

18) At the start of hearing, the ALJ verbally advised the participants of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

19) During the hearing, Requester, by avowal of counsel, made offers of proof to show that certain witness testimony that was excluded as irrelevant would be consistent with the declarations admitted as exhibits into the record.

20) During the hearing, Requester, by avowal of counsel, made offers of proof describing the testimony of certain witnesses

whose testimony was excluded as irrelevant.

21) On November 7, 2008, the ALJ issued an interim order disclosing a post-hearing ex parte communication from a non-party, non-participant that was sent to and read by Commissioner Avakian and forwarded to the ALJ. In the order, the ALJ found that the communication had no relevance to the issues before the forum, but issued an order disclosing the communication and giving Requester the opportunity to rebut its substance. On November 14, 2008, Requester filed a response to the ex parte communication. On November 18, 2008, the Agency case presenter and the Agency's legal counsel filed affidavits disclaiming knowledge of the ex parte communication until after it was delivered to the Agency.

22) The ALJ issued a proposed order on March 3, 2009, that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. Neither the Agency nor Respondent filed exceptions.

#### **FINDINGS OF FACT – THE MERITS**

1) Requester plans to develop the Rose Quarter Housing Project ("Project") located at 10 N. Weidler Street in Portland, Oregon.

2) The Project involves the purchase and remodel of the former Ramada Inn Hotel located at

10 N. Weidler Street in Portland, Oregon.

3) The former Ramada Inn Hotel is a concrete building composed of five stories above-grade with below-grade basement and parking, and includes a one-story parking deck attached to the northwest corner of the building. Since 2004, the hotel has housed caretakers, and currently is used as transitional housing for women in recovery. Other than safety upgrades, the hotel has not been remodeled. The safety upgrades are not part of Requester's renovation project.

4) When completed, the Project will provide affordable housing on the upper four stories with the first floor converted to commercial space.

5) The commercial space likely will be occupied by a private non-profit drug and alcohol treatment center.

6) The commercial space will comprise approximately 17,000 square feet.

7) Excluding the basement and parking, the commercial space is approximately 19 percent of the total square footage of the building.

8) When completed, the Project will provide approximately 176 units of affordable rental housing.

9) All housing occupants will earn no more than 50 percent of the area median income.

10) The Project involves only one building and has a single

architect, William Wilson Architects, and a single general contractor, Howard S. Wright. The Housing Development Center is the only project manager to administer and implement the Project.

11) The Project will be privately owned and supported in part by private funds.

12) The Project received a \$5,000,000 loan from the Portland Development Commission to acquire the Project property. The Project received a \$200,000 grant from Multnomah County for the Project. The City of Portland committed grant monies to the Project totaling approximately \$3,680,000 from the proposed sale of the City's Housing Opportunity Bonds. Agreements with these public agencies were executed before July 1, 2007.

13) As of April 7, 2008, the Oregon Housing and Community Services Department has reserved grant funding for the project totaling \$335,000.

#### **ULTIMATE FINDINGS OF FACT**

1) Requester is a non-profit corporation that plans to renovate a five-story former hotel located at 10 N. Weidler Street in Portland, Oregon.

2) The Project is privately owned and Requester has received public funding to support the Project.

3) When completed, the Project will provide affordable housing on the upper four stories with the

first floor converted to commercial space.

4) Requester executed public funding agreements in September 2004 and February 2005 which were the project's principal sources of public financing when HB 2140 went into effect on July 1, 2007.

5) The funds Requester received from public entities before July 1, 2007, exceed \$750,000.

6) As of April 7, 2008, a public entity has reserved grant funding for the project totaling \$335,000.

7) The Project involves only one building, a single architect, a single general contractor, and only one project manager to administer and implement the Project.

#### **CONCLUSIONS OF LAW**

1) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the subject matter herein. ORS 279C.817.

2) Requester's Rose Quarter Project is a public works under ORS 279C.800(6)(a)(B).

3) Requester's Rose Quarter Project does not qualify for any exemptions under ORS 279C.810.

4) Under the facts and circumstances of this record, and according to the applicable law, the Commissioner of the Bureau of Labor and Industries has the authority to determine whether a project or proposed project is or would be a public works upon which payment of the prevailing wage rate is or would be required

under ORS 279C.840. ORS 279C.817.

#### **OPINION**

The Commissioner of the Bureau of Labor and Industries ("Agency") "shall, upon request of a public agency or other interested persons, make a determination about whether a project or proposed project is or would be a public works on which payment of the prevailing rate of wage is or would be required under ORS 279C.840." Responding to Requester's February 5, 2008, request, the Agency made a determination that Requester's Rose Quarter Housing Project ("Project") would be a public works if Requester accepted public funds after July 1, 2007, the date HB 2140 containing prevailing wage law amendments became law. The Agency further determined that the Project was not exempt under the amended statute's affordable housing exemption. Requester subsequently brought this case under ORS 279C.817(4), which states "the commissioner shall afford the requester or a person adversely affected or aggrieved by the commissioner's determination a hearing in accordance with ORS 183.413 to 183.470."

Requester contends that "HB 2140 only allows the 2007 law to be applied to public contracts entered into after July 1, 2007" and the Agency improperly applied the 2007 statute to "all of the public contracts supporting the [Project]." Requester further contends that, even if the Agency applied the

correct law, the Project is exempt under the amended statute's affordable housing exemption, and that the Agency 1) erroneously interpreted ORS 279C.810(2)(d)(D) and the term "residential construction" to forbid the separation of the Project's commercial and residential components, 2) refused to rely on the Portland City Code to define the Project as exempt under the definition of "residential construction," and 3) ignored the statutory mandate found in ORS 279C.825(2) to separate the Project's commercial and residential components and apply prevailing wage laws to each only if they separately meet the standard.

**A. The Agency correctly applied the 2007 prevailing wage law as amended and determined that Requester's Rose Quarter Housing Project will be a public works if the Project accepts public funds after July 1, 2007.**

The term "public works" was redefined by the Oregon Legislature, effective July 1, 2007,<sup>2</sup> and states, in pertinent part:

"(6)(a) A 'public works' includes, but is not limited to:

" \* \* \* \* \*

"(B) A project for the \* \* \* major renovation \* \* \* of a privately owned building \* \* \* that uses funds of a private entity and \$750,000 or more of funds of a public agency \* \* \*."

ORS 279C.800(6)(a).

The Agency and Requester stipulated that the Project is a major renovation of a former hotel that will be privately owned and is supported by private funds. Requester does not dispute that the Project received a \$5,000,000 loan from the Portland Development Commission ("PDC"), a \$200,000 grant from Multnomah County, and a \$3,680,000 grant from the City of Portland to further the Project, or that the PDC, Multnomah County, and City of Portland are public agencies as that term is defined in ORS 279C.800(5). However, Requester argues that ORS 279C.800(6), as amended in 2007, does not apply to "public contracts" entered into before July 1, 2007, and, that if the funding sources are analyzed under the 2005 prevailing wage rate law, the funds are not "funds of a public agency." Requester's argument fails as a matter of law.

The text of HB 2140 provides the terms on which the 2007 legislation takes effect. In addition to stating the effective date, the legislation specifically exempts one type of project from the application of the PWR law amendments – those funded in whole or in part by bonds issued by the State Treasurer before July 1, 2007. Or Laws 2007 c. 764 § 48(3). Requester does not dispute and credible evidence shows that the Project does not contain revenue from State bond issues – only from the City of Portland. Therefore, the Agency correctly observed during

<sup>2</sup> Or Laws 2007 c. 764 § 49.

the hearing that while it has not sought to retroactively apply the amended definition of “public works” to the Project based solely on agreements executed prior to July 1, 2007, the Project is not exempt from the 2007 amendments. The Agency specifically determined that if the project is revised to include a funding commitment from Oregon Housing and Community Services (“OHCS”), the Project will be subject to the current definition of “public works” under ORS 279C.800(6)(a)(B).<sup>3</sup>

The legislation also provides that the amendments contained in HB 2140 “apply only to public contracts first advertised, but if not advertised then entered into, on or after the effective date of this 2007 Act.” Or Laws 2007 c. 765 § 48(1). Requester argues that the agreements executed prior to July 1, 2007, are “public contracts” based on the plain, ordinary meaning of the term; therefore, pursuant to HB 2140, the 2007 statute cannot apply to those agreements. Citing *Merriam-Webster’s Dictionary*, Requester maintains that by considering the definitions of “public” and “contract,” one could reasonably conclude “that an agreement between two parties, one of which being the government or a relation thereto, is a ‘public contract.’”

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<sup>3</sup> OHCS had not made any commitment to funds when the Agency made its determination or when the hearing commenced. OHCS only had reserved grant funding for the project totaling \$335,000 as of April 7, 2008. See Finding of Fact – The Merits 13.

While that definition is consistent with Requester’s theory, resort to dictionary definition to ascertain legislative intent is not necessary in this case. The Public Contracting Code consists of ORS chapters 279A, 279B, and 279C. ORS 279A.010(1)(bb). As used in the Public Contracting Code, “public contract” means:

“a sale or other disposal, or a purchase, lease, rental or other acquisition, by a contracting agency of personal property, services, including personal services, public improvements, public works, minor alterations, or ordinary repair or maintenance necessary to preserve a public improvement. ‘Public contract’ does not include grants.”

ORS 279A.010(1)(z). This definition was renumbered in 2007, but otherwise remained unchanged. Or Laws 2007 c. 764 § 1. Accordingly, none of the agreements funding Requester’s Project - the City of Portland grant, the Multnomah County grant, and the PDC loan for this Project - is a public contract. This conclusion is also consistent with the context of Section 48(1) in HB 2140. HB 2140, as introduced, did not amend the Prevailing Wage Rate Law portion of the Public Contracting Code. Yet similar language stating that the amendments to the Code “apply only to public contracts first advertised, but if not advertised then entered into, on or after the effective date of this 2007 Act” was included in the original bill. See HB 2140 A-

Eng. Section 30 (2007). Only after amendments to the Prevailing Wage Rate Laws were added to HB 2140 were two subsections added to Section 48 that specifically address the bill's effect on public works projects. See HB 2140 B-Eng. Section 48(2) & (3) (2007).

One of those subsections is contained in Section 48(2), which provides that the 2007 amendments to the Prevailing Wage Rate Laws "do not apply to development and disposition agreements signed by an urban renewal agency before the effective date of this 2007 Act in connection with public-private projects for which no contracts for construction are advertised." The City of Portland grant, the Multnomah County grant, and the PDC loan for this Project are not development and disposition agreements signed by an urban renewal agency. While PDC may be an urban renewal agency, evidence shows it did not own the Project property and therefore did not enter an agreement for its disposition.

The only evidence of legislative intent with respect to the application of the 2007 Prevailing Wage Rate Law amendments to specific projects is the language stating the amendments will not apply to certain agreements, i.e., "public contracts" and "development and disposition agreements entered into by an urban agency." Requester's Project does not include those types of agreements. At the same time, the legislature

made it clear that the only public works projects that will be wholly exempt from application of the 2007 amendments are projects with bond issue funding when the State Treasurer issued the bonds before July 1, 2007. Requester's Project includes a grant funded by bonds issued from the City of Portland, not the State.

The forum cannot find that the legislature intended to apply retroactively the amended definition of "public works" in ORS 279C.800(6)(a)(B) to a project for which the agreements were completed prior to July 1, 2007. But, neither Requester's Project nor its associated funding agreements are exempt from application of the 2007 amendments. As a result, if the Project is revised to include a funding commitment from OHCS, the Project will be subject to the current definition of "public works" under ORS 279C.800(6)(a)(B).

**B. The Agency correctly determined that Requester's Rose Quarter Housing Project is not exempt from prevailing wage rate laws if the Project accepts public funds after July 1, 2007.**

ORS 279.810(2)(d) provides that the Prevailing Wage Rate Laws, ORS 279C.800 to 279C.870, do not apply to "[p]rojects for residential construction that are privately owned and that predominantly provide affordable housing." The terms "affordable housing," "predominantly" and "privately owned" are defined or otherwise addressed in

ORS 279C.810(2)(d). The Agency and Requester stipulated that the Project is intended to be privately owned and the apartment units that will be created during the hotel remodel will provide affordable housing under the income limits set forth in the definition of “predominantly.” However, the Agency concluded in its April 7, 2008, determination that the Project is not “residential construction” for purposes of this exemption. As defined in ORS 279C.810(2)(d):

“‘Residential construction’ includes the construction, reconstruction, major renovation or painting of *single-family houses or apartment buildings not more than four stories in height* and all incidental items, such as site work, parking areas, utilities, streets and sidewalks, pursuant to the United States Department of Labor’s ‘All Agency Memorandum No. 130: Application of the Standard of Comparison “Projects of a Character Similar” Under Davis-Bacon and Related Acts,’ dated March 17, 1978. However, the commissioner may consider different definitions of residential construction in determining whether a project is a residential construction project for purposes of this paragraph, including definitions that:

“(i) Exist in local ordinances or codes; or

“(ii) Differ, in the prevailing practice of a particular trade or occupation, from the United

States Department of Labor’s description of residential construction.” (Emphasis added)

ORS 279C.810(2)(d)(D).

The Agency and Requester agree that “residential construction” is an inexact term. See *Springfield Education Assn. v. School Dist.*, 290 Or 217, 223-24 (1980)(distinguishing exact terms “which impart relatively precise meaning” from inexact terms “which are less precise,” and noting that “[t]o determine the intended meaning of inexact statutory terms, in cases where their applicability may be questionable, courts tend to look to extrinsic indicators such as the context of the statutory term, legislative history, a cornucopia of rules of construction, and their own intuitive sense of the meaning which legislators probably intended to communicate by use of the particular word or phrase”). The Agency and Requester also agree that to determine the term’s intended meaning the question is what did the legislature intend by using that term. *Id.* at 224. They disagree, however, on the correct analytical framework for interpreting the term.

Requester maintains that the Agency has the authority to interpret a statute’s terms, but only within the legislative intent and overall purpose and policy of the term. Requester acknowledges that legislative intent is determined by using the methodology prescribed by the Oregon Supreme Court in *PGE v. Bureau of*

*Labor and Industries*, 317 Or 606, 610-12 (1993).

However, Requester contends that under *Springfield*, the Agency, “because of its assistance in drafting and pushing the statute through the legislature,” is obliged to use its own “intuitive sense of the meaning which legislators probably intended to communicate by use of the particular word or phrase” when considering the purpose and policy of the term. Requester misapplies *Springfield*. The Court stated that it is the courts that “look to intrinsic indicators such as the context of a statutory term, legislative history, a cornucopia of rules of construction, and *their own intuitive sense of the meaning which legislators probably intended to communicate by use of the particular word or phrase.*” *Springfield* at 224. (Emphasis added)

Moreover, in order to effectuate the complete policy judgment that particular terms represent, the Oregon Supreme Court has held that “determining the general policy of a statute is a matter of statutory construction *controlled by the PGE framework.*” *Bergerson v. Salem-Keizer School District*, 341 Or 401, 412-13 (2006). (Emphasis added) Although the issues in *Bergerson* and *Springfield* were whether the agency’s interpretation of a *delegative* term was within the range of discretion allowed by the more general policy of the statutes at issue, interpretation of inexact or delegative terms is a matter of

statutory construction “controlled by the *PGE framework*,”<sup>4</sup> and not *Springfield* as Requester contends. The Agency correctly applied the *PGE* methodology to interpret the meaning of the affordable housing exemption in this case.

The forum thereby adopts the Agency’s analysis and its conclusions in their entirety as follows.

The PGE analysis begins by examining the text and context, applying statutory and judicially developed rules of construction that bear directly on how to read the text, such as to give words of common usage “their plain, natural, and ordinary meaning.” *PGE* at 611; ORS 174.010. If more than one meaning is possible after examining the text and context, then legislative history must be examined to determine legislative intent. *Id.* at 611-12. If the legislative history does not clarify the meaning of the statute, then general maxims of statutory construction are considered. *Id.* at 612.

In this case, the Agency correctly concluded that the Project is not “residential construction.” The meaning of the phrase “not more

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<sup>4</sup> Notably, interpretation of the term “residential construction” does not require a legislative policy determination by the Agency; thus, the term is not delegative. Requester and the Agency have agreed that the term is not so precisely defined to be an “exact term,” but rather is an “inexact term,” subject to interpretation for consistency with legislative intent.

than four stories in height” in ORS 279C.810(2)(d) is exact. The Project in this case involves a building five stories in height, exceeding the height limitation in ORS 279C.810(2)(d) by one story.

The meaning of the term “apartment building” is less exact, but when given its plain, ordinary meaning, establishes that the Project is neither a single family home nor an apartment building. “Apartment building” is commonly defined as a “building containing a number of separate residential units and usually having conveniences (as heat and elevators) in common.” *Webster’s Third New Int’l Dictionary* 98 (Unabridged ed 2002). The evidence is undisputed that the Project involves a former Ramada Inn hotel, which is not an apartment building. In common parlance, a “hotel” is:

“a building of many rooms chiefly for overnight accommodation of transients and several floors served by elevators usually with a large open street-level lobby containing easy chairs, with a variety of compartments for eating, drinking, dancing, exhibitions and group meetings (as a salesmen or convention attendants) with shops having both inside and street-side entrances and offering for sale items of particular interest to a traveler, or providing personal services (as hairdressing, shoe shining), and with telephone booths, writing tables, and washrooms freely available.”

*Webster’s* at 1095. Although both types of buildings are habitable, their construction form and uses differ.

The Agency and Requester stipulated that the Project is for the purchase and remodel of a hotel. Requester’s project documents describe the Project as the purchase and remodel of the Ramada Inn hotel.<sup>5</sup> There is no dispute that when the building was purchased, the building was a hotel. According to Requester, the building has not been physically altered from its initial construction before Requester’s purchase and no remodel work has begun.<sup>6</sup> The fact that Requester has used the hotel to provide transitional housing to its clients does not change the character of the structure. There is no evidence the Project to renovate a five-story hotel has changed since the Agency issued its April 7, 2008, determination.

To be exempt under ORS 279C.810(2)(d), “residential construction” must involve the construction, reconstruction, major renovation or painting of a single family house or an apartment building. The term “construction” is defined in OAR 839-025-0004(5) as meaning “\* \* \* the initial construction of buildings and other structures, or additions thereto \* \* \*.” Because the Project involves the remodel of an exist-

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<sup>5</sup> See Finding of Fact – The Merits 2.

<sup>6</sup> See Finding of Fact – The Merits 3.

ing hotel, it cannot be characterized as “construction.”

The term “reconstruction” is defined in OAR 839-025-0004(22) to mean “\* \* \* highway and road resurfacing and rebuilding, the restoration of existing highways and road, and the restoration of buildings and other structures.” The term “restoration” means “bringing back to or putting back into a former position or condition.” *Webster’s* at 1936. Because the Project would convert an existing hotel building into a mixed-use structure comprised of both commercial space and apartments, the Project cannot be considered a restoration. The Project’s proposed conversion will change the entire character of the building and, therefore, does not meet the definition of residential construction under the “reconstruction” component.

As the Project does not involve construction or reconstruction, the applicable definition is under OAR 839-025-0004(11), which provides that “major renovation” means “the remodeling or alteration of building and other structures within the framework of an existing building or structure and the alteration of existing highways and roads, the contract price of which exceeds \$50,000.” While this definition describes the type of work to be done on the Project site, the fact that the work will be performed on a hotel makes the exemption inapplicable. The Project does not entail the “major renovation” of a single family

home or an apartment building, but of an existing hotel building.

As the Agency points out, the legislature knows how to draft a law so that it has the intended effect, and it did so when it amended the prevailing wage rate law in 2007. OR Laws 2007 c. 764. In addition to retaining the former definition of a “public works” in ORS 279C.800(6)(a)(A), the legislature created the definition under subparagraph (B) by expressly including in the term “public works”

“[a] project for the construction, reconstruction, major renovation or painting of a privately owned road, highway, building, structure or improvement of any type that uses funds of a private entity and \$750,000 or more of funds of a public agency.”

The legislature used the terms “road,” “highway,” “building,” “structure,” or “improvement” of any type as the subject of the designation. In the exemptions from the definition of “public works,” the legislature clearly defined the term “residential construction” at ORS 279C.810(2)(d)(D). Had the legislature intended to include as “residential construction” the construction, reconstruction, major renovation or painting of structures other than single family houses or apartment buildings, it could have done so. Whether the omission was by design or by default, the Agency and this forum are prohibited from inserting language that the legislature has omitted. *Tee v. Albertson’s, Inc.*,

148 Or App 384, 389 (1997); ORS 174.010.

A final element of the statutory definition of “residential construction” is that it applies “pursuant to the United States Department of Labor’s All Agency Memorandum No. 130: Application of the Standard of Comparison ‘Projects of a Character Similar’ Under Davis-Bacon and Related Acts, dated March 17, 1978.” This memorandum and a subsequent clarifying memorandum, All-Agency Memorandum No. 131, dated July 14, 1978, confirm that the major renovation of a five-story hotel is not residential construction. Under All Agency Memorandum No. 130, construction projects are generally classified as building, heavy, highway, or residential. Building construction is described as “the construction of sheltered enclosures with walk-in access for the purpose of housing persons, machinery, equipment, or supplies. It includes all construction of such structures, the installation of utilities and the installation of equipment, both above and below grade level, as well as incidental grading, utilities and paving.” Examples of building construction are provided and include hotels and motels of any height and apartment buildings that are five stories and above. The Project, a five story hotel, meets this description.

Residential construction, however, is described in All Agency Memorandum No. 130 as involving “single family homes or apartment buildings of no more than four (4) stories in height.”

All Agency Memorandum No. 131 clarifies that when a project includes different categories of construction, multiple wage schedules may be used. If work of a different category is incidental to the overall character of the project or is not a substantial amount of construction in itself, only one wage schedule is necessary. Generally, work that is less than 20 percent of the total project is incidental, except when the work is substantial by itself. Evidence shows the majority of work on the Project involves the renovation of a hotel, which is classified as building construction. As the Agency points out, even if that portion of the Project that will create affordable housing is construed as residential construction, the Project would become a mix of construction types. Additionally, credible evidence supports the Agency’s contention that the new commercial space – 17,000 square feet - is a substantial project by itself. While the commercial space is approximately 19 percent of the total square footage of the building, evidence shows that calculation does not include the sections of the basement and parking that the commercial tenants and customers will occupy. Consequently, that portion of the Project is not incidental and the Project cannot be identified as residential construction in keeping with the memoranda.

Under the “residential construction” definition, the Agency is authorized to consider different definitions of “residential construc-

tion” in determining whether a project is residential construction. However, the Agency’s discretion is limited to what the legislature has identified as the type of different definitions that may be considered. ORS 279C.810(2)(d)(D) provides in pertinent part:

“[T]he commissioner may consider different definitions of residential construction in determining whether a project is a residential construction project for purposes of this paragraph, including definitions that:

“(i) Exist in local ordinances or codes; or

“(ii) Differ in the prevailing practice of a particular trade or occupation, from the United States Department of Labor’s description of residential construction.”

Requester provided no evidence or identified any definition of “residential construction” in a local ordinance or code that applies to the renovation of a five-story hotel of concrete construction. The Portland City Code defines “residential structure,” but not “residential construction.” Although the definition refers to “any building or other improvements designed or intended to be used for residential purposes,” it does not define “construction,” and although it applies to “any building,” it does not define “residential.” Portland City Code § 24.15.14 (2007). Requester also refers to Portland City Code provisions that

provide for wood frame construction designed for apartment occupancies. However, the Agency correctly points out that those provisions do not define “residential construction,” nor is the use of wood framing in new construction relevant to the renovation of an existing hotel constructed of concrete. The Agency’s discretion to consider different definitions of residential construction is limited to definitions of “residential construction.” The Portland City Code contains no such definition. Similarly, Requester provided no evidence or identified any relevant definitions of “residential construction” that differ in the prevailing practice of a particular trade or occupation from the United States Department of Labor’s description of residential construction.

Based on the text and context of ORS 279C.810(2)(d)(D), the definition of “residential construction” does not include the major renovation of a five-story hotel into a mixed-use building with apartments and commercial space. For a statute to be ambiguous there must be at least two reasonable interpretations of the disputed statutory terms. *State v. Cooper*, 319 Or 162, 167 (1994). A reasonable interpretation refers to an interpretation that is “not wholly implausible.” *State v. Owens*, 319 Or 259, 268 (1994); *State v. Stamper*, 197 Or App 413, 417 (2005), *rev den*, 339 Or 230 (2005). The term “residential construction” does not lend itself to more than one reasonable interpretation in this context. Based

on a plain reading of the statute, residential construction does not include construction, reconstruction, major renovation or painting of hotels and even if it did, it does not include structures more than four stories in height. Furthermore, the Project itself is of mixed residential and commercial use due to the substantial commercial component on the ground floor and related areas.

Absent any apparent ambiguity, there is no need to examine legislative history. When the legislature's intent is clear from the text and context, further inquiry is unnecessary. *PGE*, 317 Or at 611.

Requester's attempt to provide declarations of witnesses who collaborated with the Agency prior to the passage of HB 2140 as purported evidence of legislative intent is misguided. Under *PGE*, and its progeny, the best evidence of legislative intent is the statute itself. *PGE*, 317 Or at 610-11. See also, e.g., *Cooper*, 319 at 166 ("the best evidence of the legislature's intention and the first level of analysis is to examine the text and context of the statute"); *Owens*, at 319 Or 810 ("[w]e begin with the text \* \* \* which provides the best evidence of the legislature's intent). The Agency's interpretation of ORS 279C.810(2)(d)(D) is reasonable and Requester has offered no legislative history to support a different interpretation.

**C. The Agency was not required to divide the Project before making its determination.**

Alternatively, Requester argues that the Agency was required to divide the Project pursuant to ORS 279C.827(2), which provides that

"[i]f a project is a public works of the type described in ORS 279C.800(6)(a)(B) or (C), the commissioner shall divide the project, if appropriate, after applying the considerations set forth in subsection (1)(c) of this section to separate the parts of the project that include funds of a public agency or that will be occupied or used by a public agency from the parts that do not use funds of a public agency and will not be occupied or used by a public agency."

The Agency's initial task, pursuant to ORS 279C.817, was to "make a determination about whether a project or proposed project is or would be a public works on which payment of the prevailing rate of wage is or would be required under ORS 279C.840." The Agency made that determination based on information provided by Requester. Requester contested the Agency's determination on the ground that it was erroneous and not consistent with legislative intent.

Nothing in ORS 279C.840 requires the Agency to address whether a project should be divided, and that issue is not

properly before this forum. Even if it were an issue, all of the information in the record militates against division. The Agency must divide a project only if appropriate and in light of the considerations listed in ORS 279C.827(1)(c). Requester provided no information to support its contention that the Project must be divided. Indeed, if anything, the record establishes that the Project is not appropriate for division because there is no physical separation of the project structures, the project involves only one building, has one single architect, a single general contractor and one single project manager to administer and implement the Project. Additionally, Requester has not identified any parts of the Project that will not use public funds. Although the Agency was not required to address whether division of the Project is appropriate under ORS 279C.827 in its determination, the evidence establishes that the Project is for the renovation of a single building using public funds and cannot be divided.

Requester's principal disagreement with the Agency's determination from the outset has been that the Agency failed to effectuate legislative intent by determining that Requester's Project was not "residential construction" of affordable housing as contemplated in ORS 279C.810(2)(d)(D). However, the record shows the Agency properly ascertained the legislature's intent from the statute's text and context, and correctly concluded that Requester's Project, a renovation of

a five-story hotel, would be subject to the prevailing wage rate laws if public funds were committed to the Project after July 1, 2007. The Agency's determination therefore is affirmed.

#### ORDER

NOW, THEREFORE, as authorized by ORS 279C.817, the Agency's determination, issued pursuant to ORS 279C.817, hereby is **AFFIRMED**.

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**In the Matter of  
LAURA M. JAAP and NETTICE  
M. HONN**

**Case No. 32-08**

**Final Order of Commissioner  
Brad Avakian**

**Issued April 8, 2009**

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#### SYNOPSIS

Respondent Laura Jaap employed three wage claimants in January and February 2007 to perform repairs on Respondent Honn's house at the respective agreed rates of \$25, \$12, and \$12 per hour. Claimants respectively earned \$4,400, \$2,112, and \$1,056 in gross wages and were only paid \$1,000, \$980, and \$288 before quitting. The forum found that Respondent Jaap was Claimants' sole employer and dismissed the Order of Determination as to Respondent Honn. Respondent Jaap was ordered to pay the

Claimants a total of \$5,300 as unpaid, due, and owing wages. Respondent Jaap's failure to pay the wages was willful, and she was ordered to pay Claimants a total of \$11,760 in penalty wages. ORS 652.140(2), ORS 652.150.

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The above-entitled case came on regularly for hearing before Alan McCullough, designated as Administrative Law Judge ("ALJ") by Brad Avakian, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on February 24 and 25, 2009, at the Eugene office of the Bureau of Labor and Industries, located at 1400 Executive Parkway, Suite 200, Eugene, Salem, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by case presenter Jeffrey C. Burgess, an employee of the Agency. Wage claimants David Northern, Thomas Northern, and John Swinger were present throughout the hearing and were not represented by counsel. Respondents Laura Jaap and Nettice Honn appeared at the hearing by telephone and were present throughout the hearing.

The Agency called the following witnesses: Claimants David and Thomas Northern; Claimant John Swinger; Newell Enos, BOLI Wage and Hour Division compliance specialist; and Robert McArthur, Wage and Hour Division screener.

Respondents called themselves as telephonic witnesses.

The forum received into evidence:

a) Administrative exhibits X-1 through X-14 (submitted or generated prior to hearing); and

b) Agency exhibits A-1 through A-28 (submitted prior to hearing).

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

#### **FINDINGS OF FACT – PROCEDURAL**

1) On August 17, 2007, Claimant David Northern ("D. Northern") filed a wage claim with the Agency alleging that "Laura Zapp"<sup>1</sup> had employed him from January 9 through February 6, 2007, and failed to pay wages earned and due to him. He did not sign and date the original wage claim, but did so at hearing and the forum received his signed and dated wage claim as a substitute for Exhibit A-1 that was filed with the Agency's case summary.

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<sup>1</sup> It was undisputed that the "Laura Zapp" named in the wage claims and "Laura Jaap," the named Respondent in this case, are the same person.

2) On March 7, 2007, Claimant Thomas Northern ("T. Northern") filed a wage claim with the Agency alleging that "Laura Zapp" had employed him from January 9 through February 6, 2007,<sup>2</sup> and failed to pay wages earned and due to him.

3) On March 7, 2007, Claimant John Swinger ("Swinger") filed a wage claim with the Agency alleging that "Laura Zapp" had employed him from January 9, 2007, through February 6, 2007, and failed to pay him wages earned and due to him.

4) At the time they filed their wage claims, Claimants D. Northern, T. Northern, and Swinger assigned to the Commissioner of the Bureau of Labor and Industries, in trust for Claimants, all wages due from Respondents.

5) Claimants brought their wage claims within the statute of limitations.

6) On October 1, 2007, the Agency issued Order of Determination No. 07-0683 based upon the wage claims filed by Claimants and the Agency's investigation. The Order of Determination alleged that Respondents Laura M. Jaap and Nettice Honn had employed Claimants in January and February 2007 and owed a total of

\$5,300 in unpaid wages and \$11,600 in penalty wages, plus interest on both sums, and required that, within 20 days, Respondents either pay these sums in trust to the Agency, request an administrative hearing and submit an answer to the charges, or demand a trial in a court of law.

7) Respondents were served with the Order of Determination and filed an answer and request for hearing on October 15, 2007.

8) On January 6, 2009, the Agency filed a "BOLI Request for Hearing" with the forum regarding its Order of Determination.

9) On January 9, 2009, the Hearings Unit issued a Notice of Hearing to Respondents, the Agency, and Claimants setting the time and place of a hearing as 9 a.m., February 24, 2009, at BOLI's Eugene office. Together with the Notice of Hearing, the forum sent a copy of the Order of Determination, a document entitled "Summary of Contested Case Rights and Procedures" containing the information required by ORS 183.413, a document entitled "Servicemembers Civil Relief Act (SCRA) Notification, and a copy of the forum's contested case hearings rules, OAR 839-050-000 to 839-050-0440.

10) On January 15, 2009, the Agency moved for a prehearing conference to discuss Respondents' statement to the Agency that they had moved out of state and wished to have a telephone hearing.

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<sup>2</sup> His wage claim alleged January 9 through February 6, 2007, but the Agency calendar of hours worked (Form WH-127) that he filled out when he filed his wage claim only showed that he worked through January 30.

11) On January 16, 2009, Respondent Jaap filed a motion to allow both Respondents and their witnesses to appear by telephone.

12) On January 21, 2009, the ALJ ordered the Agency and Respondents each to submit a case summary including: lists of all persons to be called as witnesses; identification and copies of all documents to be offered into evidence; and a brief statement of the elements of the claim, a statement of any agreed or stipulated facts, and any wage and penalty calculations (for the Agency only). The ALJ ordered the participants to submit case summaries by February 13, 2009, and notified them of the possible sanctions for failure to comply with the case summary order.

13) On January 28, 2009, the ALJ conducted a recorded prehearing conference with both Respondents and Burgess for the purpose of considering Respondents' motion for a telephone hearing. At the conclusion of the hearing, the ALJ **GRANTED** Respondents' motion, subject to conditions set out in an order entitled "Ruling on Respondents' Motion for Telephone Hearing; Summary of Prehearing Conference" that the ALJ issued the next day.

14) At the start of the hearing, the ALJ orally advised the Agency and Respondents of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

15) During the hearing, Respondents were both given an opportunity to cross examine the Agency's witnesses, but Honn declined to do so.

16) The ALJ issued a proposed order on March 18, 2009, that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. No exceptions were filed.

#### **FINDINGS OF FACT – THE MERITS**

1) In January and February 2007, Respondent Honn ("Honn") owned a house ("Honn's house") located at 390 N. 6<sup>th</sup> St., Harrisburg, Oregon. Honn had purchased the house in September 2005 as an investment property. She then sold it on contract, but subsequently repossessed it after the buyers defaulted. While living at the house, the buyers tore out some of the walls.

2) Due to the buyers' demolition, it was necessary to repair Honn's house before it could be sold or rented. Honn gave Jaap, her mother, the authority to determine what work would be done to the house.<sup>3</sup>

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<sup>3</sup> The only evidence presented on this issue was Honn's following testimony:

Q: "Was the decision about what the ultimate floor plan was to be – were those your mother's?"

A: "I don't know."

Q: "Okay, it was your house, right?"

3) Jaap had no financial interest in Honn's house.

4) In late December 2006 or early January 2007, Jaap was dating Steven Davis, D. Northern's nephew. Davis told Jaap D. Northern did construction work, and Jaap asked Davis to contact D. Northern about repairing and remodeling Honn's house. Davis called D. Northern and asked him if he would do some repair and remodel work on Honn's house so it could be sold or rented.

5) D. Northern and Claimant T. Northern ("T. Northern") are brothers. D. Northern's wife is Swinger's aunt.

6) On January 5, 2007, the three Claimants met with Davis and Jaap at Honn's house. Honn was not present at the meeting. Davis and Jaap showed Claimants the repair work and remodeling they wanted done. The work included demolition and reconstruction of several rooms, including a bathroom and two bedrooms in a former garage, the replacement of electrical receptacles, lights, switches, and plug-ins, and demolishing a concrete floor and building a new false floor. D. Northern told Jaap that he needed help to do the work, and told her what T. Northern and

Swinger could do. Claimants agreed to do the work and Jaap hired them. Jaap and the Claimants made individual agreements that D. Northern would be paid \$25 per hour and T. Northern and Swinger would be paid \$12 per hour. Jaap agreed to pay them by the week.

7) None of the three Claimants submitted a written bid and there was no written employment contract between Claimants and Respondents. None of the three Claimants filled out any employment-related paperwork, such as W-4s, I-9s.

8) At that time, D. Northern had been doing construction work for 40 years. He had previously been licensed as a contractor in Idaho and had been a partner in a construction company located in Grants Pass, for which he worked as a salesman. He had not worked as a contractor in Oregon or Idaho for the previous five years and was not an Oregon licensed contractor.

9) D. Northern and Swinger first reported to work on January 9, 2007. Davis and Jaap explained the scope of the work and took them around Honn's house and explained the work Jaap wanted done.

10) T. Northern's first day of work was January 10, 2007.

11) While working on Honn's house, D. Northern's primary work was the carpentry required in the project.

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A: "Yeah."

Q: "Did you give her the authority to do whatever she pleased with the place for the purposes of this remodel?"

A: "Yes."

12) While working on Honn's house, Swinger helped perform the demolition necessary on the job, including using the jackhammer to remove the concrete floor from the former garage, framing, and drywall.

13) While working on Honn's house, T. Northern performed the electrical work required on the job, as well as doing some clean up work. He had learned to do basic electrical work around his house and had replaced plugs for a "co-op" that was his former employer.

14) D. Northern and Swinger performed work at Honn's house in January and February 2007. T. Northern only worked in January 2007. Claimants each worked eight hours every day that they worked at Honn's house.

15) D. Northern kept a contemporaneous written record of the hours the Claimants worked each day by noting them in his personal calendar. D. Northern and Swinger worked the same days, including every day that T. Northern worked.

16) After Claimants had worked a week at Honn's house, they submitted their record of hours worked to Jaap for the dates of January 9-13. D. Northern and Swinger reported 40 hours worked and T. Northern reported 24 hours worked. Jaap went to the bank and returned with a large manila envelope with three smaller envelopes in it, which she gave to D. Northern.

The smaller envelopes each had a different Claimant's name written on them. D. Northern's envelope contained \$1,000 in cash; T. Northern's envelope contained \$288 in cash; and Swinger's envelope contained \$480 in cash.

17) Jaap was present at the work site at least three days a week while Claimants performed work at Honn's house except for January 16-23, 2007, when Jaap was commuting to, participating in, or returning from a dog sled race in Joseph, Oregon. When Jaap was at Honn's house, she stayed for one to four hours, doing some repair work herself and giving directions to Claimants regarding what work should be performed. When Jaap was in Joseph, Davis was at the house and gave Claimants direction. Handwritten instructions for the work to be performed by the Claimants at Honn's house, including a floor plan with dimensions and a list of the electrical work to be performed, were left for Claimants on a counter at Honn's house.

18) Jaap provided and paid for all the materials for the job, although Claimants had to pick those materials up at two different building supply stores. Honn met the Claimants and paid for the building supplies with her debit card at Jerry's, one of the stores, and Jaap repaid her for the expense.

19) D. Northern provided most of the hand and power tools used on the job, including a table saw, chop saw, worm drive skill

saw, drills, hammers, tapes, squares, knives, and nail aprons. Davis provided the jackhammer. Jaap provided saw blades, nails, a wheelbarrow, sledgehammer, and crowbar.

20) Honn's only involvement with the work on her house was that she owned the house and met the claimants on one occasion at Jerry's to pay for building materials because Jaap was out of town.

21) On January 24, 2007, Jaap paid Swinger another \$500 in cash after Swinger requested a draw so that he could go to Medford and pick up his car that had been stolen and wrecked.

22) At some point during the work on Honn's house, Jaap asked D. Northern to fix the ceiling on the second floor of the house she lived in at 290 7<sup>th</sup> Street, Harrisburg, and gave D. Northern the keys to her house. Claimants decided not to perform that work when Jaap could not pay them for the work on Honn's house.

23) Claimants D. Northern and Swinger continued to work until the only work left was hanging doors. They decided to quit when Jaap told them she had no money to pay them and had unsuccessfully tried to refinance so she could pay them. At that time, T. Northern had already quit.

24) There was no evidence that the Claimants were employed by anyone else or working on any other job while they worked on Honn's house.

25) There was no evidence that T. Northern or Swinger have ever been construction contractors.

26) By week, D. Northern worked the following days and hours at Honn's house:

January 9-13 (40 total hours)  
 January 15-19 (40 total hours)  
 January 22-26 (40 total hours)  
 January 29 – February 2 (40 total hours)  
 February 5-6 (16 hours)

In total, D. Northern worked 176 hours, earning \$4,400 in gross wages. He was only paid \$1,000, leaving \$3,400 due and owing.

27) By week, T. Northern worked the following days and hours at Honn's house:

January 10-11, 13 (24 total hours)  
 January 16-17, 19 (24 total hours)  
 January 22-23, 26 (24 total hours)  
 January 29 – 30 (16 total hours)

In total, T. Northern worked 88 hours, earning \$1,056 in gross wages. He was only paid \$288, leaving \$768 due and owing.

28) By week, Swinger worked the following days and hours at Honn's house:

January 9-13 (40 total hours)  
 January 15-19 (40 total hours)  
 January 22-26 (40 total hours)  
 January 29 – February 2 (40 total hours)  
 February 5-6 (16 hours)

In total, Swinger worked 176 hours, earning \$2,112 in gross wages. He was only paid \$980, leaving \$1,132 due and owing.

29) On March 19, 2007, Jaap called Robert McArthur,

WHD Screener, and told him, among other things, that Claimants "did work for her."

30) On August 17, 2007, BOLI's Wage & Hour Division mailed separate letters entitled "Notice of Wage Claim" that were identical in content to Respondents Jaap and Honn. In part, the letters read:

"You are hereby notified that DAVID DEAN NORTHERN, ET AL, have filed wage claims with the Bureau of Labor and Industries alleging:

"David D. Northern claims unpaid wages of \$3,400.00 at the rate of \$25.00 per hour from January 9, 2007 to February 6, 2007.

"Thomas A. Northern claims unpaid wages of \$768.00 at the rate of \$12.00 per hour from January 10, 2007 to January 30, 2007.

"John B. Swinger claims unpaid wages of \$1,132.00 at the rate of \$12.00 per hour from January 9, 2007 to February 6, 2007.

"IF THE CLAIMS ARE CORRECT, you are required to IMMEDIATELY make negotiable checks or money orders payable to the claimants for the amount of wages claimed, less deductions required by law, and send the payments to the Bureau of Labor and Industries at the above address."

"IF YOU DISPUTE THE CLAIMS, complete the enclosed "Employer Response"

form and return it together with the documentation which supports your position, as well as payment of any amounts which you concede are owed the claimants to the BUREAU OF LABOR AND INDUSTRIES within ten (10) days of the date of this Notice."

31) On September 12, 2007, Enos sent separate letters, by regular and certified mail, to Jaap and Honn in which he stated his determination with regard to the Claimants' wage claims. The certified letters were returned unclaimed from the post office, but the letters sent by regular mail were not returned. In pertinent part, the letters read as follows:

"After review of the information provided, it is my determination that you owe the three wage claimants unpaid wages as listed below. Computations are attached:

<u>NAME</u>	<u>UNPAID</u>	<u>PENALTIES</u>
	<u>WAGES</u>	
D. Northern	\$3,400.00	\$6,000.00
T. Northern	\$ 768.00	\$2,880.00
J. Swinger	\$1,132.00	\$2,880.00

[Editor's note: Claimants' first names are not abbreviated in the original and are abbreviated here to fit into the BOLIO format.]

"Please respond on or before **September 26, 2007**. If no response is received by that date, the Bureau will initiate administrative action to collect these wages. In addition the Bureau may seek to collect penalty wages of up to 30

days' wages plus costs and attorney fees. Please be advised that penalty wages totaling \$11,750.00 have accrued as of this date."

32) Penalty wages for D. Northern under ORS 652.150 are computed as follows: \$25 per hour x 8 hours x 30 days = \$6,000.

33) Penalty wages for T. Northern under ORS 652.150 are computed as follows: \$12 per hour x 8 hours x 30 days = \$2,880.

34) Penalty wages for Swinger under ORS 652.150 are computed as follows: \$12 per hour x 8 hours x 30 days = \$2,880.

35) Thomas Northern answered questions on direct and cross examination calmly, concisely, and without hesitation. His memory was clear and his answers were responsive. He testified entirely from his recollection, not referring to any notes except when he was asked to refer to a specific exhibit. His testimony was internally consistent and consistent with documentary evidence provided by the Agency. His testimony was consistent with the testimony of Swinger, whom the forum has found to be a credible witness, and he was not impeached by Respondents. The forum has credited his testimony in its entirety.

36) Like T. Northern, John Swinger answered questions on direct and cross examination

calmly, directly, and without hesitation. He had an excellent memory of the events relevant to the wage claims and testified in detail about the condition of the work site and work he performed without having to refer to any notes. His testimony was internally consistent and consistent with documentary evidence provided by the Agency. He was not impeached by Respondents. The forum has credited his testimony in its entirety.

37) David Northern's testimony during direct and cross examination was like day and night. On direct examination, he answered questions calmly, directly, and without hesitation. Under cross examination by Jaap, he was hostile, combative, evasive, argumentative, abrasive, and sarcastic. At times, his tone of voice and facial expression conveyed disgust or indignation, as though Jaap's questions were absurd and it was an extreme annoyance for him to have to answer them. In addition, one of his answers, repeated twice in response to different questions, showed extreme disrespect for Jaap and the forum.<sup>4</sup> Based on

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<sup>4</sup> Q: "You just stated you couldn't get things done in the length of time I needed. What length of time was that?"

A: "You wanted a wham, bam, thank you ma'am and I refused to do it in a wham bam, thank you ma'am attitude."

Q: "What amount of time was that, Mr. Northern?"

D. Northern's demeanor on cross examination, the forum has only credited his testimony when it was uncontroverted or supported by other credible evidence.

38) Honn's testimony was credible with the exception of two statements that the forum did not believe because they were contrary to more credible evidence. Those were her statements that D. Northern told Honn he was a contractor when he called to ask her to meet him at Jerry's to pay for supplies and that she met Claimants at Jerry's on January 20.

39) Laura Jaap was not a credible witness because of her prior inconsistent statements, prior omissions in statements made to the Agency and in her answer, and the inherent improbability of one statement. In her answer and request for hearing, she stated:

"Mr. Northern was paid in full for work that was never completed. He represented himself as a contractor, van and trailer [sic], but apparently no license. It was never an issue, because Mr. Davis was the facilitator. Initially, no money was to be paid. Mr. Davis [sic] and Mr. Northern were just going to do the repairs to help a friend. Mr. Davis became very busy, so we decided it was fair to pay Mr. Northern something after seeing the damage. We

agreed to the \$5,000, plus supplies, which I provided."

In contrast, at hearing Jaap testified that she agreed to pay \$2,500 to D. Northern. She provided no explanation for the \$2,500 discrepancy between the amount stated in her answer and the figure she testified to at hearing. At hearing, Jaap also conspicuously failed to mention that Davis and Northern originally offered to do the work for free and presented no evidence to establish that D. Northern knew either Jaap or Honn before January 5, 2007 or was a "friend." If D. Northern was in fact a contractor, the forum finds it improbable that he would have been willing to do \$5,000 worth of work for free for someone he did not know. A second prior inconsistent statement was that Jaap told Enos on September 10, 2007, that she was not around much because she was out of town while the job was being done, whereas at hearing she testified that she was only gone from January 16-23, 2007.

Regarding prior omissions, Jaap testified at hearing that (1) Claimants performed work at Honn's house that far exceeded the scope of work they were authorized to perform and that she had expected the work to be completed in a week; and (2) that Claimants left Honn's house in a bigger mess than it was when they started work. Jaap did not raise either issue before the hearing, despite opportunities to do so in an August 3, 2007, letter to a former Agency compliance spe-

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A: " \* \* \* get in and get out. And I refused to do that."

cialist's request for information concerning the wage claims, during a September 10, 2007, interview with Enos, and in her answer. Jaap's failure to raise these issues before the hearing or to present any other witnesses to support her testimony on those issues leads the forum to conclude that her testimony on these issues was fabricated.

Based on the above, the forum has only credited Jaap's testimony when it was corroborated by other credible evidence.

40) Enos is an experienced investigator who responded directly to questions and did not give any speculative answers when he was asked questions he could not answer. Most of his testimony was based on conversations that he contemporaneously documented. He was not impeached and the forum has credited his testimony in its entirety.

41) The forum gives no weight to Ron Boone's written statement because it claims Boone came out to make a carpet bid at Honn's house on February 9, 2007, at which time none of the Claimants were still working at Honn's house.

#### **ULTIMATE FINDINGS OF FACT**

1) At all times material herein, Respondent Laura Jaap was an individual who employed Claimants to perform remodeling and repair work on a house owned by Respondent Honn that is located at 390 N. 6<sup>th</sup> St. in Harrisburg, Oregon.

2) Jaap hired Claimants on January 5, 2007, and agreed to pay D. Northern \$25 per hour and T. Northern and Swinger \$12 per hour.

3) D. Northern worked for Jaap from January 9 through February 6, 2007, for Jaap. In total, he worked 176 hours, earning \$4,400 in gross wages. He was only paid \$1,000, leaving \$3,400 in due and owing wages.

4) T. Northern worked for Jaap from January 10 through January 30, 2007. In total, he worked 88 hours, earning \$1,056 in gross wages. He was only paid \$288, leaving \$768 in due and owing wages.

5) Swinger worked for Jaap from January 9 through February 6, 2007. In total, Swinger worked 176 hours, earning \$2,112 in gross wages. He was only paid \$980, leaving \$1,132 in due and owing wages.

6) All three Claimants voluntarily quit Jaap's employment.

7) Jaap or Davis directed Claimants' work on Honn's house.

8) D. Northern provided most of the tools Claimants used to perform the work and Jaap and Davis provided the remaining tools.

9) Jaap provided and paid for all the materials and supplies used by Claimants.

10) While working on Honn's house, Claimants had no opportunity to make a profit or suffer a loss.

11) Claimants did not work for anyone else while employed by Jaap and were offered limited additional employment by Jaap while they worked on Honn's house.

12) On August 17 and September 12, 2007, BOLI's Wage & Hour Division made written demand for unpaid wages to the Claimants in the same amount sought in the Agency's Order of Determination.

13) Penalty wages for D. Northern, computed under ORS 652.150, equal \$6,000.

14) Penalty wages for T. Northern and Swinger, computed under ORS 652.150, equal \$2,880 each.

### CONCLUSIONS OF LAW

1) At all times material herein, Respondent Jaap was an employer who directly engaged the personal services of Claimants in Oregon and Claimants were Respondent Jaap's employees, 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 has jurisdiction over the subject matter and Respondents herein. ORS 652.310 to 652.405.

3) Respondent Honn did not employ the Claimants and the Order of Determination is dismissed with regard to Honn.

4) Respondent Jaap violated ORS 652.140(2) by failing to pay to Claimants all wages earned

and unpaid not later than five days, excluding Saturdays, Sundays and holidays, after Claimants quit Jaap's employment. Respondent Jaap owes Claimants the following amounts of unpaid, due, and owing wages: D. Northern - \$3,400; T. Northern - \$768, and Swinger - \$1,132.

5) Respondent Jaap's failure to pay Claimants all wages due and owing was willful and Respondent Jaap owes penalty wages in the following amounts to Claimants: D. Northern - \$6,000; T. Northern - \$2,880, and Swinger - \$2,880. ORS 652.150.

### OPINION

#### CLAIMANTS' WAGE CLAIMS

To establish Claimants' wage claims, the Agency must prove the following elements by a preponderance of the evidence: 1) Respondent(s) employed Claimants; 2) The pay rate upon which Respondent(s) and Claimants agreed; 3) Claimants performed work for which they were not properly compensated; and 4) The amount and extent of work Claimants performed for Respondent(s). *In the Matter of Creative Carpenters Corporation, 29 BOLI 271, 277 (2007).*

#### CLAIMANTS WERE NOT INDEPENDENT CONTRACTORS

In determining whether Jaap, Honn, or both employed Claimants, the forum must first address Jaap's affirmative defense that D. Northern was an independent contractor. Respondent Jaap must prove this defense by a pre-

ponderance of the evidence in order to prevail. *In the Matter of Gary Lee Lucas*, 26 BOLI 198, 210 (2005). Jaap waived this defense with respect to Claimants T. Northern and Swinger by not raising it in her answer. OAR 839-050-0130(2). Consequently, although the forum's discussion of the facts relevant to Jaap's independent contractor defense necessarily mentions all three Claimants, it only applies to D. Northern.

This forum applies an "economic reality" test to distinguish an employee from an independent contractor under Oregon's minimum wage and wage collection laws. *Id.* The degree of economic dependency in any given case is determined by analyzing the facts presented in light of the following five factors, with no one factor being dispositive:

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

*Gary Lee Lucas* at 310. See also *In the Matter of Orion Driftboat and Watercraft Company*, 26 BOLI 137, 146 (2005); *In the Mat-*

*ter of Kilmore Enterprises*, 26 BOLI 111,120-21 (2004).

For reasons stated later in this Opinion, the forum has concluded that Respondent Honn was not Claimants' employer. Therefore, the forum only evaluates Jaap's working relationship with Claimants with regard to Jaap's independent contractor defense.

#### **A. Degree of control exercised by Jaap.**

Jaap met Claimants at Honn's house their first day of work and was present to direct work and perform work herself at least three days a week except during the week while she was at the Eagle Cap dog sled race. In that week, Davis, whom the forum infers was acting as Jaap's agent, came to Honn's house to direct work in Jaap's absence. Claimants performed the work that Jaap and Davis instructed them to perform. There is no evidence that Claimants were working for anyone else immediately before, during, or after they worked on Honn's house. Although there was no testimony about how closely Jaap and Davis supervised the Claimants, the Claimants credibly testified that Jaap and Davis directed their work. Jaap has the burden of proof on this issue, and the lack of more specific evidence concerning the extent of supervision by Jaap and Davis leads the forum to rely on the Claimants' general testimony and conclude that Jaap and Davis directed their work. This supports the Agency's claim that D. Northern was Jaap's em-

ployee and not an independent contractor.

**B. The relative investments of Claimants and Jaap.**

Claimants had no investment in Honn's house or in the work performed, other than their time. Jaap paid for all the materials and supplies necessary to perform the work. There is no evidence that D. Northern had to spend any money related to Claimants' performance of the work. The forum does not consider D. Northern's ownership of most of the tools that he, T. Northern, and Swinger used on the job as an "investment" because there is no evidence that D. Northern had to purchase any of those tools to perform the work or that the tools would not have been provided by Jaap or Davis if D. Northern had not provided them. Again, the relevant facts favor the conclusion that Claimants were employees, not independent contractors.

**C. The degree to which Claimants' opportunity for profit and loss was determined by Jaap.**

Claimants were not licensed contractors. They did not bid on the project and were paid based on an agreed hourly rate. The latter fact was established by their credible testimony about their wage agreement with Jaap, Jaap's agreement to pay them by the week, and the fact that Jaap's first cash payment to them corresponded exactly to the hourly wage they agreed to and the number of hours they reported for

their first week of employment. Claimants had no opportunity to make more money by working more efficiently and finishing the job in fewer hours. They made no capital investment and therefore risked no loss of money if the project fell through or was not completed. These facts are indicative of an employment relationship.

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

D. Northern had previously worked as a construction contractor in Idaho and has spent most of his adult life doing construction work. However, he did not bid on the work to be done at Honn's house. Once on the job, Jaap told him the work that needed to be done. A hand-drawn floor plan with dimensions and a list of the electrical work to be performed was left on a counter in Honn's house to show Claimants the work that Jaap wanted completed. There were no blueprint plans.

Testimony by the Claimants establishes that Jaap and Davis directed their work, and that Jaap was at Honn's house for one to four hours, at least three days a week, except for her week at the dog races when Davis took her place. There was no specific testimony about how closely Jaap and Davis supervised the Claimants, other than that they directed Claimants' work. Likewise, there was no testimony about the degree of skill or initiative required to perform the specific work done by the Claimants, other than a listing

of the tools that they used and the specific rooms they remodeled. Given this paucity of evidence, the forum declines to speculate about the degree of skill, training, or initiative required to perform that work or the specific amount of supervision exercised by Jaap and Davis.

The fact remains that Jaap and Davis were not at Honn's house the majority of the time that Claimants worked. The forum infers that Claimants necessarily possessed some skill and exercised some initiative in order to perform the work when Jaap and Davis were gone. Again, because there was no specific testimony about the work that D. Northern performed when Jaap and Honn were gone, the forum is unable to draw any conclusions about the skill and initiative required to perform that work, D. Northern's prior experience notwithstanding. Respondent Jaap has the burden of proof to show that the degree of skill and initiative required of D. Northern to perform the work was that of an independent contractor, and she did not meet that burden.

**E. The permanency of the relationship between Claimants and Jaap.**

Claimants were hired to perform needed repairs and remodeling on Honn's house. Although they were not hired for a specific duration of time, Claimants' testimony establishes that the work was almost complete when they quit. The evidence establishes that, at some time while Claimants worked at Honn's

house, Jaap also asked D. Northern to do some repair work on her own house and gave him a key to her house. D. Northern opted not to do that work because Jaap did not pay him in full for the work he performed on Honn's house. There was no evidence that D. Northern or the other two Claimants worked for anyone else while they worked at Honn's house.

In a number of cases, the forum has considered whether a claimant was engaged for an "indefinite period" in evaluating the permanency of the relationship. See *In the Matter of Gary Lucas*, 26 BOLI 198, 212 (2005); *In the Matter of Orion Driftboat and Watercraft Company*, 26 BOLI 137, 147 (2005); *In the Matter of Alphabet House*, 24 BOLI 262, 278 (2003); *In the Matter of Procom Services, Inc.*, 24 BOLI 238, 244 (2003); *In the Matter of Heiko Thanheiser*, 23 BOLI 68, 75-76 (2002); *In the Matter of Debbie Frampton*, 19 BOLI 27, 36-37 (1999); *In the Matter of Elmer DeHart*, 18 BOLI 199, 207-08 (1999). In making the same evaluation, the forum has also considered whether there was a "fixed date" for the claimant's employment to cease. See *In the Matter of Adesina Adeniji*, 25 BOLI 162, 170 (2004); *In the Matter of William Presley*, 25 BOLI 56, 69 (2004), *aff'd*, *Presley v. Bureau of Labor and Industries*, 200 Or App 113, 112 P3d 485 (2005). The forum has also recognized that "the impermanence of a particular job alone does not create an independent contractor relationship." *In the Matter of Triple A*

*Construction, LLC*, 23 BOLI 79, 93 (2002). Finally, the forum has noted that “[i]ndependent contractors are generally engaged to perform a specific project for a limited period.” *Id* at 93.

In this case, D. Northern was hired to perform specific repair and remodeling work on Honn’s house, with the option of performing limited repair work on Jaap’s house when the work on Honn’s house was complete. The work on Honn’s house was nearly completed in a few days less than one month, and the scope of work at Jaap’s house was even more limited. Under these circumstances, the facts are indicative of an independent contractor relationship between Jaap and D. Northern.

#### **F. Conclusion.**

Four of the five factors used by the forum to determine whether an independent contractor relationship exists indicate that an employment relationship, not an independent contractor relationship, existed between D. Northern and Jaap. Jaap has not met her burden of proof and the forum concludes that D. Northern was not an independent contractor while he worked on Honn’s house.

#### **RESPONDENT JAAP WAS CLAIMANTS’ EMPLOYER; RESPONDENT HONN WAS NOT**

In its Order of Determination, the Agency alleges that Laura Jaap and her daughter Nettice Honn both employed Claimants. The Agency has the burden of proving that Jaap and Honn were employers and that Claimants

were employees. *In the Matter of Kilmore Enterprises*, 26 BOLI 111, 119 (2004). Jaap and Honn are named as individual respondents, and the Agency did not allege a specific legal theory for holding them individually liable.

Under ORS 652.310(1), an “employer” is “any person in this state who, directly or through an agent, engages personal services of one or more employees \* \* \*.” Under ORS 652.310(2), an “employee” is:

“any individual who otherwise than as copartner of the employer or as an independent contractor renders personal services wholly or partly in this state to an employer who pays or agrees to pay such individual at a fixed rate, based on the time spent in the performance of such services.”

Since the Agency has alleged joint individual liability, the forum assumes that the Agency is not pursuing the theory that Jaap was acting as Honn’s agent, as agency would not create liability for Jaap but only require the imputation of her actions and statements to Honn. *See, e.g., In the Matter of Crystal Heart Books Co.*, 12 BOLI 33, 39 (1993). Likewise, the Agency did not allege a partnership between Jaap and Honn and, in any event, presented no evidence that would establish a partnership.<sup>5</sup>

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<sup>5</sup> A partnership is never presumed. *In the Matter of John Steensland*, 29 BOLI 235, 263 (2007).

Based on the Agency's pleading, the only possible remaining theory of liability is that Jaap and Honn were joint employers. In general, a joint employment relationship exists when two associated employers share control of an employee. Joint or co-employers are responsible, both individually and jointly, for compliance with all applicable provisions of Oregon's wage and hour laws. *In the Matter of Kurt E. Freitag*, 29 BOLI 164, 197-98 (2007), *appeal pending*.

The facts relevant to the determination of whether Jaap and Honn were Claimants' joint or individual employers can be summarized as follows:

- i Jaap and Honn were not partners.
- i Honn gave Jaap complete authority over the repair and remodel work on her house.
- i Jaap hired all three Claimants to perform repair and remodel work on Honn's house.
- i Jaap agreed to pay Claimants at a fixed hourly rate for their work.
- i Jaap paid \$2,268 in wages to the Claimants that corresponded to their agreed hourly rate.
- i Jaap paid for all the building materials and supplies.
- i Jaap or Jaap's agent Davis directed Claimants' work.
- i Honn's only connection with the work was that

she owned the house that Claimants worked on and she met Claimants at a building supply store to pay for materials when Jaap was gone. Jaap reimbursed her for the materials.

- i Jaap had no ownership interest in Honn's house.

The forum relies on the federal Fair Labor Standards Act ("FLSA"), specifically 29 CFR § 791.2,<sup>6</sup> and three prior Final Orders, applied to the above facts, to determine whether Jaap and Honn were joint employers. 29 CFR §791.2 of the FLSA provides:

"(a) A single individual may stand in the relation of an employee to two or more employers at the same time under the [FLSA], since there is nothing in the act which prevents an individual employed by one employer from also entering into an employment relationship with a different employer. A determination of whether the employment by the employers is to be considered joint employment or separate and distinct employment for purposes of the act depends upon all the facts in the particular case. If all the relevant facts establish that two or more employers are act-

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<sup>6</sup> See *In the Matter of Kurt E. Freitag*, 29 BOLI 164, 197-98 (2007), *appeal pending*, in which the forum first relied on 29 CFR §791.2 as a standard for determining if a joint employment relationship existed.

ing entirely independent of each other and are completely disassociated with respect to the employment of a particular employee, who during the same workweek performs work for more than one employer, each employer may disregard all work performed by the employee for the other employer (or employers) in determining his own responsibilities under the Act. On the other hand, if the facts establish that the employee is employed jointly by two or more employers, i.e., that employment by one employer is not completely disassociated from employment by the other employer(s), all of the employee's work for all of the joint employers during the workweek is considered as one employment for purposes of the Act. In this event, all joint employers are responsible, both individually and jointly, for compliance with all of the applicable provisions of the Act \* \* \*.

“(b) Where the employee performs work which simultaneously benefits two or more employers, or works for two or more employers at different times during the workweek, a joint employment relationship generally will be considered to exist in situations such as:

“(1) Where there is an arrangement between the employers to share the employee's services, as, for

example, to interchange employees; or

“(2) Where one employer is acting directly or indirectly in the interest of the other employer (or employers) in relation to the employee; or

“(3) Where the employers are not completely disassociated with respect to the employment of a particular employee and may be deemed to share control of the employee, directly or indirectly, by reason of the fact that one employer controls, is controlled by, or is under common control with the other employer.”

This forum has found joint employment relationships to exist in three prior cases. In *Freitag*, the forum found that an individual respondent and a corporate respondent jointly employed a claimant when they: (1) shared an interest in the property being developed on a construction site; (2) the individual respondent controlled and directed the work performed by claimant and other laborers on the construction site and signed their paychecks, which he paid to them as a sole proprietor using an assumed business name; (3) the corporate respondent maintained an office where claimant and other laborers submitted their timesheets and controlled, to some extent, how, when, and whether claimant would be paid; and (4) the facts supported an inference that the claimant was under the simultaneous control of Respondents and simultaneously performed ser-

VICES for both. *Freitag* at 299-301. In the second case, the forum found three respondents – an individual and two corporate respondents – liable as joint employers when they shared work crews and equipment, the claimant performed work that benefited all three respondents, and the claimant was issued separate paychecks drawn on the accounts of each respondent. *In the Matter of Jack Crum Ranches, Inc.*, 14 BOLI 258, 271 (1995). In the third case, an employer leased the wage claimant from an employee leasing company. The forum found that each respondent retained sufficient control of the terms and conditions of the claimant's employment to be considered a joint employer and held both respondents jointly and individually liable for the claimant's unpaid wages. *In the Matter of Staff, Inc.*, 16 BOLI 97, 114-16 (1997).

A joint employment relationship cannot exist unless each alleged "joint" employer is also an individual employer. Consequently, the forum must determine whether Jaap and Honn each individually employed Claimants. The evidence shows that Jaap hired Claimants to work in Harrisburg, Oregon; agreed to pay them a fixed hourly wage; that Claimants performed the work they were hired to do; and that Jaap paid them part of their wages, paid for all the materials involved in the job, provided some tools, and directed their work, either by herself or through Davis. In contrast, there is no evidence that

Honn had any involvement whatsoever in any of those actions or any contact with or control over the Claimants, other than meeting them at a building supply store at Jaap's request. Under the facts of this case, Honn's mere ownership of the house is insufficient evidence to establish that she "engage[d] the personal services of [Claimants]," and the forum concludes that Honn was not Claimants' employer.<sup>7</sup> The fact that Honn, by her ownership of the house, may have benefited from Claimants' work is not enough to make her their employer as a matter of law. Jaap's actions, on the other hand, place her squarely within the definition of "employer" set out in ORS 652.310(1), and the forum concludes that Jaap employed Claimants during the period of time encompassed by the wage claims.

#### **THE PAY RATE UPON WHICH JAAP AND CLAIMANTS AGREED**

The Claimants credibly testified that Jaap made individual agreements with them to pay D. Northern \$25 per hour, T. North-

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<sup>7</sup> Compare with ORS 87.010 and 87.030, which entitle persons who perform labor upon construction projects to a construction lien on the property on which the labor was performed. These statutes do not apply in this case because there is no evidence that such a lien was ever perfected, as required by ORS 87.035, and because the Commissioner lacks jurisdiction to enforce such a lien, even if it had been perfected.

ern \$12 per hour, and Swinger \$12 per hour. This testimony was supported by Jaap's payment in cash to them after their first week of work (January 9-13) that exactly corresponded to the amount of wages they had earned, calculated at \$25 and \$12 per hour, in that first week of work.<sup>8</sup> In contrast, Jaap testified that she agreed to pay D. Northern \$2,500 for the entire job and that she paid him in advance. Jaap's testimony conflicted with (1) her answer, in which she stated that she agreed to pay D. Northern \$5,000 for the entire job; (2) her testimony that she paid D. Northern in full before the job was done, whereas she only paid Claimants \$2,268 in total; (3) her payment in cash to each Claimant individually; (4) her payment to them of the exact wages they had earned after their first week of employment; and (5) her payment of a \$500 "draw" to Swinger after she returned from the dog sled races. Based on the above, the forum concludes that Jaap agreed to pay D. Northern \$25 per hour, T. Northern \$12 per hour, and Swinger \$12 per hour.

#### **CLAIMANTS PERFORMED WORK FOR WHICH THEY WERE NOT PROPERLY COMPENSATED**

As discussed above, all three Claimants were paid in full after their first week of work (January 9-13) for the work they performed that week. D. Northern was paid \$1,000 for 40 hours work (\$25 per

hour x 40 hours = \$1,000); T. Northern was paid \$288 (\$12 per hour x 24 hours = \$288); and Swinger was paid \$480 (\$12 per hour x 40 hours = \$480). There is no dispute that they continued to work after that first week and that D. and T. Northern were paid nothing more for that work. This establishes that D. and T. Northern performed work for which they were not properly compensated. Swinger was paid an additional \$500 on January 24. According to the contemporaneous record of hours worked maintained by D. Northern and Swinger's credible testimony, Swinger had worked another 64 hours by the end of the work on January 24. At \$12 per hour, \$500 only compensated Swinger for 41.67 hours of work. This differential establishes that Swinger performed work for which he was not properly compensated.

#### **AMOUNT AND EXTENT OF WORK CLAIMANTS PERFORMED FOR RESPONDENT**

The final element of the Agency's case requires proof of the amount and extent of work performed by the Claimants. The Agency provided a calendar on which D. Northern, who worked every day that T. Northern and Swinger worked, created a contemporaneous record of the hours worked by all three Claimants, supported by the testimony of each Claimant.

When the forum concludes an employee performed work for which he or she was not properly compensated, it becomes the employer's burden to produce all

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<sup>8</sup> See Finding of Fact #16 – The Merits.

appropriate records to prove the precise hours and wages involved. When the employer produces no records, the forum may rely on evidence produced by the agency from which "a just and reasonable inference may be drawn." *In the Matter of Kilmore Enterprises*, 26 BOLI 111, 122 (2004). A claimant's credible testimony may be sufficient evidence to show the amount of hours worked by the claimant and amount owed. *Id.* at 123.

There was no evidence that Jaap maintained any record of the hours worked by Claimants. She produced no records showing the hours worked by Claimants. Jaap was out of town from January 16-23 and had no personal knowledge of the hours Claimants worked during that time period. However, Davis was at the work-site that week, acting on behalf of Jaap, and presumably could have been called as a witness by Jaap to support Jaap's defense that Claimants worked fewer hours than they claimed. Jaap did not call Davis as a witness, despite listing him as a potential witness on her motion for a telephone hearing, and the forum infers that his testimony would not have aided Jaap's case.

In contrast, all three Claimants testified credibly that the hours shown on D. Northern's calendar were an accurate record of the dates and hours they worked for Jaap and were able to describe the work they had performed. This testimony was not impeached on cross examination,

and there was no evidence that the calendar was not an authentic copy of a contemporaneous record. Based on this evidence, the forum concludes that D. Northern worked 176 hours, T. Northern worked 88 hours, and Swinger worked 176 hours.

#### **COMPUTATION OF WAGES OWED TO CLAIMANTS**

D. Northern earned \$4,400 in gross wages (\$25 per hour x 176 hours = \$4,400) and was only paid \$1,000. Jaap owes him \$3,400 in unpaid, due and owing wages.

T. Northern earned \$1,056 in gross wages (\$12 per hour x 88 hours = \$1,056) and was only paid \$288. Jaap owes him \$768 in unpaid, due and owing wages.

Swinger earned \$2,112 in gross wages (\$12 per hour x 176 hours = \$2,112) and was only paid \$980. Jaap owes him \$1,132 in unpaid, due and owing wages.

#### **CLAIMANTS ARE OWED PENALTY WAGES**

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

The Agency established, by a preponderance of the evidence, that: (1) Jaap knew Claimants' agreed rate of pay; (2) Jaap paid Claimants in full for their first week of work; (3) Jaap knew Claimants worked additional hours after their first week of work but did not pay D. or T. Northern any additional wages; and (4) Jaap paid Swinger additional wages, but those wages were less than what he earned. It is an employer's duty to keep an accurate record of the hours worked by its employees. ORS 653.045; *In the Matter of Tina Davidson*, 16 BOLI 141, 148 (1997). The fact that Jaap kept no record of Claimants' hours worked does not allow her to evade her responsibility for penalty wages, nor does her claim that D. Northern was an independent contractor, which contains the implication that she was not required to keep track of Claimants' hours. See, e.g., *In the Matter of Bukovina Express, Inc.*, 27 BOLI 184, 203 (2006) (a respondent's ignorance or misunderstanding of the law does not exempt that respondent from a determination that it willfully failed to pay wages earned and owed.) There is no evidence that Jaap acted other than voluntarily and as a free agent in underpaying Claimants.

ORS 652.150(1) and (2) provide, in pertinent part:

“(1) Except as provided in subsections (2) and (3) of this section, if an employer willfully fails to pay any wages or compensation of any employee whose employment ceases, as

provided in ORS 652.140 \* \* \*, then, as a penalty for the nonpayment, the wages or compensation of the employee shall continue from the due date thereof at the same hourly rate for eight hours per day until paid or until action therefor is commenced.

“(2) If the employee or a person on behalf of the employee sends a written notice of nonpayment, the penalty may not exceed 100 percent of the employee's unpaid wages or compensation unless the employer fails to pay the full amount of the employee's unpaid wages or compensation within 12 days after receiving the written notice. If the employee or a person on behalf of the employee fails to send the written notice, the penalty may not exceed 100 percent of the employee's unpaid wages or compensation. \* \* \*”

The Agency provided documentary and testimonial evidence that its investigative staff made the written demand contemplated by ORS 652.150(2) for Claimants' wages on August 17 and September 12, 2007, and the Agency's Order of Determination, issued on October 1, 2007, repeated this demand.<sup>9</sup> Each demand was for the actual amount of wages found due and owing in this Final Order.

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<sup>9</sup> See *In the Matter of MAM Properties, LLC*, 28 BOLI 172, 190 fn. 7 (2007) (the Agency's Order of Determination constitutes a written notice of nonpayment of wages).

Jaap failed to pay the full amount of Claimants' unpaid wages within 12 days after receiving the written notices and has still not paid them. Consequently, the forum assesses the penalty wages in the manner provided for in ORS 652.150(1) (hourly rate x eight hours per day x 30 days = penalty wages). Penalty wages for D. Northern equal \$6,000 (\$25 per hour x eight hours x 30 days). Penalty wages for T. Northern and Swinger equal \$2,880 (\$12 per hour x eight hours x 30 days).

#### ORDER

NOW, THEREFORE, as authorized by ORS 652.140(2), ORS 652.150, ORS, and ORS 652.332 and as payment of the unpaid wages and penalty wages, the Commissioner of the Bureau of Labor and Industries hereby orders Respondent **LAURA M. JAAP** to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 1045 State Office Building, 800 NE Oregon Street, Portland, Oregon 97232-2180, the following:

(1) A certified check payable to the Bureau of Labor and Industries in trust for Claimant David D. Northern, in the amount of NINE THOUSAND FOUR HUNDRED DOLLARS, less appropriate lawful deductions, representing \$3,400 in gross earned, unpaid, due and payable wages, plus interest at the legal rate on that sum from March 1, 2007, until paid; and \$6,000 in penalty wages, plus interest at the legal rate on that

sum from April 1, 2007, until paid.

(2) A certified check payable to the Bureau of Labor and Industries in trust for Claimant Thomas A. Northern, in the amount of THREE THOUSAND SIX HUNDRED AND FORTY-EIGHT DOLLARS (\$3,648), less appropriate lawful deductions, representing \$768 in gross earned, unpaid, due and payable wages, plus interest at the legal rate on that sum from March 1, 2007, until paid, and \$2,880 in penalty wages, plus interest at the legal rate on that sum from April 1, 2007, until paid.

(3) A certified check payable to the Bureau of Labor and Industries in trust for Claimant John B. Swinger, in the amount of FOUR THOUSAND TWELVE DOLLARS (\$4,012), less appropriate lawful deductions, representing \$1,132 in gross earned, unpaid, due and payable wages, plus interest at the legal rate on that sum from March 1, 2007, until paid, and \$2,880 in penalty wages, plus interest at the legal rate on that sum from April 1, 2007, until paid.

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**In the Matter of  
LINDA MARIE MORGAN  
Case No. 80-08**

**Final Order of Commissioner  
Brad Avakian  
Issued March 30, 2009**

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**SYNOPSIS**

Respondent employed Claimant as a food server at the agreed rate of \$9 per hour. Claimant worked 489 hours, including 9.25 overtime hours. Claimant earned \$4,442.63, including \$124.88 in overtime wages, and was paid \$2,397.00. Respondent was ordered to pay the balance due of \$2,045.63 in unpaid, due and owing wages. Respondent's failure to pay was willful and Respondent was ordered to pay \$2,160.00 in penalty wages. Respondent also was ordered to pay a civil penalty of \$2,160.00 based on Respondent's failure to pay Claimant the appropriate rate for the overtime hours Claimant worked. ORS 652.140; ORS 652.150; ORS 653.055; ORS 653.261.

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The above-entitled case came on regularly for hearing before Linda A. Lohr, designated as Administrative Law Judge ("ALJ") by Brad Avakian, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The

hearing was held on January 27, 2009, in the Oregon Employment Department conference room, located at 450 Marine Drive, Astoria, Oregon.

Patrick Plaza, an Agency employee, represented the Bureau of Labor and Industries ("BOLI" or "Agency"). Danielle J. McConnell ("Claimant") was present throughout the hearing and was not represented by counsel. Respondent Linda Marie Morgan ("Respondent") was present throughout the hearing and was not represented by counsel.

The Agency called as witnesses: Mary Garrett, Respondent's former landlord; Bernadette Yap-Sam, BOLI Wage and Hour Division Compliance Specialist; Katherine Johnson, Claimant's acquaintance; and Claimant.

Respondent did not call any witnesses.

The forum received as evidence:

- a) Administrative exhibits X-1 through X-7; and
- b) Agency exhibits A-1 through A-17 (filed with the Agency's case summary).

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

**FINDINGS OF FACT –  
PROCEDURAL**

1) On October 12, 2007, Claimant filed a wage claim with the Agency alleging Respondent had employed her and failed to pay her wages for the hours she worked between April 28 and September 13, 2007. Claimant alleged she earned \$4,443.50 and was paid only \$2,352 during that period, and that Respondent owed her \$2,091.50 in unpaid wages.

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

3) On March 31, 2008, the Agency issued Order of Determination No. 07-3310. In the Order, the Agency alleged Respondent had employed Claimant during the period claimed, failed to pay her for hours worked during those periods, and was liable to her for \$2,045.63 in unpaid wages, plus interest. The Agency also alleged Respondent's failure to pay all of the wages when due was willful and she was liable to Claimant for \$2,160 as penalty wages, plus interest. The Agency further alleged Respondent paid Claimant less than the wages required by law and was liable for an additional \$2,160 as civil penalties, plus interest. The Order gave Respondent 20 days to pay the sums, request an administrative hearing and submit an answer to the charges, or demand a trial in a court of law.

4) Respondent was served with the Order of Determination and thereafter filed an answer and requested a hearing. In her answer, Respondent claimed Claimant took Respondent's work sheets and failed to credit Respondent with an additional \$80 that Respondent gave to Claimant on her last work day.

5) On September 9, 2008, the Agency submitted a request for hearing. On September 10, 2008, the Hearings Unit issued a Notice of Hearing stating the hearing would begin at 9:00 a.m. on December 16, 2008. The Notice of Hearing included copies of the Order of Determination, a language notice, a Servicemembers Civil Relief Act notification, and a Summary of Contested Case Rights and Procedures and the Contested Case Hearing Rules, OAR 839-050-0000 to 839-050-0440.

6) On September 11, 2008, the ALJ ordered the Agency and Respondent each to submit a case summary that included: a list of all persons to be called as witnesses; identification and copies of all documents to be offered into evidence; and, for the Agency only, a brief statement of the elements of the claim and any wage and penalty calculations. The ALJ ordered the participants to submit their case summaries by December 5, 2008, and notified them of the possible sanctions for failure to comply with the case summary order. On the same date, the ALJ issued an order pertaining to fax filings and timelines for responses

to motions and service of documents.

7) On November 25, 2008, the Hearings Unit Coordinator re-mailed to Respondent's new address, 2264 Jennifer Place, Longview, WA 98632, copies of all documents in the hearing file that had been returned by the U.S. Postal Service as undeliverable at Respondent's last known address. In the cover letter, Respondent was reminded that she must notify the Hearings Unit when she has a change of address.

8) On December 5, 2008, the Agency timely submitted a case summary.

9) On the morning of December 15, 2008, the participants were notified by telephone that the hearing scheduled for the next day was cancelled due to inclement weather. On December 17, 2008, the ALJ issued an order re-scheduling the hearing to begin on January 27, 2009. The case summary deadline was extended to January 16, 2009. Respondent did not file a case summary.

10) At the start of hearing, the ALJ verbally advised the participants of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

11) At the start of hearing, the ALJ, on her own motion, amended the caption in the Notice of Hearing to include Respondent's full name as it appears in the Agency's Order of Determination.

12) The ALJ issued a proposed order on March 6, 2009, that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. Neither the Agency nor Respondent filed exceptions.

#### **FINDINGS OF FACT – THE MERITS**

1) At all times material, Respondent was an individual operating a restaurant known as the Hidden Flower in Clatskanie, Oregon.

2) Respondent hired Claimant to work as a food server on April 28, 2007. The restaurant had 10-15 tables and 2-3 employees. There was no set schedule and each day Claimant was told when to report to work for her next shift. Respondent gave each food server, including Claimant, a separate calendar that remained at the work site to record hours worked. Claimant recorded her daily work hours on that calendar. Every time she was paid, she wrote the amount on the calendar.

3) Respondent agreed to pay Claimant \$9 per hour.

4) Respondent had no established pay period. Food servers were paid sporadically based on each day's earnings. Respondent paid Claimant varying amounts ranging from \$5 to \$30 in cash. Additionally, between April and September 2007, Respondent gave Claimant three checks totaling \$820.00. Claimant and the other food servers put their daily tips in a cup for distribution

amongst the employees at a later date. Respondent never distributed the tips and Claimant does not know what happened to the tips after they were placed in the cup.

5) Claimant quit working for Respondent on September 13, 2007. When she quit, she asked Respondent for all of her wages. Respondent promised she would pay Claimant when she had the money. When she left, Claimant took with her the calendar documenting her work hours. Claimant later returned the calendar to Respondent, along with a "personal spreadsheet" that was prepared using the information she had recorded on the calendar during her employment. Claimant gave Respondent one week to pay the wages owed. Claimant never heard from Respondent and has not received any wages from Respondent since she quit her employment.

6) On October 19, 2007, the Agency mailed a "Notice of Wage Claim" to "Hidden Flower" stating that Claimant had filed a wage claim alleging she was owed \$2,091.50 in unpaid wages. Respondent submitted no response to the notice.

7) On December 27, 2007, the Agency mailed a letter to Respondent requesting a response to the notice of wage claim or full payment of unpaid wages. Respondent submitted a response on January 14, 2008, that included a completed "Employer Response" form and copies of the calendar Claimant used to record

her work hours, Claimant's "personal spreadsheet," and an itemized statement of Claimant's "2007 - YTD Wages." In her response, Respondent admitted she employed Claimant during the wage claim period and that she had agreed to pay Claimant \$9 per hour. The itemized statement of Claimant's "2007 - YTD Wages" included a breakdown of Claimant's gross earnings totaling \$4,443.50, showing "Draws" totaling \$2,352 and a "net" amount due of \$2,091.50. The statement also documented "net wages" of \$1,058.00 after deductions, which included "Draws," FICA, Medicare, and other lawful withholdings.

8) Based on the records Claimant and Respondent provided, the Agency determined that Claimant worked 489 hours between April 28 and September 13, 2007, including 8.75 overtime hours for the week ending May 19, 2007, and .5 overtime hours for the week ending June 23, 2007. For all of those hours, Claimant earned gross wages of \$4,442.63. During that period, she was paid \$2,397, leaving \$2,045.63 in unpaid, due, and owing wages.

9) All of the witnesses testified credibly.

#### **ULTIMATE FINDINGS OF FACT**

1) At times material, Respondent was an individual operating a restaurant as a sole proprietor and employing one or more persons to perform work in Oregon.

2) Respondent employed Claimant as a food server be-

tween April 28 and September 13, 2007, and agreed to pay her \$9 per hour.

3) Between April 28 and September 13, 2007, Claimant worked 489 hours for Respondent, including 9.25 hours in excess of 40 hours per work week.

4) Respondent did not pay Claimant one and one half times her pay rate for any of the overtime hours she worked during that period.

5) Claimant quit her employment with Respondent on September 13, 2007.

6) From April 28 and September 13, 2007, Claimant earned \$4,442.63 and Respondent paid her only \$2,397 for the work she performed.

7) Respondent owes Claimant \$2,045.63 in due and unpaid wages.

8) Respondent willfully failed to pay Claimant the wages due and owing and more than 30 days have elapsed since the wages were due.

9) BOLI sent Respondent written notices of nonpayment of wages to Claimant on October 19 and December 27, 2007, and on February 26, 2008, before issuing an Order of Determination on March 31, 2008.

10) Penalty wages for Claimant, computed pursuant to ORS 652.150, equal \$2,160.

11) Respondent did not pay Claimant 9.25 hours of overtime and civil penalties, computed pur-

suant to ORS 652.150, equal \$2,160.

### CONCLUSIONS OF LAW

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

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

3) Respondent violated ORS 652.140(2) by failing to pay Claimant all wages or compensation earned and unpaid when her employment terminated.

4) Respondent is liable for penalty wages under ORS 652.150 based on her willful failure to pay all wages or compensation earned and due to Claimant when Claimant's employment terminated as provided in ORS 652.140(2).

5) Respondent violated ORS 653.261 by failing to pay Claimant one and one half times her wage rate for each hour she worked in excess of 40 per week and is liable for civil penalties as provided in ORS 653.055.

6) Under the facts and circumstances of this record, and according to the applicable law, the Commissioner of the Bureau of Labor and Industries has the authority to order Respondent to pay Claimant her earned, unpaid, due and payable wages, penalty

wages, and civil penalties, plus interest, on all sums until paid. ORS 652.332.

### OPINION

The Agency was required to prove: 1) Respondent employed Claimant; 2) any pay rate upon which Respondent and Claimant agreed, if it exceeded the minimum wage; 3) Claimant performed work for which she was not properly compensated; and 4) the amount and extent of work Claimant performed for Respondent. *In the Matter of Forestry Action Committee of the Illinois Basin*, 30 BOLI \_ (2008).

Respondent admitted she employed Claimant at the agreed upon rate of \$9 per hour and acknowledged Claimant was improperly compensated. Respondent did not dispute the number of hours Claimant claimed, but contended she paid Claimant \$80 that was not reflected on the calendar Claimant contemporaneously maintained at Respondent's behest. Respondent's contention was negated by evidence demonstrating the Agency credited Respondent with the \$80 payment when computing the wages owed and Respondent produced no evidence showing she paid Claimant more wages than claimed.<sup>1</sup> In fact, Respon-

dent provided the Agency with Claimant's 2007 itemized wage statement that corroborates Claimant's testimonial and documentary evidence. For those reasons, Respondent owes Claimant the amount alleged in the Order of Determination - \$2,045.63.

### PENALTY WAGES

Penalty wages may be awarded when a respondent's failure to pay wages is deemed willful. Willfulness does not imply or require blame, malice, or moral delinquency. A respondent commits an act or omission "willfully" if the respondent acts or fails to act intentionally, as a free agent, and with knowledge of what is being done or not done. *In the Matter of Forestry Action Committee of the Illinois Basin*, 30 BOLI 1, (2008).

Respondent does not dispute she owed Claimant wages when Claimant quit her employment. Moreover, Respondent did not refute credible evidence establishing that Claimant recorded her hours on a calendar provided and maintained by Respondent or that Respondent was well aware of the amount and extent of Claimant's work hours when Claimant quit her employment. The itemized statement that Respondent produced showing Claimant's 2007 earnings reflects the identical amount Claimant claimed she

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<sup>1</sup> Although she was not testifying under oath at the time, Respondent made a statement against interest during the hearing when she admitted she never distributed the tips that accrued each day in the tip jar during the wage claim period. She also ap-

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peared to concede that she owed the amounts claimed and profusely apologized to Claimant for failing to pay the amounts owed.

earned and was owed during the wage claim period. Respondent did not refute Claimant's credible testimony that Respondent promised to pay Claimant when she "had the money," or that after Claimant quit, she continued to rebuff Claimant's attempts to collect her wages. Evidence demonstrates Respondent voluntarily and as a free agent failed to pay Claimant all of the wages she earned between April 28 and September 13, 2007, when Claimant terminated her employment without notice. Respondent acted willfully and is liable for penalty wages pursuant to ORS 652.150.

Accordingly, penalty wages are assessed and calculated in accordance with ORS 652.150 in the amount of \$2,160. This figure is computed by multiplying \$9 per hour by 8 hours per day multiplied by 30 days. See ORS 652.150 and OAR 839-001-0470(1)(c).

#### **CIVIL PENALTIES**

If an employer pays an employee "less than the wages to which an employee is entitled under ORS 653.010 to 653.161," the forum may award civil penalties to the employee. ORS 653.055. The Agency alleged Respondent failed to compensate Claimant at one and one half times her regular rate of pay for each hour she worked that exceeded 40 hours in a given work week between April 28 and September 13, 2007. The Commissioner's rules governing overtime requirements were promulgated pursuant to ORS 653.261 and are within the range of wage entitlements encom-

passed by ORS 653.055. The Agency presented sufficient evidence to show Respondent failed to pay Claimant overtime for the hours she worked in excess of 40 per week, as required under OAR 839-020-0030(1). Accordingly, Respondent is liable to Claimant for \$2,160 in civil penalties as provided in ORS 652.150 (\$9 x 8 hours per day x 30 days). ORS 653.055(1)(b).

#### **ORDER**

NOW, THEREFORE, as authorized by ORS 652.332, and as payment of the unpaid wages, Respondent **Linda Marie Morgan** hereby is ordered to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232-2162, the following:

A certified check payable to the Bureau of Labor and Industries, in trust for Claimant Danielle J. McConnell, in the amount of SIX THOUSAND THREE HUNDRED SIXTY FIVE DOLLARS AND SIXTY THREE CENTS (\$6,365.63), less appropriate, lawful deductions, representing \$2,045.63 in gross earned, unpaid, due and payable wages, less appropriate lawful deductions, \$2,160 in penalty wages, and \$2,160 in civil penalties, plus interest at the legal rate on the sum of \$2,045.63 from October 1, 2007, until paid, and interest at the legal rate on the sum of \$4,320 from November 1, 2007, until paid.

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**In the Matter of  
82<sup>nd</sup> AUTO MALL, INC. dba 82<sup>nd</sup>  
Auto Mall  
and Vahid Tajadod and Joan  
Tajadod  
Case No. 23-08**

**Final Order of Commissioner  
Brad Avakian  
Issued March 30, 2009**

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**SYNOPSIS**

Respondent 82<sup>nd</sup> Auto Mall, Inc. employed Claimants as car salesmen and agreed to pay them a commission for each car they sold. The combined wage and commission payments paid to Claimants during the wage claim periods failed to meet the state minimum wage rate for the hours they worked and Respondent was ordered to pay unpaid wages to Claimants totaling \$2,200. The failure to pay wages was willful and Respondent was also ordered to pay penalty wages totaling \$3,600. Additionally, Respondent was ordered to pay Claimants civil penalties totaling \$3,600 based on Respondent's failure to pay the statutory minimum wage in violation of ORS 653.025. The Agency failed to make a prima facie case showing that Respondents Vahid and Joan Tajadod were personally liable for wages, penalty wages, or civil penalties and the charges against them were dismissed.

ORS 652.140; ORS 652.150;  
ORS 653.055; ORS 653.025.

The above-entitled case came on regularly for hearing before Linda A. Lohr, designated as Administrative Law Judge ("ALJ") by Brad Avakian, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on December 2, 2008, in the W. W. Gregg Hearing Room of the Oregon Bureau of Labor and Industries, located at 800 NE Oregon Street, Portland, Oregon.

Chet Nakada, an Agency employee, represented the Bureau of Labor and Industries ("BOLI" or "Agency"). Keith Johnson and Ronnie Robinson ("Claimants") were present throughout the hearing and were not represented by counsel. Respondent 82<sup>nd</sup> Auto Mall, Inc. ("Respondent 82<sup>nd</sup> Auto Mall") appeared through its authorized representative Vahid Tajadod. Respondents Vahid Tajadod ("V. Tajadod") and Joan Tajadod ("J. Tajadod") individually appeared and were not represented by counsel.

The Agency called as witnesses: Margaret Trotman, BOLI Wage and Hour Division Compliance Specialist; Vahid Tajadod; and Claimants Johnson and Robinson.

Respondents called as witnesses: Vahid Tajadod and Joan Tajadod.

The forum received as evidence:

a) Administrative exhibits X-1 through X-10;

b) Agency exhibits A-1 through A-15 (filed with the Agency's case summary), and A-16 through A-20 (submitted at hearing).

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

#### **FINDINGS OF FACT – PROCEDURAL**

1) On August 31, 2006, Claimant Johnson filed a wage claim with the Agency alleging 82<sup>nd</sup> Auto Mall had employed him and failed to pay his wages for the hours he worked between June 2 and July 17, 2006. Claimant Johnson alleged he earned \$2,542.50 and was paid only \$1,450 during that period, and that Respondent 82<sup>nd</sup> Auto Mall owed him \$1,092.50 in unpaid wages.

2) When he filed his wage claim, Claimant Johnson assigned to the Commissioner of the Bureau of Labor and Industries, in trust for Claimant, all wages due from Respondent 82<sup>nd</sup> Auto Mall.

3) On October 2, 2006, Claimant Robinson filed a wage claim with the Agency alleging Respondent 82<sup>nd</sup> Auto Mall had employed him from August 8 until September 5, 2006, and failed to pay his wages for the hours he

worked between August 9 and September 5, 2006. Claimant Robinson alleged he earned \$2,000, was paid only \$1,300, and 82<sup>nd</sup> Auto Mall owed him \$700 in unpaid wages.

4) When he filed his wage claim, Claimant Robinson assigned to the Commissioner of the Bureau of Labor and Industries, in trust for Claimant, all wages due from 82<sup>nd</sup> Auto Mall.

5) On May 1, 2007, the Agency issued Order of Determination No. 06-3323 alleging that Respondent 82<sup>nd</sup> Auto Mall and Respondents V. Tajadod and J. Tajadod, acting as partners, had employed Claimants during the periods Claimants claimed on their wage claims, failed to pay them for hours worked during those periods, and were liable to them for \$4,950 in unpaid wages, plus interest. The Agency also alleged Respondents' failure to pay all of the wages when due was willful and they were liable to Claimants for \$3,600 as penalty wages, plus interest. The Agency further alleged Respondents paid Claimants less than the minimum wage required by law and were liable for an additional \$3,600 as civil penalties, plus interest. The Order gave Respondents 20 days to pay the sums, request an administrative hearing and submit an answer to the charges, or demand a trial in a court of law.

6) Respondents were served with the Order of Determination and filed an answer and requested a hearing. In the answer, Respondents disputed the accu-

racy of the claimed work hours and denied they willfully failed to pay wages that were due for hours worked.

7) On September 29, 2008, the Agency submitted a request for hearing. On September 30, 2008, a Notice of Hearing issued from the Hearings Unit stating the hearing would begin at 9:00 a.m. on December 2, 2008. The Notice of Hearing included copies of the Order of Determination, a language notice, a Servicemembers Civil Relief Act notification, and copies of the Summary of Contested Case Rights and Procedures and the Contested Case Hearing Rules, OAR 839-050-0000 to 839-050-0440.

8) On October 1, 2008, the ALJ ordered the Agency and Respondents to submit a case summary that included: a list of all persons to be called as witnesses; identification and copies of all documents to be offered into evidence; and, for the Agency only, a brief statement of the elements of the claim and any wage and penalty calculations. The ALJ ordered the participants to submit their case summaries by November 21, 2008, and notified them of the possible sanctions for failure to comply with the case summary order. On the same date, the ALJ issued an order pertaining to fax filings and timelines for responses to motions and service of documents.

9) On November 6, 2008, the Agency moved for a discovery order compelling Respondents to furnish discovery previously re-

quested but not provided. On November 14, 2008, the ALJ issued a discovery order requiring Respondents to provide the requested discovery.

10) On November 21, 2008, the Agency timely submitted a case summary.

11) On November 25, 2008, the Agency filed a response to the November 21, 2008, discovery order.

12) On November 26, 2008, the Agency filed an addendum to its case summary.

13) On December 1, 2008, the Agency filed a second addendum to its case summary.

14) At the start of hearing, the ALJ verbally advised the participants of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

15) The ALJ issued a proposed order on March 6, 2009, that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. Neither the Agency nor Respondents filed exceptions.

#### **FINDINGS OF FACT – THE MERITS**

1) During all times material, Respondent 82<sup>nd</sup> Auto Mall, Inc. ("82<sup>nd</sup> Auto Mall") was a domestic corporation engaged in retail auto sales in Oregon under the assumed business name of 82<sup>nd</sup> Auto Mall, located at 18346 SE McLaughlin Boulevard in Mil-

waukie, and at 1205 SE 82<sup>nd</sup> Avenue in Portland. Respondent Vahid Tajadod ("V. Tajadod") was 82<sup>nd</sup> Auto Mall's president, secretary and registered agent. Respondent Joan Tajadod ("J. Tajadod") was Vahid Tajadod's wife and was not a corporate officer.

#### CLAIMANT JOHNSON

2) Claimant Johnson was hired by 82<sup>nd</sup> Auto Mall's manager, Dave ("Doc") Hulscher, to work as a car salesman at 82<sup>nd</sup> Auto Mall's Milwaukie location in or around January 2006. His primary duty was to sell cars, but he also opened and closed the car lot, set out balloons and flags, and moved cars around. Hulscher supervised Johnson's day to day activities.

3) Claimant Johnson's work day began around 11 a.m. and ended at 8 or 9 p.m. The car lot usually stayed open until 8 p.m. in the winter and until 9 p.m. in the spring. There were no time clocks on the premises, but Johnson "had to work his scheduled shift to sell cars" and he kept a record of his work hours on a calendar that he kept in a file cabinet at the work site.

4) Hulscher told Claimant Johnson he would be paid a percentage of the gross profit on the cars that he sold. If he did not sell cars, then he had to wait until payday to be paid for the hours he worked. Hulscher told Johnson that company policy determined how salesmen were paid and that payday was on the fifth of each month. Johnson was usually paid

in cash or by check. Often he was paid later than the fifth and, although he usually collected his pay from Hulscher, he went to the Tajadods directly for any wages that were not timely paid.

5) On May 10, 2006, Claimant Johnson quit working for 82<sup>nd</sup> Auto Mall. He returned to work at the 82<sup>nd</sup> Auto Mall location in Milwaukie in June 2006 and continued working there until he quit on July 17, 2006. During June 2006, Claimant Johnson sold five cars and was paid commissions totaling \$734.46.

6) In 2006, the state minimum wage was \$7.50 per hour.

7) Claimant Johnson worked the following hours for 82<sup>nd</sup> Auto Mall in June and July 2006, for the weeks ending:

i	June 3	18 hours
i	June 10	50 hours
i	June 17	43.5 hours
i	June 24	52 hours
i	July 1	52.5 hours
i	July 8	53 hours
i	July 15	53 hours
i	July 22	17 hours

Johnson worked 339 hours between June 2 and July 17, 2006, and earned gross wages of \$2,542.50. During that period, he was paid \$1,450, including his commissions, leaving \$1,092.50 in unpaid, due, and owing wages.

8) Claimant Johnson asked the Tajadods for his remaining wages in July 2006, but they neither responded nor paid him the remaining wages due and owing.

9) On September 27, 2006, the Agency mailed a "Notice of Wage Claim" to 82<sup>nd</sup> Auto Mall stating that Claimant Johnson had filed a wage claim alleging he was owed \$1,092.50 in unpaid statutory minimum wages.

10) On November 2, 2006, J. Tajadod and V. Tajadod submitted a response to the Notice of Wage Claim on 82<sup>nd</sup> Auto Mall's behalf admitting Claimant Johnson worked for 82<sup>nd</sup> Auto Mall during the wage claim period, but denying he was owed any wages.

11) Although Claimant Johnson was confrontational and argumentative during the hearing, his testimony about the hours he worked in June and July was reliable and not refuted by any credible evidence.

#### **CLAIMANT ROBINSON**

12) On August 9, 2006, Claimant Robinson was hired by 82<sup>nd</sup> Auto Mall's manager, Doc Hulscher, to work as a car salesman at 82<sup>nd</sup> Auto Mall's Milwaukee location. His primary duty was to sell cars, but he also opened the lot, started and moved cars, "helped get cars to the customers," and greeted customers.

13) Claimant Robinson's work day began around 9:30 a.m. and ended at 8 or 9 p.m. There was a schedule to follow, but he worked "bell to bell" because he was going on vacation soon after starting the job and wanted to work extra hours to increase his paycheck. Robinson tracked his own hours in a notebook he kept for that purpose.

14) Claimant Robinson understood that payday was on the 5<sup>th</sup> of each month. Employees were allowed to make a draw on their pay on "draw day" which was on the 20<sup>th</sup> of each month. Employees had to "sign for a draw and give it to Joan [Tajadod]." He was told by Hulscher that the pay was "per car sold."

15) Claimant Robinson quit his employment on September 9, 2006, and asked V. Tajadod and J. Tajadod for the wages that he was owed. J. Tajadod gave him a check for \$200 and when Claimant Robinson disputed that amount, V. Tajadod told him he "knew the law" and he did not have to pay him an additional amount. Claimant Robinson was not paid any additional wages.

16) Claimant Robinson worked the following hours for 82<sup>nd</sup> Auto Mall in August and September 2006, for the weeks ending:

i	August 12	57.5 hours
i	August 19	63.5 hours
i	August 26	12.5 hours
i	September 2	82 hours
i	September 9	34.5 hours

Robinson worked 250 hours between August 5 and September 9, 2006, and earned gross wages totaling \$1,875. During that period he sold five cars and was paid \$1,300, leaving \$575 in unpaid, due, and owing wages.

17) On October 11, 2006, the Agency mailed a "Notice of Wage Claim" to Respondent 82<sup>nd</sup> Auto Mall stating that Claimant Robinson had filed a wage claim for that purpose.

alleging he was owed \$700 in unpaid statutory minimum wages.

18) On November 2, 2006, Joan and Vahid Tajadod submitted a response to the Notice of Wage Claim on 82<sup>nd</sup> Auto Mall's behalf admitting Claimant Robinson worked for 82<sup>nd</sup> Auto Mall but denying he was owed any wages.

19) Claimant Robinson's testimony was credible and not impeached in any way. The forum credited his testimony in its entirety.

20) The Tajadods did not refute Claimants' testimony that they worked during the wage claim periods or that Doc Hulscher managed the car dealership. They admitted Claimants were paid on commission and entitled to minimum wage for work hours not covered by the commission. However, their testimony that Claimants did not work all of the hours claimed was not substantiated by any credible evidence. Their testimony that a fire destroyed their computer and other property at the Milwaukie location was credible and corroborated by Claimants, but the Tajadods offered no explanation for their failure to produce bank records showing payroll information or computer records that may have been available at the other location. For that reason, their testimony about Claimants' hours worked was not given any weight.

21) Trotman was a credible witness.

#### ULTIMATE FINDINGS OF FACT

1) During times material, Respondent 82<sup>nd</sup> Auto Mall was an Oregon corporation employing one or more persons to perform work in Oregon.

2) Respondent 82<sup>nd</sup> Auto Mall employed Claimant Johnson from June 2 through July 22, 2006, at the minimum wage rate of \$7.50 per hour. During that time he worked 339 hours and earned gross wages of \$2,542.50. He was paid \$1,450, including his commissions, leaving \$1,092.50 in unpaid, due, and owing wages.

3) Claimant Johnson asked V. Tajadod and J. Tajadod for the wages due and owing when he left his employment in July 2006 and they did not respond.

4) On September 27, 2006, the Agency mailed a written notice to Respondent stating that Claimant Johnson had filed a wage claim alleging he was owed \$1,092.50 in unpaid statutory minimum wages. At the time of hearing, Respondent had not paid any additional wages.

5) Respondent 82<sup>nd</sup> Auto Mall employed Claimant Robinson from August 5 through September 9, 2006, at the minimum wage rate of \$7.50 per hour. During that time, he worked 250 hours and earned gross wages totaling \$1,875. He was paid \$1,300, including commissions, leaving \$575 in unpaid, due, and owing wages.

6) Claimant Robinson asked V. Tajadod and J. Tajadod for wages owed when he voluntarily left his employment and he was given a check for \$200, which was less than the wages due and owing.

7) On October 11, 2006, the Agency mailed a written notice to Respondent 82<sup>nd</sup> Auto Mall stating that Claimant Robinson had filed a wage claim alleging he was owed \$700 in unpaid statutory minimum wages. At the time of hearing, Respondent 82<sup>nd</sup> Auto Mall had not paid any additional wages.

8) Respondent 82<sup>nd</sup> Auto Mall knowingly failed to pay Claimants the wages due and owing and more than 30 days have elapsed since the wages were due.

9) Respondent 82<sup>nd</sup> Auto Mall did not pay Claimants the statutory minimum wage rate for each hour they worked during the period they each were employed.

#### **CONCLUSIONS OF LAW**

1) At all times material herein, Respondent 82<sup>nd</sup> Auto Mall was an employer utilizing the services of Claimants and was subject to the provisions of ORS 652.110 to 652.200, 652.310 to 652.405, and ORS 653.010 to 261.

2) The actions, inaction, and statements of Vahid Tajadod are properly imputed to Respondent 82<sup>nd</sup> Auto Mall.

3) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the subject matter and Respondent 82<sup>nd</sup> Auto Mall. ORS 652.310 to 652.405.

4) Respondent 82<sup>nd</sup> Auto Mall violated ORS 652.140(2) by failing to pay Claimants all wages or compensation earned and unpaid when their employment terminated.

5) Respondent 82<sup>nd</sup> Auto Mall is liable for penalty wages under ORS 652.150 based on its willful failure to pay all wages or compensation earned and due to Claimants when their employment terminated as provided in ORS 652.140(2).

6) Respondent 82<sup>nd</sup> Auto Mall violated ORS 652.025 by failing to pay Claimants the statutory minimum wage rate for each hour they worked during the period they each were employed.

7) Respondent 82<sup>nd</sup> Auto Mall paid Claimants less than the wages to which each were entitled under ORS 653.025 and is liable under ORS 653.055 for the full amount of wages, less any amount actually paid to Claimants, and for civil penalties as provided in ORS 652.150.

8) Respondents Vahid Tajadod and Joan Tajadod were not Claimants' employers for the purposes of ORS 652.110 to 652.200, 652.310 to 652.405, and ORS 653.010 to 261, and are not liable for unpaid wages, penalty wages, or civil penalties.

9) Under the facts and circumstances of this record, and according to the applicable law, the Commissioner of the Bureau of Labor and Industries has the authority to order Respondent 82<sup>nd</sup> Auto Mall to pay Claimants

their earned, unpaid, due and payable wages, penalty wages, and civil penalties, plus interest, on all sums until paid. ORS 652.332.

10) Under the facts and circumstances of this record, and according to the applicable law, the Commissioner of the Bureau of Labor and Industries has the authority to dismiss the Order of Determination as to Respondents Vahid Tajadod and Joan Tajadod. ORS 652.332.

### OPINION

The Agency was required to prove: 1) Respondents employed Claimants; 2) any pay rate upon which Respondents and Claimants agreed, if it exceeded the minimum wage; 3) Claimants performed work for which they were not properly compensated; and 4) the amount and extent of work Claimants performed for Respondents. *In the Matter of Sue Dana*, 28 BOLI 22, 29 (2006).

Respondents do not dispute that Claimants worked for Respondent 82<sup>nd</sup> Auto Mall during the wage claim periods or that the compensation agreement was commission based. The only issues are whether Claimants performed work for which they were not properly compensated, the amount and extent of the work they performed, and whether Respondents V. Tajadod, J. Tajadod and 82<sup>nd</sup> Auto Mall are jointly and severally liable for any wages owed to Claimants.

### AGREED UPON RATE BASED ON COMMISSION

Oregon employers are free to pay employees solely by commission so long as the commission does not result in an employee earning less than the minimum wage for all hours worked. *In the Matter of William Presley*, 25 BOLI 56, 70 (2004), *affirmed Presley v. Bureau of Labor and Industries*, 200 Or App 113 (2005). See also ORS 653.035(2) which provides that an employer "may include commission payments to employees as part of the applicable minimum wage" but "[i]n any pay period where the combined wage and commission payments to the employee do not add up to the applicable minimum wage under ORS 653.010 to 653.261, the employer shall pay the minimum rate as prescribe in ORS 653.010 to 653.261."

There is no dispute that Claimants were promised a commission for every car they sold. Moreover, Respondents conceded during the hearing that Claimants would be entitled to the statutory minimum wage if the number of hours they worked exceeded the amount of the commissions.

### AMOUNT AND EXTENT OF WORK PERFORMED

Employers are required to keep and maintain proper records of wages, hours and other conditions and practices of employment. ORS 653.045. When the forum concludes an employee performed work for which the employee was not

properly compensated, the burden shifts to the employer to produce all appropriate records to prove the precise hours and wages involved. When, as in this case, the employer produces no records, the forum may rely on evidence produced by the Agency from which "a just and reasonable inference may be drawn." A claimant's credible testimony may be sufficient evidence. *In the Matter of Kilmore Enterprises, Inc.*, 26 BOLI 111, 122-23 (2004).

Claimants credibly testified that they maintained a written record of their hours worked and that Respondents had access to those records. Although Respondents claimed they kept independent records that refute Claimants' allegations, they failed to produce those records. The Tajadods' testimony that a fire destroyed the records stored in a computer at their Milwaukie location, although undisputed, failed to explain the absence of bank records or information maintained on the computer at their 82<sup>nd</sup> Avenue location.

On the other hand, Claimant Johnson's credible testimony established that he worked 339 hours between June 2 and July 17, 2006, and earned gross wages of \$2,542.50 at the minimum wage rate of \$7.50 per hour (\$7.50 per hour x 339 hours). He readily acknowledged that he was paid \$1,450, including his commissions, and the forum concludes he is owed \$1,092.50 in unpaid, due, and owing wages.

Additionally, Claimant Robinson's credible testimony established that he worked 250 hours between August 5 and September 9, 2006, and earned gross wages totaling \$1,875 at the minimum wage rate of \$7.50 per hour (\$7.50 per hour x 250 hours). He also readily acknowledged that he was paid \$1,300, and the forum concludes he is owed \$575 in unpaid, due, and owing wages.

#### **LIABILITY FOR UNPAID WAGES**

The Agency offered no evidence to support its allegation that Respondent 82<sup>nd</sup> Auto Mall, along with Respondents Vahid and Joan Tajadod, acting as partners, aka Atlantic Wholesale, jointly employed Claimants during the wage claim periods. There is no evidence the Tajadods formed a partnership known as Atlantic Wholesale or that such partnership and Respondent 82<sup>nd</sup> Auto Mall jointly employed Claimants. At hearing, apparently in lieu of arguing a joint employment relationship, the Agency introduced a successorship theory through compliance specialist Trotman, who testified that the Tajadods were named as respondents because the corporation dissolved on September 1, 2006, but continued to conduct business thereafter, during which Claimant Robinson was employed an additional nine days. She also testified, and documentary evidence confirms, that the Secretary of State reinstated the corporation on January 4, 2007.

In Oregon, an administratively dissolved corporation has five

years from the date of dissolution to apply to the Secretary of State for reinstatement. When a corporation is reinstated, as it was in this case, the reinstatement “relates back to and takes effect as of the effective date of the administrative dissolution and the corporation resumes carrying on its business as if the administrative dissolution had never occurred.” ORS 60.654(3). (Emphasis added)

Credible evidence shows the corporation has continued to carry on business since the reinstatement and, because the reinstatement relates back to and takes effect as of the effective date of the administrative dissolution, which was September 1, 2006, Respondent 82<sup>nd</sup> Auto Mall, a reinstated corporation, is liable for Claimant Robinson’s unpaid wages that continued to accrue until September 9, 2006. Additionally, absent any evidence showing a partnership relationship amongst Respondents as alleged in the Order of Determination, the forum concludes that Respondent 82<sup>nd</sup> Auto Mall is solely liable for Claimants’ unpaid wages and any penalty wages or civil penalties resulting from the failure to pay wages.

#### **PENALTY WAGES**

The forum may award penalty wages where a respondent willfully fails to pay any wages due to any employee whose employment ceases. Willfulness does not imply or require blame, malice, or moral delinquency. Rather, a respondent commits an act or

omission willfully if he or she acts, or fails to act, intentionally, as a free agent, and with knowledge of what is being done or not done. *In the Matter of Usra Vargas*, 22 BOLI 212, 222 (2001).

Credible evidence established that Respondent 82<sup>nd</sup> Auto Mall knew each Claimant was owed wages when each left his employment. Moreover, both Tajadods, acting as Respondent 82<sup>nd</sup> Auto Mall’s agents, declined each Claimant’s specific request for payment when each one quit their employment. There is no credible evidence that Respondent 82<sup>nd</sup> Auto Mall was unaware of the hours each Claimant worked; in fact, the Tajadods maintained they kept independent records that were destroyed in a fire. From those facts, the forum infers Respondent 82<sup>nd</sup> Auto Mall voluntarily and as a free agent failed to pay Claimants all of the wages they earned for the work they performed during their employment. Respondent 82<sup>nd</sup> Auto Mall acted willfully and is liable for penalty wages pursuant to ORS 652.150.

Based on Respondent Auto Mall’s failure to pay Claimant Johnson all of the wages he earned between June 2 and July 17, 2006, for the work he performed, penalty wages are assessed and calculated in accordance with ORS 652.150 in the amount of \$1,800 (\$7.50 per hour x 8 hours per day x 30 days). See ORS 652.150 and OAR 839-001-0470.

Based on Respondent Auto Mall's failure to pay Claimant Robinson all of the wages he earned between August 5 and September 9, 2006, for the work he performed, penalty wages are assessed and calculated in accordance with ORS 652.150 in the amount of \$1,800 (\$7.50 per hour x 8 hours per day x 30 days). See ORS 652.150 and OAR 839-001-0470.

#### CIVIL PENALTIES

Under ORS 653.055(1), an employer who pays an employee less than the applicable minimum wage is liable to the employee for civil penalties that are computed in the same manner as penalty wages under ORS 652.150. *Cornier v. Paul Tulacz, DVM PC*, 176 Or App 245 (2001). A *per se* violation occurs when an employee's wage rate is the minimum wage, the employee is not paid all wages earned, due, and owing under ORS 652.140(1) or 652.140(2), and no statutory exception applies.<sup>1</sup>

The wage rate for both Claimants was \$7.50 per hour, the statutory minimum wage in 2006. Neither was paid all wages earned, due, and owing under ORS 652.140(1), and no statutory exception applies that would ex-

cuse Respondent 82<sup>nd</sup> Auto Mall from paying the minimum wage to Claimants. Accordingly, each Claimant is entitled to a civil penalty of \$1,800 (\$7.50 x 8 hours per day x 30 days).

#### ORDER

NOW, THEREFORE, as authorized by ORS 652.332, and as payment of the unpaid wages, Respondent **82<sup>nd</sup> Auto Mall, Inc.** is hereby ordered to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232-2162, the following:

A certified check payable to the Bureau of Labor and Industries, in trust for Claimant Keith Johnson, in the amount of FOUR THOUSAND SIX HUNDRED NINETY TWO DOLLARS AND FIFTY CENTS (\$4,692.50), less appropriate, lawful deductions, representing \$1,092.50 in gross earned, unpaid, due and payable wages, less appropriate lawful deductions, \$1,800 in penalty wages, and \$1,800 in civil penalties, plus interest at the legal rate on the sum of \$1,092.50 from August 1, 2006, until paid, and interest at the legal rate on the sum of \$3,600 from September 1, 2006, until paid.

A certified check payable to the Bureau of Labor and Industries, in trust for Claimant Ronnie Robinson, in the amount of FOUR THOUSAND ONE HUNDRED SEVENTY FIVE DOLLARS (\$4,175), representing \$575 in gross

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<sup>1</sup> An example of a statutory exception is ORS 653.035, which provides that employers may deduct from the minimum wage "the fair market value of lodging, meals, other facilities or services furnished by the employer for the private benefit of the employee."

earned, unpaid, due and payable wages, less appropriate lawful deductions, \$1,800 in penalty wages, and \$1,800 in civil penalties, plus interest at the legal rate on the sum of \$575 from October 1, 2006, until paid, and interest at the legal rate on the sum of \$3,600 from November 1, 2006, until paid.

ADDITIONALLY, as Respondents Vahid Tajadod and Joan Tajadod have been found not to owe Claimant Johnson wages, the Commissioner of the Bureau of Labor and Industries hereby orders that Keith Johnson's wage claim against **Vahid Tajadod** and **Joan Tajadod** be and is hereby dismissed.

FURTHERMORE, as Respondents Vahid Tajadod and Joan Tajadod have been found not to owe Claimant Robinson wages, the Commissioner of the Bureau of Labor and Industries hereby orders that Robbie Robinson's wage claim against **Vahid Tajadod** and **Joan Tajadod** be and is hereby dismissed.

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**In the Matter of  
TAILOR MADE FENCING &  
DECKING, INC.  
dba Tailor Made Construction  
and Thomas Sciborski  
Case No. 04-09**

**Final Order of Commissioner  
Brad Avakian  
Issued May 28, 2009**

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**SYNOPSIS**

Respondent Thomas Sciborski, individually operating a construction business under an unregistered assumed business name, employed Claimants and failed to pay them wages totaling \$2,118.00. Respondent Sciborski acted willfully by failing to pay the wages and was ordered to pay \$10,080.00 in penalty wages in addition to the \$2,118.00 in unpaid wages, plus interest. At all times material, Respondent Tailor Made Fencing & Decking, Inc. was a defunct corporation; therefore, the wage claims alleging unpaid wages and penalty wages against Respondent Tailor Made Fencing & Decking, Inc. were dismissed. ORS 652.140, ORS 652.150, ORS 652.332.

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The above-entitled case was scheduled for hearing on April 7, 2009, before Linda A. Lohr, designated as Administrative Law

Judge ("ALJ") by Brad Avakian, Commissioner of the Bureau of Labor and Industries for the State of Oregon. Case Presenter Patrick Plaza, an Agency employee, represented the Bureau of Labor and Industries ("BOLI" or "Agency"). Neither Respondent Thomas Sciborski nor Respondent Tailor Made Fencing & Decking, Inc. was represented by counsel. Thomas Sciborski was Respondent Tailor Made Fencing & Decking, Inc.'s authorized representative. Before the scheduled hearing date, the ALJ granted the Agency's motion for summary judgment and canceled the hearing.

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

**FINDINGS OF FACT –  
PROCEDURAL**

1) On or about April 14, 2008, the Agency issued an Order of Determination alleging that "employers" Tailor Made Fencing & Decking, Inc., "an inactive corporation," dba Tailor Made Construction, and Thomas Sciborski had employed Claimants Alfredo Gonzalez and Jon C. Irvine and failed to pay them \$2,538.00 in earned wages. The Agency further alleged that the failure to pay wages was willful and the employers, therefore, owed Claimants \$10,080 in pen-

alty wages. The Order of Determination required the employers, within 20 days, either to pay these sums, plus interest, in trust to the Agency, request an administrative hearing and submit an answer to the charges, or demand a trial in a court of law.

2) On or about June 27, 2008, Respondent Thomas Sciborski filed an Answer and Request for Hearing, stating that he was the owner and authorized representative of Respondent Tailor Made Fencing & Decking, Inc., and the owner of Tailor Made Construction. In that Answer, Respondent Sciborski admitted Claimants were employed by Tailor Made Construction and that they were paid all wages "except an amount of \$2,118.00 that is currently outstanding." Respondent Sciborski stated that "this figure is different than the amount claimed of \$2,538 due to the fact that Alfredo Gonzalez was employed for a total of 45/hrs @ \$30 and not 59 hours." Respondent Sciborski further stated that he did not pay Claimants the earned and due wages because one of his clients did not pay him for the work he "contracted and completed" for his client.

3) On November 13, 2008, the Hearings Unit received the Agency's request for hearing.

4) The Hearings Unit issued a Notice of Hearing on November 17, 2008, setting forth the time and place of hearing. The Notice was served on Respondents together with a copy of the Order of Determination, a language notice,

a Servicemembers Civil Relief Act notification, a Summary of Contested Case Rights and Procedures, a copy of the Contested Case Hearing Rules, OAR 839-050-0000 to 839-050-0440.

5) On January 23, 2009, the ALJ ordered the Agency and Respondents each to submit a case summary that included a list of all persons to be called as witnesses, identification and copies of all documents to be offered into evidence, and, for the Agency only, a brief statement of the elements of the claim and any wage and penalty calculations. The ALJ ordered the participants to submit their case summaries by March 27, 2009, and notified them of the possible sanctions for failure to comply with the case summary order.

6) The Agency filed a motion for summary judgment on March 12, 2009. In its motion, the Agency stipulated that Claimant Gonzalez worked 45 hours and earned \$1,350 during the wage claim period. The forum issued an interim order notifying Respondents that their response to the summary judgment motion was due on March 23, 2009. Respondents did not file a response to the motion.

7) On March 26, 2009, the Agency filed a case summary.

8) On March 30, 2009, the ALJ issued an order granting the Agency's motion for summary judgment and canceling the contested case hearing. That order stated:

"The Agency alleged in the Order of Determination that Respondents employed Claimants Gonzalez and Irvine in Oregon from February 7 through February 22, 2008, and December 17 through December 30, 2007, respectively, and unlawfully failed to pay them wages totaling \$2,538.00. The Agency further alleged that 30 days had elapsed since the wages became due and owing, that Respondents' failure to pay the wages was willful, and that Respondents, therefore, owed Claimants Gonzalez and Irvine penalty wages totaling \$10,080.00.

"Respondent Sciborski filed a response to the Order of Determination, on his own behalf, and as Respondent Tailor Made Fencing and Decking, Inc.'s authorized representative. Respondent Sciborski requested a contested case hearing and made the following assertions:

Re: Paragraph II, I do agree that the wage claimants were employed by Tailor Made and both were paid all wages due except an amount of \$2,118 that is currently outstanding. This figure is less than the amount claimed of \$2,538 due to the fact that Alfredo Gonzalez was employed for a total of 45/hrs @ \$30.00 per hour and not 59 hours.

Re: Paragraph III, the reason I have not paid the

claimants has not been due to negligence, but rather I have been unable to pay the wage claimants, due to the fact that a client of mine, who currently owes me \$15,000, has failed to pay me for the work I contracted and completed for him. Unfortunately, my business is small enough that such a shortage directly affected my ability to pay the way [sic] claimants. I, myself, have not even been paid my earned time and material costs. Given the sizeable amount due to me, I have contacted an attorney and filed a lien against this client and his numerous businesses. I am hopeful that this action will resolve this issue quickly. In light of these circumstances beyond my control, I do not feel the penalty wages are warranted at this time, so long as we can make an agreement and possible [sic] a payment plan to get both parties paid the outstanding wages actually incurred while working for Tailor Made. (Summary Judgment Motion, Agency Exhibit C)

“On March 12, 2009, the Agency filed a motion for summary judgment claiming that no genuine issues of material fact remained in dispute, and that Respondent Sciborski is individually liable for the unpaid wages and penalty wages

due and owing. The forum issued an order stating that Respondents’ response to the summary judgment motion was due on Monday, March 23, 2009. To date, the forum has received no response from Respondents.

“A participant in a BOLI contested case hearing is entitled to summary judgment only if the participant demonstrates that ‘[n]o genuine issue as to any material fact exists and the participant is entitled to a judgment as a matter of law \* \* \*.’ OAR 839-050-0150(4)(B). In reviewing a motion for summary judgment, this forum ‘draw[s] all inferences of fact from the record against the participant filing the motion for summary judgment \* \* \* and in favor of the participant opposing the motion \* \* \*.’ *In the Matter of Efrain Corona*, 11 BOLI 44, 54 (1992), *aff’d without opinion, Corona v. Bureau of Labor and Industries*, 124 Or App 211, 861 P2d 1046 (1993). In considering summary judgment motions, this forum gives some evidentiary weight to unsworn assertions contained in the participants’ pleadings and other filings. *In the Matter of Barbara Coleman*, 19 BOLI 230, 241 (2000).

“In a typical wage claim case, the Agency has the burden of proving 1) that the respondent employed the claimant; 2) any pay rate upon which the respondent and the claimant agreed, if other than minimum

wage; 3) that the claimant performed work for the respondent for which he or she was not properly compensated; and 4) the amount and extent of work the claimant performed for the respondent. *Coleman*, 19 BOLI at 262-63. In this case, none of the elements are disputed. Therefore, the following undisputed facts in the record are deemed determinative for the purposes of this order:

“1) On March 17, 2008, Claimant Alfredo Gonzalez filed a wage claim against ‘Tailor Made Construction,’ a business owned and operated by Respondent Thomas Sciborski. Claimant Gonzalez worked for Sciborski from November 15, 2007, through February 22, 2008, at the agreed upon wage rate of \$30 per hour. Claimant Gonzalez worked 45 hours for which he was not paid and he is owed \$1,350 in unpaid wages. (Summary Judgment Motion, Order of Determination, Agency Exhibits A and C)

“2) On February 19, 2008, Claimant Jon C. Irvine filed a wage claim against ‘Tailor Made Construction,’ a business owned and operated by Respondent Thomas Sciborski. Claimant Irvine worked for Sciborski from September 17, 2007, through January 7, 2008, at the agreed upon wage rate

of \$12 per hour. Claimant Irvine worked 64 hours for which he was not paid and he is owed \$768 in unpaid wages. (Summary Judgment Motion, Order of Determination, Agency Exhibits B, C)

“3) Respondent Sciborski knew Claimants were owed wages totaling \$2,118 when Claimants left their employment. (Summary Judgment Motion, Agency Exhibit C)

“4) Respondent Tailor Made Fencing and Decking, Inc. has been a defunct corporation since June 29, 2007. On September 9, 2002, Respondent Tailor Made Fencing and Decking, Inc. registered an assumed business name - Tailor Made Construction - with the Oregon Secretary of State Corporation Division. Respondent Sciborski was Respondent Tailor Made Fencing and Decking, Inc.’s owner and president. The registration expired on September 23, 2004. (Summary Judgment Motion, Agency Exhibits C, D, F)

“5) From September 17, 2007, through February 22, 2008, Respondent Sciborski, individually, operated a construction business under the unregistered assumed business name of Tailor Made Construction. (Summary Judgment Mo-

tion, Agency Exhibits A, B, C)

#### **“Liability For Unpaid Wages**

“Based on the record herein, including Respondent Sciborski’s admissions, there is no dispute that Respondent Sciborski, using the unregistered assumed business name of Tailor Made, employed Claimants, agreed to pay them the alleged pay rates, and failed to compensate them for some of the hours they worked during the wage claim periods and in the amounts claimed. Consequently, there is no genuine dispute of fact regarding Respondent Sciborski’s obligation to pay \$2,118 in unpaid wages, plus interest. See ORS 652.320(7); 652.330(1).

“Additionally, the undisputed facts demonstrate that Respondent Tailor Made Fencing and Decking, Inc. was a defunct corporation well before Respondent Sciborski employed Claimants and has remained inactive ever since. Accordingly, there being no connection between Respondent Tailor Made Fencing and Decking, Inc. and the wage claimants, the wage claims against Respondent Tailor Made Fencing and Decking, Inc. hereby are **dismissed**.

#### **“Liability For Penalty Wages**

“The Agency also seeks penalty wages for Claimants totaling \$10,080.00. A respondent must pay penalty wages when the respondent

has ‘willfully fail[ed] to pay any wages or compensation of any employee whose employment ceases \* \* \*.’ ORS 652.150. An employer acts ‘willfully’ when it ‘knows what [it] is doing, intends to do what [it] is doing, and is a free agent.’ *Vento v. Versatile Logic Systems Corp.*, 167 Or App 272, 277, 3 P3d 176, 179 (2000); see *Wyatt v. Body Imaging*, 163 Or App 526, 531-32, 989 P2d 36 (1999), *rev den* 320 Or 252 (2000). In his answer, Respondent Sciborski claims his failure to pay wages was not ‘negligent’ but due to a client’s failure to pay for Respondent Sciborski’s performance on a contract. There is no dispute that Respondent Sciborski knew the amount of wages due to Claimants when the wages accrued and that he intentionally failed to pay those wages based on his client’s failure to pay on a contract. Those facts alone establish that Respondent Sciborski acted voluntarily and as a free agent and, therefore, acted willfully. However, an employer who willfully fails to pay wages may avoid paying penalty wages by proving that the failure to pay was due to the employer’s financial inability to pay the wages at the time they accrued. *In the Matter of U.S. Telecom International*, 13 BOLI 114, 122 (1994). Financial inability to pay wages is an affirmative defense for which an employer has the burden of proof. In this case, Respon-

dent Sciborski had the burden of producing evidence to support the allegation that he was financially unable to pay the wages owed Claimants at the time the wages accrued. See ORCP 47C(nonmoving participant has the burden of producing evidence on any issue raised in the motion as to which the nonmoving participant has the burden of persuasion at hearing). See also *In the Matter of R.L. Chapman Ent. Ltd.*, 17 BOLI 277, 284-85 (1999)(when a respondent's answer includes this defense but the respondent produces no supporting evidence, a claimant's right to penalty wages is not overcome). Respondent produced no evidence to support his affirmative defense and there is nothing in the record that shows he was unable to pay Claimants their wages at the time the wages accrued. The undisputed evidence also establishes that more than 30 days have passed since Respondent Sciborski failed to pay Claimants' wages. Under these circumstances, 'as a penalty for such nonpayment,' Claimant's wages 'shall continue' as a matter of law. ORS 652.150. The amount of penalty wages owing is calculated pursuant to statute and Agency rule as follows:

"Claimant Gonzalez - 30 days x 8 hours/day x \$30/hour = \$7,200.00;

"Claimant Irvine – 30 days x 8 hours/day x \$12/hour = \$2,880.00.

"See ORS 652.150; OAR 839-001-0470(1).

"The Agency's motion for summary judgment is **GRANTED**. The hearing scheduled to commence on April 7, 2009, is  **canceled**. Within the next few weeks, I will issue a proposed order based on this interim order granting the Agency's summary judgment motion.

**"IT IS SO ORDERED."** (Footnotes omitted)

The procedural findings made in the interim order granting summary judgment are incorporated in this Final Order.

9) The ALJ issued a proposed order on April 20, 2009, that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. Neither the Agency nor Respondent filed exceptions.

#### **FINDINGS OF FACT – THE MERITS AND ULTIMATE FINDINGS OF FACT**

The forum decides no factual issues in ruling on a summary judgment motion. The following are the undisputed material facts in the record, construed favorably to Respondent Sciborski.

1) From September 17, 2007, through February 22, 2008, Respondent Sciborski individually operated a construction business under the unregistered assumed

158 **In the Matter of TAILOR MADE FENCING & DECKING, INC.**

business name of Tailor Made Construction.

2) Respondent Sciborski employed Claimant Alfredo Gonzales in Oregon from February 7 to February 22, 2008, and Claimant Jon C. Irvine in Oregon from December 17 to December 30, 2007.

3) Respondent Sciborski agreed to pay Claimant Gonzalez \$30 per hour and Claimant Irvine \$12 per hour.

4) From February 7 to February 22, 2008, Claimant Gonzalez worked 45 hours and earned \$1,350. Respondent Sciborski did not pay Claimant any part of those wages earned and owes Claimant \$1,350 in due and unpaid wages.

5) From December 17 to December 30, 2007, Claimant Irvine worked 64 hours and earned \$768. Respondent Sciborski did not pay Claimant any part of those wages and owes Claimant \$768 in due and unpaid wages.

6) Respondent Sciborski knowingly and intentionally failed to pay Claimants a total of \$2,118.00 in earned, due and payable wages. Respondent Sciborski has not paid the wages owed and more than 30 days have elapsed from the date the wages were due.

7) Penalty wages for Claimants, computed pursuant to ORS 652.150, total \$10,080.00 (Claimant Gonzalez: \$30 per hour x 8 hours x 30 days = \$7,200; Claimant Irvine: \$12 per hour x 8 hours x 30 days = \$2,880).

8) Respondent Tailor Made Fencing and Decking, Inc. was administratively dissolved on June 29, 2007. In September 2002, Respondent Tailor Made Fencing and Decking, Inc. registered an assumed business name - Tailor Made Construction - with the Oregon Secretary of State Corporation Division. The assumed business name registration expired on September 23, 2004.

**CONCLUSIONS OF LAW**

1) Respondent Sciborski was Claimants' employer for purposes of ORS Chapter 652.

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

3) Respondent Sciborski violated ORS 652.140 by failing to pay Claimants all wages earned and unpaid after their employment terminated.

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

5) Under the facts and circumstances of this record, and according to the applicable law, the Commissioner of the Bureau of Labor and Industries has the authority to order Respondent Sciborski pay Claimants their earned, unpaid, due and payable wages and penalty wages, plus in-

terest on those sums until paid. ORS 652.332.

6) Respondent Tailor Made Fencing & Decking, Inc. has been a defunct corporation since June 2007 and at no time employed Claimants Gonzalez and Irvine.

7) Under the facts and circumstances of this record, and according to the applicable law, the Commissioner of the Bureau of Labor and Industries has the authority to dismiss the wage claims filed against Respondent Tailor Made Fencing & Decking, Inc. by Claimants Gonzalez and Irvine. ORS 652.332.

#### OPINION

The ALJ granted the Agency's pre-hearing motion for summary judgment. That ruling is confirmed for the reasons set forth in the ALJ's interim order granting the motion, quoted above.

#### ORDER

NOW, THEREFORE, as authorized by ORS 652.332, and as payment of the unpaid wages and penalty wages, **Thomas Sciborski** is hereby ordered to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232-2162, the following:

A certified check payable to the Bureau of Labor and Industries, in trust for Claimant Alfredo Gonzalez, in the amount of EIGHT THOUSAND FIVE HUNDRED AND FIFTY DOLLARS (\$8,550), representing \$1,350 in gross earned,

unpaid, due and payable wages, less appropriate lawful deductions, and \$7,200 in penalty wages, plus interest at the legal rate on the sum of \$1,350 from March 1, 2008, until paid, and interest at the legal rate on the sum of \$7,200 from April 1, 2008, until paid.

A certified check payable to the Bureau of Labor and Industries, in trust for Claimant Jon C. Irvine, in the amount of THREE THOUSAND SIX HUNDRED AND FORTY EIGHT DOLLARS (\$3,648), representing \$768 in gross earned, unpaid, due and payable wages, less appropriate lawful deductions, and \$2,880 in penalty wages, plus interest at the legal rate on the sum of \$768 from January 1, 2008, until paid, and interest at the legal rate on the sum of \$2,880 from February 1, 2008, until paid.

FURTHERMORE, as Respondent Tailor Made Fencing & Decking, Inc. has been found not to have employed Claimants Gonzalez and Irvine, the Commissioner of the Bureau of Labor and Industries hereby orders that the wage claims filed by Claimants Alfredo Gonzalez and Jon C. Irvine against **Tailor Made Fencing & Decking, Inc.** be and are hereby dismissed.

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**In the Matter of  
ROBERT J. THOMAS dba  
More and More Construction  
Case No. 11-09**

**Final Order of Commissioner  
Brad Avakian  
Issued June 4, 2009**

**SYNOPSIS**

The Agency paid out \$2,037.50 in unpaid wages to two wage claimants from the Wage Security Fund and sought reimbursement of that amount from Respondent, plus a twenty-five percent penalty of \$509.38, \$6,000.00 in penalty wages, and a \$3,000.00 civil penalty for one claimant who was not paid overtime wages. The forum ordered Respondent to repay \$2,037.50 to the Wage Security Fund, a twenty-five percent penalty of \$509.38, \$6,000.00 in penalty wages, and a \$3,000.00 civil penalty. ORS 652.150; 652.414, ORS 653.055; ORS 653.261; OAR 839-001-0510, OAR 839-001-0515.

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The above-entitled case came on regularly for hearing before Alan McCullough, designated as Administrative Law Judge ("ALJ") by Brad Avakian, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on Tuesday, April 28, 2009, at the offices of the

Oregon Employment Dept, located at 119 N. Oakdale Avenue, Medford, OR 97501.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by Patrick Plaza, an employee of the Agency. Claimants Travis Englehart and Gary Nunez were present and were not represented by counsel. Respondent did not appear at hearing and was held in default.

The Agency called as witnesses: Claimants Englehart and Nunez; Jess Campbell; and Wage and Hour Division compliance specialist Katy Bayless.

The forum received into evidence:

a) Administrative exhibits X-1 through X-5 (submitted or generated prior to hearing); and

b) Agency exhibits A-1 through A-32 (submitted prior to hearing) and A-33 (submitted at hearing).

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

**FINDINGS OF FACT –  
PROCEDURAL**

1) On January 15, 2008, Claimant Travis Englehart ("Englehart") filed a wage claim with the Agency alleging that Respondent had employed him and

failed to pay wages earned and due to him. At the time he filed his wage claim, Englehart assigned to the Commissioner of the Bureau of Labor and Industries, in trust for himself, all wages due from Respondent.

2) On January 15, 2008, Claimant Gary Nunez ("Nunez") filed a wage claim with the Agency alleging that Respondent had employed him and failed to pay wages earned and due to him. At the time he filed his wage claim, Nunez assigned to the Commissioner of the Bureau of Labor and Industries, in trust for himself, all wages due from Respondent.

3) Claimants filed their wage claims within the statute of limitations.

4) On April 23, 2008, the Agency issued Order of Determination No. 08-1203 based upon the wage claims filed by Claimants Englehart and Nunez. The Order of Determination alleged:

(a) Claimant Englehart was employed in Oregon by Respondent from November 29 to December 12, 2007; that he was entitled to the agreed pay rate of \$12.50 per hour; that he performed work, labor, and services; that he was paid nothing for 80 hours regular work and 2 hours of overtime work, for which he earned \$18.75 per hour; and that he is owed \$1,037.50 in unpaid wages, plus interest.

(b) Claimant Nunez was employed in Oregon by Respondent from December 3

to December 17, 2007; that he was entitled to the agreed pay rate of \$12.50 per hour; that he performed work, labor, and services; that he was paid nothing for 80 hours regular work; and that he is owed \$1,000.00 in unpaid wages, plus interest.

(c) Respondent willfully failed to pay those wages, more than 30 days had elapsed since the wages became due and owing, and Respondent owes Claimants each \$3,000.00 in penalty wages, plus interest.

(d) Respondent paid Englehart less than the wages to which he was entitled under ORS 653.010 to 653.261 and is liable to Englehart for civil penalties, pursuant to the provisions of ORS 653.055(1)(b), in the amount of \$3,000.00, plus interest.

(e) BOLI has paid Englehart and Nunez \$2,037.50 from the Wage Security Fund ("WSF") and is entitled to recover from Respondent that amount as wages paid from the WSF, plus a penalty of 25% of the sum paid from the WSF, equaling \$509.38, plus interest.

The Order of Determination required that, within 20 days, Respondent either pay these sums in trust to the Agency, request an administrative hearing and submit an answer to the charges, or demand a trial in a court of law.

5) On June 16, 2008, Respondent filed an answer and

request for hearing in which he denied he owed any wages to Claimants and stated that "I Robert Thomas am the or [sic] was the owner of More and More Construction." Respondent also alleged that Claimants had been fired on November 14, 2007, and that Claimants were "stepson and son-in-law to Jess Campbell who took \$196,270.00 plus stole all my tools and put me into bankruptcy."

6) On November 14, 2008, the Agency filed a "BOLI Request for Hearing" with the forum.

7) On November 17, 2008, the Hearings Unit issued a Notice of Hearing to Respondent, the Agency, and Claimants stating the time and place of the hearing as April 28, 2009, at the office of the Oregon Employment Dept, 119 N. Oakdale Avenue, Medford, Oregon. Together with the Notice of Hearing, the forum sent a copy of the Order of Determination, a document entitled "Summary of Contested Case Rights and Procedures" containing the information required by ORS 183.413, a document entitled "Servicemembers Civil Relief Act (SCRA) Notification, and a copy of the forum's contested case hearings rules, OAR 839-050-000 to 839-050-0445.

8) At the time set for hearing, Respondent had not appeared and had not previously announced that he would not appear. Pursuant to OAR 839-050-0330(2), the ALJ waited 30 minutes before commencing the hearing. When Respondent did not appear or contact the hearings unit by tele-

phone during that time, the ALJ declared Respondent in default at 9:30 a.m. and commenced the hearing.

9) At the outset of the hearing, the ALJ explained the issues involved in the hearing, the matters to be proved, and the procedures governing the conduct of the hearing.

10) The ALJ issued a proposed order on May 19, 2009, that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. No exceptions were filed.

#### **FINDINGS OF FACT – THE MERITS**

1) At all times material herein, Robert J. Thomas ("Respondent") was an employer in the state of Oregon doing business under the assumed business name of More & More Construction and a contractor licensed with the Oregon Construction Contractor's Board.

2) Respondent hired Claimants Englehart and Nunez in July 2007 to work on houses that Respondent was building. Nunez was hired to do roofing and labor. Englehart was hired to do carpentry work. Respondent agreed to pay Claimants \$12.50 per hour and \$18.75 hour for any overtime work.

3) Claimants were not asked to fill out an employment application, but filled out W-4 forms for Respondent around the time they were first hired.

4) Claimants were supervised by Jess Campbell. Campbell is Englehart's stepfather and Campbell's daughter is Nunez's girlfriend. Campbell went to work for Thomas as a supervisor, with the promise that he could become a partner.

5) While working for Respondent, Claimants regularly worked Monday through Friday. They filled out weekly timecards showing the hours they worked and turned them into Respondent each Wednesday after work. For the first few months of their employment, Respondent paid them every Friday by check, including a pay stub that showed statutory deductions.

6) As their employment continued, Respondent began to pay Claimants one or more days late and paying them in cash or by personal check. On these occasions, Respondent did not give Claimants pay stubs.

7) In November and December 2007, Claimants worked on a \$700,000 "spec" house in Shady Cove, Oregon that was located on property adjacent to home in which Respondent and his wife lived.

8) Between November 29 and December 12, 2007, Englehart worked the following dates and hours for Respondent:

November 29: 8 hours

November 30: 8 hours

December 3-7: 8 hours each day (total = 40 hours)

December 8: 2 hours

December 10-12: 8 hours each day (total = 24 hours)

In all, Englehart worked 82 hours, including two hours of overtime on December 8, a Saturday, in his last two weeks of work. Englehart's last day of work for Respondent was December 12. Respondent discharged Englehart.

9) Respondent did not pay Englehart for any of the 82 hours he worked between November 29 and December 12, 2007.

10) Between December 3 and December 14, 2007, Nunez worked the following dates and hours for Respondent:

December 3-7: 8 hours each day (total = 40 hours)

December 10-14: 8 hours each day (total = 40 hours)

In all, Nunez worked 80 hours in his last two weeks of work. Nunez's last day of work for Respondent was December 14. Respondent discharged Nunez.

11) Respondent did not pay Nunez for any of the 80 hours he worked between December 3 and December 14, 2007.

12) When Englehart and Nunez were not paid after their first week of work in December, Nunez visited Respondent's wife at Respondent's house to ask about pay. At the time, Respondent was working with another crew on a house in Eugene. Respondent's wife told him that they

should finish the house and that Respondent would be back.

13) On January 28, 2008, the Agency sent a Notice of Wage Claim to Respondent at his address on file with the Corporations Division. The letter stated that Claimants had filed wage claims alleging they were owed unpaid wages in the respective amounts of \$1,037.50 (Englehart) and \$600.00 (Nunez).

14) On February 11, 2008, the Agency received a written response from Respondent in which he stated, among other things, that both Claimants started work for him on "7-5-07," that they were "discharged due to lack of work," that Respondent's workweek was Monday to Friday, and that he agreed to pay Claimants \$12.50 per hour and \$18.75 per hour for overtime.

15) Katy Bayless, an Agency compliance specialist, investigated Claimants' wage claims. Based on her interviews with Claimants, the time records they provided, Respondent's failure to provide any time records, and Respondent's admissions that he employed Claimants and agreed to pay them \$12.50 per hour, Bayless made a determination that Englehart was owed \$1,037.50 in unpaid, due and owing wages (80 hours x \$12.50/hour = \$1,000; 2 hours x \$18.75 = \$37.50; \$1,000.00 + \$37.50 = \$1,037.50) and that Nunez was owed \$1,000.00 in unpaid, due and owing wages (80 hours x \$12.50/hour = \$1,000.00).

16) On April 1, 2008, Bayless interviewed Campbell, who verified that he had supervised Claimants, that they had worked for Respondent in December, and that they were never paid for that work. Campbell also told her that Respondent had gone out of business and had his license suspended, and that he had no knowledge of anyone else taking over Respondent's business.

17) After talking with Campbell on April 1, Bayless determined that Claimants were eligible for payment of their wages from the Wage Security Fund ("WSF"). That same day, she mailed a letter to Respondent that stated:

**"NOTICE OF WAGE CLAIMS**

"GARY S NUNEZ, ET AL have filed claims for wages with the Bureau of Labor and Industries, and assignments thereof have been made to the Commissioner of the Bureau of Labor and Industries for the purpose of collection, as provided by law. The details of the claims are as follows:

"SEE ATTACHED

"Available information indicates that your business operations have ceased and that you may have insufficient assets to pay these claims. For this reason, the Bureau is considering paying the claims from the Wage Security Fund. The Wage Security Fund provides for the payment of wage claims when

the employer ceases business and has no assets.

“So that we can determine whether GARY S NUNEZ, ET AL are eligible to receive payments from the Wage Security Fund, your assistance is requested. Please complete the Employer’s Questionnaire enclosed and return it to our office by April 14, 2008.

“If the Bureau determines that an employee is eligible for payment from the Wage Security Fund and does in fact make a payment to the employee from the Fund, the law allows the Bureau to perfect a security interest in the personal property of the employer. The law also allows the Bureau to recover any such amounts from employers as well as a penalty, attorney fees, costs and disbursements.

“Please review your records regarding this matter. If you dispute any of the claims, please submit your position in writing along with any supporting records or documents with the complete Employer’s Questionnaire.

“If, of course, your business operations have not ceased or you have sufficient assets to pay the full amounts owing these employees as shown on your records, please immediately tender to this office the amounts due.

“Gary Nunez           \$1,000

“Travis Englehart   1,037.50

“for work done on spec. house in Shady Cove OR the first 2 weeks of December.”

18) On April 7, 2008, Nunez signed and dated a “Wage Security Fund Assignment of Wages.” On April 10, 2008, Englehart signed and dated an identical form.

19) When Respondent did not respond to the Agency’s April 1 letter, Bayless completed the Agency’s WH-105 form entitled “Wage Security Fund Wage Claim Case Summary” in which she summarized Claimants’ wage claims, and then forwarded it to her supervisor for review. On April 22, 2008, Bayless’s supervisor approved the claims for payment from the WSF. On May 1, 2008, the Agency caused the WSF to issue a check in the amount of \$696.00 to Englehart and a check to the Oregon Department of Justice in the amount of \$259.38<sup>1</sup>, representing Englehart’s gross wages of \$1,037.50, less statutory deductions. On May 1, 2008, the Agency caused the WSF to issue a check in the amount of \$786.50 to Nunez, representing Englehart’s gross wages of \$1,000.00, less statutory deductions.

20) Twenty-five percent of \$2,037.50 is \$509.38.

21) Penalty wages for Claimants, calculated pursuant to ORS 652.150, equal \$3,000.00

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<sup>1</sup> The check to the Oregon Department of Justice was a garnishment for a child support payment.

each (\$12.50 per hour x 8 hours x 30 days = \$3,000).

22) ORS 653.055 civil penalties for Englehart based on Respondent's failure to pay two hours of overtime, calculated pursuant to ORS 652.150, equal \$3,000.00 (\$12.50 per hour x 8 hours x 30 days = \$3,000.00).

23) As of the date of hearing, Respondent had not paid Claimants any of the \$2,037.50 in gross wages due and owing to them or repaid the WSF.

24) Bayless, Englehart, Nunez, and Campbell were credible witnesses.

#### **ULTIMATE FINDINGS OF FACT**

1) At all times material herein, Respondent was an employer in the state of Oregon doing business under the assumed business name of More & More Construction and engaged the personal service of one or more employees.

2) Respondent employed Claimants Englehart and Nunez in July 2007 to work on houses that Respondent was building. Respondent agreed to pay them \$12.50 per hour, plus overtime. Respondent's regular workweek began on Monday.

3) Between November 29 and December 12, 2007, Englehart worked 82 hours for Respondent, including two hours of overtime, earning \$1,037.50 in gross wages. As of the date of hearing, Respondent had not paid Englehart any of these wages.

4) Between December 3 and December 14, 2007, Nunez worked 80 straight time hours for Respondent, earning \$1,000.00 in gross wages. As of the date of hearing, Respondent had not paid Nunez any of these wages.

5) On January 28, 2008, and again on April 1, 2008, the Agency sent letters to Respondent notifying him that Englehart and Nunez had filed wage claims and demanding payment of \$1,037.50 in gross, unpaid wages for Englehart and \$1,000.00 in gross, unpaid wages for Nunez.

6) The Agency investigated Englehart's and Nunez's wage claims and made a determination that they were owed \$1,037.50 and \$1,000.00, respectively, in unpaid, due and owing wages for work performed within 60 days of their last day of work. The Agency further determined that Respondent lacked sufficient assets to pay the wage claims and that the wage claims could not otherwise be fully and promptly paid.

7) On May 1, 2008, BOLI issued checks to Englehart and Nunez for gross wages of \$1,037.50 and \$1,000.00, respectively, less statutory deductions.

8) Respondent willfully failed to pay wages to Englehart and Nunez and more than 30 days have expired since their wages were due. Penalty wages, computed in accordance with ORS 652.150, equal \$3,000.00 each (\$12.50 per hour x 8 hours x 30 days = \$3,000.00)

9) ORS 653.055 civil penalties for Englehart based on Respondent's failure to pay two hours of overtime, calculated pursuant to ORS 652.150, equal \$3,000.00 (\$12.50 per hour x 8 hours x 30 days = \$3,000.00).

### CONCLUSIONS OF LAW

1) During all times material herein, Respondent was an employer subject to the provisions of ORS 653.261 and 652.110 to 652.414, and Englehart and Nunez were Respondent's employees.

2) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the subject matter and Respondent herein. ORS 653.261 and ORS 652.310 to 652.414.

3) Respondent violated ORS 652.140(1) by failing to pay Englehart and Nelson all wages earned and unpaid not later than the end of the first business day after their discharge.

4) Respondent's failure to pay Englehart and Nunez all wages due and owing was willful. Respondent owes Englehart and Nunez \$3,000 each in penalty wages. ORS 652.150; OAR 839-001-0470.

5) Under ORS 653.055, Respondent is liable for a civil penalty to Englehart in the amount of \$3,000.00 for failing to pay Englehart overtime wages to which he was entitled pursuant to ORS 653.261 and OAR 839-020-0030. ORS 653.055(1)(b).

6) The Agency paid out a total of \$2,037.50 from the WSF to Englehart and Nunez and is entitled to recoup \$2,037.50, plus a 25 percent penalty of \$509.38 from Respondent. ORS 652.414(1), ORS 652.414(3).

7) Under the facts and circumstances of this record, and according to the law applicable to this matter, the Commissioner of the Bureau of Labor and Industries has the authority to order Respondent to reimburse the Wage Security Fund, to pay a 25 percent penalty on the amount paid out by the Wage Security Fund, to pay Claimants Englehart and Nunez their penalty wages, and to pay Claimant Englehart a civil penalty, plus interest on all sums until paid. ORS 652.332, ORS 653.256.

### OPINION

#### WAGE SECURITY FUND RECOVERY

In cases involving payouts from the WSF, when (1) there is credible evidence that a determination on the validity of the claim was made; (2) there is credible evidence as to the means by which that determination was made; and (3) the Agency has paid out money from the Fund and seeks to recover that money, there is a rebuttable presumption that the Agency's determination is valid for the sums actually paid out. *In the Matter of Catalog-finder, Inc.*, 18 BOLI 242, 260 (1999). In this case, the Agency established that rebuttable presumption through credible

evidence documentary evidence and witness testimony showing:

(1) It determined that the Claimants' wage claims were valid for \$2,037.50 in wages earned within 60 days before the last day Claimants were employed, that Respondent had ceased doing business, and that Claimants' wage claims could not otherwise be fully and promptly paid;

(2) It based its determination on an investigation that included interviews of all material witnesses and an inspection of available, relevant documents; and

(3) It paid out \$2,037.50 from the WSF, an amount equal to Claimants' unpaid, due, and owing wages, and seeks to recover that money.

No evidence was presented to rebut this presumption, and the forum concludes that Respondent is liable to repay the WSF the \$2,037.50 paid out to Claimants.

#### **WAGE SECURITY FUND PENALTY**

Pursuant to ORS 652.414(3), the Commissioner is entitled to recover a 25 percent penalty on \$2,037.50, the amount of wages paid out, or \$200, whichever is greater. In this case, a 25 percent penalty of \$509.38 is greater and Respondent is liable to the Commissioner for that amount.

#### **PENALTY WAGES**

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

An employer is liable for penalty wages when it willfully fails to pay any wages or compensation of any employee whose employment ceases. *In the Matter of Procom Services, Inc.*, 24 BOLI 238, 245 (2003). Willfulness does not imply or require blame, malice, wrong, perversion, or moral delinquency, but only requires that that which is done or omitted is intentionally done with knowledge of what is being done and that the actor or omittor be a free agent. *Sabin v. Willamette Western Corp.*, 276 Or 1083, 557 P2d 1344 (1976).

The Agency proved that both Claimants were not paid for the hours they worked during their last two weeks of employment. During those hours of work, Nunez was the lead roofer and Englehart performed carpentry on a \$700,000 "spec" house located on a lot adjacent to Respondent's own home. At that time, Respondent was working with another crew on a house in Eugene. After the first week, Nunez went to Respondent's home and asked Respondent's wife about pay. She told him to finish the house and that Respondent would be back. Claimants then continued to work on the house before they were discharged. The forum infers from these facts that Respondent knew Claimants were working during the wage claim period. Although Respondent knew Claimants were working, Respondent paid them nothing at all for two weeks of work. There was no evidence that, in failing to pay Claimants, Respondent acted other than voluntarily or as a free

agent. Consequently, the forum concludes that Respondent's failure to pay Claimants their unpaid, due and owing wages was willful.

The forum notes that an employer's financial inability to pay wages at the time they accrue is an affirmative defense to liability for penalty wages. However, Respondent waived this defense by failing to plead it in his answer and request for hearing. OAR 839-050-0130(2); *In the Matter of Captain Hooks, LLP*, 27 BOLI 211, 223 (2006). Penalty wages are therefore assessed for both Claimants and calculated pursuant to ORS 652.150 (8 hours x \$12.50 per hour x 30 days = \$3,000.00).

#### **CIVIL PENALTIES - ORS 653.055**

If an employer pays an employee "less than the wages to which an employee is entitled under ORS 653.010 to 653.261," the forum may award civil penalties to the employee. ORS 653.055(1). The Agency alleged Respondent failed to pay Englehart overtime for the two hours of overtime he worked on December 8. The Commissioner's rules governing overtime requirements were promulgated pursuant to ORS 653.261 and are within the range of wage entitlements encompassed by ORS 653.055(1). See OAR 839-020-0030(1). The Agency proved that Englehart worked those two hours of overtime, and that Respondent paid him nothing, not even straight time, for those two hours of work. Respondent is therefore liable to

Claimant for \$3,000.00 in civil penalties as provided in ORS 652.150 (\$12.50 x 8 hours per day x 30 days = \$3,000.00). ORS 653.055(1)(b).

#### **ORDER**

NOW, THEREFORE, as authorized by ORS 652.150, 652.414, and ORS 653.055, and as payment of the amounts paid from the Wage Security Fund as a result of his violation of ORS 652.140, the Commissioner of the Bureau of Labor and Industries hereby orders Respondent **Robert J. Thomas** to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 1045 State Office Building, 800 NE Oregon Street, Portland, Oregon 97232-2180, the following:

(1) A certified check payable to the Bureau of Labor and Industries in the amount of TWO THOUSAND FIVE HUNDRED FORTY-SIX DOLLARS AND EIGHTY-EIGHT CENTS (\$2,546.88), representing \$1,037.50 paid to Travis Englehart from the Wage Security Fund, \$1,000.00 paid to Gary Nunez from the Wage Security Fund, and a 25 percent penalty of \$509.38 on the sum of \$2,037.50, plus interest at the legal rate on the sum of \$2,546.88 from February 1, 2008, until paid; and

(2) A certified check payable to the Bureau of Labor and Industries, in trust for Claimant Travis Englehart, in the amount of SIX THOUSAND DOLLARS (\$6,000.00), repre

senting \$3,000.00 in penalty wages and a \$3,000.00 civil penalty, plus interest at the legal rate on the sum of \$6,000.00 from February 1, 2008, until paid; and

(3) A certified check payable to the Bureau of Labor and Industries, in trust for Claimant Gary Nunez, in the amount of THREE THOUSAND DOLLARS (\$3,000.00), representing \$3,000.00 in penalty wages, plus interest at the legal rate on the sum of \$3,000.00 from February 1, 2008, until paid.

amounts sought and ordered Respondents to pay \$6,556.25 as reimbursement to the Fund, plus the statutory penalty. Also, the forum concluded Respondents were jointly and severally liable for the remaining unpaid wages totaling \$17,280 and ordered Respondents to pay the wage claimants the full amounts owed. The forum further concluded that Respondents were jointly and severally liable for their willful failure to pay the wages when due and ordered Respondents to pay the wage claimants penalty wages totaling \$4,200, pursuant to ORS 652.150. The forum also concluded that Respondents were jointly and severally liable to one wage claimant for failing to pay him at the applicable overtime rate for the hours he worked in excess of 40 hours per week and ordered Respondents to pay \$2,400 in civil penalties, pursuant to ORS 653.055. ORS 652.140; ORS 652.150; ORS 652.332; ORS 652.414; ORS 653.055.

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**In the Matter of  
SEHAT ENTERTAINMENT, INC.  
fdba Sin Club Bar & Grill, and  
Babak Sehat, successor in interest to Sehat Entertainment,  
Inc.**

**Case No. 30-08**

**Final Order of Commissioner  
Brad Avakian  
Issued July 31, 2009**

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**SYNOPSIS**

The Agency paid out \$5,245 in unpaid wages to two wage claimants from the Wage Security Fund and sought to recover the full amount from Respondents, plus a \$1,311.25 penalty, pursuant to ORS 652.414. The forum concluded Respondents were jointly and severally liable for the

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The above-entitled case came on regularly for hearing before Linda A. Lohr, designated as Administrative Law Judge ("ALJ") by Brad Avakian, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on March 3, 2009, in the W. W. Gregg Hearing Room of the Oregon Bureau of Labor and Industries, located at 800 NE Oregon Street, Portland, Oregon.

Case presenter Chet Nakada, an Agency employee, represented

the Bureau of Labor and Industries ("BOLI" or "Agency"). Jodi Noelle Durfee and Michael ("Fin") Gette ("Claimants") were present throughout the hearing and were not represented by counsel. Sehat Entertainment, Inc. ("Respondent Corporation") and Babak Sehat ("Respondent Sehat") failed to appear for hearing in person or through counsel.

The Agency called as witnesses: Margaret Pargeter, BOLI Wage and Hour Division Compliance Specialist; Steven Merrill, Respondents' former landlord; Richard Allegretto, Respondents' former customer; Jennifer Bogus, Respondents' former customer, and Claimants Durfee and Gette.

The forum received as evidence:

- a) Administrative exhibits X-1 through X-8;
- b) Agency exhibits A-1 through A-22 (filed with the Agency's case summary), A-23, A-24, A-25, and A-26 (offered during hearing).

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

**FINDINGS OF FACT –  
PROCEDURAL**

1) On February 22, 2007, Claimant Durfee filed a wage claim with the Agency alleging

Babak Sehat dba Sin Club Bar & Grill had employed her and failed to pay her wages for the hours she worked between October 18 and December 31, 2006. Claimant Durfee alleged she earned \$1,691.25, and that Respondent Sehat did not pay any part of those wages and owed her \$1,691.25 in unpaid wages.

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

3) On May 24, 2007, Claimant Gette filed a wage claim with the Agency alleging Babak Sehat dba Sin Bar and Grill employed him from September 13, 2006, and April 24, 2007, and failed to pay his wages for the hours he worked during that period. Claimant Gette alleged that he earned \$25,423.50, he was paid only \$1,300, and Respondent Sehat owed him \$24,723.50 in unpaid wages.

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

5) On May 1, 2007, the Agency issued Order of Determination No. 07-1895. In the Order, the Agency alleged Respondent Corporation and Respondent Sehat had employed Claimants during the periods Claimants claimed on their wage claims,

failed to pay them for hours worked during those periods, and were liable to them for \$25,278.75 in unpaid wages, plus interest. The Agency also alleged Respondents' failure to pay all of the wages when due was willful and they were liable to Claimants for \$4,200 as penalty wages, plus interest. Additionally, the Agency alleged Respondents failed to compensate Claimant Gette at one and one half times his regular pay rate as required by law and were liable for an additional \$2,400 as civil penalties, plus interest. The Agency further alleged Claimants were paid \$5,245 out of the Wage Security Fund and the BOLI Commissioner is entitled to recover from Respondents the wages paid from the Fund, pursuant to ORS 652.414. The Order gave Respondents 20 days to pay the sums, request an administrative hearing and submit an answer to the charges, or demand a trial in a court of law.

6) Respondents were served with the Order of Determination and thereafter filed an answer and requested a hearing. On September 24, 2007, Respondent Sehat responded by facsimile transmission to the Order stating, "I, Babak Sehat, as an authorized representative of Sehat Entertainment, an inactive corporation in the state of Oregon, deny exhibits A, B and C and request a hearing." On September 26, 2007, the Agency sent Respondents a Notice of Insufficient Answer to Order of Determination # 07-1895 advising Respondents

that an answer must include "an admission or denial of each fact alleged in the Order of Determination and a statement of each relevant defense to the allegations." The Notice also included a reminder that responses must be mailed or hand-delivered and that "[f]ax responses are not accepted."

7) On October 5, 2007, Respondent Sehat timely filed an answer to the Order of Determination on Respondent Corporation's behalf stating, in pertinent part:

"I, Babak Sehat, as an authorized representative of Sehat Entertainment, an inactive corporation in the state of Oregon, deny exhibits A, B and C and request a hearing. Jodi Noelle was never an employee of Sehat Entertainment and was employed by private pleasures and the g-spot. Mike Gette was hired to do some contracting work and then was in the process of becoming an employee. In no way are the hours represented by Jodi and Mike correct. They were boyfriend and girlfriend who lived in my house. They owe me in excess of \$25,000 in rents and damage they caused to my house. They were know [sic] for domestic violence and drug use. Mike Gette is a convicted felon, who admitted to me personally [sic]. I tried to help him out and he damaged my house and would not leave, thus forcing me to get an eviction through the court system. This is their way of getting back at

me. After I lost the bar I went in to gather my belongings and noticed that many items were stolen. The person, I believe stole those items, the only person with access to the bar other than myself [sic], was Mike Gette. After I called the police Mike Gette told the officer that he was my partner and had 'invested \$20,000 in the bar.' A complete lie. I will have the officer confirm this. Mike and Jodi were heavy into drug use and fabricated these numbers. I have no contract with either of them and never hired them as employees. Any moneys owed to Mike Gette were paid. Also the business is closed."

8) On January 13, 2009, the Agency submitted a request for hearing. On January 15, 2009, a Notice of Hearing issued from the Hearings Unit stating the hearing would commence at 9:00 a.m. on March 3, 2009. With the Notice of Hearing, the forum included copies of the Order of Determination, a language notice, a Servicemembers Civil Relief Act notification, and copies of the Summary of Contested Case Rights and Procedures and the Contested Case Hearing Rules, OAR 839-050-0000 to 839-050-0440.

9) On January 23, 2009, the ALJ ordered the Agency and Respondents each to submit a case summary that included: a list of all persons to be called as witnesses; identification and copies of all documents to be offered into evi-

dence, and, for the Agency only, a brief statement of the elements of the claim and any wage and penalty calculations. The ALJ ordered the participants to submit their case summaries by February 20, 2009, and notified them of the possible sanctions for failure to comply with the case summary order. On the same date, the ALJ issued an order pertaining to fax filings and timelines for respondent to motions and service of documents.

10) The Agency timely submitted a case summary.

11) On February 24, 2009, the Agency filed an addendum to its case summary.

12) On February 26, 2009, the Agency filed a second addendum to its case summary.

13) On February 26, 2009, the Agency filed a "Notification of Mailing of Agency Case Summary" that stated:

"In order to avoid any misunderstanding, the Agency hereby notifies the Forum that the Agency Case Summary mailed to Babak M. Sehat (10865 Avocet Ct/Beaverton OR 97007-8391) on February 19, 2009, was returned by the US Postal Service on February 23, 2009. Due to an error by the undersigned in putting the incorrect address on the mailing label, the US Postal Service was unable to deliver the documents. The Agency Case Summary was mailed again on February 23, 2009, with the correct address and

has not been returned by the US Postal Service as of the date of this notification. If the Forum needs an affidavit for the above information, the Agency will provide one.”

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

15) At the start of hearing, the ALJ verbally advised the Agency of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

16) The ALJ issued a proposed order on July 8, 2009, that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. Neither the Agency nor Respondent filed exceptions.

#### **FINDINGS OF FACT – THE MERITS**

1) At times material, until December 15, 2006, Respondent Sehat Entertainment, Inc. (“Respondent Corporation”) was an active domestic corporation operating a bar and restaurant under the assumed business name of Sin Club Bar & Grill (“Sin Club”), located at 11445 SW Pacific Highway, Tigard, Oregon. Respondent Babak Sehat (“Respondent Sehat”) was Sehat Entertainment, Inc.’s president

and secretary. In May 2006, Respondent Corporation obtained a liquor license for Sin Club from the Oregon Liquor Control Commission. Respondent Corporation involuntarily dissolved on December 15, 2006.

2) After Respondent Corporation dissolved, Respondent Sehat continued to operate the bar and restaurant located at 11445 SW Pacific Highway, Tigard, Oregon, using the same assumed business name.

3) On June 14, 2006, Respondent Sehat, individually, entered into a lease agreement with Steven Merrill and two other co-owners (“landlords”) of the premises located at 11445 SW Pacific Highway, Tigard, Oregon. Respondent Corporation was not involved in the lease because the landlords intended to hold Sehat personally liable for any default on the agreement. The lease was for a 10 year term, unless otherwise terminated as provided under the agreement. The landlords allowed Sehat to occupy the premises rent free from June through November 2006. They also loaned Sehat \$35,000 to stock the bar and purchase food for the restaurant because they wanted to “prime the pump” and give the business every opportunity to succeed. The landlords believed Sehat would repay the loan after he “closed a deal” on land he claimed he had sold.

4) Starting in December 2006, the base rent for the premises housing the bar and restaurant was \$6,000 per month. Respon-

dent Sehat paid the first month's rent in December 2006, but failed to pay the rent due each month thereafter. Sehat gave the landlords "the runaround" each time the rent was due and they eventually decided to terminate the lease. After giving the required notices, the landlords evicted Sehat from the premises and the business closed on or about April 20, 2007. Sehat never repaid the initial loan and owed the landlords an additional \$25,000 in back rent when the business closed. As of the hearing date, Sehat has not repaid the loan or overdue rent.

#### **CLAIMANT DURFEE**

5) Claimant Durfee worked at Sin Club from October 18 through December 31, 2006. Respondent Sehat hired her to work as a bartender and food server for the minimum wage rate of \$7.50 per hour. During that time, she worked the following hours for the weeks ending:

October 22, 2006 – 18 hours  
 October 29, 2006 – 32.5 hours  
 November 5, 2006 – 36 hours  
 November 12, 2006 – 18 hours  
 November 19, 2006 – 27 hours  
 November 26, 2006 – 18 hours  
 December 3, 2006 – 33 hours  
 December 10, 2006 – 36 hours  
 December 31, 2006 – 7 hours

Durfee worked 225.5 hours and earned gross wages of \$1,691.25. Respondent Sehat did not pay Durfee any wages during that period or anytime thereafter. When

Durfee filed her wage claim, she was owed \$1,691.25 in unpaid, due and owing wages.

6) On February 27, 2007, the Agency mailed a "Notice of Wage Claim" to "Sin Club" that stated, in pertinent part:

"You are hereby notified that JODI N. DURFEE has filed a wage claim with the Bureau of Labor and Industries alleging:

"Unpaid statutory minimum wages of \$1,691.25 at the rate of \$7.50 per hour from October 18, 2006 to December 31, 2006.

"IF THE CLAIM IS CORRECT, you are required to IMMEDIATELY make a negotiable check or money order payable to the claimant for the amount of wages claimed, less deductions required by law, and send it to the Bureau of Labor and Industries at the above address.

"IF YOU DISPUTE THE CLAIM, complete the enclosed 'Employer Response' form and return it together with the documentation that supports your position, as well as payment of any amount which you concede is owed the claimant to the Bureau of Labor and Industries within ten (10) days of the date of this Notice.

"If your response to the claim is not received on or before March 13, 2007, the Bureau may initiate action to collect these wages in addition to

penalty wages, plus costs and attorney fees.”

The notice was mailed to 11455 SW Pacific Hwy, Portland, Oregon.<sup>1</sup> Neither Respondents nor anyone on their behalf responded to the notice.

7) In April and May 2007, Agency compliance specialist Pargeter sent three letters to Respondent Sehat reiterating the information provided in the Notice of Wage Claim and requesting that Sehat either:

“1. Submit to me a check payable to Jodi Durfee in the gross amount of \$1,691.25 along with an itemized statement of lawful deductions, if any.

“2. Submit to me evidence she did not work the hours claimed, or that she has been paid[, or]

“3. Submit evidence my computations are incorrect.”

The first letter, dated April 13, 2007, was mailed to “11445 SW Pacific Hwy, Tigard, OR 97223.” The second letter, dated April 30, 2007, was mailed to “11550 SW 72<sup>nd</sup> Ave., Tigard, OR 97223,” with a “cc” to “Sehat Entertainment, Inc., 11580 SW 72<sup>nd</sup> Avenue, Tigard, OR 97223.” The third letter, dated May 9, 2007, was mailed to 11550 SW 72<sup>nd</sup> Ave., Tigard, OR 97223.” The letters were returned

<sup>1</sup> The mailing apparently was incorrectly addressed. Credible evidence showed the business location was 11445 SW Pacific Highway, Tigard, Oregon. See Finding of Fact – The Merits 1.

to Pargeter and she later determined through the U.S. Postal Service that Respondent Sehat had stopped picking up his mail from the 11580 SW 72<sup>nd</sup> Avenue, Tigard, OR 97223 address, and left no forwarding address. Pargeter’s supervisor at the time drove to the business site at 11445 SW Pacific Hwy, Tigard, Oregon, and determined that the business had closed. Pargeter contacted OLCC and confirmed that Sin Club was no longer in business.

8) On May 21, 2007, Pargeter sent Respondent Sehat a notice stating, in pertinent part:

“Available information indicates that your business operations have ceased and that you may have insufficient funds to pay this claim. For this reason, the Bureau is considering paying this claim from the Wage Security Fund.

“ \* \* \* \* \*

“So that we can determine whether Jodi Durfee is eligible to receive payment from the Wage Security Fund, your assistance is requested. Please complete the Employer’s Questionnaire enclosed and return it to our office by **May 31, 2007**.

“If the Bureau determines that an employee is eligible for payment from the Wage Security Fund and does, in fact, make payment to the employee from the Fund, the law allows the Bureau to perfect a security interest in the personal

property of the employer. The law also allows the Bureau to recover any such amounts from employers as well as a penalty, attorney fees, costs and disbursements.

“ \* \* \* \* \*

“If, of course, your business operations have not ceased or you have sufficient assets to pay the full amount owing this employee as shown on your records, please immediately tender to this office the full amount due.”

The notice was mailed to 11580 SW 72<sup>nd</sup> Ave., Tigard, Oregon. The notice included a “cc” to “Bob Sehat, c/o Town & Country Home Loans, Inc., 10228 S.W. Capitol Hwy, Suite 201, Portland, OR 97219.” Neither Respondents nor anyone on their behalf responded to the notice.

#### **CLAIMANT GETTE**

9) Claimant Gette began working at Sin Club on or about September 13, 2006. He was hired by then general manager, Gary Swanson, to tend bar and perform general maintenance related to a remodel in progress when he was hired. There was no discussion about pay and Gette assumed he was earning minimum wage. Respondent Sehat later fired Swanson and told Gette he would pay him \$10 per hour and \$400 per month as rent on a house Sehat owned near the business if Gette agreed to assume the duties of bar manager. Gette agreed and at the end of November 2006 moved into Se-

hat’s house along with his girlfriend, Jodi Durfee. His duties as bar manager included: opening and closing the bar; weekly bar and kitchen inventory and ordering; scheduling events for the bar; and placing web advertisements on My Space.

10) Other than the rent credit totaling \$1,600, Gette received no wages from Respondents for the work he performed between September 2006 and April 2007. The only employee who received any wages during that period was the cook who was paid in cash after every shift. Based upon Respondent Sehat’s representation that he planned to pay his rent, creditors and employees with the proceeds from an impending land deal, Gette was optimistic the business would thrive and eventually he would receive his wages. As time went on, Gette observed that there was enough coming in after daily sales to maintain inventory in the bar but not enough to continue the inventory and pay all the bills associated with the bar. Between January and April 2007, the landlords came to the bar often to collect overdue rent. Sehat usually asked Gette to take whatever he could out of the till to give the landlords, and to leave just enough money to maintain a cash flow for the day. In April 2007, the landlords told Gette they were evicting Respondents and closing the bar. When the business closed, Sehat evicted Gette from the rental house. On his last working day, Gette took with him a small safe he had loaned to Sehat

during his employment. The safe contained \$100 and Gette kept the money as part of the wages Respondents owed him.

11) Gette's last working day was on or about April 12, 2007. From September 13, 2006, through April 12, 2007, Gette worked the following hours for the weeks ending:

- September 16, 2006 – 30 hours
- September 23, 2006 – 45 hours
- September 30, 2006 – 75 hours
- October 7, 2006 – 80.5 hours
- October 14, 2006 – 79.5 hours
- October 21, 2006 – 82 hours
- October 28, 2006 – 73 hours
- November 4, 2006 – 71 hours
- November 11, 2006 – 70 hours
- November 18, 2006 – 70 hours
- November 25, 2006 – 67 hours
- December 2, 2006 – 72 hours
- December 9, 2006 – 73 hours
- December 16, 2006 – 97 hours
- December 23, 2006 – 94 hours
- December 30, 2006 – 72 hours
- January 6, 2007 – 57 hours
- January 13, 2007 – 65 hours
- January 20, 2007 – 63 hours
- January 27, 2007 – 62.5 hours
- February 3, 2007 – 65.5 hours
- February 10, 2007 – 62 hours
- February 17, 2007 – 82.5 hours
- February 24, 2007 – 64.5 hours
- March 3, 2007 – 68 hours

- March 10, 2007 – 68.5 hours
- March 17, 2007 – 65 hours
- March 24, 2007 – 60 hours
- March 31, 2007 – 63.5 hours
- April 7, 2007 – 39 hours
- April 14, 2007 – 42 hours

From on or about September 13 until the week ending December 2, 2006, Gette worked 815 hours, including 335 overtime hours, at the minimum wage rate of \$7.50 per hour, earning \$7,368.75 (480 hours @ \$7.50 per hour, plus 335 overtime hours @ \$11.25 per hour). From December 3, 2006 until the week ending April 14, 2007, Gette worked 1,264 hours, including 505 overtime hours, at the agreed upon rate of \$10 per hour, earning \$15,165 (759 hours @ \$10 per hour, plus 505 overtime hours @ \$15 per hour). Gette worked a total of 2,079 hours and earned gross wages of \$22,533.75. Other than providing a rent credit of \$1,600 and leaving \$100 in a safe that belonged to Gette, Respondents did not pay Gette any wages during that period or anytime thereafter. When Gette filed his wage claim, he was owed \$20,833.75 in unpaid, due, and owing wages (\$22,533.75, less the rent credit of \$1,600 and \$100 Gette retrieved from the safe).

12) On May 24, 2007, Claimant Gette filed a wage claim, and on May 30, the Agency sent "Sin Bar & Grill" a notice stating, in pertinent part:

"Available information indicates that your business operations

have ceased and that you may have insufficient funds to pay this claim. For this reason, the Bureau is considering paying this claim from the Wage Security Fund.

\*\*\*\*\*

“So that we can determine whether MICHAEL A. GETTE is eligible to receive payment from the Wage Security Fund, your assistance is requested. Please complete the Employer’s Questionnaire enclosed and return it to our office by June 6, 2007.

\*\*\*\*\*

“If, of course, your business operations have not ceased or you have sufficient assets to pay the full amount owing this employee as shown on your records, please immediately tender to this office the full amount due.”

The notice was mailed to “11445 SW Pacific Hwy, Tigard, OR 97223.” The notice, marked as “not deliverable as addressed - unable to forward,” was returned to the Agency by the U.S. Postal Service on June 4, 2007.

13) Based on her determination that Sin Club had ceased doing business and that Claimants had valid wage claims, Pargeter recommended that Claimants be paid their unpaid, due and owing wages from the Wage Security Fund.

14) On or about June 12, 2007, BOLI caused the WSF to issue a check in the amount of

\$2,918.69 to Claimant Gette and on or about June 13, 2007, caused the WSF to issue a check in the amount of \$1,009.35 to Claimant Durfee.

15) All of the witnesses testified credibly.

#### **ULTIMATE FINDINGS OF FACT**

1) At times material, until December 15, 2006, Respondent Corporation was an Oregon corporation that engaged the personal services of one or more employees to perform work in Oregon, including Claimants Gette and Durfee.

2) At times material, Respondent Sehat was Respondent Corporation’s president, registered agent, and sole principal.

3) Between December 16, 2006, and April 20, 2007, Respondent Sehat continued to conduct the same business in Oregon as his predecessor, Respondent Corporation, at the same location, using the same facilities, employees, and assumed business name.

4) In 2006, the state minimum wage was \$7.50 per hour.

5) Claimant Durfee worked for Respondents from October 18 through December 31, 2006, at the minimum wage rate.

6) Claimant Gette worked for Respondents from on or about September 13, 2006, through April 12, 2007, at the minimum wage rate and later at the agreed upon rate of \$10 per hour.

7) When Claimant Durfee's employment ended, Respondents owed her \$1,691.25 for the hours she worked between October 18 and December 31, 2006.

8) When Claimant Gette's employment ended, Respondents owed him \$20,833.75 for the hours he worked between September 13, 2006, and April 12, 2007, including overtime hours.

9) Claimants Durfee and Gette filed wage claims and the Agency mailed written notices of nonpayment of wages to Respondents on the Claimants' behalf. After investigation the Agency determined the wage claims were valid.

10) The Agency determined that Respondents ceased doing business on April 20, 2007, and, based on that determination, paid Claimant Durfee \$1,009.35 and Claimant Gette \$2,918.69 from the Wage Security Fund.

11) Respondent Corporation willfully failed to pay the wages due and owing Claimants and more than 30 days have elapsed since the wages were due.

12) Penalty wages, computed pursuant to ORS 652.150 and OAR 839-001-0470(1)(c), total \$4,200.00.

13) By failing to pay Claimant Gette for the hours he worked in excess of 40 per week, Respondent Corporation paid Claimant Gette less than the wages to which he was entitled and Claimant Gette is owed civil penalties totaling \$2,400.00.

## CONCLUSIONS OF LAW

1) At all times material herein, until December 15, 2006, Respondent Corporation was an Oregon employer subject to the provisions of ORS 652.110 to 652.414 and ORS 653.010 to 653.261, and Claimants Durfee and Gette were Respondent Corporation's employees.

2) Respondent Sehat is a successor to Respondent Corporation and therefore an employer under ORS 652.310(1) and subject to the provisions of ORS 652.310 to 652.405 and 652.409 to 652.414.

3) The actions, inaction, and statements of Respondent Sehat are properly imputed to Respondent Corporation.

4) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the subject matter herein and Respondents herein. ORS 652.310 to 652.332; ORS 652.409 to 652.414.

5) Respondent Corporation violated ORS 652.140 by willfully failing to pay Claimants Durfee and Gette all wages or compensation earned and unpaid when their employment terminated.

6) Respondent Corporation paid Claimant Gette less than the wages to which he was entitled under ORS 653.261 and is liable under ORS 653.055 for the full amount of wages, less any amount actually paid to Claimant Gette, and for civil penalties as provided in ORS 652.150.

7) As a successor employer, Respondent Sehat is jointly and

severally liable for Respondent Corporation's failure to pay Claimants Durfee and Gette all wages earned and unpaid when their employment terminated.

8) Under the facts and circumstances of this record, and according to the applicable law, the Commissioner of the Bureau of Labor and Industries has the authority to order Respondents to reimburse the Wage Security Fund in the amount of \$3,928.04, the amount paid to Claimants from the Wage Security Fund, plus a \$982.01 penalty on that sum, plus interest at the legal rate on both sums until paid. ORS 652.414.

9) Under the facts and circumstances of this record, and according to the applicable law, the Commissioner of the Bureau of Labor and Industries has the authority to order Respondents to pay Claimants Durfee and Gette their earned, unpaid, due and payable wages, less any amounts paid out of the Wage Security Fund, penalty wages, and civil penalties, plus interest, on all sums until paid. ORS 652.332.

### OPINION

Respondents failed to appear at hearing and the forum found both in default pursuant to OAR 839-050-0330. When a respondent defaults, the Agency is required to establish a prima facie case on the record to support the allegations in its charging document. *In the Matter of Sue Dana*, 28 BOLI 22, 29 (2006). When making factual findings, the forum may consider unsworn assertions

contained in a defaulting respondent's answer when making factual findings, but those assertions are overcome whenever controverted by other credible evidence. *Id.*

### UNPAID WAGES

#### A. The Agency presented prima facie evidence showing Respondents employed Claimant Durfee and failed to pay her all wages due and owing when her employment terminated.

Credible evidence controverted Respondents' unsworn claim in their answer that they did not employ Claimant Durfee. Several witnesses credibly testified that they regularly frequented Sin Club between October 18 and December 31, 2006, and observed Durfee waiting on tables and bartending. Moreover, Durfee's credible testimony and documentary evidence established that she maintained an independent record of her work hours showing the amount and extent of the work she performed during that period. She was entitled to receive at least \$7.50 per hour for the hours she worked during that time and Respondents owed her \$1,691.25 when she terminated her employment on December 31, 2006.

**B. The Agency presented prima facie evidence showing Respondents employed Claimant Gette and failed to pay him all wages due and owing when his employment terminated.**

Credible evidence controverted Respondents' unsworn claim in their answer that Claimant Gette worked for Respondents as an independent contractor. Although Respondents claimed Gette "was hired to do some contracting work and then was in the process of becoming an employee," Gette's credible testimony that he was hired to tend bar and do some general maintenance for what he assumed to be the minimum wage rate, and then later was asked to manage the bar for \$10 per hour and \$400 per month as rent on a house owned by Respondent Sehat, was corroborated by credible witness testimony that was not controverted by credible evidence. Gette maintained a written record of his work hours showing the amount and extent of the work he performed between September 13, 2006, and April 12, 2007, including overtime hours, and was owed \$22,533.75 at the minimum wage rate of \$7.50 per hour and later at the agreed upon rate of \$10 per hour. Respondents paid Gette \$1,700 of that amount and owed him \$20,833.75 when his employment ended in April 2007.

**WAGE SECURITY FUND**

In cases involving payouts from the Wage Security Fund ("Fund"), when 1) there is credible

evidence that a determination on the validity of the claim was made; 2) there is credible evidence as to the means by which that determination was made; and 3) the Agency has paid out money from the Fund and seeks to recover that money, there is a rebuttable presumption that the Agency's determination is valid for the sums actually paid out. *In the Matter of Kilmore Enterprises, Inc.*, 26 BOLI 111, 123 (2004), *citing In the Matter of Catalogfinder, Inc.*, 18 BOLI 242, 260 (1999).

Respondents did not appear at the hearing to contest the recovery action and the Agency presented prima facie evidence showing that it determined the validity of the wage claims filed by Claimants Durfee and Gette; based its determination on the information available at the time; and paid out money from the Fund to Claimants. After confirming that Respondents had ceased doing business and had no visible means of paying Claimants, the Agency paid Claimant Durfee \$1,009.35 and Claimant Gette \$2,918.69 from the Fund, less lawful deductions. Consequently, Respondents are liable to the Fund for \$5,245, plus an additional 25 percent of the sum paid from the Fund, or \$200, whichever is greater. In this case, Respondents owe an additional \$1,311.25, which is 25 percent of the sum paid from the Fund and greater than \$200. Respondents' total liability to the Fund is \$6,556.25.

**PENALTY WAGES (ORS 652.150)**

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

There is sufficient credible evidence from which the forum may reasonably infer that Respondents knew each Claimant was owed wages when each left their employment. Based on Claimant Durfee's credible testimony, corroborated by credible witness testimony, the forum finds Respondents knew she worked as a food server and bartender because Respondent Sehat hired her to perform those jobs. The forum may reasonably infer that Respondents knew she was not paid for the work she performed. Other than Respondents' unsworn assertions in their answer that Durfee was employed by "private pleasures" and "g-string" and "fabricated" her hours, Respondents proffered no evidence that controverted the credible evidence presented by the Agency.

Claimant Gette credibly testified that Respondent Sehat repeatedly assured him that when his purported land sale went through, the employees, including

Gette, would be paid. Absent any contrary evidence, the forum concludes Respondents voluntarily and, collectively, as a free agent failed to pay Claimants all of the wages they earned for the work they performed during their employment. Respondents acted willfully and are jointly and severally liable for penalty wages pursuant to ORS 652.150.

**CIVIL PENALTIES (ORS 653.055)**

If an employer pays an employee "less than the wages to which an employee is entitled under ORS 653.010 to 653.161," the forum may award civil penalties to the employee. ORS 653.055. The Agency alleged Respondent Gette at one and one half times his regular rate of pay for each hour he worked that exceeded 40 hours in a given work week between September 13, 2006, and April 12, 2007. The Commissioner's rules governing overtime requirements were promulgated pursuant to ORS 653.261 and are within the range of wage entitlements encompassed by ORS 653.055. The Agency presented sufficient evidence to show Respondent failed to pay Claimant Gette overtime for the hours he worked in excess of 40 per week, as required under OAR 839-020-0030(1). Accordingly, Respondents are liable to Claimant Gette for \$2,400 in civil penalties as provided in ORS 652.150 (\$10 x 8 hours per day x 30 days). ORS 653.055(1)(b).

**ORDER**

NOW, THEREFORE, as authorized by ORS 652.414, and as payment of the amounts paid from the Wage Security Fund, under ORS 652.414(1), Respondents **Sehat Entertainment, Inc.** and **Babak Sehat** are hereby ordered to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232-2162, the following:

A certified check payable to the Bureau of Labor and Industries in the amount of SIX THOUSAND FIVE HUNDRED FIFTY SIX DOLLARS AND TWENTY FIVE CENTS (\$6,556.25), representing \$5,245 paid to Jodi Durfee and Michael Gette from the Wage Security Fund, and a \$1,311.25 penalty on that sum, plus interest at the legal rate on the sum of \$6,556.25 from June 13, 2007, until paid.

FURTHERMORE, as authorized by ORS 652.332, and as payment of the unpaid wages, less amounts paid from the Wage Security Fund, Respondents **Sehat Entertainment, Inc.** and **Babak Sehat** are hereby ordered to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232-2162, the following:

A certified check payable to the Bureau of Labor and Industries, in trust for Jodi Durfee, in the amount of TWO THOUSAND TWO HUNDRED

FORTY SIX DOLLARS AND TWENTY FIVE CENTS (\$2,246.25), less lawful deductions, representing \$446.25 in gross earned, unpaid, due and payable wages and \$1,800 in penalty wages, plus interest at the legal rate on the sum of \$446.25 from February 1, 2007, until paid, and interest at the legal rate on the sum of \$1,800 from March 1, 2007, until paid.

A certified check payable to the Bureau of Labor and Industries, in trust for Michael Gette, in the amount of TWENTY ONE THOUSAND SIX HUNDRED THIRTY THREE DOLLARS AND SEVENTY FIVE CENTS (\$21,633.75), less lawful deductions, representing \$16,833.75 in gross earned, unpaid, due and payable wages, \$2,400 in penalty wages, and \$2,400 in civil penalties, plus interest at the legal rate on the sum of \$16,833.75 from May 1, 2007, until paid, and interest at the legal rate on the sum of \$4,800 from June 1, 2007, until paid.

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**In the Matter of  
SPUD CELLAR DELI, INC.  
Case No. 28-08**

**Final Order of Commissioner  
Brad Avakian  
Issued August 11, 2009**

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**SYNOPSIS**

Respondent violated Oregon child labor laws by employing minors in 2007 without first obtaining a validated employment certificate, pursuant to ORS 653.307 and OAR 839-021-0220(2); by employing minors without first verifying the age of the minors, pursuant to OAR 839-021-0185; by employing at least one minor to perform work declared to be particularly hazardous or detrimental to the health or well being of minors 16 and 17 years old, in violation of OAR 839-021-0104; and, by failing to post a validated employment certificate, pursuant to OAR 839-021-0220(3). As a result of the violations, Respondent was found liable for civil penalties in the amount of \$5,000. ORS 653.307; ORS 653.370; ORS 109.510; OAR 839-021-0220(2); OAR 839-021-0185; OAR 839-021-0104; OAR 839-021-0220(3); OAR 839-019-0020.

The above-entitled case came on regularly for hearing before Linda A. Lohr, designated as Administrative Law Judge ("ALJ") by Brad Avakian, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on March 10, 2009, in the Oregon Employment Department conference room, Suite 105, located at 700 Union Street, The Dalles, Oregon.

Case presenter Jeffrey C. Burgess, an Agency employee, represented the Bureau of Labor and Industries ("BOLI" or "Agency"). Attorney Jennifer L. Bouman-Steagall represented Spud Cellar Deli, Inc. ("Respondent"). Respondent's president, Gerald Huston, was present throughout the hearing as a corporate representative.

The Agency called as witnesses: Nichole Archer (telephonic), former Respondent employee; Newell Enos (telephonic), BOLI Wage and Hour Division Compliance Specialist; Stacie Long, former Respondent employee; Karen Gernhart (telephonic), BOLI Wage and Hour Division administrative specialist; Shannon Copher, former Respondent employee; Shelby Long, former Respondent employee; and Korryn B. Copher-Gooch, former Respondent employee.

Respondent called no witnesses.

The forum received as evidence:

- (a) Administrative exhibits X-1 through X-10;

(b) Agency exhibits A-1 through A-9 (filed with the Agency's case summary).

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

**FINDINGS OF FACT –  
PROCEDURAL**

1) On October 17, 2008, the Agency issued a Notice of Intent to Assess Civil Penalties ("Notice"), Case No. 28-08, alleging Respondent violated Oregon child labor law provisions by employing at least two minors without first obtaining an annual employment certificate, employing at least two minors without first verifying their ages, employing at least one minor to engage in work declared to be particularly hazardous for minors, and failing to post a validated employment certificate in a conspicuous place readily visible to all employees. The Agency proposed civil penalties totaling \$7,000 against Respondent. In the Notice, Respondent was given 20 days from the date the Notice was mailed to file an answer and request a hearing.

2) Respondent was served with the Notice and thereafter timely filed an answer and a request for hearing through its designated authorized representative Gerald Huston. In its answer, Respondent denied all of the

Agency's allegations and alleged the following affirmative defenses:

"As a First Affirmative Defense to the [Notice], Respondent alleges that it did not authorize the employment of the minor children named in the [Notice].

"As a Second Affirmative Defense to the [Notice], Respondent contacted the local office of the Department of Labor prior to the dates alleged in the Notice in an effort to assure compliance with the Department's rules and regulations, and follow the directions of the Department.

"As a Third Affirmative Defense to the [Notice], Respondent alleges that Koryn Copher was never authorized by Respondent to use a meat slicer and such conduct, if it occurred, was as a result of said child's own folly."

On October 30, 2008, the Agency submitted the pleadings to the Hearings Unit and requested a hearing.

3) On November 3, 2008, the Hearings Unit issued a Notice of Hearing stating the hearing would commence at 9:00 a.m. on January 15, 2009. The Notice of Hearing included a copy of the Notice of Intent to Assess Civil Penalties, a language notice, a Servicemembers Civil Relief Act notification, and copies of the Summary of Contested Case Rights and Procedures and the Contested Case Hearing Rules,

OAR 839-050-0000 to 839-050-0440.

4) On November 12, 2008, the ALJ issued an order requiring the Agency and Respondent each to submit a case summary that included: a list of all persons to be called as witnesses, including expert witnesses; identification and copies of all documents to be offered into evidence; a statement of any agreed or stipulated facts; and, for the Agency only, a brief statement of the elements of the claim and penalty calculations. The ALJ ordered the participants to submit their case summaries by January 5, 2009, and notified them of the possible sanctions for failure to comply with the case summary order. On the same date, the ALJ issued an order pertaining to fax filings and timelines for responding to motions and service of documents.

5) On December 31, 2008, the Agency moved for a postponement of the hearing and an extension of time to file case summaries. The Agency's motion was made on the ground that Respondent's counsel had been traveling out of state due to a death in her family and was unable to adequately prepare for hearing. Respondent did not oppose the motion and the Agency stated that the motion was made "as a courtesy" to counsel and Respondent. On January 7, 2009, following a prehearing conference, the ALJ granted the Agency's motion and extended the due date for filing case summaries. The hearing was rescheduled to

commence on March 10, 2009, and the case summary deadline was extended to February 27, 2009.

6) The Agency and Respondent timely submitted case summaries.

7) On February 27, 2009, Respondent's counsel filed a second answer to the Notice. In the second answer, Respondent admitted the substantive allegations and alleged 11 affirmative defenses pertaining to mitigating circumstances. Respondent also alleged that the Agency's proposed civil penalties "are excessive, unreasonable, and inconsistent with the guidelines outlined in OAR 839-019-0025 and ORS 653.370."

8) On March 9, 2009, Respondent's counsel filed a third "amended answer" to the Notice, revising its answer to paragraph 5 of the Notice. The "amended" answer was identical to the answer filed on February 27, 2009; except that instead of admitting the allegation in paragraph 5 of the Notice, Respondent stated that it "lacks knowledge and information sufficient to form a belief as to the truth of the allegation set forth in paragraph 5 of the Notice and therefore denies the same."

9) At the start of hearing, the ALJ verbally informed the participants of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

10) Before the evidentiary portion of the hearing commenced, the Agency sought to

clarify the status of Respondent's multiple answers to the Notice. Respondent's counsel stated that initially she was unaware of Respondent's first answer, filed *pro se*, and believed the answer she filed on Respondent's behalf was the first answer to the Agency's Notice and that the "amended" answer she filed on Respondent's behalf was the second. Respondent was entitled to amend its answer once as a matter of course before a responsive pleading was filed. OAR 839-050-0140(1). For that reason, the ALJ determined that the answer filed on February 27, 2009, was Respondent's amended answer and controlling for the purpose of hearing. The third answer filed on March 9, 2009, was disregarded.

11) The ALJ issued a proposed order on July 8, 2009, that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. Respondent timely filed exceptions that are addressed in the opinion section of this Final Order.

#### **FINDINGS OF FACT – THE MERITS**

1) At times material, Respondent was an Oregon corporation operating a restaurant under the assumed business name of Spud Cellar Deli. Gerald Huston was Respondent's president and sole owner.

2) In or around June 2007, Respondent, through Huston, hired Shannon Copher ("S. Copher") to prepare food and work

the cash register at the Spud Cellar Deli. S. Copher had some prior management experience and she helped Huston recruit and schedule summer staff. Anticipating a need for additional short term help during the Fort Dalles Day rodeo, S. Copher told Huston that she knew "a couple of girls who could make shakes" and were looking for temporary work. Huston agreed to interview both girls, Korryn Copher (K. Copher), S. Copher's daughter, and Shelby Long (S. Long), S. Copher's niece.<sup>1</sup> Huston hired K. Copher to make and serve food, wash dishes, and clean. Huston hired S. Long to serve food, clean and cut vegetables, wash dishes and clean the dining room. K. Copher worked at the Spud Cellar Deli approximately two weeks and S. Long worked there approximately three days.

3) K. Copher's birthdate is February 6, 1991, and S. Long's birthdate is April 25, 1991. Huston knew the girls were under 18 years old when they were hired. When she was hired, K. Copher told Huston she was 16 years old and he told her that she could not serve beer to customers. After she assisted customers with Keno two or three times, he told her she was not allowed to handle Keno. Huston told S. Long that she could not serve alcohol or go in the Keno room. He told her that "you have to be 18 to go in

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<sup>1</sup> Witness Stacie Long (C. Long) was S. Long's mother and S. Copher's sister.

the Keno room.” Keno is a game of chance governed by the Oregon Lottery Commission.

4) Huston taught K. Copher how to operate the meat slicer and told her to always wear the metal mesh glove when using the slicer. The metal mesh glove did not fit K. Copher’s hand. The glove’s fingers were an inch longer than hers and she was afraid the glove would “get sucked” in the machine, taking her hand with it. Several times, she told Huston and a co-worker, Sara, that she was concerned about the ill-fitting glove, but Huston did not respond to her concerns. She used the metal mesh glove “most of the time” when operating the meat slicer.

5) K. Copher told her mother, S. Copher, that she was using the meat slicer while preparing food. S. Copher knew K. Copher should not be using the slicer and told her not to use it anymore. K. Copher told Huston that her mother did not want her to use the meat slicer and Huston told her that she worked for him and not her mother.

6) Nichole Archer, S. Copher’s friend and co-worker, worked the same shift as K. Copher and observed her using the meat slicer. Archer did not know that K. Copher should not be using the meat slicer. On several occasions, she had heard Huston tell K. Copher and others to use the metal mesh glove. One day, while operating the meat slicer, K. Copher said “ow” loud enough for Archer to hear. Archer was startled and

thought K. Copher was injured. When she turned around, K. Copher told her that she was okay and was “just joking around.” Archer sternly told K. Copher never to do that again and later reported the incident to Huston who was not present at that time. Huston’s wife was present and appeared shocked when Archer scolded K. Copher. Thereafter, nothing was ever said or done about the incident.

7) Several days after she feigned an injury to “tease” Archer, K. Copher sliced off the tip of her thumb on the meat slicer while slicing tomatoes. She was not wearing the metal mesh glove. S. Copher took K. Copher to the hospital where she received seven to nine stitches. K. Copher, through her mother, filed a workers’ compensation claim. BOLI’s Child Labor Unit later received information from the Workers’ Compensation Department about K. Copher’s injury. K. Copher’s injury left her thumb permanently scarred and she still suffers discomfort when she uses her thumb to write.

8) S. Long never used and was never asked to use the meat slicer while working for Respondent.

9) Huston told all employees who used the meat slicer that they would be fired if they did not use the metal mesh glove. There was no written policy, handbook, or posting that pertained to the meat slicer.

10) Respondent did not obtain a validated annual employment certificate from BOLI before hiring K. Copher and S. Long.

11) Respondent did not ask K. Copher or S. Long to provide an acceptable proof of age document before employing them.

12) Huston cooperated with the Agency's child labor investigation.

13) All of the witness testimony was credible and not disputed.

#### **ULTIMATE FINDINGS OF FACT**

1) At times material, Respondent was an Oregon corporation operating a restaurant under the assumed business name of Spud Cellar Deli and employing one or more persons in Oregon.

2) In June 2007, Respondent hired S. Long and K. Copher to work in Respondent's restaurant.

3) S. Long and K. Copher were 16 years old when Respondent hired them to work in the restaurant.

4) Respondent did not verify the ages of S. Long or K. Copher before they began working in the restaurant.

5) Respondent did not apply for or obtain an annual employment certificate to hire minors in 2007.

6) Respondent did not post a validated employment certificate in a conspicuous place readily visible to all employees in 2007.

7) During her employment with Respondent in June 2007, K. Copher cut off the tip of her thumb while using Respondent's meat slicer and, as a result, suffered a permanent injury.

8) K. Copher worked approximately two weeks and S. Long worked approximately three days for Respondent during the summer of 2007.

9) Respondent's corporate president cooperated with the Agency's child labor investigation.

#### **CONCLUSIONS OF LAW**

1) At all times material herein, Respondent was an employer and subject to the provisions of ORS 653.305 to 653.370.

2) The actions, inaction, statements, and motivations of Gerald Huston, Respondent's corporate president, are properly imputed to Respondent.

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

5) The legal age of majority in Oregon is 18 years old. ORS 109.510.

6) Respondent violated OAR 839-021-0185 by employing at least two minors under 18 years old without verifying their ages.

7) Respondent violated ORS 653.307 and OAR 839-021-0220(2) by employing minors under 18 years old in Oregon during 2007 without first obtaining a vali-

dated annual employment certificate to employ minors.

8) Respondent violated OAR 839-021-0104 by employing at least one minor child under 18 years old in 2007 to perform work using a meat slicer, an occupation declared to be particularly hazardous or detrimental to the health or well being of minors 16 and 17 years old.

9) Under the facts and circumstances of this record, and according to the applicable law, the Commissioner of the Bureau of Labor and Industries is authorized to assess civil penalties against Respondent for each violation of ORS 653.305 to 653.370 or any rule adopted by the Wage and Hour Commission thereunder. ORS 653.370, OAR 839-019-0010(1)&(2), and OAR 839-019-0025.

#### OPINION

In its amended answer, Respondent admitted the substantive allegations alleged in the Notice of Intent to Assess Civil Penalties, but denied the Agency's proposed civil penalties were justified or appropriate under OAR 839-019-0020, 839-019-0025, or ORS 653.370.

Based on Respondent's admissions and credible evidence that substantiated each of the Agency's allegations, Respondent is deemed liable for civil penalties for: 1) employing at least two minor children between June and August 2007 without obtaining an annual employment certificate to hire minors; 2) hiring minors with-

out first verifying their ages; 3) employing at least one minor to engage in work particularly hazardous for minors, resulting in an injury to the minor; and 4) failing to post a validated employment certificate in a conspicuous place readily visible to all employees. The only issue is whether the civil penalties proposed for each violation are warranted or mitigated by evidence in the record.

#### CHILD LABOR VIOLATIONS/CIVIL PENALTIES

Each violation is a separate and distinct offense. OAR 839-019-0015.<sup>2</sup> The maximum civil penalty for any one violation is \$1,000 and the actual amount depends upon "all the facts and any mitigating and aggravating circumstances." OAR 839-019-0025(1). Willful and repeated violations are considered to be of such seriousness and magnitude that no less than \$500 for each willful and repeated violation will be imposed when the forum determines to impose a civil penalty. OAR 839-019-0025(5).

When determining the civil penalty amount to be imposed, the forum must consider Respondent's history in taking all necessary measures to prevent or correct violations; any prior viola-

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<sup>2</sup> Under the rule, in the case of continuing violations, each day's continuance is a separate and distinct violation. However, the Agency did not allege any continuing violations or present any evidence demonstrating continuing violations.

tions, if any; the magnitude and seriousness of the violations; the opportunity and degree of difficulty in complying with the statutes and rules; and any other mitigating circumstances. OAR 839-019-0020(1). Respondent is required to provide the forum with evidence of mitigating circumstances. OAR 839-019-0020(2). When arriving at the actual amount to be imposed, the forum must consider whether a minor was injured while employed in violation of the statute and rules. OAR 839-019-0020(3).

**A. Respondent employed minors in 2007 without first obtaining a validated employment certificate.**

The minimum civil penalty for employing minors without a valid employment certificate is \$100 for the first offense, \$300 for the second offense, and \$500 for the third and subsequent offenses. OAR 839-019-0025(2). Here, Respondent employed two minors without first applying for and obtaining a validated employment certificate. The violations are substantially aggravated by K. Copher's injury, incurred while she was performing inherently hazardous work. OAR 839-019-0020(3); OAR 839-019-0020(1)(c). The violations are further aggravated because the failure to file a validated employment certificate thwarts the Agency's ability to enforce the child labor laws. An application for an employment certificate must include a description of the duties to be performed by the minors and

a list of the machinery or other equipment to be used by the minors. OAR 839-021-0221(1)(d)&(e). If Respondent had complied with the law, presumably, the Agency would have denied the application and Respondent would have terminated K. Copher's employment or changed her job duties to exclude hazardous ones, thereby preventing her injury. Respondent's argument that it did not have sufficient opportunity to comply with the statute and rules has no merit. Business exigencies - in this case, being shorthanded during an anticipated busy period - are not a mitigating circumstance. Credible evidence shows Respondent was in business for at least two years and should have anticipated an increase in business during the months that particular local events are scheduled.

As mitigation, credible evidence established that Respondent has no prior offenses and that its failure to obtain a validated employment certificate to employ minors in 2007 was its first violation of record. Additionally, the magnitude of the violation was relatively small because Respondent hired two minors, one of whom was employed about two weeks and the other for three days, and one of the minors did not engage in hazardous work. Evidence also showed Respondent cooperated during the Agency's child labor investigation.

However, the Agency alleged and proved by a preponderance of credible evidence that Respon-

dent knew or should have known of the violations. Respondent knew K. Copher and S. Long were minors when hired and knew K. Copher was operating the meat slicer during her employment. Moreover, credible evidence established that Respondent knew the metal mesh glove did not fit K. Copher's hand, but chose to ignore her safety concerns while allowing her to continue operating the meat slicer. Those facts constitute aggravating circumstances that overcome the mitigating circumstances in this particular case.

The Agency seeks the maximum civil penalty of \$1,000 for each of two violations. The forum finds that Respondent's failure to apply for and obtain a validated employment certificate to hire minors in 2007 constitutes one violation, and, having considered both the aggravating and mitigating circumstances, concludes that Respondent is liable for **\$1,000** as an appropriate civil penalty for violating ORS 653.307 and OAR 839-021-0020(2).

**B. Respondent employed minors in 2007 without first verifying the age of each minor.**

Respondent was required to verify the age of all minors by requiring the minors to produce an acceptable proof of age document. OAR 839-021-0185(1). An acceptable proof of age document includes, but is not limited to, a birth certificate, a state-issued driver's license, a U. S. Passport, or other acceptable proof approved by BOLI. OAR 839-021-

0185(2). Additionally, Respondent had an affirmative duty to retain a record of the document used to verify each minor's age. A notation in each minor's personnel file identifying the document used to verify the minor's age satisfies the requirement. OAR 839-021-0185(3).

Respondent did not dispute and credible evidence established that Respondent's corporate president did not ask K. Copher or S. Long to produce a proof of age document when he hired them in June 2007. The violations are substantially aggravated by K. Copher's bodily injury, incurred while performing inherently hazardous work. The violations are serious because the purpose for verifying a minor's age before hire is to ensure that the minor is employed under proper working conditions and with proper hours for that specific age. *In the Matter of Panda Pizza*, 10 BOLI 132, 146 (1992). Failing to verify a minor's age reduces the employer's ability to safely and legally employ a minor. *Id.* at 146. Respondent's president knew K. Copher and S. Long were minors because he told both they could not serve alcohol to customers or go in the Keno room because they were "under 18." At that point, he had a duty to verify their specific ages in order to safely and legally employ them. Respondent's argument that it did not have sufficient opportunity to comply with the statute and rules has no merit. The opportunity to comply arose when Respondent's president in-

interviewed the minors before hiring them. Verifying their ages at that time and making a notation in their personnel files identifying the document used to verify their ages could have been done without any degree of difficulty. That the minors were hired as temporary help for a short period does not negate Respondent's duty to comply with child labor laws.

While Respondent has no prior history of child labor violations and cooperated with the Agency during the investigation, the additional violations could have been prevented if Respondent had complied with the law in the first place. Accordingly, after considering the aggravating and mitigating circumstances, the forum concludes that Respondent is liable for **\$2,000** (\$1,000 per violation) as an appropriate penalty for two violations of OAR 839-021-0185.

**C. Respondent employed a minor to engage in work declared to be particularly hazardous to minors.**

Respondent does not dispute that K. Copher suffered bodily injury while operating Respondent's meat slicer, which is a violation of OAR 839-021-0104 and Federal Hazardous Occupations Order No. 10. As mitigating circumstances, Respondent alleged that it took reasonable steps to ensure that minors were working in a safe environment and in a safe manner, that K. Copher's injury was not serious, and that she was injured "as a result of her own folly,"

i.e., she did not follow "posted" safety guidelines or express safety instructions given to all employees.

Respondent's admission that it did not obtain a validated employment certificate or verify the ages of the two minors completely negates Respondent's argument that it took reasonable steps to ensure the minors' safety in the workplace. The child labor laws were designed to ensure the safety of minors and Respondent's failure to comply demonstrates that it did not take reasonable steps to protect minors in its employ. Moreover, credible evidence shows Respondent ignored K. Copher's and her mother's concerns about the ill-fitting metal mesh glove - designed to fit an adult, not a child, and that posed an equal if not greater danger to K. Copher if she used it. Had Respondent truly been concerned about K. Copher's safety, it would not have required her to operate the meat slicer in the first place. If anything, Respondent demonstrated complete disregard for her safety by not even responding to her concerns about the ill-fitting glove. Additionally, had Respondent complied with the child labor law requiring a validated employment certificate to hire minors, the injury would not have occurred because Respondent would have been required to either change K. Copher's duties to exclude performing hazardous work or not hire minors. Evidence that Respondent's president trained K. Copher how to use the meat slicer

and warned all employees, including K. Copher, that they would be fired if they did not use the metal mesh glove is not a mitigating circumstance. K. Copher should not have been operating a meat slicer, glove or no glove.

Respondent's argument that K. Copher's injury was not serious and was a result of her own folly only demonstrates Respondent's failure to understand the purpose of the child labor laws. The purpose of labor laws generally is to protect all workers from employer exploitation. Children are particularly vulnerable; hence, the child labor laws hold employers to certain standards that enable minors to participate in the workforce without risk to life and limb and that protect them from the vagaries of youth, including occasional lapses of judgment. To that end, certain occupations have been deemed inherently hazardous to the health and well being of minors and employers are prohibited from employing minors in those jobs. Operating a meat slicer is one of them. If Respondent had applied for an employment certificate and listed the machinery K. Copher would be operating, the Agency would have denied the application and Respondent either would have terminated K. Copher's employment or changed her job duties to exclude the hazardous ones. OAR 839-021-0220(6). Instead, K. Copher suffered an injury serious enough to require immediate medical attention and that left a permanent scar and continued discomfort whenever she uses her thumb. As

previously stated, while Respondent has no prior history of child labor violations, cooperated with the Agency during the investigation, and employed the minors for a short duration, K. Copher's injury was entirely preventable and only happened because Respondent failed to comply with child labor laws.

Accordingly, after considering the aggravating and mitigating circumstances, the forum concludes that Respondent is liable for the maximum penalty of **\$1,000** for one violation of OAR 839-021-0104 and Federal Hazardous Occupations Order No. 10.<sup>3</sup>

**D. Respondent failed to post a validated employment certificate in 2007.**

Respondent admits it did not apply for or obtain an annual employment certificate in 2007, and, therefore, did not post a validated employment certificate in a conspicuous place readily visible to all employees in 2007, in violation of OAR 839-021-0220(3). The failure to post constitutes one violation and, after considering all of the aggravating and mitigating circumstances that apply to the previous violations, the forum

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<sup>3</sup> The Agency did not allege a continuing violation as permitted under OAR 839-019-0015. Given the nature of the injury and the other aggravating circumstances, had the Agency alleged a continuing violation, the forum would have assessed a \$1,000 civil penalty for each day K. Copher used the meat slicer while in Respondent's employ.

concludes that Respondent is liable for **\$1,000** as an appropriate civil penalty for violating OAR 839-021-0220(3).

#### RESPONDENT'S EXCEPTIONS

On July 20, 2009, Respondent's counsel submitted handwritten exceptions that were signed by "Spud Cellar Deli." The exceptions stated, in pertinent part:

"Exception #1

"[Korin was hired] at request of her mother Shannon (asst mgr) and I was told she would be 18 in two weeks. She was to bus tables and wash dishes 2-4 Mon-Fri.

"#2 I absolutely did not want her anywhere near the slicer, nor did I train her on the slicer.

"#3 Shannon hired her niece while I was out of town. When I came back and ask [sic] her why, she said to 'keep the peace in the family.' I terminated her on the spot and paid her for the seven hours she had put in.

"#4 This incident is a [sic] ongoing ploy by Shannon and her friends and family to get money. They will do and say anything to do so. Thank you."

Respondent's exceptions assert facts that are not in the record. Notwithstanding Respondent's answer admitting the substantive allegations, Respondent, despite ample opportunity to do so, did not refute any of the testimony or documentary evidence presented

at hearing. Moreover, Respondent's assertion that the "incident" was a ploy by its employees "to get money" is misguided. ORS 653.370 provides, in pertinent part:

"4) All sums collected as penalties pursuant to this section shall be first applied toward reimbursement of the costs incurred in determining the violations, conducting hearings under this section and assessing and collecting such penalties. The remainder, if any, of the sums collected as penalties pursuant to this section shall be paid over by the commissioner to the Department of State Lands for the benefit of the Common School Fund of this state. The department shall issue a receipt for the money to the commissioner."

Respondent's exceptions are **DE-NIED**.

#### ORDER

NOW THEREFORE, as authorized by ORS 653.370, and as payment of the penalties assessed for violations of ORS 653.307, OAR 839-021-0220, OAR 839-021-0185, and OAR 839-021-0104, the Commissioner of the Bureau of Labor and Industries hereby orders **Spud Cellar Deli, Inc.**, to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 1045 State Office Building, 800 NE Oregon Street, Portland, Oregon 97232-2180, a certified check payable to the Bureau of Labor and Indus

tries in the amount of FIVE THOUSAND DOLLARS (\$5,000), plus any interest thereon that accrues at the legal rate between a date ten days after the issuance of the Final Order and the date Spud Cellar Deli, Inc., complies with the Final Order.

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**In the Matter of  
BLACHANA, LLC, dba Penner's  
Portsmouth Club**

**Case No. 06-08**

**Final Order of Commissioner  
Brad Avakian  
Issued August 26, 2009**

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**SYNOPSIS**

NW Sportsbar, LLC, a bar and restaurant, went out of business on May 9, 2006. Subsequently, four employees who were owed wages for work performed in the prior 60 days filed wage claims. The commissioner made a determination that the claims were valid and caused \$7,047.62 to be paid to the four claimants from the Wage Security Fund. On June 26, 2006, Respondent opened for business as a bar and restaurant at the same location at which NW had conducted business. The commissioner determined that Respondent was a "successor" employer under ORS 652.310(1) and ordered Respondent to repay the Wage Security Fund \$7,047.62, as well as a 25 percent

penalty of \$1,761.91. ORS 652.140, ORS 652.310(1), ORS 652.414.

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The above-entitled case came on regularly for hearing before Alan McCullough, designated as Administrative Law Judge ("ALJ") by Brad Avakian, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on June 16-17, 2009, W. W. Gregg Hearing Room of the Oregon Bureau of Labor and Industries, located at 800 NE Oregon Street, Portland, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by case presenter Jeffrey C. Burgess, an employee of the Agency. Wage claimants Gye Alexander, Jerry Peterson, and Jerri Smith were present and not represented by counsel. Wage claimant Katharine Cleary made an appearance and testified by telephone. Steven C. Burke, attorney at law, was present and represented Respondent Blachana, LLC. Chris Penner, a member of the Respondent LLC, was present throughout the hearing as the person designated by Respondent to assist in the presentation of its case.

The Agency called the following witnesses: Claimants Jerri Smith, Jerry Peterson, and Gye Alexander; Claimant Katharine Cleary (telephonic); Bernadette Yap-Sam, BOLI Wage and Hour Division compliance specialist (telephonic); and Chris Penner

and Janet Penner, members of Blachana, LLC. Respondent called the following witnesses: Chris Penner and Janet Penner.

The forum received into evidence:

a) Administrative exhibits X-1 through X-23 (submitted or generated prior to hearing);

b) Agency exhibits A-1, A-3 through A-23 and A-25 through A-30 (submitted prior to hearing), portions of A-24 (submitted prior to hearing), and A-31 (submitted at hearing);

c) Respondent exhibits R-1 through R-4 and R-7 (submitted prior to hearing), and R-10 (submitted at hearing). Exhibits R-8 and R-9 were not offered.

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

#### **FINDINGS OF FACT – PROCEDURAL**

1) On May 18, 2006, Claimant Jerry Ann Smith (“Smith”) filed a wage claim with the Agency alleging that Respondent had employed her and failed to pay wages earned between April 15 and May 7, 2006, and due to her. At the time she filed her wage claim, Smith assigned to the Commissioner of the Bureau of Labor and Industries, in trust for

herself, all wages due from Respondent.

2) On July 6, 2006, Claimant Gye Alexander (“Alexander”) filed a wage claim with the Agency alleging that Respondent had employed him and failed to pay wages earned between January 1 to May 1, 2006, and due to him. At the time he filed his wage claim, Alexander assigned to the Commissioner of the Bureau of Labor and Industries, in trust for himself, all wages due from Respondent.

3) On July 14, 2006, Claimant Jerry L. Peterson (“Peterson”) filed a wage claim with the Agency alleging that Respondent had employed him and failed to pay wages earned between “09/01/05 to 04/31/06” and due to him. At the time he filed his wage claim, Alexander assigned to the Commissioner of the Bureau of Labor and Industries, in trust for himself, all wages due from Respondent.

4) On September 15, 2006, Claimant Katharine O. Cleary (“Cleary”) filed a wage claim with the Agency alleging that Respondent had employed her and failed to pay wages earned between March 1 and April 2006 and due to her. At the time she filed her wage claim, Cleary assigned to the Commissioner of the Bureau of Labor and Industries, in trust for herself, all wages due from Respondent.

5) Claimants filed their wage claims within the statute of limitations.

6) On January 17, 2007, the Agency issued Order of Determination No. 06-4470 based upon the wage claims filed by Claimants. The Order of Determination alleged:

(a) Claimant Cleary was employed in Oregon by NW Sportbars Inc. dba Portsmouth Club and Blachana, LLC dba Penner's Portsmouth Club, successor to the business of NW Sportbars Inc., from 3/10/06 through 4/29/06; that she worked 124.933 hours at the wage rate of \$7.50 per hour; that she earned \$937.00 and was paid nothing; and that she is owed \$937.00 in unpaid wages, plus interest at the legal rate per annum from June 1, 2006, until paid.

(b) Claimant Smith was employed in Oregon by NW Sportbars Inc. dba Portsmouth Club and Blachana, LLC dba Penner's Portsmouth Club, successor to the business of NW Sportbars Inc., from 4/15/06 through 5/7/06; that she worked 64 hours at the wage rate of \$7.50 per hour; that she earned \$480.00 and was paid nothing; and that she is owed \$480.00 in unpaid wages, plus interest at the legal rate per annum from June 1, 2006, until paid.

(c) Claimant Alexander was employed in Oregon by NW Sportbars Inc. dba Portsmouth Club and Blachana, LLC dba Penner's Portsmouth Club, successor to the business of NW Sportbars Inc., from

3/10/06 through 5/9/06; that he worked 344 hours at the wage rate of \$7.50 per hour; that he earned \$2,580.00 and was paid only \$400.00; and that he is owed \$2,180.00 in unpaid wages, plus interest at the legal rate per annum from June 1, 2006, until paid.

(d) Claimant Peterson was employed in Oregon by NW Sportbars Inc. dba Portsmouth Club and Blachana, LLC dba Penner's Portsmouth Club, successor to the business of NW Sportbars Inc., from 3/10/06 through 4/30/06; that he worked one month, three weeks, and one day at the salary of \$2,000.00 per month; that he earned \$3,450.62 and was paid nothing; and that he is owed \$3,450.62 in unpaid wages, plus interest at the legal rate per annum from June 1, 2006, until paid.

(e) Respondent NW Sportbars Inc. dba Portsmouth Club willfully failed to pay those wages, more than 30 days have elapsed since the wages became due and owing, and Respondent NW Sportbars Inc. dba Portsmouth Club owes Claimants Cleary, Smith, and Alexander each \$1,800.00 in penalty wages, plus interest from July 1, 2006, until paid, and owes Peterson \$3,691.20 in penalty wages, plus interest at the legal rate per annum from July 1, 2006, until paid.

(f) Respondent paid Claimants Cleary, Smith, and Alexander less than the wages to which

they were entitled under ORS 653.010 to 653.261 and is liable to each for \$1,800.00 in civil penalties, pursuant to the provisions of ORS 653.055(1)(b), plus interest at the legal rate per annum from July 1, 2006, until paid.

(g) BOLI has paid Claimants \$7,047.62 from the Wage Security Fund ("WSF") and is entitled to recover from Respondents that amount as wages paid from the WSF, plus a penalty of 25% of the sum paid from the WSF, equaling \$1,841.91, plus interest at the legal rate per annum.

The Order of Determination required that, within 20 days, Respondents either pay these sums in trust to the Agency, request an administrative hearing and submit an answer to the charges, or demand a trial in a court of law.

7) On February 5, 2007, Chris Penner and Janet Penner filed an answer and request for hearing on behalf of Blachana, LLC ("Respondent"). In their answer, they stated that they were Respondent's only members and authorized themselves to be authorized representatives for Respondent.

8) On March 27, 2007, the Agency issued a Final Order on Default against NW Sportbars Inc. dba Portsmouth Club based on its failure to file an answer and request a hearing.

9) On March 31, 2009, the Agency filed a "BOLI Request for Hearing" with the forum.

10) On April 1, 2009, the Hearings Unit issued a Notice of Hearing to Respondent,<sup>1</sup> the Agency, and Claimants stating the time and place of the hearing as May 12, 2009, in the W. W. Gregg Hearing Room of the Oregon Bureau of Labor and Industries, located at 800 NE Oregon Street, Portland, Oregon April 28, 2009. Together with the Notice of Hearing, the forum sent a copy of the Order of Determination, a document entitled "Summary of Contested Case Rights and Procedures" containing the information required by ORS 183.413, a document entitled "Servicemembers Civil Relief Act (SCRA) Notification, and a copy of the forum's contested case hearings rules, OAR 839-050-000 to 839-050-0445.

11) On April 17, 2006, Steven C. Burke, attorney at law, filed a notice of appearance on behalf of Respondent. Burke also filed an amended request for hearing, an amended answer, and a motion for postponement so that he could "obtain further discovery to adequately prepare and serve the interests of my clients."

12) On April 21, 2009, the Agency filed objections to Respondent's request for a postponement. On April 23, 2009,

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<sup>1</sup> For the rest of this Final Order, the term "Respondent" refers only to Blachana, LLC.

the ALJ issued an interim order denying Respondent's request for postponement on the grounds that inability to complete discovery is not good cause for a postponement and Respondent had not demonstrated that its need for additional preparation was due to circumstances beyond Respondent's control.

13) On April 22, 2009, the Agency filed a motion for a discovery order requiring Respondent to provide documents related to the interrelationship between C.P. Underhill LLC, Blachana, LLC, and Northwest Sportsbar Inc. and Dustin Drago. The Agency provided documentation showing that it had made a written request for this information on April 2, 2009, and represented that Respondent had not responded to the request.

14) On April 23, 2009, the ALJ granted the Agency's motion for a discovery order, noting that if Respondent filed objections before April 29, 2009, she would construe those objections as a motion for reconsideration of the order and "give them the same consideration [she] would have given them had they been filed before this order issued."

15) On April 25, 2009, Respondent renewed its motion for a postponement.

16) On April 28, 2009, the ALJ conducted a telephonic pre-hearing conference to address Respondent's renewed motion for postponement. On May 5, 2009, the ALJ reconsidered her ruling

and granted Respondent's motion for a postponement. The ALJ reset the hearing to begin on June 16, 2009.

17) On June 1, 2009, the ALJ in the case was changed from ALJ Linda Lohr to ALJ Alan McCullough.

18) Respondent submitted its case summary on June 2, 2009, and the Agency submitted its case summary on June 4, 2009.

19) At the outset of the hearing, the ALJ explained the issues involved in the hearing, the matters to be proved, and the procedures governing the conduct of the hearing.

20) After opening statements, and before any witnesses were called, Respondent moved to dismiss the case on the grounds that the Agency had submitted an "inadequate" case summary, in that the Agency's case summary failed to detail all the elements of the specific successor in interest test the Agency intended to apply to the case. The ALJ's case summary order had required, among other things, that the Agency submit "a brief statement of the elements of the claim." The Agency's case summary stated that "Respondent, as successor in interest, is liable to the Wage Security Fund for reimbursement of \$7,047.62 in wages paid to Claimants and for a penalty of 25% of those wages in the amount of \$1,841.91 plus interest until paid." The ALJ ruled that the Agency's case summary met the

requirements of OAR 839-050-0210 and overruled Respondent's objection.

21) During the hearing, Respondent moved to amend its answer to add the affirmative defense that the claimants were independent contractors. The ALJ ruled that affirmative defenses must be raised in the pleadings and denied Respondent's motion.

22) The ALJ allowed Respondent's counsel to make an oral offer of proof as to what the testimony of Gye Alexander and Bernadette Yap-Sam would have been, had Respondent been allowed to question them regarding whether or not claimants were independent contractors.

23) The Agency provided an unsigned declaration of Katharine Cleary with its case summary. After opening statements, and before any witnesses were called, the Agency offered the same declaration, signed by Cleary, as Exhibit A-31. Respondent requested cross examination of Cleary and objected to the introduction of Cleary's declaration without the opportunity to cross examine her. The ALJ conditionally admitted Cleary's signed declaration, contingent on the Agency making Cleary available for cross examination by June 30, 2009. The ALJ based his ruling on the grounds that the signature on Cleary's declaration made it a different document than the unsigned declaration submitted with the Agency case summary and Respondent had had no prior opportunity to request cross

examination based on that particular document. The Agency called Cleary as a telephone witness on the second day of hearing, and Respondent had an opportunity to cross examine her. During cross examination, Cleary testified that Burgess had drafted the affidavit and that she had reviewed drafts of the affidavit before signing the final version. She did not testify that she reviewed those drafts in preparation for hearing. During Cleary's cross examination, Respondent requested the production of the drafts the purpose of cross examining Cleary on their contents. The ALJ reserved ruling on Respondent's request until after the hearing. Under the circumstances, the forum concludes that Respondent is not entitled to production of the drafts prepared by the Agency's case presenter and Respondent's request is denied.<sup>2</sup>

24) During the hearing, the Agency offered Exhibit A-24, two one-page print-outs from Willamette Week's internet site describing local entertainment in Portland in May and December 2006. The May printout contained information about the Portsmouth Club's closure and anticipated re

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<sup>2</sup> See, e.g. *In the Matter of Logan International, Ltd.*, 26 BOLI 254, 257-58 (2005) (agency not required to produce interviews specifically conducted by the agency case presenter); *In the Matter of Wing Fong*, 16 BOLI 280, 283 (1998)(agency case presenter's communications with complainant were protected from disclosure.)

opening. The December printout described upcoming musical events at the Portsmouth Club. Respondent objected to the admission of A-24 on the basis that it was unreliable, that its prejudice outweighed its probative value, and that there was no foundational testimony showing how the information was gathered. At the time the objection was made, the ALJ reserved ruling until the proposed order. C. Penner subsequently testified that a woman from Willamette Week had talked with him in May 2006 and that he provided some of the information printed in A-24. He also verified the accuracy of some of the other information contained in A-24. The forum receives into evidence the printed information on A-24 that C. Penner either acknowledged providing to Willamette Week or that C. Penner admitted was accurate information.

25) At the conclusion of the hearing, and prior to closing argument, Respondent moved for a directed verdict. The ALJ denied the motion.

26) The ALJ issued a proposed order on August 6, 2009, that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. No exceptions were filed.

#### **FINDINGS OF FACT – THE MERITS**

1) Since 1940, five different businesses have operated a bar and restaurant in the same build-

ing at 5264 N Lombard, Portland, Oregon. The building at that location is designed to house a restaurant/lounge. Since a bar and restaurant first began operating in that location, customers have referred to the business as “Portsmouth Club,” even when one of the previous owners changed the name.

2) Janet Penner (“J. Penner”) is a manager of C. P. Underhill (“CPU”), an Oregon limited liability company. On February 28, 2005, Penner, in her capacity as “manager” of CPU, Christopher Penner (“C. Penner”), as an individual, and NW Sportsbar, Inc. (“NW”) executed a lease agreement that included among its terms the following language:

“By this Lease, dated as of 2/28/2005, CP Underhill, LLC, and Christopher Penner, (hereinafter called ‘Landlord’) and NW Sportsbar, Inc, a Washington corporation, (hereinafter called ‘Tenant’) agree as follows:

“1. **Lease of Premises.** Landlord does hereby lease to Tenant and Tenant hereby leases from Landlord the real property (hereinafter called ‘Premises’) located at 5264 N Lombard, in the City of Portland, County of Multnomah and State of Oregon, more particularly, that property comprising The Portsmouth Club, Mama’s BBQ and the attached parking designated for said business.

**Term.**

**a. Original Term.** The lease shall commence 2/28/2005 and terminate on 2/27/2010.”

Dustin Drago signed the lease agreement on behalf of NW in his capacity as president. (Testimony of J. Penner; Exhibit A-27)

3) On the same day that CPU, C. Penner, and NW executed the lease, they also executed an “Agreement for Sale of Business” that included among its terms the following language:

“BY THIS AGREEMENT dated as of 2/28/2005, C.P. Underhill, LLC, and Christopher Penner, hereinafter called Sellers, and NW Sportsbar, Inc, hereinafter called Buyer, agree as follows:

“\* \* \* \* \*

“1. Sale of Business. Sellers agree to sell to Buyer all of the listed assets of C.P. Underhill, LLC and Buyer agrees to purchase from Sellers the Sellers’ listed assets of C.P. Underhill and Sellers’ interest in said assets consists of the following assets:

“A. Inventory of the Portsmouth Club - \$50,000.00

“B. Good Will - \$285,000.00

“This transaction includes only those assets specifically described above and included in Schedule A., and excludes all cash on hand and in bank accounts.”

Again, Dustin Drago signed the sale agreement on behalf of NW in his capacity as president.

4) Schedule A in the sale agreement listed the following physical inventory under the page heading of “C.P. UNDERHILL LLC”:

1 beer tap system  
 1 glass cooler  
 1 under counter cooler  
 2 ice wells  
 4 bar cabinets  
 1 parking lot awning  
 1 store front awning  
 1 tall outside sign  
 1 square outside sign  
 1 outside sign with/readerboard lighting  
 11 booths  
 10 hard wood table tops  
 77 wooden chairs  
 17 bar stools, black  
 16 bar stools, red  
 1 BBQ room stereo with 8 speakers  
 1 bar stereo with 9 speakers  
 1 espresso maker  
 1 espresso grinder  
 3 cash registers  
 1 sm. Deep freezer  
 1 lg. prep cooler  
 1 sm. Prep cooler  
 1 4 slot steam table  
 1 broiler  
 2 deep fryers

1 grill	2 ceiling fans
1 range	2 10 seater round tables
3 microwaves	12-15 various table tops
1 under counter freezer	table bases
175 dishes	1 2 door upright freezer
100 sets table ware	4 ladders
275 glassware	1 hand truck
1 Sears upright freezer	2 high chairs
1 Holbart slicer	1 sofa table (ladies restroom)
1 Kitchen Aid mixer	1 liquor gun system
1 Triumph mixer	janitorial stuff
Stephan vertical mixer	1 double safe
1 sm. stainless prep table	1 floor safe
1 lg. stainless prep table	1 cash safe
1 maple prep table	1 Bloomfield coffee maker
? pots, pans, heat lamps & kitchen stuff	1 True 2 door cooler
3 rolling carts	1 bread warmer
1 stainless prep sink	1 phone system
1 stainless dish station	1 100 gallon hot water heater
2 lg. store room shelves	3 fire extinguishers
1 security camera system	6 sm. shelf units
1 alarm system	
1 new ice maker	
1 used ice maker	
1 lg. chest freezer	
1 set kitchen cooler shelves	
1 set keg cooler shelves	
5 TV's	
1 cigarette machine	
1 ATM	

5) On March 31, 2005, NW, a Washington corporation, registered with the Oregon Corporation Division. NW's registered agent was listed as Vincent Drago; its president was listed as Dustin Drago ("Drago"). That same day, NW registered with the Corporation Division as the authorized representative for "Portsmouth Club," an assumed business name that had been registered in 1988.

6) Prior to February 28, 2005, CPU owned and ran the business that was sold to NW. CPU also held the OLCC liquor license in its name.

7) For the rest of 2005, and until going out of business in May 2006, NW operated a bar and restaurant under the names of Portsmouth Club and Anchor Grill at the property leased from CPU and C. Penner. A sign on the outside of the building read "Anchor Grill." NW had a restaurant time, a happy hour time, and an entertainment time, with a full service kitchen, and did some limited catering. It offered food and drinks that included, among other things, beer, salad, and pizza. NW offered live hip hop, reggae and blues music as entertainment, and as part of its business catered extensively to a "late night hip hop crowd." It also offered video poker. Drago managed the business and hired the four wage claimants.

8) Between January and May 2006, NW partially remodeled the Portsmouth Club's interior physical premises.

9) Claimant Peterson was hired to work at NW in August 2005. Peterson was hired primarily to work as a manager, but also to tend bar and do some kitchen work. Drago agreed to pay Peterson a \$2,000 a month salary for his managerial work and \$11 per hour when he tended bar and worked in the kitchen. Peterson did that work until the end of April 2006. As a manager, Peterson did marketing, ordered liquor,

made up employee schedules, and trained bartenders, cooks, and waitresses. During his employment, Peterson made a \$20,000 personal loan to Drago. He hoped that, in return for the loan, Drago's business would take off and eventually Peterson "could afford to become a partner in the business."

10) NW paid Peterson his managerial salary through the end of 2005, but did not pay him anything additional for his bartending and kitchen work. At the end of 2005, Drago told Peterson he could not pay him any longer for his work, but he would pay Peterson when he could. Peterson agreed to continue to work under those conditions and worked through April 30, 2006 without pay, earning his manager's salary of \$2,000 a month. His last day of work was April 30, 2006. From March 10 through April 30 2006, he earned \$3,450.62 in salary (1 month @ \$2,000 salary per month = \$2,000.00 + 3.143 weeks @ \$461.54 per week = \$1,340.62; \$2,000.00 + \$1,340.62 = \$3,450.62).

11) On Peterson's last day of work, Drago told him that NW was closing and that the Penners had given Drago notice that they were shutting the building down.. Peterson asked Drago for his pay, and Drago told him that he had no money.

12) When Peterson left NW's employment, he took with him some personal property that he had used at NW, including all his marketing books, food from

the kitchen that he had purchased to use for “outside catering events,” some light bulbs, and some sound systems.

13) Claimant Alexander worked for NW doing “maintenance/janitorial/security” from December 1, 2005, through May 1, 2006. He was hired at \$7.50 per hour, with the agreement that he would be paid \$15 per hour when business picked up. As Alexander’s employment continued, Drago began paying him irregularly, but Alexander kept working based on Drago’s promises that things would get better. In March and April 2006, Alexander’s workweek was Tuesday through Saturday. Between March 10 and April 29, 2006, Alexander worked 38 days, working at least eight hours a day. The last day he worked was April 29, 2006.<sup>3</sup> Based on a 40 hour workweek, he earned \$2,280 in gross wages in March and April 2006 (38 days x 8 hours x \$7.50 per hour). NW paid him nothing for that work.

14) Claimant Cleary worked for NW as a night waitress and day bartender from about January 19, 2006, through April 29, 2006. She worked 125 hours from

March 10 through April 29, 2006, earning a total of \$937.50 (125 hours x \$7.50 per hour), and was paid nothing for that work.

15) Claimant Smith worked for NW as a bartender and waitress from April 15 through May 7, 2006. She worked one to three days a week, approximately six hours per shift, and was paid \$7.50 per hour. In total, she worked 64 hours, earning \$480 in gross wages (64 hours x \$7.50 per hour = \$480). She was paid nothing for her work. She stopped working when NW went out of business and closed its doors.

16) By May 2006, Drago was three months’ behind in his payments on the sale agreement. In early May, Drago called J. Penner and told her “I’m done.” J. Penner met with Drago to discuss NW’s closing and CPU’s repossession of the business. At the time, NW’s business was no longer operating. Drago and J. Penner then executed an agreement to protect CPU against financial liability.

17) On May 9, 2006, Drago, as an individual, NW, and CPU, through J. Penner, executed a Surrender and Release Agreement. The Agreement included among its terms the following language:

**“THIS SURRENDER AND  
RELEASE AGREEMENT**  
(‘Agreement’) is made and entered into effective this 9<sup>th</sup> day of May, 2006 \* \* \* by and among C.P. Underhill, LLC, \* \*

<sup>3</sup> He wrote on his wage claim that his last day was May 1, but May 1, 2006, fell on a Monday, a day Alexander was not scheduled to work. According to his testimony, he was also not scheduled to work on Sunday, April 30. Also, the calendar he completed at the Agency’s request shows he did not work those on April 30 or May 1.

\* NW Sportsbar, Inc. \* \* \* and Dustin Drago \* \* \* (“Drago”).

“\* \* \* \* \*

“A. Drago is the sole shareholder of NW Sportsbar.

“B. Pursuant to that certain Agreement for Sale of Business dated February 28, 2005 (the ‘Sale Agreement’), by and among C.P. Underhill, LLC, Christopher Penner and NW Sportsbar, C.P. Underhill and Christopher Penner sold to NW Sportsbar substantially all of the assets (i) used in a bar known as The Portsmouth Club (the ‘Bar’) and (ii) used in a restaurant business known as Mama’s BBQ (the ‘Restaurant’). \* \* \* The Bar and Restaurant are collectively referred to herein as the ‘Business.’”

“C. NW Sportsbar has changed the name of the Restaurant to Anchor Grill.

“D. C.P. Underhill owns the real property and improvements thereon commonly known as 5264 N. Lombard Street, Portland, Oregon 97203 (‘Business Premises’). The Business is located at and operated out of the Business Premises. \* \* \*

“\* \* \* \* \*

“F. NW Sportsbar is in default on its payment obligations under both the Sale Agreement and Lease.

“G. NW Sportsbar desires to surrender all of its assets used or useful, or intended for use,

in the Business and the Business Premises to C.P. Underhill in full satisfaction of NW Sportsbar’s obligations and liabilities arising under the Sale Agreement and Lease.

“\* \* \* \* \*

“**NOW, THEREFORE**, for good and valuable consideration as provided for in this Agreement, the sufficiency of which is hereby acknowledged by the parties, the parties hereby agree as follows:

“**1. Surrender of Assets of Business.** In consideration for (i) C.P. Underhill’s agreement to terminate all further obligations and liabilities of NW Sportsbar under the Sale Agreement as provided for in Section 2 of this Agreement, (ii) C.P. Underhill’s agreement to terminate all further obligations and liabilities of NW Sportsbar under the Lease as provided for in Section 3 of this Agreement, and (iii) C.P. Underhill’s release as provided for in Section 4 of this Agreement, effective as of the Effective Date, NW Sportsbar hereby surrenders, bargains, sells, assigns, transfers and delivers to C.P. Underhill all of the assets used or useful, or intended for use, in the operation of the Business \* \* \* including, but not limited to, all of the assets listed on Exhibit A to the Sale Agreement, all of the assets located at the Business Premises as of the Effective Date, and all of the following assets:

“1.1 The names ‘The Portsmouth Club,’ ‘Mama’s BBQ’ and ‘Anchor Grill’ and all goodwill associated with such names;

“1.2 All food, beverage and liquor inventory located at the Business Premises as of the Effective Date;

“1.3 To the extent transferable, all approvals, authorizations, consents, licenses, permits, franchises, tariffs, orders, and other registrations of any federal, state, or local court or other governmental department, commission, board, bureau, agency, or instrumentality held by NW Sportsbar and required or appropriate for the conduct of the Business;

“1.4 All assignable rights, if any, to all telephone lines and numbers used in the conduct of the Business;

“1.5 All accounts receivable and other receivables of NW Sportsbar; and

“1.6 All choses in action, causes of action, rights of recovery and setoff, warranty rights, and other similar rights of NW Sportsbar.

“\* \* \* \* \*

**“3. Surrender of Business Premises and Termination of Remaining Obligations and Liabilities under Lease.** Effective as of the Effective Date, NW Sportsbar hereby surrenders and relinquishes possession of the Business

Premises to C.P. Underhill. Subject to the condition set forth in Section 5 of this Agreement, the parties agree that effective as of the Effective Date, the Lease is hereby terminated and the parties shall have no further obligations or liabilities to each other under the Lease.

“\* \* \* \* \*

**“22. Entire Agreement.**

This Agreement \* \* \* constitutes the entire agreement and understanding of the parties with respect to the subject matter of this Agreement and supersedes all prior understandings and agreements, whether written or oral, among the parties with respect to such subject matter.”

18) As a result of the Surrender and Release Agreement, CPU got back “the building and what was in it,” taking over everything that was in the building in which NW had conducted its business and in which CPU had previously run the business before selling it to NW.

19) On May 17, 2006, Blachana, LLC registered with the Oregon Corporation Division, with J. Penner listed as a manager and member.

20) On May 18, 2006, Blachana, LLC (“Respondent”) registered the assumed business name of “Penner’s Portsmouth Club” with the Corporation Division, with J. Penner listed as its authorized representative. (Testimony of J. Penner; Exhibit A-12)

21) Respondent had no financial interest in NW.

22) On May 18, 2006, Smith filed her wage claim. On it, she stated, among other things: (1) that she had worked as a bartender for NW from 4/15/06 through 5/7/06, earning \$7.50 per hour and she had been paid nothing; (2) that her employer Drago had sold the business; (3) that it had closed on May 8, 2006; (4) that she had heard that the owner was bankrupt and had left town; and (5) that the business phone number was 503-286-4644. Her wage claim was assigned to Agency Compliance Specialist Yap-Sam for investigation. Because there was evidence that NW was no longer in business, Yap-Sam handled Smith's case from the outset as a Wage Security Fund ("WSF") case.

23) With her wage claim, Smith submitted a calendar showing the dates and specific hours in which she had worked a total of 64 hours for NW.

24) On June 1, 2006, Yap-Sam telephoned 503-289-4644. A male who identified himself as Chris Penner answered the phone with the words "Portsmouth Club." Penner told Yap-Sam that he had sold the business to Dustin Drago 14 months earlier, that Drago had closed on May 9, 2006, and left town, owing a lot of money to individuals and the state, and that the new business was owned by Blachana, LLC.

25) On June 2, 2006, Yap-Sam sent a letter to Chris and

Janet Penner in which she described Claimant Smith's wage claim, explained that Blachana, LLC might be considered a "successor" employer, stated six factors that the Agency uses to determine if an employer is a successor, and asked the Penners to take one of three actions by June 19, 2006:

"1. Submit to my attention a check or money order payable solely to Jerri A. Smith for the gross amount of \$480.00 (or the gross amount you do not dispute is owed to the claim) together with an itemized statement of all lawful deductions, if any;

"2. [P]rovide me with a written explanation as to why you did not believe that Blachana, LLC is a successor to the business of Portsmouth Club and address the six factors outlined above;

"3. [P]rovide me with any additional information, evidence, records, etc., that you feel supports your position that Blachana, LLC is not or should not be held liable for Ms. Smith's unpaid wages."

26) On June 9, 2006, Yap-Sam phoned 503-289-4644 again. Once again, a male who identified himself as Chris Penner answered the phone with the words "Portsmouth Club." Penner told Yap-Sam he had heard that Drago was going to Arizona, but that he did not have a current address for Drago. He also said that he had lost Yap-Sam's June 2 letter. In

response, Yap-Sam faxed a copy of that letter to Penner.

27) On June 23, 2006, the OLCC granted Respondent a "Full On-premises [F-com] license to sell liquor.

28) On June 26, 2006, Yap-Sam sent another fax to Penner in which she stated:

"Mr. Penner, when we spoke on June 20, you stated that you were going to respond to my June 2<sup>nd</sup> letter immediately. At the time, I asked that you also provide a copy of the correspondence that you had mentioned you had received from ADP (payroll service). Your response was that you would if you could find it. Since that conversation I have received nothing from you.

"Please note that if you do not respond very soon, Ms. Smith will be paid wages from the Wage Security Fund and the Bureau will pursue recovery of such payments from Blachana, LLC."

29) Respondent opened for business on June 26, 2006, as a neighborhood bar under the assumed business name of "Penner's Portsmouth Pub." The Club was located at the same address, in the same building, as the "Portsmouth Club" that NW had operated. Respondent closed the Anchor Grill, initially used the space it had occupied for storage before remodeling it, and has never operated under the name of "Anchor Grill." By late summer or early fall, Penner's Portsmouth

Pub began to feature live jazz and blues artists. At the time of hearing, it no longer featured live jazz. Since Respondent opened for business, it has operated a bar and restaurant, serving food, drinks, and beer. Respondent has repainted the interior of the premises and remodeled the bar, but the stage and dance floor have not changed. It has also replaced all the kitchen equipment except for the dishwasher station.

30) Since opening, Respondent has used different food vendors and the same beer vendors as NW.

31) On August 14, 2006, Yap-Sam sent another letter to the Penners. Among other things, she stated that:

"Peterson and Alexander have recently filed wage claims against Portsmouth Club. Mr. Peterson states that he was the General Manager and that he worked from August 29, 2005 until April 30, 2006. He further alleges that he was paid \$2,000 salary per month for managerial duties and \$11 per hour for other duties such as cooking, bartending, and security. His wage claim is for \$9,514.00. Mr. Alexander states that he performed maintenance and janitorial duties from December 1, 2005 until May 1, 2006 at the rate of \$7.50 per hour and that he is owed \$4,888.00 in wages.

"With respect to each claimant, please take on of the following

actions by no later than **August 30, 2006**:

\*\*\*\*\*

“Explain in writing why either or both claimants are not entitled to be paid any wages by Blachana, LLC and provide any and all supporting documentation.”

32) In the course of her investigation, Yap-Sam made unsuccessful attempts to locate Drago. She received no information or documents from the Penners to prove or disprove that Claimants were employed by NW or relating to their wage rates and the unpaid hours and dates claimed in their wage claims. She further determined there was no bond or any other source available to pay the wages. Based on the information contained in their wage claims, interviews with the claimants, and the fact that NW had gone out of business and she could not find Drago, she made a determination that the Claimants' wage claims were valid, that NW had ceased doing business, and that Claimants' wage claims could not be fully and promptly paid except through the WSF.

33) On July 6, 2006, Yap-Sam caused the WSF to issue a check for \$443.28 to Claimant Smith, representing \$480.00 in gross, unpaid wages.

34) Claimant Alexander filed his wage claim on July 6, 2006. He stated on it, among other things: (1) that he had performed maintenance for NW from 12/1/05 to 5/1/06, earning \$7.50 per hour;

(2) that Drago had skipped town and filed bankruptcy; (3) that NW had closed on 5/1/09; and (4) that he was owed almost \$5,000 in earned, unpaid wages.

35) With his wage claim, Alexander submitted a calendar showing that he had worked eight hours a day, 40 hours a week, from December 2005 through May 2006.

36) Claimant Peterson filed his wage claim on July 14, 2009. He stated on it, among other things: (1) that he had worked for NW from 8/29/05 to “4/31/06,” earning \$2,000/month salary as manager; (2) that Drago closed NW with no warning and had to file bankruptcy; and (3) that he was still owed over \$9,000 in earned and unpaid wages.

37) With his wage claim, Peterson submitted a calendar showing all the dates and hours he worked from September 2005 through April 2006.

38) On August 31, 2006, Yap-Sam caused the WSF to issue a check for \$3,186.65 to Claimant Peterson, representing \$3,450.62 in gross, unpaid wages.

39) Claimant Cleary filed her wage claim on September 15, 2006. She stated on it, among other things: (1) that she was a waitress and bartender for NW from 1/19/06 through 4/29/06, earning \$7.50 per hour; (2) that NW closed on 5/8/06; (3) that Drago had filed bankruptcy and was “out of reach”; and (4) that she received no paycheck for her last two months of employment.

- 39) With her wage claim, Cleary submitted a calendar showing that she had worked 125 hours between March 10 and April 29, 2006.
- 40) On September 27, 2006, Yap-Sam caused the WSF to issue a check for \$807.50 to Cleary, representing \$937.00 in gross, unpaid wages and a check for \$1,836.82 to Alexander, representing \$2,180.00 in gross, unpaid wages.
- 41) The telephone number at Portsmouth Club remained the same, both before and after NW bought the business from CPU. Respondent kept the same phone number that NW had used. Prior to May 2007, C. Penner answered the phone with the words "Portsmouth Club" or "P Club."
- 42) Respondent has its own liquor and lottery licenses, city business licenses, and tax and employer identification numbers.
- 43) Respondent has not employed any of the same persons who worked for NW.
- 44) As of the date of hearing, the status of the equipment listed in Schedule A in the sale agreement between CPU and NW was as follows:
- 1 beer tap system – still in use
  - 1 glass cooler – still in use
  - 1 under counter cooler– still in use
  - 2 ice wells– still in use
  - 4 bar cabinets – still in use
  - 1 parking lot awning – replaced by new awning
  - 1 store front awning – replaced by new awning
  - 1 tall outside sign – sold
  - 1 square outside sign – still in use
  - 1 outside sign with/readerboard – still in use
  - lighting – 90% of inside lighting fixtures replaced
  - 11 booths – gone
  - 10 hard wood table tops – 5 still in use
  - 77 wooden chairs – still in use
  - 17 bar stools, black – still in use
  - 16 bar stools, red – gone because they didn't match
  - 1 BBQ room stereo with 8 speakers – gone
  - 1 bar stereo with 9 speakers – gone
  - 1 espresso maker – gone
  - 1 espresso grinder – gone
  - 3 cash registers – gone
  - 1 sm. Deep freezer – gone
  - 1 lg. prep cooler – gone
  - 1 sm. Prep cooler – still in use
  - 1 4 slot steam table – gone
  - 1 broiler – gone
  - 2 deep fryers – gone
  - 1 grill – gone
  - 1 range – gone
  - 3 microwaves – 2 still in use
  - 1 under counter freezer – gone
  - 175 dishes – gone

100 sets table ware – gone	2 x 10 seater round tables – still in use
275 glassware – gone	12-15 various table tops – gone
1 Sears upright freezer – still in use	table bases – gone
1 Holbart slicer – still in use	1 x 2 door upright freezer – gone
1 Kitchen Aid mixer – gone	4 ladders – 2 still in use
1 Triumph mixer – gone	1 hand truck – still in use
Stephan vertical mixer – gone	2 high chairs – gone
1 sm. stainless prep table – gone	1 sofa table (ladies restroom) – still in use
1 lg. stainless prep table – still in use	1 liquor gun system – gone
1 maple prep table – gone	janitorial stuff – replaced
? pots, pans, heat lamps & kitchen stuff – gone	1 double safe – still in use
3 rolling carts – gone	1 floor safe – gone
1 stainless prep sink – still in use	1 cash safe – gone
1 stainless dish station – still in use	1 Bloomfield coffee maker – gone
2 lg. store room shelves – gone	1 True 2 door cooler – gone
1 security camera system – replaced	1 bread warmer – gone
1 alarm system – replaced	1 phone system – still in use
1 new ice maker – still in use	1 x 100 gallon hot water heater– replaced old heater with new one
1 used ice maker – gone	3 fire extinguishers – replaced; not there when Blachana, LLC opened
1 lg. chest freezer – gone	6 sm. shelf units – still in use
1 set kitchen cooler shelves – gone	Some tables and booths, televisions, and sound equipment on the list were missing when Respondent opened, and all three fire extinguishers were missing. There was no other evidence to show when Respondent stopped using these objects, replaced them, or disposed of them.
1 set keg cooler shelves – still in use	
5 TV's – gone	
1 cigarette machine – gone	
1 ATM – gone	
2 ceiling fans – still in use	

45) On May 31, 2007, Respondent registered the assumed business name of "Portsmouth Pizza and Pub" with the Corporation Division, with J. Penner listed as its authorized representative. Subsequently, Respondent began serving pizza, cooking it with a pizza oven that Respondent had purchased. At some time, Respondent also placed a sign reading "Portsmouth Pizza and Pub" on the outside of the building.

46) Respondent has never run a catering business or as a hip-hop club or as an "after-hours club."

47) At the time of hearing, the bar, stage, dance floor, and part of the carpeting at Respondent were still the same as those used by NW.

48) In the daytime, Respondent caters to retired men, some of whom who come in who as early as 10 a.m. Most of its business in the early evening is the "work crowd." At night, it caters primarily to persons aged 35 and up, mostly mid-upper income white singles or couples who enjoy jazz music.

#### **CREDIBILITY FINDINGS**

49) Yap-Sam was a credible witness and the forum has credited her testimony in its entirety.

50) Cleary and Smith were credible witnesses and the forum has credited the entirety of their testimony.

51) Peterson was candid and forthcoming in all his testi-

mony except for his marked reticence to testify about the amount and circumstances of his personal loan to Drago. As Drago's manager, he was in the best position to observe the type of business that Drago was operating. Since Drago was not available as a witness, the forum has primarily relied on Peterson's testimony to determine the nature of Drago's business operation. Surprisingly, despite the fact that Drago owes him considerable wages that Peterson will likely never recover and has not repaid him any of the \$20,000 personal loan, Drago and Peterson remain friends. Any potential bias caused by his unpaid wages was offset by the fact that Peterson had already recovered all the wages the Agency was seeking on his behalf through a WSF payout, leaving him nothing to gain by his testimony. The forum has credited his testimony in its entirety.

52) Alexander's inaccurate time records and improbable testimony regarding a statement allegedly made to him by an Agency representative made his testimony suspect. In addition, during cross examination he pointedly tried to avoid answering the question of whether NW's sign had the same words on it as Respondent's present sign. He wrote on his wage claim form that the time period for his wage claim ended May 1, 2006, yet filled out a calendar in support of his wage claim that showed he worked the entire month of May 2006, and offered no explanation for that calendar. He also testified that

the eight hours per day, 40 hours per week he recorded on the Agency's calendar for December 2005 through May 2006 (Form WH-127) were true and accurate, but explained that he worked more than the 40 hours he was guaranteed and only wrote down 40 because someone at BOLI told him he could not be paid for more than 40 hours per week. The forum is aware of no law, administrative rule, or agency policy that prohibits BOLI from pursuing wages earned for hours worked in excess of 40 hours a week in an ordinary wage claim proceeding or a WSF recovery proceeding, and the Agency called no witnesses to support Alexander's claim. As a result, the forum finds Alexander's testimony on this issue to be improbable. However, based on the entire record, the forum has found that Alexander worked at least 40 hours per week and that his wage claim was valid for that amount. In conclusion, the forum has credited Alexander's testimony that he worked at least 40 hours per week, but has only credited the remainder of his testimony when it was corroborated by other credible evidence.

53) Janet Penner's credibility was seriously undermined by her demeanor. When called as a witness by the Agency, her demeanor was characterized by an almost nonstop smirk and her repeated attempts to avoid answering questions in a direct manner. As an example, when Burgess asked her if she was a manager or member of Blachana,

LLC, she cavalierly instructed him to look at the exhibits before finally consenting to answer "yes." Her testimony was also disingenuous. For example, she answered "I don't remember" in response to Burgess's question whether Blachana, LLC offered live musical entertainment and claimed to have no knowledge of whether Blachana, LLC offered live music. She also feigned surprise when Burgess asked, as a leading question, whether there was a "reader board" on the outside of the building, a fact no one else disputed. In marked contrast, when testifying on Respondent's behalf, her demeanor was calm, thoughtful, and polite. The forum has only believed her testimony when it was uncontradicted or corroborated by other credible evidence.

54) On direct and cross examination, Christopher Penner answered questions directly, with little hesitation, and the content of his answers demonstrated that he had a good memory. However, the forum disbelieved his statement that, when Respondent opened, he did not believe that wages were owed to any of NW's employees, for the reason that Yap-Sam had twice sent Penner the same letter describing Smith's wage claim against NW before Respondent opened for business on June 26, 2006. Except for that statement, the forum has credited C. Penner's testimony in its entirety and has relied on his testimony to determine the nature of Respondent's business opera-

tion as Penner's Portsmouth Club and Portsmouth Pizza and Pub.

#### ULTIMATE FINDINGS OF FACT

1) Prior to February 28, 2005, CPU, doing business as The Portsmouth Club and Mama's BBQ, operated a restaurant and bar in a building located at 5264 N Lombard, Portland, Oregon. J. Penner and C. Penner, mother and son, were CPU's managers. Since 1940, five different businesses have operated a bar and restaurant in that location, and customers have referred to each business as the "Portsmouth Club."

2) On February 28, 2005, CPU, C. Penner, and NW executed a lease agreement in which NW agreed to lease the property located at 5264 N Lombard comprising The Portsmouth Club, Mama's BBQ and the attached parking for a period of five years. The same day, the same parties executed a sales agreement in which NW agreed to buy the inventory and good will of the Portsmouth Club.

3) On March 31, 2005, NW, a Washington corporation, registered with the Oregon Corporation Division as a foreign business corporation and also registered as the authorized representative for "Portsmouth Club," an assumed business name that had been registered in 1988.

4) For the rest of 2005 and until going out of business in May 2006, NW operated a bar and restaurant under the names of Portsmouth Club and Anchor Grill

at the property leased from CPU and C. Penner. NW offered food, drinks, and live music. Drago, NW's president, managed the business and hired the four wage claimants.

5) Claimant Peterson was employed by NW in from August 2005 until April 30, 2006, and was paid a \$2,000 monthly salary. His last day of work was April 30, 2006, his last day of work. He was not paid anything for his work in 2006 and earned \$3,450.62 from March 10 through April 30 2006.

6) Claimant Alexander was employed by NW from December 1, 2005, through April 29, 2006, at the rate of \$7.50 per hour. His last day of work was April 29, 2006. He worked at least 40 hours per week in March and April 2006, and earned \$2,280 in gross wages between March 10 and April 2006.

7) Claimant Cleary was employed by NW from about January 19, 2006, through April 29, 2006, at the rate of \$7.50 per hour. She worked 125 hours from March 10 through April 29, 2006, earning \$937.50 in gross wages, and was paid nothing for that work.

8) Claimant Smith was employed by NW from April 15 through May 7, 2006, at the rate of \$7.50 per hour. She worked 64 hours, earning \$480.00 in gross wages, and was paid nothing for her work.

9) By May 2006, NW was unable to continue in business because of its debts. On May 9,

2006, Drago, NW, and CPU executed a Surrender and Release Agreement in which NW surrendered all the assets sold to it in the February 28, 2006, sales agreement. More specifically, NW surrendered:

“\* \* \* all of the assets used or useful, or intended for use, in the operation of the Business \* \* \* including, but not limited to, all of the assets listed on Exhibit A to the Sale Agreement, all of the assets located at the Business Premises as of the Effective Date, and all of the following assets:

“1.1 The names ‘The Portsmouth Club,’ ‘Mama’s BBQ’ and ‘Anchor Grill’ and all goodwill associated with such names;

“1.2 All food, beverage and liquor inventory located at the Business Premises as of the Effective Date;

“\* \* \* \* \*

“1.4 All assignable rights, if any, to all telephone lines and numbers used in the conduct of the Business;

“1.5 All accounts receivable and other receivables of NW Sportsbar; and

“1.6 All choses in action, causes of action, rights of recovery and setoff, warranty rights, and other similar rights of NW Sportsbar.”

10) As a result of the Surrender and Release Agreement, CPU got back “the building and

what was in it,” taking over everything that was in the building in which NW had conducted its business and in which CPU had previously run the business before selling it to NW.

11) After NW closed its business, the four wage Claimants filed wage claims with the Agency, and the Agency investigated the claims. Based on the information contained in and submitted with the four Claimants’ wage claims, interviews with the Claimants, and the fact that NW had gone out of business and Drago could not be located, the Agency made a determination that the Claimants’ wage claims were valid, that NW had ceased doing business, and that Claimants’ wage claims could not be fully and promptly paid except through the WSF.

12) On July 6, 2006, the Agency caused the WSF to issue a check for \$443.28 to Claimant Smith, representing \$480.00 in gross, unpaid wages. On August 31, 2006, Yap-Sam caused the WSF to issue a check for \$3,186.65 to Claimant Peterson, representing \$3,450.62 in gross, unpaid wages. On September 27, 2006, Yap-Sam caused the WSF to issue a check for \$807.50 to Claimant Cleary, representing \$937.00 in gross, unpaid wages, and a check for \$1,836.82 to Claimant Alexander, representing \$2,180.00 in gross, unpaid wages. In total, the WSF paid out \$7,047.62 to the four Claimants.

13) Twenty-five percent of \$7,047.62 is \$1,761.91.

14) Respondent opened for business on June 26, 2006. In its first year of operation, Respondent: (a) conducted business as Penner's Portsmouth Club; (b) conducted business in the same building as NW; (c) opened 47 days after NW closed; (d) offered food, drinks, and live music; (e) used much of the same equipment as NW; and (f) employed an entirely different workforce than NW.

### CONCLUSIONS OF LAW

1) During all times material herein, NW was an employer and Jerri Smith, Gye Alexander, Katharine Cleary, and Jerry Peterson were employees subject to the provisions of ORS 652.110 to 652.200 and 652.310 to 652.414. During all times material herein, NW employed Smith, Alexander, Cleary, and Peterson.

2) Respondent is a "successor to the business" of NW within the meaning of ORS 652.310(1) and, as an employer, is subject to the provisions of ORS 652.110 to 652.200 and 652.310 to 652.414.

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

4) NW violated ORS 652.140 by failing to pay the Smith, Alexander, Cleary, and Peterson all wages earned and unpaid after the termination of their employment.

5) The Agency paid out a total of \$7,047.62 from the WSF to re-

imburse Smith, Alexander, Cleary, and Peterson for wages earned and unpaid within 60 days before NW ceased operating its business and is entitled to recoup \$7,047.62, plus a 25 percent penalty of \$1,761.91. ORS 652.414(1), ORS 652.414(3).

6) Under the facts and circumstances of this record, and according to the law applicable to this matter, the Commissioner of the Bureau of Labor and Industries may recover from Respondent the \$7,047.62 paid to the four wage claimants from the WSF and sought in the Order of Determination, along with a 25 percent penalty of \$1,761.91 assessed on that sum, plus interest until paid. ORS 652.332, ORS 652.414(3).

### OPINION

#### WAGE SECURITY FUND PAYOUT

In cases involving payouts from the WSF, when (1) there is credible evidence that a determination on the validity of the claims was made; (2) there is credible evidence as to the means by which that determination was made; and (3) the Agency has paid out money from the Fund and seeks to recover that money, there is a rebuttable presumption that the Agency's determination is valid for the sums actually paid out. *In the Matter of Robert J. Thomas*, 30 BOLI \_\_\_\_ (2009); *In the Matter of Catalogfinder, Inc.*, 18 BOLI 242, 260 (1999). In this case, the Agency established that rebuttable presumption through

credible documentary evidence and witness testimony showing:

(1) It determined that the Claimants' wage claims were valid for \$7,047.62 in wages earned within 60 days before May 9, 2006, NW's last day of business, that NW had ceased doing business, and that Claimants' wage claims could not otherwise be fully and promptly paid;

(2) It based its determination on an investigation that included Claimant interviews, unsuccessful attempts to locate Drago, NW's president, an inspection and evaluation of written statements and calendars showing dates and hours worked that were submitted by the Claimants in support of their wage claims, and an unsuccessful effort to obtain NW's records; and

(3) It paid out \$7,047.62 from the WSF, an amount equal to Claimants' unpaid, due, and owing wages, and seeks to recover that money.

Respondent unsuccessfully attempted to rebut this evidence by moving to amend its answer to include the defense that Claimants Peterson and Alexander were independent contractors and not employees of NW, a motion that was denied by the forum. The Agency established, by a preponderance of the evidence, that Claimants were employees of NW and entitled to the unpaid wages paid out to them by the WSF. However, Respondent is not liable

to repay those wages or a penalty unless the forum determines that it is a successor in interest to NW.

**A SUCCESSOR IS LIABLE FOR WSF PAYMENTS OF WAGES BASED ON A PREDECESSOR EMPLOYER'S FAILURE TO PAY EARNED AND DUE WAGES.**

Respondent argues that it is not a successor. In the alternative, Respondent contends that, even if it is a successor, it is not liable to repay the WSF for the reason that there are no unpaid wages, in that the WSF has already reimbursed Claimants in full for the unpaid wages they earned during NW's last 60 days of business. Respondent's argument lacks merit.

ORS 652.414(3) provides that "[t]he commissioner may commence an appropriate action, suit or proceeding to recover from the employer, or other persons or property liable for the unpaid wages, amounts paid from the Wage Security Fund \* \* \*." OAR 839-001-0500(6) provides that "[e]mployer has the same meaning given it in ORS 652.310(1)." ORS 652.310(1) provides that "[e]mployer' \* \* \* includes any successor to the business of any employer \* \* \*, so far as the such employer has not paid employees in full." OAR 839-001-0500(10) defines "successor" as "one who follows an employer in ownership or control of a business so far as such employer has not paid employees in full." Finally, the commissioner has long held in that a successor is liable to repay

the WSF for wages paid from the WSF. See *In the Matter of SQDL Co.*, 22 BOLI 223, 238-42 (2001); *In the Matter of Fjord, Inc.*, 21 BOLI 260, 286 (2001), *affirmed without opinion*, *Fjord, Inc. v. Bureau of Labor and Industries*, 188 Or App 566, 65 P3d 1132 (2003); *In the Matter of Tire Liquidators*, 10 BOLI 84, 93-95 (1991). If Respondent is a successor in interest to NW, it is liable to repay the WSF for all the wages paid to the Claimants by the WSF, plus a 25 percent penalty.

#### **BLACHANA, LLC IS A SUCCESSOR IN INTEREST TO NW**

This forum's test for determining whether a respondent is a "successor" employer is the same for wage claim and WSF recovery cases. *Fjord* at 286. This forum has consistently held that the test to determine whether an employer is a successor in a wage claim case is whether it conducts essentially the same business as conducted by the predecessor. The elements to consider include: the name or identity of the business; its location; the lapse of time between the previous operation and the new operation; whether the same or substantially the same work force is employed; whether the same product is manufactured or the same service is offered; and whether the same machinery, equipment, or methods of production are used. Not every element needs to be present to find a successor employer. The forum considers all of the facts together to reach a determination. See *In the Matter of*

*Bukovina Express, Inc.*, 27 BOLI 184, 201 (2006); *In the Matter of Mermac, Inc.*, 26 BOLI 218, 225 (2005); *In the Matter of Stephanie Nichols*, 24 BOLI 107, 121 (2002); *In the Matter of SQDL Co.*, 22 BOLI 223, 240 (2001); *In the Matter of Fjord, Inc.*, 21 BOLI 260, 286 (2001), *affirmed without opinion*, *Fjord, Inc. v. Bureau of Labor and Industries*, 188 Or App 566, 65 P3d 1132 (2003); *In the Matter of Catalogfinder, Inc.*, 18 BOLI 242, 256 (1999); *In the Matter of Susan Palmer*, 15 BOLI 226, 234 (1997).

Respondent urges the forum to abandon this test and to substitute the nine element successor in interest test used by the commissioner in deciding cases alleging violations of anti-discrimination laws contained in ORS Chapter 659A. In support of its argument, Respondent specifically cites *In the Matter of Tyree Oil, Inc.*, 17 BOLI 26 (1998), *reversed*, *Tyree Oil, Inc. v. Bureau of Labor and Industries*, 168 Or App 278 (2000). The nine elements set out in *Tyree*, a case in which the Agency alleged that Respondent Tyree had committed an unlawful employment practice by failing to reinstate an injured worker in violation of *former* ORS 659.415(1)<sup>4</sup> are: (1) whether the

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<sup>4</sup> ORS Chapter 659 and the anti-discrimination statutes contained in it were reorganized in 2001 into ORS Chapters 659 and 659A. The anti-discrimination statutes in it that are enforced by the Bureau of Labor and Industries were placed in ORS Chapter 659A.

successor had notice of the charge; (2) the predecessor's ability to provide relief; (3) whether there has been a substantial continuity of business operations; (4) whether the new employer uses the same plant; (5) whether the new employer uses the same or substantially the same work force; (6) whether the new employer uses the same or substantially the same supervisory personnel; (7) whether the same jobs exist under substantially the same working conditions; (8) whether the new employer uses the same machinery; and (9) whether the new employer produces the same product. *Tyree*, at 36-37.

The forum declines Respondent's invitation to adopt *Tyree's* nine element successor in interest test and decides this case based on the six element successor test used in deciding wage claim cases set out in *Bukovina* and its predecessor cases.

Since NW went out of business, Respondent has operated a club in the same location under two assumed business names, Penner's Portsmouth Club and Portsmouth Pizza and Pub. The Order of Determination specifically names "Blachana, LLC dba Penner's Portsmouth Club," the assumed business name under which Respondent conducted business for its first year of operation. The forum focuses its inquiry on that business.

#### **A. Name Or Identity Of The Business**

In its Order of Determination issued on January 17, 2007, the Agency named "Blachana, LLC dba Penner's Portsmouth Club" as the alleged successor to NW. Since Portsmouth Pizza and Pub did not exist as a legal entity until May 2007, the proper comparison for this first element is between NW dba "Portsmouth Club" and Respondent dba "Penner's Portsmouth Club."

The name of a business, although entitled to substantial weight, is only one factor in determining if the identity of an alleged successor business is the same as its defunct predecessor. Other factors include, but are not limited to, an historical common identity, common ownership, common management, and common vendors and clients. *SQDL* at 239. The forum examines these factors below.

The same building in which NW and Respondent operated their businesses has been used to operate a neighborhood bar and restaurant since 1940 and has been historically known as the "Portsmouth Club." In or around March 2005, NW commenced operations after leasing premises comprising "The Portsmouth Club, Mama's BBQ and the attached parking designated for said business" and purchasing the inventory of the Portsmouth Club, valued at \$50,000, and the "good will" of the business, valued at \$285,000, from C. Penner, as an individual, and CPU, through J.

Penner, one of CPU's managers.<sup>5</sup> NW then registered with the Oregon Secretary of State as the new authorized representative for "Portsmouth Club" and commenced business under that assumed business name. NW continued to operate under that name and the name "Anchor Grill" until May 9, 2006, when NW surrendered the business to CPU due to NW's inability to make the monthly payments required by the sales agreement.

When Respondent took over the business, it acquired "all good will" associated with the names "The Portsmouth Club, Mama's BBQ, and Anchor Grill." The good will of "Portsmouth Club" had been originally transferred from CPU and C. Penner to NW in their sales agreement at a stated value of \$285,000. After taking over the business, Respondent operated for almost an entire year under the assumed business name of "Penner's Portsmouth Club." During that period of time, C. Penner commonly answered Respondent's business phone with the words "Portsmouth Club" or "P Club."

NW and Respondent use the same beer vendors but different food vendors. Both offered live blues music, initially shared the same address,<sup>6</sup> and have the same telephone number.

Respondent's *present* clientele is drawn from a different demographic than NW's, and there is no reliable evidence that Respondent has ever offered hip hop music, one of NW's mainstays. NW and Respondent share no common management or ownership, and Respondent has its own liquor, lottery, and city business licenses, as well as its own tax and employer identification number.

Considering all the foregoing facts, the forum finds that Respondent's name and identity indicate successorship.

#### **B. Location Of The Business**

The geographical location of Respondent's business is identical to the location of NW's business, with the caveat that Respondent initially used the space that NW used for the Anchor Grill as storage space. This indicates successorship.

#### **C. Lapse In Time, If Any, Between The Previous And New Operation?**

In prior cases in which successorship was alleged and a lapse in time existed, the forum has found successorship when the interval between the close of a predecessor's operation and the start of an alleged successor's operation was 3-4 days,<sup>7</sup> 18 days,<sup>8</sup> 25 days,<sup>9</sup> and

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Lombard to 5262 N Lombard, although the location is exactly the same.

<sup>7</sup> *In the Matter of Anita's Flowers & Boutique*, 6 BOLI 258, 267-69 (1987).

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<sup>5</sup> C. Penner was also one of C.P. Underhill's managers.

<sup>6</sup> At some point, C. Penner had the address changed from 5264 N

“a maximum of three to four months.”<sup>10</sup> In this case, 47 days elapsed between May 9, 2006, the date NW closed its doors, and June 26, 2006, the date Respondent reopened for business. This interval falls within the range of prior lapses of time that the forum has found indicative of successorship and the forum finds it indicates successorship in this case.

**D. Does Respondent Employ The Same Or Substantially The Same Work Force as NW?**

The “same or substantially the same work force” refers to specific employees, not a generic labor pool. There is no evidence that Respondent has ever employed any of the same persons as NW. This indicates a lack of successorship.

**E. Does Respondent Manufacture The Same Product Or Offer The Same Service As NW?**

The products and services offered by NW were food, drinks, and beer, and live hip hop, reggae and blues music in a bar and restaurant. When Respondent took over the business after Drago,

CPU, and NW executed the Surrender and Release Agreement on May 9, 2006, CPU acquired “all food, beverage and liquor inventory” located at the Portsmouth Club and Anchor Grill, along with everything else in the building. When Respondent opened for business under the assumed business name of Penner’s Portsmouth Club, it also operated a bar and restaurant, serving food, drinks, and beer, and provided live jazz and blues music.

Respondent argues that it did not offer the same service as NW because its food and drink menu was different than NW’s. However, other than general testimony that NW and Respondent both served food, drinks, and beer in a bar and restaurant, there is no reliable evidence about the specific food and drinks menu offered by NW and Respondent in its first year of operation that would allow the forum to make this comparison.

Respondent further urges the forum to concentrate on the fact that its *present* focus is pizza and drinks. The forum does not give this evidence any weight because Respondent did not purchase a pizza oven and began business as Portsmouth Pizza and Pub until in or around July 2007, 11 months after Respondent opened for business.

Based on undisputed evidence that the services and products offered by both NW and Respondent consisted of food, drinks, and beer, and live music in a club atmosphere, and in the ab-

<sup>8</sup> *In the Matter of Tire Liquidators*, 10 BOLI 84, 93-94 (1991).

<sup>9</sup> *In the Matter of Fjord, Inc.*, 21 BOLI 260, 297 (2001), affirmed without opinion, *Fjord, Inc. v. Bureau of Labor and Industries*, 188 Or App 566, 65 P3d 1132 (2003).

<sup>10</sup> *In the Matter of Stephanie Nichols*, 24 BOLI 107, 121-122 (2002).

sence of evidence identifying specific differences between the food, beer, and drinks offered by NW and Respondent, the forum concludes that this element is indicative of successorship.

**F. Does Respondent Use The Same Machinery, Equipment, Or Methods Of Production As NW?**

When NW purchased the Portsmouth Club from CPU and C. Penner, it acquired all of the equipment listed on Exhibit A of the Sales Agreement, plus the "good will" of the Portsmouth Club. The lengthy list of equipment was valued at \$50,000, and the good will was valued at \$285,000. When NW surrendered the business to CPU, it specifically surrendered "all the assets listed on Exhibit A to the Sale Agreement." As of the date of hearing, nearly three years after Respondent commenced operations, Respondent had stopped using, disposed of, or replaced much of that equipment listed on Exhibit A, but Respondent was also still using a considerable amount of the listed equipment. Except for three fire extinguishers, some tables and booths, some television sets, and some sound equipment that were missing when Respondent opened for business, there is no evidence as to when Respondent stopped using, disposed of, or replaced any of the equipment listed on Exhibit A. Respondent also conducted business in the same building, although it had been remodeled to an extent to suit Respondent's business needs.

Taken as a whole, these facts indicate successorship.

**CONCLUSION**

In this case, five of the six elements of the successor test are indicative of successorship, with the only exception being the workforce. Taken as a whole, the forum concludes that, in its first year in business, Respondent conducted essentially the same business that NW conducted and is a "successor to the business" of NW under ORS 652.310(1).

**WAGE SECURITY FUND PENALTY**

In this case, the Agency caused the WSF to pay out \$7,047.62 in gross, unpaid wages. As a WSF penalty, the Agency seeks recovery of a total of \$1,841.91, computed as follows:

<u>Claimant</u>	<u>WSF Paid</u>	<u>Penalty</u>
Alexander	\$2,180.00	\$545.00
Cleary	\$ 937.00	\$234.25
Alexander	\$3,450.62	\$862.66
Smith	\$ 480.00	\$200.00

ORS 652.414(3) provides that, when the commissioner commences an action or proceeding to recover amounts paid from the WSF under ORS 652.414(1), "the commissioner is entitled to recover \* \* \* a penalty of 25 percent of the amount of wages paid from the Wage Security Fund or \$200, whichever amount is the greater."

In previous cases involving multiple wage claimants in which a WSF penalty was assessed, the commissioner has consistently or-

dered respondents to pay a 25 percent penalty on the total amount of wages paid out,<sup>11</sup> except in one case in which \$200 was greater than 25 percent of the amount paid out by the WSF.<sup>12</sup> This is consistent with the wording in ORS 652.414(3), which bases its 25 percent penalty assessment on “the amount of wages paid from the Wage Security Fund” and does not provide for a 25 percent or \$200 penalty, “whichever amount is the greater,” based on the amount of unpaid wages paid out to each individual claimant when the case involves multiple claimants. Consequently, the forum assesses a penalty amounting to 25 percent of the total amount paid out by the WSF, or \$1,761.91 ( $\$7,047.62 \times .25 = \$1,761.91$ ).

#### ORDER

NOW, THEREFORE, as authorized by ORS 652.414 and as payment of payment of amounts

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<sup>11</sup> See, e.g., *In the Matter of Robert J. Thomas dba More and More Construction*, 30 BOLI \_\_\_\_ (2009)(WSF paid out \$2,037.50 in unpaid wages to two wage claimants and a 25 percent penalty of \$509.38 was assessed); *In the Matter of Carl Odoms*, 27 BOLI 232, 240 (2006)(WSF paid out \$5,399.13 in unpaid wages to four wage claimants and a 25 percent penalty of \$1,349.78 was assessed); *In the Matter of Hickox Enterprises, Inc.*, 22 BOLI 10, 17 (2001)(WSF paid out \$46,602.37 in unpaid wages to 50 wage claimants and a 25 percent penalty of \$11,650.59 was assessed).

<sup>12</sup> *In the Matter of Lisa Sanchez*, 27 BOLI 56, 62 (2005).

paid from the Wage Security Fund (“WSF”), the Commissioner of the Bureau of Labor and Industries hereby orders Respondent **Blachana, LLC** to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 1045 State Office Building, 800 NE Oregon Street, Portland, Oregon 97232-2180, the following:

(1) A certified check payable to the Bureau of Labor and Industries in the amount of EIGHT THOUSAND EIGHT HUNDRED NINE DOLLARS AND FIFTY THREE CENTS (\$8,809.53), representing \$7,047.62 paid to Gye Alexander, Jerry Peterson, Jerri Smith, and Katharine Cleary from the WSF, and a 25 percent penalty of \$1,761.93 on the sum of \$7,047.62, plus interest at the legal rate on the sum of \$7,047.62 from June 1, 2006, until paid;

(2) Interest at the legal rate on the sum of \$120.00, representing a 25 percent penalty on \$480.00 in unpaid wages paid to Jerri Smith from the WSF, from July 5, 2006, until paid;

(3) Interest at the legal rate on the sum of \$866.66, representing a 25 percent penalty on \$3,450.62 in unpaid wages paid to Jerry Peterson from the WSF, from August 31, 2006, until paid;

(4) Interest at the legal rate on the sum of \$234.25, representing a 25 percent penalty on \$937.00 in unpaid wages paid to Katharine Cleary from the

WSF, from October 2, 2006, until paid; and

(5) Interest at the legal rate on the sum of \$545.00, representing a 25 percent penalty on \$2,180.00 in unpaid wages paid to Gye Alexander from the WSF, from October 2, 2006, until paid.

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**In the Matter of**

**FROM THE WILDERNESS, INC.  
dba From the Wilderness  
Publications and Michael  
Ruppert as employer proxy,**

**Case No. 39-08  
Final Order of Commissioner  
Brad Avakian  
Issued September 16, 2009**

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**SYNOPSIS**

The Agency established by a preponderance of credible evidence that Respondent, through its proxy Michael Ruppert, subjected Complainant to offensive and unwelcome sexual conduct that created a hostile and intimidating work environment, in violation of ORS 659A.030(1)(b), then discharged Complainant in retaliation for her complaint about the sexual conduct, in violation of ORS 659A.030(1)(f). The forum concluded that Respondent was liable for Ruppert's sexual harassment and awarded Complainant \$2,713.42 in back wages and

\$125,000 for emotional and mental suffering damages. ORS 659A.030; OAR 839-005-0030.

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The above-entitled case came on regularly for hearing before Alan McCullough, designated as Administrative Law Judge ("ALJ") by Brad Avakian, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on June 23, 24, and 25, 2009, at the Oregon Employment Department office located at 119 N. Oakdale Avenue, Medford, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by case presenter Patrick A. Plaza, an employee of the Agency. Lindsay Gerken ("Complainant") was present throughout the hearing and was not represented by counsel. Respondent From the Wilderness, Inc. ("FTWI") and was represented by Michael Ruppert, FTWI's authorized representative, who was present throughout the hearing.

The Agency called the following witnesses: Complainant; Eric Yates, senior investigator, BOLI Civil Rights Division (telephonic); Mike Reinert and Steve Crews, Complainant's friends; Ryan Spiegl, Complainant's former co-worker (telephonic); Rebecca Jones, Complainant's mother (telephonic); Stephen Jones, Complainant's stepfather (telephonic); and Michael Ruppert, Respondent's president.

Respondent called the following witnesses: Michael Ruppert, Respondent's president; Scott McGuire, freelance writer and horticultural advisor; and Jamie Hecht, Ruppert's professional colleague.

The forum received into evidence:

a) Administrative exhibits X-1 through X-78 (submitted or generated prior to hearing) and X-79 (submitted at hearing);

b) Agency exhibits A-1 through A-27 (submitted prior to hearing), and A-40 (submitted at hearing);

c) Respondent exhibits R-7 and R-10 (submitted prior to hearing). Exhibits R-3, R-4, R-5, consisting of affidavits of Brendan Flanagan, Zach Evans, and Spencer Merkel, were offered but not received because the affiants were not made available for cross examination after the Agency requested cross examination of them at least 10 days before the hearing; the ALJ received the exhibits into the record as offers of proof. Exhibits R-6, R-11, R-12, R-13, R-14, and R-15 were offered but not received. Exhibits R-1 and R-2 were offered and not received and Respondent withdrew their offer.

Having fully considered the entire record in this matter, I, Brad Avakian, Commissioner of the Bureau of Labor and Industries, hereby make the following Findings of Fact (Procedural and on the Merits), Ultimate Findings of

Fact, Conclusions of Law, Opinion, and Order.

#### **FINDINGS OF FACT – PROCEDURAL**

1) On November 13, 2006, Complainant filed a verified complaint with the Agency's Civil Rights Division alleging that she was the victim of the unlawful employment practices of FTWI. After investigation, the Agency found substantial evidence of an unlawful employment practice and issued a Notice of Substantial Evidence Determination on October 18, 2007.

2) On August 12, 2008, the Agency issued Formal Charges alleging that:

(a) FTWI unlawfully discriminated against Complainant based on her sex through the words and actions of Ruppert, its proxy, by creating a workplace environment that was hostile, intimidating, or offensive to Complainant, in violation of ORS 659A.030(1)(b) and OAR 839-005-0030(1)(a) & (b); and

(b) FTWI retaliated against Complainant, in violation of ORS 659A.030(1)(f), by attempting to make her sign a disciplinary notice after she complained about the sexual harassment, then terminated her when she refused to sign the notice.

The Formal Charges sought lost wages, "in an amount to be proven at hearing," and "at least \$35,000 in damages for emo-

tional, mental, and physical suffering.” The Charges were mailed to Respondent’s attorney of record, Raymond D. Kohlman, in New York, and to Ruppert, FTWI’s registered agent, at 655 Washington St., Ashland, OR 97520.

3) On September 4, 2008, the Agency filed a Notice of Intent to file a motion for default if FTWI failed to file an answer to the Formal Charges by September 15, 2008.

4) On September 17, 2008, an answer was filed by Raymond Kohlman, who identified himself as Michael Ruppert’s attorney in the answer.

5) On September 18, 2008, the Agency moved for an order of default based on FTWI’s failure to timely file an answer.

6) On September 23, 2008, Raymond Kohlman filed a “motion for pro hac vice.” Kohlman represented that he is an attorney licensed to practice in Massachusetts who has been corporate counsel for FTWI and personal counsel to Michael Ruppert.

7) On September 24, 2008, Ruppert filed a letter with the forum opposing the Agency’s motion for default and requesting that any default judgment be temporarily suspended until the forum allowed Kohlman to represent FTWI and himself or gave him “ample time to identify, retain and consult with local counsel.”

8) On September 25, 2008, the ALJ issued an interim order denying Kohlman’s motion on two

grounds: (1) He did not state that he had associated himself with an active member in good standing of the Oregon State Bar; and (2) he certified to the Massachusetts Board of Bar Overseers of the Supreme Judicial Court that he was not covered by professional liability insurance.

9) On September 29, 2008, the ALJ issued an interim order denying the Agency’s motion for default. Except for introductory language, the order is reprinted in its entirety below:

“The Formal Charges allege that Respondent is ‘an administratively dissolved domestic business corporation’ and that ‘Michael Ruppert \* \* \* was the registered agent \* \* \* during all times of the corporation’s existence in this state.’ For argument’s sake, the forum assumes that Respondent was a corporation and Michael Ruppert was its registered agent,<sup>1</sup> and that an answer had to be filed by ‘counsel’ or

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<sup>1</sup> At this time, the forum may not conclude as a matter of law that these allegations are true because (1) the Agency has provided no documentary evidence to support them and (2) Respondent may still have an opportunity to deny them, depending on what evidence may or may not be produced after this Order is issued to show when Respondent was served or the extension of time granted to Ruppert on September 11, 2008. The forum disregards the substantive responses in Kohlman’s Answer because it was not filed by “counsel” as defined in OAR 839-050-0020(9).

an 'authorized representative.' OAR 839-050-0110(1)&(2). Mr. Kohlman filed a motion to appear *pro hac vice* on September 23, 2008, and I denied that motion on September 25, 2008. Since no answer has been received except for the answer filed by Kohlman, the forum considers that Respondent has not filed an answer as of the date of this Order.

"The Agency's motion is based on Respondent's failure to file a timely answer. That failure, or lack of it, can only be ascertained by determining when the answer was due. No answer is due until service has occurred.

"OAR 839-050-0130(1) provides that a party named in Formal Charges must file an answer 'within 20 days after service' of the Formal Charges. OAR 839-050-0030(1) defines the date when service occurs:

'(1) \* \* \* [T]he charging document will be served on the party or the party's representative by personal service or by registered or certified mail. Service of a charging document is complete upon the earlier of:

(a) Receipt by the party or the party's representative; or

(b) Mailing when sent by registered or certified mail to the correct address of the party or the party's representative.'

"In this case, the 'party' is From the Wilderness, Inc., an Oregon corporation. 'Party representative' is not defined in OAR Chapter 839, Division 50, or the Attorney General's Model Rules, OAR Chapter 137. For argument's sake only, the forum assumes that Kohlman, although not qualified to file an answer as Respondent's counsel, can be considered a 'party representative' under OAR 839-050-0030(1)<sup>2</sup> as of the time that Kohlman filed an Answer in which he stated that he represented Respondent.

"The service-related notice on pages 3 and 4 of the Formal Charges show that that the Formal Charges were mailed to Ruppert at 655 Washington Street, Ashland, OR 97520. The Agency's recent motions have been mailed to Ruppert at 4269 Baldwin Avenue, Culver City, CA 90232. There is no evidence explaining this discrepancy and the Agency has not provided any documentary or testimonial evidence showing that Ruppert, Respondent's alleged registered agent, or anyone listed under ORCP 7(DD)(3)(b)(i) ever received

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<sup>2</sup> Other than the statement that Kohlman was served with the Formal Charges, the Agency has provided no evidence in support of its motion to show that it had any reason to believe that Kohlman was Respondent's "party representative" at the time it issued the Formal Charges.

the Formal Charges, or that they were ever mailed to Respondent's 'correct address.' The case presenter's bare representation that he spoke with Ruppert on September 11, 2008, by telephone and gave him additional time to file an Answer to the Formal Charges does not constitute proof that the Agency actually served the 'party.' Since the Agency has not established that it ever served the 'party' in this case, Respondent cannot be in default based on the theory that it has failed to file a timely answer after service upon the 'party.'

"The service-related notice on pages 3 and 4 of the Formal Charges show that that the Formal Charges were also mailed to Kohlman at the following three addresses:

Raymond D. Kohlman

Raymond D. Kohlman,  
Counselor at Law

300 E. 71<sup>st</sup> Street, Ste. 3H  
New York, NY 10021

Raymond D. Kohlman

Raymond D. Kohlman,  
Counselor at Law

PO Box 3244

Attleboro, MA 02703

Raymond D. Kohlman

Raymond D. Kohlman,  
Counselor at Law

79 Central Avenue

Seekonk, MA 02771

The Agency's Notice of Intent to File a Motion for Default was sent to Kohlman at these three addresses. However, the Agency's Motion for Default was addressed to Kohlman at a different address:

Raymond D. Kohlman

Raymond D. Kohlman,  
Counselor at Law

116-6 142<sup>nd</sup> Street

Jamaica, NY 11436

"The Agency has provided no evidence showing (1) what Kohlman's correct address is; (2) when the Formal Charges were mailed to Kohlman at that address; or (3) when Kohlman actually received the Formal Charges. The forum infers that Kohlman received the Formal Charges no later than September 12, 2008, the date that appears next to his signature on the Answer received by the forum on September 17, 2008. Again assuming, for argument's sake, that Kohlman can be considered Respondent's 'party representative,' without proof of items (1) and (2), Respondent's Answer is due twenty days after September 13, 2008, at the earliest.<sup>3</sup> OAR 839-050-0040(3).

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<sup>3</sup> The Answer may be due later. The Agency's Notice Of Intent To File A Motion For Default, which was filed on September 4, 2008, gives Respon-

“As of this date, for reasons stated in this Order, the forum is unable to conclude that Respondent has not filed a timely Answer. The Agency’s motion for default is **DENIED.**”

10) On October 2, 2008, the Agency filed a renewed motion for default. On October 3, 2008, the ALJ issued an interim order denying the Agency’s motion for default. The order is reprinted in its entirety below:

“On October 2, 2008, the Agency filed a Renewed Motion for Default in which the Agency asked the forum to issue an Order finding Respondent in default based on Respondent’s failure to file a timely answer to the Agency’s Formal Charges. For two separate reasons described below, the forum must deny the Agency’s motion.

“The Agency attached several supporting exhibits to its argument in support of the motion. Among those exhibits was a printout from the Oregon Sec-

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dent an extension of time until September 15, 2008, to file an Answer. However, the Agency’s Motion For Default, filed September 18, 2008, states that the Agency case presenter spoke with Ruppert on September 11, 2008, and gave him “additional time to file an Answer.” The motion does not state the amount of additional time granted to Ruppert. Since the Agency had given Respondent an extension until September 15 only one week earlier, the forum infers that the Agency gave Ruppert an extension to some date after September 15.

retary of State, Corporations Division, showing that Michael C. Ruppert was Respondent’s registered agent and that Ruppert’s address on file with the Corporations Division, in his capacity as Respondent’s registered agent, was ‘655 Washington St., Ashland, OR 97520.’ Based on the signed statement of the Hearings Unit Coordinator on page 3 of the Notice of Hearing and the address listed for Ruppert on page 4 of the Notice of Hearing, the forum takes official notice that the Formal Charges and Notice of Hearing were ‘placed in the outgoing Bureau of Labor and Industries mail’ to Ruppert at ‘655 Washington St., Ashland, OR 97520’ mailed on August 14, 2008.

”ORCP 7D(3)(b)(ii) provides, in pertinent part, that:

‘If a registered agent, officer, director, general partner, or managing agent cannot be found in the county where the action is filed, true copies of the summons and the complaint may be served: \* \* \* by mailing true copies of the summons and the complaint to the office of the registered agent or to the last registered office of the corporation or limited partnership, if any, as shown by the records on file in the office of the Secretary of State[.]’

“OAR 839-050-0030 provides, in pertinent part, that:

'(1) Except as may be otherwise provided in ORS 652.332(1) the charging document will be served on the party or the party's representative by personal service or by registered or certified mail. Service of a charging document is complete upon the earlier of:

'(a) Receipt by the party or the party's representative; or

'(b) Mailing when sent by registered or certified mail to the correct address of the party or the party's representative.'

"The Agency argues that two returned, unsigned certified mail receipts to Ruppert the above-mentioned Ashland address constitute 'certificates of mailing of the Formal Charges' that establish that Ruppert, as Respondent's registered agent, was served with the Formal Charges on August 14, 2008. The forum disagrees. OAR 839-050-0030(1)(b) states that service occurs by mailing when sent 'by registered or certified mail.' Although the Hearings Unit Coordinator mailed the Notice of Hearing and Formal Charges to the correct address, there is no evidence – for example, an affidavit statement from the Coordinator -- other than the two returned, unsigned certified mail receipts, that the Notice of Hearing and Formal Charges correspond to either receipt

and that that the Notice of Hearing and Formal Charges were sent by certified mail. Without evidence to confirm that those receipts correspond to the Coordinator's mailing of the Notice of Hearing and Formal Charges to Ruppert, the forum cannot conclude that Respondent, through Ruppert, its registered agent, was served by mail on August 14, 2008.

"Even if the forum concludes that the Agency served Respondent by serving Kohlman as Respondent's 'party representative,' a second problem remains. On September 11, 2008, the Agency filed a notice of intent to file a motion for default, stating that the Agency would file a motion for default on September 15, 2008, if Respondent did not file an Answer by that date. Subsequently, in the Agency's motion for default, Patrick Plaza, the Agency case presenter, stated that he spoke with Ruppert by telephone on September 11, 2008, and gave him "additional time" to file an Answer. Because this conversation occurred **after** the Agency's notice that gave Respondent until September 15, 2008, to file an answer, the forum infers that the 'additional time' must have extended Respondent's deadline for filing an Answer.

"When the Agency gives a respondent an extension for filing a responsive pleading past the 20-day deadline set out in

OAR 839-050-0130(1), the date set out in Agency's extension becomes the new deadline for filing an answer. The Agency case presenter has stated that, on September 11, 2008, he gave Respondent 'additional time' in which to file an answer. Whatever 'additional time' was given is the deadline Respondent was entitled to rely on. The Agency has not informed the forum of the date of the deadline given to Ruppert on September 11, 2008. Without knowing that date, the forum cannot know what date Respondent's Answer is due. Without knowing the date that Respondent's Answer is due, the forum cannot find Respondent in default.

"For the reasons stated above, the Agency's motion is **DENIED.**"

11) On October 6, 2008, Oregon attorney Lee Werdell filed a letter stating that he had been retained by Michael Ruppert to represent him in Case No. 39-08. In the letter, Werdell requested a 10-day extension of time in which to file an answer to the Formal Charges and a postponement of the hearing.

12) On October 6, 2008, the ALJ conducted a prehearing conference with Pat Plaza, the Agency case presenter, and Lee Werdell regarding Respondent's requests. Mr. Plaza did not object to Respondent's requests and the ALJ granted Respondent's requests for a 10-day extension in which to file an answer and reset

the hearing to begin on March 10, 2009.

13) On October 16, 2008, Werdell filed an answer to the Formal Charges on FTWI's behalf.

14) On January 5, 2009, the ALJ issued an interim order instructing both participants about fax filings and the forum's seven-day timeline after service of motions to file a written response to those motions.

15) On January 5, 2009, the forum ordered the Agency and Respondent each to submit a case summary including: a list of all persons to be called as witnesses; identification and copies of all documents to be offered into evidence; a statement of any agreed or stipulated facts; a brief statement of the elements of the claim and any damage calculations (for the Agency only); and a brief statement of any defenses to the claim (for Respondent only). The forum ordered the participants to submit case summaries by February 26, 2009, and notified them of the possible sanctions for failure to comply with the case summary order.

16) On February 19, 2009, Respondent filed a motion for a discovery order allowing Respondent to take the deposition of the Complainant and Patrick Plaza, the case presenter representing the agency in this case. Respondent coupled that motion with a second motion for a continuance to give Respondent the time in which to conduct those depositions. Respondent argued that

both depositions were necessary, based on a lack of cooperation by the Agency and Complainant, in order to allow Respondent to obtain the discovery they are entitled to under the administrative rules and statutes related to this case. The Agency opposed Respondent's motions on the grounds that the Agency had fully cooperated with Respondent's discovery requests.

17) On February 25, 2009, the ALJ issued an interim order ruling on Respondent's requests for a discovery order and postponement. Except for introductory language, that order is reprinted in its entirety below:

**“DEPOSITION OF PATRICK PLAZA**

“Respondents seek to depose agency case presenter Plaza to learn the content of any conversations he has had with Complainant regarding her allegations of harassment and the merits of the case and because Plaza has not provided any notes he may have taken related to statements given to him by Complainant. Respondents assert that they are entitled to obtain Plaza's testimony because he is not entitled to a work product exception and the privileged communications relative to attorneys do not apply.

“The forum relies on an earlier decision to determine whether to grant Respondents' request. In the case of *In the Matter of Thomas Myers*, 15 BOLI 1

(1996), a Respondent sought to call the case presenter as a witness to impeach complainant based on statements that complainant might have made to the case presenter that contradicted complainant's testimony made in the first stage of a reconvened hearing. The forum acknowledged that ‘the attorney-client privilege does not exist between an Agency case presenter and a Complainant,’ but denied Respondent's request based on the following policy reason:

‘ORS 183.450(7) allows a state agency to be represented at contested case hearings by agency employees with the consent of the Attorney General. The Attorney General has given this consent to the Bureau, and the Bureau has designated individual employees as case presenters to perform this function. At a contested case hearings, the case presenter is authorized to perform every function related to litigation that the Attorney General would perform except presenting legal argument. ORS 183.450(8), OAR 839-50-230. An essential component of litigation is that the attorney or case presenter representing the client communicate candidly with the client regarding all facts within the client's knowledge that are relevant to the case. Here, although the client is tech-

nically the agency, the real party in interest is the Complainant. It is the Complainant who was subjected to the alleged discriminatory conduct and the Complainant who will be the beneficiary of any award of damages, not the agency. It is illogical to assume that the legislature and the Attorney General intended for an agency employee to perform all the essential functions of an attorney except for presenting legal argument and simultaneously intended to place this employee in the untenable position of being subject to examination, either by deposition or during a contested case hearings, as to the substance of any conversations between the employee and the Complainant whose case is being heard. This interpretation of the law would effectively hamstring the agency case presenter in performing the very task the legislature delegated to the case presenter to perform.' *Id* at 15-16.

"The policy reason that the forum relied on in deciding *Myers* still exists and Respondents have articulated no reason that would require the forum to overrule that decision.

"For the same reasons, this forum has previously ruled that a Respondent is not entitled to discovery of copies of inter-

views specifically conducted by the agency case presenter. *In the Matter of Wing Fong*, 16 BOLI 280, 283 (1998). See also *In the Matter of Logan International, Ltd.*, 26 BOLI 254, 257-58 (2005).

"Based on this precedent, Respondents' motion to depose Mr. Plaza is **DENIED**.

**"PRODUCTION OF INTERVIEW NOTES WITH COMPLAINANT**

"As stated above, Respondent is not entitled to copies of any interviews with the Complainant or any other witness specifically conducted by the agency case presenter. To the extent it has not already done so, I ORDER the Agency to produce copies of any notes made by an agency investigator of interviews with the Complainant, including any interviews conducted at the direction of Mr. Plaza or any other case presenter assigned to the case, that meet the definition of "documents" set out in Respondents' First Request for Discovery. *Wing Fong*, at 282. The Agency is ordered to provide any documents meeting this definition to Mr. Werdell no later than March 4, 2009.

**"DEPOSITION OF COMPLAINANT**

"Respondents' grounds for deposing Complainant rest on Complainant's alleged inadequate response to Respondents' interrogatories. Respondents contend that

these inadequate responses leave a deposition as Respondents' only alternative to gain the information it needs to prepare for hearing. Respondents argue that Complainant's interrogatory responses are deficient in the two ways:

"1. Complainant did not sign them under oath, rendering them useless to Respondent for impeachment purposes.

"2. Complainant's responses are nonresponsive or only partially response to Interrogatories 1-2, 5, 7, and 9.

"After reviewing the Interrogatories and Complainant's responses, I find the following:

"1. OAR 839-050-0200(6) requires that interrogatories 'must be answered separately and fully in writing under oath unless it is objectionable, in which event the objecting party must state the reasons for objection and must answer to the extent the interrogatory is not objectionable.' (emphasis added) This rule entitles Respondents to have sworn answers to Interrogatories. The Interrogatory Answers sent to Respondents are signed by Mr. Plaza, not the Complainant. Respondents are entitled, by agency rule, to receive Interrogatory Answers that are signed under oath by the Complainant.

"2. Interrogatory #1 requests Complainant's 'full name, date of birth, current address and education history.' The

Agency refused to provide Complainant's current address. Respondents seek Complainant's address so that Respondents' attorney can contact Complainant to discuss settlement with her. Respondent is not entitled to Complainant's address for the purpose of contacting Complainant.

"3. In pertinent part, Interrogatory #2 requests Complainant's 'employment history, excluding [her] work for the Respondent,' including the 'names, last known addresses, phone numbers and dates of employment for each employer [Complainant] has worked for prior to working for Respondent and to provide the same information for any employers [Complainant] has worked for since working for Respondent.' The Agency's response objects that the request is 'overbroad and unduly burdensome and to such extent may not be calculated to lead to the discovery of admissible evidence.' The response then states that Complainant provided her employment history to Respondent when she completed her application for employment and was also provided in the investigative file 'already forwarded to counsel.' It also provides her subsequent employment history and earnings at each employer, but does not provide contact information for them. Respondents have not stated how production of Complain-

ant's lifetime employment history is reasonably likely to produce information generally relevant to the case. Consequently, I will not order Complainant to state her employment history prior to working for Respondents beyond what has already been provided to Respondents. However, I find that the most recent contact information Complainant has for her employers between March 6, 2006, and September 2007 is reasonably likely to produce information generally relevant to the case.

"4. Interrogatory #5 asks Complainant to '[d]escribe all complaints that you have made to Evans, Speigl, Merkel or Plain, including when you made the complaints and what you complained of to them. Also describe their responses to your complaints, if any. State when was the last time that you talked to each of these three individuals and the circumstances and content of such conversations.' The Agency did not object to this Interrogatory, but the answer does not state when Complainant talked to these persons, their responses, if any, or the last time she talked to them and the content of those conversations. I find that this information is reasonably likely to produce information generally relevant to the case and that Respondents are entitled to a complete response to its Interrogatory.

"5. Interrogatory #7 asks Complainant to '[d]escribe when you first began to feel the emotional distress alleged in your Complaint and what first caused the emotional distress.' The Agency objected on the grounds that the Interrogatory is 'vague, overbroad, ambiguous, unduly burdensome, and to such extent may not be calculated to lead to the discovery of admissible evidence' and refers Respondents to Complainant's 'written statement dated May 31, 2006' previously provided to Respondents. I find that this information is reasonably likely to produce information generally relevant to the case and that Respondents are entitled to a sworn response to its Interrogatory.

"6. Interrogatory #9 asks Complainant to '[d]escribe all appointments, visits or counseling sessions that you have had with any counselors, medical providers or doctors relating to any emotional distress within the last ten years. Identify by name, address and phone number all treatment providers.' The Agency objected to the request on the same bases as Interrogatory #7, but provided the names, address and phone numbers of two doctors Complainant saw for counseling after she left Respondents' employment and described those visits with those doctors. I find that this information is reasonably likely to produce information gener-

ally relevant to the case and that Respondents are entitled to a sworn response to its Interrogatory. However, I note that Respondents' ability to obtain any medical records from any named provider may be subject to OAR 137-003-0036. In addition, given the broad timeline encompassed by Respondents' request, I would likely require that any medical records sought through OAR 137-003-0036 be subject to my *in camera* inspection before releasing them.

"Although Complainant has failed to adequately respond to the Interrogatories, the remedy is not a deposition. OAR 839-050-0200(3) provides:

'Depositions are strongly disfavored and will be allowed only when the requesting participant demonstrates that other methods of discovery are so inadequate that the participant will be substantially prejudiced by the denial of a motion to depose a particular witness.'

"Respondents have not demonstrated that taking Complainant's deposition is the only alternative to obtaining the requested discovery. Respondents are not entitled to the additional information sought in response to Interrogatory #1. The additional discovery sought in response to Interrogatories 2, 5, 7, and 9 can be obtained by this forum's requirement that Complainant

respond to them completely. Accordingly, the forum **HEREBY ORDERS THE AGENCY TO PROVIDE RESPONDENTS' ATTORNEY WITH THE FOLLOWING, NO LATER THAN MARCH 4, 2009:**

"1. A written response, under oath, to Interrogatory #2 that includes the last known addresses and phone numbers that Complainant has for her employers between March 6, 2006, and September 2007.

"2. A written response, under oath, to Interrogatory #5 that includes a description of when Complainant talked to Evans, Speigl, Merkel or Plain and the last time that Complainant talked to Evans, Speigl, Merkel or Plain and the circumstances and content of such conversations.

"3. A written response, under oath, to Interrogatory #7 that contains a specific and complete answer to that Interrogatory.

"4. A written response, under oath, to Interrogatory #9 that describes all appointments, visits or counseling sessions that Complainant had with any counselors, medical providers or doctors relating to any emotional distress from January 1, 1999, until May 31, 2006, and identifies all treatment providers by name, address and phone number.

"5. The original responses to Respondents' Interrogatories,

with Complainant's oath affixed.

"Respondents' motion to take Complainant's deposition is **DENIED**.

**"MOTION FOR POSTPONEMENT**

"The hearing in this matter is set to begin on March 10, 2009. Respondents seek a postponement so they can complete discovery before the hearing. OAR 839-050-0150(5) provides:

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

'(A) Whether previous postponements have been granted;

'(B) The timeliness of the request;

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

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

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

'(b) The administrative law judge will issue a written ruling either granting or denying the motion and will set forth the reasons therefore;

'(c) If all participants agree to a postponement, in order for the postponement to be effective, the administrative law judge will approve of this agreement. Whether the administrative law judge grants or denies such a motion for postponement, the administrative law judge will issue a written ruling setting forth the reasons therefore.'

"On October 6, 2008, Respondents moved for and were granted a postponement because Mr. Werdell had just been retained to represent Respondents and the hearing was set to begin on November 19, 2008. The motion was granted so that Mr. Werdell would have time 'to prepare for the hearing' and the case was reset for March 10, 2009. Mr. Werdell then filed an answer on Respondents' behalf on October 16, 2009. However, the Interrogatories and discovery request that form the basis of Mr. Werdell's motion for a discovery order were not mailed by Mr. Werdell until January 23, 2009, more than three months after this hearing was scheduled. It appears that Respondents' present need for a postponement, based on its failure to complete discovery, could have been obviated if

Respondents had not waited three months before the hearing to seek discovery. Respondents have not represented that their delay in seeking discovery is attributable to the Agency, and I have fashioned an order that will give Respondents the information I find they are entitled to on March 4, 2009. If Respondents wanted the information sooner, it could have sought the requested information sooner. Respondents' delay in seeking discovery was within the control of Respondents and does not constitute 'good cause' under OAR 839-050-0020(12). The Agency has stated that it is prepared to proceed and I will not penalize the Agency based on Respondents' failure to seek timely discovery.

"Respondents' motion for a continuance is **DENIED**."

18) On February 27, 2009, the Agency filed a motion to amend the Formal Charges to name "Michael Ruppert dba FromTheWilderness.com as a respondent successor in interest" and "to increase by \$20,000 the amount of damages sought for emotional, physical and mental suffering."

19) On February 27, 2009, Respondent FTWI and the Agency filed case summaries.

20) On March 3, 2009, the Agency filed a request for cross examination in which the Agency asked that the forum require Re-

spondent "make available for cross examination at hearing each and every author, preparer or transcriber" of any of the five affidavits submitted with Respondent's case summary that Respondent intended to offer or refer to at hearing.

21) On March 4, 2009, Respondent FTWI filed objections to the Agency's proposed amendments to the Formal Charges to add Michael Ruppert as a Respondent. Respondent Michael Ruppert also filed objections to the Agency's proposed amendments on the basis that the Agency lacked jurisdiction over Michael Ruppert.

22) On March 5, 2009, the ALJ issued an interim order granting the Agency's motion to amend the Formal Charges to name Michael Ruppert as a Respondent successor in interest, but denying the Agency's request to increase the amount of damages sought by \$20,000 because the motion did "not include a substantive recital of any continued retaliation other than what is already set out in the Formal Charges and does not state why those allegations already set out in the Formal Charges support \$20,000 more in emotional distress damages than the amount originally plead." The Agency was ordered to reissue the Amended Formal Charges "with the amended language incorporated into it and underlined so it can be clearly identified, then to serve Michael Ruppert and Respondent From the Wilderness, Inc. with the Amended Formal

Charges.” The ALJ also postponed the hearing to give the Agency an opportunity to serve Respondent Ruppert. Finally, the ALJ noted that Respondent’s jurisdictional objection was premature because the Agency had not yet attempted to serve Respondent Ruppert.

23) On March 6, 2009, the ALJ issued an interim order stating that, when the hearing was reset, he would issue an order requiring persons already served with subpoenas to honor that subpoena by appearing at the time, date, and place set for the rescheduled hearing.

24) On March 27, 2009, the Agency issued Amended Formal Charges and the ALJ signed a new Notice of Hearing that reset the hearing for June 23, 2009, in Medford, Oregon, and the Agency issued those Charges. However, the ALJ did not actually see the actual Amended Formal Charges until May 10, 2009.

25) On April 9, 2009, Respondent FTWI filed an amended answer and Respondent Ruppert filed a motion to dismiss the Formal Charges against him on the grounds of lack of jurisdiction.

26) On May 7, 2009, the Agency filed a motion for a protective order regarding Complainant’s “medical, psychological, counseling, and therapy records” that the Agency might introduce as evidence at the hearing or that Respondent “may obtain during this contested case process.”

27) On May 7, 2009, the Agency filed a Notice of Intent to File a Motion for Default against Respondent Michael Ruppert. In the Notice, the Agency stated that it intended to file a motion for default against Respondent Ruppert if he did not file an answer to the amended Formal Charges by May 18, 2009.

28) On May 13, 2009, the ALJ issued an interim order entitled “Impermissible Scope of the Agency’s Amended Formal Charges.” That order is reprinted in its entirety below:

**“Introduction**

“On March 26, 2009, the Agency issued its Amended Formal Charges. I signed an accompanying Notice of Hearing on March 27, but unfortunately did not receive a copy of the actual Amended Formal Charges until May 10, 2009, when I read them for the first time. This order is in response to the content of the Amended Formal Charges. Motions filed by the Agency and Respondents since the Amended Formal Charges were issued will be addressed in separate orders.

**“The Agency’s Motion To Amend And Scope Of The Order Granting The Agency’s Motion to Amend**

“On February 27, 2009, the Agency filed a motion to amend the Formal Charges to name Michael Ruppert dba FromTheWilderness.com as a respondent successor in inter-

est and to increase by \$20,000 the amount of damages sought for emotional, physical, and mental suffering. On March 5, 2009, I issued an interim order granting the Agency's motion in part. Related to the Agency's motion to amend, I ordered the following:

'1. Based on alleged facts the Agency recites in support of its motion to name Michael Ruppert as a respondent successor in interest, I find justice requires that I grant the Agency's motion to name Michael Ruppert as a respondent successor in interest. The Agency's motion to name Michael Ruppert as a respondent successor in interest is **GRANTED**.

'2. The Agency alludes to continued retaliation as allegedly documented in the website attached to its motion to amend as the justification to amend the Formal Charges to add another \$20,000 for emotional distress damages. However, the Agency's motion to amend the Formal Charges does not include a substantive recital of any continued retaliation other than what is already set out in the Formal Charges and does not state why those allegations already set out in the Formal Charges support \$20,000 more in emotional distress dam-

ages than the amount originally plead. The Agency's motion to amend the Formal Charges to add another \$20,000 for emotional distress damages is **DENIED**.'

"The scope of my order was based on the following language taken from the Agency's motion:

'The Agency moves \* \* \* to amend the Formal Charges issued August 14, 2008 to name, as a respondent successor in interest, Michael Ruppert dba FromTheWilderness.com and to increase by \$20,000 the amount of damages sought for emotional, physical and mental suffering."

\* \* \* \*

'For purposes of creating an accurate record in this contested case and obtaining a judgment against all of the proper Respondents, the Agency respectfully requests that it be allowed to amend the Formal Charges as requested to name Michael Ruppert doing business as FromTheWilderness.com as a successor respondent to From the Wilderness, Inc. dba From the Wilderness Publications based on facts occurring after Formal Charges were filed (my emphasis). Based on Respondent's continued retaliation in violation of

ORS 659A.030(1)(f) the Agency seeks to increase the amount of damages sought by \$20,000 for emotional, physical and mental suffering. Respondent and Michael Ruppert should not be allowed to escape financial liability for their actions by dissolving the corporation and continuing to operate through a new entity.'

"Except for the 'continued retaliation' cited in the above paragraph and a recitation of alleged negative references on a website allegedly operated by Ruppert, set out in the context of explaining why Ruppert should be named as a successor in interest, the Agency's motion contains no reference to any retaliatory activities by Ruppert. As a result, my ruling was limited to allowing the Agency to name Ruppert as a respondent successor in interest.

**"The Agency's Amended Formal Charges**

"As authorized by my March 5 interim order, the Amended Formal Charges name Ruppert as a Respondent successor in interest and set out alleged facts to support that allegation. However, the Amended Formal Charges do not stop there. On page 8, line 12, and continuing through page 11, line 9 (paragraphs 28 through 34), the Agency cites numerous actions by Ruppert, all occurring after Complainant was discharged,

that appear related to the Agency's subsequent allegation that Ruppert, as an individual, unlawfully retaliated against Complainant. Starting at page 12, line 6, and continuing through page 13, line 4 (paragraphs 39 through 41), the Agency alleges another set of new facts that appear to relate back to the new allegations contained in paragraphs 28 through 34 and charge Ruppert with unlawful retaliation, in violation of ORS 659A.030(1)(f), based on acts that occurred after Complainant's termination. None of these allegations appear (a) in the Complainant's complaint to the Agency filed on November 13, 2006,<sup>4</sup> (b) in the original Formal Charges; or (c) in the Agency's motion to amend the Formal Charges. In this text, the Agency alleges that Respondent Ruppert, 'in his individual capacity as successor in interest to Respondent FTWI dba FTWP retaliated against Complainant in violation of ORS 659A.030(1)(f)' by actions Ruppert took after Complainant was discharged. These retaliation charges and the successor in interest charges are separate and distinct issues and do not merge in the manner suggested by the Agency. Retaliation is a form of unlawful discrimination, whereas successor in interest status relates to liability for

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<sup>4</sup> This document is Exhibit A-2 of the Agency's case summary.

acts of unlawful discrimination that were committed by a predecessor. The Agency did not seek to amend the Formal Charges to include retaliation charges against Ruppert individually, and permission for amendments of this nature was not granted.

"In addition, I note that, should the Agency move to amend to include its post-termination allegations of retaliation by Ruppert, I would not grant the motion. With respect to complaints of employment discrimination, OAR 839-003-0040(2) provides:

'A complaint may be amended to add a protected class only if the addition is supported by facts already alleged. New facts may not be added. If new facts are alleged, the complainant must file a new complaint meeting the standards provided in OAR 839-003-0005(4).'

"The statutory scheme found in ORS 659A.820 through 659A.850 provides that a complaint of unlawful discrimination must be filed and a finding of substantial evidence issued before the commissioner can issue formal charges. In this case, a complaint containing the post-termination allegations of retaliation that the Agency has now introduced in its Amended Formal Charges was never filed, so far as the forum is aware. Consequently, the Agency may not bootstrap

these new allegations into the existing Formal Charges.

#### **"Conclusion**

"The Agency's Amended Formal Charges exceed the scope of my interim order granting the Agency the right to amend the Formal Charges. On my motion, I am striking paragraphs 28 through 34 and 39 through 41 of the Amended Formal Charges. I am also striking the second sentence of paragraph 18 of the Amended Formal Charges, a new sentence inserted by the Agency that is unrelated to the successor in interest charges.

#### **"IT IS SO ORDERED"**

29) On May 13, 2009, the ALJ issued an interim order denying Respondent Ruppert's motion to dismiss. Except for introductory language, that order is reprinted in its entirety below:

"On April 9, 2009, \* \* \* Respondent Ruppert filed a motion to dismiss on the grounds of lack of jurisdiction. In his motion, Ruppert argued the following:

'Motions to dismiss for lack of jurisdiction are brought under the provisions of OAR 839-050-0150. The motion to dismiss is analogous to an ORCP 21 motion to dismiss for lack of jurisdiction. Defendant Michael Ruppert has never made any personal appearance in this action other than to previously

raise the issue of jurisdiction.

'There are no allegations contained within the Amended Formal Charges which provide any factual allegations of any activities by Michael Ruppert that would establish sufficient activity within the state of Oregon within the requisite statute of limitations that would allow this agency to find jurisdiction.

'Additionally, there has been no service upon defendant Michael Ruppert sufficient for jurisdiction. This failure of lawful service upon Michael Ruppert makes it impossible for the Bureau of Labor and Industries to obtain any relief against Michael Ruppert and the agency has no basis upon which any relief may be granted on June 23, 2009, which is the date that this agency has set for hearing in this matter.

'Until there has been lawful service upon Michael Ruppert and a determination that Michael Ruppert has engaged in activities over which the agency has jurisdiction, there can be no hearing relating to Michael Ruppert personally.'

"The Agency filed a timely response to the Respondent's motion in which it asserted that Michael Ruppert had been properly served and that the

forum has jurisdiction to hear the Amended Formal Charges.

"For reasons stated below, Respondent's motion to dismiss the Amended Formal Charges against Michael Ruppert is **DENIED**. As explained below, the part of Respondent's motion that impliedly addresses the allegations of continued retaliation has been rendered moot by another ruling I have issuing today entitled 'Impermissible Scope of the Agency's Amended Formal Charges.'

#### **"Continued Retaliation**

"Respondent's motion to dismiss is based in part on the lack of activity by Michael Ruppert in the state of Oregon that would allow the forum to find jurisdiction. To the extent that Respondent's motion addresses the allegations of 'continued retaliation' by Michael Ruppert, the motion is moot. I have issued another interim order today entitled 'Impermissible Scope of the Agency's Amended Formal Charges.' In that order, I have stricken all of the Agency's allegations related to continued retaliation and a resultant violation of ORS 6590A.030(1)(f) by Michael Ruppert for reasons stated in detail in that order. As a result, Michael Ruppert's potential liability in this matter is limited to any liability that may accrue based on the Agency's allegation that he is a successor in interest to Respondent FTWI.

**“Successor in interest**

“The Agency amended its Formal Charges to name Michael Ruppert as a Respondent successor in interest after first seeking and obtaining permission from the forum to do so. To begin, I note that successor in interest is a basis for liability for acts of unlawful discrimination that were committed by a predecessor. There is no dispute that FTWI was an Oregon employer, that Michael Ruppert operated FTWI in Oregon at times material, that Complainant was employed by FTWI, and that Complainant’s entire employment with Respondent FTWI took place in Oregon. As to Respondent Ruppert, the only relevant facts related to his individual liability concern whether or not his activities make him a successor in interest to FTWI. The fact that he does not currently reside or conduct business in Oregon does not require a conclusion that he is not a successor in interest. The question of successorship is up to the Agency to prove. Whether or not the Agency can prove it will be decided at hearing. Since the alleged unlawful discrimination only involves actions alleged to have taken place in Oregon, Respondent Ruppert’s argument that the Agency cannot acquire jurisdiction over him because he did not engage in any of the alleged unlawful activities in Oregon fails. To acquire jurisdiction,

the Agency only need serve Respondent Ruppert in a manner consistent with the provisions of OAR 839-050-0030.

**“Respondent Ruppert Has Been Served With The Amended Formal Charges**

“OAR 839-050-0030 provides that service of charging documents is done in the following manner:

‘(1) Except as otherwise provided in ORS 652.332(1) the charging document will be served on the party or the party’s representative by personal service or by registered or certified mail. Service of a charging document is complete upon the earlier of:

‘(a) Receipt by the party or the party’s representative; or

‘(b) Mailing when sent by registered or certified mail to the correct address of the party or the party’s representative.’

“The Agency’s response to Respondent Ruppert’s motion to dismiss includes documentary evidence that the Amended Formal Charges were mailed, by certified mail, to Michael Ruppert on April 14, 2009, at 4269 Baldwin Avenue, Culver City, CA 90232-3201. The forum infers that this is Ruppert’s correct address based on Ruppert’s letter to the forum dated September 24,

2008, titled 'Opposition to Motion for Default,' in which Michael Ruppert signed and listed his address as the Baldwin Avenue address stated above. The Agency also included documentary evidence showing that Michael Ruppert was personally served with the Amended Formal Charges on April 18, 2009, at the same Baldwin Avenue address. Both types of service are authorized by OAR 839-050-0030.

"The Agency argues that the filing of a motion to dismiss by Ruppert's attorney is further proof that Ruppert was served. The Agency is incorrect on this point. Mr. Werdell, Ruppert's attorney, also represents Respondent FTWI and, as such, was served with the Amended Formal Charges in his capacity as Respondent FTWI's counsel. On March 5, 2009, I held a prehearing conference with Mr. Plaza and Mr. Werdell. During that conference, Mr. Plaza specifically asked Mr. Werdell if he would accept service on behalf of Michael Ruppert, and Mr. Werdell stated that he would not. Under these circumstances, the mere fact that Mr. Werdell filed a motion to dismiss on Respondent Ruppert's behalf does not establish that Respondent Ruppert was served as required under OAR 839-050-0030.

"Finally, I note that the Agency is correct in its assertion that,

even if service has not been accomplished, it is premature to dismiss the Amended Formal Charges before hearing based [sic] due to lack of service.

#### "Conclusion

"For reasons stated above, Respondent's motion to dismiss the Amended Formal Charges against Michael Ruppert is **DENIED.**"

30) On May 13, 2009, the ALJ issued an interim order stating that Respondent Ruppert risked being held in default with respect to the Amended Formal Charges if he did not file an answer to them.

31) On May 13, 2009, the ALJ issued an interim order in response to the Agency's request for cross examination reminding Respondents that failure to make the authors, preparers or transcribers of any of the five affidavits submitted with Respondent's case summary available for cross examination at hearing could result in the exclusion of those exhibits. The ALJ also noted that it was Respondents' responsibility to arrange for the appearance of those persons at such time as the Agency was prepared to cross examine them.

32) On May 15, 2009, the ALJ issued an interim order requiring Respondent Michael Ruppert to submit a case summary by June 12, 2009. The ALJ also ordered the Agency and Respondent FTWI to submit supplemental case summaries,

should they choose to present the testimony of witness and offer witnesses not listed or included in their original case summaries, by June 12, 2009.

33) On May 18, 2009, the ALJ issued a Protective Order covering all "individually identifiable health information pertaining to Complainant that the Agency provides in its case summary or offers as evidence at the contested case hearing currently set in this matter for June 23, 2009, as well as any medical, psychological, counseling and therapy records of Complainant that Respondents obtain during this contested case process."

34) On May 21, 2009, Respondent Ruppert filed an answer to the Amended Formal Charges.

35) On May 28, 2009, Respondent Ruppert faxed and mailed a motion for partial summary judgment to the ALJ. The faxed copy was missing page two of the motion and the "sworn answer to Claimant's interrogatories" that Respondent cited in paragraph one of its motion as supporting the motion. The copy mailed to the Hearings Unit was missing pages two and three of the motion and the "sworn answer" referred to in the previous sentence.

36) On June 1, 2009, Respondent Ruppert faxed all six pages of its motion for partial summary judgment to the Hearings Unit.

37) On June 2, 2009, the ALJ issued an interim order re-

minding Respondents of the forum's filing requirements. The ALJ issued a second interim order stating that the Agency's response to Respondent Ruppert's motion for partial summary judgment, should it choose to file one, "would be due seven days from the date that: (1) Respondent files its motion, complete with 'the sworn answer to Claimant's interrogatories' referenced in the first paragraph of Respondent's motion; or (2) Respondent files a statement that Respondent does not intend to rely on 'the sworn answer to Claimant's interrogatories' in support of its motion."

38) On June 4, 2009, the ALJ issued an interim order requiring witnesses previously served with subpoenas to compel their appearance on the date originally set for hearing to honor that subpoena on the reset hearing date. The ALJ ordered that notice "of the duty of each witness to comply with the previously served subpoena on this new hearing date shall be given to each witness by means of Respondent and the Agency sending a copy of this ruling by regular mail to the witness's mailing address."

39) On June 11, 2009, the Agency filed a response to Respondent Ruppert's motion for partial summary judgment and a supplemental case summary.

40) On June 15, 2009, the ALJ issued an interim order ruling on Respondent Ruppert's motion for partial summary judgment. That ruling is HEREBY AF-

FIRMED and is reprinted below in its entirety:

**“Introduction**

“On June 2, 2009, Respondent Ruppert (‘Ruppert’) filed a motion for partial summary judgment, contending that it is not possible for the Agency to meet its burden of proof in support of its allegation that Ruppert is a successor in interest to Respondent From the Wilderness, Inc. (‘FTWI’) and that the charges against him as an individual should be dismissed. The Agency responded by way of objection to Ruppert’s motion.

**“Summary Judgment Standard**

“A motion for summary judgment may be granted where no genuine issue as to any material fact exists and a participant is entitled to a judgment as a matter of law, as to all or any part of the proceedings. *OAR 839-050-0150(4)(B)*. The standard for determining if a genuine issue of material fact exists and the evidentiary burden on the participants is as follows:

‘ \* \* \* No genuine issue as to a material fact exists if, based upon the record before the court viewed in a manner most favorable to the adverse party, no objectively reasonable juror could return a verdict for the adverse party on the matter that is the subject of the motion for summary

judgment. The adverse party has the burden of producing evidence on any issue raised in the motion as to which the adverse party would have the burden of persuasion at [hearing].’ ORCP 47C.

“The ‘record’ considered by the forum consists of: (1) The Formal Charges and Respondent FTWI’s answer; (2) The Amended Formal Charges and Respondents’ answers; (3) Ruppert’s motion and attached response to the Agency’s interrogatories; and (4) The Agency’s response to Respondent’s motion that was authored and signed by the Agency case presenter, and Exhibit A-27, pages 1-3, that was submitted with the Agency’s case summary.

**“The Issue**

“Ruppert has not been charged, as an individual, with an unlawful employment practice. Rather, his status as a Respondent rests on the allegation in the Agency’s amended Formal Charges that he is a successor in interest to Respondent FTWI. If found to be a successor in interest, Ruppert faces potential liability if the forum concludes that FTWI committed an unlawful employment practice alleged in the Amended Formal Charges. If Ruppert is not proven to be a successor in interest, the Charges will be dismissed against him, regardless of the outcome against FTWI.

**“Successor In Interest**

“The Agency has the burden of persuasion to establish that Respondent Ruppert is a successor in interest to FTWI. The test for determining whether Ruppert is a successor in interest is set out in OAR 839-005-0050. It reads as follows:

‘An employer's liability for unlawful discrimination under ORS 659A.030 and OAR 839-005-0010 to 839-005-0045 extends to a successor employer. Determining whether a respondent is a successor employer involves a nine-part test. Not every element of the test need be present to find an employer to be a successor; the facts must be considered together to reach a determination:

‘(1) Whether respondent had notice of the charge at the time of acquiring or taking over the business;

‘(2) The ability of the predecessor to provide relief;

‘(3) Whether there has been a substantial continuity of business operations;

‘(4) Whether the respondent uses the same plant as the predecessor;

‘(5) Whether respondent uses the same or substantially the same work force as the predecessor;

‘(6) Whether respondent uses the same or substantially the same supervisory personnel as the predecessor;

‘(7) Whether under respondent the same jobs exist under substantially the same working conditions as under the predecessor;

‘(8) Whether respondent uses the same machinery, equipment and methods of production as the predecessor;

‘(9) Whether respondent produces the same product as the predecessor.”

In the following discussion, the forum evaluates the record with regard to each of these elements.

**“Analysis****“A. Did Ruppert have notice of the charge at the time of acquiring or taking over the business?”**

“In its Amended Formal Charges, the Agency alleges that ‘Respondent Ruppert had notice of the Formal Charges at the time he began using the website and blog to conduct the business of the now-defunct entities, Respondent FTWI dba FTWP.’ Ruppert denies this allegation in his answer. The original Formal Charges were issued on August 13, 2008. The Agency does not allege a specific date that Ruppert ‘began using the website and blog to conduct

the business' of FTWI, but alludes to an article written by Ruppert dated September 17, 2008, which the Agency contends is evidence that Ruppert was conducting FTWI's business as a successor in interest. September 17, 2008, is the earliest date in the record considered for purposes of this motion for which there is any evidence that Ruppert conducted business as FTWI's successor in interest. Even though the forum did not accept the answer filed on FTWI's behalf by New York attorney Raymond Kohlman dated September 12, 2008, Kohlman's statement that, as attorney for 'Michael Ruppert,' he was authorized to answer the complaint filed in the case of 'In the Matter of FROM THE WILDERNESS INC., Case 39-08' shows that that Ruppert had knowledge of the Formal Charges before September 17, 2008.

"Ruppert argues that the notice requirement is not met because he 'did not in fact take over the business of From the Wilderness, Inc. From the Wilderness, Inc. simply went out of the business and there was no successor of any kind.' Ruppert's argument begs the question.

"Because evidence in the record shows that Ruppert may have first engaged in carrying on FTWI's business as a successor on September 17, 2008, and he knew of the For-

mal Charges no later than September 12, 2008, the forum concludes there is a genuine issue of material fact as to whether the notice requirement of the Agency's successor in interest test has been met.

**"B. The ability of FTWI, the alleged predecessor, to provide relief.**

"In its Amended Formal Charges, the Agency alleges that 'Respondent From the Wilderness, Inc. is an administratively dissolved domestic business corporation that \* \* \* was administratively dissolved on June 1, 2007.' Ruppert admits this allegation in his answer. FTWI admitted this allegation in its original answer. In its answer to the Amended Formal Charges, FTWI incorporated a sworn declaration by Ruppert in that included a statement referring to FTWI as '[t]he defunct corporation \* \* \* is not currently in business and has not been in business since sometime in 2006.'

"The Agency seeks monetary relief in this case. Viewing the evidence in a manner most favorable to the Agency, I find there is a genuine issue of material fact as to whether FTWI has any ability to provide any monetary relief to Complainant.

**"C. Is there substantial continuity of business operations?"**

“This test focuses on the lapse of time between the date an alleged predecessor stops operations and the date the alleged successor commences operations. It is undisputed that FTWI ceased operations in December 2006 or early January 2007 and that it was administratively dissolved on June 1, 2007. In the record, there is no evidence to show that Ruppert may have initiated continuance of FTWI’s business before September 17, 2008. That is a lapse of 20 months and indicates a lack of continuity. I find there is no genuine issue of material fact as to whether there is “substantial continuity of business operations” between the cessation of FTWI’s business and the business Ruppert is alleged to be currently engaged in.

**“D. Does Ruppert use the same plant as FTWI?”**

“Undisputed evidence in the record shows that FTWI’s business consisted of publishing and posting written material on an internet website and selling books on the website and that this work was done by FTWI’s employees from an office building located in Ashland, Oregon. Neither the Agency nor Respondents assert that the business conducted by Ruppert in his alleged capacity as successor in interest to FTWI is conducted anywhere in Oregon, much less in the same office in Ash-

land, and there is no evidence from which to draw such a conclusion. In his sworn declaration, Ruppert denies that the existing website *From-thewilderness.com* is anything but an archival website, and that no business is or has been done since 2006 from that site. Even if FTWI’s website, archival or otherwise, is considered part of its ‘plant,’ Exhibit A-27, without an accompanying declaration or affidavit explaining and authenticating it, is insufficient to raise a genuine material issue of fact. I find there is no genuine issue of material fact as to whether Ruppert uses the same plant as FTWI in the business Ruppert is currently alleged to be engaged in.

**“E. Does Ruppert use the same or substantially the same work force as FTWI?”**

“Ruppert testifies in his sworn declaration that FTWI employed eight persons, including him; that he does not employ any of these persons; and that the only thing he is doing that is at all related to FTWI is operating a blog named <http://www.mikeruppert.blogspot.com>. Ruppert further testifies that this blog is not a business, has no bank accounts, no income, no employees, and has one unpaid moderator, Jenna Orkin, who was not a prior employee of FTWI. I find there is no genuine issue of material fact as to whether Ruppert uses the

same or substantially the same work force as FTWI in the business Ruppert is currently alleged to be engaged in.

**“F. Does Ruppert use the same or substantially the same supervisory personnel as FTWI?”**

“In its Amended Formal Charges, the Agency alleges that Ruppert was the registered agent, founder and sole owner of FTWI at all material times. Respondents admit that allegation in their answers. However, the Agency does not specifically allege, and Respondents do not specifically admit, that Ruppert was Complainant’s supervisor or a supervisor at FTWI. Looking at this evidence in a manner most favorable to the Agency, it is possible to infer that Ruppert was a supervisor at FTWI.<sup>5</sup> Ruppert’s sworn declaration in response to the Agency’s interrogatories also establishes that Ryan Spiegl, an employee of FTWI, was FTWI’s ‘IT manager.’ Looking at this evidence in a manner most favorable to the Agency, it is also possible to infer that Spiegl was a supervisor at FTWI. In Ruppert’s sworn declarations, he states that the operation that the Agency contends is a successor business is merely a blog -- [http://www.mikerup-](http://www.mikerup-<br/>pert.blogspot.com)

[pert.blogspot.com](http://www.mikerup-pert.blogspot.com) -- that he operates and that it has no employees. In order to have supervisory personnel, a business must first have employees. The Agency has provided no evidence to show that Ruppert has any employees. With no evidence in the record that Ruppert is operating a business that has any employees, I find there is no genuine issue of material fact as to whether Ruppert uses the same or substantially the same supervisory personnel as FTWI.

**“G. Under Ruppert, do the same jobs exist under substantially the same working conditions as under FTWI?”**

“In the Amended Formal Charges the Agency alleged and Respondents admitted or do not deny that:

- i Complainant worked as a staff/writer/assistant at Respondent’s office in Ashland, Oregon.
- i FTWI had a shipping and receiving area.
- i Complainant had a desk.

Relevant to this issue, Ruppert testifies as follows in his sworn declarations:

- i FTWI had eight employees, including an IT manager.
- i Ruppert has no employees, but uses his

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<sup>5</sup> See, e.g., *In the Matter of WINCO Foods, Inc.*, 28 BOLI 259, 300 (2007) (evidence includes inferences).

girlfriend as an unpaid moderator on his website.

- i While FTWI operated as an online business, it was edited and published by Ruppert and Spiegl, its IT manager.
- i FTWI sold books on its website by means of FTWI's employees taking orders, receiving cash, credit cards and checks for deposit to banks or credited in bank accounts of FTWI.
- i FTWI maintained the books it sold at its Ashland office and sold, packaged, and shipped them from Ashland to purchasers. No books have been sold from the archival website.

Without employees, it is impossible for the same jobs to exist. Based on Ruppert's sworn declaration that he has no employees and the Agency's failure to provide any evidence to the contrary, I find there is no genuine issue of material fact as to whether Respondent's alleged successor business has the same jobs under substantially the same working conditions as existed under FTWI.

**"H. Does Ruppert use the same machinery, equipment and methods of production as the predecessor?"**

"In its Amended Formal Charges, the Agency asserts that '[t]he similarities between the business conducted by Respondent FTWI dba FTWP and that currently conducted by Respondent Ruppert would dictate the same or similar machinery, equipment and methods of production.' Ruppert denies this allegation in his answer. In his sworn declaration, he states that he no longer sells books directly from his website. The Agency case presenter's arguments to the contrary are insufficient to raise a material issue of fact. Given that Ruppert publishes a blog, the forum can reasonably infer that he uses a computer, which the forum also infers that Ruppert used at FTWI to carry out FTWI's business. Given Ruppert's declaration that FTWI maintained the books it sold at its Ashland office and sold, packaged, and shipped them from Ashland to purchasers, the forum also infers that FTWI used some type of equipment to ship books. There is no evidence that Ruppert uses any of this same machinery or equipment as FTWI. Although Ruppert's 'method of production' for posting articles on his blog may be similar to FTWI's method of posting its newsletter online, in that they both involve interaction with an internet website, this is insufficient evidence, considering the entirety of FTWI's business, to raise a genuine issue of material fact

regarding whether Ruppert uses the same machinery, equipment and methods of production as FTWI.

**“I. Does Ruppert produce the same product as FTWI?”**

“In its Amended Formal Charges, the Agency alleges that ‘Ruppert essentially produces the same product as [FTWI] in the form of commentary on government cover-ups and conspiracies and by providing a forum for peak oil issues.’ Ruppert argues that FTWI’s ‘product’ was ‘the taking of orders, processing of orders and shipping of books and articles, which included books and writings authorized by Michael Ruppert’ and denied the Agency’s allegation in his answer. As an aside, the forum notes that there is a material difference between the business of writing books and the business of selling them.

“It is undisputed that FTWI published an online newsletter and sold books, including those written by Ruppert, that it advertised and sold on its website. Ruppert currently produces a blog, and neither Ruppert nor the Agency produced any evidence to show the similarity – or lack of similarity – of Ruppert’s blog to FTWI’s newsletter. In Ruppert’s sworn declaration, he testifies that he does not directly sell books, that he has not sold any books on the *Fromthewilderness.com* website since January 2007, and

that Ruppert’s books are sold by his publisher through *Amazon.com*. The Agency’s only evidence to the contrary is Exhibit A-27, referred to earlier, and the Agency’s argument that Ruppert continues to produce the same product. Although Ruppert’s name appears frequently on pages 1-3 of A-27, A-27 also corroborates his assertion that his books can only be purchased through *Amazon.com*. The Agency bears the burden of persuasion on this issue, and has not met the burden of showing there is a genuine issue of material fact as to whether or not Ruppert’s alleged successor business is in the business of direct book sales. However, since neither the Agency nor Respondent has produced any evidence pointing out the difference, if any, between FTWI’s newsletter and Ruppert’s blog, the forum concludes that there is a genuine issue of material fact as to whether they are the same product.

**“Conclusion**

“A genuine issue of material fact exists with regard to three of the nine factors contained in the Agency’s test used to determine whether a respondent is a successor. Although not every element of the test need be present to find an employer to be a successor, in this case the Agency has failed to raise sufficient genuine material issues of fact to survive

Ruppert's motion for partial summary judgment.

"In passing, the forum notes that the Agency appears to view Ruppert's motion for summary judgment as a preliminary skirmish, instead of a procedural matter that carries with it the potentiality and weight of a final order. The following quote from the Agency's response is illustrative of this point:

'Since the filing of its case summary, the Agency has uncovered additional facts in support of its successor in interest theory against Ruppert and that evidence will be disclosed at hearing, at the appropriate time for proving the elements of its case.'

This statement completely misses the target. Argument and a reference to undisclosed evidence is not evidence. If the Agency had additional evidence in support of its successor in interest theory, its response to Respondent's motion for partial summary judgment was the 'appropriate' time to present enough evidence to cast reasonable doubt on Respondent's sworn statements, instead of arguing that this is an inappropriate time to disclose that evidence.

"Based on this ruling, the Agency cannot prevail on its allegation that Ruppert is a successor in interest to FTWI. As the Agency has alleged no

other legal theory for naming Ruppert as a respondent, the charges against Ruppert as an individual respondent are hereby dismissed.

"This interim order will become part of the Proposed Order that is issued subsequent to the hearing."

**"IT IS SO ORDERED"**

41) On June 22, 2009, Lee Werdell filed a written notice with the forum stating that he was withdrawing as attorney for Respondent FTWI and that Michael Ruppert would appear at hearing on behalf of Respondent FTWI.

42) At hearing, the ALJ required Michael Ruppert to write and sign a statement giving himself to the authority to represent Respondent FTWI at hearing as its authorized representative.

43) At the start of the hearing, the ALJ orally advised the Agency and Ruppert of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

44) During the hearing, Respondent asked to call Ryan Spiegl as a witness in support of its case in chief. The Agency objected on the basis that Respondent had not listed Spiegl as a witness in its case summary, and the ALJ sustained the Agency's objection on that basis. At the time he made his ruling, the ALJ instructed Ruppert that during Respondent's case in chief he could make an offer of proof as to what he believed Spiegl's testi-

mony would have been, had Respondent been allowed to question him.

45) On August 28, 2009, the ALJ issued a proposed order that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. No exceptions were filed.

#### **FINDINGS OF FACT – THE MERITS**

1) Ruppert is a former Los Angeles policeman who has been an investigative journalist for a number of years and was in his mid-50s in 2006. He is a solidly built man of average height who weighed approximately 200 pounds in the spring of 2006. He began publishing *From the Wilderness* magazine in 1998 as a monthly newsletter that was available by mail and online, operating out of Sherman Oaks, California. In time, his business grew from 68 monthly copies to an online bookstore. The newsletter focused on “peak oil” and “sustainability” issues. In February 2006, Ruppert moved to Ashland, Oregon, continuing his same business in an office building in Ashland.

2) On April 5, 2006, Ruppert’s business was incorporated in Oregon as From the Wilderness, Inc. (“Respondent”), with Ruppert as the sole shareholder. At that time, Respondent employed at least four persons, including Complainant.

3) Once in Ashland, Ruppert began looking for an editor to help him. Up to that time, he had been

doing all the editorial work for his business and needed help with the workload. Complainant’s neighbor told him about Complainant, who had journalistic experience, a bachelor’s degree in English and a master’s degree in writing, and was living in Ashland. Ruppert thought she had the qualifications he was looking for in an editor, and told the neighbor to ask Complainant to submit an application.

4) On February 27, 2006, Complainant sent a letter, resume, and writing samples to Ruppert. On March 3, 2006, she completed an application for employment with Ruppert, and Ruppert interviewed Complainant and offered her a job, which Complainant accepted.

5) Complainant, who was working at a realty management company at the time, looked at the job as an opportunity to get into professional journalism and publishing and thought the job could be a starting point for her career. In addition, Complainant was interested in the issue of sustainability, and Ruppert offered her a larger salary than Complainant had earned at any other job. From a “professional standpoint,” Complainant believed it was the ideal job for her. At that time she was 25 years old, of average height, and slender.

6) Complainant started work on March 6, 2006, as a staff writer and editor at the salary of \$500 per week. Her primary job duties were to format news stories for Ruppert’s webmaster, edit and

format stories received from freelance writers, and edit and format Ruppert's hard copy newsletter. Throughout her employment, Ruppert was her immediate supervisor.

7) On March 11, 2006, the *Ashland Daily Tidings* published an article about Ruppert's business that described Ruppert and his business and included the following statement:

"From the Wilderness' now employs six people including Ruppert. Two came with him from Los Angeles and four more have been hired locally since he arrived. He even hired a young writer, Lindsay Gerken, to cover local sustainability issues."

8) During her employment, Complainant generally started work at 10 a.m. and left work between 6 and 9 p.m. Sometimes she arrived late at work.

9) Throughout her employment, Complainant liked the type of work she performed for Respondent, as her passion was writing and the job involved writing. As her employment continued, she was torn between working in an uncomfortable work environment and performing work that she liked very much.

10) Complainant and Ruppert often worked late together after all other employees had left for the day so they could work without interruption.

11) Near the beginning of her employment, Complainant got

a bad sunburn on her shoulders while rock climbing. When she came to work, she asked Ruppert if he would put some aloe on her shoulders, which he did. A few days later, Ruppert told Complainant how much he had enjoyed putting the aloe on her shoulders and touching her at that time. This made Complainant feel uncomfortable.

12) Soon after the aloe incident, Complainant was rubbing tiger balm into her forearms while at work. Ruppert reached out and touched her arm and said he would rub it in for her. Complainant pulled her arm away and told him no. This made her feel uncomfortable.

13) In Complainant's first few weeks of employment, she came into the office wearing a skirt that stopped just above the knee. Ruppert looked her up and down and Complainant responded "It's just a skirt." Complainant felt this was "chauvinistic."

14) While working for Ruppert and Respondent,<sup>6</sup> Complainant wore "G-string" underwear. Once, she bent over to write a note on the editorial board and the back of her underwear became exposed. Ruppert, who was nearby, commented "thank you." Complainant did not realize why he was saying "thank you" until she noticed that some of her bare side was showing, at which

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<sup>6</sup> Complainant was Ruppert's employee until Ruppert incorporated his business on April 5, 2006.

point she stood up and kept writing. Ruppert's comment made Complainant feel very uncomfortable. No evidence was presented to show the date on which this incident occurred.

15) One day, Complainant wore a shirt to work with a decorative bow on the back of it. A friend came to meet Complainant for lunch. In Ruppert's office, in front of Complainant's friend, Ruppert asked Complainant in a joking manner -- "What happens if I pull that bow?" Complainant was shocked, taken aback, and felt uncomfortable. She responded "Nothing, it's just decorative." Complainant complained to Reinert about this incident. No evidence was presented to show the date on which this incident occurred.

16) During her employment with Ruppert and Respondent, Complainant also complained to Crews that Ruppert was "coming on to her."

17) Ryan Spiegl worked for Respondent from May 2004 to June 2006 as webmaster/programmer/IT manager. He worked from 8 a.m. to 4 or 5 p.m. Complainant was attracted to Spiegl and, shortly after she was hired, asked Ruppert if it was appropriate for her to pursue a relationship with a co-worker. Ruppert assured her it was fine. Complainant then learned Spiegl was in a committed relationship. They remained friends, but Complainant did not pursue the relationship on a romantic level.

18) The "subject of sex and sexuality" came up often in discussions between Complainant and Ruppert as topics related to their work, particularly with regard to the works of Stan Goff, Ruppert's veteran's affairs writer, who had just finished his most recent book, entitled *Sex and War*. In one discussion involving Goff's work, Ruppert told Complainant that he views pornography. Complainant told Ruppert that she had also seen some pornography but, but did not appreciate "XXX films that degrade women." "More towards the beginning or middle" of Complainant's employment, Ruppert told Complainant he had created a "personal disk" he wanted to give to her. Complainant, who did not know the contents of the disk, told him "fine." The next day, he said he had decided not to give the disk to her because he valued their friendship and he wouldn't want giving the disk to Complainant to disturb their friendship. Complainant concluded from this statement that the disk contained materials she might have found offensive.

19) Ruppert called Complainant into his office many times to talk. Towards the end of her employment, Ruppert asked Complainant "a few times" what her sexual preferences were and brought up pornographic websites on his computer monitor during their conversation. Although Ruppert did not ask Complainant "to come around the desk and look," Complainant was able to

see the monitor screen “with a glance” from where she sat.

20) Complainant’s work was “good” between mid-April and mid-May 2006, and on several occasions, Ruppert talked with Complainant about promoting her to assistant editor. Ruppert considered promoting Complainant based on her skills with the English language<sup>7</sup> and because he did not know if he could find another person in the Rogue Valley who could replace her skill and experience.

21) Towards the end of Complainant’s employment, Ruppert gave Complainant a letter that he characterized as a “mentoring document.” In the letter, Ruppert counseled Complainant. In pertinent part, it read:

“I thought it might be better if I wrote to you because we — above most other mice — are able to communicate well with anything.

“I’m going to talk to you as a boss and a friend — as someone who actually cares about you deeply.

“There is nothing wrong with you but you. The same thing almost always applies to me to — the only thing wrong with me is me. When I point a finger out at someone or something, I fail to notice

that there are four pointing back at me.

“Please take these words not as a lecture but as words of experience, offered out of selfishness (to see you become a better manager) and out of affection.

“I see you reacting to a lot of pressure. But almost every bit of your pressure is self-created and not imposed by an outside source. If you view your pressures as all originating from outside then you are both a victim and powerless to change anything; which leads to a perception of panic, crisis and breakdown. Example: It was you that insisted on having a new sub-only story every day. I knew it would be too much and I was right. You jumped into publisher and told us what you needed as if you would have no problem shouldering the additional work. I didn’t order you to do that and I’ve been waiting for you to come to me and say, ‘Mike, with the newsletter stuff, I find that I can’t keep up so we need to figure something out.’ That would have been a sure sign that you were getting ready to manage other people. But no one is capable of managing other people until they have demonstrated they’re able to manage themselves. That’s where you’re a little weak.

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<sup>7</sup> In Ruppert’s words, Complainant “had gifts with the English language that were absolutely priceless.”

"[This is not about being right or wrong, it's about learning and growing. We are all weak in places and all still growing and learning.]

"You stepped up to the plate beautifully this week but I think you bit off too much.

"You don't have to worry about impressing me. You have already won my heart, mind and earned my professional respect. I'm not breathing down your neck. Now if you could just get a little personal rhythm and self-discipline, I believe almost all of these problems would disappear. I would drive myself crazy with a different set of hours every day. The rest of us get our personal lives tended to without needing to have a reason to deviate daily.

"Sure, you have discipline, you got your degree, etc. [LOUD APPLAUSE]. But in other areas you have very little.

"But it seems that you bit off more than you could chew again. Example: getting the speeding ticket. No one asked that you run and get the DVD. And if you thought that getting it before Stan had to leave might risk a traffic ticket then good judgment wouldn't have volunteered in the first place. How much did I — as your employer — gain from having you get the DVD vs. how much did I

lose by not having you back at all in the office after lunch when I needed to collaborate and work with you? (I took care of getting the Goff story up.) No offense but I don't need that kind of help. ;-)

"I waited late in the office for you to come back. How thoughtful or managerial was it to leave me sitting here and not tell me you weren't? I have to wonder if you would manage your subordinates that way. If I had to offer an opinion I'd say that Lindsay's out of office life gets her so sideways that it leaves her off-balance when she gets to the office and that much of the time in the office is spent straightening out other issues from outside.

"No one is even remotely suggesting that you not have a personal life. First, it would destroy your amazingly beautiful personality and secondly, your work would suffer. But a professional (take me, Stan and Monica as examples) starts from having everything about the workplace become the clock, rhythm and meter of your life. Every life needs a rhythm. Work is as good a rhythm as anything, perhaps better because it happens regularly and occupies most of our waking time. Logically speaking the tree has to exist before

it bears fruit. Work is the tree. The fruit is the money that you have and the time that you have and the satisfaction that you derive from your job. When you stay with the rhythm you become more, not less, powerful.

"You already have a firm place here. So don't tell me that you think I'm adding all these burdens. Yes, I've said that a promotion has to wait until you've finished Rubicon but I didn't put a clock on it did I. When you have finished Rubicon you will tell me two things.

"First, you will tell me that you are familiar enough with the material to make sound judgments based upon it.

"Second, and perhaps more importantly, you will have shown me that you can prioritize your life, manage your time, focus on and achieve a medium-term goal.

"Ryan kind of implied that I ought to pay for your ticket. I think that you, already understand why that would be a horrible idea.

"Actions produce consequences. We are all responsible for the consequences of our own actions.

"If you need to lighten up in some work areas, come to me and we'll talk about it. I will not shame you for being

human. I will love and respect you for being mature enough to come to me. But come to me with (even partial) solutions and suggestions. I am neither a mind reader nor a slave driver. I'm your boss and your friend and someone who deeply cares about you, your future and (yes) even your happiness.

"If I were to ask you to sit down and seriously think for a while about one question, I already know what the answer would be.

"The question is, 'What are you mad at?' The answer is, yourself.

"Now, to make this all really irritating this is just the process of seasoning and maturation that I wanted you to go through. It's not over all at once, but this is the way it works for every human being who becomes a successful, happy, professional adult.

"Surprisingly, all the fun and good times that your head tells you will go away from becoming stable, do not go away. They get better and deeper and reveal truer and more substantial emotional and personal payoffs.

"No need to respond. I just thought maybe you were ready to listen to this.

"Love,  
Mike"

This letter made Complainant feel upset and “really creeped out” because she felt Ruppert was trying to keep tabs on her personal life. Ruppert’s signature “Love” made her feel “belittled.” She also felt “belittled” by Ruppert’s references to her lack of personal discipline about her attendance, as her absences were primarily caused by her numerous medical appointments.

22) Neither Ruppert nor Respondent had a written sexual harassment or attendance policy during Complainant’s employment.

23) Ruppert was physically attracted to Complainant. In his words, she “tempted” him and this was a “form of torment.” In contrast, Complainant was never romantically interested in Ruppert and never expressed any romantic interest in him.

24) One evening in mid-May when Complainant and Ruppert were alone in the office, Ruppert began complaining that he had a story he needed to get out, that he needed to free himself, and that it would be great if he could just run around the office naked for a minute to get out his “writer’s block.” Shortly afterward, Complainant was typing at her desk and Ruppert came to her open door, standing in his underwear in a “wide legged stance” with a “big smile.” Ruppert stood there for 10 seconds before returning to his office, where he put his clothes back on. This shocked Complainant. Later that same evening, Ruppert asked Complainant if she had

seen his appendix scar. Complainant said no and Ruppert pulled up his shirt and displayed his scar. This frightened Complainant.

25) Complainant complained to Spiegl that Ruppert had appeared before her in his underwear. Spiegl advised that she should communicate her discomfort to Ruppert.

26) In early May, Ruppert confronted Spiegl and Complainant and demanded to know if they were sleeping together, then attempted to physically restrain Spiegl. Spiegl pulled away and said he quit. Later, Ruppert apologized and asked him not to quit. On or about May 18, Spiegl gave two weeks’ notice that he was quitting.

27) In May 2006, Ruppert had a note on Respondent’s office bulletin board that read “Days Without Drama,” referring to the number of days since Complainant had engaged in disruptive behavior. On one of the days between May 22 and May 26, the note read “Days Without Drama – 2.”

28) On May 20, 2006, a Saturday, Complainant called Ruppert and he invited her to come to his house. Complainant came to Ruppert’s house, wearing a low cut sleeveless tank top blouse. Ruppert took a photo of her sitting on his couch, smiling.

29) Late in the day on May 26, 2006, the Friday before Memorial Day weekend, Ruppert told Complainant that he had some-

thing to tell her and said they should go into the shipping area. Once there, Ruppert started talking to Complainant about their writers' relationship, and how he would mentor her into being a great journalist. He then started talking to himself, saying "No, Mike, you're beating around the bush; just spit it out." He then said "Since you started working here, I've had sexual thoughts about you and I know you feel the same. I think of you sexually and romantically and I know you feel the same." He then said he was "in love" with Complainant and told her he was willing to have a "sexual relationship" with Complainant "if that's what she wanted." Complainant felt shocked and scared. Complainant told him he should be concentrating on the women who want to be with him, not those who don't, then left the room. Ruppert's statements were unwelcome to Complainant and made her feel distraught because she realized that his attentions were personally directed to her.

30) Complainant left work and went rock climbing all weekend with Reinert and Crews. She told them about the situation and asked their advice. Complainant also called her parents and asked for their advice, as well as calling a lawyer and asking for advice. Everyone told her to confront the situation.

31) On Tuesday, May 30, 2006, the day after Memorial Day weekend, Complainant found a CD marked "personal" in her

locked desk when she arrived at work. The CD was placed there by Ruppert and contained "legal" pornography that he had downloaded from the internet. Because only Complainant and Ruppert had a key to open her desk, Complainant assumed the CD had been placed there by Ruppert. She also believed that it contained "inappropriate" content, namely, pornography. Deciding to return it to Ruppert, she did not listen to or view its contents. She called Spiegl and asked his advice, and Spiegl advised her to confront Ruppert about it. Complainant decided to work until the end of the day before confronting Ruppert.

32) During the workday on May 30, 2006, Ruppert came into Complainant's office and told her he had been thinking of giving her a raise. Complainant told Ruppert she needed a few more months of work and experience in formatting the newsletter before she deserved a merit raise. Ruppert did not disclose the amount of the proposed raise.

33) At the end of the workday on May 30<sup>th</sup>, Complainant went into Ruppert's office and told him she needed to talk with him. Complainant told Ruppert she got the CD, that she was returning it to him, and that she thought giving it to her was "unprofessional." Complainant also told him that, although he said his comments in the shipping department the previous Friday "did not require a response," she wanted to respond. She told him that she did

not think about him sexually and that she had no emotional feelings towards him. She added she was sorry if that hurt his feelings, but that she needed to know if their relationship could continue on a professional level. Ruppert said that was "fine," that he would take back the CD, and that they could continue working on a professional level. Ruppert also said that he wished that she had kept the knowledge of the CD just between them. At this same time, unbeknownst to Complainant, Spiegl was trying to text Complainant on her cell phone. Ruppert also made a "deliberately egregious comment to Complainant" which might have been something about "fisting." Spiegl then walked into Ruppert's office. Complainant assured Spiegl that things were fine. Ruppert asked what they were talking about. Complainant told Ruppert that Spiegl was aware that she had returned his inappropriate CD, and she had just let Spiegl know that Ruppert had taken back the CD and had assured her that they could continue to work together on a professional level. Ruppert became extremely angry and started yelling, accusing Complainant of calling him a "flasher" because of the underwear incident, and seemed embarrassed and upset that Complainant had told Spiegl about his behavior. After Ruppert left, Complainant told Spiegl that she had just lost her job. (Testimony of Complainant, Spiegl, Ruppert)

34) Prior to May 31, 2006, Ruppert gave Complainant no

written warnings regarding her attendance, performance, or her attire at work other than the "mentoring" letter. Prior to May 31, 2006, Complainant was not counseled that her job was in jeopardy.

35) On the morning of May 31, 2006, Complainant looked on Craig's List, where most jobs in the Rogue Valley are posted, and saw her own job posted. Based on that, Complainant concluded she was going to be fired.

36) In response to seeing her job advertised on Craig's List, Complainant wrote a five-page, single-spaced document detailing "what specific incidents during my brief, three-month employment have led me to feel sexually harassed by my employer." Her hope was to state "in writing and in detail the incidents that had occurred that led up to the incident where I gave back the CD." That same day, Complainant emailed the finished document to Spiegl, Psomas, her parents, and her grandfather, who is an attorney, in an attempt to "authenticate it" by the date she wrote it.

37) After writing her five-page note, Complainant called in late to work and talked with Ruppert. Ruppert was angry and yelled at her and told her she was fired. Ruppert said that if she wanted her job back, she needed to come into the office and he would tell her what she needed to do. Complainant was fearful of going into the office alone and did not go to work that day. She was a member of an Ashland conservation commission that had a

meeting scheduled for that night, and Ruppert told her "I'll get you off that commission so fast it will make your head spin." This upset Complainant because of the threat and because she had gone to a lot of effort to be appointed to that commission.

38) Between the time Ruppert left work after the May 30 confrontation with Complainant and Spiegl and June 1, Ruppert prepared a probationary agreement for Complainant to sign. Fully expecting that she would refuse to sign it, he also prepared a termination notice.

39) On the morning of June 1, 2006, Complainant obtained counsel from a local attorney before reporting to work. At work that day, Ruppert, in the presence of Monica Psomas, another employee, gave Complainant two documents. One was entitled "PROBATIONARY CONDITIONS OF EMPLOYMENT." The second was entitled "NOTICE OF TERMINATION." When Complainant read the probationary notice, she believed that Ruppert was trying to transfer the blame for his actions to her. Ruppert told Complainant if she did not want to sign the first document, then she was fired and she should sign the termination slip. Based on the advice of the local attorney she had consulted that morning, she did not sign the termination slip.

40) The probationary notice stated:

"EMPLOYEE: Lindsay Gerken

"DATE/TIME THIS REPORT:

May 31, 2006/1200 hrs

"As a result of disruptive behavior which has threatened the ongoing operations of the company, poor time management skills, excessive unscheduled absences, late shows and dramatic incidents and outbursts you are hereby placed on 30-day probation subject to the following terms and conditions. It is understood by both FTW Publication and the employee that violation of any of these condition will be grounds for immediate dismissal without further consultation.

"1. Your daily start time is 10:00 AM. Being more than 10 minutes late without prior approval will constitute a violation.

"2. Excluding lunch hours, your daily work schedule is to include at least eight hours of work. Since you are in a salaried position you will be required — as are all salaried employees — to occasionally work overtime without extra compensation.

"3. Your lunch breaks are to be exactly one hour and no more unless prior approval is given for things like medical appointments and other essential personal business.

"4. You are to refrain from exceeding the authority vested in your position and are charged with following the corporate chain of command.

"5. You are to cease and desist from any form of disruptive behavior, office gossip about your personal life or the personal lives of fellow staff members, or the creation of any conflict between staff members or between the staff and yourself.

"6. You are to complete all work assignments in a timely, professional manner.

"7. As much as possible you are to keep personal problems and issues out of the office.

"8. At all times while at work, your clothing, regardless of whether you are standing, sitting or bending over shall completely cover your buttocks and underwear.

"I have read acknowledge and understand these terms. I accept these terms and have been given a copy for my own records."

41) The termination notice stated:

"EMPLOYEE: Lindsay Gerken

"DATE/TIME THIS REPORT: May 31, 2006/1200 hrs

"DATE/TIME TERMINATION: Immediately upon issuance of this notice.

"Effective immediately your employment with FTW Publication, Inc. is terminated.

"CAUSE OF ACTION: Excessive unscheduled absences,

excessive late shows at work, poor time management, engaging is [sic] disruptive, manipulative behavior affecting the entire office staff and endangering the successful operations of the company."

42) June 1, 2006, was also Spiegl's last day of work for Respondent.

43) Complainant believed she had been fired because she told Spiegl about Ruppert's sexual harassment.

44) Complainant became very upset when she was fired, and called her mother and told her she had been fired. Complainant thought she "was on her way with her career" and being fired was a "big blow" to her.

45) On June 6, 2006, Complainant visited her primary care physician because she was very depressed and distraught over the loss of her job. Complainant, who was 25 years old while employed by Respondent, had bouts of depression when she was a teenager, but her depression and anxiety had been controlled for a number of years before she began work for Respondent. When she was fired, her anxiety snowballed and she started having panic attacks. Her doctor prescribed the generic form of Xanax, a drug used to treat panic attacks, to be taken as needed. Subsequently, Complainant had this prescription refilled once.

46) When she was fired, Complainant also feared retaliation.

tion by Ruppert, in part because the handguns that he possessed.

47) Ruppert is a firearms expert. There have been two documented attempts on his life in the past. When Ruppert went to visit Pat Tillman's mother in San Jose in early May while working on the Tillman exposé, he took two Smith & Wesson pistols with him, one as a backup gun. He brought a traveling case with him for the guns. In a staff meeting, he showed the guns and waved one around the room. Every employee knew that Ruppert kept one of the pistols in a folder in his desk in the event any violence occurred, for the protection of his company and his employees. After her termination, Complainant was afraid of Ruppert, in part because he had told everyone he kept a concealed weapon with him. Complainant bought window locks for her house and asked all her neighbors to let her know if Ruppert was in the neighborhood.

48) Except for reading Ruppert's website, Complainant had no communication with Ruppert from the date of her termination until the hearing.

49) Ruppert never made any threats to physically harm Complainant; he only made threats to harm her professionally.

50) Complainant had never been fired before. Losing her job was a major blow to her self esteem, and she began to second guess her work ethic and ability to create a positive work experience with her employer.

51) After Complainant was fired, she wanted to get a job that did not have a male manager. It took her a few months to be comfortable working for an employer with a male in authority.

52) At the time she was fired, Complainant lived in an apartment that rented for \$495 a month. After she was fired, she could no longer afford that amount of rent and moved in with a friend who rented a room to her.

53) In June 2006, Complainant started work on a limited part-time basis at the same job she held when hired by Respondent. In mid-July, she obtained additional part-time work at a graphics company. She had to spend all \$5,000 of her life savings that she had earned while working for her prior employer and had to ask her mother and stepfather for financial help for a few months.

54) On July 18, 2006, Ruppert left the United States and relocated to Venezuela. There is no evidence that Respondent continued operating after that date.

55) Had she not been terminated by Respondent, Complainant would have earned \$3,300 in gross wages between June 1 and July 17, 2006 (June 1 through July 17 = 33 days = 6 weeks + 3 days @\$500 per week).<sup>8</sup> In June 2006, she earned

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<sup>8</sup> No evidence was presented showing the amount of Complainant's last pay check or what time period it covered, and the forum infers that Complainant

\$457. In the first half of July 2006, she earned \$129.57 gross wages working for the same employer, for a total of \$586.57. Her gross lost wages total \$2,713.42 (\$3,300 - \$586.57 = \$2,713.42).

56) Shortly after Complainant was fired, someone emailed a copy of the five-page document described in Finding of Fact 36 – The Merits to Victor Thorn, Ruppert’s “sworn internet enemy” and rival. On June 15, 2006, Ruppert responded by sending Thorn a three-page email that included the following statements:

“ \* \* \* \* \*

“Since you refused to answer whether or not you were going to publish the name of the individual referenced in your email dated June 12<sup>th</sup>, I am at a legal handicap in my ability to respond fully and completely. \* \* \*

“As the former employer of the individual in question there are things that I cannot disclose unless and/or until that individual either files a legal action of [sic] identifies herself publicly and affirms the statement. Accordingly, all documents furnished herewith have been redacted to exclude this individual’s name. If you reveal it, then the onus and legal liability will be on you.

“I am also putting you on legal notice that, per se, any defamation which involves sexual conduct is

libelous. \* \* \* By all legal standards you must make sure that this alleged fact is accurate. If it is, in fact, the same document I have seen, it contains inflammatory and retaliatory allegations from - as you will see - an individual who is obviously a disgruntled former employee.

“ \* \* \* \* \*

“Basically, this is a very troubled individual whom I believe is in need of help, which I sincerely hope she gets. She was terminated for cause on June 1st and is not eligible for rehire. A redacted copy of her termination is attached, as is a ‘probationary’ employment contract which would have served as written notice to correct deficiencies had she accepted it. \* \* \*

“Very little of this dispute has to do with me personally. Attached you will find three signed statements from *FTW* office staff. A fourth witness, a female, is not available today to respond in time to meet your deadline. None of them corroborates, or will corroborate, what you or she will apparently be alleging.

“Shortly after being hired, the individual in question engaged in a sexual relationship with an employee here who was already involved in a committed relationship (according to him) with another woman in California. The woman who was terminated, after starting this relationship with my employee, used an *FTW*-owned cell phone to place 103 telephone calls to

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was paid in full through May 31, 2006, but did not receive any other pay.

our male employee during the course of her last month of employment alone. Why this was necessary is unknown since her office and his were next to each other. This was a direct violation of our stated policy, agreed to by her verbally, when the phone was issued.

"How many people call others 103 times in one month? Of course I have the records to prove this. That much I can disclose. Many of these calls were made during hours when she was supposed to be working.

"Shortly after commencing the sexual relationship with our employee, the same individual, who you are basing your article on, made inappropriate sexual advances, overtures, and remarks to another male *FTW* staff member who is married. He strenuously objected at the time. His statement is attached.

"This second male staff member became concerned and attempted to warn the first male staff member who was apparently disinclined to listen. This ultimately resulted in a physical altercation involving the now-fired female employee, the second male staff member and the first male staff member on the evening of Sunday, April 2<sup>nd</sup>. After the altercation the young woman hurried to my home at 10:30 at night in a state of high drama which seems to be, for lack of a better term, her drug of choice. This resulted in the first counseling session with the

young woman in front of witnesses.

"Not long after that, the now-terminated employee, engaged in a loud, abusive verbal assault on a third male employee of *FTW* \* \* \*. In that case the young woman used loud, abusive language, strong profanity and personal insults. This was all complicated by the fact that this third male employee did not work for the young woman and was not under her supervision, or even in her department.

"This resulted in a second intense counseling session with the young woman wherein she started talking about hiring and firing people. I am the only one who hires and fires at *FTW*. Because we all had hopes that she could [sic] be saved and her writing skills honed and developed, it was decided not to terminate her then. I deeply regret that decision.

"Finally, after the first male employee (with whom the young woman had remained romantically involved), gave sudden and dramatic two-week notice - I now suspect as a result of manipulation by the young woman - I noticed that the woman's work performance was suffering enormously. The same woman had been making inappropriate sexual advances, remarks and comments to me for several weeks and at one point I had stridently emphasized that this was not the way I wanted the relationship to work.

“Sadly, this young woman is extremely bright and has an enormous potential to be a successful writer/editor someday, if she can acquire control of her personal life and conduct.

“ \* \* \* \* \*

“It is best that all cards in all hands be placed on the table now to prevent this person from harming more people's lives than she already has. The only way that can happen is if this former employee files a legal action which will untie my hands.

“Therefore, it is my express wish that she file a legal action against me at the earliest possible moment. At that time I will be freer to disclose substantial additional evidence which will completely and utterly destroy her credibility and leave WNG TV well out on a very long, libelous and creaky limb. That would constitute an early Christmas present for me.”

Complainant became aware of and read this email for the first time sometime between November 13, 2006, and October 18, 2007, during Yates's investigation of her complaint. When she read it, it embarrassed her because it portrayed her as promiscuous. She felt that her career was threatened because the email was potentially available through the internet. She also felt that Ruppert had written it to intimidate her, knowing she would read it.

57) On or about June 25, 2006, Respondent's office was burglarized and vandalized. All of Respondent's computers were destroyed. On June 28, 2006, Ruppert emailed a statement to the Ashland city police that implied, among other things, that Complainant was involved in the burglary and had thrown raw eggs and a quart of chocolate milk at the front of his house.

58) After the burglary, Complainant was considered a suspect by the Ashland police, who contacted her three times in a two week period, came to her apartment, questioned her, and searched her apartment. This upset her considerably. She eventually took a “CVSA,” a voice stress test administered by the police, and passed the test.

59) On August 25, 2006, the *Ashland Daily Tidings* published an article about Ruppert's move to Venezuela that was written by Robert Plain, an employee of the *Tidings*. In the article, Plain stated that Ruppert believed that a former female employee whom he had fired had burglarized his office and that Ruppert suspected the employee of trying to use his shipping department to smuggle methamphetamine. Plain quoted Ruppert as stating that “her behavior was entirely consistent with meth addiction.” Plain's article also raised issues about Ruppert's “mental well-being,” based on a statement of friend of Ruppert's, and concluded that “government plots against him have been one of the most consistent aspects to

[Ruppert's] career as a writer." Complainant read Plain's article. The statements attributed to Ruppert upset her and made her feel "embarrassed" and "like a criminal." The article also made her reluctant to attend Ashland conservation commission meetings.

60) On August 16, 2006, Ruppert posted an article on the internet entitled "By the Light of a Burning Bridge – A Permanent Goodbye to the United States." Several lengthy paragraphs, quoted below, referred specifically to Complainant.

"It is almost certain that the burglary was perpetrated, at minimum, based upon inside information provided by recently fired or resigned FTW staff members. \* \* \*

"The burglary followed on the heels of my humiliation of the perpetrator of a feeble and stupidly executed sexual blackmail plot that began when a newly-hired staff writer (with a clean record and a Master's degree in English) began a torrid (and not very discrete) sexual affair with my long-term IT manager. The IT manager was, at the time, involved in a committed relationship with a woman in Los Angeles. The same female employee also made simultaneous direct sexual advances to my Operations Manager who is married. These included her showing naked photographs of herself to both men in our offices, something which they kept from me until later.

"Eventually the sexual intrigue resulted in an altercation between the three which wound up on my doorstep late on a Sunday night in April. It seems no one involved in the altercation was capable of telling the whole truth. It was also clear that my IT manager - who was known for his appetites - had fallen hopelessly in the grasp of an attractive sexual smorgasbord that was fulfilling his every wish. This is what he said to people in phone conversations who later told me about them. He reportedly described her as a 'sexual demon.' \* \* \*

"After all of the previous attempts to sink FTW over the years I was well-prepared when the same woman started making advances to me. How dumb did they think I was? I concealed a tape recorder in my office as she directed me, after regular office hours, to pornographic web sites and continually tried to tempt me with scanty outfits, G-strings and hints of sexual delights including descriptions of her private parts. She was doing all this at a time when she made 103 cell phone calls in one month to my IT Manager on a cell phone that FTW was paying for. I got the bills. Most of the calls were made during business hours. The second month's bill was just as bad when it arrived after she had been fired. My IT Manager had been my most trusted employee and a close friend. I

may never be able to forgive his betrayal even if the Siren's song had overwhelmed him. In previous years FTW computers had been sabotaged, our web site had been hacked, and several attempts had been made to financially sabotage our operations. Being fully aware that he was likely revealing our sensitive proprietary information, including account access codes, I had but two choices.

"I could fire the young woman. But if I did so she would be angry outside the company and still have the IT Manager as helpless as Ulysses' crew in her vindictive grasp. Or, I could keep her close, play along with her games, prepare myself against the blackmail I knew would come, and try to find out what kind of damage she was intent on doing and head it off. When she could not compromise me sexually, she turned the IT Manager against me, and he gave sudden notice. That was damaging enough. His last day of work was to be June 1st. I decided immediately that that would be her last day of work too, and so it was.

"As June 1 approached I baited her with actions I knew would force her to show her hand. She did on May 29th and that's when I let it be known how I had protected myself. \* \* \*

"Her allegations of sexual harassment against me fell flat on

their faces, and she was publicly humiliated. She had also been showing highly erratic emotional behavior consistent with drug use in her last two weeks of work. \* \* \*

Complainant, who was continuing to read Ruppert's latest internet postings, read this article. When she read it, she felt that her freelance writing career was being slandered, believing it was obvious to anyone who had read Plain's August 25<sup>th</sup> article that "the woman" and "female employee" in Ruppert's article referred to Complainant. Complainant felt that if people believed Ruppert's statements, she would not only be unable to get a job in the Ashland area, but not get a date, either. She felt "extremely embarrassed and mortified" about Ruppert's comments that she showed naked photographs of herself to Ruppert and other men in the office.

61) On January 31, 2007, Ruppert published an internet article entitled "*From Me To You – A Personal Message from Michael C. Ruppert – A Tribute to Gary Webb and a Message of Hope*" in which he described his life circumstances in the previous eight months. With regard to Complainant, he wrote:

"And one former employee waited five months until November to charge me with sexual harassment, not in a civil court or with the police department but with the Department of Labor in Oregon. That charge was filed at a time when it wasn't clear at all

whether I would get out of Venezuela alive, let alone in time to respond. But respond we did, with documentation that demolishes her allegations. We believe we have beaten that case but should it go to a hearing we will go to Ashland with additional documentation and evidence that will put that matter to rest forever.”

Complainant read this article and believed that Ruppert’s statement was designed to intimidate her.

62) On August 21, 2007, Ruppert sent an email to Detective Randy Snow of the Ashland Police Department regarding the June 25, 2006, burglary of Respondent’s office. In the email, Ruppert again accused Complainant of the burglary. He also accused her of having sexual relationships with Bob Plain, the *Ashland Daily Tidings*’s columnist, Zach Evans, and Ryan Spiegl. Additionally, he stated that “[s]ex was the oly [sic] tool in Gerken’s toolbox.” Snow gave Complainant a copy of Ruppert’s email.<sup>9</sup> When Complainant read it, she considered Ruppert’s accusations to be “outlandish” because they implied that Plain only wrote an article that was critical of Ruppert because Complainant had provided Plain “with sexual favors.”

63) On October 24, 2007, Ruppert sent another email to a

Detective Snow regarding the burglary case. In the email, Ruppert speculated as to the identity of the father of Complainant’s child and added that “[s]omeone was running [Complainant] and telling her what to do.” Snow described Ruppert’s statements to Complainant and told Complainant it was extremely inappropriate for Ruppert to bring up the percentage of Complainant’s child in the context of a burglary investigation.”

64) Complainant saw a mental health counselor in May 2008 and discussed this case with the counselor.

### CREDIBILITY FINDINGS

65) Eric Yates is an experienced investigator who is employed with BOLI’s Civil Rights Division. Except for authenticating documents, his testimony consisted of reading typed interview notes taken or documents received from in the course of his investigation, as he had no independent recollection of his interviews or the contents of those documents. The forum has credited his testimony in its entirety.

66) Mike Reinert and Complainant are friends who met in or around 2004 while both were attending Southern Oregon University and who frequently went rock climbing together when Complainant was employed by Respondent. After Complainant’s termination, Reinert continued to climb rocks with Complainant and helped her find a new living situation and move there. Reinert

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<sup>9</sup> There was no evidence to show the date when Snow gave the email to Complainant.

answered questions on direct and cross examination directly, without hesitation. Despite his friendship with Complainant, he did not exaggerate or speculate when asked to describe what Complainant told him about Ruppert's behavior, and he did not volunteer any information that he thought might be helpful to Complainant. The forum has credited his testimony in its entirety.

67) Steve Crews and Complainant are good friends who met in 2003 and were rock climbing partners. Like Reinert, Crews answered questions on direct and cross examination directly, without hesitation, he did not exaggerate or speculate when asked to describe what Complainant told him about Ruppert's behavior, and he did not volunteer any information that he thought might be helpful to Complainant. The forum has credited his testimony in its entirety.

68) Rebecca Jones had a natural bias as Complainant's mother. Her testimony was limited to what Complainant told her, what she and her husband told Complainant, and the financial assistance they gave Complainant after she was fired. Regarding Complainant's termination, she testified that Ruppert had offered Complainant a promotion, then fired her because she refused to accept the promotion. The forum did not believe this statement because no one else testified to this version of the facts. However, the forum has credited the rest of her testimony because it was consis-

tent with other credible evidence in the record.

69) Stephen Jones had a natural bias as Complainant's stepfather. His testimony was limited to what Complainant told him, what he told Complainant, and a statement about the financial assistance he and his wife gave Complainant after she was fired. He was not impeached in any way and the forum has credited his testimony in its entirety.

70) Jamie Hecht was a former writer for Respondent and self-described "colleague" of Ruppert who was called as an impeachment witness. In his testimony, he was boastful, pompous, and self-righteous. For example, he identified himself as "Dr. Jamie Hecht" based on his 1995 PhD in English and American Literature. He volunteered gratuitous statements that he apparently thought would assist Respondent's case. For example, he stated "I do not stand in judgment upon it" when referring to a conversation he had with Complainant. When asked on cross examination why he had perceived Complainant to be "flirtatious" during a conference call when Hecht was in Los Angeles and Complainant was in Oregon, he stated "the tone of her voice; I remember feeling that her word choice was part of it; though I don't recall her word choice. It's difficult to put one's finger on, but I certainly felt as though I was in the presence of a woman being seductive. \* \* \* Sex addiction is a grievous illness which affects mil-

lions of people. That's what I felt I was dealing with." In addition, under direct and cross examination, he was unresponsive to many questions and kept volunteering information after he thought he had answered the question, despite being counseled not to do so. The forum has discredited all his testimony that was in any way relevant to the Agency's charges or Respondent's defenses.

71) Scott McGuire described himself as a friend of Ruppert who first met Ruppert when Ruppert moved his office to Ashland. As a freelance writer, he has written articles for Ruppert and been paid for them. In his testimony, he described Ruppert as a "celebrity" in the "peak oil/sustainability movement" and "a person of rare integrity," clearly showing his admiration of Ruppert. In contrast, he painted Complainant as "more common." He testified in detail about an event that allegedly occurred on May 18, 2006, in which he was speaking on a panel on sustainability in Jackson County, claiming that he observed Complainant and Ruppert sitting next to one another, with Complainant clinging to Ruppert and engaging in "overly affectionate, lovey dovey, huggy kissy type behavior" and Ruppert doing all he could to avoid Complainant's "romantic body language." This was the first time since Complainant's termination that this incident was ever mentioned, and Ruppert himself did not testify about it or ever mention it in his extensive pre-hearing writings about Complain-

ant's alleged sexual behavior. Due to McGuire's bias and the fact that Ruppert never mentioned the alleged May 18 incident before the hearing, the forum does not believe any of McGuire's testimony on that subject.

72) Ryan Spiegl, whom Respondent alleged to be Complainant's lover, answered questions directly and without hesitation. With one principal exception, his testimony was consistent with testimony of Complainant that the forum has found credible. That exception was his testimony that he never saw Complainant wearing a "G-string" or "thong" in Respondent's office, whereas Complainant testified that she wore "G-string" underwear while she worked for Ruppert and Respondent. Given Complainant and Spiegl's friendship and Complainant's acknowledgment that Ruppert saw her underwear on one occasion when she bent over, the forum finds it unlikely that Spiegl would not have been aware of her choice of underwear. In addition, he testified that Complainant once told him that Ruppert had told her he had some feelings for her that involved Ruppert masturbating to her, and that Ruppert told Complainant he thought she might have reciprocal feelings. The forum has not credited this testimony because Complainant never mentioned it in her extensive pre-hearing writings about Ruppert's alleged sexual behavior and did not testify about it. Except for those two issues, the forum

has credited his testimony in its entirety.

73) In previously written statements introduced as evidence at the hearing and his testimony about the articles and books he has written, Ruppert showed himself to be a highly articulate, productive investigative journalist who is capable of writing at great length and in great detail. When those prior statements are compared to his testimony related to Complainant's employment, the alleged sexual harassment, and incidents that occurred after Complainant's termination, numerous inconsistencies surface. Ruppert also testified extensively about specific incidents of sexual behavior by Complainant that he had never mentioned previously, despite his uncontested writing ability and extensive pre-hearing writings on that subject. These inconsistencies and "new" evidence cast a deep shadow on his credibility. It is also telling that he failed to call Evans, Flanagan, or Psomas, all former employees whom he alleged had witnessed egregious sexual behavior by Complainant, as witnesses to support his case. A few examples of the evidence that leads the forum to question Ruppert's credibility follow:

- i Although never mentioning these behaviors before the hearing, Ruppert testified that Complainant told him she was bisexual, that Complainant engaged in "lesbian" activity in his office, that Complainant had

a favorite lesbian pornography website, that Complainant suggested he take off his shirt so she could walk on his aching back, and that Complainant discussed sexual activities such as "fisting" with him at work. He testified that he did not mention these behaviors sooner because he believed the complaint would be dismissed and he was "trying not to go with the sleaze factor." In contrast, after firing Complainant, he told a local reporter that he suspected Complainant of burglarizing his office and being a methamphetamine user; and wrote in articles published on the internet that Complainant was "the perpetrator of a feeble and stupidly executed sexual blackmail plot," "showed naked photographs of herself to both men in our offices," and that she "directed [Ruppert], after regular office hours, to pornographic web sites and continually tried to tempt me with scanty outfits, G-strings and hints of sexual delights including descriptions of her private parts"; and that she showed "highly erratic emotional behavior consistent with drug use in her last two weeks of work." He also told a po-

lice detective that the identity of the father of Complainant's child should be investigated and that he suspected Complainant of engaging in sexual relationships with Zach Evans, Ryan Spiegl, and Robert Plain. In light of Ruppert's pre-hearing writings, the forum finds his excuse of "trying not to go with the sleaze factor" to be unbelievable and has disbelieved all of Ruppert's testimony regarding Complainant's sexual behavior that he did not mention prior to hearing.

- i Ruppert testified that "[t]here were so many instances \* \* \* of [Complainant] engaging in overtly sexual behavior not only with me but with Mr. Evans, Mr. Spiegl \* \* \* had I listed them all, it would have been, you know, maybe an inch thick." In the forum's view, this demonstrates Ruppert's propensity for exaggeration and casts further doubt on his credibility.
- i During direct examination by the Agency, Ruppert testified that Complainant's last day was May 31, and Spiegl gave notice on May 17. He also dated Complainant's probationary agreement and termination "May 31,

2006." In contrast, on June 28, 2006, he told the Ashland City Police that Spiegl gave notice on May 18 and that Complainant's last day of work was June 1. Earlier, on June 24, 2006, he sent out an email that also stated that Complainant was fired on June 1.

- i Ruppert testified that he told Complainant on Memorial Day 2006 or the Saturday or Sunday before Memorial Day that, "in light of her continued sexual advances I thought it might be possible to have a sexual relationship if that's what she wanted." On June 28, 2006, he told the Ashland City Police that this occurred on May 30, which was the Tuesday **after** Memorial Day.
- i Ruppert testified that his motivation for appearing in his underwear before Complainant was to provide "comic relief" for his writer's block and that it was an "editorial statement" to make light of things. In contrast, he told the Ashland City Police on June 28, 2006, that "I played along with her sexual games to the point of stripping down to my underwear once (something she had discussed) hoping to learn if she would try to blackmail me."

The forum has not credited any of Ruppert's testimony about Complainant's sexual behavior that he did not mention prior to hearing and has only credited the other parts of his testimony that were corroborated by other credible evidence or uncontested.

74) Complainant, though lacking Ruppert's experience, is also a highly articulate, productive writer who is capable of writing at great length and detail. On May 31, 2006, she wrote a five page, single-spaced letter<sup>10</sup> that she prefaced with the unequivocal statement – "I will explain now what specific incidences during my brief, three-month employment have led me to feel sexually harassed by my employer." Her testimony about those incidences at hearing was consistent with her May 31 statement, and much of her testimony was corroborated, although given a different twist, by Ruppert. Complainant testified passionately, with great conviction, about the "G-string," "underwear," and "CD" incidents, as well as her termination and the emotional and financial impact of Ruppert's actions. She also testified credibly that she was not involved in a sexual relationship with Spiegl. Ruppert asks the forum to believe that Complainant's numerous cell phone calls to Spiegl show that Complainant was involved in such a relationship, but the forum declines to draw that inference, as they are equally consistent with a friendship. At

hearing, Complainant also testified that Ruppert described his sexual experiences with other women in detail and this offended her. The forum did not believe this statement because she did not mention it in her in her detailed contemporaneous written statement or in her investigative interview, and there was no mention of it in her initial complaint or in the Formal Charges. Except for that statement, the forum has credited her testimony in its entirety.

#### ULTIMATE FINDINGS OF FACT

1) In February 2006, Michael Ruppert moved to Ashland, Oregon, from California and continued his business of publishing *From the Wilderness* magazine as a monthly newsletter that was available by mail and online in an office building in Ashland. On April 5, 2006, Ruppert incorporated his business in Oregon under the name of From the Wilderness, Inc., with Ruppert as the sole shareholder. At that time, Respondent employed at least four persons, including Complainant.

2) On March 6, Ruppert hired Complainant as a staff writer and editor at the salary of \$500 per week. Throughout her employment, Ruppert was her immediate supervisor.

3) Throughout her employment, Complainant enjoyed the type of work she performed for Respondent. As her employment continued, she was torn between working in an uncomfortable work

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<sup>10</sup> Exhibit A-1, pages 5-9.

environment and performing work that she enjoyed.

4) Near the beginning of her employment, Complainant got a bad sunburn on her shoulders while rock climbing. When she came to work, she asked Ruppert if he would put some aloe on her shoulders, which he did. A few days later, Ruppert told Complainant how much he had enjoyed putting the aloe on her shoulders and touching her at that time. This made Complainant feel uncomfortable.

5) Soon after the aloe incident, Complainant was rubbing tiger balm into her forearms while at work. Ruppert reached out and touched her arm and said he would rub it in for her. Complainant pulled her arm away and told him no. This made her feel uncomfortable.

6) In Complainant's first few weeks of employment, she came into the office wearing a skirt that stopped just above the knee. Ruppert looked her up and down and Complainant responded "It's just a skirt." Complainant felt this was "chauvinistic."

7) Once, when Complainant bent over to write a note on Respondent's editorial board, the back of her underwear and her bare side became exposed. Ruppert, who was nearby, commented "thank you" in response. This comment made Complainant feel very uncomfortable.

8) One day, Complainant wore a shirt to work with a decorative bow on the back of it. In Rup-

pert's office, in front of Complainant's friend, Ruppert asked Complainant in a joking manner -- "What happens if I pull that bow?" Complainant was shocked, taken aback, and felt uncomfortable.

9) Early in Complainant's employment, Complainant and Ruppert were discussing a staff writer's recent work entitled "*Sex and War*." In that discussion, Ruppert told Complainant that he views pornography. Complainant told Ruppert that she had also seen some pornography but did not appreciate films that degrade women. Later, Ruppert told Complainant he had created a "personal disk" he wanted to give to her. Complainant, who did not know the contents of the disk, told him "fine." The next day, he said he had decided not to give the disk to her because he valued their friendship and he wouldn't want giving the disk to Complainant to disturb their friendship. Complainant concluded from this statement that the disk contained materials she might have found offensive.

10) Towards the end of her employment, Ruppert asked Complainant "a few times" what her sexual preferences were and brought up pornographic websites on his computer monitor in her presence.

11) Towards the end of Complainant's employment, Ruppert gave Complainant a letter that he characterized as a "mentoring document" in which he stated, among other things, that

he cared deeply and affectionately for Complainant, and that she had an "amazingly beautiful personality." Ruppert signed it "Love, Mike." This letter made Complainant feel belittled, upset, and "really creeped out."

12) Ruppert was physically attracted to Complainant. In his words, she "tempted" him and this was a "form of torment." In contrast, Complainant was never romantically interested in Ruppert and never expressed any romantic interest in him.

13) One evening in mid-May 2006 when Complainant and Ruppert were alone in the office, Ruppert began complaining that he had a story he needed to get out, that he needed to free himself, and that it would be great if he could just run around the office naked for a minute to get out his "writer's block." Shortly afterward, Complainant was typing at her desk and Ruppert came to her open door, standing in his underwear in a "wide legged stance" with a "big smile." Ruppert stood there for 10 seconds before returning to his office, where he put his clothes back on. This shocked Complainant. Later that same evening, Ruppert asked Complainant if she had seen his appendix scar. Complainant said no and Ruppert pulled up his shirt and displayed his scar. This frightened Complainant.

14) Late in the day on May 26, 2006, the Friday before Memorial Day weekend, Ruppert told Complainant that he had something to tell her and said they

should go into the shipping area. Once there, Ruppert told her "since you started working here, I've had sexual thoughts about you and I know you feel the same. I think of you sexually and romantically and I know you feel the same." He then said he was "in love" with Complainant and told her he was willing to have a "sexual relationship" with Complainant "if that's what she wanted." Complainant felt shocked and scared and told him he should be concentrating on the women who want to be with him, not those who don't, then left the room. Ruppert's statements were unwelcome to Complainant and made her feel distraught because she realized that his attentions were personally directed to her.

15) On Tuesday, May 30, 2006, the day after Memorial Day weekend, Complainant found a CD marked "personal" in her locked desk when she arrived at work. The CD was placed there by Ruppert and contained "legal" pornography that he had downloaded from the internet. Because only Complainant and Ruppert had a key to open her desk, Complainant assumed the CD had been placed there by Ruppert and that it contained "inappropriate" pornographic content. Deciding to return it to Ruppert, she did not listen to or view its contents and determined to confront Ruppert about it at the end of the day. She also called Spiegl and told him about the CD.

16) The conduct by Ruppert described in Finding of Facts 11-

15 18-20, 24, 29, 31, and 33 – The Merits was directed in part or in whole towards Complainant because of her sex and was offensive and unwelcome to Complainant.

17) During the workday on May 30, 2006, Ruppert came into Complainant's office and told her he had been thinking of giving her a raise. He considered promoting complainant based on her skills and did not think he could find another person in the Rogue Valley who could replace her skill and experience.

18) At the end of the day on May 30, Complainant went into Ruppert's office and told him she needed to talk with him. Complainant told Ruppert she got the CD, that she was returning it to him, and that she thought giving it to her was "unprofessional." Complainant also told him that she did not think about him sexually and had no emotional feelings towards him. She added she was sorry if that hurt his feelings, but that she needed to know if their relationship could continue on a professional level. Ruppert said that was "fine," that he would take back the CD, and that they could continue working on a professional level. He also said that he wished that she had kept the knowledge of the CD just between them, and made a "deliberately egregious comment to Complainant" which might have been something about "fisting." Spiegl then walked into Ruppert's office. Complainant assured Spiegl that things were fine, and Ruppert

asked what they were talking about. Complainant told Ruppert that Spiegl was aware that she had returned his inappropriate CD, and she had just let Spiegl know that Ruppert had taken back the CD and had assured her that they could continue to work together on a professional level. Ruppert became extremely angry and started yelling, accusing Complainant of calling him a "flasher" because of the underwear incident, and seemed embarrassed and upset that Complainant had told Spiegl about his behavior.

19) The next morning, Complainant's job was posted on Craig's List.

20) Prior to May 31, 2006, Ruppert gave Complainant no written warnings regarding her attendance, performance, or her attire at work other than the "mentoring" letter, and she was not counseled that her job was in jeopardy.

21) On May 31, 2006, Complainant called in late to work and talked with Ruppert. Ruppert was angry and yelled at her and told her she was fired. He also told her that if she wanted her job back, she needed to come into the office and he would tell her what she needed to do. Complainant was fearful of going into the office alone and did not go to work that day.

22) After Complainant left work on May 30, Ruppert prepared a probationary agreement for Complainant to sign. Fully ex-

pecting that she would refuse to sign it, he also prepared a termination notice.

23) On the morning of June 1, 2006, Ruppert gave Complainant the probationary document to sign when she came to work. When she refused to sign it, he gave her the termination notice.

24) Neither Ruppert nor Respondent had a written sexual harassment policy during Complainant's employment.

25) At the time of and after her termination, Complainant experienced substantial emotional and mental suffering as a result of Ruppert's sexual harassment, being fired for opposing that sexual harassment, her fears of Ruppert's retaliation, and because of Ruppert's published internet statements and to the Ashland City police about her. She continued to experience emotional distress as late as 2008.

26) On July 18, 2006, Ruppert left the United States and relocated to Venezuela, and Respondent ceased operations. Had she not been terminated by Respondent, Complainant would have earned \$3,300 in gross wages between June 1 and July 17, 2006. Between June 1 and July 17, she earned \$586.57 in gross wages. In total, she lost \$2,713.42 in gross wages that she would have earned, had she not been fired.

#### **CONCLUSIONS OF LAW**

1) At all times material herein, Respondent From the Wilderness,

Inc. was an "employer" as defined in ORS 659A.001(4).

3) The actions, statements and motivations of Michael Ruppert, Respondent's sole shareholder and Complainant's immediate supervisor, are properly imputed to Respondent. OAR 839-005-0030(3).

3) The Commissioner of the Bureau of Labor and Industries has jurisdiction of the persons and of the subject matter herein and the authority to eliminate the effects of any unlawful employment practices found. ORS 659A.800 to ORS 659A.865.

4) Respondent, through its proxy Ruppert, subjected Complainant to unwelcome sexual conduct directed toward her because of her gender that was sufficiently severe to alter her work conditions and create a hostile, intimidating, and offensive work environment. By doing so, Respondent committed an unlawful employment practice based on Complainant's sex in violation of ORS 659A.030(1)(b) and OAR 839-005-0030(1)(a) and (b).

5) Respondent discharged Complainant in retaliation for opposing unlawful sexual harassment, committing an unlawful employment practice in violation of ORS 659A.030(1)(f).

6) Pursuant to ORS 659A.850, the Commissioner of the Bureau of Labor and Industries has the authority under the facts and circumstances of this case to award Complainant back pay resulting from Respondent's unlawful em-

ployment practice and to award money damages for emotional and mental suffering sustained and to protect the right of Complainant and others similarly situated. The sum of money awarded and the other actions required of Respondent in the Order below are an appropriate exercise of that authority.

### OPINION

In this case, the Agency alleges that Respondent, through its proxy Ruppert, sexually harassed Complainant, then retaliated against her by firing her when she complained of the harassment.

### SEXUAL HARASSMENT

To establish sexual harassment, the Agency is required to prove the following elements: (1) Respondent was an employer subject to ORS 659A.001 to 659A.030; (2) Respondent employed Complainant; (3) Complainant is a member of a protected class (sex); (4) Respondent, through its proxy, engaged in unwelcome conduct (verbal or physical) directed at Complainant because of her sex; (5) the unwelcome conduct was sufficiently severe or pervasive to have the purpose or effect of creating a hostile, intimidating or offensive work environment; and (6) Complainant was harmed by the unwelcome conduct. *In the Matter of Gordy's Truck Stop, LLC*, 28 BOLI 200, 210 (2007).

#### **A. Respondent was an employer and employed Complainant, a female.**

There is no dispute that Respondent From the Wilderness, Inc. was an employer subject to ORS 659A.001 to 659A.030 and employed Complainant, a female. The evidence also established that Respondent did not exist as a legal entity until April 5, 2006. Effective that date, Ruppert incorporated the business that he had previously been operating as a sole proprietorship. Until April 5, 2006, Ruppert, not Respondent, was Complainant's employer.

#### **B. Respondent, through its proxy Ruppert, engaged in unwelcome conduct (verbal or physical) directed at Complainant because of her sex.**

Ruppert, Complainant's immediate supervisor and Respondent's sole shareholder, engaged in numerous instances of unwelcome conduct, both verbal and physical, directed at Complainant because of her sex. The forum concludes that the conduct was unwelcome based on Complainant's credible testimony that it made her "uncomfortable," "shocked," "taken aback," "distracted," "belittled," "upset," and "frightened" and because of her complaints to others about the conduct. The forum concludes that the unwelcome conduct detailed below was due to Complainant's sex because of its very nature and the fact that there is no evidence that Ruppert be-

haved similarly towards male employees.

As Respondent's sole shareholder, Ruppert's conduct is properly imputed to Respondent and Respondent is strictly liable for any unlawful harassment found herein. See OAR 839-005-0030(3)("[a]n employer is liable for harassment when the harasser's rank is sufficiently high that the harasser is the employer's proxy, for example, the respondent's president, owner, partner or corporate officer").

Since Respondent did not become Complainant's employer until April 5, 2006, Respondent cannot be held liable for any harassment by Ruppert that occurred before April 5, 2006.<sup>11</sup> The forum therefore divides Ruppert's specific instances of unwelcome conduct into two categories – (1) conduct that occurred before April 5, 2006, and conduct for which no date of occurrence was established; and (2) conduct that

occurred after that date (the "actionable conduct.")

*Pre-April 5, 2006, conduct and conduct for which no date of occurrence was established*

- i The "aloe" incident<sup>12</sup>
- i the "tiger balm" incident<sup>13</sup>
- i the "skirt comment"<sup>14</sup>
- i the "G-string/thank you" incident<sup>15</sup>
- i the "decorative bow" incident<sup>16</sup>
- i the "personal disk" incident<sup>17</sup>

*Conduct on or after April 5, 2006*

- i the questions about "sexual preferences" and "pornography websites" incidents<sup>18</sup>
- i the "mentoring document" incident<sup>19</sup>
- i the "underwear" incident<sup>20</sup>
- i the "appendix scar" incident<sup>21</sup>

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<sup>11</sup> To hold Respondent liable for Ruppert's pre-April 5, 2006, conduct, the Agency would have had to name Ruppert as the respondent employer for the first month of Complainant's employment and name From the Wilderness, Inc. as a successor employer to Ruppert. This could have been accomplished by the Agency naming Ruppert as a respondent in the initial complaint, or by amending Complainant's original complaint, within one year after November 13, 2006, the date on which the complaint was filed, to name Ruppert as a respondent.. OAR 839-003-0040(1).

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<sup>12</sup> See Finding of Fact 11 - The Merits.

<sup>13</sup> See Finding of Fact 12 - The Merits.

<sup>14</sup> See Finding of Fact 13 - The Merits.

<sup>15</sup> See Finding of Fact 14 - The Merits.

<sup>16</sup> See Finding of Fact 15 - The Merits.

<sup>17</sup> See Finding of Fact 18 - The Merits.

<sup>18</sup> See Finding of Fact 19 - The Merits.

<sup>19</sup> See Finding of Fact 21 - The Merits.

<sup>20</sup> See Finding of Fact 24 - The Merits.

<sup>21</sup> See Finding of Fact 24 - The Merits.

- i the “sexual thoughts,” “I’m in love,” and “sexual relationship” comments<sup>22</sup>
- i the “pornographic CD” incident<sup>23</sup>
- i the “fisting” comment.<sup>24</sup>

**C. Ruppert’s unwelcome conduct was sufficiently severe or pervasive to have the purpose or effect of creating a hostile, intimidating or offensive work environment.**

The standard for determining whether conduct is sufficiently severe or pervasive to have created a hostile, intimidating or offensive working environment is from the objective standpoint of a reasonable person in Complainant’s particular circumstances. *Gordy’s at 212*; OAR 839-005-0030(2).

In making that determination, the forum looks at the totality of the circumstances, *i.e.*, the nature of the conduct and its context, the frequency of the conduct, its severity or pervasiveness, whether it is physically threatening or humiliating, and whether it unreasonably interferes with an employee’s work performance. *Id.*

*Nature of the conduct and its context* – Complainant was 25 years old, working at her first professional job, whereas Ruppert

was not only Complainant’s boss, but a former Los Angeles policeman, an experienced investigative journalist, and a “celebrity” in his field. While the half dozen pre-April 5, 2006, incidents do not, as a matter of law, constitute unlawful sexual harassment because the Agency did not charge Ruppert, Respondent’s predecessor, as an employer who engaged in sexual harassment during that time period, Ruppert’s unwelcome sexual conduct towards Complainant before that date is relevant to show context.

*Frequency* – While the frequency cannot be calculated with exactness, all the incidents occurred within a three-month time span and the six incidents of actionable conduct occurred between April 5 and May 30, 2006.

*Severity* – The actionable conduct included exposure to internet pornography, questions about sexual preference, a comment about a specific sexual practice, written romantic expression, spoken romantic expression, seminaked exposure, a pornographic CD, and a proposal for a sexual relationship. It was intensified by the fact that most of it occurred when Ruppert and Complainant were working alone.

*Physically threatening or humiliating* – Complainant credibly testified that two specific incidents of the actionable conduct “frightened” or “scared” her – Ruppert’s exposure of his appendectomy scar and his statement to Complainant that he was ready to have

<sup>22</sup> See Finding of Fact 29 - The Merits.

<sup>23</sup> See Finding of Fact 31 - The Merits.

<sup>24</sup> See Finding of Fact 33 - The Merits.

a sexual relationship with her if she was willing. Both incidents occurred when Ruppert and Complainant were working alone at Respondent's office. Complainant was also aware that Ruppert kept a handgun in his desk, although she did not testify that she feared him using it against her at any time during her employment.

*Unreasonable interference with Complainant's work performance* – Complainant credibly testified that she liked her work very much because writing was her chosen field, she was excited by the subject matter, and it was a possible stepping stone in the writing career she hoped to have. Ruppert's harassment made it more difficult for her to do her work.

Based on the above, the forum concludes that Ruppert's actionable conduct was sufficiently severe or pervasive to have created a hostile, intimidating or offensive working environment from the objective standpoint of a reasonable person in Complainant's particular circumstances, and that the conduct created a hostile, intimidating or offensive working environment for Complainant.

**D. Complainant was harmed by Ruppert's sexual harassment.**

At the time the harassment occurred, Complainant experienced the emotions of being "uncomfortable," "shocked," "taken aback," "distracted," "belittled," "upset," and "frightened." This fulfills the

"harm" element of the Agency's prima facie case.

**E. Conclusion.**

The Agency proved the elements of its prima facie case by a preponderance of the evidence and the forum concludes that Respondent, through its proxy Ruppert, violated ORS 659A.030(1)(b) by sexually harassing Complainant.

**RETALIATION**

ORS 659A.030(1)(f) makes it an unlawful employment practice for an employer to "discharge \* \* \* any person because that \* \* \* person has opposed any unlawful practice[.]" A violation of ORS 659A.030(1)(f) is established by evidence that shows a complainant opposed an unlawful practice, the respondent subjected the complainant to an adverse employment action, and that there is a causal connection between the complainant's opposition and the respondent's adverse action. See *In the Matter of Trees, Inc.*, 28 BOLI 218, 247 (2007); *In the Matter of Robb Wochnick*, 25 BOLI 265, 287 (2004); *In the Matter of Barbara Bridges*, 25 BOLI 107, 123 (2003).

In this case, the opposition occurred on May 30, 2006. The precipitating incidents that led to Complainant's opposition were Ruppert's proposal of a sexual relationship on May 26 and the pornographic CD that she found in her desk drawer on the morning of May 30. At the end of the day on May 30, 2006, Complainant confronted Ruppert and complained

that she did not appreciate the pornographic CD and, with regard to his proposal, she had no sexual feelings towards him. By doing this, she engaged in behavior protected by ORS 659A.030(1)(f). At some point during the conversation, Spiegl came into the room and she assured him that everything was "fine." Ruppert asked them what they were talking about. Complainant told Ruppert that Spiegl was aware of the CD Ruppert had left for her, and that she had just let Spiegl know that Ruppert had taken back the CD and had assured her that they could continue to work together on a professional level. Ruppert reacted to this information by becoming extremely angry, accusing Complainant of calling him a "flasher" because of the underwear incident, and appearing embarrassed and upset that Complainant had told Spiegl about his behavior.

The next morning, Complainant wrote a lengthy letter detailing Ruppert's sexual harassment and emailed it to her parents and grandfather, Spiegl, and Psomas, then called in late to work. Ruppert was angry, yelled at her, and told her she was fired. He added that, if she wanted her job back, she needed to come into the office and he would tell her what she needed to do. Complainant was fearful of going into the office alone and did not go to work that day. In the interim, Ruppert prepared a probationary agreement for Complainant to sign. Fully expecting that she would refuse to sign it, he also prepared a termi-

nation notice. When Complainant arrived at work on June 1, Ruppert gave her a notice containing "PROBATIONARY CONDITIONS OF EMPLOYMENT" and told her she was fired if she refused to sign it. When Complainant refused, he gave her a termination slip and told her she was fired.

Respondent contends that Complainant was fired based on her longstanding performance issues, and Ruppert had been planning to fire her the same day as Spiegl's last day. The forum finds this argument pretextual for several reasons. First, except for the "mentoring" letter, Ruppert gave Complainant no written warnings regarding her attendance, performance, or her attire at work before May 30, 2006, and she was never counseled that her job was in jeopardy. Second, Ruppert had a discussion with Complainant on the morning of May 30 about promoting her. Third, Ruppert's immediate, negative emotional response upon learning that Complainant had told Spiegl about the CD and underwear incidents. Finally, the fact that Ruppert decided to terminate Complainant within hours after his meeting with Complainant and Spiegl, as shown by the fact that her job was posted on Craig's List the next morning and his statement to Complainant on May 31 that she was fired. Under these circumstances, the forum does not believe Ruppert's excuse that Complainant's performance had been poor all along, and that he was merely waiting to fire her until Spiegl's last day in order to mini-

mize possible sabotage to his company.

In conclusion, a preponderance of the evidence shows that Complainant opposed unlawful sexual harassment by Ruppert on May 30, 2006; that Respondent, through Ruppert, fired Complainant; and that Respondent, through Ruppert, fired Complainant because of her opposition to Ruppert's unlawful employment practice in violation of ORS 659A.030(1)(f).

## DAMAGES

### A. Back pay.

The commissioner has the authority to fashion a remedy adequate to eliminate the effects of unlawful employment practices. *In the Matter of Executive Transport, Inc.*, 17 BOLI 81, 96 (1998). The purpose of back pay awards in employment discrimination cases is to compensate a complainant for the loss of wages and benefits the complainant would have received but for the respondent's unlawful employment practices. *See, e.g., In the Matter of Gordy's Truck Stop, LLC*, 28 BOLI 200, 213 (2007). A complainant who seeks back pay is required to mitigate damages by using reasonable diligence in finding other suitable employment. *In the Matter of Rogue Valley Fire Protection*, 26 BOLI 172, 184 (2005).

In this case, the duration of Complainant's back pay is limited by the fact that Respondent ceased doing business on or about July 17, 2006, when Ruppert

moved to Venezuela, and there is no evidence that Respondent employed anyone after that date.<sup>25</sup>

Respondent paid Complainant a salary of \$500 per week. Had she continued to work for Respondent until Ruppert left for Venezuela, she would have earned an additional \$3,300 in gross wages between June 1 and July 17, 2006. After Complainant was fired, she promptly sought work and earned \$586.57 in gross wages while working at two limited, part-time jobs. In total, she suffered a net loss of \$2,713.42 in gross wages as a result of being fired by Respondent and is entitled to a back pay award in that amount.

### B. "Out-of-Pocket Expenses" and "Lost Benefits"

The Agency seeks reimbursement for Complainant's "out-of-pocket" expenses and "lost benefits." This forum has consistently held that economic loss that is directly attributable to an unlawful practice is recoverable from a respondent as a means to eliminate the effects of any unlawful practice found, including actual expenses. *In the Matter of Trees, Inc.*, 28 BOLI 218, 251 (2007). *See also In the Matter of Southern Oregon Subway, Inc.*, 25 BOLI 218, 242 (2004).

The "out-of-pocket" expense for which the Agency seeks reimbursement is the \$5,000 in life

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<sup>25</sup> See Finding of Fact 54 - The Merits.

savings that Complainant testified that she had to spend to meet living expenses after she was fired. In the past, the forum has awarded damages for expenses such as travel expenses incurred in obtaining alternative employment,<sup>26</sup> medical expenses that would have been covered by a respondent's insurance policy, had the complainant not been fired,<sup>27</sup> added costs incurred because of loss of use of an employee discount card,<sup>28</sup> and moving costs attributable to an unlawful act involving real property.<sup>29</sup> In contrast, the forum did not award damages for expenses such as costs for professional recertifications,<sup>30</sup> and debts incurred while

employed by respondent that complainant had trouble paying off after her discharge.<sup>31</sup> The common thread running through all these cases is that any award for out-of-pocket expenses must be supported by evidence showing it is a direct result of a respondent's unlawful practice. In this case, Complainant spent her life savings of \$5,000 because she no longer had Respondent's income to meet her living expenses. However, her lost income from Respondent only amounted to \$3,300. The forum has awarded compensation for that loss in its back pay award, less her interim earnings, and awarding Complainant additional damages for her "out-of-pocket" loss would be a double award for the same loss. Although Complainant is not entitled to any additional compensation for "out-of-pocket" expense based on the expenditure of her life savings, the forum notes that this issue is relevant to an award of damages for emotional and mental suffering.

No evidence of "lost benefits" was presented at the hearing, and the forum awards no damages for them.

### **C. Emotional, mental, and physical suffering.**

In determining an award for emotional and mental suffering, the forum considers the type of

<sup>26</sup> *In the Matter of Barrett Business Services, Inc.*, 20 BOLI 189, 215, *aff'd Barrett Business Services, Inc. v. Bureau of Labor and Industries*, 173 Or App 444 (2001); *In the Matter of Day Trucking, Inc.*, 2 BOLI 83, 87-88 (1981).

<sup>27</sup> *In the Matter of Body Imaging, P.C.*, 17 BOLI 162, 175, 191 (1998), *affirmed in part, reversed in part, Body Imaging, P.C. and Paul Meunier, M.D. v. Bureau of Labor and Industries*, 166 Or App 54 (2000).

<sup>28</sup> *In the Matter of Wal-Mart Stores, Inc.*, 24 BOLI 37, 65 (2003).

<sup>29</sup> *In the Matter of Strategic Investments of Oregon, Inc.*, 8 BOLI 227, 250 (1990).

<sup>30</sup> *In the Matter of Trees, Inc.*, 28 BOLI 218, 252 (2007) (expenses to renew commercial pesticide applicator and certified arborist licenses not recoverable when there was no evidence showing that respondent's unlawful demotion of complainant caused him to incur those expenses).

<sup>31</sup> *In the Matter of Southern Oregon Subway, Inc.*, 25 BOLI 218, 242-43 (2004) (evidence did not show that respondent's actions caused complainant to initially incur those debts).

discriminatory conduct, and the duration, frequency, and severity of the conduct. *Emerald Steel Fabricators*, 27 BOLI at 278 (2006), *appeal pending*. It also considers the type and duration of the mental distress and the vulnerability of the Complainant. *In the Matter of State Adjustment, Inc.*, 23 BOLI 19, 32-33 (2002), *amended* 230 BOLI 67 (2002). The actual amount depends on the facts presented by each complainant. *Gordy's*, at 214. A complainant's testimony, if believed, is sufficient to support a claim for mental suffering damages. *Id.*

From April 5 through June 1, 2006, Complainant was subjected to a variety of types of verbal and physical sexual harassment by Ruppert, culminating in her discharge on June 1, 2006, that she reasonably believed was caused by her opposition to that harassment. The harassment itself, while ongoing, made her feel "uncomfortable," "shocked," "taken aback," "distracted," "belittled," "upset," and "frightened." When she was fired, she became very upset, and called her mother. Complainant thought she "was on her way with her career" and being fired was a "big blow" to her. Her anxiety snowballed, and she experienced almost immediate panic attacks, for which she visited a doctor and was prescribed the generic form of Xanax. Subsequently, she had to have the prescription refilled.

Ruppert's threat to have Complainant removed from the

Ashland conservation commission and his concealed handgun reasonably caused Complainant to fear retaliation by Ruppert before he left for Venezuela, despite the fact that he made no actual physical threats towards her. After she was fired, she bought window locks for her house and asked all her neighbors to let her know if Ruppert was in the neighborhood.

Complainant had never been fired before, and losing her job caused a large blow to her self esteem, causing her to begin to second guess her work ethic and ability to create a positive work experience with an employer. She became distrustful of working with a male supervisor, and it took her a few months to be comfortable working for an employer with a male in authority.

Complainant's job loss also caused her significant financial distress. She had to move from her apartment because she could no longer afford the rent and move in with a friend who rented a room to her. When she began work for Respondent, she had saved \$5,000 from her last job. After being fired, she had to spend all of it to meet living expenses. Although the part of this expenditure that was attributable to her discharge will be potentially recouped by Complainant as a back pay award, the emotional impact on Complainant of having to spend that portion of her life savings is also an element of an award for emotional suffering. In addition, Complainant had to ask her mother and stepfather for fi-

nancial help for a few months. Finally, as late as May 2008 Complainant saw a mental health counselor and discussed this case with the counselor.

The duration of Complainant's emotional distress was extended by Ruppert's subsequent communications to the Ashland City Police, Victor Thorn, the *Ashland Daily Tidings*, and Ruppert's internet blog. These communications continued into October 2007. In them, Ruppert: (1) described Complainant as a troubled and disgruntled employee and attractive sexual smorgasbord who engaged in sexual blackmail and showed naked photographs of herself to male co-workers; (2) accused her of burglary, vandalism, being a meth addict and facilitating the use of Respondent's office to smuggle meth; (3) stated she was having sexual affairs with two employees and a writer for the *Daily Tidings*; and (4) questioned who was the father of her child. Complainant became aware of these communications at different times between late June 2006 and October 2007. She reasonably believed that the articles published in the *Ashland Daily Tidings* and on the internet would be read by the public and would affect the public's perception of her as a person and potential employee. They embarrassed and mortified her and made her feel "like a criminal." Complainant felt that her career was threatened and that Ruppert was attempting to intimidate her. Although these communications did not occur during the time pe-

riod encompassed by the unlawful practices pleaded in the Agency's Formal Charges and proved by the Agency at hearing, they constitute a basis for part of the forum's award of damages for emotional and mental suffering because they arose directly out of Complainant's employment and served as a constant reminder to Complainant of those unlawful practices.

In its Formal Charges, the Agency asked for damages for Complainant's emotional, mental, and physical suffering "in the amount of at least \$35,000." To summarize the evidence supporting those damages, Complainant was sexually harassed at her first professional job, fired in retaliation for complaining about the harassment, suffered serious emotional distress that required medical consultation and treatment, had to move out of her apartment, and was portrayed by Ruppert in the media, on the internet, to the police, and to Ruppert's internet rival as sexually promiscuous, a sexual blackmailer, and a criminal over the 17-month period following her discharge. Because the Agency sought "at least \$35,000" (emphasis added) in the Formal Charges, the forum is not limited to an award of \$35,000. Under the egregious facts and circumstances that were presented at hearing in this case, the forum finds that \$125,000 is an appropriate award to compensate Complainant for her mental and emotional suffering.

**ORDER**

NOW, THEREFORE, as authorized by ORS 659A.850(2) and ORS 659A.850(4), and to eliminate the effects of Respondent's violations of ORS 659A.030(1)(b) and ORS 659A.030(1)(f), and as payment of the damages awarded, the Commissioner of the Bureau of Labor and Industries hereby orders **From the Wilderness, Inc.** to:

Deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 1045 State Office Building, 800 NE Oregon Street, Portland, Oregon 97232-2180, a certified check payable to the Bureau of Labor and Industries **in trust for Complainant Lindsay Gerken** in the amount of:

- 1) TWO THOUSAND SEVEN HUNDRED THIRTEEN DOLLARS AND FORTY-TWO CENTS (\$2,713.42), less lawful deductions, representing income lost by Lindsay Gerken between June 1 and July 17, 2006, as a result of Respondent's unlawful practice found herein; plus,
- 2) Interest at the legal rate on the monthly accrual of wages lost between June 1 and July 17, 2006;
- 3) Interest at the legal rate on the sum of \$2,713.42 from July 18, 2006, until paid; plus
- 4) ONE HUNDRED AND TWENTY-FIVE THOUSAND DOLLARS (\$125,000), representing compensatory damages for mental distress Lindsay Gerken suffered as a result of Respon-

dent's unlawful practice found herein; plus,

5) Interest at the legal rate on the sum of \$125,000 from the date of the Final Order until Respondent complies herein; and,

6) Cease and desist from discriminating against any employee based upon the employee's gender.

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