

BOLI ORDERS

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

VOLUME 6

Cited: 6 BOLI

Published by the

OREGON BUREAU OF LABOR AND INDUSTRIES

1995

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Portland, Oregon

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Printed in the United States of America

BOLI ORDERS

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INTRODUCTORY NOTE

This sixth volume of BOLI ORDERS contains all of the Final Orders of the Commissioner of the Oregon Bureau of Labor and Industries that were issued between December 11, 1986, and June 24, 1987.

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

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

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

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In the Matter of
LOREN L. MALCOM
 and Joan Malcom, partners, dba
 BLM Excavation, Respondents.

Case Number 09-86
 Final Order of the Commissioner
 Mary Wendy Roberts
 Issued December 11, 1986.

SYNOPSIS

Respondents intentionally failed to pay the prevailing wage rate to workers on a public works project in violation of ORS 279.350. The law imposes a duty on employers to know the wages that are due to their employees. As partners, owners, and operators of the company, Respondents were responsible for the company's failure to pay prevailing wage rates. Respondents were held not eligible for public works contracts for three years, pursuant to ORS 279.361(1), ORS 279.350, 279.361, 68.210(1), 68.230.

The above entitled matter came on regularly for contested case hearing before Susan T. Venable, designated as Hearings Referee by the Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was conducted on October 21, 1986, in Room 402 of City Hall located at 1220 S.W. Fifth Avenue, Portland, Oregon. The Hearings Referee called the following as witnesses for the Agency: Douglas McKean, Program Coordinator for the Wage and Hour Division (WHD) of the Agency; and Margaret Trotman, Compliance Specialist for the WHD of the Agency.

Loren L. Malcom and Joan Malcom, who were and are partners doing business as BLM Excavation (hereinafter Contractor), were present and testified in this matter.

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

**FINDINGS OF FACT –
 PROCEDURAL**

1) On August 14, 1986, the Agency issued a Notice of Intent to Make Placement on List of Ineligibles (hereinafter Notice) stating that the Agency intended to place Loren L. Malcom and Joan Malcom, partners, doing business as BLM Excavation, on the list of contractors ineligible to receive any contract or subcontract for public works for a period of three years from the date of publication of their names on the ineligible list.

2) The Notice cited the intentional failure of the Contractor, in violation of ORS 279.350(1), to pay the prevailing wage rate (PWR) to workers employed on a public works contract let by the City of Salem Parks Division for the installation of an irrigation system at Minto Brown Island Park from on or about September 24, 1984, to on or about June 4, 1985.

3) The Notice was served to Joan Malcom on August 20, 1986, and to Loren Malcom on August 21, 1986, by the Marion County Sheriff's Office.

4) By letter dated August 21, 1986, Contractor requested an

administrative hearing in response to the Notice.

5) On September 11, 1986, the forum sent a Notice of Hearing to the Contractors indicating the time and place of the hearing. Together with the Notice of Hearing, the forum sent a document entitled "Notice of Contested Case Rights and Procedures" that contained the information required by ORS 183.413.

6) At the commencement of the hearing, the Hearings Referee explained the issues involved herein and the matters to be proved or disproved.

7) On November 14, 1986, the Contractor timely filed exceptions to the proposed order. The arguments set forth therein require no changes to the Findings of Fact or Conclusions of Law and are, therefore, discussed in the Opinion section of this Final Order.

FINDINGS OF FACT – THE MERITS

1) The Contractor is an Oregon business owned entirely by the partners Loren L. Malcom and Joan Malcom, who operate the business.

2) On August 18, 1984, the City of Salem issued an Invitation to Bid for a public works project entitled Irrigation System/Minto Brown Island Park (hereinafter referred to as Project). This document contained the following statement:

"No bid will be received or considered by the City of Salem or any of its officers unless the bid contains a statement by the bidder that the provisions of ORS 279.350 shall be included in this contract."

3) This project was 100 percent funded by the City of Salem, and was

therefore not regulated by the federal Davis-Bacon Act.

4) On August 30, 1984, the Contractor submitted a "Proposal" in response to the Invitation to Bid. This document contained the following pertinent statements:

"The Bidder further declares that the provisions required by ORS 279.350 relating to prevailing wage rates shall be included in his Contract.

"The Bidder agrees that all of the applicable provisions of Oregon Law relating to public contracts (ORS 279) are, by this reference, incorporated in and made a part of this Proposal."

L. Malcom was aware of, and so admitted, the obligation to pay the PWR on the Project.

5) The Proposal stated that the "Bidder" was BLM Excavation, and that the partners were Loren Malcom and Joan Malcom. The Proposal was signed by Loren Malcom as "Bidder" and by Loren Malcom as "Partner." The total base bid was \$27,689.

6) The contract for the Project was awarded to the Contractor and signed on September 24, 1984, by Loren Malcom. The final contract amount was \$29,246. Attached to the contract was a copy of a publication prepared by the Commissioner of the Bureau of Labor and Industries entitled: "Prevailing Wage Rates for Public Works Contracts in Oregon," dated July 1, 1984.

7) This publication contains a summary of the applicable law regarding payment of PWR, including the requirement for posting those rates, the filing of certified wage statements and

guidelines for the classification of workers.

The Agency presumes that all public agencies rely on this publication to determine the applicable prevailing wage rates. Contractors are expected to follow, and may rely, on this publication.

8) Contractor employed seven workers to work on this Project. The work was performed between September 24, 1984, and June 4, 1985. Work on the Project was stopped for a period of approximately six months due to the winter weather.

The workers on the Project were Edward Zerst, Mark Bedsaul, Stephen Bowdish, Michael Eggleston, Michael Stanley, Randy Weddle, and Richard Weddle. With the exception of Edward Zerst, these workers worked on the Project before and after the period during the winter when work was stopped due to the weather. All of these workers spent more than 20 percent of their time performing physical or manual work.

9) Joan Malcom and Loren Malcom are the owners, as partners, and operators of BLM Excavation. At the times material herein, the Contractor had no permanent staff to perform clerical functions. Contractors handled all the necessary paperwork and payment to workers. J. Malcom served as bookkeeper for the partnership.

10) Workers who were working on the Project for Contractors were to submit the number of hours worked to L. Malcom. Based on this information from the workers, L. Malcom would prepare a time card, which he then sent to J. Malcom, containing the

number of hours worked and the name of the project. If the worker was working on a public works project, L. Malcom would note the applicable rate. If no rate was noted, J. Malcom was to assume the rate of pay was that set out in the worker's file. When J. Malcom received the time cards from L. Malcom, she did not question L. Malcom about the information thereon, but rather paid the worker pursuant to the rate of pay noted in the worker's file. J. Malcom would then prepare and issue the checks for the workers. L. Malcom did not review these checks prior to their issuance. (It should be noted that while this forum accepts as fact that J. Malcom did not question L. Malcom about the rates of pay noted on the time card, this forum does not accept that this fact implies that J. Malcom believed the rate of pay to be accurate.)

11) The time cards submitted by L. Malcom to J. Malcom for this Project listed the name of the project. J. Malcom has found it difficult to keep up with all the public works projects handled by Contractor, but does generally know which are the public works projects.

12) In most cases, L. Malcom made the decision to enter into a contract. Generally, J. Malcom would type the bid proposals, and she believes that she did type the bid proposal for this Project.

13) Contractor paid the PWR to workers on this Project during 1984. However, when work commenced again in 1985 after the winter delay, Contractor did not pay the PWR to these workers.

14) On January 6, 1986, Edward Zerbst, a worker on the Project, filed a wage claim with the WHD of the Agency claiming that he had not been paid the proper rate of wages or overtime wages on four separate public works contracts, including this Project, that had been awarded to the Contractor. For the Project, Zerbst claimed \$264.24 at the rate of \$16.56 an hour from March 20, 1985, to April 10, 1985, at the rate of \$15.33 an hour on April 30, 1985, and at the rate of \$17.19 an hour from May 1, 1985, to May 2, 1985.

15) On March 11, 1986, a demand letter was sent to L. and J. Malcom, dba BLM Excavation, requiring payment or that the Contractor contact the WHD. Subsequent to this time, Margaret Trotman explained to L. Malcom the violations of the laws governing the PWR. L. Malcom admitted the error, agreed to pay the wages owed, and did so by check dated March 18, 1986, and delivered to Trotman on March 24, 1986.

16) When a contractor is found to be in violation of the laws regarding payment of the PWR, it is the policy of the Agency to pursue the matter to determine whether other workers on the same public works project have been paid appropriately. Pursuant to this policy, Trotman requested that L. Malcom submit payroll records for workers on the Project. L. Malcom did submit records to Trotman on March 24, 1986. These records were prepared by J. and L. Malcom.

18) According to these records, work on the Project was performed between September 24, 1984, to October 22, 1984, and again from March 20,

1985, to June 4, 1985. These records also establish that the workers were paid the PWR during 1984, but not during 1985. A column of each page of one exhibit in the record indicates the correct rate of pay that should have been paid. Another column shows the wages paid based on the number of hours worked (number of hours multiplied by the rate of pay in the left hand corner). It should be noted that there was a miscalculation on one page of the exhibit for Michael Stanley; that is, although the notation in the left corner indicates he was paid at a rate of \$7.50 per hour, the figure \$38.25 in the wages paid column reveals he was paid at a rate of \$8.50 per hour for 4½ hours of work. Trotman so noted and initialed the document.

19) These records indicate the following:

Name	Hr. Wage Pd.	Group 1 PWR	Group 5 PWR	Group 6 PWR
Mark Bedtsaul	\$ 8.00	n.a.	n.a.	\$16.56
Stephen Bowdish	\$10.00	n.a.	\$13.05	n.a.
Michael Eggleston	\$ 8.00	n.a.	\$13.05	n.a.
Michael Stanley	\$ 8.50	n.a.	\$13.05	\$16.56
Randle Weddle	\$ 7.00	n.a.	\$13.05	n.a.
Richard Weddle	\$ 8.50	n.a.	\$13.05	n.a.

20) On March 25, 1986, Trotman sent a letter to each worker on the Project requesting that she be contacted in regard to their work on that project. Two of the workers disputed the Contractor's records. The differences were addressed in the Wage Transcription and Computation Sheets for those workers.

21) Based on the records provided by the Contractor and conversations with the workers, Trotman prepared the Wage Transcription and Computation Sheets. The following wages were determined to be owed to the workers:

Name	Wages Earned	Wage Rec.	Wage Owed
Mark Bedtsaul	\$315.92	\$156.00	\$159.92
Stephen Bowdish	\$3,226.11	\$2,730.29	\$495.82
Michael Eggleston	\$1,390.36	\$1,290.91	\$99.45
Michael Stanley	\$881.18	\$556.75	\$324.43
Randle Weddle	\$190.30	\$91.00	\$99.30
Richard Weddle	\$389.27	\$250.75	\$138.52
Edward Zerbst	\$835.37	\$575.13	\$260.24

22) On May 9, 1986, Trotman sent a demand letter to L. Malcom and J. Malcom requesting payment of the wages owed as reflected in an exhibit for this Project, and also for three other public works projects.

23) Trotman advised L. Malcom of the discrepancies raised by two of his workers regarding the number of hours worked on this Project. L. Malcom did not dispute the claims of these workers or require any substantiation of their claims. On May 21, 1986, the Agency received from the Contractor full payment of the wages owed to the workers.

24) The only real conflict in testimony involves the reason why Contractor failed to pay the PWR to workers on this Project. Based on the testimony set forth below and the analysis thereof, the forum accepts the testimony offered by Agency witnesses as facts in this matter.

a) Testimony

On October 9, 1986, L. Malcom had a telephone conversation with Douglas McKean of the WHD of the Agency. At that time, L. Malcom stated his failure to pay the PWR was due to a bookkeeping error that was the result of the fact that his business was undergoing substantial expansion during the time at issue. L. Malcom stated at the hearing that he could not recall whether he had discussed this bookkeeping problem with Trotman during the investigation of this matter. Trotman stated that L. Malcom did not advise her of any bookkeeping problems during the investigation.

Between the years 1984 and 1985, Contractor's business increased by \$500,000. The additional work created much confusion, and the situation became more than Contractor could handle. L. Malcom testified that his confusion was what caused him to fail to mark on the time cards for the workers on this Project that the PWR was to be paid. According to L. Malcom, his oversight was not discovered by J. Malcom as she did not check his notations, but routinely paid as he indicated on the time cards.

Trotman testified that L. Malcom advised her on two separate occasions that Contractor had not paid the PWR to workers on the Project in 1985 as Contractor "could not afford it." Trotman documented a telephone conversation she had with L. Malcom on March 21, 1986, noting as follows:

"Employer admits no PWR wages were paid on Minto Brown Project in 1985. Could not afford it as it was the 1st of year."

L. Malcom testified that he did not advise Trotman that he could not afford to pay the PWR rate in 1985. L. Malcom stated that he believed there had been a misunderstanding, that is, he stated that he did advise Trotman that he could not afford to pay overtime rates as it was the first of the year. L. Malcom stated that he and Trotman discussed the failure to pay PWR and overtime at the same time, therefore, Trotman may have confused the two. According to L. Malcom, he would have had no reason to state that he could not pay the PWR as he had a good line of credit, and further, there was nothing unusual, as regards payment of wages, about the first of the year.

Trotman testified that she did discuss Contractor's failure to pay overtime wages to workers on April 4, 1986. She further testified that there had been no previous discussion of the overtime matter. According to Trotman, L. Malcom did not advise her that he could not afford to pay the overtime wages.

b) Analysis

Trotman requested, and the Contractor provided, payroll records. It seems most unlikely that in preparing these records, that contain both the correct rate of pay owed to the workers and that rate actually paid, that L. or J. Malcom would not have realized this bookkeeping error and so advised Trotman. These records were given to Trotman in March of 1986. The Contractor continued to work with the Agency through May of 1986. There was more than ample time to discover what would have been an obvious error and inform the Agency. However,

L. Malcom did not, by his own admission, recall bringing up this bookkeeping error until October of 1986 when he spoke to Douglas McKean. This date was after the Agency had issued the Notice based on Contractor's "intentional" failure to pay PWR and after a hearing in this matter had been scheduled.

L. Malcom explained his statement regarding his inability to pay by saying that Trotman may have misunderstood, that is, that he said he could not afford to pay overtime wages. L. Malcom stated he could not have said he could not afford to pay PWR as he had a good line of credit. These two statements are quite inconsistent. If Contractor had the funds to pay PWR, it seems illogical that Contractor did not have the funds to pay overtime wages. L. Malcom would have this forum believe that the partnership had funds for one purpose, but not for another. Furthermore, Trotman testified that L. Malcom made the statement on two occasions, one of which she documented in her contact report of March 21, 1986.

Finally, it is most difficult to believe that L. Malcom was confused or would forget to note that PWR was to be paid on time cards where he filled in the name of the project. His omission would be more believable if it had happened one time or for one worker; however, the evidence indicates that the omission was made on six time cards for six different workers for more than one month. This forum finds it impossible to believe that a person in such a state of prolonged confusion could increase their business by \$500,000 in one year; that is, it quite

clearly takes an attentive mind to be so successful. The second part to the time card situation involves J. Malcom. She contends that she never questioned L. Malcom's notations on the time cards, but routinely paid wages pursuant thereto. Again, it is difficult to accept that J. Malcom, who typed the proposal for the Project, and who was the bookkeeper for the business, did not notice the omission on six cards over several months.

In assessing the testimony of L. and J. Malcom, this forum has also considered the fact that Contractor had violated, and had so admitted, the laws governing payment of the PWR on other public works projects. This weighs heavily against Contractor's contention that the failure to pay the PWR on the Project was the result of a bookkeeping error.

Therefore, the forum accepts as a fact that L. Malcom stated that Contractor did not pay the PWR on the Project as Contractor could not afford it. This fact establishes that Contractor was aware that he was not paying the PWR at the time he made payment to the workers. This fact does not establish, and this forum need not determine, whether or not Contractor could or could not financially afford to pay the PWR on the project.

ULTIMATE FINDINGS OF FACT

1) BLM Excavation is an Oregon business owned and operated by Joan Malcom and Loren Malcom as partners.

2) On August 18, 1985, the City of Salem issued an Invitation to Bid on a project entitled Irrigation System/Minto Brown Island Park. This document

contained a provision that no bid would be considered unless it contained a provision indicating that the bidder would include the provisions of ORS 279.350 in the contract. On August 30, 1984, Contractor submitted a Proposal, typed by J. Malcom in response to the Invitation to Bid. This document contained a statement that the provisions of ORS 279.350 requiring that PWR be paid would be included in the contract. The contract for the Minto Brown Project was awarded on September 24, 1984, by the City of Salem, to Contractor in the amount of \$29,246. The contract was 100 percent funded by the City of Salem. Attached to the contract was a copy of the publication entitled "Prevailing Wage Rates for Public Works Contracts in Oregon" dated July 1, 1984.

3) Contractor employed seven workers to work on the Project. Work on the Project was performed between September 24, 1984, and June 4, 1985. During this time, the Contractor was performing other public works contracts and failed to pay the PWR for certain workers thereunder.

4) L. Malcom and J. Malcom handled all clerical and payroll functions for Contractor. L. Malcom would prepare time cards for workers on the Project which showed the name of the project, the hours worked, and indicated the rate of pay. J. Malcom would prepare and issue checks to workers based on the information set forth on the time cards.

L. Malcom did not note on the time cards for the workers on the Project that PWR should be paid. J. Malcom did not question L. Malcom about the time cards, but rather paid workers as

L. Malcom had indicated, although she knew this was a public works contract.

5) The workers employed by Contractor on the Project were paid the PWR for their work in 1984, but were not paid the PWR in 1985. Contractor, with knowledge of his legal and contractual obligation to pay PWR, knew at the time payment was made to these workers that the PWR was not being paid.

6) After being advised by the Agency of the violations of the laws governing PWR, Contractor admitted the failure to pay those rates and that Contractor could not afford to pay PWR. Contractor then paid to the Agency the wages owed to the workers.

CONCLUSIONS OF LAW

1) Contractor employed workers to perform work on a public works project and is subject to the provisions of ORS 279.348 to 279.363. The Commissioner of the Bureau of Labor and Industries has jurisdiction over this matter.

2) Contractor was required to pay the PWR determined by the Commissioner of the Bureau of Labor and Industries pursuant to ORS 279.359 to workers employed under the contract and on the Project herein.

3) Contractor, having knowledge of the legal requirements of ORS 279.310 to 279.356 and its contractual obligations, failed to pay the PWR to workers employed on the public works project in violation of ORS 279.350. Contractor did, therefore, intentionally fail to pay the PWR to the workers and is subject to the provisions of ORS 279.361.

4) Every partner is an agent of the partnership for the purpose of its business, and the authorized act of every partner carrying on in the usual way of the business binds the partnership. ORS 68.210(1). Any admission or representation of a partner within the scope of the partner's authority is evidence against the partnership. ORS 68.230. By their own admission, L. and J. Malcom were performing their usual functions, and therefore, the actions or inactions of each partner binds the partnership, and the statements of each partner are evidence against the partnership.

5) Loren Malcom and Joan Malcom, as partners, owners, and operators of BLM Excavation, were responsible for the Contractor's failure to pay the PWR on the contract herein and are subject to the provisions of ORS 279.361(1).

6) Pursuant to ORS 279.361, and based on the facts set forth herein, the Commissioner has the authority to and must place the name of the Contractor and Joan Malcom and Loren Malcom on the list of persons who are ineligible to receive any contract or subcontract for public works for a period not to exceed three years from the date of publication of their names on that list. Under the facts and circumstances of this record, her placement of the name of the Contractor on the list for a period of three years is appropriate.

OPINION

Joan Malcom and Loren Malcom were partners, dba BLM Excavation, and were the owners and operators of the business. As partners, they and the partnership are bound by the authorized acts of each other. They

had no permanent staff, but rather handled all payroll and clerical functions between the two of them. During the pendency of the Project in question, Contractor was performing other public works contracts and had failed, in some instances, to pay PWR as required. Contractor L. Malcom admitted that he was aware of his obligation to pay PWR.

Contractor had devised a payroll system whereby L. Malcom would prepare time cards indicating the number of hours a worker had worked, the rate of pay, and the name of the project. He would send these cards to J. Malcom, who would, without question, prepare the checks for the workers.

There was no dispute as to the facts regarding the actual failure to pay the PWR to workers on the Project. There was, however, a dispute as to why the PWR was not paid to the workers. The only issue in this case then is whether the Contractor's failure to pay the PWR was intentional under ORS 279.361.

ORS 279.361 provides for placement of a contractor's name on the list of persons ineligible to receive a public works contract only if the contractor "intentionally failed" to pay the PWR. Although the Oregon Court of Appeals has not had occasion to discuss and establish under what circumstances a contractor can be said to have "intentionally failed" to pay the PWR, the Supreme Court did address the question of an employer's failure to pay wages as "willful" under ORS 652.150, in *Sabin v. Willamette Western Corporation*, 276 Or 1083, 557 P2d 1344 (1976). ORS 652.150 provides for the imposition of a penalty if an employer

"willfully" fails to pay wages due. The terms "intentional" and "willful" have been determined to be interchangeable. *Starr v. Brotherhood's Relief & Compensation Fund*, 268 Or 66, 518 P2d 1321 (1974); argument of the Department of Justice, *In the Matter of P. Miller and Sons Contractors, Inc.*, 5 BOLI 149 (1986). This forum adopted the court's interpretation of "willful" in the *Sabin* case, as set forth below, in *In the Matter of P. Miller and Sons Contractors, Inc.*, *supra*, at 156.

"In defining the term 'willful' for the purpose of this statute, however, we held in *State ex rel Nilsen v. Johnson et ux*, *supra* at 108 as follows:

"* * * Its purpose is to protect employees from unscrupulous or careless employers who fail to compensate their employees although they are fully aware of their obligation to do so. In *Nording v. Johnston*, 205 Or 315, 283 P2d 994 (1955), this court said: "The meaning of the term 'willful' in the statute is correctly stated in *Davis v. Morris*, 37 Cal App 2d 269, 99 P2d 345." We now quote the definition thus adopted:

"* * * In civil cases the word "willful," as ordinarily used in courts of law, does not necessarily imply anything blamable, or any malice or wrong toward the other party, or perverseness or moral delinquency, but merely that the thing done or omitted to be done was done or omitted intentionally. It amounts to nothing more than this: That the person knows

what he is doing, intends to do what he is doing, and is a free agent.'

"That definition excludes the individual who does not know that his employee has left his employ or who has made an unintentional miscalculation. * * * 276 Or at 1093 (Emphasis supplied.)

The Agency testified that L. Malcom had stated on two occasions, one of which is documented, that Contractor could not pay PWR as Contractor could not afford to do so. At the hearing, L. Malcom denied these statements and maintained that the failure to pay was a bookkeeping error. For the reasons set forth above (see Finding of Fact 21), this forum has found that L. Malcom did in fact make those statements to the Agency. These statements, that Contractor could not afford to pay the PWR, indicates quite clearly that L. Malcom knew at the time he noted the applicable rate of pay for the workers on the time cards that he was not paying PWR. L. Malcom knew what he was doing, he intended to do what he did, and he did so as a free agent. The acts or omissions of L. Malcom bind the partnership. Moreover, J. Malcom, who typed the proposal for the Project, did not question the figure noted on the time card. She knew what she paid the workers, intended to pay the workers as she did, and did so as a free agent. The acts or omissions of J. Malcom bind the partnership. The facts establish that the Contractor was subject to the provisions of ORS chapter 279, was aware of the obligation to pay PWR, and intentionally failed to do so.

This forum would note further that the Contractor's position at hearing, that the failure to pay was a bookkeeping error, would not be successful even if it was a fact. As stated above, the definition of willful excludes the "unintentional miscalculation;" however, this type of "bookkeeping error" is far from an unintentional miscalculation. Contractor had paid PWR to the workers under this contract in 1984. Contractor L. Malcom, admittedly aware of his obligation to pay PWR and who was performing other public works contracts at the time, then incorrectly entered the rate of pay for six employees on six different time cards over a period of several months. This is not a miscalculation. Moreover, J. Malcom failed to question these entries, although she herself had typed the proposal, and paid the workers at the wrong rate of pay. The law imposes a duty upon an employer to know the wages that are due to its employees. *McGinnis v. Keen*, 189 Or 445, 459, 221 P2d 907 (1950). A faulty payroll system is no defense to a failure to pay wages owed, and certainly does not allow the Employer's actions to be characterized as unintentional. The Contractor's violation, even if it was the result of this type of bookkeeping error, was intentional inasmuch as Contractor knew the law regarding PWR, but disregarded it and failed to take steps reasonably calculated to assure compliance.

Contractor filed exceptions to the Proposed Order in this matter. Those arguments are separately addressed below as numbered by the Contractor.

1) The fact that Contractor did not have counsel at the time the contract

was signed is not relevant herein. Moreover, the Minto-Brown contract was only one of many public works contracts performed by Contractor. According to L. Malcom's own testimony, he was aware of the requirement to pay PWR. His "feeling" that he was in compliance with the law does not constitute, as discussed by the Oregon courts, an "unintentional miscalculation" such as would excuse Contractor's failure to pay PWR.

2) Contractor raises the point that PWR was paid in 1984 as a basis for supporting the contention that the failure to pay in 1985 was "inadvertent." This fact supports only the findings that Contractor was aware of, and did pay, the PWR in the beginning phase of the contract. As stated above, these facts do not establish inadvertence. L. Malcom failed to make provision for the payment of PWR on six time cards over a period of several months. In addition, J. Malcom failed to prepare checks in the appropriate amount.

Contractor also relies on the fact that the company was expanding and that "Contractor was not schooled in bookkeeping or record keeping and did not check the project for payroll records or audited the same in a manner consistent with the contract." A failure to check or audit records or maintaining a business where Contractor was not sufficiently knowledgeable hardly establishes "inadvertence" or an "unintentional miscalculation." In a case construing the definition of "willful" under ORS 652.150, the Oregon Court of Appeals determined penalties were appropriate, that is, the employer's conduct was willful, where late payment of wages was due solely to

inefficiencies in the employer's payroll system. *Putnam v. Department of Justice*, 58 Or App 111, 647 P2d 949 (1982).

3) The forum has discussed in detail the reasons for accepting the testimony of Compliance Specialist Trotman over that of Contractor in this regard. (See Finding of Fact 24.)

4) Contractor raises herein two reasons why the failure to pay was not intentional or willful. First, Contractor maintains that the books were available to Trotman and that there was no attempt to conceal the information. This in no way negates the conclusion that Contractor's failure to pay was intentional. Second, Contractor contends the failure to pay was not intentional as Contractor did pay the wages owed once the "errors were pointed out." This forum has specifically addressed this argument in a previous case. In *In the Matter of P. Miller & Sons, Contractors, Inc.*, *supra*, the forum concluded as follows:

"The fact that the wage differential was ultimately paid to the workers does not negate the violation. Likewise, the fact that the Contractor did eventually begin to pay the appropriate prevailing wage rate does not release the Contractor from liability." 5 BOLI at 159.

5) Contractor contends that his payment of PWR under other public works contracts should establish "good intent." Again, as stated above, the term willful or intentional does not imply "anything blamable" or "malice." *Sabin v. Willamette Western Corporation*, *supra*.

6) Contractor argues herein that the comments made regarding the payment of overtime wages were not correctly interpreted. The forum has clearly explained its analysis of this testimony and is not persuaded to make any changes thereto. (Finding of Fact 24.)

7) Contractor contends that it is being "singled out and used as an example." This argument merits no response. The Commissioner is charged with enforcing the provisions of ORS 279.361 and is authorized by that statute to place the name of Contractor on the ineligibles list for a period of three years.

8) Contractor maintains that the maximum penalty was imposed herein for a "single incident" rather than "intentional efforts" to avoid the law. This forum has found Contractor's failure to pay PWR in this matter to be intentional under ORS 279.361. This forum would note that while only a single contract is the basis of this particular action, evidence was presented, and was not disputed, at the hearing establishing that Contractor had in fact failed to pay PWR to workers on other public works contractors during this period of time. (See Findings of Fact 22 and 24, and Ultimate Findings of Fact 3.) Furthermore, the failure to pay PWR on the Minto-Brown was not limited to a single incident even under that contract. Contractor failed to pay six workers on more than one occasion. (See Finding of Fact 24.)

For all these reasons, the Proposed Order to place Contractor's name on the list of ineligibles for a period of three years is adopted and made final by this Order.

ORDER

NOW, THEREFORE, as authorized by ORS 279.368, it is hereby ordered that the Contractor and Joan Malcom and Loren Malcom or any firm, partnership, corporation, or association in which the Contractor has a financial interest, shall be ineligible to receive any contract or subcontract for public works for a period of three years from the date of publication of their names on the list of those ineligible to receive such contracts maintained and published by the Commissioner of the Bureau of Labor and Industries.

**In the Matter of
DEANA J. MILLER
and Whitney Miller, Respondents.**

Case Number 12-84
Final Order of the Commissioner
Mary Wendy Roberts
Issued December 17, 1986.

SYNOPSIS

Respondent W. Miller, by making derogatory remarks, telling ethnic jokes, and using insulting slang terms when referring to persons of Hispanic descent, created an offensive working environment based upon Complainant's national origin, which constituted discrimination against Complainant in the terms and conditions of her employment. The working conditions were so intolerable that Complainant

was forced into involuntary resignation, constituting a constructive discharge. The Commissioner held Respondent D. Miller also responsible for the discriminatory conditions because she knew of the offensive conduct and did nothing to correct the situation, she was the co-owner of the business, and she participated in its management. The Commissioner found no religious discrimination, and held that Respondents' request that employees speak English was made for legitimate business reasons. The Commissioner awarded Complainant \$1,997 in back pay and \$1000 for mental suffering. ORS 659.030(1); EEOC § 1606.8(b).

The above-entitled contested case came on regularly for hearing before Diana E. Godwin, designated as Presiding Officer by Mary Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on April 14 and 15, 1986, in the east conference room of the Umatilla National Forest Service Office, 2517 S.W. Hailey Avenue, in Pendleton, Oregon, on April 14; and in the State Office Building in Pendleton, Oregon, on April 15. The Bureau of Labor and Industries was represented by Frank Mussell, Assistant Attorney General. Respondents Deana J. Miller and Whitney Miller were present and testified.

The Agency called as its witnesses Complainant Mary Ann Garcia; Respondent Deana J. Miller, Nedra Cunningham, a Supervisor with the Civil Rights Division of the Bureau of Labor and Industries; Steven Thomas, attorney with Oregon Legal Services in Pendleton; Respondent Whitney Miller;

Deana Jenson, by telephone from Palm Springs, California; and Lisa Smith, by telephone from Portland, Oregon.

Respondents called as witnesses Paul Alderson of Milton-Freewater, LoRaine Koegel, Paul Alderson's mother from Milton-Freewater, Doug Frank, by telephone from College Place, Washington; Nancy Webb of Milton-Freewater, Hazel J. Hayworth of Weston, Oregon; Complainant Mary Ann Garcia; Maria Pena, of Milton-Freewater, Doug Hayworth of Weston, Oregon; Nedra Cunningham, by telephone from Portland; Respondent Deana J. Miller; Respondent Whitney Miller; and Walter Sans Soucci, a professional chef and teacher of food services from Walla Walla Community College in Washington.

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

RULINGS UPON MOTIONS

At the beginning of the hearing, the Agency moved to amend the specific charges to add an additional allegation to the effect that Respondent discriminated against Complainant "in that Respondent prohibited employees and Complainant from speaking Spanish." That motion was allowed. The Agency further moved to amend the prayer in the Specific Charges to add interest to apply to the back pay from the date the wages would have accrued to the date of Final Order. There was no objection to that motion and it was allowed. Mr. Collins, attorney for Respondents, had

been advised of these amendments by letter dated June 14, 1985. Mr. Collins then made a motion to be allowed to amend his answer to respond to the new allegation in the Specific Charges regarding whether or not Spanish was allowed to be spoken. There was no objection, and the motion for Mr. Collins to submit an amended answer was allowed.

The Agency and Respondents stipulated orally that any damages incurred by Complainant would have ceased August 1, 1984, because at that time Respondents' restaurant was closed.

FINDINGS OF FACT — PROCEDURAL

1) On March 31, 1983, Complainant Mary Ann Garcia filed a verified complaint with the Civil Rights Division of the Oregon Bureau of Labor and Industries. She alleged therein that she had been discriminated against in connection with her employment by Respondents in that Respondents subjected Complainant to insulting remarks about her race, color or national origin, and that they further subjected her to insulting remarks about her religion. Complainant also alleged in her Complaint that Respondents had retaliated against her for her protests against the discriminatory actions by threatening to fire her, and that they further discriminated against her by refusing to allow her to speak Spanish during her employment.

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

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

4) Respondents, through their attorney Robert Collins, filed an answer to the Specific Charges and requested a hearing.

5) The Agency duly served Respondents with Notice of the Time and Place of the Hearing. Enclosed with this Notice of Hearing was a document entitled "Information Relating to Civil Rights or Wage and Hour Contested Case Hearings," which contained the information required by ORS 183.413.

6) At the commencement of the hearing the parties were advised verbally by the Presiding Officer of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

FINDINGS OF FACT — THE MERITS

1) Respondents, who are husband and wife, built and owned the El Alamo restaurant in Milton-Freewater, Oregon. Respondents were the employers of Complainant at all times material herein.

2) Complainant was born in California and is a third generation American of Mexican/Hispanic ethnic origin. She speaks fluent Spanish and English.

3) Complainant is a practicing member of the Catholic religion.

4) Complainant is married to Joe Garcia, and moved with him from California to Milton-Freewater, Oregon, in March 1982.

5) A couple of months after moving to Milton-Freewater, Garcia lost his job and Complainant began work at a fast food Mexican restaurant called the "Outrageous Taco."

6) In November of 1982, Complainant began work as a cook at "El Alamo" restaurant. She began work at \$3.35 per hour. She was hired by Jose Guterrez, the manager. Guterrez is a person of Mexican/Hispanic ethnic origin.

7) El Alamo restaurant was built and furnished by Respondents to look like restaurants with which they were familiar from their travels in Mexico. They also designed the menu of the restaurant to duplicate Mexican food dishes with which they had become familiar. The restaurant was open seven days a week.

8) Respondents had no experience in the restaurant business prior to opening El Alamo. They hired Guterrez because he had prior experience in operating a restaurant.

9) Respondents also owned the "Country Trader," an antique and auction business, which required that they travel overnight outside the Milton-Freewater area most days of the week. Their travel schedule was particularly busy during the Christmas season, from shortly before Thanksgiving until after Christmas. As a consequence, Respondents were unable to provide daily supervision over the operation of the new restaurant. During this period Respondent W. Miller would go into the restaurant for a couple of hours once or twice a week at most, and Respondent D. Miller would go to the restaurant no more than one hour each week.

10) Respondents had photographs of the way various dishes were to be prepared and served by the cooks in the restaurant. These photographs were available in the kitchen for the cooks.

11) In addition to Complainant and Guterrez, Respondents employed several waitresses, one of whom was Hawaiian; a dishwasher, Jorge, who was Guatemalan; a hostess of Hispanic ethnic origin; and a cook who was Mexican. Respondents also employed Garcia, Complainant's husband, as a cook; and her nephew, Roger Breashears, as a busboy. Garcia and Breashears are also of Hispanic origin. Respondents were not in the restaurant much during this time.

12) One of the waitresses, Nancy Webb, worked at the restaurant from the time it was opened until it closed in August of 1984. She worked more hours than the other waitresses — 30 to 35 hours per week. Another waitress, Lisa Smith, worked 20 hours a week at the restaurant for the first six weeks that it was open; but she was terminated. Waitress Deana Jenson worked for the same period of time as Complainant at the restaurant, and was discharged at approximately the same time as Complainant left.

13) Certain food items, such as re-fried beans and Spanish rice, were to be prepared or heated on the stove everyday and then placed in a steam table to stay hot and moist for serving throughout the day. The steam table had heating elements on top of which pans partly filled with water were placed. The pan of food, with a lid on, was then placed inside the pan with the water. Complainant remembers

only that there was "some problem" with her use of the steam table, but stated that it "didn't seem like a big problem." In response to a question from Respondents' attorney, as to whether she had difficulty with the steam table, Complainant stated she "didn't remember."

14) Complainant resisted using the steam table, instead keeping the pans of beans and rice hot on the stove top. On one occasion when she was required to use the steam table, she poured water directly onto the heating elements rather than into the pan that was placed on top of the elements, potentially causing damage to the steam table and danger to herself. Although instructed not to, she also ran the burners on the stove on high for long periods of time. This resulted in the elements burning out and requiring frequent replacement. In one instance Doug Hayworth had to replace three elements in one week. Complainant remembers being shocked by the stove and remembers Respondent W. Miller complaining about the stove burners being on too high.

15) When Complainant worked the evening shift she was responsible for refrigerating the leftover hot cooked beans and rice so that they could be served the following day. Despite instructions to the contrary, she would place the hot beans and rice directly into the refrigerator with lids on them. The lids held in the heat and moisture and slowed down the cooling process which resulted in frequent spoilage of the food. The soured rice and beans were sometimes served to patrons the next day who complained about it. Complainant herself sometimes

served the soured food. Complainant's belief was that the requirement to cool hot food without a lid was "an old wives' tale." Complainant blamed the spoiled food on an improperly functioning refrigerator.

16) When the steam table was in use, Complainant would fail to properly heat all food before placing it in the steam table. Complainant also failed to keep the lid on the food, allowing it to cool down and dry out. Customers would complain about the food not being hot. Complainant recalls that there were complaints, including from Respondent W. Miller, about the food being served cold, but she blamed the problem on a faulty warming table.

17) Complainant also had difficulty preparing the orders for a single table such that they were all hot and ready at the same time. Complainant denies that she was ever criticized for this problem.

18) On one occasion Complainant served customers chicken that was cold and uncooked in the center, which also resulted in complaints from the customers. Complainant blamed another cook for this incident, as she thought he had already cooked the chicken and that she was merely required to warm it. She did not check the food before serving it, although that is the responsibility of the cook who serves the food.

19) Complainant was erratic in her preparation and presentation of meals. The food was not presented attractively and portions varied significantly. Guterrez told Complainant at one point that she was "getting sloppy."

20) Complainant sometimes failed to clean pots and pans and do other required clean up work. She also failed to rinse the floor after washing it with cleaner, leaving the floor slippery. Complainant denies that she ever failed to do her share of required clean up work, and said she "doesn't remember" Respondent W. Miller getting angry about her failure to clean up.

21) When Complainant was required to cook the refried beans for the day, she did not wash the dried beans or sort through them for rocks and rotten beans. Dried beans shipped in large restaurant quantities must be washed and sorted as the dirt can contain botulism, a deadly poison. Complainant denies that Respondent W. Miller criticized her for failing to wash the dried beans prior to cooking them.

22) From the time Complainant first started working at El Alamo in November of 1982 until early January of 1983, there were three cooks, each of whom had responsibility for different parts of a plate. This arrangement was not satisfactory, and when Respondent W. Miller started coming into the restaurant on a daily basis, he changed the arrangement and began using two cooks per shift. Through January and early February there was confusion and tension among the employees because Respondent W. Miller would tell them to perform their job one way and Guterrez, the manager, would contradict the instructions.

23) After Respondent W. Miller began coming into the restaurant regularly and assuming more managerial control, the tension between him and the Complainant increased. Complainant reacted negatively to criticism of

her work and resisted following instructions from either Respondent W. Miller or Hayworth. This was due to Miller's vocal criticism of her failures. She began to feel "picked on" and "harassed" and complained to Respondent D. Miller. Complainant, however, also testified that she "basically doesn't recall any conflicts with Respondent W. Miller" over her job performance, except for the complaints about food being cold.

24) At this time Respondent W. Miller brought in another cook, Hazel Hayworth, to reorganize and supervise the kitchen duties. Complainant, and other staff, did not understand Hayworth's function and resented her.

25) Some of the employees working in the kitchen, including Complainant, began speaking Spanish to each other, even though all but two were English speaking. The dishwasher, Jorge, spoke very little English and one of the other cooks, Juan, had some difficulty with English. Neither the waitresses nor Hayworth, however, spoke Spanish, and as a result it was difficult for them to know what was going on in the kitchen and dining room. The waitresses complained about it to Respondent W. Miller and he told the kitchen staff on more than one occasion to speak English to each other with the exception that they could speak Spanish to Jorge and Juan. Respondents and some of the other employees began to feel that the rest of the staff was speaking Spanish in order to talk about and criticize the Millers. The employees were not prohibited from speaking Spanish, however, nor were they threatened with the loss of their jobs if they did speak Spanish.

26) Respondents had a few tapes of Mexican music which were played in the restaurant all day. The employees, both those of Hispanic descent and the others, grew weary of this music and would put popular music on the radio when Respondents were not in the restaurant. This was a source of friction between Respondents and the employees, including both those of Hispanic descent and those who were not.

27) Sometimes Complainant would have her husband, Joe Garcia, take part of her shift in addition to his own shift, which resulted in Garcia sometimes working more than 40 hours in one week. Respondents were required to pay him overtime for these hours, rather than having to pay only the regular hourly wage to Complainant. Respondents were unhappy with Complainant for making this arrangement with her husband. Complainant does not remember having her husband take part of her shift, and also does not remember what time her work shift was.

27) The manager, Guterrez, was a newly converted Seventh Day Adventist, and did not work from sundown Friday to sundown Saturday. Complainant and her husband worked Saturdays, but wanted Sundays off to go to Mass. Guterrez did not want to give them Sundays off. However, shortly thereafter Respondent W. Miller was made aware of the request and advised Guterrez that they were to be given that day off. Complainant did get Sunday off, but does not remember that it was Guterrez who did not want to give her Sunday off or that she

ultimately got Sunday off as a result of Respondent W. Miller's intervention.

28) Complainant and Guterrez would discuss and argue about religion at work. Respondent W. Miller does not practice any religion and usually was not involved in these discussions, except to tell Guterrez and Complainant to stop arguing when the discussion became too loud. On one occasion, however, Miller did get involved in one of these discussions about religion, and remarked that Complainant was "going to the wrong church" and the "the Pope is just like any other man in that he puts his pants on one leg at a time." He also made comments about his perceptions of the Pope's role in World War II and the Pope's supposed agreements with the fascists not to bomb the Vatican. Complainant was upset about the remarks concerning the Pope.

29) Complainant did not like to be referred to as Mexican and would tell the other employees that she was American, not Mexican. On one occasion when Hispanic migrant farm workers came into the restaurant and were not able to speak English with the waitresses, who did not speak Spanish, Respondent W. Miller asked Complainant to wait on them. Complainant refused, saying she did not want anything to do with them.

30) On two occasions in January, Respondent W. Miller found Complainant in his office going through records and the restaurant's checkbook. He confronted her and told her not to go into the office. These incidents increased the tension between Miller and Complainant. He subsequently put a lock on the office door.

Complainant admits being in the office, but "doesn't recall" going through the check book.

31) During one of the arguments that Respondent W. Miller had with Complainant, he told her that if she did not like the way he did things "she could go back to Mexico." Complainant cried in response to this remark. Respondent W. Miller testified that he made this remark because "as far as he knew" Complainant was from Mexico.

32) Shortly after the restaurant opened, Respondent W. Miller asked Paul Alderson, the 12 year old son of one of Respondents' rental tenants, if he would go into partnership on raising some pigs for later sale. Under the arrangement Paul would keep the pigs at his house and feed them the leftover and discarded Mexican food from the restaurant. Paul agreed since he was already raising some pigs of his own as a 4-H project. Paul was required to feed grain to the 4-H pigs. According to Respondent W. Miller, in order to differentiate between the two groups of pigs, the pigs that ate Mexican food from the restaurant were called the "Mexican pigs" by both Paul and Respondent W. Miller.

34) When talking to the restaurant employees about the pigs and instructing them about saving leftover food for them, Respondent W. Miller would call the pigs "my Mexican pigs." When he was asked whether hot salsa could go into the slop bucket, he replied, "my Mexican pigs will eat anything." There were Hispanic employees, including Complainant, present when these remarks were made.

35) Respondent W. Miller often told derogatory jokes to the restaurant employees, including complainant. Some of these jokes and remarks were made about Mexicans and some about blacks and other minority groups. On more than one occasion, Respondent made comments to the effect that "Mexicans are okay - everyone ought to own one." Respondent W. Miller also used the terms "spic" and "greasers" when referring to persons of Hispanic heritage.

36) Complainant complained to both Respondent W. Miller and to Guterrez about these remarks.

37) Complainant's nephew, Roger Breashears, was working as a dishwasher and busboy in the restaurant. He was apparently not happy about the work. On one occasion, Breashears was neglecting his work and was over in the area with the cooks putting his finger in pots of food. Respondent W. Miller told him to stop. Breashears repeated it and Respondent W. Miller then told him to "get his 'spic' fingers out of the food." Complainant and Breashears were upset and complained to Guterrez about this incident.

37) On another occasion Breashears was told to clean up the debris from some logs that had fallen out of the fireplace. He picked up the logs, but Respondent W. Miller felt that he had not cleaned up the ashes adequately. Respondent W. Miller yelled at him, saying that "when I tell a Mexican to do something he better do it." Complainant complained to Guterrez about this remark.

38) The incident with the logs occurred on February 3, 1983. Complainant was upset about Respondent

W. Miller's treatment of her nephew and went with her sister, Breashears's mother, to talk to Guterrez about it. Guterrez stated that is how Respondent W. Miller is and that Complainant should ignore it. Apparently, Guterrez talked with Respondent W. Miller, because the next day, February 4th, Miller asked Complainant why she did not speak to him directly. Complainant went home and was sufficiently upset that she called Guterrez on the phone later and said she would not be coming back to work.

39) After Complainant quit her job with Respondents she sought help from Oregon Legal Services in Pendleton to pursue her complaint against Respondents. She saw attorney Steven Thomas three times in person and also spoke with him by telephone several times. She was visibly upset and depressed during these interviews, and had difficulty telling Thomas what had happened at the restaurant. She told him that her hopes for pursuing a career in the restaurant business were "crushed."

40) Complainant earned \$3.35 per hour from the time she began work on November 21 through December 31, 1982. During this period she worked a total of 206 hours. Her total gross earnings during this period were \$690.09. She received a raise to \$3.50 per hour on January 1, 1983. From January 1 to February 4, 1983, she worked a total of 142.9 hours. Her total gross earnings during this period were \$500.61. Complainant worked a total of 348.9 hours in the 11 weeks she worked for Respondents, for an average of 31.7 hours per week.

41) Taking the average number of hours per week that Complainant worked for Respondents, 31.7, and multiplying those hours by \$3.50 an hour, her closing rate of pay, results in an average weekly wage of \$110.95.

42) Complainant began work as a teacher's aid for the school district on June 12, 1983. The job paid wages higher than she earned with Respondents. She was unemployed between the time she left her job on February 4th until June 12, 1983, a period of 18 weeks. At an average weekly wage of \$110.95, Complainant lost \$1,997.10 in total earnings during this 18 week period. Complainant began working again at the "Outrageous Taco" restaurant in September of 1983 for one month.

43) The Agency did not address, or present any evidence to support, the claim of retaliation made in the Specific Charges.

ULTIMATE FINDINGS OF FACT

1) Complainant is a woman of Mexican/Hispanic ethnic origin. She is a third generation American born in California. She speaks fluent Spanish and English.

2) Complainant is a practicing member of the Catholic religion.

3) On November 21, 1982, Complainant began work as a cook at the El Alamo Mexican food restaurant in Milton-Freewater, which had just been built and opened by Respondents.

4) Respondents, who were husband and wife, had never owned a restaurant before and hired Jose Guterrez, a person of Mexican/Hispanic ethnic origin, as a manager of the restaurant.

5) Respondents also owned another business, the Country Trader, which required that they travel outside the Milton-Freewater area a great deal of the time for the first six weeks after the restaurant opened. That is, from mid-November 1982 until approximately December 31, 1982. During this time Respondent W. Miller would go into the restaurant for no more than an hour or two a couple of days a week. Respondent D. Miller would go into the restaurant maybe one hour a week during this time period.

6) In addition to Complainant and Guterrez, Respondents employed several other staff people, including waitresses who were Caucasian, a dishwasher who was Guatemalan, a hostess of Hispanic ethnic origin, and two other cooks who were Hispanic. Respondents also employed Joe Garcia, Complainant's husband as a cook, and her nephew, Roger Breashears, as a busboy. Both Garcia and Breashears are of Hispanic ethnic origin. Several of the persons who were employed at the restaurant spoke Spanish, either as a first or second language.

7) Complainant did have some problems performing her functions at work.

8) During one of the arguments that occurred between Respondent W. Miller and Complainant over her job performance, he remarked to her that if she did not like the way he did things she could "go back to Mexico." Complainant was upset by this remark.

9) Some of the employees, including Complainant, would speak Spanish to each other in the kitchen. Those employees who did not speak

Spanish, including the waitresses and at least one of the other cooks, Hayworth, complained to Respondents that they were unable to understand what was going on in the kitchen, and this made their job more difficult to perform. As a result, Respondent W. Miller told the staff members that they should speak English and not Spanish. However, he allowed the two employees who spoke little or no English to speak Spanish and to have Spanish spoken to them. Although Respondent W. Miller did tell the employees to use English, they were not absolutely prohibited from speaking Spanish, nor were they threatened with the loss of their jobs if they did speak Spanish. Speaking English posed no hardship on Complainant as it was her first language.

10) Complainant would participate in discussions with Guterrez and occasionally other employees, and on one occasion with Respondent W. Miller, regarding the differences between her religion, Catholicism, and Seventh Day Adventism, the religion of Guterrez. When the discussions between Complainant and Guterrez and other staff members became too loud or too disruptive, Respondent W. Miller would step in and tell the employees to cease the discussion. On one occasion Respondent W. Miller did get drawn into one of these religious discussions and made some unflattering comments about the Pope.

11) Guterrez, who himself, because of his religion, did not work from sundown Friday to sundown Saturday, did not want to give Complainant and her husband Sunday off in order that they might attend their church.

However, once made aware of the situation, Respondent W. Miller intervened on behalf of Complainant and told Guterrez that she and her husband were to be given Sunday off to attend church.

12) Shortly after the restaurant opened, Respondent W. Miller purchased some pigs which were to be fed from the leftover food from the Mexican restaurant. These pigs were being raised by a 12 year old boy who was raising some other pigs for a 4-H project. To differentiate between the two groups of pigs, the pigs that ate the Mexican food were called "the Mexican pigs." When instructing the restaurant employees to save food for these pigs, Respondent W. Miller would refer to them as "my Mexican pigs." These remarks were made in the presence of the Hispanic employees, including Complainant.

13) Respondent W. Miller frequently told derogatory ethnic jokes to the restaurant employees, including Complainant. Some of these jokes and remarks were made about persons of Mexican descent. He would also remark that "Mexicans are okay, everyone ought to own one." Respondent W. Miller also used the slang terms "spic" and "greasers" when referring to persons of Hispanic heritage. These remarks creating a discriminatory working environment which was upsetting to Complainant.

14) On two occasions Respondent W. Miller reprimanded Complainant's nephew, Roger Breashears, within earshot of Complainant. On one occasion when Breashears apparently failed to adequately clean up some logs that had fallen out of the fireplace,

Respondent W. Miller told him, "when I tell a Mexican to do something, he better do it." On another occasion when Breashears was putting his fingers directly into food after being told not to do so, Respondent W. Miller told him to "get his 'spic' fingers out of the food."

Complainant complained to Guterrez about these remarks. Complainant was sufficiently upset after Respondent W. Miller's response to the incident involving the logs that she left work on February 4, 1983, and declined to return.

15) When Complainant started work at Respondents' restaurant in November 1982 she was earning \$3.35 per hour. She was given an increase to \$3.50 an hour commencing January 1, 1983. During the period from November 21, 1982, through the date on which she quit, February 4, 1983, Complainant worked an average of 31.7 hours per week. At her closing rate of pay of \$3.50 an hour Complainant, at the time she quit, would have earned an average of \$110.95 per week. Complainant was out of work for a period of 18 weeks until June 12, 1983, at which time she secured a job that paid wages higher than she earned with Respondents. Her total lost earnings for the 18 week period when she was unemployed after leaving Respondents' restaurant were \$1,997.10.

16) Complainant experienced emotional distress and mental anguish as evidenced by the fact that she was visibly upset and depressed as a result of the remarks regarding her national origin made to her and the discriminatory atmosphere at the restaurant,

which ultimately prompted her resignation.

CONCLUSIONS OF LAW

1) At all times material herein, Respondents were employers subject to the provisions of ORS 659.010 to 659.110.

2) Respondent W. Miller and Respondent D. Miller are "persons" within the meaning of ORS 659.010 to 659.110, including ORS 659.030(1)(b).

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

4) Both before and at the commencement of the contested case hearing, Respondents and Complainant were informed of the matters described in ORS 183.413.

5) The actions of Respondent W. Miller in making derogatory remarks to Complainant herself, regularly telling ethnic oriented jokes, making derogatory remarks to and about others in Complainant's presence, and using insulting slang terms when referring to persons of Hispanic descent, created an offensive working environment which constituted discrimination, based on national origin, against Complainant in the terms and conditions of her employment, in violation of ORS 659.030(1)(b).

6) Respondent D. Miller knew that Respondent W. Miller told derogatory jokes related to Complainant's national origin, to the employees, including Complainant, and did nothing to correct the situation. As a co-owner of the business who participated in its management, Respondent D. Miller is also responsible for the discriminatory

conditions under which Complainant was required to work, also in violation of ORS 659.030.

7) Respondent W. Miller's deliberate actions made Complainant's working conditions so intolerable that Complainant was forced into involuntary resign action, thus constituting a constructive discharge.

8) Respondents' request to Complainant and other employees that they speak English rather than Spanish at the restaurant was made for legitimate business reasons and did not constitute discrimination based on National Origin against Complainant.

9) The discussions that took place between Complainant and Respondents' manager, Jose Guterrez, and on one occasion with Respondent W. Miller, about the merits of their respective religions, did not result in a working environment that discriminated against Complainant on the basis of her religion.

10) The facts do not establish whether Guterrez was a supervisor such as would make Respondent liable for his conduct. In any case, Respondent W. Miller took immediate and corrective action to accommodate Complainant's request for time to worship. Therefore, the refusal of Respondents' manager, Guterrez, to allow Complainant Sunday off for religious worship does not, in this case, constitute discrimination.

11) The Commissioner of the Bureau of Labor and Industries has the power to award money damages to Complainant for her lost wages and her emotional injury under the facts and circumstances of this record, and

the sum of money awarded in the Order below is an appropriate exercise of that authority.

OPINION

It is evident from the record in this matter, as outlined in the Findings of Fact – The Merits, that there was considerable personal conflict between Respondent W. Miller and Complainant. The sources of this conflict were many. One significant cause of the conflict was Respondent W. Miller's criticism of Complainant's poor job performance. Complainant lacked some of the basic technical skills and knowledge that she needed to do an adequate job as a cook in a Mexican food restaurant. Complainant apparently resented being corrected or criticized by Respondent W. Miller for these deficiencies.

The interpersonal conflicts between Complainant and Respondent W. Miller started during the first six weeks the restaurant was open. These conflicts were not a tremendous problem at this time as Respondents were not in the restaurant very frequently during this first six week period. The conflict escalated, however, after the first of the year in 1983 when Respondents were devoting nearly all their time to participation in the management and running of the restaurant. At that time Respondents made some changes in staffing and in staff responsibilities. Complainant was not happy with these changes. During this time, Respondent W. Miller's criticism of Complainant increased due in large part to his increased presence in the restaurant.

1. National Origin Harassment

Because of the evidence about Complainant's poor job performance, it has been somewhat difficult to sort out whether Respondent W. Miller's criticisms of Complainant's inability to perform the job and her resentment of that criticism caused Complainant's unhappiness with her job, her decision to leave, and the mental anguish she experienced, or whether Respondent W. Miller's derogatory jokes based on Complainant's national origin, and his use of derogatory terminology and language related to Complainant's national origin, was the cause. It appears from the record that Respondent W. Miller had grounds for criticizing Complainant's job performance and may have grounds, in fact, for terminating her for inadequate job performance or for her unauthorized entry into his office. However, the law will not allow Respondents to use Complainant's poor job performance as an excuse or a defense to Respondents' use of or allowance of derogatory and discriminatory language, which he directed at Complainant or used in her presence. This forum has determined that Complainant's primary reason for leaving her job when she did was the atmosphere in the restaurant, which Respondents created and maintained and which discriminated against Complainant in the terms and conditions of her employment.

Evidence establishes that during one of the arguments that Respondent W. Miller had with Complainant about her job performance, he told her that if she did not like the way things were done, she could "go back to Mexico." Respondent W. Miller admitted in his

testimony that he made this remark because, as he stated, "As far as I knew, that's where she was from." This remark caused Complainant to be upset and heightened the tension between them. The forum believes that this remark indicates that Respondent W. Miller regards persons of Hispanic heritage, even those persons who are, in Complainant's case, third generation Americans, as not being "American," and therefore, not being entitled to live here unless they agree with Respondent's point of view.

In the presence of Complainant and others, Respondent W. Miller made many derogatory jokes and, on more than one occasion, used the terms "spic," "greasers" and "wet-backs" to refer to persons of Mexican national origin. Respondent W. Miller even went so far as to make the remark that "Mexicans are okay – everyone ought to own one."

When Respondent W. Miller criticized Complainant's nephew, Roger Breashears, on two separate occasions for failings in his job performance, he used derogatory language based on Complainant's national origin, and in one instance, admits telling Breashears to get his "spic" fingers out of the food. Respondent W. Miller did not dispute that he made any of these remarks.

Respondent W. Miller also demonstrated tremendous insensitivity toward Complainant's national origin when talking about the pigs that were being fed from the restaurant food. He referred to these animals as "his Mexican pigs" and would comment in front of the Hispanic employees at the restaurant, including Complainant, that

"my Mexican pigs will eat anything." Considering the fact that Respondent W. Miller regularly told ethnic jokes to the restaurant employees, including Complainant, this forum cannot accept his explanation for his reference, that is, that he only used the term to differentiate these pigs from other pigs. Clearly, it was another of his remarks disparaging persons of Mexican national origin.

This forum adopts the standard set forth in Section 1606.8(b) of the EEOC Guidelines for determining whether harassment based on national origin has occurred. Ethnic slurs and other verbal or physical conduct relating to an individual's national origin constitute harassment when this conduct:

- (1) has the purpose or effect of creating an intimidating, hostile, or offensive working environment;
- (2) has the purpose or effect of unreasonably interfering with an individual's work performance; or
- (3) otherwise adversely affects an individual's employment opportunities.

Respondents' derogatory comments and jokes were not isolated incidents. These remarks were persistent and strong in tenor.

All of the cited instances of Respondent W. Miller's use of derogatory terms, and the telling of ethnic jokes related to Complainant's national origin, had the purpose or effect of creating an intimidating, hostile, or offensive working environment, and did therefore create an atmosphere in the restaurant which discriminated against Complainant in the terms and conditions of her employment, by subjecting her, along

with the other Hispanic employees, to regular verbal humiliation.

Very few of the Ultimate Findings of Fact in this matter turned upon the credibility of one witness versus another on a particular fact. As set out above, Respondent W. Miller admitted making many of the derogatory comments. He admitted that he told derogatory jokes and that he told Complainant that she could "go back to Mexico." He further admitted that he used the term "spic" when reprimanding Roger Breashears. He freely admitted that he referred to animals that he was feeding as his "Mexican pigs." Respondent D. Miller testified that she heard her husband, Respondent W. Miller, state that "Mexicans are okay - everyone ought to own one." The testimony of Nedra Cunningham, relating hearsay statements made by Guitierrez and Walter King, was not substantially relied upon in making the determination that Respondents had in fact created a harassing atmosphere in the restaurant.

Damages

Complainant was compelled, by Respondent's actions, to leave her employment and was unemployed for a period of eighteen weeks.

This forum has set forth the standard for constructive discharge in *In the Matter of West Coast Truck Lines, Inc.*, 2 BOLI 192 (1981), *aff'd without opinion, West Coast Truck Lines, Inc., v. Bureau of Labor and Industries*, 63 Or App 383, 665 P2d 882 (1983). In that order, this forum stated:

"The general rule, which this forum adopts, is that if an employer deliberately makes an employee's

working conditions so intolerable that the employee is forced into involuntary resignation, then the employer has encompassed a constructive discharge ***"

Respondent W. Miller's derogatory remarks to Complainant regarding her national origin, as well as such remarks made in Complainant's presence, created intolerable working conditions. The fact that Respondents may not have intended for Complainant to resign is not relevant where Respondent deliberately imposed the intolerable conditions.

In making the award of damages to Complainant for mental anguish and suffering, the forum has considered that at least a significant part of her distress on the job was caused by criticism of her job performance and was separate from the anguish and suffering resulting from the discriminatory atmosphere created in the restaurant by Respondent's harassment of Complainant.

However, Complainant did suffer personal humiliation and anguish as a result of such remarks made by Respondent W. Miller. The testimony of attorney Steven Thomas established that Complainant was visibly upset and depressed because of the harassment. Mr. Thomas was an unbiased and credible witness who observed the effects of the harassment on Complainant on several different occasions. For this mental distress the award of \$1000.00 is made.

2. National Origin Discrimination

Respondent W. Miller's request of the employees to speak English while working in the restaurant does not

constitute national origin discrimination in the terms and conditions of Complainant's employment. The persons who were asked to speak English, including Complainant, spoke English as their first language, and Respondents made an exception for the employees who spoke little or no English. It is not unreasonable for an employer who employs some persons who speak both English and Spanish and some persons who speak only English to ask that all employees speak, where possible, the common language in order that the work of the business be conducted smoothly. Respondents did not make the request to the employees to speak English in order to disparage the Spanish language or prevent the employees of Hispanic origin from identifying with their ethnic origin, but rather made the request only in response to the needs of the other employees who had difficulty in understanding what was going on, and therefore, had difficulty in performing their jobs. This request was made for, and based upon, reasons of business necessity and no discrimination was found.

3. Religious Harassment

This forum has addressed the subject of religious harassment in a prior Final Order, *In the Matter of Sapp's Realty, Inc.*, 4 BOLI 232 (1985). In that case, the Complainant was subjected to daily harangues about the Employer's religion and was given religious material that was neither wanted nor requested. At one point, her continued employment was conditioned upon her ability to listen to the Employer's religious discussions. The Commissioner determined that respondent employer's actions in that

matter created such an intolerable atmosphere of religious harassment and intimidation as to constitute unlawful discrimination. The situation presented in the instant case before the forum is in stark contrast to that presented in the *Sapp's Realty* matter.

As stated in the Findings of Fact, there appeared to be only one occasion upon which Respondent W. Miller engaged in a discussion regarding the merits of Complainant's religion. It also appears that Respondent did not initiate this discussion but was drawn into an on-going discussion that was taking place between Complainant and Respondent's manager, Guitierrez. Although Respondent W. Miller made certain remarks as to his perception of the Pope, his remarks were made in the context of a discussion and were not made to convert Complainant or to convey the message that Complainant's continued employment depended upon participating in or listening to discussions of the merits of any religion. Furthermore, Respondent's remarks were isolated, and were not, as in the *Sapp's Realty* matter, continuous. The facts establish that the remarks did not create a hostile environment or unreasonably interfere with Complainant's ability to work. Likewise, no employment decision was based upon Complainant's submission to or rejection of such remarks. Respondent's actions, therefore, do not constitute discrimination against Complainant in the terms and conditions of her employment on the basis of religion.

The facts in this matter also established that Respondent's manager, Guitierrez, did engage in discussions and arguments with Complainant in

regard to religion. These conversations, however, were not in the nature of, as in *Sapp's Realty*, preaching or proselytizing, nor did it create a hostile environment or unreasonably interfere with Complainant's work performance. Furthermore, no employment decisions were made on the basis of Complainant's submission to or rejection of such discussions. While the facts in this case do not rise to the level of actual religious harassment, an employer will be held responsible for the acts of a supervisor that do constitute harassment, whether or not the employer had knowledge of such acts by the supervisor. In this context, supervisor is defined as any person who exercises direct supervisory authority over the position of the complainant, and has the authority to hire and discharge, or to effectively recommend hiring and discharge.

In determining what does in fact constitute discrimination, this forum notes that the mere fact that a discussion occurs among employees regarding religion does not necessarily mean that any employee whose religion is criticized in the course of those discussions is subjected to an atmosphere of discrimination.

4. Religious Discrimination

The evidence indicates that Complainant asked Guterrez to have Sunday off in order to attend mass. Guterrez, a Seventh Day Adventist, did himself take time off between sundown on Friday and sundown on Saturday for worship. Although Guterrez refused Complainant's request, Respondent W. Miller, once he was made aware of her request, did make accommodation for Complainant to

attend church by allowing her to have Sundays off.

This forum has held an employer responsible for the actions or inactions of the employer's supervisory personnel. *In the Matter of Pioneer Building Specialties Co.*, 3 BOLI 123 (1982), *aff'd without opinion, Pioneer Building Specialties Co. v. Bureau of Labor and Industries*, 63 Or App 871, 667 P2d 583 (1983); *In the Matter of Rich Manufacturing Company*, 3 BOLI 137 (1982). Stated differently, the supervisor's actions or inactions are imputed to the employer. As stated above, a supervisor is defined as one who has the authority to hire and discharge, or to effectively recommend hiring or discharge. The facts in this case do not establish whether Guterrez was such a supervisor. If he was, Respondent would be liable for his failure to reasonably accommodate Complainant in this fact situation. Although in any case, there were no damages since accommodation was immediately made. If he was not, Respondents would not be liable where they took immediate action to correct the situation. In this case, since there are no facts to establish that Guterrez was a supervisor as defined above, and Respondent did take immediate action to correct the situation and accommodate, the forum has determined that Complainant was not discriminated against on the basis of religion.

ORDER

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

similarly situated, Respondents are hereby ordered to:

1) Deliver to the Hearings Unit of the Portland office of the Bureau of Labor and Industries a certified check payable to the Bureau of Labor and Industries in trust for MARY ANN GARCIA in the amount of TWO THOUSAND NINE HUNDRED NINETY-SEVEN DOLLARS AND TEN CENTS (\$2,997.10) plus interest upon \$1,997.10 thereof compounded and computed at the annual rate of nine percent from the dates the appropriate portions thereof would have been paid but for Respondents' unlawful practices until the date paid. This award represents \$1,997.10 in damages for wages lost due to Respondent's unlawful employment practices, and \$1000 in damages for the mental distress Complainant suffered as a result of the unlawful practices.

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

**In the Matter of
SAFEWAY STORES, INC.
and Donald E. Boss, Respondents.**

Case Number 16-85
Final Order of the Commissioner
Mary Wendy Roberts
Issued January 12, 1987.

SYNOPSIS

Female Complainant's testimony regarding alleged acts of sexual harassment by her male supervisor, who was named as a respondent, was not credible because it was inconsistent, unlikely, and inexact in the extreme as to date of occurrence. Subsequent to her harassment charges, Complainant's substandard performance was not attributable to any retaliation by Respondent employer. Finding that neither Respondent had committed an unlawful employment practice, the Commissioner dismissed the complaint and specific charges. ORS 659.030.

The above-entitled contested case came on regularly for hearing before Leslie Sorensen-Jolink, designated as Presiding Officer by the Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was conducted on April 9, 1986, in Room 311 of the State Office Building, 1400 S.W. Fifth Avenue, Portland, Oregon. The Bureau of Labor and Industries (hereinafter the Agency) was represented by Renee Bryant Mason, Assistant Attorney General of the Department of Justice of the State of Oregon. Safeway Stores, Inc. and Donald

E. Boss (hereinafter Respondent Safeway and Respondent Boss) were represented by Janice M. Stewart, Attorney at Law. Maxine D. Strauss (hereinafter Complainant) was present throughout the hearing.

The Agency called as its witnesses Complainant; Ronald Lundgren, Complainant's friend during times material herein; and Cindy Christian, Complainant's daughter. Respondents called as witnesses Carol (Rossiter) Smith (hereinafter Smith) and Mildred Fynskov, co-workers of Complainant at the bakery of Safeway Store No. 505 during times material herein; Dolores Perry, Store No. 505's lead bakery sales clerk before Complainant; Respondent Boss (by videotaped deposition), Complainant's supervisor and alleged perpetrator of the sexual harassment at issue herein; Mary Custis and Steven Arce, Complainant's supervisors after Respondent Boss; Wiley Phillips, manager of Store No. 505 during some times material herein; and Larry Levens, Safeway district manager during all times material herein.

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

FINDINGS OF FACT – PROCEDURAL

1) On or about May 10, 1982, Complainant filed a verified complaint with the Civil Rights Division of the Agency alleging that Respondents had discriminated (and, apparently,

continued to discriminate) against her in connection with her employment by Respondent Safeway.

2) Following the filing of the aforementioned complaint, the Civil Rights Division investigated its allegations. Thereafter, the Agency determined that substantial evidence existed to support the overall allegation of sexual harassment contained in that complaint (even though the Agency did not find substantial evidence of some of the particulars contained in that complaint).

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

4) Accordingly, the Agency caused to be prepared and duly served on Respondents Specific Charges dated December 30, 1985, alleging: 1) that Respondent Safeway had violated ORS 659.030 by discriminating against Complainant in the terms and conditions of her employment because of her sex, and 2) that Respondent Boss had violated ORS 659.030 by aiding, abetting, inciting, coercing, or compelling Respondent Safeway in its above-described discrimination.

5) The forum duly served Respondents and the Agency a notice of the time and place of the hearing of this matter.

6) On or about January 17, 1986, Respondents served their answer to the Specific Charges on the forum.

7) Before the commencement of the hearing, Complainant received

from this forum a copy of a document entitled "Information Relating to Civil Rights or Wage and Hour Contested Case Hearings," which had been sent to her, and stated that she had read the document and had no questions about it. Before the commencement of the hearing, Respondents each received from this forum a copy of the same document, which had also been sent to them. At the commencement of the hearing, Respondent Safeway, through its lay representative Arlene Hatfield, stated that it had read this document and had no questions about it.

8) Respondent Boss voluntarily ended his employment with Respondent Safeway effective March 30, 1986, and moved to Maryland before the hearing. The Agency and Respondents agreed to his testimony herein being perpetuated by transcript and videotape of his March 28, 1986, deposition, which have been admitted as exhibits.

9) At the Presiding Officer's request, Respondent Safeway and the Agency submitted the following documents to the forum after the hearing:

a) Respondent Safeway submitted the Affirmative Action Policy Statements, and an example of the Equal Employment Opportunity poster, which were posted in its Store No. 505 during times material herein.

b) The Agency submitted the Complaint to which the Specific Charges and Procedural Finding of Fact 1 above refer.

When the Presiding Officer requested these documents at hearing, there was not objection to their

submission and admission, and the Presiding Officer stated that they would be admitted as exhibits. Accordingly, they have been admitted.

FINDINGS OF FACT – THE MERITS

1) At all times material herein Respondent Safeway was a foreign corporation engaged in the retail grocery business. In that business during all times material, Respondent Safeway employed one or more employees in the State of Oregon.

2) On July 9, 1971, Respondent Safeway hired Complainant, a female individual, to work as a bakery sales clerk in its Store No. 505 in Medford, Oregon (hereinafter Store No. 505). Complainant was employed at that store during all times material herein.

3) Complainant's duties as bakery sales clerk included waiting on customers, packaging rolls and slicing bread, stocking showcases and displays, and various cleaning tasks.

4) From the time Respondent Safeway hired her through 1979, Complainant received average and good yearly performance evaluations, and Respondent Safeway took no disciplinary action against her.

5) At all material times after September in 1975 or 1976, Respondent Safeway employed Respondent Boss. Complainant first met Respondent Boss when he began working for Respondent Safeway, as a baker in Store No. 505's bakery. From that time until he was transferred to another store in about October 1977, Complainant and Respondent Boss got along well. They liked each other as friends, but never saw each other socially.

Respondent Boss was not Complainant's supervisor during this period.

6) According to Complainant, at sometime before Respondent Boss transferred to another Safeway store in 1977, Frank Czekli, a baker at Store No. 505, made a breast and a penis out of dough and showed it to Complainant. Complainant testified that Mr. Czekli and Respondent Boss "more or less" laughed, "kind of" whispered back and forth and asked Complainant how her sex life was. Complainant stated that this changed her opinion of Respondent Boss (apparently for the worse). Ms. Fynskov testified that about the time Respondent Boss transferred in 1977, Complainant told her that she liked Respondent Boss (in such a way that in response Ms. Fynskov felt moved to remind Complainant that Respondent Boss was married).

Complainant did not report this dough incident to anyone at Respondent Safeway. In fact, Complainant did not mention it to the Agency at any time before the hearing. Because this omission is unexplained, because Complainant's assertion that this alleged act diminished her regard for Respondent Boss conflicts with Ms. Fynskov's testimony, because Respondent Boss does not recall making the remark attributed to him and Mr. Czekli in the previous paragraph, and because of the forum's assessment of Complainant's relative general credibility contained in Finding of Fact 67 below, this forum cannot find that Respondent Boss did what Complainant asserts in the previous paragraph. Whether Mr. Czekli did not know is irrelevant herein.

7) In about October 1977, Respondent Boss was upgraded to bakery manager and transferred to Respondent Safeway's store in Grants Pass, Oregon.

8) Complainant asserts that one evening during the time he was working in the Grants Pass store, Respondent Boss, who still lived in Medford, came to Store No. 505 and asked to talk to Complainant after she completed her work shift. Complainant testified that Respondent Boss told her that he was going to become Store No. 505's bakery manager and asked her what she thought of that. Complainant stated she was bothered a little, because she could not understand why Respondent Boss was telling her this.

The forum notes that by itself, this visit by Respondent Boss, if made, is not probative of any issue herein.

9) On October 9, 1979, Respondent Safeway transferred Respondent Boss back to Store No. 505 as bakery manager (and baker). At that time, the bakery department in Store No. 505 consisted of the bakery manager, the lead bakery sales clerk (Dolores Perry); three bakery sales clerks (Complainant, Mildred Fynskov, and Lois Herrin, two of whom worked at a time); a cake decorator (Carol (Rositer) Smith after February 1980); two bakers (in addition to Respondent Boss, apparently); and probably a clean-up person. Between October 9, 1979, and June 1982, Respondent Boss remained bakery manager and, as such, supervised all these employees and reported directly to Store No. 505 manager James Mosley.

10) During all times material, the "back end" of the bakery was the

production area, where the bakers, cake decorator, and bakery manager worked; and the "front end" of the bakery was the sales area, where the sales clerks and lead sales clerk worked.

11) Complainant testified, and this forum finds, that from the time Respondent Boss transferred back to Store No. 505 through the first part of 1980, their working relationship was "alright." Respondent Boss testified, and this forum finds, that on an interpersonal level, they were friends. He testified that he was not attracted to her and answered negatively when asked if he felt friendly enough with her to flirt with her, even as a friend.

12) Complainant testified that from the time Respondent Boss transferred back to Store No. 505, she felt that he "still" was "kind of interested" in her, because of the above-described dough incident and "the way" he looked at her. She testified that she was not attracted to him. Ms. Smith, a very good friend of Complainant's after she began working in Store No. 505's bakery in February 1980, testified that Complainant mentioned to her, probably around the early part of 1980, that she thought Respondent Boss was an attractive man, that she had been attracted to him, and that she had to "fight the urge" because he was a married man. Complainant testified that it is not possible that she told Ms. Smith this. Based upon this forum's assessment of relative credibility in Finding of Fact 67 below, this forum gives greater weight to Ms. Smith's testimony and finds that Complainant did make the statements to Ms. Smith which are cited above. The only relevance of this

finding, however, is that it shows inconsistent statements by Complainant which bear upon her credibility. (See section 2 of the Opinion below.)

13) Early in 1980, Ms. Perry, the head bakery sales clerk in Store No. 505 for over ten years, resigned. She did so because she had found Respondent Boss was a very hard person to work for, and he and she did not "see eye to eye" on some things. She did not resign because of any sexual advances or sexual harassment by Respondent Boss; he made none against her.

On or about February 3, 1980, pursuant to a decision by Mr. Mosley, Complainant was promoted to head bakery sales clerk.

Although Complainant had let Respondent Boss know that she wanted this promotion, Respondent Boss did not do anything to help Complainant get it.

14) Complainant's duties as head bakery sales clerk were significantly different from what they had been as bakery sales clerk, in that she had to oversee the operation of the front end of the bakery. This involved directing the sales clerks' work and making out their schedule, making sure that all bakery goods were packaged and displayed in a proper manner and that the sales clerks were trained properly, and ordering some supplies. Complainant's supervisory responsibilities included relating to the sales clerks whatever instructions Respondent Boss gave to her. During the first few hours of her shift, when she handled the front end of the bakery alone, Complainant was to open the bakery, unload the pastries into the display

case, and otherwise prepare the front end of the bakery for business. Complainant also was to perform the sales clerk tasks described in Finding of Fact 3 above.

15) Once Complainant became head bakery sales clerk, Respondent Boss explained to her, when she arrived at work each morning, what he was going to do that day, what he wanted to see done at the front end, where he wanted to see his products displayed, and so on. During the day, he went up front and discussed with Complainant questions which arose, and she was to come back to him with any question or customer complaint she had. The interaction between Respondent Boss and Complainant was ongoing all day long.

16) At first, Complainant did a very good job as head bakery sales clerk, and Respondent Boss was very pleased with her work. Respondent Boss was demanding as a supervisor, in that he insisted that his subordinates follow his instructions.

17) Until the summer of 1980, Complainant got along very well with the two other bakery sales clerks, Ms. Herrin and Ms. Fynskov, with whom she was good friends.

18) On April 8, 1980, Respondent Boss completed his first annual written "Training and Development Appraisal" (hereinafter performance evaluation) of Complainant. In it, Respondent Boss gave her performance of every specific job duty named the highest of three possible ratings; rated her performance in each of seven broad categories "considerably above average" or "superior" (the two highest of seven possible ratings); rated her overall

work performance "considerably above average," and noted in the section for "Supervisor's Comments and Recommendations" that Complainant was "becoming a very good lead person." This evaluation did not otherwise specifically evaluate Complainant's supervisory activities.

Respondent Boss testified that by the last comment noted in the previous paragraph, he was trying to encourage Complainant to continue trying to learn her job. He testified that Complainant was having difficulties in her position (such as not knowing what to do), which he then attributed to the pressure of learning the job. Respondent Boss testified that at that time he did not have "much" problem with Complainant being argumentative or refusing to do jobs. Based on Respondent Boss's completely consistent and unqualified specific and general ratings of Complainant in his April 1980 evaluation of her, the forum finds that he viewed her as a considerably above average head bakery sales clerk.

19) Respondent Boss testified that Complainant's performance as lead bakery sales clerk deteriorated after his April 1980 evaluation of her. He testified that many times between April 1980 and April 1981 he pointed out to Complainant a job which was not being done properly, explained to her how it had to be done, and asked her to do it that way. Respondent Boss asserted that, in response, Complainant went from being a friend to an adversary. He claimed that she did not want to listen to advice or to directives, and became argumentative whenever asked to do anything differently; that she took his pointing out things being

done wrong as a direct affront or insult to her, and would not accept it. Respondent Boss attributed this deterioration in Complainant's performance to her having allowed her position as head sales clerk to go "to her head * * * she decided that she and she alone was in charge of her area and did not want to tolerate any interference from me."

20) Five or six months after she became head sales clerk (i.e., in early July or August 1980), problems began to develop between Complainant and sales clerks Fynskov and Herrin. According to Complainant, Ms. Fynskov began telling Complainant that she did not have to take orders from her, that Complainant was not her boss. According to Ms. Fynskov, she and Ms. Herrin would ask Complainant questions, and if Complainant could not answer them, Complainant would start an argument. Furthermore, Ms. Fynskov and Ms. Herrin did not think Complainant was doing her share of the work.

21) On April 3, 1981, Respondent Boss completed a second yearly evaluation of Complainant. This evaluation rated her performance in each category either "considerably above average" or "slightly above average" (the second and third highest ratings), and rated her overall work performance "considerably above average." Respondent Boss made no comments or recommendations on this evaluation.

Based upon his very good (and unqualified) ratings of Complainant in this evaluation, this forum finds that Respondent Boss (A) did not then view her job performance as having deteriorated as much as he indicated in the

testimony reflected in Finding of Fact 19 above, and (B) still found Complainant to be a considerably above average head bakery sales clerk.

22) Complainant alleges that after she received her April 3, 1981, evaluation from Respondent Boss, he began sexually harassing her.

Complainant testified that the first outright act of sexual harassment occurred one morning when she was in the back of the bakery at a bench in front of the oven. Complainant alleges that Respondent Boss came up behind her and kissed the back of her neck. Respondent Boss denies ever kissing Complainant on the back of the neck.

23) Complainant alleges that she and Respondent Boss were the only two people in the "entire bakery area" when this kiss occurred.

Respondent Boss testified that he could not remember any specific time when only he and Complainant were in the bakery and that that would not be normal under any circumstances. Complainant testified that often before 10 a.m. the only people in the bakery other than she and Respondent Boss were "way in the back" of the bakery.

When this kiss allegedly occurred, Complainant was working from 7 a.m. to 4 p.m. The other bakery clerks did not arrive until 10 a.m. One or two bakers (other than Respondent Boss) and a cake decorator, however, did work in the back of the bakery from during the period between the start of Complainant's shift and the start of the bakery clerks' shifts. Complainant testified that the bakers might have been on a break at the time of this kiss, and that she does not remember any cake

decorator being there. Although the cake decorator worked the same morning schedule, and the same days, as Complainant at that time, she occasionally missed a day of work due to a scheduling cut.

At that time, the front and the back ends of the bakery were divided by a doorway and a wall which consisted of both solid shelving and louvered shelving. A person in the front of the bakery conceivably could see through the louvered shelving or the door to the area where Complainant alleges this kiss occurred.

24) Before and during the hearing, Complainant's assertions as to when this alleged kiss occurred were inconsistent.

In June 1981, Complainant told Safeway management that the kiss occurred during the first part of 1981 (or the last part of 1980). (See Finding of Fact 31 below)

In April 1982, Complainant made a written statement to Respondent Safeway in which she described this incident and stated that this kiss occurred about 3 to 4 months after she became head bakery sales clerk (i.e., about May or June 1980). Complainant testified at hearing that she made a mistake in so stating and that she does not remember dates well.

On May 6, 1982, Complainant stated, in her complaint herein, that this kiss occurred in June 1981.

At hearing, Complainant first indicated that this kiss occurred around and before June 1981. Immediately thereafter, she stated it occurred around June or July 1981; twice later, she said it occurred before June 1981.

The one witness who testified that Complainant reported this kiss to him at the time it happened was not sure of the month Complainant did so.

25) Complainant alleges that she was startled, surprised, upset and sick to her stomach when Respondent Boss kissed her. She alleges that she turned and looked at him, feeling embarrassed, angry, and scared. Complainant testified that she does not recall what she said to him, but she does recall that he did not like her reaction; he was "mad" and gave her a "cold stare."

Later, Complainant testified that she confronted Respondent Boss after this kiss, saying, "I know what you're up to and I don't like it; leave me alone." Still later, Complainant testified she approached him once about the sexual harassment, saying that she knew what he was up to, that it was not going to work, and that they both needed their jobs. It is not clear how soon after the kiss this confrontation allegedly occurred.

26) Complainant asserts that after the kiss, she kept working. Thereafter, she told Ms. Herrin about the kiss, and Ms. Herrin urged her to report it to Mr. Mosley immediately.

27) From on or about March 21, 1981, through at least 1982, a Safeway Affirmative Action Policy statement containing, in pertinent part, the following language was posted on a bulletin board in Store No. 505:

"Sexual harassment will not be tolerated. Employees violating Safeway's policy (i.e., unwelcome sexual advances, request for sexual favors, and other verbal or

physical conduct of a sexual nature) will be subject to immediate and appropriate disciplinary action."

This statement also advised employees to contact their manager if they felt they had been discriminated against in violation of this policy. It stated that Arlene Hatfield, Safeway's affirmative action representative, was also available to assist such an employee. Finally, this policy stated that the manager and/or affirmative action representative would investigate a complaint and insure that the employee's rights were protected.

28) Complainant asserts that she did not tell Mr. Mosley (or any other person in Respondent Safeway's management) about Respondent Boss's kiss at that time, because Mr. Mosley was not in Store No. 505. She asserts that she would have reported it to him if he had been there.

29) In her April 1982 statement to Safeway, Complainant said she reported the kiss to Mr. Mosley two weeks after it occurred. At hearing, Complainant testified, variously, that she reported it to him as soon as he returned to Store No. 505 after the kiss; just before he retired; before the meeting described in Finding of Fact 31 below.

Mr. Mosley's time cards establish that he worked in his regular capacity and, therefore, presumably at Store No. 505, continuously from the week ending April 4, 1981, through the week ending May 2, 1981, and from the week ending June 6, 1981, through the week ending July 4, 1981 (except possibly for sixteen hours during the week ending April 11, 1981, when he

appears to have worked in another area). There is no evidence concerning the period from May 2 to May 31, 1981. Therefore, it is possible that Mr. Mosley was out of the store for sixteen hours during the week ending April 11, 1981, and/or for some period of time between May 2 and May 31, 1981.

Mr. Mosley retired on July 31, 1981, and the meeting referred to in the first paragraph of this Finding occurred in June 1981.

In other words, Complainant's testimony asserts that she reported this kiss to Mr. Mosley (A) during or just after the week ending April 11, 1981, or during or just after May 2 to May 31, 1981; (B) just before July 31, 1981; (C) before sometime in June 1981. Obviously, not all three assertions can be accurate.

Before she testified at hearing, Complainant did not tell anyone at the Agency about this alleged report to Mr. Mosley. Complainant testified that she told her friend Ronald Lundgren and Howard Blair, her union representative, that she had told Mr. Mosley about the kiss, but she did not testify when she did so.

Because her testimony as to when she reported this kiss is inconsistent, because it is uncorroborated, and because Complainant did not inform the Agency of this report before her testimony at hearing, this forum must conclude that Complainant did not inform Mr. Mosley of the kiss on the back of the neck before the meeting described in the next Finding of Fact.

30) At some point, Complainant told Mr. Lundgren and Mr. Blair about

this kiss. She asserts that she told Mr. Blair after she told Mr. Mosley.

31) In June of 1981, at the suggestion of Mr. Blair, a meeting was held between Complainant, Respondent Boss, Mr. Mosley, Larry Levens (Safeway District Manager) and Mr. Blair. This meeting took place at Mr. Levens's office, in the District Office of Respondent Safeway adjacent to its West Main store in Medford.

Complainant asserts that Mr. Blair asked for this meeting in response to her reporting the kiss on the neck to him, and that the purpose of the meeting was for her to tell Safeway management that Respondent Boss was sexually harassing her. Mr. Levens testified that Mr. Blair asked for this meeting because Complainant had received some criticism, and that Mr. Blair did not say a word about sexual harassment. Mr. Levens asserted that the purpose of this meeting was for Complainant and Respondent Boss to try to work out their problems with each other. Complainant denied this assertion and testified that when, at the meeting, Mr. Levens tried to say that the meeting was just over a communication problem, Mr. Blair said that that was not correct, that it was a meeting about sexual harassment.

In any case, the Agency and Respondent Safeway agree that at that meeting Complainant informed Safeway management that Respondent Boss had kissed her on the back of the neck. Complainant testified that she did this at the beginning of the meeting. Mr. Levens testified that they spent the meeting talking about problems such as Respondent Boss and Complainant not getting along and dissension

among bakery staff. Mr. Levens stated that Complainant mentioned sexual harassment only at the end of the meeting, as the participants were preparing to leave. At that point, according to Mr. Levens, Complainant said that Respondent Boss had kissed her on the back of the neck earlier that year or the later part of the previous year. According to Mr. Levens, Mr. Boss was not present when Complainant made this first report of the kiss to the management of Respondent Safeway.

Beyond the stipulation that Complainant told Safeway management of the kiss on the neck at this meeting, the only direct evidence as to the genesis, purpose, or content of this meeting is the testimony of Complainant and Mr. Levens. As noted above, this testimony is diametrically opposed on certain key points. For the following reasons, this forum gives Mr. Levens's testimony greater weight than Complainant's testimony, where they differ, and adopts Mr. Levens's testimony as accurate. First, the fact that Mr. Blair did not appear to corroborate Complainant's assertions as to the disputed aspects of this meeting is unexplained. Given that, this forum cannot presume that his testimony would have supported Complainant's testimony. Second, after this June 1981 meeting, there were several meetings between Complainant and Safeway management, as noted below. Complainant's manifest confusion, at hearing, concerning events during times material raises the possibility that she confused the June 1981 meeting with another, later, meeting. Third, while this forum has not found Complainant's testimony

generally reliable, this forum has no reason (other than Complainant's assertions) to consider Mr. Levens's testimony unreliable. (See Finding of Fact 67 below.) Fourth, in light of this forum's finding that Complainant did not tell Mr. Mosley of the kiss until the June 1981 meeting, her testimony that she told Mr. Blair after Mr. Mosley indicates that she did not tell Mr. Blair before this meeting. This contradicts Complainant's assertions in dispute concerning this meeting, as those assertions hinge upon Mr. Blair's knowing of the kiss before the meeting.

32) Mr. Levens was shocked by Complainant's report of the kiss on the neck. He asked Complainant when this kiss occurred, and she said in the first part of the year. Mr. Levens asked her why she had not reported it at that time, and Complainant said that Mr. Mosley had been out of the store and she just had not felt like saying anything about it. Mr. Levens asked her if any other problems, incidents or anything "of that nature" had come up since then, and Complainant said no. Mr. Levens told Complainant to contact him or her store manager immediately if any incident whatsoever of that nature came up again. Mr. Levens also instructed Mr. Mosley to discuss with Respondent Boss Respondent Safeway's policy concerning sexual harassment.

33) Complainant asserts that no action was taken against Respondent Boss pursuant to her complaint about his kiss. She testified that after the June 1981 meeting, Mr. Mosley did not have any discussion with her concerning sexual advances by Respondent Boss, and he did not investigate her

assertions to ascertain whether they were true. Mr. Levens did not recall if he checked whether Mr. Mosley followed his above-cited instructions, but he testified that it would have been unlike Mr. Mosley not to.

34) Respondent Boss testified that after April 1981 he had two meetings with Mr. Mosley and Complainant regarding problems with Complainant, including a meeting with Mr. Blair at Store No. 505. He said that on both occasions, he and Complainant were called up to the office and more or less lectured by Mr. Mosley; these were not participatory occasions and he did not recall specific comments from him or Complainant.

Respondent Boss said the purpose of the meeting Mr. Blair attended was to try to get him and Complainant to work to communicate with each other and to get Complainant to understand that her job had to be done in a correct manner. He testified that he did not know why Mr. Blair was present. He testified that Complainant did not accuse him of having kissed her on the back of the neck, and that he was not aware of that accusation or Complainant's accusations described in Finding at Fact 38 below before Complainant filed her complaint herein.

35) Complainant and Mr. Levens testified, and this forum finds, that she did not make any complaints to Mr. Levens about sexual harassment after the June 1981 meeting. Mr. Levens testified that he did not meet again with Complainant, and did not talk with anyone or hear anything further about any complaint of sexual harassment by Complainant, before she filed the instant complaint.

36) Complainant testified that she and Safeway management had about three meetings (at the Medford store on West Main). She does not recall Respondent Boss being at the very first one. Thereafter, he was present, but never at the same time Complainant was present.

37) Upon Mr. Mosley's retirement, Wiley Phillips became Store No. 505 manager on August 1, 1981.

38) Complainant asserts that after the kiss on the back of the neck and the above-described meetings, Respondent Boss continued to make sexual advances to her. Quite often, Respondent Boss suggested that he and Complainant take their coffee breaks together at a neighboring dime store. Complainant agreed to do this because Respondent Boss said he wanted to discuss store business; she felt she would have been arguing had she not gone.

Most of the time, Respondent Boss and Complainant went alone on these coffee breaks. Complainant asserts that sometimes, but not always, they discussed store business, and that Respondent Boss tried to discuss more personal things (like "role relationships"). Complainant testified that he made remarks such as, "Since we can't be lovers, let's be friends," which Complainant found "suggestive." Complainant asserted that Respondent Boss also, on these breaks, several times asked her to go out for a drink with him or meet him sometime after work. Complainant testified that she found these remarks and invitations unwelcome and always just said no. Complainant testified that they did

not occur every day; they seemed to go in "moods."

Upon explaining why she could offer no other specific examples of Respondent Boss's verbal harassment, Complainant testified that Respondent Boss went about it in such a subtle way that it was hard to describe. She stated that he was a "real manipulator" and knew what he was doing.

Mr. Lundgren testified that Complainant described to him the kiss on the neck and a couple more acts of sexual harassment by Respondent Boss, including suggestive remarks or nuances, maybe asking her out for a drink, when they went for coffee at the dime store.

Respondent Boss testified that Complainant and he took coffee breaks at the dime store, generally to discuss some business topic that needed to be discussed. Respondent Boss stated that he never made a point of talking with Complainant about matters personal to him or to her. He denied ever asking Complainant out for dates or ever saying to her or anyone, "If we can't be lovers, let's be friends."

39) Complainant testified that before November 14, 1981, Respondent Boss did not criticize her work performance to her.

40) A corrective action notice is a document by which Respondent Safeway apprises an employee in writing of a failure by that employee to perform work according to company standards and of the necessary corrective action. It is viewed as both a warning and a training tool.

On November 14, 1981, Respondent Boss filed a Corrective Action Notice against Complainant, which stated that Complainant had "become argumentative, uncooperative and uncommunicative," and that she "will not report problems or unusual situations to the bakery manager and fails to discharge her duties properly." This notice also referred to poor personnel morale and Complainant being unreasonable with co-workers. It cited as the required corrective action Complainant accepting "constructive criticism and direction without arguments and sullen attitude."

On this notice, in the space for the employee's statement, Complainant wrote that she thought the perception that she was argumentative was based on "nothing more than lack of communication because of job pressures on both of us," and stated that she would do her utmost to change Respondent Boss's attitude toward her. She wrote nothing about sexual harassment.

41) Complainant was upset by this notice, the first she had ever received during her employment at Respondent Safeway. Complainant asserted in her complaint that this notice was "completely false" and that she believed Respondent Boss gave it to her because she declined his sexual advances.

Complainant testified that she "went to" Messrs. Phillips and Blair about this notice. Mr. Phillips testified that Complainant did not complain directly to him about this notice.

42) Respondent Boss testified that after his April 1981 evaluation of Complainant, Complainant's job performance became progressively worse;

that she became more argumentative and less apt to do what she was asked to do. He testified that he gave her the corrective action notice to make her realize that she had to do her job the way the company wanted it done, and that that was what he was trying to get her to do. He stated that he had given Complainant verbal warnings prior to this notice.

Respondent Boss stated that any time he counseled Complainant, she disagreed with him and became more difficult to deal with: more argumentative and less apt to do what he asked her to do. He stated that Complainant argued with him about almost anything that he told her she needed to do, including basic job tasks. He stated that she was offended by constructive criticism and did not accept the fact that something had to be done. He testified that when he gave her this notice, she did not accept what it said, but did not accuse him of issuing it because of sexual harassment.

43) Complainant testified other than in this notice, Respondent Boss never really made any criticisms of her work performance. She testified that he harassed her in other ways. The particulars of this harassment which Complainant provided at hearing were her worsening performance evaluations and her assertion that just before the kiss on the neck, Respondent Boss started yelling and screaming at her, making her working conditions miserable.

44) Complainant asserts that on her way home on December 24, 1981, Respondent Boss kissed her on the lips and said "Merry Christmas." Respondent Boss denied this.

45) Initially, Complainant stated that this kiss occurred when Respondent Boss came up to the front of the bakery. Later, she asserted that it occurred behind some bread racks which were lined up along an aisle in front of the bakery oven. The only oven in the bakery is in the back of the bakery. Accordingly, this forum finds that Complainant has testified once that this kiss occurred in the back of the bakery, and that both these statements cannot be accurate.

46) Complainant first asserted that no one else but she and Respondent Boss were "there" at the time of this kiss, but that there may have been workers in the back of the bakery. Later, she stated that if someone else was working the bakery at the time of the kiss, they must have been upstairs on a break; there was no one else in the bakery.

Complainant testified that this kiss occurred when Respondent Boss came to her while he was getting ready to leave the bakery for the day. She also testified that he left the bakery immediately after the kiss. Respondent Boss's time card shows that on December 24, 1981, he clocked out (by handwritten interlineation, due to having accidentally clocked in in the clocking out space for that day) at precisely 1:00 p.m. Complainant's time card shows that she was out to lunch from 12.02 until she clocked in at 1.05 (1:03 p.m.). Both Boss's 1:00 notation and

Complainant's 1.05 clocking in were done at Store No. 505's time clock. To go to that time clock from the bakery, one must walk from the front to the back of Store No. 505 and up the stairs. Accordingly, Respondent Boss could not have kissed Complainant in the bakery on his way home, as Complainant testified, unless he returned to the bakery after clocking out. Respondent Boss testified that his practice was to leave the store immediately after clocking out, but he admitted that on occasion he would return to the bakery after clocking out to do or say something he had forgotten. Respondent Boss testified he does not recall whether he returned to the bakery after clocking out on December 24, 1981.

Their time cards show, and this forum finds, Mr. Czekli, Henry Johnson, Ms. Smith, Complainant, Ms. Herrin, Ms. Fynskov, and Sheila Rossi were working in Store No. 505's bakery on December 24, 1981. They also reflect, and this forum finds, that Mr. Czekli, Ms. Smith, Ms. Herrin, and Ms. Rossi were in the bakery when Complainant returned from lunch that day, unless they were out on coffee breaks. Although normally workers tried to take their afternoon break halfway between their return from lunch and their quitting time (both of which varied among the above-cited employees on December 24, 1981), there is no way of knowing when they took breaks at a hectic holiday time such as December 24, 1981. However, given the above-cited

* The other possibility is that Respondent Boss lied on his time card entry. To find this, however, would require the forum to believe that Respondent Boss planned this kiss with the forethought and minute care of a master schemer. Considering the whole record, the forum cannot find persuasive support for such a thing.

holiday rush and normal practice, this forum finds it highly unlikely that all of those employees (a baker, a cake decorator, a clerk, and a helper) went on their coffee breaks at the same time, just after Complainant returned from lunch at 1 p.m.

47) Complainant testified that when Respondent Boss kissed her on December 24, 1981, she was disgusted and upset and said, "I didn't like that." Respondent Boss testified that Complainant never said to him anything to the effect that she felt he was sexually harassing her or that he was taking actions against her because she would not grant him sexual favors.

48) Complainant testified that she told Mr. Lundgren about the kiss on the lips. However, when testifying at hearing, Mr. Lundgren did not mention this kiss, even though he recounted the sexual harassment Complainant told him about.

49) Complainant testified that she did not tell Respondent Safeway's management about the kiss on the lips. Complainant testified that given management's response to her previous complaint about a kiss, she had no confidence that they would do anything about this kiss. She also stated that it would have been difficult to report this to Mr. Phillips, whom she did not know.

However, Complainant otherwise claimed that after the kiss on the lips, she did go to Mr. Phillips after work four or five times, tell him Respondent Boss was sexually harassing her and ask him to do something about it. Moreover, Complainant claims that in these visits, she told Mr. Phillips about the kiss on the back of the neck, asserting that it explained Respondent

Boss's corrective action notice and worsening evaluations of her.

Mr. Phillips testified that Complainant's statement that she met with him privately after work on several occasions and told him she was having problems with Respondent Boss was a lie. He stated that Complainant has never mentioned sexual harassment to him personally.

50) According to Complainant, Mr. Phillips buried his head in the sand and avoided the real issue, saying he did not want to talk about it or hear all these problems. Complainant testified that Mr. Phillips took no action to stop the harassment or correct its attendant problems. Complainant maintained that when Mr. Phillips met with Complainant and Respondent Boss several times, Mr. Phillips acted as if he had never heard her saying it was sexual harassment, told them to settle their problems between themselves, and said, "Someone's going to get fired."

51) Mr. Phillips testified that in late winter 1981 to February-March 1982, Respondent Boss first complained to him about Complainant, stating that he was not getting the full cooperation he would prefer to get from his lead sales clerk, that she had become argumentative and uncooperative, and that he had discussed this problem with her to no avail; and asking Mr. Phillips to step in. In response, Mr. Phillips had Respondent Boss and Complainant meet in his office to discuss the problem. Mr. Phillips testified that he indicated his own list of priorities for their conduct and production activities, and let them know that he expected them to work as a team, that Respondent Boss was the department superior, and that his

instructions were to be followed and everyone was to cooperate with him. Mr. Phillips felt that they had resolved their differences and were going to work together as a team.

Mr. Phillips testified that Respondent Boss made a similar complaint, with more emphasis on the lack of cooperation, about one month later. Mr. Phillips asked Respondent Boss to meet with his supervisees, lay out exactly what he wanted each to do that day, and follow through to see that it was done on schedule. Mr. Phillips did not meet with Complainant in response to this complaint.

Mr. Phillips testified that thereafter for one month (until approximately April 1982), Respondent Boss complained to him regularly about the lack of cooperation and deterioration in the bakery sales force production schedule. Mr. Phillips did not receive complaints from any other bakery employee at that time.

Mr. Phillips testified that on about April 1, 1982, he met for a second time with Complainant and Respondent Boss. Respondent Boss had complained that he was not getting good cooperation and follow through from Complainant on his production plans, and that her attitude left something to be desired; Complainant felt she was working very, very hard. Again, Mr. Phillips left the meeting feeling that the differences in their approaches had been "arbitrated" successfully.

Mr. Phillips testified that through the time Complainant filed her complaint herein, these were the only two times he counseled her about work problems. He asserted that before the time he learned of that filing, Complainant

did not complain to him or tell him anything about any sexual advances by Respondent Boss. In fact, Mr. Phillips testified that he did not learn of Complainant's complaint of Respondent Boss's sexual harassment until he received her filed complaint.

52) Respondent Boss testified that after he gave Complainant the November 1981 Corrective Action Notice, Complainant did not improve her attitude or job performance; both got worse. Ms. Fynskov testified that she complained to Respondent Boss and Mr. Phillips (as she said she had to Mr. Mosley) more than once that Complainant yelled at her in front of customer quite often, and Ms. Fynskov often had to work overtime because Complainant did not get her work done. Ms. Smith testified that she saw Complainant and the other bakery clerks arguing occasionally and that she saw Complainant being argumentative with Respondent Boss occasionally.

53) In her annual April 17, 1982, evaluation, Respondent Boss rated Complainant worse than he had in April 1981, but her specific and overall performance ratings were all "slightly above average" (the third highest rating). He commented that Complainant was good about rotating the stock in the proper manner, but Complainant needed to improve somewhat in pricing merchandise and maintaining displays; that she was excellent with customers once she began to handle their orders, but sometimes slow to acknowledge their presence in the first place; and that Complainant's performance as a clerk was "very good," that her working relationship with the other

clerks seemed to be improving and that she needed to try to improve her leadership abilities. Respondent Boss stated that by these remarks, he was trying to encourage Complainant to improve her job performance. The forum notes that this evaluation indicates that Complainant's job performance as of April 1982 was not as abysmal as Respondent Boss's March 1986, deposition testimony painted it to have been.

Complainant commented on that notice that she did not agree with everything in it but would sign it since she did not want to be argumentative. After she received this evaluation, she filed her discrimination complaint with the Agency.

54) Complainant testified that Respondent Boss accused her of being argumentative with him, and she was not; that it is not true that she did not want to do things his way. She testified that she was not having problems with her co-workers. Complainant testified that the harassment may have affected her work, but she got along with other employees "alright."

55) Complainant asserts that Respondent Boss's sexual advances were unwelcome. She testified that after they began, she became nervous, frustrated and emotionally "just a wreck." She tried to distance herself from Respondent Boss, by staying mostly in the front of the bakery and just doing her job - staying out of this way. Mr. Lundgren testified that when Complainant related incidents of harassment to him, she was always very upset, "uptight," under a lot of stress and strain and unhappy.

Complainant testified that by the time of the kiss on the lips,

Respondent Boss's harassment had made Complainant feel "terrible, humiliated;" it had put her under a lot of emotional strain, and she dreaded coming to work. She stated that after the kiss on the lips, she would have liked to quit her job at Safeway, but she was reluctant to leave a job she had loved so much and her employer of fourteen years; she wanted and needed her job and its benefits.

Complainant attributes any deterioration in her job performance after her promotion to lead bakery sales clerk to the sexual harassment she suffered and its above-cited effects. She testified that she could not perform her job as well because of them.

56) Complainant asserts that sometime after 1981, she put herself in the care of a doctor, because she had been suffering severe stomach cramps every day during the end of 1981. She asserts that she felt angry that she had to take Respondent Boss's treatment of her and fearful for her job. She testified that she told the doctor what was going at work, describing the stress, strain and anxiety. The doctor gave her medicine to soothe her lower intestinal tract and a tranquilizer. Complainant denies having emotional problems unconnected with any problems at work during this time. Complainant did not tell her store manager, Mr. Levens, or Respondent Safeway's affirmative action representative about her medical problems themselves or that she was on a doctor's medication.

Ms. Smith testified that Complainant's stomach problems started after she started fighting with the bakery clerks, and that Complainant told her they were caused by stress and worry.

Ms. Perry testified that Complainant was always taking non-prescription medication for stomach problems for a while before Ms. Perry left Respondent Safeway in February 1980.

Given the fact that Complainant had stomach problems before the alleged sexual harassment began, given the tension in her relations with her subordinates (which may or may not have been caused by sexual harassment), and in the absence of any testimony from Complainant's doctor concerning the cause of Complainant's stomach problems, or the stress and strain accompanying them, as corroboration of her assertions of Respondent Boss's sexual harassment.

57) In June 1982, Respondent Boss was transferred, after his request, back to the Grants Pass store as a baker. Regardless of exactly how this transfer came about, Respondent Boss's decision to transfer was made when he became upset and nervous about Complainant's instant complaint, which he told Mr. Phillips was "way out of line." Respondent Boss did not ever return to Store No. 505 after his transfer.

58) After Respondent Boss's transfer, Complainant's problems at work did not end. In fact, according to Ms. Fynskov, they worsened. Complainant had problems with Mary Custis, who replaced Respondent Boss as bakery manager in June 1982, and Steven Arce, the bakery manger after Ms. Custis left in October 1984. In fact, Complainant filed three retaliation complaints against Respondent Safeway after Respondent Boss's transfer, and she attributes her problems with Ms. Custis and Mr. Arce to Mr. Phillips's

(allegedly) instructing them to find fault with her because of her discrimination and retaliation complaints. Complainant told Mr. Lundgren that she felt that her authority as lead sales clerk was being undermined from above, causing her subordinates to work against, rather than with, her.

Ms. Custis and Mr. Arce deny knowing of Complainant's complaints when they evaluated or disciplined Complainant (or until May 1985), and deny that Mr. Phillips gave them any such instructions.

Complainant's daughter testified that she was present at a meeting between Complainant and Mr. Arce at which Mr. Arce stated that Mr. Phillips had wanted him to find a reason to "write up" Complainant.

59) Ms. Custis stated that she had problems with Complainant after being her bakery manager a few weeks. She testified that those problems mostly consisted of Complainant's inability to get along with her fellow workers and not doing her work. Ms. Custis received complaints from Ms. Fynskov and Ms. Herrin, and herself saw, that Complainant was not getting her work done, was yelling at her sales clerks in front of customers, and generally harassing them.

60) There is no evidence of any 1983 annual evaluation of Complainant on the record. On March 4, 1983, Ms. Custis wrote a progress report (a document used to establish a permanent record of both outstanding and below standard performance) in which she stated that Complainant was unable to get along with co-workers (that she could not tell/ask those under her to do their specific jobs without creating

resentment) and that Complainant did not appear to have any loyalty to either Ms. Custis or Respondent Safeway. Complainant noted on this report that she did not agree with it.

Ms. Custis also did an annual evaluation on Complainant in July 1984, which rated Complainant "more than acceptable" in personal appearance; "acceptable" in customer relations, rotation, stocking, ordering, special orders, and cleaning; "barely acceptable" in attendance (nothing that although she reported for work on time, she was always late in returning from breaks); and "unacceptable" in employee interaction (noting that she had "difficulty getting along with fellow employees"). Ms. Custis commented that Complainant needed "to change her attitude and become more company-minded and more conscious of increasing sales and business." Complainant refused to review and sign this evaluation.

61) Ms. Custis talked to Mr. Phillips about her problems with Complainant, and he told her to handle them. Finally, because she did not feel she could resolve the problems between Complainant and her co-workers, Ms. Custis sought and was given a downgrade from bakery manager to journeyman baker.

62) Mr. Arce testified that he started having problems with Complainant about four months after he became bakery manager in October 1984. He testified that Complainant once wanted to argue with him in front of customers, and she had a very hard time completing her work. Ms. Herrin and Ms. Fynskov both complained to him about Complainant not doing what

she was supposed to do. Ms. Fynskov's problems with Complainant upset Ms. Fynskov so much that she had to get sleeping pills to sleep at night and, finally, in January 1984, reduce her work time.

63) Mr. Arce mentioned these problems to Mr. Phillips once. Mr. Arce also completed an annual evaluation of Complainant on May 24, 1985, which rated her "barely acceptable" in customer relations, personal appearance, rotation-stockings; and "unacceptable" in employee interaction, baking/preparation, special orders and other. Complainant would not sign this evaluation.

64) Effective on or about July 5, 1985, Respondent Safeway terminated Complainant's employment, citing poor work performance.

65) Respondent Safeway has received no other complaints accusing Respondent Boss of any acts of sexual harassment. Respondent Safeway testified, and this forum finds, that at no time, including during his previous nine years of supervising as many as 32 female employees at once, has any accusation or complaint of sexual harassment, other than herein, been made against Respondent Boss.

66) There are no independent eye witnesses to any of the sexual advances by Respondent Boss alleged herein.

67) For the reasons recited in section 2 of the Opinion below, which is incorporated by reference into this Finding of Fact, this forum does not find Complainant's testimony to be credible, overall, and finds the testimony of her co-workers and managers

at Respondent Safeway to be credible. Accordingly, this forum has found Complainant to be a less credible witness than any of her co-workers or managers at Respondent Safeway, and where her testimony differs from their testimony, this forum has given far greater weight to the latter.

ULTIMATE FINDINGS OF FACT

1) At all times material herein, Respondent Safeway was an employer subject to the provisions of ORS 659.030.

2) At all times material herein, Respondent Boss was employed by Respondent Safeway and was subject to the provisions of ORS 659.030.

3) Complainant worked in the bakery of Respondent Safeway's Store No. 505, in Medford, Oregon, from July 9, 1979, to July 5, 1985. From the start of her employment until February 3, 1980, she worked as a bakery sales clerk, receiving average and good annual performance evaluations and no disciplinary action. One of her co-workers in the bakery, from September 1975 or 1976 until about October 1977, was Respondent Boss, a baker.

4) Respondent Boss worked in another of Respondent Safeway's stores from October 1977 until October 9, 1979, when he was transferred back to Store No. 505 as bakery manager.

5) On February 3, 1980, Complainant was promoted to lead bakery sales clerk and, as such, reported directly to Respondent Boss and supervised two bakery sales clerks. A substantial part of Complainant's new position involved translating Respondent Boss's directives into action by the sales clerk staff, and necessitated

Complainant's ongoing daily interaction with Respondent Boss. Her new position also required Complainant to continue to do bakery sales clerk work.

6) Complainant's initial performance as head bakery sales clerk was very good, and Respondent Boss was pleased with it. He gave her overall work performance the second highest of seven possible ratings in her annual April 1980 evaluation.

7) In April 1981, Complainant received another annual evaluation from Respondent Boss which rated her overall performance just as he had rated it one year before. However, her ratings in five of the seven applicable specific performance categories had fallen one or two, of seven, rating notches, and the evaluation contained no comments. In light of this evaluation, the testimony of Respondent Boss and bakery sales clerk Fynskov, and the absence of any probative refutation by Complainant, this forum finds that Complainant's work performance did deteriorate somewhat between her April 1980 and April 1981 evaluations. Complainant had begun to argue with Respondent Boss when he asked her to do something differently; she perceived constructive criticism as an affront and would not accept it. In the summer of 1980, problems between Complainant and her two sales clerks had begun to surface. Those clerks claimed that Complainant's response to not knowing the answers to their questions was to argue, and they claimed that she did not do her share of the work. Complainant claims that at least one of those clerks had begun to challenge Complainant's authority over her. However, Respondent Boss

still, in April 1981, viewed Complainant as a considerably above average bakery sales clerk.

8) Complainant alleges that thereafter, Respondent Boss began subjecting her to sexual harassment. She alleges that the first overt act of that harassment occurred when he kissed her on the back of her neck, an action which Respondent Boss denies. There were no eyewitnesses to this kiss, which Complainant explains by the assertion that she and Respondent Boss were alone when it occurred. The only assertions that this kiss occurred come directly or indirectly from Complainant. Given Respondent Boss's denial that it happened, this forum's general assessment of the relative credibility of Complainant and Respondent Boss (see Finding of Fact 67 above), the fact that Complainant's explanation of the absence of any eyewitness is unlikely, Complainant's unexplained inability to consistently state even the month the kiss occurred (even during the month when, or just after, she now asserts it occurred), and the fact that this forum has not believed that Complainant first told her store manager about this kiss when she asserts she did, this forum cannot find that this kiss occurred. See section 1 of the Opinion below, which is incorporated by reference herein.

9) Complainant also asserts that Respondent Boss several times asked her to go out with him, or meet him, socially after work. She asserts he once said to her, "Since we can't be lovers, let's be friends." Respondent Boss denies both these allegations. Complainant was unable to specify or give examples of any other suggestive

verbal remarks, innuendoes, or other verbal sexual harassment by Respondent Boss. Based on this forum's assessment of Complainant's general credibility, and its findings above and below declining to find that the other acts of sexual harassment occurred, this forum cannot conclude that Respondent Boss asked Complainant to meet him socially after work or made the above-cited remark or any remark to that effect.

10) After her April 1981 evaluation, Complainant's performance as head bakery sales clerk continued to deteriorate. On November 14, 1981, Respondent Boss filed a corrective action notice (written warning) concerning Complainant which stated that she was "argumentative, uncooperative and uncommunicative." This notice required Complainant to accept "constructive criticism and direction without arguments and sullen attitude." Although Complainant terms this notice "completely false" and asserted in her complaint that Respondent Boss gave it to her because she declined his advances, she did not say one word about sexual harassment in her written statement on that notice or, this forum finds, in her oral response to Respondent Boss concerning this notice.

11) Complainant asserts, and Respondent Boss denies, that he kissed her on the lips on December 24, 1981. As Complainant's testimony as to where this kiss occurred was contradictory, one of her assertions on that key point must have been inaccurate. Complainant's explanation as to why there was no independent eye witness to this kiss is highly unlikely (and even less likely than her similar explanation

as to the kiss on the neck). The only evidence that this kiss occurred is Complainant's direct testimony. Although Complainant asserts she told her friend Lundgren about this kiss (as well as all of the sexual harassment alleged herein), Mr. Lundgren's failure to mention it in his testimony recounting the harassment Complainant told him about, and this forum's assessment of the general reliability of Complainant's testimony, have caused the forum to conclude that Complainant did not tell Mr. Lundgren about this kiss. This forum finds Complainant's unexplained failure to tell store manager Phillips about this kiss, when she allegedly complained to him four or five times after this kiss about Respondent Boss's sexual harassment, and therein informed him of the kiss on the neck, an indication that this kiss on the lips never occurred. For all these reasons, as well as this forum's general assessment of the relative credibility of Complainant and Respondent Boss, this forum cannot find that this kiss occurred.

12) Complainant did not improve her job performance or attitude after receiving the November 1981 corrective action notice. In his April 1982 rating of Complainant, Respondent Boss gave her an overall rating one grade below her overall rating of the two previous years. He commented therein, in pertinent part, that her working relationship with other clerks seemed to be improving and that she needed to try to improve her leadership abilities.

13) Respondent Boss transferred to another store as baker in June 1982, shortly after and in response to Complainant's filing her complaint

herein. Complainant continued to work in Store No. 505 as head bakery sales clerk for over three years thereafter.

14) After Respondent Boss's transfer, Complainant's problems at work did not abate. She continued to be unable to get along with or supervise her fellow workers, and to not complete her work. The two bakery managers during the rest of her employment gave Complainant progressively worse performance evaluations, culminating in ratings of "barely acceptable" and "unacceptable" in May 1985. Complainant refused to sign these evaluations. The first of those bakery managers left her position and downgraded to baker because she felt she could not resolve the problems between Complainant and her co-workers. Bakery sales clerk Fynskov reduced her work hours because she was so upset by Complainant.

Complainant attributes her problems to an absence of support from the bakery managers, caused by Respondent Safeway instructing them to find fault with her in retaliation for her complaint herein and related complaints. Complainant's daughter asserted that she heard one bakery manager attest to such instructions. However, in light of Complainant's general credibility; the repeated indications on the record that Complainant avoids taking responsibility for her own problems; the fact that one bakery manager actually demoted herself, and a bakery clerk went into partial retirement, in response to Complainant's problems; and the absolutely uncontroverted evidence by credible witnesses that these problems existed and worsened for three years, this forum must

find that Complainant's work performance after Respondent Boss's departure posed serious problems. Moreover, the credible testimony of bakery managers Custis and Arce that this, not any retaliatory scheme, motivated their evaluations and discipline of Complainant is persuasive. (The forum finds the testimony of Complainant's daughter on this point less credible, because of her relationship to Complainant). Accordingly, this forum concludes that on July 5, 1985, Respondent Safeway terminated Complainant's employment for poor work performance, and this forum does not believe that any actual retaliatory scheme caused or worsened that work performance.

15) For the reasons stated in Finding of Fact 67 above and section 2 of the Opinion below, this forum has not found Complainant to be a credible witness. This forum, furthermore, has found that testimony of her co-workers and managers at Respondent Safeway to be credible. Accordingly, where Complainant's testimony has differed from the testimony of a member of the latter group, this forum has given much greater weight to the latter testimony.

CONCLUSIONS OF LAW

1) During all times material herein, Respondent Safeway, an employer, and Respondent Boss, its employee, were subject to the provisions of ORS 659.010 to 659.110.

2) The Commissioner of the Bureau of Labor and Industries of the State of Oregon has jurisdiction over the persons and of the subject matter related to the violations of ORS 659.030 alleged herein.

3) As this forum cannot find that any of the alleged acts of sexual harassment of Complainant actually occurred, this forum cannot find that either Respondent committed any such acts. Accordingly, this forum does not conclude that either Respondent Boss or Respondent Safeway discriminated against Complainant on the basis of her sex, as charged herein or, therefore, that either Respondent violated ORS 659.030 as charged.

OPINION

1. Concerning the Kiss on the Neck A) Were There No Independent Eye-witnesses Because Complainant and Respondent Boss Were Alone?

For the following reasons, the record established that it is unlikely the Complainant and Respondent Boss were ever alone in the bakery during the time this kiss allegedly happened. Even if the kiss on the neck occurred before the rest of the bakery sales staff arrived, it is unlikely that at that time none of the two or three other bakery production staff were present in their work area, where the Complainant alleges this kiss occurred. Moreover, any staff or customer in the front of the bakery conceivably could have seen the area where the Complainant alleges the kiss occurred.

B) Complainant's Statements as to When the Kiss on the Neck Occurred

Complainant's statements as to when this kiss occurred have ranged from June 1980 to July 1981. Given how much Complainant said this kiss upset her, it is difficult for this forum to believe that in at least June 1981 and April 1982 Complainant did not remember the season (if not the month)

in which the kiss occurred, if it occurred. However, in June 1981 (just after or at the very time Complainant now asserts the kiss occurred), Complainant asserted the kiss occurred in early 1981 or late 1980. In April 1982, she said the kiss occurred in bout May or June 1980. Moreover, although Complainant has asserted that she reported this kiss to Mr. Mosley before a June 1981 meeting, this forum has concluded that she did not. Complainant's wholly inconsistent assertions lead to this forum's decision that it could not find that this kiss ever occurred.

2. Witness Credibility

The forum offers the following explanation of Finding of Fact 67 concerning Complainant's general credibility and the credibility of her co-workers and managers at Respondent Safeway.

For the following reasons, the forum did not find testimony of Complainant to be credible, overall. First of all, Complainant did not communicate very well at hearing. It very often was impossible for this forum to ascertain with any certainty what her testimony meant, for she repeatedly (even after being warned) responded to questions before they had been fully stated and stopped testifying in mid-sentence, without completing enough of a statement to allow the forum to ascertain its intended meaning. Despite the assistance of counsel and the Presiding Officer, it appeared that Complainant experienced extreme difficulty finding words which accurately conveyed her thoughts, and she seemed very distracted and confused throughout her two-part testimony. Often, the

gist of what she was saying, even concerning straightforward events or documents, never emerged, or became apparent only after lengthy questioning. For example, her lengthy and repeated testimony about Mr. Blair tearing up a document written by Respondent Boss was indecipherable. All of this could be an understandable result of the sexual harassment Complainant alleges she suffered. Nonetheless, its inevitable effect was to make the meaning of much of Complainant's testimony either unclear or incomprehensible and, therefore, of little or no probative value by itself.

Moreover, Complainant repeatedly made assertions about other people's actions which were refuted by the very persuasive testimony of those other people. (For example, Complainant testified that Ms. Perry had recommended her for head sales clerk; Ms. Perry testified that she had not, and that although she believed that Complainant would make a good head clerk, she had not been asked her opinion. As another example, Complainant asserted that it is not true that Ms. Fynskov did not want to become head clerk; Ms Fynskov testified that she was offered and declined the job.) The frequency with which this occurred gave the forum the impression that Complainant was prone to leaping to conclusions from insufficient facts, or was willing to attest to facts which she did not really know to be true, in order to see things "her" way.

Furthermore, Complainant has offered testimony herein which is inconsistent with, or diametrically opposed to, other testimony she gave herein or a statement she had previously made.

(See Finding of Fact 12, for example.) This has also greatly impeached this forum's view of Complainant's accuracy herein.

Finally, some of Complainant's testimony herein has been found to be absolutely inaccurate. (For example, see Finding of Fact 29.)

For all these reasons, Complainant's testimony simply was not reliably accurate, even where its meaning was discernible.

At the same time, the testimony of Complainant's co-workers and managers at Respondent Safeway (Messrs. Arce, Levens, and Phillips; Ms. (Rositer) Smith, Ms. Fynskov, Ms. Perry, and Ms. Custis; and even Respondent Boss) was offered in an entirely comprehensible, straightforward, and otherwise credible manner. The testimony of each was internally consistent, and consistent with the assertions of every witness but Complainant (and, in one instance, her daughter). In many instances, to believe Complainant the forum would have to disbelieve Complainant, and the forum would have to disbelieve all these other witnesses. Although they are all currently employed by Respondent Safeway, this forum simply cannot believe that they are all enmeshed in a long-term conspiracy to conceal Respondent Boss's sexual harassment of Complainant or retaliate against Complainant for her allegations of that harassment. Respondent Boss's exaggeration of the degree and frequency of Complainant's performance flaws, or acceleration of the onset and worsening of those flaws, in his testimony has caused the forum to assess Complainant's performance under him

by his contemporaneous responses to her work rather than his testimony. That exaggeration of acceleration, however, cannot by itself impeach the credibility of Respondent Boss's assertion that he did not commit the alleged acts of sexual harassment; it can be attributed to the passage of time and Respondent Boss's distress at Complainant's accusations against him.

For all these reasons, this forum has not found Complainant credible, overall, has found the testimony of her co-workers and managers at Respondent Safeway credible, and accordingly has given far greater weight to the latter.

ORDER

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

**In the Matter of
JESUS G. AYALA,
dba Ayala Reforestation,
Respondent.**

Case Number 14-85
Final Order of the Commissioner
Mary Wendy Roberts
Issued January 21, 1987.

SYNOPSIS

Respondent forest labor contractor made no effort to ascertain whether his workers were aliens legally present and employable in the U.S.; following the deportation by INS of nine workers from his job site, he rehired six of them within 60 days without determining if they were then legal. The Commissioner found that Respondent knowingly employed illegal aliens, that he repeatedly failed to file certified payroll records and post a notice of surety bond, and that these violations demonstrated Respondent's unfitness to act as a forest labor contractor. The Commissioner revoked Respondent's forest labor contractor license. ORS 658.405; 658.415(15); 658.417(3); 658.440(1)(f), (2)(d) and (e); 658.445(3); OAR 839-15-004(5); 839-15-165; 839-15-210(1); 839-15-300(1) and (2); 839-15-310; 839-15-520(1), (2), (3) and (5); and 839-15-530(1) to (4).

The above-entitled contested case came on regularly for hearing before Leslie Sorensen-Jolink, designated as Presiding Officer by the Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was conducted on August 13, 1986, in Room 311 of the State Office Building, 1400 S.W. Fifth Avenue, Portland, Oregon. The Bureau of Labor and Industries (hereinafter the Agency) was represented by Renee Bryant Mason, Assistant Attorney General of the Department of Justice of the State of Oregon. Jesus G. Ayala, doing business as Ayala Reforestation, (hereinafter the Contractor) was represented by Kevin T. Lafky, Attorney at Law.

The Agency called as its witness Jerry Garcia, Compliance Specialist for the Wage and Hour Division of the Agency. Contractor called himself and Gabriel Ayala, his brother and foreman.

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

**FINDINGS OF FACT –
PROCEDURAL**

1) By a notice dated July 9, 1985, the Agency informed Contractor that the Agency proposed to revoke Contractor's 1985 forest labor contractor's

* "Forest labor contractor," as used herein, means a person who is a farm labor contractor, as defined by ORS 658.405, with regard to the forestation or reforestation of lands. This is, in effect, the definition of that term adopted by the Agency in OAR 839-15-004(5), and the use of this term throughout this Order conforms to its use in OAR 839-15-000 through 839-15-530, the Agency's administrative rules on farm and forest labor contractors.

license. This notice cited the following as its bases for that proposal:

a) Contractor's knowing employment of alien workers not legally present or legally employable in the United States during February 1985, in violation of ORS 658.440(2)(d);

b) Contractor's failure to make efforts to ascertain the employment status of the alien workers referred to in allegation (a) above, in violation of OAR 839-15-530(1) through (4);

c) Contractor's failure to post a Notice of Bond, in violation of ORS 658.415(15);

d) Contractor's failure to provide workers the required written statements, in violation of ORS 658.440(1); and,

e) Contractor's failure to provide certified true copies of payroll records, in violation of ORS 658.417(3)

2) By a letter dated August 22, 1985, Contractor, through an attorney, requested a hearing on the Agency's proposed action.

3) By a notice dated January 2, 1986, this forum notified Contractor and the Agency of the time and place set for the requested hearing and the designated Presiding Officer.

4) Contractor made timely application to renew his 1985 forest labor contractor's license for the 1986 licensing year. By a notice dated January 31, 1986, the Agency informed Contractor that the Agency proposed to refuse to issue Contractor a 1986 license. This notice cited as grounds for that proposal the same grounds cited in its July 9, 1985, Notice of Proposed Revocation of Contractor's 1985 license.

5) By a letter dated March 31, 1986, Contractor, through an attorney, requested a hearing on the Agency's proposed refusal to issue Contractor a 1986 license.

6) On or about March 13, 1986, Contractor requested postponement of the hearing on the revocation, which was set for March 27, 1986, for 30 to 45 days, in response to the Agency's request to consolidate the hearings on the revocation and the refusal to renew and to materially amend both those notices. Contractor agreed to stipulate to the granting of those Agency requests, and the Agency agreed to the requested hearing postponement. The forum granted the consolidation and postponement requests.

7) By a notice dated April 11, 1986, the forum notified Contractor and the Agency of the new time and place set for the hearing. However, shortly before the hearing was scheduled to commence, on June 18, 1986, it was postponed once again, due to Contractor's illness. By a notice dated June 26, 1986, the forum notified Contractor and the Agency of the third time and place set for hearing.

8) At the commencement of the hearing, Contractor stipulated that he had notice of the facts contained in "Information Relating to Civil Rights or Wage and Hour Contested Case Hearings," a document which had been sent as part of each of the above-cited Notices of Hearing.

9) At the commencement of the hearing, the Agency and Contractor stipulated to certain amendments of the notice of Agency intent. The Presiding Officer made these

amendments which included inserting the following language:

"5) You assisted an unlicensed person to act in violation of ORS 658.405 to 658.475, in violation of ORS 658.440(2)(e).

"6) Your character, reliability or competence makes you unfit to act as a farm labor contractor, pursuant to ORS 658.445(3) and OAR 839-15-520(3)."

FINDINGS OF FACT – THE MERITS

A. General

1) During all times material herein, Contractor, as a sole proprietor, owned and operated Ayala Reforestation, a business which recruited, hired, and employed workers to perform labor in Oregon in the forestation or reforestation of lands, including but not limited to the planting and thinning of trees. Contractor's workers performed labor, pursuant to contracts entered into between Contractor and a primary contractor or subcontractor, on a primary contractor's contracts with the United States Forest Service or Bureau of Labor Management (hereinafter BLM). Contractor, a natural person, performed these activities for remuneration or a rate of pay agreed upon in his above-cited contracts with a primary contractor or subcontractor.

2) Pursuant to ORS chapter 658, the Contractor was licensed as a forest labor contractor by the State of Oregon during the 1984 and 1985 licensing years (i.e., from no earlier than February 1, 1985, through January 31, 1986). Contractor currently is a licensed forest labor contractor for the licensing year 1986, pending the outcome of this proceeding, as he made

timely application for renewal of his 1985 license.

Before becoming a licensed forest labor contractor, Contractor subcontracted to do forestation or reforestation work for forest labor contractors for about six years.

3) Contractor has had about four years of formal education. Spanish is his native language, and he can read a little, and write less, English. Ayala Reforestation is the first business Contractor has operated.

4) An exhibit in the record is a packet of information the Agency sent out, during all times material herein, to applicants for Oregon farm and forest labor contractor licenses or their renewal. It contains information regarding those licenses and a copy of Oregon statutes and Oregon Administrative Rules relating to farm and forest labor contractors, all in English. The Contractor received this packet from the Agency no later than when he applied for his 1985 license (i.e., no later than January 1, 1985) and when he applied for his 1986 license. (OAR 839-15-165.)

5) Before this proceeding, the Contractor did not consult an attorney or other person about compliance with Oregon law governing forest labor contractors.

6) All work described below occurred in the State of Oregon.

B. Concerning the charge that during January 1985, the Contractor knowingly employed aliens not legally present or legally employable in the United States, in violation of ORS 658.440(2)(d)

7) During all times material herein, Contractor hired most of his employees himself. Occasionally, however, his foremen, Gabriel Ayala and Benjamin Garibay, hired them.

8) During and before all times material herein, Contractor knew, and this forum finds, that all of Contractor's employees were "Mexicans," and many, if not most, of them did not speak English. The forum presumes that by using the word "Mexicans" in the testimony supporting this finding, Contractor meant people who are citizens of Mexico and aliens in the United States.

9) During all times material herein, Contractor understood that it was not legal to knowingly employ an alien not legally present and legally employable in the United States. The packet Contractor received from the Agency at some time before January 1, 1985, includes the text of OAR 839-15-530, a rule explaining what actions or inactions can constitute "knowingly" employing an alien not legally present or employable in the United States. (See Finding of Fact 4 above.)

10) Contractor maintains that he has not ever knowingly employed an alien not legally present or employable in the United States; i.e., the Contractor maintains that if an employee was not legally present or employable, Contractor did not know it "at the time." During the times material herein, however, Contractor, in his own words,

"was not too particular about making sure" his hirees "were legal."

When asked at hearing whether he had ever knowingly hired aliens not legally present or employable in the United States on behalf of Contractor, Contractor's foreman G. Ayala replied,

"I don't know whether they're illegal; I just hire them because I need the people to work. I don't discriminate anybody; if they look good to work [for] me, I put them to work. As long as they are healthy, big and strong."

Mr. Ayala further testified that his hirees do not make any statements to him as to whether they are "legal," and he has no reason to suspect they are not.

11) During all times material herein, many of Contractor's employees were people who had known Contractor a long time, and many had worked for him periodically over several years, being employed over and over on a contract by contract basis.

12) In initially hiring people during all times material herein, Contractor or his foreman explained the type of work available, rate of pay, hours of work, etc., and asked whether the applicant knew how to do the work. If he or she did, Contractor or his foreman hired the applicant and, as standard operating procedure, had the hiree complete a Form W-4, supplying his or her social security number for payroll purposes. Contractor assumed that the social security numbers hirees gave him were correct; he did not ask for or inspect any social security cards or otherwise verify the social security numbers his hirees gave him.

13) Before January 1985, Contractor did not ask his employees, or have them supply any information to aid him in ascertaining, whether or not they were legally present or legally employable in the United States, even though he knew all of them were aliens.

In a deposition of him taken for purposes of this proceeding on March 12, 1986, Contractor stated that he knew of no law requiring him to ask his employees if they were legally present and employable in the United States.

14) The Contractor has never asked, or had his foremen ask, for any form of documentation from any of his employees or applicants for employment.

During times material herein, Contractor thought he did not have the right, and that it was not his place, to ask anyone for documentation of status in the United States. No one has ever advised Contractor not to do this.

15) In January 1985, Contractor employed workers who were performing forestation or reforestation work in the Coos Bay Resource Area near Reedsport, Oregon, pursuant to a contract between the BLM and Tapa Jalisco, Inc., on which Contractor was a subcontractor. On or about January 26, 1985, upon "raiding" the motel in which these workers were staying, the United States Immigration and Naturalization Service (hereinafter INS) apprehended nine of Contractor's employees and returned them to Mexico, their country of citizenship, because they were not legally present or employable in the United States.

16) During his above-cited deposition, Contractor was asked, "Did you know * * * (that these nine employees) were aliens, illegal aliens as the saying goes, before that (January 26, 1985) raid?" He answered, "I could not prove that they weren't."

17) An exhibit in the record contains the Forms I-213 ("Record of Deportable Alien"), which INS employees completed for each of the above-described nine apprehensions. INS furnished these reports to Jerry Garcia, the Agency's compliance specialist handling all Oregon farm/forest labor contractor investigations. Mr. Garcia had been employed in this capacity for about 1½ years before the time of hearing, after having been a police officer for 16 years. The Agency is informed on INS laws and procedures. Mr. Garcia has, on one occasion, accompanied INS officials on an INS "raid," though not as an enforcer of immigration laws. Mr. Garcia is familiar with the procedures INS uses in them. Mr. Garcia testified, and this forum finds, that the Forms I-213 are prepared by INS agents in the field, normally about two hours after the "raid."

18) The nine people apprehended on January 26, 1985, told INS that their names were Santiago Zamudio-Villalobos, Jesus Garcia-Varisco (sic?), Jose O. Garibay, Ramon Galvan-Hernandez, Ruben Lopez-Ochila (sic?), Daniel Garibay-Lopez, Rafael Garibay-Garibay, Agustin G. Garibay and Alfredos O. Garibay.

19) Consistent with his above-described practice, Contractor had not asked any of these nine apprehendees about their status in the United States. According to the Forms I-213

concerning two of them, Rafael Garibay-Garibay told INS that Contractor knew he was "illegally" in the United States, and Jesus Garcia-Varisco stated that Contractor "knows he has no papers." Contractor has denied Mr. Garibay-Garibay's assertion. Given the impeachment of the accuracy of information cited on these forms, and the lack of opportunity to cross-examine either their subjects or writers, described in Finding of Fact 31 below, this forum gives the information cited in the second sentence of this paragraph no weight herein.

20) Contractor maintains that since the January 1985 INS apprehension of his workers, he has had people being hired for the first time complete a form at the time of hire. This exhibit is an employment application written in English and Spanish which asks for, in parts pertinent herein, the hiree's full name, address, date of birth, social security number, work experience, and answers to the following questions:

a) "Are you prevented from lawfully being employed in this Country because of visa or immigration status?" ("Yes" or "No.")

b) "Can you provide proof of citizenship, visa or alien registration number after being hired?" ("Yes" or "No.") This form includes a line for the hiree's signature affirming that all his or her answers on the form are true.

Since he allegedly started using this form, Contractor has not asked for, required, or inspected documentation of status in the United States of any applicant or worker or asked INS to verify any such documentation. Contractor did not produce any completed

examples of the form, and the record is devoid of evidence that Contractor took note of, or in any way responded to, any answers provided to its above-quoted questions (a) and (b). Accordingly, even if Contractor did in fact require completion of this form, which this forum cannot affirmatively find, the forum cannot deem that requirement more than a token effort to discourage the presence in Contractor's work force of aliens not legally present or employable in the United States.

21) After INS returned the above-described nine workers to Mexico, Contractor reemployed seven of them. He rehired at least six of those people in early March of 1985, and the seventh by no later than August 2, 1985. Contractor alleges that each of these seven workers completed his form before being rehired, but Contractor did not produce any such forms. Although Contractor was aware of the above-described INS action against each of those seven workers, he did not request any kind of documentation from any of them when he reemployed them.

22) During all times material herein, after an undocumented alien was returned to his or her country of citizenship by the INS, it took at least six months for that alien to obtain documentation of legal status in the United States and reenter the United States. Moreover, the alien could not obtain such documentation that quickly unless he or she was already lawfully entitled to it. Presumably, few aliens who are apprehended by INS and returned to their country of citizenship as not legally present or employable in the United States are at the same time

lawfully entitled to documentation of being legally present and employable in the United States. Based on this information, the latter presumption, and the stipulation that none of the nine workers INS returned to Mexico after their January 1986 apprehension was documented, this forum concludes that none of them could have been legally present or employable in the United States before July 25, 1986, at the very earliest.

23) There is no evidence that at any time material herein Contractor made any effort to familiarize himself with INS regulations and procedures, the types of documentary proof of status in the United States issued by INS, or other types of documentary identification of aliens issued by INS.

C. Concerning the charges that the Contractor failed to post the notice required by ORS 658.415(15)

24) As a person required to be licensed under ORS 658.405 to 658.475 whenever he was acting as a forest labor contractor during times material, the Contractor was required to maintain during those times the corporate surety bond or deposit described in ORS 658.415 and OAR 839-15-200 through 839-15-220.

25) Contractor admitted at hearing that he did not post anywhere any notice of compliance with the requirement recited in the previous Finding of Fact at any time material herein or at any time before his March 1986 deposition. This was confirmed by Mr. Garcia's October 1985 visit to one of Contractor's job sites. (See Finding of Fact 29 below.) The eight workers on that site had not seen any such notice, and no such notice was posted at that site or

in either of the two vehicles used by Contractor to transport workers. Accordingly, the forum finds the admission cited in the first sentence of this finding to be fact.

26) As is evidenced in Findings of Fact 34 through 39 below, Contractor employed workers at Oregon job sites, on many different forestation or reforestation contracts, at least from February 10, 1984, to July 2, 1984, and in November 1984, as well as at two sites in early 1985; in April, May, and June 1985; in August 1985; and at two jobs sites in September 1985.

27) Contractor testified that he had not posted the notice of compliance described above at any job sites, or anywhere, because he did not know what it was until he was asked about it during his March 1986 deposition. He testified that when he found out he was required to post it, he did so.

D. Concerning the charge that the Contractor failed to furnish to each of his workers the written statement required by ORS 658.440(1)(f)

28) During all times material herein, OAR 839-15-310 provided that forest labor contractors could use Agency Form WH-151 ("Rights of Workers") or its Spanish equivalent, WH-151S, to comply with the requirement of ORS 658.440(1)(f) that they furnish a written statement specifying certain information to each of their workers. Agency Form WH-153 ("Agreement between Contractor and Workers") and its equivalent in Spanish, WH-153S, were intended for another purpose. (see OAR 839-15-360), and a contractor could not comply with ORS 658.440(1)(f) simply by providing Form WH-153 or WH-153S to workers.

29) In October 1985, Contractor had a crew of employees performing work in the Clackamas Resource Area on a reforestation contract. During an October 21, 1985, field visit to their work site, Agency Compliance Specialist Garcia spoke with eight of Contractor's employees in Spanish, their native language and a language in which Mr. Garcia is fluent. Mr. Garcia took notes while he spoke with them, and he wrote a report on that visit very soon thereafter, based on his notes and recollection. During that visit, Mr. Garcia showed each of those workers a copy of forms labeled WH-151S and WH-153S.

30) At hearing and in his deposition, Contractor maintained he and his foremen have always handed out and read to hires, at the time they "signed on" with Contractor, the Agency's Form WH-153S. Contractor produced an exhibit, a used WH-153S, as an example of a WH-153S which Contractor completed and provided his workers, this particular one on April 22, 1985.

31) According to what INS agents wrote on the Forms I-213 contained in the record, four of the nine employees of Contractor which INS apprehended in January 1985 (see Findings of Fact 15 above) indicated to INS, in effect, that Contractor had not provided the information in WH-151S or WH-153S to them. According to his Form I-213, a fifth such employee stated he had been provided that information when he was first employed by Contractor.

The statements written on the Forms I-213 concerning the four above-noted employees who allegedly denied being provided the information have been impeached by the fact that

the Forms I-213 for three of those four also indicate that they told INS that Contractor had not asked them for a social security number. This almost certainly is not true, as Contractor has testified and presented other evidence, and this forum has found, that it was his standard operating procedure to obtain a social security number from each new worker, including those four. Moreover, Contractor produced Forms W-4 for two of those four which bear social security numbers and purported signatures for those two workers, and Contractor testified that he had such a Form W-4 for the third worker. Given this impeachment, and the lack of any opportunity for Contractor or the forum to examine either the subjects or the INS writers of the Forms I-213, the statements on those forms, as double hearsay, are not given any weight by the forum on the issue of whether Contractor had provided their subjects with Form WH-151S or FORM WH-153S.

32) Sometime in 1986, Contractor started using a form in English and Spanish which his workers sign to certify that they have received copies of WH-151, WH-153, WH-154, and WH-155 (or their Spanish versions) and that Contractor has explained those forms to them.

E. Concerning the charge that the Contractor failed to provide certified true copies of payroll records required by ORS 658.417(3), and the charge that the Contractor assisted an unlicensed person to act in violation of ORS 658.405 to 658.475, in violation of ORS 658.440(2)(e)

33) During all times material herein, Contractor or his agent paid any

persons Contractor employed directly every two weeks, by check.

34) In 1984, Contractor or his agent paid at least five employees directly for work they had performed for him in the forestation or reforestation of lands. Contractor issued paychecks to some or all of those employees every two weeks starting February 10, 1984, and ending July 2, 1984, and on November 14 and 28, 1984.

Pursuant to ORS 658.417(3) and OAR 839-15-300(1) and (2), Contractor was required to submit to the Agency a certified true copy of the payroll records for these (and any other) 1984 employees of Contractor at least once every 35 days from the time the above-cited work first began. As the record does not indicate these work start dates, this forum uses the initial dates of the above-described two series of paychecks, because work must have begun at least by the time employees were paid for that work. Accordingly, Contractor was required to submit a certified true copy of payroll records at least once every 35 days from February 10 through July 2, 1984 (i.e., by at least March 16, April 20, May 25, June 29, and August 31, 1984), and from November 14, 1984 (i.e., by at least December 19, 1984).

35) In early 1985, Contractor or his agent directly paid Contractor's employees for work they had performed for him on a forestation or reforestation contract in the Deschutes-Sisters area, which had been started in 1984. Pursuant to ORS 658.417(3) and OAR 839-15-300(1) and (2), Contractor was required to submit to the Agency at least once a certified true copy of his payroll records on this contract.

36) In 1985, Contractor or his agent paid at least six employees directly for other work they had performed for Contractor in the forestation or reforestation of lands. Contractor issued paychecks to some or all of those employees on March 13, 1985, and every two weeks from April 19 through June 14, 1985.

Pursuant to ORS 658.417(3) and OAR 839-15-300(1) and (2), and the work start date assumption cited in Finding of Fact 34 above, Contractor was required to submit to the Agency a certified true copy of the payroll records for this work at least 35 days from March 13, 1985, and at least once every 35 days from April 19 through June 14, 1985 (i.e., by at least April 17, 1985, May 24, 1985, and June 28, 1985).

37) Also in 1985, Contractor or his agent directly paid the Contractor's employees for work they had performed for him on forestation or reforestation contract OR52-04R4-5-4300 in the Willamette National Forest. This contract had been awarded to Lee Chism and subcontracted to Contractor. As these employees began work on this contract on August 2, 1985, Contractor was required to submit a certified true copy of payroll records for their work to the Agency by September 6, 1985.

38) Later in 1985, Contractor or his agent paid Contractor's employees directly for work on forestation or reforestation contract 53-04GG-5-3128 in the Deschutes National Forest. This contract also had been awarded to Mr. Chism and subcontracted to Contractor. As the employees began work on this contract on September 3, 1985,

Contractor was required to submit a certified true copy of their payroll records by October 8, 1985.

39) Later in 1985, Contractor or his agent paid directly eight to twelve employees of Contractor for work on a forestation or reforestation contract in the Clackamas Resource area in Oregon. As these employees began work on the contract on September 25, 1985, Contractor was required to submit a certified true copy of their payroll records to the Agency by October 30, 1985.

40) Neither Contractor nor anyone on his behalf has submitted any payroll records to the Agency for 1984 or 1985.

41) On November 26, 1985, and at hearing, Contractor stated that he had not submitted any payroll records in 1984 or 1985, although he had heard that forest labor contractors were supposed to, because "nobody else does it" and other contractors had told him it was not mandatory.

42) On November 26, 1985, in his March 1986 deposition, and at hearing Contractor stated repeatedly that:

a) he had subcontracted the two contracts described in Findings of Fact 37 and 38 above to persons whom he knew were not licensed forest labor contractors; and

b) because those subcontractors employed all the workers who performed those contracts, Contractor had no payroll to report on them.

Contractor told Mr. Garcia in November 1985 that he had also subcontracted the contract described in

Finding of Fact 39 above to someone else. Later at hearing, Contractor admitted that all of these assertions were lies, and stated that he had not in fact ever subcontracted to anyone to perform work for him. Because the testimony received in the last sentence is consistent with the rest of Contractor's testimony and the rest of the record (other than the assertions recited before it in this Finding), the forum finds it to be fact.

F. Concerning the charge that the Contractor's character, reliability, or competence make him unfit to act as a farm labor contractor, pursuant to ORS 658.445(3) and OAR 839-15-520(3)

43) Contractor's repeated lies described in the previous Finding of Fact impeach Contractor's credibility herein and taint the forum's view of his reliability. Contractor's admission that he lied does not rehabilitate that credibility or reliability, as that very admission served Contractor's interest in establishing that he had not violated ORS 658.440(2)(e) as charged.

Because of the above-described impeachment, where Contractor has maintained a fact which is contradicted by other evidence, the forum has given great weight to the other evidence, unless the credibility of that other evidence has also been impeached.

44) The forum incorporates by this reference the Findings of Fact in Sections B through E above into this section.

ULTIMATE FINDINGS OF FACT

1) During all times material herein, the Contractor was a forest labor contractor doing business in the State of

Oregon, and was licensed as such as required by ORS 658.410 and 658.417(1).

2) During all times material herein, Contractor knew that it was unlawful to knowingly employ an alien not legally present or employable in the United States, and he had received at least once, by no later than January 1, 1985, the Agency's rule interpreting that proscription.

3) In January 1985, Contractor employed nine aliens in the State of Oregon who were not legally present or employable in the United States. At no time before January 26, 1985, had Contractor taken any steps to ascertain or verify the status in the United States of any of these nine aliens, or any of his other workers (even though he knew they were all aliens), including asking any of them if they were legally present or legally employable in the United States. On or about January 26, 1985, INS apprehended these nine workers and returned them to their country of citizenship because they were aliens not legally present or legally employable in the United States.

4) Contractor admits, and this forum finds, that after and because of their January 26, 1985, apprehension, of which Contractor was aware, Contractor knew these nine workers were not legally present or employable in the United States. Nevertheless, with this knowledge, he reemployed seven of these people, six within about six weeks of the apprehension. Contractor did nothing to ascertain and verify their status in the United States when he reemployed them except, at most, have them mark "yes" or "no" to two questions on the employment

application (which Contractor was then allegedly using) as to whether they were "prevented from lawfully being employed in this country, because of visa or immigration status," and whether they could "provide proof of citizenship, visa or alien registration number after being hired."

At least six, and almost certainly all seven, of these people were not legally present or employable in the United States when Contractor reemployed them.

5) At no time material herein did Contractor directly or through his foremen, who were his agents,

a) make clear to his applicants, hirees, and workers that they could not work for him unless they were legally present and employable in the United States;

b) ask or require any applicant or hiree to produce documentary proof or indication that he or she was legally present and legally employable in the United States, or actually inspect any such proof or indication;

c) ask INS to check the status in the United States of any hiree or worker, or

d) make more than one token effort to discourage and detect the presence of aliens not legally present and legally employable in the United States in his work force, even when he knew, after and by virtue of the above-cited INS apprehensions of his workers, that he had employed at least nine such aliens.

Contractor in fact made virtually no effort at any time material herein to actually ascertain the status in the United States of his workers, applicants, or

hirees, all of whom he knew were aliens. Accordingly, during all times material herein, Contractor displayed almost completed disregard for, and certainly failed to make reasonably diligent inquiry as to, whether or not his employees were legally present or legally employable in the United States.

6) Because Contractor knew that nine of his employees had been apprehended and returned to Mexico in January 1985 as aliens not legally present and employable in the United States, and he did not ask six of them to document any change of status when he reemployed them within six weeks of their apprehension, and because of the forum's assessment of Contractor's credibility noted in Finding of Fact 43 above, this forum disbelieves Contractor's assertion that he did not know those six reemployed aliens were not legally present and employable in the United States when he reemployed them. The forum finds Contractor actually knew that those six aliens were not legally present or employable in the United States when he reemployed them.

7) Pursuant to ORS 658.415(3) and OAR 839-15-210(1), Contractor was required to continually maintain a properly executed corporate surety bond or deposit while acting as a forest labor contractor during times material herein, as he was required to be licensed under ORS 658.405 to 658.475 throughout that period. At no time material herein did Contractor post on the premises where his employees worked any notice concerning this bond or deposit, in compliance with the requirement of ORS 658.415(15), even though he had

employees working almost continuously throughout 1984 and 1985 on many different forestation or reforestation contracts.

8) The evidence does not indicate by a preponderance of the evidence that at any time material herein, Contractor failed to timely furnish to his workers a written statement complying with the requirements of ORS 658.440(1)(f). According to the Agency's own evidence, Contractor had furnished his employees with Agency WH-151S, which can satisfy this requirement if timely furnished. OAR 839-15-310. There is no evidence that this form was furnished to them in an untimely fashion.

9) The record does not establish by preponderance of the evidence that Contractor assisted any unlicensed person in acting as a subcontractor, in violation of ORS 658.405 to 658.475. Instead, the record establishes that Contractor had no subcontractors, and that all persons working for him in his capacity as a forest labor contractor during 1984 and 1985 were his employees, whom he or his agent paid directly for their work. Contractor failed to provide to the Commissioner of the Bureau of Labor and Industries a copy of any payroll records for his payments to those employees. Those documents were due during 1984 and 1985 on a minimum of six different occasions in 1984 and a minimum of seven different occasions in 1985.

CONCLUSIONS OF LAW

1) At all times material herein, Contractor was a forest labor contractor subject to the provision of ORS 658.405 to 658.475 and OAR 839-15-000 to 839-15-530.

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

3) By failing to submit a certified true copy of payroll records to the Commissioner on at least thirteen occasions during 1984 and 1985 when submission of those documents was required, Contractor violated or failed to comply with ORS 658.417(3) at least 13 different times. This constitutes a "repeated failure to file * * * information required by ORS 658.405 to 658.475" and OAR 839-15-000 to 839-15-530, and "repeated violations of" a section of ORS 658.405 to 658.475, as those phrases are used in OAR 839-15-520(3)(a) and (f).

4) By failing to post the notice of compliance required by ORS 658.415 (15) at any time material herein, including on any of the many job sites where Contractor's employees worked on the many contracts Contractor performed during 1984 and 1985, Contractor repeatedly violated or failed to comply with ORS 658.415(15). This constitutes "repeated violations of" a section of ORS 658.405 to 658.475, under OAR 839-15-520(3)(a).

5) Contractor's knowledge that all his employees were aliens in the United States and that it was illegal to knowingly employ aliens not legally present and legally employable in the United States; Contractor's employment in January 1985 of at least nine aliens not legally present or employable in the United States, after Contractor had failed to take any step, or make any effort, to ascertain the status in the United States of any of his

workers, applicants or hirees; Contractor's failure after he learned that those nine aliens were not legally employable or present in the United States to make more than one effort, which was token, to better discourage and detect the presence of such aliens in his work force; Contractor's failure to ever make clear to his applicants, hirees, and workers that they could not work for him unless they were legally present and employable in the United States; Contractor's failure to ever ask or require any applicant or hiree to produce documentary proof or indication that he or she was legally present and employable in that United States; Contractor's reemployment of seven of the above-cited aliens after he had learned they were not legally present and employable in the United States, with no more than a token effort to ascertain whether their status had changed, even though six of them were reemployed within six weeks, and the seventh within just over six months, of being returned to their country of citizenship by INS because of their status; and Contractor's failure to ask INS to check the status in the United States of any hiree or worker, constitute a failure by Contractor to make any effort to ascertain the status in the United States of his alien workers which are reasonably diligent under the circumstances as Contractor knew them. Contractor's failure to make any such efforts, which would have given him reason to actually know, in January 1985, that nine of his employees were aliens not legally present or employable in the United States, and to know thereafter that seven of his employees were such aliens, constitutes Contractor's knowledge that he was employing alien

workers not legally present or legally employable in the United States, within the meaning of the word "knowingly" as it is used in ORS 658.440(2)(d).

Furthermore, as explained in Ultimate Finding of Fact 6 above, the forum has concluded that Contractor actually knew that six aliens he reemployed in March 1985, after their January 1985 apprehension and return to Mexico as aliens not legally present or employable in the United States, were not legally present and employable in the United States when he reemployed them.

6) During times material herein, Contractor failed 16 times to comply with or violated ORS 658.440(2)(d), in that he knowingly employed nine aliens not legally present or legally employable in the United States during one period and reemployed seven aliens not legally present or legally employable in the United States during another period thereafter. This constitutes a repeated violation or failure to comply with ORS 658.440(2)(d).

7) According to OAR 839-15-520 (3)(a) and (f), either the repeated violations of any section of ORS 658.405 to 658.475 by a forest labor contractor, or the repeated failure of that contractor

to file all information required by ORS 658.405 to 658.475 and division 15 of OAR chapter 839, demonstrates by itself that Contractor's character, reliability, and competence make Contractor unfit to act as a forest labor contractor. Accordingly, because Contractor has repeatedly violated ORS 658.440 (2)(d), 658.415(15), and 658.417(3), and has repeatedly failed to file all information required by ORS 658.417(3) and OAR 839-15-300, Contractor's character, reliability, and competence make him unfit to act as a forest labor contractor.

9) Because Contractor has violated or failed to comply with the above-cited provisions of ORS 658.405 to 658.475, and because his character, reliability, and competence make him unfit to act as a farm labor contractor, the Commissioner of the Bureau of Labor and Industries has the authority to and may, according to ORS 658.445 and 839-15-520(1)(d) and (2), revoke and refuse to issue Contractor's license to act as a forest labor contractor.

* The issue of whether Contractor knowingly employed aliens not legally present or employable in the United States, when he reemployed six of his January 1985 workers in March 1985 and one in August 1985, was not specifically raised in the charging documents herein. However, this issue clearly was raised at hearing, through submission of evidence which was not objected to on the grounds that it was not within the issues raised by the pleadings. Accordingly, the forum views this issue as raised with the implied consent of Contractor and, therefore, is treating it in all respects as if it was specifically raised in the charging documents. The forum notes, however, that its conclusions on the issues which were explicitly raised in those charges, and sanction against Contractor imposed in this Order, would not be different if the forum ignored the issue of whether Contractor knowingly employed seven aliens not legally present or employable in March and August 1985.

OPINION

A Knowingly Employing Aliens Not Legally Present or Legally Employable in the United States

OAR 839-15-530 is the administrative rule which specifically interprets ORS 658.440(2)(d), the statutory provision making it unlawful for a forest labor contractor to knowingly employ an alien not legally present or legally employable in the United States. Section (1) of that rule provides that a contractor knowingly employs such a person, in violation of ORS 658.440(2)(d), if the contractor:

(a) actually knows that the alien is not legally present and/or not legally employable in the United States, or

(b) would know that fact if the contractor made effort, reasonably diligent under the circumstances as the contractor knows them, to ascertain the alien's status in the United States.

Contractor maintains that he has not knowingly employed any alien not legally present or not legally employable in the United States. The forum must assume that by that, Contractor means that he did not do this in the way it is defined in subsection (a) above, for Contractor's admitted actions and inactions herein with regard to nine undocumented alien workers make clear that Contractor knowingly employed and reemployed those people as that phrase is defined in subsection (b) above.

OAR 839-15-530(2) describes efforts to ascertain those aliens' status which would have been reasonably diligent under the circumstances

herein. This description includes, but is not limited to, Contractor

(1) making clear to all applicants, hirees, and workers that they could not work for him unless they were legally present and employable in the United States;

(2) requiring that every hiree produce documentary proof of that status before beginning work, or asking all applicants if they were US citizens and requiring any who said he or she was not, and whom Contractor intended to hire, to produce such proof;

(3) familiarizing himself with pertinent INS regulations and procedures, the types of documentary proof of legal status in the United States, and the other types of documentary identification of aliens issued by INS;

(4) asking INS to check the status in the United States of a hiree or worker, if Contractor was suspicious that that person was not legally present and/or not legally employable in the United States; and

(5) making additional efforts to better discourage and detect the presence of aliens not legally present and/or not legally employable in the United States, if Contractor knew or should have known that any past efforts to accomplish that objective have been unsuccessful.

The record establishes that even though Contractor knew during all times material herein that all of his workers were aliens, Contractor did not make clear to anyone that he or she could not work for him unless he or

she was legally present and employable. The closest Contractor came to doing this was to allegedly, after the apprehension of nine of his workers as undocumented workers in January 1985, start asking his hirees to answer questions in writing as to whether they were legally employable and could provide documentation of status in the United States. However, Contractor did not indicate that he examined those answers or responded to a negative answer.

Contractor admitted that he never asked any workers for any form of documentation of status.

The record does not include any allegation or indication as to whether Contractor familiarized himself with pertinent INS regulations and procedures or the types of documentary proof of status in the United States. This forum notes without finding that presumably Contractor did not do this, as he did not plan to inspect any INS documentation of status.

The record establishes that Contractor did not ask INS to check the status in the United States of any hiree or worker, even though Contractor should have been suspicious that the seven people whom he knew had recently been apprehended and returned to Mexico as not legally employable or present in the United States and who were soon thereafter seeking work from him were not legally employable or present in the United States. The record establishes that Contractor did not make more than one token additional effort to better discourage or detect aliens not legally present and employable in his work force, after he knew he had employed at least nine

such people. Contractor maintains that, after he learned that he had employed nine aliens not legally employable or present in the United States, he did take the new step of asking his hirees to answer questions as to whether they were legally employable and could provide documentation of status in the United States. However, that action by itself, even if taken, would not even rise to the level of diligence of the least diligent of the above-enumerated examples, and therefore must be viewed as a token step.

In fact, it is clear from the record that Contractor did nothing to discourage and detect in his work force the presence of aliens not legally present and/or not legally employable in the United States before he learned that nine of his workers were undocumented aliens, and it is clear that even after that, he took none of the steps enumerated in OAR 839-15-520(1) as constituting reasonably diligent efforts to ascertain an alien's status in the United States. Contractor seems to have believed, and to still believe, that as long as an alien employee or applicant for work has not paraded his or her undocumented status before Contractor in a way so obvious that Contractor could not possibly have avoided noting it, Contractor can successfully assert that he did not know that that employee or applicant was an alien not legally present or employable in the United States. This very narrow definition of "knowing" simply is not the law in Oregon. *In the Matter of Alfonso Gonzales*, 1 BOLI 121, 128 (1978), *aff'd without opinion, Gonzales v. Bureau of Labor*, 39 Or App 407, 593 P2d 532 (1979); followed, *In the Matter of*

Desiderio Salazar, 4 BOLI 154, 173 (1984); *In the Matter of Highland Reforestation, Inc.*, 4 BOLI 185, 206-07(1984), *aff'd without opinion, Highland Reforestation, Inc. v. Bureau of Labor and Industries*, 74 Or App 179, 702 P2d 1173 (1985); and *In the Matter of Jose Solis*, 5 BOLI 180, 198-99 (1986); OAR 839-15-530. Accordingly, having failed to make any reasonably diligent efforts to ascertain the status in the United States of any of his employees, efforts which would have put him in a position to have known that nine of them were not legally present or employable, Contractor cannot avoid being found to have had "constructive" knowledge of the status of those nine aliens when he employed them in January 1985, and when he reemployed seven of them thereafter.

Furthermore, given Contractor's knowledge that those reemployed workers were not legally present or employable in the United States on January 26, 1985, and his reemployment of six of them within six weeks with nothing, but a token effort, at most, to ascertain if their status had changed, the forum has also found that Contractor actually knew that those six aliens were not legally present or employable when he reemployed them.

B. Current Compliance or Intention to Comply

Contractor has presented evidence that he has complied with all the provisions of ORS chapter 658 which he has been found to have violated, except ORS 658.440(2)(d), since he has understood their requirements. Contractor argues that this should be viewed as evidence that his character,

reliability, and fitness do not make him unfit to act as a forest labor contractor. While potentially relevant to a future request by Contractor that the Commissioner issue his license pursuant to 839-15-520(5), this evidence, even if fully found to be fact, would not change the findings and conclusions concerning times material herein, which are dispositive of this matter and which are necessary to support the action ordered below.

ORDER

NOW, THEREFORE, as authorized by ORS 658.445, the Commissioner of the Bureau of Labor and Industries hereby revokes Contractor's license to act as a forest labor contractor for the 1985 licensing year, which ran from February 1, 1985, through January 1, 1986, and hereby refuses to issue Contractor a license to act as a forest labor contractor for the 1986 licensing year, which runs from February 1, 1986, through January 31, 1987.

In the Matter of NORTHWEST ADVANCEMENT, INC., Jeff Henke, Joe Geer and Tim Cox, Respondents.

Case Numbers 01-86 & 02-86
Final Order of the Commissioner
Mary Wendy Roberts
Issued January 23, 1987.

SYNOPSIS

Finding that the individual Respondents and the minors employed in door-to-door sales were employees of the corporate Respondent and not independent contractors, the Commissioner held that Respondents violated child labor laws involving underage employment, employment after permissible hours, taking minors out-of-state without parental permission, failure to provide transportation to and from job sites, employing minors without work permits, failing to file employment certificates, and employing minors in door-to-door sales without identification cards. The Commissioner declined to consider a constitutional argument by Respondents, and imposed civil penalties totaling \$45,550. ORS 653.310; 653.315(1) and (2); 653.320; 653.370; OAR 839-21-067; 839-21-077(1); 839-21-097(2)(c); 839-21-215(1); 839-21-220; 839-21-246; 839-21-265 (1), (11), (13) and (14).

The above entitled matters came on regularly for a combined contested case hearing before Diana E. Godwin, designated as Presiding Officer by the Commissioner of the Bureau of Labor

and Industries for the State of Oregon. The hearing was conducted on April 21, 1986, in Room 707 of the State Office Building, 1400 S.W. Fifth Avenue, Portland, Oregon; on July 14, 1986, in Room 311 of the State Office Building; and on July 18, 1986, in Room 311 of the State Office Building. The Bureau of Labor and Industries (hereinafter the Agency) was represented by Linda Rodgers, Assistant Attorney General. Northwest Advancement Inc. (hereinafter referred to as NWA), Jeff Henke, Tim Cox, and Joe Geer were represented by Gordon T. Carey, Attorney at Law. Jeff Henke, president and owner of NWA, was present representing NWA and was also present on his own behalf. Mr. Henke testified as a witness. Neither Mr. Geer nor Mr. Cox was present at the hearing.

At the hearing held on April 21, 1986, the Agency called as its witnesses Genita Noheart, a minor who sold goods for NWA; Shirley Noheart, the mother of Genita Noheart; Lyssa Thomas, a minor who sold goods for NWA; Cara Ruff, a minor who sold goods for NWA; Scotty Dunbar, a minor who sold goods for NWA; Jay Phillips, a minor who sold goods for NWA; and Julie Walter, a minor who sold goods for NWA. At the hearing held on July 14, 1986, the Agency called as its witness Charles W. Allen, compliance specialist with the Wage and Hour Division of the Agency.

At the hearing on April 21, 1986, Respondents did not call any witnesses. At the hearing on July 14, 1986, the Respondents called Jeff Henke and Paul Tiffany, Administrator of the Wage and Hour Division of the Agency, as their witnesses, and on

July 18, 1986, called Patrick L. Marlon, circulation director of the Oregonian newspaper.

In addition to the in-person testimony by the above cited persons the Agency offered the testimony of the following individuals through written transcript of hearings held in Multnomah County Circuit Court in a related matter in February of 1986: Robert Bray, a minor who sold goods for NWA; Brad Westman, a minor who sold goods for NWA; Phillip N. Tussing, a police officer with the City of Forest Grove in Washington County, Oregon; Shirley Noheart; Keith Dunbar, the father of Scotty Dunbar; Jeff Henke, one of the Respondents in this matter; Tim Cox, also a Respondent in this matter; Paul Tiffany; Charles W. Allen; Pamela Lind, the wife of one of the crew chiefs for NWA; Sherry Gallagher, a minor who sold goods for NWA; Tanya Dow, a minor who sold goods for NWA; Jan Peterson, case manager for developmentally disabled children in Multnomah County; Margaret Jackson, a person who sold goods for NWA; Mrs. Corine Jackson, mother of Margaret Jackson; Joe Jensen, a person who sold goods for NWA; Damien Johnson, a minor who sold goods for NWA; James Irwin, a minor who sold goods for NWA; Genita Noheart; Audrey Grohn; Lyssa Thomas; Cara Ruff; Jay Phillips; Scotty Dunbar; and Julie Walter.

In addition to the in-person testimony of Respondents' witnesses, the Respondents introduced the testimony of the following persons by way of written transcript of hearings held in Multnomah County Circuit Court in a related matter in February of 1986:

Jeff Henke; Sherry Gallagher; Melody Gallagher; Sherry Gallagher's mother; Vickie Gearhart, a minor who sold goods for NWA; Janet Gearhart; Vickie Gearhart's mother; Tanya Dow; Jan Peterson; Tim Cox; Margaret Jackson; Corine Jackson; Joe Jensen; Sharon Jensen, the mother of Joe Jensen; Lyssa Thomas; Scotty Dunbar; Jay Phillips; Damien Johnson; James Irwin; Charles Allen; Paul Tiffany; Robert Daley, a crew manager for the Oregonian; Audrey Grohn; and Pamela Lind. Respondents also introduced the testimony of the following persons by way of written transcript of hearings held in Multnomah County Circuit Court on July 21, 1986: Jean K. Young, Norman L. Nilsen, Gerald Lee Chadwick, Richard Mickelson, Patrick Marlon, Susan Eilertsen, Vickie Gearhart, Clair M. Grieve, Vickie J. Bash, Shirley A. Barshaw, Michael McQuade, Jeff Henke, and Paul Tiffany.

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

FINDINGS OF FACT – PROCEDURAL

1) Pursuant to ORS 653.370 and by Order No. CL01/86, dated January 21, 1986, Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries, imposed and directed payment of a civil penalty against NWA, Jeff Henke, and Joe Geer in the total amount of \$26,750.00. The Order imposing and directing payment of this civil penalty was entered for 48 listed specific violations of the Oregon

Revised Statutes and administrative rules adopted by the Wage and Hour Commission relating to the employment of minors. The Order specifically listed two violations for employing minors under the age of 14; three violations for employing minors under the age of 16 in door-to-door sales; 16 violations for employing minors past the hour in the evening permitted by statute and regulations, considering the minors' ages and employer's lack of certification; eight violations for transporting a minor from the State of Oregon without the prior written consent of the minor's parent or guardian; four violations for failure to provide transportation for minors back to the place where they were picked up; five violations for employment of a minor who did not have a work permit; five violations for employing minors without filing the required employer certificate; and five violations for employing minors to sell products door-to-door without proper identification cards. The Order dated January 21, 1986, also provided notice to NWA, Jeff Henke, and Joe Geer that unless a written request for a contested case hearing was received by a specific date the Order would become final immediately. The period within which a hearing must have been requested was 20 days within receipt of the Order.

2) On February 10, 1986, Gordon T. Carey, Jr., attorney for NWA and Jeff Henke, filed a notice of request for a contested case hearing. This notice was filed on behalf of NWA, Jeff Henke, and Joe Geer.

3) Pursuant to ORS 653.370 and by Order No. CL02/86, dated January 21, 1986, Mary Wendy Roberts,

Commissioner of the Bureau of Labor and Industries, imposed and directed payment of a civil penalty against NWA, Jeff Henke, and Tim Cox in the total amount of \$26,800.00. The Order imposing and directing payment of this civil penalty was entered for 45 listed specific violations of the Oregon Revised Statutes and administrative rules adopted by the Wage and Hour Commission relating to the employment of minors. The order specifically listed one violation for employment of a minor under the age of 14; eight violations for employing minors under the age of 16 as door-to-door sales persons; three violations for employing minors past the hour permitted by statute, considering the minors' ages and employer's lack of certification, and employing minors in excess of 10 hours per day; three violations for failure to provide transportation back to the place where the minors were picked up; 10 violations for employing minors under the age of 18 who did not have a work permit at the time they commenced employment; 10 violations for employing minors where no employer certificate had been filed; and ten violations for employing minors to sell products door-to-door without identification cards. The Order dated January 21, 1986, also provided notice to NWA, Jeff Henke, and Tim Cox that unless a written request for a contested case hearing was received by a specified date the Order would become final immediately. The period within which a hearing must have been requested was 20 days within receipt of the Order.

4) On February 10, 1986, Gordon T. Carey, Jr., attorney for NWA, Jeff

Henke, Tim Cox, and Joe Geer filed a notice of request for a contested case hearing. This notice was filed on behalf of NWA, Jeff Henke, and Tim Cox.

5) The Agency duly served NWA, Jeff Henke, Joe Geer, and Tim Cox with the notice of time and place set for the contested case hearings. Enclosed with the notice of the time and place of hearing was a document titled "Information Relating to Civil Rights or Wage and Hour Contested Case Hearings" which contained the information required by ORS 183.413. All parties were advised that the hearing on Order No. CL01/86 and Order No. CL02/86 would be combined.

6) At the commencement of the combined hearing the parties were advised verbally by the presiding officer of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

FINDINGS OF FACT - THE MERITS

Because there were some 48 violations listed in Order No. CL01/86 and 45 violations listed in Order No. CL02/86, this section, Findings of Fact on the Merits, will be separated into three parts. The first will make findings of fact on matters that are common to both cases. The second section will make findings of fact on the specific violations listed in Order No. CL01/86. The third section will make findings of fact on the specific violations listed in Order No. CL02/86.

Part One (Findings of Fact Common to Both Cases)

1) NWA is an Oregon corporation owned entirely by Jeff Henke, who serves as its president. There are no other officers. NWA is engaged in the

business of selling cookies, candies, and other miscellaneous goods to individuals through the use of teenagers, including minors, who sell the goods either door-to-door or at business establishments. Mr. Henke began working in Oregon in February of 1985. NWA was incorporated and began operation in Oregon in April of 1985.

In May of 1985 NWA obtained Workers' Compensation coverage for its minor employees and was issued a notice of compliance. NWA applied for, as required by OAR 839-21-265, and received a registration certificate from the Wage and Hour Commission of the Agency certifying it to employ minors to do door-to-door sales for the period of July 25, 1985, through June 30, 1986. Mr. Henke obtained a license to do business in the City of Beaverton in 1985, and on March 21, 1985, was issued a business license for the City of Portland.

3) NWA conducts its business by purchasing cookies, candies, and other items such as tablecloths, from Miller Candy Company through a warehouse in the Portland area. NWA, through its president and owner Jeff Henke, purchases the items on credit or consignment, paying a typical price of \$1.30 per box.

4) These goods are stored at Mr. Henke's home, which is also the headquarters of NWA. Mr. Henke then separately distributes these same goods, again on credit or consignment, to persons known as "crew chiefs." The crew chiefs "purchase" the goods from Mr. Henke for a typical price of \$1.45 per box with the 15 cent difference between what NWA paid for the item from Miller Candy Company and

the price for which they sold it to the crew chief representing profit.

5) The crew chiefs in turn provide these goods to the teenagers, who sell the items either door-to-door in residential neighborhoods or at shopping malls. The goods are again advanced to the teenage sales persons on credit or consignment for a typical price of \$2.25 per unit, representing a profit of 80 cents to the crew chief over what he paid the NWA. The teenager then sells this same typical item for the "recommended price" of \$3.00 to the ultimate end purchaser, typically a residential householder. The difference between the \$3.00 which the purchaser pays and the \$2.25 which the teenage sales person must pay to the crew chief is profit for the sales person.

6) At the end of a day or evening of selling the minor returns all unsold boxes of goods to the crew chief along with all monies collected from sales. The crew chief then counts the number of unsold boxes and subtracts those from the number given to the teenager at the beginning of the shift, and determines how many boxes have been sold and pays to the teenager his or her \$.75 per box profit.

7) Jeff Henke recruited most of the crew chiefs from acquaintances or friends. These crew chiefs were responsible for recruiting a crew of teenagers and for providing transportation for the crew, which they supervised. The crew chiefs signed an "Independent Distributorship Agreement" with NWA. This agreement purported to create an independent contractor to supplier relationship between the crew chief and NWA. The agreement provided that NWA would train the crew

chief on a continuous basis in new methods for sale of the company's products and would also furnish to the crew chief "on consignment" various products for sale. Under the agreement NWA retained title to all items consigned to the crew chief until such time as the crew chief sold those same goods and delivered the money to NWA. Under the agreement, a crew chief was to bear his own costs of participating in the program, but did not have to put up any risk capital or furnish any of the inventory. Also under the agreement, the crew chief was required to keep all sales information on forms prescribed by NWA and transfer all monies collected once each week. NWA reserved the right to enter onto the crew chief's premises and audit all books of account relating to gross revenues and business transacted. The crew chiefs were prohibited under the terms of the agreement from engaging in other door-to-door sales business or home delivery sales which would be in competition with the business of NWA, and in fact none of the crew chiefs were otherwise engaged in any work or business similar to what they were doing for NWA. All work they performed was done in furtherance of NWA's business.

8) Jeff Henke himself signed such an agreement to act as a crew chief with NWA on August 26, 1985. Respondent Tim Cox signed the same agreement on February 4, 1985. Respondent Joe Geer signed the agreement on November 1, 1985.

9) The crew chiefs recruited teens to work as part of their sales crew by, among other things, posting ads in public places, which advertised "Jobs

for Teens Fourteen and Older." The flyers listed a telephone number where a teenager could call. When a teenager called, a crew chief would interview the teenager at his or her home. If the crew chief was new, Jeff Henke would usually accompany him on the first couple of interviews.

10) Pursuant to OAR 839-21-246 and prior to beginning work, a person under 18 years of age must have a work permit issued by the Agency. The minor must show this valid work permit to the employer prior to being employed. Within 48 hours of the employer hiring the minor, the employer is required under OAR 839-21-220 to submit an employer certification to the Agency. The employer certifications sent in by the crew chiefs listed NWA as the employer and not the crew chief. If a minor interviewed by a crew chief for NWA did not have a work permit, the crew chief could send the minor's completed work permit application form along with the employer's certification, to the Agency. NWA separately required the crew chief to obtain the written permission from a minor's parent or legal guardian in order for the minor to work for NWA. In addition, if the minor was going to work as a door-to-door sales person, OAR 839-21-265 requires that he or she must be at least 16 years of age, and the crew chief for NWA must obtain a photograph of the minor, which would be sent to the Agency in order to obtain an identification card whenever he or she is engaged in door-to-door sales.

11) Teenagers employed by the crew chiefs for NWA would typically work three days a week - two school

days and one day on the weekend. On school days they would be picked up anywhere from 3:30 to 4:30 and would be driven by the crew chief to a residential area for canvassing. The crew chief would drop two teens off at the top of a street, and the minors would each go down one side of the street selling their goods door-to-door. At the end of the street they would be met by the crew chief, who would take them to another street. At the beginning of the evening they were allocated a certain number of boxes of goods to sell, and at the end of the evening if any goods remained unsold these would be counted together with the money for all goods sold. The crew chief would then pay to the teenager the profit earned by the teenager on each item sold. The teenager would then generally be returned to the place where he or she was picked up earlier in the day.

12) Teens who sold goods door-to-door for NWA did not procure their own goods to sell, but were rather required to "purchase" them from NWA. NWA set the "recommended" price of the goods to be charged to the ultimate purchaser. The crew chief and NWA determined the area where each crew of teens would be selling that day. When the resident of a household purchased goods from one of the teenagers and wished to pay for those goods with a check, the teenager directed that the check be made out to NWA rather than to him or her. None of the teenagers who worked for NWA were working in any other similar employment at the time. All of the work performed by the teenagers was done in the furtherance of NWA, rather than for

their own business enterprise. The teenagers did not have to furnish any equipment or transportation when working with NWA, nor were they required to invest or risk any of their own money in the venture. All goods which remained unsold at the end of a shift were returned to the crew chief.

Part Two (Findings of Fact, Case No. 01-86)

Minimum Age Violations. Minors Under the Age of Fourteen

1) Lyssa Thomas was born on March 1, 1972. In November of 1985 Lyssa was 13 years old.

2) In November of 1985, Lyssa saw a NWA poster and called the telephone number on that advertisement. One evening in late November Respondent Joe Geer met with her and asked her her age. She told him she was "thirteen going on fourteen," but was not asked to provide any proof of her age. She was asked to complete some paper work, in particular an application for a work permit, which she filled out and gave back to him. The next night she began work for NWA.

3) Lyssa Thomas worked for NWA for a total of four nights selling candy and cookies door-to-door, under the supervision of crew chief Joe Geer.

4) The days when Lyssa Thomas was employed by NWA were days when school was in session.

5) Cara Ruff was born on October 1, 1974. In November of 1985 she was eleven years old. Cara Ruff is a very slightly built young girl who looks younger than her eleven years.

6) Cara Ruff began work for NWA when she came along with her friend, Gentia Noheart, one evening when

Genita was working. The crew chief was Respondent Joe Geer. When asked, Cara lied about her age, telling Joe Geer she was thirteen. Mr. Geer did not require Cara, pursuant to the provisions of OAR 839-21-220(1)(a), to demonstrate any proof of her age.

7) Cara worked two days in late November of 1985 selling candy door-to-door on behalf of NWA. Both of the days when she worked for NWA were days when school was in session.

Minimum Age Violations. Minors Under the Age of Sixteen Selling Door-to-Door

1) Genita Noheart was born on October 20, 1971. In November of 1985 Genita was 14 years old.

2) In November of 1985 Genita saw a NWA flyer advertising jobs for teens and called the number on that advertisement. On November 20, 1985, Respondent Joe Geer came to Genita's house and interviewed Genita and talked with her mother, Mrs. Shirley Noheart. Genita told Mr. Geer that she was 14, and Mrs. Noheart showed Mr. Geer Genita's birth certificate. Mr. Geer gave Genita a work permit application to fill out. She never returned this document to him. The next night she began working for NWA.

3) Genita Noheart worked for NWA selling candy and cookies door-to-door on four different occasions from November 21, 1985, until November 27, 1985.

4) Scotty Dunbar was born on July 29, 1971. In November of 1985 he was 14 years old.

5) In November of 1985 Scotty saw a NWA poster advertising jobs for teens and called the telephone number

on that advertisement. In November of 1985 Scotty was interviewed in his home by Jeff Henke and Joe Geer. Mr. Keith Dunbar, Scotty's father, was present. Scotty told them he was fourteen, but was not asked for proof of his age. His father signed NWA's parent permission slip.

6) Scotty began work for NWA selling cookies and candy door-to-door. Initially Scotty was working under the supervision of crew chief Joe Geer.

7) Tanya Dow was born on August 11, 1970.

8) Respondent Jeff Henke is Tanya Dow's legal guardian.

9) On August 3, 1985, when Tanya was not yet 15 years old she was working for NWA in the City of Forest Grove, Oregon, selling cookies and candy door-to-door. Tanya Dow also worked as a door-to-door sales person for NWA in November and December of 1985. During the incident in August of 1985, Tanya Dow was working for NWA under the supervision of crew chief Jeff Henke.

Violations of Restricted Hours of Employment

1) In November of 1985 Genita Noheart worked for NWA on four different occasions until past 6:00 p.m. On the first night of November 21st or 22nd she worked until 9:30 p.m.; on the second night she worked until somewhere between 9:30 and 9:45 p.m.; on the third night she walked to her grandparents after leaving work, and did not arrive there until 11:00 p.m., although she had quit work some time earlier than that. Genita Noheart

was 14 years old at the time. Her crew chief was Joe Geer.

2) Lyssa Thomas also worked for NWA past 6:00 p.m. on four occasions in late November of 1985. On the first night she worked until around 9:45 p.m.; on the second night until approximately 9:30 p.m.; on the third night until 9:00 or 9:30 p.m.; and until 11:45 on the fourth night. At the time Lyssa Thomas was 13 years old. Her crew chief was Joe Geer.

3) Cara Ruff worked for NWA past 6:00 p.m. on two occasions in late November of 1985. On the first occasion she worked until 9:45, and until 11:00 or 11:30 p.m. on the second occasion. Cara Ruff was 11 years old at the time. Her crew chief was Joe Geer.

4) Scotty Dunbar worked for NWA past 6:00 p.m. on various occasions including December 2, 1985, until 8:45 p.m.; December 3, 1985, until 8:45 p.m.; and December 7, 1985, until 8:45 p.m. Scotty Dunbar was 14 years old at the time. His crew chief was Jeff Henke.

5) Tanya Dow worked for NWA past 6:00 p.m. on at least three occasions. She worked in the State of Washington selling door-to-door and was not returned home to Oregon until 8:45 p.m. on December 2, 1985; 8:45 p.m. on December 3, 1985; and 8:45 p.m. on December 7, 1985. Tanya Dow was fifteen years old at the time. Her crew chief was Jeff Henke.

6) NWA did not have any special permit issued by the Wage and Hour Commission allowing it to employ a child under 16 years of age past 6:00 p.m.

Removal of Minors from Oregon

1) Crew chief Joe Geer took Genita Noheart to the State of Washington to work door-to-door on either November 21st or 22nd, 1985. Genita first learned that she was going to Washington after she got in the crew car. There was no prior written consent obtained from a parent at the time she was taken over the state line, nor did the parent have notice in advance.

2) Crew chief Joe Geer took Lyssa Thomas across the state line to Vancouver, Washington, to work door-to-door for NWA on either November 21st or 22nd, 1985. Lyssa first learned that she was going to Washington after she got in the crew car. Lyssa's parents had not given prior written consent to take Lyssa out of state, nor did they have advance notice.

3) Crew chief Jeff Henke took Scotty Dunbar to the State of Washington to work door-to-door for NWA on three separate occasions: December 2nd, December 3rd, and December 7th, 1985. At the time Scotty Dunbar was 14 years old. Although Scotty told his father that he was going to go to Washington on at least one occasion, his father did not give prior written permission to take Scotty out of state.

4) Crew chief Jeff Henke took Jay Phillips to Washington on four separate occasions to sell door-to-door for NWA. At the time Jay Phillips was 16 years old. Although Jay's father had consented verbally in advance to Jay going to Washington, Jay's father never provided prior written permission for him to be taken out of state.

Return Transportation from Job Sites

1) In late November of 1985, on the third evening when Genita Noheart worked for NWA, she did not return home in the vehicle of crew chief Joe Geer. On that evening during the course of selling door-to-door, Genita had a disagreement with one of the other minors with whom she was working and did not want to continue working with her. In connection with this she exchanged some heated words with crew chief Joe Geer, and as a result she got out of the car. She started walking down the road and was told to get back in the car both by Joe Geer and Damien Johnson, another minor. Damien Johnson offered to work with her. Genita refused again and the crew car followed her for ten blocks or so before they left her. Joe Geer did not offer to find her another way home nor did he take any action to call Genita's parents.

2) On the fourth night when she worked for NWA, Genita Noheart was left at the end of the work shift without transportation home. On this occasion in late November 1985, she and Lyssa Thomas and Cara Ruff were in the car driven by crew chief Joe Geer. There were several boys in the car who were also working for NWA. The girls and the boys got into various verbal fights and, as a result of racial and sexual remarks being made, Genita, Cara, and Lyssa all got out of the car when it stopped for a traffic light. At the place they got out they were approximately five and one-half miles from Genita's home, and the weather that evening was extremely cold and icy. Crew chief Joe Geer drove away and made no effort to find other transportation for

Genita, Lyssa, or Cara, nor did he telephone their parents.

Work Permit Violations

1) NWA, Jeff Henke, and Joe Geer employed Genita Noheart to work for NWA when Genita Noheart did not have a work permit. Genita Noheart was 14 years old at the time of her employment by NWA.

2) NWA, Jeff Henke, and Joe Geer employed Lyssa Thomas to work for NWA when Lyssa Thomas did not have a work permit. Lyssa Thomas was 14 years old at the time of her employment by NWA.

3) NWA, Jeff Henke, and Joe Geer employed Cara Ruff to work for NWA when Cara Ruff did not have a work permit. Cara Ruff was 11 years old at the time of her employment by NWA.

4) NWA, Jeff Henke, and Joe Geer employed Jay Phillips to work for NWA when Jay Phillips did not have a work permit. Jay Phillips was 16 years old at the time of his employment by NWA.

5) NWA, Jeff Henke, and Joe Geer employed Scotty Dunbar to work for NWA when Scotty Dunbar did not have a work permit. Scotty Dunbar was 14 years old at the time of his employment by NWA.

6) Jay Phillips and Scotty Dunbar completed applications for work permits prior to commencing employment with NWA, however they did not obtain the work permits prior to actually working.

Employer Certification Violations

1) NWA, Jeff Henke, and Joe Geer employed Genita Noheart without filing an employer certification with

the Agency within 48 hours of when Genita began working. When Charles Allen of the Agency checked the records of the Agency to determine whether or not an employer certification had been applied for with regard to Genita Noheart, none was found. Respondents offered no evidence to show that the certification had been filed.

2) NWA, Jeff Henke, and Joe Geer employed Lyssa Thomas without filing an employer certification with the Agency within 48 hours of when Lyssa began working. When Charles Allen of the Agency checked the records of the Agency to determine whether or not an employer certification had been applied for with regard to Lyssa Thomas, none was found. Respondents offered no evidence to show that the certification had been filed.

3) NWA, Jeff Henke, and Joe Geer employed Cara Ruff without filing an employer certification with the Agency within 48 hours of when Cara began working. When Charles Allen of the Agency checked the records of the Agency to determine whether or not an employer certification had been applied for with regard to Cara Ruff, none was found. Respondents offered no evidence to show that the certification had been filed.

4) NWA, Jeff Henke, and Joe Geer did file an employer certification with the Agency within 48 hours of the time they employed Jay Phillips and he began working.

5) NWA, Jeff Henke, and Joe Geer did file an employer certification with the Agency within 48 hours of the time they employed Scotty Dunbar and he began working.

Identification Card Violations

1) NWA, Jeff Henke, and Joe Geer employed Genita Noheart as a door-to-door sales person and did not obtain an identification card for her before she began work.

2) NWA, Jeff Henke, and Joe Geer employed Lyssa Thomas as a door-to-door sales person and did not obtain an identification card for her before she began work.

3) NWA, Jeff Henke, and Joe Geer employed Cara Ruff as a door-to-door sales person and did not obtain an identification card for her before she began work.

4) NWA, Jeff Henke, and Joe Geer employed Jay Phillips as a door-to-door sales person and did not obtain an identification card for him before he began work.

5) NWA, Jeff Henke, and Joe Geer employed Scotty Dunbar as a door-to-door sales person and did not obtain an identification card for him before he began work.

Part Three (Findings of Fact, Case No. 02-86)

Minimum Age Violation, Minors Under the Age of Fourteen

Demond Clark worked for NWA during the summer of 1985. His crew chief was Tim Cox. He worked in the crew with Julie Walter, and told her at the time that he was 12 years old.

Minimum Age Violations, Minors Under the Age of Sixteen Selling Door-to-Door

1) Julie Walter was born on November 11, 1970. In May of 1985 Julie was 14 years old.

2) Julie Walter began working as a door-to-door sales person for NWA in May of 1985 under the supervision of crew chief Tim Cox. She started work for NWA by coming along with a friend, Melissa, when Melissa was picked up by Tim Cox. On that occasion Tim Cox asked her how old she was, and she replied that she was 14 years old. She was not required to furnish any proof of age.

3) Julie Walter worked for NWA selling candy and cookies door-to-door for the period of May 1985 until January 8, 1986.

4) There were other minors under the age of 16 who worked with Julie Walter on Tim Cox's crew selling goods door-to-door for NWA during the period when Julie worked from May 1985 through January 8, 1986. These minors were Mike Menlow, age 15, and Lisa Marks, age 15. Lisa Marks attends the same grade in the same school with Julie Walter. Julie Walter attended Lisa's 15th birthday party. Joe Jensen, age 15, was also part of Tim Cox's crew.

5) Robert Bray was born April 7, 1970. In mid-November and early December 1985 Rob was 15 years old. Rob learned about NWA and called Tim Cox to see about getting a job. Tim Cox came to his house and had Rob fill out an application for a work permit. Rob told Tim Cox he was 15 years old and gave Mr. Cox a copy of his birth certificate for use with the work permit application.

6) Rob Bray worked for NWA selling candy and cookies door-to-door during the period of mid-November and early December of 1985.

7) There was not sufficient evidence in the record to support any finding of fact on the issue of whether or not Jolanda Clark, Kevin Johnson, Jason Allen, or a person known only as "Joe" were under the age of eighteen at the time they worked with NWA.

Violations of Restricted Hours of Employment

1) In May and June of 1985 Julie Walter worked for NWA on various occasions until 10:30 or 11:00 p.m. During the time when school was not in session in the summer, Julie regularly worked from around 10:00 a.m. until 10:30 p.m. or midnight. On Saturdays she would generally work from either 8:30 or 9:00 in the morning until 9:00 or 9:30 at night. Julie was 14 years old during these periods. From September 1985 to January 1986 she would generally work until 10:00 p.m. or midnight on school nights, and on the weekends would work from approximately 8:30 or 9:00 a.m. to 9:00 or 9:30 at night. Julie turned 15 years old during this period in November.

2) NWA, Jeff Henke, and Tim Cox did not have any special permit issued by the Wage and Hour Commission allowing them to employ a child under 16 years of age past 6:00 p.m.

Return Transportation from Job Sites

1) Sometime during June or July 1985, Julie Walter felt ill shortly after getting in the crew car and before the crew reached its work destination for that day. She told her crew chief, Tim Cox, that she felt ill. However, Mr. Cox replied that he did not have time to take her home. Mr. Cox then dropped Julie off at the intersection of 185th and Tualatin Valley Highway. This spot

was across the street and down the block from where her mother worked. Julie was able to go to her mother's place of employment until someone could take her home.

2) On another occasion during the summer, at the beginning of the work shift, Julie accidentally spilled a soft drink on herself. It was hot that day and she was uncomfortable with the sticky soft drink on her and told Tim Cox, her crew chief, that she was too uncomfortable to work that day. At that point Mr. Cox dropped her at a gas station and told her to stay at the gas station and that he didn't have time to take her home because he had other teenagers out working. Julie called her grandmother to pick her up.

3) On a third occasion when Julie was out on a work crew with crew chief Cox, Cox got into a fight with one of the boys in the crew. While she was working going door-to-door, the mother of one of the other crew members, Joe Jensen, came by and picked her up along with another girl and took her back to Joe Jensen's home. The crew was to meet up with Cox there. At the house Cox told Julie and the others that he wanted them to get back into the crew car or be fired. The other members of the crew refused because they were angry with Cox over his fight with the other boy. At that point, Cox left and left the crew members at Joe Jensen's house. Julie cannot remember how she got home that day.

4) On all of the occasions cited above Julie Walter was 14 years old.

Work Permit Violations

1) NWA, Jeff Henke, and Tim Cox employed Julie Walter to work for

NWA as a door-to-door sales person when Julie Walter did not have a work permit. Julie Walter was 14 years old at the time she began her employment with NWA.

2) NWA, Jeff Henke, and Tim Cox employed Rob Bray to work for NWA when Bray did not have a work permit. Bray was 15 years old at the time he began work with NWA.

3) NWA, Jeff Henke, and Tim Cox employed Mike Menlow as a door-to-door sales person when Mike Menlow did not have a work permit. Charles Allen, Compliance Specialist with the Agency, checked the records of work permit applications on file with the Agency on more than one occasion and did not find any work permit application for Mike Menlow.

4) NWA, Jeff Henke, and Tim Cox employed Demond Clark as a door-to-door sales person when Demond Clark did not have a work permit. Charles Allen checked the records of work permit applications on file with the Agency on more than one occasion and did not find any work permit application for Demond Clark.

5) There was not sufficient evidence in the record to establish whether Lisa Marks had her work permit at the time she commenced work for NWA, Jeff Henke, and Tim Cox. She applied for a work permit, which was received by the Agency on May 30, 1985. The Agency normally issues work permits within two or three days after receipt of the application. There is no evidence on the record, however, to establish the date when she stated work.

6) There was not sufficient evidence on the record to determine whether the Kevin Johnson, named in the Notice of Revocation, had a work permit, or, if he did, whether it was issued before or after he commenced work for NWA. There is no evidence to establish the date when he began work. The Agency received applications for work permits on September 24, 1984, from Kevin Blair Johnson of Portland; on January 17, 1985, from Kevin Douglas Johnson of Portland; and one from Kevin Erik Johnson of Beaverton in November of 1984.

7) There was not sufficient evidence on the record to determine whether the Jason Allen named in the Notice of Revocation had a work permit, or, if he did, whether it was issued before or after he commenced work for NWA. There is no evidence to establish the date when he began work. The Agency received applications for work permits in February 1985 from Jason Glenn Allen of Rogue River, Oregon, and on June 28, 1985, from Jason David Allen of Portland, Oregon.

8) There was not sufficient evidence in the record to establish whether or not "Joe" or "Steve" had a work permit at the time they commenced employment with NWA. Work permit applications are filed by the Agency by last name of the minor and it is therefore impossible to verify whether or not a work permit has been issued to someone where only the first name is known.

9) There was no evidence on the records to establish Jolanda Clark's age and therefore whether she was a minor at the time she was employed

by NWA. She is not required to have a work permit unless she is a minor.

Violation of Employer Certification Requirements

1) NWA, Jeff Henke, and Tim Cox employed Julie Walter without filing an employer certification with the Agency within 48 hours of the time Julie Walter began working. Sometime during April of 1985, Cox, the crew chief who hired Julie Walter, stopped sending work permits and employer certifications to the Agency. Julie Walter was hired by Cox in May of 1985. When Charles Allen checked the records of the Agency to determine whether or not an employer certification had been filed for Julie Walter, none was found. Respondents offered no evidence to show that the certification had been filed.

2) NWA, Jeff Henke, and Tim Cox employed Rob Bray without filing an employer certification with the Agency within 48 hours of the time Rob Bray began working. Sometime during April of 1985, Cox, the crew chief who hired Rob Bray, stopped sending work permits and employer certifications to the Agency. Rob Bray was hired by Cox in November of 1985. When Charles Allen checked the records of the Agency to determine whether or not an employer certification had been filed for Rob Bray, none was found. Respondents offered no evidence to show that the certification had been filed.

3) NWA, Jeff Henke, and Tim Cox employed Mike Menlow without filing an employer certification with the Agency within 48 hours of the time Mike Menlow began working. When Charles Allen checked the records of the Agency to determine whether or

not an employer certification had been filed for Mike Menlow, none was found. Respondents offered no evidence to show that the certification had been filed.

4) NWA, Jeff Henke, and Tim Cox employed Lisa Marks without filing an employer certification with the Agency within 48 hours of the time Lisa Marks began working. When Charles Allen checked the records of the Agency to determine whether or not an employer certification had been filed for Lisa Marks, none was found. Respondents offered no evidence to show that the certification had been filed.

5) NWA, Jeff Henke, and Tim Cox employed Demond Clark without filing an employer certification with the Agency within 48 hours of the time Demond Clark began working. When Charles Allen checked the records of the Agency to determine whether or not an employer certification had been filed for Demond Clark, none was found. Respondents offered no evidence to show that the certification had been filed.

6) There was no evidence in the record to establish the age of Jolanda Clark at the time NWA, Jeff Henke, and Tim Cox employed her. If Jolanda Clark was not a minor, there was no requirement to file an employer certification with the Agency within 48 hours of when she began working.

7) There was no evidence in the record to establish the age of Kevin Johnson at the time NWA, Jeff Henke and Tim Cox employed him. If Kevin Johnson was not a minor, there was no requirement to file an employer certification with the Agency within 48 hours of when he began working.

8) There was no evidence in the record to establish the age of Jason Allen at the time NWA, Jeff Henke, and Tim Cox employed him. If Jason Allen was not a minor, there was no requirement to file an employer certification with the Agency within 48 hours of when he began working.

9) There was not sufficient evidence in the record to establish whether or not NWA, Jeff Henke, and Tim Cox employed persons named "Joe" or "Steve" without filing an employer certification within 48 hours of when these persons began working. The employer certifications are filed by the last name of the minor involved, and it cannot be determined whether or not certifications had been filed when there is only a first name. The names "Joe" and "Steve" are common male names.

Identification Card Violations

1) NWA, Jeff Henke, and Tim Cox employed Julie Walter, age 14, to work as a door-to-door sales person for NWA without an identification card. Julie Walter was hired by crew chief Tim Cox in May 1985, after the time when he stopped sending in paperwork to the Agency.

2) NWA, Jeff Henke, and Tim Cox employed Rob Bray, age 15, to work as a door-to-door sales person for NWA without an identification card. Rob Bray was hired by crew chief Tim Cox in November 1985, after the time when he stopped sending in paperwork to the Agency.

3) When Charles Allen of the Agency checked the records of the Agency to determine whether or not an application for an identification card

had been filed for Mike Menlow, none was found. Respondents offered no evidence to show that an application for an identification card for Mike Menlow had been filed.

4) When Charles Allen of the Agency checked the records of the Agency to determine whether or not an application for an identification card had been filed for Lisa Marks, none was found. Respondents offered no evidence to show that an application for an identification card for Lisa Marks had been filed.

5) When Charles Allen of the Agency checked the records of the Agency to determine whether or not an application for an identification card had been filed for Demond Clark, none was found. Respondents offered no evidence to show that an application for an identification card for Demond Clark had been filed.

6) It was not established whether Jolanda Clark was a minor at the time NWA employed her. If she was not a minor, there was no requirement to obtain an identification card.

7) It was not established whether Kevin Johnson was a minor at the time NWA employed him. If he was not a minor, there was no requirement to obtain an identification card.

8) It was not established whether Jason Allen was a minor at the time NWA employed him. If he was not a minor, there was no requirement to obtain an identification card.

9) There was insufficient evidence to determine whether or not an application for an identification card had been filed for "Joe" or "Steve." These applications are filed by the last name

of the minor involved, and unless a last name is supplied there is no way to verify whether or not there is an application on file. The names "Joe" and "Steve" are common male names.

ULTIMATE FINDINGS OF FACT

Again to provide an orderly listing of the Ultimate Findings of Fact, I have broken this section down into the same three parts as the Findings of Fact – the Merits.

Part One (Ultimate Findings of Fact Common to Both Cases)

1) NWA is an Oregon corporation owned entirely by Jeff Henke, who serves as its president. NWA has been engaged in the business of selling cookies, candies, and other miscellaneous goods through door-to-door sales since April 1985.

2) NWA purchases its goods on consignment from the regional distributor of Miller Candy Company. Jeff Henke, as president of NWA, employs crew chiefs, including himself, to whom he distributes the goods obtained from Miller Candy Company. The crew chiefs in turn recruit and employ teenagers to work door-to-door selling the goods obtained through Miller Candy Company.

3) NWA makes a profit on each item that it obtains from Miller Candy Company and provides to the crew chiefs. The crew chiefs make their income by having the teenage sales persons sell the product to the ultimate purchaser, usually a residential householder, at a price which is high enough to provide a profit per box to the crew chief above what the price of the goods was from NWA, and also high enough to ensure that a profit can be

paid to the teenage sales person. The teenage sales persons earn their income by getting a commission for each box of goods sold. The commissions vary depending on the item sold. Typically the teenager makes a profit of approximately \$.75 per box sold.

4) In working for NWA, the crew chiefs are required only to provide their own transportation for themselves and their crew of teenagers. Other than that, they invest no money and take no risk of loss by participation in NWA. They are not required to pay in advance for the goods that their teenage sales crews sell, but only after the goods are actually sold. Any goods remaining unsold can be returned to NWA, and the crew chiefs bear no risk of carrying an inventory of unsold goods. None of the crew chiefs employed by NWA had their own business prior to entering into their relationship with NWA. NWA controls most of the aspects of how the crew chiefs conduct business. NWA provides the credit for all goods obtained from Miller Candy Company, and also provides a central accounting system to keep track of all sales and inventory. The crew chiefs also turn over all monies collected once a week to NWA, which then pays them their share of commission on the goods sold. Jeff Henke, Tim Cox, and Joe Geer as crew chiefs were thus acting in a capacity no different than any other commissioned sales person who is an employee of the parent company. They earned their income through commissions on individual sales.

5) Members of the teenage sales crews were recruited by the crew chiefs through posting of flyers

advertising "Jobs for Teens Fourteen and Older." The teenagers who responded to the flyer were interviewed by one of the crew chiefs. Usually they were asked to fill out some documents. In some cases a work permit application was completed by the minor. In most instances the crew chief asked the age of the teenager and sometimes asked for proof of age. In other instances, a teenager would start working with NWA as a result hearing about the program from a friend and just coming along and starting to work.

6) Before a minor can start work he or she must have a valid work permit. Also, within 48 hours of the time an employer hires a minor, the employer must submit an employer certification with the Agency. If the minor is going to be employed in door-to-door sales, the minor must have an identification card with his or her photograph on it prior to beginning work. If an employer intends to take a minor out of state to work, prior written consent of the parent or guardian must be obtained.

7) The minors who sold goods door-to-door for NWA did not control any aspect of the business operation in which they were participants. They did not procure or purchase in advance the goods which they were selling, nor were they engaged in the business of selling goods outside of their work for NWA. They did not furnish any equipment or transportation. They did not control the initial price structure of the goods being sold. They did not control the area where they would be selling. They were covered as employees under the workers' compensation policy of NWA. When the ultimate purchaser

used a check to purchase the goods from the minor, the checks were made out to NWA rather than to the minor. The minors bore no risk of failure to sell the goods, but were able to turn back unsold goods at the end of each work shift.

Part Two (Ultimate Findings of Fact, Case No. 01-86)

Minimum Age Violations. Minors Under the Age of Fourteen Selling Door-to-Door

1) NWA, Jeff Henke, and Joe Geer employed Lyssa Thomas to work as a door-to-door sales person in Oregon. During the days when Lyssa Thomas worked she was 13 years old and school was in session.

2) NWA, Jeff Henke, and Joe Geer employed Cara Ruff to work as a door-to-door sales person in Oregon. During the days when Cara Ruff worked she was 11 years old and school was in session.

Minimum Age Violations. Minors Under the Age of Sixteen Selling Door-to-Door

1) NWA, Jeff Henke, and Joe Geer employed Genita Noheart in November 1985 to work as a door-to-door sales person for NWA. At the time she worked for NWA, Genita Noheart was 14 years old.

2) NWA, Jeff Henke, and Joe Geer employed Scotty Dunbar in November 1985 to work as a door-to-door sales person for NWA. At the time he worked for NWA, Scotty Dunbar was 14 years old.

3) NWA, Jeff Henke, and Joe Geer employed Tanya Dow in November 1985 to work as a door-to-door sales person for NWA. At the time she

worked for NWA, Tanya Dow was 15 years old.

Violations of Restricted Hours of Employment

1) NWA, Jeff Henke, and Joe Geer employed Genita Noheart to work as a door-to-door sales person in November 1985. On four separate occasions she worked past 6:00 p.m. Genita Noheart was 14 years old at the time.

2) NWA, Jeff Henke, and Joe Geer employed Lyssa Thomas to work as a door-to-door sales person in November 1985. On four separate occasions she worked past 6:00 p.m. Lyssa Thomas was 13 years old at the time.

3) NWA, Jeff Henke, and Joe Geer employed Cara Ruff to work as a door-to-door sales person in November 1985. On two separate occasions she worked past 6:00 p.m. Cara Ruff was 11 years old at the time.

4) NWA, Jeff Henke, and Joe Geer employed Scotty Dunbar to work as a door-to-door sales person in November 1985. On three separate occasions he worked past 6:00 p.m. Scotty Dunbar was 14 years old at the time.

5) NWA, Jeff Henke, and Joe Geer employed Tanya Dow to work as a door-to-door sales person in November 1985. On three separate occasions she worked past 6:00 p.m. Tanya Dow was 15 years old at the time.

6) NWA, Jeff Henke, and Joe Geer did not have any special permit issued by the Wage and Hour Commission allowing them to employ a

child under 16 years of age past 6:00 p.m.

Removal of Minors from Oregon

1) NWA, Jeff Henke, and Joe Geer transported Genita Noheart to the State of Washington to work in door-to-door sales on one occasion without prior written consent of her parent.

2) NWA, Jeff Henke, and Joe Geer transported Lyssa Thomas to the State of Washington to work in door-to-door sales on one occasion without prior written consent of her parent.

3) NWA, Jeff Henke, and Joe Geer transported Scotty Dunbar to the State of Washington to work in door-to-door sales on three occasions without prior written consent of his parent.

4) NWA, Jeff Henke, and Joe Geer transported Jay Phillips to the State of Washington to work in door-to-door sales on four occasions without prior written consent of his parent.

Return Transportation from Job Sites

1) NWA, Jeff Henke, and Joe Geer were responsible for the failure to provide return transportation to Genita Noheart on the occasion when she got out of the crew car, after having a disagreement with one of the other minors with whom she was working. They were responsible for making sure that Genita Noheart got home safely even though she made this difficult by refusing to get back in the crew car. Although it was difficult for the employer in this situation to meet the strict requirements of the law to provide return transportation, at a minimum Geer should have telephoned Noheart's parents and should not have let her go off alone.

2) NWA, Jeff Henke, and Joe Geer failed to provide return transportation from the job site for Genita Noheart on the night of November 27, 1985. On that occasion crew chief Joe Geer had allowed, and to some extent encouraged, a situation to develop in the crew car which was sufficiently intolerable to Noheart that she felt compelled to get out of the car when it stopped for a traffic light. When she got out, crew chief Joe Geer drove away. Noheart was forced to find her own way home that evening.

3) NWA, Jeff Henke, and Joe Geer failed to provide return transportation from the job site for Lyssa Thomas on the night of November 27, 1985. On that occasion crew chief Joe Geer had allowed, and to some extent encouraged, a situation to develop in the crew car which was sufficiently intolerable to Thomas that she felt compelled to get out of the car when it stopped for a traffic light. When she got out crew chief Joe Geer drove away. Thomas was forced to find her own way home that evening.

4) NWA, Jeff Henke, and Joe Geer failed to provide return transportation from the job site for Cara Ruff on the night of November 27, 1985. On that occasion crew chief Joe Geer had allowed, and to some extent encouraged, a situation to develop in the crew car which was sufficiently intolerable to Ruff that she felt compelled to get out of the car when it stopped for a traffic light. When she got out, crew chief Joe Geer drove away. Ruff was forced to find her own way home that evening.

Work Permit Violations

1) NWA, Jeff Henke, and Joe Geer employed Genita Noheart to work for NWA as a door-to-door sales person when Genita Noheart did not have a work permit.

2) NWA, Jeff Henke, and Joe Geer employed Lyssa Thomas to work for NWA as a door-to-door sales person when Lyssa Thomas did not have a work permit.

3) NWA, Jeff Henke, and Joe Geer employed Cara Ruff to work for NWA as a door-to-door sales person when Cara Ruff did not have a work permit.

4) NWA, Jeff Henke, and Joe Geer employed Jay Phillips to work for NWA as a door-to-door sales person when Jay Phillips did not have a work permit.

5) NWA, Jeff Henke, and Joe Geer employed Scotty Dunbar to work for NWA as a door-to-door sales person when Scotty Dunbar did not have a work permit.

6) All of these persons were minors required to have a work permit prior to commencement of employment.

Employer Certification Violations

1) NWA, Jeff Henke, and Joe Geer employed Genita Noheart and failed to file an employer certification with the Agency within 48 hours of when Genita began working.

2) NWA, Jeff Henke, and Joe Geer employed Lyssa Thomas and failed to file an employer certification with the Agency within 48 hours of when Lyssa began working.

3) NWA, Jeff Henke, and Joe Geer employed Cara Ruff and failed to file an employer certification with the Agency within 48 hours of when Cara began working.

4) NWA, Jeff Henke, and Joe Geer did file an employer certification with the Agency within 48 hours of the time they employed Jay Phillips.

5) NWA, Jeff Henke, and Joe Geer did file an employer certification with the Agency within 48 hours of the time they employed Scotty Dunbar.

Identification Card Violations

1) NWA, Jeff Henke, and Joe Geer employed Genita Noheart to work as a door-to-door sales person without an identification card.

2) NWA, Jeff Henke, and Joe Geer employed Lyssa Thomas to work as a door-to-door sales person without an identification card.

3) NWA, Jeff Henke, and Joe Geer employed Cara Ruff to work as a door-to-door sales person without an identification card.

4) NWA, Jeff Henke, and Joe Geer employed Jay Phillips to work as a door-to-door sales person without an identification card.

5) NWA, Jeff Henke, and Joe Geer employed Scotty Dunbar to work as a door-to-door sales person without an identification card.

Part Three (Ultimate Findings of Fact, Case No. 02-86)

Minimum Age Violation. Minors Under the Age of Fourteen

NWA, Jeff Henke, and Tim Cox employed Demond Clark to work as a door-to-door sales person when he was 12 years old.

Minimum Age Violations. Minors Under the Age of Sixteen Selling Door-to-Door

1) NWA, Jeff Henke, and Tim Cox employed Julie Walter in May of 1985 to work as a door-to-door sales person for NWA. At the time she worked for NWA, Julie Walter was 14 years old.

2) NWA, Jeff Henke, and Tim Cox employed Mike Menlow to work as a door-to-door sales person for NWA. At the time he worked for NWA, Mike Menlow was 15 years old.

3) NWA, Jeff Henke, and Tim Cox employed Lisa Marks to work as a door-to-door sales person for NWA. At the time she worked for NWA, Lisa Marks was 15 years old.

4) NWA, Jeff Henke, and Tim Cox employed Joe Jensen to work as a door-to-door sales person for NWA. At the time he worked for NWA, Joe Jensen was 15 years old.

5) NWA, Jeff Henke, and Tim Cox employed Robert Bray in November of 1985 to work as a door-to-door sales person for NWA. At the time he work for NWA, Robert Bray was 15 years old.

6) There was no evidence to show that at the time NWA, Jeff Henke, and Tim Cox employed Jolanda Clark, Kevin Johnson, Jason Allen or "Joe" as door-to-door sales persons they were under the age of 18.

Violations of Restricted Hours of Employment

1) NWA, Jeff Henke, and Tim Cox employed Julie Walter to work as a door-to-door sales person past 6:00 p.m. on at least one occasion during May and June of 1985, and on at least one occasion during the period of

September 1985 to January 1986. Julie was 14 years old during these periods. NWA, Jeff Henke, and Tim Cox also employed Julie Walter to work as a door-to-door sales person on at least one occasion for more than 10 hours per day.

2) NWA, Jeff Henke, and Tim Cox did not have any special permit issued by the Wage and Hour Commission allowing them to employ a child under 16 years of age past 6:00 p.m.

Return Transportation from Job Sites

1) NWA, Jeff Henke, and Tim Cox failed to provide return transportation from the job site on an occasion in June or July of 1985 to Julie Walter, when she was ill. On that occasion crew chief Tim Cox dropped Julie off near her mother's place of employment, and someone else was required to take her home.

2) NWA, Jeff Henke, and Tim Cox failed to provide return transportation on another occasion during the summer of 1985 to Julie Walter when she spilled a soft drink on herself and was unable to work. On that occasion Tim Cox, the crew chief, dropped her at a gas station and she was required to find her own way home.

3) NWA, Jeff Henke, and Tim Cox failed to provide return transportation on third occasion to Julie Walter as a result of an altercation that occurred between Tim Cox and another member of the crew. When the other members of his crew sided with the member of the crew with whom Mr. Cox had had the altercation, Mr. Cox left Julie Walter and other crew members at the home of one of the crew

members. Julie found her own transportation home that day.

Work Permit Violation

1) NWA, Jeff Henke, and Tim Cox employed Julie Walter to work for NWA as a door-to-door sales person when Julie Walter did not have a work permit.

2) NWA, Jeff Henke, and Tim Cox employed Robert Bray to work for NWA as a door-to-door sales person when Robert Bray did not have a work permit.

3) NWA, Jeff Henke, and Tim Cox employed Mike Menlow to work for NWA as a door-to-door sales person when he did not have a work permit.

4) NWA, Jeff Henke, and Tim Cox employed Demond Clark to work for NWA as a door-to-door sales person when he did not have a work permit.

5) All of these persons were minors required to have a work permit prior to commencement of employment.

6) There was not sufficient evidence to support a finding that NWA, Jeff Henke, and Tim Cox employed Lisa Marks, Jolanda Clark, Kevin Johnson, Jason Allen, "Joe" or "Steve" when these persons did not have a work permit.

Violation of Employer Certification Requirements

1) NWA, Jeff Henke, and Tim Cox employed Julie Walter to work as a door-to-door sales person without filing an employer certification with the Agency within 48 hours of the time Julie commenced work.

2) NWA, Jeff Henke, and Tim Cox employed Robert Bray to work as a

door-to-door sales person without filing an employer certification with the Agency within 48 hours of the time Robert commenced work.

3) NWA, Jeff Henke, and Tim Cox employed Mike Menlow to work as a door-to-door sales person without filing an employer certification with the Agency within 48 hours of the time Mike commenced work.

4) NWA, Jeff Henke, and Tim Cox employed Lisa Marks to work as a door-to-door sales person without filing an employer certification with the Agency within 48 hours of the time Lisa commenced work.

5) NWA, Jeff Henke, and Tim Cox employed Demond Clark to work as a door-to-door sales person without filing an employer certification with the Agency within 48 hours of the time Demond commenced work.

6) Because there was no evidence on the record to establish whether Jolanda Clark, Kevin Johnson, and Jason Allen were minors at the time they worked for NWA, there is no way to know whether the filing of an employer certification was required.

7) There was not sufficient evidence on the records to find that NWA, Jeff Henke, and Tim Cox employed persons named "Joe" or "Steve" without filing an employer certification with the Agency.

Identification Card Violations

1) NWA, Jeff Henke, and Tim Cox employed Julie Walter to work as a door-to-door sales person for NWA without an identification card.

2) NWA, Jeff Henke, and Tim Cox employed Robert Bray to work as a

door-to-door sales person for NWA without an identification card.

3) NWA, Jeff Henke, and Tim Cox employed Mike Menlow to work as a door-to-door sales person for NWA without an identification card.

4) NWA, Jeff Henke, and Tim Cox employed Lisa Marks to work as a door-to-door sales person for NWA without an identification card.

5) NWA, Jeff Henke, and Tim Cox employed Demond Clark to work as a door-to-door sales person for NWA without an identification card.

6) Because there was no evidence on the record to establish whether Jolanda Clark, Kevin Johnson, and Jason Allen were minors at the time they worked for NWA, there is no way to determine whether they were required to have identification cards.

7) There was not sufficient evidence to determine whether or not NWA, Jeff Henke, and Tim Cox employed persons named "Joe" or "Steve" to work as door-to-door sales persons without identification cards.

CONCLUSIONS OF LAW

1) At all times material herein Respondents were subject to the provisions of ORS 653.305 to 653.370 and the administrative rules adopted thereunder.

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

3) Both before and at the commencement of the contested case hearing on these combined matters, Respondents and the Agency were

informed of the matters described in ORS 183.413(2) and 183.415.

4) The provisions of ORS 653.305 to 653.370 and the administrative rules adopted thereunder, OAR 839-21-005 to and including 839-21-380, apply to the actions of Respondents and each of them in these matters.

5) The actions of Respondents Joe Geer, Tim Cox, and Jeff Henke, when acting as a crew chief, are attributable to NWA. The actions of Respondents Joe Geer, Tim Cox, and Jeff Henke in employing minors were done in the furtherance of NWA's business interests rather than in the furtherance of the separate business interests of Mr. Geer, Mr. Cox, or Mr. Henke. Respondents Joe Geer, Tim Cox, and Jeff Henke were not acting as independent contractors when engaged in securing and using the services of minors to sell the boxes of cookies and candy, but rather were working as commissioned salesmen for NWA.

6) The minors working on behalf of the business interests of NWA were not independent contractors acting in furtherance of their own business interests, but rather were working as commissioned sales persons. Therefore these minors were employees and the child labor laws apply to them.

7) ORS 653.320 provides that no child under the age of 14 years of age shall be employed during the time when public schools are in session. Respondents and each of them violated this statute by employing the following minors, who were under the age of 14: Lisa Thomas, Cara Ruff, and Demond Clark.

8) Oregon Administrative Rules 839-21-097(2)(c) and 839-21-265(1) prohibit the employment of minors under the age of 16 as door-to-door sales persons. Respondents and each of them violated these rules by employing the following minors under the age of 16 as door-to-door sales persons: Genita Noheart, Scotty Dunbar, Tanya Dow, Julie Walter, Mike Menlow, Lisa Marks, Joe Jenson, and Robert Bray.

9) ORS 653.315 provides that no child under 16 years of age shall be employed after 6:00 p.m., unless the Wage and Hour Commission has issued a special permit to allow such employment. Respondents and each of them violated this statute by employing the following minors after 6:00 p.m. without a special permit: Genita Noheart, Lyssa Thomas, Cara Ruff, Scotty Dunbar, Tanya Dow, and Julie Walter.

10) ORS 653.315(1) prohibits the employment of a child under 16 years of age for longer than 10 hours in any one day. Respondents and each of them violated this statute by employing Julie Walter for more than 10 hours in one day.

11) OAR 839-21-265(14) provides that no minor employed as a door-to-door sales person may be transported to another state without the express written consent of a parent or legal guardian. Respondents and each of them violated this rule by taking the following minors out of state without prior written permission: Genita Noheart, Lyssa Thomas, Scotty Dunbar, and Jay Phillips.

12) OAR 839-21-265(13) requires an employer to provide transportation to and from the job site for all minors

employed as door-to-door sales persons. Respondents and each of them violated the provisions of this rule by failing to provide transportation from the job site for the following minors: Genita Noheart, Lyssa Thomas, Cara Ruff, and Julie Walter.

13) ORS 653.315(1) and OAR 839-21-246 require that a minor must have a work permit prior to commencing employment. Respondents and each of them violated the provisions of the law and rule by employing the following minors prior to the time when they had a work permit: Genita Noheart, Lyssa Thomas, Cara Ruff, Jay Phillips, Scotty Dunbar, Julie Walter, Rob Bray, Mike Menlow, and Demond Clark.

14) ORS 653.310 provides that no child under 18 years of age shall be employed or permitted to work unless the employer has filed an employment certificate. OAR 839-21-077(1) and OAR 839-21-220 require that these certifications be filed within 48 hours of the time the employer employs a minor. Respondents and each of them violated the provisions of the law and rules by employing the following minors without filing an employer certification within 48 hours of when the minors began working: Genita Noheart, Lyssa Thomas, Cara Ruff, Julie Walter, Rob Bray, Mike Menlow, Lisa Marks, and Demond Clark. They did not violate the provisions of the law and rules with regard to the following minors: Jay Phillips, Scotty Dunbar, Jolanda Clark, Kevin Johnson, Jason Allen, "Joe" or "Steve".

15) OAR 839-21-265(11) requires that an employer who employs a minor as a door-to-door sales person must

provide such minor, before the minor begins work, with an identification card. Respondents and each of them violated the provisions of this rule by employing the following minors as door-to-door sales persons without obtaining identification cards: Genita Noheart, Lyssa Thomas, Cara Ruff, Jay Phillips, Scotty Dunbar, Julie Walter, Rob Bray, Mike Menlow, Lisa Marks, and Demond Clark. The Respondents did not violate provisions of this rule with respect to the following persons: Jolanda Clark, Kevin Johnson, Jason Allen, "Joe" or "Steve".

16) Under ORS 653.370 and the facts and circumstances of the record in these proceedings, the Commissioner has the authority and the power to impose and direct payment of civil penalties against Respondents and each of them as follows:

Case No. 01-86 (Northwest Advancement Inc., Jeff Henke, and Joe Geer):

a) \$3,000 for three violations (\$1,000 each) for employing minors under the age of 14.

b) \$2,250 for three violations (\$750 each) for employing minors under the age of 16 as door-to-door sales persons.

c) \$5,000 for 16 violations for employing minors under the age of 18 after 6:00 p.m. This total includes seven violations (\$200 each) for minors who worked past 6:00 p.m., and nine violations (\$400 each) for minors who worked past 9:00 p.m.

d) \$9000 for nine violations (\$1,000 each) for taking minors out of state without prior written parental permission.

e) \$4,000 for four violations (\$1,000 each) for failure to provide transportation for minors to and from the job site.

f) \$1,250 for five violations (\$250 each) for employing minors without work permits.

g) \$3,000 for three violations (\$1,000 each) for failure to file an employer certification within 48 hours of employing a minor.

h) \$1,250 for five violations (\$250 each) for employing minors as door-to-door sales persons who did not have identification cards.

Case No. 02-86 (Northwest Advancement Inc., Jeff Henke, and Tim Cox):

a) \$1,000 for one violation for employing a minor under the age of 14.

b) \$3,750 for five violations (\$750 each) for employing minors under the age of 16 as door-to-door sales persons.

c) \$1,800 for employing minors past 6:00 p.m., and employing a minor more than 10 hours a day. There were two violations for employing a minor after 9:00 p.m. (\$400 each), and one violation (\$1,000 each) for employing a minor for more than 10 hours a day.

d) \$3,000 for three violations (\$1,000 each) for failure to provide transportation for minors to and from the job site.

e) \$1,000 for four violations (\$250 each) for employing minors without a work permit.

f) \$5,000 for five violations (\$1,000 each) for failure to file an employer certification within 48 hours of employing a minor.

g) \$1,250 for five violations (\$250 each) for employing minors as door-to-door sales persons who did not have identification cards.

OPINION

There was very little dispute about the basic facts in these proceedings. There was no dispute about the ages of the minors listed in the Notice of Proposed Revocation or, in most instances, about whether those under 16 years of age were in fact selling goods door-to-door in Oregon. With regard to some of the persons named in the Notice, there was simply no evidence on the record to make a determination of age.

Both Cara Ruff and Lyssa Thomas were employed by Respondents during the term when the public schools were in session. ORS 653.320(1) provides:

"No child under the age of 14 shall be employed in any work, or labor of any form for wages or other compensation to whomsoever payable, during the term when the public schools of the town, district or city in which the child resides are in session." (Emphasis supplied.)

Cara Ruff was 11 and Lyssa Thomas was 13 at the time they worked for NWA in November of 1985.

The evidence regarding Demond Clark's age was the hearsay testimony of Julie Walter. However, in this forum hearsay evidence is admissible and may be relied upon to make a decision. Therefore it was found that Demond Clark was employed by NWA at a time when he was under 14 years of age.

There was no evidence offered by the Respondents to contradict the Agency's evidence that the minors named in the relevant parts of the Notice, for whom no application was found, had in fact commenced employment without having a valid work permit. At best, a couple of the minors obtained them after beginning work and with some others it could not be established from the evidence whether they began work before the permit was issued. OAR 839-21-215(1) requires that minors "shall obtain a Work Permit and Age Statement prior to securing employment." (Emphasis supplied.)

There was no dispute that minors had been taken out of state without prior written permission of the minors' parents. There was testimony by Scotty Dunbar and Jay Phillips that they informed their parents, and that the parents voiced no objections. This was not sufficient, however, as OAR 839-21-265(14) requires prior written permission. In the case of Genita Noheart and Lyssa Thomas, the parents had no notice whatsoever.

There was no evidence offered by Respondents to contradict the Agency's evidence that the minors who were going door-to-door for NWA did not have identification cards as required by OAR 839-21-265(11). The Respondents did not show copies of any applications for identification cards for the minors named in the Notice of Revocation.

The Respondents did not offer any evidence to rebut the Agency's evidence that the minors involved in this case worked past 6:00 p.m. ORS 653.315(2) provides that "No child under sixteen years of age shall be

employed at any work before 7:00 a.m. or after 6:00 p.m. except for those * * * (d) employed under a special permit which may be issued by the Wage and Hour Commission * * *." The Respondents offered no evidence that they were entitled to any exception to the provisions of ORS 653.315. There was no evidence that they had been issued a special permit to employ persons under 16 years of age after 6:00 p.m.

There was a dispute at the hearing as to whether the law and the administrative rules adopted thereunder require that a minor cease work at 9:00 p.m., or whether the minor has to be returned to his or her home at 9:00 p.m. OAR 839-21-265(12) provides that minors employed as door-to-door sales persons "shall not be employed past the hour of 9:00 at night." However paragraph (13) of that same OAR provides that the transportation of a minor employed as a door-to-door sales person shall be provided by the employer and "shall occur no later than 9:00 o'clock at night." There was some discussion by Respondents to the effect that the seeming ambiguity between these two sections should be resolved in favor of work terminating at 9:00 p.m. and transportation from the job site beginning then. While there may be some room for argument in interpreting these two sections of the same OAR, it matters not which way the conflict is resolved. Under the facts involved here all the minors who were working as door-to-door sales persons, and to whom the requirements for transportation would apply, were under the age of 16 and were not allowed to be employed as door-to-door sales

people in the first place. Also, because the law provides that minors under 16 may not work past 6:00 p.m. without a specific exemption from the Wage and Hour Commission, it is irrelevant as to whether the minors under 16 stopped work at 9:00 p.m., or whether they were delivered back home at 9:00 p.m.

The Respondents also were not able to refute the evidence that some of the minors had been employed for longer than 10 hours in one day. ORS 653.315(1) prohibits the employment of a child under 16 years of age for longer than 10 hours in any one day. There was clear testimony that Julie Walter worked for more than 10 hours in a day.

The issue of whether or not NWA, Jeff Henke, and Tim Cox had in fact applied for identification cards or filed the required employer certifications within 48 hours of employing a minor was more difficult. OAR 839-21-220(3) requires that "within forty-eight hours after the hiring of a minor or of permitting a minor to work, an employer shall file a completed Employment Certificate form by taking the completed form to any office of the Bureau of Labor and Industries * * *." OAR 839-21-265(11) requires a minor selling door-to-door to have an identification card. As mentioned in the Findings of Fact on this issue, the Agency had some difficulty proving that employer certificates had not been applied for within 48 hours and that identification card applications had not been filed for some of the minors. In the case of Genita Noheart, Lyssa Thomas, and Cara Ruff there was sufficient evidence to find that Joe Geer had not filed any of the required paper

work, particularly where Genita, Lyssa, and Cara worked only a few days. With regard to Julie Walter and Rob Bray, the testimony by transcript of crew chief Tim Cox itself proved that he had filed no paper work on any minor that he employed after April of 1985. As stated in the Findings of Fact, Julie Walter was hired in May of 1985 and Rob Bray was hired in November of 1985. However, the Respondents were able to provide that there was evidence that the employer certification application had been filed with 48 hours on Jay Phillips and Scotty Dunbar.

With respect to those minors whose names had been furnished by Julie Walter, Charles Allen testified that he did check whether or not employer certifications and applications for identification cards had been filed and found none. This testimony, combined with Respondents' failure to produce any copies of employer certifications or applications for identification cards, was sufficient to find that none had been filed with regard to Mike Menlow, Lisa Marks, and Demond Clark. However, there was clearly no way to determine whether or not an employer certification or an application for an identification card had been filed with regard to "Joe" or "Steve"; nor could any finding be made on this issue with regard to Jolanda Clark, Kevin Johnson, and Jason Allen because there was no evidence upon which to determine whether they were minors.

The issue of whether or not NWA, Jeff Henke, Tim Cox, and Joe Geer violated the provisions of OAR 839-21-265 and 829-21-067 requiring transportation to be provided was also

somewhat difficult in one of the alleged incidents. The first incident alleged in the Notice of Proposed Revocation involved Genita Noheart. On the third evening that she worked for NWA she had an argument with the girl that she was working with, and because of that was upset and exchanged some hostile words with Joe Geer, her crew chief. As a result Genita made the decision herself to get out of the crew car and refused to get back in even though told to do so by Mr. Geer and urged to do so by one of the other minors working on that crew. The other minor, Damien Johnson, offered to work with Genita in order to get her back with the crew. The crew chief followed her in the car for some blocks. She ignored the overtures from the car and walked a number of blocks to her grandmother's house in the dark. The crew chief went on his way. Thus she was not provided transportation back to the place where she had initially been picked up for work that evening. OAR 839-21-265 (13) requires that "transportation of a minor employed to act as a canvasser, peddler, or outside salesman to and from the job site shall be provided by the employer * * *." (Emphasis supplied.) The administrative rules do not address the situation where the employer stands ready and able to provide such transportation but the minor, despite urgings from the employer, refuses to accept such transportation. As cited in the Findings of Fact in this instance, however, after Genita refused to get back into the car and Mr. Geer had followed her for some way, he did not telephone her parents or take any other action to insure that she got home safely.

The second incident involving crew chief Joe Geer, Genita Noheart, Lyssa Thomas, and Cara Ruff is much less ambiguous. In that instance crew chief Joe Geer failed to control a situation in which the three girls were subjected to abusive sexual and racial remarks. The situation was sufficiently intolerable that the three girls felt it imperative to get out of the crew vehicle and find an alternative way home. When they got out of the car they were some five and one-half miles from Genita's home, and the weather that evening was extremely cold and icy. Despite these facts Mr. Geer drove away and made no effort of any kind ascertainable from the record to insure that these three girls were returned to their home. In this situation it is likely that had he urged them to get back into the car, they would have refused. However, this situation is distinguishable from the earlier incident with Genita Noheart in that in this second incident Mr. Geer himself was responsible for creating the situation which caused the girls to get out of the car, and didn't even attempt to persuade them to get back in the car. Again he did not telephone their parents.

The three instances where NWA, Jeff Henke, and crew chief Tim Cox failed to provide return transportation from the job site for Julie Walter were clear violations. At a minimum, on the first occasion when Julie became ill, Tim Cox should have delivered her personally to her mother's place of employment. Then at the end of the work shift he should have picked up Julie and delivered her to her home, along with the other teenagers. On the second occasion when Julie spilled the

soft drink on herself, Tim Cox should have kept her with the rest of the crew even if she did not want to leave the van to work that day. She should not have been left at a gas station on her own. On the third occasion, Tim Cox appeared to be largely personally responsible for an altercation which occurred between him and one of the minors on the crew, and for creating a situation where the other minors on the crew declined to get back into his car once they had been taken to Joe Jensen's home. When the minors refused to get back into his car when he ordered them to do so, he left without securing transportation for them.

A major issue that arose in these proceedings was whether or not crew chiefs Joe Geer, Tim Cox, and Jeff Henke were acting as wholly independent contractors when the actions complained of occurred, or whether they were in fact acting on behalf of and as employees of NWA. As cited in the Findings of Fact - The Merits above, none of the indicia of independent contractor status were present. Notwithstanding the fact that the crew chiefs signed an "Independent Distributorship Agreement" with NWA, they were in fact employees of NWA. None of the crew chiefs was otherwise engaged in the type of business that they purportedly "contracted" to do for NWA. None of them had any financial investment in that business or in their own business enterprise. They were not required to risk any capital, not even to the extent of having to first purchase the goods up front that they would later resell. If goods remained unsold they could be turned back to NWA. NWA controlled the methods by

which the business was conducted. All the program materials and supplies were provided by NWA. All of the paper work that was sent in to the Agency was filed in the name of NWA as the employer of the minors, rather than in the name of the "independent contractor" crew chiefs. NWA did all the bookkeeping and accounting and inventory control. All of this evidence points to the existence of an employer/employee relationship between the crew chiefs and NWA. The crew chiefs were merely acting as commissioned salesmen for NWA.

It was also clear from the evidence on the record that the minors who sold the goods door-to-door to the ultimate purchasers were also employees of NWA. It would require an even greater stretch to characterize these minors as independent contractors. The minors controlled fewer of the aspects of the business than did the crew chiefs. Again, all of the paper work filed on these minors listed NWA as the employer. The minors were carried as employees under the workers' compensation policy issued to NWA. When a purchaser of the cookies or candies wished to pay for them by check, the check was made out to NWA. The minors were acting as employees who earned income on a commission sales basis.

A number of legal issues were raised by the Respondents at the beginning of the hearing. In addition to the issue of whether the crew chiefs and minors who sold the candy and cookies were acting as independent contractors rather than employees of NWA, the Respondents raised the issue of whether or not Oregon's child

labor laws deprived the Respondents and the minors of their constitutional rights to commercial free speech. Aside from the lack of merit of Respondents' arguments on this issue it is not, in this case, within the province of this forum to declare that its own rules are violative of constitutional guarantees. This forum was advised by letter, dated April 18, 1986, from the Department of Justice that the child labor statutes and regulations are "constitutionally sound as written, and as applied."

Moreover, the same issues of constitutionality raised herein were raised by Respondents and ruled upon by the Circuit Court of Marion County in a letter opinion dated June 10, 1986. The court concluded therein as follows:

"Next, it is my interpretation and opinion of the legislation that the rules and regulations adopted by defendant are within the statutory authority. I therefore reject Plaintiff's contention of ultra vires. I also believe that Plaintiff's 'Free Speech' argument is not well taken.

"The most bothersome area is that of the exemptions granted by the legislature and the Defendant to newspaper carriers or vendors. I conclude that these exemptions are severable and if invalid do not require invalidation of all of the general statutes and rules restricting child labor. I further conclude that there is a valid classification/distinction between newspaper carriers and other child labor. I therefore do not find any invalid discrimination.

"In summary my review leads me to the general conclusion that the statutes in question and rules adopted are valid as applied to the Plaintiffs" *Northwest Advancement vs. State of Oregon*, #851052 (June 10, 1986).

In a separate action involving Respondents, the Circuit Court of Multnomah County also issued a letter opinion, dated April 7, 1986, in a separate action upholding the statutes and regulations challenged herein. The court determined that the Wage and Hour Commission had the authority to regulate the activities of children engaged in outside sales, and that the regulations sought to be enforced fell within that authority. In so doing, the court stated:

"Defendants argue that the exemption from regulation which is enjoyed by newspaper carriers and sales people is an arbitrary and discriminatory exemption and the regulations are void by reason of selective enforcement. I find no merit in this contention. I also find no merit in defendants' other two contentions, namely that the regulations violate rights of free speech and that they deny to children under 16 the equal protection of the laws." *State of Oregon, ex rel Mary Wendy Roberts, Commissioner of the Oregon Bureau of Labor and Industries, and the Wage and Hour Commission of the State of Oregon v. Northwest Advancement, Inc.*, Case No. A860100401 (April 7, 1986).

It is understood, however, that as a legal matter it may have been necessary to raise these separate legal and

**In the Matter of
CITY OF PORTLAND,
Declaratory Ruling.**

Case Number 21-85
Declaratory Ruling of the
Commissioner
Mary Wendy Roberts
Issued February 10, 1987.

SYNOPSIS

Finding that the employer's "cafeteria" style benefit plan was not a subterfuge to evade the purposes of ORS chapter 659, the Commissioner found that it is not unlawful for Respondent to observe the plan terms, whereunder an older employee electing to receive a cash benefit or alternative benefits, rather than a defined level of life insurance coverage, may receive compensation exceeding that which a younger employee so electing would receive, because any such difference in compensation is based solely on Petitioner's cost of providing insurance coverage. The holding is based only on the facts found or assumed in this proceeding, and is only binding between the Agency and Respondent, which asked for a ruling. ORS 183.410; 659.010(6); 659.015; 659.022; 659.028; 659.030(1)(a) and (b); OAR 839-05-020.

On or about February 27, 1986, the City of Portland (hereinafter Petitioner) filed a Petition for Declaratory Ruling with Mary Roberts, Commissioner of the Bureau of Labor and Industries of the State of Oregon. On or about March 26, 1986, the Forum notified

constitutional issues in this forum and thereby preserve them for some later possible judicial proceeding. The record reflects that these issues have been raised, notwithstanding that the resolution of those issues is outside the scope of this contested case proceeding.

ORDER

NOW, THEREFORE, as authorized by ORS 653.370 and in order to penalize the Respondents and each of them for commission of the unlawful employment practices as outlined above, as well as to protect the future interests of other minors similarly situated, Respondents are hereby ordered to deliver to the Hearings Unit of the Portland office of the Bureau of Labor and Industries, 1400 S.W. Fifth Avenue Room 309, Portland, Oregon, the total amount of FORTY-FIVE THOUSAND FIVE HUNDRED FIFTY DOLLARS (\$45,550.00).

Petitioner and all persons named in the Petition and in an addending letter from Petitioner dated March 19, 1986, of that decision by serving them with a copy of the Petition and a notice of the hearing at which the Petition would be considered. The Notice of Hearing included a designation of Leslie Sorensen-Jolink as the Presiding Officer for the hearing. On or about June 19, 1986, the Forum served on Petitioner and on the persons named in the Petition and in the addending letter an Addendum to the Notice of Hearing, which broadened the issues which the declaratory ruling might concern.¹

By letter of June 2, 1986, Petitioner notified the Forum that Pam Hodge, its Employee Benefits Manager, would present oral argument on its behalf at the hearing. By letter of June 9, 1986, Tektronix, Inc. notified the Forum that E. J. Niebuurt, its Employee Benefits Manager, would present oral argument at the hearing. By letter of June 23, 1986, Ms. Hodge submitted written testimony on behalf of the Petitioner.

On June 30, 1986, the hearing on the Petition was conducted by Ms. Sorensen-Jolink in Room 26 of the State Office Building, 1400 S.W. 5th Avenue, Portland, Oregon. Although all persons in attendance were invited to present oral argument or other testimony, only Ms. Hodge and Mr. Niebuurt did so. In addition to Ms. Hodge, Richard A. Braman, of attorneys for Petitioner, was present for Petitioner. The Presiding Officer, as well as W. W. Gregg, Quality Assurance Manager for the Civil Rights Division of the Bureau

of Labor and Industries (hereinafter Agency), and Susan T. Venable, Legal Policy Advisor for the Agency, questioned Ms. Hodge and Mr. Niebuurt. During the post-hearing period set forth by the Presiding Officer, Petitioner submitted a brief in support of its position. No oral or written argument opposing the ruling sought by Petitioner was presented at any time during or after the hearing.

In addition to the above-noted exhibits, the Presiding Officer has admitted a February 19, 1986, letter from Mr. Braman to Mr. Gregg; an April 21, 1986, letter from Mr. Braman to Ms. Venable; and a September 23, 1986, letter and copy of amicus brief from Mr. Gregg to the forum.

Having fully considered this matter, I, Mary Roberts, issue the following Declaratory Ruling.

FACTS

Petitioner has alleged the following facts, which the Forum presumes to be accurate and complete for purposes of this declaratory ruling.

Petitioner, the City of Portland, is a municipal corporation of Oregon, which directly engages the personal services of approximately seven hundred non-represented employees, reserving the right to control the means by which those services are performed. For many years, Petitioner has provided those employees with employer-paid group-term life insurance for a face value equal to each employee's annual salary, rounded to the next highest \$1,000. This has been "mandated"

coverage, provided to each non-represented employee whether the employee needed or wanted it. This benefit has been a nontaxable fringe benefit, qualifying as an exclusion from the employee recipient's gross income under the Internal Revenue Code, 26 USC section 79.

Effective in July 1985, Petitioner adopted a "cafeteria" employee benefit plan called Beneflex for its non-represented employees. Pursuant to this plan, which has been in operation since the time of its adoption, Petitioner gives each such employee an annual dollar "allowance" for benefit expenditures, which is equal to the cost for that employee of the "defined" benefits, i.e., the benefits which Petitioner's non-represented employees mandatorily received up until Beneflex implementation, at the levels mandated at that time. That is, Petitioner gives each non-represented employee an allowance sufficient to purchase the benefits he or she had before Beneflex, at the levels provided before Beneflex. Pursuant to Beneflex, Petitioner also gives each employee a long list, or "menu," of benefit options from which to choose in spending his or her allowance, each showing a price tag which is equal to, in the case of insurance, the actual annual premium cost of that coverage for that employee. Included on that benefit menu are three life insurance options, for coverage in the amount of \$5,000, one times the employee's annual salary (the defined life insurance benefit), or \$50,000.

Viewing Beneflex from the life insurance context, eligible employees may choose between spending the portion of their allowance based on the

premium cost for the defined life insurance benefit, plus any other allowance not spent on another menu option, on any of these three levels of life insurance coverage; applying it to an alternative benefit; or taking it in cash. That is, the Beneflex employee either spends the entire allowance on (life insurance or other) benefits, or elects to take the "residual" (the allowance minus cost of benefits selected) in cash. (Any spending on benefits exceeding the allowance results in payroll contributions by the employee equal to that excess.) From any cash residual amount is subtracted a "withhold" of (currently) 50 percent, and the remaining sum is paid to the employee in cash, through payroll. Part of this withhold pays Petitioner's retirement and social security contributions on the cash payment (amounting to approximately 22.92 percent of that payment). The remainder of the withhold funds Petitioner against adverse selection, a factor pursuant to which the employee choice option in a cafeteria plan operates to create, with regard to each insurance option, a risk pool more concentrated with employees with higher claim costs than the risk pool which occurs in a non-choice employee benefit plan. Petitioner maintains the adverse selection fund, therefore, to reasonably ensure that sufficient funds are available to cover expenses for the benefit coverage. The adverse selection withhold percentage is computed annually on that basis, and it is the same for every employee regardless of age.

Under Beneflex (as well as Petitioner's previous benefit plan), (1) employees above age 29 are placed, for

¹ For reasons mentioned in the "Questions Presented in This Matter" section of this Opinion, this Opinion addresses just the question posed in the petition (which was reiterated in question 1 of the Hearing Notice).

life insurance premium purposes, in five-year age brackets; (2) the premium for life insurance coverage increases with each higher age bracket; and (3) this premium rate pattern is established by the life insurance industry and based on claims experience and competitive market factors over which Petitioner has no control.

Pursuant to Petitioner's plan, regardless of age, all employees have the same ability to purchase the defined benefits without incurring additional costs. However, because employer-paid group-term life insurance premium rates increase with the age of the insured person, Petitioner's cost for life insurance coverage, and therefore the life insurance allowance, is higher for employees in older age brackets. Accordingly, if an employee elects not to receive the defined benefit of life insurance, the amount of the cash or credit toward another benefit for that employee varies with his or her age. The unavoidable result is that between employees who (1) earn the same salary and have, therefore, the same defined benefit (dollar amount of coverage) in life insurance, and (2) elect to receive the cash option or apply their life insurance allowance to a benefit other than life insurance, those employees in older age brackets will receive a higher benefit than those employees in younger age brackets, in cash or residual allowance to apply to other benefits.

Petitioner changed to a cafeteria benefit plan to contain the costs of employee benefits, by making employees "cost conscious" concerning those benefits, and to maximize employees' choice as to their benefits, thereby

maximizing the personal usefulness of the benefit value. The choice between cash or other statutory nontaxable insurance benefits feature of Beneflex is not only critical to the achievement of these goals, but also mandated by the Internal Revenue Code, if Petitioner's insurance benefit options are to remain untaxable. Petitioner did not institute Beneflex to reduce employee benefits.

Tektronix, Inc., the US National Bank of Oregon, Clackamas County, Good Samaritan Hospital and Medical Center, Portland General Electric, Omark Industries, and SAIF Corporation have cafeteria plans similar to Beneflex.

In accordance with ORS 183.410, the conclusions in subsequent sections of the Ruling are based upon the alleged fact recited above in this Section. The Agency will not be bound by the below Conclusions in any proceeding based on factual findings which differ materially from the above-cited facts.

QUESTION PRESENTED IN THIS MATTER

The Presiding Officer decided to limit the specific scope of this matter to the question posed by the features of the cafeteria plans of the employer-contributors to this record: Petitioner and Tektronix, Inc. Accordingly, and because the answer to the below question renders unnecessary the resolution of further questions, the specific scope of this Ruling is limited to the following question:

Pursuant to Petitioner's "cafeteria" employee benefit plan, it is unlawful under ORS 659.010 to 659.110, and particularly ORS

659.028 and ORS 659.030(1), for the Petitioner to pay a higher benefit to older employees electing to receive a cash option or alternative benefit, instead of a defined level of group-term life insurance coverage, than the benefit paid to younger employees electing the same option?

STATUTES OR RULES IN ISSUE

The above-cited question puts directly at issue ORS 659.030(1)(a) and (b) and ORS 659.028. Resolving this question involves not only examination of those provisions, but consideration of ORS 659.015, 659.022, and OAR 839-05-020, as well as the federal Age Discrimination in Employment Act of 1967 (hereinafter the ADEA), 29 USC sections 621 to 634; 29 CFR 869.120 and 29 CFR 1625.10.

In pertinent part, ORS 659.030(1) (a) and (b) make it unlawful for an employer

"because of an individual's * * * age * * * to refuse to hire or employ or to bar or discharge from employment such individual * * * (or) to discriminate against such individual in compensation or in terms, conditions or privileges of employment."

This prohibition covers individuals between ages 18 and 70 years of age.

ORS 659.028 provides in pertinent part:

"It is not an unlawful employment practice for an employer * * * to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension or insurance plan, which is not a subterfuge to

evade the purposes of this chapter * * *"

CONCLUSION AS TO THE APPLICABILITY OF THESE STATUTES TO THE ABOVE-CITED FACTS

ORS 659.030(1)(a) and (b) and 659.028 apply to the factual situation given herein. As a municipality which in the State of Oregon directly engages or utilizes the personal service of one or more employees, reserving the right to control the means by which such service is or will be performed, Petitioner is an "employer" for purposes of these statutes. ORS 659.010(6). The life insurance component of Petitioner's Beneflex plan described above is a "bona fide employee benefit plan" which is not a "subterfuge to evade the purposes of ORS chapter 659," as those phrases are used in ORS 659.028.

CONCLUSION AS TO THE LEGAL EFFECT OR RESULT OF APPLYING THOSE STATUTES TO THE ABOVE-CITED FACTS

The result of applying ORS 659.028 and 659.030 to Petitioner's Beneflex employee benefit plan and the facts stated above is the conclusion that it is not unlawful under ORS 659.010 to 659.110 for Petitioner to observe the above-described Beneflex terms, whereunder an older employee electing to receive a cash benefit or alternative benefits, rather than a defined level of life insurance coverage, may receive compensation exceeding that which a younger employee so electing would receive. This conclusion is based in part on the conclusion that any such difference in compensation is based solely on Petitioner's cost of providing that insurance coverage.

REASONS FOR THOSE CONCLUSIONS

The initial question herein is whether Petitioner's operation of the life insurance feature of the Beneflex plan described above discriminates against any of employee with respect to that employee's compensation, terms, conditions or privileges of employment, because of that employee's age, as proscribed by ORS 659.030(1)(a) and (b). OAR 839-05-020(1), a 1982 administrative rule relating generally to the civil rights statutes enforced by the Agency, indicates that in adverse impact cases, a seemingly neutral "employment standard or policy" (i.e., one applied equally to all employees) can constitute discrimination prohibited by ORS 659.030 if use of that standard or policy has an adverse affect on a protected class, regardless of the employer's intent. Beneflex's life insurance components arguably could constitute a policy falling within this description. Pursuant to OAR 839-05-020(2), an employer can justify such an adverse impact by showing that the standard or policy is a business necessity, unless another standard or policy with less adverse impact would work as well. It is noted that while the Forum might be inclined to opine that Beneflex's life insurance features do not constitute adverse impact discrimination on the basis of age which violates ORS 659.030, the resolution of the next issue makes it unnecessary to determine if that is the case.

Even, however, if it were concluded that Beneflex's life insurance features do constitute adverse impact age discrimination in violation of ORS 659.030, that opinion would not end

the inquiry herein, for the reason that some types of age discrimination are permissible under ORS 659.010 to 659.110, pursuant to ORS 659.028. This is because even though the language of ORS 659.030 and 659.028 does not specify their relationship to each other, the plain language of ORS 659.028 specifies certain circumstances in which age (and other types of) discrimination, which could (otherwise) be an unlawful employment practice according to the general language of ORS 659.030, in fact is not an unlawful employment practice. This is, the provision of ORS 659.028 which is relevant herein cannot reasonably, or under any rule of statutory construction, be viewed as anything but a specific exemption to the general proscription of ORS 659.030 which relates to age. This conclusion conforms to the federal judicial and administrative treatment without debate of virtually identical language in the ADEA as an exemption to virtually identical (in pertinent part) general ADEA proscriptions. The Forum found no Oregon case law on this point. However, the Oregon Attorney General has articulated, without explanation, agreement with the above-stated conclusion on this point in an opinion appearing at 36 AG 449, 453 (1973). (See footnote 2, *infra*.)

Given the opinion of the Forum in this regard that ORS 659.028 provides certain exemptions to prohibitions stated in ORS 659.030, the issue herein becomes whether the life insurance feature of Petitioner's Beneflex plan qualifies for such an exemption; i.e., whether in following Beneflex, Petitioner is observing "the terms of a bona

fide employee benefit plan * * * which is not a subterfuge to evade the purposes of [ORS chapter 659.] If the answer to that question is yes, the inquiry in this proceeding need go no further.

Assuming for the moment that Beneflex is a bona fide employee benefit plan, the answer to this question turns upon whether it is a "subterfuge to evade the purposes of" ORS chapter 659. Definitions of "subterfuge" offered by dictionaries range from: "(t)hat to which one resorts for escape or concealment;" to "a deception by artifice or stratagem to conceal, escape, avoid or evade;" to "a deceptive device or stratagem." Representative dictionary definitions of "evade" are to "use craft or stratagem in avoidance" or "to manage to avoid the performance of." *Black's Law Dictionary, Fifth Edition* (1979); *Webster's Third New International Dictionary* (1966.)

Accordingly, it is accepted that "subterfuge" and "evade" both involve an element of intent to evade, and together in ORS 659.028 they logically mean a plan, scheme, or some intentional act to circumvent, escape, or thwart the purposes of the prohibitions against age discrimination contained in ORS chapter 659. Indicia of those purposes are found in ORS 659.015 and 659.022.

ORS 659.015 recites the Oregon Legislature's policy against discrimination in employment because of age:

"It is declared to be the public policy of Oregon that available manpower should be utilized to the fullest extend possible. To this end the abilities of an individual, and not any arbitrary standards

which discriminate against an individual solely because of age, should be the measure of the individual's fitness and qualification for employment."

With the language recited below, ORS 659.022 declares the purpose of ORS 659.010 to 659.110, and in so doing, in part reiterates the public policy statement contained in ORS 659.015:

"The purpose of ORS 659.010 to 659.110 and 659.400 to 659.435 is to encourage the fullest utilization of available manpower by removing arbitrary standards of race, religion, color, sex, marital status, national origin or age as a barrier to employment of the inhabitants of this state; to insure human dignity of all people within this state, and protect their health, safety and morals from the consequences of intergroup hostility, tensions and practices of discrimination of any kind based on race, religion, color, sex, marital status or national origin. To accomplish this purpose the Legislative Assembly intends by ORS 659.010 to 659.110 and 659.400 to 659.435 to provide:

"* * *

"(2) An adequate remedy for persons aggrieved by certain acts of discrimination because of race, religion, color, sex, marital status or national origin or unreasonable acts of discrimination in employment based upon age."

Together, these statues indicate that the purpose of ORS chapter 659's prohibitions of age discrimination in employment is to encourage the fullest

possible utilization of employable persons by removing arbitrary standards which discriminate against those people solely because of age and encouraging, instead, measurement of such an individual's fitness for employment by his or her abilities.

If "subterfuge to evade" as used in ORS 659.028 is given the meaning clearly indicated by dictionary definitions, as suggested herein, it means for our purposes that an employee benefit plan intended to be a means of getting around or avoiding the statutory purpose of removing discrimination on

the basis of age rather than ability from the workplace.

If, however, the meaning of "subterfuge to evade the purposes of" ORS chapter 659 were to be seen as ambiguous rather than clear, the Forum would have to look, of course, to relevant legislative history and case law for guidance in resolving that ambiguity and discerning the meaning of that statutory phrase. The Forum has found little case law interpreting ORS 659.028, and none dealing with this question.² The language and enactment dates of pertinent provisions of

² In an opinion reported at 36 AG 453 (1973), Oregon Attorney General Lee Johnson considered whether a state retirement plan which was designed to provide equal total annuity benefits to male and female retirees with equal service and equal contributions, but which provided different rates of payment for those men and women because of their differing life expectancies, constituted sex discrimination under ORS 659.030. Mr. Johnson found it "unnecessary to determine if the state's retirement plan constituted sex discrimination under" ORS 659.030, because of ORS 659.028's exemption from the operation of ORS 659.010 to 659.115 of any bona fide employee benefit plan which is not a subterfuge to evade the purposes of ORS chapter 659. (Mr. Johnson thereby concluded without explanation that ORS 659.028 operates as an exception to the proscriptions of ORS 659.030.) Also, without explanation, Mr. Johnson stated that the state's retirement plan "clearly" meets these criteria. This supports the presumption that "subterfuge to evade the purposes of" ORS chapter 659 is not an ambiguous phrase.

It should be noted, however, that any benefit plan must be viewed independently upon the particular facts involved. The 1973 opinion cited in this footnote does not stand as precedent for or approval of benefit plans that differ in costs or benefits on the basis of sex or any other protected group or class. Recent federal decisions have discussed the validity of sex based benefits plans under Title VII.

In *City of Los Angeles v. Manhart*, 435 US 702, 17 FEP 395 (1978), the court held that an employer had violated Title VII by requiring its female employees to make larger contributions to a pension fund than male employees in order to obtain the same monthly benefits upon retirement.

Likewise, in *Arizona Governing Committee v. Norris*, 32 FEP 233 (1983), the court reviewed a case that involved a deferred compensation plan wherein the employer offered its employees the option of receiving retirement benefits from one of several companies selected by the employer, all of which would pay a woman lower monthly retirement benefits than a man who made the same contribution. The court held this practice does not constitute discrimination on the basis of sex in violation of Title VII.

the Oregon discrimination in employment statutes at issue and the ADEA, however, establish a clear intent on the part of the Oregon Legislature to copy federal ADEA provisions in enacting those Oregon statutory provisions.

In 1959, the Oregon Legislature first enacted a prohibition against age discrimination in employment, with ORS 659.015 declaring the same public policy as that recited above. ORS 659.024 made unlawful employment discrimination on the basis of age concerning individuals between the ages of 25 and 65 who were employed in the private sector. ORS 659.026 made the same proscription concerning (most) public sector employees.

In 1967, the ADEA was enacted, prohibiting discrimination in employment because of age of a person aged from 40 to 65. At 29 USC section 623(f), the Act contained the caveat that despite that general ADEA proscription, it was not unlawful for an employer:

"(1) to take any action otherwise prohibited * * * where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business * * * [or]

"(2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this Act, except that no such employee benefit plan shall excuse the failure to hire any individual * * *

In 1969, the Oregon Legislature amended Oregon age discrimination in employment statutes to include a provision almost identical to the above-quoted 29 USC section 623(f)(1). Moreover, the Legislature enacted ORS 659.028, stating:

"It shall not be unlawful for an employer * * * to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension or insurance plan, which is not a subterfuge to evade the purposes of ORS chapter 659, except that no such employee benefit plan shall excuse the failure to hire any individual."

This provision is virtually identical to the above-quoted 29 USC section 623(f)(2). The 1969 amendments also brought state and local public governments within the definition of the employers covered by Oregon employment discrimination statutes.

In 1973, ORS 659.024 and 659.026 were amended to lower the age of the protected class from 25 to 18.

In 1978, the ADEA was amended so that 29 USC section 623(f) provided that it was not unlawful for an employer:

"(2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefit plan shall excuse the failure to hire any individual, and no such seniority system

or employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title because of the age of such individuals ***"

At the same time, the ADEA was amended to raise the minimum age of protected class from 65 to 70.

In 1979, the Wage and Hour Division of the US Department of Labor, then charged with enforcement of the ADEA, promulgated 29 CFR 860.120, a regulation containing an extensive interpretation of 29 USC section 623(f)(2), including the meaning of a "subterfuge." In 1981, the Equal Employment Opportunity Commission, to whom responsibility for enforcing the ADEA had been transferred, adopted 29 CFR 1625.10, incorporating by reference 29 CFR 860.120.

In 1981, Oregon Revised Statutes were amended to conform to the above described 1978 ADEA amendments. ORS 659.028 was amended to read, and now reads:

"It is not an unlawful employment practice for an employer *** to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension or insurance plan, which is not a subterfuge to evade the purposes of this chapter. However, except as otherwise provided by law, no such employee benefit plan shall excuse the failure to hire any individual and no such seniority system or employee benefit plan shall require the involuntary retirement of any individual 18 years of age or older and under 70 years of age

because of the age of such individual."

At the same time, the maximum age of the protected class was raised from 65 to 70.

The above recitation shows that, and how, on a step-by-step basis, the Oregon Legislature has, in formulating ORS 659.030(1) and 659.028, borrowed from, and indeed copied almost verbatim in respects pertinent herein, the ADEA, even after the promulgation of federal regulations interpreting the meaning of 29 USC section 623(f)(2).

The ADEA is a remedial statute designed, in its own words,

"to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment." 29 USC section 621(b).

That policy statement, and the policy and purpose statements of ORS 659.015 and 659.022 discussed above, indicate that with the distinction not relevant herein Oregon law was not intended to protect only older workers, the Oregon statutory scheme prohibiting age discrimination in employment and the ADEA further the same policy. If and to the extent that an Oregon statute and a federal statute further the same policy, when the Oregon statute has been copied from the federal statute, Oregon courts have considered federal interpretations of the federal law. See *U. of O. Co-Operative Store v. State Dept. of Revenue*, 273 Or 539, 544, 542 P2d

900 (1975). Accordingly, this forum looks to the federal interpretations of the ADEA, and particularly the language of 29 USC section 623(f)(2).

As seen above, the ADEA has, for purposes pertinent herein, the same benefit plan exception to a general age discrimination prohibition as that which appears in ORS 659.028. The purpose of the ADEA

"is to permit employers to shape employee benefit plans which are significantly affected by age in a way that account for costs that increase because of age." *Diedrich & Gaus, Defense of Equal Employment Claims*, section 6.16 (1982).

According to 29 CFR 860.120(a)(1), interpreting this ADEA exemption,

"(t)he legislative history of this exemption provision indicates that its purpose is to permit age-based reductions in employee benefits plans where such reductions are justified by significant cost considerations."

To qualify for this ADEA exemption, an employee benefit plan must meet four criteria. It is the burden of the one seeking the exception to show each criteria has been clearly and unmistakably met, and the exemption must be narrowly construed. 29 CFR 860.120(a)(1); *EEOC v. Borden's, Inc.*, 724 F2d 1390 (9th Cir 1984).

First, obviously, the plan must be the sort of plan covered by the exemption scheme. That is, it must be a plan, such as an insurance plan, which provides employees with fringe benefits.

Second, the plan must be "bona fide," which means no more than that it

exists and provides substantial benefits to employees. 29 CFR. 860.120(b); *Id.* at 1395; *United Airlines, Inc. v. McMann*, 434 US 192, 194, 98 S Ct 444, 446, 54 LEd2d 402 (1977).

Third, any disparity in benefits on the basis of age must be provided for in the employer's plan. See 29 CFR 860.120(c).

Fourth, the plan must not be a subterfuge to evade the purposes of the ADEA. In a portion of the *McMann* decision which was not affected by subsequent ADEA amendments, the US Supreme Court has said the following concerning "subterfuge," as that word is used in the ADEA:

"(i)n ordinary parlance, and in dictionary definitions as well, a subterfuge is a scheme, plan, stratagem, or artifice of evasion. In the context of this statute, 'subterfuge' must be given its original meaning and we must assume Congress intended it in that sense."

The court indicated that it meant therefore that such a subterfuge must include an intent to evade a statutory requirement. *United Airlines v. McMann*, *supra* at 203.

The regulations appearing in 29 CFR 860.120 provide that benefits can be reduced for older employees without that act being viewed as a subterfuge under 29 USC section 623(f)(2), to the extent those reductions are justified by increased costs. In *Cipriano v. Board of Educ. of City School Dist.*, 785 F2d 51, 58 (1986), the Second Circuit stated that these regulations seem to put a fairly heavy burden on the employer to justify any age-based distinctions in employee benefit plans

on the basis of "age-related cost justifications." That court, noting that it did not mean to endorse "every detail of the regulations" and that it could not "simply disregard them," limited its decision to the fact that, in the case of voluntary early retirement plans, the employer must present some evidence that it is not a subterfuge "by showing a legitimate business reason for structuring the plan as it did."

Under the facts given herein, Petitioner's Beneflex plan clearly meets the first two of the above criteria. It also meets the third, as the choice of a cash option, or alternative benefit, at issue would actually be prescribed by the terms of Petitioner's plan.

With regard to the fourth criteria, under either the Supreme Court's *McMann* definition of "subterfuge," the requirements of 29 CFR 860.120, or the *Cipriano* decision, which together seem to present the scope of divergence in federal interpretations of "subterfuge to evade the purposes of" the ADEA, it is clear that the life insurance features of the Beneflex plan, as described in the alleged facts described above, should not be regarded as a subterfuge to evade the purposes of either the ADEA (or ORS chapter 659). Those alleged facts do not evidence directly or by inference an intent, much less a stratagem, by Petitioner to evade the purposes or enforcement of the proscriptions against age discrimination which appear in the ADEA (and Oregon law). Under the alleged facts, any age-based differences in compensation are firmly explained by, that is they are rooted in and do not go beyond, age-related cost justifications,

i.e., the actual cost to Petitioner of providing the benefits, as determined by factors Petitioner does not control. Each of Petitioner's non-represented employees receives an allowance equal to what it would cost Petitioner to provide the previously-mandated benefits to that employee, just as the prices charged for the menu options on which the employee spends that allowance are determined solely by the cost to Petitioner of providing the option to that employee. It is that allowance and those prices (plus employee choice) which determine what, if any, cash option or credit toward other (non-life insurance) benefits, the Beneflex features at issue herein, the employee will receive. Accordingly, it is the opinion of the Forum that differences in the amounts of those cash options or credits received by employees of different ages but equal salary, who elect to receive cash or credit rather than a given level of life insurance from Petitioner, are based solely on Petitioner's cost of providing life insurance coverage. Moreover, the options at issue are just that: Beneflex does not compel, but permits, employees to choose or not the cash option or alternative benefits, or its equivalent in alternative benefits, equal to the previously-mandated benefit level. Finally, Petitioner has recited several business reasons, plus a legal tax requirement, for structuring its employee benefit plan as it has, which appear to be perfectly legitimate.

For these reasons, it has been difficult to "give content to the concept of 'subterfuge,'"³ as it is used in the ADEA, in applying it to Petitioner's

**In the Matter of
E. HAROLD SCHIPPOREIT and
Grace Schipporeit, dba Sunnyview
Mobile Home Park, Respondents.**

Case Number 06-84
Final Order of the Commissioner
Mary Wendy Roberts
Issued February 20, 1987.

SYNOPSIS

After a white Complainant provided white Respondents written notice of his intent to sell his mobile home in their mobile home park, Respondents failed to provide black buyer (also a Complainant) with an application to rent the space for the mobile home. The Commissioner found that Respondents deliberately discouraged and refused to rent the space because of the buyer's race and color. Respondents' later refusal to rent the same space to another non-white Complainant was for legitimate, non-discriminatory reasons. As to the initial transaction, the Commissioner awarded the Complainant buyer \$12,000 for mental distress, and awarded the Complainant owner of the mobile home \$2,781 for pecuniary loss and \$2,000 for mental distress. ORS 659.031; 659.033; OAR 839-04-030 (3)(b)(A) and (B).

The above-entitled contested case came on regularly for hearing before Leslie Sorensen-Jolink, designated as Presiding Officer by the Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was convened at 10 a.m. on May 15 and 16, 1985; at 1 p.m. on May 20 and

plan. In fact, under the facts given herein, it is virtually impossible to imagine a valid application of any meaning of "subterfuge to evade the purposes" of ORS chapter 659 to the life insurance features of Petitioner's Beneflex plan. Furthermore, those features clearly are provided for in a bona fide employee benefit plan, according to the above-enunciated federal interpretations, which the Forum adopts for purposes herein. Accordingly, the Forum has concluded that any difference in benefits paid to Petitioner's employees of different ages but equal salary, who elect to receive cash or an alternative benefit instead of a given level of group-term life insurance, does not constitute an unlawful employment practice under ORS 659.028 or, therefore, ORS 659.010 to 659.110.

**EFFECT OF DECLARATORY
RULING**

Pursuant to ORS 183.410, the ruling herein is strictly limited to the facts presented to the Forum and set forth in this ruling. Moreover, as provided in ORS 183.410, this ruling binds this Agency only to Petitioner City of Portland. It is also important to note that this ruling involves the issue of disparate treatment based on age and is not intended as precedent regarding any other benefit plan involving differences based on age or any other group or class protected by statute.

³ *Cipriano v. Board of Educ. of City School Dist., supra*, at 58.

22, 1985; and at 10 a.m. on June 11 and 13 and August 27, 1985. It was conducted at various locations in Salem, Oregon. The Bureau of Labor and Industries (hereinafter the Agency) was represented by Victor Levy, Assistant Attorney General. E. Harold Schipporeit and Grace Schipporeit, doing business as Sunnyview Mobile Home Park (hereinafter Respondents), were represented by Dale L. Crandall, attorney at law. John A. Cavender (hereinafter Complainant Cavender) was present throughout the hearing; Sherry E. Masanda (hereinafter Complainant Masanda) was present except at the start of the June 11 and 13 hearings days; and Pearl L. Hampton (hereinafter Complainant Hampton) was present except at the start of the last hearing day.

The Agency called as its witnesses Complainant Cavender, John Branch, bank manager, Mike Cavender, Complainant Cavender's son; John Hofer, Investigator for the Civil Rights Division (hereinafter CRD) for the Agency; Byron E. Cooley, mobile home broker, Complainant Hampton; Complainant Masanda; Donna Manley, friend of Complainant Masanda; Donald E. Foster, Sr., Tammy Davis, Layne Davis, and Janice Boseke, tenants in Sunnyview Mobile Home Park during times material herein; Pearl Cavender, Mike Cavender's wife; Lloyd Hughes and David DeLapp, owners of mobile homes in Sunnyview Mobile Home Park during times material herein; Respondent Grace Schipporeit; Robert Toney, mobile home realtor; and John H. Cavender, Complainant Cavender's son. Respondents called as their wit-

nesses Larry Griffin, realtor, and Respondent Harold Schipporeit.

After consideration of all the record existing at the time, which included post-hearing briefs of both the Agency and Respondents, the forum issued a proposed order.

Having fully considered the entire record in this matter, including all arguments in the exceptions of Respondents and the Agency to the proposed order, I, Mary Roberts, Commissioner of the Bureau of Labor and Industries, hereby make the following Findings of Fact, Ultimate Findings of Fact, Ruling on Motion to Dismiss, Conclusions of Law, Opinion, and Order.

FINDINGS OF FACT – PROCEDURAL

1) On or about November 22, 1983, Complainant Masanda filed a verified complaint with the CRD of the Agency alleging that Respondents had discriminated against her by rejecting her application for tenancy in their mobile home park because of her race, color, and national origin.

On or about December 28, 1983, Complainant Hampton filed a verified complaint with CRD of the Agency alleging that Respondents had discriminated against her by refusing to let her apply for tenancy in their mobile home park because of her race and color.

On or about October 10, 1983, Complainant Cavender filed a verified complaint with CRD of the Agency alleging that Respondents had discriminated against and continued to discriminate against him, by preventing him from selling his mobile home to Complainant Hampton, because of Complainant Hampton's race and

color. On or about December 6, 1983, Complainant Cavender filed a second, separate verified complaint with CRD alleging that Respondents had discriminated against him in connection with his efforts to sell his mobile home to Complainant Masanda, because of Complainant Masanda's race, color, or national origin.

These four complaints have been admitted solely for the purpose of formulating this procedural finding and not as proof of the allegations made in them.

2) Following the filing of these four complaints, CRD investigated the allegations contained in them and determined that there was substantial evidence to support the allegations in each complaint

3) Thereafter, CRD attempted to resolve these complaints through conference, conciliation, and persuasion, but was not successful in these efforts.

4) Thereafter, the Agency caused to be prepared and duly served on each Respondent Specific Charges, dated October 8, 1984, alleging in effect that Respondents had violated ORS 659.033 by discriminating against each Complainant in connection with Complainant Cavender's efforts to sell his mobile home to Complainant Hampton and Complainant Masanda, and the ensuing efforts of Complainant Hampton and Complainant Masanda to obtain tenancy in Respondents' mobile home park. Those Specific Charges further alleged that this discrimination occurred because of the race and color of Complainant Hampton and the race, color, and national origin of Complainant Masanda.

5) On or about October 29, 1984, Respondents served their answer to the Specific Charges on the forum.

6) With the Specific Charges, the forum duly served on Respondents and the Agency a notice of the time and place of the hearing of this matter. Pursuant to a request by the Agency, the hearing was postponed once.

7) On March 20, 1985, the Agency filed a motion to compel Respondent Grace Schipporeit to answer certain questions she had refused to answer during her deposition. As explained in the Presiding Officer's ruling on this motion, after considering oral argument on this motion offered by the Agency and Respondents at a telephonic pre-hearing conference, as well as their written arguments, the Presiding Officer denied the motion.

After considering the Agency's argument against the Presiding Officer's ruling contained in its exceptions to the Proposed Order, this forum has concluded that the ruling was correct and adopted it as the forum's ruling.

8) Before the commencement of the hearing, each Complainant received from this forum a copy of a document entitled "Information Relating to Civil Rights or Wage and Hour Contested Case Hearings," which had been sent to each of them. At the commencement of hearing, each Complainant stated that he or she had read this document and had no questions about it.

Before the commencement of the hearing, each Respondent received from this forum a copy of a document entitled "Information Relating to Civil Rights or Wage and Hour Contested

Case Hearings," which had been sent to each of them. At the commencement of hearing, each Respondent stated that he or she had read this document and had no questions about it.

9) Pursuant to the request of counsel, all witnesses except the Complainants and Respondents were excluded from the hearing until they had completed their testimony.

10) Respondents' objections to certain exhibits have been overruled. Although the forum agrees that the relevance of these exhibits is very limited, particularly as the comparative evidence the Agency offered most of them to be, this forum has admitted each of them. In each case, the forum has found the exhibit helpful in some minute way or has found it necessary to admit the exhibit in order to illustrate a finding as to why the exhibit's value was found to be negligible or nonexistent.

11) Before Respondents commenced the presentation of their defense case, they moved to dismiss Complainant Hampton's complaint. As explained in the ruling on that motion below, it has been denied, and the Specific Charges have been amended as specified in that ruling.

12) During the Agency's rebuttal case, Respondents objected several times that the Agency was introducing evidence which went beyond the scope of what Respondents had presented in their defense case. In a specific sense, Respondents were correct, most of that evidence responded to the testimony Respondent Grace Schipporeit offered when she was called as an adverse party witness in the

Agency's case-in-chief. However, as a fact finding body, this forum does not adhere strictly to rules of civil procedure concerning the order of presentation of evidence, where doing so would prevent relevant facts from coming into the record; i.e., this forum does not exclude evidence simply because it was not presented at the optimal time. Instead, as the Presiding Officer did herein, this forum affords the objecting party an opportunity to respond to the evidence at issue. Respondents declined that opportunity herein.

Accordingly, the evidence to which this objection pertains (including exhibits and certain testimony) has been admitted, and to the extent that it proved relevant and material to the issues herein, it has been considered.

13) Near the close of hearing, the Agency asked the Presiding Officer to conduct a view of Sunnyview Mobile Home Park, and particularly space 42 and the space across from it, so that she could accurately describe that area in her proposed findings. The Presiding Officer reserved ruling on this request, which relates to the question of whether or not Respondents could have failed to notice whatever "For Sale" sign Complainant Cavender allegedly displayed in the window of his home during times material.

The forum declines the Agency's request, because the record amply describes the area from which such a sign arguably could be viewed, and includes a photograph of Complainant Cavender's home with a sign in its window. To view that area now, after both the sign and Complainant Cavender's home have been removed from it

would not add anything helpful to the record.

14) After the hearing, the forum received a letter from the Agency dated November 20, 1985. (The Agency had also sent a copy of this letter to Respondents' counsel.) The forum has admitted this letter as an exhibit.

The forum has also admitted all post-hearing writings between the forum and the Agency or Respondents which concerned, or were, closing arguments or exceptions to the proposed order.

FINDINGS OF FACT - THE MERITS

1) At all times material herein, Respondents were two individuals who owned and operated the Sunnyview Mobile Home Park (hereinafter the Park), situated in Salem, Oregon, and engaged in the business of leasing and renting 47 units of real property in the Park to members of the public.

2) At all times material, Respondents were married to each other.

3) On or about November 28, 1981, Complainant Cavender and his wife became tenants in space number 42 of the Park.

4) As a result of his wife's death in July 1982, Complainant Cavender decided to sell his mobile home and move out of the park. Between the time of that decision in August 1982 and March 8, 1983, Complainant Cavender offered his mobile home for sale himself. From March 8 through September 8, 1983, he offered it for sale through National Mobile Home Sales and Listings, Inc., a mobile home dealer. Thereafter, Complainant Cavender again offered his home for sale himself.

Complainant Hampton:

5) On September 13, 1983, Complainant Cavender received a telephone call from Complainant Hampton. She told Complainant Cavender that, having seen a newspaper advertisement for his home, she was interested in viewing it. Complainant Hampton also told Complainant Cavender (and this forum finds) that she was (and is) a black person and asked him if that made any difference. Complainant Cavender told her it did not and invited her to view his home.

6) Later that day, Complainant Hampton viewed Complainant Cavender's mobile home and decided she wanted to buy it. She discussed terms with Complainant Cavender, and they agreed that she would buy, and he would sell, the home for a cash purchase price of \$11,500, if Complainant Hampton could obtain financing. No realtor was involved, and Complainants Hampton and Complainant Cavender did not put their agreement into writing. Complainant Hampton asked Complainant Cavender not to show the home until she let him know, probably the next day, whether she could obtain financing.

7) The following day, September 14, 1983, Complainant Hampton applied for a loan from a local bank to finance her purchase of Complainant Cavender's mobile home. Later the same day, the bank notified Complainant Cavender that Complainant Hampton's loan was approved and made an appointment for closing on the following afternoon. At that point, Complainant Cavender believed that he had sold his home to Complainant Hampton.

8) Thereafter, on September 14 or 15, 1983, Complainant Cavender had his son Mike Cavender (herein after Mike), who lived across the street from him in the park, telephone Respondents to let them know that he had sold his mobile home. After Respondent Grace Schipporeit (hereinafter Respondent G.) told Mike she was happy about that, Mike informed her that the buyer was a black person. Respondent G. indicated that that posed no problem. (As it is uncontroverted, the Agency finds as fact Respondent G.'s testimony that Mike asked her if the buyer's race "made a difference" before she made the comment described in the previous sentence.)

9) Respondents are white people.

10) Four or five minutes after Mike's above-described exchange with Respondent G. ended, Respondent Harold Schipporeit (hereinafter Respondent H.) telephoned Mike.

11) According to Mike, the conversation went something like this, after Mike answered:

Respondent H.:

"See what kind of bind you put us in?"

Mike:

"Why?"

Respondent H.:

"How much does your dad want for the mobile?"

Mike:

"\$11,500."

Respondent H.:

"Now, I'll have to go out and dig up that much money to buy the mobile."

Mike:

"Why?"

Respondent H.:

"Because I'll never approve of the blacks in a mobile. I tried it once and it didn't work out. And the old people out there are prejudiced."

Thereafter, Respondent H. asked Mike to talk to Complainant Hampton and let him know that night if she would agree to let Respondent H. move the mobile home out of the park at Respondent H.'s expense.

Mike's wife Pearl Cavender and Complainant Cavender overheard Mike's portion of that conversation, and when it ended Mike related what is described above in this Finding to them, adding that Respondent H. had rejected Complainant Hampton just because she was black.

12) Respondent H. stated in his April 26, 1985, deposition and his testimony at hearing that this September 14 or 15, 1983, conversation with Mike consisted of the following interchange (which this forum describes without at the same time finding it to be fact):

Respondent H. told Mike that he understood that Complainant Cavender was selling his mobile home and that he had a prospective tenant, which Mike confirmed. Respondent H. told Mike that Complainant Cavender needed to give Respondents a written 30 day notice of intent to sell, and that Respondents needed that notice before they could accept an application for tenancy from a prospective purchaser. Mike asked him why he needed the notice of intent, and Respondent H.

explained that Respondents needed it to keep track of the tenants occupying the space, to appraise tenants of Park rules and regulations, and to make sure before they moved in that prospective tenants met Park requirements. As Mike objected to the 30 day component of the notice, Respondent H. tried to make clear that 30 days meant that although Respondents had 30 days to accept or reject an applicant (and they very seldom, if ever, took that long), the applicant could apply immediately upon submission of the written notice. Mike was very argumentative about the notice, and Respondent H. went through at least two examples of why it was required. Mike told Respondent H. he was not going to give him the notice, and Respondent H. said something like, "Mike, it's no big deal. Just bring me over a notice and we'll accept your applicant, your application for your dad's tenant." When Mike said he wasn't going to do it, Respondent H. said, "I'm not going to accept any tenant of yours until I get that notice," and hung up.

In his deposition, Respondent H. stated he did not recall anything else being discussed in that conversation. However, at hearing, Respondent H. added the following (which this forum does not find as fact by the following description) to his deposition's description of this conversation:

Every time Respondent H. insisted on the written notice of intent to sell, Mike stated that the reason Respondent H. would not accept

the application was because he did not want to accept a black tenant. Mike brought up "the black." Respondent H. and Mike discussed the problems Respondent H. had had in the past trying to control Park tenants who were harassing a black man who had moved in with a female Park tenant. Mike asked for written notice that a written notice of intent was required, and Respondent H. told him it was on the back of the written rental agreement, a copy of which he agreed to furnish to Mike. The end of this heated conversation came when Respondent H. told Mike, "I am going to do everything I legally can do to keep from accepting your black tenant or any other tenant without a 30 day notice" and hung up on him.

In the record is a copy of a report of statements Respondent H. made in a tape-recorded November 8, 1983, interview with Agency investigator John Hofer. During this interview, Mr. Hofer told Respondent H. that the tape recording would be used as notes for the record of the interview, but would not itself be used as evidence in any other proceeding. The exhibit recites verbatim quotations transcribed from that tape recording. Based upon Mr. Hofer's testimony to this effect, and this forum's determination that Mr. Hofer exercised great care to be accurate and complete in formulating the exhibit and his testimony concerning it, this forum finds that the exhibit describes every statement Respondent H. made during this interview.

According to the above-cited verbatim quotations from the November

1983 interview, Respondent H. told Mike during their September 14 or 15, 1983, conversation that he would

"do everything legally to keep from taking the black, because [he] had people in that general area that were old people and [he] knew their feelings on it; [that he] hated to accept a black tenant in that neighborhood because of the other tenants around, and that [he] would do everything legally to prevent taking the tenant."

At hearing, Respondent H. admitted making these statements to Mike and Mr. Hofer, but indicated vaguely that they were made in the context of the notice of intent requirement and problems concerning a former black tenant, rather than Complainant Cavender's prospective tenant. Also, according to the non-verbatim items in the exhibit, Respondent H. told Mike that if he accepted a black into the Park, tenants would probably move. At hearing, Respondent H. did not deny making a comment to this effect.

13) Hofer's report includes no reference to any mention of the notice of intent to sell in the September 14 or 15, 1983, conversation between Mike and Respondent H. The report does reflect that Respondent H. stated that after that conversation, he checked his files to ascertain whether Complainant Cavender had filed a notice. Mike testified that there was no mention of a notice of intent in that conversation to Complainant Cavender and Pearl Cavender right after it occurred, he did not mention that notice.

14) Hofer's report does not include any indication of any discussion of a previous black tenant at the Park

during the September 14 or 15, 1983, conversation between Respondent H. and Mike. On recall after Respondent H. testified, Mike testified that there was no such discussion, beyond the mere reference to Respondent H. having tried having a black tenant before.

15) Respondent H. testified the last name of the former black tenant mentioned in Finding of Fact 12 above may have been Edwards; that he believes, but is not sure, that he lived in Complainant Cavender's home; that Complainant Cavender's son John H. Cavender knew him fairly well; and that Respondent H. and John H. Cavender had talked about him before.

At times between 1976 and 1980, a man whose last name was Edwards visited the home occupying Park space number 42. Mr. Edwards was not black. Although on occasion Mr. Edwards damaged that home, neither he nor the tenant of the home was harassed by other Park tenants. John H. Cavender, who did not live in the Park until May 1981, never was a friend of or observed any black Park tenant, and never discussed with Respondent H. a former black tenant.

16) Respondent H. maintains that at no time during his very heated September 14 or 15, 1983, discussion with Mike, and at no time during the weeks following it, would Respondent H. have excluded any black tenant because he or she was black.

17) At some point on September 14 or 15, 1983, before 2:30 p.m. on September 15, 1983, Complainant Hampton informed the bank which had approved her financing for the purchase of Complainant Cavender's home that before she could close that

transaction, she had to get a rental agreement from Respondents. Toward that end, Complainant Hampton contacted Respondent G. by telephone on September 14 or 15, 1983.

Respondent G. had suffered a 75 percent hearing loss, and her speech was not (and is not) easily understandable. Consequently, Respondent G. had a great deal of difficulty hearing Complainant Hampton during their telephone conversation, and neither Respondent G. nor Complainant Hampton clearly or completely understood what the other was saying. From their testimony, the forum has deduced that the following interchange occurred. Complainant Hampton told Respondent G. that she wanted an application for a Park rental agreement. Respondent G. asked Complainant Hampton to identify herself, and Complainant Hampton explained that she was "in the market for buying a home in the Park" and that she wanted to know when she could pick up an application for a rental agreement. Respondent G. said that she would have to talk with Respondent H. about that, and that he would be home by 6 p.m. that day. In the absence of any specifically controverting evidence, this forum finds that Respondent G.'s testimony that she also apologized for her hearing impairment and asked Complainant Hampton to call back the next morning is accurate, but that Complainant Hampton did not understand either of those statements.

Complainant Hampton telephoned Respondents at 6 p.m. that evening and on the next day and got no answer.

18) After and on same evening as Mike's September 14 or 15, 1983, talk with Respondent H., Mike, Pearl, and Complainant Cavender decided that Mike was not going to call back Respondent H. that night and spent several hours discussing how to tell Complainant Hampton what Respondent H. had told Mike.

19) The day after his September 14 or 15, 1983, conversation with Mike, Respondent H. had Respondent G. take a copy of Complainant Cavender's rental agreement and a sample notice of intent to sell to him. Not finding Complainant Cavender at home, Respondent G. went to Mike's home, where she met Mike at the front door.

Respondent G. testified that the following then occurred, which the forum does not find as fact by this recounting:

When Respondent G. told Mike that she had a copy of his father's rental agreement and a sample notice of intent, Mike said he wanted written notice of the requirement that his father give Respondents a 30 day notice of intent. Respondent G. pointed out that it was on his father's rental agreement. Mike said he did not want to hear anything more about it and closed the door. Respondent G. put the copy of the rental agreement and notice form on Mike's steps and left.

Respondent G. also testified that she did not take an application for tenancy to Mike because she had a "hard and fast" rule against giving out an application for tenancy in a space before she had received a notice of intent to sell the home occupying that space.

(See last paragraph of Findings of Fact 23 below.)

After initially failing to recollect this contact with Respondent G., Mike attested, on recall, to the following encounter, which this forum does not find as fact by this recounting:

Respondent G. told Mike that what she needed to have was the written notice of intent. Mike told her to put that and her reasons for refusing Complainant Hampton tenancy in writing. Respondent G. said that she did not have to. Mike said "fine," and Respondent G. walked off, leaving no documents at all with Mike.

20) Also on the day after his September 14 or 15, 1983, conversation with Respondent H., Mike telephoned Complainant Hampton and asked her to meet with the Cavenders. During the call, Complainant Hampton recounted to Mike her unsuccessful efforts to reach Respondent H.

21) Later that day, the Cavenders met with Complainant Hampton, and Mike told her that Respondent H. did not want to accept a black tenant. When Complainant Hampton, shocked and disbelieving, asked Mike if he was sure, Mike said yes, that Respondent H. had told him that he didn't want any blacks in the Park. Mike also told her that Respondent H. had said he had some "old people" in the Park who did not want to be bothered with any black people. Mike did not tell Complainant Hampton that Respondent H. was not going to let her apply for tenancy in the Park. Although she was extremely hurt and humiliated by what Mike had recounted to her (see Findings of Fact 97 below), Complainant Hampton still

wanted to pursue purchasing Complainant Cavender's mobile home, as she had not yet contacted Respondent H. directly about renting Park space.

22) After meeting with the Cavenders, Complainant Hampton returned home and resumed trying to reach Respondent H. by telephone that night. Her efforts were successful at 6 a.m. the next morning.

Complainant Hampton offered the following rendition of her conversation with Respondent H. that morning, which this forum does not find as fact by this description:

Complainant Hampton told Respondent H. repeatedly that she wanted to buy Complainant Cavender's mobile home, and that she wanted to know when she could pick up an application for tenancy. Respondent H. finally said that Complainant Cavender had not followed the rules and regulations very well, in that he had not given Respondent H. a written 30 day notice of intent to sell.

When Complainant Hampton explained that she could wait 30 days, Respondent H. told her that he as going over to Complainant Cavender's home that morning, and that he had to talk to him. When Complainant Hampton asked one more time when she could pick up the application, Respondent H. said he would have to talk with Complainant Cavender and would leave that information with him. Complainant Hampton asked Respondent H. if he meant he would leave information with Complainant Cavender about the Park for her, and Respondent H. said yes.

Respondent H. offered this version of the same conversation, which this forum does not find as fact by this recitation:

Respondent H. told Complainant Cavender that he had discussed the 30 day notice of intent with Mike; that Mike had not been following the rules for the sale of a mobile home very carefully; that Respondent H. had worked out the matter with Mike; that Mike would be glad to take care of the notice that day; that he was sure that as soon as Mike did that, Respondents would be glad to accept her application.

According to Hofer's report, Respondent H. told Complainant Hampton that he could not give her an application until Complainant Cavender had submitted his notice of intent to sell; that he would make an application available to her if and when Respondents received the notice from Complainant Cavender, and that she could obtain an application through Complainant Cavender.

23) Complainant Cavender's rental agreement with Respondents included the following provisions:

A. An agreement by the tenant to: "comply with the rules and regulations of this mobile home park, a copy of which is attached hereto and made a part hereof, as well as all additional or further rules and regulations which might from time to time be lawfully adopted by" Respondents. The attached rules stated, in pertinent part:

"7. Prospective tenants resulting from sale or rental of a mobile

home must be approved by the management. If you decide to sell your mobile home, please inform the management ***.

"9. A 30 day notice is required prior to moving."

B. " * * * TENANT shall give LANDLORD a 30-day advance notice prior to the sale of a mobile home if a prospective purchaser desires to become a tenant, so that the landlord may obtain information about the proposed tenant and check references and other qualifications * * *."

Although Respondents required the 30 day notice of intent to sell so that they could interview and qualify prospective purchasers for tenancy in the Park, the notice itself did not have to name a particular purchaser. However, if Respondent H. received a notice stating merely a general intent to sell, he had the notifier add to it that Respondents had the right to evaluate a particular purchaser.

Respondents testified that they do not feel free to give out an application for tenancy of a space before receiving a notice of intent to sell the home on the space.

24) The Agency introduced the following evidence to show that Respondents did not strictly enforce the 30 day written notice of intent requirement:

In 1981, Lloyd Hughes owned and rented space for, but did not occupy, a mobile home which was parked in the Park. During that time, Mr. Hughes sold his mobile home to two successive purchasers, each of who then resided in the home while it was in the Park.

During 1981 and 1982, David DeLapp owned and rented space for, but did not occupy, a mobile home which was parked in the Park. During that time, in December 1981 and March 1982, Mr. DeLapp attempted to sell his home to two successive purchasers who wanted to reside in the Park.

Prior to none of these sales or attempted sales did Mr. Hughes or Mr. DeLapp give Respondents a written notice of intent to sell. Respondent G. testified, and this forum finds, that she had no reason to, and did not, ask either of them for such a notice because neither of them had a rental agreement with Respondents, and neither ever lived in the Park. Neither was required to give that notice to Respondents.

Respondents do not possess a notice of intent to sell from Don Davis, who sold his mobile home (which he was not occupying) to Gary Macomber on or before February 1, 1983, or from James Canoy, who sold his home to H. Davis on or before May 1, 1984. Respondent G. indicated the Respondents did not require such a notice from Davis because it would have been redundant, as Davis moved his home into the Park solely for the purpose of selling it. Respondent G. allowed Davis to do this after he signed a space rental agreement stating that the home would not be occupied, that it was in the Park strictly to be sold, and that no children would be allowed. Respondents do not possess notices of intent to sell from eleven other tenants who, according to Respondent's records, were replaced by new tenants in their Park spaces between January 1982 and the time of hearing.

However, there is no evidence on the record that these changes in tenancy were accompanied, and there is evidence that two of these changes were not accompanied, by the sale of the mobile home of the first tenant to the next tenant of the space. Accordingly, there is no evidence that a notice of intent to sell was required in any of these eleven changes.

The above-cited evidence sufficiently explains, for all but one of the instances cited in the two preceding paragraphs, why Respondents do not possess written notices of intent to sell for those instances. Concerning that one remaining instance (1984 Canoy-H. Davis transaction), this forum notes that there is no evidence that Respondents were legally required to retain, or made a practice of retaining, these notices.

Given the above-cited explanations, this forum cannot conclude that the fact that Respondents do not possess any notices of intent to sell concerning these transactions is any indication at all that Respondents did not strictly enforce the requirement for such notices.

However, the forum notes that Respondent G. testified that:

(A) if a tenant tells her orally that the tenant is going to sell the tenant's home, Respondent G. reminds the tenant that they need to give her a 30 day written notice of intent to sell; and

(B) if a sale occurs concerning which she has no written notice, Respondent G. reminds the tenant that they must give her a notice of

intent before the tenant can go any further.

If this forum finds that Respondent G. was orally told of Complainant Cavender's intent to sell by three different people in 1982 (see Finding of Fact 34 below), this forum will find the fact that she then failed to follow her above-alleged practice of making a reminder of the written notice requirement on any of those occasions, or thereafter until September 1983, probative of her not enforcing the 30 day written day of intent requirement as she asserts she did. If this forum further finds that Respondents did not even mention that notice requirement in their September 14 or 15, 1983, conversations with Mike about Complainant Cavender's sale, the forum will take that as an indication that they did not attach the importance to that notice herein that they now assert.

25) Later during the day that Complainant Hampton talked with Respondent H. (see Finding of Fact 22 above), she called Complainant Cavender to see if Respondent H. had left with Complainant Cavender the information which Complainant Hampton alleges he had promised to leave for her. Complainant Cavender told her, and in the absence of any evidence to the contrary this forum finds, that Respondent H. had not left any information about the Park (including an application for tenancy) with him.

26) At some point, Complainant Hampton and the Cavenders discussed the written notice requirement Respondent H. was imposing on Complainant Cavender. Although Complainant Hampton's testimony as to when this occurred seemed

contradictory, after reviewing it carefully, this forum finds that Complainant Hampton maintained that this discussion did not occur until after her September 16 or 17, 1983, conversation with Respondent H. (described in Finding of Fact 22 above). As this is corroborated by Complainant Cavender's testimony, this forum finds it to be fact.

27) Partly because Complainant Cavender then (after hearing it from Complainant Hampton) understood that Respondent H. was claiming that he had not received written notice of intent from Complainant Cavender, Complainant Cavender sent to Respondents a notice written by Mike that Complainant Cavender's mobile was for sale. This notice is dated Thursday, September 15, 1983, and Mike testified he knew of no reason why that would not be the date he wrote it. Mike did not recall at hearing why he wrote this notice, but surmised that he did so because he found the notice requirement in reading his own Park rental agreement. The envelope in which this notice was sent is postmarked September 17, 1983. Complainant Cavender testified that he personally deposited this notice "in the box" on September 15 and that it is not possible that he mailed it on September 17. Respondents received it on September 19.

28) On about September 19, 1983, on the advise of counsel, Complainant Cavender and Mike telephoned Respondent H. and asked him if he (still) wanted to buy Complainant Cavender's mobile home. Respondent H. either gave a qualified affirmative or a directly negative answer. Immediately thereafter, Respondent H. said that

Complainant Cavender had to give a 30 day written notice that he intended to have his mobile home up for sale.

29) Thereafter, on September 19, 1983, so that Respondent H. could not continue to claim that he had not received a notice of intent from him, Complainant Cavender sent Respondents another such notice, by certified mail, return receipt requested. Respondents received this notice on September 20, 1983.

30) Complainant Cavender did not ever receive from Respondents any tenancy application to give to Complainant Hampton. Respondents did not offer or tell him to pick up any such form.

Neither Respondent brought any tenancy application to Mike to deliver or make available to Complainant Hampton, and neither asked Mike how Respondents could contact her.

There is no evidence that, after Respondent H.'s conversation with Complainant Hampton and before or after receiving Complainant Cavender's notices of intent to sell, either Respondents took any step to allow, or let Complainant Hampton know they would allow her to complete and file a tenancy application.

31) Complainant Hampton did not have any further conversation with either Respondent after her early-morning conversation with Respondent H. Two or three days after she checked with Complainant Cavender to see if Respondent H. had left Park information for her, Complainant Hampton telephoned the Cavenders and asked them in effect whether she was going to be able to buy

Complainant Cavender's home. The Cavenders told her that Respondent H. "had not changed" and indicated that he still had not left any application form or other Park information for her. Because Respondent H. had not left any Park information with Complainant Cavender as Complainant Hampton believed Respondent H. had promised, and because Complainant Hampton felt he thereby had not told the truth when he said that he would, and because he had not left her an application form, Complainant Hampton did not contact Respondents further, and decided not to go through with the purchase of the home. Respondent H.'s failure to leave Park information or an application for her with the Cavenders convinced Complainant Cavender that Respondents would not allow her to apply for tenancy because of her race. Accordingly, Complainant Hampton and Complainant Cavender went no further in their transaction for Complainant Hampton's purchased of Complainant Cavender's home.

32) Respondent H. testified that he is convinced that had Complainant Hampton submitted an application for tenancy, she would be a Park tenant today. However, elsewhere, he testified that it is not extraordinary for Respondents to deny a tenancy application, and he does not know if Complainant Hampton would have been accepted had she applied.

33) Following the failure of his sale to Complainant Hampton, Complainant Cavender continued to offer his home for sale, displaying a "For Sale" sign in his window and advertising the home in a local newspaper.

34) The Agency made extensive efforts to impeach Respondents' credibility through evidence relating to Complainant Cavender and Complainant Hampton transaction. In its evaluation of those efforts, the forum considered not only the factors detailed below, but the strong impression of the credibility of Respondents, and particularly Respondent G., which the Presiding Officer gained from observing Respondents' demeanor while they testified at hearing.

One of the most detailed such efforts was the Agency's evidence that Respondents in fact knew that Complainant Cavender intended to sell his mobile home long before they admit such knowledge. Respondents both assert that they did not know that Complainant Cavender's mobile home was for sale until their September 14 or 15, 1983, telephone conversations with Mike. However, Complainant Cavender, Pearl Cavender, and Mike testified that shortly after Complainant Cavender first put his home on the market in August 1982, each of them told Respondent G. that he was going to sell his home. Furthermore, most of the time from August 1982 through at least much of November 1983, Complainant Cavender displayed a "For Sale" sign in the front, street-side window of his home. An exhibit shows the location of that sign. It was clearly visible to people walking or driving past his home, and both Respondents went past or were within viewing distance of this sign frequently during this period. Respondents each deny noticing any "For Sale" sign in Complainant Cavender's window. Although the Agency attempted to prove that National Mobile

Home Sales and Listings, Inc. sent Respondents a notice of intent to sell from Complainant Cavender when it listed his home, Respondents denied receiving any such notice, and the evidence that it was National's practice to do this, or that National did it in Complainant Cavender's case, is inconclusive.

Given the completeness of the testimony of each of them concerning this, and because it makes sense, this forum finds that Complainant Cavender and Mike and Pearl Cavender did indicate to Respondent G. that Complainant Cavender was going to sell his home. Furthermore, this forum concludes that at least one of the Respondents must have noticed the "For Sale" sign in Complainant Cavender's window during the thirteen month period when it was displayed there, given the undisputed fact that they were within viewing distance of this sign frequently during this period. Accordingly, although they may not have been aware that this home still was "For Sale" as of September 13, 1983, Respondents' testimony that they did not know he had his home for sale until their September 14 or 15 conversations with Mike is inaccurate. (See Ultimate Finding of Fact 23 below.)

The Agency also pointed to Respondent H.'s failure to describe the contents of his September 14 or 15, 1983, conversation with Mike consistently in his November 28, 1983, statement, his April 26, 1985, deposition, and his testimony at hearing as an impeachment of his credibility. (See Findings of Fact 12, 13, 14, and 15 above.)

Moreover, the Agency alleged that Respondent H.'s testimony that he had

discussed with Mike problems posed by a former black tenant was a wholesale fabrication. However, the evidence does not establish that this black tenant never existed. While showing that Respondent H.'s specific recollections about this tenant's possible name and friendship with John H. Cavender were not accurate, the Agency has not established that his recollection that the man may have lived in space 42 was inaccurate. There is no evidence as to who lived in that space between the time Ms. Boseke left in 1980 and the time Complainant Cavender moved in in 1981.

The Agency attempted to demonstrate that Respondent G.'s ability to recall events was poor by demonstrating that she had met and spoken with a person in July 1981, whom she stated at hearing she had not met before the hearing. The Agency also maintained that Respondent G. was in error in testifying that she got a court order, which she believes was directed against David DeLapp to move his mobile home, when what she filed, in 1982, was a forcible entry and detainer action against him, which subsequently was dismissed because it should have been filed against Mr. DeLapp's tenant. This forum finds that Respondent G.'s failure to recall meeting a person four years before hearing and her failure to recall with precision the complicated legal machinations of 1982 does not impeach at all her ability to recollect that which is herein important.

The Agency also attempted to impeach Respondent G.'s credibility showing that she did not provide a document as soon as she could have to a tenant who had been evicted

under circumstances potentially related to this matter. The forum finds that her failure to produce this document between May 17 and May 22, 1985, indicates nothing at all.

35) By the inconsistencies in his own testimony, Mike demonstrated an inability, at the time of hearing, to accurately and completely remember the contents and sequence of the conversations in which he was involved herein. To a much lesser extent, Complainant Cavender and Complainant Hampton also evidenced this problem.

Complainant Masanda

36) Complainant Masanda was born in the State of Hawaii. Her father was from the Philippines and her mother from Puerto Rico.

37) On November 12, 1983, Complainant Masanda was looking for a home to purchase. During the second week of that month, Robert Toney, her realtor, took her to view Complainant Cavender's mobile home. Thereafter, on January 12, 1983, through Mr. Toney, Complainant Masanda made an offer to purchase this home for \$13,950. According to the purchase offer, \$12,450 of this amount was to be paid by contract with Complainant Cavender, at ten percent interest, payments of \$110.00 per month, and the entire balance due in full on or before ten years after closing.

38) Complainant Cavender had listed his home with Byron Cooley, a mobile home broker, for a period starting October 4, 1983, and ending June 1, 1984. On November 13, 1983, after Mr. Cooley presented Complainant Masanda's offer to Complainant Cavender, he accepted it.

39) When Mr. Toney had delivered the offer to Mr. Cooley, Mr. Cooley had told Mr. Toney that Park policy required Complainant Masanda to apply for a rental agreement for the space which the home she was purchasing occupied. After Complainant Cavender accepted her offer, Mr. Toney informed Complainant Masanda of this requirement.

40) During times material herein, Respondents' general procedure was to require a prospective tenant to complete an application before Respondents decided whether to enter into a rental agreement with that person. In pertinent part, the application form asked for basic tenancy history information, income information, financial institution references, the amounts and payees of installment payments and car payments, credit card identification, whether the applicant had ever filed bankruptcy, and the types of vehicles owned. It did not ask for any information concerning children living with the applicant.

41) During all times material herein, and since 1979, Respondent G. was responsible for doing the paperwork involved in managing the Park, including bookkeeping. In connection with this, she took the applications for Park tenancy and considered and determined whether they would be approved.

42) Mr. Toney made an appointment with Respondents, and took Complainant Masanda to their home, to file a rental application. Complainant Masanda filled out the above-described application form and asked Respondent G. if it was complete.

After reviewing Complainant Masanda's application form, Respondent G. said it was complete and asked Complainant Masanda whether she had children, their ages, when they lived with her, and perhaps some other related questions. Complainant Masanda told her, and this forum finds, that she had three children aged 16, 14, and 12 years, who were in the father's custody and who visited her often. When Respondent G. asked how often, Complainant Masanda told her three or four times a week and for six weeks during the summer. Complainant Masanda asked Respondent G. if that was a problem, and Respondent G. said that it was not, if the children were visiting, and that her primary concern was that no children live in the Park. While Complainant Masanda was talking with her, Respondent G. noted on Complainant Masanda's application form that she had children aged 16, 14, and 12 who visited her twice a week.

At no time during this meeting did Respondent G. ask Complainant Masanda any questions about her personal finances. Mr. Toney did not give Respondent G. any papers concerning Complainant Masanda's purchase of Complainant Cavender's home.

43) Complainant Masanda testified that Respondent G. told her that she would check her references, Respondent H. would review her application, and Respondents would give her a call that night.

Mr. Toney testified to the following interchange, which this forum does not find as fact by this recitation. Mr. Toney asked when he could pick up Complainant Masanda's rental

agreement, because he had to deliver it to the escrow officer before the home purchase transaction could close. Respondent G. was rather vague in response, saying that she had to talk with Respondent H. and that Mr. Toney could get it in a few days. Feeling that he needed some kind of definite answer in order to plan closing, Mr. Toney asked whether Respondent G. would be able to tell him when he could pick it up if he called the next day. Respondent G. said yes.

In the absence of any other evidence, this forum concludes that both these exchanges took place and that, by saying that Respondents would call Complainant Masanda that night, Respondent G. did not necessarily mean that they would tell her that night whether her tenancy application was accepted or rejected.

44) Complainant Masanda did not hear from Respondents that night.

45) Respondent H. testified that the next day, a man who he believes was Mr. Toney telephoned him and asked how Respondents were coming along with their evaluation of Complainant Masanda's application. Respondent H. testified that this may have been the first he heard of Complainant Masanda's application. In any case, according to Respondent H., Respondents had not decided whether to accept or reject Complainant Masanda. Respondent H. testified that he told Mr. Toney that they were working on her application; that he may have told him what they had done so far, and that he probably reminded Mr. Toney that Respondents had 30 days to make a decision and it was early for him to call. Respondent H. testified that he does

not believe anything else was discussed in that conversation.

In contrast, Mr. Toney testified that he spoke with Respondent G. the day after Complainant Masanda's application was filed, when he called to ask when he could pick up the rental agreement, and Respondent G. informed him that Respondents had decided not to rent to Complainant Masanda because her children would be at her home too much. Mr. Toney testified that when he objected, pointing out that the children only visited periodically, and not for extended periods of time, Respondent G. said that their decision was also based upon their feeling that if Complainant Masanda lived in the Park, her income would not meet all her expenses. Mr. Toney stated that he tried unsuccessfully to persuade Respondent G. that Complainant Masanda would be able to meet her expenses. Mr. Toney stated that he asked Respondent G. to send the rejection to him in writing, so that he could obtain a cancellation of the escrow with no financial jeopardy for Complainant Masanda.

Respondent G. denied having this conversation with Mr. Toney. (See Finding of Fact 48 below.)

46) Mr. Toney and Mr. Cooley testified that after Mr. Toney had spoken with Respondent G., Mr. Toney told Mr. Cooley that it appeared that Respondents were not going to admit Complainant Masanda into the Park.

Mr. Cooley testified that when he asked Mr. Toney why, Mr. Toney said possibly because of her nationality (without adding why he thought this was a possibility). Mr. Cooley also testified that, in response to his question,

Mr. Toney said that Complainant Masanda's nationality was Hawaiian.

Mr. Toney testified that he told Mr. Cooley that there apparently was some problem of which he was not aware which was going to cause Respondents to reject Complainant Masanda, and he asked Mr. Cooley to try to discover what it was and how to solve it. Mr. Cooley agreed to contact Respondents.

47) On May 16, 1985, Mr. Cooley testified that he thinks he had just one conversation with Respondents about Complainant Masanda, in which he asked Respondent H. why they could not "put" Complainant Masanda into Complainant Cavender's mobile home. He testified that Respondent H. told him that it was because he felt that Complainant Masanda could not afford the home and because of the presence of her children in the Park three or four days a week.

At the June 13, 1985, hearing convenement, Mr. Cooley attested to the same conversation, stated that it occurred late on the same day Mr. Toney had called him. Without apparently

realizing he was contradicting his earlier testimony, Mr. Cooley stated that this conversation was with Respondent G.

48) Respondent G. testified that she had (at least) one conversation with Mr. Cooley, when he called to ascertain if Complainant Masanda had been accepted as a tenant.

Respondent G. testified to the following interchange during that conversation which the forum does not find as fact by this recitation:

Mr. Cooley told Respondent G. that Complainant Masanda's monthly payment on the mobile home would be \$110 (which Respondent G. does not believe she knew before then). After getting some particulars concerning the contract, Respondent G. told him that it could not be \$110; it had to be \$175. When Mr. Cooley insisted that it was \$110, Respondent G. went and got her amortization tables, returned and read to Cooley from them that the monthly payment on Complainant Masanda's loan would be \$175.*

* Respondent G. testified, and in the absence of any disputing evidence this forum finds, that during this conversation, Mr. Cooley did not read to Respondent G. from the Cavender/Masanda purchase agreement all the terms of the sale, or tell her that the entire balance due on the contract had to be paid in full on or before ten years after the transaction closed, even though he had that agreement before him.

** Respondent G. did not state what principal balance figure she used in referring to these tables, or whether she knew that Complainant Masanda was going to make a down payment of \$1,500 on the purchase price of \$13,950. The parties stipulated that the table on monthly loan amortization payments at 10 percent annual percentage interest in the 1978 Realty Blue Book reflects that amortization of a \$12,000 principal balance over 10 years at 10 percent annual interest requires a monthly payment of \$158.59, while amortization of a \$13,000 principal balance over the same term at the same interest requires a monthly payment of \$171.80. Accordingly this forum finds that Respondent G.'s \$175 figure was a correct approximation, if she was using a principal bal-

Mr. Cooley eventually agreed with Respondent G. Accordingly, in evaluating Complainant Masanda's financial condition, Respondent G. used \$175, rather than \$110, as her monthly home payment figure.

49) Respondent H. corroborated Respondent G.'s testimony concerning this conversation, and added the following description of the conversation, which this forum does not find to be fact by this recitation:

After Respondent G. and Mr. Cooley had discussed the amortization table figures, Mr. Cooley wanted to know what Respondents were going to do, and Respondent G. told him he could talk to Respondent H., who then took the telephone. Mr. Cooley said that he had to know that night if Respondents were going to accept or reject Complainant Masanda. Respondent H. went through his reservations (that Respondents did not have enough information about her financial situation and were concerned about her children's visits being too frequent), and said that if Mr. Cooley had to have an answer right then, Respondents were going to have to reject Complainant Masanda. Respondent H. rejected Complainant Masanda at that time because Mr. Cooley insisted that Respondent H. give him an answer immediately. Mr. Cooley asked Respondent H. to send him a letter to that effect, which Respondent H. agreed to do.

ance of \$13,000 or more.

50) At hearing, Mr. Cooley did not recall discussing with Respondent G. the amount of the monthly mobile home payments Complainant Masanda would be required to make under the purchase contract or according to amortization tables. Mr. Cooley denied telling Respondent G. that he needed to know immediately whether or not Complainant Masanda would be accepted as a tenant, or requesting from Respondent G. any kind of written statement as to the reasons for her rejection.

51) Thereafter, Mr. Cooley told Mr. Toney that he had not been able to make any progress, Complainant Masanda was rejected, and they did not have a home sale transaction any longer. Very soon (that evening or the next day), Mr. Toney notified Complainant Masanda that Mr. Cooley had informed him that she had been rejected because of her children and her finances.

52) Respondents do not allow new tenants with children living with them to move into the Park; in that respect, the Park is, and must remain, an adult park.

In late 1977, public authorities threatened to evacuate the Park unless Respondents cured a sewage disposal problem which was posing a health hazard. Respondents' occupant level was then about 3.75 people per space, and their sewage disposal system could handle about 1.75 per space. On advice of a sanitary engineer, and as part of a compromise agreement with public authorities, Respondents agreed to lower and limit the number of occupants per Park unit

by not accepting any additional children. Respondents believed that at least one adult in each unit would not "load" the sewage system as much as would a child, because presumably one adult in each unit would be working away from the unit each day. To avoid giving the impression that they still accepted children, Respondents changed the Park's name from Family Trailer Park to Sunnyview Mobile Home Park. Respondents also put in a sizable new sewage system. As a result of these efforts, occupant level is now about 1.75 per unit, and its sewage problem has been "pretty much" under control since the early 1980's. Respondents' policy of not accepting new tenants with children into the Park has been in effect since the late 1970's.

53) During times material herein, Respondents had no written rule concerning visitation of children with Park tenants, and tenants could have children for "reasonable" visitation periods. Respondent H. was the arbiter of what was reasonable under the circumstances.

54) Respondents testified that because of the frequency of the visits by Complainant Masanda's children, which if successive rather than concurrent could total more than several days each week, and because of the possibility that the children might move in with Complainant Masanda at some point, Respondents were concerned that the children would be virtually or actually living in the Park. Respondents allege they did not discuss or consider discussing this concern with Complainant Masanda because they

were pressed for an immediate response to her application.

55) Complainant Masanda did not feel that the above-cited reasons Respondents gave for her rejection adequately responded to her application, given Respondent G.'s statement to her that children were allowed if visiting. Complainant Masanda did not understand how her income could be adequate enough to purchase a mobile home, but not to rent the space for it. She did not know that Respondents (allegedly) believed her monthly home payments would be \$175, and that her children's visits might, from Respondents' point of view, constitute occupancy in the Park.

56) After Mr. Toney told Complainant Masanda that she was rejected, Complainant Masanda discussed her rejection with Complainant Cavender. When she told him she did not understand why she was being rejected, Complainant Cavender told her that he was not surprised, because "this" had happened before, and he explained Complainant Hampton's "situation." He suggested that Complainant Masanda might be part of a pattern of discrimination.

57) On November 18, 1983, Respondent H. sent, and Complainant Masanda and Complainant Cavender received, a letter stating that Respondents were rejecting Complainant Masanda's request for tenancy in the Park based on the information given on her application, because her income seemed inadequate to support the obligations noted on the application, plus mobile home payments, rent, and utilities, and because Respondents, who were accepting only adults

into the Park, felt that tenancy of three children two days each week was unacceptable.

58) Thereafter, and within the same week as she received this rejection letter, Complainant Masanda noticed a newspaper advertisement for a mobile home space in the Park. She telephoned the number listed in the advertisement and talked with Respondent G. Complainant Masanda and her neighbor, who overheard her, testified that after asking for and receiving information about the location of the space, Complainant Masanda said, "I have children; are children accepted there?" or "are there children in the Park?" According to Complainant Masanda, Respondent G. responded, "By all means; we have children there." Complainant Masanda testified that she said that she also had children who visited her, and Respondent G. invited her to look at the space and call back if interested in it.

59) At the time Complainant Masanda noticed the above-described advertisement, the text of all of the brief newspaper advertisements for space in the Park included the notation "Adults."

60) After the conversation described in Finding of Fact 58 above, which was Complainant Masanda's last contact with Respondents, Complainant Masanda believed that Respondents had lied in naming her children's visits as a reason for their rejection of her tenancy, and felt "real sure" that she was being discriminated against because of her race, color, or national origins.

61) On November 28, 1983, Complainant Cavender and Complainant

Masanda executed a rescission of their agreement for his sale and her purchase of his mobile home.

62) Thereafter, until July 1984, Complainant Cavender continued trying, unsuccessfully, to sell his mobile home. After he moved it out of space 42 and the Park in January 1984, that space remained unoccupied until March 1984.

Complainant Masanda's Race, Color, or National Origin as Cause of Her Rejection

63) A color photograph depicts Complainant Masanda's general physical appearance during the Fall of 1983. The Presiding Officer noted during hearing that Complainant Masanda has olive skin, ebony hair, and almond-shaped, dark eyes.

When asked if there are physical attributes that she would identify as being characteristic of people of Puerto Rican or Filipino origin, Complainant Masanda answered, "darker skin, the dark eyes, the distinctive nose, dark hair * * * just non-white * * *". She further indicated that she believes she possesses those characteristics.

There is no evidence that Complainant Masanda's race, color, or national origins could have been, and so this forum finds that they were not, indicated to Respondents during times material in any other way than through her physical characteristics.

64) Respondent G. testified that she does not recall what she perceived, during times material, to be Complainant Masanda's race or national origin; that she did not notice or think about her race; and that she does not recall noticing, thinking about, or

wondering what was Complainant Masanda's national origin or ethnic background.

Respondent H., who had not met or talked with Complainant Masanda when he and Respondent G. considered and rejected her application, testified that he had no idea what Complainant Masanda's race or national origin was at that time.

Complainant Masanda's Financial Circumstances as Cause of Her Rejection

65) During times material herein, in evaluating the credit-worthiness and financial adequacy of an applicant for tenancy in the Park, Respondent G. took into consideration the applicant's take-home pay, expenses, and obligations shown on the application form, plus other items of expenses that are not on that form (including the mobile home payment to be made, any installment payments, and other monthly payments that had to be made, car payments, whether the applicant had credit cards, and the projected amount of utility bills).

Generally, Respondent H. did not have much to do with evaluating the financial circumstances of an applicant for tenancy, but he did review Complainant Masanda's application form with Respondent G., and consulted with her concerning Complainant Masanda's financial situation. In evaluating that situation, Respondents considered the following monthly expenses and obligations in addition to what Complainant Masanda stated on her application:

a. Monthly mobile home payment: \$175.00.

b. Gasoline for commuting daily Salem/Portland/Salem: \$100.00.

c. Utilities: \$125.00.

d. Incidentals: Unspecified Amount.

e. Taxes and Insurance on the mobile home: Unspecified Amount.

Respondent G. testified that although these are the factors she recalls considering, there may have been others. Respondent G. did not have the opportunity to check the accuracy of these figures with Complainant Masanda.

Respondent G. testified that she figured after Complainant Masanda met the above-noted payments and obligations, plus the \$115 monthly obligation noted on her application, Complainant Masanda would not have enough money left over from her monthly take home pay of \$846 to pay the space rental, which apparently would have been \$110 or \$117.50. Accordingly, Respondent G. felt that at some point she would have to "hassle" Complainant Masanda for the rent. Respondent H. concurred.

66) During times material herein, in evaluating an applicant's creditworthiness and financial adequacy, Respondent G. also evaluated the subject's credit and tenancy history.

During the approximately 24 hours she had Complainant Masanda application before it was rejected, Respondent G. investigated Complainant Masanda's tenancy history by visiting the place she then lived and talking to its manager. They had no records or books concerning Complainant Masanda, because they had been there only two weeks. When Respondent G. asked if she could speak with the previous manager, they told her they knew of no way to contact him.

Consequently, Respondent G. was not able to check Complainant Masanda's tenancy history any further. Respondent G. also telephoned one of Complainant Masanda's credit references to ascertain how she was paying her bill to that reference. Respondent G. did not have time to complete her investigation before Mr. Cooley pressed Respondents for a response to Complainant Masanda's application.

During times material herein, Respondents obtained credit bureau reports on some, but not necessarily all, applicants for tenancy. On the day he talked with Mr. Toney, he believes, Respondent H. requested a credit bureau report on Complainant Masanda because Respondents did not have enough information about her credit-worthiness. As usual, the credit bureau employee from whom Respondent H. obtained the telephonic report interpreted its coding for him, telling him that it said that there was no information one way or the other on Complainant Masanda, and that the report said nothing about Complainant Masanda's credit. In the record is the document the credit bureau then sent to Respondent H., which stated that there was no information on Complainant Masanda. Respondents did not believe that this indication that there was nothing to report was a positive piece of information; they simply believed that they had received no information from the report. Respondent G. had expected to learn from it whether Complainant Masanda had

credit and, if so, how she was managing it. Respondent G. did not ask Complainant Masanda for financial information she had sought but not obtained from the credit report, but she did not have the opportunity to do so.

67) During times material herein, Respondents did not allow people to become Park tenants unless they owned the mobile home in which they resided, because Respondents had found it very difficult to have a tenant who was not the person with whom they had the space rental agreement. In problem situations, such tenants could be uncooperative. Moreover, Respondents felt that an owner was likely to take better care of the property than a renter. In reviewing an application for tenancy, Respondent G. considered whether the applicant was paying for the mobile home through bank financing or through a personal contract. In the latter case, especially if the down payment was low, the applicant could be a de facto renter. If that person abandoned the home, Respondents would be faced with a loss of all the rent due on the tenancy agreement, and probably would have difficulty seeking redress from the original owner. Accordingly, Respondents made sure that an applicant for tenancy was making a substantial down payment on the home he or she was buying and that that purchase was in fact a purchase rather than rental.

Respondent G. was concerned that Complainant Masanda's purchase on contract was a way to evade the

* Respondents did allow a person with a lease option on a home in the Park to become a tenant in the Park. They did so, however, only because the owner of the home, with the tenant, signed the rental agreement in which the owner agreed to be the final party responsible for the space rent.

no-rental rule; that if her payment was \$110 per month, she would in essence be a renter. Part of this concern was based upon Mr. Toney's failure to present her with any purchase documentation when he brought Complainant Masanda to file an application form, and his telling Respondent G. about his work purchasing property to rent to other people. Moreover, when Mr. Cooley called and attempted to intimidate her (in her opinion) concerning Complainant Masanda, Respondent G. was reminded that he had tried in the past to intimidate her into accepting two other applicants for tenancy. She believed that Mr. Cooley did not have any purchase contract in front of him when she spoke with him because of his insistence that the monthly payment was \$110 even when she showed him it was \$175. For all of these reasons, Respondent G. felt Complainant Masanda's purchase might in fact be a rental.

68) During times material herein, Respondent G.'s knowledge of how to evaluate financing arrangements or other aspects of personal financial situations was rudimentary. There is no evidence as to whether Respondent G. was aware of this.

69) The Agency attempted to prove that during times material, Respondents did not require financial information from applicants for tenancy and that, indeed, they often did not even require completion of their application form. The Agency offered what the Agency purported was a compilation of rental agreements of tenants who had not filed any application form with Respondents. This exhibit contains the rental agreements of just

three tenants. Respondent G. testified that she supplied to the Agency applications for two of those three tenants, including Complainant Cavender. Complainant Cavender denied that he had filed any such application or given Respondents any information about his financial status when he moved into the Park in 1981, and the Agency intimated that Respondent G. was confusing Complainant Cavender with his son John. Given Respondent G.'s assertion, Complainant Cavender's occasional lapses of specific memory at hearing, the passage of time, and the fact that his wife could have filed an application, this forum concludes that an application for Complainant Cavender's tenancy was filed.

70) An exhibit contains the application forms of four people who subsequently were accepted and became tenants at the Park and paid their rent each month. Their application forms list no dollar figures in the spaces for "salary" (appearing on two forms) or "take home pay" (appearing on two forms). One form states that the applicant is not married and is not employed. One form states that the applicant is retired, but has income from "cd's." The two others state that the applicant is retired and leave blank spaces for "take home pay" and "other income" (the latter space appearing just on one form). Respondent G. discussed monthly income with all four of these people when they applied.

71) Respondents rented space to the eight people who are the subjects of another exhibit. According to the Agency, with perhaps one exception, these people showed less take-home pay on their rental applications than did

Complainant Masanda. Respondent G. questioned whether one of them, applicant Macomber, would be able to pay his rent, so she did not allow him to become a tenant until Don Davis, who was purporting to sell his home to Mr. Macomber, agreed to be a party to the rental agreement, and to be the final party responsible for paying the rent due under it. (Mr. Davis suggested this arrangement.) Respondent G. does not recall what information other than that stated on their applications she considered in evaluating the other seven applicants.

Children as Cause of Complainant Masanda's Rejection

72) Donald E. Foster, Sr. first became a tenant at the Park in 1974, when he moved into space 31. At that time, two of his minor daughters and his minor granddaughter lived with him and his wife. Mr. Foster lived there continuously until April 1982, when, in preparation for retirement, he sold his trailer and moved out of the Park.

At the time Mr. Foster moved out of the Park, his minor granddaughter still lived with him. Before he released his Park space, Mr. Foster told Respondent H. that he wanted to know if he could move back into the Park if necessary. Respondent H. told him he could. Mr. Foster assumed that this meant that he, his wife, and his granddaughter could return.

Mr. Foster moved back into the Park with his wife and granddaughter in September 1983, after having waited at least three months for a space to become available. He does not recall having any discussion with either Respondent about his granddaughter living with him. At the top of

his rental agreement dated September 11, 1983, is the typewritten notation, "This rental agreement is a revision of previous rental agreement changing your space from no. 31 to number 11." That agreement was based upon three occupants in that space.

73) When Mr. Foster moved into the Park, there was no rule prohibiting children there. When he moved out of the Park, Respondents were not accepting any more tenants with children.

74) When Respondents changed the Park policy on children, they did not evict Park tenants who had children: the rule was that any tenant with children (or who subsequently had children) could stay, but Respondents would not accept any new people with children. Respondent H. understood that landlord-tenant law prohibited him from limiting the sale of a tenant's mobile home to adults only if that tenant did not have a rental contract which imposed such a limitation.

75) Layne Davis has been a tenant in the Park since June 16, 1984. His rental agreement with Respondents stated, in pertinent part, that it is based on one occupant and one pet (an inside cat only) in his space.

76) From the time Mr. Davis's tenancy in the Park stated, Tammy Lee Davis stayed at Mr. Davis's home with her minor child quite frequently. Ms. Davis and her child have lived with Mr. Davis since mid-September 1984, and Mr. and Ms. Davis have been married since December 1984.

77) When Ms. Davis and her child moved in with Mr. Davis, Mr. Davis knew that Respondents were not accepting any more children. However,

although Mr. Davis made Respondent H. aware that Ms. Davis was going to be with him, and she subsequently completed an application for tenancy, Mr. Davis never advised either Respondents that there would be or was a child living with him.

78) In early April 1985, Respondent H. gave Mr. Davis an emphatic verbal warning that he would be evicted if Respondent H. saw Mr. Davis's truck or dog in the Park again. Although Respondent H. had built a gravel driveway to give Mr. Davis's truck access to the back of his home without being driven through the Park, Mr. Davis had driven his truck through the Park to the front of his house.

On or about Sunday, May 6, 1985, Mr. Davis received a notice the Respondents were terminating his tenancy effective June 6, 1985. The notice gave as reasons Mr. Davis's violation of his rental agreement by having an unauthorized person or persons in his residence, and his failure to remove his unauthorized dog after verbal notice. In citing the first violation, the notice stated that minor children had not been allowed in the Park since 1976.

79) Respondents maintain that they issued this eviction notice very soon after they learned that a child was living with Mr. Davis. The Davises believe Respondent H. knew before that time that a child was living with them. They allege that the child's presence was obvious from their garbage, most of which consisted of used diapers and other baby paraphernalia in a transparent bag and diaper boxes; from the obvious presence of a child's car seat in the back seat of their car which was

parked every night in front of their house; from the child playing in the open field on the far side of their house and on their carport; and from the presence of his toys outside the house. During times material, Respondent H. drove by the Davises' house almost every morning. He has worked in the area around the Davises' home, especially the field, at times since the child moved in, including times when the child was playing outside.

Respondent H. admitted that it was through collecting the Davises' garbage that he learned of the child. However, another person collected garbage each week with Respondent H., and there is no evidence that Respondent H. himself ever collected the Davises' garbage during the time in which he denies knowing that there was a child living with Mr. Davis. Moreover, during a period of unspecified duration after Ms. Davis moved into Mr. Davis's home, she, Mr. Davis and the child were not at home very often because of Mr. Davis's trucking business. Given these facts, this forum cannot conclude that Respondent H. must have encountered the child or indications of him often enough, or in such a way, as to have become aware that a child was living with Mr. Davis before Respondent H. acknowledges learning that fact.

80) According to Mr. Davis, the weekend after he received his eviction notice, Mr. Davis asked Respondent H. why he was being evicted, and Respondent H. told him that it was because of this proceeding. They were both very upset, and Mr. Davis told Respondent H. that he hoped Respondent H. "was hung."

Mr. Davis's eviction notice was dated May 6, 1985, the day after two Agency investigators interviewed Mr. Foster in connection with this matter. The Agency points to this timing and Respondent H.'s above-cited statement to Mr. Davis, which Respondent H. has not denied making, as evidence that Respondent H. in fact knew about the child long before, but evicted Mr. Davis because of this proceeding. However, the Agency notes that Mr. Foster did not tell Respondent H. about this interview until Respondent H. next collected his garbage. As Respondent H. collected garbage on Saturdays, Mr. Foster's interview was on Sunday, and the eviction notice was dated the day after the interview, Mr. Foster must not have told Respondent H. about his interview until after Mr. Davis's eviction notice was sent. There is no evidence Respondent H. knew of the interview before sending the notice.

The forum concludes that the evidence does not effectively refute Respondent H.'s claim, and so this forum finds, that he did not know that a child was living with Mr. Davis until just before May 6, 1985. This forum notes that in the absence of any other evidence or allegation of retaliatory motive, the fact that Respondent H. stated that he was evicting Mr. Davis because of this proceeding, if true, could logically mean that because of this proceeding, Respondent H. felt compelled to strictly enforce the Park's policy on children, and therefore evict Mr. Davis as soon as he learned that a child was living in the Davis home.

81) Mr. Foster knows of no Park tenant who, during Mr. Foster's

tenancy at the Park, moved into the Park with a child living with him or her.

Mr. Davis testified that there are approximately 8 to 9 other children living in the Park, including Mr. Foster's granddaughter. This information is not helpful absent any indication as to whether, and if so when, these tenants moved into the Park with children.

FINDINGS OF FACT – DAMAGES

82) Pursuant to the forum's conclusion below that Respondents have violated the law as charged with regard to the Cavender-Hampton transaction, the forum makes the following Findings of Fact concerning resulting damages.

Complainant Cavender

Pecuniary Losses

83) When he met Complainant Hampton, Complainant Cavender was eager to sell his home. He was 79 years old, his wife had just died, and he planned to travel to see the family in Texas he had lived away from since 1926, particularly an elderly sister and two nephews who were ill. He planned to live in Texas in the winters and in Oregon in the summers. He did not plan on buying another mobile home, as he owned a travel trailer in which he was going to live.

84) After his sales to Complainant Hampton and Complainant Masanda did not work out, Complainant Cavender continued trying to sell his mobile home. He lived in it part-time until December 1983, when he began living in his travel trailer on his daughter's property. He has not lived in his mobile home since that time.

85) Complainant Cavender paid \$110 per month for his space rental at the park from October through

December 1983, and \$98.54 for a partial month rental fee until the time he moved his mobile home in January 1984. At that time, he moved it to Kennedy Park, another mobile home park, because he could not sell it at the Park. He paid his first three months' space rent (\$360) in advance at Kennedy Park, in exchange for Kennedy Park moving the home for him. Thereafter, from April through June 1984, Complainant Cavender paid a total of \$360 for rent to Kennedy Park.

In order to move his mobile home to Kennedy Park, Complainant Cavender had to tear off its awning and deck, thereby expending \$500 and decreasing the value of the home. He incurred \$63 in expenses in setting up the home at Kennedy Park.

86) For the period between July 1, 1983, and June 30, 1984, Complainant Cavender paid a total of \$151.37 in county taxes on his mobile home. Between November 28, 1983, and July 13, 1984, he paid \$223.40 in utility bills for his mobile home.

87) Complainant Cavender had his mobile home listed for sale with Mr. Cooley until June 1, 1984. Thereafter, in June or July 1984, Complainant Cavender asked an employee of Kennedy Park to sell his mobile home, stating that he was willing to sell it for \$8500. Complainant Cavender does not recall that person bringing him any offers. Anxious to sell, Complainant Cavender sold his home to his son James in July 1984 for \$11,000 cash, the same price for which he would have sold it to a stranger. In connection with this sale, Complainant Cavender incurred the expense of a \$150 appraisal fee required for the financing.

88) Complainant Cavender paid a fee of \$45 for his September 16, 1983, consultation with an attorney in connection with the sale of his mobile home.

Mental Suffering

89) Complainant Cavender was thrilled, excited, and very happy to sell his home to Complainant Hampton, the first person who really had looked at it.

90) When Mike described to Complainant Cavender his September 14 or 15, 1983, conversation with Respondent H., Mike and Pearl Cavender saw the color drain from Complainant Cavender's face and his facial features drop: he found it unbelievable and very wrong that one person would discriminate against another person because of race. Complainant Cavender had expressed the fact that he opposed racial discrimination and believed it was wrong for as long as his family could remember. Complainant Cavender felt helpless to do anything about Respondents' below-described actions, inactions, and statements concerning Complainant Cavender's potential tenancy, and they disappointed, disturbed, and depressed him a great deal. He did not know how to tell Complainant Hampton about Respondent H.'s below-described statements to Mike, and he spent several hours agonizing with Mike and Pearl Cavender about how to minimize her pain for them. He was very uncomfortable, sad, and nervous explaining those statements to Complainant Hampton, feeling like the "whole bottom fell out of" him and empathizing with the hurt she was suffering, which bothered him far more than the loss of the sale itself.

91) Complainant Cavender has talked to Mike and Pearl Cavender about Respondents' below-described responses to Complainant Hampton's potential tenancy "just about all the time" since they occurred. For some time thereafter, if he and his family talked about them too much, Complainant Cavender became obviously upset, ready to cry, and his hands became very shaky. Several months after Respondents' response to Complainant Hampton's potential tenancy, Mike contacted Complainant Hampton to see how she was and thereafter related to Complainant Cavender that she really wanted to live in his home; Complainant Cavender broke down and cried.

92) Complainant Cavender believes that the strain caused by Respondents' below-described reaction to Complainant Hampton's potential tenancy has affected his health a great deal. Before it occurred, he had been healthy all his life. Since it occurred, he has had a stroke in his right eye. He is "pretty sure" it was caused by worrying too much about this racial discrimination, Complainant Hampton, and the relatives he was yearning to see. He has also stayed awake at night, unable to sleep. His physicians have put him on high blood pressure medication.

93) Before Respondents' responses to Complainant Hampton's potential tenancy, Complainant Cavender had a very happy and outgoing temperament, and he was very excited about his future. Thereafter, for the first time in his life, he became nervous and shaky, short-tempered, moody, unhappy and depressed.

94) Respondents' responses to the possibility of Complainant Hampton's tenancy have continued to bother Complainant Cavender every since they occurred. At the time of hearing, they were still upsetting him, although he had become somewhat calmer when talking about them. He was still exhibiting some nervousness, and he still was short-tempered and not very happy. He was still thinking about Respondents' responses, and remarked at hearing that one "cannot forget about something like" them.

The forum finds that Complainant Cavender's suffering ceased in mid November 1985, when he died.

Complainant Hampton Pecuniary Losses

95) After her attempt to buy Complainant Cavender's home, Complainant Hampton did not look for another mobile home, because she did not want to subject herself again to the experience of being discriminated against in a mobile home park. She purchased her present home in late 1983 for \$31,500, and at the time of hearing it was worth at least that amount.

Mental Suffering

96) When she agreed to purchase Complainant Cavender's mobile home, Complainant Hampton was very excited about, and very happy to be purchasing, it; she felt it was her mobile home.

97) When Mike told Complainant Hampton that Respondent H. said he did not want a black tenant, she was stunned, very depressed, and very disappointed. With the expression on her face and the tone and pace of her speech, as well as the words she

used, Complainant Hampton very eloquently expressed at hearing how (and this forum finds that) Respondent H.'s statement terribly hurt and wounded her, "taking everything away from" her. She did not want to have to discuss this incident with the Cavenders, but she wanted to ascertain from them what were Respondent H.'s reasons. After talking with them, she felt she had been discriminated against because of her race, and she felt that all her personal dignity had been stripped from her.

98) For at least five years before this incident, Complainant Hampton's best friend was another Park tenant, Mary Olson. Ms. Olson is a white person.

After the Cavenders told her what Respondent H. had said, Complainant Cavender went to Ms. Olson's home and told her what had happened, and they wept together. Complainant Hampton told Ms. Olson, and this forum finds, that Complainant Hampton would not be visiting Ms. Olson at her home anymore, because she would find it humiliating to come to the Park. For this reason, and in light of Respondents' subsequent response to her efforts to apply for Park tenancy, Complainant Hampton has not since been, and does not intend to go, back to Ms. Olson's house.

99) Before her encounter with Respondents, all of Complainant Hampton's friends in Salem, where she has lived since December 1978, were white. Consequently, when Respondents, white people, acted in a manner clearly indicating that they did not want her in the Park because of her race or color, Complainant Hampton felt alone

and isolated. She did not know whether she should trust and accept those white people who still said they wanted to be her friends. For this reason and because she did not feel free to visit Ms. Olson's home, Complainant Hampton lost her friendship with Ms. Olson, and that has hurt Complainant Hampton deeply.

100) After she left Ms. Olson's home the night the Cavenders told her what Respondent H. had said to Mike, Complainant Hampton felt very "belittled" ("made littler than anyone else.") and let down. In light of subsequent contact with Respondents, every time she thought about those statements she wept, no matter where she was.

101) All of Complainant Hampton's above-described feelings are still with her. She has thought of Respondents' response to her efforts to live in the Park almost every day since they occurred, because of the financial strain she is under to maintain her new home, and the fact that she does not like it as much as Complainant Cavender's home and is not nearly as satisfied as she would be there.

ULTIMATE FINDINGS OF FACT

1) Respondents, two individuals married to each other, owned and managed the mobile home Park in the State of Oregon during all times material herein. In that business, they leased or rented 47 spaces of real property in the Park to owners and buyers of mobile homes.

2) In August 1982, Complainant Cavender, a tenant in the Park since November 1981, decided to sell his mobile home and move out of the Park.

Complainant Hampton

3) On September 13, 1983, after Complainant Cavender's mobile home had been for sale for about 13 months, Complainant Hampton, a prospective buyer and a black person, inspected it and offered to purchase it for \$11,500, subject to her obtaining financing. Complainant Cavender accepted that offer.

4) On September 14, 1983, the next day, when the bank to which Complainant Hampton had applied for financing notified Complainant Cavender that financing was approved and scheduled an appointment to close the transaction the next day, Complainant Cavender believed that he had sold his home to Complainant Hampton.

5) Thereafter, on September 14 or 15, 1983, Complainant Cavender had his son Mike, also a tenant in the Park, notify Respondent G. by telephone that Complainant Cavender had sold his mobile home. Mike also told Respondent G. that the buyer was a black person and asked her if that made any difference, and Respondent G. stated that it did not.

6) Just a few minutes after that conversation ended, Respondent H. telephoned Mike. At hearing, Mike and Respondent H. offered versions of the ensuing conversation which diverged diametrically in several pertinent parts.

Mike testified, in pertinent part, that during the conversation, Respondent H. made statements to the effect that he would never approve a black applicant for tenancy, as he had tried it once before and it did not work out, and that the "old" Park tenants were "prejudiced." According to Mike,

Respondent H. asked Mike to ascertain and let him know that night whether Complainant Hampton would agree to let him move Complainant Cavender's mobile home out of the Park for her, at his expense. All this testimony was corroborated by Complainant Cavender and Mike's wife, Pearl Cavender, both of whom overheard Mike's portion of the conversation and to both of whom Mike repeated the conversation right after it occurred.

In the record is a complete and accurate rendition of the statements Respondent H. made during a November 8, 1983, interview with an Agency investigator, which corroborates Mike's assertion that Respondent H. made statements to the effect of those appearing in the first sentence of the above paragraph. In that interview, Respondent H. stated, in pertinent part, the following:

a. "I told him (Mike) that I would do everything to keep from taking the black, because I had people in that general area that were old people and I knew their feelings on it."

b. "I just told to him (Mike) that I hated to accept a black tenant in that neighborhood because of the other tenants around, and that I would do everything legally to prevent taking the tenant."

c. "Something to the effect that if he accepted a black into his trailer park, tenants would probably move."

Respondent H. testified that the conversation revolved around the Park requirement that a tenant submit a 30

day notice of intent to sell his or her mobile home, and Respondents' practice of requiring this notice before accepting any applications for tenancy in the tenant's Park space. According to Respondent H., after he made clear this Park requirement and practice, Mike argued with him about the meaning and necessity of the notice requirement. Respondent H. maintained that after his repeated attempts to explain it to Mike were rebuffed, and Mike said he was not going to have Complainant Cavender submit the notice, Respondent H. simply told him that he would not accept any "tenant" of Complainant Cavender's until he had received the notice and hung up.

During his April 26, 1985, deposition, Respondent H. stated that he did not recall anything else being discussed in that conversation. However, at hearing, Respondent H. stated that the subject of race did come up in it. Specifically, he testified that Mike brought up that subject, and that every time Respondent H. insisted upon the notice of intent, Mike charged that the reason Respondent H. would not accept the prospective buyer's application was that he did not want to accept a black tenant. According to Respondent H., they also discussed problems which had been created by the presence of a black resident in the Park in the past. Respondent H. testified that this conversation ended with him telling Mike,

"I am going to do everything I legally can do to keep from accepting your black tenant or any other tenant without a 30 day notice."

Also at hearing, however, Respondent H. admitted making statements

(a) and (b) above, but he asserted that they were rendered in the context of the notice requirement and the discussion of problems posed by a former black tenant. He did not deny a comment to the effect of statement (c) above.

The interview report, which reflects all of Respondent H.'s rendition of that conversation at his interview, includes no reference to the notice of intent to sell being brought up in his conversation with Mike. In fact, that exhibit reflects that Respondent H. said that after that conversation, he checked to see if Complainant Cavender had filed such a notice. It does not make sense that Respondent H. would assert to Mike during the conversation that the notice had not been given if he had not yet ascertained that fact. At hearing, Mike denied that the notice was mentioned in that conversation, and Mike did not mention the notice when he recounted the conversation to Complainant and Pearl Cavender just after it ended.

Furthermore, the report includes no reference to any discussion of a former black tenant during Respondent H.'s September 14 or 15, 1983, conversation with Mike, and Mike testified that there was no such discussion (beyond the mere reference to Respondent H. having tried "it" (having a black tenant) before). Respondent H.'s attempts to describe this black tenant at hearing imparted information which appears to be inaccurate in part, at best.

Based upon the care Mr. Hofer took in formulating the report, the fact that the report and Mr. Hofer state that the above-quoted statements (a) and (b) are verbatim quotations, and

Respondent H.'s above-cited admissions concerning that exhibit and those statements, this forum is certain, and so concludes, that Respondent H. made the above-quoted statements (a) and (b), and something to the effect of statement (c), to Mike Cavender during their September 14 or 15, 1983, conversation. Furthermore, given Respondent H.'s failure to mention a discussion of the notice requirement or a discussion of a former black tenant in his deposition or his November 23, 1983, interview with the Agency, the absence of any explanation for these failures, Mike's assertion that these topics were not mentioned in that conversation, and the fact that Mike didn't mention them when he recounted the conversation immediately afterward, this forum concludes that those two topics were not discussed in the September 14 or 15, 1983, conversation between Respondent H. and Mike Cavender. Accordingly, this forum also finds that the statements (a), (b), and (c) above are not taken out of context in their rendition in the report exhibit and, therefore, that their meaning can be accurately determined by assessing them by themselves. That assessment establishes that by them, Respondent H. meant that he intended to do everything "legal" to keep Complainant Hampton out of the Park, i.e., to attempt to discourage her tenancy there, because she was black. In light of these admissions, this forum finds that Respondent H. did so intend. Accordingly, this forum also concludes that in this conversation, Respondent H. first indicated an interest in buying Complainant Cavender's home and later asked Mike to ask Complainant Hampton, and let him know, whether

she would let him move Complainant Cavender's home out of the Park for her, at his expense.

7) By at least the afternoon of September 15, 1983, Complainant Hampton knew that she had to get a rental agreement from Respondents before she could close the transaction to purchase Complainant Cavender's home. Accordingly, Complainant Hampton telephoned the Park, reaching Respondent G. Because of Respondent G.'s hearing impairment, they had difficulty understanding one another. When Complainant Hampton made clear that she wanted to know when she could pickup and application for a rental agreement, Respondent G. told her that she would have to talk with Respondent H., indicating that he would be home by 6 p.m. that day, and asking if Complainant Hampton would call back the next morning.

Believing that Respondent G. wanted her to call back at 6 p.m. that day, Complainant Hampton did so and got no answer then (or the next day).

8) The day after Respondent H.'s September 14 or 15, 1983, conversation with Mike, Respondent G., for her husband, took a copy of Complainant Cavender's rental agreement and a sample notice of intent to sell to Mike. After Respondent G. told Mike that Complainant Cavender needed to submit a notice of intent, Mike told her to put in writing that requirement and her reason for refusing Complainant Hampton tenancy. After Respondent G. pointed out that the requirement was on his father's rental agreement, their conversation ended abruptly. Although Respondent G. asserts that after Mike closed the door on her, she

left the documents she had brought on his front steps, where they had met, Mike testified that she did not leave him any documents. Given Mike's failure to recall this encounter at all during his initial testimony, this forum finds that Respondent G.'s testimony on this point is more accurate. The forum cannot make any finding as to when (or whether) Mike found those documents.

Respondent G. testified that she did not take a tenancy application form to Mike because she had a strict rule against giving out an application before receiving the notice of intent to sell.

9) Also on the day after his conversation with Respondent H., Mike telephoned Complainant Hampton and arranged for her to meet with him and his father. Later that day, the Cavenders met with Complainant Hampton, told her that Respondent H. did not want to accept a black tenant and recounted some of what Respondent H. had said to that effect in his conversation with Mike. Although shocked and wounded, Complainant Hampton continued her efforts to apply for tenancy in the Park, as she had not yet spoken with Respondent H. directly. She continued trying to reach him by telephone the night of her meeting with the Cavenders, but she was not successful until 6 a.m. the next morning, September 16 or 17, 1983.

10) In light of Respondent H.'s flawed recollection of his September 14 or 15, 1983, conversation with Mike at hearing, this forum has regarded Respondent H.'s statements to Mr. Hofer, made within 2½ months of his September 16 or 17, 1983, conversation with Complainant Hampton, more

accurate than his testimony at hearing concerning that conversation. Moreover, in light of Respondent H.'s intent to do everything "legal" to thwart the tenancy of a black person in the Park, this forum finds Complainant Hampton's testimony as to their September 16 or 17, 1983, conversation more believable than Respondent H.'s statements concerning that conversation, where they diverge, unless that divergence can reasonably be explained through misunderstanding. Accordingly, the forum finds that the following occurred during the September 16 or 17, 1983, telephonic conversation between Complainant Hampton and Respondent H.

Complainant Hampton repeatedly informed Respondent H. that she wanted to buy Complainant Cavender's mobile home, and that she wanted to know when she could pick up an application for tenancy. Finally, Respondent H. told her that he could not make an application available to her until Complainant Cavender had filed the required 30 written notice of intent to sell, and that he would make it available to her through Complainant Cavender if and when he received that notice from Complainant Cavender. Complainant Hampton explained that she could wait 30 days, and Respondent H. told her that he would leave information about the Park for her with Complainant Cavender when he talked with him that morning.

11) Complainant Cavender's rental agreement with Respondents did provide that he had to give Respondents a 30 day advance notice prior to selling his home if the prospective purchaser desired to become a tenant in the

Park, so that Respondents could evaluate the qualifications of the proposed tenant. The notice could be a general notice of intent to sell, dated, signed, and submitted before Complainant Cavender had a purchaser, if it also specified that Respondents had the right to evaluate the purchaser.

Respondents allege, and in the absence of substantial evidence otherwise this forum finds, that they did not receive a written notice of intent to sell from Complainant Cavender until September 18 or 20, 1983. As evidence of how seriously she took the notice requirement during times material, Respondent G. testified that if she learned that the home of a tenant who had not submitted a notice was for sale, she reminded the tenant of the notice requirement. However, Respondent G. did not remind Complainant Cavender, Mike, or Pearl Cavender of this requirement when they separately told her, before September 1983, that Complainant Cavender's home was for sale. Furthermore, neither Respondent mentioned this requirement in their September 14 or 15, 1983, conversations with Mike. Accordingly, this forum concludes that in practice, Respondents did not necessarily enforce this requirement strictly, or attach the importance to the notice of intent to sell which they alleged they did herein.

12) Later on the day she spoke with Respondent H., Complainant Hampton called Complainant Cavender to ascertain whether Respondent H. had left her any information. Complainant Cavender told her, and this forum has found that neither Respondent had done so. (The forms Respondent G. had left on Mike's

steps were not information for Complainant Hampton, and they had been left the day before, and therefore not pursuant to Respondent H.'s conversation with Complainant Hampton.)

13) After Complainant Hampton talked with Respondent H., she and the Cavenders discussed the notice of intent requirement. On September 16 or 17, 1983, partly because he understood that Respondent H. was claiming that he had not received a written notice of intent from Complainant Cavender, Complainant Cavender mailed such a notice to Respondents. (Although that notice was dated and probably written on September 15, 1983, by Mike, and Complainant Cavender testified that it is not possible that he mailed it as late as Saturday, September 17, 1983, it is postmarked September 17, 1983. Accordingly, and in light of both Mike's manifest confusion as to dates and the fact that Respondents received this notice on September 19, 1983, this forum finds that this notice was in fact processed by the post office on September 17, 1983, after having been deposited in the mail on September 16 or September 17, 1983.)

14) On or about September 19, 1983, on the advice of counsel, Mike and Complainant Cavender telephoned Respondent H. and offered to sell him Complainant Cavender's mobile home. (See the last sentence of Ultimate Finding of Fact 6 above.) Although the record does not make clear what Respondent H. replied, Respondent H. thereafter told Complainant Cavender that he had to have a 30 day written notice that Complainant Cavender intended to have the mobile up for

sale. Given this, the forum finds that Respondent H. in fact rejected their offer, even though he may not have conveyed that unequivocally.

15) Thereafter, on September 19, 1983, to establish clearly that he had submitted the required notice, Complainant Cavender sent Respondents, by certified mail, a written notice that his home was for sale, which Respondents received on September 20, 1983.

16) Even after Respondents received this notice, they took no step to make available to Complainant Hampton, through Complainant Cavender or Mike, the application form she so clearly had requested (or any other Park information), as Respondent H. had promised he would do after receiving the notice. For example, they did not bring Complainant Cavender or Mike an application, or tell either of them that Respondents had received the notice and Complainant Hampton, Complainant Cavender, or Mike could pick up and application. Moreover, Respondents did not take any step to contact Complainant Hampton directly to let her know she could apply for tenancy. By these failures, in light of Respondent H.'s earlier offer to move Complainant Cavender's home out of the Park, his refusal to make an application available to Complainant Hampton, and his promise to do so on receipt of the notice, Respondents attempted to discourage Complainant Hampton from rental real property space in the Park.

17) Because Respondents did not leave any information for her with Complainant Cavender when Respondent H. had promised to do so or

thereafter, Complainant Hampton felt that Respondent H. had lied to her in promising to do so. When two or three days later, she asked the Cavenders whether she was going to be able to buy Complainant Cavender's home and the Cavenders told her that Respondent H. had not changed and had not left her any application, she gave up any hope of purchasing Complainant Cavender's home and living in the Park. Because of Respondent H.'s continuing "lie," i.e., Respondent H.'s refusal and Respondents' failure to make available to her an application for tenancy or take any step to let her know that she could apply for tenancy, Complainant Hampton believed that it was true that Respondents did not want and would not allow her to live in the Park because of her race. Because of this belief, Complainant Hampton did not contact Respondents again and decided not to complete the transaction to purchase Complainant Cavender's home.

18) In light of Respondents subsequent failure to respond to them as Respondent H. had promised, this forum finds that Complainant Hampton's repeated and persistent requests to be supplied with an application form constitute her application for tenancy in the Park. She did all she could to make known her interest in completing the application process, and she reasonably could be expected to have done no more until Respondents did something to make the application form available to her. That she did not fill out the form was due entirely to Respondents' failure to do anything to make it available to her.

19) Because of Respondents' action and inactions described in Finding of Fact 16 above, Complainant Cavender thought Respondents would not let Complainant Hampton apply for tenancy because of her race and color.

20) Respondent H.'s intent to keep Complainant Cavender's prospective buyer out of the Park by any "legal" means, because of her race; Respondents' subsequent and untypical strict enforcement of the 30 day written notice requirement in refusing Complainant Hampton an application; and their failure to make available to Complainant Hampton thereafter, even after Respondents had received the notice, an application form or any other Park information which Respondent H. had promised to her at her insistence after she had made absolutely clear her continuing desire to file an application form, establish that the lack of a written notice was a mere pretext for, and a means of Respondents' attempting to discourage Complainant Hampton from renting space in the Park because of her race.

By this means, and their actions and inactions related thereto (see Ultimate Finding of Fact 16 above), Respondents accomplished that discouragement.

21) Respondent H. testified both that at the time of hearing (1) he considered Complainant Hampton qualified in effect for tenancy in the Park in September 1983, and (2) since he did not evaluate any application from her, he did not know whether he would have accepted her or not. Based upon the former statement, the absence of any evidence that it is not accurate and the fact that the accuracy of the latter

statement is entirely due to Respondents discouragement of such an application, the forum finds that during times material herein, Complainant Hampton was qualified to become a tenant in the Park.

22) After the failure of his sale to Complainant Hampton, Complainant Cavender continued to try to sell his home.

Credibility

23) This forum finds that the inaccurate testimony of Respondents that they did not know that Complainant Cavender's home was for sale before learning of its pending sale to Complainant Hampton at the least damages this forum's impression of the ability of Respondents to recall when they learned of an event and their ability to discern whether their recollection is accurate. At the most, it impeaches them by demonstrating a willingness to mislead or not be perfectly forthright. By itself, however, in light of Respondents' (particularly Respondent G.'s) very credible demeanor at hearing, this inaccurate testimony does not cause the forum to view either Respondent as a deliberately untruthful witness, a liar.

This forum's findings that two topics which Respondent H. testified were discussed during his September 15 or 16, 1983, conversation with Mike Cavender were not in fact discussed in that conversation, and its findings that Respondent H.'s statements as to those alleged topics were inaccurate, further impeach Respondent H.'s credibility to this forum by significantly qualifying this forum's impression of his ability to, at hearing, accurately and completely describe events and conversations of

critical importance to the Complainant Hampton matter. However, Respondent H.'s statements to Mr. Hofer concerning the September 14 or 15, 1983, conversation, and his admissions at hearing that he made those statements (even though he must have known that they were statements very much against his interests herein), caused the forum to decline again to further conclude that Respondent H. was a deliberately untruthful witness or a liar.

Complainant Masanda

24) Complainant Masanda's race or color is non-white. Complainant Masanda's physical coloring (ebony hair and eyes and olive skin) is non-white, and her eyes are almond-shaped. As her parents came from The Philippines and Puerto Rico, Complainant Masanda is a person of Filipino-Puerto Rican national origins. Her above-described immutable physical attributes are characteristic of person of her national origins as well as other ethnic backgrounds.

25) On November 12, 1983, after inspecting Complainant Cavender's mobile home, Complainant Masanda, through her realtor Robert Toney, offered to purchase it for \$13,950. The terms of her written offer were that \$12,450 of the purchase price was to be paid by contract with Complainant Cavender, at ten percent interest, with payments of \$110 per month and the entire balance due in full on or before ten years after closing.

On November 13, 1983, after his realtor Byron Cooley had presented the offer to him, Complainant Cavender accepted it.

26) Thereafter, Mr. Toney informed Complainant Masanda that, because she intended to live in the mobile home in its current Park site, she had to apply to Respondents for a rental agreement for that site. Accordingly, Complainant Masanda, accompanied by Mr. Toney, went to Respondents' home and completed a tenancy application form. The purpose of this application was to provide to Respondents information concerning the applicant's income, expenses, and obligations so that Respondents could evaluate the applicant's financial circumstances and creditworthiness. In pertinent part, the application form Complainant Masanda completed asked for basic tenant history information; income, credit, and installment payment information; and whether the applicant had ever filed bankruptcy. It asked no questions about children.

After reviewing Complainant Masanda's application for completeness, Respondent G. asked Complainant Masanda whether she had children, their ages, when they lived with her, etc. Complainant Masanda answered that she had three teenage children who were in their father's custody, but visited her often. When Respondent G. inquired how often, Complainant Masanda told her three or four times a week and for six weeks in the summer. Respondent G. indicated that it would not be a problem if the children were visiting, but they could not live in the Park. Respondent G. noted on Complainant Masanda's application form that her three children visited twice a week.

During this meeting, Mr. Toney did not present any documentation

concerning the purchase transaction to Respondent G., and Respondent G. asked no questions about Complainant Masanda's finances.

Respondent G. told Complainant Masanda that she would check her references and have Respondent H. review her application. At Mr. Toney's urging, Respondent G. agreed to tell him when he could pick up Complainant Masanda's rental agreement, if he telephoned the next day.

27) Respondent H. and Mr. Toney testified as to what occurred next, and beyond agreeing that it occurred the next day, their testimony was diametrically different.

Respondent H. testified that Mr. Toney, he thinks, telephoned him and asked how Respondents' evaluation of Complainant Masanda's application was progressing. At that point, according to Respondent H., Respondents had not decided whether to accept or reject her application. Respondent H. testified that he told Mr. Toney that Respondents were working on the application and probably reminded him that, since they had 30 days for their evaluation, his inquiry was early. Respondent H. also testified that he does not believe anything else was said in this conversation.

Mr. Toney testified that the next day he spoke with Respondent G., who told him that Respondents had decided to reject Complainant Masanda's application because her children would be at her home too much, and also because her income was not sufficient to meet the expenses she would incur if she lived in the Park. Mr. Toney testified that he argued with both rationale, and when

Respondent G. did not change her mind, he asked her to send a written rejection to him.

28) Mr. Toney told Mr. Cooley that it appeared that Respondents were not going to allow Complainant Masanda to become a Park tenant. Although Mr. Cooley testified that Mr. Toney surmised that that was because of Complainant Masanda's "nationality," Mr. Toney testified that he told Mr. Cooley that he thought it was because of a problem which he had not identified, and asked Mr. Cooley to contact Respondents to identify and solve it. This divergence illustrates that Mr. Toney and or Mr. Cooley are at least somewhat confused in his/their testimony on a key point concerning his/their contacts with Respondents herein.

29) Mr. Cooley testified twice about his subsequent contact with Respondents. His testimony was inconsistent, and diverged completely from the testimony of Respondents concerning that contact. First, on May 16, 1985, Mr. Cooley testified that he called Respondent H. to see what the problem was, and Respondent H. answered that it was: (a) his feeling that Complainant Masanda could not afford the home, and (b) the presence of her children in the Park three or four days a week. Mr. Cooley testified that this was his only conversation with Respondents. On June 13, 1985, however, Mr. Cooley testified that he talked with Respondent G. by telephone to see what the problem was, and Respondent G. gave him the rationale cited above in this Finding.

Respondent G. attested to her conversation with Mr. Cooley, state that after Mr. Cooley told her that

Complainant Masanda's monthly payment on the mobile home would be \$110, Respondent G. told him that it had to be \$175.* Respondent G. testified that when Mr. Cooley argued that point, she got her amortization tables and read to him from them that the payment amount was \$175. According to Respondent G., Mr. Cooley eventually agreed with her and asked her to send a letter of rejection to Complainant Masanda.

Respondent H. corroborated Respondent G.'s testimony, adding that after this, Mr. Cooley wanted to know what Respondents were going to do, and Respondent G. referred him to Respondent H. According to Respondent H., Mr. Cooley insisted on knowing that night whether Respondents were going to accept or reject Complainant Masanda. Respondent H. cited his reservations (insufficient information about her financial situation and concern about her children's visitation being too frequent), and when Mr. Cooley insisted that he had to have an answer immediately, Respondent H. told him that Respondents were going to have to reject Complainant Masanda.

Mr. Cooley denied that he and Respondent G. discussed the amount of Complainant Masanda's monthly mobile home payments under her contract with Complainant Cavender, and denied that he told her he needed to know immediately whether Respondents accepted or rejected Complainant Masanda.

30) This forum assumes that Mr. Cooley does not recall his full conversation with Respondent G., because he does not recall any conversation about the monthly payment. For all their flaws in recollection, neither Respondents has impressed this forum as a liar (see Ultimate Finding of Fact 23 above), and if they fabricated their testimony as to the monthly payment components of this conversation, which they each reiterated several times, they both were lying. Rather than believe that, and in light of Mr. Cooley's other demonstrated oversights in his recollection of his conversations with Respondents, and his below-described demeanor at hearing, this forum concludes that Respondents did discuss Complainant Masanda's monthly payment with Mr. Cooley.

31) Whether or not they rejected Complainant Masanda in a conversation with Mr. Toney or in a conversation with Mr. Cooley, Respondents did reject her, and they did state that the reasons were the presence of her children and her insufficient income. In whichever conversation/s this occurred, the forum believes that the rejection occurred at the time because of pressure from Mr. Toney, who began pressing Respondent G. for a decision the night Complainant Masanda submitted her application, and from Mr. Cooley, whose very demeanor evinces an impatience and insistence which exerts pressure. After witnessing Mr. Cooley's vociferously argumentative outburst at hearing, this forum can well imagine him insisting (or giving the

* The record does not reveal whether Respondent G. ascertained the interest rate and term of the contract between Complainant Cavender and Complainant Masanda during her conversation with Mr. Cooley or earlier.

strong impression of insisting) upon an immediate answer from Respondent H., and thereby making Respondent H. feel forced to decide, or cementing his inclination, to reject Complainant Masanda because of Respondents' misgivings. Accordingly, although the substantive reasons Respondents stated for the rejection were Complainant Masanda's financial situation and her children's visits, this forum finds credible the assertion that the reason why that rejection occurred at that time, on the basis of the incomplete information Respondents then had, was the pressure on Respondents from Mr. Cooley and Mr. Toney to voice a decision immediately. That Respondents may have confused elements of their conversations with Mr. Toney and Mr. Cooley, especially the element which could have occurred in both conversations, does not persuade the forum otherwise. That Mr. Toney and/or Mr. Cooley have confused elements of their conversations with Respondents seems likely, given the passage of time and the confusion noted at the end of Ultimate Finding of Fact 28 above, and the discrepancies in Mr. Cooley's testimony on two different days.

32) At hearing, Respondents explained further their concerns about Complainant Masanda's financial situation. The \$115 monthly payment shown on Complainant Masanda's application plus the \$400 in other monthly payments and obligations Respondent G. figured Complainant Masanda would incur lead to the conclusions that Complainant Masanda would be spending \$515 of her \$846 monthly income just for her mobile home

payment, car payment, gasoline to commute to work and utilities. Respondent G. testified, in effect, that she did not feel that the remaining \$331 would cover Complainant Masanda's living expenses plus her \$110-117 monthly rent for her Park space. Although it appears that under her contract with Complainant Cavender, Complainant Masanda's monthly payment would have been just \$110 (leaving a balance due at ten years), this forum does not fault Respondent G. for using the \$175 figure which is much more accurate according to her amortization table. After all, Respondent G., whose knowledge of financing was rudimentary, did not have a copy of the purchase agreement, so she did not know its wording. Mr. Cooley did not read to her all the terms of the sale or tell her that the entire balance due was to be paid in full on or before ten years had passed. The record does not even establish that he told her, or she otherwise knew, that Complainant Masanda was going to make a \$1500 down payment. Added to this was what Respondents perceived as the absence of any credit history concerning Complainant Masanda. To them, this meant at least that Complainant Masanda had not demonstrated that she had managed credit and other payment obligations. Furthermore, Respondent G. had been unsuccessful in her reasonable efforts to learn Complainant Masanda's tenant history. Mr. Cooley's (and Mr. Toney's) pressure denied Respondents the opportunity to seek this information from Complainant Masanda before deciding fully whether to accept her or reject her. Finally, the "low" monthly payment that Mr. Cooley was asserting,

plus her past contacts with Mr. Cooley and the fact that Mr. Toney had not presented her with any purchase documentation when he brought Complainant Masanda to apply, led Respondent G. to worry that Complainant Masanda's purchase of the home was in fact a rental, which the Park prohibited for administrative reasons.

The Agency has not shown that Respondents did not require financial information from applicants for tenancy. The Agency attempted to show that Respondents have accepted tenants whose application forms showed less income (in dollar amounts) than Complainant Masanda or no income. The forum finds that although there is evidence that that occurred in four cases, that is irrelevant herein, as Respondent G. made clear that her financial evaluations were based upon information beyond that stated in application forms, especially when the latter was incomplete. The Agency also attempted to show that in eight instances, Respondents accepted tenants whose application forms showed less take-home pay than did Complainant Masanda's. The forum finds that one of those acceptances was predicated upon another person agreeing to be the final responsible party under the rental agreement. The forum finds, with regard to the other seven instances, that their existence is irrelevant, given the fact that it was Respondent G.'s practice to consider not only income, but obligations and expenses, and information from other sources than the application form, in evaluating an applicant.

Finally, the forum finds no evidence to support the Agency's argument that

the consultation between Respondents on Complainant Masanda's financial situation occurred after they had rejected her.

33) At hearing, Respondents also further explained their Park policy concerning children. In the late 1970's, pursuant to their need to reduce and control the number of people per unit, Respondents made the Park an adult park. To do this, they changed the Park's name to delete a family connotation, and they instituted a policy of not allowing new people with children to move into the Park. There is scant evidence that they have not, and so this forum finds true Respondents' assertion that they have, enforced this policy, as they have construed it. That construction allowed in the Park children already living with people who were Park tenants when the policy went into effect, and children born thereafter to people who were Park tenants. Respondents believed that they could not legally limit a tenant's sale of his or her mobile home to a buyer without children (or to a buyer who did not wish to dwell in the Park) unless such a limitation was voiced in the seller-tenant's rental agreement with Respondents. Accordingly, it took some time for Respondents' policy against children to manifest any results. As is obvious from Mr. Foster's case, even by the Fall of 1983 this policy was not construed to prohibit as many children as technically possible under a strict construction of the policy. Respondents permitted Mr. Foster to move into the Park with his granddaughter, apparently because they did not view him as a new tenant under a new rental agreement, as he had lived

in the Park with his granddaughter for eight years until April 1982. Respondents' 1985 eviction of Mr. Davis, who gained a child through marriage after he moved into the Park, is not probative of their enforcement of the policy on children during times material herein.

Respondents do not prohibit "reasonable" visitation of children with Park tenants, but Respondent H. decides what is "reasonable."

In Complainant Masanda's case, Respondents have testified that in light of their Park policy on children, they were concerned that the frequency of the visits of Complainant Masanda's children, which could amount conservatively to six child-days of time per week, or a decision by the children to move in with Complainant Masanda, would constitute or lead to her children living in the Park. Because Respondents have persuasively articulated this concern, which makes sense in light of the reason for their policy on children, and because there is no substantial evidence indicating that Respondents were not thusly concerned, this forum concludes that Respondents were.

34) After learning from Mr. Cooley that Complainant Masanda was rejected, Mr. Toney notified Complainant Masanda of this, telling her that her children and her finances were primary reasons.

35) Complainant Masanda did not understand the rationale of her rejection. She did not know that Respondents were assuming her monthly payment would be \$175, or understand that as far as Respondents were concerned, her children's visits could amount to their occupancy in the Park,

because of their frequency. She did not know about the pressure Mr. Cooley and Mr. Toney had placed upon Respondents to make their decision on her application before they were ready.

36) When Complainant Masanda discussed her rejection with Complainant Cavender, he told her what had happened with Complainant Hampton and suggested that she might be part of a pattern of discrimination.

37) Thereafter, Complainant Masanda received a letter of rejection from Respondents. It stated that the reasons for the rejection were that her income seemed inadequate to support the obligations noted on her application, plus mobile home payments, rent, and utilities, and because Respondents, who were accepting only adults into the Park, felt that tenancy of three children two days each week was unacceptable.

38) Within one week after receiving this letter, Complainant Masanda responded to a newspaper advertisement for a space in the park. She reached Respondent G. by telephone, verified that the space was in the Park, and noting that she had children, asked either whether children were accepted in the Park or whether there already were children in the Park. According to Complainant Masanda, Respondent G. responded, "By all means, we have children there." After Complainant Masanda said that she also had children who visited her, she was invited to look at the space and call back if interested. Respondent G. did not explicitly deny this conversation, but pointed out, and this forum finds, that all Park advertisements at

that time noted that it was an adult park. Believing that, as the Agency acknowledged in closing arguments, Respondents did have the above-described rule and practice against admitting new tenants with children living with them, and in light of the undisputed evidence that Respondent G. indicated this to Complainant Masanda during their first contact, this forum finds it very difficult to believe that Respondent G. was indicating soon thereafter that Respondents would accept a new tenant into the Park with children. Although this forum believes that Complainant Masanda is a truthful person, and that the above-described conversation occurred, this forum concludes that: (a) Respondent G. was replying to her question as to whether there were children in the Park; (b) possibly because of Respondent G.'s substantial hearing impairment, Respondent G. did not accurately hear the question Complainant Masanda asked, or Complainant Masanda did not accurately hear her answer, and/or (c) Complainant Masanda has not recalled Respondent G.'s exact answer. This forum is confident that the exact wording of this conversation, if known, would not establish an inference that Respondents actually did allow new tenants with children into the Park. However, by the end of the conversation, and in light of what Complainant Cavender had told her about Complainant Hampton, Complainant Masanda was convinced that Respondents' citation of her children as a reason for her rejection was a pretext for discriminating against her because of her race, color, or national origins.

39) On November 28, 1983, Complainant Masanda and Complainant Cavender formally rescinded their purchase/sale agreement, because of Respondents' rejection of Complainant Masanda's application for Park tenancy.

40) There is no direct evidence that Respondents were motivated by a discriminatory purpose in their decision to reject Complainant Masanda. Although this forum has concluded that Respondents discouraged Complainant Hampton's tenancy in the Park because she is black, this forum concludes that it was Respondents' desire to keep tenants and avoid conflict in the Park, rather than any personal animus against black persons or persons of color, which motivated them to discourage Complainant Hampton. There is no evidence that Respondents feared that the presence of Complainant Masanda, who is not white, but not black, would lead to the same problem which they feared if a black person moved into the Park. On the contrary, Respondent G. asserted that she did not even note to herself what Complainant Masanda's race, color, or national origin was, and Respondent H. asserted that Respondent G. did not mention Complainant Masanda's race, color, or national origin to him. Not finding these assertions improbable, this forum declines to find them untrue.

41) As explained above, this forum believes that, in evaluating Complainant Masanda's application for tenancy, Respondents were concerned about the presence of Complainant Masanda's children and her financial situation. They did not want a new

tenant with a child and a tenant from whom it might be difficult to obtain rent. Respondents could not fully consider these concerns because of pressure from Mr. Cooley and Mr. Toney to decide her application. The Agency has not convinced the forum that either, much list both, of these concerns was merely a pretext for rejecting Complainant Masanda because of her race, color, or national origins.

Damages

42) Although he continued to attempt to sell his mobile home for nearly ten months after Respondents frustrated his sale to Complainant Hampton, and even moved his home to another park in an attempt to market it better, Complainant Cavender was not able to sell it until July 1984, and then for \$500 less than Complainant Hampton had agreed to pay for it. Between the time his sale to Complainant Hampton was thwarted by Respondents and his successful sale, Complainant Cavender incurred \$2281.31 in expenses in connection with the maintenance and marketing of the home, which he would not have incurred had Respondents not frustrated his sale to Complainant Hampton.

Therefore, Complainant Cavender lost \$500 and expended an additional \$2281.31 as a direct consequence of Respondents' thwarting of his mobile home sale to Complainant Hampton because of her race or color.

43) Complainant Cavender and Complainant Hampton suffered severe and long-lasting mental distress, which was manifested in many pronounced ways, as a direct consequence of Respondents' attempts to discourage her tenancy in the Park because of her

race and color. As the person most personally affected by those attempts, Complainant Hampton's suffering has been particularly acute, pervasive, and enduring, inflicting upon her great pain, degradation, loss of dignity and loneliness, and costing her her closest friend. Complainant Cavender, a person who abhorred racial discrimination, and who was put by Respondents in the position of having to explain their discrimination to Complainant Hampton, suffered the pain of that duty and Complainant Hampton's reaction right up to the time of hearing. Complainant Cavender died in mid-November 1985.

RULING ON MOTION TO DISMISS

After the Agency had finished presenting its case-in-chief, Respondents moved to dismiss Complainant Hampton's complaint, arguing that its basic allegation, "on or about September 16, 1983, the Respondents *** refused to rent or lease mobile home space to *** Hampton because of her race and color" was not supported by any evidence. Respondents maintained that there was never any such refusal and that, furthermore, there never was any application upon which a refusal could have been made. Respondents argued that the Agency merely predicted that Complainant Hampton would have been refused if she had applied for tenancy at the Park.

Respondents further based this motion upon the argument that the Specific Charges do not allege the Respondents attempted to discourage Complainant Hampton from applying. They pointed out that the only specific allegation of attempting to discourage is the allegation concerning

Complainant Cavender (that Respondents attempted to discourage the sale of his home to Complainant Hampton and Complainant Masanda). The Charges' only mention of Complainant Hampton's discouragement appears in the paragraph which claims damages as a result of her "being discourage" from renting or leasing mobile home space and from purchasing Complainant Cavender's mobile home. This reference appears only in the statement that Complainant Hampton is asking for emotional distress damages because of her feeling of discouragement; it does not appear in any allegation of liability, much less any allegation of liability based upon Respondents' discouraging or attempting to discourage her. Accordingly, Respondents argued, the only claim concerning Complainant Hampton contained in the Specific Charges is a refusal to rent, rather than a discouragement from renting space or buying a home.

During the presentation of the Agency's case-in-chief, the Agency did introduce persuasive evidence that Respondents had attempted to discourage (and in fact discouraged) Complainant Hampton from renting space from them and, thereby, purchasing Complainant Cavender's home. The forum has carefully reviewed the record of that presentation and found no objection by Respondents that any of that evidence went beyond the scope of the Specific Charges. Respondents made no such objection until that evidence had been admitted and the Agency's case-in-chief concluded. Accordingly, the forum rules on this portion of

Respondents' Motion to Dismiss on the basis of OAR 839-04-030(3)(b), which includes the following provisions concerning amendment of the pleadings after the commencement of the hearing:

"(A) When issues not raised in the pleadings are raised at the hearing by the express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Upon motion to the presiding officer, a party may amend its pleadings to conform to the evidence and to reflect the issues which were presented. This motion may be made at any time within 10 days after the last day of the hearing.

"(B) If evidence is objected to at the time of the hearing on the ground that it is not within the issues raised by the pleadings, the presiding officer may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action or defense will be served thereby and the objecting party fails to satisfy the presiding officer that the admission of such evidence would prejudice him/her in maintaining his/her action or defense upon the merits. The presiding officer may grant a continuance to enable the objecting party to meet such evidence."

This forum concludes that, by not objecting at any time during its presentation that the evidence on discouragement went beyond the scope of the Specific Charges, Respondents gave their implied consent to the raising of

those issues. Respondents thereby either signaled their agreement that those issues were within the scope of the Specific Charges or allowed provision (A) above to come into play to afford the Agency an opportunity to amend its Specific Charges to conform to the evidence and reflect the issues adduced. The Agency has submitted language for such an amendment.*

Even if the provisions (B) above more appropriately applies herein (given Respondents' objection, through this Motion raised after the conclusion of the Agency's case-in-chief, to the scope of the issues raised in that case), the Presiding Officer would allow the pleadings to be amended to reflect those issues and the evidence on them. Clearly, the presentation of the merits of the action would be served by allowing his amendment, and Respondents failed to satisfy the Presiding Officer that the admission of such evidence would prejudice them in maintaining their defense on the merits. Even if it existed, any such prejudice could have been cured by Respondents accepting the Presiding Officer's offer to continue the proceeding so that Respondents could meet this evidence and respond to the amendments. The Presiding Officer made it clear that Respondents were

to notify her by the close of hearing if they wanted such a continuance. Respondents did not notify her, and at the end of the hearing stated, at the Presiding Officer's inquiry, that they declined to present any more evidence.

Accordingly, under either OAR 839-04-030(3)(b)(A) or (B), the forum may amend the Specific Charges to reflect the evidence and issues presented. The forum chooses to do this, using the language suggested by the Agency and a statutory reference. Accordingly, paragraph (1) of Section III of the Specific Charges is amended to read:

"(1) On or about September 16, 1983, the Respondents, and each of them refused to rent or lease mobile home space to Pearl S. Hampton, a black person, and attempted to discourage the sale of John Cavender's mobile home to her and to discourage her from renting mobile home space from them, because of her race and color, in violation of ORS 659.033. On December 28, 1983, Pearl S. Hampton filed a verified complaint with the Civil Rights Division of the Oregon Bureau of Labor and Industries according to the provisions of ORS 659.045."^{**} (Underlining added only to

* Respondents agreed to waive the ten day requirement for this submission. OAR 839-04-030(3)(b)(A).

** In point 6 of their Exceptions to the Proposed Order, Respondents apparently argued, in effect, that these Amendments to the Specific Charges violate Oregon statutes and Agency rules by alleging discriminatory acts not alleged in the complaint of Complainant Hampton or Complainant Cavender. The forum does not agree. These amendments voice issues which certainly are like or reasonably related to the allegations contained in those complaints (Exhibits described in Procedural Finding of Fact 1 above). Accordingly, these amendments are requisitely related to those complaints, under the pertinent part of the test set forth in *School District No 1 v. Nilsen*, 271 Or 461, 468-470,

illustrate the language inserted by this amendment.)

In their Motion to Dismiss Complainant Hampton's claim, Respondents argued further that even if one assumes that the discouragement claim concerning Complainant Hampton has properly been raised, as this forum has just ruled, the Agency has failed to prove any subjective act by Respondents that was directed to any party in this matter toward the end of discouraging Complainant Hampton from applying. Respondents stated that an attempt to discourage must comprise an intent coupled with an act falling short of the thing intended; i.e., an endeavor to do an act, carried beyond mere preparation, but short of execution. Respondents maintained that the Agency has not proved any act by Respondents made with the intent of discouraging Complainant Hampton. Respondents argued that the evidence of statements made by Respondent H. in his argument with Mike Cavender (not a party or a complainant herein) is at most circumstantial evidence of Respondent H.'s motive or intent to discourage. Respondents stated that at best, the Agency's case concerning Complainant Hampton's complaint is that Respondents' request for a written notice of intent to sell was an act of discouragement that was made because she is black. Respondents pointed out that they had the legal and contractual right to request the notice, and that there is no evidence that they had an established business policy of waiving the notice requirement and acted contrary

to that policy in Complainant Hampton's case because she is black.

The forum does not agree with these contentions concerning the sufficiency of the Agency's case-in-chief. The Agency clearly presented a prima face case of unlawful housing discrimination under ORS 659.033 (as described in the Opinion below) during the presentation of its case-in-chief. The Agency did not need to accomplish more than this in its case-in-chief in order to thwart Respondents' above argument. The forum has considered this argument, however, in assessing the Agency's entire case. (See the Opinion below.)

Finally, Respondents argued that even if some act by them could be construed to be a refusal or a discouragement, that act was not the reason for Complainant Hampton's failure to pursue her application for tenancy. Respondents asserted that Complainant Hampton testified that even after Mike Cavender told her that Respondent H. did not want her in the Park because she was black, she still was going to go through with her purchase until she came to believe Respondent H. subsequently lied to her about taking her application to Complainant Cavender. Respondents asserted therefore that according to Complainant Hampton herself, it was that perception of a lie, rather than racial discrimination, which discourage her from applying for tenancy. The forum notes again that as the Agency established, during its case-in-chief, a prima facie case of the discrimination charged, Respondents' arguments as to the sufficiency of proof go not to the

Agency's case-in-chief, but to its entire case. The forum further notes that even with regard to the Agency's entire case, this argument by Respondents makes a distinction without a difference, because Respondent H's "lie," his failure to take any Park information or a tenancy application form to Complainant Cavender for Complainant Hampton as he had promised to do, was itself part and parcel of Respondents' attempts to discourage her tenancy because of her race and color. (See the Opinion below.)

CONCLUSIONS OF LAW

1) During all times material herein, Respondents, were two "persons" for purposes of ORS 659.010 to 659.110, and were subject to the provisions of ORS 659.010 to 659.110.

2) During times material herein, Complainant Hampton and Complainant Masanda were "purchasers" as that term is defined for purposes of ORS 659.033, in that they were both prospective lessees of rental space for a mobile home concerning which they were prospective buyers and occupants.

3) During times material herein, Complainant Cavender was a "purchaser," as that term is defined for purposes of ORS 659.033, in that he was an occupant of a mobile home and a lessee of mobile home space in the Park.

4) The Commissioner of the Bureau of Labor and Industries of the State of Oregon has jurisdiction over the persons and of the subject matter related to the violations of ORS 659.033 alleged herein.

5) By attempting to discourage Complainant Hampton, a purchaser, from renting real property in the Park, and thereby attempting to discourage the sale of Complainant Cavender's mobile home (which occupied that real property) to Complainant Hampton, because of Complainant Hampton's race and color, Respondents violated ORS 659.033 as charged. By these actions, which discriminated and made distinctions and restrictions against Complainant Cavender, a purchaser, in the terms, conditions, and privileges relating to his lease and occupancy of real property in the Park by thwarting

* Having found that Respondents' statements, actions, and inactions constitute the attempts to discourage alleged in Paragraph I of the Amended Specific Charges, this forum need not decide whether those statements, actions, and inactions, which in fact did succeed in discouraging, also constitute, under the law, the refusal to rent charged in that Paragraph. However, the forum notes that it has concluded, in Ultimate Finding of Fact 18 above, that Complainant Hampton's request for an application form constituted her application for a space rental at Respondents' Park. The forum is inclined to conclude that Respondents' failure to grant that application (indeed, they failed to take any affirmative action in response to it) constitutes a refusal to rent to Complainant Hampton. To put it another way, this forum is inclined to conclude that Respondents' discouragement, or chilling, of this application constitutes a refusal to rent under ORS 659.033, just as the same type of discouragement, or chilling, of an employment application constitutes a refusal to employ under ORS 659.030, if the potential applicant would have applied, but for the discouragement.

the sale of his mobile home to Complainant Hampton, because of the race and color of Complainant Hampton, Respondents violated ORS 659.033 as charged.

6) By refusing to rent mobile home space to Complainant Masanda because of their legitimate, non-discriminatory concerns about her financial circumstances and the presence of children in her home, Respondents did not violate ORS 659.033 as charged.

7) The Commissioner of the Bureau of Labor and Industries has the authority to award money damages to Complainant Cavender and Complainant Hampton under the facts and circumstances of this record, and awarding as damages the sums of money specified in the Order below is an appropriate exercise of that authority.

OPINION

Credibility

The forum has included in its basic and ultimate Findings of Fact several explanations relating to the forum's conclusions about Respondents' credibility, as it relates to Respondents' contacts with Complainant Hampton and Complainant Masanda, and concerning the credibility of other persons involved in Respondents' contact with Complainant Masanda. The forum adds the following explanation of how its assessment of certain witnesses in the Hampton matter influenced its findings as to the chronology and contents of the conversations which occurred therein, and which are described in the Findings of Fact above. Although the memory of virtually every witness

concerning the exact order of those conversations (as well as the order of the topics discussed in them) was blurred, the forum pieced together the chronology and contents presented in the Hampton portion of this Order by heeding the more probative (i.e., corroborated and likely in light of the weight of the testimony) evidence. As noted above, Mike Cavender (and to lesser extents Complainant Cavender and Complainant Hampton) as well as Respondents, illustrated their inability, at the time of hearing, to accurately and completely remember the contents and sequence of all those conversations. Consequently, except where otherwise noted, the forum's findings on those contents and timing were not predicated on any one person's testimony or other statements on the record, unless that testimony of statement was consistent with and uncontroverted by other evidence.

Other Findings and Conclusions

Because of the sheer amount and scope of evidence presented in this matter, the forum has made lengthy Findings of Fact which start at a very basic level. Because of this, and to aid the flow of the Ultimate Findings of Fact to their culminations, the forum has included in the basic and Ultimate Findings many explanations which usually would be left for the Opinion section of an Order. Accordingly, the reader should scrutinize the basic and Ultimate Findings of Fact, as well as the Opinion, for a full explanation of the forum's findings herein.

The Agency made a prima facie case that Respondents attempted to discourage (and did discourage) Complainant Hampton from renting real

property in the Park, and thereby attempted to discourage and did discourage the sale of Complainant Cavender's mobile home to Complainant Hampton, because of Complainant Hampton's race and color, by establishing that Complainant Hampton was a member of a protected class; that she applied for, and was qualified to become, a tenant in the Park; that Respondents attempted to and did discourage her tenancy, and that thereafter the housing opportunity Complainant Hampton sought remained available. Respondents countered this prima facie case by stating that their statements, actions, and inactions concerning Complainant Hampton's application for tenancy were caused solely by Complainant Cavender's failure to comply with the provision of his rental contract requiring his submission of a 30 day written notice of his intent to sell (a provision permissible under Oregon law), and that after he filed that notice, Respondents did nothing to thwart Complainant Hampton's application. The Agency has proved, however, in light of Respondent H.'s manifest intent to keep Complainant Hampton out of the Park because of her race, Respondents' atypically strict enforcement of the notice rule, and their failure to take any step to make a tenancy application form available to Complainant Hampton when Respondent H. had promised to do so, at her emphatic and clear request, even after his rationale for that failure had disappeared, that this explanation was but a pretext for Respondents' attempt to discourage, and discouragement, of Complainant Hampton's tenancy in the Park because of her race. Contrary to

Respondents' argument, this forum finds that the record contains proof not only of Respondent H.'s discriminatory intent, but "actions" (affirmative and through inaction) to implement that intent in precisely the manner he told Mike he would use: employment of an otherwise legally permissible notice requirement as a pretext for discrimination against Complainant Hampton because of her race, and failing to respond to Complainant Hampton's application after that requirement had been met. That the Respondents did this for fear of racial conflict due to bigotry of Park tenants, rather than because of any racial animus of their own, does not change the fact that Respondents did discourage Complainant Hampton's tenancy because of her race and color. Furthermore, that Complainant Hampton had not completed all of the application materials did not mean she had not applied, for she had done all she reasonably could be expected to have done without Respondents' further action.

In the Masanda matter, assuming for purposes of argument that the Agency made a prima facie case, as described above, it is clear to the forum that the Agency has not shown that either, much less both, of the reasons Respondents gave for rejecting Complainant Masanda's tenancy was pretextual. From their first contact with Complainant Masanda, Respondents voiced their concern that the frequent visits of Complainant Masanda's children might constitute (for purposes of Respondents' sewage concerns) their occupancy in the Park. Respondents' concerns about Complainant Masanda's financial situation were

multifaceted, and Respondents were not able to fully evaluate them because of the pressure from the realtors involved for their decision. Given these concerns, the weight of the evidence that Respondents felt they could not accept Complainant Masanda without the further investigation which realtor pressure deprived them of an opportunity to do is persuasive. The Agency failed to show that this explanation was a pretext for discriminating against Complainant Masanda because of her race, color, or national origins.

Damages

The Agency has asked the forum to award Complainant Hampton damages of \$20,000 for pecuniary loss. This amount is the difference between the price for which Complainant Cavender had agreed to sell Complainant Hampton his home and price Complainant Hampton paid for the home she eventually purchased. The home she purchased is a permanent, rather than mobile, structure, and given the undisputed evidence that it is worth at least the \$31,500 Complainant Hampton paid for it, this forum cannot conclude that it is in any way comparable to Complainant Cavender's mobile home. In fact, the forum has no evidence on which to decide what comparable available housing, mobile or permanent, would have cost Complainant Hampton. Accordingly, this forum has no way of calculating whether, and if so in what amount, Complainant Hampton suffered pecuniary damages as a result of Respondents' discrimination against her.

ORDER

NOW, THEREFORE, as authorized by ORS 659.060(3) and 659.010(2) and in order to eliminate the effects of the violations of law found herein, as well as to protect the lawful interests of others similarly situated, Respondents are hereby ordered to:

1) Deliver to the Hearings Unit of the Portland Office of the Bureau of Labor and Industries a certified check payable to the Bureau of Labor and Industries in trust for PEARL S. HAMPTON in the amount of TWELVE THOUSAND DOLLARS (\$12,000). This award represents damages for mental distress Complainant Hampton has suffered because of Respondents' violation of law set out in the Conclusions of Law above.

2) Deliver to the Hearings Unit of the Portland Office of the Bureau of Labor and Industries a certified check payable to the Bureau of Labor and Industries in trust for THE PERSONAL REPRESENTATIVE OF JOHN A. CAVENDER in the amount of FOUR THOUSAND SEVEN HUNDRED EIGHTY-ONE DOLLARS AND THIRTY-ONE CENTS (\$4,781.31). This award represents \$2,781.31 in damages for the pecuniary losses and expenses Complainant Cavender suffered and incurred because of Respondents' violations of law set out in the Conclusions of Law above, and \$2,000.00 in damages for the mental distress he suffered because of those violations of law.

* As the Agency had ample opportunity to present evidence on this subject at hearing, and did not do so, the forum is not willing to reopen the record for the purpose of affording the Agency another such opportunity.

3) Cease and desist from discouraging anyone from renting mobile home space in the Park because of that person's race.

**In the Matter of
Timothy G. Dickerson, dba
TIM'S TOP SHOP,
Respondent.**

Case Number 26-85
Final Order of the Commissioner
Mary Wendy Roberts
Issued March 23, 1987.

SYNOPSIS

Male Respondent employer subjected female Complainant and her female co-workers to unwelcome sexual remarks and touching, made a quid pro quo sexual suggestion to Complainant through another female employee, and followed the suggestion with unwelcome remarks of a sexual nature, all on account of Complainant's sex. Finding that this behavior created an intolerable work environment, which forced Complainant's resignation (a constructive discharge), the Commissioner awarded Complainant \$5,569 in lost wages and \$4,000 for mental distress, and ordered Respondent to cease discriminating on the basis of sex. ORS 659.030(1)(a) and (b); OAR 839-07-550.

The above-entitled contested case came on regularly for hearing before Leslie Sorensen-Jolink, designated as Presiding Officer by Mary Roberts, the Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was conducted on December 1 and 2, 1986, in Room 311 of the State Office Building, 1400 S.W. Fifth Avenue, Portland, Oregon. The Bureau of Labor and Industries (hereinafter the Agency) was not represented by counsel at the hearing. Timothy G. Dickerson, doing business as Tim's Top Shop (hereinafter Respondent), was represented by Shaun S. McCrea, Attorney at Law. Cheryl L. Scott (hereinafter Complainant) was present throughout the hearing.

The Presiding Officer called as witnesses W. W. Gregg, Quality Assurance Manager of the Civil Rights Division; Complainant; Debra Thome and Susan Garboden, co-workers of Complainant during her employment by Respondent; and Respondent. Respondent testified and called as witnesses Quinten Bangert, Connie Gibson, Don Wicker, and John Freno, some of Respondent's other employees during Complainant's employment.

Having fully considered the entire record in this matter, I, Mary Roberts, the 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 March 28, 1984, Complainant filed a verified complaint with the Civil Rights Division of the

Agency (through the Equal Employment Opportunities Commission) alleging that Respondent had discriminated against her because of her sex, in connection with her employment.

2) Following the filing of the aforementioned complaint, the Civil Rights Division investigated the allegations contained therein and determined, as stated in an Administrative Determination dated March 13, 1985, and an amended Administrative Determination dated February 12, 1986, that there was substantial evidence to support these allegations.

3) After the issuance of the Administrative Determination, the Civil Rights Division attempted to resolve the complaint through conference, conciliation, and persuasion, but was not successful in these efforts.

4) Accordingly, the Agency caused to be prepared and duly served on Respondent Specific Charges, dated June 24, 1986. Pursuant to the granting of Respondent's Motion to Make those Charges More Definite, the Agency prepared and duly served on Respondent Amended Specific Charges, dated October 13, 1986. These Amended Specific Charges alleged that Respondent had violated ORS 659.030(1)(b) by discriminating against Complainant in the terms and conditions of her employment because of her sex, and that Respondent had violated ORS 659.030(1)(a) by constructively discharging her because of her sex.

5) The forum duly served on Respondent and the Agency notices of the time and place of the hearing of this matter.

6) On or about July 18, 1986, Respondent duly served his answer to the Specific Charges on the forum, and on or about November 17, 1986, Respondent duly served his answer to the Amended Specific Charges on the forum. The latter answer denied all allegations contained in the Amended Specific Charges and asserted the affirmative defense of laches.

7) Before the commencement of the hearing, Respondent received from this forum a document entitled "Notice of Contested Case Rights and Procedures," which had been previously sent to Respondent, and stated that he had read that document and had no questions about it.

8) At the commencement of the hearing, the Presiding Officer explained the issues involved and the matters that must be proved and disproved herein.

9) On Respondent's motion, all witnesses except Complainant and Respondent were excluded from the hearing when they were not testifying.

At the request of Respondent, the testimony of witnesses Don Wicker and John Freno was taken by telephone. All other witnesses testified in person. The forum's attempt to take telephonic testimony from Jennifer Grant, a witness suggested by the Agency, were frustrated when there was no answer at the telephone number the Agency provided at the time specified. The Agency did not recommend that the forum attempt to obtain Ms. Grant's testimony at a later time or by another means.

At the request of the Agency and with no objection by Respondent, a

portion of the testimony of witness Garboden was taken in camera, and the verbatim tape-recorded record of that testimony was sealed. That record and any transcript made of it shall remain sealed unless requested by the forum's counsel and reviewing court in any appeal of this Order.

10) At the Presiding Officer's request during the hearing, Respondent made a 46-page post-hearing submission consisting of copies of certain 1983-1986 payroll records. This has been admitted as an exhibit. With the forum's permission, and to addend another exhibit, Respondent also submitted, at the same time, a copy of a Form W-4 for witness Garboden, which the forum has admitted.

FINDINGS OF FACT – THE MERITS

1) From July 1, 1983, to July 1, 1985, which includes all times material herein, Respondent, a male individual, was the owner, operator, and sole proprietor of Tim's Top Shop in Salem and Albany. This matter concerns just the Salem Tim's Top Shop (hereinafter referred to as the Shop).^{*} In the Shop, which engaged in general automobile and boat upholstery, Respondent employed one or more employees in the

State of Oregon during all times material herein.

2) On or about August 8, 1983, Respondent hired Complainant, a female individual, to work as a sales representative for the Shop, and he employed her in that capacity from that time through September 30, 1983.

3) As a sales representative for Respondent, Complainant solicited business for the Shop from new and used car dealers in Salem. This involved visiting dealerships, making estimates on upholstery work for them, transporting vehicles to be upholstered to the Shop, and returning them to the dealers after the work was completed.

4) When Complainant started her employment for Respondent, she, Jennifer Grant, and Debra Thorne were the Shop's sales representatives. Ms. Thorne was employed in that capacity throughout Complainant's employment. Jennifer Grant resigned about two weeks after Complainant started. In early September, Sue Garboden began working at the Shop as a driver, picking up and delivering vehicles but not soliciting business. During approximately the second or third week of September, a woman named Ruth worked as a driver at the Shop for a

* Before July 1, 1983, Tim's Top Shop was owned by and operated as a partnership of Henry A. Baumgartner, James B. Baumgartner, and Respondent. That enterprise did business in three locations, Albany, Eugene, and at the Shop in Salem, Oregon. Effective July 1, 1983, the partnership was dissolved and Respondent took as his sole and separate property, and became the sole proprietor of, the Tim's Top Shop located in Albany and the Shop in Salem, Oregon, and Messrs. Baumgartner took as their sole and separate property the Tim's Top Shop located in Eugene.

Effective July 1, 1985, Respondent's sole proprietorship became a corporation, apparently named Timco Upholstered Products, Inc., of which Respondent and his wife have since owned 55% of the stock, and Respondent's brother and wife have since owned the other 45%. Since its formation, this corporation has owned the Shop and the Albany Tim's Top Shop.

few days. These were the only female employees of the Shop during Complainant's employment.

5) Most of Complainant's work time was spent off the premises of the Shop, and most of Respondent's work time was spent on the premises. Complainant's main contact with Respondent occurred when they happened to be at the Shop at the same time, or when Respondent drove her to or from a dealership. Before September 28, 1983, Respondent did that only when there was no sales representative or driver available to do it, which did not happen "that often."

6) Complainant has alleged that during her employment at the Shop, Respondent often made "little" comments with sexual innuendoes to her personally, such as, "Why don't we go out in the field and make mad, passionate love?" Complainant testified that when she did not respond to this particular remark, Respondent patted her leg and told her not to worry about it, or something to that effect. Respondent did not laugh when he made these comments, and Complainant did not find them at all funny. They usually occurred when Complainant was alone with Respondent, and rarely occurred in the Shop. Until September 28, 1983, she "did not think anything of" and paid little attention to these remarks, and she did not tell Respondent that they bothered her.

As Respondent did not deny making these comments to Complainant, and the forum finds Complainant's testimony that he did credible, the forum finds that Respondent did often direct remarks with sexual implications to Complainant. Respondent asserted

that his statements about making, "mad, passionate love" were intended as ridiculous responses to ridiculous questions. For example, Respondent testified, when a female employee asked him where she and he were going, and it was obvious they were going to pick up or deliver a car, he might make this remark rather than state the obvious. Respondent testified that it was not a proposition; that he would feel kind of foolish making that kind of statement seriously, and that he did not know that anyone took it as such. Based on the forum's assessment of the credibility of Respondent and Complainant made in Finding of Fact 28 below, the forum finds that if Respondent meant this statement to be seen as ridiculous rather than sexually suggestive, he did not make that clear to Complainant.

Respondent testified that he did not recall ever patting Complainant on the leg. Based on the forum's assessment of the credibility of Respondent and Complainant made in Finding of Fact 28 below, the forum finds that Respondent did pat Complainant on her leg as she asserted above in this Finding.

7) Complainant has alleged that approximately twice during her employment by Respondent, Respondent put his arm on her shoulder, "or something like that," when he and she were walking out of the Shop to look at a vehicle. Complainant further asserted that one Saturday morning in the first part of September, Respondent put his arm "all the way" around her waist and "kind of grabbed" or "squeezed" her breast, while telling her she was doing a great job but that she "just needed to loosen up a bit." Complainant testified

that she "kind of pulled away and just ignored the whole situation."

Respondent essentially agreed that all of this incident occurred but the alleged contact with Complainant's breast. He explained that the day before this incident, Complainant has been more zealous than necessary in doing her work. He stated that the next morning, in response, he put his arm around her and told her that he appreciated her trying hard but there had been no reason to work as hard as she had the previous day, especially since it forced him to wait late for her to return to the Shop. Respondent testified that he told Complainant to, in effect, "relax a little bit and not try to get it all done;" there was always another day. Respondent asserted that there was "no way" he touched Complainant's breast at all; he gave her a one-armed hug around the outside of her arm. He hypothesized that rather than lying about contact, Complainant imagined that Respondent had grabbed her breast when he hugged her.

As explained in Section 2 of the Opinion below, which is incorporated by reference into this Finding, the forum declines to find that Respondent came into contact with Complainant's breast during this hug. The forum finds that this hug around Complainant's waist and/or arm otherwise occurred as described above by Complainant and Respondent.

8) Complainant testified that Respondent sometimes looked at her with a "look in his eye" which she found sexual. Complainant could not explain, and Respondent testified that he had no idea, what Complainant meant by this testimony. The forum

finds this testimony insufficiently specific to form the basis of any finding herein.

9) Before September 28, 1983, Respondent's sexual comments to and physical touching of Complainant occurred "out of the blue," in isolated instances, each of the seven or eight times Complainant and Respondent were alone during her employment. They were entirely unwelcome to Complainant, but she was afraid to tell Respondent that. Complainant felt that she had no choice but to ignore these sexual remarks and touches and try to go about her work, which she did, or resign. She asserts that because she was afraid Respondent would make sexual comments and she did not know what she was supposed to say in response, Complainant found the seven or eight times she had to work alone with Respondent very stressful.

10) According to Complainant, she was aware during her employment of the following verbal conduct of a sexual nature which Respondent directed toward her female co-workers.

a) Complainant testified that Respondent was a man of few words, but sexual innuendo saturated whatever comments he made to his female Shop workers. (Example: "Did you girls have a nice evening last night? Did you get what you want?") Complainant and Ms. Thorne testified that Respondent knew that these remarks bothered his female workers, because Ms. Thorne and Ms. Grant told him so. Respondent testified that he was sure he occasionally told jokes at work, some of which were "dirty," but that he never got any negative reaction to them from anyone.

b) Complainant testified that Jennifer Grant told Complainant she was resigning because she "just couldn't fake" the sexual comments Respondent made to her. Respondent testified that Ms. Grant quit when and because she lost her means of transportation to and from work.

c) Complainant testified that, before she began working for Respondent, Ms. Thorne told her that she would probably like the job if she could "put up with" Respondent's "comments" and advised her to ignore Respondent. Thereafter, according to Complainant, when she complained to Ms. Thorne that Respondent's sexual comments bothered her, Ms. Thorne said that Respondent had made similar remarks to her.

Ms. Thorne testified that Respondent made a lot of off-color, "little off-hand" jokes and sexual remarks relating to things that would go on in a normal business day, and that on occasion he directed them to her. Ms. Thorne testified that the remark said most often was "Let's go make love in the back of my van." (Respondent asserted that he had never said this to anyone.) Ms. Thorne gave two other examples:

A) that Respondent said, once when Complainant and Ms. Thorne had brought back one car from a dealer, "Maybe if I'd bought you short skirts, you'd bring back two cars;" and

B) that once when Ms. Thorne brought in a motor home for work, Respondent suggested that Ms. Thorne buy it and he and she go to Disneyland together in it.

(Respondent did not deny making either remark, but testified that the second one obviously could not have been a serious suggestion, as the motor home cost much more than Ms. Thorne could possibly pay.) Ms. Thorne testified that these comments by Respondent occurred probably twice each week and that she never "went along with" them. Usually, she ignored the comments or shrugged her shoulders and said something sarcastic indicating her displeasure, and Respondent would stop making such comments for the rest of the conversation. Ms. Thorne stated that she did not take these remarks seriously, and she could "pretty much" push them aside and ignore them until the disclosures described in Finding of Fact 12c below.

Based on the forum's assessment of the credibility of Respondent and Complainant in Finding of Fact 28 below, and of the credibility of Ms. Thorne described in that Finding and Section 4 of the Opinion below, the forum finds that each of the above-described assertions by Complainant or Ms. Thorne are true. To the extent that Respondent's above-described testimony contradicts those assertions, this forum finds his testimony untrue.

11) Complainant testified she knew of the following physical contacts which Respondent had with his other female employees during her employment.

a) Complainant testified that Ms. Grant told her that she, Ms. Grant, could not stand the way Respondent looked at her and that he had pinched her "on the rear or something." This forum finds this testimony insufficiently

specific to form the basis of any Finding herein.

b) Complainant testified that when Respondent hired the woman named Ruth, Ms. Garboden told Complainant that Respondent hired Ruth to perform sexual favors for him, and paid her an extra \$300 to \$400 per month for them. This forum finds that Ms. Garboden did tell this to Complainant. However, as explained in Section 4 of the Opinion below, this forum declines to make any factual finding based solely on hearsay rooted in Ruth's alleged statement.

12) According to Ms. Thorne or Ms. Garboden, Complainant's female co-workers at the Shop experienced the following additional sexual remarks from and touching by Respondent. The record does not establish whether Complainant was aware of these alleged remarks or actions before September 28, 1983.

a) Ms. Thorne testified that once, toward the end of her employment, when she and Respondent were driving alone in a van, Respondent reached over, put his arm around her neck, tried to pull her over to him, and asked her if she thought anything would ever become of the two of them. Ms. Thorne testified that she pulled away, looked out the window, said nothing and felt very nervous and upset. Respondent did not deny making this remark, but asserted that his question to Ms. Thorne concerned just their business relationship. Ms. Thorne's business relationship was very promising for her, and Ms. Thorne denied that Respondent's above-cited remark had anything to do with it. Respondent testified that he did not recall putting his arm around Ms. Thorne and her pulling

away. He asserted that it is almost impossible to reach from the driver's seat in his van and get one's arm around someone. Based on this forum's assessment of the credibility of Ms. Thorne and Respondent in Finding of Fact 28 below, as explained in Section 4 of the Opinion below, the forum finds that Ms. Thorne's above assertions and denial are fact and Respondent's assertions to the contrary are not.

b) Ms. Garboden testified that she noticed Respondent rubbing the legs of female employees and putting his arm around them. Based on this forum's assessment of the credibility of Respondent and Ms. Garboden in Finding of Fact 28 below, and Respondent's failure to deny that he touched female employees as Ms. Garboden above asserted, this forum finds that he did.

c) Ms. Thorne testified that just a few days before she resigned, Ruth told Ms. Thorne that Respondent had offered her money to work as a driver and provide him sexual favors, and that she had declined this offer. Respondent emphatically testified that he never offered Ruth money for sexual services. As explained in Section 4 of the Opinion below, the forum declines to make any factual finding based solely on the hearsay rendition of Ruth's statements. Accordingly, this forum cannot find that Respondent offered Ruth money for sexual services.

Ms. Thorne testified that Ruth told her that she had met Respondent when she was working in a "massage parlor" (hereinafter referred to as a "lotion studio"). Taken altogether, Ms. Garboden's ginger testimony indicates that a lotion studio is an establishment

catering primarily to male customers at which "body lotion hostesses" do "disreputable" work while wearing high heels and a negligee. Respondent stated that it was quite possible that he met Ruth at a lotion studio. Through this statement, Respondent implicitly admitted having been a customer at such an establishment.

13) Respondent produced four witnesses who worked for him, three at the Shop, during Complainant's employment, to testify about Respondent's conduct at work. To the extent that their testimony indicated that Respondent's verbal contact with his female Shop employees was not saturated with comments of a sexual nature, the forum has discounted their testimony. No one so testifying was in a position to hear what Respondent said to his female employees when they were alone with him, and the one who might have regularly been in a position to overhear what Respondent said to them in the Shop testified that Respondent "periodically" told sexual jokes there. Three of these four witnesses acknowledged seeing Respondent put his arm around female employees.

14) The alleged sexual arrangement between Respondent and Ms. Garboden does not itself form the basis of any allegation herein, but ascertaining whether it occurred is critical herein, to the assessment of the credibility of Respondent and Ms. Garboden. Furthermore, whether or not this arrangement existed, it provides background to Respondent's alleged later sexual proposition to Complainant, and serves to explain Complainant's fear of Respondent after Ms.

Garboden told her about that alleged proposition. For these reasons, the forum must explain the allegations concerning a sexual arrangement between Respondent and Ms. Garboden, and ascertain if the allegations are true.

During her employment by Respondent, Ms. Garboden lived with Jennifer Jamison. Based on this forum's assessment of the credibility of Ms. Garboden and Respondent in Finding of Fact 28 below, the forum finds that Respondent, who was married to someone else, recently had or was having a sexual relationship with Ms. Jamison. Ms. Jamison was not employed by Respondent, but according to Ms. Garboden, Ms. Jamison told her that Respondent paid her to have sex with him. It was Ms. Jamison who referred Ms. Garboden to Respondent for a driver job, and Ms. Garboden testified that Ms. Jamison told her later that \$100 which Respondent sent to Ms. Jamison through Ms. Garboden was compensation for that referral.

Ms. Garboden went for an interview for Respondent's driver job, because she wanted a "reputable" job. Ms. Garboden testified that during that evening interview alone with Respondent, he offered her the job, which he said was reputable, and told her he wanted sexual favors for himself from her. Ms. Garboden testified that she accepted Respondent's offer, even though she felt "uncomfortable" with the sexual aspect of it, because she needed a job. Immediately thereafter, according to Ms. Garboden, Respondent took her into a back room in the Shop and had sexual intercourse with her. Ms. Garboden began her

employment with Respondent the next day, and according to her, Respondent engaged in sexual acts with her approximately three to four times throughout her employment in the van she drove for Respondent and in a back room at the Shop.

Respondent testified that neither he nor Ms. Garboden brought up the subject of sex during Ms. Garboden's interview. Respondent stated that sex was not made a condition of her employment and that he did not offer to pay her money for sex. Respondent testified that he has never had any sexual contact with Ms. Garboden. Respondent produced photographs of the Shop which show that the cubicle in which he works has no door, but the forum cannot find that evidence probative of whether or not Respondent engaged in sexual acts at the Shop. Although Respondent asserted that he never had any opportunity to have a secret sexual rendezvous with Ms. Garboden, because he had to come to and leave work on time for his carpool with Ms. Thome and another employee, the forum notes that this does not foreclose the possibility of sexual activities at other times than the beginning and ending of the work day. Respondent postulated that Ms. Garboden fabricated a sexual relationship with him to enhance her standing in the eyes of Complainant and Ms. Thome. For reasons explained in Section 4 of the Opinion below, this forum finds Respondent's theory nonsense; the only possible effect of such a fabrication on the opinion of Ms. Garboden by Complainant and Ms. Thome would be to discredit Ms. Garboden in their eyes, as they were repelled by the idea

of sex for money or sex related to employment. Ms. Garboden had no apparent reason to assert a sexual relationship with Respondent which did not exist.

15) Ms. Garboden testified that she received a \$200 bonus in cash from Respondent for the sexual services she rendered him. Complainant corroborated this in part with undisputed testimony, which this forum finds as fact, that she saw Respondent hand Ms. Garboden \$200 in cash at the mid-September 1983 payday. Complainant testified that when she asked Ms. Garboden about the payment, Ms. Garboden told her that there were a lot of things Complainant did not know "that were going on." Ms. Garboden also told her the payment was a bonus.

Respondent testified that he paid Ms. Garboden \$100 or more in cash in mid-September, but he denied that it was compensation for sexual favors. Respondent had two monthly pay periods at this time, one for each half of the month. Respondent testified that he paid Ms. Garboden this cash because he had forgotten to make arrangements for Ms. Garboden to receive a paycheck for what apparently was her first pay period in his employ. Respondent testified that he asked Ms. Garboden if the amount he gave her was enough for her to live on until the next pay day and that Ms. Garboden said it would be fine. Respondent testified that he does not recall if Ms. Garboden paid him back the cash or if it was deducted from her subsequent check, but he stated he knew that Ms. Garboden did not receive a full paycheck for the second

half of September 1983. Complainant testified that Ms. Garboden did.

To corroborate his testimony concerning his cash payment to Ms. Garboden, Respondent produced an exhibit, which he asserted is a copy of Ms. Garboden's "comp card," Respondent's pay record for her 1983 employment. The notations on this exhibit indicate, and this forum finds, that Ms. Garboden's gross pay was \$700 per month, and Respondent's sole wage payment to her was for gross wages of \$595 on "9-30-84." Although the "comp cards" for Respondent's other employees on the record all state the number of the paycheck for each wage payment notes, this exhibit does not note any such check number. Respondent testified that he believed that the difference between the \$700 he believed Ms. Garboden earned and the \$595 gross pay she received was his mid-September cash payment to her. The forum notes, however, that there is no indication of that in the logical places on the exhibit, the deduction columns marked "Draw" and "Other," both of which contain entries on other comp cards in evidence. In fact, on this exhibit those columns contain handwritten dashes, affirmatively indicating no draws or miscellaneous deductions from Ms. Garboden's gross pay. Together, these discrepancies impeach Respondent's contention that it is a contemporaneously kept payroll record and, along with Complainant's and Ms. Garboden's testimony as to what the cash payment Respondent made to Ms. Garboden in September

1983 was for, impeach Respondent's contention that it was in lieu of a paycheck for her wages for work as a driver. Accordingly, the forum finds that it was not.

16) According to Ms. Garboden, in mid-September 1983, she told Respondent she felt she had been doing a good job and felt "kind of" uncomfortable about her sexual encounters with him. Ms. Garboden testified that Respondent agreed that she had done a good job, told her that if he could find someone to replace her, he would not have to ask her for sexual favors, and asked if she knew anyone who might be interested. Ms. Garboden testified that up to that point she had regarded her sexual favors as a requirement of getting and keeping her job. Thereafter, Ms. Garboden believed that she had to either continue providing Respondent sex, find someone else who would, or lose her job.

17) Soon thereafter, according to Ms. Garboden, a woman named Della Drake, an unemployed lotion hostess looking for a "reputable" job, applied for work with Respondent. Ms. Garboden testified that immediately after Ms. Drake's interview with Respondent, Ms. Drake called Ms. Garboden and, outraged, told her that Respondent has offered her a bonus for sexual favors. Based on this forum's assessment of Ms. Garboden's credibility in Finding of Fact 28 below and the absence of any contradictory evidence, the forum believes that Ms. Drake made this statement to Ms. Garboden. However, as Ms. Drake was not available to testify

* Although Respondent testified that this entry is dated "9-30-84," the entry quite clearly notes the year as "83," as the Presiding Officer pointed out at hearing.

and there is no direct evidence concerning her alleged encounter with Respondent, and because it is not necessary to the findings and conclusions herein, this forum makes no finding as to whether Respondent made this offer to Ms. Drake or not.

18) Also soon after the conversation described in Finding of Fact 16, above, Ruth started working for Respondent. During 1981 and 1982, Ms. Garboden had met and known Ruth through "lotion studios" at which they both worked, and they recognized each other right after Ruth started working for Respondent. Ruth told Ms. Garboden that Respondent was giving her a \$200 bonus and asked Ms. Garboden if she was getting one too. Ruth then went off to work with Ms. Thome. Ms. Garboden, who had "built a rapport" with Ms. Thome and Complainant, feared that Ruth would reveal to Ms. Thome the nature of Ruth's and Ms. Garboden's "disreputable" employment background. In order to buffer the shock she feared that Complainant and Ms. Thome would suffer at this revelation, Ms. Garboden told Complainant a bit about her past. Ruth told Ms. Thome about Respondent's alleged sexual arrangements with Ruth and Ms. Garboden, and this upset Ms. Thome very much.

19) Soon thereafter, on September 28, 1983, Ms. Garboden went to lunch with Complainant and Ms. Thome and told them that Respondent was paying her to engage in sexual acts with him whenever he wished and that she was doing this, unwillingly, because she feared losing her job if she did not. Ms. Garboden told them that she had told Respondent she did not want to give

him sexual favors anymore, and that Respondent indicated to her that she would have to find someone who would, and if she did not, she would easily be replaced as a driver. Ms. Garboden went on to tell Ms. Thome and Complainant that Respondent had later asked her to take Complainant out, have a few drinks, and see if Complainant would be interested in having a sexual affair with him. Ms. Garboden told Complainant that Ms. Garboden would be paid a \$500 bonus for doing this, and Complainant would receive a large bonus if she agreed; if she did not, "that would be fine." Ms. Garboden also told them that Respondent would fire Ms. Garboden if he learned that Complainant and Thome knew about Ms. Garboden's sexual arrangements with him. Ms. Garboden testified that all the statements described in this paragraph which she made to Complainant and Ms. Thome were true.

Respondent denied directing or telling Ms. Garboden that she should find someone else with whom he could have sex, and he denied asking her to approach or proposition Complainant for him or offering her money to do that. Respondent testified that Ms. Garboden once told him that she had run into a former lotion studio client while working with Complainant, that she had been flustered and that, afraid of what the client was going to say, she quickly had introduced Complainant to him. Respondent testified when Ms. Garboden told him this, he replied "Well I bet old John would give \$500 for a program with her." Respondent asserted that this was just a "smart" remark comparing Ms. Garboden to

Complainant, and was not intended as a proposition for Complainant. Respondent testified, however, that this "off color" remark was the only thing Respondent had said to Ms. Garboden that could explain what Ms. Garboden told Complainant; it was the only time he ever mentioned \$500 to her about anything.

20) Because Ruth had told Ms. Thome that Respondent had offered her money for sexual favors; because Complainant had seen Respondent give Ms. Garboden the \$200 cash payment; because what Ms. Garboden told her dovetailed with things Complainant had heard about Respondent and with his sexual approach to Complainant and her co-workers, and because she could not imagine why Ms. Garboden would lie, Complainant believed Ms. Garboden's assertions. Complainant was amazed, shocked, angry, and upset by the statements, and felt "violated" and "demeaned." Ms. Garboden had indicated that Respondent knew she was going to tell Complainant of this proposition at lunch, and Complainant was very nervous and frightened and did not want to return to work to face him.

When Complainant reluctantly returned to work after the lunch, Respondent informed her that he had changed her usual work plan so that she would work with him the rest of the day. This had never happened before.

21) Thereafter that afternoon, when Complainant and Respondent were driving alone to a dealership, they passed a lotion studio. According to Complainant, Respondent said something to the effect that the "girls" who worked in "massage parlors really

have their shit together, and they make a lot of money." According to Complainant, Respondent told her about someone close to him who worked in "places like that." Complainant testified that she looked out the window and did not say anything, but she was "scared to death."

Complainant testified that later that afternoon, when she and Respondent were returning alone to the Shop, Respondent asked if she wanted to take a break and go into a lotion studio. Complainant testified that she said no, she had a lot of work to do. Complainant testified that she was extremely frightened and ready to jump out of the vehicle.

22) Respondent denied making a remark like "Girls who work in massage parlors really have their shit together" or any other statement which Complainant could have misinterpreted or taken out of context that afternoon. Respondent denied saying something like "Let's go down to the French Quarter or the Maui Club" (two local lotion studios) or any comment Complainant could have interpreted to mean that, stating that he thought a studio client could not bring his "own." Respondent denied ever propositioning Complainant. Respondent stated that he talked to Complainant about a lotion studio because he had just found out that the wife of one of his employees had worked at her son's lotion studio as a bookkeeper, and he mentioned to Complainant how funny it would be for someone to walk in to that establishment and find that women, who looked like the perfect grandmother. Complainant recalled Respondent saying parts of this.

Based on the forum's assessment of the credibility of Respondent and Ms. Garboden in Finding of Fact 28 below, the forum accepts Complainant's assertions in Finding of Fact 21 as fact and disbelieves those of Respondent, where they contradict Complainant.

23) Respondent's remarks at hearing concerning lotion studios evidenced his familiarity with their practices and terminology during times material herein.

24) Before Complainant's lunch time conversation with Ms. Garboden on September 28, 1983, Respondent's conduct and statements of a sexual nature directed toward Complainant probably interfered with her work performance to some extent, although, as she stated, she could continue to perform her duties "fine", in that they made her nervous when she had to work with Respondent. However, Complainant did not have to "deal" with Respondent's sexual conduct and statements "that much," so she just put them out of her mind and dealt with them only when they occurred. Complainant would not have said the sexual harassment to which she was subjected before the lunch was severe, other than the time Respondent put his arm around her, and Complainant had never thought of resigning before then.

25) After Ms. Garboden's revelations on September 28, 1983, however, it quickly became impossible for Complainant to continue her employment with Respondent. His proposition to Ms. Garboden and his treatment of Complainant after Ms. Garboden conveyed it to Complainant, against

the background of Respondent's previous sexual conduct toward Complainant and her co-workers, made employment by Respondent intolerable to Complainant. Because of his proposition, the fact that Respondent had contrived to be alone with Complainant immediately after it was conveyed to her and the clearly suggestive meaning of Respondent's remarks to her during the time alone, Complainant viewed those remarks as leading questions and comments through which Respondent was trying to ascertain whether Ms. Garboden had conveyed his proposition to Complainant, and whether Complainant was amenable to it. Respondent's proposition, verbal sexual innuendoes, and other above-described conduct to Complainant on September 28 represented an escalation in both degree and frequency of his previous sexual conduct and his sexual pressure toward Complainant. Complainant had no reason to assume that this conduct would stop, and every indication that it would continue to worsen. She was terrified of what Respondent might do or say to her next. Complainant felt shocked, disbelieving, worried, very angry, "demeaned," and "violated." She feared that she was to be Respondent's next sexual "victim."

26) After finishing work on that day, Complainant did not ever return to work at the Shop. Because of Respondent's sexual conduct toward her, she was not able to sleep at all between September 28, 1983, and the time her resignation was submitted on the evening of September 30, 1983. Ms. Thome and Ms. Garboden also felt, after the lunch time conversation

on September 28, 1983, that they could not work for Respondent any longer because of his sexual conduct toward them. Accordingly, Complainant, Ms. Thome and Ms. Garboden resigned together, effective Saturday, October 1, 1983.

27) Although Complainant labeled herself "very assertive," she never said anything to Respondent about the above-described sexual comments and actions, because Respondent "scared" her.

28) Because of the forum's assessment of Ms. Thome's credibility in Section 4 of the Opinion below, which is incorporated by this reference into this Finding, the forum has believed Ms. Thome's assertions of Respondent's sexual conduct toward her.

The Presiding Officer found Ms. Garboden to be an earnest, articulate, and credible witness at hearing. Some of her assertions were absolutely denied by Respondent, and the forum has resolved the differences in their testimony in the manner, and with the effects, described in Section 4 of the Opinion below, which is incorporated herein by reference. As explained in that Section, this forum has found that Respondent had impeached his credibility herein and that Ms. Garboden was a credible witness. This forum has decided accordingly to believe Ms. Garboden's testimony where it differs with that of Respondent in respects material herein, unless noted otherwise.

As explained in Section 2 of the Opinion below, which has been incorporated herein by reference, the forum has found Complainant to be a credible witness. In light of the above-

mentioned impeachment of Respondent's credibility and the forum's determination of Complainant's credibility, the forum has given more weight to her testimony than his, where they differ.

29) Complainant's rate of pay during her employment as Respondent's sales representative was \$700 per month. She was to be paid at that rate for her first 90 days, or three months, of employment; thereafter, she was to be paid \$600 per month plus one percent of the business generated by Respondent's sales representatives.

30) Complainant enjoyed her job with Respondent and performed it satisfactorily.

31) Respondent testified that if Complainant had remained employed at his business, she would have been compensated on the bases, and at the rates, recited in Finding of Fact 29 above. He estimated that given his seasonal fluctuations in business volume, she would have earned about \$800 per month from March through September, and about \$700 per month during the other months between her resignation and the time of hearing. Records Respondent submitted of the actual earnings of the Shop's sales representatives since Complainant's resignation show that in fact, the only sales representative who had been employed long enough to earn commissions earned \$900 per month in 1983. In 1984, the same sales representative continued earning \$900 per month, and sales representatives hired after Complainant resigned earned \$800 per month. The forum finds these records more precise than Respondent's ad hoc estimates at hearing. Accordingly, the forum finds that

had Complainant continued in Respondent's employ, she would have earned \$900 per month in 1983 and 1984, as did the sales representative most equivalent to Complainant in experience. From these gross earnings, Respondent would have made deductions for state and federal taxes, federal social security, and worker's compensation, as required by law.

32) Complainant was unemployed from the time of her resignation from Respondent until about March 3, 1984. During the period from March 3 until March 29, 1984, she worked part-time as a cashier, earning a total of \$478.00 at the rate of \$4.00 per hour; part-time as a waitress, earning \$219.25 at the rate of \$3.35 per hour plus tips; and, for one day she earned \$32.00 at the rate of \$4.00 per hour. Complainant obtained full-time employment, in Portland, Oregon, on about March 29, 1984, and from then until about June 15, 1984, she worked as a receptionist, earning \$2160.00 at the rate of \$780.00 per month. Thereafter, in July 1984, Complainant worked part-time at a Portland restaurant, earning \$341.72 at the rate of \$3.10 per hour. She left that job to start work at R B Industries, Inc. on or about August 3, 1984.

33) There is no indication that R B Industries, Inc. hired Complainant on anything but a permanent basis. She worked there full time, in sales, continuously for over 5½ months, until approximately January 15, 1985. She was paid a gross salary of \$230.80 per week (i.e., \$1000 per month). At some point, her pay rate apparently became \$1000 per month or a percentage of sales commission, whichever was higher. She was terminated for failure

to make sufficient sales to earn a commission.

34) During her periods of unemployment between her resignation from Respondent's employ and the start of her work for R B Industries, Inc., Complainant received unemployment compensation and made diligent efforts to find work. She was willing to do any kind of work, and she did not decline any offers of employment. She searched for work constantly, in the Salem and Portland areas, through the Oregon Employment Division, private employment agencies, and newspaper advertisements. She was hampered by the fact that she did not dare use Respondent as a reference. She continued seeking full-time work while employed part-time, and she relocated to Portland to obtain full-time work.

35) Complainant endured severe monetary pressure while unemployed after she left Respondent's employ. She had to move back into her parents' home and almost had her car repossessed. She found it demeaning to tell her parents why she had resigned. Since she left Respondent's employ, Complainant has feared being alone at work with men, and particularly meeting alone with male supervisors. When she has had to do this, she has suffered and still suffers vivid flashbacks to the events of September 28, 1983, and her encounters with Respondent.

36) The Agency has interpreted ORS 659.030(1) to include sexual harassment, and has defined sexual harassment as unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature, the acceptance of

which is explicitly or implicitly a term or condition of employment, or has the effect of creating an intimidating, hostile, or offensive work atmosphere.

ULTIMATE FINDINGS OF FACT

1) During all times material herein, Respondent did business as Tim's Top Shop, an upholstery business which employed one or more employees in the State of Oregon.

2) Respondent employed Complainant, a female individual, as a sales representative for the Tim's Top Shop in Salem, Oregon (the Shop), from about August 8, 1983, until October 1, 1983.

3) During Complainant's employment, Respondent's verbal interactions with his female Shop employees were rife with comments and jokes with sexual innuendo, and Respondent often directed "off color," sexual remarks to Complainant, particularly when they were alone. The comments included references to sexual activities between Respondent and the worker to whom they were directed, to other sexual activities of that worker, and to the sexuality of the worker. The sexual implications of the language of these remarks were unmistakable to Complainant and her fellow sales representatives at the Shop. Neither Complainant nor those colleagues liked or wanted to be the objects of these remarks or found them amusing, and each but Complainant told Respondent so. Complainant knew that her female co-workers were bothered by Respondent's sexual remarks.

4) During her employment by Respondent, after Complainant had failed to respond to one of his sexual

remarks, Respondent patted her leg, telling her "not to worry about it." He also put his arm around Complainant on at least two occasions. Complainant did not like or want these physical contacts by Respondent.

5) Respondent's sexual remarks to and/or touches of Complainant occurred each of the seven or eight times she was alone with him during her employment. Complainant felt a lot of nervous stress when she had to work alone with Respondent because she was afraid he would make a sexual comment and she did not know what to say in response. Complainant ignored Respondent's sexual remarks and physical contacts and did not tell him they bothered her.

6) Although Complainant may not have known about it, Respondent rubbed the leg of at least one female employee and put his arm around female employees other than Complainant during her employment.

7) While Complainant, Ms. Garboden, and Ms. Thome were credible witnesses, Respondent's credibility has been significantly impeached by his assertion that he had no sexual relationship with Ms. Garboden during times material, which this forum does not believe. (See Section 4 of the Opinion below, which is incorporated by reference into these Ultimate Findings to avoid unnecessary repetition.) Accordingly, where the testimony of Respondent has contradicted that of Ms. Garboden, Ms. Thome, or Complainant, this forum has given greater weight to the testimony of the latter witnesses, unless the forum has noted otherwise.

8) Based on the credibility findings enunciated and explained in the previous Ultimate Finding, Finding of Fact 28 above, and Section 4 of the Opinion below, this forum makes the following ultimate findings concerning Respondent and Ms. Garboden, one of Complainant's co-workers at the Shop. On or before September 28, 1983, Respondent asked Ms. Garboden to take Complainant out for a few drinks and ask her if she would be interested in having a sexual affair with Respondent, for which he would compensate her over and above what he paid her for her sales representative work. Respondent indicated to Ms. Garboden that this was a way Ms. Garboden could earn a bonus and extricate herself from a similar sexual arrangement she had with Respondent without losing her job.

9) Ms. Garboden conveyed this proposition to Complainant, stating that it "would be fine" if she did not accept it. Ms. Garboden explained to Complainant that Respondent had coerced her into having sexual relations with him three or four times since her job interview, so that she could get and keep her job. Ms. Garboden explained to Complainant that Respondent knew that in the past Ms. Garboden had worked in establishments which provided services of a sexual nature to male customers. Ms. Garboden also told Complainant that Respondent had hired Ruth to perform sexual favors as well as drive vehicles.

Complainant was shocked, horrified, and angered by Respondent's proposition and frightened by the fact that Respondent knew that Ms. Gar-

boden was going to convey it to her that day.

10) When Complainant reluctantly returned to work at after lunch on September 28, 1983, after learning of Respondent's proposition, Respondent changed her work plan so that she would work with him the rest of the day. Thereafter, he and Complainant drove to a client's place of business. The forum makes the following ultimate findings based on its assessment of the credibility of Respondent and of Complainant made in Ultimate Finding 7 and Finding of Fact 28 above and Sections 2 and 4 of the Opinion below. En route, when Respondent and Complainant drove past a lotion studio, a business providing services of a sexual nature to its customers, Respondent talked to Complainant about the advantages of working in such an establishment. When they were returning alone to the Shop thereafter, and they again passed a lotion studio, Respondent asked Complainant if she wanted to go into a lotion studio with him. Complainant declined. Because of Respondent's proposition, because of the timing of Respondent's contriving to be alone with her, and because of the clearly suggestive nature of his sexual remarks to her that afternoon, Complainant perceived them as Respondent's attempts to ascertain whether or not Complainant was interested in agreeing to the proposition he had asked Ms. Garboden to convey. Complainant felt very frightened by Respondent's overt pressure on her to engage in acts of a sexual nature with him.

Respondent's proposition and his behavior thereafter toward

Complainant, against the background of his making sexual remarks to her whenever they were alone (and to her co-workers) and his feeling free to pat her leg and put his arm around her, made it impossible for Complainant to continue working for him. She had no reason to think that his sexual advances would stop, and she feared they would continue worsening. Respondent had subjected Complainant to unwelcome sexual conduct, because of her sex, which had affected the terms and conditions of her employment by creating a hostile, offensive, and intimidating work environment which Complainant could not tolerate. Accordingly, Complainant did not return to work after September 28, 1983, and resigned effective October 1, 1983.

11) Complainant acted with reasonable diligence to mitigate her back pay damages herein, by seeking and accepting available and similar employment. On or about August 1, 1984, she obtained permanent, full-time work in the same area of endeavor as her work in Respondent's employ, sales, which paid her more per month than she would have, or what she had, earned working for Respondent. This work, therefore, was substantially equivalent to her work with Respondent. Between her termination at Respondent on October 1, 1983, and the start of her substantially equivalent job on about August 1, 1984, Complainant earned no compensation in 1983 and a total of \$3230.97 in 1984. Had she continued working for Respondent, she would have earned \$700 in October 1983, and \$900 per month thereafter until

August 1, 1984, or a total of \$2500 in 1983 and \$6300.00 in 1984. From this compensation, Respondent would have deducted withholding for state and federal income taxes, federal social security, and worker's compensation insurance, as required by law.

12) As a result of Respondent's sexual harassment of her, Complainant suffered severe mental anguish from lunch time and thereafter during September 28, 1983, and for two days thereafter until she resigned. Since October 1, 1983, she has experienced fear and painful flashbacks to the events of September 28, 1983, at the prospect of being alone with a male at work, as a result of Respondent's sexual harassment.

CONCLUSIONS OF LAW

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

2) The Commissioner of the Bureau of Labor and Industries of the State of Oregon has jurisdiction over the persons and of the subject matter, related to the violation of ORS 659.030 herein.

3) Both before and at the commencement of the contested case hearing, Respondent was informed of the matters described in ORS 183.413.

4) Although OAR 839-07-550 was not in effect during times material herein, it does reflect Agency policy during times material herein.

5) By the totality of Respondent's deliberate actions of (a) subjecting Complainant to unwelcome remarks of a sexual nature and unwelcome physical touching, as well as subjecting her

female co-workers at the Shop to the same type of remarks and touching, during Complainant's employment up to September 28, 1983; (b) making, through Ms. Garboden, an unwelcome proposition that Complainant have a sexual affair with Respondent for compensation; and (c) subjecting Complainant to unwelcome remarks of a clearly sexually suggestive nature immediately thereafter, during a time he had directed Complainant to be alone with him, and thereby subjecting her to unwelcome pressure to assent to his proposition, Respondent engaged in sexual harassment of Complainant. This conduct by Respondent had the effect of unreasonably interfering with Complainant's work performance and creating an intimidating, hostile, and offensive working environment for her. By this conduct, therefore, Respondent committed an unlawful employment practice in violation of ORS 659.030(1)(b), as charged, by discriminating against Complainant in the terms and conditions of her employment because of her sex.

6) Respondent's actions described in the previous Conclusion of Law, and Complainant's reasonable conclusion that such practices would continue if not worsen, made Complainant's working conditions intolerable, thereby forcing her resignation from Respondent's employ effective October 1, 1983. Respondent thereby committed an unlawful employment practice in violation of ORS 659.030(1)(a), as charged, by constructively discharging Complainant from employment because of her sex.

7) The Commissioner of the Bureau of Labor and Industries has the

power to award money damages to Complainant for her wages lost and her mental distress suffered because of Respondent's sexual harassment, and to order Respondent to cease and desist from sexually harassing similarly-situated female employees, under the facts and circumstances of this record; and the sum of money awarded, and the cease and desist mandate contained in the Order below are appropriate exercises of that authority.

OPINION

1. The Affirmative Defense of Laches

Respondent has raised the affirmative defense of laches, asserting that the length of time which elapsed between the failure of conciliation and the issuance of the Specific Charges herein constituted a delay which triggers the laches defense.

In order to establish this defense, Respondent must prove that: (A) there was an unreasonable delay by the Agency, (B) the Agency had full knowledge of facts which would have allowed it to avoid the unreasonable delay, and (C) the unreasonable delay resulted in such prejudice to Respondent that it would be inequitable to afford the relief sought by the Agency. *Clackamas Co. Fire Protection v. Bureau of Labor and Industries*, 50 Or App 337, 341-342, 624 P2d 141 (1981).

A. Unreasonable Delay

Respondent argues that the Agency failed to issue Specific Charges herein within a reasonable time after conciliation failed. However, the record does not establish when conciliation failed. Respondent stated

in motion and argument that that failure occurred on March 28, 1985, but there is no evidence to that effect. The record simply established that the Agency issued an Administrative Determination dated March 1985, an amended Administrative Determination apparently dated February 1986, and Specific Charges in June 1986. Moreover, even presuming that conciliation failed on March 28, 1985, there is no evidence whatsoever that the fifteen months which elapsed between that date and the issuance of the Specific Charges was unreasonable. Although Respondent asserts that the Agency did nothing during that period but issue a "pro forma" amended Administrative Determination, the record contains no evidence as to what else the Agency did or did not do during this period. This period could have been an entirely reasonable lapse of time, for example, for further Agency investigation, settlement negotiations, and/or Agency consultation with counsel.

B. Agency Knowledge of Facts

Although Respondent argues that the Agency had full knowledge of all relevant facts in January 1985, the record does not establish this. Although it indicates that an Agency investigator interviewed witnesses and took statements from some key witnesses in January 1985, the record does not reveal whether that information amounted to, or whether the Agency otherwise had, full knowledge of all

facts necessary to issue Specific Charges before June 1986, and if so, when.

C. Substantial Prejudice to Respondent

Finally, Respondent argues that he has been prejudiced by the lapse of time between the failure of conciliation and the issuance of the Specific Charges because of the unavailability of some witnesses and the continuing accrual of back pay liability during the delay. The forum need not deal with the latter basis, as the accrual period of its back pay award ended before the period of any alleged delay.

Although in his Post-Hearing Closing Argument Respondent stated that he was prejudiced by the unavailability of potential witnesses Pat Holland, Jennifer Jamison, and Mike Wroth, there is no evidence or argument as to how substantial any such prejudice was. Respondent has not informed the forum what the testimony of any of those witnesses would have been. In fact, the record contains no information as to who Mr. Worth is. Given the evidence on the record, this forum presumes that Mr. Holland, like his co-manager Don Wicker, would testify as to what he heard and saw in the Shop during times material and his carpooling arrangement with Respondent. The forum has already heard the testimony of three of Respondent's witnesses on the first subject, and Respondent has not told the forum

* Without explanation or any supporting evidence, Respondent's bald assertions in his Post-Hearing Closing Argument – that he was also prejudiced by "having to re-employ counsel to defend him and by having to face these charges without recourse to the limitations normally accorded actions(.) *** a denial of equal protection and due process" under the US and Oregon Constitutions – are not cognizable by this forum.

anything to indicate that Mr. Holland's testimony on it would be anything but cumulative. The forum has not disagreed with Respondent's testimony concerning the carpooling arrangement.

As Respondent has not established any, much less all, the elements of the laches defense, that defense clearly fails.

2. Complainant's Credibility

This forum found Complainant to be a credible witness, and notes that there is no evidence of any reason why she would have fabricated her allegations of sexual harassment. The forum did not find the fact that Complainant's descriptions of those allegations were often vague and indefinite, by itself, impeaching, for it is often difficult for a victim of sexual harassment to describe it explicitly. Complainant's testimony was sufficiently specific to make clear that her testimony was as it is described in the above findings.

The forum does wish to explain why it has not found that Respondent grabbed or squeezed Complainant's breast when he hugged her in the incident described in Finding of Fact 7 above.

In recounting Complainant's assertions herein, the Findings of Fact in the Agency's Administration Determination and Amended Administration Determination herein do not mention any allegation that Respondent had any contact with Complainant's breast; they state that Complainant described the physical contact in the hug at issue merely as "(Respondent) put his arm around * * * (me)." Although it is not conclusive, the forum notes that in

summarizing potential testimony and suggested areas of inquiry for the Presiding Officer, the Agency's September 12 and November 7, 1986, Summaries of this Case make no mention of Respondent's physical contact with Complainant other than his placing his hand on Complainant's leg once. These absences lead the forum to conclude that the Agency was not aware, until very recently, of any allegation by Complainant that Respondent had touched, squeezed, grabbed for or otherwise contacted her breast. In fact, that the Agency did not bring any such an allegation to the Presiding Officer's attention at any time before Complainant testified about it causes the forum to conclude that the Agency did not know about it until then.

At her November 1983 hearing for unemployment benefits, Complainant was represented by counsel, and whether Respondent had sexually harassed her was an issue. In testifying there, Complainant described the hug at issue, but she did not mention that it involved any contact with her breast.

Complainant's apparent failure to mention this contact to the Employment Division, some two months after this hug occurred, and the Agency's failure to raise this allegation has led the forum to conclude that a preponderance of the evidence herein does not establish that this contact occurred. This conclusion, however, does not damage this forum's impression of Complainant's truthfulness: Respondent himself pointed out in this testimony and Post-Hearing Closing Argument, Complainant's "vision" of this incident could have become so obscured over time that she has

(apparently inadvertently) built it up in her imagination, to involve more than it did. The forum has, however, taken this possibility into consideration in assessing other allegations by Complainant which she might have imagined, if Respondent has denied that they occurred. The only such allegation was of the "looks" which Complainant testified Respondent gave her, an allegation which in any case was too indefinite to be the basis of any finding material herein.

3. The Law: Hostile Work Environment and Constructive Discharge

Like Section 703 of Title VII (42 USC §§ 2000e to 2000e-2), its federal counterpart, ORS 659.030(1)(b) makes it an unlawful employment practice to discriminate against an individual in the terms or conditions of employment because of sex. Sexual harassment is one type of sexual discrimination in terms and conditions of employment. What conduct constitutes sexual harassment? "Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when such conduct is directed toward an individual because of that individual's gender and * * * such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." OAR 839-07-550; See *Holien v. Sears, Roebuck & Co.*, 298 Or 76, 86-90, 689 P2d 1292 (1984), and *Meritor Savings Bank v. Vinson*, 477 US 57, 40 FEP 1822 (1986).

Herein, the Specific Charges allege not only that Respondent violated ORS

659.030(1)(b) by creating a "pervasive, hostile, offensive and intimidating atmosphere," which discriminated against Complainant in terms and conditions of employment because of her sex; but that by creating this intolerable atmosphere, Respondent constructively discharged Complainant in violation of ORS 659.030(1)(a). This forum set forth the standard for constructive discharge in *In the Matter of West Coast Truck Lines, Inc.*, 2 BOLI 192 (1981), *aff'd without opinion*, *West Coast Truck Lines, Inc. v. Bureau of Labor and Industries*, 64 Or App 383, 665 P2d 882 (1983), and most recently applied it in *In the Matter of Deana Miller*, 6 BOLI 12 (1986). In *West Coast Truck Lines*, this forum stated:

"The general rule, which this forum adopts, is that if an employer deliberately makes an employee's working conditions so intolerable that the employee is forced into an involuntary resignation, then the employer has encompassed a constructive discharge * * *." (Citation omitted.) *Ibid.* at 215.

This Forum has made clear that "deliberately" does not mean that the employer's imposition of "intolerable" working conditions need be done with the intention of either forcing the employee to resign or relieving himself of that employee. The term "deliberately" refers to the imposition of the working conditions; that is, it means the working conditions were imposed by the deliberate or intentional actions of the employer. In *In the Matter of Sapp's Realty, Inc.*, 4 BOLI 232 (1985) this Forum stated:

"To find a constructive discharge, this forum must be satisfied that

'working conditions * * * so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign' caused the employee to resign, and that the conditions were imposed by the deliberate, or intentional, actions or policies of the employer. *West Coast Truck Lines, supra* at 215, citing *Alicia Rosado v. Garcia Santiago* 562 F2d 114, 119 (1st Cir 1977); *Cal-cote v. Texas Educational Foundation*, 578 F2d 95, 97-98 (5th Cir 1978); EEOC Decision 172-2062 (June 22, 1972)."

The Respondent's deliberate imposition of the working conditions, that is, subjecting the Complainant to the words and actions described above in this order, constitute a constructive discharge.

4. The Facts

This forum has found that during Complainant's employment through September 27, 1983, Respondent engaged in the following conduct directed specifically toward Complainant:

1) Respondent often made "little sexual comments" or jokes with sexual innuendoes to her. One example was the inquiry, "Why don't we go out in the field and make mad, passionate love?"

2) When complainant did not respond to the remark quoted in the previous paragraph, Respondent patted her leg and told her not to worry. Respondent also put his arm around Complainant on at least two occasions.

In addition, this forum has found that during Complainant's employment through September 27, 1983, Complainant observed the fact that

Respondent's comments to all his female Shop workers were saturated with sexual innuendo. Examples of such comments are as follows: "Did you girls have a nice evening last night?;" "Did you get what you want?;" or, when two female workers brought back one car from a dealer, "Maybe if I'd bought you short skirts, you'd bring back two cars." The forum has found that both of Respondent's other female sales representatives indicated to Complainant and Respondent that they did not like these comments. Moreover, one told Complainant that she was going to resign because of the comments.

The forum has made no finding in response to the allegations herein of Respondent's conduct toward an employee named Ruth, because Respondent has denied those allegations, and the source of them is Ruth, a person who has not provided any information to the Agency or the forum concerning those allegations.

Complainant testified in effect that the instances of conduct by Respondent toward her and her co-workers before September 28, 1983, which she considered sexual in nature did not unreasonably interfere with her work performance; although they bothered her, they occurred, as far as she knew, infrequently enough so that she could put them out of her mind and deal with them only when they occurred, when she was alone with Respondent, or she heard about them. This conduct did not make her consider resigning. For these reasons, the forum has concluded that this conduct was not sufficiently pervasive to create the intimidation, hostile, or offensive work

environment actionable under ORS 659.030(1)(b), and it did not amount to a constructive discharge of Complainant.

The question then became whether the events of September 28, as they impacted Complainant, change either of these conclusions. On or about that day, Complainant's co-worker Ms. Garboden told Complainant and Ms. Thome, in pertinent part, that she had been coerced into providing Respondent sexual favors for remuneration during her employment; that another co-worker, Ruth, had done the same; and that because Ms. Garboden did not want to continue to provide him favors, Respondent had asked her to take Complainant out for a few drinks and ascertain whether Complainant would be interested in providing him sexual favors for money. Because Ms. Garboden's story made sense to Complainant and Ms. Thome, in light of all they knew and had heard about Respondent, they believed it. Knowing that Respondent knew that Ms. Garboden put forth his proposition to Complainant at lunch on September 28, Complainant was terrified when, on her return to work after that lunch, Respondent changed her work plan so that she would work with him the rest of the day. That afternoon, when Respondent and Complainant were alone and driving past a lotion studio, Respondent allegedly talked about the advantages of working in such a business, and, later, asked Complainant if she wanted to take a break and go into a lotion studio. Because Complainant viewed these comments as attempts by Respondent to ascertain whether Complainant agreed to his proposition,

and because his escalating sexual pressure indicated to her that his sexual harassment of her would continue and worsen, Complainant found her work environment intolerable and resigned her employment.

The forum believes that Complainant believed Ms. Garboden's assertions; even Respondent does not argue otherwise. However, those assertions cannot be bases for a finding of sexual harassment through creation of an offensive work environment if they are not true. To phrase it differently, Respondent is responsible for the words or actions of an employee against a co-worker where he knew or should have known of the conduct.

Whether they are true turns, but is not entirely reliant upon, the forum's assessment of credibility of Ms. Garboden (the sole direct source of evidence supporting the allegation that Respondent had her proposition Complainant) and Respondent (who denies that allegation). The forum has painstakingly analyzed both the record and the Presiding Officer's impressions of Ms. Garboden and Respondent at hearing to make that assessment.

The forum has found, and Respondent did not deny, that Respondent had sexual relations with Ms. Garboden's roommate during or just before times material herein. Respondent has not denied being a client of lotion studios just before times material herein, a fact corroborated by the familiarity with lotion studio practices and terminology which Respondent used in his testimony. Accordingly, this forum finds that Respondent was willing to indulge in sexual activities outside his marriage just

before times material herein. He made sexually suggestive remarks to his employees and touched them during times material. Nothing about Respondent's character or behavior, therefore, clearly belies an assertion of his sexual relationship with Ms. Garboden.

Respondent's testimony as to his sexual conduct toward his female employees contradicted not only that of Complainant in some parts pertinent herein, it also contradicts that of Debra Thorne, a witness with no apparent interest in fabricating her testimony. Ms. Thorne had no reason to terminate her employment with Respondent, as she did on September 30, 1983, and every reason to continue it, aside from the sexual advances by Respondent to which Ms. Thorne testified herein and which Respondent denied in part. Respondent implies that Ms. Thorne was unduly influenced by the false allegations Ruth and Ms. Garboden made to her about Respondent's sexual conduct. However, this forum has not found Ruth's allegations to be false (or true; see above in this Section). This forum has found the allegations of Ms. Garboden to be true. Moreover, even if Ms. Thorne had been influenced by false assertions of Respondent's sexual activities with others, that would not have caused Ms. Thorne to imagine or fabricate the sexual conduct toward her to which she attested herein. Therefore, as noted below, the forum has found Ms. Thorne credible and her allegations as to Respondent's conduct toward her, described in Finding of Fact 10 above, true.

Ms. Garboden and Ruth were veteran lotion studio hostesses, and Ms. Garboden also has worked as a

stripteaser. Respondent knew this. Accordingly, it is entirely possible that Respondent perceived them as amenable to providing sexual services for remuneration in a way he would have had no reason to perceive Complainant. Therefore, if Respondent did seek and obtain Ms. Garboden's sexual services, that by itself is not very probative of the assertion that Respondent sought Complainant's sexual services. However, if Respondent did seek and obtain Ms. Garboden's sexual favors, Respondent's credibility before this forum is highly compromised, as he has repeatedly denied that to this forum.

Ms. Garboden asserts that she accepted remuneration from Respondent for her unwilling sexual favors for him. The forum has concluded that she accepted at least one cash payment from Respondent which was not compensation for her work as a driver for him. Both Ms. Garboden's testimony and manner, as well as Respondent's testimony, establish that Ms. Garboden was impressed with Complainant and Ms. Thorne, and very concerned that they like and respect her; she wanted to leave her background behind her and be a "nice girl" (in Respondent's words) like them. Even if she feared that Ruth would reveal her employment background to Ms. Thorne and Complainant, this forum finds absolutely no plausible explanation for why Ms. Garboden would fabricate her assertions to Complainant and Ms. Thorne that she provided sexual favors to Respondent and that he asked her to approach Complainant for him.

When the forum asked Respondent why Ms. Garboden would say

she had sexual relations with Respondent if she had not, Respondent offered the following hypothesis. He stated that when she worked for him, Ms. Garboden liked being around "nice girls" like Complainant and Ms. Thorne and being part of their group; it was a new experience for her. Respondent testified that Ms. Garboden followed them around "like a little puppy;" and she would have done anything they asked to be part of their group or conversation. Respondent postulated that Ms. Garboden "wanted to keep it interesting;" that maybe she had to talk about him, because someone else had talked about him, to be part of the group. When asked why Ms. Garboden would claim that he had offered her money for sex if he had not, Respondent speculated that there was "some carryover" from her former way of earning a living. When asked if there was any way Ms. Garboden could have thought Respondent asked her to approach Complainant, Respondent said that Ms. Garboden is "hyper; she's active, she gets bouncing around and talking without thinking * * *."

However, even though Respondent's assessment of Ms. Garboden's feelings toward Complainant and Ms. Thorne is accurate, his hypothesis makes no sense; this forum has found that asserting to Complainant and Ms. Thorne that she had a sexual relationship with Respondent would only defeat Ms. Garboden's desire to be accepted by Complainant and Ms. Thorne. The only possible effect of those allegations on Ms. Thorne and Complainant would be to discredit Ms. Garboden (as well as Respondent, if they believed her) in their eyes. If Ms.

Garboden felt animus toward Respondent, there is no evidence that it was strong enough to cause her to discredit herself and sacrifice her new friendships with Ms. Thorne and Complainant just to diminish Respondent before them. Ms. Garboden admitted that she described some of her past to Ms. Thorne to buffer Ms. Thorne's reaction if Ruth revealed it to Ms. Thorne, but this forum can postulate no reason why Ms. Garboden would have asserted that she had a sexual relationship with Respondent if she did not. Even Respondent admitted that Complainant and Ms. Thorne were repelled by the ideas of sex for hire, and disdained sexual remarks, much less sexual contact, related to work. Respondent's assertion that Ms. Garboden made them believe that she had been forced into her sexual activities with Respondent in order to gain "prestige and a sort of off-beat glamour in the other women's eyes" not only appears to be Respondent's wishful thinking, it makes no conceivable sense unless Respondent and Ms. Garboden had engaged in sexual activities in the first place. For all those reasons, this forum finds that Ms. Garboden had no apparent reason to maintain she had a sexual relationship with Respondent if she did not and, therefore, believes Ms. Garboden's assertion that they did. This finding impeaches Respondent, who testified repeatedly and specifically that they did not, and substantiates the forum's impression of Ms. Garboden's credibility.

There is no discernible motive for Ms. Garboden to assert that Respondent asked her to proposition Complainant for him unless he did. Ms.

Garboden was not trying to salvage her standing by putting Complainant in the same position she was asserting she had been in, for Ms. Garboden did not maintain to Complainant that she had to accept Respondent's proposition if she wanted to continue working for him. Once again, Ms. Garboden's testimony concerning what Respondent said about propositioning Complainant is more plausible than that of Respondent; it makes more sense. Because of the above-described impeachment of Respondent; Ms. Garboden's apparent credibility; the greater plausibility of her testimony on this point than Respondent's; and Respondent's other sexual activities, including his sexual remarks and other conduct to Complainant and Ms. Thome, this forum has found that Respondent did ask Ms. Garboden to proposition Complainant for him in the manner Ms. Garboden asserts. Because of that finding, the forum has further found that Respondent did make the remarks to Complainant on the afternoon of September 28 which are described in Finding of Fact 21 above.

Given these findings, it is clear to the forum that as of the end of her workday on September 28, 1983, the totality of the harassment to which Complainant had been subjected, and the harassment which she knew her co-workers and suffered, had created an intimidating, hostile, and offensive working environment for Complainant, because of her sex. As set forth in the Agency's policy clarification, whether such "conduct is unwelcome or unwanted is determined by the recipient, not the actor." The facts herein indicate that Complainant has in fact

determined Respondent's conduct to be unwanted and unwelcome. Respondent's verbal and physical sexual harassment, which peaked on September 28 through his proposition and his subsequent suggestions to Complainant, was not "too isolated and discrete to amount to a pattern of harassment;" it occurred whenever Complainant was alone with Respondent. Its duration and intensity was not "slight" (Respondent's words) or abating; both aspects of it were worsening. Complainant's psychological well being was affected seriously by the severe sexual harassment to which she had been subjected by the time she left work on September 28, 1983. In fact, it not only unreasonably interfered with Complainant's work performance on September 28, 1983, and created an intimidating, offensive, and hostile working environment, it made her continued employment with Respondent impossible, and she never returned to work after September 28, 1983. The fact that Respondent may not have intended that Complainant resign is not relevant because the intolerable conditions were imposed by the deliberate actions of Respondent. Consequently, this forum has concluded not only that Respondent discriminated against Complainant because of her sex in the terms and conditions of her employment, but that he constructively discharged her, as of her resignation, because of her sex.

5. Back Pay Damages

In employment discrimination cases, the victim's damages in the form of lost wages cease to accrue when the victim either finds, or refuses an offer of, a substantially equivalent

job. See *Ford Motor Co. v. EEOC*, 458 US 219, 236, 102 S.Ct 3057, 73 LEd2d 721 (1982). Complainant's sales job at R B Industries, Inc. was, like her job with Respondent, a full-time sales job. In the absence of any evidence to the contrary, and given the duration of her employment there, this forum has found that she was hired on a permanent basis. Complainant earned \$100 per month more with R B Industries, Inc. than she would have with Respondent. For those reasons, and because there was no evidence or assertion to the contrary, this forum has found Complainant's job at R B Industries, Inc. substantially equivalent to her job at Respondent. Accordingly, when Complainant obtained her job at R B Industries, Inc., on about August 1, 1984, the accrual of her back pay award herein stopped. Between October 1, 1983, and August 1, 1984, Complainant earned \$3230.97, and in Respondent's employ during that period, she would have earned \$8800.00. Her loss of pay because of Respondent's unlawful employment practices, therefore, equaled \$5569.03.

6. Mental Suffering Damages

The forum has awarded Complainant \$4000 to help compensate for the severe shock, demeanment, anger, and very immediate fear she suffered from the time of her lunch on September 28, 1983, throughout the rest of her workday; for the shock, anger, fear, and violation she felt for two days thereafter, until she finally decided to resign; for the fear of being alone with a man at work, which she has suffered since then and continues to suffer; and for the flashbacks to the events and emotions of September 28, 1983, she

has suffered when faced with the immediate prospect of being alone with a male supervisor at work. The forum has concluded, from Complainant's own testimony, that she did not suffer compensable mental anguish due to Respondent's sexual harassment until the events of September 28, 1983, cast his sexual actions and comments to her in a completely threatening light.

ORDER

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

1) Deliver to the Hearings Unit of the Portland office of the Bureau of Labor and Industries a certified check payable to the Bureau of Labor and Industries in trust for Cheryl L. Scott in the amount of Nine Thousand Five Hundred Sixty-Nine Dollars and Three Cents (\$9569.03) minus lawful deductions for taxes, social security and worker's compensation, and plus interest upon \$5569.03 thereof (minus the latter deductions), compounded and computed annually at the annual rate of nine percent from the dates the appropriate portions thereof would have been paid but for Respondent's unlawful practices until the date paid. This award represents \$5569.03 in damages for wages lost due to Respondent's unlawful employment practices and \$4000 in damages for the mental distress Complainant suffered as a result of those unlawful practices.

2) Cease and desist from discriminating against any similarly situated

current or future employee because of the employee's sex.

**In the Matter of
JACK P. MONGEON,
dba Galerie Mongeon or Galerie
Mongeon, Respondent.**

Case Number 24-86
Final Order of the Commissioner
Mary Wendy Roberts
Issued April 17, 1987.

SYNOPSIS

Finding that Respondent employer did not appear at hearing despite at least seven written notices of the time and place for hearing directed to him, the Commissioner ruled that Respondent's unilateral mistake of marking the wrong date for the hearing on his calendar was not an excusable mistake or circumstance beyond his control, and confirmed the Hearings Referee's finding of default. Finding that the Agency presented a prima facie case of Respondent's willful failure to pay Claimant all wages due within 48 hours of his resignation, the Commissioner ordered Respondent to pay Claimant \$1,265 in earned, unpaid, due, and payable wages, plus penalty wages of \$630 and interest. ORS 183.415(5) and (6); 652.140(2); 652.150; 653.045; OAR 839-30-075(2); 839-30-185; 839-30-190.

The above-entitled contested case came on regularly for hearing before Douglas A. McKean, designated as Hearings Referee by Mary Roberts, Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was conducted on March 12, 1987, in Room 411 of the State Office Building, 1400 S.W. Fifth Avenue, Portland, Oregon. The Hearings Referee called the following as witnesses for the Bureau of Labor and Industries (hereinafter the Agency): Lee Bercot, Program Coordinator for the Wage and Hour Division (WHD) of the Agency; Merle Erickson, Compliance Specialist for WHD; Claimant Richard M. Gardner; Shirley Roggen; and Inez McPherson. Employer Jack P. Mongeon, after being duly notified of the time and place of this hearing, failed to appear.

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

**RULING ON REQUEST FOR RELIEF
FROM DEFAULT**

On March 23, 1987, the Hearings Referee had two telephone contacts with Employer. He requested information regarding how to obtain relief from default. Hearings Referee read to Employer OAR 839-30-190 - Relief from Default, and emphasized that Employer's written request had to be submitted no later than 5 p.m. on March 23, 1987. The rule requires such requests be submitted within ten (10)

days. In this case, the tenth day fell on a Sunday, and therefore Employer was allowed to submit his request on the next business day, Monday, March 23, 1987.

Employer's written request for relief was received on March 23, 1987. For only the purpose of ruling on this request, the hearing record was reopened to admit documents related to the request. Employer's request was admitted.

In his letter request, Employer stated that he "was not aware that the hearing was on March 12." He believed it was scheduled for March 13, 1987, and so marked it on his appointment calendar. The reasons for the erroneous date of March 13, according to Employer, were (1) his receipt of an incorrect notice of hearing, (2) he was apparently misinformed by a "Hearings Unit person" of the hearing date, and (3) he never received a correct notice. Employer acknowledges receiving two copies of a Summary of the Case from the Agency.

On March 24, 1987, Hearings Referee notified WHD of the request, and asked for a statement, with supporting documents, of Agency's position.

On March 26, 1987, Agency submitted its position, supported by four attachments. Agency records reveal that a correct Notice of Hearing showing a hearing date of March 12, 1987, was mailed to Employer at two addresses on February 10, 1987. One of the two addresses was exactly the same address showing on Employer's answer, dated January 6, 1987, and on a letter from Employer dated February 12, 1987.

Employer's letter referred to above, dated February 12, 1987, states "I understand that we have a hearing of March 12, 1987, I will be there."

The Summary of the Case, which Employer acknowledges receiving two copies of, included a copy of the Notice of Hearing.

Additionally, the Agency sent a letter dated February 27, 1987, to Employer in which an additional copy of the Notice of Hearing was enclosed. This letter was sent to two addresses for Employer, including the business address listed on Employer's letterhead used on his answer and his February 12, 1987 letter.

The facts set forth in the previous four paragraphs completely rebut Employer's assertion that he "was not aware that the hearing was on March 12." He was provided with notice of the correct hearing date at least seven times by the Agency. Even assuming some lost mail, Employer's own letter of February 12, 1987, rebuts his assertion.

If Employer wrote down the hearing date on the wrong day of his appointment calendar, that mistake shows a simple failure to exercise due care. Unilateral carelessness does not constitute excusable mistake or a circumstance beyond Employer's control.

Accordingly, Employer's request for relief from default is denied.

**FINDINGS OF FACT -
PROCEDURAL**

1) A wage claim was filed with the Agency on March 25, 1986, by Richard Martin Gardner. It alleged that he had been an employee of Employer

and that Employer had failed to pay wages earned and due to Claimant.

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

3) On December 17, 1986, the Commissioner of the Bureau of Labor and Industries served on Employer an Order of Determination based upon the wage claim filed by Claimant and the Agency's investigation. The Order of Determination found that Employer owed a total of \$1680.00 in wages and \$630.00 in penalty wages. The Order of Determination required that, within 20 days, either these sums be paid in trust to the Agency, or Employer request an administrative hearing and submit an answer to the charges contained in the Order.

4) On January 6, 1987, Employer filed a request for an administrative hearing and an answer to the charges. That answer alleged that the hours worked by Claimant were in error, Employer had made several payments of wages to Claimant, and, according to Employer's records, Claimant had been paid in full. Employer, in his answer, agreed that Claimant was employed by him during the "approximate" period of the claim, and that Claimant's rate of pay was \$3.50 per hour.

5) On February 10, 1987, this forum sent a Notice of Hearing to Employer indicating the time and place of the hearing. That notice was also sent to the Agency and Claimant. Together with the Notice of Hearing, the Forum sent a document entitled "Notice of

Contested Case Rights and Procedures" containing the information required by ORS 183.413.

6) At the commencement of the hearing, the Hearings Referee explained the issues involved herein and the matters to be proved or disproved.

7) The Order of Determination was issued to "Jack P. Mongeon dba Gallerie Mongeon, Employer." At hearing, the Hearings Referee noted that the spelling of "Gallerie" used on the Order of Determination matched the spelling registered with the Corporation Division. Employer's stationary and checks showed that the assumed business name was spelled "Galerie Mongeon." Accordingly, the Hearings Referee directed that the Order list both assumed business names in its caption.

FINDINGS OF FACT -- THE MERITS

1) During all times material herein, Employer, a person, did business as Gallerie Mongeon, also known as Galerie Mongeon, a business involved in antiques and fine arts. The business was located in Portland, Oregon, and employed one or more persons in the State of Oregon.

2) From on or about March 26, 1984, to on or about August 31, 1985, Employer employed Claimant to write items for Employer's furniture catalog, appraise furniture, and perform maintenance.

3) Around March 20 to March 25, 1984, Employer and Claimant entered into an oral agreement that Claimant would perform work for \$3.50 per hour. During the period of his claim, which was from November 1, 1984, to March

30, 1985, Claimant never agreed to work for free.

4) The Gallerie was open from 11 a.m. to 6 p.m., Tuesday through Saturday.

5) Claimant's regular agreed upon hours of work each day were between 11 a.m. and 5 p.m. to 6 p.m. Claimant testified that he often worked longer hours, but that he did not put the extra hours in his wage claim. He usually worked Tuesday through Saturday each week.

6) Claimant usually took a meal period that lasted from 15 minutes to one-half of an hour. On those occasions when Claimant worked longer hours, for example, until 8 or 9 p.m., Claimant's meal period varied from one-half to one hour.

7) Claimant worked an average of six hours each work day during the period of his claim. The six hours do not include the meal period.

8) Claimant filled out Agency calendar forms to show the days and hours he worked during the period of his wage claim. The forms were filled out at about the same time, around March 18, 1986, that Claimant filed his wage claim. His memory at that time was fresher than at the time of the hearing. The days and hours shown on the calendar form are his best estimate of the times he worked during the claim period.

9) Claimant worked the hours and days shown on the calendar forms he submitted to the Agency. Based upon those forms, Claimant worked 78 hours in November, 42 hours in December, 108 hours in January, 120 hours in February, and 132 hours in

March. Total hours worked during the period November 1, 1984, through March 30, 1985, equals 480 hours.

10) Shirley A. Roggen, an independent interior designer, had business dealings with Employer during the period of Claimant's wage claim. During November and the first part of December 1984, Ms. Roggen was in the Gallerie approximately five times. Ms. Roggen witnessed Claimant working at the Gallerie during each of her visits. From December 1 to December 11, 1984, Ms. Roggen was "in the Gallerie several times." She observed Claimant working during that period. Ms. Roggen had a conversation with Employer about Claimant in which Employer said Claimant worked in the Gallerie a lot.

11) Claimant worked an average of six hours each day on December 4, 5, 6, 7, 8, and 11, 1984. Claimant's testimony that he worked these days is supported by Inez McPherson's testimony. Ms. McPherson was Claimant's landlord and drove the Claimant to work "most of the time." She recalled the period in question, that is, the first two weeks in December 1984, because Claimant's rent was due, Christmas was coming up, and Claimant was unsure when or if he would be paid before Employer left for Europe. Although in his answer Employer asserts that Claimant did not work from December 1 through December 11, 1984, the forum does not accept that assertion for the reasons given in the Opinion, which is incorporated herein by this reference.

12) The period of time covered by Claimant's wage claim was November 1, 1984, to March 30, 1985. In addition

to the wages he claimed were earned during that period, he claimed \$98.25, which was the amount of a check, dated November 14, 1984, issued by Employer to Claimant for wages earned prior to November 1, 1984. That check was not negotiable due to insufficient funds (NSF). The claim period was adjusted back from November 18, 1984, the starting date listed on the Wage Claim form, to November 1, 1984, because, after filing his wage claim, he then believed the NSF check was for wages earned between November 1 and November 14, 1984. These wages have not yet been paid.

13) Claimant worked six hours on November 1 and six hours on November 2, 1984. He received a wage payment of \$175.00 on or about November 2, 1984, for the period ending November 2, 1984. Accordingly, Claimant was paid for those 12 hours.

14) Claimant received a wage payment of \$252.00 on or about November 17, 1984. Although he could not recall receiving this payment, he had a Statement of Earnings for this amount, which matches a payment amount claimed by Employer in his answer. Claimant could not recall ever accepting a Statement of Earnings when he did not also receive his wages.

15) Claimant received a Statement of Earnings each time he was paid. He has no other earnings statements besides those exhibited in the record that relate to the period of his claim.

16) Employer paid Claimant \$120.75 by check around December 15, 1984.

17) With the exceptions noted above in Findings of Fact 13, 14, and

16, Employer has failed to pay the wages earned and due Claimant for work performed during the claim period.

18) Claimant filled out time cards that were supplied by Employer. Employer's secretary, Robin Wilkerson, collected the time cards every two weeks. Ms. Wilkerson then calculated the wages due to Claimant. Employer would customarily look over the time cards and Statement of Earnings slips prepared by Ms. Wilkerson, and then Employer would pay Claimant. Ms. Wilkerson kept the time cards.

19) In January 1985, Employer's secretary, Robin Wilkerson, quit. Thereafter, no secretary made out Employer's checks, and "his check-making went into chaos." Claimant continued to make out time cards after Ms. Wilkerson quit, and those cards remained at the Gallerie. Employer kept the time cards on his desk.

20) The Agency sent four written requests to Employer for payroll records or other supporting documents. Additionally, the Agency made two verbal requests by telephone for records or other supporting documents. The employer submitted no such records or documents. Employer did not make and keep available to the Commissioner records of the time worked by employees as required by ORS 653.045.

21) Claimant's last day of work was on or about Saturday, August 31, 1985. He gave Employer notice on that day that he would not work the following Wednesday as scheduled because he was starting a new job on Tuesday, September 3, 1985.

22) Prior to quitting his employment with Employer, Claimant made a demand for payment of wages earned during the period of this wage claim. Employer's "most frequent" response was "I'm too busy now to do it, I'll do it later," or that he could not afford it at the time. Employer never denied that he owed wages.

23) Claimant's testimony was credible. His demeanor was forthright, even where his memory was deficient and unsupportive of his wage claim. His statements were supported by the testimony of the other witnesses. The testimony of Claimant and the other witnesses was reliable and credible.

24) Penalty wages were assessed by the Agency in the Order of Determination for Employer's knowing failure to pay Claimant, as Employer was subject to the law requiring payment of wages and there was no applicable exemption. Employer has not yet paid Claimant the wages due, and therefore penalty wages continued, and were assessed, for 30 days under ORS 652.150.

25) Penalty wages were computed, in accordance with Agency policy, on the Wage Transcription and Computation Sheet as follows: \$1680.00 (total wages earned) divided by 80 (number of days worked during the claim period) equals \$21.00 (average daily rate of pay). This figure of \$21.00 is multiplied by 30 (number of days for which penalty wages continued to accrue) for a total of \$630.00 in penalty wages. This figure is set forth in the Order of Determination.

26) Employer did not allege in his answer an affirmative defense of financial inability to pay the wages at the

time they accrued; nor did he provide any such evidence for the record.

ULTIMATE FINDINGS OF FACT

1) During all times material herein, Employer was a person doing business as the Gallerie Mongeon or Galerie Mongeon in the State of Oregon, and employed one or more persons in the operation of that business.

2) Claimant was employed as a shop assistant by Employer from March 26, 1984, to August 31, 1985.

3) During the period covered by the wage claim, that is November 1, 1984, to March 30, 1985, Employer and Claimant had an agreement whereby Claimant would be paid \$3.50 per hour for each hour Claimant worked for Employer.

4) During the claim period, Claimant worked an average of six hours per day for 80 days, a total of 480 hours.

5) Claimant's total earnings during the period of his claim were \$1,680.00 (480 hours at \$3.50 per hour).

6) Employer has failed to pay the wages earned by the Claimant during the period November 1, 1984, through March 30, 1985, with the following exceptions:

a) Payment has been made for November 1 and November 2, 1984; the payment amounts to \$42.00 (12 hours at \$3.50 per hour).

b) Payment of \$252.00 on or about November 17, 1984.

c) Payment of \$120.75 by check on or about December 15, 1984.

7) The NSF check for \$98.25 was for wages earned outside of the period of the claim, namely, before November 1, 1984. Thus, that check is not

covered by the scope of the Order of Determination.

8) Employer owes Claimant wages of \$1,265.25, which represents the total earnings listed in Ultimate Finding of Fact 5 above, less the payments made listed in Ultimate Finding of Fact 6 above.

9) During Claimant's employment with Employer, but after the period covered by the wage claim, Claimant made a demand on Employer for the wages earned during the claim period. Additionally, Employer was in possession of Claimant's time cards. Thus, Employer or his employee, Robin Wilkerson, knew of the hours Claimant worked, the wages Claimant had been paid, and Claimant's demand for payment.

10) Claimant's last day worked was August 31, 1985, the same day he notified Employer that he was quitting.

11) Penalty wages were computed and assessed by the Agency pursuant to ORS 652.150 and Agency policy in the amount of \$630.00

12) Employer has made no showing that he was financially unable to pay at the time wages accrued.

13) Employer failed to make and keep available to the Commissioner records of the time worked by employees as required by ORS 653.045.

CONCLUSIONS OF LAW

1) During all times material herein, Employer was an employer and Claimant was an employee 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 juris-

diction over the subject matter and Employer herein.

3) Employer was notified of his rights as required by ORS 183.413(2). The Forum complied with ORS 183.415(7) by providing the information described therein at the beginning of the hearing.

4) ORS 653.045 requires an employer to maintain payroll records. Where the forum concludes that the claimant was employed and was improperly compensated, it becomes the burden of employer to produce all appropriate records to prove the precise amounts involved. *Anderson v. Mt. Clemens Pottery Co.*, 328 US 680 (1946); *In the Matter of Marion Nixon*, 5 BOLI 82 (1986). Based on these rulings, the forum may rely on the evidence produced by the Agency regarding the number of hours worked and rate of pay for Claimant.

5) The actions or inactions of Robin Wilkerson, an employee of Employer, are properly imputed to Employer.

6) Employer has a duty to know the amount of wages due to an employee. *McGinnis v. Keen*, 189 Or 445, 221 P2d 907 (1950); *In the Matter of Jack Coke*, 3 BOLI 238 (1983).

7) Employer violated ORS 652.140(2) by his failure to pay Claimant all wages earned and unpaid within 48 hours, excluding Saturdays, Sundays and holidays, after Claimant quit his employment on August 31, 1985.

8) Employer's failure to pay the wages owed to Claimant was knowing, intentional, and voluntary, and therefore constitutes a willful failure to pay for purposes of ORS 652.150.

9) Employer has not avoided liability for penalty wages, as he has not shown that he was financially unable to pay the wages owed to Claimant at the time they accrued.

10) 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 Employer to pay Claimant his earned, unpaid, due, and payable wages and the penalty wages, plus interest on both sums.

OPINION

The Employer failed to appear at the hearing, and thus has defaulted as to the charges set forth in the Order of Determination. In a default situation, pursuant to ORS 183.415(5) and (6), the task of this forum is to determine if a prima facie case supporting the Agency's Order of Determination has been made on the record. See *In the Matter of Judith Wilson*, 5 BOLI 219, 226 (1986); *In the Matter of John Cowdrey*, 5 BOLI 291, 298 (1986); *In the Matter of Art Farbee*, 5 BOLI 268, 276 (1986). See also OAR 839-30-185. The Agency has in fact made a prima facie case.

Where a charged party submits an answer to a charging document, the Forum may admit the answer into evidence during a hearing and may consider the answer's contents when making findings of fact. Where a charged party fails to appear at hearing, the Forum may review the answer to determine whether the charged party has set forth any evidence or defense to the charges. *In the Matter of Richard Niquette*, 5 BOLI 53, 60 (1986). On only the issue discussed in

the last two sentences, this Order specifically overrules *In the Matter of Ray Carmen*, 3 BOLI 15, 18 (1982). In a default situation where the employer's total contribution to the record is his or her request for a hearing and a letter which contains nothing other than unsworn and unsubstantiated assertions, those assertions are overcome whenever they are controverted by other credible evidence on the record.

Pursuant to OAR 839-30-075(2),

"after commencement of the hearing:

"(a) issues not raised in the pleadings may be raised and evidence presented on such issues, provided there is expressed or implied consent of the Agency and the Party. Consent will be implied where there is no objection to the introduction of such issues or where the Agency or the responding party addresses the issues..."

In a default situation, the charged party obviously can not expressly consent to new issues being raised or the pleadings being amended. Nor can there be implied consent. In order to consent, either expressly or implicitly, a person needs to be notified of the matter requiring the consent and needs an opportunity to consent. In other words, it boils down to a question of due process: did the person have notice of and an opportunity to respond to the new issues. At a default hearing, the charged party can not object or implicitly consent to issues about which he or she has had no notice or opportunity to respond. Therefore, in a default situation, the charging document sets the limit on the issues and relief which the Forum can consider. Put another way,

the Forum cannot rule on matters falling outside the limits of the charging document.

In this case, the Order of Determination, the charging document, was prepared for wages earned and unpaid during the period November 1, 1984, through March 30, 1985. Claimant testified at hearing that an NSF check for \$98.25, dated November 14, 1984, was for wages earned during a period prior to November 1, 1984. For the reasons given in the previous paragraph, this Forum is unable to order payment on that check since it falls outside the limits of the charging document.

The evidence on the record establishes that Employer owes Claimant \$1265.25 of earned, unpaid, due, and payable wages, and that Employer has willfully failed to pay those wages. This evidence is credible, persuasive, and the best evidence available, given Employer's failure to appear at the hearing. It clearly constitutes a prima facie case. Having considered all the evidence on the record, and especially the meager evidence Employer submitted in response to the Agency's repeated requests for information, the prima facie case has not been effectively contradicted or overcome.

The record establishes that Employer has violated ORS 652.140 as alleged, and that he owes Claimant penalty wages pursuant to ORS 652.150.

ORDER

NOW, THEREFORE, as authorized by ORS 652.332, the Commissioner of the Bureau of Labor and Industries hereby orders JACK P.

MONGEON to deliver to the Hearings Unit of the Bureau of Labor and Industries, 309 State Office Building, 1400 S.W. Fifth Avenue, Portland, Oregon 97201, the following:

A certified check payable to the Bureau of Labor and Industries IN TRUST FOR RICHARD M. GARDNER in the amount of ONE THOUSAND EIGHT HUNDRED NINETY-FIVE DOLLARS and TWENTY-FIVE CENTS (\$1895.25) representing \$1265.25 in gross earned, unpaid, due, and payable wages, less legal deductions previously taken by Employer, and \$630.00 in penalty wages, plus interest at the rate of nine percent per year on the sum of \$1265.25 from October 1, 1985, until paid and nine percent interest per year on the sum of \$630.00 from November 1, 1985, until paid.

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

Case Number 04-79

Second Addendum to the
Final Order of the Commissioner
Mary Wendy Roberts
Issued May 7, 1987.

SYNOPSIS

In a supplemental proceeding brought by the Agency to clarify whether Respondent public employer had complied with the Commissioner's order that Respondent hire Complainant as a firefighter, in spite of its ordinance that specified age 31 as the maximum age for hiring firefighters, and accord him benefits and seniority as if he had been hired at an earlier date, the Commissioner found that Respondent had credited the proper amount of vacation leave to Complainant. Finding that Respondent had properly complied with the Order, the Commissioner dismissed the specific charges. OAR 839-30-070(5); 839-30-105; 839-30-115.

The above-entitled matter came on regularly for hearing before Douglas A. McKean, designated as Hearings Referee by Mary Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on March 10, 1987, in Room 311 of the Portland State Office Building, 1400 S.W. Fifth Avenue, Portland, Oregon. The Hearings

Referee called as witnesses for the Bureau of Labor and Industries (hereinafter Agency) the following: W. W. Gregg, Quality Assurance Manager for the Civil Rights Division of the Agency; and Tylan J. Peters, the Complainant (hereinafter Complainant).

The Civil Service Board of the City of Portland (hereinafter Respondent) was represented by Richard A. Braman, Senior Deputy City Attorney for Respondent. Respondent's witnesses were Lynn C. Davis, Division Chief of Emergency Operations of the Portland Fire Bureau; and Kathryn L. Steinberg, Administrative Assistant 1 of the Portland Fire Bureau.

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

FINDINGS OF FACT - PROCEDURAL

1) On October 21, 1980, the Commissioner issued Order No. 04-79 which required Respondent to "offer Tylan J. Peters appointment to the next available position as Fire Fighter with the Portland Fire Bureau, at the seniority, compensation, and benefits levels he would have attained had he been appointed on the date when the next appointee ranked below him on the 1977 Fire Fighter Eligible List was appointed."

2) On January 23, 1981, the Commissioner issued an Addendum to Order No. 04-79, the purpose of which was

"to resolve Respondent's uncertainty [about what specific acts were required to comply with the Order] by explaining the Order's requirements more specifically."

In pertinent part, the Addendum required that:

"5) Sick Leave and Vacation Time

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

3) On January 21, 1987, the Agency prepared and duly served on Respondent Specific Charges for Supplemental Proceeding alleging that Respondent had fully complied with all provisions of Order No. 04-79 as amended, except the paragraph quoted above in paragraph 2 concerning vacation leave time. The Specific Charges alleged that Respondent had not properly calculated or credited vacation leave time due to Complainant. Accordingly, this Supplemental Proceeding was scheduled to determine the extent of Complainant's vacation leave time entitlement.

4) With the Specific Charges for Supplemental Proceeding, the Agency duly served on Respondent a Notice of Hearing setting forth the time and place of the hearing in this matter. Enclosed with that notice was a document entitled "Notice of Contested Case Rights and Procedures," which contained the information required by ORS 183.413. At the commencement of the hearing, the attorney for Respondent stated that he had no questions about it.

5) Respondent, through its attorney, filed a Motion for More Definite Charges on January 27, 1987. After allowing the Agency an opportunity to respond to the motion, it was granted on February 5, 1987.

6) On February 11, 1987, Respondent filed a Motion for Postponement of Hearing on the ground that insufficient time was available before the hearing scheduled for February 19, 1987, to file responsive pleadings to the Amended Specific Charges which, as of February 11, 1987, had not been filed. The Agency did not oppose the motion, which was granted on February 12, 1987.

7) On February 12, 1987, Agency prepared and served on Respondent Amended Specific Charges for Supplemental Proceeding along with an Amended Notice of Hearing.

8) On February 25, 1987, Respondent filed an answer to the Amended Specific Charges.

9) In addition, Respondent filed a Motion for Production of Evidence pursuant to OAR 839-30-070(5). Respondent's motion requested that Complainant answer eight interrogatories. The motion was denied because the evidence referred to in OAR 839-30-070(5) is restricted to physical evidence. The rule is not intended to cover interrogatories. The rules provide for depositions only, not interrogatories. See OAR 839-30-115.

10) On March 5, 1987, Respondent filed a Motion for Summary Judgment, supported by a brief and three affidavits.

11) Also on March 5, 1987, Agency submitted a Summary of the Case to

the Forum. A letter dated March 9, 1987, was later submitted to append the Agency policy section of the Summary.

12) On March 6, 1987, the Forum contacted the Agency and the attorney for Respondent regarding a prehearing conference. During the telephone contact with Respondent, the Forum informed Respondent that the Motion for Summary Judgment would be denied. Pursuant to a request by Respondent, the Forum prepared and delivered a memorandum regarding vacation accrual to Respondent and Agency. The purpose of the memo was to assist Respondent and Agency in preparing for a prehearing conference and the hearing.

13) On March 10, 1987, before the hearing, the Forum presented Respondent and Agency with a written ruling denying Respondent's Motion for Summary Judgment.

14) A prehearing conference was held on March 10, 1987, at which time the Agency and Respondent stipulated to certain facts. These facts were read into the record by the Hearings Referee at the beginning of the hearing.

15) At the commencement of the hearing, Agency and Respondent were verbally advised by the Hearings Referee of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing, pursuant to ORS 183.415(7).

FINDINGS OF FACT - THE MERITS

1) Pursuant to the Commissioner's Order No. 04-79, dated October 21, 1980, and the Addendum to Order, dated January 23, 1981, Complainant should have been appointed by

Respondent as a fire fighter on June 21, 1978. Complainant was appointed by Respondent as a fire fighter on December 21, 1979. Thus, the relevant period is the 18 months between those dates. There were 39 two-week periods between those dates.

2) The majority of the work Complainant performs as a fire fighter is in the area of emergency medical services, although his primary responsibility is fire fighting.

3) Between June 21, 1978, and August 31, 1979, a period of 14 months and 10 days, Complainant worked 40 hours per week as a registered nurse at the University of Oregon Health Sciences Center (UOHSC). He worked for the hemo-dialysis unit, directly with patients. In his employment with UOHSC, Complainant earned more per hour in wages than he would have earned as a fire fighter during all times material herein.

4) As a nurse at UOHSC, Complainant earned vacation benefits at the rate of 96 hours per year, or eight hours per month. In addition, Complainant was given 72 hours, or nine days, off per year for paid legal holidays.

5) Complainant was appointed by Respondent as a fire fighter assigned to a 56-hour work week, in which Complainant works one 24 hour shift every three days. Fire fighters on a 56-hour schedule accrue nine shifts of paid vacation per year. This vacation accrual equals 216 hours (9 x 24 hours) per year, or 8.3077 hours every two weeks. Such fire fighters receive no paid holidays, nor do they receive paid personal leave days. Complainant

testified that it was his understanding that 56-hour personnel did not receive paid holidays because that benefit "is offset by additional hours of vacation."

6) Fire fighters assigned to a 40-hour week accrue 80 hours of paid vacation leave per year. In addition, such fire fighters receive 80 hours of paid legal and personal holidays per year.

7) During the period June 21, 1978, to December 21, 1979, labor agreements between the City of Portland and the Portland Fire Fighters' Association stated that 56-hour per week personnel "shall continue to receive vacation time in lieu of holidays." The City and the Association, to which Complainant belonged, have maintained approximate parity in paid time off between personnel working a 40-hour week and personnel working a 56-hour week.

8) When a fire fighter changes assignment from a 40-hour schedule to a 56-hour schedule or vice versa, accrued benefits are converted so that the amount carried forward and credited will be at the rate applicable under the new schedule. The conversion factor used by Respondent is 40/56, or 1.4.

When a 40-hour fire fighter becomes a 56-hour fire fighter, the amount of accrued vacation is multiplied by 1.4. The amount of vacation time which results after conversion will be less than what a 56-hour fire fighter would have earned over a similar time period because the former 40-hour fire fighter would have enjoyed paid holidays during that time period. A 56-hour fire fighter receives more va-

cation leave in lieu of holiday or personal leave benefits.

When a 56-hour fire fighter becomes a 40-hour fire fighter, the amount of accrued vacation is divided by 1.4. For example, if a 56-hour fire fighter had accumulated one year's worth of vacation benefit, 216 hours, this would be divided by 1.4 to yield 154.2857 hours of vacation benefits after conversion. The 154.2857 hours are intended to approximate the 80 hours of vacation plus 80 hours of legal and personal holidays, a total of 160 hours, which a 40-hour fire fighter would accumulate in one year.

No special adjustment in pay is made by Respondent to compensate a 56-hour fire fighter for work on legal holidays. A fire fighter on a 40-hour schedule would receive pay at 1.5 times the regular rate for work on legal holidays.

9) Complainant took off with pay the month of August 1979, using 160 hours of accrued vacation time and 24 hours of accrued holiday/ compensatory time.

10) Complainant elected to quit his employment at UOHSC at the end of August 1979, and take the month of August as paid vacation because he believed he would soon be hired as a fire fighter and would be unable to use vacation time during the six-month training period with the Fire Bureau. The original hearing on this matter, which resulted in Order No. 04-79, had occurred on July 11, 1979. Complainant believed he would prevail and be hired by Respondent in September or October 1979. With the exception of his wife, Complainant did not seek

anyone's counsel before deciding to quite his job at UOHSC.

11) Upon termination at the UOHSC, all unused accrued vacation time was paid in Complainant's last payroll. Unused accrued sick leave was not paid upon termination.

12) During the period September 1, 1979, to December 21, 1979, Complainant accepted three successive temporary jobs. None of these jobs provided benefits such as paid vacation or holiday leave. The first job was with a terminally ill person. The second job was with Manpower Temporary Services, which placed him in a temporary job at the post office as a registered nurse. The third job was with Emmanuel Hospital in the I.V. Department for approximately three weeks. Although Complainant testified that he had been advised by an Assistant Attorney General that his case might be appealed by Respondent, Complainant sought temporary jobs because he anticipated being hired by Respondent.

13) Kathryn Steinberg, Administrative Assistant with the Fire Bureau, was instructed to, and did, credit Complainant with 12 hours of vacation accrual, none of which were accrued during the period June 21, 1978, to December 21, 1979. The credit amount resulted from an increase in the rate of accrual used to compute Complainant's vacation earned after December 21, 1979. The rate of accrual was increased because Complainant's date of hire had been moved back to June 21, 1978, and thus his time in service increased. Steinberg had been told that Complainant had received vacation "in his old job, and that

his vacation was as good as, or better than, what he would have received if he had been working for us. And that therefore, we didn't have to deal with it." Thus, no calculations were made for vacation accrual for the period June 21, 1978, to December 21, 1979.

14) On June 23, 1983, Steinberg met with Complainant to discuss the terms of the settlement of the Commissioner's Order. She indicated that Complainant would receive 12 hours of accrued vacation. Complainant testified that he thought she said Complainant would receive twelve 24-hour shifts of accrued vacation, which was approximately what Complainant thought he would receive for the period June 21, 1978, to December 21, 1979. Complainant did not see Respondent's vacation computations, and Complainant had none of his own. Complainant did not see any documentation regarding the amount of vacation time to be credited until after he had signed a Satisfaction of Final Order.

15) On July 1, 1983, Complainant signed a document prepared by Respondent entitled Satisfaction of Final Order. That document states that Complainant acknowledges receiving "the appropriate credit for sick leave and vacation accrual."

16) Complainant was credited by Respondent with the full amount of sick leave he would have earned during the 18 month period of June 21, 1978, to December 21, 1979. That amount equaled 186.8 hours. Steinberg testified that she did not know how much sick leave Complainant had accrued or used while he was employed at the UOHSC during the period noted above, but she was

instructed "to figure the value of sick leave from June 21, 1978, to * * * December 21, 1979." No set-off was made for any sick leave accrued or used while Complainant was employed by UOHSC.

17) Sometime after July 1, 1983, Complainant received a copy of a memo dated June 29, 1983, from Steinger to Braman. The memo said that Complainant was to be credited with 12 hours of vacation leave. At that point, which was sometime in early July 1983, Complainant called Steinger and said he disagreed with the amount of vacation with which he had been credited.

He later contacted an Assistant Attorney General at the Department of Justice, which had provided Agency with counsel during the original hearing on this matter, to notify the Agency that he believed an error was being made by Respondent regarding credit for vacation leave.

ULTIMATE FINDINGS OF FACT

1) Pursuant to the Commissioner's Order No. 04-79 and the Addendum to that Order, Complainant should have been appointed by Respondent as a fire fighter on June 21, 1978. Complainant was actually appointed on December 21, 1979.

2) The majority of Complainant's work as a fire fighter is in the area of emergency medical services. His primary responsibility is fire fighting.

3) During the period June 21, 1978, to August 31, 1979, Complainant worked a 40-hour per week schedule as a registered nurse at UOHSC. In that employment he earned vacation benefits at the rate of 96 hours per

year, which equals 8 hours per month. He also received 72 hours off per year in paid legal holidays.

During all times material herein, Complainant accrued and was fully compensated for 114.7 hours of vacation leave by UOHSC. This number is arrived at by multiplying 8 hours per month, Complainant's accrual rate, by 14.333 months, the relevant period of Complainant's employment at UOHSC. In addition, he was fully compensated for all holiday leave benefits; he used all accrued sick leave, except 13.5 hours for which he was not paid upon termination.

4) Once appointed as a fire fighter, Complainant was assigned to a 56-hour per week schedule. Personnel on a 56-hour schedule accrue 216 hours per year, or 8.3077 hours every two weeks, of paid vacation leave. They received no paid legal or personal holidays, as those benefits are offset by additional vacation leave. Personnel assigned to a 40-hour per week schedule receive 80 hours per year of paid vacation, plus 80 hours per year of paid legal and personal holidays. The labor agreements in effect during all times material herein acknowledged that 56-hour personnel receive additional vacation time in lieu of holidays, and maintain approximate parity in paid time off between 40-hour and 56-hour personnel.

5) Although characterized as "vacation time," the 216 hours of paid leave which 56-hour fire fighters accrue each year is comprised of several benefits, namely, vacation leave, legal holiday leave, and personal leave. These are the same benefits enjoyed by 40-hour fire fighters, who receive a

total of 160 hours of benefits, half of which are vacation leave hours and half of which are other benefits. Thus, for the purpose of computing the amount of actual vacation leave, as compared to the amount of the several benefits named above that a 56-hour fire fighter accrues, this Forum finds that a 56-hour fire fighter accrues 108 hours per year, or 4.1539 hours every two weeks, of paid vacation leave. These numbers are each one-half the total benefit accrual for 56-hour fire fighters.

6) During the period June 21, 1978, to December 21, 1979, there were 39 two-week periods. At the 56-hour personnel's vacation leave accrual rate found in the previous Ultimate Finding of Fact, Complainant would have accrued 162 hours of vacation leave during the above-mentioned period (39 two-week periods x 4.1539 hours per two-week period).

7) To convert a 56-hour fire fighter's accrued vacation to that of a 40-hour fire fighter, a conversion factor of 1.4 is applied. Thus, this Forum finds that during the relevant time period Complainant would have accrued 115.7 hours of vacation leave as a 40-hour fire fighter (162 hours divided by 1.4). The annual vacation accrual, converted from a 56-hour rate to a 40-hour rate, equals 77.1429 hours (108 hours divided by 1.4).

8) During the period June 21, 1978, to December 21, 1979, the difference between what Complainant should have accrued in vacation leave as a 40-hour fire fighter (converted from a 56-hour fire fighter) and what Complainant actually accrued and

received at UOHSC equals one (1) hour (115.7 hours as a fire fighter minus 114.7 hours as a nurse).

9) On August 31, 1979, Complainant voluntarily quit his employment at the UOHSC. During that employment he earned or accrued the equivalent amount or more of wages and benefits than he would have earned or accrued if he had been employed by Respondent. He did not obtain other comparable, permanent employment before he was employed by Respondent on December 21, 1979.

10) Respondent has not credited Complainant with any vacation leave for the period June 21, 1978, to December 21, 1979. Respondent gave Complainant credit for 12 hours of vacation leave as an adjustment due to seniority on vacation accrued after December 21, 1979. Complainant did not understand this adjustment to his credited vacation leave until after he signed a Satisfaction of Final Order on July 1, 1983. Thereafter, he notified Respondent and the Department of Justice.

Respondent has credited Complainant with 186.8 hours of sick leave accrued and used at UOHSC.

CONCLUSIONS OF LAW

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

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

3) Both before and at the commencement of the hearing, Respondent and Complainant were informed

of the matters described in ORS 183.413.

4) Where an employer is found to have committed an unlawful employment practice, the Commissioner may order the employer to pay the Complainant back pay, including benefits, as a remedy. The purpose is to make complainants whole for injuries suffered on account of unlawful employment discrimination. The general rule is that the compensation shall be equal to the injury. Accordingly, the equitable principle of set-off applies. This principle is codified in federal law, and provides:

"Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable." Title VII of the Civil Rights Act of 1964, as amended, Section 706(g).

In this case, vacation leave benefits that Complainant accrued and either used or was compensated for while employed by UOHSC are properly applied as a set-off against the vacation leave credit for which Respondent is liable.

5)

"The deduction from a back pay award of amounts that could have been earned by the exercise of reasonable diligence has its roots in a principle of contract law that is usually, though improperly, called the duty to mitigate damages." Schlei and Grossman, *Employment Discrimination Law*, 2d Ed. (1983), p. 1447.

This principle of law, properly referred to as the avoidable consequences rule, denies a complainant a recovery for harm he or she might reasonably have avoided. In other words, it relieves the employer of liability for any losses that complainant could reasonably have avoided. See Dobbs, *Remedies* (1973), Sections 3.7 and 12.25.

Pursuant to OAR 839-30-105, Respondent has the burden of showing that Complainant has failed to mitigate his damages. See also *In the Matter of Lucille's Hair Care*, 5 BOLI 13, 28 (1985).

In this case, the evidence shows that Complainant voluntarily left his job at UOHSC on the belief that he would prevail on his complaint of age discrimination and Respondent would appoint him to a fire fighter position within two to three months after the initial hearing. Although he was appointed approximately five months after the hearing, the Commissioner's Final Order requiring the appointment was not issued until 15 months after the hearing, and the Order was later appealed. The temporary employment that Complainant obtained after he voluntarily quit his job at UOHSC did not provide the equivalent benefits, namely paid vacation leave, which Complainant received at UOHSC.

Where Complainant voluntarily quit a job which provided him with the equivalent, and in this case superior, benefits to those he would have received had he been employed by Respondent; and where the reason for quitting was merely Complainant's belief that Respondent would hire him at some indefinite future time; and where

Complainant failed to seek or obtain alternative employment with equivalent benefits, then Complainant's loss of benefits was a loss he might reasonably have avoided. In terms of mitigation of damages, Complainant failed to mitigate his damages by (1) the willful conduct of voluntarily quitting alternative, equivalent employment without good cause, and (2) his failure to exercise reasonable diligence in his efforts to obtain other employment providing benefits equivalent to those he voluntarily lost. See *Sangster v. United Air Lines, Inc.*, 633 F2d 864, 868 (9th Cir 1980), *cert den* 451 US 971 (1981). See also *In the Matter of Lucille's Hair Care*, 5 BOLI 13, 24-25 (1985).

Accordingly, Respondent is relieved of its liability for the loss of vacation leave which Complainant experienced.

OPINION

Respondent raised three affirmative defenses in its answer and, later, in its motion for summary judgment.

First, Respondent contended that the Satisfaction of Final Order, dated July 1, 1983, and signed by Complainant, operated to extinguish Respondent's obligation to Complainant. This defense fails for the reason set out in the Ruling on Motion; namely, the Complainant was not a party to this case. He was, rather, a witness for the Agency in an enforcement action. Therefore, the Satisfaction does not bar the Commissioner from seeking full compliance with her Order.

Second, Respondent alleged that Complainant received more vacation leave as an employee of UOHSC than he would have received if he had been

appointed on June 21, 1978, and thus no vacation leave was due. Although the facts presented difficulties in computing whether any vacation leave was due, the method adopted by the Hearings Referee allowed for comparing two very different "vacation" policies by removing consideration of other benefits not at issue, and by converting all accrued hours to a 40-hour basis. Following this method, it was determined that one hour of vacation leave was due to Complainant. Respondent's defense merely compared the annual accrual rates of the UOHSC and Respondent, and concluded that, per year, Complainant would have received more vacation hours from UOHSC than from Respondent. That defense fails because it does not account for the fact that Complainant did not work for UOHSC the entire 18 month period that is relevant here.

Last, Respondent claimed that it was not liable for any vacation leave found due because Complainant failed to mitigate his losses by voluntarily quitting his state employment. Based upon the facts found and the legal conclusions reached, Respondent prevails on this point. Whatever amount of vacation leave Complainant lost after he quit the UOHSC, Respondent is not liable for it because that loss was avoidable by Complainant. Additionally, the method used to compare the vacation policies of Respondent and UOHSC revealed that Complainant accrued vacation leave at a higher rate while employed at UOHSC than he would have accrued if employed by Respondent. He accrued 96 hours per year, or 8 hours per month, while at UOHSC. He would have accrued 77.1429 per year,

after conversion to the rate of 40-hour personnel, if employed by Respondent during the same period. Therefore, any liability of Respondent for vacation leave accrued during the period June 21, 1978, to August 31, 1979, is set-off by the higher amount earned by Complainant while employed at UOHSC.

Regarding sick leave, Complainant suggested that since Respondent gave him full credit for 18 months of sick leave, Respondent should treat his vacation leave similarly. What the limited facts on sick leave appear to reveal is that Respondent may possibly have over-compensated Complainant with sick leave credit, since the same rules about set-off apply to sick leave as they do to vacation leave. That possibility certainly does not make Respondent liable for vacation leave compensation greater than Complainant's injury.

SECOND ADDENDUM TO ORDER

NOW, THEREFORE, Respondent not having been found liable for any additional vacation leave credit, the Specific Charges for Supplemental Proceeding is hereby dismissed under the provisions of ORS 659.060(4).

In the Matter of DEANNA E. DONACA, Respondent.

Case Number 20-85
Final Order of the Commissioner
Mary Wendy Roberts
Issued May 18, 1987.

SYNOPSIS

Respondent farm labor contractor twice failed to pay subcontractors for work they performed, three times failed to comply with the terms and provisions of valid contracts, failed to file certified payroll records required, and either failed to file such records or assisted an unlicensed person to act as a farm labor contractor. For these multiple violations, the Commissioner imposed civil penalties totaling \$4,000. ORS 658.405(1); 658.410; 658.417(3); 658.440(1)(c), (d) and (2)(e); 658.453; OAR 839-15-002; 839-15-004(5); 839-15-130(15); 839-15-300(2); 839-15-510(1)(c).

The above-entitled contested case came on regularly for hearing before Leslie Sorensen-Jolink, designated as Presiding Officer by Mary Roberts, the Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was conducted on December 9, 1986, in Room 411 of the State Office Building 1400 S. W. Fifth Avenue, Portland, Oregon. Douglas McKean, Program Coordinator for the Wage and Hour Division of the Bureau of Labor and Industries (hereinafter the Agency), presented a summary of the case for the Agency. Deanna E.

Donaca (hereinafter the Contractor) represented herself. The Presiding Officer called as witnesses Mr. McKean; the Contractor, Jay Schartz and Arthur Tepper, who allegedly subcontracted with the Contractor, Andy Boe and Glenn Sellars, Mr. Schartz's employees; Raymond Donaca, the Contractor's husband; Steven and Patrick Smith, alleged employees of the Contractor's; and Jerry Garcia, Compliance Specialist for the Agency. The Contractor cross-examined those witnesses.

Having fully considered the entire record in this matter, the Presiding Officer hereby makes 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) By a notice dated January 31, 1986, the Agency informed the Contractor that the Agency intended to assess a civil penalty of \$4,000 against her. The notice cited as the bases for this assessment the Contractor's failure to pay two different subcontractors for work performed, in violation of ORS 658.440(1)(c); failure to comply with the agreement the Contractor had entered with each of those subcontractors, in violation of ORS 658.440(1)(d); failure to pay employees wages for work performed on a contract, in violation of ORS 658.440(1)(d); and failure to provide to the Commissioner a certified true copy of all payroll records of employees employed on two different contracts, in violation of ORS 658.417(3). This notice was served on the Contractor on February 10, 1986.

2) By a letter dated February 10, 1986, the Contractor requested a hearing on the Agency's intended action.

3) Thereafter, this Forum duly served on the Contractor and the Agency a notice of the time and place of the requested hearing and the designated presiding officer.

4) With this notice, the Contractor received a document entitled "Notice of Contested Case Rights and Procedures," and before the commencement of the hearing she stated that she had read the document and had no questions about it.

5) The Presiding Officer advised the Contractor and the Agency in pre-hearing conference that this matter is governed by the hearing rules in effect when the Agency's Notice of Intent was issued, i.e., OAR 839-15-002 and the rules it references, rather than the current rules starting at OAR 839-30-020.

6) At the commencement of the hearing, the Presiding Officer explained the issues involved and the matters that had to be proved and disproved herein.

7) During hearing, in order to conform the Notice of Intent to the evidence, as requested by the Agency, the Presiding Officer amended item six on that exhibit to delete the period at the end of the first sentence and insert in its place:

"or, in the alternative, assistance of unlicensed persons to act in violation of ORS 658.405 to 658.475, in violation of ORS 658.440(2)(e)."

Before making this amendment, the Presiding Officer explained its import to the Contractor, who stated she

understood and made no objection to the amendment.

8) After hearing, the Agency submitted a copy of an exhibit, as directed by the Presiding Officer. It also submitted more readable copies of certain exhibits, which the Forum has substituted for the copies submitted at hearing. Finally, as the Presiding Officer requested, the Agency submitted a copy of the Form 1040 of the 1984 income tax return for Jay Scharz and his wife, which has been admitted.

Also at the Presiding Officer's request, the Contractor submitted information after the hearing as to the hours Patrick and Steven Smith worked, which has been admitted as an exhibit.

FINDINGS OF FACT – THE MERITS

A. General

1) During all times material herein, the Contractor, a natural person, owned and operated a business in her own name which recruited, solicited, supplied, or employed workers to perform labor for another in Oregon in the forestation or reforestation of lands and/or entered into subcontracts with others for the performance of those activities. The Contractor's husband, Raymond Donaca, worked with her in this business during all times material herein.

2) The Contractor performed the activities described in the previous Finding of Fact pursuant to contracts between the Contractor and the Forest Service of the United States Department of Agriculture (hereinafter the USFS), for remuneration or a rate of pay agreed upon in those contracts.

3) Pursuant to ORS chapter 658, the Contract was licensed as a farm/forest labor contractor by the State of Oregon from July 24, 1984, through January 31, 1986.

4) The Contractor and her husband filed a Chapter 13 bankruptcy before times material herein. They filed a Chapter 11 bankruptcy on December 18, 1986.

5) The Contractor's demeanor at hearing struck the Presiding Officer as obfuscatory; the Presiding Officer had to wade through a morass of testimony from the Contractor, which was tangential at best, in order to ascertain what were the Contractor's defenses to the charges against her.

6) For purposes of this Order, the Forum will use logging terms as follows. To "thin and buck" is to cut down trees fitting certain specifications and cut them into "pieces," or logs of certain size specifications (salvage material). To "skid" is to cut the limbs off the pieces, take them to a landing and place them in a "deck." A "deck" is a grouping of merchantable or firewood logs. A "landing" is a place where one can access a unit and remove a deck. To "pile" is to stack the brush (or slash) that is left over after all the "pieces" have been removed to the deck.

B. Concerning the Charges that:

The Contractor failed to pay Jay Scharz Contracting \$7,500.00 for work performed as a subcontractor from on or about October 19, 1984, to on or about November 7, 1984, in violation of ORS 658.440(1)(c) and

The Contractor failed to comply with the agreement entered into with Jay Scharz Contracting by failing to pay all amounts when due, in violation of ORS 658.440(1)(d).

7) In September of 1984, the Contractor was having difficulty completing Contract No. 53-04GG-2-02561 (hereinafter contract -2561), a contract she had with the USFS to thin, buck, skid, and pile units of land in Central Oregon. This contract had been in default since August 7, 1983.

8) During all times material herein, Jay Scharz was a farm/forest labor contractor who did reforestation work as Jay Scharz Contracting. For piling only, Art Tepper worked with Mr. Scharz in this business. Sometime in September 1984, Jay Scharz Contracting agreed to do some work for the Contractor on the 162 acre "Apollo 21" unit of contract -2561 (hereinafter the Unit), because Messrs. Scharz and Tepper had some extra time on a contract they were performing nearby.

9) The agreement between the Contractor and Jay Scharz Contracting for the latter's work on the Unit was oral, as is often the case in the reforestation industry.

10) According to Messrs. Scharz and Tepper and Mr. Scharz's employee Glenn Sellars, those present at the meeting at which the agreement between Jay Scharz Contracting and the Contractor was made were Messrs. Scharz and Tepper, for Jay Scharz Contracting, and the Contractor, as well as Messrs. Sellars and Donaca.

In pertinent part, Contract -2561 required the Contractor to skid pieces

within certain size specifications and place them in a deck, and to pile anything on the landing that was not in a deck. Messrs. Scharz and Tepper allege that in essence, they agreed that Jay Scharz Contracting would subcontract with the Contractor to do piling on the Unit in exchange for compensation from the Contractor at the rate of \$50 per acre. Mr. Scharz testified that the Contractor was piling on one end of the Unit, and Jay Scharz Contracting was to pile on the other end of the Unit. According to Mr. Scharz, after the piling was done, Jay Scharz Contracting and the Contractor were to negotiate as to how many of the Unit's 162 acres each had piled.

The Contractor was also doing the skidding on the Unit, and Messrs. Scharz, Tepper, and Sellars testified that the Contractor told them that when they piled, they were to pile everything on the ground which the Contractor had not skidded to a landing. In other words, according to Messrs. Scharz, Tepper, and Sellars, all material on the ground was to be skidded to a deck or piled by the Jay Scharz Contracting. Mr. Scharz testified that when he questioned whether all the material which was supposed to be skidded (according to the contract specifications) was being skidded, the Contractor told him that skidding was the Contractor's responsibility and to go ahead and pile before the USFS could raise any objections concerning what was being skidded or piled.

11) The Contractor maintains that she did not make any agreement to pay Jay Scharz Contracting for piling on the Unit. The Contractor claims that she allowed Jay Scharz Contracting to

remove salvageable wood from the Unit in exchange for its work on the Unit.

The Contractor alleges that Mr. Scharz met with her and Mr. Donaca alone, telling them that he had heard they were behind on their contract and that he would like something to keep his equipment and crew busy for a few days. The Contractor stated that when she and her husband told Mr. Scharz that they could not afford to give away any work, and that it would be difficult to estimate how many acres of piling had been done by each of two different groups on the Unit, Mr. Scharz said "Who said anything about money?" According to the Contractor, Mr. Scharz then mentioned that he had "some money left over from a planting contract" and that he "would just have to pay taxes on it if he didn't use it," and said that if he did not find something for his men to do, they might go home and forget to return. The Contractor maintains that Mr. Scharz wanted to buy the decks of salvage material, for which he said he had a market, in exchange for helping Mr. Donaca separate the salvageable material from that needing to be piled. According to the Contractor, she and her husband told Mr. Scharz that he could remove salvageable material from the decks, if he shared the decks with a woodcutter to whom they had already given permission to remove the decks. (The Contractor testified that she did not have time to haul away the salvage material and sell it, and she would give it away rather than have it wasted.) The Contractor asserts that she explained to Mr. Scharz that because any attempt by Jay Scharz

Contracting to help with actual piling on contract -2561 might slow, rather than expedite, the work (by hindering the Contractor's system), she would rather that Jay Scharz Contracting do no piling and nothing with the slash other than move some of it while separating it from salvage material.

According to the Contractor, Mr. Scharz knew that some of the people who had done the cutting on the Unit had not done the limbing properly, and he said he would clean that up. The Contractor maintained that Mr. Scharz said that when he finished taking out his salvage, he would see to it that the landings were clean enough that the USFS would pass the job.

The Contractor testified that she believed her agreement with Jay Scharz Contracting was made in this one encounter with Mr. Scharz.

12) Mr. Scharz adamantly denies that Jay Scharz Contracting was to be compensated only by salvage material for its work for the Contractor on contract -2561. He testified that the agreed-upon \$50 per acre rate for Jay Scharz Contractor's piling on the Unit was "firm" and "very well understood" by the Contractor and him. Mr. Tepper testified that he recalls \$50 per acre figure as the rate agreed upon, because it was a little more than the rate Jay Scharz Contracting was earning on its adjoining contract. Mr. Sellars testified that the fact that Jay Scharz Contracting would receive monetary compensation was definitely discussed and that there was some dollar per acre figure mentioned and agreed on.

Mr. Scharz testified that he knows of no possible tax benefit which he would have gained by performing the

work he did for the Contractor on the Unit without compensation or for only the value of the salvage material; he was not making enough money to benefit from a tax shelter. Mr. Scharz's 1984 US income tax return verifies this assertion, showing no tax liability (other than self-employment tax).

13) Mr. Scharz testified that the Contractor told him that, as far as she was concerned, the salvageable material on the Unit had no value and he could haul it out if he wanted to. Mr. Scharz testified that he told the Contractor he would do that if he could sell the material. Mr. Scharz testified that being allowed to remove salvageable material was not to have any effect on Jay Scharz Contracting's earnings for its piling subcontract.

14) According to Messrs. Scharz and Tepper, very soon after the agreement between Jay Scharz Contracting and the Contractor concerning contract -2361 was made, they, with Mr. Scharz's employees Sellars and Andy Boe, started doing the piling on the Unit. On their first day, Ray Cooley, USFS employee in charge of monitoring the performance of contract -2561, directed them to stop work because the Contractor had not skidded the Unit property: not all skiddable pieces had been skidded. Accordingly, in piling everything on the ground as directed by the Contractor, Jay Scharz Contracting was putting skiddable material in the piles.

15) Because of Mr. Cooley's work stoppage, the Contractor pulled the skiddable material out of the piles which had been made. Mr. Scharz testified that she then told him the Unit

was ready to be piled. According to Messrs. Scharz, Sellars, and Tepper, Jay Scharz Contracting then proceeded to finish all the piling on the Unit in four to five days.

16) Messrs. Scharz, Sellars, and Tepper testified that when they resumed piling after Mr. Cooley's interruption, the Contractor told them again to pile everything on the ground (regardless of whether it was skiddable), which they did. The Contractor asserted that when Mr. Cooley stopped the piling, she told Messrs. Tepper and Sellars "to go around anything that had to be skidded." In contravention of that directive, according to the Contractor, Jay Scharz Contracting continued putting everything on the ground into piles. The Contractor testified that Mr. Cooley told her about the amount of salvageable material Jay Scharz Contracting was piling.

17) According to Messrs. Scharz, Tepper, Sellars, and Boe, Mr. Cooley inspected their piling work after it was finished, and told them that it was good and had passed (been completed to the satisfaction of the USFS). Mr. Cooley continued to be concerned about the larger, skiddable material in the piles; it needed to be removed from them.

18) The Contractor testified that the USFS objected to the piling work Jay Scharz Contracting did for her, and the USFS ended up certifying it as satisfactory only after the Contractor redid most of it. She testified that Jay Scharz Contracting was putting the salvageable material in the piles, which it was not supposed to do according to the contract; Jay Scharz Contracting was supposed to get the pieces to be

skidded away from the parts Mr. Donaca was piling or do nothing with them, going around them. Because Jay Scharz Contracting piled those pieces, according to the Contractor, she had to tear down about 40 acres of piles, skid the pieces in them to the landing, and re-pile what was left, at a cost of about \$2000. The Contractor also testified that the finished product of Jay Scharz Contracting did not look as good as she thought it should; there were too many pieces on the ground and the piles were small and sometimes dirty.

19) Mr. Scharz testified that while Jay Scharz Contracting was piling on the Unit, woodcutters were cutting firewood out of the decks of skidded, salvageable material, and the only clean up to do on the Unit was of those woodcutters' messes of unusable wood pieces they had cut and left laying on the ground. He stated that Mr. Cooley said that the decks out of which the woodcutters had cut firewood would not pass his inspection and directed that they be cleaned up. According to Mr. Scharz, this was not part of and had nothing to do with the work which Jay Scharz Contracting had agreed to do and had done; there was no clean up or re-piling concerning that work.

Messrs. Scharz, Tepper, and Boe testified that, on or about October 30, 1984, to further the performance of contract -2561 and make sure the USFS made final payment on it to the Contractor, and as a gesture of good faith, Jay Scharz Contracting volunteered to do the deck clean up in 1984 if weather permitted. Mr. Scharz asserted that whether or not Jay Scharz Contracting performed the deck clean

up, Respondent would pay it at the agreed upon rate for its piling.

20) According to the Contractor, "Rather than ask for a final inspection when * * * (the Contractor) had finished the piling, and thus close the contract, Mr. Scharz asked that he be allowed time to remove as much salvage as possible." According to the Contractor, she agreed to wait "if Scharz would clean up each landing as he removed the salvage," and Mr. Scharz agreed that "he would see to it that the Unit passed final inspection that season[.]" The Contractor asserts that she told Mr. Scharz that if she had to clean up a mess that Jay Scharz Contracting had left, she intended to charge Jay Scharz Contracting for every stick of salvage he removed from the Unit.

21) Mr. Scharz testified that Jay Scharz Contracting took just one load of salvage out of the Unit, because he was not able to find a market to pay for such material. (The Contractor testified that she "saw considerably more than one load of salvage go out" of the Unit.)

22) According to Mr. Scharz, at the same time he volunteered to do the above-cited clean up, the Contractor (in a meeting with him and Mr. Boe) agreed that if contract -2561 was not completed in 1984, the Contractor would pay Jay Scharz Contracting 2/3 of the money out of the USFS payment due it, and the final 1/3 when the Unit was completed and the USFS made final payment on it.

23) On November 6, 1984, the USFS suspended work on contract -2561 for the winter. According to Messrs. Scharz and Boe, snow

prevented Jay Scharz Contracting from doing any clean up on the Unit in 1984.

According to the Contractor, after Mr. Scharz told her that Jay Scharz Contracting would do the clean up if the weather held, Jay Scharz Contracting failed to do it during the two days on which the weather would have allowed it to do it, thereby preventing completion of contract -2561 in 1984.

USFS diaries in evidence concerning contract -2561 do not establish whether or not the Contractor's latter assertion is correct.

24) According to Messrs. Scharz, Tepper, and Sellars, very soon after Jay Scharz Contracting finished piling on the Unit, the Contractor and Mr. Scharz agreed that the Contractor had piled 12 acres and Jay Scharz Contracting had piled 150 acres, for which the Contractor would pay it a total of \$7500.00. According to the same witnesses, Messrs. Scharz, Tepper, Sellars, and Donaca, and the Contractor, were present when Mr. Scharz negotiated this agreement with the Contractor. Mr. Tepper testified that there was clear and immediate agreement on the acreage figures by everyone present.

25) Mr. Scharz paid his employees for their work on contract -2561.

26) The Contractor received the USFS payment out of which, according to Mr. Scharz, she had agreed to pay Jay Scharz Contracting 2/3 of which she owed it, but she paid Jay Scharz Contracting nothing. According to Mr. Scharz, in January or February 1985, he contacted the Contractor, who told him that she had received the payment but that Jay

Scharz Contracting was not going to get any of it; she needed it and had spent it. Mr. Scharz testified that the Contractor told him that she would pay Jay Scharz Contracting out of the remaining sum the USFS owed her on contract -2561. (Mr. Scharz testified that he discovered later that sum was less than what the Contractor owed Jay Scharz Contracting.)

27) According to Mr. Scharz, in hope that the Contractor would pay Jay Scharz Contracting if she was paid by the USFS on contract -2561, Mr. Scharz periodically inspected the Unit, during the winter and spring of 1984, to see if the snow had cleared enough for Jay Scharz Contracting to do the deck clean up. Mr. Scharz testified that when the snow had cleared, he informed the Contractor that Jay Scharz Contracting was going to do the clean up during the first part of the coming week. Thereafter, on the Sunday just before Jay Scharz Contracting was to do the clean up, the Contractor did it.

28) According to the Contractor, she waited for Jay Scharz Contracting to do the clean up until the last day of the ten days the USFS allowed for it after their issuance of a resumption of work order for contract -2561, effective May 30, 1985. (Mr. Scharz testified that he did not know of this ten day period.) The Contractor asserts that she then had to do the clean up herself, at a cost of \$1060.99.

29) The Contractor did not charge Jay Scharz Contracting for any of the salvage removed from the Unit

30) In late Spring of 1985, Messrs. Scharz and Tepper talked to Robert A. Otteni, a contractor who asserted he

was also having some problems getting paid for work he and done for the Contractor, and Arlyn Granger, another contractor. Messrs. Otteni and Granger told Mr. Scharz, and Mr. Otteni wrote to the Agency in a letter, that Mr. Donaca had told them, before Jay Scharz Contracting started its piling work for the Contractor, that Mr. Scharz was going to do some piling for the Contractor, and that if at any time Mr. Scharz gave the Contractor any reason at all not to pay, the Contractor was not ever going to pay him for the work, because the Donacas needed the money. Specifically, Mr. Otteni wrote that

"Mr. Donaca informed me that when he engaged Mr. Scharz that he did not intend on paying Jay and would look for the least little opportunity to seize (sic) his (Jay's) money as he had need of it to pay his own debts."

Mr. Donaca testified that he does not recall making any statement to this effect to Mr. Otteni. Messrs. Granger and Otteni told Mr. Scharz that the Contractor had jumped ahead of Jay Scharz Contracting on the clean up work so she could say that Jay Scharz Contracting had not complied with its agreement and thereby defaulted and not pay it.

31) The Contractor has paid Jay Scharz Contracting nothing for the work it did on contract -2561 for the Contractor.

32) Mr. Scharz paid his two employees fully for their work on contract -2561, and when the Contractor did not pay him for that work, Mr. Scharz almost went out of business as a reformation contractor.

33) Messrs. Scharz and Tepper testified that at several meetings they had with the Contractor and Mr. Donaca concerning payment for their work on contract -2561, and the possibility of Jay Scharz Contracting doing other work for the Contractor, the Contractor and Mr. Donaca admitted several times that they owed Jay Scharz Contracting money for its work on contract -2561. However, according to Messrs. Scharz and Tepper, the Contractor and Mr. Donaca just "beat around the bush" at those meetings; they told them that Jay Scharz Contracting did not really deserve to get paid because it had completed the job too quickly; that the Contractor needed the money to stay out of bankruptcy; that it was better for Jay Scharz Contracting to go broke than for the Contractor and Mr. Donaca to go broke; and that if the Contractor could use Jay Scharz Contracting's money for two or three years before "getting caught up with, that's fine ***."

34) The Contractor argues that if she owed Mr. Scharz money, he would have filed a claim for it on the Contractor's bond for contract -2561. Mr. Scharz testified that he did not file a claim on that because doing so immediately would have put the

Contractor out of business and thereby extinguished any chance of her paying Jay Scharz Contracting.

35) As Messrs. Scharz and Tepper had no pecuniary interest in the outcome of this proceeding, the Forum views the fact that they traveled from Central Oregon, and brought the two employees who worked for them on contract -2561, to testify at this hearing as an indication of the truthfulness of the assertions they came to, and did, express in their testimony. The Presiding Officer found the demeanor of Messrs. Scharz, Tepper, Sellars, and Boe very forthright and credible. The testimony of each was consistent with, and corroborated, the testimony of the others, as well as the documentary assertions of Robert Otteni. Although Mr. Otteni was not present at hearing, the Forum views the fact that he was sufficiently moved by his documentary assertions herein to make them a formal complaint to the Agency, even though he had nothing pecuniary to gain in so doing, as an indication that he believed those assertions to be true.

36) The Presiding Officer's assessment of the Contractor's demeanor is contained in Finding of Fact 5 above.

The substance of the Contractor's testimony in defense of this charge, much more than her demeanor at hearing, impeached her; those defenses are not credible. Rather than being believable factual assertions, the defenses appear to be post hoc rationalizations for the Contractor's failure to pay Jay Scharz Contracting, and her use of the funds the USFS had remitted to her for that purpose for her own purposes. For example, the Contractor seems to have transformed, or

confused, Jay Scharz Contracting's volunteering to do clean up for no compensation into, or for, its volunteering to do everything it did for the Contractor on contract -2561 for no compensation. The Contractor has overlooked the fact that any re-piling she had to do was directly caused by her own directives to Jay Scharz Contracting, and any other clean up was caused by her allowing other people to create messes on the Unit.

The Contractor's testimony and other statements as to whether she had Jay Scharz Contracting do piling on contract -2561 is inconsistent: although at times she insisted that Jay Scharz Contracting was to separate skiddable from non-skiddable material, and not pile the latter, the Contractor also made numerous references to the piling that Jay Scharz Contracting did. For example, while asserting that Jay Scharz Contracting was not to pile, the Contractor faulted its piling work for her. The consistent and credible testimony by Messrs. Scharz, Tepper, Sellars, and Boe that Jay Scharz Contracting did pile, in compliance with its agreement with the Contractor, causes this Forum to conclude that it did.

What the Contractor is asking the Forum to believe in her defense to this charge, therefore, is that Jay Scharz Contracting agreed to do what turned out to be 150 acres of piling, or perform services for which it normally would receive approximately \$7500 in compensation and which would cost it wages for two employees, expenses, and the time of Messrs. Scharz and Tepper, for no compensation other than the unknown salvage value of material Jay

* Mr. Otteni was not present at the hearing. However before the hearing, Mr. Otteni told Mr. McKean, and this Forum finds, that his testimony at this hearing would be just as it was in a letter Mr. Otteni wrote to the Agency dated August 19, 1985, and that he would offer its contents as testimony if he was at hearing.

Schartz Contracting was to share with a third party in some unclear fashion.

The Contractor asserts that Jay Schartz Contracting's faulty piling had to be re-piled, and its clean up work done, at a cost to her of about \$2000, yet there is no evidence that the Contractor, hardly a reticent person, has made any attempt to recover those damages from Jay Schartz Contracting or charged it for the salvage material it removed from the Unit, as she allegedly had told Mr. Schartz she would if his work required clean up.

The main corroboration to the Contractor's assertions at issue regarding this charge was provided by the testimony of her husband, which was cursory and unclear on key points.

Messrs. Schartz, Tepper, and Otteni have asserted that the Contractor admitted to them, in effect, that she had no intent (even at the start) to pay Jay Schartz Contracting what it had earned on contract -2561. Mr. Otteni further asserted that the Contractor's husband told him, in the Contractor's presence, that the Contractor would seek any chance to seize the money Jay Schartz Contracting had earned. To this Forum the defenses the Contractor has attempted to raise to this charge are no more than just such a chance, and a farfetched chance at that.

Because the Contractor's defenses to this charge are not credible, the Forum does not believe them. This gravely impeaches the Contractor's overall credibility before this Forum. Given that, and its assessment of the credibility of Messrs. Schartz, Tepper, Boe, and Sellars, the Forum believes and finds as fact each of their

assertions, and the assertions of Mr. Otteni, recited in the above Findings of Fact, and disbelieves the assertions of the Contractor to the contrary.

C. Concerning the Charges that:

The Contractor failed to pay Robert A. Otteni, doing business as LaPine Forestry Services, \$4,291 for work performed as a sub-contractor from on or about April 15, 1985, to on or about May 20, 1985, in violation of ORS 658.440(1)(c); and

The Contractor failed to comply with agreements entered into with Robert A. Otteni, doing business as LaPine Forestry Services, by failing to pay all amounts when due, in violation of ORS 658.440(1)(d).

37) On or about August 27, 1984, the USFS awarded the Contractor contract 53-04GG-4-02985 (hereinafter contract -2985), for thinning, bucking, and piling work in the Deschutes National Forest in Oregon. By an agreement dated September 15, 1984, and addended June 4, 1985, the Contractor and Mr. Donaca subcontracted thinning work on contract -2985 to Robert A. Otteni, doing business as LaPine Forestry Services, (hereinafter Mr. Otteni). This agreement required the Contractor and Mr. Donaca to pay Mr. Otteni every two weeks, upon formal USFS approval of his completed thinning acreage.

38) Mr. Otteni timely completed his work on contract -2985, and the USFS formally approved that work and recommended payments therefore to him totaling \$7448 on May 24, 1985, and June 18, 1985. (In a conversation with Mr. McKean, Mr. Otteni stressed that the USFS told him that the work he

had done on that contract was excellent.) The Contractor received complete payment from the USFS for Mr. Otteni's work no later than on or about July 15, 1985. Mr. Otteni asserts that the Contractor owed these payments (totaling \$7448) minus a two percent credit for a bonding fee, or \$7291.40, to him.

39) In response to Mr. Otteni's assertion, the Contractor has paid him a total of \$2000 for his work on contract -2985, by two \$1000 payments made in July and September 1985.

40) The Contractor denies that she owed Mr. Otteni anything for his work on contract -2985, and maintains that she has paid him money she did not owe him for that work. She asserts that the \$2000 she paid Mr. Otteni were not acknowledgments that she owed him anything for his work, but delaying tactics suggested by her lawyer. She asserts that the USFS was wrong in saying Mr. Otteni had satisfactorily completed the work he had agreed to do, and maintains that Mr. Otteni did not cut the work to the contract specifications. The Contractor has admitted that the USFS accepted Mr. Otteni's work as done to those specifications, but she alleges that she suffered excess costs because the specifications to which Mr. Otteni adhered for at least part of his work differed from the original specifications.

The Contractor has asserted that she held back payment to Mr. Otteni because she knew of no other way to try to force him to do his thinning to the original specifications. The Contractor maintains that she asked Mr. Otteni to

go back and finish thinning to those specifications, and he refused, saying his work had been accepted. Thereafter, the Contractor made a claim for \$4684 to the USFS, alleging that what was in effect an informal change in specifications for Mr. Otteni's work by the USFS, and USFS preparation of the invoice for payment on the work before the Contractor had inspected the work caused her to incur time and expense in completing the contract over and above what the original specifications would have required of her. Without finding that Mr. Otteni's work on contract -2985 was unsatisfactory or not to specifications, the USFS settled the Contractor's claim for \$1500.

41) The Contractor testified another reason she did not pay Mr. Otteni on contract -2985 was the confusion about what amount Mr. Otteni owed the Contractor on another USFS contract, contract 53-04GG-4-02962 (hereinafter contract -2962). Contract -2962 was a contract between Mr. Otteni and the USFS. Mr. Otteni initially subcontracted all the piling work on contract -2962 to the Contractor and then, after some conflict with the Contractor, subcontracted it to the Contractor and two sub-subcontractors (Arlyn Granger and Charles Pense), with the Contractor to be paid \$10 more per acre than the sub-subcontractors for the work the sub-subcontractors did. The addended agreement between Mr. Otteni and the Contractor specified that Mr. Otteni was authorized to make payments of sums due the sub-subcontractors by check payable to

* The Forum disagrees with the Contractor's characterization, at hearing, of USFS findings as saying that Mr. Otteni did not cut the job to specifications.

the Contractor and the sub-subcontractor jointly. (There is no indication in the addended agreement that the Contractor's assertion that Mr. Otteni was also authorized to make such payments by check payable just to the Contractor is correct.)

42) The Contractor maintains that Mr. Otteni did not conform to the payment provisions of her agreement with him concerning contract -2962, in that he never issued any check to the Contractor and either sub-subcontractor, jointly, for the work the sub-subcontractors did on contract -2962. On July 1 and 17, 1985, the Contractor asserted that Mr. Otteni owed her and the sub-subcontractors a total of \$16,770 (\$2000 for the Contractor and \$14,770 for the sub-subcontractors). By note dated August 1, 1985, the Contractor corrected that claim to include an additional \$2320, \$290 of which was for her, at \$10 per acre for 29 acres, and \$2030 of which she was to pay to the sub-subcontractors.

43) According to his attorney and as acknowledged by the Contractor's attorney, Mr. Otteni fully paid the Contractor's sub-subcontractors directly. According to his attorney, Mr. Otteni did this with advance notice to and consent by the Contractor.

44) Mr. Otteni tried unsuccessfully to fully obtain payment for his work on contract -2985 from the Contractor. Finally, on July 17, 1985, the Contractor, in a letter written by her attorney, acknowledged that she owed Mr. Otteni \$7291.40 on contract -2985 and that Mr. Otteni owed her \$2000 on contract -2962. This was based on Mr. Otteni having satisfied the Contractor's attorney that Mr. Otteni had made direct full

payment to the sub-subcontractors on contract -2962. In this letter, the Contractor agreed to resolve these debts by paying Mr. Otteni \$5291.40 (the amount she owed him after taking into account the \$2000 Mr. Otteni owed her on contract -2962), as she received payments on the work involved from the USFS within one to two weeks.

The Contractor states that she never authorized her attorney to acknowledge that any amount was due Mr. Otteni. Her attorney dictated this acknowledgment immediately after conferring with the Contractor.

45) In a letter dated August 22, 1985, the Contractor acknowledged that her attorney had told her that Mr. Otteni's attorney had furnished to her attorney evidence of Mr. Otteni's direct and full payment to the sub-subcontractors on contract -2962. Even so, the Contractor said she wanted "some assurance" that the sub-subcontractors had been paid before she paid Mr. Otteni for his work on contract -2985. In that letter dated September 29, 1985, the Contractor stated that her experience with Mr. Otteni and his reputation "as a bit of a 'schemer'" had made it difficult for her to trust him, and his refusal to pay her had left her very concerned about whether he had paid the sub-subcontractors or whether they expected payment from her (given her contract with at least one of them that he would be paid a certain amount per acre for his work). At hearing, the Contractor testified that she still did not know (had "no idea") whether the sub-subcontractors on contract -2962 had been paid; she did not mention that her

attorney had been given evidence of such payment.

Neither of the sub-subcontractors on contract -2962 has made any demand of or claim to the Contractor to pay any of the money they earned on that contract, and the Contractor has not filed any action against Mr. Otteni concerning any such sum.

46) On August 10, 1985, because the ninety day period for making a claim under the Contractor's payment bond for contract -2985 was about to expire, Mr. Otteni's attorney notified the Contractor's bonding company of Mr. Otteni's claim for compensation for this thinning work on that contract. On November 15, 1985, the Contractor's bonding company paid Mr. Otteni the full amount claimed, \$3,291.40 plus attorney's fees of \$481.86, "(a)fter reviewing the claim as presented, and finding no defenses to the amount claimed of****"

47) The Contractor asserts that her bonding company was wrong to pay Mr. Otteni's claim. She stated that she directed her attorney to inform her bonding company "of the amount she knew should have been deducted from the total amount owed to" Mr. Otteni. (This is an apparent reference to the additional \$290 referred to in Finding of Fact 42 above.) She asserted that "the liquid asset held by the *** (bonding company), plus the lack of an attorney's delaying tactics, caused the *** (bonding company) to take the easiest way out."

48) In a complaint to the Agency dated August 19, 1985, Mr. Otteni stated that at the time the Contractor and Mr. Donaca engaged him on contract -2985, Mr. Otteni was aware that

they "were under" a Chapter 13 bankruptcy for previous unpaid debts, and that they repeatedly assured him, verbally and in writing, that their intentions were honest and promised to pay him for his work. Mr. Otteni wrote that he learned later that at the very time the Contractor and her husband were saying that to him, they were telling Mr. Schartz that if they could obtain any of Mr. Otteni's monies for contract -2985, they would not pay him and would give his money to Mr. Schartz, as they had already spent the money they owed Mr. Schartz. Mr. Otteni also complained that Mr. Donaca told him that he planned to use the money Mr. Otteni earned on contract -2985 to pay a prior judgment a bank had against Mr. Donaca. According to Mr. Otteni, Mr. Donaca told him that it would take two years for Mr. Otteni to get a judgment to force payment to Mr. Otteni for his contract -2985 work, and that during that time Mr. Donaca would use Mr. Otteni's money to stall the bank. According to Mr. Otteni, Mr. Donaca said "I'd rather have you loose (sic) your place than me loose (sic) mine * * *". Mr. Otteni affirmed the veracity of these assertions to Mr. McKean just before this hearing.

49) The evidence concerning the Contractor's encounter with Mr. Otteni affirms the findings on credibility which this Forum made in Finding of Fact 36 above, concerning her encounter with Mr. Schartz. The Contractor's excuses for never paying Mr. Otteni more than \$2000 for his work on contract -2985 are flimsy at best. Even if she believed, as she has alleged, that Mr. Otteni caused her to incur \$4684 in expenses by allegedly not thinning to

contract specifications, she never sought that sum from Mr. Otteni. It is difficult for the Forum to believe that the Contractor had any real doubt that Mr. Otteni had fully paid the sub-subcontractors on contract -2962, as there is no evidence or assertion that she ever even checked with either of those sub-subcontractors to see if he had not been paid, there is no evidence or assertion that either sub-subcontractor has ever asserted to anyone that he was not paid, the Contractor never made a claim against Mr. Otteni for the amount the sub-subcontractors earned, and the Contractor's own attorney told her, by July 17, 1985, that he had seen proof of such payment. Accordingly, the Forum finds the Contractor's assertions concerning her failure to fully pay Mr. Otteni not credible and specious. The Forum finds Mr. Otteni's assertions concerning that failure credible, and they are lent further credence by the Contractor's actions toward Mr. Schartz. Accordingly, where the Contractor's testimony has differed from the assertions of Mr. Otteni, the Forum has given more weight to Mr. Otteni's assertions and found them to be fact.

D. Concerning the Charge that

The Contractor failed to provide the Commissioner with certified true copies of payroll records of employees employed on Contract 53-04GG-402985, in violation of ORS 658.417(3) or, in the alternative, assisted an unlicensed person to act in violation of ORS 658.405 to 658.475, in violation of ORS 658.440(2)(e).

50) This charge also concerns contract -2985, the Contractor's contract with the USFS discussed in connection

with the preceding charge. During or after the time Mr. Otteni did the aforementioned thinning work on this contract for the Contractor, Roddy Bauman, the USFS official monitoring contract -2985, insisted that the Contractor find additional help to complete this contract. Mr. Bauman threatened to terminate the contract if it was not completed by its June 30, 1985, expiration date and re-procure the acres not completed.

51) The Contractor was not able to find a licensed farm/forest labor contractor who could assist her. However, Pete Sharp, a logger from Prineville, Oregon, who was not a licensed farm/forest labor contractor, had the time and equipment to help the Contractor and was known to the Contractor as a competent piler. Accordingly, on June 6, 1985, the Contractor authorized Mr. Sharp to act for her on contract -2985 and help her finish that contract.

52) Thereafter, starting no later than June 11, 1985, and finishing apparently by July 1, 1985, Mr. Sharp, Darrell Conklin, and Mr. Sharp's son Ron worked together for the Contractor on contract -2985, doing slash piling and trimming. It is unclear whether anyone else worked with them.

53) On or about July 29, 1985, the Contractor paid Mr. Sharp directly for his work on contract -2985. (See Finding of Fact 60 below.)

54) The Contractor did not file any payroll records with the Agency for Pete Sharp or Darrell Conklin during any time material herein.

55) The Contractor's defense to her failure to provide certified true

copies of payroll records of employees on this contract is, apparently, that she had no employees on it. The Contractor argues that

a) Mr. Sharp was a subcontractor and not an employee, whom the Contractor believed to be exempt from farm/forest labor contractor licensing requirements because he was a family-owned operation;

b) Ron Sharp worked for his father and, therefore, not as the Contractor's employee; and

c) she did not know who Mr. Conklin was.

56) The record does not establish whether Pete Sharp was in fact an employee or subcontractor of the Contractor, whether Mr. Conklin was an employee or subcontractor of the Contractor or an employee of Mr. Sharp, or whether Ron Sharp was an employee of the Contractor of Pete Sharp. The following Findings render determination of those questions unnecessary.

57) Neither Mr. Sharp nor Mr. Conklin was licensed in Oregon as a farm/forest labor contractor at any time material herein.

58) According to the Contractor, she asked Mr. Sharp about his farm/forest labor contractor's license when they started talking about him working on contract -2985, and Mr. Sharp told her he was exempt from state farm/forest labor contractor licensing requirements. The Contractor knew by at least that time that Mr. Sharp did not have a farm/forest labor contractor's license. (See Finding of Fact 62 below.)

59) The Contractor asserted that she telephoned Ann Hill, a USFS

official for the Ochoco National Forest whom the Contractor viewed as knowledgeable and trustworthy, in order to verify Mr. Sharp's exemption claim. (The Contractor did not state when she made this alleged inquiry.) According to the Contractor, Ms. Hill confirmed that Mr. Sharp was exempt and stated it was because his business was family-owned. The Contractor testified that he had no reason to question this information.

According to the Contractor, an exhibit in the record is a form Mr. Sharp filed with Ms. Hill concerning his work on a contract of the Contractor's in the Ochoco National Forest, in which he claimed to be exempt from Oregon farm/forest labor contractor licensing requirements. The Contractor asserts that she presumed this document also applied to contract -2985. The Forum notes that this statement by Mr. Sharp is dated July 2, 1985, well after Mr. Sharp started, and apparently after he finished, working on contract -2985 for the Contractor. The Contractor could not have relied on this document, therefore, when she decided to allow Mr. Sharp to work for her on contract -2985. That fact causes the Forum to wonder whether the Contractor's above-described telephone inquiry of Ms. Hill was made before Mr. Sharp's work for her on contract -2985.

The Contractor did not inquire of the Agency as to whether Mr. Sharp qualified for the asserted exemption.

60) The Contractor paid Mr. Sharp for his work on contract -2985 by a check made out to an assumed business name of Pete Sharp and his wife Linda. She also paid a \$20 bonus for

work on this contract directly to Ron Sharp.

61) There is no evidence that Mr. Conklin was a member of Mr. Sharp's immediate family. The USFS inspector on contract -2985 believed that Messrs. Sharp and Conklin were friends and not immediate relatives.

62) The Forum notes two instances in which the Contractor made contradictory statements, both of which could not be true, concerning this charge. These statements, each set of which involve one statement by the Contractor to the Agency, further impeach the Contractor's credibility before this Forum.

First, although as reflected in Finding of Fact 60 above, the Contractor testified and an exhibit shows, that on July 29, 1985, she paid Mr. Sharp's business directly for his work on contract -2985, on August 23, 1985, the Contractor told an Agency Compliance Specialist that Mr. Sharp had received payment for his work on contract -2985 directly from the USFS, rather than through the Contractor. The latter statement cannot be true.

Second, although the Contractor asserted that she asked Mr. Sharp about his farm/forest labor contractor's license when they started talking about him working on contract -2985, and Mr. Sharp informed her of his alleged exemption from licensing requirements, the Contractor told Mr. Garcia in August 1985, after Mr. Sharp finished working on contract -2985, that she did not know if Mr. Sharp had a farm/forest labor contractor's license. Both statements cannot be true. As the Contractor's defense to this charge makes no sense otherwise, the Forum

has concluded that the Contractor knew that Mr. Sharp did not have a farm/forest labor contractor's license when she engaged his services on contract -2985.

Given this impeachment of the Contractor's credibility concerning this charge, and the above noted impeachment of her generally and concerning other charges herein, the Forum does not consider the Contractor's assertions concerning this charge, by themselves, to be credible enough to support any finding. Accordingly, unless they are supported by other evidence, the Forum has not found the Contractor's assertions concerning this charge to be true.

E. Concerning the Charges that:

The Contractor failed to pay employees wages for work performed on Contract 53-04GG-5-03053, in violation of ORS 658.440(1)(d); and

The Contractor failed to provide the Commissioner with certified true copies of payroll records of employees employed on Contract 53-04GG-5-03053, in violation of ORS 658.417(3).

63) The USFS awarded contract 53-04GG-5-03053 (hereinafter contract -3053), for work in the Deschutes National Forest in Oregon, to the Contractor on April 8, 1985. The Contractor's initial plan to subcontract the thinning work on contract -3053 to Larry Acuff and Gerald Hills collapsed just before Messrs. Acuff and Hills were to begin work, because they had not renewed their farm/forest labor contractor's licenses.

64) Thereafter, under pressure from the USFS to complete contract -3053, the Contractor had two

brothers, Patrick and Steven Smith, trim slash piles and thin trees on that contract. The agreement between the Contractor and the Smiths for those services was verbal.

65) Patrick Smith started trimming slash piles on contract -3053 on July 2, 1985, and Steven Smith joined him on July 18, 1985. They started thinning (and continued trimming) work on the contract on about July 22 and continued both activities until August 15, at the latest.

66) The Contractor paid Messrs. Smith fully, as far as they are concerned, for their trimming work.

67) Patrick and Steven Smith and the Contractor have agreed, and the Forum finds, that the Smiths thinned a total of 19.4 acres on contract -3053. This thinning passed USFS inspection.

68) The wage rate agreement between the Contractor and the Patrick and Steven Smith for their thinning work on contract -3053 was complicated by the fact that the Contractor offered the Smiths one rate (\$40 per acre, which is what the USFS paid the Contractor for thinning) if they worked as subcontractors (i.e., independent contractors), and another (\$20 per acre) if they worked as employees. The Contractor wanted and encouraged the Smiths to subcontract the thinning on contract -3053 from her, but they had to get their Oregon farm/forest labor contractor's license before they could legally do so.

69) The Contractor testified that she told the Smiths at the start that if they did not plan on getting their farm/forest labor contractor's license, she had to know ahead of time, to

make arrangements to treat them as employees (obtain their worker's compensation insurance, pay withholding and other taxes on them, etc.). The Smiths decided to, and did, begin the process of obtaining their license. They told the Contractor that, and at the time she hired them, the Contractor thought they were in process of acquiring their license.

70) At some point during the time they were thinning on contract -3053, Patrick and Steven Smith decided not to obtain a farm/forest labor contractor's license after all, but to continue working for the Contractor. (Patrick Smith testified that they decided not to get their license because Mr. Donaca, he believes, told them that if they had that license and the job did not get finished, the Contractor could sue them for not having it done. Patrick Smith testified that he knew that the job could not get done on time.) Thereafter, the Smiths did a bit more thinning work on contract -3053.

71) The Smiths believed that they performed their thinning work on contract -3053 as employees of the Contractor. It was Patrick Smith's understanding that he and his brother would be employees until they got their farm/forest labor contractor's license, because one cannot act as a subcontractor without that license.

72) The Smiths testified that on August 7, 1985, the Contractor told them that she did not wish to "hire" them any longer if they did not obtain their farm/forest labor contractor's license. They maintained that the Contractor told them to take their personal equipment and leave, which they did.

73) The Contractor stated in an exhibit that the Smiths told her that they had received the license and that after they had worked about five days without producing it, the Contractor told them not to thin any more until they had shown her their license. The Contractor testified that about this time, the Smiths moved the trailer in which they were camping from the work site to the USFS campground (against the Contractor's instructions and even though their USFS permit said they would not) and apparently continued work on the contract (while staying in the campground). The Contractor testified that she did not terminate the Smith brothers; they chose to return (to the work site from the campground) when the Contractor no longer believed they had received their license, and because the Contractor told them again that without the license, they would receive half the per-acre price for the work.

The Contractor told the USFS on August 15, 1985, that the Smiths had gone "down the road" because they had not obtained the license they were going to get, so the Contractor could make them subcontractors, and because they did not like thinning.

74) Patrick Smith denied that either he or his brother ever told the Contractor, or said anything to the Contractor or Mr. Donaca that might have given the impression that, they had received their farm/forest labor contractor's license. Patrick Smith asserted that he and Steven Smith first told the Contractor they were working on getting the license, and then told her of their decision not to get it.

75) On September 4, 1985, the Smith brothers wrote to the Contractor

stating that the USFS had informed them they had thinned 19.4 acres satisfactorily on contract -3053 and asking for the pay they had earned. The Contractor's response was that in accordance with USFS preference, she was going to wait until more work was done on the contract before submitting a request for payment, and that that should not be too much longer. She also said she would send the Smiths their money as soon as she got it.

On October 6, 1985, the Smiths spoke with the Contractor directly, asking for their pay, and the Contractor again put them off. On October 7, 1985, the Smiths informed the Contractor that they had filed a wage claim with the United State Department of Labor, which they offered to cancel if they each received checks for \$388 from her by October 14, 1985.

In a letter dated October 10, 1985, the Contractor again told the Smith brothers that she would pay them the "money due" them when she received a check from the USFS for their thinning work, and asserted that they had agreed to wait until that time. In that letter, the Contractor stated that the Smiths had agreed to accept \$20 per acre for their thinning work if that work was done on a payroll basis (rather than \$40 per acre if they acquired a contractor's license).

76) On or about October 9, 1985, Patrick and Steven Smith made wage claims to the US Department of Labor for their unpaid wages due from the Contractor. After investigation of their claims, the Department of Labor determined that the Smiths were due back wages under the Service Contract Act (the Act of October 22, 1965, as

amended, 42 USC 351 et seq.), to which contract -3053 was subject. The Department of Labor made a demand for payment, which the Contractor refused. Thereafter, on February 24, 1986, the Department of Labor filed an administrative complaint alleging that the Contractor owes each Smith brother \$633.60 for his work, pursuant to the minimum hourly wage requirements of the Service Contract Act. At the time of hearing, the Department of Labor was awaiting a trial date on this complaint.

77) In computing the above-cited amounts allegedly owed Patrick and Steven Smith, the Department of Labor used the records the Smiths had contemporaneously kept of all hours they worked on contract -3053. According to those records, each of the Smiths worked 97 hours thinning on that contract. According to the Contractor, the Smiths worked approximately 65.5 hours thinning. However, the Contractor did not ever see the Smiths when they were thinning for her, after the first day, and the Contractor states that her information as to the hours they worked came from the Smiths.

78) On March 22, 1986, the Contractor wrote to Patrick and Steven Smith acknowledging that she had agreed, and restating her agreement, to pay them a total of \$20 per acre for 19.5 acres, or a total of \$400 for their thinning work on contract -3053.

79) At hearing, the Contractor testified that she never paid this \$400 because it was contingent upon the Smiths dropping their wage claim, which they refused to do. Steven Smith testified that the Smiths would

have dropped their wage claim had the Contractor offered them anything reasonable.

80) The Contractor has paid nothing to Patrick or Steven Smith for their thinning work on contract -3053.

81) The Contractor stipulated at the start of the hearing that she "owes some sum of money to one of the Smith brothers for work he performed for her on this contract." Her only reference to this at hearing was her testimony that "the \$150" she said she owes Steven Smith is the total she owes him for trimming and thinning. The Contractor initially claimed an offset of the amount she alleged she had deliberately overpaid the Smiths for trimming against any amount due them for their thinning, but she could not provide a figure for any such offset to the Forum. Thereafter, the Contractor testified that she was not asking the Forum to consider this extra trimming money an offset (and that she never intended to subtract it from what Smiths made thinning), but only explaining the origin of the \$150 figure.

82) The Contractor did not submit any payroll records to the Agency for Steven or Patrick Smith during any time material herein.

83) The Contractor's defense to the two violations alleged concerning the Smiths is that her accountant told her that she did not have to submit payroll records to the Agency until she had paid a payroll. However, when asked at hearing why she did not pay the Smiths the \$20 per acre she admitted she had promised for the 19.4 acres she admits they thinned, the Contractor stated it was because her

attorney or accountant told her to let Department of Labor "settle this."

F. Penalties

84) The penalties the Agency has proposed for each violation charged herein are well under the \$2000 which ORS 658.453 provides may be assessed for each such violation. The Agency determined the exact amount to be assessed for each violation by application of the criteria set forth in OAR 839-15-510(1). Specifically, the amounts assessed are the Agency's "standard first-time" violation penalties for each type of violation charged, as determined pursuant to the "magnitude and seriousness of the violation" criterion of OAR 830-15-510(1)(c). As far as the Agency knows, there is no evidence concerning the other criteria of that provision which this Forum should know.

ULTIMATE FINDINGS OF FACT

1) During all material times herein, the Contractor was a farm/forest labor contractor, as defined by ORS 658.405, doing business in the State of Oregon. From July 24, 1984, through January 31, 1985, and from March 22, 1985, through January 31, 1986, the Contractor was licensed as a farm/forest labor contractor, as required by ORS 658.410.

2) The Contractor's husband Ray Donaca worked with the Contractor in all her farm/forest labor contractor activities described herein, either as her employee or agent.

3) All the work described in the Ultimate Findings of Fact below was performed on USFS contracts in the State of Oregon.

4) In the fall of 1984, the Contractor entered into a verbal subcontracting agreement with Jay Scharz Contracting whereunder Jay Scharz Contracting would perform piling work on a contract the Contractor had with the USFS. In exchange for payment of \$50 per acre piled, Jay Scharz Contracting would pile whatever the Contractor had not piled on a given unit of land, and they would negotiate how many acres each had piled after the completion of the piling. The Contractor's instructions to Jay Scharz Contracting were to pile everything left on the ground after the Contractor had skidded. The Contractor indicated to Jay Scharz Contracting that it should pile material left on the ground even if it seemed to fall within the contract specifications for what should have been skidded. The Contractor also agreed to let Jay Scharz Contracting remove salvageable wood from the Unit's landing if it wished to do so, as long as Jay Scharz Contracting shared that wood with a woodcutter the Contractor was letting cut firewood out of salvageable wood. The Contractor afforded Jay Scharz Contracting and the woodcutter this opportunity because the salvageable material had no value to her and, accordingly, otherwise would go to waste. Jay Scharz Contracting removed just one load of salvage.

5) Just after Jay Scharz Contracting started piling for the Contractor, the USFS stopped its work because there was too much skiddable material in its piles. Nonetheless, the Contractor continued her above-cited instructions to Jay Scharz Contracting after it resumed piling. Any piling of skiddable

materials by Jay Scharz Contracting, therefore, was done at the specific direction of the Contractor, who was under pressure to finish the contract and obtain payment for it as soon as possible. When Jay Scharz Contracting finished piling for the Contractor, the USFS approved its work as satisfactory.

6) The Contractor and Jay Scharz Contracting agreed that if the contract on which Jay Scharz Contracting had piled was not completed in 1984, the Contractor would pay Jay Scharz Contracting 2/3 of what was due it when she received payment for its work from the USFS, and the final 1/3 due it when the USFS made final payment on the contract.

7) While Jay Scharz Contracting was piling, the above-mentioned woodcutters were cutting firewood out of the decks of skidded, salvageable material on the Unit. Those woodcutters left messes in the decks by leaving unusable wood pieces they had cut off laying in the roads and around the landings, rather than piling and organizing it. To aid in completion of the contract and thereby make sure the USFS made final payment on the contract, Jay Scharz Contracting volunteered to clean up the woodcutters' mess. Jay Scharz Contracting was not able to do this in 1984 due to snow.

8) After Jay Scharz Contracting finished its piling work on the Unit, the Contractor and Jay Scharz Contracting agreed that the latter had piled 150 acres, for which the Contractor would pay it a total of \$7500.

9) When the Contractor received the USFS payment out of which she had agreed to pay Jay Scharz

Contracting 2/3 of what it had earned, she paid it nothing.

10) During the winter and spring of 1985, Jay Scharz Contracting periodically inspected the landing area to ascertain whether the snow had cleared enough to allow it to do the promised clean up. When it had, Jay Scharz Contracting informed the Contractor that it was going to do the clean up at the beginning of the following week. Just before that time, however, the Contractor performed the clean up.

11) Since that time, the Contractor has paid Jay Scharz Contracting nothing for its piling on her contract. In several meetings with Jay Scharz Contracting, the Contractor and/or her husband admitted that she owed Jay Scharz Contracting money for its piling. However, even though Jay Scharz Contracting did not know it at the time, the Contractor had no intention, from the start, of paying it for its work.

12) By her actions and inactions recited in Ultimate Findings of Fact 4 through 11 above, the Contractor failed to pay promptly, when due, (or at all) to Jay Scharz Contracting what it was entitled to as compensation for work that business had performed as a subcontractor of the Contractor in the fall of 1984, and which the USFS had entrusted to the Contractor for that purpose. By those same actions and inactions, the Contractor failed to comply with the terms and provisions of the legal and valid subcontracting agreement the Contractor had entered into, in her capacity as a farm/forest labor contractor, with Jay Scharz Contracting.

13) In an agreement completed in June 1985, the Contractor and her husband subcontracted thinning work on another USFS contract to Robert A. Otteni, doing business as LaPine Forestry Services. In this agreement, the Contractor agreed to pay Mr. Otteni every two weeks for whatever thinning he had completed, upon formal USFS approval of it.

14) Mr. Otteni timely completed the thinning work he had agreed to do, and the USFS formally approved that work on May 24, 1985, and June 18, 1985. The Contractor received payment from the USFS for Mr. Otteni's work no later than approximately July 15, 1985.

15) The Contractor owed Mr. Otteni \$7291.40 for his work, and she has paid him \$2000 of that sum. After making repeated unsuccessful attempts to obtain full payment from the Contractor, during which it became clear to Mr. Otteni that the Contractor did not intend to pay him anything (even her \$2000 payment was merely a delaying tactic suggested by the Contractor's attorney), Mr. Otteni obtained what the Contractor owed him for his work, minus an offset for money Mr. Otteni owed the Contractor under an unrelated agreement, and attorney fees, from the Contractor's bonding company, pursuant to his claim therefore against the Contractor's payment bond.

16) By her actions and inactions recited in Ultimate Findings of Fact 13 through 15 above, the Contractor failed to pay promptly, when due, (or at all) to Robert A. Otteni, doing business as LaPine Forestry Services, \$4291.40 to which Robert A. Otteni was entitled, for work he had performed as a

subcontractor of the Contractor in the Spring of 1985, and which the USFS had entrusted to the Contractor for that purpose. By those same actions and inaction, the Contractor failed to comply with the terms and provisions of the legal and valid subcontracting agreement the Contractor had entered into, in her capacity as a farm/forest labor contractor, with Robert A. Otteni, doing business as LaPine Forestry Services.

17) At the end of or just after Mr. Otteni's thinning work for the Contractor, the Contractor engaged Pete Sharp to help her finish the same contract, USFS contract 53-04GG-4-02985. Between approximately June 11, 1985, and July 1, 1985, Mr. Sharp, Darrell Conklin, and possibly other individuals performed slash piling and trimming for the Contractor. The Contractor paid Mr. Sharp for this work directly.

18) The Contractor did not file any payroll records with the Agency for Mr. Sharp or Mr. Conklin.

19) Mr. Sharp was not licensed in Oregon as a farm/forest labor contractor during any time material herein. The Contractor knew this, and she knew that a subcontractor was legally required to have this license. The Contractor asserts that she reasonably believed that Mr. Sharp was exempt from this requirement by virtue of the fact that his business was family-owned. The Forum does not believe that the Contractor believed that Mr. Sharp was exempt when she engaged his services. However, even if she did, Mr. Sharp was not exempt from this requirement, as the family enterprise exemption to the Oregon farm/forest labor contractor licensing requirement

does not apply to a subcontractor. (See Section B of the Opinion below.) The Contractor, charged with knowledge of the law relating to her farm/forest labor contracting activities, should have known that. Even if she did not, she could have checked with the Agency to ascertain whether Mr. Sharp qualified for the asserted exemption, but she did not.

20) The Contractor either employed or subcontracted with Pete Sharp, a person whom the Contractor knew was not licensed as a farm/forest labor contractor by the Agency, for the forestation or reforestation of lands, specifically the thinning of trees.

21) If the Contractor employed Mr. Sharp to do this thinning, she failed to provide the Commissioner of the Bureau of Labor and Industries with certified true copies of payroll records of Mr. Sharp as required. (See Conclusion of Law 9 below.)

22) If Mr. Sharp performed this thinning as a subcontractor, he acted as a farm/forest labor contractor without a license. As Mr. Sharp was not exempt from the requirements of ORS 658.410, that action would constitute a violation of ORS 658.410. The Contractor assisted him in any such endeavor by entering into the subcontracting agreement with him knowing that he was not licensed and knowing that a subcontractor such as he was required to be licensed. Accordingly, if Mr. Sharp was the Contractor's subcontractor, she assisted him to act as a farm/forest labor contractor in violation of ORS 658.405 to 658.475.

23) In the Summer of 1985, the Contractor engaged Patrick and

Steven Smith to trim slash piles and thin trees on another USFS contract 53-04GG-5-03053. Messrs. Smith trimmed piles between July 2, 1985, and August 14, 1985, at the latest, during which time they also thinned trees on and after about July 22.

24) The Contractor fully paid the Smiths for their trimming, but she has paid them nothing for their thinning.

25) The Contractor agreed to pay the Smiths directly \$20 per acre for their thinning if they worked as her employees, and directly \$40 per acre if they subcontracted the thinning from her. The Contractor encouraged them to subcontract. Although she knew that in order to do that legally, the Smiths had to obtain a farm/forest labor contractor's license, the Contractor allowed them to start thinning without that license, as they told her they were in the process of obtaining it. During their thinning work, however, the Smiths decided not to obtain their license and subcontract their work from the Contractor, as they were warned that subcontracting could expose them to liability if the contract was not completed on time. They knew it could not be completed on time. The Contractor and the Smiths ended their relationship when the Smiths told the Contractor that they were not going to obtain a license.

26) When they finished working for the Contractor, Patrick and Steven Smith had thinned 19.4 acres, and the USFS approved their work. Even though the Contractor has acknowledged (and did not really assert otherwise at hearing) that the Smiths did this work and earned \$20 per acre for it, the Contractor paid them nothing.

27) The Contractor has conceded that she owes Patrick and Steven Smith \$388.00 in wages due them, and this Forum concludes that she owes them at least that sum.

28) By her actions and inactions found in Ultimate Findings 23 through 27 above, the Contractor failed to pay her employees Patrick and Steven Smith wages for work they had performed for her and, thereby, failed to comply with the terms and provisions of the legal and valid employment agreement the Contractor had entered into, in her capacity as a farm/forest labor contractor, with Patrick and Steven Smith.

29) The Contractor failed to provide the Commissioner of the Bureau of Labor and Industries with certified true copies of payroll records for Patrick and Steven Smith concerning their work.

30) The amounts of the penalties which the Agency has proposed herein were determined by proper application of governing statute and rule.

CONCLUSIONS OF LAW

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

2) As a person licensed and acting as a farm/forest labor contractor with regard to the forestation or reforestation of lands in the State of Oregon during all times material herein, and licensed from July 24, 1984, to January 31, 1985, and from March 22, 1985, to

January 31, 1986, the Contractor was and is subject to the provisions of ORS 658.405 to 658.475.

3) The actions, inactions, and statements of Raymond Donaca described herein are properly imputed to the Contractor. As Mr. Donaca was either the Contractor's employee or her agent during all times material herein, and his actions, inactions, and statements described herein were made in the course and within the scope of that employment or agency, the Contractor is responsible for those actions, inaction, and statements.

4) By failing to pay promptly, when due, (or at all) to Jay Scharz Contracting \$7,500 to which Jay Scharz Contracting was entitled and which the USFS had entrusted to the Contractor for that purpose, the Contractor violated ORS 658.440(1)(c). By failing to pay all amounts to Jay Scharz Contracting when they were due, the Contractor failed to comply with the terms and provisions of the legal and valid subcontracting agreement the Contractor had entered into, in her capacity as a farm/forest labor contractor, with Jay Scharz Contracting and, thereby, violated ORS 658.440(1)(d).

5) By failing to pay promptly, when due, (or at all) to Robert A. Otteni, doing business as LaPine Forestry Services, \$4,291 to which Robert A. Otteni was entitled and which the USFS had entrusted to the Contractor for that purpose, the Contractor violated ORS 658.440(1)(c). By failing to pay all amount to Robert A. Otteni when they were due, the Contractor failed to

* For purposes of the charges before it, this Forum need not determine whether the Contractor owes them this amount, twice this amount, the amounts the Department of Labor asserts, or some other exact figure.

comply with the terms and provisions of the legal and valid subcontracting agreement the Contractor had entered into, in her capacity as a farm/forest labor contractor, with Robert A. Otteni and, thereby, violated ORS 658.440(1)(d).

6) During all times material, any person who subcontracted with another for the forestation of reforestation of lands, including thinning of trees and piling of brush and slash, was a farm/forest labor contractor, as that term was defined in ORS 658.405(1) and OAR 839-15-004(5), and therefore, pursuant to ORS 658.410, was required to possess a valid farm/forest labor contractor's license issued to him or her by the Agency.

7) During all times material herein, ORS 658.417(3) required the Contractor to provide to the Commissioner of the Agency a certified true copy of all payroll records (wage certifications) for work done as a farm labor contractor, if she paid (or was to pay) her employees on her contracts directly. Specifically, as implemented by OAR 839-15-300, ORS 658.417(3) required the Contractor to submit such a wage certification at least once every 35 days from the time work first began on each contract.

8) For work on USFS contract 53-04GG-4-02985, the Contractor either employed or entered into a subcontracting agreement with Pete Sharp. Pursuant to that subcontracting or employment agreement, Mr. Sharp performed work in the forestation or reforestation of lands.

If Mr. Sharp performed that work as a subcontractor, he acted as a farm/forest labor contractor without the

required license. That action would constitute a violation of ORS 658.410. The Contractor knew Mr. Sharp was not licensed as a farm/forest labor contractor by the Agency, and if the Contractor assisted him in acting as a farm/forest labor contractor without the required license by entering into a subcontracting agreement with him, the Contractor violated ORS 658.440(2)(e).

If Mr. Sharp was the Contractor's employee on contract -2985, since the Contractor paid him directly for his work on that contract, the Contractor was required to file a wage certification concerning work he performed on that contract by at least July 16, 1985, pursuant to ORS 658.417(3) and OAR 839-15-300(2). Therefore, if Mr. Sharp was the Contractor's employee on that contract, the Contractor violated ORS 658.417(3) by failing to provide any such wage certification to the Commissioner.

9) Therefore, by either failing to provide the Commissioner of the Bureau of Labor and Industries with a certified true copy of payroll records for work done by Pete Sharp on contract -2985, if he was an employee, or in the alternative, assisting Mr. Sharp, an unlicensed person, to act as a farm/forest labor contractor on that contract, in violation of ORS 658.405 to 658.475, the Contractor violated ORS 658.417(3) (in the first instance) or violated ORS 658.440(2)(e) (in the second instance).

10) Because the Contractor was to pay her employees Patrick and Steven Smith directly for their work on contract 53-04GG-5-03053, the Contractor was required to provide to the Commissioner of the Bureau of Labor and

Industries a certified true copy of all payroll records for work done on that contract by at least August 26, 1985, pursuant to ORS 658.417(3) and OAR 839-15-300(2). By failing to provide the Commissioner such payroll records, the Contractor violated ORS 658.417(3).

11) By failing to pay Patrick and Steven Smith wages for work they had performed on her USFS contract 53-04GG-5-03053, the Contractor failed to comply with the terms and provisions of the legal and valid employment agreement the Contractor had entered into, in her capacity as a farm/forest labor contractor, with Patrick and Steven Smith and, thereby, violated ORS 658.440(1)(d).

The Contractor was obliged, as provided in ORS 652.160, to pay them at least the \$388 in wages she conceded she owes them, even if she had a bona fide dispute as to whether she owed them anything more than that sum.

12) Under the facts and circumstances of this record, and according to the law applicable in this matter, the Commissioner of the Bureau of Labor and Industries has the authority to and may assess civil penalties against the Contractor, and her assessment of the sums of money specified in the Order below as such penalties is an appropriate exercise of that authority.

OPINION

A. The Contractor and Robert Otteni, Doing Business as LaPine Forestry Services

As noted in the Findings of Fact above, one of the Contractor's defenses to her failure to pay Mr. Otteni

for his work for her on contract -2985 was her allegation that Mr. Otteni did not pay the sub-subcontractors on another contract (-2962) by joint check to the Contractor and those sub-subcontractors, as the Contractor alleged he had agreed to do, and, therefore, the Contractor had no proof that those sub-subcontractors had been paid. For reasons explained above, the Forum did not believe the latter factual assertion and therefore found this defense invalid. If there was any breach by Mr. Otteni's direct full payment to the sub-subcontractors, there is no evidence that it damaged the Contractor.

The Forum wishes to note, however, that even if Mr. Otteni had breached his agreement with the Contractor concerning contract -2962, and even if that breach had damaged the Contractor, that would not have extinguished the Contractor's obligations, under ORS 658.440(1)(c) and (1)(d), to pay Mr. Otteni the money she owed him under her agreement with him concerning contract -2985. As pointed out by the Agency, where there is more than one agreement between two parties, payment obligations under one agreement between them cannot be viewed as contingent upon resolution of all disputes under another, absent some clear agreement by the parties to the contrary. (There was no evidence of any such agreement between Mr. Otteni and the Contractor.) In other words, as the Agency stated, the Contractor cannot excuse her own breach of an agreement with Mr. Otteni by claiming breach by Mr. Otteni of a wholly different agreement with the Contractor.

B. Pete Sharp's Alleged Exemption from Licensing Requirements

The Contractor's defense to the allegation that she assisted Pete Sharp, an unlicensed person, to act as a farm/forest labor contractor was that she believed Mr. Sharp was exempt from Oregon farm/forest labor contractor licensing requirements because his business was family-owned.

OAR 839-15-130(15) provides a "family business exemption" to Oregon farm/forest labor contractor licensing requirements, which has two explicit limitations pertinent herein: 1) the exemption applies only to individuals who are working by themselves or with only the assistance of their spouse, son, daughter, brother, sister, mother, or father, and 2) the exemption applies only when the contract or agreement under which the allegedly-exempt individual is working is between that individual and the farmer, owner, or lessee of the land involved.

Herein, Mr. Sharp was working with Darrell Conklin, and there is no evidence whatsoever that Mr. Conklin was, or that the Contractor had any reason to believe he was, a member of Mr. Sharp's family. Moreover, Mr. Sharp's agreement to do the work involved was with the Contractor rather than the farmer, owner, or lessee of the land involved. Only if his agreement had been directly with the United States (through the USFS), the owner of that National Forest land, could Mr. Sharp have been exempt from licensing requirements for his piling and trimming work on that land. Accordingly, the Forum has concluded that Mr. Sharp was not exempt from Oregon farm/forest labor contracting

requirements through OAR 839-15-130(15).

The Contractor further asserts, in essence, that since she had reason to believe that Mr. Sharp was exempt from licensing requirements through OAR 839-15-130(15), and did not know that he was not exempt, she could not have assisted him in violating the law requiring him to have a license, as charged. The Forum does not agree with this defense: the Contractor is charged with knowledge of the law, and even a quick reading of OAR 839-15-130(15), or an inquiry to the Agency, would have apprised the Contractor of the fact that a subcontractor cannot qualify for this exemption. The Contractor, therefore, is charged with knowledge that Mr. Sharp did not qualify for this exemption.

ORDER

NOW, THEREFORE, as authorized by ORS 658.453, the Contractor is hereby ordered to deliver to the Hearings Unit of the Bureau of Labor and Industries, Room 309, 1400 S. W. Fifth Avenue, Portland, Oregon 97201, a certified check payable to the BUREAU OF LABOR AND INDUSTRIES in the amount of FOUR THOUSAND DOLLARS (\$4000.00) plus any interest thereon which accrues, at the annual rate of nine per cent, between a date ten days after the issuance of this Order and the date the Contractor complies with this Order. This assessment is the sum of the following civil penalties against the Contractor: \$1,000 for each of the Contractor's two violations of ORS 658.440(1)(c) found herein; \$500 for each of the Contractor's three violations of 658.440(1)(d) found herein; \$250 for the Contractor's

violation of 658.417(3) on contract 53-04GG-5-03053 found herein; and \$250 for the Contractor's violation of ORS 658.417(3) or ORS 658.440 (2)(e) on contract 53-04GG-4-02985 found herein.

**In the Matter of
Douglas D. French, dba
ASSOCIATED OIL COMPANY,
Respondent.**

Case Number 28-86
Final Order of the Commissioner
Mary Wendy Roberts
Issued June 2, 1987.

SYNOPSIS

Respondent's practice of requiring his employee-drivers to operate his fuel oil delivery truck in an unsafe condition without repair, even after a police citation for safety violations, was an unsafe practice forbidden by the Oregon Safe Employment Act. Two Complainants' refusals to operate the unsafe vehicle were a protected activity. When the Respondent refused to assign the Complainants other work in retaliation for opposing the unsafe practice, he thus unlawfully discharged them. The Commissioner awarded one Complainant \$6,440 in lost wages and \$1,500 for mental distress, and the other Complainant \$7,720 in lost wages and \$2,500 for mental distress. ORS 183.415(6); 654.005; 654.010;

654.062(5)(a) and (b); OAR 839-06-020; 839-30-060; 839-30-105(10); 839-30-185(1).

The above-entitled matter came on regularly for hearing before Susan T. Venable, designated as Hearings Referee by Mary Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on April 21, 1987, in Room 311 of the Portland State Office Building, 1400 S.W. Fifth Avenue, Portland, Oregon. The Hearings Referee called as witnesses for the Bureau of Labor and Industries (hereinafter Agency) the following: W. W. Gregg, Quality Assurance Manager for the Civil Rights Division (CRD); Complainant Donald J. Blaska (hereinafter Blaska); Complainant Kevin L. Thomson (hereinafter Thomson); Steven Crampton, Multnomah County Deputy Sheriff, and Don Haugston (hereinafter Haugston).

Douglas D. French, doing business as Associated Oil Company (hereinafter Respondent), failed to appear at the hearing.

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

**FINDINGS OF FACT –
PROCEDURAL**

1) Verified complaints were filed with the CRD of the Agency on December 30, 1985, by Donald J. Blaska, and on January 6, 1986, by Kevin L. Thomson, alleging that Respondent had discriminated against

Complainants by conduct amounting to a discharge from employment because Complainants had opposed safety hazards.

2) The complaints filed by Complainants in this matter show the address of Respondent as: 51333 S.W. Old Portland Rd., Scappoose, Oregon 97056. CRD used this address to correspond with Respondent throughout the investigation, and was not asked by Respondent to use any other address.

3) On April 3, 1986, CRD issued a Notice of Administrative Determination in each case finding substantial evidence of the violation set forth in each of the complaints.

4) Pursuant to ORS 659.050, the Commissioner caused steps to be taken through conference, conciliation, and persuasion to effect a settlement of the complaints and to eliminate the effects of the unlawful practice; however, all such efforts were unsuccessful.

5) After failure to resolve the complaints under ORS 659.050, the Commissioner prepared Specific Charges, dated February 25, 1987, pursuant to ORS 659.060, and served said charges on Respondent and Respondent's attorney, Robert Miller, at the addresses supplied by CRD from CRD's file in this matter.

6) Together with the Specific Charges, the Agency also served on Respondent and Respondent's attorney the following: a) a Notice of Hearing setting forth the time and place of the hearing in this matter; b) a copy of the Notice of Contested Case Rights and Procedures containing the

information required by ORS 183.413; c) a complete copy of the Agency's administrative rules establishing the procedures and timelines for the contested case process; and, d) a separate copy of those specific administrative rules regarding default and relief from default.

7) A receipt for certified mail establishes that the Specific Charges and enclosures were received on February 26, 1987, by Respondent, who signed on the "Signature - Addressee" line, at the following address: Douglas D. French, Associated Oil Company, 51333 S.W. Old Portland Road, Scappoose, Oregon 97056.

8) A receipt for certified mail establishes that the Specific Charges and enclosures addressed to Respondent's attorney were received by an individual, who signed on the "Signature - Agent" line, on February 27, 1987, at the following address: Robert Miller, 12275 N.E. 2nd, Beaverton, Oregon 97005.

9) Respondent failed to file an answer to the Specific Charges, as required by OAR 839-30-060, within twenty days from the date of issuance of those charges.

10) Pursuant to OAR 839-30-185, which states that a respondent defaults to the Specific Charges where an answer is not timely filed, the Hearings Referee sent a Notice of Default, dated March 23, 1987, to both Respondent and his attorney at the same addresses where the receipt for certified mail shows the Specific Charges and enclosures were received. The notice advised that Respondent had ten days from the date of issuance of said notice, that is until April 2, 1987, to

request relief from default, and that failure to do so would result in Respondent being precluded from presenting evidence at hearing.

11) Respondent failed to request relief from default. The Hearings Referee then sent a letter, dated April 2, 1987, to both Respondent and Respondent's attorney at the same addresses listed in Findings of Fact 7 and 8 above. The letter advised that Respondent would be precluded from presenting any evidence at hearing.

12) On April 3, 1987, the Hearings Referee received a letter, dated April 2, 1987, from Robert J. Miller, who advised he was not Respondent's attorney. Mr. Miller did nevertheless request relief from default for Respondent; however, he provided no reasons therefor. This letter indicated that it was copied to Douglas French. Respondent made no contact with the Forum either before or after this time.

13) Prior to the commencement of the hearing, pursuant to ORS 183.415(7), the Hearings Referee explained the matters to be proved or disproved, and advised that in a default proceeding ORS 183.415(6) and OAR 839-30-185(2) require the Agency to present a prima facie case in support of the Specific Charges.

14) At the conclusion of the hearing in this matter, the Forum held the record open for five days to allow the Agency an opportunity to submit evidence regarding the status of Associated Oil Company.

15) On April 28, 1987, the Agency timely submitted a Supplement to Summary of Case with attached affidavit sworn to and signed by W. W.

Gregg and a second affidavit sworn to and signed by W. W. Gregg with attachments. These documents have been accepted as establishing facts in this matter.

16) Said affidavits establish that Douglas D. French did business as Associated Oil Company and as Doug's Oil Service during the first three quarters of 1986. The Employment Division's records show that Mervin Arnold and Donald Hougston (Haugsten) were employed during that time by Doug's Oil Service. Arnold advised the Agency, and Hougston testified at hearing, that they were employed by Douglas French doing business as Associated Oil Company.

17) The Hearings Unit sent a copy of the Proposed Order in this matter to Respondent indicating that Respondent had 10 days to file exceptions thereto. Respondent made no response.

FINDINGS OF FACT – THE MERITS

1) At all times material herein, Respondent Douglas D. French owned and was doing business under the assumed business name of Associated Oil Company, a fuel oil delivery business in Scappoose, Oregon, and employed one or more persons in the State of Oregon.

2) Blaska was hired by Respondent on August 1, 1985, primarily to drive Respondent's 1979 Chevrolet fuel oil truck to deliver diesel fuel to homes and businesses. Blaska had driven trucks for a total of approximately five years over the past 15 years; however, his primary occupation was in warehousing, and he is not

knowledgeable about the mechanics of a truck nor can he repair trucks.

3) Thornton was hired by Respondent on November 26, 1985, to drive Respondent's fuel oil delivery trucks. Thornton had not previously driven trucks, had no knowledge of the mechanics of a truck, and relied on others to determine and make necessary repairs.

4) On December 18, 1985, Blaska was driving Respondent's 1979 Chevrolet fuel oil delivery truck down US Highway 30 when he was signaled by a Multnomah County Deputy Sheriff to pull over at a weigh station in Scappoose, Oregon. The purpose of the stop was to allow the deputies to check the safety of the truck and its equipment to determine whether it was safe for the truck to be on the road.

5) On December 18, 1985, Thornton was "off duty" and was returning from Portland driving down US Highway 30. Observing Blaska and the fuel oil truck at the weigh station, Thornton pulled over, stopped, and listened to the conversation among Blaska and Deputy Sheriffs Graham and Crampton.

6) At that time, Deputy Sheriff Crampton assisted Deputy Sheriff Graham in the weigh station inspection of Respondent's truck. A citation in the amount of \$110.00 was issued to Donald John Blaska for operating a vehicle with the following safety and equipment violations in contravention of state statutes:

a) Inoperative Identification Lights – Respondent's truck had certain inoperative lights in the back, front, and sides of the truck. These lights are

necessary to mark the corners of the truck so that it can be better seen by motorists.

b) Lack of Shipping Documentation – Any vehicle carrying hazardous materials, such as the diesel fuel oil in Respondent's truck, must maintain shipping documents in the cab of the vehicle. This is an "out of service" violation.

c) Fuel Oil Tank Leaking – The tank carrying the product was leaking. The diesel oil fuel is a flammable material which will ignite upon contact with any open flame. This is an "out of service" violation.

d) Front Placard Missing – Any vehicle carrying hazardous material must display a placard on the front of the truck so indicating.

e) Roadside Warning Devices Out of Order – These devices are used when the truck is parked to warn oncoming motorists of a hazard.

f) Failure to have a Low Vacuum Warning Device – This device warns the driver that the truck is losing vacuum and that the brakes will not function. This is an "out of service" violation.

g) Inoperative Speedometer and Horn.

h) Improper Name Identification on the Vehicle.

The designation of "out of service" means that a vehicle cannot be driven until it is repaired and the vehicle is in safe working order. It takes the citation of only one "out of service" violation to ground the vehicle.

7) Crampton has been a Multnomah County Deputy Sheriff for the past 22 years and has been working in

motor carrier safety for three years. Deputy Sheriff Crampton was trained by the PUC and the federal government in inspection of large trucks, and he has also attended various educational programs in this regard. He inspects vehicles "full time," approximately 2500 vehicles per year. Deputy Sheriff Crampton was familiar with the mechanics of a truck and the potential consequences resulting from disrepair of a truck. It was his opinion, and this Forum accepts as fact, that Respondent's truck was not safe to operate and that the cited violations could "quite possibly" have resulted in an accident.

8) Deputy Sheriff Crampton advised Blaska, and he understood, that if the vehicle was driven while "out of service," this would be a crime and that Blaska could be jailed, fined, or have his license suspended. However, since Respondent's place of business was only one mile from the weigh station, Deputy Sheriff Crampton allowed Blaska to drive the truck to Respondent's premises provided that he be followed by Thornton.

9) Thornton recalls the Deputy Sheriffs informing Blaska that the truck had violations: no placards stating that the truck was carrying hazardous material; lights not working; no brake warning system; and, that the fuel oil tank was "dripping the product." Thornton also heard Deputy Sheriff Crampton advise Blaska that the truck could be driven to Respondent's place of business. However, Deputy Sheriff Crampton said that Blaska could only drive the truck back if Thornton drove behind Blaska to "make sure" that Blaska got there "safely." After that,

the truck was not to be moved from Respondent's property until the cited violations were repaired.

10) After being issued the citation, Blaska told Deputy Sheriff Crampton that he did not believe the truck to be in good operating condition and he was grateful that someone with authority had inspected the truck. Blaska also advised Deputy Sheriff Crampton that the truck had been driven in a condition of disrepair on previous occasions.

11) Blaska understood that most of the cited violations, specifically the leaking fuel oil tank and the failure to have a warning device for the brakes, were safety violations and that these conditions were dangerous. He did not consider the truck safe to drive. The warning device is to advise the driver to have the brakes checked "immediately." It is an immediate situation in that the brakes will fail suddenly and completely. Blaska was aware that the brakes had, on a previous occasion, failed on this truck. If the brakes were to fail, he believed this could cause him to have a "severe accident." Blaska believed that the leaking fuel tank could result in an "explosion," for example, where a lit cigarette came into contact with the leaked fuel oil. Blaska noted that Respondent had another truck, a Ford tilt truck that was at that time in the shop for "serious repairs," including a leaking fuel oil tank.

12) Thornton also believed that the truck was unsafe, and particularly noted that the dripping fuel could result in an "explosion."

13) After Blaska returned the truck to Respondent's place of business, he informed Respondent's wife of the citation issued by Deputy Sheriff

Crampton. She then called Respondent, who said "don't worry about it." In response, Blaska stated that Deputy Sheriff Crampton advised him that the truck was not to be driven until the repairs had been made. Respondent told Blaska, "then go home." Respondent also stated that the truck had been "tagged" before but had nevertheless been driven. Respondent asked Blaska to continue to make deliveries with the truck that day; however, due to the citation and unsafe condition of the truck, Blaska refused. Thereafter, as directed by Respondent, Blaska went home at the conclusion of the telephone conversation.

14) Thornton was with Blaska when Blaska spoke to Respondent's wife regarding the citation issued by the Deputy Sheriff. Respondent's wife told Thornton that the matter was not his business and that he should "go home." Thornton left immediately.

15) After Thornton returned home, on December 18, 1985, Respondent called him and requested that he drive the truck. Thornton advised Respondent that he would not do so as the truck was "unsafe." Respondent said "fine" and hung up. Thornton relied upon the findings of the Deputy Sheriff and he feared injury if he drove the truck.

16) Prior to December 18, 1985, Don Haugston had applied for a job as a truck driver with Respondent, who had told Haugston he would contact him when work was available. On the evening of December 18, 1985, Respondent called Haugston and asked him to begin work the next day as a truck driver. Respondent did not men-

tion the condition of the truck or Blaska and Thornton at that time.

17) On December 19, 1985, Haugston reported to work. While Respondent was instructing Haugston how to operate the truck, he mentioned that others had refused to drive the truck as it had been "red tagged." Haugston understood this to mean the truck was not to be driven until it was repaired. Respondent told Haugston that Blaska and Thornton had said the truck was unsafe; however, he seemed to take their comments in a less than serious way. Respondent said he "could" order the required warning device for the brakes, but said he thought the leaking fuel tank was a "loose connection." Respondent did, however, put the truck in the shop for repairs on December 20, 1985.

18) On December 19, 1985, Blaska called Respondent to determine his work assignment for that day. Respondent stated there was no work for him. Blaska then inquired whether the truck had been repaired; however, Respondent did not answer.

On December 20, 1985, Blaska reported for work and, since it was his regular pay day, to pick up his pay check. At that time, Blaska believed he was and would be working for Respondent, and therefore advised Respondent that he had failed the test to obtain his chauffeur's license, but would be taking the test again in a few days. Previous to this time, and with Respondent's knowledge, Blaska had been driving Respondent's trucks without a chauffeur's license. When Respondent was questioned by Investigator David L. Wright prior to the

issuance of the Administrative Determination, the Respondent stated:

"If Don (Blaska) had not refused to drive the truck that day (December 18, 1985) he would have driven the rest of the day."

Respondent again asked Blaska to drive the Chevrolet truck. Blaska refused as the repairs had not yet been made. Respondent then advised Blaska that if he was not willing to drive the truck he "no longer had a job." Subsequent to that time, Respondent never contacted Blaska regarding work. Blaska would have driven any of Respondent's trucks that were in safe operating condition and would have continued to work for Respondent after December 18, 1985, had Respondent scheduled him for work.

19) Thornton called Respondent every morning to find out if he had work. He did so, as usual, on the morning of December 19, 1985, and spoke to Respondent's wife. She advised Thornton that there was no work that day. Thornton called back on December 20, 1985, which was pay day, and was told by Respondent's wife that his pay check was ready. Thornton was advised by Respondent's wife to go up to Respondent's house to collect his pay check from Respondent. He did so. While there, Thornton asked Respondent if the truck had been repaired. Respondent said the truck was not repaired, but was being used for deliveries at that time. Thornton's telephone bill, dated January 5, 1986, verifies he made calls to Respondent's place of business on December 19 and 20, 1985.

20) Thornton was given two pay checks. When he asked Respondent

why he had done this, Respondent told Thornton that he had "quit" when he refused to drive the truck on December 18, 1985. At that point Thornton left. Although he would have continued to work for Respondent driving any truck in safe operating condition, it was clear to him after this conversation that he would no longer be working for Respondent.

21) Haugston worked for Respondent for a period of only three weeks as Respondent could not provide him with enough work. He believed Respondent was about to "fold," and stated he has not recently seen Respondent's service station open or active at the plant.

22) The Respondent remained in business as Associated Oil Company and maintained truck drivers until August 1, 1986, at which time Associated Oil Company ceased operations.

23) Blaska worked for Respondent as a truck driver from August, 1985, until December 18, 1985. He worked five days each week, Monday through Friday, at an average of eight hours each day at the rate of \$5.00 per hour. Blaska received no benefits or other compensation. While Blaska had been seeking work in his primary profession of warehousing, he was willing to accept any job. He did, in fact, apply for a job as a dishwasher. Blaska has applied for approximately 60 jobs in the Portland area. In his efforts to find work, he has pursued leads from friends, checked newspaper help wanted advertisements, searched door to door, and has applied at several temporary placement agencies including Western Temporary Services, Kelly, and Barrett's (now under a

different name). He has also sought employment at places he knew to hire temporary help, including the Coliseum and Civic Stadium.

24) After his discharge, Blaska suffered mentally and emotionally. During a conversation regarding his discharge that Blaska had with an employee at a gas station owned by Respondent, the employee laughed about the situation and said that Respondent could replace "anybody" at "anytime." Blaska responded that he did not find driving a "hazardous truck" to be funny. He left embarrassed about the situation. Knowing that Respondent had been cited for safety violations previous to the December 18, 1985, incident, and considering the fact that Respondent had laughed about these incidents, Blaska was "very upset" that Respondent had asked him to drive the truck in its unsafe condition and about his termination for his refusal to do so. Blaska has listed Respondent as a place of previous employment on numerous job applications. He believes prospective employers have spoken to Respondent and that this has been a hindrance to his obtaining work. This situation has resulted in his being "very depressed."

25) Thornton worked an average of eight hours each day, six days each week, at the rate of \$5.00 per hour between November 26, 1985, and December 18, 1985.

After he realized that he would not be working for Respondent anymore, Thornton sought other work. He went to the unemployment office "everyday" to check for jobs, looked in the newspaper, and contacted friends. He even sought work in Arkansas, where he

had relatives. While he estimated that he filled out approximately 200 job applications, Thornton was only interviewed by three employers.

Thornton thought it best to list Respondent as a present employer as he knew "experience" was needed to find a job. However, Thornton came to believe that noting Respondent as a previous employer hindered him in obtaining employment. The three interviews Thornton had resulted from applications where he had not used Respondent's name as a previous employer.

Considering the difficulty he was having finding a job, Thornton decided he should be seeking training in a trade. Thereafter, in July of 1986, Thornton entered the Job Corps program, which he finished in March of 1987. He was trained to be a cook. There is no evidence that Thornton ceased to look for a job during this time.

On April 2, 1987, Thornton obtained work as a cook at the Tri City Health Care Center in Gladstone, Oregon. This is a permanent part-time job. Thornton works four days each week, eight hours per day at \$4.50 per hour.

Prior to being hired by Respondent, Thornton had gone to school to be trained in truck driving. He had taken a loan, which he still owes, of \$2500 to pay for the training. When Thornton obtained employment with Respondent he explained about this loan. Thornton has recently been advised that collection proceedings will begin if he has not commenced payments by April 30, 1987.

26) Thornton was "hurt" by Respondent's actions and the discharge. Since that time, he has suffered "severe depression" and feels he is still "recuperating." Thornton has trouble sleeping, which he attributes mostly to worrying about his loan payments. Four months after his discharge by Respondent, Thornton was diagnosed by a doctor at St. Helen's Hospital as having an ulcer.

27) The Forum found both Blaska and Thornton to be credible witnesses. Each offered answers that were direct and responsive to the questions. The testimony offered by Blaska and Thornton was internally consistent and consistent with documents submitted by the Agency setting forth their previous statements. With the Respondent having failed to appear, the Forum has found no reason to disbelieve these Complainants.

28) Agency policy in this matter is twofold:

a) Applicable administrative rules allow an employee to refuse to work where there is extreme danger to life and limb and there is no viable means of redress such as calling Accident Prevention Division or filing a union grievance; and

b) Protection also extends to situations where a safety oriented citation has been issued and the driver warned not to operate the vehicle. Agency policy holds that an employee should not be in the position of breaking the law to retain employment.

ULTIMATE FINDINGS OF FACT

1) At all times material herein, Respondent Douglas D. French owned and was doing business under the

assumed business name of Associated Oil Company, a fuel oil delivery business in Scappoose, Oregon, and employed one or more persons in the State of Oregon.

2) Complainant Donald J. Blaska was hired by Respondent on August 1, 1985. Complainant Kevin L. Thornton was hired by Respondent on November 26, 1985. Both were hired to drive Respondent's fuel oil delivery trucks. Neither Blaska or Thornton were familiar with the mechanics of a truck, nor were able to repair trucks.

3) On December 18, 1985, Blaska was driving Respondent's 1979 Chevrolet fuel oil delivery truck. He was stopped at a weigh station, where the truck was inspected. Blaska was issued a citation by Deputy Sheriff Crampton in the amount of \$110 for operating a vehicle with the following safety and equipment violations:

- a) Inoperative identification lights,
- b) Fuel oil tank leaking,
- c) Failure to have shipping documents for carrying hazardous material,
- d) Failure to have front placard indicating truck carrying hazardous material,
- e) Inoperative roadside warning device,
- f) Failure to have a low vacuum warning device for the brakes,
- g) Inoperative speedometer and horn, and
- h) Improper name identification on the vehicle.

Deputy Sheriff Crampton tagged the truck "out of service" and advised Blaska that to drive this truck while "out of service" would be a crime

punishable by a fine or imprisonment or loss of license.

4) Thornton observed Blaska at the weigh station, stopped, observed the inspection and issuance of the citation, and overheard the conversation between Deputy Sheriff Crampton and Blaska.

5) Deputy Sheriff Crampton found the vehicle was not safe to operate, and was of the opinion that the cited violations could quite possibly lead to an accident. Since Respondent's place of business was nearby, Deputy Sheriff Crampton allowed Blaska to drive the truck to Respondent's premises, but required Thornton to follow in his vehicle to insure Blaska arrived safely.

6) Blaska understood he had been cited for safety violations. He believed the condition of the truck to be dangerous and unsafe to drive, specifically noting that a brake failure could cause a severe accident, and that the leaking fuel tank could result in an explosion. Thornton also believed the truck to be unsafe and focused on the fact that the dripping fuel oil could cause an explosion.

7) After returning the truck to Respondent's premises on December 18, 1985, Blaska informed Respondent of the citation and the Deputy Sheriff's warnings. Respondent said that Blaska should not worry about it, and that the truck had been driven on a previous occasion after being tagged. Blaska refused to drive the truck any more on December 18, 1985, due to the citation and the unsafe condition of the truck. Thornton, who was present at the time, was advised by Respondent's wife to go home. Respondent called Thornton later that day to ask him to drive

the truck. He refused because the truck was unsafe and he feared injury.

8) Thornton called Respondent to find out his work assignment on both December 19 and 20, 1985. He was told there was no work. On December 20, 1985, Respondent gave Thornton his check and told him that he, Thornton, had "quit" when he refused to drive the truck on December 18, 1985. It was clear to Thornton at that time that he would no longer be working for Respondent. Thornton was terminated on December 18, 1985.

9) Blaska also called for his work assignment on December 19, 1985, but was advised there was none. He reported to work on December 20, 1985. He asked if the truck had been repaired. Respondent replied that the repairs had not been made and that if he, Blaska, was "not willing to drive the truck, he no longer had a job." Blaska believed he had been terminated, and was in fact terminated by Respondent on December 18, 1985.

10) Both Blaska and Thornton would have continued to work for Respondent driving any truck in safe operating condition. However, Respondent never asked them to do so. Neither Blaska nor Thornton were contacted by Respondent for work after December 20, 1985.

11) Blaska worked five days a week, eight hours a day at \$5.00 per hour. There are 161 days (counting five days each week) between December 18, 1985 (the date of termination), and August 1, 1986 (the date Associated Oil ceased doing business). Blaska made diligent efforts to find other employment, but was unsuccessful. Had he continued to work for

Respondent during this time, Blaska would have earned \$6,440 computed as follows:

161 days
 x 8 hours a day
 1,288 total hours
 x 5 dollars per hour
 \$6,440 wages Blaska would have earned

12) Blaska was upset and embarrassed by the discharge and became very depressed.

13) Thornton worked six days each week, eight hours each day at \$5.00 per hour. There are 193 days (counting six days each week) between December 18, 1985 (the date of termination), and August 1, 1986 (the date Associated Oil ceased doing business). Thornton made diligent efforts to find other employment, but was unsuccessful until April of 1987, a period not relevant since Respondent ceased business on August 1, 1986. Had he continued to work for Respondent until Respondent's business ceased, Thornton would have earned \$7,720 computed as follows:

193 days
 x 8 hours a day
 1,544 total hours
 x 5 dollars per hour
 \$7,720 wages Thornton would have earned

14) Thornton was hurt by the discharge. As a result thereof, he has suffered severe depression and was subsequently diagnosed as having an ulcer.

15) Respondent did business as Associated Oil Company until August

1, 1986, at which time that operation ceased.

CONCLUSIONS OF LAW

1) The Commissioner of the Bureau of Labor and Industries of the State of Oregon has jurisdiction over the persons and of the subject matter related to the violation of ORS 654.062 alleged herein. Pursuant to ORS 654.062, the Commissioner is to process complaints filed in accordance with the procedures, policies, and remedies established by ORS 659.010 to 659.110 and the policies of ORS 654.001 to 654.295 to the same extent as other violations under ORS 659.030(1)(f).

2) ORS 654.010 requires an employer to provide a safe place of employment, furnish safeguards and adopt processes necessary to render a place of safe employment, and do everything necessary to protect the life, safety, and health of employees. Respondent's practice of allowing his fuel oil delivery truck to be operated in an unsafe condition, and requiring drivers to drive the truck before repairing the hazardous conditions, even after being advised that a citation had been issued by a Multnomah County Deputy Sheriff for safety violations, is a practice forbidden by ORS 654.010.

3) The refusal of Blaska and Thornton to drive the fuel oil delivery truck in its unsafe conditions constitutes opposition to a practice forbidden by ORS 654.001 to 654.295.

4) Blaska and Thornton refused to perform a task, drive a truck cited for safety violations, because each reasonably believed that to perform such task would pose an imminent risk of

serious injury or death, and there was insufficient time or opportunity to seek other effective redress or resort to statutory enforcement channels. Their conduct was, therefore, protected under OAR 839-06-025.

5) Respondent's statements to both Blaska and Thornton regarding their employment, together with his conduct in not scheduling them for work, constitutes a discharge of Blaska and Thornton from Respondent's employment.

6) Respondent discharged Blaska and Thornton from employment on December 18, 1985, for the reason that Blaska and Thornton opposed a practice forbidden by ORS 654.001 to 654.295. This is a violation of ORS 654.062(5)(a).

7) Douglas French, as owner of the business operated under the assumed business name of Associated Oil Company, is liable for any damages owed to Complainants in this matter.

8) The Commissioner of the Bureau of Labor and Industries has the authority pursuant to ORS 654.062(5) and ORS chapter 659 to award money damages to Complainants under the facts and circumstances of this record, and awarding as damages the sum of money specified in the Order below is an appropriate exercise of that authority.

OPINION

Respondent failed to submit an answer to the Specific Charges, failed to appear at the hearing in this matter or correspond in any way with the Forum. Respondent has defaulted as to the Specific Charges. Pursuant to ORS

183.415(6) and OAR 839-30-185(2), the Agency must present a prima facie case in support of the Specific Charges and to establish damages. In that Respondent was not present at the hearing and submitted no evidence to refute evidence offered by the Agency, the credible testimony of Complainants and other witnesses, together with documentary evidence submitted, has been accepted and relied upon herein.

ORS 654.062(5) provides that it is an unlawful employment practice for an employer to bar, discharge, or otherwise discriminate against an employee because the employee opposed any practice forbidden by ORS 654.001 to 654.295. In order to prove a violation of this statute then, three elements must be satisfied:

1. that the employer committed or maintained a practice forbidden by ORS 654.001 to 654.295;
2. that the employee opposed said practice; and
3. that the employer made an adverse employment decision because the employee opposed said practice.

1. Practices forbidden by ORS 654.001 to 654.295

ORS 654.010 provides as follows:

"Every employer shall furnish employment and a place of employment which are safe and healthful for employees therein, and shall furnish and use such devices and safeguards, and shall adopt and use such practices, means, methods, operations and processes as are reasonably necessary to render such employment and place of

employment safe and healthful, and shall do every other thing reasonably necessary to protect the life, safety and health of such employees."

Respondent had been cited previous to December 18, 1985, for safety violations involving the 1979 Chevrolet fuel oil delivery truck. The truck had been driven after the issuance of the citation before repairs had been made. On December 18, 1985, the truck was cited for numerous equipment and safety violations, including failure to have a warning device for the brakes and a leaking fuel oil tank, and was placed out of service. Even after Respondent was so informed by Blaska, he asked both Blaska and Thornton to drive the truck before making the necessary repairs to restore the truck to a safe operating condition. By his actions then, Respondent failed to provide a safe place of employment, failed to use processes necessary to render a safe place of employment, and failed to do those things necessary to protect the safety of such employees, in violation of ORS 654.010. Respondent therefore maintained a practice forbidden by ORS 654.001 to 654.295.

2. Employee Opposed A Practice Forbidden by ORS 654.001 to 654.295

OAR 839-06-020 states that the protection of ORS 654.062(5) does not, under usual circumstances, cover an employee who opposes a safety hazard by refusing to work. This position is based on two assumptions:

a) that an employer is concerned about a safe workplace and will ordinarily correct hazards once brought to his attention; and

b) where corrections are not made, the employee can normally take less drastic action than refusing to work, such as contacting a safety enforcement agency.

However, OAR 839-06-020(4) provides that an employee can refuse to perform an assigned task that would involve exposure to a dangerous condition if:

a) the employee reasonably believes the task poses an imminent risk of serious bodily injury or death; and

b) the employee has reason to believe there is insufficient time to seek other redress or resort to regular statutory enforcement channels, including the situation where an employer issues a "work or be fired" ultimatum.

Serious Injury or Death

Complainants herein opposed a practice forbidden by ORS 654.010 by refusing to perform a task; that is, refusing to drive the truck in its unsafe condition before repairs had been made. Both Blaska and Thornton herein clearly fall under the exception set forth in OAR 839-06-020(4). Blaska testified he believed the truck to be unsafe to drive, specifically that a brake failure could cause a "severe accident," and that the leaking fuel oil tank could result in an "explosion." Thornton believed, after observing the findings of Deputy Sheriff Crampton, that the truck was not safe to drive. He further stated that the leaking fuel oil tank could result in an explosion. Where an employee believes that he is being asked to drive a truck that could explode, this cannot logically be

construed as anything but a belief that the task poses "an imminent risk of serious injury or death" under OAR 839-06-020.

That rule further states that "imminent risk" means that "a reasonable person, under the circumstances then confronting the employee, would conclude that the danger of serious injury or death would be real and immediate if the employee did the work." Quite clearly, any reasonable person faced with driving a truck in the condition of Respondent's truck could conclude that the danger of serious injury or death would be immediate. With no warning system for the brakes, a brake failure could occur without notice to the driver. One need not be a mechanic to know that brake failure in a large truck could result in a horrendous accident. The same is true as regards the leaking fuel oil tank. The diesel fuel carried in the truck was flammable. Contact with any type of fire could ignite the fuel, leading to an explosion. Again, one need not be a scientist to understand the danger involved in this situation. Either incident could have occurred at anytime.

Finally, Deputy Sheriff Crampton tagged the truck "out of service," not to be driven until the cited violations were repaired. Deputy Sheriff Crampton, an officer with three years of training and experience in the equipment and safety of large trucks, determined that an accident could "quite possibly" result from the cited violations and that the truck was unsafe to drive. Deputy Sheriff Crampton is quite knowledgeable in this area and his opinion clearly satisfies the "reasonable person" test.

Insufficient Time to Seek Redress

There was no opportunity for either Blaska or Thornton to seek other redress or resort through any government agency. On December 18, 1985, Blaska was advised by Respondent to go home if he would not drive the truck, and on the 20th he was informed by Respondent that he did not have a job if he refused to drive the truck. Likewise when Thornton refused to drive the truck on December 18th, Respondent said "fine" and hung up the phone. Respondent later told Thornton he considered his refusal to drive to be a "quit." Clearly, neither Complainant had an opportunity to call any enforcement agency. Moreover, Respondent's actions amount to an ultimatum under OAR 839-06-020 rendering any attempt to seek other redress a "non-consideration."

3. Adverse Employment Action

After Blaska's refusal to drive the truck on December 18, 1985, Respondent advised him to "go home." When he checked for work on December 19, 1985, Respondent advised Blaska there was no work. This was most unusual since Blaska had been steadily working an average of eight hours each day for five days each week. Finally, when Blaska spoke to Respondent on December 20, Respondent told him that if he was not willing to drive the truck he "no longer had a job." Thereafter, and since December 18, 1985, Respondent failed to schedule Blaska for any work. Since Blaska was not "willing" to drive the truck in an unsafe condition, although he was willing and would have driven any of Respondent's trucks that were safe to

operate, he was effectively discharged as of December 18, 1985.

Although Thornton called Respondent on both December 19 and 20, 1985, for work assignments, Respondent told him there was no work. Thornton had been working six days each week for an average of eight hours each day. On December 20, 1985, Respondent told Thornton that he had "quit" when he refused to drive the truck on December 18, 1985. As with Blaska, Respondent did not schedule work or contact Thornton after this time, or since December 18, 1985. Thornton testified that although he would have continued to work for Respondent and to drive any truck in safe operating condition, it was clear to him that he would no longer be working for Respondent. Again, Respondent's statements and actions amount to a discharge of Thornton on December 18, 1985.

Respondent made it abundantly clear from his statements and actions that there would be no more work for Complainants. Therefore, there was no reason for them to continue to call Respondent to ask for work assignments. The Forum has adopted and follows the standard set forth below in determining whether a complainant has been constructively discharged:

"The general rule, which this Forum adopts, is that if an employer deliberately makes an employee's working conditions so intolerable that the employee is forced to involuntary resignation, then the employer has encompassed a constructive discharge * * *." *In the Matter of West Coast Truck Lines, Inc.*, 2 BOLI 192 (1981),

affirmed without opinion, West Coast Truck Lines, Inc. v. Bureau of Labor and Industries, 63 Or App 383, 665 P2d 882 (1983), quoting *Young v. Southwestern Savings and Loan Assn.*, 509 F2d 140 (5th Cir 1975).

This Forum made clear in the cited Order that "deliberately" does not mean that the employer's imposition of "intolerable" working conditions need be done with the intention of either forcing the employee to resign or relieving himself of that employee. The term "deliberately" refers to the imposition of the working conditions; that is, it means that the working conditions were imposed by the deliberate or intentional actions of the employer. *In the Matter of Sapp's Realty, Inc.*, 4 BOLI 232 (1985), this Forum stated:

"To find a constructive discharge, this Forum must be satisfied that 'working conditions * * * so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign' caused the employee to resign, and that the conditions were imposed by the deliberate, or intentional, actions or policies of the employer. *In the Matter of West Coast Truck Lines, supra*, at 215, citing *Alicia Rosado v. Garcia Santiago* 562 F2d 114, 119 (1st Cir 1977); *Calcote v. Texas Educational Foundation*, 578 F2d 95, 97-981 (5th Cir 1978); EEOC Decision 172-2062 (June 22, 1972)."

Applying that standard in a case where Respondent failed to schedule Complainant, a waitress, for work after she assisted in a civil rights proceeding, the Forum determined that

Respondent had constructively discharged Complainant, and stated:

"The Respondent 'deliberately' failed to schedule Complainant for work. He 'intended' to do so and he did. Clearly, it was reasonable for Complainant to feel compelled not to return to Respondent's business. Conditions were more than intolerable, conditions were non-existent. Complainant could not work where she was not scheduled to do so. As a result, the Respondent's intentional failure to schedule Complainant caused her not to return to Respondent's business." *In the Matter of Richard Niquette*, 5 BOLI 53, 62 (1986).

Similarly, Respondent herein intentionally failed to schedule Blaska and Thornton for any work after December 18, 1985. Both Blaska and Thornton would have continued to work for Respondent driving any truck in safe operating condition. However, subsequent to the issuance of the citation of December 18, 1985, Respondent only asked them to drive the 1979 Chevrolet fuel oil truck.

Although Blaska testified that on December 20, 1985, he advised Respondent he had failed the test to obtain his chauffeur's license, his status of driving trucks without a license had nothing whatsoever to do with his termination. Blaska had previously driven trucks for Respondent, with Respondent's knowledge, without such a license. In addition, Respondent stated that had Blaska not refused to drive, he could have "driven the rest of the day." Moreover, Respondent asked Blaska to drive the truck on December 19,

1985, immediately after being informed by Blaska about his failing the test.

While this situation may constitute a violation of the law, it is not the responsibility of this Agency to enforce such licensing laws, and in any case, the failure to obtain a chauffeur's license or to drive a truck without this license does not diminish the protection guaranteed to employees by the Oregon Safe Employment Act and the rights established in ORS 654.062 (5)(a) and ORS chapter 659.

Damages

It is the burden of Respondent to prove that a complainant failed to mitigate damages. OAR 839-30-105(10); *In the Matter of Lucille's Hair Care*, 5 BOLI 13 (1985); *In the Matter of 3 Son Loggers, Inc.*, 5 BOLI 65 (1986); *In the Matter of Veneer Services, Inc.*, 2 BOLI 179 (1981). The Respondent failed to submit an answer to the Specific Charges, failed to appear at hearing or to otherwise communicate with the Forum. Therefore, finding no reason to disbelieve the Complainants, their testimony regarding damages has been accepted as facts in this matter.

A. Back Pay

Although Blaska testified that he "believed" Respondent was still doing business as Associated Oil Company, the Forum has concluded that Respondent ceased to do business under that name on August 1, 1986. While Blaska was found to be a credible witness, no objective facts were presented to support his belief regarding the continued operation of a fuel oil delivery business by Respondent. Moreover, the affidavit submitted by the Agency indicates that Respondent did

in fact do business during the first three quarters of 1986, but ceased doing business as Associated Oil Company on August 1, 1986:

1) Oregon Department of Commerce shows Respondent failed to renew said assumed business name effective November 29, 1986.

2) Richard Warren, a former employee knew Respondent's gas station had ceased operation in mid-March 1986, and that the oil delivery portion of Respondent's business "may have continued thereafter until mid-summer of 1986."

3) Agency correspondence with Respondent and his attorney in May of 1986 indicated that neither stated Respondent was no longer in business as Associated Oil Company.

4) A former employee stated he worked for Associate Oil as a driver from "January 11, 1986, to August 1, 1986," on which date Associated Oil Company ceased operations.

These facts construed together indicate that Respondent was apparently winding down his operation and ceased to do business as Associated Oil on August 1, 1986. Where a respondent sells or closes the business and therefore could not have offered employment or reinstatement after that date, back pay will end upon the sale or closing. Schlei and Grossman, *Employment Discrimination Law* (1983); *Slack v. Havens*, 522 F2d 1091 (9th Cir 1975). The Agency did not request and there was no evidence to indicate that there was any subsequent purchaser who might be liable for further back pay. Therefore, Complainant's

damages ceased to accrue on August 1, 1986.

Both Complainants worked eight hours each day at a rate of \$5.00 per hour. Blaska worked five days each week and Thornton six days. Neither received any benefits or other compensation, and there was no evidence that they took any days off for vacation or due to illness between their termination and the date Respondent ceased doing business as Associated Oil Company.

Although Haugston testified that he left Respondent's employ after only three weeks for the reason that Respondent could not supply him with enough work, this testimony was not considered in calculating the amount of back pay owed to Blaska and Thornton for the following reasons:

1) the 1979 Chevrolet truck driven by Blaska and Thornton was placed in the shop for repairs on December 20, 1985;

2) the Ford tilt truck driven by Blaska on approximately three occasions for fuel oil deliveries had been in the shop for "serious" repairs; and,

3) the Forum has no way of knowing, since Respondent failed to appear, what other reasons he may have had for not scheduling Haugston for full eight-hour days.

Therefore, back pay was computed by determining the number of days worked by Blaska, based on a five day work week, and Thornton, based on a six day work week, between December 18, 1985, and August 1, 1986.

B. Mental Suffering

1) Blaska:

Blaska testified, and this Forum found to be a fact, that he was upset and embarrassed by the discharge. He has not been able to find a new job, although he has applied for over 60 positions, which has caused Blaska to become and remain very depressed. In a retaliation case where the complainant was found to have suffered mental distress and anxiety and was unable to secure new employment for over a year, the Forum awarded complainant \$1500 as compensation for her mental suffering. *Richard Niquette, supra*, at 64. The Forum finds an award of \$1500 to be appropriate compensation to Blaska for his mental suffering in this case as well.

2) Thornton:

Thornton testified, and this Forum accepted as fact, that he was not only hurt by the discharge, but has suffered severe depression and is still recuperating from the incident. Thornton was diagnosed as having an ulcer four months after the unlawful discharge. Clearly, his mental distress has taken physical form. As compensation for his mental suffering, this Forum finds \$2500 to be appropriate.

Although Thornton began the Job Corps training program in July of 1986, there is no evidence that he ceased to look for work during this time period, and therefore, his back pay continued to accrue. While Thornton did obtain work in April of 1987, it is not appropriate to deduct these wages, as these wages were earned after the time Respondent ceased to do business.

Respondent

It appears that Respondent Douglas French used more than one business name for his fuel oil business between December 18, 1985, and prior to August 1, 1986.

Haugston testified at hearing that he worked from December 19, 1985, to January 1986 for Douglas French doing business as Associated Oil Company. Mervin Arnold advised the Agency that he worked for Associated Oil Company until August 1, 1986, at which time Associated Oil Company ceased doing business. The records of the Employment Division show, however, that Haugston and Arnold were employed by Douglas French doing business under the non-registered assumed business name of Doug's Oil Service. This business ceased operation in the third quarter of 1986. The earnings of Arnold establish that Doug's Oil Company ceased doing business early in the third quarter which would coincide with the conclusion of Associated Oil Company.

This evidence considered together forms the basis for the conclusion that either Douglas French had two operations at which he simultaneously employed the same employees, or he used business names interchangeably. In any case, Respondent was not a corporation and he is liable to the Complainants herein for back pay no matter what name he used for the fuel oil business.

ORDER

NOW, THEREFORE, as authorized by ORS 654.062(5)(b), 659.060(3), and 659.010(2), and in order to eliminate the effects of the

unlawful practices found, Respondent is hereby ordered to:

1) Deliver to the Hearings Unit of the Portland office of the Bureau of Labor and Industries a certified check payable to the Bureau of Labor and Industries in trust for DONALD J. BLASKA in the amount of SEVEN THOUSAND NINE HUNDRED FORTY DOLLARS (\$7940.00) plus interest upon \$6440 thereof, compounded and computed at the annual rate of nine percent from the August 1, 1986, until the date paid. This award represents \$6440 in damages for lost wages due to Respondent's unlawful employment practices and \$1500 in damages for the mental distress Complainant suffered as a result of the unlawful practices.

2) Deliver to the Hearings Unit of the Portland office of the Bureau of Labor and Industries a certified check payable to the Bureau of Labor and Industries in trust for KEVIN L. THORNTON in the amount of TEN THOUSAND TWO HUNDRED TWENTY DOLLARS (\$10,220.00) plus interest upon \$7720 thereof, compounded and computed at the annual rate of nine percent from the August 1, 1986, until the date paid. This award represents \$7720 in damages for lost wages due to Respondent's unlawful employment practices and \$2500 in damages for the mental distress Complainant suffered as a result of the unlawful practices.

In the Matter of

Anita F. Peterson and

**Glenn L. Peterson, Partners, dba
ANITA'S FLOWERS & BOUTIQUE,
Respondents.**

Case Number 32-86

Final Order of the Commissioner

Mary Wendy Roberts

Issued June 24, 1987.

SYNOPSIS

Respondents sold their flower shop to a purchaser, who employed Claimant and did not fully pay her. Because Respondents repossessed the shop and continued to operate it as before, the Commissioner ruled that Respondents were successor employers to the purchaser, and as such were liable for Claimant's unpaid wages. Respondents had no employment records, and Claimant's records established the debt. Following established policy, the Commissioner did not assess penalty wages against Respondent as successor employers. Respondents were ordered to pay Claimant's wages of \$820, plus interest. ORS 652.140(1); 652.150; 652.310(1); 652.610(3); 653.045; OAR 839-20-030; 839-30-075(2)(b) and (c).

The above-entitled case came on regularly for hearing before Douglas A. McKean, designated as Hearings Referee by Mary Roberts, Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was conducted on April 30, 1987, in Room 311 of the State Office

Building, 1400 SW Fifth Avenue, Portland, Oregon. The Hearings Referee called the following as witnesses for the Bureau of Labor and Industries (hereinafter the Agency): Lee Bercot, Program Coordinator for Wage and Hour Division (WHD) of the Agency; Claimant Florence E. Lewis; Debbie L. DiPietra; and Alice Randall, a broker with Interstate Commercial & Investment Realtors.

Employers Anita F. and Glenn L. Peterson, doing business as Anita's Flowers & Boutique (hereinafter referred to as Employers), were represented by Lee C. Finders. The Hearings Referee called the following witnesses for Employers: Anita F. Peterson, Glenn L. Peterson, Betty Gallucci, and Lee Finders for the limited purpose of describing his preparation of sale documents. Employers cross-examined all Agency witnesses.

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

RULING ON OBJECTION AT HEARING

During the hearing, Employers objected to a request by the Hearings Referee that the Agency recompute penalty wages in order to correctly account for Claimant's wage and compensation agreement. This objection was not ruled upon during the hearing. The Forum hereby overrules the objection. The Hearings Referee has the right and duty to conduct a fair and full

inquiry and create a complete record. See ORS 183.415(10); *Berwick v. AFSD*, 74 Or App 460, 703 P2d 994 (1985). Where errors are detected, the Hearings Referee is empowered to cause them to be corrected. This is especially true where there are arithmetic errors or other similar computation oversights.

The issue of penalty wages was squarely before the Forum, as it was raised in the Order of Determination. The charging document may be amended to request increased damages or, where appropriate, penalties to conform to the evidence presented at the contested case hearing. OAR 839-30-075(2)(b). Even if the issue had not been raised in the Order of Determination, "The Hearings Referee may allow the pleadings to be amended, and shall do so freely, when the presentation of the merits of the action or defense will be served thereby, and the objecting participant fails to satisfy the Hearings Referee that the admission of such evidence would prejudice the objecting participant in maintaining the action or defense on the merits." OAR 839-30-075(2)(c). In this case, Employers presented no evidence that they were so prejudiced. Nor did they object to the admission into evidence of Claimant's records, which were the basis of the penalty computations.

**FINDINGS OF FACT --
PROCEDURAL**

1) A wage claim was filed with the Agency on October 9, 1985, by Florence E. Lewis (hereinafter Claimant). Claimant alleged that she had been an employee of Employers and that

Employers had failed to pay wages earned and due to Claimant.

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

3) On January 28, 1987, the Commissioner of the Bureau of Labor and Industries served on Employers an Order of Determination based upon the wage claim filed by Claimant and Agency's investigation. The Order of Determination found that Employers owed a total of \$781.00 in wages and \$684.30 in penalty wages.

The Order of Determination required that, within 20 days, either these sums be paid in trust to the Agency, or Employers request an administrative hearing and submit an answer to the charges.

4) On February 18, 1987, Employers filed a request for an administrative hearing and an answer to the charges. That answer denied that any wages or penalty wages were due to Claimant, and affirmatively alleged that Employers had sold the business to Ann M. Evans before the claim period, and that Employers had repossessed it from Ms. Evans after the claim period, and therefore Claimant was an employee of Ann Evans and not Employers.

5) On March 24, 1987, this forum sent a Notice of Hearing to Employers indicating the time and place of the hearing. That notice was also sent to the Agency and Claimant. Together with the Notice of Hearing, the Forum sent a document entitled "Notice of

Contested Case Rights and Procedures" containing the information required by ORS 183.413. At the commencement of the hearing, Employers indicated that they had reviewed that document and had no questions about it.

6) On April 27, 1987, Agency submitted a letter to the Hearings Unit. The letter contained revised calculations of Claimant's earned and unpaid wages, mileage compensation, and draw amounts, as well as revised penalty wage calculations. The revisions resulted from the discovery by Claimant of her original records of hours worked and miles driven. At hearing, Agency requested that the Order of Determination be amended to reflect the revised amounts. Employers had no objection, and the Order of Determination was revised accordingly.

7) At the commencement of the hearing, the Hearings Referee explained the issues involved herein and the matters to be proved or disproved.

8) At hearing, the issue was raised of whether the Statute of Frauds would affect the Forum's treatment of an alleged oral agreement between Employers and Ann Evans to sell the Flower Shop.

9) The hearings record was left open by the Hearings Referee until May 8, 1987, to allow Employers and Agency to submit additional information. The document submitted by Agency was received and marked as an exhibit. The document submitted by Employers was received and marked as an exhibit.

10) The Hearings Unit sent a copy of the Proposed Order in this matter to

Employers indicating that Employers had 10 days to file exceptions thereto. Employers made no response.

FINDINGS OF FACT - THE MERITS

1) Anita's Flowers & Boutique and Anita's Flower Boutique (hereinafter Flower Shop) are two names for the same business. The Flower Shop was located in Portland, Oregon.

2) In May 1985, Anita Peterson lost part of her right thumb in an accident with her lawn mower. The accident left her unable to do her work as a florist at the Flower Shop.

Thereafter, Employers posted a notice at a floral wholesale house that the Flower Shop was for sale. In response to that notice, Ann Evans went to Employers' shop, where she and Employers discussed the sale of the business. Evans and Employers reached an agreement on the sale. On May 30, 1985, Employers and Evans had a document entitled "Bulk Transfer - Earnest Money Receipt, Offer and Acceptance" drawn up by Employers' attorney, Lee Finders. This document was not signed by Employers or Evans because Evans did not have the earnest money at that time.

3) On June 15, 1985, Employers allowed Evans to take possession of the Flower Shop, in reliance on Evans's promise that money to pay the entire purchase price of the business was soon forthcoming. Pursuant to the sale agreement, Employers and Evans caused the business's neon advertising display agreement to be assigned to Evans, the electric company to prepare a final bill for Employers, and the creation of a new account with

the electric company for Evans as the new owner.

4) Ann Evans was in physical possession of Anita's Flowers & Boutique from June 15, 1985, to October 15, 1985.

5) Except for the period during which Evans was in possession of the shop, Employers were the owners and operators of Anita's Flowers & Boutique. In other words, at all times material herein before June 15, 1985, and at all times since October 15, 1985, Employer's have owned and operated the shop as a partnership.

6) When Evans called Claimant to go to work, that is, sometime before June 17, 1985, Evans told Claimant that Evans was in the process of buying the business. During the period which Claimant worked at the shop, it was Claimant's impression that Evans was trying to raise the money to pay for the business.

7) On July 9, 1985, Debbie DiPietra, who is Ann Evans's daughter and who worked in the shop during Evans's possession of it, signed a telephone directory advertising contract with Pacific Northwest Bell. DiPietra signed the contract with the title "owner."

8) On July 9, 1985, Employers had their attorney draw up a Bill of Sale, a Schedule of Property and List of Transferor's Creditors, and an Assignment of Lease. These documents were prepared in anticipation of Evans's payment of the purchase price in the near future, as promised. Employers signed the documents, which were never presented to Evans

because she never paid the purchase price.

9) Employers gave a profit-loss statement and business tax returns to Ann Evans, who was to provide them to Carlene Terry, a realtor at Interstate Commercial & Investment Realty, with whom Evans was working to obtain the purchase money for the shop.

10) After June 15, 1985, Betty Gallucci, a residential real estate broker for 19 years, met Ann Evans at the Flower Shop to discuss locating a home for Evans to buy. Evans told Gallucci that she was buying Anita's Flowers & Boutique and that she wanted to buy a house near the Flower Shop so she could walk to work. No serious offer to purchase a home was made by Evans, so eventually Gallucci dropped Evans as a client.

11) During the period June 15, 1985, to October 15, 1985, Ann Evans's daughter, Debbie DiPietra, helped out around the Flower Shop. DiPietra was not paid for this work, and she did not consider herself an employee. DiPietra was operating her own flower shop during that time. She observed Claimant working at the Flower Shop, but she had no knowledge of Claimant's wage agreement with Ann Evans.

DiPietra testified that Employers were the owners of the shop, and that Evans was managing the shop. She testified that Employers found someone to manage the Flower Shop every summer. According to DiPietra, Evans was thinking of buying the business, but did not have the money. DiPietra testified that Evans was not attempting to obtain the financing to buy the Flower Shop. DiPietra testified further,

however, that "if it would have worked out," Evans had a farm which she would consider selling to buy the Flower Shop. DiPietra said she did not know at the time of hearing Evans's address or telephone number because Evans had recently moved.

12) In a letter dated December 8, 1985, to the Agency, Evans states that she was "running the Flower Shop for Glenn and Anita Peterson - every year they get someone to take over and run the shop for 4 months during the summer. They tried to push me into buying the place. * * * I even put my own money into it to keep it going to the tune of \$2800.00." She also wrote that she "never even collected my wages out of them."

13) Alice Randall, a business broker, testified that she was aware that the shop was for sale, and had been for sale occasionally prior to the summer of 1985. It was her opinion that no sale had been completed between Evans and Employers.

14) Due to the small size of the shop, Employers never hired anyone to manage the business. On occasion, Employers would allow an employee-floral designer to run the shop for one or two weeks while Employers were on vacation.

15) During the summer of 1984, Employers had agreed with their employee, Howard Gee, that he would run the Flower Shop and retain the profits while Employers were on vacation. The Flower Shop was not for sale, but Employers and Gee had talked about him purchasing the Flower Shop. No agreement was reached; none of the Flower Shop's bills were assigned to Gee.

16) Between July 9, 1985, and October 15, 1985, Employers talked with Evans several times about the payment of the purchase money. Each time, Evans assured Employers that "the money would be there momentarily, and not to worry about it." Claimant observed Employers visiting the Flower Shop several times, during which Employers and Evans talked about the business.

17) Employers never received any payments toward the purchase price of \$32,000, nor any earnest money payment from Evans.

18) Evans was supposed to pay all of the utilities and other bills of the Flower Shop after she took possession. Evans paid Employers \$500.00 during that period. From this money, Employers were to pay utility bills that were still in Employers' names and the lease payment. The telephone bill was still in Employers' names, because Evans could not afford the down payment to connect new telephone service. As Evans could afford it, she was supposed to have the Flower Shop's bills transferred from Employers to her.

19) When Employers accepted the \$500.00 payment referred to in the previous Finding of Fact, \$325.00 was to be applied to the lease payment. Since no utility bills were due when the \$500.00 payment was made, Employers intended to apply the balance of \$175.00 to the purchase price.

20) On October 12 or 13, 1985, Evans called Employers and asked Employers to come to the Flower Shop and pick up the purchase money. On October 15, 1985, Employer's went to the Flower Shop and discovered the Flower Shop stripped of merchandise,

and a note on the door saying that the keys to the shop were at a neighboring business. Since October 15, 1985, Employers have been unable to locate Evans, despite attempts to contact her through Evans's daughters.

21) Claimant worked for the Flower Shop from June 17, 1985, to September 12, 1985. Her job involved flower preparation, cleaning, customer assistance, sales, and delivery work. She used her own car for deliveries. All of her work was performed within Oregon.

22) Claimant was hired by Ann Evans. The wage agreement between Claimant and Evans was for \$4.00 per hour and \$.20 per mile for deliveries. The agreement on the hourly wage was entered into before June 17, 1985. The mileage agreement was reached after June 17, 1985; the mileage shown on Claimant's records was covered by the mileage agreement. Claimant and Evans also agreed that Claimant would be compensated at "time and a half" for hours worked over eight per day.

23) Employers have no records covering Claimant's employment at the shop. Nor do Employers have first-hand knowledge of Claimant's hours worked, miles driven, or wage agreement. Anita Peterson observed Claimant in the shop on several occasions when Employers stopped to talk with Evans about the purchase money.

24) Initially, Claimant kept records each workday on a tablet which was kept at the shop. About two weeks after Claimant started work, she recorded her hours on a slip that was posted on a wall of the Flower Shop. Claimant also kept her own record of

her hours. Evans kept the slips that were posted on the wall. From time-to-time, Claimant and Evans compared the personal records that Claimant kept with the slips that Evans kept, and the two sets of records were identical. Evans kept no other records of Claimant's hours worked. Copies of Claimant's records appear in the record.

25) Claimant's records reveal the following information, which is accepted as fact: she worked a total of 313 hours, 307.5 of which were straight time, and 5.5 of which were overtime; at her agreed rate of \$4.00 per hour plus overtime at one and one-half the regular rate, she earned \$1263.00 in wages (307.5 hours x \$4.00 = \$1,230 + 5.5 hours x \$6.00 = \$33.00); she drove 362 miles at the agreed rate of 20 cents per mile, earning \$72.40 in mileage compensation; her total wages and compensation equal \$1,335.40 (\$1,263.00 + \$72.40); she was paid \$300.00 by check, plus \$215.00 in cash draws, which equal \$515.00 paid; the balance of earned, unpaid, due, and owing wages and compensation equals \$820.40 (\$1,335.40 - \$515.00). The 5.5 hours of overtime accrued first during the week ending June 22, 1985, in which Claimant worked 43.5 hours, 3.5 of which are overtime under Oregon law; and second on July 24, 1985, when Claimant worked 10 hours, two of which are overtime pursuant to the wage agreement.

26) Evans never made any deductions from Claimant's wage payments. Claimant never authorized, orally or in writing, Evans to take any deductions from Claimant's wages. Evans's letter mentions one anticipated deduction of

\$53.00 from Claimant's wages to cover customer refunds.

27) Claimant was discharged by Ann Evans due to a lack of work at the Flower Shop. Claimant was notified by Evans a day or two before September 12, 1985, that September 12th would be Claimant's last day.

28) Evans employed one additional employee sometime during September 1985. That employee worked for the Flower Shop after September 12, 1985, until no later than October 15, 1985.

29) Claimant made several demands on Ann Evans for Claimant's earned, unpaid wages. Evans knew that wages were owed to Claimant. Claimant never made a demand for wages on Employers. Claimant knew that Employers were the owners of the Flower Shop before and after the period during which Evans was in possession of the Flower Shop. Agency has made demands for Claimant's wages on Employers since June 3, 1986.

30) Since October 15, 1985, when Employers regained possession of the Flower Shop, they have operated it under the same name, at the same location, and conducted essentially the same business as Evans had during her possession of it, and as they had before June 15, 1985. Employers used the same suppliers and serviced the same market with the same product as Evans had, and as Employers had before June 15, 1985. After repossessing the business on October 15, 1985, Employers had the shop open for business within three or four days. Employers did not employ any employees who had been employed

by Evans. Employers were still operating the Flower Shop at the time of the hearing.

31) Employers have argued that they were "predecessors in interest," who sold that interest and then terminated the interest of the defaulting buyer, Evans. They argued that "the meaning of 'successor' cannot be stretched to include a seller or predecessor." Employers appeared to argue that only a purchaser, who can protect himself against unpaid wages, can be a successor, and that a repossessing seller, who has no opportunity to so protect himself, should not be a successor. To hold the seller liable as a successor employer, they argued, "would not only be contrary to the plain language of the statute, but it would cause an unjust result ***"

32) Agency policy is to hold "successor" employers not liable for penalty wages under ORS 652.150.

33) Both Employers were found to be credible. Their testimony was consistent between the two of them and with Claimant and Gallucci.

34) Testimony of Claimant was found to be credible. Although her memory of dates was weak, she testified that her records, contained in an exhibit in the record, were made at the time she worked and were accurate. The Forum found no reason to determine the testimony of Claimant or her records to be anything except reliable and credible.

35) Debbie DiPietra's testimony was found to be inconsistent and incredible. She testified that her mother was only managing the Flower Shop, but she signed the telephone book

advertising contract as the "owner." She testified that her mother was not attempting to find financing to buy the business, but this was contrary to her statements about her mother selling a farm to raise the purchase money, and contrary to the testimony of Claimant, Employers, and Randall. All of her testimony, together with her assertion that she did not know how to contact her mother, leave the Forum with the impression that DiPietra was trying to protect Evans. Accordingly, her testimony about the sale of the Flower Shop was given less weight than other sworn testimony where it conflicted with the other testimony.

36) Ann Evans's testimony was found to be inconsistent, unreliable, and incredible. Her only submission to the record was her letter of December 8, 1985. In it was the unsworn assertion that she was only "running the Flower Shop;" however, she also stated that she put \$2800.00 of her own money into the business. She wrote that she "never even collected my wages out of them." The Forum finds these assertions conflicting, and her investment of \$2800.00 into the business simply inconsistent with the actions of a paid manager. In addition, her assertions are inconsistent with statements she made to Claimant, Gallucci, and Employers. Finally, the Forum has found that Evans and Claimant agreed that Claimant would record her hours worked and miles driven. To the extent that Evans's records differed from Claimant's records, which were made at the same time that Claimant wrote down her hours and miles for Evans, Claimant's sworn records were found to be more reliable

than Evans's records. Accordingly, Evans's unsworn assertions were given less weight where they conflicted with other credible, sworn statements or evidence on the record.

ULTIMATE FINDINGS OF FACT

1) At all times material herein before June 15, 1985, and after October 15, 1985, Employers, a partnership, did business as Anita's Flowers & Boutique or Anita's Flower Boutique, an establishment located in Portland, Oregon.

2) During May 1985, Employers reached an agreement with Ann Evans to sell the business to Evans. Evans took possession of the business on June 15, 1985, as the owner, and remained in possession as owner until she voluntarily returned possession and ownership to Employers on October 15, 1985. During the period of Evans's possession and ownership of the Flower Shop, namely June 15 to October 15, 1985, she represented to Claimant and, through her daughter, Debbie DiPietra, to utility companies and to Betty Gallucci that she was the owner of, or that she was buying, the Flower Shop. Although an Earnest Money Agreement, a Bill of Sale, and other documents were prepared, none were signed by Evans because she never paid the full purchase price. Employers planned to apply \$175.00 of a \$500.00 payment from Evans toward the purchase price, although the purpose of the \$500.00 payment was to cover lease and utility expenses. Since October 15, 1985, Employers have been unable to locate Evans.

3) On June 17, 1985, through September 12, 1985, Evans employed Claimant as an employee. Claimant

worked wholly within the State of Oregon. Evans agreed to pay Claimant \$4.00 per hour, plus "time and a half," or \$6.00 per hour, for each hour over eight per day. Additionally, Evans agreed to pay Claimant \$.20 per mile for deliveries. Claimant worked a total of 313 hours, 307.5 hours at the straight time rate of \$4.00 per hour, and 5.5 hours at the overtime rate of \$6.00 per hour. She drove 362 miles at \$.20 per mile. Her total earnings equaled \$1,335.40. She received wages of \$515.00. Wages and compensation due and owing equal \$820.40. Claimant never authorized Evans to take any deductions from Claimant's wages.

4) Evans discharged Claimant on September 12, 1985. Claimant made demands for her wages on Evans. The Agency has made demands for Claimant's wages on Employers since June 3, 1986. No evidence on the record shows that Employers were or are financially unable to pay Claimant's wages.

5) Penalty wages were computed, in accordance with Agency policy, as follows: \$1,263.00 (wages earned) plus \$72.40 (mileage compensation) equals \$1,335.40 (total earnings), divided by 57 (number of days worked during the claim period) equals \$23.43 (average daily rate of pay). This figure of \$23.43 is multiplied by 30 (number of days for which penalty wages continued to accrue), for a total of \$702.90 in penalty wages. This amount is higher than the figure set forth in the Order of Determination, in paragraph III, because the Agency had not included one part of the Claimant's compensation, namely the mileage

compensation, in its calculation of Claimant's total earnings. Also, two additional hours of overtime were identified by the Hearings Referee, and those hours slightly increased the total earnings upon which the average daily wage is based.

6) Agency policy is to hold "successor" employers not liable for penalty wages under ORS 652.150.

7) After Employers regained possession of the business on October 15, 1985, they reopened it within three or four days. Employers operated the business using the same name, at the same location, using the same suppliers, servicing the same market with the same product as Evans had. Employers did not employ the employees who Evans had employed. Employers were still operating the Flower Shop at the time of the hearing. In sum, Employers were conducting essentially the same business that their predecessor, Ann Evans, did.

CONCLUSIONS OF LAW

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

2) Employers were notified of their rights as required by ORS 183.413(2).

3) Employers and Ann Evans agreed to the sale of the Flower Shop. When Evans took possession of the shop on June 15, 1985, she did so as the owner of the business. She remained the owner until she relinquished possession to Employers on October 15, 1985. Accordingly, Claimant was Evans's employee during the period June 17, 1985, to September 12, 1985.

4) The Agency cannot raise the Statute of Frauds as a defense to the sale of the business because this defense can only be asserted by parties to a contract, or by their privies. Here, the parties to the contract are Employers and Ann Evans. The Agency is a stranger to the sale contract. *Jenks Hatchery, Inc. v. Elliott*, 252 Or 25, 448 P2d 370 (1968); *Clarke v. Philomath College*, 99 Or 366, 195 P 822 (1921).

5) ORS 652.310(1) defines, in pertinent part, "employer" as "any person who *** engages personal services of one or more employees and includes any producer-promoter, and any successor to the business of any employer, or any lessee or purchaser of any employer's business property for the continuance of the same business, so far as such employer has not paid employees in full ***." Thus, an employer includes:

- A) any producer-promoter, and
- B) 1) any successor to the business of any employer, so far as such employer has not paid employees in full, or
- 2) any lessee or purchaser of any employer's business property for the continuance of the same business, so far as such employer has not paid employees in full.

As the language of the statute shows, a "successor" employer may be "any successor to the business of any employer," or "any lessee or purchaser of any employer's business property." That language clearly recognizes two kinds of "successor" employers.

To decide whether an employer is a "successor," the test is whether it

conducts essentially the same business that the predecessor did. The elements to look for include: the name or identity of the business; its location; the lapse of time between the previous operation and the new operation; the same or substantially the same work force employed; the same product is manufactured or the same service is offered; and, the same machinery, equipment, or methods of production are used. Not every element needs to be present to find an employer to be a successor, the facts must be considered together to reach a decision. See, for example, *N.L.R.B. v. Jefferies Lithograph Co.*, 752 F2d 459 (9th Cir 1985).

Applying the facts found in this case to the test described above, the Forum concludes, as a matter of law, that Employers are "successors" within the meaning of ORS 652.310(1), and therefore are employers subject to the provisions of ORS 652.110 to 652.200 and ORS 652.310 to 652.405, and ORS chapter 653.

6) OAR 839-20-030 provides that all work performed in excess of 40 hours per week must be paid for at the rate of not less than one and one-half the regular rate of pay. The Employers are obligated by law to pay Claimant one and one-half times her regular hourly rate for all hours worked in excess of 40 hours in a week.

7) ORS 653.045 requires an employer to maintain payroll records. Where the forum concludes that the Claimant was employed and was improperly compensated, it becomes the burden of the Employers to produce all appropriate records to prove the precise amounts involved. *Anderson v.*

Mt. Clemens Pottery Co., 328 US 680 (1946); *In the Matter of Marion Nixon*, 5 BOLI 82, 88 (1986). Based on these rulings, the Forum may rely on the evidence produced by the Agency regarding the number of hours worked and rate of pay for Claimant.

8) ORS 652.610(3) covers when an employer may withhold, deduct, or divert any portion of an employee's wages. Except as required by law or authorized by a collective bargaining agreement, nothing in that statute would allow for a deduction from wages where the employee has not authorized that deduction in writing, and particularly where the ultimate recipient of the money withheld is the employer. See *Sabin v. Willamette Western Corp.*, 276 Or 1083, 557 P2d 1344 (1976); *In the Matter of SOS Towing and Storage, Inc.*, 3 BOLI 145, 148 (1982). Here, the proposed deduction to cover customer refunds mentioned in Evans's December 8, 1985 letter would constitute an illegal deduction.

9) Employers violated ORS 652.140(1) by their failure to pay Claimant all wages earned and unpaid at the time of her discharge on September 12, 1985.

10) 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 Employers to pay Claimant her earned, unpaid, due, and payable wages, plus interest on that sum.

OPINION

In this case there was very little dispute about the details of the wage

claim. Claimant's records were accepted as fact because they were made at the time the work was done, and they were recorded by Claimant in accordance with a system agreed to by Claimant and Ann Evans. Also, because Claimant was found to be more credible than the unsworn assertions made in Evans's December 8, 1985, letter, Claimant's figures were accepted as fact where they differed from the figures in Evans's letter. Employers had no records. Where necessary to conform the pleadings to the evidence, the Forum adjusted the total claim amounts to reflect what the facts revealed, and to make computation corrections.

There were two main issues in this case. First was the question of whether a sale of the business had occurred between Employers and Evans. If Evans was found to be the owner of the business during the wage claim period, then the second question was whether Employers were successors to the business of Evans.

Regarding the first issue, the Forum found that the great weight of the evidence indicated that an agreement to sell the business had been reached by Employers and Evans. There was no credible evidence of a management agreement. Compare *In the Matter of Lois Short*, 5 BOLI 277, 280-81 (1986). While there was evidence that Employers had, in the past, allowed employees to run the Flower Shop while Employers were on vacation, that does not alter the facts found regarding the relationship between Employers and Evans. Although both Evans and DiPietra asserted that Evans was merely managing the Flower Shop,

they were each found to be unbelievable. The Forum is satisfied from the weight of the evidence that Employers sold the business to Evans, who took possession and operated it during the wage claim period, but walked away from it on October 15, 1985, when she found that it was not as profitable as expected and financing money was unavailable.

Regarding the second issue, that is, whether Employers were successors to Evans's business, the Forum has found that Employers were successors. As noted in Findings of Fact 31, Employers argued they are not successor employers. Employers have read the statute too narrowly. As noted in Conclusions of Law 5, the statute recognizes two kinds of successor employers. Employers would have the Forum recognize only the "purchaser" type of successor. The other type, namely "any successor to the business of any employer," is broad enough to encompass the facts presented here. Accordingly, Employers are Claimant's employer as that term is defined in ORS 652.310, and are legally responsible for payment of Claimant's wages in accordance with ORS 652.140. Pursuant to Agency policy, no penalty wages are assessed.

ORDER

NOW, THEREFORE, as authorized by ORS 652.332, the Commissioner of the Bureau of Labor and Industries hereby orders Glenn L. Peterson and Anita F. Peterson, Partners, dba Anita's Flowers & Boutique, to deliver to the Hearings Unit of the Bureau of Labor and Industries, 309 State

Office Building, 1400 SW Fifth Avenue, Portland, Oregon 97201, the following:

A certified check payable to the Bureau of Labor and Industries IN TRUST FOR FLORENCE E. LEWIS in the amount of EIGHT HUNDRED TWENTY DOLLARS and FORTY CENTS (\$820.40), representing gross earned, unpaid, due, and payable wages, less any legal deductions previously taken by the Employers, plus interest at the rate of nine percent per year on the sum of \$820.40 from October 1, 1985, until paid.

**In the Matter of
John W. Masepohl, dba
THE PUB,
Respondent.**

Case Number 33-86
Final Order of the Commissioner
Mary Wendy Roberts
Issued June 24, 1987.

SYNOPSIS

Respondent owned and operated a tavern that maintained signs on the front door reading "No Shoes, No Shirts, No Service, No Niggers" and "Viva Apartheid," and an additional sign inside reading "Nigger Handcuffs" with instructions next to a chain device with spikes. When a black woman approached the premises, she was shocked and insulted by such bigotry,

believed she would not be served therein, and became humiliated, frightened, and apprehensive about such establishments. Rejecting Respondent's argument that the signs were protected forms of free speech, the Commissioner found that discrimination in places of public accommodation is a particularly noxious form of bigotry, awarded the woman \$5,000, and ordered Respondent to post the Oregon public accommodations statute on the premises, to cease and desist from engaging in practices intended to harass or curtail free enjoyment of public accommodations, and to refrain from displaying such signs or similar communications. ORS 30.670; 30.675; 659.037; 659.045(1); 659.050.

The above-entitled case came on regularly for hearing before Susan T. Venable, designated as Hearings Referee by Mary Roberts, Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was conducted on June 1, 1987, in Main Harris Hall, Lane County Courthouse, Eugene, Oregon. The Hearings Referee called the following as witnesses for the Bureau of Labor and Industries (Agency): Judith Bracanovich, Civil Rights Division (CRD) staff of the Agency; Beverly Russell, Investigative Supervisor of the CRD; Wes Thayer, Enforcement Inspector for Oregon Liquor Control Commission (OLCC); Robin Prentice, customer of The Pub; and CH, a person alleged to have been denied rights under ORS 30.670.

John W. Masepohl, doing business as The Pub (Respondent), did not appear at hearing.

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

**FINDINGS OF FACT --
PROCEDURAL**

1) On or about March 6, 1987, and pursuant to ORS 659.045, Complainant Mary Roberts, Commissioner of the Bureau of Labor and Industries, filed a verified complaint with CRD of the Bureau of Labor and Industries alleging that she had reason to believe that Respondent's place of public accommodation had engaged in unlawful practices based on race/color, in violation of ORS 659.037 and ORS 30.670 to 30.685.

2) Thereafter, CRD issued an Administrative Determination finding substantial evidence of said unlawful practices on the part of Respondent.

3) Pursuant to ORS 659.050, CRD attempted to resolve the matter by conference, conciliation, and persuasion as follows:

a) On March 20, 1987, William B. Blevins, Acting Administrator of CRD, sent a letter to Respondent offering the opportunity to resolve this matter through conciliation, indicating that Respondent would be contacted by a conciliator;

b) Russell sent a letter, dated March 26, 1987, to Respondent stating that she would be the conciliator and establishing a time by which Respondent should contact her in this regard.

Respondent failed to contact Russell, and the Agency determined that this, taken together with the content of Respondent's letter dated March 23, 1987, referencing conciliation, made it clear that Respondent was not interested in conciliation. The attempts at conciliation were therefore unsuccessful.

4) Subsequent to this failure to resolve the complaint under ORS 659.050, the Commissioner prepared Specific Charges, dated April 9, 1987, pursuant to ORS 659.060, and sent said charges by certified mail to Respondent at the addresses supplied by CRD from CRD's file in this matter.

a) John W. Masepohl
dba: The Pub
P.O. Box 456
Noti, Oregon 97476

b) The Pub
Attn: John W. Masepohl
22506 Highway 126
Noti, Oregon 97476

These are the addresses used in all subsequent correspondence with Respondent.

5) Together with the Specific Charges, the Agency also sent Respondent the following: a) Notice of Hearing setting forth the time and place of the hearing in this matter; b) copy of the Notice of Contested Case Rights and Procedures containing the information required by ORS 183.413; c) complete copy of the Agency's administrative rules establishing the procedures and timelines for the contested case process; and d) a separate copy of the specific administrative rule regarding responsive pleadings.

6) On April 30, 1987, having received no answer as required by OAR 839-30-060, the Forum sent Respondent, by regular mail, a Notice of Default to the following addresses:

a) John W. Masepohl
dba: The Pub
P.O. Box 456
Noti, Oregon 97476 and

b) The Pub
Attn: John W. Masepohl
22506 Highway 126
Noti, Oregon 97476

7) On May 4, 1987, the Hearings Unit received via return mail the two envelopes mailed by certified mail indicating that Respondent had not received the Specific Charges and enclosures sent on April 9, 1987.

8) On May 4, 1987, the Hearings Unit sent a letter to the Sheriff of Lane County requesting that Respondent be personally served with said Specific Charges and enclosures within five days at the following address:

The Pub
Attn: John W. Masepohl
22506 Highway 126
Noti, Oregon 97476

9) On May 11, 1987, the Hearings Unit was advised that Respondent had been served with the Specific Charges and enclosures by the Lane County Sheriff on May 6, 1987. On May 14, 1987, the Hearings Unit received written confirmation of service from the Lane County Sheriff's Department

10) On May 13, 1987, the Forum received the following documents from Respondent

a) Notice of Default (a document which had been sent to Respondent by regular mail);

b) Letter from Bev Russell of CRD to Respondent dated March 26, 1987, regarding conciliation;

c) Letter from Respondent to Mary Roberts dated March 23, 1987, regarding Respondent's response to the offer to conciliate; and

d) Respondent's answer and motions.

Within those documents, Respondent alleged the following defenses to the Specific Charges:

1. that the content of the signs is protected political speech under the Oregon Constitution;

2. that he did not, or that he must be shown to have, personally written the signs in order to be responsible under ORS 659.037; and

3. that he has not refused service to anyone or discriminated on the basis of race.

11) Since Respondent was not served with the Specific Charges until May 6, 1987, the Forum treated Respondent's answer as a request for relief from default. The request was granted and Respondent's motions were addressed in the Hearings Referee's rulings dated May 14, 1987. Respondent was again advised to appear for the hearing as set forth in the Notice of Hearing. The Hearing Referee's Rulings on Motions are hereby adopted and incorporated as part of this Order.

12) The Hearings Unit requested that the Lane County Sheriff serve the Hearing Referee's Rulings on Respondent. Said document was also sent to Respondent by regular mail on May 14, 1987. On June 1, 1987, the Hearings Unit received notification from the

Sheriff that Respondent could not be served; however, the document sent by regular mail was not returned to the Hearings Unit.

13) Prior to the commencement of the hearing, pursuant to ORS 183.415(7), the Hearings Referee explained the matters to be proved and disproved.

14) The Hearings Unit sent a copy of the Proposed Order in this matter to Respondent indicating that Respondent had 10 days to file exceptions thereto. Respondent made no response.

FINDINGS OF FACT - THE MERITS

1) During all times material herein, John Masepohl did business as The Pub, a tavern open to the public serving food and beverages.

2) Respondent has lived at The Pub in a storage room as his residence since September of 1985.

3) On March 4, 1987, Russell, together with CRD investigator Alan McCullough, went to The Pub. At that time, Russell observed a sign on the front door of The Pub commercially printed in the following manner: the word "NO" was printed on the left with the words "SHOES," "SHIRTS," and "SERVICE" adjacent to the right. Beneath those words, the word "NIGGERS" had been printed by hand in letters of near equal size. Just above that sign, also attached to the front door of The Pub, Russell observed a white sign of nearly equal size with the phrase "VIVA APARTHEID" printed by hand thereon.

4) On the same day, Russell and McCullough went inside The Pub and observed a sign hanging from the

ceiling on the wall behind the bar approximately 18" x 20". The front of the sign was hand printed and read as follows: "Discrimination. Webster - to use good judgment." The reverse side of that sign was visible in the mirror. The hand printing on that side read as follows: "Authentic South African Apartheid Nigger 'Black' Handcuffs Directions Drive Points Through Wrists and Bend Over Tips."

5) After observing the signs, Russell identified herself to the man behind the bar of The Pub. He identified himself as "George Hornsneider," manager of the bar. Russell asked the man whether he was aware of the sign on the door. He stated that he was not so aware, that someone must have written "NIGGERS" on the sign and that he would remove the sign when he "got around to it." At that time, Russell advised the man that the signs were unlawful under Oregon Civil Rights laws. Respondent refused to remove the signs at that time and stated he favored apartheid.

6) Just after this conversation, Russell left and met Don Bishop of Register Guard outside The Pub. Bishop showed her a picture of John Masepohl. The photograph was of the man inside The Pub who had just identified himself as "George Hornsneider." It was clear at that time that Respondent had given Russell a false name.

7) On March 5, 1987, Russell and McCullough returned to The Pub to take photographs of the signs on the front door of The Pub. Russell had no conversation with Respondent on this date.

8) To determine ownership of The Pub, Russell contacted Key Title and

Escrow in Eugene and requested that a chain of title search be conducted. Records show that John and Patricia Masepohl purchased the property upon which The Pub is located pursuant to a land sales contract dated September 4, 1974, from Adeline A. Huffman. Russell further contacted the property taxation department of Lane County. The County's report dated March 16, 1987, shows the owner of said property as follows:

Huffman James M & Adeline A.
% Masepohl, John W. & Patricia.

9) Investigations conducted by OLCC establish that Respondent was the owner of the property upon which The Pub was located between 1974 and 1977; sold said property in 1977; purchased said property in 1979 and sold it again in that year, again purchased the property in 1985. Information received also indicates that Respondent entered into a land sales contract to sell said property within the last month, that is, May 1987. The Pub has been closed for approximately the last month prior to the date of the hearing in this matter.

10) Since 1985 when Respondent retook ownership and possession of the property upon which The Pub is located, Thayer has observed the following:

a) a sign reading "NO, SHOES, SHIRTS, SERVICE" with the word "NIGGERS" handwritten thereon posted on the main entrance to The Pub;

b) a sign reading "VIVA APARTHEID" also on the main entrance; and

c) a sign with a chain device referring to "NIGGER HANDCUFFS" over the bar inside The Pub.

11) Robin Prentice stopped at The Pub on two occasions, once in August 1986 and once just after Thanksgiving of that year, on his way to the coast. On both occasions he observed a hand written cardboard placard with a three to four foot chain with spikes at each end hanging over the bar inside The Pub. The front of the placard described this as a "LOGDOG." The back of the sign visible in the mirror defined a "LOGDOG" to the effect of "APARTHEID NIGGER HANDCUFFS," and that to use, it should be wrapped around wrists, driving "SPIKES IN." Prentice also observed another hand written sign reading to the effect that Webster's definition of discrimination was to use good judgment. Prentice recalled having seen a sign on the door reading to the effect of "NO NIGGERS."

12) In June of 1986, CH, a black woman, was returning from the coast with a friend who was white. She saw a sign that said "music - nightly" outside The Pub and decided to stop, have a beer, get some cigarettes and see about having her band's demo tape heard. Upon approaching the building, she observed a sign, about 18" x 15" on the door of The Pub that said "NO NIGGERS." She decided not to go in, believing that she would not be served because of her race, and also fearing she would be beaten. CH not only feared for her own safety, but for that of her friend.

13) CH was "shocked" by the sign, felt humiliated, and found it to be an insult to her dignity. After having lived in

Oregon for quite some time, she was discouraged by the situation and felt this was the type of "bigotry" she had not had to tolerate for a long time. After the incident, she did discuss it with her friends and family.

14) The night of the incident, CH suffered a colitis attack, a physical reaction she has to the stress of dwelling on a disturbing subject. Since then, she has frequently thought about the incident and has had nightmares anticipating Respondent's retaliation against her for testifying. These nightmares increased as the time for this hearing approached.

15) Since the incident at The Pub, CH has been less inclined to leave the "island of safety" of her home town, has avoided the town of "Noti," and has been apprehensive and very "cautious" about stopping in certain public establishments.

16) CH felt she was being denied entrance to The Pub and did consult with Russell regarding filing a complaint with CRD; however, fear of retribution by Respondent prevented her from doing so. After CH was advised that the Commissioner intended to file a complaint against The Pub, she asked her friends if they were willing to tolerate the possibility of retribution, and upon receiving their support, continued with the administrative process.

17) CH sat rigid while testifying with her hands clasped together. Her fear and apprehension were obvious. As she recounted the events of the day she stopped at The Pub, her voice shook and she began to cry. The Forum could easily determine from her demeanor that even after the passage of a year from the date of the incident,

the events remained vivid to her and she was still deeply disturbed by her encounter with The Pub. It was likewise clear, in view of her fear of retaliation, it took great courage for CH to appear at the hearing.

18) The Respondent failed to appear and therefore did not challenge the facts presented or the credibility of any witness at hearing. Moreover, in his answer and other correspondence with the Forum, Respondent did not challenge the basic facts asserted by the Agency. The witnesses were all forthright with their responses, and there was physical evidence to support much of the testimony. There is, therefore, no reason to question the veracity of the testimony presented.

The Forum does note that the description of the signs inside The Pub offered by Prentice differs somewhat from that given by other witnesses. Considered in light of all the evidence, this does not reflect on his credibility, but rather on his memory. Prentice was only in The Pub on two occasions and was there as a customer rather than as an enforcement agent trained to look for unlawful practices, and his recollection of the basic content of the signs inside the bar is consistent with that of other witnesses.

For all these reasons, the Agency's witnesses were found to be credible and their testimony accepted as facts in this matter.

ULTIMATE FINDINGS OF FACT

1) During all times material herein, John Masepohl was the owner of the premises known as The Pub and did business as The Pub, a tavern open to the public serving food and beverages.

2) Respondent has maintained the following signs on the premises known as The Pub:

a) a sign on the front door of The Pub which read "NO, SHOES, SHIRTS, SERVICE, NIGGERS;"

b) a sign which read "VIVA APARTHEID" on the front door of The Pub placed just above the previously described sign; and

c) a sign, with chain and spikes attached at each end, inside The Pub hanging from the ceiling in front of a mirror over the bar which read: "Discrimination. Webster - to use good judgment" on the front and "Authentic South African Apartheid Nigger 'Black' Handcuffs Directions Drive Point Through Wrists and Bend Over Tips" on the back.

3) After being advised by CRD staff that these signs were unlawful under Oregon Civil Rights laws and being asked to remove said signs, Respondent failed to do so.

4) In June 1986, a black woman, CH, stopped at The Pub and observed the "NO NIGGERS" sign on the front door. She believed she would not be served because of her race and did not enter The Pub.

5) As a result of the sign on the door of The Pub, CH suffered physically and mentally. She was shocked and discouraged by such bigotry. CH felt humiliated and found the sign to be an insult to her dignity. She also became quite frightened by the sign for herself and her friends, and since the incident has had nightmares fearing Respondent's retaliation against her for testifying. She has also become apprehensive about stopping in certain

public establishments. CH's mental suffering has continued since the incident, she has thought of that day frequently, and the intensity of her suffering was obvious by her demeanor at the hearing in this matter.

CONCLUSIONS OF LAW

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

2) At all times material herein, John W. Masepohl was the owner of the premises known as The Pub doing business as "The Pub", a place of public accommodation offering goods and services to the public as defined in ORS 30.675(1) and is responsible for compliance with any order issued by this Forum.

3) Respondent caused to be displayed a communication or sign to the effect that services in Respondent's place of public accommodation would be refused, withheld, or denied or that discrimination would be made against persons on account of race in violation of ORS 659.037.

4) Respondent committed an unlawful practice by taking action designed to discourage or deny rights to persons on the basis of race to full and equal access to a place of public accommodation, in violation of ORS 30.670.

5) The Commissioner of the Bureau of Labor and Industries has the authority to award money damages to any person aggrieved by a distinction, discrimination, or restriction on account of race in a place of public accommodation. ORS 659.060, 659.070, and 659.435.

6) Pursuant to ORS 659.060 and by the terms of ORS 659.010, the Commissioner of the Bureau of Labor and Industries has the authority to issue a Cease and Desist Order requiring Respondent to refrain from any action that would jeopardize the rights of individuals protected by ORS 659.010 to 659.110 and 30.675, or to perform any act or series of acts reasonably calculated to carry out the purposes of said statutes and to eliminate the effects of an unlawful practice found and protect the rights of others similarly situated.

OPINION

Although Respondent submitted an answer to the Specific Charges and filed numerous motions, he failed to appear at the hearing in this matter. Pursuant to ORS 183.415(6) and OAR 839-30-185(2), the Agency must present a prima facie case in support of the Specific Charges and to establish damages. In that Respondent was not present at hearing and submitted no evidence to refute evidence offered by the Agency, the credible testimony of Agency witnesses together with the physical and documentary evidence submitted has been accepted and relied upon herein. The Agency has met its burden.

1. Respondent's Defenses

As stated, Respondent did fail to appear at hearing and therefore defaulted as to the Specific Charges; however, in furtherance of the goal of ORS 659.100 to "eliminate and prevent discrimination," the Forum takes this opportunity to discuss Respondent's three defenses to the charges and to clarify the law in this regard. This discussion should further serve as

a basis upon which to analyze the particular facts of this case.

a. The content of the signs is protected political speech under the Oregon Constitution

As stated in the Hearing Referee's Rulings on Motions, this Forum is an arm of the Executive Branch of government and is required by law to enforce the statutes in ORS chapter 659. These statutes are presumed to be constitutional until or unless a court determines otherwise. *In the Matter of Northwest Advancement, Inc.*, 6 BOLI 71 (1987). The Forum notes, however, that notwithstanding this principle of law, Respondent's arguments are without merit.

Although not articulated in legal terms, the thrust of Respondent's argument is that ORS 659.037 is unconstitutional as applied to this situation in that it denies him his constitutional guarantee, as established in Article I, § 8 of the Oregon Constitution, to free speech. ORS 659.037 must be read in the light of the Oregon Constitution and construed to balance the guarantee of free speech and the interest of the State of Oregon in eliminating discrimination in places of public accommodation. The Oregon Supreme Court has stated that Article I, § 8 of the Oregon Constitution is not to be read as more inclusive than the First Amendment of the United States Constitution.

"We realize that we could construe the freedom of expression provision of the Oregon Constitution, Art. 1, § 8, as providing greater freedom of expression than that of the First Amendment to the United States Constitution. We do not believe there is any legal basis for

such a construction." *State v. Childs*, 252 Or 91, 98, 447 P2d 304 (1968).

Upon that premise, we look to the construction of the federal guarantee of free speech. The First Amendment rights are not absolute. Where the exercise of such rights threatens a clear and present danger to some substantial state interest, the state is justified in "curtailing" those rights. *Gilmore v. James*, 274 FSupp 75 (N.D. Tex 1967), *aff'd*, 389 US 572 (1968).

"While it is true that our system of government does not tolerate suppression or censorship of speech merely because such expressions may be offensive to those in authority or opposed by the majority, it is likewise true that the freedoms of speech and association protected by the First and Fourteenth Amendments are not absolutes and are subject to constitutional restrictions for the protection of the social interest in government, order and morality." *Cox v. State of Louisiana*, 379 US 536 (1965), citing *Konigsberg v. State Bar of California*, 366 US 36 (1961) and *Giboney v. Empire Storage and Ice Co.*, 336 US 490 (1949).

The liberty of expression guaranteed by the First Amendment can be abridged by state officials in their protection of legitimate state interests where those interests necessitate an invasion of free speech. *Blackwell v. Issaquena County Board of Education*, 363 F2d 749 (5th Cir 1966), citing *Dennis v. US*, 341 US 494 (1951) and *Whitney v. People of State of California*, 274 US 357 (1927).

ORS 659.037 represents a reasonable exercise of power by the state to promote a vital interest, that is, the elimination of discrimination in places of public accommodation. The right to free speech can therefore be restricted, within certain boundaries, for the protection of this legitimate state interest of eliminating discrimination.

It is instructive to note that where the issue concerned the orderly education of students, a New York federal court stated as follows:

"While there is a certain aura of sacredness attached to the First Amendment, nevertheless these First Amendment rights must be balanced against the obligation of the State to educate students in an orderly and decent manner to protect the rights not of a few, but of all the students in the school system. The line of reason must be drawn somewhere in this area of ever expanding permissibility." *Schwartz v. Schuker*, 298 FSupp 238, 242 (E.D.N.Y. 1969).

Similarly, the obligation of the State of Oregon, through the Bureau of Labor and Industries, to enforce the Civil Rights laws must be balanced with the rights of free speech. Based on the above citations, the line can be fairly, and lawfully, drawn where speech or expressions result in the denial of rights guaranteed to citizens regarding public accommodations. ORS 659.037 does not generally operate to deny Respondent his constitutional guarantees of free speech. The particular facts of this case are analyzed below against these principles of law.

b) In order to find a violation of ORS 659.037, Respondent must be shown to have personally written the signs.

The Specific Charges in this matter alleged that Respondent "displayed" a sign which had the effect of communicating that service would be denied on account of race in violation of ORS 659.037. The statute reads in pertinent part that:

"[N]o person acting on behalf of any place of public accommodation as defined in ORS 30.675 shall publish, circulate, issue or display, or cause to be published, circulated, issued or displayed, any communication. * * *." (Emphasis added.)

Pursuant to the plain language of the statute, Respondent need not be shown to have actually displayed such a sign, but rather to have caused the sign to be displayed. Two of the signs in question were on the front door of The Pub and one was inside over the bar. Testimony established that all three signs were in place since 1985. It is completely illogical to believe that Respondent had no knowledge of such signs. Moreover, he refused to take down the signs upon the request of CRD. Whether or not he physically placed said signs himself, his actions did

"cause * * * a sign * * * to the effect that any of the accommodations, advantages, facilities, services or privileges of such place of public accommodation will be refused, withheld or denied to, or that any discrimination will be made against, any person on account of race * * * to be displayed." ORS 659.037. (Emphasis added.)

c) Respondent has not refused service to anyone or discriminated on the basis of race.

Again, the plain language of ORS 659.037 is responsive to this defense. The statute maintains that a violation occurs where the sign is "to the effect" that services "will be refused." Thus, actual refusal is not necessary to establish a violation of ORS 659.037.

The same rationale applies to ORS 30.670, that is, actual refusal to serve an individual is not required to prove a violation of the statute. ORS 30.670 guarantees to all persons within the state full accommodations without distinction, discrimination, or restriction on account of race. To narrowly construe this statute would operate to dilute its effect and to stifle the legislature's clear intention to insure access and service to all persons within this state in places of public accommodation.

The Forum notes that in something of an analogous situation, a federal court has held that the application of 42 USC 3604(c), the Fair Housing Act, to newspapers did not violate the freedom of the press guaranteed by the First Amendment to the United States Constitution. *US v. Hunter*, 459 F2d 205 (CA4 Md 1972), *cert den* 409 US 934 (1972). In deciding the newspapers could be constitutionally enjoined from printing classified advertisements which violated section 3604(c), the court stated:

"In combating racial discrimination in housing, Congress is not limited to prohibiting only discriminatory refusals to sell or rent. Widespread appearance of discriminatory advertisements in public or private media may reasonably be

thought to have a harmful effect on the general aims of the Act * * * We cannot condone an interpretation which would circumnavigate congressional intent in this remedial statute designed to eliminate humiliation and social cost of racial discrimination." (Emphasis added.)

2. Violations of the Public Accommodations Law

a) Definition of Public Accommodation

The Specific Charges allege five violations of ORS 659.037 and 30.670. The term "public accommodation" is defined in pertinent part in ORS 30.675 as follows:

"A place of public accommodation * * * means any place or service offering to the public accommodations, advantages, facilities or privileges whether in the nature of goods, services, lodgings, amusements or otherwise."

In this case, then, in order for Respondent's restaurant and tavern, "The Pub," to be considered a "place of public accommodation," three statutory elements must be present; that is, "The Pub" must be:

- 1) a place or service; that
- 2) offers to the public;
- 3) accommodations or facilities whether in the nature of goods, services, or otherwise.

1) Place or Service

The evidence has established that "The Pub" was a tavern open to the public serving food and beverages. There can be no dispute about the fact that a restaurant or tavern that offers food and drink for consumption is a "place or service" within the meaning

of ORS 30.675. In *Schwenk v. Boy Scouts of America*, 275 Or 327, 551 P2d 465 (1976), the Supreme Court of Oregon considered the legislative history of ORS 30.675 to determine the intent of the legislature in using the terms "place" or "service." The court set out its findings in pertinent part as follows:

"The Public Accommodation Act was first enacted in 1953. As originally enacted, it prohibited discrimination 'on account of race, religion, color or national origin' in any 'place of public accommodation,' which was defined as follows:

"* * * any hotel, motel or motor court, any place offering to the public food or drink for consumption on the premises, or any place offering to the public entertainment, recreation or amusement; * * *." Oregon Laws 1953, ch. 495, sec 2, 872, 873."

The law was amended in 1957 and 1961, both versions included in the definition of public accommodation "Any place offering to the public food or drink for consumption on the premises."

It is clear therefore from the legislative history of ORS 30.675 that any place offering food or drink to the public was always included in the definition of "place of public accommodation." On this basis, this Forum has previously held a supper club serving food and drink to the public to be a place of public accommodation. In *Matter of Joseph Gaudry*, 1 BOLI 235 (1980) *aff'd, rev'd in part on other grounds, Gaudry v. Bureau of Labor and Industries*, 48 Or App 589, 617 P2d 668 (1980).

2) Offers to the Public

The result of an act of discrimination in a "place of public accommodation" is that the offer of the accommodations or facilities was in fact not made to the entire public. That is, the offer was made to that segment of the public not part of the protected class that was the target of the discrimination. Thus, to give meaning to ORS 30.675, the term "offers to the public" can only be construed to mean that even though the offer excluded much of the public, in this case, black individuals, the offer was made to the public. Respondent, by operating an on-going restaurant and tavern business, made an offer to the public.

3) Accommodations or Facilities

The accommodations offered may be in the nature of "goods, service, lodgings, amusements or otherwise." Testimony established that Respondent offered food and beverages for purchase to customers. This offer falls squarely under the term "goods."

For all the reasons set forth above, The Pub was unquestionably a place of public accommodation.

b) Violations Alleged In The Specific Charges

1) The content of the sign reading "NO SHOES, SHIRTS, SERVICE, NIGGERS" communicates, in effect, that accommodations will be refused, withheld, or denied, or that discrimination will be made on account of race, and constitutes a violation of ORS 659.037.

The sign quite clearly communicates that persons without shoes or shirts, or black individuals, will not receive service. The sign was on the

front door or The Pub where any customer entering would be confronted with it. Respondent knew the sign was there, and furthermore refused to remove the sign at the request of CRD. Respondent therefore caused said sign to be displayed in violation of ORS 659.037.

2) The sign "VIVA APARTHEID" communicates, in effect, that accommodations will be refused, withheld or denied or that discrimination will be made on account of race.

The Supreme Court of the United States has held that political speech is afforded maximum protection. *New York Times Co. v. Sullivan*, 379 US 254 (1964); *Garrison v. Louisiana*, 379 US 64 (1964). The sign in question itself is pure political speech and it is therefore accorded the utmost deference. However, both of the cited cases also stand for the proposition that such speech is not absolutely protected or completely unfettered.

In *Beauharnais v. Illinois*, 343 US 250 (1952), petitioner was convicted for distributing "anti-negro" leaflets in violation of a statute making it a crime to exhibit in a public place any publication which "portrays depravity * * * or lack of virtue of a class of citizens of any race, color * * * which exposes the citizens of any race, color * * * to contempt * * *." Holding that the statute did not violate freedom of speech guarantees, the court stated:

"There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitution problem. These include the lewd and

obscene, the profane, the libelous, and the insulting or fighting words those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. "Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution and its punishment as a criminal act would raise none under that instrument." 343 US 250, at 257, citing *Cantwell v. Connecticut*, 310 US 296 (1940).

To determine whether ORS 659.037 has been violated, as discussed above, the interest of the state in enforcing civil rights laws and eliminating discrimination must be balanced against the guarantee of free speech. Apartheid is a system of philosophical justification of institutionalized segregation by race and is, in and of itself, the antithesis of both the federal and Oregon laws mandating equal access to places of public accommodation. While this sign may be completely legitimate in another place or context, it is not under the particular facts of this case. That is, the sign reading "VIVA APARTHEID" was placed just above the sign reading "NO NIGGERS" on the front door of a place of public accommodation. The two signs read together clearly communicate that services within would be refused,

withheld, denied, or that discrimination would be made on the bases of race. Again, Respondent knew the sign was there and refused to remove it upon request. His actions amount to causing the sign to be displayed in violation of ORS 659.037.

3) The sign in the bar referring to Webster's definition of discrimination and so called "Black Handcuffs" communicates in effect that accommodations will be refused, withheld, or denied or that discrimination will be made on account of race, in violation of ORS 659.037.

Again, this sign does not blatantly state "No Service" such as the sign on the front door, however, the intent is abundantly clear. The definition of "discrimination" being physically connected to the "Black Handcuffs" communicates by its plain message that "discrimination will be made *** on account of race." The sign, which Respondent causes to be displayed, is not only frightening to a person of ordinary sensibilities, but constitutes a violation of ORS 659.037.

4) By virtue of the "NO NIGGERS" sign on the front door of The Pub, full and equal access to a place of public accommodation was denied to a black individual, in violation of ORS 30.670

In this case, evidence established that a black woman approached the door, observed a sign reading "NO SHOES, SHIRTS, SERVICE, NIGGERS," and left without attempting to enter. The issue here is whether under such facts, does ORS 30.670 require that the woman have entered, requested service, and have been denied service to establish a violation of

that statute? In order to give effect to the clear intent of the statute and to be consistent with general principles of civil rights laws the answer must be a resounding "no."

The decision in *US v. Hunter* was previously cited and reiterated here to establish the point that it would stifle the goal of eliminating discrimination to narrowly interpret the statute. The statute is designed to insure full access. A sign such as the one in question that discourages access by a protected class violates the statute.

The statutory prohibition against distinction, discrimination, or restriction on the basis of race encompasses more than outright denial of service. In *Schwenk v. Boy Scouts of America*, 275 Or 327, 551 P2d 465 (1976), the Oregon Supreme Court noted as follows:

"According to a statement by one of the principal sponsors of that statute at a hearing during its consideration by the State and Federal Affairs Committee of the Oregon House of Representatives on April 7, 1953, it appears that the intended purpose of the bill was to prevent 'operators and owners of businesses catering to the general public to subject Negroes to oppression and humiliation * * *' (Emphasis added.)"

Moreover, court decisions have consistently held in employment cases that application need not be made where this would be a futile act under the particular circumstance. This Forum has reached the same conclusion. In *the Matter of McCoy Oil Company*, 3 BOLI 9 (1982). Similarly, an individual, such as the black woman in this case,

faced with these circumstances should not, and this Forum finds need not, perform not only a futile, but possibly a dangerous act, to establish a violation of the law.

5) By virtue of the "NO NIGGERS" sign on the front door of The Pub, full and equal access to a place of public accommodation was denied to black persons, in violation of ORS 30.670.

For the same reasons cited above, this sign operates to deny black persons equal access to a place of public accommodation in violation of ORS 30.670.

3. Posting

Pursuant to ORS 659.060(3), the Commissioner has the authority to issue an appropriate cease and desist order against any respondent found to have engaged in an unlawful practice. *Gaudry v. Bureau of Labor and Industries*, 48 Or App 589, 617 P2d 668 (1980). In *Fred Meyer v. Bureau of Labor*, 39 Or App 253, 592 P2d 564 (1979), *rev den* 287 Or 129 (1979), the Court of Appeals discussed the appropriateness of requiring the posting of a notice in discrimination cases. The court determined therein that the requirement to post a notice must have an "apparent relationship to the accomplishment of statutory purposes based on unlawful employment practice." 39 Or App at 269. The court further stated:

"The purpose of the cease and desist order is to protect the rights of the complainant and other persons similarly situated. ORS 659.010(2). In this case, the Commissioner specifically found that

the notice requirement was necessary to protect people like the complainant in light of the petitioner's standard practice of discouraging the patronage of racially mixed couples and black persons. There is evidence in the record to support the Commissioner's finding that such a practice existed.

"The ordered remedial act, the posting of the notice, is related to a specific statutory purpose. It can be reasonably expected to accomplish this purpose. The need for the notice is demonstrated in the evidence and the Commissioner's findings." *Fred Meyer v. Bureau of Labor, supra*, 39 Or App at 269, 592 P2d 564.

The statutory purpose is quite clearly set forth in ORS 30.670, that is to insure that all persons within the state are guaranteed full and equal accommodations, advantages, facilities, and privileges in a place of public accommodation without regard to "race, religion, sex, marital status, color or national origin." Evidence presented established that at least one black person was denied equal access to the place of public accommodation known as The Pub. The nature of the communications set forth in the signs indicates a clear intent to discourage black persons. Thus, a posting requirement in this case would have an "apparent relationship to the accomplishment of the statutory purposes."

4. Monetary Damages

Although CH did not formerly file a complaint with CRD because of her fear of Respondent's retaliation, this does not preclude the Commissioner from awarding her damages to

compensate for her mental suffering as a result of Respondent's unlawful practices.

Pursuant to ORS 659.060, where a complaint filed under ORS 659.040 or 659.045 has not been resolved, the Commissioner may proceed to a contested case hearing. The complaint herein was filed in accordance with ORS 659.045. After considering the evidence at such hearing, pursuant to ORS 659.060(3), the Commissioner may issue an appropriate cease and desist order against Respondent where Respondent is found to have engaged in any unlawful practice charged. A cease and desist order may include the award of monetary damages. Thus, there is no statutory requirement that a complaint have been filed by the victim to whom damages are awarded. In this case then, the Commissioner may award monetary damages to CH.

The Commissioner has previously awarded the sum of \$2,500.00 as compensation for mental suffering to the victims of discrimination on the basis of race in a place of public accommodation. In *In the Matter of Joseph Gaudry*, 3 BOLI 32 (1982), the Commissioner noted the following points are focal to the discussion of such awards.

"a) The battle against discrimination in public accommodations.

"b) The brief duration and discreet nature of the contact between Complainants and Respondent in most public accommodation cases indicate that the suffering resulting therefrom is usually mental rather than financial or physical. The very nature of most public

accommodation discrimination necessitates that, in order to follow the laws' mandate to 'eliminate the effects' of discrimination in places of public accommodation, award may be based solely in terms of Complainant's mental suffering.

"c) The actual act of discrimination in public accommodations can be devastating yet fleeting in duration, it is the degree and duration of the effects of discrimination which damage awards are meant to compensate."

These considerations were distilled from the Commissioner's discussion of this subject in a previous Final Order entered against the same Respondent wherein the Commissioner awarded \$2,500 as compensation for mental suffering to the Complainant. In *In the Matter of Joseph Gaudry*, 1 BOLI 235 (1980) *aff'd, rev'd in part on other grounds, Gaudry v. Bureau of Labor and Industries*, 48 Or App 589, 617 P2d 668 (1980). That discussion is most significant and bears repeating once again:

"a) The battle against race discrimination in places of public accommodation has been on the front line of the Civil Rights movement in the United States. Matters involving discrimination on buses and in soda fountains were among the first litigated under the Civil Rights Act of 1964. This makes sense, because public accommodation discrimination law strikes at the very heart of discrimination: an effort to impair a person's basic right to move about freely in society and to be recognized thereby as a part of his or her community.

Denial or abridgment of that right conveys in a particularly persuasive way the fragility of the victim's position as a functioning member of society. Although no setting for race discrimination is anything less than egregious, discrimination in public accommodations can be particularly insidious and devastating.

"b) * * * The law forbidding discrimination in places of public accommodation was enacted to prevent the infliction of such suffering and, when it does occur, to compensate the victim therefor. That this suffering is usually entirely mental rather than physical or financial makes it less easily described (much less measured in pecuniary terms), but no less palpable or destructive * * *

"c) Because discrimination in public accommodations can be particularly devastating, yet fleeting in duration, it is important to emphasize that the duration of the discrimination itself does not determine either the degree or the duration of the effects of discrimination and it is these effects which damages awarded are meant to compensate.

"* * * In addition to the degree and extent of suffering of which there is persuasive proof, I may infer from the fact of the discrimination itself mental suffering of which there may be little or no specific proof, especially if the discrimination has taken the form of racial harassment. Oregon courts have acknowledged that mental anguish is one of the effects of race

discrimination: * * * Indignity must be the natural, proximate, reasonable, and foreseeable result of race discrimination * * *; indignity visited from the inference in such discrimination that black people are inferior.' *Gray v. Semuro Builders, Inc.*, 110 NJ Super 297, 265 A2d 404 (1970), cited with approval in *Williams v. Joyce*, 4 Or App 482, 497, 479 P2d 513, 40 ALR 3rd 1972, *rev den* (1971); *School District No. 1 v. Nilsen*, 271 Or 461, 534 P2d 1135 (1975)."

In *Gaudry* (1980), the Forum determined that the complainant, as a result of respondent's discrimination, was angry, humiliated, embarrassed and suffered "real and tangible frustration and depression." The complainant saw the treatment she received as a blow to her self esteem and an insult to her dignity. These effects were intense over the weekend of the discriminatory incident and to a lesser extent thereafter. In *Gaudry* (1982), the Forum again found the complainants were humiliated, embarrassed, and suffered real and tangible frustration as a result of respondent's unlawful actions. The Forum found that complainants were, as a result of respondent's discriminatory actions, reluctant to go into certain public establishments. As stated, all of these complainants were awarded \$2,500 as compensation for their mental suffering.

The facts of the instant case call for a higher award. Not only did CH suffer all of the above described feelings, but was stricken with fear for her own safety and that of her friends as a result of Respondent's actions. She testified, and this Forum found to be a fact, that

she feared she would be "beat up" if she entered Respondent's establishment. Since then she has been the victim of nightmares about Respondent's possible retaliation against her for testifying in this matter. CH was so frightened that she would have preferred not to pursue this matter rather than to have Respondent know her identity. Neither the hearing in this matter nor the entry of an order will automatically operate to terminate the possibility of retaliation by Respondent, and moreover cannot serve to allay CH's fears.

For all these reasons, an award to CH of \$5,000 as requested in the Specific Charges is appropriate in this case.

5. Respondent Liability

During all times material herein, John Masepohl owned the premises upon which The Pub was located and did business as "The Pub." While there was testimony that Respondent may have recently sold said premises, this is not relevant to a finding that Respondent violated the law or to the issuance of a cease and desist order including the award of monetary damages. Respondent was not a corporation at times material, and is therefore personally liable for compliance with any requirement and payment of any monetary damages. In *the Matter of Associated Oil Company*, 6 BOLI 240 (1987). The pendency of such sale does not preclude the Commissioner from entering a cease and desist order containing posting requirements as the sale may not be consummated. As long as Respondent remains the owner of The Pub, the Commissioner retains jurisdiction over the premises.

The Agency did not raise the issue of successor liability herein and it is not, therefore, addressed herein.

6. Racial Discrimination in Places of Public Accommodation

As can be observed from *Gaudry* (1980), *supra*, discrimination in places of public accommodation is a particularly noxious form of bigotry. Its pernicious influence on race relations surpasses even the most blatant employment discrimination: Its impact on both victim and society as a whole extends well beyond the boundaries of one job or one employer. It is a public insult to the minority citizens of this state, and is antithetical to the most basic social values of Oregonians.

In this case, the signs displayed by Respondent not only discourage or deny service to black individuals, they create an intimidating atmosphere in which a black individual could reasonably feel physically threatened. The display of so called "handcuffs" designed to pierce the flesh is not only barbaric, it represents an immediate threat to public safety and peace.

One need only to recall the violence of early civil rights demonstrations in places of public accommodation to appreciate the dangers and hatred generated by such discrimination.

This case also illuminates the less apparent, but no less profound, personal costs of public accommodation discrimination to its victims. The clear public message to minority citizens is that they are less than full participants in the life of our state, undeserving of the freedom and opportunities afforded white Oregonians. The potentially

devastating effect of such bigotry on minority individuals is powerfully demonstrated in the testimony of CH. The compensation ordered below is small recompense for the fear and indignity she has suffered at the hands of Respondent.

ORDER

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

1) Deliver to the Hearings Unit of the Portland Office of the Bureau of Labor and Industries, a certified check payable to the Bureau of Labor and Industries to be held in trust for CH, in the amount of FIVE THOUSAND DOLLARS (\$5,000), as compensation for the damages suffered as a result of Respondent's unlawful practices. The Agency shall be responsible for the appropriate dispersal of these funds.

2) Post on the premises known as The Pub, should that be owned by Respondent, for a period 90 days from the fifth day after the date of this order, a readable copy of ORS 30.670 and 659.045(1), together with notice that any person who believes that he or she had been discriminated against in a place of public accommodation may notify the Bureau of Labor and Industries. Said notices should be posted in a location within or outside the establishment known as "The Pub" that is accessible and plainly visible to each and every person seeking admission to "The Pub."

3) Cease and Desist from engaging in practices designed or intended to

harass, discourage, or deny to persons the full and equal enjoyment of accommodations, advantages, and facilities of public accommodation by imposing restrictions and distinctions based upon race or color as conditions for admissions. This includes the display of any sign, photograph, or physical object that communicates a distinction on the basis of race. Respondent is therefore ordered to remove from the premises of The Pub, and to refrain from displaying any similar communications, those signs set forth in this order found to be in violation of the law.
