

BOLI ORDERS

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

VOLUME 7

Cited: 7 BOLI

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BOLI ORDERS

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INTRODUCTORY NOTE

This seventh 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 August 12, 1987, and January 13, 1989.

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
UNITED GROCERS, INC.,
an Oregon corporation, Respondent.**

Case Number 40-86

Final Order of the Commissioner

Mary Wendy Roberts

Issued August 12, 1987.

SYNOPSIS

A series of incidents with racial overtones that occurred in Respondent's warehouse were directed at black Complainant, creating for him an intimidating, hostile, and offensive work environment, and adversely affecting the terms and conditions of his employment. After examining Respondent's reaction to each incident to determine liability, the Commissioner found that given the nature of the work force and of the job site, the specific acts of harassment, and the constraints imposed by a collective bargaining agreement, Respondent acted timely and appropriately in its investigation, its notice to other employees, and in the eventual sanctions against two identified coworkers, who were the perpetrators. Finding that Respondent had not committed an unlawful employment practice, the Commissioner dismissed the complaint and specific charges. ORS 659.030(1)(b); 659.050(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 July 8 and 9, 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 (Agency) the following: Judith Bracanovich, Quality Assurance for the Civil Rights Division (CRD) of the Agency; Anthony Mims, the Complainant (hereinafter Complainant); Barbara Stroughter, Investigative Supervisor for CRD; George Goodwin, vocational counselor; Jim Schuh, Complainant's supervisor; Dave Sletholm and Don Morris, co-workers of the Complainant. The record reflects that the CRD investigator who was assigned to this case, Douglas Nicoli, has been deceased since the summer of 1986. The Agency was not represented by counsel.

United Grocers, Inc. (Respondent), was represented by attorneys Donna Cameron and Linda Marshall. Respondent called the following employees as witnesses: Supervisors Steve Andrus, Glen Hayner, Jim Schuh and Doug Rabe; Bob Harris, Director of Corporate Loss Prevention; Ken Thompson, Grocery Warehouse Manager; and Bob Hedberg, Personnel Manager.

Having fully considered the entire record in this matter, I, Mary Roberts, hereby make the following Rulings On Motions, Objections and Arguments; Findings of Fact (Procedural and on the Merits); Ultimate Findings of Fact; Conclusions of Law; Opinion; and Order.

RULINGS ON MOTIONS, OBJECTIONS AND ARGUMENTS

1) Respondent's Motion in Limine.

At the commencement of the hearing, Respondent filed a Motion in Limine to exclude from admission into evidence a document set forth in the Summary of the Case filed by the Agency. Respondent based this motion on the grounds that the author of the document was not listed as a witness for the Agency, that the document is not a self-authenticating document under OEC 902, and that it is composed of hearsay and fits within no recognized exception to the hearsay rule under OEC 801-804.

It should be noted that this contested case proceeding was conducted in accordance with the administrative rules, at OAR 839-30-020 through 839-30-200, duly promulgated. There is no provision for a Motion in Limine. Moreover, while the Forum may draw on the Oregon Rules of Civil Procedure or Oregon Evidence Code for guidance in a matter not addressed in the rules, the proceedings are not governed by the rules of civil procedure or the evidence code. The motion is addressed, however, in an effort to clarify the law in this regard.

OAR 839-30-120 sets forth the basic rule regarding admissible evidence. Section (1) of the rule mirrors ORS 183.450(1) and provides:

"All evidence of the type commonly relied upon by reasonably prudent persons in the conduct of their serious affairs will be admissible."

In discussing the statutory provision, the publication entitled *State*

Administrative Law, prepared by the Oregon State Bar Committee on Continuing Legal Education states in pertinent part as follows:

"This provision is commonly referred to as the 'non-hearsay rule.' The legislature certainly intended to relax court-imposed rules dealing with the use of hearsay evidence in contested cases. Thus, a medical report, psychologist evaluation, *** may be admissible without the necessity of requiring the doctor, psychologist, *** to be a witness in the proceeding."

The document in question is entitled "Discharge Summary on Anthony J. Mims" and is signed by James L. Miller, MA, Mental Health Therapist. The face of the document indicates it was received by CRD on April 2, 1986. The record reflects that said document was obtained from the Agency file maintained in the ordinary course of Agency business. It is signed by a professional mental health therapist and is on letterhead of Providence Medical Center. Quite clearly, the document is the type "commonly relied upon by reasonably prudent persons in the conduct of their serious affairs." The record further reflects that said document was provided to Respondent, together with the balance of the Summary of the Case, on June 29, 1987. The record does not reflect a subpoena by Respondent for the deposition of the document's author or any request for postponement to conduct further discovery in this regard.

The Motion in Limine was denied at the hearing with the Hearings Referee advising that appropriate weight would be assigned to the document in

preparation of the Proposed Order. The document was accepted into evidence. That ruling is hereby adopted and incorporated herein by reference.

2) Respondent's Motion to Exclude the Portion of the Summary of the Case (pages 1-12) Prepared by Judith Bracanovich.

Respondent moved to exclude the 12 page summary prepared by the Agency from the Agency file in accordance with OAR 839-30-071. That summary includes: Statement of Respondent's Position; Elements of the Claim; Disputed Issues of Fact; Agreed Facts; Legal Issues Raised; Agency Investigation and Process; Witnesses Anticipated for the Agency and Respondent; Summary of Witness Testimony; Relevant Statutes; Rules and Policy; and Remedies Sought. Respondent based the motion on the grounds that Judith Bracanovich did not have personal knowledge of the facts contained in the file, that the document reflects multiple hearsay, and that the summary had no relevance as substantive evidence.

Based on the provisions of ORS 183.450(1) and OAR 839-30-120 regarding the admissibility of evidence, this document was accepted as evidence. In addition, the Department of Justice has advised this Forum in two letters that the summary report is evidence. By letter dated July 31, 1986, Department of Justice advised Commissioner Roberts in pertinent part as follows:

"Summary evidence, orally or written, is generally admissible in contested case administrative proceedings."

That letter also indicated, citing *Glide School District No. 12 v. Carroll*, 39 Or App 727, 593 P2d 1224 (1979), that the hearsay nature of such a summary is not a basis for its exclusion. In addition, by letter to the Agency dated August 7, 1986, the Department of Justice advised that the Summary is a form of evidence.

Respondent argued that the Agency had failed to include in the Summary its Request for Reconsideration and Position Statement that it had previously submitted to the Agency. The fact that the Agency did not include said documents does not make the Summary inadmissible. Respondent submitted said documents at hearing, where they were received into evidence, and had every opportunity to submit those documents, as provided in OAR 839-30-071, by way of a Summary of the Case prior to the hearing.

For all these reasons, Respondent's motion was denied. That ruling is hereby adopted and incorporated herein by reference.

3) Respondent's Motion to Exclude From Evidence Certain Exhibits.

At the commencement of the hearing, Respondent also moved to exclude exhibits which represent handwritten and formal typed summaries of statements given by witnesses in this case to the CRD investigator, Douglas Nicoli. As indicated, Mr. Nicoli has been deceased since the summer of 1986. Respondent moved to exclude these notes as there would be no way to cross examine the investigator, that said documents are comprised of hearsay, and that there is no way to determine if said notes are accurate.

Again, OAR 839-30-120 governs this matter. The notes in question were obtained from the Agency file maintained in the ordinary course of business. These are notes, therefore, from an official file of the State of Oregon. It is the finding of this Forum that such notes meet the requirements of OAR 839-30-120 and are admissible. The *State Administrative Law* manual previously referenced states:

"Counsel will not obtain a favorable exclusionary ruling merely by claiming that the statement is hearsay. It will be necessary to go one step further and show why a reasonably prudent person would not rely upon the evidence in the conduct of his or her serious affairs."

In addition, as stated, the Department of Justice has indicated in two letters that the Summary is a form of evidence. The type of Summary to which the Department of Justice referred in said letters included summaries of witness statements and document contents.

The Hearings Referee specifically asked Respondent to point out inconsistencies between the oral testimony of witnesses at hearing and the notes in question. Only one such inconsistency was noted by Respondent's attorney, and that was shown to be a misreading of the notes by Respondent's attorney. This Forum is nevertheless mindful that an agency order must be supported, as set for in ORS 183.450(2), by "reliable, probative and substantial evidence in the whole record," and that the Hearings Referee has the statutory obligation to provide a full and complete record. For these

reasons, said documents were admitted as evidence, again with the notice that such documents would be given appropriate weight in consideration of oral testimony presented at hearing in the preparation of the Proposed Order. That ruling is hereby adopted and incorporated herein by reference.

4) Respondent's Objection to the Presentation and Admissibility of Evidence Involving Mental Suffering By Complainant.

During the course of the hearing, Respondent objected to evidence involving Complainant's mental suffering on the grounds that Complainant had a claim pending with Worker's Compensation Department for stress suffered as a result of the alleged harassment which is the basis of the Complaint and Specific Charges herein. The Forum reserved ruling on that objection. The objection is overruled and all such testimony is admitted as evidence and made a part of the record. According to Complainant, he did file a claim for worker's compensation based on job stress related to incidents of alleged racial harassment. The Complainant received, pursuant to that claim, two checks each in the amount of \$689. The record reflects that a final decision regarding the appropriateness of such payments has not yet been rendered.

OAR 839-30-060 governs responsive pleadings and provides that the "failure of a party to raise an affirmative defense in the answer shall be deemed a waiver of such defense." The Agency's rules do not define the term "affirmative defense," and therefore, the Forum has relied upon ORCP 19(b) for guidance, which provides in pertinent part that affirmative defenses

include "payment * * * and any other matter constituting an avoidance * * *." Quite clearly, Respondent's allegation that Complainant is being compensated for stress through worker's compensation and should not therefore receive an award of damages from this Forum for stress falls within said parameters. As stated, Respondent failed to raise any affirmative defenses in the answer, and pursuant to OAR 839-30-060, that defense is now waived. The Forum would like to take this opportunity to note, however, that even if Respondent had timely raised this defense, the defense would have failed and the objection been, as it is now, overruled.

The workers' compensation laws provide for monetary payment to a worker who sustains a compensable injury. That term is defined in ORS 656.005(8)(a) as follows:

"is an accidental injury, * * *; an injury is accidental if the result is an accident whether or not due to accidental means. However, 'compensable injury' does not include injury to any active participant in assaults or combats which are not connected to the job assignment and which amount to a deviation from customary duties."

The injury for which the Agency has sought remedy herein is for "mental suffering, including humiliation, embarrassment, distress and loss of human dignity." These are injuries that result from a respondent's actions of discrimination. Quite clearly, this injury does not fall within the above definition. It should be noted, generally, that ORS 656.018(3)(a) provides for an exception to the exclusivity provision for

injury "proximately caused by willful and unprovoked aggression." Without discussing the facts herein, quite clearly there are and will be fact situations covered by this exception.

While there appears to be no Oregon case directly on point, guidance can be obtained from other jurisdictions. In *McGee v. McNally*, 174 Cal Rptr 253 (1981), a California Court of Appeals held that the exclusivity provisions of the workers' compensation statutes do not preclude civil actions based on intentional infliction of emotional distress. In *Russell v. Massachusetts Mutual Life Insurance Co.*, 722 F2d 482 (1983), the Ninth Circuit adopted this position, stating:

"Where the primary injury is emotional distress, and that is the gist of the complaint, a cause of action in intentional tort lies, regardless of whether the emotional distress also manifests itself physically in some way or causes some physical injury." 722 F2d at 495.

More specifically, the Court of Appeals of Michigan discussed the effect of the exclusivity provisions of the state's workers' compensation laws where the plaintiff brought an action to recover against her former employer for a nervous breakdown, humiliation, loss of esteem, and denial of promotions and discharge based on sex. *Stimson v. Michigan Bell Telephone Company*, 258 NW2d 227 (Ct App Mich 1977). While certain elements of damage may be barred by the exclusivity provisions, the court stated that in general "non physical torts, such as false imprisonment or sex discrimination, fall outside the scope of an exclusivity remedy provision." 258 NW2d at

231. Relying on Larson, *Workmen's Compensation Law*, as did the California court in *McGee (supra)*, the court determined:

"the courts of this state do not bar a civil action against an employer completely because several of the injuries alleged are those within the coverage of the compensation act. Instead, recovery is merely precluded for the injuries covered under the compensation law." 258 NW2d at 232.

The workers' compensation laws generally provide payment for lost wages, medical costs, and disabilities. There is no compensation for humiliation, loss of esteem, insult to integrity, or embarrassment. These are the injuries that result from discrimination. *Fred Meyer v. Bureau of Labor*, 39 Or App 253, 592 P2d 564 (1979). These injuries can be compensated by an award of damages from this Forum. There is no double recovery in such matters. Thus, where a complainant has suffered these injuries, and respondent's liability has been established, this Forum can and will compensate complainant whether or not complainant has received payment on a stress claim pursuant to workers' compensation.

5) Respondent's Motion to Dismiss.

After the conclusion of the Agency's case, Respondent moved to dismiss the Specific Charges on the grounds that the Agency had failed to establish a prima facie case.

Pursuant to ORS 183.450(2) and OAR 839-30-105(10), the burden of presenting evidence to support a fact

or position in a contested case rests on the proponent of that fact or position. The Agency must have presented a prima facie case. Drawing on the principles established in *Holien v. Sears, Roebuck & Co.*, 298 Or 76, 689 P2d 1292 (1984) regarding sex harassment, the Forum finds that in order to establish a prima facie case, the Agency must show:

- 1) Complainant is a member of a protected class;
- 2) that Complainant was subject to unwelcome harassment;
- 3) that but for Complainant's protected class, Complainant would not have been the object of such harassment;
- 4) the terms and conditions of Complainant's employment were affected; and
- 5) the employer, in the case of co-worker harassment, knew or should have known, and failed to take prompt action.

Based on those guidelines, the Forum summarizes its analysis as follows:

- 1) Complainant is a black man. Race is a protected class.
- 2) Complainant was subjected to at least four incidents that he did not encourage or consent to: attaching a "Mr. T." mask to his lunch box; the word "NIGER" (sic) written on his time card; his name written in the restroom in conjunction with the name "Mr. T."; and, having "NIGER" and "KKK" written on his equipment.
- 3) These incidents viewed in their totality and against the

circumstances existing at the time were clearly racially oriented.

a. The mask, although placed on Complainant's lunch box on Halloween, was of a black man bearing some resemblance to Complainant. The fact that others may not have been offended does not alter the fact the Complainant was insulted and upset thereby. Complainant never referred to himself as "Mr. T." nor did he allow anyone else to do so.

b. The writing of the word "NIGER" on Complainant's time card cannot rationally be seen as anything besides racial. Even Complainant's supervisor, Schuh, was convinced of the racial nature of the mask incident after the occurrence of the writing on Complainant's card.

c. The writing on the bathroom wall linked Complainant's name to "Mr. T." Again, Complainant saw this as racial and was offended thereby. Moreover, it occurred after the defacing of Complainant's time card.

d. The writing of "NIGER" and "KKK" on Complainant's equipment is quite obviously connected to race. The word "NIGER" although misspelled was clear in its meaning and anyone of ordinary sensibilities would have considered the phrase "KKK" as racial, particularly in view of its proximity to the word "NIGER."

4) Complainant testified that he had begun to fear for his safety

and was constantly concerned about the occurrence of another incident. He felt his work production suffered as a result. His feelings about going to work and the atmosphere were substantiated, although that was not necessary to this ruling, by witness George Goodwin and to some extent, Schuh.

5) Based on the oral testimony of Complainant and Schuh, Respondent had failed to take immediate and appropriate action.

a. Although a crew meeting was held immediately after the mask incident, Schuh testified he had information within two weeks after the incident of the possible culprit and failed to interview him. There was no evidence that any other steps, such as a test for fingerprints, were taken. The fact that Complainant agreed then or at hearing that Respondent's action was reasonable is not relevant, as it is the responsibility of Respondent not Complainant to comply with the law.

b. While the time card was turned over to security, there was no evidence to indicate the timeliness of management's response. Complainant testified no crew meeting was held nor was any other action, such as posting, taken.

c. The record indicated that the graffiti had been painted over; however, there was no evidence of any other actions taken, for example, an attempt

to obtain a handwriting analysis or a crew meeting.

d. In the matter of the Barrett, Complainant was issued another machine. Aside from that action, there was no evidence of any other corrective or preventive steps taken by Respondent.

Although certain portions of Complainant's testimony were eroded by the presentation of Respondent's case, and evidence was later presented to establish that Respondent did take reasonable action to remedy the situation, this does not operate to alter the conclusion that the Agency had established a prima facie at the conclusion of presenting its evidence. Respondent's motion was denied at hearing and that ruling is adopted and incorporated herein by reference.

6) Respondent's Contention that the Agency Failed to Make Reasonable Efforts to Resolve the Case by Conference, Conciliation, and Persuasion.

Respondent raised this argument in its answer and addressed the matter at hearing. This matter is controlled by ORS 659.050 and 659.060. If the investigation of a complaint discloses any substantial evidence to support that complaint, ORS 659.050 provides the Commissioner "may cause" steps to be taken through conference, conciliation, and persuasion to effect a settlement. Pursuant to ORS 659.060, if a case cannot be resolved under ORS 659.060, "or if it appears to the Commissioner that the interest of justice requires a hearing without first proceeding by conference, conciliation

or persuasion," then charges shall be issued.

The cited statutes clearly state that the decision to pursue conciliation is in the Commissioner's discretion. This Forum has so ruled in previous Final Orders. Where Respondent moved to dismiss Specific Charges alleging the Commissioner had failed, refused, and neglected to engage in conciliation under ORS 659.050, the Forum denied the motion stating there was no substantial evidence to support said allegation, and noting that in any case the statute "permits but does not require the Commissioner to cause steps to be taken to effect settlement of a civil rights complaint." *In the Matter of Lucille's Hair Care*, 5 BOLI 13, 25 (1985).

In the instant matter, there is likewise no substantial evidence to support Respondent's allegation. Barbara Stroughter, the Investigative Supervisor who handled the conciliation process in this case, indicated that she followed Agency procedure in this regard and that she did not exert any less effort in this matter. (See Finding of Fact-Procedural 12.) As stated, in any case, conciliation is a discretionary matter with the Commissioner. For these reasons, Respondent's argument fails.

**FINDINGS OF FACT –
PROCEDURAL**

1) On May 6, 1987, the Agency prepared and duly served on Respondent, and Respondent's attorney, Specific Charges alleging that Respondent had repeatedly engaged in a course of conduct designed to harass, intimidate, humiliate, and embarrass Complainant because of his race, that Respondent had failed to take immediate and

corrective action; that such conduct created a hostile and abusive environment; and that said conduct violated ORS 659.030(1)(b).

2) The Specific Charges also alleged that the Agency attempted to resolve the Complaint by conference, conciliation, and persuasion, but was unsuccessful. Evidence presented at hearing established the following facts in this regard:

a. Barbara Stroughter was an Investigative Supervisor for CRD of the Agency at the time of the issuance of the Administrative Determination in this matter. As part of her responsibilities, she reviewed the file prepared by the investigator, Douglas Nicoli, and found no problems with the file. Stroughter's responsibilities also included attempting to effect conciliation. In this regard, she felt she had not devoted less effort to this case than others.

b. In accordance with Agency procedure for attempting conciliation, Stroughter contacted Complainant to see what it would take, in his view, to resolve the matter. She then called Respondent's attorney and conveyed that information. Respondent's attorney at some point made a counter offer to Stroughter, which she relayed to Complainant. In response, Complainant contacted his attorney and then advised Stroughter he would not accept Respondent's offer. Complainant made one more counter offer, however, this was not accepted. Stroughter felt conciliation had failed and, pursuant to procedure, sent the case to be

reviewed and processed for hearing.

c. In determining the appropriate remedy, Stroughter did consider time and wages lost from work in seeing doctors and some out of pocket expenses. She did not consider any benefits derived from workers' compensation. In regard to damages for mental suffering, Stroughter indicated this is difficult to value and the process is to ask Complainant and Respondent for their figures, which is what she did.

d. Although not alleged in the Complaint, the Agency's investigation covered actions through the fall of 1985. The Agency did find that Respondent had acted promptly to stop racial harassment in the work force where Respondent discovered racially oriented graffiti, most of which was directed at Complainant, on cross bars in Respondent's warehouse.

e. These facts were not considered by Stroughter in attempting to effect conciliation as the incident was not a part of the Complaint to which conciliation was addressed. This is in accordance with Agency procedure.

3) With the Specific Charges, 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 attorneys for Respondent stated that neither they nor

Respondent had any questions about the document.

4) On May 22, 1987, Respondent filed an answer to the Specific Charges admitting certain allegations in said Charges and alleging that Respondent took prompt and reasonable action to identify the perpetrators, and that such action included the discharge of an employee believed to be responsible. No affirmative defenses were raised in Respondent's answer.

5) On May 22, 1987, Respondent, through its attorney mailed a Request for Subpoena and Motion for the Production of Evidence. The Hearings Referee responded, allowing said requests, by letter hand delivered on May 28, 1987. Said ruling is incorporated herein by reference.

6) On June 23, 1987, Respondent, through its attorney, mailed a Motion for Postponement of Hearing. The Agency, through Judith Bracanovich, responded to that motion by letter to the Hearings Referee dated June 24, 1987. The Hearings Referee denied said motion by letter to Respondent's attorney, dated and hand delivered on June 25, 1987. Pursuant to Respondent's indication in the motion of a possible settlement in the matter, the Hearings Referee also enclosed a notice, in accordance with OAR 839-30-200, regarding settlement procedures. All rulings are incorporated herein by reference.

7) On June 26, 1987, Respondent, through its attorney, issued a subpoena for the deposition of Anthony Mims. The record reflects Mr. Mims was in fact deposed in this matter.

8) Pursuant to OAR 839-30-071, the Agency filed a Summary of the Case including documents from the Agency's file. Although allowed to do so in accordance with OAR 839-30-071, the Respondent did not submit a Summary of the Case.

9) On July 6, 1987, the Agency hand delivered a letter including a summary of statements by a proposed witness to Respondent's attorney and the Hearings Referee.

10) 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).

11) All documents marked as exhibits in this matter were accepted as evidence and made a part of the record. Those rulings are adopted and incorporated by reference herein.

12) At the conclusion of the hearing, the Forum requested both the Agency and Respondent to submit certain information by 5:00 p.m. on July 17, 1987, to be included in the record. Those documents were marked as exhibits by the Forum and are made apart of the record herein.

FINDINGS OF FACT – THE MERITS

1. Introduction: Complainant, Respondent's employees who have knowledge of the incidents alleged in the Specific Charges, description of Respondent's premises, work rules and collective bargaining agreement

1) Complainant was employed as a full time employee by Respondent in 1979. He was hired as an order filler

and worked the swing (night) shift. Complainant is still an order filler for Respondent, however, he has more responsibilities. He has acquired this through seniority rather than promotion, and has obtained pay increases due to the union contract. Complainant is a large man, who described himself as having been an aggressive football player, that he wore to work diamonds and gold, and occasionally an earring. Complainant acknowledged that some people found him intimidating. He also believes many people were jealous of the fact that he was a good football player and has received much publicity, some of which occurred on Respondent's premises. Complainant kept a diary of the incidents at Respondent's warehouse and stated he gave the diary to the Agency. The diary was not produced at hearing.

2) Respondent is an Oregon corporation doing business in the State of Oregon, and employs about 1000 employees in its grocery sales business. There are seven acres under the warehouse roof and 70 to 90 employees on each shift. Respondent has two to four supervisors for each of those shifts. Each supervisor has a particular area but is responsible for the entire area. The atmosphere was informal; some name calling, practical joking, and graffiti was not uncommon. There is a public address (PA) system used in the warehouse. It is necessary to leave access to it unrestricted to perform necessary functions. It is common for employees to use the PA system for non-work related comments. There is no way to identify from which station the speaker is

speaking. There are tall racks with shelved boxes and it is difficult to see over them. Thompson feels that employees in the warehouse rudely voice opinions on issues with little or no respect for management. It is a "hard core culture." Matters are often blown out of proportion. For these reasons, when there is a potential problem, Thompson feels it is better not to go to the work force if it can be handled on a one-to-one basis. He noted the letter sent to Complainant was an example of this process.

3) Jim Schuh, now the day shift supervisor for Respondent, was the assistant swing shift supervisor and Complainant's immediate supervisor from October 1984 to January 13, 1985. Schuh eventually replaced his immediate supervisor, Steve Andrus, and during this time he basically performed the functions of both positions. It was Schuh's opinion that he had the authority to terminate employees. After Schuh was moved to another position on or about January 13, he had no responsibility for any incidents involving Complainant.

4) Steve Andrus was the swing shift supervisor until December 1984, and was, at that time, Schuh's immediate supervisor. He supervised Complainant for nearly two years. In December Andrus was promoted to manager and is still employed by Respondent. In his capacity as swing shift supervisor, Andrus indicated that he can permanently suspend an employee and has made recommendations to management regarding employee status that have been followed.

5) Glen Hayner became shift supervisor on January 13, 1985, replacing Steve Andrus. Prior to that time, he was assistant day shift supervisor and had no contact with Complainant. He was not involved with either the mask or time card incidents. Hayner is still employed by Respondent.

6) Ken Thompson is presently the grocery warehouse manager for Respondent and has been so since January 13, 1985. Prior to this time, he was day shift supervisor and did not work with Complainant. Thompson changed positions during the reorganization of the warehouse in January of 1985, which he pointed out was a very confusing period of time.

7) Bob Harris is now the Director of Corporate Loss Prevention for Respondent and functioned as Security Director at all times material herein. He contracted with the Burns Protective Association for the services of nine security officers. During 1985, he also had the assistance of one employee, Mike Brewster. Harris was a police officer for about eight years, has training in investigative techniques and has worked in security for companies and banks. The security guards assigned to Harris do not investigate without direction. Harris will prioritize projects for investigation by 1) type of incident; and 2) ability to expeditiously accomplish a solution. In providing security, Harris uses alarms, cameras, has used undercover people, and outside assistants such as a handwriting analyst. Harris stated that he is not involved in all problems. Whether or not he is involved depends on the severity of the problem and he only becomes involved at the request of a department

head, and functions only in a supplemental capacity in disciplinary matters. Harris believes it is important in his position to be seen as fair

8) Bob Hedberg is and was during all times material herein the Personnel Manager for Respondent. In that capacity, he has the primary responsibility for Respondent in collective bargaining negotiations and interpretation of the agreement. It is his job to determine whether or not action would be or was in compliance with the terms of said agreement.

9) Bob Green is the Business Agent for Warehousemen's Local No. 206. He works in conjunction with Hedberg on matters concerning the collective bargaining agreement, and is, according to Hedberg, vigorous in his representation of employees.

10) Doug Rabe is currently the assistant shift supervisor for Respondent and Complainant's supervisor. During times material herein, Rabe was first a co-worker of Complainant's as an order filler and then became a first line supervisor on the swing shift.

11) Dave Sletholm was at all times material herein a warehouseman and a co-worker of Complainant's. On occasion, he worked side by side with Complainant. He had no problems with Complainant at work. They did not see each other socially.

12) Don Morris was and is presently a forklift operator for Respondent. He did not work closely with Complainant since Complainant was an order filler, but saw him on breaks or passing in the aisle.

13) Laury Angelos was a co-worker of Complainant's.

14) A collective bargaining agreement between Associate Food Distributors and Warehousemen's Local No. 206, dated July 10, 1983, through July 12, 1986, was in effect and Respondent was bound thereby during all times material herein. Said agreement provided in pertinent part as follows:

"16.1 The Employer may discharge or suspend an employee for just cause, but no employee shall be discharged or suspended unless written warning notice shall previously have been given to such employee of a complaint against him concerning his work, conduct or violation of Company rules, except no such prior warning notice shall be necessary if the cause for discharge or suspension is dishonesty, drinking related to employment, illegal use or possession of drugs, recklessness, gross insubordination, the carrying of unauthorized passengers, or willful, wanton or malicious damage to the Employer's property. Company rules shall be made available to the employees in writing. (Emphasis added.)

"16.2 The complaint specified in such prior warning notice must contain the same type of misconduct as the cause for discharge or suspension. No such warning notice shall remain in effect for a period of more than nine (9) months ***.

"16.3 The employee may request an investigation of the discharge or suspension or any warning notice and the Union shall have the right to protest any such discharge, suspension or warning notice ***.

"20.1 The Employer agrees to provide suitable space for the Union to use as a bulletin board.

"21.1 The Union, as well as the members thereof, agree at all times as fully as it may be within their power, to further the interest of the Industry and of the Company."

In a grievance proceeding, the standard that must be met to uphold employer action is higher than a preponderance of the evidence. In establishing "just cause," an employer must establish that the disciplinary action taken fits the offense.

15) Respondent had in place at all times material herein, a policy entitled "EMPLOYMENT POLICY OF UNITED GROCERS, INC." signed by Alan C. Jones, President. The policy set forth a commitment to the principles of equal employment opportunity and specifically addressed sexual harassment. The policy also included a two page list of rules entitled "WAREHOUSE WORKING RULES." Those rules indicated that "participation in fights, willful intimidation of other employees affecting the performance of their duty, or damage of any individual's personal property is prohibited." The working rules also prohibited damage to Respondent's property. Violations of these rules would be considered a "severe infraction and shall result in suspension or discharge." Although there was no specific training thereon, said policy was given to employees when hired. The policy was posted at all times material herein in the lunchroom of the warehouse.

2. Incidents Alleged in the Specific Charges

A. The Mask

16) On October 31, 1984, Complainant found a "Mr. T" Halloween mask attached to his lunch box in the lunchroom, to which all employees have access, of Respondent's warehouse. The mask depicts a black actor known to be aggressive showing big lips, a mohawk haircut, earrings, and jewelry. Complainant noted some similarities between himself and "Mr. T.," that is, Complainant is black, has been aggressive on occasion, has worn earrings and his first name begins with a "T." However, Complainant felt it was a racial incident, was a "slam" against him, and was an insult to be compared to "Mr. T." Complainant was very upset by the incident. Complainant never referred to himself as "Mr. T." nor allowed anyone else to do so. Schuh testified that when Complainant advised him of the mask incident, Complainant did not seem mad or upset and that he was "sort of smiling," however, as more people gathered, Complainant became more upset. Complainant stated he wanted to be objective when the first incidents occurred, that is, the IOU and the mask. (See Finding of Fact 75.) He even wanted to "laugh it off" despite the fact that he believed it to be racially motivated. But as the incidents continued, he became increasingly upset.

17) On the basis of previous incidents involving Schuh and other employees that Complainant believed to be racially oriented, he originally thought Schuh may have put the mask on his lunch box. Complainant did ask Schuh, in a "matter of fact" fashion, if

he had put the mask on the box. Schuh stated he had not done so.

18) Complainant reported the incident to Schuh on the same day. Schuh advised Complainant the incident would be investigated. Andrus was advised of the incident. It was decided, and Complainant was so advised, that a crew meeting would be held with each shift the next day. Although no other examples of racial harassment were mentioned, Andrus explained that the mask incident could constitute racial harassment and that anyone involved in acts of racial harassment would be terminated. Neither Andrus, nor any other supervisor, suggested or requested that anyone having information about the incident come forward and advise a supervisor.

19) The crew meetings were held in an effort to stop the occurrence of more serious incidents or "mushrooming." During the crew meetings, the employees were quiet and paid attention. After the meeting, Schuh heard comments from employees to the effect that Complainant "got what he deserved" and that Complainant brought this upon himself. These attitudes, according to Schuh, were based on Complainant's aggressive demeanor.

20) On or about November 2, 1984, three days after the mask incident, Andrus recalls an incident involving Complainant and a co-worker, Paul Broyles, where Broyles stated Complainant had been "yelling" at him and "giving him gestures." Andrus brought the two employees together to discuss the problem pointing out that "harassment of any nature" would not be tolerated. The employees agreed and shook hands. Andrus was of the

opinion that this was the best manner in which to deal with problems between employees, that is, to have them confront each other and be direct.

21) On the same day and shortly after the mask incident, Sletholm was working side by side with Complainant when Robert Rupley was heard over the P.A. system mimicking "Mr. T.," something that had occurred on previous occasions. Although Complainant's name was not mentioned over the P.A., Sletholm felt the implication was clear, the "Mr. T." mask having just been placed on Complainant's lunch box, that the comments over the P.A. were directed at Complainant. After hearing said comments, Complainant unhooked his machine and walked away. Shortly thereafter, Sletholm saw Complainant speaking to Rupley. About one-half hour after that time, while Sletholm was speaking to Rupley, Angelos approached them and told Sletholm he had put the mask on Complainant's lunch box. Sletholm assumed that Angelos so advised him as he must have believed Rupley was telling Sletholm of the incident. After realizing Sletholm did not know until he, Angelos, told him, Angelos asked Sletholm not to repeat what he had said. Sletholm does not recall advising Schuh of said conversation with Angelos until January 23, 1985. At that time, Sletholm recalls Schuh saying the subject was dead and his statements would go no further. Sletholm felt Complainant was upset after the mask incident as he became quiet and was "not talking."

22) Although he does not recall why he approached him, Schuh spoke to Sletholm one or two weeks after the

crew meeting held in regard to the mask incident and asked if he had any information about the incident. Sletholm gave Schuh the name of Angelos. Later the same day, Sletholm asked Schuh to keep his name out of the matter and advised that he, Sletholm, would not provide a sworn statement. Schuh felt that the crew meeting had been successful in that there had been no further incidents to date. Based on this, he advised Sletholm that the matter was over. Schuh did not interview Angelos after the conversation with Sletholm, as he believed Angelos would deny his involvement. Schuh advised Andrus of his conversation with Sletholm on the same day it occurred. Schuh and Andrus decided that the meeting had been successful and that any further action in the matter may stir up the crew.

23) Complainant recalled a conversation with Sletholm one month after the mask incident in which Sletholm advised him that Angelos was responsible therefor. He recalled advising Schuh on the same day and believes the three of them, Schuh, Complainant, and Sletholm, discussed the matter. On that same day that he received the information from Sletholm, Complainant confronted Angelos, who denied the incident. Complainant told Angelos if he found out that he was responsible, he would "kick his ass." Complainant does not recall whether he told Schuh about this confrontation with Angelos.

24) Morris recalls Sletholm telling him that Angelos was responsible for the mask incident. He believes this occurred after the first of the year 1985.

He stated he recalled the day as he was called to Hedberg's office and Angelos called him "SAMBO." However, Morris admits having given an inconsistent statement to the CRD investigator, that is, that the conversation had occurred a couple of weeks after the mask incident.

25) Although he is not certain who so advised him, Andrus recalls that between two and four weeks after the mask incident, he heard about the conversation between Sletholm and Angelos. During this time frame, Andrus spoke to Sletholm, who advised him of the statement made by Angelos, but also stated he would not testify in any proceeding. Andrus was prepared to speak to Angelos, however, he was out on workers' compensation. Upon his return, Andrus asked Angelos about the incident, which he denied. Andrus felt there was insufficient proof to discipline Angelos. It is not his practice to write up reports based on rumors. As a supervisor he has been trained in the required steps necessary to discipline under the collective bargaining agreement; that is, he must have proof sufficient to establish "just cause."

(Although there was conflict between Complainant, Sletholm, Schuh, Andrus, and Morris as to when Sletholm advised Complainant and Andrus about his conversation with Angelos in which Angelos admitted having put the mask on Complainant's lunch box, Complainant, Schuh, and Andrus agree it occurred within a month of the incident. For the reason that Schuh's recollection seemed the most clear, because he has not given any inconsistent statements on this issue, and

because of his overall straightforward responses and sincere demeanor, his testimony has been accepted as a fact on this point.)

26) Andrus was essentially in charge of the investigation into the mask matter. Having dealt with investigations in the past, it had been his experience that "Teamsters" were reluctant to testify against each other. Knowing this, he felt the burden was upon him. In addition to speaking to Sletholm and Angelos, he spoke to six other employees that he thought might not be concerned about talking to him. He obtained no information and made no notes of the interviews. Andrus stated he did not set up a meeting between Complainant and Angelos as he had done with Complainant and Broyles for the reason that he believed such a confrontation to be inappropriate without proof. He was also of the opinion that to bring the two together may only "stir things up." Andrus stated Complainant's concern about this incident was a sufficient reason for him, Andrus, to take the matter seriously. Andrus realized that Complainant was both upset and mad.

27) Believing that the crew meeting solved the problem, no consideration was given to posting any sort of notice regarding harassment. Complainant stated during his deposition in this matter that he believed the crew meeting to be sufficient at the time.

28) Schuh originally believed the mask incident to be a "joke." It was not unusual to have this sort of joking occur in the warehouse. As an example, Schuh noted there were occasions of employees calling each other "names" regarding their heritage, and in fact,

other mask incidents had occurred. For these reasons, and his own perception of "Mr. T." as a "hero figure," Schuh did not initially take Complainant's concern "seriously." Schuh did note, however, that he was not black and could not say how he "would feel" if he were black about such incidents.

29) Andrus left his position as swing shift supervisor the day after the time card incident. He never saw the card but was aware it had been given to Harris. It was his opinion that writing "Niger" on a timecard was a "terminable offense." Andrus advised his successor, Hayner, of the mask and time card incidents, and believes he told him of the information about Angelos, and added that there was "something boiling." Andrus noted that there had been no racial incidents between the date of the mask incident, October 31, and the date of the time card incident, December 26. Andrus did not believe there was generally a racial problem in the warehouse.

30) Harris received the mask, within a short time after the incident from supervisor Jack Smith, who advised him it had been found on Complainant's lunch box. Smith asked Harris to retain it and inquired about checking it for fingerprints. Harris made the decision not to pursue a test for prints as he had taken prints on other occasions and did not believe such a test would be useful in this situation.

31) Harris was not given the name of or information about Angelos until after the time card incident. Although he believes the potential for repudiation is why he was not sooner advised of this information, he stated the

information would have been helpful. Harris knew that Complainant's supervisors believed the mask incident to be serious enough to have a crew meeting, yet he stated he found "no significance" to the mask, thinking it was a Halloween incident. Harris believes the incident was not "severe enough" for him to interview Angelos. In addition, he considered it a personnel matter and that the supervisors would handle the incident. Likewise, Harris stated he did not interview Complainant as he still considered the situation a personnel matter and thought it should be handled with discretion.

32) On January 24, 1985, Sletholm was interviewed by Hedberg in the presence of Thompson and Green. The report of the interview reflects that Sletholm stated Angelos had taken "credit for the mask incident" on the same day it occurred and that he "later" told Morris and Complainant. The report also indicated that Sletholm stated Schuh had asked him if he knew "what was going on" and to "level with him." Sletholm stated, according to the report that he advised Schuh what he knew about Angelos, and that later Schuh advised him that it was a "dead subject."

33) On January 28, 1985, Angelos was interviewed by Hedberg. The report of that interview reflects that Angelos denied knowledge of the mask incident, any meeting thereafter in that regard, and knowledge of the time card incident. Thompson believed this interview constituted a verbal warning to Angelos.

34) In attempting to resolve the matters involving Complainant, Hedberg exchanged documents with the

union and worked with Green. Hedberg sent two letters to the union, something not normally done, to advise them that harassment would not be tolerated and to make it known that the matter was under investigation. Hedberg asked Green for assistance. Green indicated he did not have any information, and while he did not "get in the way," he did not offer any real help. Hedberg stated that potential problems with the union or civil suits by employees played a part in determining what action to take in dealing with Complainant's situation.

35) Where an employee has a problem, Hedberg feels the first step is to discuss with the victim those things that, in the victim's opinion, may solve the problem. If the victim is committed to the process, this helps in reaching resolution. In harassment matters, an employer must be thorough, vigorous, and devote much time to investigation as such matters are difficult.

36) In terms of training, Hedberg indicated that periodicals and publications are routed to managers, and managers attend seminars that include discussions of harassment. Although managers are expected to share such information with their staff, he could not verify that this was done. There had been no training for employees below the management level on harassment.

37) Hedberg indicated that Complainant would call him once a week to check on the status of the investigation. While he asked Complainant for suggestions, Hedberg indicated that Complainant did not offer any or supply names for investigation. According to Hedberg, Complainant did not ask him to hold more crew meetings.

B. The Time Card

38) On December 26, 1984, upon reporting to work, Complainant discovered the work "NIGER" (sic) written across his time card. The area where the time cards are kept is not regularly monitored by a supervisor and is open to all employees. Complainant immediately brought the card to Schuh saying "What is this shit" and "What are you gonna do about it?" Schuh took the card and gave it, since Andrus was no longer his supervisor, to his then supervisor, George Beckel. Complainant was immediately given a new time card by Beckel.

39) On the night in question, Complainant had been called to temporarily act as a loader. Complainant had requested to leave early and was allowed to do so. For this reason, he originally believed one of the remaining loaders may have written on the time card. Schuh allowed Complainant to leave early as it was Christmas Eve and he had previously scheduled family plans prior to being temporarily assigned to loading. Schuh also assumed one of the loaders may have been unhappy about Complainant leaving early and have been the one who wrote on the time card.

40) Beckel decided to send the card to Bob Harris for a handwriting analysis. Schuh was asked to provide a list of names of possible perpetrators. Schuh sent the names of those six or seven employees who had worked as loaders on Christmas Eve to Beckel or Harris. Angelos did not work that night as a loader. After sending the list, the matter was out of Schuh's hands. Schuh did advise Complainant that the handwriting

analysis was being done the day after the incident occurred. Schuh does not recall Complainant requesting that a crew meeting be held. Schuh did note, however, there are not enough supervisors or time to follow "every relationship" in the warehouse and that experience has shown it can be "counter-productive" to make a "big deal" out of a situation in an effort to correct it.

41) Harris was advised of the time card incident by Beckel on December 27, 1984. Harris was leaving immediately on vacation. He asked Beckel to bring the card so that it could be secured. Beckel requested that a handwriting analysis be done. Harris returned from vacation on January 7, 1985. At this time, the warehouse was undergoing a major reorganization and employees were being moved to new positions. Beckel was moved to another department and Ken Thompson took over for him. It was generally difficult to contact employees during this time. Three days after Harris returned, having to deal with other matters of high priority, he began working on the time card incident. Harris requested names of potential suspects, initially these were the names of the loaders. He then called Bob Phillips, a handwriting analyst well known throughout the Northwest area, sometime between January 13 and 28. Harris stated that Complainant called him after the time card incident. He advised Complainant of the pending handwriting analysis and told Complainant to direct questions to his supervisor Thompson.

42) Although undercover people have been used in drug investigations by Respondent, Harris stated he did

not consider using undercover people in this matter. Having it brought to his attention, he felt it would not have been a viable option in that it was expensive, the individuals would be difficult to introduce into the system, and the same employees do not work every day. Harris has found that employees, due to the camaraderie in the warehouse, are reluctant to talk to him, particularly to disclose information. As a result, he does not confront employees directly and does not rely on rumors. He is aware that where an employee is perceived as a "fink," his personal belongings may be damaged or his work load dumped. Harris has noted that meetings in the warehouse involving security problems tend to be met with a hostile or uncooperative reaction. His opinion is that the employees resent being gathered, and as a result, such meetings are counter-productive. Also, such meeting can result in "copy cat" incidents.

43) Thompson first heard of the time card incident in January from Jack Smith, the supervisor that he replaced. He believed it was a serious incident and needed to be looked into. According to Thompson, Harris believed the interviews, which commenced on January 24, were a good idea. Thompson knew of the conversation between Sletholm and Angelos. He initially thought that, based on the possible involvement of Angelos in the mask incident, he was also responsible for the time card incident; however, the time records show Angelos was out on workers' compensation from December 23 to 27. This fact diluted his status as the primary suspect. Thompson did note, however, that

there had been rumors, although it was never proved, that Angelos was in the warehouse on the night of the incident. Thompson gave instructions to document any incidents. He had been advised to pass on any rumors to Harris.

44) Phillips asked for a handwriting exemplar from Complainant so that he could be eliminated as a suspect. Harris stated Phillips had done so in past incidents. Andrus stated he would be surprised to get a request for a sample of the victim's handwriting. Harris stated, and this Forum finds to be a fact, that he felt Andrus had expressed the "lay point of view," that is, an investigator generally tries to eliminate those who are not likely suspects as well as those who are. Complainant believed he should not be required to provide a handwriting sample as he had not written on the card and therefore did not give a sample.

45) Phillips sent a report, dated February 5, 1985, referenced as "CASE OFFENSIVE WRITING" to Harris stating that he had examined the documents submitted and compared the handwriting of Angelos to the writing on Complainant's time card. The report indicated that at that point, Phillips could not be conclusive but that there was a "strong possibility" that Angelos was the author of the word "NIGER" on Complainant's time card. By this letter, Phillips requested additional samples of handwriting by Angelos.

46) Phillips then sent a report, dated March 12, 1985, to Harris indicating he had reviewed all documents including the "return to work" forms for Angelos. Phillips concluded that the signature on the "return to work" forms was a forgery and that Angelos was

"very probably the author of the word 'NIGER'" on Complainant's time card.

47) Schuh pointed out that there was no "procedure" per se to follow in the investigation of incidents of harassment. However, there was no procedure per se for any other type of incident, for example, stealing, and all such incidents are handled and investigated in the same manner.

48) Schuh stated he had not observed a significant change in Complainant's demeanor after the mask and time card incidents. He did feel that Complainant was no longer fond of him. For this reason, he asked Complainant what he, Schuh, had done to cause a problem between them and Complainant did not respond. This strained relationship apparently remains between the two. While Schuh did not feel that Complainant seemed angered or frightened, he stated Complainant was no longer "very talkative." Complainant was very upset by the incident and was left with the feeling that he wanted to "hurt someone." Schuh, who was himself "surprised" by the incident, felt the Complainant was "visibly upset." Complainant showed Morris the time card and was "furious." He had a "sorry" look on his face.

49) The Complainant was persistent in trying to determine the status of the investigation and contacted Schuh in that regard approximately once a week.

C. The Graffiti

50) Complainant recalls that in late December 1984 or early January 1985, he found the stick figure of a man with a colored in black face on the

wall of a restroom stall. The figure was described variously by Complainant as three inches wide and two feet tall to two feet wide and 1½ feet tall. Complainant also recalled that written above the figure in black were the words "Tony is a nigger." Over the mirror in the restroom, Complainant recalls the words "Mr. T. -- Tony Mims" being written in fairly large letters.

In contrast, Hayner was advised just after the incident by Leavell that graffiti pertaining to Complainant was in the restroom on the wall of a stall about midway down. The letters were very small, about three inches in diameter, and were scratched into the paint. There was no mention of a stick figure. Hayner instructed that pictures be taken, however, the writing was too light to photograph. (Based on Findings of Fact 59 and 63 concerning Complainant's description of other incidents, the Forum must accept Respondent's version as facts on this point.)

51) Within one hour after the incident, the scratches on the wall were painted over to convey the message that management did not approve of this conduct. Hayner decided not to hold a crew meeting since the scratches were light, that is, if the graffiti had been larger, a crew meeting would have been held. Hayner believed a crew meeting may have made this situation worse. No one was posted at the restroom door after the incident. Complainant stated, however, that he believed this would have been useless.

52) Complainant recalls asking Andrus to hold a crew meeting after the time card incident and asking both

Schuh and Andrus to hold a meeting after the graffiti incident. (Since Andrus changed positions the day after the time card incident and had no involvement with that incident at all, the Forum cannot accept as a fact that Complainant made such a request. Schuh has testified that no such request was made of him and the Forum accepts this as a fact.)

53) Harris was aware of the graffiti in the restroom, although he did not see it himself. His understanding from supervisors was that the writing was very small and done in soft pencil. A request was made for photographs of the graffiti; however, because of the small size of the writing and glare, attempts to photograph were unsuccessful. Harris took no further action as he saw no significance to the graffiti, "Mr. T.," and also, felt it was up to Complainant's supervisor, Hayner, to request further investigation.

54) The graffiti incident left Complainant "devastated." He has a great deal of pride and he took it as an "insult as a person." It resulted in making him angry and causing more tension. At this time Complainant was feeling that he was not in good standing with Respondent and he had the impression that Respondent believed he was doing these acts himself.

D. The Scratches on Complainant's Car

55) On January 19, 1985, Complainant parked his car as usual in Respondent's lot. On January 20, he stated he found three scratches over a foot in length on the driver's side of the car. He believed these scratches were made in Respondent's lot as he had not seen the scratches earlier on

January 19, when he washed his car. There is also a bright street light in front of his house where he parks his car, and he believed he would have seen the scratches upon getting in the car on the 20th. Complainant found the scratches later on the morning of January 20, after he drove his daughter to school. Complainant immediately called Respondent and spoke to supervisor Dale Heiman. Complainant brought his car in, upon Heiman's instructions, so that security could take photographs. Complainant did not speak to the guards who were on duty that night, and does not know if anyone else did. Complainant believed the scratches appeared to be made with a cutting instrument used by employees in the warehouse.

56) A report drafted by Dale Heiman indicates that Complainant called Respondent on January 18, 1985, at 8:50 a.m. to report he noticed two big scratches on the driver's side of his car. Complainant stated he believed this was done on the night of January 17, in Respondent's parking lot. Complainant was instructed to come in on that day or Sunday and contact a supervisor to take pictures of the car. The report also notes that the matter was to be directed to Bob Harris, Security Director.

57) After the car incident, Jack Smith sent Harris a list of names of possible suspects. A security guard sent Harris the license plate number of Angelos. No one could recall whether Angelos had parked near Complainant on the night in question. At that time, Harris was not aware that Sletholm had stated Angelos threatened to scratch his car. Although Harris noted

at least one other employee who has sustained damage to his car was allowed to move his car closer to the guard shack, Harris stated this was done at the employee's request and is only done upon employee request. A written report was filed by security but was inadvertently, according to Harris, thrown away two months ago. Harris was of the opinion that because the vehicle was moved before the scratches were observed, there was a question as to where the incident occurred. A racial motivation could not be discerned from the type of scratch on the car. It was not Respondent's policy to pay or reimburse employees for such alleged incidents in the parking lot.

58) Sletholm had heard rumors in January of 1985, which he took seriously, that Angelos felt he was a "rat" and was going to scratch Sletholm's car. After this time Sletholm asked, and was allowed, to park his car closer to the guard shack in Respondent's parking lot.

59) Photographs were taken of the scratches on Complainant's car. Complainant identified at hearing the photographs as being of his car and representing the scratches as they appeared when he first observed them. The two scratches visible in the photograph are straight lines approximately 1½ to 2 inches in length.

60) There are two security guards in Respondent's lot; however, their primary function is not to monitor the parked cars but rather the trucks and activities entering and exiting the warehouse. There are cameras that pan and tilt in the lot. The cameras pan every 12 seconds and pick up things in

the lot that are there longer than that time period. Harris stated if Complainant's car had been in the lot more than 12 seconds and the cameras had been turned on, the car would have been filmed. The cameras were not normally turned on but were rather used as a deterrent. Harris has monitors in his office and any employee who had been in his office could have seen the cameras were not filming. Since Harris was of the opinion that it had not been established that the scratches to Complainant's car happened in Respondent's lot, no filming was done thereafter.

61) Complainant's car was new and the incident upset him and left him wanting "to cry."

E. The Barrett Clipboard

62) On or about March 24, 1985, Complainant found the word "NIGER" and the letters KKK written on the clipboard of a piece of equipment, a barrett, assigned to him. Complainant stated that the word "NIGER" was written in black chalk, the type used by employees in their jobs, on the clipboard. Complainant believed the word was "easily visible from several feet away." "KKK" was written on a bar at the bottom of the clipboard on the face of the barrett, also, according to Complainant, clearly visible.

The clipboard was presented at hearing. The word "NIGER" was written in the upper right corner in what appeared to be ordinary lead pencil. The word was approximately ½ inch in height and 3 inches in length. Against the dark background, the word was barely visible even upon close examination by the Forum. Complainant identified the clipboard as his and

stated the writing was as it appeared when he discovered it.

63) Leavell left a handwritten note, which Thompson did receive, dated March 24, 1985, to advise Thompson of the incident. The note indicated that the barrett had "KKK" written on it and that Complainant first noticed this after lunch. Leavell also stated he had tried unsuccessfully to get pictures of the writing. According to the note, Complainant stated he would call Thompson to discuss the matter.

64) Hayner was advised by an assistant that the word "NIGER" had been written on the clipboard of Complainant's barrett. Hayner promptly instructed the clipboard was to be removed and a new one given to Complainant. The clipboard was then turned over to Harris. Hayner did not hold a crew meeting as he saw no reason to involve the entire crew, since there was no reason to believe anyone aside from Complainant had seen the writing. Hayner feared that drawing attention to the matter may cause employees to see the admonishment as a "challenge" despite the fact that it is a disciplinary offense.

65) Harris was made aware of the clipboard incident the morning after it occurred. The board was brought to him. He noted the five letters of the word "NIGER" were "identical" to the writing on the time card. Harris understood "KKK" was written on the bar of the machine in large heavy letters. He did not see the bar, does not have it, and does not know what happened to it. Harris spoke to the supervisors. There was no obvious suspect as the previous suspect, Angelos, had been terminated. Harris called Phillips the next

day, advised him of the surface of the clipboard and the type of instrument used to write the letters. Phillips advised it would be difficult to make any determination particularly where the writer had, as in this case, made an effort to disguise the writing.

66) Harris did not feel that he necessarily had to see the bar where "KKK" was written as he felt "KKK" could have been "initials" and he did not feel "KKK" was a direct racial slur, even though it was written in close proximity to the word "NIGER". There is no evidence in the record to indicate what happened to the bar upon which "KKK" had been written.

67) Harris indicated that the investigation commenced on the Barrett incident more quickly than the timecard incident for several reasons including the fact that Phillips was available and there were no intervening holidays.

68) Following the incident with the Barrett, no notice was posted concerning harassment nor was a crew meeting held.

69) Complainant was devastated and upset by the incident. His reaction was, in part, that he wanted to "hurt someone." With the appearance of the phrase "KKK," Complainant became more worried and feared for his safety and that of his family. He was frightened at work and at home. These incidents resulted in affecting his job performance in that he was always "looking over his shoulder" in apprehension of the next incident. He no longer knew who he could trust, and for this reason, he ceased to see some people he once saw socially. In addition, Complainant's life at home was affected. He had begun to drink more

and started to take his problems out on his children. He had emotional as well as sexual problems with his wife, and he likewise began to blame her for his problems. Physically, Complainant had headaches which he felt hampered his production level, stomach trouble, he slept only about three to four hours each night and tossed and turned during that time, and suffered from shortness of breath. Complainant did see a chiropractor he had been seeing for a back injury and got some relief for his headaches.

70) On April 3, 1985, Hedberg made a note to his file regarding the Barrett incident. The note indicated that Complainant advised "KKK" had been written on his Barrett and that Hedberg told Complainant the clipboard from the Barrett was being kept. The note further reflects Hedberg asked Complainant if there was anything Respondent could do that was not being done. To this question, the note states that Complainant could not think of anything except that he had a "feeling" that Robert Rupley might be a suspect. Hedberg noted that Complainant was to call if he had a problem, that the two agreed they wanted the problem stopped and that Complainant would not make any "adverse comment." The note reflects that Complainant was also advised at this time that Angelos had been terminated.

71) Sometime after the incident with the Barrett, George Goodwin, a vocational counselor, was contacted by Marty Brandel, an employee of Respondent's insurance company, to consult with Complainant. This was not an official referral but was

requested, at the initiation of Brandel and not Respondent, to determine whether Complainant needed to be referred for psychiatric treatment. Goodwin was advised only that Complainant had some problems at the work site and there was some "allusion" to mental problems. Goodwin was to contact Brandel with his determination. For the reason that this was not an official referral, Goodwin did not open a file and kept no records of his meetings with Complainant. Goodwin saw Complainant more than once but not more than six times during the Spring of 1985. In his conversations, he found Complainant to be "clear and articulate" and did not "pick up" on any anger on Complainant's part.

Because this was not an official referral, Goodwin did not conduct an independent investigation. He did not consult with any other health professionals, any of Respondent's supervisors or managers, any of Complainant's co-workers, friends, or his wife. He was not provided with names, as he usually is in the case of an official referral, by Brandel. Goodwin did not report or discuss this matter with anyone at Respondent company.

Goodwin stated that Complainant advised him that people had written things derogatory to him at work. These incidents, according to Complainant, caused him to drink more and to "not feel good about going to work," something he had once "enjoyed." Complainant stated that while he once felt he had a good relationship with his supervisor, he no longer felt "safe" going to him. Goodwin suggested to Complainant that he try to re-establish this relationship with his supervisor.

Goodwin did ask Complainant what the company had done in regard to the problems mentioned and whether he was satisfied. Goodwin felt Complainant was not satisfied and that whatever the company had done did not remove his bad feelings about going to work or dealing with his supervisor.

Goodwin did not feel he was being of any assistance to Complainant. It was a "joint decision" between Goodwin and Complainant that a referral was not necessary at that time. While Goodwin felt he was not in a position to determine the cause of Complainant's condition, he stated that based on Complainant's feelings about work, his increased drinking, and his prior history, Goodwin felt Complainant had sustained damage to his "self esteem" and "was not confident in going to work." Goodwin did report to Brandel that further referral was not necessary.

72) Complainant did file a claim for workers' compensation based on stress he suffered at work resulting from the incidents of racial harassment. Complainant noted his injuries, among others, to be hemorrhoids, headaches, shortness of breath, and lack of concentration. Complainant has received two checks pursuant to this claim each for \$689.00. A final decision regarding compensability of the claim has not yet been rendered.

3. Other Incidents and Perception of Complainant

73) Don Morris has heard employees say they found Complainant intimidating. He believes this may be because of Complainant's size and also that many have never been around black individuals. Morris does

not know how widespread is this attitude.

74) Rabe recalls that Complainant had a reputation in the warehouse as an "intimidator," that he would "stare people down." Rabe recalls a situation about one year prior to the mask incident where he bumped Complainant with his cart. Complainant threatened to "kick his ass" to which Rabe responded that if Complainant was such a "big man" why didn't he "do it." No fight resulted and Rabe did not report the incident to a supervisor.

75) On approximately October 17 or 18, 1984, an IOU signed "Mr. T." was placed in the change box for pastry in the warehouse lunch room. The contractors who provide the pastry and collect the money threw the IOU away but advised Complainant of the incident. Andrus was made aware of the IOU incident by Valerie, the daughter of the contractor.

76) On March 6, 1985, a report was received and verified that Complainant had made the following statement in the warehouse: "Fuck everybody in the warehouse except the black guys." Respondent determined, in consideration of the harassment apparently directed at Complainant, not to initiate disciplinary action against Complainant. In the alternative, Thompson issued a letter to Complainant, dated March 12, 1985, requesting his assistance in maintaining an environment free of harassment. The letter made clear that Respondent would like any input Complainant could offer to assist in preventing racial incidents in the warehouse.

77) Sletholm does not recall hearing Complainant use the PA system for

non-work related comments. Rabe recalls Complainant using the PA system making comments about an employee who was generally "teased a lot" by other employees.

78) Don Morris recalled he himself had been the victim of an incident he considered racial. Another employee, Lee Ferris, told him he had "big lips" and a "big butt." This occurred after the time card incident but before the time Angelos left Respondent's employ. Don Morris told Hayner, who involved Leavell and Thompson. Don Morris was told by Thompson that if the matter was pursued that he, Morris, may be fired if it was determined that he was the instigator; however, Morris indicated he did want to pursue the matter. Thereafter, Hedberg and Thompson interviewed Ferris. Later, Hedberg called Don Morris and advised that a letter had been sent to Ferris advising him the conduct in question would not be tolerated. With the exception of never being told what Ferris said to Hedberg and Thompson, Don Morris was satisfied with Respondent's handling of the situation.

79) After being advised by Don Morris that a magazine had been left open in the lunch room showing a cartoon with racial slurs, Rabe filed a report on February 6, 1985. Rabe did so as he had been advised by one of his supervisors, either Hayner or Thompson, to document any racial problems. This was to be done, at least in part, because of the "feeling" in the warehouse that there were racial problems. Rabe noted that Complainant and Morris had complained of such problems and indicated he felt they

spoke for the group of black employees.

80) In August of 1985, crude remarks regarding Complainant were written on the crossbars in Respondent's warehouse in large letters. Harris recommended immediate removal. Photographs were taken and sent to Phillips and a union analyst, Jeannine Babeckos, for handwriting comparison. The graffiti on the crossbars stated as follows:

- a. "T— M— IS BLACK NO HE'S NOT HE'S A NIGGER"
- b. "T— M— IS A BLACK JIGABOO WITH NIGER LIPS"
- c. "DIE NIGERS"
- d. "THE ONLY REASON GOD CREATED BLACKS IS SO WHITES NIGERS KKK"

Babeckos submitted a report to Harris, dated August 23, 1985, which stated:

"It is the opinion of this examiner that there were two (2) writers involved but the majority of the printing done on the four (4) I-Beam structures were written by the same hand as the application signed by SCOTT W. MORRIS."

Phillips sent a report, dated August 13, 1985, to Harris indicating he had examined 15 Polaroid photographs of graffiti writings in various locations and had compared those photographs to eleven exemplars in the form of employment applications of persons with access to the areas of writing. Phillips stated it was his "conclusion" that Scott Morris was the "writer responsible" for the writings in the pictures in the discernible photographs. Scott Morris was indefinitely suspended on August 20, 1985.

4. Termination of Angelos

81) On March 1, 1985, the Personnel Division received a letter addressed to Hedberg, dated February 22, 1985, from Attorney Randall Vogt on behalf of Angelos. The letter indicated that Angelos advised his attorney he had been asked to resign and offered a cash settlement to do so. The letter further stated that Angelos had no intention of resigning, insisted on strict compliance with the terms of the collective bargaining agreement, and warned against attempts to intimidate Angelos. Hedberg did in fact receive the letter and confirmed he had made the offer of a cash settlement to Angelos in exchange for his resignation. Hedberg noted it was his opinion that action against Angelos may result in a wrongful discharge suit or a claim based on the fact that action was taken while Angelos was out under workers' compensation.

82) Thompson was involved in the decision to terminate Angelos. It was his opinion that since Angelos could not be solidly connected to the mask, that he could "capitalize" on his absentee problems. Thompson felt he could prove discharge based on those grounds, and terminated Angelos by letter dated March 3, 1985. Thompson stated he was pleased to have a reason to fire Angelos as he believed he was the "responsible party."

After receiving the report from Phillips, Thompson and Hedberg sent a second letter of termination to make sure that if Respondent lost a grievance on the absentee issue, they would have a second chance on the racial harassment issue. That letter was dated March 25, 1985, and

indicated Angelos was being terminated in accordance with the terms of the collective bargaining agreement. The letter states that Respondent had concluded its investigation regarding "defacing company property and misconduct effectively constituting racial harassment." The letter further indicated that it was in addition to the letter dated March 3, 1985.

83) After termination of Angelos for harassment, Thompson did not consider posting a notice of any kind in this regard. He pointed out the Angelos had filed a grievance on the first termination notice. Hedberg felt that posting a notice regarding the termination of Angelos or any employee would be "gloating," and would be "poor etiquette" in Respondent's relationship with employees. Although he realized there may be some legal problem with such action, he had not been so advised. Hedberg also was of the opinion that the union would "find some way" to grieve the posting of a notice regarding the termination of an employee, even though the employee's name was not mentioned.

Don Morris did not know why Angelos had been fired. Management does not announce the reasons for termination. Employees hear such things through the "grapevine." In this case, Don Morris heard Angelos had lied about a doctor's appointment.

5. The Agency's Position

84) The Agency has charged that Respondent did not take immediate and appropriate corrective action. The Agency's position on each incident in this regard is as follows:

a) The Mask – The Company should have followed sources of information that identified Angelos much sooner, and should have confronted him before January 24, 1985, specifically, no later than when Schuh became aware of the situation. The crew meeting held after the incident was a good idea, but was not sufficient in view of Respondent's knowledge that certain employees, Angelos and Ruple, were disruptive.

b) Time Card – The handwriting analysis should have been commenced immediately after the incident, as more than one incident had occurred by that time. Respondent should have held a crew meeting and posted a general policy statement. While the Agency did not feel it was absolutely necessary, sensitivity training would have been an appropriate step.

c) Graffiti in Restroom – Respondent should have held a crew meeting after the incident. An investigation should have been launched interviewing employees, particularly Angelos as he had already been identified as being involved in the mask incident. Harris, the Security Director with law enforcement training, should have been called upon for investigative ideas.

d) Car Scratches – Respondent should have investigated the matter as it had knowledge that Angelos had threatened to scratch Sletholm's car. Respondent should have given Complainant a different parking place, spoken to Sletholm, had a crew meeting, and posted a notice condemning racial harassment.

e) Barrett – Respondent should have held a crew meeting and arranged for a handwriting analysis. After Angelos was terminated, it should have been communicated to the work force that harassment will not be tolerated. The Agency takes the position that this can be done in accordance with defamation law and collective bargaining agreements.

In analyzing cases, the Agency considers the following:

a) Work obligations of Respondent's work force.

b) Takes into account, although it is not determinative, the normal behavior in the work environment. The Agency points out that even where the behavior is the norm, it cannot be allowed if it violates the law. Such behavior is, however, relevant to the mode or style of fashioning an appropriate response.

c) Whether possible actions by Respondent will lead to better or worse results; for example, the Agency did consider the statement of Schuh that crew meetings may "stir things up."

d) Complainant's possible provocation is a relevant factor.

e) How clearly racial an incident actually was; however, something that was not clearly racial on its face may be shown to be so when it is one event in a series of similar events and connected to a particular person.

f) The Agency does consider the effect of a collective bargaining agreement.

g) Agency attempts to stand in the shoes of both Respondent and Complainant, and view the events from

both perspectives as the events appeared at the time.

h) The Agency does not afford any greater deference to Complainant or Respondent or any agents thereof.

Overall, the Agency's position was that it did not appear that Respondent was interested or began a legitimate investigation until January 24, 1985, after Complainant's car had been scratched. In determining cases, the Agency basically looks for a company's efforts to give workers clear notice that it takes these incidents seriously.

6. Credibility

A) Complainant

85) There is no question that Complainant's testimony regarding the details of the incidents involving the graffiti, the car, and the Barrett has been eroded by the testimony of Respondent's witnesses as well as the Forum's observation of the physical evidence. For the reason that Respondent's witnesses presented essentially consistent versions verified in some cases by physical evidence, their testimony has been accepted on those points where it conflicts with Complainant's. Complainant's testimony that the incidents did occur was, however, supported in substance by that of other witnesses and the physical evidence. Thus, the facts indicate that Complainant is given to exaggeration rather than dishonesty.

The other main area of inconsistency involves the matter of whether or not Complainant requested crew meetings. While this is not relevant to the issue of Respondent's liability, it must be considered in determining

Complainant's credibility. As recited above, Complainant contends he requested that a crew meeting be held after each incident. Each one of Respondent's witnesses deny having been asked or hearing of such a request. It is difficult to determine with specificity what actually occurred in this regard after each incident, and the problem is complicated by the fact that two of the supervisors Complainant states he asked could not be present at the hearing. As regards the time card incident, I have explained my reasons for not accepting Complainant's testimony in Finding of Fact 25; however, it is clear from the testimony of Andrus and Schuh that the matter of whether to hold a crew meeting was discussed. This finding then casts doubt on the other alleged requests. For this reason, and in consideration of the credible testimony of Thompson, Hayner, Hedberg, Andrus, and Schuh, the Forum finds Complainant made no such requests. The Forum notes, however, that Complainant's failure to make such a request is, as stated, not relevant to the issue of Respondent's liability. It was suggested by the Agency that additional crew meetings would have been appropriate. That being the case, Complainant's contention that he made such requests seems to reflect more on Complainant's susceptibility to suggestion than an intention to deceive the Forum.

Overall, the Forum found Complainant to be the type of person who is easily influenced and, as stated, susceptible to suggestion. For example, Respondent's witnesses persisted in pronouncing the word "NIGER," as the name of the African river is

pronounced as opposed to the pronunciation of its very obvious meaning. After some time, the Complainant himself began to use Respondent's pronunciation. Complainant was quick with his responses, he did not stammer or speak in a circular fashion. With the exception of the incidents noted above, and in consideration of the Forum's personal observation of the demeanor of this witness, the Forum finds this witness to have offered credible testimony on subjects not specifically noted otherwise.

For the reason that it is impossible to stand in another's shoes and know how one feels about an incident (see Finding of Fact 28), together with Complainant's comments made to Goodwin (see Finding of Fact 27), the statements of witnesses at hearing, and the Forum's perception of Complainant's sincerity in describing his feelings, the Forum accepts as facts, even where it conflicts with the testimony of witnesses found to be credible, Complainant's testimony regarding his reactions to the incidents that are the subjects of this matter. There was testimony by both Hedberg and Schuh that Complainant was persistent in checking the status of his case on a weekly basis. Moreover, much of Complainant's testimony in this regard was supported by Goodwin's observations. The Forum accepts for the same reasons Complainant's testimony regarding his physical suffering.

B) Hedberg

Hedberg responded to questions in a deliberate fashion. His responses were internally consistent and do not conflict with the testimony of any other witness. Having no reason to

disbelieve his testimony, the statements of Hedberg are accepted as facts.

C) Schuh

This witness was straightforward in his responses, and did not waiver or vacillate in his answers even where his statements could have been damaging to Respondent's position. His sincerity and concern for Complainant was apparent to the Forum. It was quite clear at the hearing that Schuh was disturbed by the erosion of his relationship with Complainant. With the exception of certain testimony noted above regarding Complainant's demeanor, the testimony of Schuh has been given great weight.

D) Andrus

The Forum was impressed by the obvious concern he had for the Complainant's perception of the situation and his efforts in taking immediate action based thereon. He readily responded to questions and his testimony appears consistent with previous statements and with that of Schuh on all material points. For these reasons, the testimony of Andrus is accepted as establishing facts in this matter.

E) Harris

There is no evidence on the record to contradict the testimony of this witness in any substantial way and it is not appropriate or lawful for the Forum to rely on general knowledge or other information outside the record to do so. Thus, where there was no conflict with other witnesses found to be credible, the testimony of this witness was accepted as establishing facts in this matter. This Forum must, however,

question the dedication and judgment of a Security Director, with the long list of professional accomplishments described including police work, who could testify under oath that the phrase "KKK" written on a piece of equipment in close proximity to the word "Niger" did not connote anything racial to him. The Forum finds Harris's statement that "KKK" could have been someone's initials, in light of the series of racial incidents that had occurred, to be absolutely appalling and an insult to this Forum.

F) Hayner and Thompson

The testimony of these witnesses was in each case internally consistent and does not conflict on any material point with any other witness. Having no reason to disbelieve these witnesses, their testimony is found to be credible.

G) Sletholm

The Forum cannot accept Sletholm's statement regarding when he advised Schuh of the conversation with Angelos for a number of reasons: 1) the statement he gave the CRD investigator is not clear, was not sufficiently explained by the witness, and appears contradictory; 2) his general recollection of times and dates was extremely poor; 3) it is inconsistent with the statements on this point given by not only Complainant, but also Andrus and Schuh, who were found to be credible witnesses; 4) January 23, 1985, is after the time when Schuh switched positions, and it is unlikely he would have been involved in this matter at that time; and similarly, 5) Sletholm stated he told Schuh, his "shift supervisor," and Schuh was not in that position at that time.

Nevertheless, the substance of the conversation given by this witness is essentially the same as that offered by Schuh. Thus, while Sletholm's testimony as to specific dates and times cannot be relied upon by this Forum, his general credibility has not been damaged.

H) Rabe

Doug Rabe was straightforward in his responses, and was not shown to have made any inconsistent statements. His testimony did not conflict with any other witness, and there is no reason not to accept his statements as facts in this matter.

I) Don Morris

With the exception of his testimony regarding the date of the conversation with Sletholm, this witness was found to have given credible testimony. The Forum finds that this witness did have a problem placing incidents in time, and his mistake regarding the above mentioned conversation is attributed to that fact rather than any intention to deceive the Forum.

J) Goodwin

Goodwin had no personal or economic interest in this matter whatsoever. His testimony was quite detailed considering the lapse of time and the fact that he had no notes of his conversations with Complainant to review prior to hearing. He was responsive to the questions and his testimony does not conflict with that of any other witness found to be credible. The Forum, therefore, accepts Goodwin's testimony as establishing facts in this matter.

K) Bracanovich and Stroughter

These witnesses were employees of the Agency. Both gave straight forward and factual responses, and neither was shown to have made inconsistent statements. The Forum finds their testimony credible and as establishing facts in this matter.

ULTIMATE FINDINGS OF FACT

1) During all times material herein, Respondent was an Oregon corporation doing business in the State of Oregon employing one or more persons, and Complainant was an employee of Respondent. Complainant was still an employee of Respondent on the date of the hearing.

2) At all times material herein, Respondent was subject to, and Respondent's employees including Complainant were covered by, the terms of a collective bargaining agreement requiring "just cause" for disciplinary action. Respondent's employees had access to the grievance procedure to challenge employer action, and Respondent had to prove such action appropriately. During this time period, Respondent gave new hires and posted on the bulletin board of the lunch room Respondent's work rules, which prohibited intimidation of employees and damage to either the property of the employees or Respondent, and stated what such action would result in.

3) Respondent has seven acres under the warehouse roof, three shifts with 70 to 90 employees, and two to four supervisors assigned to each. The atmosphere therein was hardened with some name calling, practical joking, and graffiti. It was common for

employees to use the PA system for non work related comments. Because of the physical set up of the warehouse, and limited supervisory staff, it was impossible to see who was speaking and impossible to monitor all areas and employee relationships. Employees were known to voice their opinions with little respect for management often blowing matters out of proportion. Meetings often resulted in a hostile or uncooperative reaction, increased tension, or copy cat incidents. Consistent admonishments resulted in having a negative effect. For these reasons, management felt, in some cases it was better to handle matters discreetly than to involve the entire work force.

4) Complainant is a large man who occasionally wore to work an earring, gold chains, and diamonds. Prior to working for Respondent, Complainant had been a football player. Some employees felt that Complainant attempted to and did intimidate them. On occasion, Complainant was heard using the PA system to tease a certain employee, and there were at least two incidents of intimidation in which Complainant was the instigator. After the mask incident, some employees commented that Complainant had gotten what he deserved. Sometime in March of 1985, Complainant was heard to comment in the lunch room "Fuck everybody except the black guys."

5) On October 31, 1984, a mask depicting "Mr. T." was placed on Complainant's lunch box in the lunch room of Respondent's warehouse. Complainant immediately reported the incident to his supervisor. On the day following the incident, a crew meeting

was held on each of the three shifts. At that time, Andrus advised employees that such conduct could constitute racial harassment and result in termination. After the crew meeting, some employees were heard to comment that Complainant "got what he deserved." Shortly after and on the same day as the mask incident, Rupley, a co-worker of Complainant's, began to mimic "Mr. T." over Respondent's PA system. Just after this incident, Sletholm, also a co-worker of Complainant, was approached by co-worker Angelos while speaking to Rupley. Angelos advised Sletholm that he had placed the mask on Complainant's lunch box and asked Sletholm not to repeat the information.

6) Within two to four weeks after the incident involving the mask, Andrus became aware that Angelos may have been involved in the incident. Andrus confronted Angelos, who denied any involvement. The mask was sent to Harris to determine if it was possible to lift fingerprints. Harris decided, based on his experience, that a fingerprint comparison was not feasible. On January 24, 1985, Hedberg interviewed Sletholm in the presence of Green, the union's business agent. Sletholm advised Hedberg of the conversation with Angelos in which he admitted putting the mask on Complainant's lunch box. On January 28, Hedberg interviewed Angelos, who denied involvement in the mask and time card incidents.

7) On December 26, 1984, Complainant found his time card with the word "NIGER" written across it. Complainant immediately turned it over to a supervisor. The card was brought to Beckel, who promptly issued

Complainant a new card and forwarded the defaced card to Harris for a possible fingerprint analysis. Within four weeks of the incident, a period including the holidays, Harris's vacation, and a major corporate reorganization, the time card was sent to Phillips with some handwriting exemplars of those employees initially thought to be involved. On February 5, 1985, Phillips advised while he thought there was a strong possibility that Angelos was the author, he needed more exemplars. On March 12, Phillips informed Harris by letter that Angelos was very probably the author of the word "NIGER" on the time card. No racial incidents involving Complainant occurred between October 31, 1984, and December 26, 1984.

8) Angelos was terminated by letter on March 3, 1985, for falsely reporting the reason for absencing from work. After Phillips sent his report of March 12, Angelos was sent a second termination letter terminating him for misconduct effectively constituting racial harassment.

9) In late December or early January, Complainant found his name written on a wall in the restroom in conjunction with the name "Mr. T." Complainant immediately reported the incident to his supervisor. Supervisory staff, as well as Harris, attempted to photograph the writing for possible handwriting analysis. Due to the faint writing and light reflection on the camera, photographs were impossible. Thereafter, supervisors had the writing painted over. All of these actions occurred within one hour of Complainant's report.

10) On March 24, 1985, Complainant found the word "NIGER" written on the clipboard of the Barrett assigned to him and the phrase "KKK" written on the bar in close proximity to the word "NIGER." Complainant immediately reported this incident to a supervisor. Supervisory staff promptly collected the clipboard, issued a new one to Complainant, and the defaced clipboard was sent to Harris for possible handwriting analysis. Harris determined an analysis would be most difficult. This was later verified by Phillips, who viewed the clipboard.

11) In August 1985, graffiti was written about Complainant on several crossbars in Respondent's warehouse. A handwriting analysis was conducted. Due to the clear writing, an identification could be made more quickly. The perpetrator was placed on indefinite suspension in August 1985.

12) Respondent followed the same procedures used to investigate other violations of work rules or criminal conduct. Respondent consistently asked Complainant for suggestions as to how the problem could be solved and for any information Complainant had about the incidents. Respondent also kept Complainant's union advised of the status of the investigation and solicited their assistance.

13) Complainant was upset, angered, and devastated by the incidents. He began to feel that he did not want to go to work, something he had once enjoyed. Complainant began to take out his problems out on his wife and family, resulting in strained relations between them. Complainant eventually began to fear for his safety and that of his family. As a result of his

fear and anxiety at work and apprehension about the occurrence of yet another incident, Complainant felt his work production was impaired. Complainant discussed his feelings with Goodwin, who verified that he believed Complainant had suffered damage to his self esteem and had lost his confidence in going to work. Complainant also suffered physical problems as a result of the harassment at work, including headaches, sleeplessness, increased alcohol consumption, and shortness of breath.

CONCLUSIONS OF LAW

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

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

3) Respondent was aware of the racial harassment herein, but took immediate and appropriate action, and has not, therefore, violated ORS 659.030(1)(b).

OPINION

This Forum follows the position adopted by EEOC and the affirmation thereof by federal courts that an employer has an affirmative duty to maintain a working environment free from "harassment, intimidation, or insult and that duty encompasses a requirement to take positive action where necessary to eliminate such practices or remedy their effects." *Rogers v. EEOC*, 454 F2d 234 (5th Cir 1971) cert den 406 US 957 (1972). Likewise, an employer has a duty to investigate

complaints and deal with the offending personnel appropriately. *Munford v. James T. Barnes & Co.*, 441 FSupp 459 (ED Mich 1977).

This Forum has used, and hereby formally adopts by this Order, the standard set forth in Section 1608.8(b) of the EEOC Guidelines in cases wherein racial harassment is alleged. Racially oriented statements or actions constitute harassment when the 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.

The Forum has also followed the EEOC guidelines, and hereby formally adopts them in this Order, regarding employer liability for racial harassment:

- (1) an employer is strictly liable for the actions of its agents and supervisory employees; and
- (2) a employer is liable for non supervisory employees where the employer knew or should have known of the actions, unless the employer took immediate and corrective action.

The federal law is clear, and this Forum agrees, that more than a few isolated incidents of harassment must have occurred to trigger the protection of the law. *EEOC v. Murphy Motor Freight Lines*, 488 FSupp 381 (D Minn 1980); *Ivory v. Boise Cascade Corporation*, 43 FEP 1642 (DC Or 1987). Research reveals courts have been most inconsistent in their analysis of

racial harassment cases. However, the following principles are present in most cases and have been relied upon herein:

(1) racial slurs must be more than infrequent, outside of casual conversation, and directed at the Complainant. *Johnson v. Bunny Bread Co.*, 646 F2d 1250 (8th Cir 1981).

(2) the general course of conduct at the employer's place of work can be considered. *Vaughn v. Pool Offshore Co.*, 683 F2d 922 (5th Cir 1982).

(3) since discrimination by its nature is often a subjective inquiry, the Complainant's "perception of his environment" is a significant factor. *Vaughn, supra*.

(4) conduct must be racially oriented. *Kindred v. Western Transport Co.*, 30 FEP 500 (D Or 1980).

In order to determine a particular case, the EEOC Compliance Manual, at Section 615.0010, establishes the following general principle:

"The Commission recognizes that what constitutes appropriate and corrective action depends on the nature of the particular workplace. Therefore, each employer should develop its own preventive program tailored to its individual circumstances." (Emphasis added.)

The Commissioner therefore determines what constitutes immediate and corrective action on a case by case basis. In doing so, the Commissioner suggests the following considerations are relevant:

- (1) what action was taken;
- (2) when was it taken;

(3) whether it fully remedied the conduct without adversely affecting the terms or conditions of complainant's employment;

(4) whether the employer had a policy and took steps to implement that policy.

In determining whether an employer took immediate and corrective action, the courts seem to consistently consider the following:

(1) company policy against harassment and active enforcement of that policy. *Crocker v. Boeing Co.*, 662 F2d 975 (3rd Cir 1981).

(2) disciplinary action against perpetrator. *Crocker, supra*; *U.S. v. City of Buffalo*, 457 FSupp 612 (WD NY 1978); *Gilbert v. City of Little Rock*, 29 FEP 969 (ED Ark 1982).

(3) sensitivity training. *Crocker, supra*.

(4) formal mechanism to deal with grievances. *City of Buffalo, supra*.

(5) investigation. *DeGrace v. Rumsfeld*, 21 FEP 1444 (1st Cir 1980).

It is likewise consistently held that the mere announcement of a policy against harassment and promise to discipline or discharge any employee who fails to conform is not sufficient to relieve an employer of liability. EEOC Dec. 171-1442.

The Agency has indicated in essence that it looks to find timely action by a respondent thorough investigation and communication to the work force that harassment will not be tolerated. In determining whether Respondent's actions were in fact immediate and appropriate, the Agency indicated it did

consider, although no single factor was determinative, defamation law and an employer's obligation under a collective bargaining agreement, the normal behavior in the workplace, the work force and work obligations, and the potential results of possible corrective actions by employer.

It is well established that federal law is not binding upon this Forum. *In the Matter of Pioneer Building Specialties Co.*, 3 BOLI 123 (1982). In previous cases, the Forum has, however, used the rationale of federal decisions as a framework for the resolution of matters before the Forum. *In the Matter of Union Pacific Railroad Company*, 2 BOLI 234 (1982). The Forum has, therefore, relied upon the regulations, case law, and Agency policy set forth above in reaching a decision in this matter.

1. Pattern of Racial Harassment

The Forum finds it relevant to consider the following factors in determining whether a pattern of harassment existed at Respondent's workplace.

A) The general course of conduct at Respondent's work place. *Easley v. Northern Shipping Co.*, 597 FSupp 954 (ED Pa 1984). That it may be the normal state of affairs at employer's work place to consistently violate civil rights laws does not legitimize discrimination. This atmosphere is, however, relevant to determining whether an incident was racial and whether the Complainant was singled out for such treatment. In addition, this factor is relevant to determining what type of action would be reasonable for Respondent to take under the circumstances.

B) Complainant's demeanor. In *Johns v. First Federal Savings & Loan*, 546 FSupp 762 (D Minn 1982), the court considered the complainant's conduct and his interaction with co-workers.

C) Complainant's perception of the incident.

D) The number of incidents.

E) Whether the incidents were directed to the Complainant in particular.

F) Whether the incidents were racial in nature.

With those factors as a premise, the Forum has analyzed the incidents alleged separately and in their totality.

1) The Mask

While there was testimony that there is general "horseplay" in the warehouse, there was also testimony by Respondent's witnesses that there had not previously been a problem with racial harassment. General joking is different than racially oriented conduct. The mask was not the first "Mr. T." incident, and Respondent was aware that Complainant was upset and insulted by the reference. The fact that others did not see the racial implication in the incident is not conclusive. Complainant's perception is a significant factor. *Vaughn, supra*. Similar considerations have been addressed by this Forum in other matters. This Forum has held that the term "girl" or "boy" applied to a black employee "implies an inherent inferiority" because of race. *In the Matter of Pioneer Building Specialties Co.*, 2 BOLI 234 (1982). In so doing, the Forum cited EEOC Decision # 72-0679 (12-27-71) which states:

"To be addressed as 'girl' is inherently more offensive to Negroes than to Caucasians because of the repellent historical images the term understandably evokes. Thus even though Negro and Caucasian employees are called 'girls' with equal frequency with no discriminatory intent, there will nonetheless be a foreseeable disparate effect."

Respondent's supervisor, Andrus, stated at the crew meeting that such conduct could constitute racial harassment. Moreover, even if it was not clear to Respondent on October 31, 1984, the racial implication was completely evident when "NIGER" was written on Complainant's time card.

2) The Time Card

There can be no logical conclusion other than the fact that writing "NIGER" on the time card of a black employee is racial in content. Clearly, it was directed at Complainant and Complainant was angered and upset thereby.

3) The Graffiti

The evidence does establish that Complainant's name was again linked to "Mr. T." The same rationale applies as set forth above. This incident, occurring shortly after the time card incident was obviously racial and directed at Complainant.

4) The Scratches on Complainant's Car

Because of the timing of the incident and the rumors that Angelos intended to scratch Sletholm's car, this incident is most suspect. Nevertheless, there is no substantial evidence to support that it was racially motivated. In addition, the record reveals

some confusion as to the actual date of the incident.

5) The Barrett

Again, as in the case of the time card, there can be no question that writing "NIGER" and "KKK" on Complainant's equipment is racial in nature and directed at Complainant.

There can be no doubt that there was in fact a pattern of racial harassment directed at Complainant. While it is not determinative of liability, the Forum notes that supervisor Andrus stated that the mask incident alone could constitute racial harassment. Likewise, supervisor Thompson in his termination letter to Angelos referenced his "misconduct effectively constituting racial harassment." The cited incidents are more than isolated and some were quite public in nature. Complainant was upset to the point of fearing for his safety and that of his family. As a result, Complainant began to feel that he did not want to go to work, and found himself constantly apprehensive at work about the occurrence of another incident. Complainant felt this situation affected his production. In addition, the Forum observes that while not charged by the Agency, Respondent submitted and this Forum accepted evidence of the incidents at Respondent's warehouse occurring in August of 1985 wherein racial graffiti was written about Complainant on several crossbars. Thus, the pattern of conduct continued beyond the incident with the Barrett on March 24, 1985.

Having determined that a pattern of racial harassment existed during the time period charged, the Forum must now address the sufficiency of

Respondent's response to the situation.

2. Immediate and Corrective Action

Combining court rulings, EEOC Decisions, and Agency policy, the question to be asked in this matter is:

Whether the Employer took all measures both feasible and reasonable to combat the offensive conduct and maintain an atmosphere free of racial intimidation and insult.

EEOC Dec. 171-969; 171-2344; 172-1561; *DeGrace V. Rumsfeld*, 21 FEP 1444 (US Ct App 1st Cir 1980); *EEOC v. Murphy Motor Freight Lines*, 488 FSupp 381 (DC Minn 1980).

As stated, the nature of the particular workplace is relevant in determining what constitutes immediate and appropriate corrective action in the specific case. The Forum finds it was reasonable for Respondent to consider the following factors in fashioning a plan or taking steps to correct the situation:

a) Collective Bargaining Agreement

Respondent was bound by and the employees were covered by the terms of a collective bargaining agreement. That agreement provided that action to discipline or discharge an employee could only be taken where there were facts constituting "just cause" to do so. Thus, the Respondent did not have a work force of employees at will, and Respondent's authority to act had clear boundaries.

The civil rights laws often come into conflict with other individual rights. (See *In the Matter of The Pub*, 6 BOLI 270 (1987) for a discussion of the balancing of an individual's right to free access to places of public

accommodation and the rights of free speech.) In this case, the Forum must consider the interfacing of the civil rights laws and the rights and obligations under a collective bargaining agreement. The law is clear that an individual employee cannot waive or prospectively bargain away civil rights guaranteed by statute or state or federal constitution, nor can a union representing the employee usurp and bargain away those rights in the collective bargaining process. *Alexander v. Gardner-Denver Company*, 415 US 36 (1974); *In the Matter of Portland Electric and Plumbing Co.*, 4 BOLI 82 (1983). Where there is a valid collective bargaining agreement, the disciplinary provisions must be given effect in determining whether an employer took reasonable action in dealing with the perpetrator. The agreement does not, however, operate to preempt the enforcement of the civil rights laws. In *San Diego Building Trades Council et al v. Garmon*, 359 US 236 (1959), the Supreme Court held that collective bargaining "activity and conduct" is protected and that it would not

"find withdrawal from the States of power to regulate where the activity regulated was a merely peripheral concern of the Labor Management Relations Act * * * or where the regulated conduct touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling Congressional direction, we could not infer that Congress had deprived the States of the power to act."

(See *Portland Electric and Plumbing, supra*, for discussion of preemption.) The two interests must be balanced.

b) The Work Environment

The court in *Snell v. Suffolk County*, 782 F2d 1094 (2nd Cir 1986) considered this factor relevant in deciding whether the employee in question took reasonable steps to remedy the racially discriminatory atmosphere. Thus, the reaction of employees toward Complainant and the accepted course of conduct are all relevant considerations.

c) Resources Available to Employer

Again, in *Snell, supra*, the court took this factor into consideration. In determining whether an employer fulfilled its legal responsibility to take reasonable remedial steps, it would be proper to consider the size of employer's supervisory staff and their obligations.

d) The Likely Result of Specific Corrective Action

This factor depends on Respondent's knowledge of the work force, considering in part the general reaction of the work force to certain types of disciplinary measures and the general opinion of Complainant. An element of this factor is Complainant's personality to the extent that it affected how employees would react to corrective action involving Complainant. However, the Forum would like to make it abundantly clear that it does not consider Complainant's personality a defense to harassment. The fact that certain employees may have found Complainant intimidating, or even the fact that Complainant may have insulted another

employee, does not in any way serve as a justification for racial harassment.

e) The Rights of Other Employees

Case law from other jurisdictions supports and this Forum agrees that an employer may consider the rights of even those disciplined or discharged to not be defamed. *Phipps v. Clark Oil & Refining Co.*, 396 NW2d 588 (Minn. App. 1986).

(1) The Mask

The day after the incident, Andrus held a crew meeting for all three shifts, at which time it was made clear that the mask incident could constitute racial harassment and that such conduct was a terminable offense. Within two to four weeks after the incident, Andrus spoke to the alleged culprit, Angelos. With the denial of Angelos and Sletholm's refusal to testify, there was insufficient evidence at that point to proceed with disciplinary action against Angelos under the standard of the collective bargaining agreement. The mask was then sent to Harris for possible fingerprint comparison. Based on his experience, he determined that this was not a viable alternative. There is no evidence on the record to contradict his opinion. There were no racial incidents involving Complainant between October 31 and December 26.

(2) The Time Card

Action by Respondent commenced the day the defaced time card was discovered. Complainant was immediately issued a new card and the defaced card was sent to Harris, who was at that time basically a one man department, for a handwriting analysis. Within four weeks after the incident, a period that included Harris's vacation,

holidays, and spanned a major corporate reorganization of employees, Harris had obtained a list of potential suspects and sent the list and the time card to Phillips, the handwriting analyst. The original list of names did not include Angelos, since he did not work as a loader, the group originally suspected by both Complainant and his supervisor. It was also discovered that time records show Angelos was on workers' compensation on the night in question. Phillips returned his initial report on February 5, 1985. At that time, he requested further exemplars. Those were provided and he returned a more conclusive report implicating Angelos on March 12.

In the meantime, Angelos and Sletholm were interviewed in late January 1985. Angelos again denied any involvement in either incident. Believing he was nevertheless the culprit, but knowing his discharge would more likely be upheld for his absentee violations in that the proof was stronger, Angelos was terminated by letter on those grounds on March 3. After receiving the more definite report from Phillips, a second letter was sent to Angelos on March 12, indicating he was also terminated for his involvement in racial harassment. It was therefore slightly over four months from the initial incident charged by the Agency to the termination of the suspected culprit. The Forum finds, in light of the obligations of the collective bargaining agreement, that this was reasonable. Moreover, it would have done little to stop the harassment and much to foster it had the wrong man been terminated.

(3) Graffiti

Within one hour of its discovery, Respondent had attempted photographs in an effort to possibly obtain a handwriting analysis, and failing that, painted over the writing. The Forum considered the possibility of whether an employee should have been posted outside or inside the restroom to attempt to apprehend the culprit; however, the Forum finds this would not have been feasible or reasonable under the circumstances: a) the incidents were not prior to that time repeated in kind; and b) Respondent had insufficient employees to spare for such surveillance.

(4) The Car

As stated, the Forum cannot find, although there is a strong suspicion, substantial evidence in the record to call this an incident of racial harassment. There were rumors that Angelos had threatened to scratch Sletholm's car because of the fact he had revealed their conversation to management. It could not be established then and was not established at hearing that Complainant's car was scratched on Respondent's premises, and as stated, the record reveals some confusion in the actual date of the incident. In fact, even if it had been established that Complainant's car was scratched in Respondent's lot, the Forum finds that, unlike the mask, this incident cannot be seen even when considered in light of the other incidents as clearly racial. Respondent's actions therefore are not an issue in this matter.

(5) The Barrett

The incident occurred after the termination and departure of Angelos,

who had been the primary suspect. While there was no evidence presented by either the Agency or Respondent regarding action taken or the whereabouts of the bar with the phrase "KKK," supervisors did remove the clipboard immediately upon notification, issued a new one to Complainant, and sent the defaced clipboard to Harris for a possible handwriting analysis. Harris discussed the matter with Phillips, who later viewed the board and determined an analysis would be fruitless.

(6) The Crossbars

While the evidence regarding this incident cannot be accepted as relevant to Respondent's state of mind at the time of the incident, it does show that Respondent again disciplined the perpetrator and did so more quickly in this case, as the evidence was stronger than it had been against Angelos. Thus, the evidence does tend to illustrate that Respondent's previous actions were in fact reasonable in light of the circumstances existing at that time.

3. Other Alternative Action

The Agency suggested, and this Forum questioned Respondent in regard to, other forms of remedial steps. For the reasons outlined below, the Forum finds Respondent did not fall short of its obligation by failing to take such action.

(1) Posting Notices

a) Notices Condemning Harassment

There was in effect and posted in the lunch room work rules prohibiting intimidation of other employees. Respondent established through documentary evidence that it did take action

in other incidents to enforce this policy; that is, it was more than mere lip service to the concept. In view of the fact that such a notice was posted, although it may have been helpful, it was not unreasonable for Respondent not to post another similar notice.

b) Notice of the Termination of Angelos

This is a difficult issue, as it raises the specter of defamation. In a recent California case, a former employee brought an action based on libel and slander against the employer that had issued a sexual harassment bulletin after the employee's discharge for alleged harassment, which referenced reasons for his dismissal without mentioning his name. (See 43 FEP 1790.) At least one court has determined that an action for defamation lies where an employer announces to employees that an employee has been discharged for racial harassment. *Phipps, supra*. In *Garziano v. Dupont Co.*, 43 FEP 1790 (CA5 1987), after discharging an employee for sexual harassment, the employer circulated a memo to plant supervisors referring to the employee's firing, although not by name, and calling the incident a serious act of misconduct. The court determined the memo was issued under a "qualified privilege;" however, the supervisors' discussions with employees could have been "excessive publication," amounting to abuse of the qualified privilege. The case was sent back to the lower court for further findings. As stated previously, Respondent can consider the nature of the work force in fashioning a remedy. Given the legal concerns and the vocal atmosphere of the warehouse, Respondent's failure to

post a notice either naming Angelos or merely stating an employee had been discharged for harassment was not unreasonable.

As regards the perpetrator, the employer's main concern should be to remove the individual from the work force. That was done. An employer can impress the intention to deal with such matters seriously in other more reasonable ways than posting notices. The Forum notes that in this case, the only evidence Respondent ever had against Angelos was a report from a handwriting analyst that was not positively conclusive and the statement of a co-worker, who was reluctant to repeat it, that Angelos admitted involvement in the mask incident. There were no eye witnesses and there was no proof that Angelos, who was off work at the time for an injury, was even in the warehouse on the night of the time card incident. Furthermore, the incidents continued after the termination and departure of Angelos.

(2) Training

There was evidence that Respondent's supervisors received training on the subject of harassment. The Forum finds that, with the exception of Harris, Respondent's supervisors were sensitive to racial issues and to Complainant's personal concerns. While some type of sensitivity training may have been helpful, it cannot be said that Respondent's failure to do so was unreasonable considering the nature of the workplace and the type of accepted conduct. Moreover, the Agency indicated that sensitivity training was not a necessary step.

(3) Crew Meetings

Evidence established that Respondent held a crew meeting after the mask incident, but did not hold another meeting until the incidents involving the crossbars in August. Respondent felt that additional crew meetings were not appropriate for several reasons:

- 1) potential for copy cat incidents;
- 2) better results where matters are handled more discreetly; and
- 3) Hedberg's explanation that constant brow beating in the form of crew meetings can have a very negative effect on the work force.

The Forum finds the evidence supports these concerns. Specifically, the Forum notes that just after the crew meeting regarding the mask at which employees were told such conduct could lead to termination, an employee was heard mimicking "Mr. T." on the PA system. In addition, the Forum finds that additional crew meetings would have drawn attention to incidents that were not public in nature, such as the time card and the Barrett, thereby potentially subjecting Complainant to more ridicule and embarrassment. Therefore, Respondent's actions in not having additional crew meetings was reasonable. Moreover, the perception of Complainant by many employees was that he either did or attempted to intimidate others. It was reasonable for Respondent to think that consistent crew meetings to help an individual not only thought of in this way, but who had insulted other employees, may not only be of no benefit but may have made matters worse.

There was evidence concerning whether Complainant had requested additional crew meetings and whether Respondent had asked for assistance from Complainant. The Forum would like to make clear that while an employer's solicitation of suggestions from the victim of harassment tends to show good faith on the employer's part, it does not serve as a defense to liability. The victim of harassment does not have the obligation to insure a working environment free from harassment; that burden falls on the shoulders of the employer.

(4) Posting Employees to Monitor Certain Areas

There was evidence that the time card area was not monitored on a regular basis and that time cards were accessible to all employees. Evidence established that it would not have been feasible, considering the number of supervisors and their other obligations, to post an employee to monitor this area or the restroom where the graffiti was found. Additionally, it should be noted that these incidents did not reoccur in kind, that is, each was not only different, but happened in a different location.

4. General Preventative and Corrective Measures

Evidence indicates that Respondent had some preventative measures in place and took certain general steps toward resolution.

(1) Work Rules

As stated, Respondent did have a policy prohibiting intimidation of any kind, which evidence showed was enforced. Evidence indicates that incidents of harassment were dealt with

and investigated pursuant to the same procedures followed for other violations and for suspected criminal activity.

(2) Training for Supervisors

Supervisors were sent to seminars concerning harassment issues and were kept advised by periodicals and literature sent from Hedberg.

(3) Requesting Complainant's Suggestions

Hedberg, on more than one occasion, asked Complainant for his ideas to help solve the problem or to advise him of any relevant information. This tends to show Respondent's efforts to tailor the remedial action to the specific situation, and in accordance with Complainant's perception of the situation.

(4) Advising Complainant's Union and Seeking Their Assistance

Hedberg not only kept the Business Agent advised of the status of the situation, but requested that the union forward any relevant information. The union, however, of which Complainant was a member, offered no assistance in resolving the matter.

5. Conclusion

While the Forum is of the opinion, based on the facts, that other possible steps could have been taken, the law does not require an employer to take every action imaginable, but rather all steps that were both "feasible and reasonable" as determined by the facts existing at the time. As CRD stated in the Administrative Determination, the issue in deciding whether Respondent's action was appropriate is not determined by whether Respondent's actions were correct. It would serve no purpose to impose a standard on employers that is impossible to meet.

**In the Matter of
FRANCIS MANUEL KAU,
dba Manny's Firework Service,
Respondent.**

Case Number 44-86
Final Order of the Commissioner
Mary Wendy Roberts
Issued September 2, 1987.

SYNOPSIS

Respondent forest labor contractor obtained a license with an exemption, allowing him to employ no more than two workers, and then worked on a U.S. Forest Service (USFS) contract with at least five workers, none of whom he paid in full. Once Respondent hired more than two workers and lost the exemption, the Commissioner held that he should have immediately notified the Agency, obtained a bond, and begun submitting certified payroll records to the Agency. Respondent failed to provide his workers with the statutorily required statement of rights and remedies. USFS terminated Respondent's contract because he failed to timely complete the work; Respondent thereby failed to comply with his contract with the USFS. Noting that the U.S. Department of Labor was handling the workers' wage claims, the Commissioner found that Respondent failed to abide by his wage agreement with the workers. The Commissioner assessed civil penalties totaling \$1,500. ORS 658.415(3); 658.417(3); 658.418; 658.440(1)(d), (e) and (f); OAR 839-15-300.

Rather than furthering the goal of preventing and eliminating discrimination, such action may well result in a backlash effect. Thus, the answer to the question posed is in the affirmative, that is, Respondent did take all measures both feasible and reasonable to combat the offensive conduct and maintain an atmosphere free from racial intimidation and insult.

As stated above, there is substantial evidence on the record to support that Complainant was the victim of more than "isolated" racial incidents, and that these incidents had the effect of creating and intimidating, hostile, or offensive working environment, thereby affecting the terms and conditions of Complainant's employment. Complainant was unquestionably insulted and humiliated by the conduct, and suffered not only mentally but physically. Thus, had this Respondent not taken immediate and appropriate action, these facts would constitute racial harassment under the law and a violation of ORS 659.030(1)(b).

ORDER

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

The above-entitled contested case came on regularly for hearing before Douglas A. McKean, designated as Hearings Referee by Mary Roberts, the Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was conducted on July 14, 1987, in Room 311 of the State Office Building, 1400 S.W. Fifth Avenue, Portland, Oregon. Lee Bercot, 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. Francis Manuel Kau (hereinafter the Contractor) represented himself. The Hearings Referee called as witnesses: Lee Bercot; Karen Higuera, Administrative Assistant, Licensing Unit of the Agency; Wallace Broadwell; Jack Spencer; Scott Halberg; and Ed Hurst, Contracting Officer, US Department of Agriculture. The Contractor cross-examined those witnesses. The Contractor testified for himself and called Marvin Chisholm as a witness.

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 April 24, 1987, the Agency informed the Contractor that the Agency intended to assess a civil penalty of \$1500.00 against him. The notice cited as the bases for this assessment the Contractor's:

- a. Failure to submit to the Commissioner of the Bureau of Labor and Industries a \$5,000.00 surety bond for work done on US Department of Agriculture Siuslaw National Forest contract, Purchase Order 1100-04T0-6-50157 (hereinafter the contract), in violation of ORS 658.415(3). Civil Penalty of \$500.00.
- b. Failure to provide to the Commissioner of the Bureau of Labor and Industries a certified true copy of payroll records for work done on said contract, in violation of ORS 658.417(3). Civil Penalty of \$500.00.
- c. Failure to comply with the terms and provisions of said contract, a legal and valid contract entered into in the contractor's capacity as a Farm/Forest Labor Contractor, in violation of ORS 658.440(1)(d). Civil Penalty of \$500.00.
- d. Failure to file with the Bureau of Labor and Industries information concerning changes in the circumstances under which the Farm/Forest Contractor license was issued exempting Contractor from ORS 658.415(3) and 658.417(3), in violation of ORS 658.440(1)(e). Civil Penalty of \$500.00.
- e. Failure to provide workers written statements on said contract, in violation of ORS 658.440(1)(f)(I). Civil Penalty of \$500.00.

This notice was served on the Contractor on May 7, 1987.

2) On May 13, 1987, the Contractor filed a request for an administrative hearing and an answer to the alleged

violations. In his answer, Contractor stated that he was innocent of the violations; that his compliance with the requirement to provide workers' compensation insurance exempted him from having to submit a surety bond; that he was unaware that he was not following rules and regulations correctly; and that, although he did not complete the contract, it was completed by another contractor and the cost was deducted from Contractor's final pay.

3) By letter dated June 9, 1987, the Agency notified Contractor that the Bureau was assessing \$2500.00 in Civil Penalties, which total was clear from the assessment under each alleged violation; the \$1500.00 assessment amount shown on the Notice described in Finding of Fact – Procedural 1 above was an error.

4) 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 Hearings Referee.

5) With this notice, the Contractor received a document entitled "Notice of Contested Case Rights and Procedures" containing the information required by ORS 183.413. At the commencement of the hearing, Contractor stated that he had read the document and had no questions about it.

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 the hearing and at the Agency's request, the Hearings

Referee amended the Notice of Intent to Assess Civil Penalty to exclude civil penalties for violations of ORS 658.415(3) and 658.440(1)(e) because the Agency believed it did not have authority to assess civil penalties for those violations. The Agency wished to go forward with presenting its case on those alleged violations to make a record thereof because, although Contractor was not a licensed contractor at that time, the Agency would consider these alleged violations in granting or denying a future license application. Contractor made no objection.

8) After hearing, the Agency submitted a more readable copy of one exhibit page, which the Forum has substituted for the copy submitted at hearing.

FINDINGS OF FACT – THE MERITS

1) During all times material herein, the Contractor, a natural person, owned and operated a business which recruited, solicited, supplied, or employed workers to perform labor for another in Oregon in the forestation or reforestation of lands.

2) The Contractor performed the activities described in the previous Finding of Fact pursuant to a contract between the Contractor and the Forest Service of the U. S. Department of Agriculture (hereinafter the USFS), for remuneration or a rate of pay agreed upon in that contract.

3) Pursuant to ORS chapter 658, the Contractor was licensed as a farm/forest labor contractor by the State of Oregon from July 25, 1986, through January 31, 1987.

4) A license application packet contains an application form, a surety

bond form, copies of Oregon's Farm/Forest Labor Contractor (F/FLC) statutes and Oregon Administrative Rules, a WH-151 - Statement of Worker's Rights and Remedies form, a WH-153 - Agreement Between Contractor and Workers form, and instructions on how to fill out the application and what to return to the Bureau. Contractor was provided such a packet on July 17, 1986.

5) Contractor applied for and was granted an exemption from ORS 658.415(3) - the requirement to submit proof of financial ability, and ORS 658.417(3) - the requirement to provide the Agency with certified true copies of all payroll records. When he applied for the exemption, Contractor signed a sworn statement that, among other things, he would "employ two or less individuals * * * in the license year," and would "immediately notify the Bureau of Labor and Industries and comply with ORS 658.415(3) and ORS 658.417(3) in the event that I * * * employ more than two individuals."

6) Wallace Broadwell was an employee of Contractor on the contract. He testified that he cleared brush for five days, a total of 30 hours, at an agreed rate of pay of \$8.00 per hour. Contractor testified that Broadwell worked for one day, a total of 10 hours, at \$8.47 per hour. Broadwell and Contractor testified that Broadwell has received none of his wages earned on the contract.

7) Marvin Chisholm was an employee of Contractor on the contract. Chisholm was Contractor's foreman. Chisholm has not been paid in full for his work for Contractor on the contract.

8) Mark Glickert was an employee of Contractor on the contract. He claimed on a wage claim form that he had cleared brush for 63.5 hours, at an agreed upon rate of pay of \$8.00 per hour. He claimed that he had received \$183.00 from Contractor, and that \$325.00 in earned wages remained unpaid. Broadwell, Halberg, and Spencer each testified that they worked with Glickert during the claim period. Contractor acknowledged that Glickert was owed wages.

9) Scott Halberg was an employee of Contractor on the contract. He testified that he cleared brush for 63.5 hours, at an agreed rate of pay of \$8.00 per hour. He said that Contractor had told him that he had worked 63.5 hours. Contractor testified that all of his employees were to be paid at \$8.47 per hour. Halberg testified that he had been paid \$183.00, and claimed that \$325.00 in earned wages remained unpaid. Contractor's certified payroll form shows \$183.00 in the "gross amount earned" column; however, Contractor testified that \$183.00 was actually the amount paid. Contractor acknowledged that some wages, possibly more than the \$325.00 claimed, were due to Halberg.

10) Jack Spencer was an employee of Contractor on the contract. He testified that he cleared brush for 63.5 hours, at an agreed rate of pay of \$8.00 per hour. Contractor testified that Spencer worked for 62 hours at \$8.47 per hour. Spencer and Contractor testified that Spencer was paid \$183.00 by Contractor for Spencer's work on the contract. Spencer claimed that \$325.00 in earned wages remained unpaid. Contractor agreed

that some wages earned by Spencer remained unpaid.

11) Contractor never notified the Agency of information concerning changes in the circumstances under which his license was issued. Specifically, he never notified the Agency of conditions which would make him ineligible for the exemption described in Finding of Fact 25 above; namely, that he employed more than two employees. Contractor testified that on several occasions he mentioned to Agency personnel that he might employ two or three workers.

12) Contractor has never submitted to the Agency proof of financial ability in the form of a corporate surety bond, a cash deposit, or a deposit the equivalent of cash.

13) On July 14, 1987, the day of the hearing, the Agency received a certified true copy of payroll records from Contractor. Those records show that Wallace Broadwell, Mark Glickert, Scott Halberg, and Jack Spencer were employees of Contractor. Contractor certified that "all persons employed in forestation or reforestation work have been not paid the full wages earned." The word "not" and the emphasis were added by Contractor. The records are dated January 31, 1987. Contractor testified that he provided payroll records to the Agency on January 31, 1987. Higuera testified that the Agency had received no payroll records from Contractor prior to July 14, 1987.

14) Contractor submitted a copy of form WH-151 - Rights of Workers with his license application. He swore on his application form that he would "supply my workers with forms WH-151

and WH-153 or other forms that contain all of the elements of these forms. (OAR 839-15-310 and 839-15-360)."

15) Broadwell, Halberg, and Spencer each testified that they had never received a statement of worker's rights and remedies or a WH-151 form from Contractor. Mark Glickert, another employee of Contractor on the contract, signed a statement that he had not been given a WH-151 form by Contractor.

Contractor testified that he gave all four workers a copy of WH-151 when each was hired; and in October 1986, after checking his records and finding that he had not given the workers the WH-151 forms, Contractor sent WH-151 forms, along with paychecks, to the workers. He also testified that he mailed these forms to the workers sometime before July 1987.

16) Contractor defaulted on his contract with USFS, and that contract was terminated. According to Ed Hurst, the Contracting Officer for USFS on this contract, the terms and provisions of the contract were not complied with, and the failure resulted in the termination. Specifically, Contractor failed to complete the subject contract project within the time required by its terms. Contractor had been granted two extensions of time before the termination. One provision of the contract required Contractor to comply with the Service Contract Act. That Act required, at that time, that workers who clear brush be paid a total of \$8.47 per hour. Failure to pay workers at the required rate of pay constitutes a violation of the contract. Contractor acknowledged that the contract was terminated due to his failure to comply with its terms.

17) The Contractor's testimony was often inconsistent and not credible. His testimony changed during the hearing as various requirements of the law were discussed. For example, he first testified that he had mailed the statement of worker's rights - WH-151 - to his employees sometime before July 1987. Later, he said he mailed the forms to them on January 31, 1987. Still later, he said he mailed the forms to the workers during October 1986. Finally, he testified that he gave each worker a copy of the form when each worker was hired, and that he posted a copy of the form in his car. All of these statements conflict with the sworn testimony and/or written statements of his workers.

Another example is Contractor's testimony regarding the workers' rate of pay. He testified that the rate had always been \$8.47 per hour. This testimony conflicts with a statement he made to the Agency's Compliance Specialist, in which he said the rate was \$8.00 per hour. Contractor testified that the Compliance Specialist must have heard wrong. Contractor's testimony also conflicts with that of his four workers, who consistently asserted that the agreed rate was \$8.00 per hour. Although Contractor's brother-in-law, Marvin Chisholm, also testified that the rate was \$8.47 per hour, the Forum finds this assertion unbelievable due to Chisholm's bias based upon his family relationship and ongoing business relationship with Contractor.

Other examples involve various documents. First, Contractor testified that he did not receive a WH-153 form in his application packet; yet the

license application which he submitted included a copy of form WH-153 as Contractor's example of the form he intended to supply to his workers. Second, Contractor testified that he submitted certified payroll documents to the Agency on January 31, 1987; yet the Agency has no record of such documents being submitted, and Contractor has no copy of the documents. The Forum finds Contractor's testimony unbelievable.

Because the Forum finds Contractor's testimony untrustworthy, it is accepted only to the extent that it does not conflict with the testimony of witnesses who are found to be credible.

18) Messrs. Broadwell, Halberg, and Spencer had no pecuniary interest in the outcome of this proceeding because the Agency had referred their wage claims to the U. S. Department of Labor. The Forum finds that fact and that they took time to travel to and testify at the hearing as indications of the truthfulness of their testimony. The Hearings Referee found their demeanor forthright and credible. The testimony of each was consistent with, and corroborated, the testimony of the others.

The Hearings Referee found the testimony of Ed Hurst and Karen Higuera completely credible.

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 25, 1986, through January 31, 1987, the Contractor was licensed as a farm/forest labor contractor, as required by ORS 658.410.

2) All the work described in the Ultimate Findings of Fact below was performed on a USFS contract in the State of Oregon.

3) When Contractor applied for a Farm/Forest Labor Contractor's license, he received an application packet from the Agency which contained all of the forms necessary to become licensed, as well as instructions and copies of Oregon's Farm/Forest Labor Contractors statutes and rules.

4) When he was licensed, Contractor was granted an exemption from the statutory requirements to submit proof of financial ability and to provide the Agency with certified true copies of all payroll records. The exemption was granted based, in part, upon Contractor's sworn statement that he would employ two or fewer individuals in a license year. He also swore to immediately notify the Agency if he employed more than two individuals, and to comply with the statutory requirements mentioned above if he employed more than two individuals.

5) Contractor employed no fewer than five individuals in the performance of work on the USFS contract performed in the license year. Namely, Wallace Broadwell, Marvin Chisholm, Mark Glickert, Scott Halberg, and Jack Spencer were employees of Contractor.

6) Contractor never notified the Agency that he had employed more than two employees.

7) Contractor has never submitted to the Agency proof of financial ability in the form of a corporate surety bond, a cash deposit, or a deposit the equivalent of cash.

8) Until July 14, 1987, the date of the hearing, the Contractor failed to provide the Commissioner of the Bureau of Labor and Industries with certified true copies of payroll records for his five employees concerning their work.

9) At the time each worker was hired, recruited, or solicited, Contractor failed to furnish each worker with a written statement of the worker's rights and remedies.

10) The Contractor failed to pay his employees wages in full for work they had performed for him and, thereby, failed to comply with the terms and provisions of the legal and valid employment agreements the Contractor had entered into, in his capacity as a farm/forest labor contractor, with the five named employees.

11) Contractor failed to comply with the terms and provisions of his legal and valid agreement or contract entered into in his capacity as a forest labor contractor with the USFS by failing to complete the project on time, and by failing to pay his workers the correct Service Contract Act rate of \$8.47 per hour.

12) The testimony offered by Contractor and his witness was not found to be credible where it conflicted with that of the workers, Mr. Hurst, or Ms. Higuera. Ms. Higuera and Messrs. Hurst, Broadwell, Halberg, and Spencer were found to have offered credible testimony to the Forum.

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 25, 1986, to January 31, 1987, the Contractor was and is subject to the provisions of ORS 658.405 to 658.475.

3) ORS 658.418 provides some contractors with an exemption from the statutory requirements of submitting proof of financial ability to pay the wages of employees and of providing certified true copies of all payroll records to the Commissioner. The Commissioner may exempt a contractor only if the contractor meets all of the following requirements:

- a. The contractor operates as a sole proprietor;
- b. The contractor engages in forestation or reforestation activities pursuant to contracts for less than \$25,000; and
- c. The contractor employs two or fewer individuals in the performance of work on all contracts performed in the license year.

ORS 658.440(1)(e) states, in pertinent part, that contractors shall file with the Bureau of Labor and Industries information concerning changes in the circumstances under which the license was issued.

In this case, Contractor was granted the exemption provided for by ORS 658.418 based upon his sworn statement that he would comply with that statute's requirements set forth above. Thereafter, on his first and only

contract, Contractor hired five workers. At that point, Contractor was required to notify the Agency that he had hired five workers, since that was a change in the circumstances under which his license, and particularly the exemption, was issued. Contractor's failure to file that information with the Agency constitutes a violation of ORS 658.440(1)(e).

4) At the time Contractor hired his third employee, he no longer met the requirements of the exemption provided for in ORS 658.418. As a result, Contractor was immediately required to comply with the provisions of ORS 658.415(3) and 658.417(3).

5) ORS 658.415(3) requires each applicant for a license to submit and maintain proof of financial ability to promptly pay the wages of employees and other obligations specified by that section. The proof required must be in the form of a corporate surety bond, a cash deposit, or a deposit the equivalent of cash. In this case, once Contractor was no longer exempt under ORS 658.418, he was required to comply with ORS 658.415(3). Contractor's failure to submit and maintain proof of his financial ability constitutes a violation of ORS 658.415(3).

6) ORS 658.417(3) required Contractor to provide to the Commissioner a certified true copy of all payroll records (wage certifications) for work done as a farm labor contractor, if he paid (or was to pay) his employees on his 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 the contract.

In this case, Contractor was required to submit a wage certification at least once every 35 days from the time Contractor was no longer exempt under ORS 658.418 from this requirement. Thus, Contractor was required to submit a wage certification by at least October 6, 1986. By failing to provide the Commissioner such payroll records, Contractor violated ORS 658.417(3).

7) ORS 658.440(1)(f) states, in part, that each contractor shall furnish to each worker, at the time of hiring, recruiting, soliciting, or supplying, whichever occurs first, a written statement that contains a description of the worker's rights and remedies. Contractor's failure to furnish such a statement, at any of the times listed above, to at least four of his workers constitutes four violations of ORS 658.440(1)(f). *In the Matter of Jose Solis*, 5 BOLI 180, 202 (1986).

8) ORS 658.440(1)(d) requires each contractor to comply with the terms and provisions of all legal and valid agreements or contracts entered into in the contractor's capacity as a farm labor contractor.

By failing to pay his five employees wages for work they had performed on his USFS contract, Contractor failed to comply with the terms and provisions of the legal and valid employment agreements the Contractor had entered into in his capacity as a farm/forest labor contractor, and thereby violated ORS 658.440(1)(d).

ORS 652.140 provides that whenever an employer discharges an employee, all wages earned and unpaid at the time of such discharge shall become due and payable immediately. If an employee has quit without notice,

such wages shall be due within 48 hours, excluding Saturdays, Sundays and holidays, after such employee quit.

Contractor was obliged, as provided in ORS 652.160, to pay his employees at least the amount of wages he conceded he owed them, even if he had a bona fide dispute as to whether he owed them anything more than that sum.

The Contractor's failure to comply with the terms of his valid employment agreements with the five workers constitutes five violations of ORS 658.440(1)(d). *Solis, supra*, at 203

9) Contractor's failure to comply with the terms and provisions of his legal and valid agreement or contract entered into in his capacity as a forest labor contractor with the USFS constitutes a violation of ORS 658.440(1)(d).

10) 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 this assessment of the sums of money specified in the Order below is an appropriate exercise of that authority.

OPINION

One of the primary purposes of the Farm/Forest Labor Contractor statutes and rules is to protect workers by ensuring that they get paid properly and that they are informed about their rights and working conditions. Contractor's actions and inactions effectively resulted in circumventing and frustrating that purpose. He has not paid his workers wages he concedes are due,

and he failed to properly inform them of their rights and remedies.

Contractor's written answer to the Notice of Intent to Assess Civil Penalty and his testimony at hearing indicate that he did not understand his obligations under the law. It is axiomatic that ignorance of the law does not excuse its violation. He is charged with knowledge of the law.

Contractor took advantage of an exemption which the Commissioner may grant to contractors who have small operations. She granted the exemption because Contractor swore to comply with three conditions, one of which was to hire no more than two employees. Contractor promptly hired no fewer than five employees. There was some evidence on the record that he hired several more employees around August 14 and 15, 1986, although no finding of fact was made about them. Contractor never notified the Agency about hiring more than two employees.

The exemption allowed Contractor to avoid two of the laws' primary means of ensuring that workers get paid properly. Contractor was not required to submit proof of his financial ability to pay his employees' wages, and he was not required to provide certified payroll records to the Commissioner. Once he hired more than two employees, Contractor no longer qualified for the exemption. He should have so notified the Agency and taken steps to meet the laws' requirements stated above. He failed to do so, and at least five workers are left with unpaid wages.

The Forum has found a total of 13 violations of the law by Contractor.

These violations are very substantial, and are of a magnitude and seriousness that the Forum would refuse to renew the Contractor's license if he had applied for renewal.

Contractor claims his good intentions of paying the workers' wages in the future, but has paid them nothing since October 1986. The Forum finds that these circumstances do not mitigate the violations cited. He testified that he is currently employed by the state, and yet has not made even nominal wage payments to his former employees.

Contractor provided to the Agency a certified payroll record, which the Agency received on the date of the hearing, and testified that he had sent another copy to the Agency in January 1987. For the reasons cited in the Findings of Facts, the Forum simply does not believe this testimony. It appears that these records were prepared solely in preparation for the hearing. Even if Contractor were believed, such records submitted in January 1987 would have violated the rule. Thus, the Forum finds that those records do not mitigate the violation of ORS 658.417(3).

Finally, Contractor asserted that he was unaware that he was violating any statutes or rules. He was confused about his duty to provide workers' compensation insurance and his duty to submit proof of financial ability to pay wages, such as a surety bond. As stated above, his ignorance does not excuse him. He was given copies of the laws and rules when he applied for the license, and, according to him, he was in contact with the Agency on many occasions. His ignorance or

confusion, however innocent, does not mitigate the violations cited.

ORS 658.453 provides that the Commissioner may assess a civil penalty not to exceed \$2000 for each violation of law listed therein. In this case, the Commissioner has assessed a \$500 civil penalty in the amended Notice of Intent to Assess Civil Penalty for violations of ORS 658.417(3), 658.440(1)(d) – regarding the USFS contract, and 658.440(1)(f)(l). The total civil penalty of \$1500 is well within the Commissioner's discretion, and, in light of the other violations on the record, the substantial magnitude and seriousness of those violations, and the fact that no mitigating circumstances were found, the civil penalty is an appropriate and reasonable exercise of authority.

ORDER

NOW, THEREFORE, as authorized by ORS 658.453, the Contractor is hereby ordered to deliver to the Hearings Unit, Bureau of Labor and Industries, 309 State Office Building, 1400 SW Fifth Avenue, Portland, Oregon 97201, a certified check payable to the BUREAU OF LABOR AND INDUSTRIES in the amount of ONE THOUSAND FIVE HUNDRED DOLLARS (\$1,500.00) 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: \$500 for Contractor's violation of ORS 658.417(3) found herein; \$500 for Contractor's violation of ORS 658.440(1)(d) on USFS contract # 00-04T0-6-50157

found herein; and \$500 for Contractor's violations of ORS 658.440(1)(f)(l) found herein.

**In the Matter of
METCO MANUFACTURING, INC.,
an Oregon corporation, Respondent.**

Case Number 50-86
Final Order of the Commissioner
Mary Wendy Roberts
Issued December 18, 1987.

SYNOPSIS

Respondent corporation failed to file a timely answer to the Agency's Specific Charges and was found in default. The Hearings Referee rejected the corporate president's attempt to obtain relief from default, ruling that mere contact with an Agency employee did not constitute the required answer, that failure to become fully aware of the default provision of the Forum's rules was not an excusable mistake or a circumstance beyond Respondent's control, and that Respondent also failed to be represented by an attorney. The Commissioner confirmed those rulings and one made at hearing that the attorney who appeared would not be allowed to question witnesses or present evidence because Respondent was in default. Finding that Respondent failed to reinstate Complainant, a recovered injured

worker, to his former position when it became available, or to an available suitable position before the former position became available, and that Respondent discharged Complainant due to the injury claim, the Commissioner awarded Complainant \$8,676 for lost wages (without deducting unemployment compensation) and \$2,500 for mental distress. ORS 9.320; 183.415(6); 659.410; 659.415; OAR 839-05-015; 839-30-025(7), (11), (12) and (15); 839-30-100(1)(k); 839-30-185(1)(a); 839-30-190.

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 September 3, 1987, in Room 411 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: Judith Bracanovich, Quality Assurance for the Civil Rights Division (hereinafter CRD) of the Agency; Kenneth C. Havens (hereinafter Complainant); Gary Harvey, a former co-worker of Complainant; Nedra Cunningham, Investigative Supervisor for the CRD of the Agency; and David Wright, a Senior Investigator for the CRD of the Agency.

Metco Manufacturing, Inc. (hereinafter Respondent), after being duly notified of the time and place of this hearing and of its obligation to file an answer within twenty (20) days of the issuance of the Specific Charges, failed to file an answer as required.

The Hearings Referee found Respondent in default.

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 December 2, 1985, Complainant filed a complaint of unlawful practice with the CRD. He alleged that Respondent had fired him because he used the workers' compensation system following several on-the-job compensable injuries. He stated that he believed his former job was still available.

2) On June 29, 1987, the Agency prepared and duly served on Respondent Specific Charges alleging that Respondent had fired Complainant because of his on-the-job injuries and his use of Workers' Compensation procedures; that said conduct violated ORS 659.410; that Respondent failed to reinstate Complainant to his former job when it became available, and failed to reinstate Complainant to other available and suitable work after a compensable injury; and that said conduct violated ORS 659.415.

3) The Specific Charges also alleged that the Agency attempted to resolve the complaint by conference, conciliation, and persuasion, but was unsuccessful. Evidence presented at hearing establish the following facts:

a) Nedra Cunningham was an investigative supervisor for the Agency

at the time the Administrative Determination in this matter was issued. As part of her responsibilities, she reviewed the file prepared by the investigator, David Wright, and concluded that the Administrative Determination was correct.

b) Cunningham sent a letter on December 11, 1986, to Respondent inviting conciliation of this complaint.

c) On December 19, 1986, Respondent requested reconsideration of the Administrative Determination.

d) On January 12, 1987, reconsideration was denied.

e) Between March 2, 1987, and April 15, 1987, Cunningham wrote several letters to Complainant regarding conciliation.

f) On May 4, 1987, Cunningham made contact with Complainant and, between May 4 and May 8, Cunningham attempted to resolve the complaint by conference, conciliation, and persuasion with Complainant and Respondent.

g) On May 8, 1987, Cunningham concluded that those efforts had failed. Pursuant to Agency procedure, she referred the case to the Quality Assurance Unit for further action.

4) With the Specific Charges, 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. Also enclosed were a copy of the Agency's Contested Case Hearings Rules and a separate copy of

the rule that requires Respondents to file responsive pleadings.

5) Respondent failed to file a timely answer to the Specific Charges.

6) On July 21, 1987, the Hearings Referee found and notified Respondent that it was in default. Respondent was notified that it had 10 days to request relief from the default.

7) On July 23, 1987, Respondent's president, William H. Rucker, requested relief from default. Its reasons supporting its request were that

a) it had been in contact with the Agency in an attempt to settle the case, and its president, Mr. William H. Rucker, thought that such contact would constitute filing an answer; and

b) it had never been involved in a contested case process and was not fully aware of the default provision. Respondent enclosed a "pleading Response" with its request. Respondent was not represented by an attorney.

8) On July 30, 1987, the Hearings Referee denied Respondent's request for relief from default. The Hearings Referee found that neither of the reasons supporting Respondent's request satisfied OAR 839-30-190. That rule provides that the Commissioner may relieve a party from a default where the party can show that the default was the result of an excusable mistake or circumstances beyond the control of the party. The Hearings Referee specifically found that contacts with an Agency employee do not constitute the filing of a written answer, and Respondent's failure to become "fully aware of the default provision" is neither an excusable mistake nor a circumstance beyond its control. In addition, the

Hearings Referee found that Respondent had failed to meet the requirement of ORS 9.320 that corporations must be represented by an attorney. The ruling is incorporated herein by this reference.

9) On August 7, 1987, Respondent, by attorney Lee A. Hansen, requested reconsideration of the denial of Respondent's request for relief from default. Respondent's request for reconsideration recounted alleged settlement negotiations and state that "Mr. Rucker mistakenly believed that the claims (sic) was resolved and the Answer would not be required." An answer to the Specific Charges was attached to the request for reconsideration.

10) On August 12, 1987, the Hearings Referee declined to change his July 30th Ruling. The decision was based upon the same reasons given in the July 30th Ruling.

11) On August 17, 1987, the Agency submitted a letter to the Forum "to set the record straight" regarding settlement discussions between the Agency and Respondent. Bracanovich concluded that,

"It is wholly inconceivable that Mr. Rucker could have 'mistakenly believed' on or before July 20, [when the answer was due] that the claim was resolved and an answer would not be required."

12) Pursuant to OAR 839-30-071, the Agency filed a Summary of the Case including documents from the Agency's file.

13) 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).

14) Early in the hearing, the Hearings Referee advised Respondent it would not be allowed to examine witnesses because it was in default. At that point, Mr. Rucker and Respondent's attorney left the hearing. No other representatives of Respondent attended the hearing.

15) On October 14, 1987, Respondent filed "Exceptions to Proposed Order." Respondent's two exceptions are addressed in the Opinion section of this Final Order.

FINDINGS OF FACT - THE MERITS

1) Respondent is a manufacturer of fabricated metal products, including chainsaw bars and knife blades. It operates a plant in Portland, Oregon. Complainant estimated that Respondent employed between 13 and 16 employees during the times material herein. Gary Harvey worked for Respondent from November 1984 to June 1986. Harvey estimated that during that 20 month period, Respondent employed between eight and 12 workers at any one time. Employment Division records show that Respondent employed seven workers for 13 weeks each during the fourth quarter of 1985, and an additional 14 workers for from one to nine weeks during that quarter. The fourth quarter includes the months of October, November, and December.

2) Complainant was hired by Respondent as a barman on approximately November 30, 1984. A barman is involved in the fabrication of

chainsaw bars. Complainant's second job for Respondent was as a knife grinder. Complainant's third and last job was as a heat treater. This job involves applying heat to metal parts in order to temper the metal. Complainant started working as a heat treater in the spring or early summer of 1985.

3) When Complainant was hired, his agreed rate of pay was \$4.80 per hour. Sometime later he received a raise in pay to \$5.77 per hour, and on May 26, 1985, his pay was raised to \$6.00 per hour. On August 8, 1985, Complainant received another raise to \$6.15 per hour, which was his pay rate when he was terminated on October 14, 1985. Complainant ordinarily worked eight hours per day, 40 hours per week. He was paid weekly. Complainant was supervised by a foreman who directed Complainant in the performance of his work.

4) On February 18, 1985, Complainant received an eye injury while on the job. Complainant went to a doctor for this injury and filled out an injury report for SAIF Corporation, Respondent's workers' compensation insurance carrier. William Rucker signed the report for Respondent. SAIF Corporation accepted Complainant's claim as a compensable injury. Complainant missed "a couple of hours" of work due to this injury.

5) On July 24, 1985, Complainant was treated for an on-the-job injury to his left shoulder. Complainant filled out an injury report for SAIF Corporation, which accepted Complainant's claim as a compensable injury. Rucker signed the injury report for Respondent. Complainant missed "a couple of hours" of work due to this injury.

6) On September 12, 1985, Complainant received an on-the-job injury to his left wrist. SAIF Corporation accepted Complainant's claim for compensation of his medical expenses. Complainant missed "a couple of hours" of work due to this injury.

7) On October 9, 1985, Complainant received an on-the-job injury to one of his toes while rebuilding one of Respondent's ovens. Complainant reported his injury to SAIF Corporation, which accepted his claim for compensation. Complainant was treated by a doctor at Good Samaritan Hospital. Complainant was released by the doctor to return to work without restrictions on October 14, 1985. Complainant missed three days of work due to this injury.

8) Complainant informed Rucker, Complainant's foreman, or some other management representative of Respondent each time he was injured on the job. Respondent accepted each of Complainant's workers' compensation claims described in Findings of Fact Nos. 4, 5, 6, and 7 above. A representative of Respondent signed each of Complainant's SAIF claim forms.

9) During his employment with Respondent, Complainant took other time off from work to attend counseling sessions regarding Complainant's brother, to obtain eye glasses, to visit the dentist, and to visit the doctor. Rucker gave Complainant permission to take time off for these matters. Complainant was not paid for any of the time taken off.

10) Complainant's work performance was satisfactory. On one occasion where a batch of metal Complainant treated did not come out

right, Complainant and Harvey testified that it was due to the "cheap metal" that Rucker had purchased at an auction, and which was not the quality of metal that Rucker thought. Otherwise, Rucker and one of Complainant's foreman, Gorman, often praised Complainant's work. Wright interviewed Micky Hall, a foreman for Respondent who supervised Complainant for some period of time. In Hall's opinion, Complainant was not fired due to filing workers' compensation claims, but was fired because Complainant was not a particularly good worker. Hall was not present when Complainant was fired on October 14, 1985.

11) On October 5, 1985, four days before Complainant's last on-the-job injury, Complainant was arrested for driving while his license was suspended. Rucker wrote a letter of recommendation for Complainant to the presiding judge, requesting leniency for Complainant. Rucker also advanced \$300.00 for Complainant's bail; the money was to be treated as a draw against Complainant's future earnings from Respondent. The draw shows up on Respondent's payroll record for Complainant.

12) Between October 9 and October 14, 1985, Complainant called Rucker and informed him that the doctor had released Complainant to go back to work on October 14, 1985. Rucker told Complainant that they would talk about Complainant's position when he came to work on October 14, 1985.

13) Sometime between October 9 and October 14, 1985, Harvey heard Micky Hall, who was Harvey's foreman, say that Respondent could not

afford to have Complainant around because Complainant had had several accidents and Respondent's insurance was going up. Harvey also heard Rucker say something to the effect that he would have to replace Complainant because Complainant was hurt all the time, and Respondent's workers' compensation insurance was going up.

14) When Complainant met Rucker on October 14, 1985, Complainant presented Rucker with the release to return to work, and made a request to go back to work at the heat treater job "or a suitable job." Rucker said that he was going to have to let Complainant go because, due to Complainant's last accident, Rucker's insurance was going to triple and he could not afford it. Rucker said Complainant was too accident prone. The original release document was in Respondent's records when those records were reviewed by the Agency's investigator.

15) Respondent's payroll records for Complainant show the notation "Let go 10-14-85 due to accident record." Complainant heard that his notation was made by a secretary employed by Respondent. Sheila Thomquist, Respondent's office secretary, told the Agency's investigator that she had written the notation at Rucker's direction. Rucker confirmed this during an interview with Wright. Thomquist told Wright that there was concern within the company about Complainant's injuries, and that those injuries might raise Respondent's workers' compensation insurance rates.

16) During the investigation of Complainant's complaint, Wright interviewed Rucker three times. During the

first interview, Rucker told Wright that Complainant was not a safe worker and that this was the primary reason for terminating Complainant. Rucker did not want Complainant to stay on the job and get hurt again. Rucker acknowledged that he had told Complainant of Rucker's concern that SAIF would raise Respondent's workers' compensation insurance rates due to Complainant's injuries and claims. Rucker told Wright that this was a secondary reason for terminating Complainant. Rucker said Complainant was accident prone. During the second interview Rucker again said Complainant was accident prone and this was an appropriate and not illegal reason to fire an employee. After Wright advised Rucker that his stated reasons for firing Complainant may be unlawful, Rucker indicated that he and Complainant's foreman had examined Complainant's work between October 9 and October 14, 1985, and decided Complainant was doing poor quality work as a heat treater. Rucker said he had decided he could not let Complainant do that job any longer. During the third interview, Rucker told Wright that Complainant had "mentally aberrant behavior," and that this was one of the reasons for firing Complainant. Rucker added that Complainant's absenteeism due to injuries both on-the-job and off-the-job was a reason for Complainant's discharge.

17) When Complainant returned to work on October 14, 1985, the job of heat treater was still in existence, but was filled by a new worker, Joe Pepper. Since October 14, 1985, the heat treat position has become vacant at least three times. Mr. Pepper worked

as the heat treater for approximately two to four weeks and was then terminated. The heat treater position was then filled by a former employee, Don Edwards. Gary Harvey worked in the position after Edwards. Harvey was followed by a man whose first name was Robert. Complainant was never offered the heat treater job when it became available after October 14, 1985.

18) On October 14, 1985, the barman position and the knife grinder position were in existence. Complainant was qualified to do either of those jobs. Those jobs would have paid Complainant the same as the heat treater position; they required less responsibility, and about the same or lower level of skill; they existed at the same location, on the same shift, and for the same duration, that is, 40 hours per week, as the heat treater position. Complainant would have considered the barman or knife grinder positions as suitable replacements for the heat treater job. Since October 14, 1985, both the barman and grinder jobs have become vacant several times. Complainant has never been offered either of these jobs when they have become available.

19) Since October 14, 1985, Complainant worked for Barrett Temporary Services/Barrett Business Services. Complainant testified, and Employment Division records verify, that he earned \$425.25 while employed by Barrett. Complainant was not employed by another employer between October 14, 1985, and June 28, 1986.

20) Complainant regularly searched for other work after October 14, 1985. He applied at plastic molding companies, Standard Steel

company, Pacific Steel company, and Pacific Hull company. He applied to at least three businesses per week, which was required by the Employment Division to qualify for unemployment benefits. With the exceptions of a waiting week and a couple of the weeks during which Complainant worked for Barrett, he received unemployment benefits from October 23, 1985, until June 19, 1986. Respondent did not dispute or oppose Complainant's claim for unemployment benefits. Complainant would not have been eligible for those benefits if he had been discharged for good cause by Respondent.

21) On June 28, 1986, Complainant was hit by a car. Complainant's resulting injuries left him unable to work, and he made no claim for damages from Respondent for the period after June 28, 1986.

22) If Complainant had been employed by Respondent between October 14, 1985, and June 28, 1986, and had been paid at \$6.15 per hour for 40 hours per week, he would have earned \$9102.00. (40 hours at \$6.15/hour equals \$246.00 per week for 37 weeks.)

23) Complainant was angry and hurt when he was fired by Respondent. He had considered the heat treater job as one he performed well at, he liked, and he could do the rest of his life. Complainant writes on job applications that the reason he left his former employer, Respondent, is that he was fired due to on-the-job injuries. Complainant attributes his inability to get hired to the fact that he has to write that reason on applications. As a result of being fired and being

unemployed, Complainant has had to eat at churches, to buy his clothes at goodwill, to sell all of his tools and many of his personal belongings to pay rent and other bills, to move, and to borrow money from family and friends. Complainant has suffered considerable sleeplessness and loss of appetite. He has become depressed and unhappy with himself, and has become irritable with his family and friends.

At the time of hearing, Complainant no longer wished to be reinstated to a job with Respondent because he would be discharged by Respondent at the first opportunity.

ULTIMATE FINDINGS OF FACT

1) At all times material herein, Respondent was an employer who employed six or more persons within the State of Oregon.

2) Complainant was a worker employed by Respondent from approximately November 30, 1984, to October 14, 1985, when he was discharged by William Rucker, Respondent's president. Complainant worked as a barman, a knife grinder, and a heat treater. Before he was discharged, Complainant ordinarily worked eight hours per day, 40 hours per week, and at \$6.15 per hour.

3) While he was employed by Respondent, Complainant suffered four on-the-job injuries. Following each injury, Complainant reported the injury to Respondent and applied for workers' compensation insurance benefits. Respondent accepted all four of Complainant's claims for benefits. SAIF Corporation, Respondent's workers' compensation insurance carrier,

accepted all four of Complainant's claims and paid his medical expenses.

4) Complainant's last injury occurred on October 9, 1985. He was unconditionally released by his doctor to return to work, effective October 14, 1985. Between October 9 and October 14, 1985, Complainant called Respondent and said he was released to return to work on October 14. On October 14, 1985, Complainant informed Respondent that he sought reinstatement in his job as a heat treater or other suitable work, and Complainant gave Respondent the physician's written approval for Complainant to return to his former job.

5) On October 14, 1985, Rucker fired Complainant.

6) Between October 9 and October 14, 1985, Gary Harvey heard one of Respondent's foremen say that Respondent could not afford to have Complainant around because of Complainant's on-the-job injuries and because Respondent's workers' compensation insurance was going up. Harvey also heard Rucker say that he would replace Complainant because of Complainant's injuries and because Respondent's workers' compensation insurance was going up. Rucker told Complainant the same thing on October 14. Complainant's payroll record was marked by Respondent "Let go 10-14-85 due to accident record." Sheila Thornquist, Respondent's office secretary, told the Agency's investigator that there was concern within the company about Complainant's injuries, and that those injuries could raise Respondent's workers' compensation insurance rates. Rucker told the investigator that his primary reason for

firing Complainant was that he was not a safe worker, and his secondary reason was that Complainant's injuries would drive up Respondent's workers' compensation insurance rates. The above findings of fact lead to the following finding of fact: Complainant would not have been fired if he had not been a worker (1) who had had compensable injuries as determined by Respondent's acceptance of Complainant's claims under the Oregon Workers' Compensation Law, and (2) who had applied for benefits under that law.

7) On October 14, 1985, Complainant's former job of heat treater was in existence, but was not vacant. No suitable alternative job was available.

8) Complainant's former job became available within two to four weeks of October 14. Respondent did not offer the former job to Complainant. Thereafter, the former job became available at least two more times. Respondent did not offer the job to Complainant.

9) Other suitable jobs, namely the barman and the knife grinder jobs, became available after October 14. Respondent did not offer any of these available and suitable jobs to Complainant.

10) From October 14, 1985, until June 28, 1986, Complainant made reasonable efforts to obtain employment that he was qualified for and able to perform. He earned \$425.25 and received unemployment benefits during this period.

11) Complainant's net loss of compensation due to having been fired by Respondent totals \$8,676.75, which

represents \$9,102.00 in lost wages from October 14, 1985, to June 28, 1986, less \$425.25 earned in other employment during that period.

12) When he was discharged from the job that he was very satisfied by, Complainant was angry and hurt. He attributed his inability to find permanent work to the conditions under which he was fired by Respondent. He suffered considerable sleeplessness and loss of appetite. He became depressed, unhappy with himself, and irritable with his family and friends.

CONCLUSIONS OF LAW

1) At all times material herein, Respondent was an employer subject to the provisions of ORS 659.010 to 659.110 and 659.400 to 659.435.

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

3) The actions and inactions, and the motivations for those actions and inactions, of William Rucker described herein are properly imputed to Respondent.

4) Respondent discharged Complainant because Complainant applied for benefits provided for in ORS 656.001 to 656.794 and 656.802 to 656.824. This constitutes discrimination against Complainant with respect to the tenure of his employment, which is an unlawful employment practice in violation of ORS 659.410.

5) Respondent failed to reinstate Complainant to Complainant's former position of employment upon demand for such reinstatement when that

position became available. Complainant was not disabled from performing the duties of his former position. During the period when Complainant's former position was not available, Respondent failed to reinstate Complainant in any other position which was available and suitable. These inactions by Respondent constitute unlawful employment practices in violation of ORS 659.415.

6) The Commissioner of the Bureau of Labor and Industries has the authority to award money damages to any person aggrieved by an unlawful employment practice described in ORS 659.400 to 659.435. See ORS 659.435.

7) "Oregon law does not require the Commissioner of the Bureau of Labor and Industries to deduct unemployment compensation received by Complainant from a damage award of back wages. Unemployment compensation was created only to provide a substitute income from public funds and is not intended to be a source for paying damages to a worker who has been wronged by an employer's racial discrimination. Unemployment benefits are collateral benefits to the employee only and are not designed to be used to reduce the employer's liability for the consequences of unlawful employment practices." *In the Matter of Pioneer Building Specialties Co.*, 3 BOLI 123, 129 (1982); *aff'd without opinion, Pioneer Building Specialties Co. v. Bureau of Labor & Industries*, 63 Or App 871, 667 P2d

* The word "available" means a job "exists and is vacant." *Knapp v. City of North Bend*, 304 Or 34, 42, 741 P2d 505 (1987).

583 (1983), *citing McPherson v. Employment Division*, 285 Or 541 (1979).

8) 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 659.400 to 659.435, or to perform any act or series of acts reasonably calculated to carry out the purposes of said statutes, and the authority to eliminate the effects of an unlawful practice found and protect the rights of others similarly situated.

OPINION

Respondent was found in default pursuant to OAR 839-30-185(1)(a). Pursuant to OAR 839-30-190, Respondent made a request for relief from the default. The Hearings Referee denied Respondent's request, and the Commissioner hereby ratifies that denial of relief from default. In its Exceptions, Respondent asserted that only the Commissioner may decide whether to relieve a party from a default. Relying on OAR 839-30-025 (11), the definition of good cause, Respondent argues that the Hearings Referee cannot make that decision, and thus the hearing was improperly held.

Nothing in the definition section of the Hearings rules is intended to limit

* OAR 839-30-025(11) provides: "Good Cause means, unless otherwise specifically stated, that a party failed to perform a required act due to an excusable mistake or circumstance over which the party had no control. Good cause does not include a lack of knowledge of the law including these rules. The Hearings Referee will, except in the case of a request for relief from a default, determine what constitutes good cause."

the authority granted to the Hearings Referee by the Commissioner. The Hearings Referee has been "designated by the Commissioner to preside over all aspects of a contested case hearing * * *." OAR 839-30-025(12). "Upon designation of a Hearings Referee, the Commissioner delegates to the Hearings Referee the authority to * * * take any other action consistent with the duties of Hearings Referee." OAR 839-30-100(1)(k). Hearings Referees have made rulings in the past on requests for relief from default, and the Commissioner has adopted such rulings, as here, in the Final Order. See *In the Matter of Jack Mongeon*, 6 BOLI 194, 194-95 (1987). OAR 839-30-025 (11) is written as it is because there are Agency employees besides the Hearings Referee, such as Division Administrators, who may rule on a request for relief from a default. This occurs, for example, in cases where a party has been found in default for failing to request a hearing, and no hearings referee is involved in the matter.

Respondent complains in its Exceptions "that none of the documents provided to Respondent advised it that it was required to be represented by an attorney in filing an Answer or in filing a Request for Relief from Default." This complaint is without merit. As noted in Finding of Fact - Procedural number 4, the Agency sent Respondent a document entitled "Notice of Contested Case Rights and Procedures," as well as a copy of the Agency's Contested

Case Hearings Rules. The Notice states in a section labeled "Right to an Attorney and Representation at Hearing," that "all corporations must be represented by an attorney." The Hearings Rules define who a "party" is, and require that "all other charged parties, including government entities and corporations, must be represented by counsel." Counsel is defined as "an Attorney who is a member in good standing of the Oregon State Bar." OAR 839-30-025(7) and (15). The notice and rules were also sent to Respondent's attorney, who was Respondent's registered agent. ORS 9.310 defines an attorney as "a person authorized to represent a party in the written proceedings in any action, suit or proceeding * * *." ORS 9.320 requires "that the State or a corporation appears by attorney in all cases. Where a party appears by attorney, the written proceedings must be in the name of the attorney, who is the sole representative of the client of the attorney." It is axiomatic that ignorance of the law is no excuse for its violation. Respondent in this case had ample notice of its legal obligation to be represented by counsel in this matter.

In default situations, pursuant to ORS 183.415(6), the Agency must present a prima facie case in support of the Specific Charges and to establish damages. The credible testimony of Agency witnesses together with documentary evidence submitted was accepted and relied upon herein. The Agency has met its burden.

Respondent through William Rucker and Respondent's attorney asserted several lawful reasons for discharging Complainant. Rucker told the

Agency's investigator on different occasions that Complainant was not a safe worker, that he was doing poor quality work, that he had "mentally aberrant behavior," and that he had an absenteeism problem due to injuries suffered both on-the-job and off-the-job. In a document attached to Respondent's Request for Reconsideration of the Forum's Ruling on Respondent's Request for Relief from Default, Respondent asserted that Complainant was absent from work too often, that he performed his duties in a careless and negligent manner, and that said performance endangered Complainant and his fellow workers.

Notwithstanding the scarcity of evidence on the record to support these assertions, evidence on the record certainly establishes that Complainant's status as an injured worker who applied for benefits under the Workers' Compensation Laws played a sufficient part in Respondent's action to be said to have caused that action. In other words, Complainant's protected class membership played a key role in Respondent's action of firing Complainant and failing to reinstate Complainant to his former job or an available and suitable job. This constitutes substantial evidence of unlawful discrimination. See OAR 839-05-015.

In addition, evidence on the record showed that as soon as four days before Complainant's last on-the-job injury, Rucker wrote a letter of recommendation for Complainant and advanced \$300.00 to Complainant against his future earnings. This leads the Forum to infer that just before Complainant's last accident, Respondent was not considering firing

Complainant for the reasons Respondent asserted.

In its exceptions, Respondent states that "the Hearings Referee failed to deduct unemployment compensation received by Complainant." It asserts that there is no logical basis for awarding back pay and not deducting unemployment compensation received. It cites *Shaw v. Doyle Milling Co.*, 279 Or 251, 254, 683 P2d 82 (1984) wherein the trial court had deducted unemployment benefits from an award for lost wages. The correctness of that deduction in *Shaw* was not at issue before the appellate court. This Forum knows of no Oregon Appellate court cases which have directly addressed this issue.

The Commissioner agrees with and adopts the reasoning of the United States Supreme Court and the Ninth Circuit Court of Appeals on this issue. In a decision upholding the National Labor Relations Board's refusal to deduct unemployment benefits from an employee's back pay award for discriminatory discharge, the US Supreme Court said:

"To decline to deduct state unemployment compensation benefits in computing back pay is not to make the employees more than whole, as contended by respondent. Since no consideration has been given or should be given to collateral losses in framing an order to reimburse employees for their lost earnings, manifestly no consideration need be given to collateral benefits which employees may have received.

"But respondent argues that the benefits paid from the

Louisiana Unemployment Compensation Fund were not collateral but direct benefits. With this theory we are unable to agree. Payments of unemployment compensation were not made to the employees by respondent but by the state out of state funds derived from taxation. True, these taxes were paid by employers, and thus to some extent respondent helped to create the fund. However, the payments to the employees were not made to discharge any liability or obligation to respondent, but to carry out a policy of social betterment for the benefit of the entire state * * *. We think these facts plainly show the benefits to be collateral." *National Labor Relations Board v. Gullett Gin Co.*, 340 US 361, 364, 27 LRRM 2230 (1951) (citations omitted).

In 1983, the US Court of Appeals, Ninth Circuit, affirmed a case from the US District Court for the District of Oregon. Citing the *Gullett Gin* case with approval, the court held "that unemployment benefits received by a successful plaintiff in an employment discrimination action are not offsets against a back pay award." *Kauffman v. Sidereal Corp.*, 695 F2d 343, 346-46, 32 FEP Cases 1710, 1712-1713 (9th Cir 1982).

Finally, Respondent stated in its Exceptions that "there is no provision providing for penalties or punitive damages for violation of ORS 659.410 or ORS 659.415." The Forum is not sure about what Respondent is complaining since the Commissioner has not ordered penalties or punitive damages. Besides lost wages, the Commissioner

has ordered damages only for mental suffering. Damages for humiliation and mental suffering are damages for actual harm in a case brought pursuant to the Handicapped Persons Civil Rights Act, ORS 659.400 *et seq.* They are not awarded as a penalty for unlawful discrimination. *Montgomery Ward and Co., Inc. v. Bureau of Labor*, 42 Or App 159, 162, 600 P2d 452 (1979).

ORDER

NOW, THEREFORE, as authorized by 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 KENNETH C. HAVENS in the amount of ELEVEN THOUSAND ONE HUNDRED SEVENTY SIX DOLLARS AND SEVENTY FIVE CENTS (\$11,176.75) plus interest upon \$8,676.75 thereof compounded and computed 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 \$8,676.75 in damages for lost wages due to Respondent's unlawful employment practices and \$2,500 in damages for the mental distress Complainant suffered as a result of the unlawful practices.

2) Cease and desist from discharging any employee because that employee has applied for workers' compensation benefits or invoked or

utilized the procedures provided for in ORS 656.001 to 656.794 and 656.802 to 656.824.

3) Take all appropriate steps to ensure that any worker who has sustained a compensable injury will be reinstated to his or her former job or the first suitable job available after the employee's demand for such reinstatement, provided that the employee is not disabled from performing the duties of such job.

**In the Matter of
WAYLON & WILLIES, INC.,
an Oregon corporation, and Herbert
Earl Milholland, Respondents.**

Case Number 49-86
Final Order of the Commissioner
Mary Wendy Roberts
Issued February 29, 1988.

SYNOPSIS

Respondents willfully failed to pay Claimant wages, including overtime wages, due immediately upon termination. Claimant was an employee, not an independent contractor. Respondent Milholland was the successor employer to the Respondent corporation after it was involuntarily dissolved; as the successor, Respondent Milholland was personally liable for Claimant's wages earned before, on, and after the date the corporation was dissolved. Respondents had a legal duty to know

the amount of the wages due to Claimant and to maintain payroll records. Respondent Milholland failed to show that he was financially unable to pay the wages at the time they accrued, and thus was liable for civil penalty wages. The Agency's policy of not holding successor employers liable for penalty wages was not applicable in this case because Respondent Milholland was individually responsible for Claimant's unpaid wages earned after the date the corporation was dissolved. ORS 652.140, 652.150, 652.310(1), 653.045, 653.261; OAR 839-20-030.

The above-entitled case came on regularly for hearing before Douglas 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 January 7, 1988, in Room 311 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, a Program Coordinator for the Wage and Hour Division (WHD) of the Agency; Claimant Davida Marie Raget, and Ann Seda-Ruiz (formerly Tarpley), a former employee of Employers. Waylon and Willies, Inc., and Herbert Earl Milholland, (hereinafter referred to as Employers), 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 Findings of Fact (Procedural and

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

FINDINGS OF FACT – PROCEDURAL

1) A wage claim was filed with the Agency on January 10, 1986, by Claimant. She 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 May 17, 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 the Agency's investigation. The Order of Determination found that Employers owed a total of \$8,381.90 in wages and \$3,017 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 contained in the Order of Determination.

4) On June 9, 1987, Employers filed a request for an administrative hearing and an answer to the charges. That answer denied that Employers owed Claimant past due wages of \$8381.90, or that Employers owed Claimant \$3017 in penalty wages. As an affirmative defense, Employers alleged that Employer Milholland had no individual responsibility for Claimant's

compensation, as Milholland was an agent of the Employer corporation. In addition, Employers alleged that Claimant was not an employee, but was hired as an independent contractor. Employers alleged further that Claimant removed property from Employers' business premises. Finally, Employers alleged, in the alternative, that Employers were financially unable to pay Claimant.

5) On June 29, 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.

6) On September 11, 1987, the Hearings Unit received Employers' motion for production of evidence. The Hearings Referee directed the Agency to produce information or documents required to be disclosed by ORS 192.500 to Employer by September 23, 1987.

7) On September 14, 1987, the Forum notified Employers and the Agency that a new Hearings Referee had been appointed to hear the contested case.

8) On September 16, 1987, Employers' attorney, Robert J. Custis, requested a continuance of the hearing because his office would not have sufficient time to look over the documents requested from the Agency. The Hearings Referee denied Employers' request, pursuant to OAR 839-30-070 (7), because Employers had not

shown good cause for a postponement.

9) On September 24, 1987, Employers' attorney renewed his request for a continuance. The reason for the request was that Employers had not received any of the information which was requested in the motion for production of evidence. The Hearings Referee granted the request for a continuance after verifying that the requested documents had not been produced due to a state employees strike.

10) Pursuant to OAR 839-30-071, the Agency filed a Summary of the Case, including documents from the Agency's file. Although permitted to do so under the provisions of OAR 839-30-071, Employers did not submit a Summary of the Case.

11) On November 5, 1987, this Forum sent an Amended Notice of Hearing to Employers indicating the new time and place of the hearing. That notice was also sent to the Agency and Claimant.

12) On November 20, 1987, Employers' attorney filed a motion to withdraw as attorney of record because the attorney had received no payment on the Employers' account and had lost contact with the Employers. The Forum granted the motion on December 2, 1987, and, by letter, notified Employers and the Agency of that ruling. Additionally, the Forum notified Employers by letter that, pursuant to ORS 9.320 and OAR 839-30-025(15)(b), a corporation must be represented by an attorney who is a member in good standing with the Oregon State Bar.

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

14) On January 7, 1988, the Forum sent Employers a Notice of Default, which advised Employers that pursuant to OAR 839-30-185 and 839-30-190 they had ten days from the date of issuance of the Notice to request relief from default. No request for relief from Employers was received within ten days by the Forum.

15) On February 3, 1988, the Hearings Unit of the Bureau of Labor and Industries mailed copies of the Proposed Order in this contested case to all persons listed on the Certificate of Mailing. Exceptions, if any, were due in the Hearings Unit Office by 5 p.m. on February 16, 1988. Exceptions to this Order were not received.

FINDINGS OF FACT – THE MERITS

1) During all times material herein, Employers did business as Waylon & Willie's, a bar located in Jefferson, Oregon. Employers employed one or more persons in the State of Oregon. Employers business grossed less than \$362,500 per year.

2) Waylon & Willies, Inc. was an Oregon corporation, incorporated on July 7, 1982. During all times material herein, Herbert Milholland was its sole stockholder, registered agent, and president. The corporation was involuntarily dissolved on September 13, 1985. The business closed on October 5, 1985. Between September 13 and October 5, 1985, the business continued to operate under the same name, at the same location, with the same employees, using the same

suppliers, and providing the same services as it had before September 13, 1985.

3) On or about July 1, 1985 to on or about October 5, 1985, Employers employed Claimant as a bartender and bookkeeper. Claimant was hired for an indefinite period. Employers furnished all of the equipment and supplies Claimant used on the job. Employers detailed and controlled how Claimant was to perform her duties. Claimant and other employees were paid on an hourly basis. Claimant was not allowed to hire her own employees. Claimant was carried on Employers' books as an employee. Claimant worked for only the Employers during all times material herein. She derived no benefits other than wages from her work for Employers.

4) On or about July 1, 1985, Employers and Claimant entered into an oral agreement that Claimant would perform bookkeeping work for \$7.00 per hour.

5) On or about July 7, 1985, Employers and Claimant entered into an oral agreement that Claimant would perform bartender and related work for \$4.00 per hour.

6) On or about July 10, 1985, Employers and Claimant entered into an oral agreement that, effective July 11, Claimant would perform bartender and other duties necessary to running the bar for \$7.00 per hour.

7) Claimant's records and testimony reveal the following information, which is accepted as fact: she worked 1046 total hours; 1026 of those hours were worked at the agreed rate of \$7.00 per hour; 20 of those hours were

worked at the agreed rate of \$4.00 per hour; of the total hours, 514 were hours worked in excess of forty hours per week; of the overtime hours, 496.5 hours were worked at the agreed rate of \$7.00 per hour; and, 17.5 hours were worked during a week in which Claimant worked 20 hours at the agreed rate of \$4.00 per hour and 37.5 hours at the agreed rate of \$7.00 per hour. Claimant and Employers had no agreement about overtime hours.

8) Pursuant to OAR 839-20-030 (Payment of Overtime Wages) and Agency policy, the agency calculated the total earnings of Claimant to be \$9,051.90. The total reflects the sum of the following:

1026 hours @ \$7.00 /hour =	\$7,182.00
20 hours @ \$4.00 /hour =	80.00
496.5 hours at the over- time rate of \$3.50 (the ad- ditional one-half over the \$7 agreed rate) =	1737.75
17.5 hours at the overtime rate of \$2.98 (the additional one-half over the weighted average rate of \$5.96 per hour earned in the week during which both agreed rates were earned) =	52.15
TOTAL EARNED =	\$9,051.90

9) Employers normally paid employee wages every two weeks. Claimant was not paid every two weeks; Employers had asked that Claimant "hold off" in taking her wages. Employers authorized Claimant to take draws against her earned wages, and

those draws were recorded on Claimant's time cards.

10) Claimant received \$570.00 in cash from Employers. She also received a television set valued at \$100.00. In sum, Claimant received cash and products worth \$670.00 from Employers as compensation for her work.

11) Claimant stored several beer signs belonging to Employers. The signs were not transferred to Claimant in lieu of wages; she stored them at Employers' request. Claimant has no ownership interest in the signs; they are available to Employers at any time. Claimant does not possess any other property belonging to Employers.

12) When the business closed on October 5, 1985, Employers had assets available with which Claimant could have been paid.

13) Employers alleged in their answer an affirmative defense of financial inability to pay the wages due at the time they accrued; they did not provide any such evidence for the record.

14) Penalty wages were computed, in accordance with Agency policy, on the Wage Transcription and Computation Sheet as follows: \$9,051.00 (the total wages earned) divided by 90 (the number of days worked during the claim period) equals \$100.58 (the average daily rate of pay). This figure of \$100.58 is multiplied by 30 (the number of days for which penalty wages continued to accrue) for a total of \$3,017.40 in penalty wages. Pursuant to Agency policy, this figure was rounded to the nearest dollar, that is \$3,017.00. This figure is set forth in the Order of Determination.

15) Testimony of Claimant was found to be credible. She had the facts readily at her command and her statements were supported by documentary records. There is no reason to determine the testimony of the Claimant to be anything except reliable and credible.

ULTIMATE FINDINGS OF FACT

1) During all times material herein, the Employers did business as Waylon & Willies, Inc., in the State of Oregon, and employed one or more persons in the operation of that business.

2) Claimant was employed as a bookkeeper and bartender by Employers from July 1, 1985, to October 5, 1985.

3) During the wage claim period, Employers and Claimant had oral agreements whereby Claimant would be paid \$7.00 per hour for bookkeeping work, and for her bartending work she was to be paid \$4.00 and later \$7.00 per hour.

4) Claimant's last day worked was October 5, 1985, the day the business permanently closed.

5) Employers knowingly failed to pay for a total of \$8,381.90 in earned, due, and payable wages. Employers have not paid Claimant the wages owed and more than 30 days have elapsed from the due date of those wages.

6) Penalty wages were computed and assessed by the Agency pursuant to ORS 652.150 and Agency policy in the amount of \$3,017.

7) Employers have made no showing that they were financially unable to pay at the time wages accrued.

CONCLUSIONS OF LAW

1) During all times material herein, Waylon & Willies, Inc. and Herbert Earl Milholland were employers and Claimant was an employee, subject to the provisions of ORS 652.110 to 652.200, ORS 652.310 to 652.405, and ORS chapter 653.

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

3) Employers were notified of their 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) Employers violated ORS 652.140(1) by their failure to pay Claimant all wages earned and unpaid immediately upon the termination of Claimant's employment on October 5, 1985.

5) Employers' failure to pay the wages owed to Claimant was knowing, intentional, and voluntary, and therefore constitutes a willful failure to pay in violation of ORS 652.150.

6) Employers have not avoided liability for this penalty, as they have not shown that they were financially unable to pay wages owed to Claimant at the time the wages accrued.

7) Under the facts and circumstances of this record, and according to the law applicable to this matter, the Commissioner of the Bureau of Labor and Industries has the authority to order Employers to pay Claimant her earned, unpaid, due, and payable wages and the penalty wages, plus interest on both sums.

OPINION

The Employers failed to appear at the hearing, and thus have 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); *In the Matter of Jack Mongeon*, 6 BOLI 194, 201 (1987).

Employers' defenses set forth in their answer are responded to as follows. First, Employers generally denied all of the basic elements of the wage claim. That is, they denied that wages were earned during the wage claim period. They denied the claimed rates of pay, that Claimant worked the number of hours claimed, and the claimed overtime hours. They denied the amount of wages claimed earned and owed. In addition, they denied that they willfully failed to pay wages

owed and that 30 days had past since the wages became due. They denied Claimant's average daily wage amount, and that they owe Claimant the amount of penalty wages claimed.

In a default situation where the employer's total contribution to the record is his or her request for a hearing and an answer which contains nothing other than unsworn and unsubstantiated assertions, those assertions are overcome wherever they are controverted by other credible evidence on the record. *Mongeon, supra*.

The evidence on the record establishes that Employers owe Claimant \$8,381.90 of earned, unpaid, due, and payable wages, and that Employers have willfully failed to pay those wages. This evidence is credible, persuasive, and the best evidence available, given Employers' 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 Employers submitted, the prima facie case has not been effectively contradicted or overcome.

Second, as an affirmative defense, Employer Herbert Earl Milholland denied any individual responsibility for compensation due to Claimant because Milholland was employed as an agent of Employer Waylon & Willies, Inc.

The record shows that the corporation dissolved on September 13, 1985, and that Milholland continued to operate the same business after that date. The issue, then, is whether Milholland was an "employer" liable for wages earned before, on, and after September 13. This Forum has previously

addressed this issue. *In the Matter of Anita's Flowers and Boutique*, 6 BOLI 258, 267-68 (1987), the Forum said,

"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 that Employer Milholland is a "successor" employer within the meaning of ORS 652.310(1), and therefore is subject to the provisions of ORS 652.110 to 652.200, ORS 652.310 to 652.405, and ORS chapter 653. He is, therefore, liable for employee wages earned before, on, and after September 13, 1985.

Third, Employers contended that Claimant was not an employee, but was hired as an independent contractor. Oregon statutory law does not define "independent contractor" for purposes of wage claim law. This Forum has previously followed Oregon case law to ascertain the distinction between an employee and an independent contractor. See *In the Matter of All Season Insulation Company, Inc.*, 2 BOLI 264, 274-279 (1982), and the Oregon cases cited therein. Oregon case law holds that the primary question is to what extent does the employer have the right to control and direct the details and manner of performance of the worker's work. It focuses on control over the manner and

means of accomplishing a result rather than the result itself, that is, control over how work will be done rather than just what work will be done. If answering the question above establishes that the worker is the subordinate party, depending on the employer's business, the worker is an employee rather than an independent contractor.

In this case, the evidence on the record establishes that Employers had the right to control and direct the details and methods of Claimant's work. Claimant provided to Employers services which were an integral part of Employers' business, was hired for an indefinite period of time, worked exclusively for Employers on an hourly basis, used only Employers' equipment and supplies, was carried on the books as an employee, and derived no benefits other than wages for her work. This evidence establishes that Claimant was an employee of Employers.

Fourth, Employers alleged that Claimant removed certain personal property from the business premises. There is insufficient evidence on the record supporting that allegation.

Finally, Employers alleged in the alternative that if wages were found to be due, then Employers were financially unable to pay Claimant. This Forum has repeatedly held that it is an employer's burden to show the employer's financial inability to pay a claimant's wages. See ORS 652.150, ORS 183.450(2), and OAR 839-30-105(10). See also *In the Matter of Jorion Belinsky*, 5 BOLI 1, 10 (1985). Employers have failed to show that they were financially unable to pay Claimant's wages at the time they accrued.

The record establishes that Employers have violated ORS 652.140 as alleged, and that they owe Claimant penalty wages pursuant to ORS 652.150.

Employers' denial that their failure to pay wages was willful was overcome by evidence on the record, namely Claimant's testimony and records. Claimant's testimony was that Employers acknowledged that Claimant's wages were due, and asked Claimant to "hold off" receiving them. Employers had a legal duty to know the amount of wages due to Claimant and to maintain payroll records. ORS 653.045. Willfulness does not imply or require blame, malice, wrong, perversion or moral delinquency, but only requires that that which is done or omitted is intentionally done with knowledge of what is being done and that the actor or omittor be a free agent. *Sabin v. Willamette Western Corp.*, 276 Or 1083, 557 P2d 1344 (1976). Here, evidence established that Employers knew they owed Claimant wages and intentionally failed to pay those wages. There was no evidence that Employers were not free agents. Thus, Employers' action or inaction was willful under ORS 652.150.

The Agency has a policy of not holding "successor" employers liable for penalty wages under ORS 652.150. See *Anita's Flowers, supra*. That policy, however, is not applicable in this case because Employer Milholland is individually responsible for the unpaid wages earned after September 13, 1985, when the corporation was dissolved. Therefore, Milholland is individually liable for penalty wages which accrued due to his willful failure

to pay the wages earned after September 13, 1985.

ORDER

NOW, THEREFORE, as authorized by ORS 652.332, the Commissioner of the Bureau of Labor and Industries hereby orders WAYLON & WILLIES, INC., an Oregon corporation, and HERBERT EARL MILHOLLAND, individually, to deliver to the Hearings Unit of the Bureau of Labor and Industries, 305 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 DAVIDA MARIE RAGET in the amount of ELEVEN THOUSAND THREE HUNDRED NINETY EIGHT DOLLARS AND NINETY CENTS (\$11,398.90) representing \$8,381.90 in gross earned, unpaid, due, and payable wages, less legal deductions previously taken by the Employers; and \$3,017.00 in penalty wages, plus interest at the rate of nine percent per year on the sum of \$8,381.90 from November 1, 1985, until paid and nine percent interest per year on the sum of \$3,017.00 from December 1, 1985, until paid.

In the Matter of RAUL MENDOZA, dba Northwest Tree Thinning Co., Inc. and Orakee Reforestation, Inc., Respondent.

Case Number 04-87
Final Order of the Commissioner
Mary Wendy Roberts
Issued March 2, 1988.

SYNOPSIS

Respondent, a farm labor contractor, made a misrepresentation and false statement on his license application regarding a substantive fact that was influential in the Commissioner's decision to grant or deny a license, where Respondent asserted that he was not a plaintiff or defendant in any court action or proceeding, when he knew he was a defendant in a law suit in which plaintiffs alleged wages were owed, farm labor contractor laws were violated, and that unauthorized deductions had been made from wages. The Commissioner denied a farm labor contractor license to Respondent. ORS 658.440(2)(a); OAR 839-15-520(1)(a), 839-15-140.

The above-entitled contested case came on regularly for hearing before Douglas A. McKean, designated as Hearings Referee by Mary Roberts, the Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was conducted on November 23, 1987, in Room 311 of the State Office Building, 1400 S.W. Fifth Avenue, Portland, Oregon. Lee Bercot, Hearings 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. Raul Mendoza, dba Northwest Tree Thinning Co., Inc. and Oralee Reforestation, Inc. (hereinafter the Contractor) was represented by Robert A. Bennett, Attorney at Law. The Hearings Referee called as witnesses Lee Bercot, Mary L. Lewis, an attorney with Oregon Legal Services; and William F. Pick, former Compliance Specialist with the Agency. The Contractor cross-examined those witnesses. The Contractor testified for himself and called Jack Angove as a witness.

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

FINDINGS OF FACT – PROCEDURAL

1) By a notice dated July 21, 1987, the Agency informed the Contractor that the Agency intended to deny his application for a Farm Labor Contractor's license. The notice cited as the basis for this denial the Contractor's failure to comply with ORS 658.405 to 658.475 by making a misrepresentation, false statement, and certification on his June 1987 license application that he was not a plaintiff or defendant in any court action or proceeding when, in fact, he was a defendant in a civil law suit. This violation constitutes grounds for denial of a license application pursuant to ORS 658.445(1) and OAR 839-15-520(1)(a). The notice was served on the Contractor on or before July 30, 1987.

2) By a letter dated July 28, 1987, the Contractor requested a hearing on the Agency's intended action.

3) On August 14, 1987, the Agency received Contractor's answer to the Notice of Proposed Denial of Farm Labor Contractor License. In his answer, Contractor admitted that he did not state that he was a plaintiff or defendant in any court action or proceeding, but denied that this admission constituted a misrepresentation or false statement. Contractor stated that he believed in good faith that the case had been settled and would be dismissed upon completion of paperwork, and that he believed the civil complaint lacked complete merit.

4) 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 Hearings Referee.

5) With this notice, the Contractor received a document entitled "Notice of Contested Case Rights and Procedures," containing the information required by ORS 183.413. At the commencement of the hearing Contractor stated that he had read the document and had no questions about it.

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

7) The Hearings Unit sent a copy of the Proposed Order in this matter to Contractor indicating that contractor had 10 days to file exceptions thereto. The Hearings Unit received no exceptions.

FINDINGS OF FACT – THE MERITS

1) In March 1986, a civil complaint No. 86-C-10639 was filed in Marion County Circuit Court by Oregon Legal Services on behalf of Javier Lara, Elio Manriquez, and Catarino Meza. Contractor was named as a defendant in the complaint, which was served on him on or about May 23, 1986.

2) The complaint was for unpaid wages, violations of the Farm Labor Contractors Act, and unauthorized deductions from wages. A co-defendant on the complaint was Nasairo Rodriguez, with whom Contractor had a subcontract. Plaintiffs were employees of Rodriguez. Contractor paid Rodriguez the amounts agreed upon pursuant to the subcontract.

3) Contractor hired attorney Robert Bennett to represent him soon after he was served with the civil complaint. Contractor exchanged letters and telephone calls with Bennett throughout the course of the court action. In June or July 1986, the court action was referred to arbitration by the clerk of the court. Plaintiffs' response to the arbitration referral was that the case was not ready for arbitration because discovery had not been completed. Subsequently, Contractor's attorney made a request to take the depositions of the plaintiffs in October 1986. Plaintiffs' attorney, Mary Lewis, responded that she was unable to schedule plaintiffs' depositions in October. In March 1987, Lewis wrote to Bennett regarding settlement of the case. On March 9, 1987, Bennett wrote to Contractor that Lewis had made an offer to settle the case. In May 1987, Lewis again wrote to Bennett to find out if Contractor wished to settle the case. On May

13, 1987, Bennett wrote back to Lewis saying he would contact Contractor about settlement, and then get back in touch with Lewis. Also on May 13, Bennett sent a letter to Contractor advising him about Lewis' offer to settle the case. On June 17, 1987, Bennett wrote to Jack Angove, Contractor's accountant, to clarify the proposed settlement amount and to suggest a settlement offer. Subsequently, Contractor authorized Bennett to make a settlement offer. On June 25, 1987, Bennett wrote to Lewis with a settlement offer. On July 14, Bennett again wrote to Lewis to inquire about the settlement. On July 15, 1987, Lewis told Bill Pick of the Agency that she expected the case against Contractor to settle in the near future. On July 28, 1987, Bennett again wrote to Lewis regarding settlement and to advise her that Contractor's license application had been denied. Lewis responded by telephone that plaintiffs rejected Contractor's offer, but that settlement was still possible. At no time during this period of March to July 1987 had Contractor ever paid any money to settle the case. Contractor knew that his attorney was working actively on the case. No one had ever told Contractor that the court action was either settled or dismissed.

4) On June 10, 1987, no settlement had been reached on civil complaint no. 86-C-10639. The court action was pending. It was still pending on the date of this hearing concerning Contractor's license application.

5) On June 10, 1987, Contractor made and signed a written application to the Agency for a forest labor contractor's license.

6) The application was filed out by Jack Angove, a certified public accountant hired by Contractor to handle all of Contractor's accounting records and financial affairs. Angove manages Contractor's business checking account. Contractor provided Angove with all of the information necessary to complete the farm/forest labor contractor license application. Contractor told Angove that there was a court action against him, but that it was Contractor's understanding that the action had been settled or dropped because it had been such a long time since anything had happened on the case. Angove relied on the statement in the application, at 22.E., that the information supplied on the application by the Contractor was "true and correct to the best of my [Contractor's] knowledge." Contractor read and signed the application.

7) On his application, Contractor asserted that he was not "a plaintiff or defendant in any court action or proceedings."

8) On July 20, 1987, Contractor wrote a letter to and spoke in person with Christine Hammond, Deputy Administrator of the Wage and Hour Division of the Agency. Contractor wrote that the question in the application

"regarding being a plaintiff or defendant in any court action or proceedings was marked 'NO' in error. At the time, I was under the assumption that the suit regarding Mr. Nasairo Rodriguez had been taken care of due to the period of time that had elapsed since I had heard anything concerning this. (approximately 9-10 months) * * * I

regarded the suit mentioned above as being settled * * *."

When Contractor met with Hammond, he made statements to her which were similar to those in the letter. When Hammond advised Contractor that the Agency had evidence that his attorney was actively negotiating with Oregon Legal Services about the court action, Contractor "acted like he didn't understand that any action was going on with regard to the Oregon Legal Services suit."

9) Contractor's credibility was found to be low. Inconsistencies existed in his sworn testimony at hearing. Some of the inconsistent statements may have been due to the fact that English is not Contractor's native language, and he apparently had some difficulty understanding the questions. More important were the inconsistencies in his stated knowledge of the status of the court action. For example, he testified that he was in contact with his attorney by telephone and by letter throughout the period that the court action had been pending, including during May and June 1987, when discussions regarding a settlement were active. Yet he told Angove and the Agency that he thought the case either was settled or had been dropped "due to the period of time that had elapsed since I had heard anything concerning this." Accordingly, Contractor's testimony is given less weight when it conflicts with other credible evidence in the record.

ULTIMATE FINDINGS OF FACTS

1) In March 1986, a civil complaint was filed in Marion County Circuit Court. The complaint named Contractor as a defendant. The complaint was

served on Contractor during May 1986. The complaint alleged claims for unpaid wages, violations of the Farm Labor Contractors law, and unauthorized deductions from wages.

2) Contractor hired an attorney to represent him in the court action soon after he was served with the complaint. Contractor exchanged letters and telephone calls with his attorney throughout the course of the court action, which was still pending on the date of Commissioner's hearing. During May 1987, Contractor was in contact with his attorney regarding settlement negotiations. At no time on or before June 10, 1987, did Contractor pay any money to settle the court action, or did anyone advise Contractor that the court action was settled or otherwise resolved or dismissed.

3) On June 10, 1987, the court action against Contractor was still pending, and Contractor knew that fact.

4) On June 10, 1987, Contractor had an application for a forest labor contractor license prepared. He read, and signed the application. On the application, Contractor asserted that he was not "a plaintiff or defendant in any court action or proceedings." Above his signature, the application contained a statement that the information on the application was "true and correct to the best of my [Contractor's] knowledge."

5) Contractor intended to mislead or deceive the Agency.

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 applying to be licensed as a farm/forest labor contractor with regard to the forestation or reforestation of lands in the State of Oregon during times material herein, the Contractor was and is subject to the provisions of ORS 658.405 to 658.475.

3) Contractor violated ORS 658.440(2)(a) by making a misrepresentation or false statement in the application for a license.

4) Under the facts and circumstances or 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 deny a license to Contractor to act as a farm/forest labor contractor.

OPINION

The basic facts of this case are not in dispute. The issue is whether the Contractor's answer of "no" to the question, "Are you a plaintiff or defendant in any court action or proceedings?" constitutes a "misrepresentation, false statement or willful concealment," when the Contractor was, in fact, a named defendant in a court action. The facts on the record reveal that the Contractor knew that he was a named defendant in the action. The Contractor's assessment of his liability in the court action, or his opinion about its merits, is irrelevant. In order to resolve the issue, the Forum must first find the definitions for "misrepresentation," "false statement," and "willful concealment." These three words or phrases are not defined in either the Farm Labor Contractors statutes or the rules.

ORS 658.440(2) provides that

"No person acting as a farm labor contractor, or applying for a license to act as a farm labor contractor, shall: (a) Make any misrepresentation, false statement or willful concealment in the application for a license."

OAR 839-15-520(1) provides that

"The following violations are considered to be of such a magnitude and seriousness that the Commissioner or the Commissioner's designee will only propose to deny or refuse to renew a license application or to suspend or revoke a license: (a) Making a misrepresentation, false statement or certification or willfully concealing information on the license application."

The Oregon Legislature wrote ORS 658.440(2)(a) to prohibit an applicant for a farm labor contractor license from making any "misrepresentation, false statement or willful concealment in the application for a license." The Legislature drafted this subsection with the three prohibited actions listed in the alternative. It is clear that they intended to prohibit three different types of actions.

This Forum, like a court, must construe a statute as to give effect to every section, clause, phrase or word of the legislative act. *Murphy v. Nilsen*, 19 Or App 292, 527 P2d 736 (1974). Since a finding of a violation of this statute has the consequence, pursuant to OAR 839-15-520(1)(a), of a license denial, the statute will be strictly construed.

Misrepresentation

Misrepresentation is defined in *Black's Law Dictionary* 1152 (Rev. 4th ed. 1968) (hereinafter *Black's*) as

"Any manifestation by words or other conduct by one person to another that, under the circumstances, amounts to an assertion not in accordance with the facts."

The Oregon Court of Appeals has said that

"a 'misrepresentation' is an assertion made by one party to another which is not in accord with the facts." *Ellison v. Watson*, 53 Or App 923, 633 P2d 840, 843 (1981).

The legislature did not require that a misrepresentation be made willfully. In comparison, it did require that a concealment be committed willfully. The omission of any word next to "misrepresentation" which would show an element of intent leads the Forum to believe that the Legislature did not require that a misrepresentation include an intention to deceive or mislead. However, this Forum does not believe that the Legislature intended that a false assertion, such as an erroneous zip code number listed on a license application, would be grounds for a license denial. The Forum believes that a misrepresentation which justifies the denial of a license must be:

- (1) of a substantive fact which is influential in the decision to grant or deny a license, and
- (2) made by an applicant who knew or should have known the truth of the matter asserted.

Accordingly, a "misrepresentation," for purposes of ORS 658.440(2)(a) and OAR 839-15-520(1)(a), means an assertion made by a license applicant which is not in accord with the facts, where the applicant knew or should

have known the truth of the matter asserted, and where the assertion is of a substantive fact which is influential in the Commissioner's or the Commissioner's designee's decision to grant or deny a license.

False Statement

Black's, at 725, lists definitions for "false statement" from court cases around the country. Among the definitions are the following:

"the phrase means something more than merely untrue or erroneous, but implies that statement is designedly untrue and deceitful, and made with intention to deceive person to whom false statement is made or exhibited."

"an incorrect statement made or acquiesced in with the knowledge of incorrectness or with reckless indifference to actual facts and with no reasonable ground to believe it correct."

"statement made knowingly false, or made recklessly without honest belief in its truth, and with the purpose to mislead or deceive."

"more than erroneous or untrue and import intention to deceive."

The Oregon Supreme Court has held that

"Statements are not false, as that word is used in the Corrupt Practices Act, if any reasonable inference of opinion or of correct fact can be drawn therefrom." *Thorn-ton v. Johnson*, 253 Or 342, 453 P2d 178, 188 (1969).

Although a court's definition of a phrase, as it is used in another statute, is not binding on this Forum, the court's treatment of the phrase is instructive.

Thus, it appears that "false statement," by definition, includes the elements of:

- (1) knowledge of the incorrectness or reckless indifference to the actual facts, and
- (2) intention to mislead or deceive.

Just because a statement contains an ambiguity and permits an erroneous inference to be drawn does not mean that the statement violates the statute. Additionally, as with the Forum's decision regarding the word "misrepresentation," a false statement which justifies the denial of a farm labor contractor license must be about a substantive matter which is influential in the decision to grant or deny a license.

Accordingly, a "false statement," for purposes of ORS 658.440(2)(a) and OAR 839-15-520(1)(a), means an incorrect statement made with knowledge of the incorrectness or with reckless indifference to the actual facts, and with the intention to mislead or deceive. The "false statement" must be about a substantive matter which is influential in the Commissioner's or the Commissioner's designee's decision to grant or deny a license.

Willful Concealment

Black's, at 360, defines "concealment" as

"a withholding of something which one knows and which one, in duty, is bound to reveal."

The Oregon Supreme Court has held that the term "willful," as it appears

in ORS 652.150 of the Wage Collection laws, means that the employer knew what it was doing, intended to do it, and was a free agent. *Sabin v. Willamette Western Corp.*, 276 Or 1083, 557 P2d 1344 (1976). This Forum has adopted this definition of "willful" where it occurs in other statutes enforced by the Bureau of Labor and Industries, and similarly adopts it for purposes of ORS 658.440(2)(a) and OAR 839-15-520(1)(a).

As with "misrepresentation" and "false statement," the concealment must be of a substantive matter which is influential in the decision to grant or deny a farm labor contractor license.

Accordingly, a "willful concealment," for purposes of ORS 658.440(2)(a) and OAR 839-15-520(1)(a), means a withholding of something which an applicant knows and which the applicant, in duty, is bound to reveal; said withholding must be done knowingly, intentionally, and with free will. The "willful concealment" must be of a substantive matter which is influential in the Commissioner's or the Commissioner's designee's decision to grant or deny a license.

Conclusion

This case involves either a possible misrepresentation or a possible false statement, since an assertion was made to a direct question on the license application. It is not a "willful concealment" case because that occurs where an applicant fails to reveal the existence of some fact known to the applicant, that is, the applicant gives no information, when the applicant has a duty to reveal the information.

The facts on the record show that Contractor knew that he was a defendant in a court action at the time he filled out the license application. His stated belief that the court action was settled or dismissed is either not reasonable or not truthful. The facts show that he was in contact with his attorney discussing settlement terms during the weeks immediately preceding the date he filled out the application. He knew that he had not paid any money in settlement of the court action. No one had advised him that the matter was settled or otherwise resolved. If there was some true question about whether the matter was actually settled as of June 10, 1987, the date he filled out the license application, then the question could have easily been answered by calling his attorney. The status of the court action was information that Contractor knew or should have known.

The information sought by the question on the application, "Are you a plaintiff or defendant in any court action or proceedings?" is substantive and is influential in the Commissioner's or the Commissioner's designee's decision to grant or deny a license. Here, the facts reveal that Contractor was a defendant in a court action in which it was alleged that wages were owed to workers on a contract won by Contractor, that Farm Labor Contractor laws had been violated, and that unauthorized deductions had been made from wages.

Based on the facts on the record, Contractor made an assertion on his application which was not in accord with the facts, where the Contractor knew or should have known the truth

of the matter asserted, and where the fact asserted was substantive and influential to the decision to grant or deny a license. Thus, under ORS 658.440(2)(a) and OAR 839-15-520(1)(a), Contractor made a misrepresentation on the license application, and a denial of his application is appropriate.

Due to the finding that Contractor made a misrepresentation, it is unnecessary to the Commissioner's decision to deny a license to Contractor to additionally decide whether Contractor's action also falls within the definition of "false statement." Nevertheless, the Forum does find that Contractor's action constitutes a false statement. For the reasons stated in the Findings of Fact – The Merits regarding Contractor's credibility, the Forum infers that Contractor knew that the answer he gave on the application was false, and intended to mislead the Agency. As noted above, the fact asserted was substantive and influential to the decision to grant or deny a license. Thus, Contractor made a false statement on the license application, and a denial of his application is appropriate, pursuant to ORS 658.440(2)(a) and OAR 839-15-520(1)(a).

The Forum recognizes that the license year during which the Contractor applied (February 1, 1987, to January 31, 1988) has expired. However, an application for a Farm or Forest Labor Contractor's License is considered to be pending until such license is either granted or denied. Thus, a decision to grant or deny a license is effective for the license year in which the decision is made, and not necessarily for the license year in which the application is received.

Pursuant to OAR 839-15-140 regarding the eligibility for a Farm or Forest Labor Contractor License, where an application for a license has been denied, such denial shall operate to prevent a reapplication for a period of three years from the date of denial.

ORDER

NOW, THEREFORE, as authorized by ORS 658.005 to 658.485, the Commissioner of the Bureau of Labor and Industries hereby denies Contractor a license to act as a Forest Labor Contractor, effective this date.

**In the Matter of
MARY A. ROCK,
dba Avontti Pizza & Food Co.,
Respondent.**

Case Number 03-87
Final Order of the Commissioner
Mary Wendy Roberts
Issued March 10, 1988.

SYNOPSIS

Respondent willfully failed to pay Claimant's wages due within 48 hours, excluding Saturdays, Sundays, and holidays, after Claimant quit her employment. Respondent had a duty to know the amount of wages due to the employee. A faulty payroll system is no defense to a failure to pay wages owed, and does not allow an employer's actions to be characterized as

unintentional. The law requires an employer to maintain payroll records. Respondent failed to show that she was financially unable to pay the wages at the time they accrued, and thus was liable for civil penalty wages. ORS 652.140, 652.150, 653.045.

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 November 13, 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, Hearings Coordinator for the Wage and Hour Division (WHD) of the Agency; and Joyce Deen, Claimant. Mary A. Rock (hereinafter referred to as Employer), 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 Wendy 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) A wage claim was filed with the Agency on February 26, 1987, by Joyce Deen. She alleged that she 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 July 14, 1987, 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 \$237.00 in wages and \$395.10 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 of Determination.

4) On August 5, 1987, Employer filed a request for an administrative hearing and an answer to the charges. That answer alleged that Claimant's complaint failed "to state clearly [a] claim upon which relief may be granted," and that Employer was without knowledge as to the truth of Claimant's allegations because Claimant's pay records were in her possession. Employer denied "to unwillfully pay contract labor wages allegedly owed to Claimant." Employer denied that any wages were owed to Claimant, but that "any wages owed to Claimant * * * were proximately caused by the carelessness and taking in personal possession pay records at the time of termination by Claimant." Finally, Employer alleged "that in the event Claimant is awarded any sum by her complaint, that said sum should be

diminished in proportion to that amount of negligence attributable to defendant [the employer]."

5) On September 11, 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) On November 3, 1987, the Forum received notice from the Agency that settlement was likely between the Agency and Employer.

7) On November 4, 1987, the forum sent to the Agency and Employer a letter advising them "that the hearing will not be canceled until the Forum has received the completed and signed settlement documents." (Emphasis original.) The letter also advised them of the provisions of OAR 839-30-200 regarding settlement documents and the requirements of appearing at the hearing to place settlement terms on the record under certain circumstances. No settlement documents were received by the Forum before the hearing.

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

9) On November 20, 1987, the Forum sent Employer a Notice of Default, which advised Employer that pursuant to OAR 839-30-185 and 839-30-190 she had ten days from the date of issuance of the notice to request relief from default. No request for relief from

Employer was received within ten days by the Forum.

10) The Hearings Unit sent a copy of the Proposed Order in this matter to Employer indicating that Employer had 10 days to file exceptions thereto. Employer was granted an additional three days due to an illness. Employer filed no exceptions.

FINDINGS OF FACT – THE MERITS

1) During all times material herein, the Employer, a person, did business as Avontti Pizza & Food Co., a pizza maker located in Dayton, Oregon. She employed one or more persons in the State of Oregon.

2) Employer and Employer's husband, John Rock, operated the pizza business together during all times material herein. Employer worked in the pizza manufacturing plant, and John Rock ran the office and worked on sales. Both Employer and John Rock signed checks for the company; Employer also went by the first name of Avon, and signed checks as Avon Rock.

3) From on or about September 8, 1986, to on or about November 4, 1986, Employer employed Claimant as a bookkeeper.

4) On or about March 3, 1986, Employer and Claimant entered into an oral agreement that Claimant would perform work for \$4.00 per hour.

5) Claimant worked in Employer's office. She worked as many hours as the bookkeeping needs of the business required, often only four or five hours per week. By agreement with the Employer, Claimant kept a time card in the office. Claimant did not take the original time cards with her

when she quit on November 4, 1986. She made copies of the time cards, and took the copies with her.

6) Claimant's records reveal the following information, which is accepted as fact: she worked a total of 59.25 hours at Claimant's agreed rate of \$4.00 per hour; she earned \$237.00 in wages (59.25 hours x \$4.00 = \$237.00). Claimant was paid nothing; the balance of earned, unpaid, due and owing wages equals \$237.00.

7) Claimant gave written notice to Employer on November 4, 1986, that she was quitting, and she requested payment of her earned and unpaid wages of \$237.00. Employer never denied that those wages were due to Claimant. During several telephone calls after November 4, 1986, Employer acknowledged that the wages were due and said they would be paid. On January 29, 1987, Claimant sent Employer a letter demanding payment of her wages. To date, Employer has not paid Claimant any wages for her work during the period of her claim.

8) Checks submitted to the Agency by Employer represent payment of wages to Claimant for work performed before the period of her claim. The notations on the checks showing numbers of hours and the phrase "contract labor" were not on the checks when they were first given to Claimant and cashed by her.

9) Penalty wages were computed, in accordance with Agency policy, on the Wage Transcription and Computation Sheet as follows: \$237.00 (the total wages earned) divided by 18 (the number of days worked during the claim period) equals \$13.17 (the average daily rate of pay). This figure of

\$13.17 is multiplied by 30 (the number of days for which penalty wages continued to accrue) for a total of \$395.10 in penalty wages. This figure is set forth in the Order of Determination.

10) Employer did not allege in her answer an affirmative defense of financial inability to pay the wages due at the time they accrued; nor did she provide any such evidence for the record.

11) Testimony of Claimant was found to be credible. She had the facts readily at her command and her statements were supported by documentary records. There is no reason to determine the testimony of the Claimant to be anything except reliable and credible.

ULTIMATE FINDINGS OF FACT

1) During all times material herein, the Employer was a person doing business as Avontti Pizza & Food Co., in the State of Oregon, and employed one or more persons in the operation of that business.

2) Claimant was employed as a bookkeeper by Employer from September 8, 1986, to November 4, 1986.

3) During the wage claim period, Employer and Claimant had an oral agreement whereby Claimant would be paid \$4.00 per hour for each hour Claimant worked for Employer.

4) Claimant's last day worked was November 4, 1986, the same day she notified Employer that she was quitting.

5) Employer knowingly failed to pay for 59.25 hours of work at \$4.00 per hour for a total of \$237.00 in earned, due, and payable wages. Employer has not paid Claimant the wages owed and more than 30 days

have elapsed from the due date of those wages.

6) Penalty wages were computed and assessed by the Agency pursuant to ORS 652.150 and Agency policy in the amount of \$395.10.

7) Employer has made no showing that she was financially unable to pay at the time wages accrued.

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 jurisdiction over the subject matter and Employer herein.

3) The Employer was notified of her 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) The actions or inactions of John Rock, an agent of Employer, are properly imputed to Employer.

5) Employer violated ORS 652.140(2) by her failure to pay Claimant all wages earned and unpaid within 48 hours, excluding Saturdays, Sundays and holidays, after Claimant quit her employment on November 4, 1985.

6) Employer's failure to pay the wages owed to Claimant was knowing, intentional, and voluntary, and therefore constitutes a willful failure to pay in violation of ORS 652.150.

7) Employer has not avoided liability for this penalty, as she has not

shown that she was financially unable to pay wages owed to Claimant at the time they accrued.

8) 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 her 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); *In the Matter of Jack Mongeon*, 6 BOLI 194, 201 (1987). In a default situation where the employer's total

contribution to the record is his or her request for a hearing and an answer which contains nothing other than unsworn and unsubstantiated assertions, those assertions are overcome whenever they are controverted by other credible evidence on the record. *Mongeon, supra*.

The evidence on the record establishes that Employer owes Claimant \$237.00 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 request 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 she owes Claimant penalty wages pursuant to ORS 652.150.

Employer's defenses set forth in her answer are responded to as follows. First, the Order of Determination is clear in its allegations. It states the name of the Employer, the period of the wage claim, the alleged number of hours worked, the rate of pay, and the amount of wages claimed due. In addition, it sets forth the average daily wage and that more than 30 days have elapsed since the wages became due. The penalty wage amount is stated along with the dates on which interest will begin to accrue on the unpaid wages. These allegations are

sufficiently clear to enable a respondent to reply.

Second, Claimant's sworn testimony was that her original time records were in Employer's possession. Employer's defenses alleging that Claimant's carelessness or negligence caused any failure by Employer to pay wages due are not supported by the evidence.

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, 242 (1983). A faulty payroll system is no defense to a failure to pay wages owed and does not allow an Employer's actions to be characterized as unintentional. *In the Matter of Loren Malcom*, 6 BOLI 1, 10 (1986).

ORS 653.045 requires an employer to maintain payroll records. Where the Forum concludes that a claimant was employed and was improperly compensated, it becomes the burden of the 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, 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.

Third, Employer's apparent denial that her failure to pay wages was willful was overcome by evidence on the record, namely Claimant's testimony and records. Claimant's testimony was that Employer acknowledged that Claimant's wages were due and unpaid. As stated above, Employer had

a legal duty to know the amount of wages due to Claimant and to maintain payroll records. Willfulness does not imply or require blame, malice, wrong, perversion, or moral delinquency, but only requires that that which is done or omitted is intentionally done with knowledge of what is being done, and that the actor or omittor be a free agent. *Sabin v. Willamette Western Corp.*, 276 Or 1083, 553 P2d 1344 (1976). Here, evidence established that Employer knew she owed Claimant wages and intentionally failed to pay those wages. There was no evidence that Employer was not a free agent. Thus, Employer's action or inaction was willful under ORS 652.150.

Fourth, Employer's defense that her possible liability should be diminished in proportion to her negligence is not on point. This is not a negligence matter. It is a case of an alleged statutory violation. A wage claim is essentially a contract matter. Employer's reliance on a negligence theory is misplaced.

ORDER

NOW, THEREFORE, as authorized by ORS 652.332, the Commissioner of the Bureau of Labor and Industries hereby orders MARY A. ROCK to deliver to the Hearings Unit of the Bureau of Labor and Industries, 305 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 JOYCE DEEN in the amount of SIX HUNDRED THIRTY TWO DOLLARS AND TEN CENTS (632.10), representing \$237.00 in gross earned, unpaid, due, and

payable wages, less legal deductions previously taken by the Employer, and \$395.10 in penalty wages, plus interest at the rate of nine percent per year on the sum of \$237.00 from December 1, 1986, until paid and nine percent interest per year on the sum of \$395.10 from January 1, 1987, until paid.

**In the Matter of
EBONY EXPRESS, INC.,
Respondent.**

Case Number 06-87
Final Order of the Commissioner
Mary Wendy Roberts
Issued April 11, 1988.

SYNOPSIS

Respondent willfully failed to pay Claimant's wages due immediately upon termination of his employment. Respondent, who defaulted by failing to appear at hearing, failed to show that he was financially unable to pay the wages at the time they accrued, and thus was liable for civil penalty wages. ORS 652.140, 652.150.

The above entitled matter came on regularly for hearing before Diana E. Godwin, designated as Hearings Referee by Mary Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was conducted on December 10, 1987, in

Room 411 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): Jack J. Ross, wage claimant (hereinafter Claimant); and Eduardo Sifuentez, compliance specialist with the Wage and Hour Division of the Agency. Ebony Express, Inc. (hereinafter referred to as Employer), 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 Wendy Roberts, hereby make the following Ruling, Findings of Fact (procedural and on the merits), Ultimate Findings of Fact, Conclusions of Law, Opinion, and Order.

RULING

At the beginning of the hearing in this matter the Agency moved to amend its Summary of the Case to delete "ORS 652.150" and insert "ORS 652.120." This motion was made in order to correct a clerical error and is granted.

FINDINGS OF FACT – PROCEDURAL

1) Claimant filed a wage claim with the Agency on October 2, 1986. Claimant alleged that he had been an employee of Employer and that Employer had failed to pay wages earned and due to him.

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

3) On July 16, 1987, 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 the Employer owed Claimant a total of \$2,680.57 in wages and \$1,263.00 in penalty wages. The Order of Determination required that, within twenty days, either these sums must be paid in trust to the Agency or the Employer must request an Administrative Hearing and submit and answer to the charges contained in the Order of Determination.

4) On August 3, 1987, through its attorney, William N. Kent of Eugene, Oregon, Employer filed an answer to the charges. Employer's answer also contained a request for a contested case hearing in this matter. Employer's answer alleged that Employer did not owe \$2,680.57 in unpaid wages, but rather owed Claimant \$1,862.31. Employer's answer further set forth the affirmative defense that "the Employer did not willfully fail to pay the wages because at the time said wages were due the Employer was financially unable to pay said wages."

5) On September 11, 1987, this Forum sent a Notice of Hearing to Employer and Employer's attorney indicating the time and place set for the hearing in this matter. That notice was also sent to the 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) On November 1, 1987, the Forum sent to the Employer and its attorney a letter advising that a new

Hearings Referee had been appointed to hear the contested case.

7) At the Commencement of the hearing of this matter, the Hearings Referee explained the issues involved herein and the matters to be proved or disproved.

8) On December 18, 1987, the Forum sent Employer and its attorney a Notice of Default, advising Employer that, pursuant to OAR 839-30-185 and 839-30-190, it had ten days from the date of issuance of the notice to request relief from default. No request for relief from Employer or its attorney was received within ten days by the Forum.

9) Employer was allowed ten days from the date of issuance of the Proposed Order in this case to file exceptions. The Bureau of Labor and Industries, Hearings Unit did not receive any exceptions from this Employer.

FINDINGS OF FACT – THE MERITS

1) During all times material herein, the Employer was an Oregon corporation located in Eugene, Oregon, and engaged in the trucking business. The Employer employed one or more persons in the State of Oregon in this business. The president of the corporation is Frederick DeLeon.

2) Employer employed Claimant as a long distance truck driver during the period of April 18, 1986, to October 1, 1986.

3) Claimant's wages were based on the number of miles driven. Initially, Claimant's wages were based on 20 cents per mile when Claimant was driving alone and 12 cents per mile when Claimant was driving as a

member of a two-person team. Claimant was paid wages based on these rates from the time he was employed on April 18, 1986, to July 11, 1986.

4) Claimant kept track of the miles he drove by completing a "trip sheet" and log book each day. The "trip sheet" lists the mileage for each trip undertaken each day by a driver. These "trip sheets" were prepared for purposes of Public Utility Commission records and for preparation of the payroll.

5) The trip sheets prepared by Claimant between July 12, 1986, and September 26, 1986, indicate that Claimant drove 14,560 solo miles and 4,154 team miles. Payroll statements prepared by Employer during this time indicate that the rate being paid for solo miles was 20 cents per miles and 11 cents per mile for team miles. Claimant was never informed of the decrease from 12 to 11 cents per mile for team miles driven.

6) The total amount owed to Claimant for the mileage driven between July 12, 1986, and September 26, 1986, was \$3,368.94. Employer paid the total sum of \$688.37 toward these wages owed; \$488.37 of the \$688.37 was taken as a payroll draw and \$200.00 was received by Claimant in cash after the termination of his employment with Employer. Other than these amounts, to date the Employer has not paid Claimant the remainder of wages owing to him.

7) Claimant's employment with Employer was terminated on October 1, 1986, as a result of Claimant's refusal to cross the state line of Oregon without proper permits. After Claimant waited several days in another state

Employer provided the proper permits and Claimant then came back to Eugene. When Claimant arrived back in Eugene he was fired. After he was terminated Claimant received \$200.00 in cash against wages owed.

8) Penalty wages have been computed, in accordance with Agency policy, on the Wage Transcription and Computation Sheet as follows: \$3,368.94 (the total wages earned between July 12, 1986, and September 26, 1986) was divided by 80 (the number of days worked during the claim period) to reach the figure of \$42.11 for the average daily rate of pay. This figure of \$42.11 was multiplied by 30 (the number of days for which penalty wages continued to accrue) for a total of \$1,263.30 in penalty wages. The figure of \$1,263.00 in penalty wages is set forth in the Order of Determination with the last 30 cents omitted. This Forum accepts the figure of \$1,263.00 set forth in the Order of Determination.

9) The testimony and records prepared by and in the possession of Claimant were found to be credible.

10) Although alleged in its answer the affirmative defense of financial inability to pay the wages due at the time they accrued, Employer failed to appear at the hearing and presented no evidence to prove this defense.

11) Employer submitted records prior to the hearing in support of its claim in its answer that it owes only \$863.31 to Claimant. Employer bases its figure for the amount owed on net wages after taxes and after making a deduction of \$130.00 for a claimed shortage in September 1986. There is no evidence on the records, however, to substantiate the existence or

deductibility of a shortage, or to show that the Employer paid the taxes owed on Claimant's wage. Employer's calculation of wages owed was not accurate in that Employer shows mileage totals different from those shown on the trip sheets which Claimant prepared daily. Although Employer's mileage in this respect was greater than shown on Claimant's trip sheets, the trip sheets were the most accurate account of miles traveled and therefore should be accepted to calculate wages owed. Employer's payroll records also contain arithmetic errors; one error was \$55.00 to the advantage of the Employer and another was 20 cents to the advantage of Employer.

ULTIMATE FINDINGS OF FACT

1) During all times material herein, the Employer was a corporation doing business in the State of Oregon and employing one or more persons in the operation of that business.

2) Claimant was employed as a long distance truck driver by Employer from April 18, 1986, to October 1, 1986.

3) During the wage claim period involved in this matter, the rate of pay being paid by Employer was based on the number of miles traveled and was calculated at the rate of 20 cents per mile for a solo driver and 11 cents per mile for a team driver.

4) Claimant's last day worked was October 1, 1986, the day Employer terminated Claimant.

5) Employer owes Claimant wages based on 14,560 solo miles driven, at 20 cents per mile, and 4,154 team miles driven, at 11 cents per mile, for a total of \$3,368.94. Employer paid

the total sum of \$688.37 toward these wages owed, but knowingly failed to pay the remaining wages in the amount of \$2,680.57. Employer has not paid Claimant these wages owed and more than 30 days have elapsed from the due date of those wages.

6) The penalty wages were computed and assessed by the Agency pursuant to ORS 652.150 and Agency policy in the amount of \$1,263.

7) Employer has made no showing that it was financially unable to pay the wages at the time the wages accrued.

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 jurisdiction over the subject matter and the Employer in this matter.

3) The Employer was notified of its rights as required by ORS 183.413. The Forum complied with ORS 183.415(7) by providing the information described therein at the beginning of the hearing.

4) Employer violated ORS 652.140(1) by failing to pay Claimant all wages earned and unpaid immediately upon terminating Claimant from employment on October 1, 1986.

5) Employer's failure to pay wages owed to Claimant was knowing, intentional, and voluntary and therefore constitutes a willful failure to pay in violation of ORS 652.150.

6) Employer is liable for payment of penalty wages as it has not shown

that it was financially unable to pay wages owed to Claimant at the time they accrued.

7) Under the facts and circumstances of this record, and according to the law applicable to this matter, the Commissioner of the Bureau of Labor and Industries has the authority to order Employer to pay Claimant his earned, unpaid, due, and payable wages and the penalty wages, plus interest on the regular wages from November 1, 1986, until paid, and on the penalty wages from December 1, 1986, until paid.

OPINION

Although the Employer in this matter filed a timely answer and requested a contested case hearing, the Employer failed to appear at the hearing. When an employer defaults the record must contain facts sufficient to establish a prima facie case supporting the Agency's Order of Determination. *In the Matter of Jack Mongeon*, 6 BOLI 194, 201 (1987); ORS 183.415.

Here the Claimant, testified at the hearing to the essential facts necessary to support his wage claim. Claimant was employed by the Employer to work as a truck driver for wages, with the wages calculated on the basis of miles driven. Claimant testified to the number of miles he drove during the wage period involved and to the method by which he kept a daily record of his mileage. These mileage records were also admitted into evidence. Claimant further testified that, except for \$688.37, he had not received wages due and owing to him for the period of July 12, 1986, to September 26, 1986. Claimant testified that he was fired by the Employer on October

1, 1986, and was not paid his wages immediately as required by ORS 652.140(1), nor has he been paid these amounts since.

Mr. Sifuentez, testified that he examined the records of Claimant and those submitted by the Employer and determined from this examination that the Employer owed and had failed to pay Claimant \$2,680.57 in unpaid wages. The documents submitted into evidence support the testimony of Claimant and Sifuentez. Both the testimony and the exhibits constitute credible evidence sufficient to establish a prima facie case.

The Employer submitted an answer to the Order of Determination, which was admitted into evidence as an exhibit. Employer admitted in its answer that wages were owed to Claimant, but alleged that the amount was \$1,862.31, rather than the \$2,680.57 set out in the Order of Determination. In a default situation the Forum may consider the assertions set forth in an answer. *In the Matter of Richard Niquette*, 5 BOLI 53, 60 (1986). From an examination of the payroll statements submitted by the Employer and admitted into evidence, it is evident that Employer based its claim that it owed \$1,862.31 in wages on the net wages, after taxes, it would have paid to the Claimant had the wages been paid when due. However, the Employer presented no evidence that it has in fact paid or deposited any taxes owed by Claimant with the Internal Revenue Service or the State of Oregon. Thus the entire amount of the wage is still due and owing and must be paid by the Employer.

Employer also asserted in its answer the affirmative defense of financial inability to pay the wages when due in response to the allegation in the Order of Determination that Employer willfully failed to pay wages owed and therefore was liable for penalty wages under ORS 652.150. However, the Employer offered no evidence of any kind to prove this defense. The defense of financial inability is an affirmative one which must be proved by the party asserting it. It is not the burden of the Agency or the Forum to disprove it. ORS 652.150 provides in relevant part that:

"the employer may avoid liability for the penalty by showing financial inability to pay * * *." (Emphasis supplied.)

Because the Employer failed to make such a showing and because the evidence established that the Employer knew it owed wages to Claimant, its action in not paying the wages was willful and it is liable for penalty wages.

The Order of Determination states an amount of wages owed which is calculated on a payment rate of 20 cents per mile for solo miles driven and 11 cents per mile for team miles driven. There was no dispute between the Employer and the Claimant as to the figure of 20 cents per mile for payment for solo miles driven, but there was a dispute as to whether the rate for team miles driven was 11 cents, as claimed by Employer, or 12 cents as claimed by Claimant. The testimony of Claimant and the payroll statements on exhibit are sufficient to establish that the rate for team miles was 12 cents per mile during at least two of the payroll periods prior to the period in

dispute here. The payroll statements, however, show the rate of 11 cents per mile for team miles driven during the period in dispute here, although Claimant testified that he was never told of any reduction in this mileage rate. The Order of Determination does use the rate of 11 cents per mile to determine those wages owed for team miles driven, and in a default situation the amounts stated in the Order of Determination set the limit on the relief the Forum can award. *Mongeon, supra*. Thus the Forum has accepted the figure of 11 cents per mile for calculating wages for team miles driven. Also, the Forum has used \$1,263.00, the amount of penalty wages stated in the Order of Determination, rather than the \$1,263.30 which results from the Forum's calculations.

ORDER

NOW, THEREFORE, as authorized by ORS 652.332, the Commissioner of the Bureau of Labor and Industries hereby orders EBONY Express, Inc., to deliver to the Hearings Unit of the Bureau of Labor and Industries, 305 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 JACK J. ROSS in the amount of THREE THOUSAND NINE HUNDRED FORTY-THREE DOLLARS AND FIFTY-SEVEN CENTS (\$3,943.57) representing \$2,680.57 in gross earned, unpaid, due, and payable wages, less legal deductions previously taken by the Employer; and \$1,263.00 in penalty wages, plus interest at the rate of nine percent per year on the sum of \$2,680.57 from

November 1, 1986, until paid, and nine percent interest per year on the sum of \$1,263.00 from December 1, 1986, until paid.

**In the Matter of
E. L. Martin, dba
STOP INN DRIVE IN,
Respondent.**

Case Number 07-87
Final Order of the Commissioner
Mary Wendy Roberts
Issued April 11, 1988.

SYNOPSIS

Respondent sexually harassed Complainant by sexually touching her and making sexual comments to her, which actions were unwelcome and offensive to Complainant, and thereby created a hostile and abusive working environment. This conduct constituted discrimination, based on Complainant's sex, in the terms and conditions of employment, in violation of ORS 659.030(1)(b). The Commissioner awarded complainant \$2000 for her mental suffering. ORS 659.030(1)(b).

The above-entitled matter came on regularly for hearing before Diana E. Godwin, designated as Hearings Referee by Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The

hearing was held on November 17, 1987, in the Bureau conference room, 700 E. Main Street, Medford, Oregon. The Hearings Referee called the following as witnesses for the Bureau of Labor and Industries (hereinafter Agency): Complainant Florence Estes; Dan Ellenburg, a friend of Complainant and a customer at Respondent's restaurant; Jodi Giffin, a waitress who worked with Complainant at Respondent's restaurant; Bill Rasmussen, a friend of Complainant's and a customer at Respondent's restaurant; Theresa Hulsemann, a waitress at Respondent's restaurant; and Barbara Turner, Senior Investigator with the Civil Rights Division of the Agency. The Agency was not represented by counsel. E. L. Martin (hereinafter Respondent) was represented by attorney James C. Lynch of Lakeview, Oregon. Respondent called the following as witnesses: E. L. Martin; Jim Mitchell, a minister; Mary Ann McLain, a waitress at Respondent's restaurant; Mary Louis Lewis, a former waitress at Respondent's restaurant; Railene Hilburn, a friend of Respondent's and a former waitress at Respondent's restaurant; and Gladys R. Martin, wife of Respondent.

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

FINDINGS OF FACT – PROCEDURAL

1) On September 11, 1987, Agency prepared and duly served on Respondent and Respondent's

attorney Specific Charges alleging that Respondent had repeatedly engaged in a course of conduct designed to harass, intimidate, humiliate, and embarrass Complainant because of her sex by subjecting Complainant to repeated and unwanted physical sexual contact and sexual remarks; that such conduct affected Complainant's employment in that it created a hostile and abusive working environment; and that such conduct constituted discrimination, based on sex, against Complainant in the terms and conditions of her employment in violation of ORS 659.030(1)(b).

2) The Agency attempted to resolve the alleged unlawful employment practice by conference, conciliation, and persuasion, but was unsuccessful.

3) With the Specific Charges the Agency duly served on Respondent a Notice of Hearing setting forth the time and place of the hearing in this matter. Enclosed with the notice was a document entitled "Notice of Contested Case Rights and Procedure," which contained the information required by ORS 183.413.

4) On September 28, 1987, Respondent, through his attorney, prepared and mailed an answer to the Specific Charges denying that Respondent engaged in the course of conduct outlined in the Specific Charges; denying that the conduct, if it occurred, was unwelcome or offensive to the Complainant; and further denying that, if such conduct occurred, the Complainant was harmed thereby. The Respondent's answer raised no affirmative defenses.

5) The Agency failed to receive Respondent's answer as of October 1,

1987. OAR 839-30-060 requires a Respondent to answer the Specific Charges within 20 days of their issuance. Therefore, on October 20, 1987, the Agency found the Respondent in default and issued a Notice of Default. Respondent's attorney submitted an affidavit dated October 29, 1987, in which he swore that he had mailed an "Answer to Specific Charges" to the Hearings Unit of the Agency on September 28, 1987. Attached to the affidavit were copies of the answer and certificate of mailing, both dated September 28, 1987. Also on October 29, 1987, Respondent filed a Request for Relief from the default entered by the Agency on October 20, 1987. On November 3, 1987, the Agency granted Respondent's Request for Relief on the grounds that the failure to file a timely answer was the result of circumstances beyond Respondent's control, that is, lost mail.

6) Pursuant to OAR 839-30-071, the Agency filed a Summary of the Case, including documents from the Agency's file. Although permitted to do so under the provisions of OAR 839-30-071, the Respondent did not submit a Summary of the Case.

7) 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). The attorney for Respondent stated that he understood the procedures.

8) All documents marked as Administrative Exhibits in this matter were accepted into evidence and made a part of the record. Respondent also

submitted eight exhibits, consisting of color photographs, all of which were received into evidence.

9) The Proposed Order in the contested case was issued January 25, 1988, and mailed to all persons indicated on the certificate of mailing attached thereto. Included in the Proposed Order was an Exceptions Notice which allowed ten (10) days for exceptions, if any, to be filed regarding this case. Exceptions were due by end of business on Thursday, February 4, 1988. Exceptions were not received on or before that date.

FINDINGS OF FACT – THE MERITS

1) Complainant is a female person who was employed by Respondent as a cook and waitress at the Stop Inn Drive In restaurant between the dates of May 2, 1985, and October 1, 1985. At the time that Complainant was employed she was 31 years old.

2) Respondent is the owner and proprietor of, and is doing business as, the Stop Inn Drive In, a restaurant in the Lakeview, Oregon, area. Respondent is, and all times material to this matter was, an employer in this state utilizing the personal services of one or more employees. Respondent is a male, who at the time of the hearing was 47 years old. He is 5 foot 2 inches tall.

3) Respondent originally acquired the Stop Inn Drive In Restaurant on May 1, 1985, when he took over an existing restaurant, the Burger Shack, under a one year lease agreement with an option to purchase. Respondent exercised the option to purchase on April 30, 1986, and is presently in the process of purchasing the restaurant.

4) The Stop Inn Restaurant is a small fast food restaurant. The interior of the restaurant contains a small number of tables and a cash register counter behind which various food and serving supplies are stored. The space between the cash register counter and the shelving behind it is approximately 26 inches and is sufficiently narrow that it is difficult for two people to work behind the counter without coming into very close contact with one another. Immediately behind the shelving is a counter-top opening through which food is passed from the kitchen. The kitchen area is immediately behind the shelving and consists of the work counter on one side and a stove/grill on the other side, parallel to the work counter. There is approximately 36 inches between the kitchen work counter and the stove, which provides sufficient room for two people to work without having to touch each other. Behind the stove/grill are a sink, a freezer and a milk machine. Persons using the passages behind the stove/grill area have to go through very narrow passages. In some places there is only 10 to 12 inches of space to get through. Two persons would have difficulty passing each other in these areas behind the stove/grill without coming into close physical proximity.

5) Immediately prior to when Respondent acquired the restaurant on May 1, 1985, it had been under lease by Sharon Effert. During the time she held the lease on the restaurant, Ms. Effert employed several waitresses and cooks, including Complainant. During the month immediately prior to Respondent assuming the lease of the

restaurant, Respondent visited the restaurant and observed the operations of the restaurant, including the work performance of the waitresses employed there at the time. Respondent asked Ms. Effert who among the employees she would recommend for continued employment, as Respondent intended initially only to hire one individual. Ms. Effert recommended that Respondent hire Complainant.

6) Complainant and Ms. Effert had a close personal relationship. Complainant had known Ms. Effert since Complainant was five or six years old. Complainant referred to Ms. Effert as her "sister" even though there was no family relationship. Complainant has continued to maintain that close relationship with Ms. Effert. At the time that Respondent took over the lease of the restaurant, Ms. Effert was unhappy that she was losing the restaurant.

7) Complainant was hired by Respondent to work as a cook and waitress in the restaurant on May 2, 1985, at a salary of \$4.25 per hour. Complainant actually commenced work on May 3, 1985. Since Complainant had worked in the restaurant before the lease was acquired by Respondent, she assisted Respondent and his wife, Gladys, in learning how to prepare the menu items. Respondent and his wife both worked in the restaurant full time. The restaurant was open initially from 6 a.m. to 10 p.m. and later from 5 a.m. to 10 p.m.

8) On May 3, 1985, Complainant's first full day of work, Respondent called her "hon" and "sweetie" and put his hands on or near her rear end. He also put his arm around Complainant. Complainant did not say anything

about this behavior to Respondent that day. The next day when Respondent touched Complainant in a manner which was unwelcome and offensive to her, Complainant asked Respondent not to touch her and to please keep his hands to himself. Respondent replied that that was just his way of relating to people, that he had a tendency to touch people and that he didn't mean anything by it.

9) After the incidents on May 3 and May 4, Respondent stopped touching Complainant for a while but would make "sexual remarks" to Complainant.

10) Almost as soon as Complainant began working at Respondent's restaurant she began called Respondent "Dad" and Respondent's wife, Gladys, "Mom." She called Ms. Martin "Mom" because Respondent called his wife by that name and Complainant could not remember Ms. Martin's first name. When Complainant asked Respondent if she could call him "Dad" he remarked that it would not bother him. Complainant used these terms regularly during the period of May 3, 1985, until June 15, 1985.

11) Toward the end of May 1985, Respondent employed additional female persons to serve as waitresses and as car hops. About this time Respondent again began patting or squeezing Complainant on her rear end. On one occasion Respondent remarked to Complainant that she had "nice buns." On these occasions Complainant would move away and would ask Respondent to keep his hands to himself. After Complainant said something to Respondent again about touching her Respondent

desisted, but Complainant observed him touching the other waitresses by putting his hands on their hips or rear end and by putting his arm around them.

12) During the period from the end of May to approximately June 15, 1985, Respondent continued occasionally to put his arm around Complainant and made remarks from time to time about her figure. During this time Complainant referred to herself as "assistant manager" of the restaurant because she was helping with the ordering of supplies and was helping instruct the other waitresses and cooks regarding their jobs.

13) During the period of May 3 to June 15, 1985, one of the regular customers of the restaurant, Dan Ellenburg, observed Respondent touch Complainant twice in the area of her hips and rear end. Mr. Ellenburg observed this after Complainant had mentioned to him that Respondent was touching her. On at least one occasion Mr. Ellenburg saw Respondent put his arm around Complainant and put his hand in the area of Complainant's breast. He also saw Respondent touch one of the other waitresses in the breast area. Mr. Ellenburg does not recall overhearing Respondent make any sexually suggestive remarks. Mr. Ellenburg was in the restaurant at least a couple of times a week during the time Complainant was employed by Respondent. Mr. Ellenburg had been a customer of the restaurant since May 1984, during the time it was leased by Sharon Effert, and knew Complainant from her work there.

14) On at least one occasion during the period of May 3 to June 15, 1985, Complainant initiated physical contact with Respondent. She had been upset as a result of some problems she was having with a man she was having a personal relationship with and mentioned her distress to Respondent. Respondent asked whether there was anything he could do and Complainant replied that she needed a hug, and asked Respondent to give her a hug. Respondent gave her what Complainant described as a "fatherly" hug.

15) On June 15, 1985, Respondent and his wife went to Arizona for five days. During the time that they were gone they left Complainant in charge of opening the restaurant, collecting the money, supervising the operations, and closing the restaurant. They left for Arizona about 11:00 p.m. on the night of June 15, 1985. In the early morning hours of June 16, 1985, Complainant became intoxicated and had a single car accident and sustained personal injuries, among them a broken collar bone. As a result of this accident and its aftermath Complainant lost the keys to the restaurant and was also unable to fulfill her duties of opening and supervising the restaurant. The other waitresses and cooks, some of whom had worked for Respondent for only a matter of a week or two, took care of the restaurant as best they could. However, some aspects of running the restaurant, such as equipment maintenance and repair, were neglected. As a consequence of the loss of the keys, the locks on the restaurant had to be changed and the restaurant was closed earlier than usual. On the

day Respondent and his wife returned from Arizona they went first to the restaurant and after ascertaining the situation there they went over to Complainant's house to see how she was and to speak with her.

16) During part of the time when Complainant was recuperating from the injuries from her car accident, approximately June 16th until July 15th, she stayed with her mother in Springfield. During the period in Springfield she gained weight as a result of eating more than usual and not being physically active.

17) Complainant was released by her doctor to return to light duty at work on approximately July 15th. She initially worked a reduced hourly schedule, sometimes only working a couple of hours a day. She was not able to do any lifting. She continued working reduced hours for two or three weeks. During this time she was also wearing a "figure eight" brace for the injuries to her upper torso and collar bone. As a result of wearing this brace Complainant was unable to wear a bra and would wear v-neck shirts. During this time Respondent made suggestive comments about her breasts.

18) When Complainant returned to work after her accident, Respondent's attitude toward her was changed in that he seemed angry and upset with her more often. Respondent complained about Complainant's work to other employees and commented that he felt it was irresponsible of Complainant to have gotten intoxicated when she knew she had the responsibility to open the restaurant the next morning. Complainant began spending more time sitting and visiting with customers,

particularly male customers, and neglected her work. Respondent and his wife talked to Complainant a couple of times about her job performance. After these talks Complainant's work habits would improve temporarily.

19) After Complainant returned to work after her accident she began calling Ms. Martin by her first name "Gladys." She continued to call Respondent "Dad" when both she and Respondent were in a good mood. At other times she would call him "Marty."

20) Around the time that Complainant returned to work after her accident, Respondent asked Complainant if he could come over to her house to talk with her. Complainant said OK but later, after she asked Respondent what it was that he wanted to talk with her about and he didn't reply, she became nervous about his coming over. She asked Bill Rasmussen and her ex-husband to come over to her house that evening because she was concerned about being at home alone if Respondent came over. Respondent did not show up at Complainant's house that evening, but the next day mentioned to her that he had come by her house around 11 o'clock that night but saw the lights out and did not stop. This conversation occurred on July 18, 1985.

21) Complainant's statements about this one occasion when she believed Respondent planned to come over were credible because she told her former husband and Bill Rasmussen of her concerns on that day and they went over to her house based on what she told them. She also made a contemporaneous entry in her diary about this incident.

22) Complainant also testified that Respondent asked to come to her house almost every day for 10 or 12 days in a row. This testimony was not credible in light of the fact that Respondent was never seen at her house and there was no mention in Complainant's diary about these numerous requests.

23) The day before, on July 17, Complainant was resting on a stool in the kitchen. Respondent came up and told her to get up and then bent down and kissed her. On July 19, Respondent came up behind Complainant in the passage way behind the stove-grill area and put his hand on her and turned her around and kissed her again.

24) As a result of these incidents Complainant began to keep a daily diary on July 18, 1985. In preparing the diary she went back and recorded her recollections of the incidents which had occurred between her and Respondent from her first day of work in early May 1985. The diary entries were contemporaneous from July 18, 1985, through July 30, 1985.

25) The touching incidents stopped after Complainant told Respondent that she would tell his wife if they continued. However, Respondent continued to make sexual comments.

26) Complainant testified that Respondent's behavior made her nervous and upset and that she gained 20 to 25 pounds during her period of employment with Respondent because she eats when she gets nervous. This latter testimony was not credible because it was more likely that most of Complainant's weight gain occurred during the convalescence from her automobile accident.

27) Jodi Giffin was employed by Respondent as a waitress and a cook from approximately mid-June 1985 until mid-December 1985. On a couple of occasions during the time she worked for Respondent, Respondent patted her on the rear end or gave her a peck on the cheek. These instances of touching bothered Ms. Giffin and as a consequence she attempted to avoid coming into physical contact with Respondent. On one occasion as she was leaving work and walking out the front door, Respondent patted her on the rear end. Ms. Giffin's husband was waiting for her just outside the restaurant and observed Respondent touching his wife. The next day Ms. Giffin spoke to Respondent about this in front of Respondent's wife, saying that her husband was upset and had said that Respondent should not touch Ms. Giffin. Ms. Giffin does not recall if Respondent stopped touching her after she told him about her husband's concerns. Ms. Giffin did not see Respondent touch any other employees, including Complainant. Ms. Giffin did not work the same shift as Complainant, however, and would only see Complainant as either of them was coming to or leaving work. During this time Respondent also made comments to Ms. Giffin and others of a sexual nature although she can not recall or repeat any specific remarks. However she does recall overhearing Respondent making a remark to a customer about "sharing" her and other waitresses. Ms. Giffin felt that this comment was sexual in nature. These comments did not particularly bother or upset her.

28) At various times Respondent

commented to Ms. Giffin about the fact the Complainant "drooled" over the men that came into the restaurant and said that he did not understand "what they saw in her." In making these remarks to Ms. Giffin, Respondent appeared somewhat jealous.

29) Complainant sometimes talked to Ms. Giffin about Respondent's behavior toward her, Complainant. On one occasion, Complainant told Ms. Giffin that Respondent's touching of her was more than just "pats on the rear end" and that Respondent had "grabbed her butt down into the crotch area." Complainant was angry and upset as she conveyed this to Ms. Giffin. Ms. Giffin is not a social friend of Complainant's.

30) Ms. Giffin quit to take a job at Safeway in mid-December of 1985. Her termination of employment with Respondent was not occasioned by Respondent's behavior.

31) Ms. Giffin's testimony was credible because she has no interest in the outcome of this matter and has no motive for untruthfulness.

32) Teresa Hulsemann was employed by Respondent as a waitress in July 1985, for a period of approximately two weeks, during which time she worked four or five days. She was 20 years old at the time. On one occasion Respondent came up from behind and to the side of her and reached into the pocket of her apron where she kept her tips. Respondent said he merely wanted to see how much she had in tips in her apron. Ms. Hulsemann felt that this behavior was inappropriate, particularly because Respondent had touched her leg in the course of reaching into her pocket.

Ms. Hulsemann also felt that Respondent consistently got too close to her and made her uncomfortable. On one particular occasion he had gotten very close to her and made a remark to her to the effect that if she went along with everything they would be "real good friends." On another occasion Ms. Hulsemann had had to go back into the back room to get something and as she came out Respondent stood in front of her and stayed in front of her to the point that she became uncomfortable trying to get around him. Ms. Hulsemann is not a friend of Complainant's and has no interest in the outcome of this matter.

33) On the last day Ms. Hulsemann worked for Respondent there was a mix-up with regard to whether or not some customers that Ms. Hulsemann had waited on had paid their bill. She was in the process of leaving for the day and had in fact collected money from these customers. The Respondent, however, was unaware that they had paid and as these customers were leaving the restaurant confronted them about whether they had paid their bill. When he learned that they had paid their bill he was embarrassed and upset and berated Ms. Hulsemann as she was leaving. Ms. Hulsemann was upset about this and told her mother about it. That night Ms. Hulsemann's mother telephoned Respondent's wife and told her that Ms. Hulsemann would not be coming back to work and asked that her paycheck be brought over to her. The next day when Ms. Martin took the paycheck over to Ms. Hulsemann's, her mother commented that Ms. Hulsemann didn't have to put up with "what was going on" and commented "that

Respondent had expected things of her that she wasn't willing to do." Ms. Hulsemann's mother would not give any further or more specific explanation to Ms. Martin. Ms. Martin felt the matter was sufficiently unresolved that she should ask the other waitresses whether they had had any problems.

34) Later that day Ms. Martin talked with Complainant and Ms. Giffin about whether Respondent was "out of line" in saying things that were perhaps "too raunchy." Ms. Giffin commented that that was just Respondent's way and Complainant told Ms. Martin that all she, Complainant, had to do was to tell Respondent to "knock it off" and he would quit.

35) Railene Hilburn was employed as a waitress in Respondent's restaurant from July 4, 1985, until approximately the end of September 1985. She later worked for Respondent from March 1986 to July 1986. Ms. Hilburn is a social friend of Respondent and his wife, and has been in their home 20 to 30 times. Ms. Hilburn first met Respondent through her mother, who was social friends with him, seven or eight years ago. She met him prior to his marriage to his present wife. Ms. Hilburn was going to be applying for work again with Respondent the day after the hearing in this matter.

36) On one occasion Respondent made a crude remark of a sexual nature to Ms. Hilburn. This remark was overheard by Mary Ann McLain, one of the other waitresses. The comment embarrassed Ms. Hilburn and in response she told Respondent to "fuck off."

37) Ms. Hilburn initially met Complainant in mid-July 1985, after she

returned to work following her accident. She was not a close social friend of Complainant's. However, in approximately mid-August of 1985, Ms. Hilburn was injured in a motorcycle accident and was required to recuperate at home. A few days after this accident Complainant came to Ms. Hilburn's home and brought her a card and some earrings. During this visit Complainant told Ms. Hilburn that she and Respondent had had an argument and Ms. Hilburn testified that Complainant remarked that she was going to take Respondent to court and "one way or the other was going to get the restaurant back." This conversation took 10 to 15 minutes, but Ms. Hilburn testified that she never asked Complainant during this conversation what the disagreement was about, nor did she ask what Complainant was going to take Respondent to court about. This latter testimony was not credible.

38) Ms. Hilburn was clearly a biased witness against Complainant because of Ms. Hilburn's long standing personal, social relationship with Respondent, and because of her pending application with him for employment.

39) Respondent hired Mary Ann McLain as a cook on July 3, 1985, since Complainant was still off the job as a result of her automobile accident. Ms. McLain was originally hired through the Klamath Lake Employee Training Program. Respondent's contract with that program specified that Ms. McLain would be paid \$3.35 per hour through a job training period of six weeks, and would then received a raise to \$3.50. Ms. McLain was given a second raise to \$3.90 an hour at approximately the end of August 1985.

Her job duties and responsibilities were almost identical to those of Complainant. Ms. McLain quit her job with Respondent on October 1, 1986, to stay home with her children. She returned to work with Respondent on April 15, 1987, and as of the date of hearing in this matter was still working for Respondent.

40) Ms. McLain did not work with Complainant but often cooked in the shift following her after Complainant had returned to work following her accident. When Ms. McLain would come into work after Complainant she would find sometimes that the "back up" work had not been done, and Complainant had left her without sliced tomatoes, chopped lettuce, onions, and other items that a cook needed in that job. Dishes were also left in the sink.

41) While she was working at the restaurant during the summer of 1985, Ms. McLain heard sexual comments being made in the restaurant by various parties, including both Respondent and Complainant. She described these remarks as "harmless" and "more play than anything else." The Complainant would come into the restaurant or be in the restaurant most days when Ms. McLain was working even though Complainant was not on duty. Complainant would talk and flirt with male customers. Complainant would sometimes tell Ms. McLain about the men she was dating and on one occasion told Ms. McLain that she was going away for the weekend with a particular man, and commented that she "hoped she got laid." Later, after the weekend, Complainant told Ms. McLain that her wishes had been fulfilled. Ms. McLain did not know

Complainant outside the working environment.

42) Complainant complained to Ms. McLain about being touched inappropriately by Respondent on one or two occasions. Complainant also made "insulting and belittling" comments about Respondent and would comment about "what a bastard Marty was." Complainant told Ms. McLain that Respondent had slapped her on the rear end. During the period after July 15, 1985, Ms. McLain heard Complainant call Respondent and his wife "Dad" and "Mom." Another waitress, Lorraine Fors, told Ms. McLain that Respondent had grabbed her, Ms. Fors, on the breast on one occasion.

43) Despite the fact that Ms. McLain was still employed by Respondent at the time of the hearing in this matter and had reason for bias, her testimony was nonetheless credible. Even though Ms. McLain was critical of Complainant's work habits and pattern of flirting with male customers, she nonetheless gave testimony which supported some of Complainant's contentions.

44) Mary Louise Lewis worked as a waitress for Respondent for three or four weeks during August 1985. Ms. Lewis had previously been employed as a waitress by Sharon Effert when the restaurant was known as the Burger Shack. Ms. Lewis worked with Complainant from November 1984 until the end of April 1985, when Respondent took over the lease of the restaurant. During the period from May 1, 1985, until she was hired in August 1985, Ms. Lewis was a regular customer at the restaurant because she lived very close. On one of the

occasions in May when Ms. Lewis and her roommate were in the restaurant, they complained to Complainant about not being hired to work for Respondent and about the fact that Complainant was the only one hired from the Burger Shack. Complainant replied to the effect "don't worry, I'm going to own this restaurant in a year."

45) When she was in the restaurant as a customer and later as a waitress, Ms. Lewis saw Complainant flirting with male customers. She did not see Complainant flirting with Respondent. During this time Complainant also talked a great deal about her boyfriends and would brag about her "conquests" of men. Ms. Lewis did not hear Respondent make sexual comments to Complainant but did hear Respondent frequently make joking sexual comments to everyone around. Ms. Lewis never took offense at these comments. She never saw Respondent touch anyone inappropriately and Respondent never touched her. No one complained to Ms. Lewis about sexual comments or inappropriate touching.

46) Gladys Martin is 57 years old and has been married to Respondent for three and one-half years. She is a co-owner of the Stop Inn Restaurant. Ms. Martin first met Complainant at the time she and Respondent took over the restaurant. During the time that Complainant worked for Respondent she would call them "Mom and Dad" and would hug Respondent from time to time and say "Hi Dad." Complainant would do this in plain sight of Ms. Martin. Complainant hugged Respondent on one occasion after she had returned to work after her accident. The

hug was not sexual or inappropriate, but Ms. Martin felt that this behavior was strange in light of the fact that both she and Respondent had been pressuring Complainant about her poor job performance and their relationship had deteriorated. When she was working in the restaurant Ms. Martin would overhear the banter going on among the employees and Respondent. She felt that some of the comments were not in good taste, and that Respondent always had a need to get in the last word. On some of these occasions Complainant would try to out-do Respondent verbally but was seldom successful.

47) Bill Rasmussen was a customer at the restaurant at least once or twice a day during the period of May through the end of September of 1985. He first met Complainant when he was a customer at the restaurant. During the time when he was a customer in the restaurant Mr. Rasmussen observed Respondent pat various waitresses on the rear end. Mr. Rasmussen observed Respondent do this to Complainant more than to the other waitresses. On one occasion when Respondent was behind the cash register, Mr. Rasmussen observed him reach up and pinch either the Complainant or another waitress on the breast. Generally Mr. Rasmussen would see Respondent touch the waitresses when the waitress was just behind or beside the cash register. Mr. Rasmussen also overheard Respondent frequently making sexually suggestive comments to the waitresses.

48) Mr. Rasmussen is a personal friend of Complainant's and has known her since she worked for Sharon Effert.

He occasionally sees Complainant outside the restaurant and has been to her home two or three times. Mr. Rasmussen was a friend of one of Complainant's boyfriends in 1985. Sometimes when Mr. Rasmussen came into the restaurant Complainant gave him a hug or a kiss on the cheek.

49) On April 4, 1987, Mr. Rasmussen was again in Respondent's restaurant as a customer. Respondent came over to Mr. Rasmussen's table and said that he had learned that Mr. Rasmussen was to be a witness on behalf of Complainant in this proceeding. Mr. Rasmussen replied that, yes, that was the case. Respondent then beat his fist on the table where Mr. Rasmussen was sitting and said words to the effect that he would beat-up Mr. Rasmussen and would "eighty-six" anyone who was a witness against him from the restaurant. Respondent was very serious in making these remarks.

50) Toward the end of August 1985, Respondent informed Complainant that her wages were going to be reduced from \$4.25 to \$3.90 per hour. Respondent did this in order to be able to afford to raise Ms. McLain's wages from \$3.50 to \$3.90 an hour since Ms. McLain and Complainant were doing substantially the same job. Also, Complainant was no longer performing the managerial functions which she had performed from the time of her hiring in May until the time of her accident in mid-June. Respondent was also experiencing some financial difficulty and was reducing the hours of other waitresses. Respondent's reduction of Complainant's wages was not related

to anything other than financial exigencies.

51) Complainant terminated her employment with Respondent on October 1, 1985. On that day some food supplies had arrived at the restaurant and Complainant had put some of them away. However, she had not put away a substantial portion of the frozen food items. When Respondent arrived at the restaurant later that morning he found Complainant sitting at one of the tables visiting with a customer. Respondent didn't say anything, but walked back into the back and saw the frozen food. He proceeded to put it away. When Complainant came back into the freezer area and saw that Respondent had put away the food she said "thank you, Dad." Respondent was angry at Complainant and just told her he would talk with her later. She continued to ask him what the problem was and he said again that he would talk with her later. At this point Complainant made a rude gesture to him and said she would save him the trouble of talking to her later and that she would quit. Respondent and Complainant exchanged angry remarks and called each other names. During the course of this exchange Complainant commented to Respondent that she would see him in court.

52) After she quit, Complainant got another job with a local bakery and later with another restaurant. However, Complainant went to Respondent's restaurant the day after she quit for the purposes of making Respondent mad. She went back to the restaurant two or three times after that, again just to irritate Respondent. Respondent did appear upset and would

glare at Complainant. However, Complainant also testified that if she saw a small yellow car near her house she would be "scared to death." Respondent owns a small yellow car. She also testified that if someone who looked like Respondent came into the restaurant where she was working after she quit, she would get nervous and queasy and want to hide until the person left. She testified that she has lost weight from nervousness about seeing Respondent at the hearing in this matter. In light of the fact that Complainant voluntarily returned to Respondent's restaurant to harass him after she quit, her testimony about being upset if she saw anyone who looked like Respondent was not credible.

53) Shortly after she quit Complainant made a remark to other employees that she would "probably own the restaurant in a year." Complainant also indicates in her diary entry of July 29, 1985, that she was anticipating bringing a legal proceeding against Respondent.

ULTIMATE FINDINGS OF FACT

1) During all times material herein, Respondent was the owner of and doing business as the Stop Inn Drive In restaurant, and was at all times material to this matter an employer in this state utilizing the personal services of one or more employees.

2) Complainant is a female person who was employed by Respondent as a cook and waitress in Respondent's restaurant between the dates of May 3, 1985, and October 1, 1985.

3) Some of the work spaces and passages in Respondent's restaurant

are very narrow, making it difficult for two people to work in those spaces without coming into very close physical proximity to one another without touching. The passage ways behind the stove/grill where the freezer and milk machine are located are also narrow, and would not allow for two people to pass without touching. However, the fact that these areas are narrow does not justify or excuse the sexually offensive manner in which Respondent touched employees. The area in the kitchen itself, however, is adequate for two people to work without touching each other.

4) When Complainant was first hired by Respondent she was the only employee. Respondent and his wife, Gladys Martin, also worked full-time in the restaurant. The Respondent hired additional waitresses at approximately the end of May 1985.

5) On Complainant's first full day of work, Respondent called her "hon" and "sweetie" and put his hands on Complainant's rear end and also put his arm around Complainant. When Respondent again touched Complainant the next day Complainant asked him to keep his hands to himself and not to touch her. The touching stopped for a while, but Respondent would make sexually suggestive remarks to Complainant.

6) Around the end of May, Respondent again began touching Complainant in an offensive manner by patting or squeezing her rear end. He also remarked to her that she had "nice buns." Complainant again told Respondent not to touch her and he desisted, but Complainant observed him touching the other waitresses on

their hips or rear ends or putting his arm around them. Although Respondent had desisted from touching Complainant on the rear end, he continued to put his arm around her from time to time and to make sexually suggestive comments about her figure.

7) One of the customers, Dan Ellenburg, observed Respondent touch Complainant in the area of her hips and rear end and also saw Respondent put his arm around Complainant and put his hand on Complainant's breast. Mr. Ellenburg also saw Respondent touch one of the other waitresses in the breast area.

8) On June 15, 1985, Respondent and his wife left Complainant in charge of the restaurant for a period of approximately five days. In the early morning hours of June 16, Complainant had an automobile accident as a result of having become intoxicated. She was off work recuperating from her injuries for approximately one month. As a consequence of this accident and her resulting inability to fulfill the responsibilities she had undertaken with regard to Respondent's restaurant, the relationship between Complainant and Respondent and his wife became strained. After Complainant returned to work part-time in mid-July, Respondent was curt with Complainant and complained about her job performance. Also during this period Complainant's job performance did change, in that she spent more time visiting with customers and neglected her work. She also occasionally failed to do her share of the "back-up" work expected of a cook in that restaurant. Prior to the accident Complainant had called Respondent and his wife "Dad"

and "Mom" most of the time. After her return to work after the accident Complainant used these terms less frequently as a result of the increased tension between Complainant and Respondent and his wife.

9) Shortly after Complainant returned to work Respondent began subjecting her again to unwanted and offensive sexual touching. On two separate occasions in the third week of July, Respondent kissed Complainant against her will in the area of the restaurant behind the kitchen. Respondent also made sexually suggestive remarks to Complainant about a "figure eight" brace that she was required to wear as a result of her injuries. He would comment on the effect that the brace had on her breasts. These incidents and remarks upset Complainant, and she began to keep a diary regarding Respondent's actions and comments to her.

10) Respondent also subjected another waitress, Jodi Giffin, who was employed by him from June 1985 until mid-December 1985, to offensive and unwelcome pats on the rear end. On one occasion Respondent patted Ms. Giffin on the rear end within the sight of Ms. Giffin's husband. Respondent also made comments of a sexual nature to or within the hearing of Ms. Giffin and others.

11) Complainant complained to Ms. Giffin about Respondent's touching of her. She also complained to Mary Ann McLain.

12) Respondent also touched Theresa Hulseman, another one of the waitresses employed in his restaurant, in a sexually offensive manner by putting his hands in her apron pockets

and touching her body. Respondent would also get unnecessarily close to Ms. Hulseman such that he made her uncomfortable. He also subjected her to sexually suggestive remarks.

13) Another customer, Bill Rasmussen, observed Respondent pat various of the waitresses in his restaurant on the rear end. Mr. Rasmussen observed Respondent do this to Complainant more often than the other waitresses. Mr. Rasmussen also heard Respondent frequently making sexually suggestive comments to the waitresses.

14) Toward the end of July Complainant told Respondent that if he did not quit touching her she would tell Respondent's wife. The touching did stop, but Respondent continued to subject Complainant and other waitresses in the restaurant to sexually suggestive remarks.

15) Respondent's touching of Complainant was sexual in nature and was unwelcome by and was upsetting to Complainant and made her anxious. At the same time, however, Complainant would periodically initiate physical contact with Respondent by hugging him, or asking him for a hug, and even, on at least one occasion, kissing him. She also flirted with him occasionally, as she did with some of the male customers, and continued on occasion to call him "Dad." Respondent's comments to Complainant about her body or about sexual matters were also offensive and unwelcome to Complainant, although she did occasionally participate in "off-color" banter and would try to get the last word in with Respondent. Complainant's weight gain during the

summer of 1985 was not occasioned by Respondent's behavior to her, but rather was a consequence of her traffic accident.

16) When Complainant was initially hired she was paid \$4.25 an hour because she had some managerial duties. Toward the end of August 1985, Respondent told Complainant and others that because of financial difficulties their hours would be cut. He also at that time reduced Complainant's hourly wage from \$4.25 to \$3.90 an hour, the wage that he was paying another cook whose job duties were substantially similar to those of Complainant. Respondent's actions in lowering Complainant's wages were not related to Complainant's objections to Respondent's touching of her.

17) Complainant quit her job with Respondent on October 1, 1985, as a result of a dispute with Respondent about whether or not Complainant should have put away some frozen food items that had been delivered to the restaurant. Complainant's decision to terminate her employment was not caused by Respondent's sexual conduct toward her.

18) After Complainant quit her job she continued to go back to Respondent's restaurant on at least three occasions immediately following her decision to quit. She went to Respondent's restaurant in order to irritate him.

CONCLUSIONS OF LAW

1) At all times material herein Respondent was an employer subject to the provisions of ORS 659.010 to 659.435.

2) The Commissioner of 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 in this matter Respondent and Complainant were informed of the matters described in ORS 183.413.

4) The actions of Respondent in repeatedly patting and grabbing the Complainant on the buttocks and touching her in the area of her breast, and repeatedly making sexual comments about Complainant's anatomy and other sexual comments to Complainant and within her hearing, all of which were unwelcome and offensive to Complainant, created a hostile and abusive working environment. This conduct constituted discrimination, based on sex, against Complainant in the terms and conditions of her employment, in violation of ORS 659.030(1)(b).

5) The Commissioner of the Bureau of Labor and Industries has the power under the facts and circumstances of this record to award money damages to Complainant for her emotional distress sustained, and the sum of money awarded in the Order below is an appropriate exercise of that authority.

OPINION

The record in this proceeding clearly establishes, through several different sources, that Respondent engaged in a course of conduct toward Complainant and other female employees that constituted sexual harassment. Not only did Complainant testify about a number of incidents where Respondent touched her in an offensive sexual manner, but other witnesses,

even one of Respondent's own witnesses, said they either observed Respondent touching Complainant or that Complainant complained to them at the time about the offensive touching. Both Bill Rasmussen and Dan Ellenburg saw Respondent touch Complainant inappropriately, and Jodi Giffin and Mary Ann McLain testified that Complainant complained to them at the time about Respondent's touching her. The fact that other female witnesses testified that Respondent touched them added independent weight to Complainant's claims. Theresa Hulseman said Respondent felt inside her apron pocket and would get close enough to her to make her uncomfortable. These incidents, combined with some sexually suggestive remarks, substantially contributed to Ms. Hulseman's decision to quit her job. Jodi Giffin testified that she was bothered by Respondent touching her rear end and kissing her on the cheek, and that she tried to avoid coming in contact with him.

Other witnesses supported Complainant's testimony that Respondent frequently made sexually suggestive remarks either to them or within their hearing. Even Railene Hilburn, Respondent's witness who exhibited the most bias in favor of Respondent, admitted that she was embarrassed by one of Respondent's remarks. Mary Lewis, another witness for Respondent testified that although she did not take offense, she did hear Respondent frequently make joking sexual comments. Jodi Giffin testified that Respondent would make sexual comments to her and others, and recalled overhearing one comment about "sharing" her and

other waitresses with a customer. Respondent's wife, Gladys, quizzed Complainant and another waitress about Respondent's behavior because she was concerned that he made remarks that were perhaps "too raunchy."

This record establishes the discrimination despite the fact that there were some instances of conduct or speech on which there was conflicting testimony regarding whether they occurred, and despite the fact that there were conflicting interpretations given to Respondent's action. One of the most significant areas where there was dispute as to whether an incident occurred involved Complainant's allegation that Respondent repeatedly asked her if he could come to her house. Complainant testified that Respondent asked to come over to her house "almost everyday" for 10 or 12 days in a row. In contrast, Respondent and his wife both testified that it was Complainant who asked Respondent, in front of his wife, to come over on several occasions. Respondent testified that he never accepted such an invitation, and would not, and that he told his wife so. Although Complainant further testified that on July 18 Respondent said that he had in fact come by her house about 11 p.m. on July 17, but had not stopped because he did not see any lights on, there is no other evidence that he ever came to her house. Bill Rasmussen did not see Respondent at the house on the night of July 17, even though Complainant in her diary said that Bill Rasmussen was there at "10:49" and had at least a brief conversation with her and likely could have still been at the house close to 11 p.m. It is difficult to accept that

Respondent asked to come to Complainant's house "10 or 12 times," as Complainant says he did, and then never be seen showing up. And the evidence is clear that the only time that Respondent visited with Complainant at her house was when Respondent went there with his wife after Complainant's accident. However, the conflicting testimony about whether Respondent did in fact subject Complainant to anxiety by talking about coming over to her house was not central to a finding of discrimination in this matter.

Respondent denied having touched Complainant or any other female employee in a sexually suggestive or offensive manner. His testimony was that he would touch his employees on the hips in order to let them know that he was there and to move them aside when they were working in small spaces. While it is true that several of the work spaces in the restaurant are sufficiently narrow that people cannot get around one another without coming in very close proximity or actually touching each other, Respondent's touching was beyond what could be considered necessary or businesslike under the circumstances. Certainly Respondent's patting of Jodi Giffin on the rear end as she walked out the front door was not necessitated by a confined work space, nor was kissing her on the cheek. Respondent cannot use this justification for putting his hand in Theresa Hulseman's apron pocket or for kissing Complainant. No excuse is acceptable or can even be offered for Respondent's frequent indulgence in making sexually suggestive remarks to his female employees.

There is an inherent imbalance of power in any employment situation between the owner or manager and the employees. This imbalance makes it difficult for an employee, male or female, to repulse an owner or manager's inappropriate sexual touching or sexual remarks without fear of damaging his or her employment status. Respondent took advantage of this inherent imbalance of power to subject his female employees to inappropriate touching and sexual innuendo for his own titillation. Respondent appeared to view his employees as "his girls." It is not likely that Respondent would have felt free to engage in the kind of touching and sexual commentary that he did in this case if the female working with him in the restaurant, even in the confined spaces, had been his boss.

Respondent brought out evidence of Complainant's moral character and her relations with other men in an attempt to besmirch her and to focus attention away from his own behavior toward her. Some of this evidence concerned the number of times she has been married, the number of men she was dating during the period of employment with Respondent, and the extent to which she flirted with male customers in the restaurant. None of this, however, is relevant to the issue in this matter, which is whether Respondent discriminated against Complainant in the terms and conditions of her employment on the basis of sex by subjecting her to sexual harassment on the job. Complainant's life outside of work has no bearing on the resolution of that issue.

Damages

Complainant testified that she was upset and anxious and scared of Respondent as a result of his behavior toward her. She said she gained weight because she eats when she gets nervous, she threw up, she increased her smoking, she was terrified if she saw a car resembling Respondent's coming to her house, and she would start shaking and get queasy and want to hide if someone who looked like Respondent came into the restaurant where she worked after she quit her job with him. However, Complainant's own testimony in other particulars calls into question the extent of the effect of Respondent's behavior on her. Complainant separately admitted that much of her weight gain in the summer of 1985 was occasioned by inactivity and increased eating during the period of recuperation from her accident. She called Respondent "Dad" during much of the first six weeks of her employment prior to her accident, and still called him that for part of the time up until she quit. She asked him to hug her to give her emotional comfort, and she initiated kissing him in a playful, teasing way on at least one occasion after the touching incidents in July. She went into the restaurant as a customer voluntarily and regularly when she was not on duty even though Respondent would be there. And she went back to Respondent's restaurant several times immediately after she quit in order to make him mad. This latter behavior particularly belies her testimony that she would shake and want to hide if someone who even looked like Respondent came into the restaurant where she worked after she

quit her job with Respondent. She also testified that she had lost weight because she was so nervous about having to see Respondent at the hearing, even though her earlier testimony was that she would gain weight when nervous.

Although Complainant testified that she was offended by Respondent's sexual remarks, there is other credible testimony from Mary Ann McLain that Complainant herself participated in some of the sexual banter with Respondent and others in the restaurant.

Nonetheless, even though Complainant appears to have embellished on the extent of the emotional trauma which she suffered as a consequence of Respondent's sexual harassment of her, she was in fact subjected to offensive, unwelcome sexual harassment, both physical and verbal, by Respondent. She was upset and concerned about it enough to complain to others about it, including several of the other waitresses and at least two customers. She also was concerned enough about the pattern of harassment to start recording the incidents and remarks in a diary. She needed her job and was not free just to leave at any time. One of the witnesses, Bill Rasmussen, testified that Complainant cried because of something Respondent had said to her.

Complainant did suffer as a direct result of Respondent's illegal behavior and is entitled to compensation in the amount set out in the Order.

ORDER

NOW, THEREFORE, as authorized by ORS 659.060(3) and 659.010(2), and in order to eliminate

the effects of the unlawful employment 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 FLORENCE STOVER ESTES in the amount of TWO THOUSAND DOLLARS (\$2,000.00) for the mental distress that Complainant suffered as a result of the unlawful employment practices.

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

**In the Matter of
DAN STOLLER,
Respondent.**

Case Number 09-87

Final Order of the Commissioner

Mary Wendy Roberts

Issued April 11, 1988.

SYNOPSIS

Respondent evicted female Complainant from Respondent's rental house, in violation of ORS 659.033 (1)(b), when Complainant refused to enter into a sexual relationship with him. The Commissioner awarded Complainant damages for the

expenses she incurred due to moving, and \$2500 in damages for mental suffering. ORS 659.0331)(b).

The above-entitled matter came on regularly for hearing before Douglas A. McKean, designated as Hearings Referee by Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on January 20 and 21, 1988, 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: Judith A. Bracanovich, Quality Assurance Manager for the Civil Rights Division (CRD) of the Agency; Patricia K. Clark, CRD Investigating Team Supervisor; John Hofer, Senior Investigator, CRD; Brenda Pardee, Complainant (hereinafter Complainant); Susan Duvall, friend of Complainant; and Anne Wise, co-tenant of Complainant. Dan Stoller (hereinafter Respondent) was represented by William O. Bassett, Attorney at Law. Respondent testified and his attorney cross-examined Agency witnesses.

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

**FINDINGS OF FACT –
PROCEDURAL**

1) On March 26, 1987, and pursuant to ORS 659.045, Complainant filed

a verified complaint with CRD of the Agency alleging that she had been discriminated against on the basis of sex, in that Respondent had evicted her from Respondent's rental house because Complainant declined a sexual relationship with Respondent.

2) Thereafter, CRD issued an Administrative Determination finding substantial evidence of the alleged unlawful practice on the part of Respondent.

3) Pursuant to ORS 659.050, CRD attempted to resolve the Complaint by conference, conciliation, and persuasion, but was unsuccessful. Evidence presented at hearing established the following facts in this regard:

a) Patricia Clark was an Investigative Supervisor for CRD of the Agency when the Administrative Determination was issued in this matter. As part of her responsibilities, she reviewed the file prepared by the investigator, John Hofer. She agreed with Hofer's determination that substantial evidence of an unlawful practice was found. Clark's responsibilities also included attempting to conciliate this matter. Her efforts were made according to normal Agency practices and procedures.

b) On July 7, 1987, Clark mailed a letter to both Complainant and Respondent inviting conciliation. Thereafter, Clark contacted Complainant to receive her evaluation of the damages amount she wished to receive in order to resolve this matter.

c) Clark then contacted Respondent's attorney and presented the conciliation offer. Later, Respondent sent Clark a letter dated July 22, 1987, in which Respondent said the amount of

the offer was unreasonable, and the case should move closer to hearing.

d) On July 29, 1987, Clark spoke with Respondent's attorney, who presented a counter offer. Clark spoke with Complainant, who rejected the counter offer. At that time, Clark determined that conciliation had failed, and recommended that the case be scheduled for a hearing.

4) On October 8, 1987, the Agency prepared and duly served on Respondent Specific Charges alleging that Respondent had evicted Complainant from Respondent's rental property because Complainant refused to engage in sexual relations with Respondent.

5) With the Specific Charges, the Agency also served on Respondent the following: a) a Notice of Hearing setting forth the time and place of the hearing in this matter; b) a 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 regarding the contested case process; and d) a separate copy of the specific administrative rule regarding responsive pleadings.

6) On October 23, 1987, Respondent filed an answer to the Specific Charges in which he denied that he requested sexual favors of Complainant, and denied that the eviction of Complainant from Respondent's rental property was due to Complainant's refusal to engage in sexual relations. As affirmative defenses, Respondent alleged that there were "multiple reasons necessitating this move, not the least of which was [Complainant's] financial inability to maintain and pay the agreed

and appropriate rent," that Complainant created her own atmosphere of mental suffering; and that Complainant had injected her personal character as an issue.

7) Pursuant to OAR 839-30-071, the Agency filed a Summary of the Case including documents from the Agency's file. Although permitted to do so under the provisions of OAR 839-30-071, Respondent did not submit a Summary of the Case.

8) A pre-hearing conference was held on January 20, 1988, 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.

9) At the commencement of the hearing, the attorney for Respondent stated that he had read the Notice of Contested Case Rights and Procedures and had no questions about it.

10) The 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).

11) The Proposed Order in this case was issued and mailed on February 22, 1988, to all persons indicated on the face of the certificate of mailing attached to the Proposed Order. To be accepted as timely filed, exceptions, if any, needed to be filed with the Hearings Unit of the Bureau of Labor and Industries by 5 p.m. on March 3, 1988.

The Bureau of Labor and Industries rules governing Exceptions to the Proposed Order, Timeliness, and Calcula-

tion of Time and Filing Dates are stated as follows:

OAR 839-30-165(3) speaks to filing of exceptions and states:

"Ten (10) days from the date of issuance of the Proposed Order will be allowed for a party to file Exceptions, * * * to the Hearings Referee through the Hearings Unit."

OAR 839-30-040 speaks to timeliness and states:

"(1) Any document, whether submitted by the Agency or a party, that is received by the Hearings Unit beyond the established number of days for submittal may be disregarded by the Hearings Referee.

"(2) Where the Agency or a party requires additional time to submit any document, a written request for such extension must be submitted to the Hearings Unit at least two (2) days prior to the expiration of the time period for the document in question. The Hearings Referee may grant such an extension of time only in situations where the need for more time is due to circumstances beyond the control of the Agency or party so requesting or where refusal to extend the time would create an undue hardship on the party or Agency so requesting. The Hearings Referee shall notify the Agency or the party who requested the extension whether it will be allowed."

OAR 839-30-035 speaks to calculation of time and filing dates, and states:

"(1) The computation of any period of time will not include the day from which the designated period begins to run. The computation will include the last day of this period unless it is a Saturday, Sunday or holiday officially recognized by the State of Oregon or the federal government. If the last day of the time period is a Saturday, Sunday, or holiday, the period shall run until 5 p.m. of the next day which is not a Saturday, Sunday or holiday.

"(2) Except as modified by statute or enlarged by these rules, by order of the Commissioner, or by decision of the Hearings Referee, a document is filed on the date received by the Hearings Unit."

Respondent did not request an extension of time to file exceptions to the Proposed Order. Three envelopes, each containing a copy of Respondent's exceptions, were found by a member of the Reception staff upon arrival Monday morning, March 7, 1988. They were found lying on the floor behind the reception area doors on that morning. Each envelope had "Hand Delivered 3-4-88" handwritten on its face. The Hearings Unit received Respondent's exceptions on Monday, March 7, 1988.

I find that Respondent's exceptions to the Proposed Order were not received by the Hearings Unit by the exceptions expiration date, and therefore were not considered in this Order.

FINDINGS OF FACT – THE MERITS

1) At all times material herein, Respondent Dan Stoller was the owner of real property located at 6748 S.E. 75th, Portland, which he operated as a

rental unit, and was subject to the provisions of ORS 659.010 to 659.435.

2) From the time Respondent purchased the property referred to above, until the time of this hearing, the property has been used as a rental property. The house at that location has never been Respondent's personal residence.

3) Complainant is a female.

4) Complainant called Respondent on or about September 20, 1986, after she heard from Anne Wiese that Wiese might be moving out of Respondent's three-bedroom rental house. Later, Complainant and her friend, Susan Duvall, drove to Respondent's residence to discuss a rental agreement. Complainant rented the house that day, and paid the first month's (October's) rent with a check drawn on Duvall's account. Several days later Complainant retrieved Duvall's check from Respondent and paid him cash for the rent. At no time did Respondent tell Complainant that he was renting the house to her for a limited time. Complainant moved in approximately one week later. Respondent gave Complainant a receipt dated "10/1/86" for that rent payment.

5) Complainant became a tenant of Respondent's rental house at 6748 S.E. 75th on or about October 1, 1986.

6) Rent at Respondent's rental house was \$400 per month.

7) Complainant was responsible to Respondent for the full rent each month, as Respondent had rented the house solely to Complainant. At no time did Complainant tell Respondent or Wiese that she thought the rent was too high. Before she rented the house,

Complainant told Duvall that Complainant thought that \$400 per month was a good amount for the house, based on the rental housing that they had seen previously. Respondent had never indicated that he planned to raise the rent.

8) At the time Complainant rented the house, she believed that Wiese was going to move out. Wiese had notified Respondent on several occasions that she would be moving out due to her financial inability to pay the rent and utilities; during September 1986, the electricity and water had been turned off because Wiese could not pay those bills. Prior to October 1986, Wiese had often paid her rent late and in installments; Respondent had never threatened to evict her for late rent payments.

9) After Complainant rented the house, Complainant and Wiese discussed sharing the house and splitting the expenses.

10) Complainant and Wiese were co-tenants during the entire tenancy of Complainant in Respondent's rental house. Anne Wiese was a tenant at Respondent's rental house from approximately the Spring 1985 to on or about March 22, 1987.

11) Complainant had an agreement with Wiese that the two of them would split the rent and utilities for the house "50-50"; Complainant's share of the \$400 monthly rent was \$200 per month. Wiese would pay her share of the bills to Complainant, who would then pay the rent and utilities. Respondent and Complainant discussed this agreement between Complainant and Wiese, and Respondent did not object to it. In total, six people lived in the

house: Complainant and her three children, and Wiese and her son. Respondent was aware that six people were going to occupy the rental house. Respondent said that if there were any problems, Wiese and her son would have to move; Complainant was the person renting the house.

12) Respondent agreed to allow Complainant and Anne Wiese to pay the rent by the seventh day of each month because Complainant received a child support payment on the fifth day of each month and Wiese was paid on the fifth day of each month.

13) Prior to October 31, 1986, Respondent had been very helpful to Complainant. He had offered his truck to help her move into the rental house. He loaned her a washer and dryer and his lawn mower.

14) On October 31, 1986, Complainant and Duvall went to a lounge named the Spot 79. They arrived sometime around 9:00 to 10:00 p.m. Respondent was there when Complainant arrived. Within a few minutes, Respondent walked over to where Complainant was sitting and asked whether she was "tricking or treating." Later, Respondent asked whether Complainant would like to be Respondent's neighborhood mistress. Complainant laughed it off, but Respondent said he was serious. Respondent said he could work it out so that Complainant would not have to pay any rent. Complainant said no. Respondent then pulled out his wallet and showed Complainant his credit cards. He said he would give Complainant free rent and let Complainant use his credit cards too. Complainant said no, she was not interested. Complainant was

nervous because she thought Respondent was drunk and was "getting kind of belligerent about it." Complainant believed that Respondent's propositions were serious. Complainant told Respondent that she would pay her rent "the regular way." Respondent then said that maybe he would not let Complainant rent the house anymore. When Complainant said that Respondent could not do that, Respondent said that he could do anything he wanted to, that it was his house. At that point, Complainant, Duvall, and a companion, Ken Snyder, left the lounge.

15) Complainant, Duvall, and Snyder went across the street to a tavern named the Buzzard's Roost. They were there a few minutes when Respondent came in. Respondent walked over to Complainant and repeated the propositions he had made at the Spot 79. He said that "professionals" did not make as much as Respondent was offering her. He wanted to know who she was, refusing to sleep with him. Complainant repeatedly told Respondent that she was not interested, and then she called a taxi to take her home. Respondent offered to take Complainant home, since Respondent lived just two houses down from Complainant's house. Complainant refused. Respondent repeatedly called Complainant vulgar names. When the taxi arrived, Complainant left and returned home. When she arrived home, Complainant told Wiese about Complainant's conversations with Respondent that evening.

16) During their conversations at Spot 79 and Buzzard's Roost, Complainant did not tell Respondent that

she thought the rent was too high at Respondent's rental house

17) On November 1, 1986, Respondent gave Complainant an oral eviction notice.

18) On that day, Respondent came to the rental house and met Complainant and Wiese. After he told Complainant that she was evicted, Complainant asked him why, and Respondent answered that he did not have to give her a reason. Complainant accused Respondent of evicting her because she had refused to have sex with him. Respondent told Complainant that he thought she "was trouble." Complainant became angry, told Respondent that he could not evict her, and said she would sue Respondent. Complainant left the room. Before he left, Respondent told Wiese that Complainant "could stay here now," but he "wanted her out." Respondent set no date. He testified that he did not have any particular time in mind by which he wanted her out. He told Wiese that he wanted Complainant to stay out of his way.

19) Anne Wiese was not evicted from Respondent's rental house.

20) As of November 1, 1986, Complainant's rent had always been paid on time, and there had been no damage caused to the rental house by Complainant.

21) Between November 1, 1986, and January 1, 1987, Complainant saw Respondent on only one occasion, which was at the Spot 79. When Respondent approached Complainant, she told him not to talk with her. They had no other conversation.

22) On January 1, 1987, Respondent delivered a written eviction notice to Complainant requiring that she move out by March 5, 1987.

23) Anne Wiese was not evicted. At that time there was no rent past due; rent had not been paid late prior to January 1987.

24) Complainant left the premises on March 1, 1987, pursuant to the eviction.

25) Complainant paid someone \$100 to help her move out of Respondent's rental house. In addition, she bought the mover a tank of gas for the mover's truck; the gas cost \$25. Complainant paid \$46 for transferring her telephone service, and an additional \$15 to have a telephone installed at her new apartment. She had to pay a \$125 non-refundable application fee to the apartment. During the move, Complainant's aquarium was destroyed; it had a value of \$85. Complainant was required to miss a day of work in order to move; the missed work resulted in a loss to Complainant of approximately \$60. Complainant bought boxes and tape for the move, at a cost of \$25.

26) Complainant's apartment cost \$300 per month. She lived in the same apartment at the time of the hearing. The cost of Complainant's utilities at the apartment were approximately \$50 more per month than Complainant's share of the cost of utilities at Respondent's rental house.

27) When she was evicted by Respondent, Complainant was very angry and upset. She was shocked and surprised that Respondent could evict her and her three children. She

suffered embarrassment and humiliation when she told potential landlords why she had been evicted from her previous house and that she was going to file a civil rights complaint. She believed that she had been turned down as a tenant at four or five apartments after she told them this. Complainant suffered headaches for weeks due to the stresses associated with the move, which included placing her children in new schools.

28) Respondent's testimony was not credible. All of the witnesses suffered from some memory loss, especially regarding when certain events took place. After observing the demeanor of all of the witnesses, and noting the consistency of the testimony on relevant facts given by Complainant, Duvall, and Wiese, the testimony of Complainant, Duvall, and Wiese was found to be credible. For the reasons given in the Opinion section of this Order, which are incorporated herein by this reference, Respondent's version of the facts and his reasons for evicting Complainant were not found to be credible. Accordingly, Respondent's testimony was given less weight than that of other witnesses whenever his testimony was in conflict with the other credible testimony.

ULTIMATE FINDINGS OF FACTS

1) At all times material to this case, Respondent was the owner of real property located at 6748 S.E. 75th, Portland, Oregon, which he operated as a rental property. A three bedroom house is on the property.

2) From October 1, 1986, until March 1, 1987, Complainant occupied Respondent's real property referred to in Ultimate Finding of Fact 1 above.

3) Complainant is female.

4) On October 31, 1986, Respondent solicited Complainant for a sexual relationship. Respondent offered Complainant free rent and the use of his credit cards if Complainant accepted the solicitation; Respondent suggested that he may not allow Complainant to continue to rent the house if she refused his offer. Complainant refused.

5) On November 1, 1986, Respondent gave Complainant oral notice that Respondent was evicting Complainant from Respondent's rental property. Respondent did not set a specific date when Complainant was supposed to be out of the rental house.

6) On January 1, 1987, Respondent gave Complainant a written notice that Respondent was evicting Complainant from Respondent's rental property, effective March 5, 1987.

7) Complainant vacated Respondent's rental house on March 1, 1987.

8) Respondent evicted Complainant because she refused to have a sexual relationship with Respondent.

9) Complainant incurred \$481 in expenses directly related to her move from Respondent's rental house to an apartment. In addition, the amount of her rent increased \$100 per month when she moved into the apartment. This amount was arrived at as follows: rent at the apartment was \$300 per month; Complainant's share of the rent at Respondent's house was \$200 per month; thus, the difference equals \$100 per month. From March 1, 1987, until the date of this hearing, Complainant incurred a total extra rent expense of \$1067 (10 2/3 months times \$100

per month). Complainant also paid approximately \$50 per month more for utilities at the apartment than she paid as her share of the utility expenses at Respondent's rental house. Thus, Complainant incurred a total extra utility expense of \$533 (10 2/3 months times \$50 per month). Total expenses, that is, moving expenses and rent and utility differentials, equal \$2081.

10) As a result of Respondent's eviction of Complainant, she was very angry and upset. During her search for a new place to live, she suffered embarrassment and humiliation when she explained the reason for the eviction to potential landlords. She believed that she was not accepted as a tenant at four or five apartments when she explained the circumstances associated with the eviction. The stresses caused by the move from Respondent's house caused Complainant to suffer headaches for weeks.

CONCLUSIONS OF LAW

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

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

3) The Agency complied with ORS 183.413.

4) ORS 659.033(1) provides:

"No person shall, because of [the] *** sex *** of any person:

"(b) Expel a purchaser from any real property."

ORS 659.031 provides:

"As used in ORS 659.033, unless the context requires otherwise, 'purchaser' includes an occupant, prospective occupant, lessee, prospective lessee, buyer or prospective buyer."

Respondent violated ORS 659.033.

5) 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 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 to protect the rights of others similarly situated.

OPINION

This case presents a question of credibility of witnesses. The Hearings Referee had the opportunity to observe and listen to all of the witnesses. Complainant's and Duvall's testimonies regarding the events and conversations that took place on the evening of October 31, 1986, were consistent and believable on virtually every point. During cross-examination of those witnesses, Respondent was able to reveal some inconsistencies, such as whether or not Complainant and Duvall left the Buzzard's Roost together. As mentioned in Finding of Fact 28, all of the witnesses suffered some memory loss, and the inconsistencies were about details which do not affect the determination in this case. Respondent suggested that Duvall had an interest in the outcome of this case.

However, with the exception of her possible bias due to her friendship with Complainant, the Forum found that Duvall had no other interest in the matter.

Respondent also attempted to discredit Complainant's credibility by revealing inconsistencies between Complainant's testimony and facts surrounding a divorce and other matters unrelated to this case. Those inconsistencies, and whatever the reasons therefor, do not change the Forum's finding that Complainant's testimony regarding the facts in this case was credible.

Respondent testified that he evicted Complainant on November 1, 1986, because of an argument they had on October 31, 1986, at the Spot 79 and the Buzzard's Roost. According to Respondent, Complainant approached Respondent at the Spot 79 and, initially, complained about the amount of the rent. That led to an argument over the length of time which Respondent says he agreed to rent the house to Complainant. Respondent testified that he had only rented the house to Complainant until the spring of 1987 because he wanted to move into the house himself. He said he had made that clear to Complainant when she rented the house. When Complainant insisted that Respondent had said that she could stay as long as she wanted, and that she intended to stay as long as she wanted, Respondent testified that he knew

"that there was trouble in the brewing, and I decided the next day when I got up that I was going over there and I was going to tell her

that I didn't want to rent to her no more."

In his responsive pleading, Respondent also asserted that Complainant's "financial inability to maintain and pay the agreed and appropriate rent" was one of the reasons he evicted her.

Respondent's reasons cited above for evicting Complainant were not believable. There was no evidence on the record to indicate that Complainant had any difficulty paying her rent. To the contrary, the evidence revealed that her rent was fully and timely paid at the time of the oral eviction, and thereafter until the written notice of eviction. The evidence also revealed that before Complainant became Respondent's tenant, Wiese's rent payments were often late and incomplete; Respondent never threatened to evict Wiese for this or any other reason. With regards to the amount of the rent, Complainant thought the amount of the rent was good. There was testimony that Complainant had never complained to Duvall or Wiese that the rent amount was too high. In addition, she had only been renting the house for one month, and there was no evidence that she thought the rent amount was too high when she rented it. Finally, the facts show that she ended up paying one-half of what she had thought she would be paying for rent, due to the fact that she and Wiese shared the rent expense.

Regarding Respondent's assertion that he evicted Complainant because of an argument over the amount of time Complainant could rent the house, evidence on the record cast doubt on this reason. Respondent testified that he rented the house after

Wiese moved out during March 1987. The house was still being rented at the time of the hearing on this matter. In other words, Respondent never moved into the house. In addition, there is no evidence that Respondent ever notified Wiese of his intention to move into the house; when Wiese moved, it was due to her financial inability to stay in the house without Complainant. Respondent testified that he had not set a definite date when he wanted to move into the house because he needed to convince his wife to move, and because it would be expensive to move. With that amount of uncertainty about whether he would be moving into the house, the Forum finds it highly unlikely that an argument over the matter would cause Respondent to evict Complainant. This is also unlikely when Complainant represented a source of steady rent payments, following a long period of late and insufficient rent payments from Wiese. Respondent testified that he knew he could terminate a rental agreement by giving a tenant a thirty day notice. Again, it seems unlikely that Respondent would feel the need to immediately evict Complainant over this alleged misunderstanding when he knew he had the power to terminate her tenancy with a thirty day notice whenever he decided to move into the house himself.

That leaves only the fact of the alleged argument itself as a reason to evict Complainant. The Forum is not convinced from the evidence on the record that Respondent evicted Complainant because of an argument over some ill-defined agreement about the term of Complainant's tenancy. None

of Respondent's professed reasons for evicting Complainant are believable, based on the credible evidence on the record.

ORDER

NOW, THEREFORE, as authorized by ORS 659.060(3) and 659.010(2), and in order to eliminate the effects of the unlawful practice found, 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 Brenda Pardee in the amount of FOUR THOUSAND FIVE HUNDRED EIGHTY ONE DOLLARS (\$4581.00), plus interest upon \$2081.00 thereof, compounded and computed at the annual rate of nine percent from the dates the appropriate portions thereof were incurred due to the unlawful practice, until the date paid. This award represents \$2081.00 in damages for expenses Complainant incurred, and \$2500.00 in damages for the mental distress she suffered as a result of Respondent's unlawful practices found herein.

2) Cease and desist from discriminating against any other occupant of Respondent's real properties because of the occupant's sex.

In the Matter of DEMETRIO IVANOV,

dba Demetrio Ivanov Tree Thinning,
Northwest Brushing, and Ivanov For-
estry, Respondent.

Case Number 11-87

Final Order of the Commissioner

Mary Wendy Roberts

Issued April 11, 1988.

SYNOPSIS

Respondent, a licensed farm labor contractor, repeatedly failed to submit certified payroll reports on five forestation contracts, in violation of ORS 658.417(3) and OAR 839-15-300, and repeatedly failed to furnish each worker a copy of workers rights and remedies and of the employment agreement, in violation of ORS 658.440(1). The Commissioner held that these violations demonstrated Respondent's unfitness to act as a farm labor contractor, pursuant to OAR 839-15-520(3), and denied Respondent a farm labor contractor license. ORS 658.417(3), 658.420, 658.440(1); OAR 839-15-300, 839-15-520(3).

The above-entitled contested case came on regularly for hearing before Warner W. Gregg, designated as Hearings Referee by Mary Roberts, the Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was conducted on January 27, 1988, in Room 311 of the State Office Building, 1400 S.W. Fifth Avenue, Portland, Oregon. Lee Bercot, Hearings 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. Demetrio Ivanov, dba Demetrio Ivanov Tree Thinning, Northwest Brushing, and Ivanov Forestry (hereinafter the Contractor), did not appear in person or by counsel. The Hearings Referee called as witnesses Lee Bercot, Karen Higuera, an employee of the Agency; and Jerry Garcia, former Compliance Specialist with the Agency, who testified by telephone.

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

RULING

At the commencement of the hearing, the Agency amended the "Notice of Proposed Denial of Farm Labor Contractor License" by substituting the statutory citation "ORS 658.420" for "ORS 658.445(1)" and "ORS 658.445(2)" wherever either of the latter two citations appear in the document.

For reasons stated in the Opinion, the Forum rules that this amendment be allowed.

FINDINGS OF FACT – PROCEDURAL

1) By a document entitled "Notice of Proposed Denial of Farm Labor Contractor License," the Agency informed the Contractor under date of July 21, 1987, that the Agency intended to deny his application for a Farm Labor Contractor's license. The notice cited as the basis for this denial

the Contractor's failure to comply with ORS 658.405 to 658.475 by:

a) failing to file certified true copies of payroll records for work performed on specific federal contracts;

b) failing to report to the Agency changes in circumstances under which a prior license was issued, specifically information regarding all vehicles used to transport workers and proof of insurance for such vehicles;

c) failing to provide workers on a specific federal contract with the written statement required by ORS 658.440(1)(f);

and stated that each of said failures were grounds for denial of a license application. Said notice was mailed to the Contractor on or about July 21, 1987, and was personally served on the Contractor's spouse on August 27, 1987.

2) By letter dated August 14, 1987, the Contractor requested a hearing on the Agency's intended action.

3) Thereafter, on December 4, 1987, the Forum issued to the Contractor and the Agency a notice of the time and place of the requested hearing, and of the designated Hearings Referee.

4) With this notice of hearing time and place, the Contractor received a document consisting of 10 pages and containing the text of OAR 839-30-020 to OAR 839-30-200, the administrative rules governing this Forum.

5) Thereafter, on December 9, 1987, the Forum advised the Contractor by letter that:

"The hearings rules require that a party filing a written request for a hearing must also file an answer to the allegations in the Notice of Proposed Denial of Farm Labor Contractor License ***"

The letter enclosed a document entitled "Notice of Contested Case Rights and Procedures," containing the information required by ORS 183.413 and advised further that:

"The Hearings Unit file does not contain your answer. Since it is not clear whether you were notified of the requirement to file an answer when you were served with the Notice of Proposed Denial of Farm Labor Contractor License, you are granted 20 days to file your answer. Your answer must be post-marked no later than December 30, 1987."

6) The Forum's letter of December 9, 1987, further advised the Contractor:

"Please note that failure to file the Answer as required (see OAR 839-30-060) constitutes a default as to the charging document."

7) By letter dated December 28, 1987, the Contractor submitted to the Forum a document entitled "Responsive Pleadings before the Commissions (sic) of the Oregon Bureau of Labor & Industries" and captioned "Re: Demetrio Ivanov d/b/a Demetrio Ivanov Tree Thinning, Northwest Brushing and Ivanov Forestry," which document provided a response to each of the Agency's allegations contained in its Notice of Proposed Denial of Farm Labor Contractor License.

8) By letter dated January 6, 1988, the Forum advised the Contractor of a

change of Hearings Referee in the contested case set for January 27, 1988.

9) The Hearings Referee convened the hearing at 9:07 a.m., Wednesday, January 27, 1988. The Contractor was not in attendance nor had he contacted the Forum; the Hearings Referee recessed the hearing until 9:38 a.m., January 27, 1988, at which time the Contractor had not appeared nor contacted the Forum, and the Hearings Referee proceeded with the hearing.

10) Following the hearing on January 27, 1988, at which the Contractor failed to appear, the Hearings Referee sent a letter entitled "Notice of Default," to the Contractor on January 28, 1988, advising the Contractor that his failure to appear at the hearing of January 27, 1988, constituted a default. This letter advised the Contractor further that he had 10 days from January 28, 1988, in which to request relief from default pursuant to OAR 839-30-185 to 839-30-190, and that upon failure to file such a request, the Contractor would have no further opportunity to seek relief from default.

11) No request for relief from default was received. By letter dated February 8, 1988, and post-marked February 10, 1988, the Contractor acknowledged the letter of January 28, 1988, and its contents, and expressed dissatisfaction with the process of the Agency, as well as that of the Forum.

12) On March 3, 1988, the Hearings Unit issued and mailed a Proposed Order in this contested case hearing to all persons listed on the face of the Certificate of Mailing. The Proposed Order included an Exceptions

Notice, which allowed ten (10) days from the date of issuance to file exceptions. Exceptions, if any, needed to be filed by close of business on March 14, 1988. No exceptions were received on or before that date.

FINDINGS OF FACT – THE MERITS

1) The Contractor is a natural person who was previously licensed as a Farm Labor Contractor, in license years 1984, 1985, and 1986, employing persons for the purposes of forestation and reforestation.

2) Under the prior licenses, the Contractor did business as Demetrio Ivanov Tree Thinning, Northwest Brushing, and Ivanov Forestry.

3) During the 1985 license year, on August 5, 1985, the Agency conducted a field visit at the Contractor's work location in the Alsea Resource Area in the Salem, Oregon, District of the US Bureau of Land Management, the site of Bureau of Land Management Contract No. OR 910-CT5-132 (for brevity, BLM contract #132).

4) At that time, Agency Compliance Specialist Jerry Garcia observed a motor vehicle, a 1969 Ford pickup, Oregon license number FWL 710, parked at the job-site.

5) The 1969 Ford pickup, Oregon license number FWL 710, was not included in the information regarding vehicles used by the Contractor in his 1985 license application, nor did the Contractor inform the Agency of any change in or addition to the vehicle information supplied on his 1985 license application.

6) The 1969 Ford pickup, Oregon license number FWL 710, was not included as an insured vehicle in the

information regarding motor vehicle insurance supplied by the Contractor in his 1985 license application, nor did the Contractor inform the Agency of any change in or addition to the insurance information supplied on his 1985 license application.

7) On August 5, 1985, Mr. Garcia interviewed three individuals, Ramon Antoja, Juan Sanchez, and Moices Coria, who each stated he was employed by the Contractor on the described job site of BLM contract #132; the interviews were conducted in Spanish.

8) Each of these three employees stated to Mr. Garcia that they had been transported to the job site on that date in the 1969 Ford pickup, Oregon license number FWL 710.

9) Mr. Garcia showed each of these three employees Agency forms WH 151 (Rights of Workers) and WH 153 (Agreement Between Contractor and Workers), in both English and Spanish.

10) Each of these three employees stated to Mr. Garcia separately that the Contractor had not supplied the employee with or shown the employee either of Agency forms WH 151 or WH 153 in English, Spanish, or any other language.

11) The Agency has no record of receiving certified payroll records of employees from the Contractor on BLM contract #132.

12) The Agency has contract records that indicate that the Contractor maintained an employee crew on BLM contract #132, as well as on Bureau of Land Management contract numbers OR 910-CT5-128, OR 910-CT5-130,

OR 910-CT5-145, OR 910-CT5-186, OR 910-CT5-202, and OR 910-CT5-213, (hereinafter BLM contract #'s 128, 130, 145, 186, 202, and 213) and United States Department of Agriculture, Willamette National Forest contract number 53-04R4-5-7392 (hereinafter USDA #7392).

13) The Agency has no record of receiving certified payroll records of employees from the Contractor on BLM contract ## 128, 130, 145, 186, 202, or 213, or on USDA #7392.

14) The Contractor has acknowledged and affirmed his obligation to file certified payroll records of employees on BLM contract ## 132, 128, 130, 145, 186, 202, and 213, and on USDA #7392, and that he filed no certified payroll records on any of the named contracts.

15) The Contractor has denied the use of any motor vehicle for transportation of employees other than that listed in his 1985 license application, except for one emergency situation on a date other than August 5, 1985.

16) The Contractor has disputed the Agency's assertion that he failed to provide employees with written statements describing the terms and conditions of their individual employment agreements with him and of their rights and remedies under state and federal law.

17) The Contractor did not assert nor offer evidence that these documents were provided to Ramon Antoja, Juan Sanchez, or Moices Coria, nor any other employee of Contractor on BLM contract #132.

18) The 1969 Ford pickup, Oregon license number FWL 710, was

registered to Jose Louis Linan, who was identified as a foreman for the Contractor.

19) Near the end of each license year, the Agency supplies each licensed Farm/Forest Labor Contractor with application forms and materials for renewal of the Farm/Forest Labor Contract license for the ensuing year.

20) The license year for a Farm/Forest Labor Contractor license runs from February 1 of the calendar year to January 31 of the following calendar year.

21) Included in each renewal packet, in addition to the application and information on renewal, are forms WH-151 (Rights of Workers) and WH 153 (Agreement Between Contractor and Workers).

22) Forms WH-151 and WH-153, in both English and Spanish, were supplied to the Contractor with the 1985 renewal packet, and each subsequent renewal packet.

23) Applications for renewal of Farm/Forest Labor Contractor licenses are treated as new applications if received after the expiration of a license; Contractor's 1986 license expired January 31, 1987.

24) The Contractor's application for a Farm/Forest Labor Contractor license was received July 8, 1987.

25) The Contractor was advised by Notice of Proposed Denial dated July 21, 1987, that the Agency intended to deny the application based upon his prior failures to comply with the statutes and Oregon Administrative Rules.

ULTIMATE FINDINGS OF FACT

1) The Contractor was licensed as a Farm/Forest Labor Contractor

employing persons for the purposes of forestation and reforestation for the license years 1984, 1985, and 1986, and did business as Demetrio Ivanov Tree Thinning, Northwest Brushing, and Ivanov Forestry.

2) During the 1985 license year, the Contractor paid employees directly and did not file with the Agency certified copies of payroll records for work done by the Contractor on certain federal contracts, namely: BLM #128, BLM #130, BLM #132, BLM #213, and USDA #7392.

3) During the 1985 license year, the Contractor failed to report the use of a motor vehicle to transport employees, which vehicle had not been listed on or with the 1985 license application.

4) During the 1985 license year, the Contractor failed to report the existence of an insurance policy covering a motor vehicle used to transport employees on BLM contract #132, which vehicle had not been listed on or with the 1985 license application.

5) During the 1985 license year, the Contractor failed to provide at least three of his employees on one federal contract, BLM contract #132, with Agency forms WH-151 (Rights of Workers) and WH-153 (Agreement Between Contractor and Workers), or comparable written forms, in English or any other language.

CONCLUSIONS OF LAW

1) ORS 648.405 to 658.485 provides that the Commissioner of the Bureau of Labor and Industries shall administer and enforce those sections. The Commissioner of the Bureau of Labor and Industries of the State of

Oregon has jurisdiction over the person and subject matter herein.

2) As a person applying to be licensed as a farm labor contractor with regard to the forestation or reforestation of lands (Farm/Forest Labor Contractor) in the State of Oregon during times material herein, the Contractor was and is subject to the provisions of ORS 658.405 to 658.485.

3) Contractor repeatedly violated ORS 658.417(3) and OAR 839-15-300 by failing to provide, at times material, to the Commissioner or the Commissioner's designee a certified true copy of all payroll records for work done as a Farm/Forest Labor Contractor in the form and at the times prescribed by the statute and rules.

4) Contractor repeatedly violated ORS 658.440(1) in failing to furnish to each worker, at the time of hiring, recruiting, soliciting, or supplying, or at any other time, a written statement in English, in Spanish, or any other language containing a description of the method of computing the rate of compensation, the terms and conditions of employment, and the worker's rights and remedies under state and federal law; the Contractor repeatedly violated this statute in that he failed to provide the required forms to more than one employee.

5) The Contractor demonstrated unfitness to act as a Farm/Forest Labor Contractor under OAR 839-15-520(3) by repeated failure to file or furnish all forms and other information required by ORS 658.405 to 658.475 and Oregon Administrative Rules, including failure to furnish required forms describing working conditions and rights and remedies, and by failure to

report changes in circumstances under which a license was issued.

6) Under the facts and circumstances of this record, in accordance with ORS 658.420 and related portions of ORS 658.405 to 658.475 and of Oregon Administrative Rules, the Commissioner of the Bureau of Labor and Industries has the authority to and may deny a license to Contractor to act as a Farm/Forest Labor Contractor.

OPINION

The Forum allowed the Agency to amend its Notice of Proposed Denial by substituting one statutory citation for another. The section originally used, ORS 658.445, deals with revocation, suspension, or non-renewal of an existing Farm Labor or Forest Labor Contractor license. Since the Contractor had allowed his 1986 Forest Labor Contractor License to expire without applying for renewal prior to the end of that license year (January 31, 1987), there was no license upon which the Commissioner could act under 658.445. *Schurman v. Bureau of Labor*, 36 Or App 841, 585 P2d 758 (1978). The Contractor's application of June 1987 was subject to ORS 658.420, which deals with license applications other than those for renewal.

The notice served upon the Contractor, however, was denominated "Notice of Denial of Farm Labor Contractor License" (emphasis supplied). It recited factual allegations which, if established, were grounds for denial of an initial application as well as for termination or non-renewal of an existing license. The mistaken reference to ORS 658.445 did not prejudice or mislead the Contractor. The Agency's intention was clear: to deny Contractor a

license based upon the Contractor's prior violations of the statutes and regulations governing farm/forest labor licensees.

The Agency has established a prima facie case for justifying the denial of the Contractor's application for a license to act as a Farm/Forest Labor Contractor with regard to the forestation or reforestation of lands. The facts show that at times material, while a licensee, the Contractor admittedly failed to file certified payroll records. In addition, the evidence establishes that the Contractor did not furnish the statutorily required forms to at least three of his employees. The evidence also discloses a failure to inform the Agency of the use of a vehicle for transporting workers which vehicle was different from that on Contractor's application, and a further failure to inform the Agency of a valid policy of insurance covering this additional vehicle.

Thus, the evidence clearly shows repeated inability or unwillingness on the part of the Contractor to conform with the regulations governing forestation contracting activities. The statutes and rules involved exist for the protection of the workers, and impose a duty on the Contractor to inform the workers of their working conditions, rights and remedies, and to inform the regulatory body of all circumstances of the employment, including pay, insured transportation, and other working conditions.

The Legislative Assembly has determined that the contractor's character, competence, and reliability are vital factors in the Commissioner's assessment of an applicant's fitness for a Farm Contractor License. In addition,

ORDER

NOW, THEREFORE, as authorized by ORS 658.005 to 658.485, the Commissioner of the Bureau of Labor and Industries hereby denies Contractor a license to act as a Farm/Forest Labor Contractor, effective this date.

**In the Matter of
Aaron Zeeb, Cliff Falls, and
JET INSULATION, INC.,
Respondents.**

Case Number 46-86
Final Order of the Commissioner
Mary Wendy Roberts
Issued May 4, 1988.

SYNOPSIS

Respondent corporation intentionally failed to pay the prevailing wage rate to workers on a public works project in violation of ORS 279.350, and Respondent Falls, as one of the corporation's owners and officers, was responsible for the failure to pay prevailing wage rates. The fact that Respondents ultimately paid the prevailing wage rate to workers did not negate the violation or release Respondents from liability. The Commissioner held Respondent corporation and Respondent Falls ineligible for public works contracts for three years, pursuant to ORS 279.361(1) and (2).

it has imposed by statute duties in regard to payroll and working condition reporting. Under the Commissioner's rule-making authority, the Commissioner has determined what actions or omissions on the part of a contractor or applicant will serve to render a contractor or applicant unfit for obtaining a Farm/Forest Labor Contractor license. Included among these actions and/or omissions are failures while licensed to report changes in circumstances existing when the license was issued, and repeated failures to file the required forms with the Agency and to furnish required written information to employees.

Denial of the Contractor's application for a license as a Farm/Forest Labor Contractor with regard to forestation or reforestation of lands (Forest Labor Contractor) is appropriate pursuant to ORS 658.420 and OAR 839-15-520(3).

The Forum recognizes that the license year during which the Contractor applied (February 1, 1987, to January 31, 1988) has expired. However, an application for a Farm or Forest Labor Contractor's License is considered to be pending until such license is either granted or denied. Thus, a decision to grant or deny a license is effective for the license year in which the decision is made, and not necessarily only for the license year in which the application is received.

Pursuant to OAR 839-15-140 regarding the eligibility for a Farm or Forest Labor Contractor License, where an application for a license has been denied, such denial shall operate to prevent a reapplication for a period of three years from the date of denial.

ORS 279.350, 279.361; OAR 839-16-085.

The above entitled matter came on regularly for contested case hearing before Douglas A. McKean, designated as Hearings Referee by the Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was conducted on September 10, 1987, in Room 411 of the Portland State Office Building located at 1400 S.W. Fifth Avenue, Portland, Oregon. The Hearings Referee called the following as witnesses for the Agency: Lee Bercot, Program Coordinator for the Wage and Hour Division (WHD) of the Agency; Merle Erickson, Compliance Specialist for the WHD of the Agency; Ann L. Culbertson, Washington County Office of Community Development; Martin Stevens, Oregon Department of Transportation; Brad Warren and Harold Couser, former employees of Jet Insulation, Inc.

Aaron Zeeb, Cliff Falls, and Jet Insulation, Inc., (hereinafter Contractors) were represented by Rodney C. Zeeb, Attorney at Law. Cliff Falls, secretary and one of the owners of Jet Insulation, Inc., was present and testified in this matter.

Having fully considered the entire record in this matter, I, Mary Wendy 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) On April 24, 1987, the Agency issued a Notice of Intent to Make

Placement on List of Ineligibles (hereinafter Notice) stating that the Agency intended to place Aaron Zeeb, Cliff Falls, and Jet Insulation, Inc. 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 Contractors, 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 Department of General Services, Purchasing Division for installation of insulation in the Division of Motor Vehicles East Portland Drive Test Center from on or about March 28, 1986, to on or about April 18, 1986.

3) The Notice was served to Aaron Zeeb on May 11 and May 12, 1987, by the Marion County Sheriff's Office.

4) By letter dated May 18, 1987, Contractors requested an administrative hearing in response to the Notice.

5) On June 16, 1987, 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) At the beginning of the hearing, the Hearings Referee amended the caption of the charging document to

that which shows as the caption on this Order. This was done so that the caption of this case would conform to the captions of earlier Final Orders issued by the Commissioner.

8) At the close of the hearing, the Hearings Referee left the record open until noon, September 17, 1987, for the submission of post-hearing briefs, statements of agency policy, and affidavits. No documents received after that date were admitted to the record for consideration.

9) On November 12, 1987, Contractors filed exceptions to the Proposed Order. Those exceptions have been considered throughout this Final Order.

FINDINGS OF FACT – THE MERITS

1) Aaron Zeeb was the corporate president and Cliff Falls was the corporate secretary of Jet Insulation, Inc. during all times material in this matter. Zeeb and Falls are two of the owners of Jet Insulation, Inc. Falls ran the day-to-day operation of Jet Insulation. He was responsible for bidding on public works jobs. Mail sent to Jet Insulation, Inc. was received by Falls. Aaron Zeeb owned the building which housed the offices and warehouse space for both Jet Insulation, Inc. and Jet Heating, Inc. He owned the trucks used by Jet Insulation, Inc. Jet Insulation, Inc. leased the building space and trucks from Aaron Zeeb. Aaron Zeeb and Jeff Zeeb ran Jet Heating, Inc. Aaron Zeeb had his desk in Jet Heating, Inc.'s office space. Jeff Zeeb had an ownership interest in Jet Insulation, Inc. Falls told Bercot that Aaron Zeeb and Jeff Zeeb had a financial interest in Jet Heating, Inc.

2) Jet Insulation, Inc., an Oregon corporation, had an insulation subcontract on a Department of General Services Contract, number Y-1053-85, 162-85, State of Oregon, DMV/East Portland Drive Test Center. The contract was for a public works and was subject to Oregon's prevailing wage rate law. Contractors were subject to this law. The prime contractor on the project was J. W. Mills & Associates – Contractors, Inc. Contractors performed insulation work on the project from March 28, 1986, to April 14, 1986. Contractor employed four workers, namely Harold Couser, Lonny DeHut, Michael Ferris, and Daniel Williams, on the project.

3) Jet Insulation, Inc. worked on other DMV projects before this contract. Those projects were not public works projects. Aside from this DMV public works contract, Jet Insulation, Inc. has worked on several public works projects, including one called ARC Aloha Center Renovation and Expansion. Falls knew of the requirements regarding payment of the prevailing wage rate to workers on public works projects.

4) On the job site a sign was posted identifying the project as a DMV building. Martin Stevens, the inspector on this job for the Oregon Department of Transportation, testified that anyone working on the job would have known that it was a public works job. Falls was on the job site twice.

5) The prime contractor had a trailer at the job site. Throughout the duration of the project, a poster identifying the project as a State of Oregon Prevailing Wage Rate project was posted in the trailer. Project manuals

and blue prints were available in the trailer to the prime and subcontractors. The trailer was open to subcontractors and their workers throughout the duration of the construction project. Falls testified that he went into the trailer and never saw a poster identifying the job as a PWR project.

6) The Project Manual for this public works had the prevailing wage rates manual published by the Bureau of Labor and Industries included in its entirety. The Project Manual also included a Payroll and Certified Statement Form WH-38. The "Bidding and Contract Requirements" section of the manual contained numerous references to the fact that this project was a public works and that prevailing wage rate laws had to be complied with. The Project Manual contained the specifications for the job and became part of the contract between the state and the prime contractor. Falls testified that he never saw the Project Manual when he bid for the job.

7) The blue prints for this project identified the job as:

"Oregon Department of Transportation
Bridge Design Section
 State of Oregon
 DMV/East Portland Drive Test Center
 8606 S.E. Powell Boulevard
 Portland, Oregon 97266"

Stevens testified that two of the purposes of the caption on a blue print are to identify who owns the project and identify what the project is. Falls examined the blue prints before he bid on the job.

8) Jet Insulation, Inc., by Cliff Falls, signed a subcontract with J. W. Mills & Associates - Contractors, Inc., dated

October 22, 1985, for the insulation work on the DMV building. The subcontract stated that the prime contractor had entered into a contract

"with the State of Oregon acting by and through the Department of General Services hereinafter called owner * * *"

A typed section of the subcontract, on page 1, dealing with the specific parts of the Project Manual which were included in the subcontract, states that:

"This work includes * * * 'State of Oregon Standard Conditions for Public Works Contracts' * * *"

9) On November 25, 1985, the prime contractor sent a letter with the executed subcontract to Jet Insulation. In part, the letter said,

"In order to clarify some of the various requirements for the construction of the Drive Test Center we wish to call to your attention to the following:

" * * *

"11) Since this is a prevailing wage project, you will need to submit your payroll report on form WH-38 filling in both sides. You may substitute this form as long as it contains all of the necessary information and you complete the back of form WH-38, 'Certified Statement' and attach it to your report. Please send our office the original and one copy to:

Bureau of Labor and Industries
 1400 S.W. Fifth Avenue
 Portland, Oregon 97201

"Please submit this report with each payment application."

10) Falls told the Agency's investigator, Erickson, that Falls did not know that the DMV Test Center was a public works project. Falls said he had bid on the project after reviewing blue prints for the building, and he did not see the prevailing wage rates posted in the trailer that the prime contractor had parked at the job site. At one point in the investigation, Falls told Erickson that Jet Insulation, Inc. had been paying the correct PWR, that some of the workers were paid on a piece rate basis, and that Jet Insulation's bookkeeper had not set the correct rate.

11) Contractors never disputed with Erickson the workers' trade classification or the prevailing wage rate applied by the Agency during the investigation.

12) As a result of Erickson's investigation, additional wages were found due and owing to Jet Insulation's four workers on the project. Computations based upon Jet Insulation's records and the workers' records revealed that:

(1) Couser earned \$937.16, was paid \$393.54, and was owed \$543.62;

(2) DeHut earned \$312.00, was paid \$68.92, and was owed \$243.08;

(3) Ferris earned \$720.09, was paid \$284.41, and was owed \$435.68; and

(4) Williams earned \$886.99, was paid \$345.93, and was owed \$541.06.

On July 24, 1986, Jet Insulation paid the above wages found due.

13) Jet Insulation failed to pay their workers on the DMV project the pre-

vailling rate of wage until after the investigation by the Agency.

14) Workers of Jet Insulation, Inc. did not usually keep a record of the hours they worked. Falls estimated the number of hours worked each day by each worker on public works jobs. Jet Insulation paid the workers on a piece rate basis. Falls did not know the actual number of hours each worker worked. Based upon his estimates of workers' hours, Falls signed certifications that the prevailing wage rates had been paid to his workers on public works jobs. Former employees Brad Warren and Harold Couser believed they had worked on public works projects for Jet Insulation and had not been paid at least the prevailing wage rate. Falls usually did not inform the workers about which jobs were public works projects. Falls thought that if keeping their hours on a PWR job was a "major point" for the workers, "they should have brought it up." Couser testified that if workers asked Falls about getting paid PWR, Falls "screamed" that he did not want to pay it. Couser said that workers did not discuss PWR with Falls because "if you pursued it you were harassed."

15) Cliff Falls was not found to be a credible witness. His alleged lack of knowledge that this was a public works project, in order to be believed, would require the Forum to find that he failed to see or read signs, posters, blue prints, the Project Manual, his subcontract, and correspondence which would have alerted a reasonable person to the fact that this was a public works project. Additionally, he certified in writing that prevailing wage rates were paid on other public works

projects on which he did not know the number of hours his workers worked, and thus could not know for sure whether prevailing wage rates were truly paid. He testified that he did not like to work on public projects due to the additional paper work and reporting requirements such projects bring. Other witnesses' testimony confirmed his dislike of public projects. From these facts, the Forum infers that Falls knew, or should have known, that this was a public works project, and sought to avoid his obligations under the prevailing wage rate law. Falls's answers were often evasive, inconsistent, and purposely vague. Accordingly, Falls's testimony was given less weight where it conflicted with other credible evidence, and was not always accepted as fact even when it was not contradicted.

ULTIMATE FINDINGS OF FACT

1) Jet Insulation, Inc. was an Oregon corporation owned in part by Aaron Zeeb, who served as president, and owned in part by Cliff Falls, who served as secretary.

2) Jet Insulation, Inc. bid on and received a subcontract on a public works project, namely DMV/East Portland Drive Test Center.

3) Jet Insulation, Inc. paid workers on the public works a rate of wage less than the prevailing rate of wage for an hour's work in the same trade or occupation in the locality where such labor was performed.

4) Cliff Falls knew or should have known the amount of the applicable prevailing wages and was responsible for the failure to pay the prevailing wage rates.

5) Aaron Zeeb was not responsible for the failure to pay the prevailing rate of wage.

6) Jet Insulation, Inc. and Cliff Falls intentionally failed to pay the prevailing rate of wages to workers employed upon a public works project.

CONCLUSIONS OF LAW

1) Jet Insulation, Inc. employed workers to perform work on a public works project and were 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) Jet Insulation, Inc. 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) Jet Insulation, Inc. and Cliff Falls, having knowledge of the legal requirements of ORS 279.310 to 279.356 and their contractual obligations, failed to pay the PWR to workers employed on the public works project in violation of ORS 279.350. Jet Insulation, Inc. and Cliff Falls did, therefore, intentionally fail to pay the PWR to the workers and are subject to the provisions of ORS 279.361.

4) ORS 279.361(2) provides:

"When the contractor or subcontractor is a corporation, the provisions of subsection (1) of this section shall apply to any corporate officer or corporate agent who is responsible for the failure or

refusal to pay or post the prevailing rate of wage."

OAR 839-16-085(2) repeats virtually identically the language of ORS 279.361(2), above.

OAR 839-16-085(3) provides that

"As used in (2) above, any corporate officer or corporate agent responsible for the failure to pay or post the prevailing wage rates includes, but are not limited to the following individuals when the individuals knew or should have known the amount of the applicable prevailing wages or that such wages must be posted:

"(a) The Corporate President

"(b) The Corporate Vice President

"(c) The Corporate Secretary

"(d) The Corporate Treasure

"(e) Any other person acting as an agent of the a corporate officer or the corporation."

Jet Insulation, Inc., and Cliff Falls knew or should have known the amount of the applicable prevailing wages, and were responsible for the failure to pay the prevailing wage rates.

* ORS 279.361(1) provides:

"When the Commissioner of the Bureau of Labor and Industries, in accordance with the provisions of ORS 183.310 to 183.550, determines that a contractor or subcontractor has intentionally failed or refused to pay the prevailing wage rate to workers employed upon public works, or has intentionally failed or refused to post the prevailing wage rates as required by ORS 279.350(4), the contractor, subcontractor or any firm, corporation, partnership or association in which the contractor or subcontractor has a financial interest shall be ineligible for a period not to exceed three years from the date of publication of the name of the contractor or subcontractor on the ineligible list as provided in this section to receive any contract or subcontract for public works. The Commissioner shall maintain a written list of the names of those contractors and subcontractors determined to be ineligible under this section and the period of time for which they are ineligible. A copy of the list shall be published, furnished upon request and made available to contracting agencies."

5) Pursuant to ORS 279.361, and based on the facts set forth herein, the Commissioner has the authority to and must place the names of Jet Insulation, Inc. and Cliff Falls and any firm, corporation, partnership or association in which they have a financial interest 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 names of Jet Insulation, Inc. and Cliff Falls on the list for a period of three years is appropriate.

OPINION

The main issues in this case boil down to: (1) whether Contractors' failure to pay PWR was intentional; (2) whether Aaron Zeeb and Cliff Falls were responsible for the failure to pay PWR; and (3) if Aaron Zeeb was responsible for the failure to pay PWR, then whether he had a financial interest in Jet Heating, Inc.

Regarding the first issue, that is, whether the failure to pay the PWR was intentional, the Forum found that it

was with regards to Jet Insulation, Inc. and Cliff Falls. As noted in Finding of Fact 15 regarding Falls's credibility, the Forum found that Falls knew or should have known that this was a public works project. There were numerous indications from documents and at the job site that would alert a reasonable person that it was a public works project. There were sufficient facts in front of Falls that should have caused him to inquire about whether it was a public works. Falls's defense that he was not aware that the project was a public works fails under the weight of the evidence. The general rule that pervades the whole doctrine of notice is that, whenever sufficient facts exist to put a person of common prudence upon inquiry, he is charged with constructive notice of everything to which that inquiry, if prosecuted with proper diligence, would have led. *American Surety Co. of New York v. Multnomah County*, 171 Or 287, 138 P2d 597, 601, 148 ALR 926 (1943). There was no dispute that Falls received and signed the subcontract for this project. The subcontract said on page one that "this work includes * * * all of the sections titled * * * 'State of Oregon Standard Conditions for Public Works Contractors' * * *." Under ordinary circumstances, a person is presumed to be familiar with the contents of any document which bears his signature. *Broad v. Kelly's Olympian Co.*, 156 Or 216, 66 P2d 485 (1937). In addition, the Forum found that there was a sign posted at the job site identifying the project as an Oregon DMV building. There was a poster in the trailer at the site stating that this was a PWR job. The Project Manual and the blue prints for the job identified it as a State of

Oregon job, and the manual contained many references, sections, and forms all regarding the fact that this was a public works and that prevailing wage rate laws had to be complied with. The prime contractor sent a letter to Jet Insulation on November 25, 1985 (over four months before Contractors work began on the project), which described this job as a prevailing wage rate project and outlined the need to submit the required forms. The sign, poster, and documents were all items which Falls saw or should have seen, and thus he knew or should have known that this was a public works project requiring payment of prevailing wage rates.

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, 553 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 *P. Miller and Sons, supra*, at 156-57:

"In defining the term 'willfully' 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 know 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 law imposes a duty upon an employer to know the wages that are due to its employees. *McGinnis v. Keen*, 189 Or App 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 Falls's actions to be characterized as unintentional. Here, Falls knew what Jet Insulation, Inc. was paying the workers, intended to pay them that amount, and did so freely. Thus, Jet Insulation's and Falls's failure to pay PWR was intentional.

Contractors contend the failure to pay was not intentional as Jet Insulation, Inc. did pay the wages owed once it knew that ORS 279.350(1) applied to this project. This Forum has addressed this argument in *P. Miller and Sons, supra*, where 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." *Id.*, at 159.

Regarding the second issue of whether Aaron Zeeb and Cliff Falls were responsible for the failure to pay the PWR, this Forum found that Cliff Falls was responsible and Aaron Zeeb was not. See Ultimate Findings of Fact numbers 4 and 5 and Conclusions of Law number 4.

This Forum's interpretation of ORS 279.361(2) and OAR 839-16-085(3) is that the statute extends liability for violations described in ORS 279.361(1) to corporate officers or agents responsible for the violation. OAR 839-16-085

defines who those corporate officers or agents are. All employers are charged with knowledge of wage and hour laws governing their activities as employers. *In the Matter of Country Auction*, 5 BOLI 256, 267 (1985). Similarly, as noted above, the law imposes a duty upon employers to know the wages that are due to their employees. *McGinnis v. Keen*, *supra*. Contractors cannot escape their responsibilities under the law by selective ignorance or inattention.

As found above, Cliff Falls knew or should have known that the prevailing rate of wage was to be paid on the project. Therefore, he is responsible for the failure of Jet Insulation to pay applicable wages.

As regards Aaron Zeeb, however, the Forum found that he was not responsible for the failure of Jet Insulation to pay applicable wages. The record does not establish that Aaron Zeeb knew or should have known that applicable wages were not being paid on the project.

Regarding the third issue of whether Aaron Zeeb had a financial interest in Jet Heating, Inc., since the Forum found that Aaron Zeeb was not responsible for Jet Insulation's failure to pay PWR, the issue of his financial interest in Jet Heating is moot.

ORDER

NOW, THEREFORE, as authorized by ORS 279.368, it is hereby ordered that: Cliff Falls and Jet Insulation, Inc. and any firm, partnership, corporation, or association in which they have 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
Allan J. Callahan, dba
INTERMOUNTAIN PLASTICS,
Respondent.**

Case Number 05-87
Final Order of the Commissioner
Mary Wendy Roberts
Issued May 26, 1988.

SYNOPSIS

Respondent intentionally failed to pay prevailing wages to workers on a public works project, and intentionally failed to pay time and one-half for all hours over eight in a day, in violation of ORS 279.334 and 279.350. Respondent was liable to each worker for the difference between the rate paid and the prevailing wage, including all fringe benefits. In addition, Respondent was liable to each worker for an equal amount as liquidated damages. It was no defense that the Prevailing Wage Rate guidebook did not contain a new classification for Respondent's workers, requested by Respondent after he bid for the project; also it was no defense to Respondent's failure to pay prevailing wage that the Agency did

not list the new craft. The Agency determined a job classification that was "closest to" the work done by Respondent's workers. The Commissioner held Respondent ineligible for public works contracts for eighteen months and ordered him to pay back wages, including liquidated damages, to the two workers. ORS 279.334, 279.348, 279.350, 279.356, 279.361; OAR 839-16-006, 839-16-035.

The above entitled matters came on regularly for hearing before Diana E. Godwin, 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 December 1, 1987, in room 311 of the State Office Building, 1400 S.W. Fifth Avenue, Portland, Oregon, and was continued on December 8, 1987, by a telephone conference call originating from Room 305 of the State Office Building in order to take the testimony of an additional witness. The Hearings Referee called as witnesses for the Bureau of Labor and Industries (hereinafter referred to as the Agency) the following persons: Marty Anderson, Prevailing Wage Rate research analyst for the Agency; Pedro Bengoa, former employee of Contractor and one of the claimants in the wage claim matter; and Christine Hammond, deputy administrator of the Wage and Hour Division of the Agency. The Agency was not represented by counsel.

Allan J. Callahan, dba Intermountain Plastics (hereinafter referred to as the Contractor), was present at the hearing but was not represented by counsel. The Contractor called the

following persons as witnesses: Allan J. Callahan and Jozef (Joe) Boonen, former employee of Contractor and claimant in the wage claim matter.

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

RULING

At the hearing on this matter on December 1, 1987, the Contractor made a motion to limit the evidence of his intentional failure to pay prevailing wage rates to evidence concerning the particular project at issue, that is the Eastern Oregon Training Center in Pendleton, and to exclude any evidence or testimony regarding any other projects. At that time the Forum ruled that testimony and evidence would be limited to public works projects in which the Contractor was involved in the State of Oregon. The Agency then made an offer of proof by way of testimony from Claimants Bengoa and Boonen concerning Contractor's failure to pay prevailing wage rates on public work projects that the Contractor had worked on in other states, in particular the State of Washington. The Forum separately reserved final ruling on the issue of admissibility of the evidence presented under the offer of proof until the issuance of the Proposed Order.

The issue presented by the Agency's offer of proof concerning the Contractor's failure to pay the prevailing wage rate in another state is whether or not evidence of such failure can be used to prove an intentional

failure by the Contractor to pay prevailing wage rates in Oregon. ORS 279.371 provides that when the Commissioner

"determines that a contractor or subcontractor has intentionally failed or refused to pay the prevailing rate of wage to workers employed upon public works * * * the contractor or subcontractor * * * shall be ineligible for a period not to exceed three years from the date of publication of the same of contractor or subcontractor on the ineligible list as provided in this section to receive any contract or subcontract for public works."

In order to place the name of a contractor or subcontractor on this interdicted list it must be affirmatively proved that the failure to pay prevailing wage rates was intentional. To show that a failure was intentional it is necessary to show generally that the person who failed to pay the wages knew what he was doing and intended to do what he was doing. *In the Matter of P. Miller and Sons Contractors, Inc.*, 5 BOLI 149, 156 (1986).

Since the Forum has found more than sufficient evidence of intentional failure to pay prevailing wages based on Contractor's behavior on both the subject project and one other project in the State of Oregon, evidence of Contractor's behavior in another state is not necessary for resolution of this matter, and therefore the separate legal question of admissibility of that evidence need not be reached.

FINDINGS OF FACT – PROCEDURAL

Prevailing Wage Rate Matter

1) On May 28, 1987, the Agency prepared a Notice of Intent to Make Placement on List of Ineligibles and served this notice on the Contractor on June 23, 1987. By this notice the Agency informed the Contractor that it intended to place Contractor 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 the Contractor's name on the ineligible list.

2) As the basis of this action, the notice cited the Contractor's intentional failure to pay the prevailing rate of wage to workers employed on the public works project known as the Eastern Oregon Training Center in Pendleton, Oregon, contract #4-84, let by the Oregon Department of General Services, for the period on or about July 23, 1984, to on or about October 19, 1984. The notice alleged that Contractor's failure to pay the prevailing wage rate constituted a violation of ORS 279.350(1) and OAR 839-16-035(1).

3) By letter dated July 9, 1987, the Contractor requested a contested case hearing on the Agency's intended action and stated that the Contractor would not be represented by counsel at the hearing.

4) By this same letter, dated July 9, 1987, Contractor set forth this answer to the allegations contained in the notice. In his answer Contractor denied that he had intentionally failed to pay the prevailing wage rate on the public works contract, alleged that his failure to pay the amount of prevailing

wage rate demanded by the Agency was based on the Agency's action in wrongfully determining that the work performed by his employees should be paid at the same rate as workers performing different work; and offered to pay a prevailing wage rate to his employees based upon the average wage paid to installers of seamless epoxy flooring in the Pendleton area as determined by a survey which he requested to be conducted by the Agency.

5) The Agency duly served on the Contractor a Notice of Hearing setting forth the time and place of the hearing in this matter. Enclosed with the Notice of Hearing was a document titled "Notice of Contested Case Rights and Procedures: that contained the information required by ORS 183.413.

6) On November 6, 1987, the Forum sent to the Contractor a letter advising that a new Hearings Referee had been appointed to hear the contested case.

7) Pursuant to OAR 839-30-071, the Agency filed a summary of the case, including documents from the Agency's file. Although permitted to do so under the provisions of OAR 839-30-071, the Contractor did not submit a Summary of the Case.

8) At the commencement of the hearing the Agency and the Contractor were verbally advised by the Hearings Referee of the issues to be addressed, the matters to be proved, and the procedure governing the conduct of the hearing, pursuant to ORS 183.415(7). The Contractor stated that he understood the procedures.

9) All documents marked as administrative exhibits in this matter were

accepted into evidence and made a part of the record. Contractor also submitted nine exhibits at the hearing on December 1, 1987, and later submitted 14 exhibits by the close of the record on Monday, December 14, 1987, which were allowed and received into evidence.

Wage Claim Matter

10) Jozef J. Boonen filed a wage claim with the Agency on August 21, 1984. Claimant alleged that he had been an employee of Contractor, Allan J. Callahan, dba Intermountain Plastics, and the Contractor had failed to pay wages earned and due to him.

11) At the same time that Claimant Boonen filed the wage claim, he assigned all wages due from the Contractor to the Commissioner of the Bureau of Labor and Industries in trust for Claimant Boonen.

12) Pedro J. Bengoa filed a wage claim, dated August 27, 1984, with the Agency on October 29, 1984. Claimant Bengoa alleged that he had been an employee of the Contractor, Allan J. Callahan, dba Intermountain Plastics, and that the Contractor had failed to pay wages earned and due to him.

13) At the same time that Bengoa filed the wage claim, he assigned all wages due from the Contractor to the Commissioner of the Bureau of Labor and Industries, in trust for Claimant Bengoa.

14) On June 23, 1987, the Commissioner of the Bureau of Labor and Industries served on the Contractor an Order of Determination dated June 10, 1987, based upon the wage claims filed by Claimants Boonen and Bengoa and the Agency's investigation. The

Order of Determination found that the Contractor owed a total of \$382.15 and \$349.07 in penalty wages to Claimants Bengoa and Boonen, respectively. The Order of Determination required that, within 20 days, either these sums must be paid in trust to the Agency or the Contractor must request a contested case hearing and submit an answer to the charges contained in the Order of Determination.

15) By letter dated July 9, 1987, the Contractor answered the charges in the Order of Determination and at the same time requested a contested case hearing.

16) The Agency duly served on the Contractor a Notice of Hearing setting forth the time and place of the hearing in this matter. Enclosed with the Notice of Hearing was a document titled "Notice of Contested Case Rights and Procedures" that contained the information required by ORS 183.413.

17) On November 6, 1987, the Forum sent to the Contractor a letter advising that a new Hearings Referee had been appointed to hear the contested case.

18) Pursuant to OAR 839-30-071, the Agency filed a Summary of the Case, including documents from the Agency's file. Although permitted to do so under the provisions of OAR 839-30-071, the Contractor did not submit a Summary of the Case.

19) At the commencement of the hearing the Agency and the Contractor were verbally advised by the Hearings Referee of the issues to be addressed, the matters to be proved, and the procedure governing the conduct of the hearing, pursuant to ORS 183.415(7).

The Contractor stated that he understood the procedures.

20) The Proposed Order in this contested case was issued and mailed on February 22, 1988, to persons listed on the face of the certificate of mailing attached to the Proposed Order. Exceptions, if any, were to be filed with the Hearings Unit of the Bureau of Labor and Industries by close of business on Thursday, March 3, 1988. The Hearings Unit did not receive exceptions on or before that expiration date.

FINDINGS OF FACT – THE MERITS

1) The Contractor is a Idaho business owned and operated by Allan J. Callahan. The Contractor does business in the states of Idaho, which is its principal place of business, Oregon, and Washington.

2) On January 26, 1984, the Department of General Services of the State of Oregon issued a "Notice to Proceed" to Colamette Construction Co. of Portland, Oregon, to proceed with work on building a state project known as a "multi-purpose building – 32 bed residence and facility medical center" to be erected on the grounds of the Eastern Oregon Training Center in Pendleton, Oregon (hereinafter referred to as the project). This Notice to Proceed was issued to Colamette Construction Company under Agreement #4-84, Bid #Y-2045-83.

3) The agreement between the State of Oregon and Colamette Construction contained the following language:

"The minimum wages to be paid workmen on the project shall be in

accordance with the provisions of ORS 279.348 through 279.356."

The wages to be paid laborers on this project were those specified in the July 1983 booklet entitled "Prevailing Wage Rates for Public Works Contracts in Oregon" published by the Bureau of Labor and Industries of the State of Oregon.

4) On May 15, 1984, the Contractor entered into an agreement with Colamette Construction Company whereby Contractor became a subcontractor to perform seamless epoxy flooring work on the project. The July 1983 Prevailing Wage Rate Guidebook applied to this subcontract because the terms of the subcontract provided that

"all the General and Special Conditions * * * of the Contract between Contractor and Owner * * * shall be considered a part of the Subcontract * * *"

5) At the time the Contractor entered into the subcontract with Colamette Construction Company the prevailing wage rate publication of July 1983 did not contain a separate classification for workers entitled "architectural coatings finisher," nor did it contain any classification for epoxy flooring layers. However, the July 1983 publication listed the job titles of "cement masons," with a basic hourly wage rate of \$15.49 and a fringe benefit of \$4.22, "soft floor layers," with a basic hourly wage rate of \$14.02 and a fringe benefit of \$2.38, and "tile setters," with a basic hourly wage rate of \$17.11 and a fringe benefit of \$3.45.

6) The installation of seamless epoxy flooring, the work for which the Contractor was hired by Colamette

Construction Company, involves the application of high-tech chemical materials and surfacing systems. The materials and techniques of application and surfaces include spray-in-place polyurethane foam thermal barriers; protective coating systems and specially overlays; bacteria and dust-free seamless polymer coatings for sterile environments; the application of acid, chemical, and abrasion resistant surfacing; installation of coatings which resist corrosion and are conductive and spark proof; application of water proof, heat, shock, and vibration resistant materials such as epoxies, polyesters, resins, urethanes, elastomers, synthetic rubbers and inorganic mastics; and application of chemically formulated fire-retardant and fire-proofing surfaces. Some of the tools used by persons who are applying these coatings are manual and pressure rollers, pressure guns, blowers, heat guns, in-line preheaters, metering and proportioning pumps, technical nozzle equipment, chopper guns, trowels, squeegees, sand blasting and water blasting equipment, scarifiers, plural component pumps, and miscellaneous hand and power tools.

7) By letter dated May 9, 1984, the Contractor contacted Mr. Buck Walther of the Apprenticeship and Training Division of the Agency in Pendleton, Oregon. The Contractor informed Mr. Walther that the US Department of Labor, Bureau of Apprenticeship and Training, had classified a new trade called "architectural coatings finisher" and assigned to Contractor a registration number for conducting the apprenticeship program for this new trade. By letter dated May 14, 1984, Contractor

forwarded copies to the Agency of apprenticeship agreements with four employees, including one of the Claimants in this matter, Pedro Bengoa. This letter thanked Mr. Walther for registering these individuals under the apprenticeship program for "architectural coatings finisher." This letter also asked that Contractor's request for registration of these apprentices be acknowledged. By letter also dated May 14, 1984, from Mr. Buck Walther to the Contractor, the Agency acknowledges receipt of the apprenticeship standards for the architectural coatings finisher apprenticeship program. The letter also informed the Contractor that when the Agency received a copy of the individual apprenticeship agreements between Contractor and persons serving as apprentices, the Agency would issue temporary Oregon apprenticeship ID cards for persons working in Oregon. All of this correspondence occurred after the Contractor had been awarded the subcontract for the project.

8) By letter dated May 22, 1984, addressed to the Bureau of Labor and Industries, Mary Wendy Roberts as Labor Commissioner, at 240 Cottage Street S.E., Salem, Oregon, the Contractor notified the Agency that:

"[W]e have developed some upcoming work in the State of Oregon and anticipate periodic future contract activity in your state. Some of this activity will be public works or prevailing wage construction involvement and we would appreciate your review and listing of the craft: Architectural Coatings Finisher in your prevailing wage guide book. Our present wage

scale as outlined in the enclosed US Department of Labor registration packet is \$11.00/hr for journeymen and hourly fringe benefits are \$1.75. Thank you for your early review and for establishing a State of Oregon listing for our craft."

This letter was duly placed in the US Postal Service and therefore in the normal course of business was received by the Agency.

9) The Contractor received no reply from the Agency to his letter of May 22, 1984.

10) Despite the fact that the Contractor did not receive a reply to his letter of May 22, 1984, requesting that the Agency create a new classification of worker entitled "architectural coatings finisher," the Contractor did not contact the Agency further to determine what wage classification he should use to pay his workers on the project given the lack of classification for architectural coatings finishers. The July 1983 Prevailing Wage Rates Guidebook for Oregon contains a section entitled "Commonly Asked Questions." Questions number 7 is "How do I Classify Workers?" In response to this question the guidebook provides:

"Essentially all of the trades in the construction industry are represented by the job classifications used in the PWR publication. These classification titles should be used according to common practice. Try to fit your workers into existing classifications. If you have questions about how to classify workers, contact the Research Unit or the Wage and Hour Division.

"Laborers who do basic work requiring no special skills, training or knowledge are generally classified as Group 1 Laborers."

11) Employees of the Contractor began work installing the seamless epoxy flooring at the project on approximately July 23, 1984. The three workers employed on this job were Claimants Bengoa and Boonen and Gary Chappell. Installation of the seamless epoxy flooring involved clean-up of the job site prior to beginning the actual flooring work. After the floor was prepared, a primer coat was applied with a roller; when that dried a thick, viscous, and epoxy mixture was troweled on. This epoxy layer was then sanded after it was dry and a top layer of materials applied with a squeegee.

12) On July 24, 1984, the Contractor completed and signed under oath a Public Works Contractor Wage Certification form required to be completed by all contractors and subcontractors on public works projects. A completed form must be submitted initially within 15 days of the date that work first begins on a public works project and then once before the public agency makes a final inspection of the project. In completing this form the Contractor stated, honestly, that he was employing three persons under the occupational classification of "architectural coatings finisher" at the basic hourly rate of \$11.00/hr, with total fringe benefits of a \$1.75/hr. Contractor used this classification and wage rate notwithstanding that no such classification or wage rate was listed in the July 1983, PWR Guidebook. In addition to basic hourly wages and fringe benefits, the

Contractor paid his three employees an additional \$14.00/day living allowance because they were away from their home base in Idaho and were required to procure living accommodations near the job site. This \$14.00/day was not calculated as part of the employees' fringe benefits.

13) During the period of work on this project, from approximately July 23, 1984, to August 3, 1984, Claimant Boonen worked 61 straight time hours and three overtime hours at the total hourly rate of \$12.75, including fringe benefits, for a total amount of wages received of \$935.62.

14) During the period of work on this project, from approximately July 23, 1984, to August 3, 1984, Claimant Bengoa worked 62 straight time hours and three overtime hours at the total hourly rate of \$12.75, including fringe benefits, for a total amount of wages received of \$922.25.

15) Notwithstanding the fact that a person working as an "architectural coatings finisher" or working as a seamless epoxy flooring layer has to have specialized knowledge of high-tech materials and several years of experience to become proficient with the methods and tools for application, Contractor, after he failed to receive any response to his letter of May 22, 1984, made the individual decision to pay a wage to his workers of \$12.75 per hour, including fringe benefits. This rate is considerably lower than all but the lowest paying job under the July 1983 Prevailing Wage Rate Guidebook. That guidebook requires, for instance, that a roofer who is handling irritation material (coal tar or epoxy) must be paid a minimum of

\$18.99 per hour, including fringe benefits; a soft floor layer must be paid \$16.40 per hour, including fringe benefits; bricklayers and tile setters must be paid \$16.82 per hour, including fringe benefits; and tile and terrazzo helpers must be paid \$15.47 per hour, including fringe benefits. Additionally, laborers in Group 1 are required to be paid \$17.34 per hour, including fringe benefits. Group 1 Laborers include workers who, among other jobs, do asphalt spreading and concrete curing. The lowest paid group of laborers, those in Group 5, must be paid \$12.50 per hour, including fringe benefits – only \$.25 less than the Contractor paid his skilled workers. Group 5 Laborers perform such tasks as landscape planting, building perimeter or right-of-way fencing, and working as a flagger.

16) The Contractor has performed at least one other public works project in the State of Oregon that was subject to the requirement to pay prevailing wage rates. The Contractor performed a contract to re-roof four buildings at the CNS Training Facility at Boardman, Oregon, from early April 1984 through the end of September or early October 1984. This project was a US Government project subject to the Federal Davis-Bacon Act. Contractor employed Claimants Boonen and Bengoa and Gary Chappell for most of this job. Each of these employees was listed on the required payroll certification forms as an "architectural coatings finisher and roofer." Mr. Chappell was an apprentice under this job title. Claimants Boonen and Bengoa were each paid a total hourly wage rate of \$19.15. As an apprentice, Mr. Chappell was paid 80 percent of this rate, or \$15.32 per hour.

Work on the project in Boardman involved stripping old roofs off buildings and installing new foam roofs. The new roofing materials were rolled on.

17) The roofing contract at Boardman was being performed at approximately the same time that the Contractor was undertaking the work at the Pendleton project. During the weeks of late July and early August, the three workers who had been working on the Boardman project went up to work on the Pendleton project. Thus during approximately the same period of time, the Contractor was paying a prevailing wage rate of \$19.15 per hour to Claimants Boonen and Bengoa while they were working on a federal government contract, and he was paying them only \$12.75 per hour for comparable work when they were working on a State of Oregon prevailing wage rate contract. On both of these projects the Contractor called his employees "architectural coatings finishers."

18) Claimants Boonen and Bengoa did not know at the time that they were working on the project in Pendleton that they would not be receiving the same prevailing wage rate that they were receiving while working on the Boardman project. When they got their paychecks from the Pendleton project in early August and saw that the hourly rate was only \$12.75 per hour, they each filed a complaint with the Wage and Hour Division of the Agency. They filed the complaints because they felt they should have been paid the same prevailing wage rate as a cement finisher or a painter.

19) On October 5, 1984, the Wage and Hour Division of the Agency had a

telephone conversation with Claimant Boonen about his wage claim. The notes of that conversation indicate that Claimant Boonen had done work on the project at Boardman, which was under the Federal Davis-Bacon Act, and was paid the wages of a cement finisher. Also on October 5, 1984, June Miller, a compliance specialist with the Wage and Hour Division of the Agency in the Pendleton office, sent an interoffice memorandum to Christine Hammond of the Agency requesting an opinion regarding which job classification should be used with regard to Claimant Boonen's claim against the Contractor for wages earned on the Pendleton project. The memorandum indicated that the Agency presently had no classification for architectural coatings finisher. The memorandum requested that the Agency determine which job classification should be used for Claimant Boonen's work.

20) On December 17, 1984, June Miller wrote two letters to the Contractor separately notifying him of the wage claims of Claimant Boonen and Claimant Bengoa. Each letter indicated that the Claimant should have been paid at the rate of \$19.35 per hour, the rate for a painter under the July 1983 Prevailing Wage Rates Guidebook. Both letters required the Contractor to tender to the Agency the full amount owing to each of the two Claimants.

21) In late December 1984, the Agency sent to the Contractor a letter reminding him that he had failed to respond to the Agency's letter of December 17. This new letter set a date of January 7, 1985, by which Contractor must make payment or provide proof

of payment in order to avoid further action being taken by the Agency.

22) On January 4, 1985, the Contractor wrote a letter to the Agency, which was received by the Agency on January 9, 1985, in which Contractor disputed that the two wage Claimants were entitled to be classified and paid as painters under the prevailing wage rates. The Contractor further stated that he felt he had taken "every reasonable initiative" to have his workers classified as architectural coating finishers, including submitting the letter dated May 22, 1984, formally requesting a review and listing of the architectural coating finisher classification. The Contractor further stated that in the absence of any response from the Agency regarding his request, he went ahead and paid a basic journeyman wage of \$11.00 per hour with added fringe benefits of \$1.75 per hour for the Pendleton project. By letter dated January 21, 1985, and received by the Agency on January 23, 1985, the Contractor submitted additional documentation to support his contention that his workers should be classified as architectural coating finishers.

23) In approximately February 1985, Marty Anderson, a research analyst for the Prevailing Wage Rate Unit of the Support Services Division of the Agency, conducted an investigation in response to June Miller's October 1984 request to Christine Hammond to determine which existing job classification came "closest to" the work done by architectural coating finishers. In conducting her investigation Ms. Anderson called the business representatives of unions for laborers, soft floor layers, tile setters, and cement

masons. She asked their groups if they did work similar to the work which was done on the project in Pendleton and described that work. She also asked if they knew of other trades that did this kind of work. She did not inquire into what wages were paid. After talking with the representatives of the these trade unions, Ms. Anderson determined that both tile setters and cement masons performed either the same or substantially similar work. Also at this time Christine Hammond, who was then a Supervising Compliance Specialist, Wage and Hour Division, consulted the Dictionary of Occupational Titles to assist in determining which occupational title came closest to describing the work done by Contractor's employees. She determined that Title 84 "Painting, Plastering, Water Proofing, Cementing and Related Occupations" was applicable, as was Title 844 "Cement and Concrete Finishing and Related Occupations." After this research Ms. Hammond consulted with Ms. Anderson and was advised of the results of Ms. Anderson's contacts with the trade union representatives. Ms. Hammond then communicated the recommendation to June Miller that the Contractor be offered the choice of using either the cement mason classification or the tile setter classification for paying his workers. There are no published guidelines for applying or using the "closest to" rules.

24) By letter dated February 15, 1985, from June Miller to the Contractor, the Agency advised the Contractor that the Agency had determined that seamless epoxy flooring work may be done either by a cement mason or a

tile setter, and that therefore the wage Claimants in this matter could be paid either the tile setter's rate of \$20.56 per hour or the cement mason's rate of \$19.71 per hour.

25) By letter dated February 27, 1985, and received by the Agency on March 4, 1985, the Contractor stated that he rejected any classification of his workers as tile setters or cement masons, just as he had earlier rejected any classification of his workers as painters. This letter further asked whether the Agency recognized and abided by the "Tri-State Reciprocal Agreement" for registering apprentices entered into by the states of Idaho, Oregon, and Washington. The reciprocal agreement was apparently executed on November 17, 1980, by Charles E. Ganter of the Agency. No copy of this Tri-State Reciprocal Agreement was entered into evidence. In this letter of February 27, the Contractor offered to pay a prevailing wage rate based on wages paid to seamless epoxy flooring installers in Umatilla County as determined by "specific and documented survey information."

26) On June 12, 1985, Ms. Hammond wrote a letter to the Contractor advising him that Oregon administrative rules require that a new trade classification be established prior to the commencement of the public works project. Thus she advised him that it was not possible at this point to retroactively recognize the classification of architectural coating finishers for the Pendleton project. She advised him of the research which Ms. Anderson had done in contacting representatives of the various trades in order to determine which trades do this type of work.

She advised him that as a result of that research, either the cement mason or tile setter classification would be appropriate for paying his workers. She further advised him that the Tri-State Reciprocal Agreement to which he referred in his previous correspondence was not applicable, as it refers only to the ability of apprentices from the signatory states to work in the other states.

27) On September 20, 1985, John Lessel, Compliance Specialist Supervisor with the Wage and Hour Division of the Agency, wrote a letter to Contractor in which he asked Contractor to contact him no later than October 10, 1985, with regard to whether or not Contractor was going to pay wages due. He advised Contractor that if he made no contact, the Agency would proceed with appropriate action.

28) By letter dated October 11, 1985, and received by the Agency on October 17, 1985, the Contractor responded to Mr. Lessel that he takes the position that the Agency's investigation is not complete and therefore Claimant Boonen's claim for wages is rejected. He restated his earlier offer to accept a prevailing wage rate for seamless epoxy flooring installers for Umatilla County, but asked the Agency furnish documentation or proof of survey results.

29) By letter dated October 17, 1985, and received by the Agency on October 21, 1985, the Contractor asked that the Agency review an enclosed document entitled "State of Oregon Apprenticeship and Training Council" documents detailing the work processes and approximate hours for training an apprentice for a cement

mason. The Contractor stated in his letter that he felt that this document provided "irrefutable evidence" that his workers had been misclassified.

30) On December 31, 1985, John Lessel on behalf of the Agency sent a letter to the Contractor advising him again that any new trade classification must be established and adopted by the Commissioner of the Bureau of Labor and Industries prior to the commencement of any public works contract. He further reiterated that the Agency is not attempting to contend that Intermountain Plastics is a cement or tile setter contractor, but has merely made a determination, based on study, that the employees of Contractor have performed work closely related to the work duties of a cement mason. He advised him further of the process for requesting establishment of a new trade classification for future projects. The letter listed the wages due to both Claimants Bengoa and Boonen and also to Gary Chappell based on Agency's calculation of hours worked and using the cement mason's rate of \$19.71 per hour. The letter further stated that it constituted a final demand for all wages due and owing.

31) On March 15, 1986, Renee Bryant Mason, Assistant Attorney General for the State of Oregon, wrote a demand letter to the Contractor demanding payment of wages owed in the total amount of \$14,624.32.

32) On April 9, 1986, Contractor wrote a letter to Ms. Mason objecting to what he said was a "baseless classification" for payment of wages. He further challenged the conclusion of the Agency's staff that the work of an architectural coating finishers is "closely

related to cement mason duties" on the grounds that the staff had offered no factual background for that conclusion. He requested a copy of the study leading to this conclusion together with disclosure of information leading to the decision to utilize the cement mason's wage category. He again reiterated an earlier offer to pay a representative wage for a seamless epoxy flooring installer. However, the Contractor asked that federal guidelines be followed "in that the prevailing wage be defined as the single rate paid to a majority of workers installing epoxy flooring in the locality of the Pendleton job site, or the weighted average if no single rate is paid to a majority."

33) On December 23, 1986, Christine Hammond of the Agency wrote a letter to the Contractor in which discrepancies about the hours claimed by the two Claimants were reviewed. At the end of the letter Ms. Hammond made a demand for payment in the total amount of \$731.22.

34) On March 2, 1987, Christine Hammond again wrote to Contractor reminding him that to date she had received no response to her letter of December 23, 1986. She again asked that he remit a check in the amount of \$731.22 no later than March 13, 1987. She stated that if no payment had been received by that date the file would be returned to the Department of Justice for further appropriate action.

35) On March 14, 1987, the Contractor wrote a letter to the Agency which was received March 16, 1987. The letter was addressed to Christine Hammond and stated that the Contractor was still waiting to receive information from the Agency regarding

whether it had surveyed Oregon contractors who install seamless epoxy flooring in order to determine a prevailing wage rate. The Contractor continued to challenge whether or not the Agency had in fact conducted sufficient research or in depth study to determine that cement masons do this type of work. He again stated that he would be willing to pay a prevailing wage rate for seamless epoxy flooring installers regardless of what name was attached to that category so long as the rate was a "representative wage rate." He agreed, however, that the letter of December 23, 1986, from the Agency was accurate with regard to the actual number of hours worked by Claimants Bengoa and Boonen.

36) On March 25, 1987, Marty Anderson of the Agency wrote to the Contractor to advise him that the Support Services Division of the Agency is not in the process of reviewing the classification of workers who install seamless epoxy flooring. She reiterated in her letter that she had been informed by trade union representatives that cement contractors do indeed install seamless epoxy flooring and the cement masons do receive training in this type of work. She stated that as the Agency uses the US Department of Labor in determining wage rates for Oregon they were now awaiting the results of a federal survey, and because of that did not anticipate doing any surveying of their own. She stated that if no information is published by the Department of Labor on this new trade she would recommend that the present cement mason classification in the Prevailing Wage Rate Guidebook

specifically include a reference to epoxy installers.

37) The July 1, 1987, Prevailing Wage Rate Guidebook now contains a classification for "composition workers" which includes "installation of epoxy and other resinous toppings."

38) The Agency has determined that the cement mason classification is "closest to" the job tasks performed by seamless epoxy floor installers or architectural coating finishers for purposes of determining which prevailing wage rate the Contractor is required to pay his workers. The Commissioner has the authority to make this determination.

39) The determination that cement masons are "closest to" seamless epoxy floor installers is not a finding that seamless epoxy floor installers are in fact cement masons. The "closest to" rule is only a method for determining an appropriate wage rate.

ULTIMATE FINDINGS OF FACT

1) The Contractor is an Idaho business owned and operated by Allan J. Callahan. At all times material herein the Contractor was an employer doing business in the State of Oregon and employing one or more persons in the operation of that business.

2) On May 15, 1984, the Contractor entered into a subcontract with Colamette Construction Company of Portland, Oregon. Colamette Construction Company was the prime contractor in a contract with the Department of General Services that the State of Oregon entered into on January 26, 1984, to construct a 32-bed residence and medical center at the Eastern Oregon Training Center

in Pendleton, Oregon. The contract between Colamette Construction Company and the State of Oregon was Agreement #4-84, Bid #Y-2045-83. This contract provided that

"The minimum wages to be paid workmen on the project shall be in accordance with the provisions of ORS 279.348 to 279.356."

The prevailing wage rate published in the Prevailing Wage Rate Guidebook dated July 1, 1983, applied to all work on this project.

3) When the Contractor entered into the subcontract with Colamette Industries he was aware that the contract was for a public works project. As such the Contractor was aware of the requirement to pay prevailing wage rate on the project.

4) The Contractor employed three persons on the project and the work was performed during the last part of July 1984 and the early part of August 1984.

5) The Contractor, with knowledge of the law and its obligations, failed to pay the workers on the project either the required Basic Hourly Wage Rate or pay the required hourly amount of fringe benefits when due.

6) Claimant Boonen was employed as a worker to install seamless epoxy flooring on the project from July 23, 1984, to August 3, 1984.

7) The Contractor owes Claimant Boonen wages based on 61 straight time hours worked at the hourly wage of \$19.71 and three overtime hours worked at the hourly wage of \$27.46. The Contractor has paid the total sum of \$935.62 toward these wages, but

knowingly failed to pay the remaining wages in the amount of \$349.07.

8) Claimant Bengoa was employed as a worker to install seamless epoxy flooring on the project from July 23, 1984, to August 3, 1984.

9) The Contractor owes Claimant Bengoa wages based on 62 straight time hours worked at the hourly wage of \$19.71 and three overtime hours worked at the hourly wage of \$27.46. The Contractor has paid the total sum of \$922.25 toward these wages, but knowingly failed to pay the remaining wages in the amount of \$382.15.

CONCLUSIONS OF LAW

1) The provisions of ORS 279.348 to 279.363 are applicable to the work performed by the Contractor at the Eastern Oregon Training Center Public Works Project in Pendleton. The Commissioner of the Bureau of Labor and Industries has jurisdiction over this matter.

2) The Contractor was required to pay to workers employed on the project the prevailing wage rate in effect on July 1, 1983, as determined by the Commissioner of the Bureau of Labor and Industries pursuant to ORS 279.359.

3) The Contractor, with knowledge of the legal requirements of ORS 279.310 to 279.356, knowingly failed to pay the required Basic Rate and Fringe Benefits for all hours worked on the Pendleton project in violation of ORS 279.350(1) and OAR 839-16-035 (1). Additionally, the Contractor knowingly failed to pay no less than one and one-half times the Basic Rate for all hours over eight in a day, in violation of ORS 279.334. Therefore, the

Contractor has intentionally failed to pay the prevailing wage rate to workers on the project and is thus subject to the provisions of ORS 279.361.

4) The Contractor is liable to the Claimants herein, and each of them, for the difference between what he paid them and the prevailing wage rate, including all fringe benefits under ORS 279.348. Additionally, the Contractor is liable to Claimants, and each of them, for an additional amount equal to said amount as liquidated damages.

5) Pursuant to ORS 279.356 and under the facts and circumstances of this record, the Commissioner of the Bureau of Labor and Industries has the authority to order the Contractor to pay Claimants, and each of them, their earned and unpaid wages, and an amount equal to those wages as liquidated damages.

6) The fact that the July 1983 Prevailing Wage Rate Guidebook does not contain a separate classification and wage rate for "architectural coatings finisher" does not constitute a defense to Contractor's failure to determine in advance of commencing work on the project which rate was required to be paid to his workers and to pay that rate. The fact that the Agency failed to act on or respond to the Contractor's letter of May 22, 1984, requesting the listing of the craft of "architectural coatings finisher" in the Prevailing Wage Rate Guidebook also does not constitute a defense to Contractor's failure to determine and pay an appropriate prevailing wage rate.

7) Under ORS 279.361, the Commissioner of the Bureau of Labor and Industries has the authority to place the name of the Contractor on the list

of persons who are ineligible to receive any contract or sub-contract for public works for a period not to exceed three years from the date of publication of his name on the ineligible list. Under the facts and circumstances of this record, the Commissioner's placement of the name of the Contractor on the list for a period of eighteen months is appropriate.

OPINION

The central issue in this matter is whether the Contractor knowingly and therefore intentionally failed to pay the prevailing wage rate to his workers on the Pendleton project. For his defense, the Contractor has introduced volumes of materials regarding establishment of an apprenticeship program for architectural coatings finishers. The fact that such apprenticeship programs and reciprocal agreements have been established is not being disputed by this Forum, and their existence is accepted as fact. The point, however, is that the existence or nonexistence of these apprenticeship programs has no bearing on what wage rate the State of Oregon requires a contractor to pay workers performing a certain category of work on a public works project in Oregon. An apprenticeship agreement does not override the published prevailing wage rates applicable on the public works projects.

It is apparent from the volume of correspondence and documentation generated by the Contractor that he holds strongly to the proposition that he has no legal obligation to pay a prevailing wage rate to his workers on the Pendleton project unless a separate category for architectural coatings finisher or seamless epoxy floor installers

is created and a wage rate assigned to that category, which has been determined by a survey conducted according to his prescribed methodology. He has rejected the statutory authority of the Commissioner and the Commissioner's staff to make a determination of what wage should be paid for a particular type of work not listed separately in the Prevailing Wage Rate Guidebook by specific title. This rejection of the Commissioner's authority to make such a determination, coupled with the rejection of the Agency's methodology in making the determination in the event that the Commissioner does have such authority, is the crux of the Contractor's defense to his failure to pay the prevailing wage rate.

Oregon Administrative Rule 839-16-006 specifies the procedure for adding a new trade classification to the schedule of prevailing wage rates. After a written request is received by the Agency, the Prevailing Wage Rate coordinator determines whether or not to recommend to the Commissioner that a study of the new proposed trade classification be undertaken. If a study is undertaken, a number of factors must be reviewed, among which is the issue of "whether the proposed trade is substantially different from trades included in the current wage determination." After the study is complete, the Prevailing Wage Rate coordinator submits a report and recommendation to the Commissioner for decision.

It is apparent that a new trade classification cannot be established quickly. It is unlikely that a final decision could have been made by the Commissioner in the two months between when the Contractor wrote his

letter (May 22, 1984) and when he commenced work on the project (July 23, 1984), even had the Agency made the initial decision to conduct a study.

But even assuming such a short time frame could have been met, the new classification and newly assigned prevailing wage rate would not have been applicable to the Pendleton project. ORS 279.350(2) provides that

"After a contract for a public works is executed with any contractor or work is commenced upon any public works, the amount of the prevailing rate of wage shall not be subject to attack in any legal proceeding by any contractor or subcontractor in connection with that contract."

In this matter the contract was let on January 26, 1984, and was subject to the July 1983 prevailing wage rates. The policy enunciated in ORS 279.350, that is, that once a contract is executed the wage rates are set, logically must also be applied to the creation of new trade classifications and establishment of new wage rates. Any new trade classification must have been approved prior to execution of the contract or commencement of work in order to be applicable to the Pendleton project.

Even if the Agency had been able to complete a review of the requested new trade classification within the short two month period between Contractor's initial request and when he commenced work, and even if the Agency had adopted the new classification, the Contractor had no basis for assuming that the wage rate assigned to the new classification would be an \$11.00 per hour Basic Rate with \$1.75 per hour in

Fringe Benefits. The Contractor presented a significant amount of evidence and testimony establishing that the application of seamless epoxy flooring is a unique trade, practiced by people who have spent a number of years in apprenticeship obtaining the unique skills required to handle the high-tech materials. Yet at the same time, the Contractor chose to pay an hourly wage to the practitioners of this skilled trade that was only \$.25 per hour higher than the least skilled, lowest paid basic laborer was paid under the July 1983 Prevailing Wage Rate Guidebook.

There is no dispute whatsoever that the Contractor knew that the Pendleton project was a public works project subject to the prevailing wage rates law. It is also clear from the Contractor's own records, which he submitted as an exhibit, that he knew that a higher wage is appropriate to the type of work the Claimants were doing. That exhibit consists of 18 pages of his payroll records from the public works project referred to as the "NWS Training Facility" at Boardman. The same three workers who worked on the Pendleton project, Claimants Boonen and Bengoa and Gary Chappell, are listed on the Boardman project as "Architectural Coatings Finishers" and were paid the regular total hourly rate of \$19.15, with Gary Chappell receiving 80 percent of that as an apprentice. The work on the Pendleton project took place over a two week period or so during a break in the Boardman project. The records show the Claimants receiving \$19.15 per hour for work done on the Boardman project during the payroll periods ending July 14 and

July 28, 1984. Another exhibit, which is a copy of the Public Works Contractor Wage Certificate the Contractor signed on July 24, 1984, shows three persons employed on the Pendleton project as "Architectural Coatings Finishers" and paid \$12.75 per hour total wages. These three employees were the same three employed on the Boardman project.

The Contractor is not unsophisticated or unfamiliar with the obligations attendant upon a contractor who undertakes a public works project. He knew that he was not paying the prevailing wage rate at the time he issued paychecks to his workers on the Pendleton project.

ORS 279.361 provides for placement of the contractor's name on the list of persons ineligible to receive a public works contract only if the contractor "intentionally failed" to pay the prevailing wage rate. 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 prevailing wage rate, the Supreme Court did address the question of when an employer's failure to pay wages is "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). This Forum has adopted the court's interpretation of "willful" in the *Sabin* case,

as set forth below, when construing the term "intentionally" in ORS 279.361. See *In the Matter of P. Miller and Sons Contractors, Inc.*, 5 BOLI 149, 156-57 (1986).

"In defining the term "willfully" 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 know 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 law imposes a duty on an employer to know the wages that are due to its employees. *McGinnis v. Keen*, 189 Or App 445, 459, 221 P2d 907 (1950). Although no separate classification exists for "architectural coatings finishers," the employer is not thereby relieved from determining and paying the appropriate prevailing wage rate for such workers. The Contractor is not entitled to reject any but the response it desires, i.e., the creation of a new classification, when the Agency has determined that existing classifications are applicable to the work performed.

This is not a case, however, of an employer surreptitiously violating the law. The unique aspect of this case is the Contractor's initiative in raising the issue of the proper classification of the subject workers. The Forum does not desire to discourage such inquiries, and finds it unfortunate that the Contractor's letter of May 22, 1984, did not occasion a dialogue leading to an early resolution of this matter. Thus, while the Forum must condemn the Contractor's subsequent refusal to abide by the Agency's determination of coverage, the Contractor's initial efforts to clarify the situation were a constructive and positive step. It is on this basis that the Forum mitigates the punishment otherwise appropriate to the Contractor's conduct by limiting the period of ineligibility imposed to eighteen months.

ORDER

NOW, THEREFORE, as authorized by ORS 279.361, it is hereby ordered that the Contractor, Allan J. Callahan, doing business as

Intermountain Plastics, 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 eighteen months from the date of publication of his name on the ineligible list maintained and published by the Commissioner of the Bureau of Labor and Industries.

AND FURTHERMORE, as authorized by ORS 279.356, the Commissioner of the Bureau of Labor and Industries hereby orders Allan J. Callahan, doing business as Intermountain Plastics, to deliver to the Hearings Unit of the Bureau of Labor and Industries, 305 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 JOZEF BOONEN in the amount of SIX HUNDRED NINETY-EIGHT DOLLARS AND FOURTEEN CENTS (\$698.14) representing \$349.07 in gross earned, unpaid, due, and payable wages; and \$349.07 in liquidated damages, plus interest at the rate of 9 percent per annum from November 1, 1984, until paid.

A certified check payable to the Bureau of Labor and Industries in trust for PEDRO BENGUA in the amount of SEVEN HUNDRED SIXTY-FOUR DOLLARS AND THIRTY CENTS (\$764.30) representing \$382.15 in gross earned, unpaid, due, and payable wages; and \$382.15 in liquidated damages, plus interest at the rate of 9 percent per annum from November 1, 1984, until paid.

In the Matter of
**OREGON STATE CORRECTIONAL
 INSTITUTION,**
 Corrections Division, Department of
 Human Resources, State of Oregon,
 Respondent.

Case Number 19-84

Final Order of the Commissioner

Mary Wendy Roberts

Issued July 13, 1988.

SYNOPSIS

Respondent refused to hire Complainant, who was overweight and had applied for a job as a corrections officer, because it regarded Complainant as having a physical impairment (based on his weight), when he had no such impairment. The Commissioner held that Complainant was a handicapped person, as defined in ORS 659.400(2) and (3)(c)(C). By refusing to hire Complainant because Respondent regarded him as having a physical impairment, Respondent violated ORS 659.425(1)(c). Respondent's defense that it acted on the advice of its agent (the examining doctor) failed. Because Respondent failed to show by clear and convincing evidence that complainant would not have been retained anyway because of information Respondent would have learned after Complainant's hire, Complainant was entitled to back pay, which the Commissioner awarded, along with damages (\$250) for Complainant's mental suffering. ORS 659.400(2), (3)(c)(C); 659.425(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 October 16, 1985, May 28, 1986, and September 10, 1986, in the Conference Room of Suite E-1 at 3865 Wolverine Street N.E., Salem, Oregon. The Bureau of Labor and Industries (hereinafter the Agency) was represented in this matter by Paul J. DeMuniz, Attorney at Law. The Oregon State Correctional Institution, Corrections Division, Department of Human Resources, State of Oregon (hereinafter Respondent) was represented by Josephine Hawthorne, Assistant Attorney General of the Department of Justice of the State of Oregon. Keith R. Green (hereinafter Complainant) was present throughout the hearing.

The Agency called Complainant as its witness, and Respondent called Daniel P. Johnson, its Security Manager, as its witness. The Forum also received deposition testimony from Jerry Becker, M.D., Respondent's Medical Director; and Richard S. Peterson, Respondent's Superintendent; and received affidavit testimony by Sandra Peters, who worked with Complainant as a security guard; Joseph Tribby, Complainant's friend; Robert Patton, a former supervisor of Complainant; Daniel Tschida, a friend of Complainant, who worked with him as a security guard; and Pete Rose, who supervised Complainant when he was a security guard.

Having fully considered the entire record in this matter, the

Commissioner 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) On or about August 26, 1983, Complainant filed a verified complaint with the Civil Rights Division of the Agency alleging that Respondent had discriminated against him because of his physical handicap of "perceived overweight," in connection with his employment.

2) Following the filing of the aforementioned complaint, the Civil Rights Division investigated the allegations contained in it and determined that there was substantial evidence to support those allegations.

3) Thereafter, the Civil Rights Division made some attempt to resolve the complaint through conference, conciliation, or persuasion, but was not successful in these efforts.

4) Accordingly, the Agency caused to be prepared and duly served on Respondent Specific Charges, dated April 25, 1985. At the first convenement of hearing, in response to Respondent's assertion of certain flaws in the Specific Charges, the Agency sought and was granted leave to amend the Specific Charges. Accordingly, the Agency prepared and duly served on Respondent the First Amended Specific Charges, dated November 6, 1985. They alleged that

a) Respondent has violated ORS 659.425(1)(a) by refusing to hire Complainant because he has a physical impairment which, with reasonable

accommodation by Respondent, would not prevent the performance of the work involved, or

b) Respondent has violated ORS 659.425(1)(c) by refusing to hire Complainant because Respondent regarded and treated Complainant as having a physical impairment when he did not.

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 May 21, 1985, Respondent duly served on the Forum its answer to the Specific Charges, and on or about November 27, 1985, and March 31, 1986, Respondent duly served on the Forum answers to the First Amended Specific Charges. By Stipulation, the March 31, 1986, answer, as amended at hearing, is Respondent's answer herein. It denies all allegations contained in the First Amended Specific Charges, and alleges as a defense that at all times Respondent acted on the advice of its physician.

7) On January 24, 1986, the Presiding Officer held a telephone pre-hearing conference with counsel for the Agency and Respondent in order to resolve the requests and motions concerning discovery. By agreement of counsel, this is the record of that conference. After the Agency withdrew its Request for Admissions contained, Respondent agreed to allow the Agency to depose Richard Peterson and to inspect certain documents described in the Agency's Civil Subpoena Duces Tecum, from which the Agency had withdrawn an item. Respondent's Motion to Quash

Subpoena was denied. These actions mooted the Agency's motion to compel Respondent to reply to the Agency's Request for Production, but the Presiding Officer directed the Agency to notify her if discovery did not proceed as agreed upon. Thereafter, the Agency gave no such notice.

8) Before the commencement of the hearing, Complainant and Respondent received from this forum a document entitled "Information Relating to Civil Rights and Wage and Hour Contested Case Hearings," which had been sent to each of them as part of each of the above-cited notices of hearing. Before the commencement of the hearing, Complainant and Respondent (through its counsel) stated that each had read that document and had no questions about it.

9) At the commencement of the hearing, counsel for the Agency and Respondent waived the Presiding Officer's explanation of the issues involved and the matters that had to be proved and disproved herein.

FINDINGS OF FACT – THE MERITS

1) During all times material herein, Respondent was a correctional institution which was part of the Division of Corrections of the Department of Human Resources of the State of Oregon. As such, during all times material, Respondent was an agency of the State of Oregon which employed approximately 230 people in Oregon.

2) At some time before July 15, 1983, Complainant notified

Respondent that he was interested in applying for work as a Correctional Officer at Respondent. On or about July 20, 1983, at Respondent's request, Complainant completed an application form, and was interviewed by B. Singh, an employee of Respondent, for one of the entry level Correctional Officer positions then available at Respondent. A few days later, Mr. Singh asked Complainant, by telephone, to report to Respondent at 8 a.m. on August 2, 1983, prepared to go to work as a Correctional Officer subject to passing Respondent's physical examination.

3) During times material herein, Respondent's Correctional Officers were responsible for carrying out security activities at Respondent. These activities included supervising inmates; patrolling and conducting surveillance of inmates in cellblocks, the recreation yard, and certain other areas; monitoring inmate movement; conducting cell area and person-to-person searches; breaking up disturbances; maintaining perimeter security by working in the towers on the prison wall; and making disciplinary reports as needed. These duties varied somewhat with the post assignment.

4) When Complainant reported to Respondent on August 2, 1983, he and a group of other applicants were given physical examinations by Jerry Becker, M.D., Respondent's Medical Director, and his assistant in the prison's Medical Services area.

5) The policy and procedure governing the physical examination which

* On the record this position or classification is called both "Correctional Officer" and "Corrections Officer." The Forum has decided to use "Correctional Officer" to signify this position herein, because it is the title used by Respondent's management on the record.

Complainant was given was enunciated in "Procedural Statement governing Employee and Volunteer Health Questionnaires," which had been in effect throughout the Corrections Division since October 31, 1979. Respondent was not able to produce this document for the record, but Respondent's Superintendent has indicated, and this forum finds, that it contained language which was "very similar" to the Corrections Division policy statement which succeeded it. That exhibit includes this general statement:

"The purpose of this procedural statement is to standardize the usage of health questionnaires to ensure that persons receiving appointments, job assignments or providing services are physically capable of performing all tasks required by the nature of the work * * *. This procedural statement applies to all employees * * * of the Corrections Division * * *. It is the policy of the Corrections Division that discrimination based on physical or mental condition is prohibited. However, to ensure all employees and volunteers are protected from performing any task which could be detrimental to either their own health and safety or that of other persons, no individual shall receive an appointment, job assignment or provide services which he/she is physically incapable of performing. A physical examination by a physician or medical person legally authorized to conduct a physical examination will be required at the time of employment."

This policy statement also directs each "functional unit manager" in the Division to catalog each position or classification under his or her supervision into the "health classifications" which best describe the physical requirements of the work to be performed. This cataloging is to be used in completing position descriptions and in recruiting and interviewing to fill positions, and it is to be provided to the physician when any physical examination is required by Respondent. Group 1, the first of the three health classifications, includes: "[j]obs requiring the physical capability to perform instant and/or sustained arduous physical activity." (Examples given on a report form to be used by the examining physician are state police, correctional officer, highway maintenance, park laborers, etc.) Group 2 includes: "[j]obs which require occasional lifting and exertion for short periods." (Examples from the physician report form are food service workers, custodians, psychiatric aids, nurses, painters who work inside exclusively, cabinet makers, stock clerks, etc.) Group 3 includes: "(o)ffice jobs which demand very limited physical exertion." (Examples are supervisors, managers, engineers, draftsmen, clerks, etc.)

The policy makes each functional unit manager responsible for matching the health of his or her employees to the physical requirements of their jobs. It provides that prior to final appointment of new employees, the manager will arrange for the prospective employee to receive the required physical examination, and that all new employees will be required to complete an applicant form, "Health and Working Condition Questionnaire" and deliver it,

with a second form, "Physician's Report of Physical Condition", to the physician conducting the physical examination.

An applicant questionnaire in the record asks the subject to state whether he or she would have no problems, have limited or minimal performance problems, or absolutely could not perform any of a long list of physical activities or working conditions which are deemed requirements essential for the performance of the position for which the subject has applied. The form closes by asking the "Agency Management Representative" to check one of the following statements:

"IN MY JUDGMENT:

"This person does not indicate that disabilities, physical activities or working conditions will prevent barriers to performance of work for the position indicated by this agency.

"The duties of this job require physical activities or working conditions which are beyond the capabilities of this person. Accommodations have been discussed with the applicant/employee and are not practical."

The applicant questionnaire also asks the Agency Management Representative to provide reasons for declining to employ the person and for an acknowledgment signature by the applicant or employee.

The Physician's Report of Physical Condition is a questionnaire on which the examining physician is to indicate whether the subject is restricted (permanently or temporarily) or not restricted in 17 types of physical exertion;

six types of chemical and sensitivity conditions, six types of optical conditions, three types of audio conditions, and 14 types of other restrictive conditions. On the report, the physician is to recommend classification of the subject into Group 1, 2, or 3. This form advises the physician that his or her medical evaluation will be used to inform the agency of any health condition which could be detrimental during work activity and, therefore, to place individuals in a safe environment. It states that the health classification recommendation is specifically intended to obtain the physician's opinion of the individual's current physical condition so that the agency can know which group can be matched with the individuals capability to perform the job. As neither this form nor any other evidence on the record indicates that Respondent directs the examining physician to use certain tests or criteria to ascertain the above-mentioned physical capabilities of the individuals examined, and Respondent's Superintendent does not know what tests or criteria are used, this Forum finds Respondent allows the physician to determine those tests or criteria.

In light of testimony so indicating by Respondent's Superintendent, this forum finds that the policy and procedure enunciated regarding employee health questionnaires and otherwise described above were in effect during all times material herein.

6) During all times material herein, Dr. Becker knew and agreed with the above-described purpose of the pre-employment physical examinations be conducted for Respondent. Dr. Becker testified that during times

material herein, he and his assistant used the described procedures and forms, and a questionnaire providing emergency medical information which each new Corrections Division appointee was to complete; a job description for the position being applied for, and their own medical expertise to assign applicants to one of the three health classifications. Although this assignment was technically just advice to assist Respondent's Security Manager (the "functional unit manager" for Respondent's Correctional Officers) in making a hiring recommendation, Respondent did not review or alter Dr. Becker's assignments.

7) During all times material herein, as mentioned above, the Correctional Officer position at Respondent was classified as a Group 1 position, i.e., a job requiring the capability to perform instant and/or sustained arduous physical activity. During all times material herein, the physical activities and working conditions which Respondent deemed requirements essential to the performance of the Correctional Officer position were:

"Walking-Lateral Mobility; Walking Rough Terrain; Bending; Standing-Long Periods; Running; Lifting and Carrying 35-60 Pounds; Sense of Touch; Reaching; Gripping-Hands and Fingers; Climbing Stairs; Hearing Alarms; Hearing Voice Conversation; Color Identification; Close Vision; Far Vision; Side Vision-Depth Perception; Maintaining Balance; Operating Passenger Vehicles; Operating Bus or Similar Vehicle; Speaking; Exposure to Sun; Work at Heights; Work in Confined Space; Work in

Crowded Areas; Working Alone; Work with Inmates (prison); Work on High Ladders; Work in Remote Locations; Wearing Safety Glasses; Wearing Ear Plugs (Muffs); Air Travel; Working Long Hours; Working Nigh Shifts; Working Day Shifts; Working Week Ends; Exposure to Tobacco Smoke."

Respondent's current Security Manager, Daniel Johnson, indicated and this Forum finds that during times material herein Respondent's Correctional Officers had to be able to restrain and subdue inmates. The frequency of situations in which a Correctional Officer had to do this depended in great part on the Officer's post assignment; an Officer working in a housing unit had a far greater probability of restraining an inmate than an Officer working elsewhere. Generally, the need to restrain and subdue occurred in the course of handling inmate-on-inmate assaults. Such assaults occur "somewhat regularly" at present, because Respondent's facility has an average daily population roughly twice as large as its designed capacity. The Forum finds that such assaults also occurred "somewhat regularly" during times material herein, as the average daily population then was approximately the same as now.

Dr. Becker testified, and this Forum finds, that a Correctional Officer had to be able to come to the aid of a fellow officer and to participate in a physical restraint class requiring a fair amount of physical exertion. Dr. Becker also indicated that a Correctional Officer had to be able to do such things as run the length of the hall, out-wrestle an

inmate and pull a door shut to try to isolate a riot or semi-riotous condition.

8) During Complainant's physical examination, Dr. Becker checked Complainant's eyes, ears, nose, and mouth and palpated his abdomen. After Dr. Becker had taken Complainant's resting pulse, he had Complainant do 15 sit-ups. Two minutes after Complainant had finished those sit-ups, Dr. Becker again took his pulse. Dr. Becker also had Complainant do some deep knee bends, to check Complainant's spine, and had Complainant grasp his fingers, to check Complainant's dexterity, and Dr. Becker tested Complainant's vision through reading tests.

9) Dr. Becker does not specifically remember Complainant's physical examination. However, according to Dr. Becker's interpretation of his written report of that examination, Dr. Becker found that Complainant's shoulders, arms, etc., were "OK," his range of motion was "OK," his neurologic examination "looked good," his knees, etc., were "OK," and he was able to do a deep knee bend. Dr. Becker concluded that there were no limitations to the "physical capabilities" listed on the chart form he used in Complainant's exam: walking, pulling, standing, pushing, stooping, kneeling, lifting, or reaching.

Dr. Becker testified that Complainant's resting pulse of 84 indicated to him that Complainant probably had not been doing routine physical exercise, because a person of Complainant's height and age who was doing regular exercise would have a resting pulse of between 50 and 70. Complainant's pulse elevated to 96 immediately after

doing 15 sit-ups, which Dr. Becker said would simulate physical exertion such as a "take-down" in a fight or wrestling an inmate, and was acceptable as far as Dr. Becker was concerned. However, Complainant's two-minute recovery pulse was 96, and Dr. Becker testified that the pulse rate of a person "in any semblance of physical condition" should have returned to or close to the resting pulse. Although he did not continue checking Complainant's rate to ascertain when it did return to the resting pulse rate, Dr. Becker decided that since Complainant's two minute rate was not near his resting rate, Complainant was not handling his weight in at least an average manner. Dr. Becker testified that this slow recovery pulse told him that Complainant's weight was a burden for him; that the bulk of it was fat tissue mass rather than muscle mass, and it was compromising Complainant's heart and lung function. Accordingly, Dr. Becker testified, he consulted a height/weight chart and concluded, based on it, that Complainant weighed 50 to 60 pounds more than what even a large-framed man of Complainant's height should weigh. The diagnosis Dr. Becker noted on Complainant's charge form was "obesity, carious teeth."

10) On August 2, 1983, Complainant weighed 213 pounds and was 5'6" tall.

11) Dr. Becker knew that Complainant was applying for work as a Correctional Officer, a Group 1 classification. As a result of Complainant's weight and his slow pulse recovery, and given the research in obesity as a main cause of early retirement and loss of usage of law enforcement

employees, Dr. Becker recommended that Complainant be approved for employment in Group 2 rather than Group 1. (Dr. Becker thought that Complainant also could perform safely in Group 3.) Dr. Becker testified that he did not approve Complainant for Group 1 because he viewed Complainant as incapable of performing the "instant and/or sustained arduous physical activity" required of Group 1 employees. Had Respondent specifically asked Dr. Becker, he would not have recommended that Complainant be allowed to proceed further in the hiring process for Group 1 applicants (apparently onto a physical exertion training course) before a final decision was made as to his capability of performing at a Group 1 level.

After the examination was over, Dr. Becker told Complainant that he was recommending him for Group 2, and that he might consider Complainant for Group 1 if he lost about 50 pounds. (Dr. Becker wrote on Complainant's charge: "Could go to Group 1 with weight loss more probable than not.") Complainant was not applying for, nor was he qualified or hired for, any Group 2 job.

12) Thereafter on August 2, 1983, a Lieutenant Kay, who was acting as Respondent's Security Manager, took Complainant into his office and informed him that he had been denied an available Correctional Officer position based on Dr. Becker's evaluation that he was overweight.

13) Complainant disagreed with Dr. Becker's conclusion that he was 50 pounds overweight. Complainant testified that he considered even his weight of 226 pounds at the time of the

September 1986 hearing a normal weight for him, and that he felt healthy at and above that weight. However, he did admit that in the 10 years preceding September 1986 he had tried to lose a significant amount of weight.

14) Dr. Becker is an orthopedic surgeon who has been in private practice in Salem, Oregon, since 1968. He has contracted with Respondent since 1981 or 1982 to be its Medical Director, and he also did orthopedic surgery for both Respondent and Oregon State Penitentiary (hereinafter OSP) during times material herein. As Respondent's Medical Director, he has operated as Respondent's agent under contract during all time material herein. One of his duties in that capacity has been to review and participate in the physical screening of Respondent's employment applicants.

15) Dr. Becker has an independent business through which he has provided physical screening services for many private and some public sector employers since about 1976. He has spent considerable time discussing physical screening with the Medical Director for the Oregon Workers' Compensation Board and with industrial insurers, and he clearly is oriented toward the use of such screening to prevent industrial disease or injury claims by preventing individuals from "jumping in (to jobs) over their head(s)."

16) In his independent business, Dr. Becker works with many different law enforcement and correction agencies, and in his private practice Dr. Becker has treated people who are classified as obese. Dr. Becker has attended meetings and read extensively on the subject of obesity and

physical capabilities in law enforcement and corrections employment settings, especially in the context of premature retirement. The general context of Dr. Becker's testimony indicated, and this Forum finds, that correctional and law enforcement officer positions generally require a capability of instant and/or sustained arduous physical activity or a substantially similar capability.

Dr. Becker views excessive weight as a factor in how one tolerates added stress and how much one can do physically; he believes that it "takes its toll" over time, in high blood pressure, coronary artery disease, and excessive wear on knees and hips. He testified that the overweight "get in trouble" earlier and more frequently than other law enforcement employees; they are "at much greater risk than other people ***." Dr. Becker referred to an overweight employee as a "fat boy" in his deposition.

17) Dr. Becker testified that there are several definitions of obesity, such as not liking what you see in the mirror, being above the norms or averages on actuarial height/weight tables, not being able to have a ruler balancing on your reclining abdomen touch the pubis and ribs at the same time, or having more than a given percentage of total body fat. As part of his physical screening procedures for Respondent in August 1983, Dr. Becker used (and continues to use currently) a chart clipped from a newspaper which, Dr. Becker testified, matches "actuarial

tables" of the Metropolitan Life Insurance Company. Dr. Becker has used this chart (hereinafter MetLife chart) throughout his private practice. It is titled "Height and Weight" and lists weight ranges for small, medium, and large framed men 5'2", 5'4", 5'6", 5'8" and 6'0" in height, and small, medium, and large framed women between 5'2" and 5'10" in height.

18) Dr. Becker termed Complainant's weight of 213 pounds a "gross deviation" from the MetLife chart, which lists 146 to 164 pounds as the weight for men of Complainant's height. Dr. Becker could not state how much a person with Complainant's pulse recovery rate could have deviated from this weight range and still have been recommended for Group 1. However, Dr. Becker did indicate that if Complainant had been the same except 15 pounds overweight by the newspaper chart, Dr. Becker probably would have counseled him to lose the weight and would have given him probationary status in Group 1.

19) When he testified, Dr. Becker had no personal recollection of Complainant. He agreed with Agency counsel's statement that he did not know with any reasonable degree of certainty whether Complainant, specifically, could perform instant and/or sustained arduous physical activity, and that he did not know "to a medical certainty" that Complainant was incapable of that activity. However, Dr. Becker believes that because of his weight and slow pulse recovery, Complainant

* In the absence of any other explanation, the Forum finds that "probationary status in Group 1" simply means assignment to Group 1, since all new Correctional Officers were placed in trial (i.e., probationary) service for the first six months of employment.

had the characteristics of a person who fit in a class of persons which Dr. Becker believes to a medical certainty could not perform safely in Group 1 employment. Dr. Becker testified that he felt it was more probable than not that Complainant could not so perform, and would be an added risk to himself and others in a Group 1 job. Dr. Becker testified that he thought Complainant could do 90 to 95 percent of the Group 1 job requirements, but that he could not do all of them in a manner safe to himself, his fellow officers, and others in his work area. He did not feel it was in anyone's interest for an applicant to "start out in trouble."

20) Dr. Becker testified that he knew at that time of his January 14, 1986, deposition that there were "some" people working at that time as Correctional Officers for Respondent who were "seriously overweight" and whose weight exceeded the weight limitations stated for their height on the MetLife chart. He also stated that there were then Correctional Officers for Respondent who had "physical profiles" similar to that of Complainant. Dr. Becker testified that this has caused him to be concerned about their ability to perform and that he has tried his best to correct this situation; he believes "they're at greater risk of needing CPR."

Respondent's current Security Manager Johnson testified that he considered roughly six out of Respondent's 127 current Correctional Officers, and several of its correctional corporals (whose function, but not type of post, is primarily the same as that of a Correctional Officer), to be overweight.

21) Corrections Division policy during times material herein provided that in carrying out their responsibility for matching the health of employees with the physical requirements of their jobs, Respondent's functional unit managers could require any employee to complete the employee health questionnaire annually, and could require any such employee to report to a physician with these forms for evaluation and physical examination. That policy also stated during times material that one example of the use of the Physician's Report of Physical Condition, was

"[t]o make certain that an individual is not placed or permitted to continue in work situations which could be detrimental to the health of the individual, his/her co-workers, or the functional unit."

Superintendent Peterson testified that he does not know if, during his one year tenure, any employee has been asked or required to have a physical examination or otherwise be evaluated to ascertain whether he or she was fit to carry out Group 1 duties, or required to take a physical or do anything because of "a weight problem." Dr. Becker referred to having moved "people" to less physically demanding positions, but it was unclear whether this occurred at Respondent and if so under what circumstances.

There is no system or process in place at Respondent to monitor or control the physical health or weight of Respondent's Correctional Officers during their employment or to have employees physically evaluated and re-qualified for Group 1. The only weight screening of Respondent's Correctional Officers occurs at hiring, with the

physical examination. Once a Correctional Officer is on the job there is no termination on the basis of weight. Respondent's efforts to encourage its Correctional Officers to remain in good shape consist of making the gym available and having a salad bar on the premises.

22) Complainant had worked as a Correctional Officer at OSP, another Oregon correctional institution, from about November 1975 to June 1979. Complainant weighed about 190 pounds when he started working for OSP. Pursuant to Complainant's physical examination for OSP in November 1975, the examining physician placed no restrictions on Complainant and recommended that he be classified in Group 1. At some point during his employment at OSP, Complainant's weight rose to "pretty close to 210 to 215 pounds."

23) During times material herein, both Respondent and OSP housed adult male felons. Generally, OSP housed older, more sophisticated prisoners, and Respondent more youthful, first-time offenders, but the prison to which an inmate was assigned was sometimes dictated by which had bed space at the time. The description of Complainant's job duties at OSP was the same as or very similar to the description of the job duties of a Correctional Officer at Respondent during times material, and both jobs involved work in direct contact with inmates. Complainant was involved in breaking up one physical fight in his nearly four years at OSP.

24) During Complainant's employment as an OSP Correctional Officer, he satisfactorily performed the duties

required of him. An OSP annual performance appraisal report for Complainant's work from June 1, 1977, through May 31, 1978, rated his work performance satisfactory, and included the comment that he was an experienced officer who could work most positions with little or no problem.

Complainant was counseled for absenteeism while employed at OSP because there was some concern that he was using what OSP considered an excessive amount of sick leave. There is no evidence or allegation herein that this had anything to do with Complainant's weight. Robert Patton, a supervisor of Complainant and current employee at OSP, stated by affidavit that Complainant's attendance problem was serious enough that it would have prevented him, if he had been asked, from recommending Complainant either for rehire at OSP or for hire at any other correctional institution, despite Complainant's satisfactory performance of all requisite functions.

25) During his employment at OSP, Complainant observed other OSP Correctional Officers performing the same duties as he, and who would be described commonly by people as overweight. For example, one Correctional Officer was what Complainant would term "grossly overweight;" at approximately Complainant's height, he wore clothes of a "much bigger" size than Complainant's.

26) Since completing high school in 1965, Complainant has completed CPR training (in 1981 and 1982) and reserve police training in observation, public contacts, diagram drawing, citation writing, and chemical protectors (in 1981).

27) At the time of his application to Respondent, Complainant had since high school graduation worked for short periods of time (in chronological order) as a light-duty laborer, as a bridge painter, on a line assembling vacuum suction pump motors, and in a machine shop. Thereafter, for longer periods, he had done delivery, shipping, and receiving, and order desk and counter work (filling orders), and worked in warehouses. (In two of these jobs, he had loaded and unloaded "quite heavy" oxygen, acetylene, and ammonia bottles, and in one he had handled fifty pound cases of welding rod.) Complainant also had done some outside sales work and had been the "office manager" at an automotive battery wholesale business, taking care of the books and filling orders in a small warehouse, and dealing with gasoline at a service station.

28) Complainant's security work started with his employment as a Correctional Officer at OSP from 1975 to 1979. After that, from October 1979 until June 30, 1982, Complainant was a security guard for the City of Salem. His duties in that job were to patrol public parking facilities in downtown Salem for the purpose of safeguarding persons, vehicles, buildings, and grounds by observation and reports to police; while patrolling, to observe vehicles parked in violation of ordinances and issue parking tickets; to do light maintenance and custodial duties; and perform courtesy functions with the public. This job required the physical ability to walk long hours alone both indoors and out, under varying work and climatic conditions, and the ability to

stay awake at night. Complainant had performed this job in a satisfactory manner and had been highly praised in annual performance evaluations in 1981 and 1982, particularly for his reliability and good attendance record. He also had helped apprehend a shoplifter, chasing the suspect for about two or three blocks and holding the suspect until police officers arrived.

29) Thereafter, Complainant had been unemployed for about six months until, in January 1983, he obtained six months of work as a temporary parking enforcement officer for the City of Salem. In that job he had patrolled a given area every half hour, issuing citations for violations of parking ordinances. This work had required Complainant to walk approximately 12 to 15 miles per day and had afforded him "high public contact."

30) Complainant had not been employed between June 30, 1983, when his parking enforcement officer job ended, and his application at Respondent. In October 1983, he obtained employment as a bus driver transporting students for the Salem School District. Throughout this employment, Complainant also worked in carting and hauling, moving whatever the District needed moved, on a between-routes basis as much as he could. Complainant performed this job satisfactorily and was praised for his attendance record.

Thereafter, and continually since about August 28, 1985, Complainant has worked as a shipping and receiving clerk in the Salem School District warehouse. In this job, he fills orders for requisitions and prepares them for shipping.

31) At the time of his application at Respondent, Complainant was involved in various physical activities. At that time (and during every summer but one or two since 1975), Complainant was active in church league softball, playing seven inning games or practicing three times per week. He played on the defensive field regularly, often as pitcher or catcher. He was a good hitter and was required to circle the bases many times. He also hunted, doing a lot of walking in the mountains and chasing deer out of brush. A current hunting partner testified by affidavit that on their frequent hunting trips, he and Complainant usually hike about four miles in three or four hours, and that during their trips Complainant had never shown any indication of weakness.

32) The Agency offered evidence that Complainant has twice passed physical examinations required for school bus drivers, which included, among other things, a pulse recovery rate test and dragging a weighted bag. However, as there is no evidence stating what was his two minute pulse recovery rate or the specific physical capabilities which the examinations were evaluating, this evidence is not probative of any issue herein.

33) During the 10 years preceding September 1986, Complainant tried to lose a significant amount of weight, through diet and exercise without the guidance of a physician. Although the record does not reveal how much weight he may have lost, it is clear that at the time of hearing, he weighed

about 36 pounds more than he did in late 1975, and 11 to 16 pounds more than the most he weighed between then and 1979. Accordingly, despite his efforts, Complainant had not achieved any permanent or long term weight loss in the 10 years preceding hearing.

34) Dr. Becker testified unequivocally that Complainant's weight condition is correctable (and that his recovery pulse probably would correct with some weight loss). He testified that "everybody can lose weight, even those who have endocrine disorders." Dr. Becker stated that being 60 pounds overweight is correctable by changing lifestyle to eat fewer and burn more calories (through education, diet, and exercise). The fact that most of the members of Complainant's birth family exceed the weights for their heights listed on the MetLife chart by 40 to 100 pounds raises the possibility of a hereditary factor influencing Complainant's weight. Dr. Becker testified, however, that although heredity causes some people to have to work harder at controlling weight than others, being overweight is a "voluntary lifestyle problem that can be controlled."

35) Findings of Fact 36 through 44 concern the question of whether Respondent's actions described above have caused Complainant to be damaged.

36) Much of Mr. Johnson's testimony concerning the relevant aspects of Respondent's Correctional Officer hiring process, the factors Respondent

* The Forum notes that there is no evidence that Complainant has an endocrine disorder, and Dr. Becker has testified that Complainant does not appear to have an obvious endocrine disorder.

considers in Correctional Officer hiring decisions, and the effects of those factors in those decisions concerned times present rather than times material. The testimony of Mr. Johnson, while credible, is often ambiguous with regard to its application to times material.

Mr. Johnson did not assume his duties as Security Manager until 1984, subsequent to times material herein. The Security Manager's position was Mr. Johnson's first experience with the hiring process for Correctional Officers in the security section. Mr. Johnson testified that the security section hiring process had changed since times material, and that at the time of hearing it was much more formal than prior to 1984. Since 1983, personnel functions had been centralized outside the agency and, unlike times material herein, there was a specific person assigned to Mr. Johnson's office responsible for conducting background investigations of applicants. Other changes in the composition and inquiries of interviewing panels were made as well, all apparently for the purpose of lending greater uniformity to the hiring process. In short, there are strong indications in the record that Mr. Johnson's experience with the security section's hiring process since 1984 is of limited value in constructing a reliable picture of what sort of background investigation and what sort of inquiries would have been made in 1983.

These considerations undermine the persuasiveness of Mr. Johnson's testimony at other points in his appearance where he expresses his "beliefs" about the hiring process in 1983. Although Mr. Johnson was a very

credible witness, he was clear in his testimony concerning the limits of his experience with the hiring process in the security section during times material, and about the changes in that system since 1984. Indeed, Mr. Johnson's credibility is bolstered by his candor on these points.

The Forum's perspective on Mr. Johnson's testimony is strengthened by the Respondent's lack of specific, direct evidence of routine or habitual procedures in 1983. Respondent's large pool of applicants during times material -- a thousand persons according to Mr. Johnson's testimony -- should provide numerous and documented examples of investigatory procedure in 1983. Given Respondent's reliance on the hypothetical product of its investigatory process in 1983, the Forum believes the routinization and predictability of that process is central to Respondent's claim that certain background information would have been sought, uncovered, and acted upon.

Thus, the Forum finds that in 1983 Respondent performed background investigations of some sort on Correctional Officer applicants, but that these investigations lacked the formality and uniformity of investigations conducted subsequent to 1984. Respondent made clear to Complainant, and Complainant fully understood, that Respondent's background investigation of him was "a condition of employment" at Respondent, and that unsatisfactory results could lead to termination.

The evidence indicates that during times material, Respondent did not do, or complete, background investigations on Correctional Officer applicants

before they passed the physical examination. In the absence of any information or allegation to the contrary, the Forum concludes that Respondent had not yet done, or completed in parts pertinent below, Complainant's background investigation when it rejected him for Correctional Officer employment.

37) In 1979, in applying for unemployment insurance benefits after he left his employment at OSP, Complainant had told the State of Oregon Employment Division, and that Division subsequently had found, that Complainant had left his employment at OSP because he felt physically threatened and intimidated by the inmates. A document containing this assertion and finding was contained in Complainant's official Corrections Division personnel file when Complainant applied for work at Respondent. If Respondent had investigated Complainant's background, Respondent would have known that Complainant had worked as a Correctional Officer at OSP, and could have investigated that employment. In the course of that investigation, Respondent could have accessed and reviewed Complainant's Corrections Division file and thereby discovered this assertion and finding as to why Complainant left OSP.

38) Respondent's current Security Manager testified that, if discovered, Complainant's assertion and the finding that Complainant had left his employment at OSP because he felt physically threatened and intimidated by the inmates would have caused Respondent's Security Manager, who made the hiring and firing recommendations concerning Respondent's

Correctional Officers to Respondent's Superintendent, not to recommend Complainant for hire as a Correctional Officer. The very nature of the work performed by Correctional Officers at Respondent (and OSP) is such that they cannot have a fear of working with inmates. When they are working in an area where there are inmates, Correctional Officers are generally in direct physical contact with those inmates, and any Correctional Officer (or member of Respondent's staff) must be able and willing to confront inmates who are not complying with the rules of conduct.

39) At the September 1986 hearing before this Forum, Complainant asserted that his 1979 statement to the Employment Division was not truthful and that he did not leave OSP because he felt physically threatened and intimidated by the inmates. On his application to Respondent on July 20, 1983, Complainant asserted that he was willing to deal with threats of physical harm and harassment toward him and/or his family, to work unarmed and sometimes alone in the midst of groups of inmates.

Complainant testified that he voluntarily left OSP because he "had an insecure feeling with staff" (not inmates) and because he was offered another job. Complainant stated that this insecure feeling arose because a hearings officer at a rules violation hearing took the unusual step of believing an inmate rather than Complainant. Complainant testified that he was willing in 1983 to work what he viewed as "basically the same job" at Respondent because people who worked at Respondent

had told him that it had a "fairly decent bunch of people to work with."

40) It was important to the operation of Respondent that its Correctional Officers possess a high degree of integrity and credibility. It was most common for the credibility of a Correctional Officer to be at issue in investigations of and hearings resulting from inmate grievances, particularly in inmate-officer disputes where it was the word of an inmate against that of the Correctional Officer. It was also important that Respondent's Correctional Officers be able to believe each other's word.

41) Respondent's current Security Manager testified that if the former manager had discovered and accepted the assertion and the finding that Complainant had left his OSP employment because he felt physically threatened and intimidated by inmates, and Respondent's former manager had discovered and believed Complainant's later assertion that he had lied in offering that reason for leaving, that lie could have cast doubt on Complainant's credibility and, thereby, adversely affected the Security Manager's decision as to whether to recommend Complainant for hire at Respondent.

42) Respondent's current Security Manager testified that he believed Respondent also would have checked recommendations from former employers, including OSP, about Complainant's work history. As indicated in paragraph 24, above, if he had been asked, an OSP supervisor of

Complainant who was still working for OSP at the time Complainant applied to Respondent testified by affidavit that he would not have recommended Complainant for rehire at OSP, or for employment at any other correctional institution, because of Complainant's attendance problems. Respondent's current Security Manager testified that if OSP had informed Respondent that OSP would not rehire, or that one of Complainant's former OSP supervisors would not recommend rehiring, Complainant due to attendance problems, that in all likelihood it would have weighed against a decision by Respondent's former manager to hire Complainant.

43) Respondent's current Security Manager testified that if, pursuant to a background investigation of Complainant, Respondent had learned that Complainant was not recommended for rehire by OSP and that Complainant had been untruthful in making representations to another state agency such as the Employment Division, those two facts by themselves would have caused the former manager not to recommend Complainant for hire.

44) As there is no indication or assertion on the record that Respondent would have altered, or even reviewed, a decision by its Security Manager not to recommend Complainant for hire as a Correctional Officer, the Forum concludes that Respondent would have adhered to it.

45) When Complainant left Respondent on August 2, 1983, after being denied employment in Group 1, he

felt that "everybody was laughing" at him. Emotionally, he was "very low, depressed, humiliated." This is the only evidence on the record describing Complainant's pain specifically caused by his rejection because of his obese or overweight condition, as opposed to his pain at not obtaining the job of Correctional Officer at Respondent.

46) In respects pertinent herein, the meaning of much of Dr. Becker's deposition testimony was indefinite, and Dr. Becker was not produced at hearing for clarification of that testimony. Accordingly, despite his perhaps considerable experience concerning physical screening, obesity, and physical fitness in the context of law enforcement employment, this Forum was not able to consider a great deal of Dr. Becker's testimony on particularly those, as well as other topics, because the meaning of much of it was either unascertainable or so vague as to be general in the extreme, and therefore not useful herein.

47) Complainant's credibility before this Forum has been damaged somewhat by his 1979 lie to the Employment Division, as it demonstrated a willingness to prevaricate for, presumably, economic reasons. That damage has not rendered Complainant's uncontroverted testimony not credible, although it has diminished the weight the Forum has given Complainant's testimony in the rare instances in which that testimony was controverted by evidence from other sources.

48) Because Daniel Johnson appeared to be very careful to be accurate and unbiased in testifying, the Forum found him highly credible.

49) The parties have stipulated to lost wages in the sum of \$17,656.60, such sum representing the net loss suffered by Complainant as a result of his rejection by Respondent.

ULTIMATE FINDINGS OF FACT

1) During all times material herein, Respondent was a correctional institution which was an agency of the State of Oregon employing six or more persons in Oregon.

2) In July 1983, Complainant applied for employment as a Correctional Officer at Respondent. After interviewing Complainant, Respondent instructed him to report to Respondent on August 2, 1983, prepared to go to work as a Correctional Officer, subject to passing Respondent's physical examination.

3) During all times material herein, as the persons responsible for carrying out security activities at Respondent, Respondent's Correctional Officers supervised and monitored inmates, patrolling inmate areas, searching them and their cells, breaking up somewhat regular disturbances between inmates, and maintaining security at the prison's perimeter. Respondent's Correctional Officers had to be able, for example, to restrain and subdue inmates, especially in the event of inmate-on-inmate assaults, and to come to the aid of fellow Correctional Officers. Specifically, Respondent's Correctional Officers had to be capable of the following actions related to instant and/or sustained arduous physical activity: walking with lateral mobility and over rough terrain, bending, standing for long periods, running, lifting and carrying 35 to 60 pounds, reaching, climbing stairs,

* There is no evidence on the record that Complainant listed OSP or anyone employed there as a "recommendation." OSP was listed among former employers on Complainant's application.

maintaining balance and working on high ladders.

4) During all times material herein, as part of the Oregon Corrections Division, Respondent was governed by that Division's policy prohibiting any person from doing work which he or she was physically incapable of performing. Toward ensuring its workers' physical capability to do all tasks required by their work, and in order to prevent them from performing any task which could be detrimental to their health and safety or that of others, Respondent endeavored to match worker health to the physical job requirements, by mandating standard use of health questionnaires and physical reports concerning the job requirements and a physical examination at the time of employment. Toward the same end, Respondent had catalogued its job classifications, by times material herein, in terms of the physical requirements of the work to be performed by persons working in those classifications. Correctional Officers (along with, for example, state police, highway maintenance and park laborers) were in Group 1, the grouping for classifications requiring the capability to perform instant and/or sustained arduous physical activity. The other groups were Group 2, for classifications requiring occasional lifting and exertion for short periods, and Group 3, for classifications including office jobs which demanded very limited physical exertion.

5) Pursuant to Corrections Division policy during times material herein, Respondent's Medical Director, Jerry Becker, M.D., conducted a physical examination of applicants for employment. Dr. Becker was to consider

the results of that examination, along with the applicant's information concerning his or her physical capabilities to do the specific activities and work in the specific conditions required by the job for which the applicant was applying, in determining those physical capabilities. Based on those capabilities, Dr. Becker was to ascertain the applicant's physical restrictions and assign the applicant to one of the above three groups which best matched his or her physical capabilities. Because Respondent did not review or alter those assignments, Dr. Becker thereby was to conclude for Respondent whether the applicant was capable of performing the physical requirements of the job for which he or she was applying.

6) Pursuant to the above-cited policies, Dr. Becker gave Complainant a physical examination on August 2, 1983, and assigned him to Group 2 rather than Group 1. (Dr. Becker knew that Complainant was applying for a Group 1 position.) This assignment was based on Dr. Becker's findings that Complainant was 50 pounds overweight and on Complainant's slow two-minute recovery pulse, which indicated to Dr. Becker that the bulk of Complainant's weight was fat rather than muscle mass which was compromising Complainant's heart and lung function, and his conclusion, based thereon, that Complainant was incapable of instant and/or sustained arduous physical activity. That is, Dr. Becker believed that Complainant had the characteristics of a person who fit in a class which Dr. Becker believed to a medical certainty was incapable of instant and or sustained arduous physical activity as required in Group

1, and in fact incapable of meeting the demands of other, similar positions, i.e., correctional or law enforcement officer positions requiring, as most did, a capability of instant and/or sustained physical activity or its substantial equivalent. However, Dr. Becker did not know with any reasonable degree of certainty whether Complainant's himself was capable of instant and/or sustained arduous physical activity, although he felt it was more probable than not that Complainant was not. That is, Dr. Becker felt it was more probable than not that Complainant would be an added risk to himself and others in a Group 1 job; he believed that Complainant could do 90 to 95 percent of the correctional officer job requirements, but could not do all of them in a manner safe to himself, other Correctional Officers, and persons in his area at Respondent. Dr. Becker believed that if Complainant lost 50 pounds, he "more probably than not" could move into Group 1. If Complainant had weighed 15, instead of 50 pounds, over what Dr. Becker considered an acceptable weight, Dr. Becker probably would have assigned him to Group 1 (even with the same pulse recovery rate).

Dr. Becker offered as support for his above conclusions only very vague references to authority concerning overweight or obese condition in the law enforcement employment setting.

7) In sum, Dr. Becker's assignment of Complainant to a health classification other than that required of Respondent's Correctional Officers was caused by his regarding Complainant's weight as an apparent or medically detectable condition which

diminished Complainant's health and, accordingly, regarding Complainant as having a physical or mental impairment.

Because of Dr. Becker's assignment, Respondent denied Complainant's application for an available Correctional Officer position on August 2, 1983. In so doing, Respondent adopted Dr. Becker's above-cited reasons and perceptions concerning Complainant's physical capability and, thereby, likewise regarded Complainant as having a physical impairment.

8) When he examined Complainant, Dr. Becker had been Respondent's contracting Medical Director for one to two years. He also had a private practice as an orthopedic surgeon, and another business providing physical screenings of applicants for employers which included many law enforcement and at least several corrections agencies. Dr. Becker believed that because of the physical toll of their weight, law enforcement and correctional officers had employment problems earlier and more frequently than other officers.

9) Although Dr. Becker admits that there are several definitions of obesity, or overweight, Dr. Becker's belief that Complainant was 50 pounds overweight was based simply upon a height-weight chart which Dr. Becker had clipped from a newspaper. Although the source of the information on the chart is not noted on it, Dr. Becker stated that its information matches the "actuarial tables" of an insurance company. Although the meaning of the information on that chart is not stated on it, Dr. Becker regarded the weights noted on the chart

as the acceptable weight ranges for people of given heights, and he has used the chart as such throughout his practice. The chart includes weights for small-, medium- and large-framed men whose height falls at the two inch intervals between 5'2" and 6'0", (except 5'10", which the chart unaccountably omits) and for small-, medium- and large-framed women whose height falls at the two inch intervals between 5'2" and 5'10". When examined by Dr. Becker, Complainant weighed 213 pounds, which is between 49 and 77 pounds above the weight ranges the chart lists for his 5'6" height. Dr. Becker considered this a gross deviation from an acceptable weight for Complainant.

Dr. Becker's perception that Complainant had an unacceptably slow recovery pulse rate arose when his pulse rate taken after two minutes of rest following 15 sit-ups was the same as his pulse rate immediately after he had finished those sit-ups. Dr. Becker offered no reason or authority (other than very vague reference to his experience, reading, or hearing) for his presumption that 15 sit-ups simulated instant and/or arduous sustained physical activity required of a Correctional Officer, or that Complainant's two-minute pulse rate indicated heart and lung compromise which would render him incapable of instant and/or sustained arduous physical activity. Dr. Becker's failure to ascertain when Complainant's pulse had returned to an acceptable rate, and his willingness to put Complainant in Group 1 with his pulse rate if Complainant weighed about 35 pounds less, lead the Forum to conclude that Dr. Becker did not regard

Complainant's recovery rate as a critical indicator. Dr. Becker offered no reason for not testing Complainant's ability to perform the type of instant and/or sustained arduous physical activity required of a Correctional Officer, (i.e., walking, bending, running, lifting and carrying, climbing stairs, maintaining balance and walking on high ladders), by simply having Complainant perform such activity.

10) As reflected on his application to Respondent, Complainant had satisfactorily performed the Group 1 job of Correctional Officer at the OSP, another correctional facility of the Oregon Corrections Division, for about three and one-half years ending about four years before he applied for work at Respondent. As Correctional Officer at OSP, Complainant had worked in the same classification as he would have worked at Respondent, with job duties the same as or very similar to those of Respondent's Correctional Officers during times material herein. If there was any general difference between the jobs of Correctional Officers at Respondent and OSP during times material herein, it was that the OSP Correctional Officers dealt with inmates potentially more challenging or dangerous than those at Respondent. During his employment at OSP, Complainant was involved in breaking up one physical fight, and he was not regarded as posing any safety risk. During Complainant's employment at OSP, his hiring weight of 190 pounds had risen to 210 to 215 pounds. There is no indication that Complainant's one apparent shortcoming in his OSP employment, excessive use of sick leave, had anything to do with his weight.

Given the pertinent similarities between Complainant's OSP employment and Respondent's Correctional Officer employment, and between Complainant during his OSP employment and when he applied for work at Respondent, Complainant's OSP employment is an indication that Complainant could perform the job of Correctional Officer safely and satisfactorily during times material herein.

12) Respondent has not produced any records of the weights and heights, or pulse recovery rates, of its Correctional Officers in 1983, and apparently no such records have ever existed. In January 1986 and September 1986 (times of deposition and hearing herein), Respondent employed some Correctional Officers who had "physical profiles" similar to that of Complainant, Correctional Officers whose weights exceeded the weight limitations shown on Dr. Becker's height/weight chart, and Correctional Officers who were "seriously" overweight as far as Dr. Becker was concerned. There was no evidence or assertion that these Correctional Officers were any more physically capable of performing instant and/or sustained arduous physical activity than Complainant was at the time of his application. There was no evidence or assertion that any of these Correctional Officer were not performing, or had not performed, their job with Respondent safely.

13) Although during all times material herein Correctional Division policy allowed Respondent to require an employee to provide health and working condition information and submit to a physical examination annually, to assure that that individual was not

permitted to continue in work situations which could be detrimental to the health of the individual, his or her co-workers, or the functional unit, there is no evidence or assertion that Respondent or its Security Unit has ever imposed such a requirement because of an employee's weight. Moreover, Respondent had during times material (and at the time of hearing) no system for monitoring the physical health or weight of its employees or for having all Correctional Officers physically evaluated and re-qualified periodically for Group 1. Respondent's only weight screening of employees occurred at hiring. (It is this failure by Respondent to monitor physical condition after hire which has caused Dr. Becker to be particularly anxious to appoint people who are physically fit.) Accordingly, this Forum has concluded that Respondent itself apparently did not during times material regard weight as an indication that a Correctional Officer was or probably was incapable of performing his or her duties safely. (A contrary conclusion would indicate that Respondent allowed individuals to work as Correctional Officers who it viewed as, or as probably, incapable of performing the job duties safely.)

14) During Complainant's employment at OSP, that institution employed some Correctional Officers who performed the same duties as Complainant and who commonly would have been described by people as overweight, in Complainant's opinion, and at least one Correctional Officer of about Complainant's height appeared to weigh substantially more than Complainant.

15) Although Complainant has worked in jobs requiring lifting and long hours of walking at times before and since his application for Correctional Officer work with Respondent, with the exception of his employment with OSP, there is no evidence on the record that any of them required Complainant to be capable of instant and/or sustained arduous physical activity, or that the employment setting of any of them imposed safety requirements comparable to those of Respondent. However, Complainant did demonstrate the capability for instant and/or sustained arduous physical activity when, as a parking facility security guard during 1981 or 1982, he chased a shoplifter for about two or three blocks and held that shoplifter until the police arrived. Complainant's recreational pursuits during times material herein demonstrated his capability for instant and/or sustained physical activity which could be arduous through his "circling the bases" in softball league play each summer, and by prolonged mountain hiking and instant activity to chase deer out of brush.

16) Under the circumstances and for the reasons recited in Ultimate Findings of Fact 3 through 15 above, and as explained in Section 4 of the Opinion below, the Forum has concluded, first, that Complainant's weight did not constitute a physical impairment and, second, that Respondent has not demonstrated a factual basis for believing, to a reasonable probability under all the circumstances, that Complainant's weight during times material herein (including its manifestation

in his pulse rate) rendered him incapable of instant and/or sustained arduous physical activity and, therefore, incapable of safely performing the job of Correctional Officer at Respondent.

17) If Complainant was 50 pounds overweight when he applied at Respondent, and if the condition was a condition which was correctable,* the Forum concludes, in light of Complainant's past experience with self-treatment of his weight condition and Dr. Becker's testimony, that it was correctable only upon long-term treatment changing Complainant's lifestyle as to diet and exercise.

18) At hearing, Complainant admitted that he lied to the Oregon Employment Division in 1979, when he was seeking unemployment insurance benefits, as to why he left his employment at OSP. As Complainant offered no explanation for this lie, the Forum must view it as demonstrating a capability of prevaricating for economic gain. The weight given to Complainant's testimony was diminished, although not rendered incredible *per se*, by Complainant's prevarication to the Employment Division.

19) Because the meaning of much of Dr. Becker's testimony, particularly on his experience concerning physical screenings and obesity and physical fitness in law enforcement employees, was not ascertainable in respects pertinent herein, or was so vague as to be general in the extreme, the Forum was not able to consider, or found of minimal value herein, a great deal of Dr. Becker's testimony, particularly on the latter topics.

The same is true of much of Mr. Johnson's testimony concerning the hiring process and its procedures in 1983. The foundation for many of Mr. Johnson's assertions is unclear, given his candid admission to a lack of experience with the process as conducted in 1983. When combined with the admission that significant changes had been made in that process after 1984, and the strong indications that the process was much less formal and uniform in 1983 than at the time of hearing, the Forum found Mr. Johnson's testimony on hiring procedures in 1983 to be less than clear and convincing that an investigation conducted in 1983 would be the same as conducted in 1986, or that the process in 1983 was sufficiently routinized to provide sufficient assurances that the information relied upon by Respondent would have been sought and uncovered.

20) If Complainant had attained assignment to Group 1, Respondent would have conducted some sort of background investigation of him. Satisfactory results of that investigation would have been a condition of his employment. If Respondent had appointed Complainant as a Correctional Officer in August 1983, Complainant, like all entry level Correctional Officers, would have commenced a six-month trial service period. The background investigation of Complainant would have been completed during his trial service.

21) During times material herein, Respondent's Security Manager made the hiring recommendations concerning Respondent's Correctional Officers

to Respondent's Superintendent, its hiring authority.

22) Although a background check could have been performed which might have uncovered the adverse information relied upon by Respondent, the evidence is not clear and convincing that such investigation would have extended to the specific sources cited by Respondent. The testimony of Mr. Johnson on this point is often ambiguous in its connection to times material, and also indicates that the investigatory process in 1983 was not sufficiently routinized or formal to provide the Forum with the assurance that this information would have been sought and uncovered as a matter of course.

23) Even if the information relied upon by Respondent had come to light, the evidence is not clear and convincing that Respondent would have terminated Complainant on this basis. The absence of any evidence of Respondent's actual conduct in similar situations undermines Respondent's assertion that Complainant's attendance problem while employed at OSP and his prevarication to the Employment Division would have necessarily led to his termination, particularly given that Complainant's evaluations while with the City of Salem make specific reference to an excellent attendance record and reliability.

24) The record establishes, and this Forum finds, that Respondent's refusal to employ Complainant because it regarded him as having the physical impairment of obesity caused Complainant to feel humiliated and depressed as he left Respondent on August 2, 1983. The record further establishes, and the Forum finds, that

* The Forum does not separately consider Complainant's slow recovery pulse rate, as Dr. Becker believed that it would correct with some weight loss.

Complainant lost wages in the amount stipulated to by the parties.

CONCLUSIONS OF LAW

1) At all times material herein, Respondent was an employer subject to the provisions of ORS 659.010 to 659.110 and 659.400 to 659.435.

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

3) The Forum complied with ORS 183.413 by timely informing Respondent and Complainant of the matters described in ORS 183.413(2)(a) through (i).

4) The actions of Jerry Becker, M.D., Respondent's Medical Director and agent, and of Lieutenant Kay, Respondent's employee and acting Security Manager, described herein, and their perceptions underlying those actions, are properly imputed to Respondent.

5) Because Complainant was regarded by Respondent as having a physical impairment when, in fact, he was not impaired, Complainant was at all times material a "handicapped person" as defined in ORS 659.400(2) and 659.400(3)(c)(C).

6) By refusing to hire Complainant because Respondent regarded Complainant as having a physical impairment, when Respondent did not have a factual basis for believing, to a reasonable probability under all the circumstances, that Complainant's weight rendered Complainant unable to perform safely the job for which he had applied as of the time he applied, Respondent engaged in an unlawful

employment practice in violation of ORS 659.425(1)(c), as charged.

7) Respondent's defense that it acted on the advice of its agent Dr. Becker at all times fails. See Section 5 of the Opinion below.

8) Under the facts and circumstances of this record, the Commissioner of the Bureau of Labor and Industries has the authority to award money damages to Complainant for his mental distress caused by Respondent's above-described unlawful employment practice, and to order Respondent to cease and desist from discriminating against other similarly situated individuals. As Respondent herein has failed to prove by clear and convincing evidence that Complainant would not have been retained because of factors which Respondent did not know when it placed Complainant in Group 2 but would have learned had it further investigated him, Complainant is entitled to back pay. The sum of money awarded, and the cease and desist mandate contained, in the Order below are appropriate exercises of that authority.

OPINION

1. Overview

The Forum examines below the central issues of class membership and proof which are presented by this case. Before that discussion, however, the Forum takes this opportunity to highlight three aspects of its opinion.

First and foremost, the Forum desires to clarify difficult issues of class definition. Particularly as regards so-called "perceived handicaps," the question of class membership is discussed at length.

Second, the Forum wishes to stress that it does not intend to limit the ability of Respondent, or any employer, reasonably to require appropriate physical qualifications of employees. Failure to meet such standards is not an automatic basis for membership in the protected class of "handicapped persons." Rather, where physical qualifications are reasonably required, the significant questions generally will concern the validity of the testing mechanism, its relationship to job demands, and the actual use of such qualifications.

Third, the Forum adopts a clear and convincing standard of evidence to evaluate Respondent's defense that it would not have retained Complainant anyway for reasons other than impairment. Where, as here, these reasons were unknown to Respondent at the time it rejected Complainant, Respondent appropriately bears the burden of clear and convincing evidence in establishing that such information would have come to light and that it would have resulted in Complainant's termination.

2. Definitions and Proscriptions

This matter is brought under Oregon's Handicapped Persons' Civil Rights Act (ORS 659.400 *et seq.*) ("the Act"). In its parts relevant herein, the definitional portion of that Act, ORS 659.400, provides:

"As used in ORS 659.400 to 659.435, unless the context requires otherwise:

"* * *

"(2) 'Handicapped person' means a person who has a physical or mental impairment which

substantially limits one or more major life activities, has a record of such an impairment or is regarded as having such an impairment.

"(3) As used in subsection (2) of this section:

"(a) 'Major life activity' includes, but is not limited to self-care, ambulation, communication, transportation, education, socialization, employment and ability to acquire, rent or maintain property.

"(b) 'Has a record of such an impairment' means has a history of, or has been misclassified as having such an impairment.

"(c) 'Is regarded as having an impairment' means that the individual:

"(A) Has a physical or mental impairment that does not substantially limit major life activities but is treated by an employer or supervisor as having such a limitation;

"(B) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitude of others toward such impairment; or

"(C) Has no physical or mental impairment but is treated by an employer or supervisor as having an impairment."

The relevant proscriptive portion of the Act, ORS 659.425(1), provides:

"(1) For the purpose of ORS 659.400 to 659.435, it is an unlawful employment practice for any employer to refuse to hire, employ or promote, to bar or discharge from employment or to discriminate in compensation or in terms,

conditions or privileges of employment because:

"(a) An individual has a physical or mental impairment which, with reasonable accommodation by the employer, does not prevent the performance of the work involved;

"(b) An individual has a record of a physical or mental impairment; or

"(c) An individual is regarded as having a physical or mental impairment."

3. Class Membership

Although the term "handicapped person" is not used in ORS 659.425(1), it has been held that the class protected by ORS 659.425(1) is defined by ORS 659.400(2) and (3). *Quinn v Southern Pacific Transportation Co.*, 76 Or App 617, 626, 711 P2d 139 (1985), *rev den*, 300 Or 546, 715 P2d 93 (1986). The Specific Charges allege class membership under two alternative and mutually exclusive theories. The first, brought under ORS 659.425(1)(a), alleges Complainant has an impairment which, with reasonable accommodation, does

not prevent his performing the duties of a Correctional Officer. Class membership requires that Complainant have an impairment which either substantially limits major life activities or is perceived as so limiting. ORS 659.400(2), 659.400(3)(c)(A) and (B). As Complainant introduced little or no evidence tending to establish his impairment, its degree of severity, or what accommodation by Respondent might be needed or reasonable, Complainant apparently abandoned, or could not support, this first theory at hearing.

The second theory, brought under ORS 659.425(1)(c), alleges that Complainant was regarded as having an impairment when, in fact, he had no impairment. Class membership under this theory must be established under ORS 659.400(3)(c)(C), the only "regarded as" definition which extends protection to persons without impairments:

"(C) Has no physical or mental impairment but is treated by an employer or supervisor as having an impairment."

While the statute is not entirely clear," the Forum interprets ORS

659.400(3)(c)(C) as requiring only the treatment of Complainant as impaired; treatment of the impairment as substantially limiting is not required. On its face, subsection (C) of ORS 659.400(3)(c), unlike subsections (A) and (B), does not require that Respondent treat Complainant as if he or she had a substantially limiting impairment, only an impairment. By departing from the form and language of subsections (A) and (B) and thereby assuming no physical or mental impairment of any kind, the Forum believes subsection (C) is directed against the most invidious form of discrimination: A wholly unfounded and stereotypic bias toward those perceived to be 'different'. While subsection (C) may extend the Act's

protection to those without "handicaps" as the term is commonly understood, the Forum believes it furthers the policy of the Act through a purposeful overbreadth, promoting the equal opportunities of persons who have impairments by penalizing discrimination against those erroneously perceived as impaired.

It is important to note, however, that although how an employer regards or treats a person may form the basis of the person's inclusion in the protected class; *Quinn, supra*, at 626; ORS 659.400(3)(c); not just any employer perception which leads to an adverse employment decision bestows class membership. It is the nature of the perception which bestows protected

first, to impairments "which substantially limit one or more major life activities." On the basis of subsection (2) alone, one would conclude that, whether the impairment is actual, historical, or merely perceived, class membership necessarily involves an impairment which is substantially limiting.

This conclusion, however, conflicts with the plain language of ORS 659.400(3)(c)(C):

"(3) As used in subsection (2) of this section:

"* * *

"(c) 'Is regarded as having an impairment' means that the individual:

"* * *

"(C) Has no physical or mental impairment but is treated by an employer or supervisor as having an impairment."

The question is what sort of impairment the employer must treat the Complainant as having. Must the employer (erroneously) perceive an impairment of a substantially limiting nature, or simply an impairment, of whatever degree of severity? This question is complicated somewhat by the preamble to subsection (3), which purports to quote the "regarded as" language of subsection (2) but does not do so accurately: It leaves out the "such" of "such an impairment." While this would appear to be an inadvertence, it suggests some doubt as to whether the impairment must be substantially limiting or not.

In the final analysis, however, we are left with the plain language of ORS 659.400(3)(c)(C). That subsection departs from the "impairment + perception of substantial limitation" structure of subsections (A) and (B). That structure is evidence that the Legislature appreciated the distinction between an impairment and its severity, and leads the Forum to conclude that subsection (C)'s departure from the substantial limitation language of (A) and (B) is intended to extend the Act's protection to persons erroneously perceived as impaired, period.

* It is apparent that, even after being presented argument to the contrary, Oregon appellate courts regard the definition of "handicapped person" in ORS 659.400(2) (and, therefore, the definitions relating to it in ORS 659.400(3)) as defining or describing the classes of people protected by ORS 659.425(1). See *Quinn v. Southern Pacific Transportation Co.*, 76 Or App 617, 626, 711 P2d 139 (1985), *rev den*, 300 OR 546, 715 P2d 93 (1986) (hereinafter *Quinn*); and, in that matter, Respondent's Brief to the Court of Appeals and Respondent's Response to the Petition for Review to the Supreme Court.

** The Forum notes a degree of confusion in the wording of ORS 659.400(2) and 659.400(3)(c)(C). ORS 659.400(2) describes three categories of "handicapped persons": The first refers to persons with an "impairment which substantially limits one or more major life activities," and the second and third refer to persons with either "a record of such impairment" or who are "regarded as having such an impairment." The language, "such an impairment," in the second and third categories is a clear reference to the language of the

class status: The perception must be of an "impairment," not merely a characteristic disliked by the employer.

Respondent's position is that the employer's perception must be of an impairment which not only limits employment opportunity with the Respondent-employer, but which also substantially limits opportunity with other employers. See, Respondent's Response to Commissioner's Inquiry of July 29, 1987, and Exceptions to Proposed Order. Respondent argues for this definition of substantial limitation as the only means of avoiding circularity in the class definition. Otherwise, the argument runs, any physical or mental characteristic which produces an adverse employer action, even the most eccentric, qualifies the person as a member of the protected class. Thus, the argument concludes, persons rejected on the basis of their bushy eyebrows or shyness will be bootstrapped into class membership for the sole reason that the employer's negative reaction to that characteristic foreclosed employment opportunity with that employer. *Id.* at p. 19, paragraph 4; see Attorney General's Opinion No 6057, p. 7. The Forum rejects this argument for three reasons. First, as discussed above, if Complainant is not physically impaired, ORS 659.400 (3)(c)(C) does not require the perception of a substantial limitation for class membership, but only that the unimpaired person is treated as impaired. Second, assuming Complainant does have an impairment, Respondent's position is clearly at odds with the Oregon courts' leading case on the meaning of substantial limitation in the employment context. *Quinn, supra*, at 626. Third,

and most importantly, characteristics such as bushy eyebrows are not "impairments" in the sense obviously intended by the Act. Regardless of the adverse reaction of employers, the physical or mental characteristic either possessed by the Complainant or perceived by the employer must be an "impairment," not simply a characteristic disliked by the employer. The notion of impairment is the touchstone of the Act's class definition. In the next section, the Forum proceeds to define "impairment" and to apply that definition to the circumstances of this case.

A. Definition of "Impairment"

The Forum adopts the definition of "impairment" imparted by *E. E. Black, Ltd v. Marshall*, 479 FSupp 1088, 23 FEP 1253 (D. Hawaii, 1980):

"[A]ny apparent or medically detectable condition which weakens, diminishes, restricts or otherwise damages an individual's health or physical or mental activity." *Id.* at 1098.

While it is possible to argue that this definition encompasses any physical or mental state which is less than optimal, and thus that poor physical conditioning may be said to "weaken" or "restrict" health or physical activity, the Forum believes, and finds in this case, that the failure to maintain ideal levels of physical health, or for that matter intellectual acuity or emotional well-being, is not an "impairment" for purposes of the Act. Rather, the emphasis should be placed on the phrase "apparent or medically detectable condition," a usage which implies pathological or abnormal deficits in health or capacity.

B. Definition Applied in Present Case

The Forum begins its application of the definition of "impairment" by distinguishing two issues: The first is whether Respondent's determination that Complainant failed to meet the Group 1 standard in and of itself constitutes a perception of impairment or the treatment of Complainant as impaired. The Forum holds that it does not. The second issue concerns the basis for Respondent's determination that Complainant failed to meet the Group 1 standard: Did Respondent regard Complainant as impaired? The Forum holds that it did.

1. Group 1 Standard

The physical qualification for Group 1 employment is the capacity for "instant and/or sustained arduous physical activity." Correctional Officers are placed in this category for the reason that they must be able to work among, pursue, and, if necessary, subdue prison inmates. Complainant has not contested this qualification for Group 1 employees in general or Correctional Officers in particular.

As discussed in the next section, the Forum finds that the examination conducted by Respondent is not a rational test of Group 1 capacity. But for purposes of the present discussion, the Forum presumes *in arguendo* that it is. The Forum's purpose is to make clear that Respondent's determination that Complainant failed to meet the articulated fitness standard for Group 1 employees does not, in itself, establish that the Complainant was physically impaired or that Respondent regarded him as such.

While "impairment" denotes a condition which damages or restricts health or activity, as already indicated the Forum rejects a standard for the unimpaired which requires optimal or ideal health. Rather, the Forum recognizes that there is a range of normal or acceptable variation in physical or mental function which falls below the ideal but stops short of impairment. This range is not susceptible to precise definition, but for purposes of physical conditioning, the Forum finds that this range of normal or acceptable variation includes the "out of shape" as well as the physically fit. Thus, the Forum finds that the failure to demonstrate a capacity for instant and/or sustained arduous physical activity does not make one impaired, at least not for that reason alone. Given certain interpretations of the words "arduous" and "instant and/or sustained," it is arguable that the Group 1 standard would exclude most individuals, even those of average conditioning. Falling short of the Group 1 standard simply does not establish a physical impairment. Therefore, the Forum holds that Respondent did not regard Complainant as impaired for the reason that it determined him to be unfit for Group 1 employment.

2. Respondent's Determination

Respondent does not dispute that it refused to employ Complainant as a Correctional Officer because of Dr. Becker's conclusion that Complainant was obese. (The Forum includes Complainant's slow pulse recovery rate within its references to Complainant's weight or obesity in this discussion, because it is clear that Dr. Becker treated Complainant's slow pulse

recovery rate as a manifestation and function of his weight.) The question, therefore, is whether this conclusion establishes that Respondent regarded Complainant as physically impaired. The Forum holds that it does.

It is clear from Dr. Becker's testimony that he regarded Complainant's weight as outside medically acceptable bounds. The notes of Dr. Becker's examination contain the doctor's finding that Complainant suffered from "obesity." This is a term of art which denotes a medically detectable condition damaging to health. Although often used interchangeably, "overweight" is not synonymous with "obese." Several pounds of excess weight may make a person "overweight," but they would not constitute obesity as the Forum understands the word. Rather, obesity describes an impairment of health of serious medical dimensions.

It is clear, therefore, that Respondent regarded Complainant as physically impaired. Under the Forum's interpretation of ORS 659.400(3)(c)(C), this is sufficient to bring Complainant under the protection of the Act if, in fact, Complainant is not impaired.

The Forum finds that Complainant was not physically impaired. The record contains a preponderance of evidence supportive of Complainant's unimpaired physical condition, including accounts of strenuous recreational activity, satisfactory prior performance at OSP, and Complainant's pursuit and capture of a suspect while employed by the City of Salem. The meager medical information assembled by Respondent is simply insufficient to establish Complainant's obesity or any other impairment.

4. Did Respondent's Refusal to Hire Complainant as a Correctional Officer because of His Overweight/Obese Condition Constitute a Violation of ORS 659.425?

As Complainant is, therefore, a member of the class protected by ORS 659.425(1)(c), the question becomes whether Respondent's termination of Complainant was a violation of ORS 659.425. To determine the answer, we apply the principle enunciated in *Quinn* as appropriate to an employment setting in which the employer "owes an extraordinarily high degree of care in its operation" and in which "safety is an essential part of its business":^{*} Whether, given all the

* The contrary finding -- that Complainant is physically impaired due to his weight -- would normally lead to the class membership analysis of *Quinn*: Did Respondent treat Complainant's weight as substantially limiting a major life activity when, in fact, it was not so limiting? In this case, however, Complainant came forward with evidence establishing that he was not impaired but was treated as if he were. As Complainant bears the burden of establishing protected class membership, there is no need to explore class membership on the basis of an impairment erroneously perceived to be substantially limiting. See Finding of Fact -- Procedural 4.

** The Forum does not comment on whether this constitutes imposition of an ORS 659.030(1)(a) "bona fide occupational requirement" test in a ORS 659.425(1)(c) context, as apparently assumed by the *Quinn* court, or simply a translation of the ORS 659.425(1)(a) condition that the physical impairment

circumstances, Respondent has "demonstrated a factual basis for believing, to a reasonable probability, that * * * (Complainant), because of his * * * (weight), could not safely perform the job of * * * (Correctional Officer)," i.e., in a manner which would not endanger himself or others.^{*} *Quinn, supra*, at 631-632.

In enunciating this as the standard for application in an employment context in which safety is essential, the *Quinn* court explicitly declined to adopt in handicap discrimination cases the standard adopted in *Usery v. Tamiami Trail Tours, Inc.*, 531 F2d 224 (5th Cir 1979), for determining, under the Federal Age Discrimination in Employment Act, 29 USC 621 *et seq.*, whether a particular requirement of a job involving public safety was a bona fide occupational qualification reasonably necessary to the normal operation of the particular business. If applied herein, the *Tamiami* standard would allow Respondent to impose a weight/pulse rate standard on Complainant if Respondent had a factual basis for believing that all or substantially all persons of Complainant's physical condition would be unable to perform safely and

efficiently the duties of the job involved, or if it was impossible or impractical for Respondent to deal with such persons on an individualized basis. Under *Tamiami*, in a public safety setting, an increase in the possibility or likelihood of injury or death would satisfy the "unable to perform safely" component.

The *Quinn* court specifically declined to adopt this standard in the ORS 659.425 setting because of what the court labeled "its potential for blanket disqualification of a class of person with a given handicap." *Quinn, supra*, at 631. The court went on to state emphatically that

"(i)if the Handicapped Persons' Civil Rights Act is to have any substance, the emphasis must remain on whether the individual applicant is capable of fulfilling the job requirements * * * whether an applicant's own personal safety or that of others is in question, the Act requires an individual assessment of the safety risk." *Id.*

The court then enunciated the above-cited "reasonable probability" standard derived from *Montgomery Ward v. Bureau of Labor*, 280 Or 163, 570 P2d 76

not, with reasonable accommodation by the employer, prevent the performance of the work involved into the ORS 659.425(1)(c) "perceived" physical impairment context. Rather, this Forum views this test as an enunciation of the presumption, implicit in the definition of "is regarded as having an impairment" in ORS 659.400(3)(c), that the Complainant's physical condition, in addition to being erroneously viewed as an impairment, does not, with reasonable accommodation by the employer if necessary, prevent the performance of the work involved.

* The Forum notes that although Respondent's Correctional Officer job may be a position which by its very nature includes an inherent risk of injury to co-workers, a preponderance of the evidence does not establish that this inherent risk would be materially enhanced because of Complainant's weight. See *In the Matter of Burlington Northern Railroad Company*, 3 BOLI 215, 237-38 (1983).

(1977), as the test applicable to this setting.

No one has disputed that a Correctional Officer of Respondent had to be capable of instant and/or sustained arduous physical activity during times material herein. However, for the reasons explained below, Respondent has not demonstrated a factual basis for believing, to a reasonable probability under all circumstances, that Complainant's weight affects his capability for instant or sustained arduous physical activity in a way which would prevent him from being able to safely perform the job of Correctional Officer.

Respondent has offered Dr. Becker's opinion that Complainant's two minute recovery pulse rate after doing fifteen sit-ups and the fact that his weight exceeds the weight range listed on Dr. Becker's weight chart by some fifty pounds established that Complainant was obese, and that his heart and lung function were being compromised by his weight. From this Dr. Becker concluded that Complainant fit in a class of persons who with a reasonable certainty would not safely perform the job of Correctional Officer because they would be incapable of instant and/or sustained arduous physical activity. Dr. Becker agreed, however, that he did not know with any reasonable degree of certainty whether Complainant himself, the individual applicant, would be incapable of that activity, although he felt it was more probable than not that Complainant would be an "added" risk to himself and others. Moreover, Respondent offered no evidence whatsoever, apart from Dr. Becker's very vague references to his experience and to

literature concerning excessive weight or obesity in law enforcement employees, that support Dr. Becker's presumption that Complainant's weight and two minute pulse recovery rate establish that he falls in a class of people incapable of instant and/or sustained arduous physical activity. Respondent has established at best that Dr. Becker believed that there was a general relationship between overweight or obese status (as demonstrated in Complainant's case by weight and slow pulse recovery) and an incapacity for instant and/or sustained arduous physical activity. As Dr. Becker himself testified that there are many definitions of overweight or obesity, weight alone appears to be a crude measure of the physical condition of a particular individual. This seems particularly true herein, where Dr. Becker's conclusion is based merely upon the fact that Complainant's weight exceeds the ranges noted on an old newspaper clipping, which is incomplete and not self-identifying, but which Dr. Becker believes matches an insurance company's actuarial tables. This is indefinite evidence at best. The Forum agrees with the Agency's argument that the procedure Dr. Becker used herein, particularly its heavy reliance on a standardized height-weight chart, permitted Dr. Becker to make precisely the "excessively broad" general conclusion about Complainant's capabilities with regard to its Correctional Officer position which allows, in the words of the *Quinn* court, just "the kind of invidious discrimination based on unfounded stereotyping" that the Act is designed to prevent. *Quinn, supra*, at 631.

However, Dr. Becker did not base his decision that Complainant's weight rendered him incapable of instant and/or sustained arduous physical activity on the chart alone. He also based it on his conclusion that Complainant's pulse recovery rate was unacceptable, as his rate two minutes after doing fifteen sit-ups had not acceptably recovered from, and remained the same as right after, that exertion. Dr. Becker offered no authority (other than, again, vague references to his experience or what he had read or heard at conferences) for his conclusion that doing 15 sit-ups simulated a "take-down" in a fight or wrestling an inmate, or that Complainant's two minute pulse recovery rate indicated heart and lung compromise which would render him incapable of instant and/or sustained arduous physical activity. The Forum notes that nowhere on Respondent's detailed description of the types of physical activity required of its Correctional Officers is wrestling or "taking down" mentioned or alluded to. The Forum also notes that there is no evidence that it would have been medically or economically unfeasible to test Complainant for his ability to perform the physical activities in that description (i.e., different types of walking, bending, running, lifting, carrying, climbing stairs, maintaining balance or working on high ladders) by simply having Complainant perform them. Furthermore, the Forum notes that Dr. Becker did not even mention a pulse rate problem in his diagnosis of Complainant. The Forum assumes, moreover, that if Dr. Becker felt that pulse recovery was such an important indicator, he would have further documented it by checking Complainant's pulse at

later intervals to ascertain when it did return to an acceptable rate. Finally, if Dr. Becker regarded Complainant's pulse recovery rate as a critical indicator, he would not have been willing to give Complainant Group 1 status if Complainant had had the same recovery rate, but had been 15 pounds overweight by the chart.

Up to about four years before he applied at Respondent, Complainant had worked as a Correctional Officer at OSP, which if anything was a more dangerous job setting than at Respondent. Nonetheless, and even though at times he weighed as least as much as when he applied at Respondent, Complainant performed this duties satisfactorily and was not regarded as posing any safety risk. Because of the similarities between the OSP employment setting and Complainant at OSP on one hand, and Respondent's employment setting and Complainant during times material on the other hand, Complainant's OSP employment is an indication that Complainant could have safely performed the job of Correctional Officer during times material. Moreover, when it rejected Complainant, Respondent knew or should have known of this indication, as Complainant had described his OSP employment on his application to Respondent.

Finally, Respondent itself disproves an assumption that weight alone can establish to a reasonable probability that a person is incapable of the instant and/or sustained arduous physical activity required of a Correctional Officer. Respondent has employed and continues to employ people of Complainant's weight and physical "profile." There is not one scintilla of cognizable evidence

on this record that even one such person has failed to perform his or her duties as a Correctional Officer safely. (There is only Dr. Becker's unexplained reference to one "fat boy out there" having a heart attack.) Despite Dr. Becker's opinion, Respondent itself apparently does not regard excess weight or obesity as indicators that a Correctional Officer is or may be incapable of performing his or her duties safely, for Respondent has not instituted any process for checking weight or obesity, or pulse recovery rate, or any other indicator of physical condition, of its Correctional Officers on a regular basis. The evidence on the record does not establish, in fact, that Respondent has ever checked the weight, obesity, or pulse recovery rate of any already-employed Correctional Officer.

The facts cited above make it impossible for the Forum to accept the weight and pulse recovery tests employed by Respondent as a factual basis for believing, to a reasonable probability, that a person is incapable of instant and/or sustained arduous physical activity or of safely working a Correctional Officer job at Respondent. Accordingly, for all the reasons stated above, this Forum has concluded that Respondent has not demonstrated a factual basis for believing to a reasonable probability, under all the above-cited circumstances, that Complainant was incapable of instant and/or sustained arduous physical activity or could not safely perform the job of Correctional Officer at Respondent at the time he applied to do so. In other words, Complainant did not receive the sort of "individual assessment"

required by ORS 659.425(1)(c). *Quinn, supra*, at 631.

5. Defenses

A. Liability

Respondent's defense that at all times it acted on the advice of Dr. Becker may be intended to be a defense that it acted in good faith or on reasonable grounds. Even if adequately alleged and accurate, that defense would go only to the propriety of a sanction, or remedy. *Quinn v. Southern Pacific Transportation Co., supra*, 76 Or App at 628-629, quoting *Montgomery Ward v. Bureau of Labor, supra*, 280 Or 163. However, as the Forum has not found that Respondent acted on reasonable grounds, the defense would fail even as to that point.

B. Damages

The purpose of back pay is to help accomplish the statutory goal of eliminating the effects of unlawful discrimination by monetarily compensating the victim of that discrimination in the same manner in which she or he would have been compensated had there been no discrimination, so that the victim will neither suffer loss nor receive a windfall. ORS 659.010(2). Therefore, in this case even if Complainant has been discriminatorily rejected, if Respondent proves that, if considered further during the probationary period, the Complainant would not have been retained for legitimate reasons, the Complainant is not entitled to back pay.

The Forum has previously relied upon Title VII precedent in allocating the burdens of proof and persuasion in civil rights cases, as well as in establishing the quantum of evidence necessary to carry these burdens.

E.g., In the Matter of McCoy Oil Company, 3 BOLI 9 (1982). For what the Forum believes are sound policy reasons, the Forum will be guided by the federal precedent cited below concerning the burden borne by Respondent in its defense to the back pay remedy.

Respondent bears the burden of persuasion in establishing its defense to the back pay remedy. *Muntin v. State of California Parks and Recreation Dept.*, 738 F2d 1054, 1056 (9th Cir 1981); *Ruggles v. California Polytechnic State University*, 797 F2d 782, 787, n. 1 (9th Cir 1986). That burden is a heavy one: Respondent in this case must prove by clear and convincing evidence that, regardless of its illegal discrimination against Complainant, it would have terminated Complainant anyway during the probationary period for legitimate reasons, reasons which it did not know about at the time of Complainant's termination, but which it contends it would have uncovered and acted upon. *Id.*

The Forum is not convinced on the evidence before it that Complainant would not have been retained "but for" Respondent's discriminatory action. Respondent's evidence on this point is directed principally to the sort of investigation and evaluation which would be expected under Respondent's hiring system at the time of hearing, a system admitted to be substantially changed since 1984. There is no evidence documenting the Respondent's actual conduct in similar cases or the existence of standard or habitual investigative procedures during times material. The Forum refuses to presume facts favoring Respondent when Respondent bears the burden of

proving them, particularly when there is a substantial volume of evidence relevant to Respondent's defense which would presumably be within the Respondent's possession if it existed.

Respondent contends that a background check would have revealed adverse information about Complainant and that Respondent would have taken certain action on the basis of that information. In Finding of Fact 36, this Forum finds a background check of some sort would have been made. What the record fails to establish by clear and convincing evidence, however, is that the investigation would have extended to the sources of information cited by Respondent: the Complainant's personnel file at OSP and Complainant's former supervisor at OSP. There is not a single specific instance relied upon by Respondent of investigations of applicants prior to 1984 where a background check extended to the examination of personnel files at OSP or any other former employer. Similarly, no documentation was introduced that Respondent requested and reviewed work history information from former supervisors at OSP or any other former employer prior to 1984. No evidence was introduced that the former supervisor involved in this case had or has ever been contacted for such information. And there was no evidence produced that such inquiries were routinely made by the then acting Security Manager or, for that matter, that Respondent employed any routine or standard procedure for such investigations in 1983. To the contrary, the evidence indicates that the process lacked regularity and uniformity during times material, and

that subsequent steps were taken to add greater rigor and routinization to hiring procedures.

This last observation may be the most telling, for it casts Respondent's evidence in sharp relief: the only evidence on this crucial point is the testimony of Respondent's current Security Manager, Mr. Johnson, as to the sort of investigation which would have been conducted at the time of hearing, and which Mr. Johnson believes would have occurred in 1983. However, Mr. Johnson also testified of his lack of experience with the relevant hiring process during times material and of changes made in that process since 1984, changes meant to address a lack of uniformity and formality in the process. Respondent, in essence, invites this Forum to assume that the acting manager in 1983 would have shared Mr. Johnson's judgment and acted upon it.

The Forum hastens to add that Mr. Johnson was found to be highly credible, and no criticism is intended either of the candor of his testimony or his judgment as to the inquiries appropriate to Complainant's application. The steps Mr. Johnson outlines strike the Forum as entirely reasonable.

But Respondent bears the burden of proving what would have been done, not what should have been done, and it must do so by clear and convincing evidence. Evidence of a standard investigative procedure including the sorts of inquiries cited here would be such evidence. Specific instances of prior inquiries of this nature would be such evidence. And more persuasive still would be evidence that the then acting Security Manager, Mr.

Kay, routinely made such inquiries. But Respondent introduced no such evidence. Rather, the evidence indicates that the investigative process in 1983 lacked exactly this sort of rigor as well as the assignment of personnel specifically responsible for its execution.

Even assuming for the purposes of argument that the adverse information about Complainant had reached Respondent, what evidence does the Respondent offer to establish what it would have done as a result? Respondent introduced evidence that termination of Complainant would have been justified given the need of the institution for reliable, credible, and un intimidated officers. While these needs are no doubt real, such evidence is indirect at best. Again, this Forum finds itself asking why there is no evidence of Respondent's actions in similar cases, of terminations based on the reasons involved here. The record is devoid of any such instances, and is generally lacking in any evidence of Respondent's actual conduct in similar cases.

Rather than proving what Respondent would have done on the basis of what it had done in the past, Respondent instead introduces evidence to validate the reasons it claims it would have relied upon in terminating Complainant. This Forum has no difficulty with the reasons cited; all are legitimate concerns of Respondent. But such proof largely begs the question of whether and how these concerns would have been brought to bear on Complainant.

It is plausible to the Forum that, viewed as a whole, Complainant's

generally good employment history could have outweighed the negative aspects of his background, and that the high praise of employers subsequent to OSP, some of which concerned his reliability and excellent attendance record, as well as the absence of any indication of the problems cited by Respondent, could have tipped the scales in his favor. Respondent argues essentially that the problems it cites would have disqualified Complainant outright, and that no balancing would have been necessary. Why then are there no examples in the record of Respondent's quick and certain action in similar cases? Why are there no examples of information such as is involved here serving as the basis for adverse actions of any kind?

The demands of clear and convincing evidence in this kind of case will not be easy to meet, nor should they be, but neither are they unreasonably high. Demanding evidence of specific actions in similar circumstances, documentation of standard or habitual procedures, even of the usual procedure of individuals, is not unduly burdensome and is well within the power of Respondent to produce if it exists. It should not be forgotten that Respondent's defense is one of admission and avoidance — illegal discrimination is presumed by this point in the analysis — and it is precisely because of Respondent's illegal conduct that the fact at issue — whether Complainant would have been retained — can never be determined with certainty. Respondent properly bears a heavy burden in these hypothetical circumstances, and should not be allowed to escape liability without evidence of intervening

factors which is both clear and convincing.

6. Stipulated Damages

The stipulated damages represent Complainant's wage loss between August 1983 and the date of initial convenement of the hearing herein. It is the practice of the Forum where, as in the stipulated exhibit, lost wages are organized by calendar year, to compute and compound interest as of each December 31, between the commencement of the loss and the date Respondent complies with an Order for payment. Since the record does not reveal when Complainant earned the off-setting wages, the first December 31 interest computation is December 31, 1984, because interest on wages lost in 1983 cannot begin to accrue until January 1, 1984. Similarly, the interest on the 1984 wage loss begins on January 1, 1985, and that on the 1985 wage loss begins on January 1, 1986. Thereafter, since no evidence of record shows further loss, interest is compounded annually on December 31, or on the date of compliance, whichever occurs earliest. Accordingly, interest on the award of lost wages herein has been and shall be calculated in the manner shown in the Table at the end of this Order.

Total interest accrued between August 1983 and December 31, 1987, is \$5600.82. Interest accruing between January 1, 1988, and the date of compliance with this Order shall be computed and compounded at the legal rate as of each December 31, occurring during that period and/or the date of compliance, as applicable. For instance, interest accrued as of July

13, 1988, on the December 31, 1987, total is \$1121.12.

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 in Portland a certified check payable to the Bureau of Labor and Industries in trust for KEITH R. GREEN, in the amount of:

a) SEVENTEEN THOUSAND SIX HUNDRED FIFTY SIX DOLLARS AND FIFTY CENTS (\$17,656.50), representing wages Complainant lost because of Respondent's unlawful employment practices found herein, PLUS

b) FIVE THOUSAND SIX HUNDRED DOLLARS AND FIFTY TWO CENTS (\$5600.52), representing interest on lost wages at the annual rate of nine percent accrued between January 1, 1984, and December 31, 1987, computed and compounded annually, PLUS

c) TWO HUNDRED FIFTY DOLLARS (\$250.00), which constitutes compensatory damages for the mental distress Complainant suffered as a result of Respondent's unlawful practices found herein, PLUS

d) Interest on lost wages, at the legal rate, accrued between January 1, 1988, and the date Respondent complies herewith, to be computed and compounded annually.

2) Cease and desist from discriminating against any similarly situated individual because that individual is regarded as having a physical or mental impairment.

TABLE

Accrual Period	Principal at Start of Period	Annual Interest Rate	Interest Accruing During Period	Principal Accruing During Period	Total Principal and Interest at End of Period
Aug. 1983 to Dec. 31, 1983	0.00	0 %	0.00	\$6,547.62	\$6,547.62
Jan. 1 to Dec. 31, 1984	\$6,547.62	9 %	\$589.29	\$7,631.78	\$14,768.59
Jan. 1 to Dec. 31, 1985	\$14,768.59	9 %	\$1329.18	\$3,477.10	\$19,574.97
Jan. 1 to Dec. 31, 1986	\$19,574.97	9 %	\$1761.75	0.00	\$21,336.72
Jan. 1 to Dec. 31, 1987	\$21,336.72	9 %	\$1920.30	0.00	\$23,257.02

In the Matter of
W. B. Anderson Trailer Sales, Inc.,
an Oregon corporation, dba
JAKE'S TRUCK STOP,
Respondent.

Case Number 01-87
Final Order of the Commissioner
Mary Wendy Roberts
Issued July 14, 1988.

SYNOPSIS

Respondent discharged Complainant, an injured worker who had applied for workers' compensation benefits and who returned to work with a limited work release, for cause (poor performance) after Respondent created a suitable job for her. Accordingly, Respondent did not violate ORS 659.410. When Respondent refused to reinstate Complainant after she received a full work release, the Commissioner held that Respondent did not violate ORS 659.415, because Respondent had discharged Complainant before the release for reasons not connected with the injury and for which others are or would be discharged. ORS 659.410, 659.415; OAR 839-05-010(2)(a), 839-05-015, former 839-06-130(1)(b)(iii), 839-06-140(3), 839-06-145, 839-06-150.

The above-entitled matter came on regularly for hearing before Douglas A. McKean, designated as Hearings Referee by Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on October 14 and 15, 1987, and on February 24,

1988, at 1230 N.E. Third, Suite A-244, Bend, Oregon. The Hearings Referee called as witnesses for the Bureau of Labor and Industries (hereinafter Agency) the following: Judith A. Bracanovich, Quality Assurance Manager for the Civil Rights Division (CRD) of the Agency; Beverly Russell, CRD Investigating Team Supervisor; Donna Broadsword, Senior Investigator, CRD; Sheri Haller, Complainant (hereinafter Complainant); Derek Borland; Allen Gamble, N.D.; Elaine F. Grove; Robin Kleindinst; Moira McDonough; Michael J. Muehl; Beth M. Murdock; and Diana Steinbach.

Jake's Truck Stop (hereinafter Respondent) was represented by Bruce Bischof and Neil R. Bryant, Attorneys at Law. Respondent called the following witnesses: Lyle Hicks, Respondent's manager of the cafe; Rene' M. Helms; Holly Kelly; Toni Oltman; and Susan Todd. Mr. Bischof cross-examined Agency witnesses.

Having fully considered the entire record in this matter, I, Mary Wendy 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) On September 6, 1985, Complainant filed a verified complaint with the Civil Rights Division of the Agency alleging that she had been discriminated against because Respondent failed to reinstate her after she was fully released to return to work following an on-the-job injury. On February 7, 1986, Complainant filed an amended complaint, adding to the

allegation above that she had been discharged by Respondent on April 5, 1985, because of the on-the-job injury she received on January 21, 1985, and the workers' compensation claim she had filed.

2) Thereafter, CRD issued an Administrative Determination finding substantial evidence of an alleged unlawful employment practice, pursuant to ORS 659.410, by Respondent.

3) CRD attempted to resolve the complaint by conference, conciliation, and persuasion, but was unsuccessful. Evidence presented at hearing established the following facts in this regard:

a) Beverly Russell was an Investigating Team Supervisor for CRD of the Agency when the Administrative Determination was issued in this matter. As part of her responsibilities, she reviewed the file prepared by the investigator, Donna Broadsword. She agreed with Broadsword's determination that substantial evidence of an unlawful practice was found. Russell's responsibilities also included attempting to conciliate this matter. Her efforts were made according to normal Agency practices and procedures.

b) On September 2, 1986, a letter was sent to Respondent and its counsel inviting Respondent to participate in conciliation.

c) Thereafter, Russell spoke on the telephone once with Respondent's counsel and twice with Complainant. In addition, Russell received two letters from Respondent in which Respondent made a "nuisance value settlement offer," which was its "best offer." Complainant did not accept the offer.

d) On September 24, 1986, Russell determined that conciliation had failed, and referred the case to the quality assurance unit of the Agency.

4) On July 10, 1987, the Agency prepared and duly served on Respondent Specific Charges alleging that Respondent had discharged Complainant from employment because Complainant suffered an on-the-job injury and invoked the Oregon workers' compensation procedures.

5) With the Specific Charges, the Agency also served on Respondent the following: a) a Notice of Hearing setting forth the time and place of the hearing in this matter; b) a 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 regarding the contested case process; and d) a separate copy of the specific administrative rule regarding responsive pleadings. At Respondent's request, the hearing was rescheduled and the Forum duly notified Respondent and the Agency. At the end of the first two days of the hearing, additional time was necessary and an Amended Notice of Hearing was duly served on Respondent and the Agency. Following a postponement at the Agency's request, a second Amended Notice of Hearing was duly served on Respondent and the Agency.

6) Respondent filed an answer dated July 24, 1987, and received by the Forum on July 27, 1987, in which it denied the allegation mentioned above in the Specific Charges. As an affirmative defense, Respondent alleged that it had no duty to return Complainant to

work until she had obtained a full release from her doctor, that in an effort to accommodate Complainant it created a light-duty job that was not in existence prior to the accommodation for Complainant, and that Complainant was discharged because of problems she created in the work place that were unrelated to her injury.

7) Pursuant to OAR 839-30-071, the Agency filed a Summary of the Case including documents from the Agency's file. Although permitted to do so under the provisions of OAR 839-30-071, Respondent did not submit a Summary of the Case.

8) A pre-hearing conference was held on October 14, 1987, at which time the Agency and Respondent stipulated to certain facts. Those facts were received into the record by the Hearings Referee at the beginning of the hearing.

9) At the commencement of the hearing, the attorney for Respondent stated that he had read the Notice of Contested Case Rights and Procedures and had no questions about it.

10) The 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).

11) During the third day of the hearing, the Agency made a motion to amend its pleading, the Specific Charges, to conform to the evidence and to reflect issues presented during the hearing. The motion was made pursuant to OAR 839-30-075. The Hearings Referee granted the motion because the amendments reflected

issues and evidence that had been previously introduced into the record without objection from Respondent. The amendments charged Respondent with a violation of ORS 659.415.

12) At the close of the hearing, Respondent made a request and the Hearings Referee allowed it to submit its closing argument in writing. Due to the span of time between the beginning and the end of the hearing, Respondent requested copies of the hearing tapes to assist it. As a result, the record remained open until March 11, 1988. Respondent filed a timely written closing argument.

13) A Proposed Order in this contested case was issued on April 14, 1988. The Proposed Order contained an Exceptions Notice which indicated that exceptions, if any, were to be filed within 10 days of the issuance date. No exceptions were received on or before close of business Monday, April 25, 1988.

14) On April 25, the Hearings Unit received the timely submission of a Statement of Policy from the Agency. The Statement of Policy was submitted pursuant to OAR 839-30-165(2).

FINDINGS OF FACT – THE MERITS

1) At the times material herein, Respondent Jake's Truck Stop was an assumed business name for a restaurant and gas station in Bend, Oregon, owned by W. B. Anderson Trailer Sales, Inc., an Oregon corporation.

2) Respondent was an employer in the State of Oregon utilizing the personal services of six or more employees, and was subject to the provisions of ORS 659.010 to 659.435.

3) Complainant was employed by Respondent as a waitress in August 1984.

4) On August 27, 1984, Complainant walked off the job in mid-shift following a dispute with another waitress, Elaine Grove. Several weeks later, Juanita Gilmore, Respondent's head waitress, contacted Complainant and suggested that Complainant call Respondent to get her job back. Complainant met with Lyle Hicks, the cafe manager for Respondent, and a schedule was agreed to in which Complainant would not work with Grove. Complainant was rehired and began work on October 7, 1984. She worked on a different shift from Grove beginning October 7.

5) Complainant testified that the reason she quit in August was the irregularity of her scheduled work shifts. She said that she had no dispute with Grove. Grove testified that she had no dispute with Complainant. The testimony of Hicks and Rene' Helms, one of Respondent's cooks, as well as the shift sheets that were written at around the times at issue, reflect the findings set out in Finding of Fact 4. The testimony of Hicks and Helms and the documentary evidence established persuasive evidence about this disputed issue of fact. Based upon the weight of the evidence, Complainant's testimony was not believable. The most notable aspect of Grove's testimony was her poor memory. In addition, Grove had been discharged by Respondent because she was slow and forgetful, and her demeanor demonstrated some hostility toward Respondent. For these reasons, the

Forum found that Grove's testimony was not credible.

6) Between October 7, 1984, and January 21, 1985, Hicks was not aware of any conflicts between Complainant and any other waitresses.

7) Complainant sustained an on-the-job injury to her back while in Respondent's employ on January 21, 1985. That was a Monday. The next three days were Complainant's regular days off from work. Hicks learned about Complainant's injury from other waitresses who saw Complainant fall on January 21. Complainant reported the injury to Respondent on January 25, 1985. Hicks advised Complainant to see a doctor if her back was hurting her.

8) On January 22, 1985, Complainant and a co-worker, Beth Murdock, went out for the evening to a place for dancing. Complainant was not feeling well due to her injury and left for home at around nine or ten o'clock. Complainant did not dance. Sometime during the next few days, Murdock told Hicks that she and Complainant had been out dancing; Murdock did not clarify to Hicks that Complainant had not danced.

9) On Friday, January 25, 1985, Complainant was first treated by Dr. Allen Gamble, N.D., for the injury. His diagnosis was that Complainant had a severe muscle strain in her back shoulder area, and he notified Respondent by letter that Complainant should not return to work for at least three days.

10) On January 26, 1985, Hicks called Dr. Gamble and claimed that one of Complainant's co-workers, Beth

Murdock, had seen Complainant dancing the night after the injury. Hicks seemed upset; he was not convinced that Complainant was injured if she was able to go out dancing. Hicks said that, although he knew Complainant had fallen on-the-job, he did not think that she was injured enough to prevent her from working. Dr. Gamble told Hicks that, according to Complainant, her pain did not become severe until the Thursday after the injury, and that her injury was severe enough to keep her from working.

11) On February 1, Dr. Gamble re-examined Complainant. She was released to return to work on light-duty.

12) Dr. Gamble required that Complainant avoid heavy lifting and receive at least three 10 minute rest periods during an eight hour shift to avoid aggravating the injury. Dr. Gamble notified Respondent by letter dated February 1, 1985, of this limited work release. Complainant made a request on February 1 to Respondent to return to work.

13) Complainant made a claim through the provisions of the workers' compensation statutes for the injury sustained on January 21, 1985.

14) SAIF Corporation, which was Respondent's workers' compensation insurance carrier at the time, accepted Complainant's claim and paid for the medical expenses arising from Complainant's injury. SAIF also paid Complainant for some of her lost wages. Respondent did not dispute the claim.

15) Robin Kleindinst was a baker for Respondent during times material herein. She had injured her back on-the-job, had filed a workers'

compensation claim, and was working under a restricted work release when Complainant was injured. She spoke with Hicks about Complainant on several occasions. She found that Hicks was angry that Complainant had been injured, which resulted in a workers' compensation claim, and had received a limited work release. Hicks told Kleindinst that he could replace Complainant. He told her that Respondent "takes heat" from the owners when workers' compensation claims are filed because it drives up the insurance rates.

16) Between February 1 and April 4, 1985, Hicks called Complainant several times at home with regard to Complainant obtaining a full work release. Complainant reported the telephone calls to Dr. Gamble on April 4, and said Hicks was pressuring her to obtain a full work release.

17) Hicks denied making telephone calls to Complainant at home. However, there was no dispute that he wanted to bring Complainant back to work without restrictions, and was interested in when she would obtain a full release. Derrick Borland, who lived with Complainant from 1982 to March 1987, remembered answering several calls from Hicks to Complainant. Complainant told Borland immediately after those calls that Hicks was pressuring her to obtain a full work release. Borland's testimony was believable. There was no evidence that he had an interest in the outcome of the case or that his testimony was not truthful, despite his former long-standing relationship with Complainant. Complainant's testimony was believable in part because she had reported the contents

of the calls to both Borland and her treating physician, Dr. Gamble, around the time the calls occurred. Accordingly, the Forum was persuaded that Hicks made calls to Complainant at home regarding when she could get a full work release.

18) Complainant made an appointment to see Dr. Gamble again on February 4, 1985, because Hicks had told her that she could not come to work without a full work release. Complainant told Dr. Gamble that she would lose her job if she did not return to work the next day. Dr. Gamble did not give her a full release.

19) On March 8, 1985, Complainant saw Dr. Gamble for a routine follow-up visit for her injury. During that visit, she told him that she felt that she could return to work and believed that the workers' compensation law required her to return to work for Respondent for at least one day. She said that she was not planning to continue to work at Jake's, and thought she had a job with a former employer, Trailways, if she could get a full work release.

20) Prior to March 16, 1985, Bonnie Buccannan of SAIF Corporation called Hicks to find out if Respondent had any positions which Complainant could fill subject to her restricted work release. Reinstating Complainant to a suitable job would reduce Respondent's insurance costs, and allow Complainant to work "back into the environment." Business at the cafe was increasing, and Hicks thought that he could put Complainant on at the coffee counter during weekends. Work at the coffee counter could accommodate the restrictions imposed by Complainant's

work release. Later, Hicks talked with Respondent's general manager about whether Respondent could afford to add the new position.

21) Respondent reinstated Complainant to a light-duty job on March 16, 1985.

22) Complainant worked the light duty job from March 16 through March 31, 1985.

23) On March 22, 1985, Hicks called Dr. Gamble's office regarding the limitations in Complainant's work release. Hicks was concerned because another doctor, Jim Wilkins, D.C., who was also treating Complainant's injury, had written a letter which had more detailed restrictions on Complainant's work than Dr. Gamble had required. Hicks was told that Dr. Gamble's letter of February 1 was still in effect. Hicks said that he was planning to bring Complainant back to work part-time, and hoped to work her into a full-time position. Hicks said that another doctor, Dr. Norwyn Newby, who had examined Complainant on March 21 for SAIF Corporation, had projected a full work release date of April 1, 1985.

24) Complainant's duties in the light-duty job were to serve customers at the coffee counter in the cafe. Ten customers could sit at the coffee counter. Hicks instructed Complainant that she was to do no stooping or heavy lifting. Complainant was not to wait on any of the cafe's 12 tables. Complainant agreed to those restrictions.

25) Prior to March 16, the cafe scheduled two waitresses per shift on weekends. The dishwasher would

serve the customers at the coffee counter when the cafe was busy on weekends. During those times, there might be three persons behind the coffee counter at once. When Complainant returned to work after March 16, she worked only on weekends and was the third waitress scheduled on the 7 a.m. to 3 p.m. shift. She worked two weekends: March 23 and 24, and March 30 and 31. On those two weekends, Complainant worked with waitresses Susan Todd and Toni Oltman. Prior to March 23, Todd and Oltman had been working together on the weekends on a regular basis, and they worked well together. Complainant had never worked with Todd or Oltman.

26) As the third waitress, Complainant created some conflict by being in the way of the other two waitresses and the dishwasher due to the amount of space between the coffee counter and the back counter. On the back counter were the coffee machines, the juice and milk dispensers, the salad area, the dressings and syrups, the ice cream and milk shake machines, and the silverware. That was also where the waitresses picked up all of the food orders. Complainant, Diana Steinbach, Robin Kleindinst, and Beth Murdock believed that there was a problem of employees bumping into each other behind the coffee counter when three waitresses were working during the same shift.

After any time material herein the cafe was remodeled, which increased the amount of seating available in the cafe. However, the amount of space between the new coffee counter and the new back counter is essentially the

same as or less than the space was between the old counters. As many as five employees may be behind the new coffee counter at one time. One waitress serves only the new coffee counter. Hicks, Oltman, and Todd testified that there was no problem of employees running into each other before or after the remodeling; the employees were able to work around each other.

27) Complainant created tension among the waitresses by working the tables, which included taking orders, pouring coffee, and clearing dishes. Oltman thought that Complainant was "trying to run the whole show" when she left the counter to serve customers at the tables. Todd and Oltman talked with Complainant about the problems they were having in an attempt to work them out, but the situation did not improve.

28) A third waitress on a shift could reduce the tips that two waitresses could each earn on the shift without the third waitress. The amount of tips that a waitress could earn at the coffee counter was less than what could be earned at the tables. Neither Oltman nor Todd resented Complainant working at the coffee counter or the tips she earned because neither one of them liked working at the counter. Complainant told Todd that Complainant did not want to be working and felt that she was being treated unfairly because she had to work at only the coffee counter and could not make any money there; she said she could make more money collecting workers' compensation benefits. Complainant earned an average of \$3 per day in tips while working at the coffee counter.

29) Complainant and Murdock believed that the other waitresses resented the fact that Complainant received periodic breaks pursuant to the restricted work release.

30) Hicks noticed that there were some problems with the waitresses working together during the weekend of March 23 and 24, 1985. He thought that the problems were not unusual; he had previously observed similar problems at the cafe when the number of waitresses on a shift had been increased from one to two. He expected that there would be a period of adjustment.

31) Sometime during the next week, a waitress named Diana Steinbach talked with Complainant, who complained about the people and working conditions at the cafe. Complainant said that Respondent would "screw you" if you got hurt on the job. On March 30, Steinbach told Hicks about what Complainant had said. Steinbach told Hicks that she did not wish to work with Complainant, and asked Hicks not to schedule her with Complainant. The primary reason, she told Hicks, was that she did not want to work on a shift with two other waitresses, due to the limited space behind the coffee counter and the problem of bumping into other employees.

32) On at least one occasion, Complainant arrived before Todd and served Todd's tables until she came. Later, there was a dispute between Todd and Complainant about who should keep the tips from those tables. Oltman and Todd testified that on one occasion Complainant knocked over the waitresses' tip cups, which were kept under the cash register. When

they checked the cups afterward, all of the money was in Complainant's cup. During the weekend of March 30 and 31, Murdock, who was the dishwasher, reported to Hicks and Wolfe that there was a lot of tension between Complainant, Todd, and Oltman. Hicks called Complainant, Todd, and Oltman together for a meeting. Oltman and Todd complained to Hicks that Complainant was not staying behind the counter and was serving the tables, and reported the problems about tips. Hicks told them to either work out their problems or one of them would have to go. He told Complainant to confine herself to the coffee counter. Complainant said that if she was going to be treated like an invalid, she might as well go home.

33) Hicks told Complainant that a full-time position might be coming available, but that she would need a full work release to get that position. Hicks wanted to put Claimant back to work in a full-time position. He did not think that the problems Complainant had with Todd and Oltman could be worked out, and he would have to let her go unless she got a release to return to full-time, unrestricted work.

34) During the weekend of March 30 and 31, and over the next few days before April 5, Hicks was told separately by five out of seven waitresses that they did not wish to work with Complainant. Steinbach, Oltman, Todd, Jan Smallbrook, and Lynette Lewellen each asked Hicks not to schedule her with Complainant because she did not wish to work with Complainant. Smallbrook and Lewellen had both worked with Complainant before she was injured. Hicks had

never had as many complaints from waitresses about another waitress before. Hicks talked with Wolfe and with Sandra Tate of SAIF Corporation about Complainant, and decided by mid-week to terminate her.

35) Complainant made an appointment with Dr. Gamble and saw him on Thursday, April 4, 1985, in order to seek a full work release. She told Dr. Gamble that Hicks was pressuring her to obtain a full release, and that Hicks would fire her the next day if she did not get one. Sometime before April 4, Hicks called Dr. Gamble's office to confirm that Complainant could be re-examined for the purpose of obtaining a full work release. After examining her on April 4th, Dr. Gamble kept Complainant on a limited work release. Complainant reported that to Hicks.

36) Hicks denied making a telephone call to Dr. Gamble's office to request an appointment for Complainant. However, Complainant, Dr. Gamble, and Moira McDonough, Dr. Gamble's secretary, all testified to the contrary; their testimony was believable. Therefore the weight of the believable evidence is persuasive that Hicks called Dr. Gamble's office.

37) On April 5, 1985, Respondent's manager, Lyle Hicks, discharged Complainant.

38) After Hicks made the decision to discharge Complainant, he would not have reinstated her to an unrestricted waitress position, even if such a position were available once Complainant received a full work release.

39) When Complainant asked Hicks why she was fired, Hicks told her of the complaints about her that he had

received from other waitresses, and said she was being let go because she could not get along with the other workers. He felt that Complainant was disrupting the morale of the other employees.

40) After April 5, 1985, the waitress position at the coffee counter was not refilled; it had been created to accommodate Complainant with her limited work release.

41) Complainant was released to resume full-time work on May 13, 1985, by Dr. Ralph Holtby, D.C.

42) Near the end of May, Complainant notified Hicks that she had received a full release, and asked Hicks if there were any jobs available. Hicks told her that he had no jobs available at that time. He also told her that because of the reasons for her discharge, he would not rehire her even if he had an opening.

43) Complainant testified that she notified Respondent of her full work release on the same day that she received it. Initially, she said that that date was May 28, 1985. Hicks testified that he was notified by Complainant around the end of May. Based upon the credibility findings made in Findings of Fact 48 and 49, the Forum finds in accordance with Hicks testimony, as set out in Finding of Fact 42.

44) After April 5, 1985, Complainant was never reinstated to her former full-time job.

45) On July 23, 1985, Complainant was referred to Respondent by the Employment Division, pursuant to a Job Order that Respondent had placed with the Employment Division for waitresses. Respondent filled the position

on July 24. When Complainant contacted Hicks on July 24, he told her that the waitress position had been filled a few hours before.

46) On July 30, 1985, Respondent hired another new waitress.

47) Complainant's testimony was not credible on many points. Although from her demeanor she seemed sincere, her testimony on several points was outweighed by other credible evidence in the record. See, for example, Finding of Fact 5. In addition, her testimony was inconsistent or confused on key points. For example, she testified that she received a full work release from one of her doctors on May 28. When shown a document which indicated that she received that release on May 13, she said that May 13 may have been the correct date. She reported to the Employment Division that she had been fully released on June 24. Such inconsistencies cause the Forum to find her testimony unbelievable, and, where it was controverted, to give it less weight than other credible evidence in the record.

48) Lyle Hicks was found to be a credible witness. His demeanor was sincere, and his testimony was regularly confirmed by documentary evidence and the testimony of other witnesses for both the Agency and Respondent. On two points of evidence, his testimony was overcome by the weight of other evidence. The first point was Hicks's denial that he made telephone calls to Complainant at home regarding a full work release. The second point was his denial of calling Dr. Gamble's office to confirm Complainant's April 4 appointment. Despite the Forum's findings of facts

contrary to Hicks's testimony on those two points, the Forum found the balance of his testimony, where corroborated by other evidence, to be believable.

The Agency submitted records from the Employment Division regarding a job referral around July 23, 1985, which indicated that Hicks had informed the Division that there were no hires as of July 25, and a request to keep the job order open. Complainant had been referred to Respondent by the Division, and was told by Hicks on July 24, that the job had been filled. The Agency relied on these records to show an opening for a waitress position at the cafe, and also to impeach Hicks. He testified that a waitress was hired on July 24, and that it was – and continues to be – his practice to ask the Employment Division to keep a job order open even after a position has been filled in order to collect additional applications. Records submitted by Respondent confirmed that a waitress was hired on July 24, and an additional waitress hired on July 30. Accordingly, the Employment Division records do not impeach Hicks's credibility.

ULTIMATE FINDINGS OF FACTS

1) At all times material herein, Respondent employed six or more persons within the state of Oregon.

2) Complainant was employed by Respondent as a waitress during all times material herein.

3) On January 21, 1985, Complainant was injured on the job. On January 25, 1985, Complainant notified Respondent of the injury and sought medical treatment. She filed a claim through the provisions of the

workers' compensation statutes for her injury, and that claim was accepted.

4) On February 1, 1985, Complainant was given a limited work release by her doctor. The release restricted her from stooping and heavy lifting, and required three 10 minute rest periods per eight hour shift.

5) On around March 16, 1985, Respondent created a new position for Complainant that would accommodate the restrictions in her work release. Complainant was assigned to work at only the coffee counter of Respondent's cafe on weekends. Although Respondent preferred to bring Complainant back to work without any restrictions, employing Complainant in the "light duty" position allowed Respondent to reduce its insurance costs and work Complainant back "into the environment."

6) Complainant worked two weekends, March 23 and 24, and March 30 and 31, in the new position. She worked both weekends with only two other waitresses, Susan Todd and Toni Oltman. Prior to the creation of the new position, Todd and Oltman had worked regularly together as the only waitresses scheduled for that shift. Adding Complainant to the shift resulted in some problems of employees running into each other behind the coffee counter. Tension was created among the three waitresses due to Complainant serving customers at the tables assigned to Todd and Oltman. In addition, disputes arose about tips at both the counter and the tables. These problems led to a meeting with management in which the waitresses were told to work out the problems or one of them would be let go.

7) During the weekend of March 30 and 31, Hicks told Complainant that he did not think that the problems arising on her shift could be worked out. He thought a full time position might be coming up, but it would require her to have a full release. Later, Complainant made an appointment with her doctor for Thursday, April 4, 1985. Hicks called the doctor's office to confirm that appointment.

8) During the weekend of March 30 and 31 and over the next several days, Respondent was told separately by five out of its seven waitresses that they did not want to work with Complainant. Todd and Oltman complained to Respondent that Complainant was difficult to get along with and caused problems by not staying where she was assigned to work – at the coffee counter. They also complained that Complainant took tips that did not belong to her. Lynette Lewellen and Jan Smallbrook, who had worked with Complainant before her injury, told Hicks that they did not want to work with Complainant. Diana Steinbach told Respondent that she had talked with Complainant, and Complainant had been very critical of the people at Jake's, saying that they would "screw you" and did not treat employees fairly. Steinbach told Respondent that because of what Complainant had said and because of the problem of waitresses running into each other when three waitresses worked the same shift, she did not wish to work with Complainant.

9) By midweek, Hicks had conferred with Respondent's general manager and a representative from SAIF regarding the complaints he had

received about Complainant. Hicks made the decision to terminate Complainant.

10) On April 4, Complainant saw Dr. Gamble. He did not give her a full work release. Complainant reported that to Hicks.

11) On April 5, Respondent terminated Complainant, telling her that the other waitresses felt that she was hard to work with, and that she had a bad effect on morale.

12) On May 13, 1985, Complainant received a full work release from one of her treating doctors. She notified Respondent of the release around the end of May, and requested reinstatement to her former job. Hicks informed her that he did not have any waitress jobs available, and that he would not rehire her in the future due to the reasons he gave for her discharge.

13) A preponderance of the credible evidence on the record as a whole indicates that Hicks terminated Complainant for the reasons he gave her on April 5, 1985. When Complainant returned to work, she had an attitude that she did not want to be working at Jake's in the limited position at the coffee counter. She made this attitude known to her co-workers and to Hicks when she told him that she felt that she was being treated like an invalid. She caused problems in the cafe by regularly serving tables that were assigned to the other waitresses. This also caused disputes over tips, which added to the tension among the waitresses. Her attitude and opinions about how Respondent treated its employees caused a morale problem among the employees. The undisputed evidence was that even

waitresses who had not worked with Complainant since before her injury independently approached Respondent and said that they did not want to work with Complainant. The evidence did not establish that Respondent terminated Complainant based upon her injury and use of the workers' compensation system. In other words, Respondent did not knowingly and purposefully terminate Complainant because she had applied for benefits or invoked or utilized the procedures provided for in ORS 656.001 to 656.794 and 656.802 to 656.824, or of 659.400 to 659.435.

14) Based on the evidence in the whole record, this Forum finds that Complainant was not performing her job in a satisfactory manner. The Forum also finds that similar unsatisfactory job performance would cause Respondent to terminate other waitresses. Accordingly, the Forum finds that Respondent has shown that it had just cause to terminate Complainant on April 5, 1985.

CONCLUSIONS OF LAW

1) At all times material herein, Respondent was an employer subject to the provisions of ORS 659.010 to 659.110 and ORS 659.400 to 659.435.

2) Between October 1984 and April 5, 1985, Complainant was Respondent's "workman" and "worker," as those terms were used in ORS 659.410 and 659.415.

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

4) The actions, inactions, and knowledge of Lyle Hicks, an employee

or agent of Respondent, are properly imputed to Respondent.

5) ORS 659.410 provides:

"It is an unlawful employment practice for an employer to discriminate against a workman with respect to hire or tenure or any term or condition of employment because the workman has applied for benefits or invoked or utilized the procedures provided for in ORS 656.001 to 656.794 and 656.802 to 656.824, or of 659.400 to 659.435 or has given testimony under the provisions of such sections."

Respondent did not violate ORS 659.410 as charged, as Respondent did not discriminate against Complainant with respect to her employment tenure because she had applied for benefits or invoked or utilized the procedures provided for in ORS 656.001 to 656.794 and 656.802 to 656.824, or of 659.400 to 659.435.

6) ORS 659.415 provides:

"(1) A worker who has sustained a compensable injury shall be reinstated by the worker's employer to the worker's former position of employment upon demand for such reinstatement, provided that the position is available and the worker is not disabled from performing the duties of such position. If the former position is not available, the worker shall be reinstated in any other position which is available and suitable. ***

"(2) ***

"(3) Any violation of this section is an unlawful employment practice."

OAR 839-06-150 provides:

"(1) Every injured worker has the right to reinstatement/ reemployment under ORS 659.415 and 659.420.

"(2) An injured worker loses this right if:

"(a) The employer discharges the worker for reasons not connected with the injury and for which others are or would be discharged, except as provided in subsections (3)(a) and (b) of this rule;

"(3) An injured worker * * * does not lose his right if:

"(a) ***

"(b) The employer discharges the injured worker other than for cause or the injured worker quits or resigns involuntarily or under mistake of fact; ***"

Respondent did not violate ORS 659.415 as charged, because by the time Complainant was no longer disabled from performing the duties of her former position and demanded reinstatement to that position, Respondent had terminated her for cause.

OPINION

It is the policy of the Agency that the allegations and theories of the Specific Charges define the allegations and theories to be adjudicated through the contested case hearing process, whether or not those allegations and theories are consistent with, or even based upon the allegations or theories of the Administrative Determination. The Agency alleged in the Specific Charges a violation of ORS 659.410,

based on a theory of specific intent to discriminate by Respondent.

To prove those allegations, the Agency must establish the following four elements:

- (1) The Respondent is a Respondent as defined by statute;
- (2) The Complainant is a member of a protected class;
- (3) The Complainant was harmed by an action of the Respondent;
- (4) The Respondent's action was taken because of the Complainant's membership in the protected class.

In order to establish the causal connection described in the fourth element listed above, the Agency used the Specific Intent Test, which is set forth in OAR 839-05-010(2)(a). Under that test the Agency must show that "the Respondent knowingly and purposefully discriminate[d] against [Complainant] because of [her] membership in a protected class."

Regarding the first three elements, the evidence clearly established each one. Respondent stipulated that: (1) it employed six or more persons and was subject to the provisions of ORS 659.010 to 659.435; (2) Complainant was injured on-the-job and she made a claim through the provisions of the workers' compensation statutes; and, (3) it discharged Complainant. There was uncontroverted evidence that Complainant suffered lost wages and distress due to that discharge.

The dispute in this case focused on the fourth element, that is, whether Respondent's action was taken because of Complainant's membership in the protected class of workers who have

invoked Oregon's workers' compensation procedures. Applying the Specific Intent Test to the facts found in this case, the Forum concluded that Respondent did not knowingly and purposefully discriminate against the Complainant because of her membership in that protected class.

When Complainant was first given the limited work release by her doctor, there was no evidence that Respondent had an available and suitable job for her to return to. The fact that prior to March 16 Hicks told Complainant that she could not return to work without a full work release is not evidence of discriminatory animus. Employers are not required to create jobs for injured workers. OAR 839-06-140(3). When an employer does create a job, or in other words makes a job available, for an injured worker, the job must be suitable, as defined in OAR 839-06-145. In this case, Respondent created the "light duty" job at the coffee counter for Complainant. The job was designed to accommodate the restrictions that were imposed by the limited work release issued by Complainant's doctor. The job was

"one that the injured worker [was] physically capable of performing and [was] substantially similar to the former job in compensation, location, duration, and shift." OAR 839-06-145(4).

Complainant accepted the job with its restrictions. There was no evidence that Complainant found the job unsuitable and so notified Respondent in writing. See OAR 839-06-145(9).

The problems which led up to Complainant's termination were not created by the "light duty" position that

Respondent made for Complainant. The problems were created by Complainant.

There was evidence that having a third waitress on a shift caused some bumping among employees behind the coffee counter. However, Todd and Oltman felt that they were able to work around the additional person, and that bumping into Complainant was not a problem. There was evidence that a third waitress on a shift might cause the tips of the first two waitresses to decrease. However, Todd and Oltman said that they did not resent Complainant working at the counter or the tips she made there because neither one of them liked working at the counter. Hicks was under the impression, at that time, that the counter was a good place to earn tips; evidence at the hearing showed otherwise. There was credible evidence that Todd and Oltman tried to work with Complainant to eliminate problems on their shift. The evidence in the record, taken as a whole, is persuasive that the "light duty" position, with its restrictions due to Complainant's limited work release, was a suitable job. There was not persuasive evidence that Respondent deliberately created a position that was unsuitable and caused Complainant to work in an environment that brought about the problems leading to her termination.

Respondent's reasons for terminating Complainant were that she could not get along with the other waitresses and she was hurting employee morale. Credible evidence supported those reasons. Complainant caused tension between herself and Todd and Oltman by failing to work within her assigned

area, that is, the coffee counter. By working the tables, Complainant effectively violated her doctor's restrictions on her work and the limitations built into her unique job, which Respondent created to accommodate those restrictions. This failure led to disputes over tips. Complainant's attitude about working for Jake's had become negative since her injury and her limited work release. She spread her attitude to other employees, which affected their morale. Respondent knew that she had had difficulties working with co-workers in the past, as Complainant had once quit because she could not get along with another waitress. In addition, Smallbrook and Lewellen, who had only worked with Complainant before her injury, told Respondent that they did not want to work with her.

The closeness in time between Respondent's decision to terminate Complainant and her inability to obtain full work release makes Respondent's action look suspiciously like an unlawful employment practice. However, the evidence was insufficient to persuade the Forum that if Complainant had not been a member of the protected class, Respondent would not have terminated her. In other words, the evidence did not show that Complainant's protected class caused Respondent's action of firing her. When the problems between Complainant and Todd and Oltman became obvious, it was reasonable and proper for Respondent to look for options for resolving them. Due to the restrictions of her work release, Respondent had created a unique position. Respondent had no duty to create other special positions to accommodate Complainant when she

had problems working within the constraints of the already accepted, available and suitable job. An option Respondent saw was to place Complainant in an unrestricted, full-time position. That, of course, would require Complainant first to acquire a full work release. Hicks had been advised that Complainant might be ready for such a release on April 1st. That option would allow him to schedule Complainant with waitresses other than Todd and Olman, and would eliminate the problems Complainant created by not working within her restrictions. It was reasonable for him to encourage Complainant to be re-evaluated by her doctor. The record does not reveal the precise sequence of events, but during the days immediately preceding April 4th, Hicks was advised by several of the waitresses that they did not want to work with Complainant. It is reasonable to conclude that the option Hicks had considered was no longer acceptable, even if Complainant had received a full release. The evidence revealed that Respondent had just cause for terminating Complainant at the end of the March 30-31 weekend. The option of moving her to an unrestricted position, rather than firing her at the end of the weekend, was discarded when Respondent heard from more of Complainant's co-workers. Hicks uncontroverted testimony was that he decided to terminate her by midweek.

The Agency's position, as stated in its Summary of the Case and in its Statement of Policy, was that Complainant's inability to secure a full release from her doctor played a key role in her termination by Respondent. Where the evidence indicates that

several factors contribute to causing the Respondent's action, of which only one factor is the Complainant's protected class, the Agency uses the Key Role Test, which is set out in OAR 839-05-015.

"The test requires that the Complainant's protected class be more than a minimal, but not the only, cause of the Respondent's action. The crucial question is whether or not the harmful action would have occurred had the Complainant not been a member of the protected class."

The answer, based on the facts found, is that the harmful action — that is, the termination — would have occurred had the Complainant not been a member of the protected class. The evidence on the whole record does not persuade the Forum that Respondent made its decision based on Complainant's inability to get a full work release.

Having created and placed Complainant in a suitable job, Respondent effectively satisfied ORS 659.420, which requires employers to re-employ injured workers to available and suitable employment. By taking the "light duty" job, however, Complainant's right to be reinstated to her former position, once she obtained a full work release, was not lost. OAR 839-06-150(5). Her right to reinstatement to her former position was lost when Respondent terminated her for cause. Although it is unnecessary to the determination, it should be noted that if Complainant had not been terminated for cause, she still lost her right to reinstatement when she failed to notify Respondent of her full work release by the second regular work day following the date

specified on the release. See former OAR 839-06-130(1)(b)(iii); amended April 7, 1986.

ORDER

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

**In the Matter of
ED'S MUFFLERS UNLIMITED, INC.,
an Oregon corporation, Respondent.**

Case Number 02-87

Final Order of the Commissioner

Mary Wendy Roberts

Issued July 21, 1988.

SYNOPSIS

Respondent violated ORS 659.410 by discharging complainant because he was injured on the job and invoked the workers' compensation system. Although Respondent presented evidence that Complainant was an unsafe worker and had misrepresented his qualifications on his job application, the Commissioner found that his injury and application for workers' compensation benefits played a key role in Respondent's decision to discharge him. It was no defense that Complainant's

injury might have been uncompensable. ORS 659.410 does not require a compensable injury (compare ORS 659.415 and 659.420); all that is required is the invocation of the workers' compensation system. The Commissioner awarded Complainant back pay damages. ORS 659.410; OAR 839-05-015; 839-06-105(2); 839-06-125.

The above-entitled matter came on regularly for hearing before Douglas A. McKean, designated as Hearings Referee by Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on February 3, and 4, 1988, 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: Judith A. Bracanovich, Quality Assurance Manager for the Civil Rights Division (CRD) of the Agency; Nedra Cunningham, former CRD Investigating Team Supervisor; David L. Wright, Senior Investigator, CRD; Judith Long, Operation Support Supervisor, Wage and Hour Division of the Agency; Billy R. Volk, Complainant (hereinafter Complainant); Ira Bruce; Lee Ennis; Ken Jamieson, Jr.; Nina Kaericher; Linda Monroy; Dan O'Neill; Tim Orteig; David Phillips; and, Anita Ternes.

Ed's Mufflers Unlimited, Inc., (hereinafter Respondent) was represented by Richard A. Uffelman, Attorney at Law. Respondent called the following witnesses: James Edward Hickam, Respondent's president; Candice Hickam; Richard L. Baker; Robert Chatterton; Connie Denson; Bill Farrell;

Jesse Garbrecht, Rich Labor, Gary Maundy, M.D.; Janet Moody; and, Jay Wright. Respondent's attorney cross-examined Agency witnesses.

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

FINDINGS OF FACT – PROCEDURAL

1) On August 4, 1986, and pursuant to ORS 659.045, Complainant filed a verified complaint with the Civil Rights Division of the Agency alleging that he had been discriminated against because of his on-the-job injury and utilizing the workers' compensation system in that, on June 20, 1986, Respondent informed him that he did not have a job because he was not safety conscious enough.

2) Thereafter, CRD issued an Administrative Determination finding substantial evidence of an alleged unlawful employment practice, pursuant to ORS 659.410, by Respondent.

3) Pursuant to ORS 659.050, CRD attempted to resolve the Complaint by conference, conciliation, and persuasion, but was unsuccessful. Evidence presented at hearing established the following facts in this regard:

a) Nedra Cunningham was an Investigating Team Supervisor for CRD of the Agency when the Administrative Determination was issued in this matter. As part of her responsibilities, she reviewed the file prepared by the investigator, David Wright. She agreed

with Wright's determination that substantial evidence of an unlawful practice was found. Cunningham's responsibilities also included attempting to conciliate this matter. Her efforts were made according to normal Agency practices and procedures.

b) On May 6, 1987, Respondent and Complainant were notified that the Agency had found substantial evidence of discrimination.

c) On May 21, 1987, a letter was sent to Respondent inviting Respondent to participate in conciliation.

d) On May 22, 1987, Cunningham spoke with Ed Hickam, who said he had no interest in conciliation and wanted a hearing. At that time, Cunningham determined that conciliation had failed, and referred the case to the quality assurance unit of the Agency.

4) On August 7, 1987, the Agency prepared and duly served on Respondent Specific Charges alleging that Respondent had discharged Complainant from employment because Complainant suffered an on-the-job injury and invoked the Oregon workers' compensation procedures.

5) With the Specific Charges, the Agency also served on Respondent the following: a) a Notice of Hearing setting forth the time and place of the hearing in this matter; b) a 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 regarding the contested case process; and d) a separate copy of the specific administrative rule regarding responsive pleadings. Following a postponement, the Forum duly served

an Amended Notice of Hearing on Respondent and the Agency.

6) On August 21, 1987, Respondent filed an answer in which it denied the allegation mentioned above in the Specific Charges. As affirmative defenses, Respondent alleged that Complainant was terminated because he was an unsafe worker and had misrepresented his employment experience as a muffler installer.

7) Pursuant to OAR 839-30-071, the Agency and Respondent each filed a Summary of the Case. In addition, the Agency filed a supplement to its Summary.

8) A pre-hearing conference was held on February 3, 1988, at which time the Agency and Respondent stipulated to certain facts. Those facts were read into the record by the Hearings Referee at the beginning of the hearing.

9) At the commencement of the hearing, the attorney for Respondent stated that he had read the Notice of Contested Case Rights and Procedures and had no questions about it.

10) The 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).

11) The Forum issued the Proposed Order in this contested case on March 21, 1988. The Proposed Order was mailed to all persons at their last known addresses listed on the face of the Certificate of Mailing attached thereto. Exceptions, if any, were to be filed by end of business on March 31, 1988. Exceptions were received from

Respondent before this deadline and are discussed in the Opinion section of this Final Order.

FINDINGS OF FACT – THE MERITS

1) At the times material herein, Respondent corporation was an employer, which, within the State of Oregon, utilized the personal services of six or more employees, subject to the provisions of ORS 659.010 to 659.435.

2) Complainant was a worker employed by Respondent. Complainant was hired on June 5, 1986.

3) Before he was hired, Complainant was interviewed by Ed Hickam, Respondent's president. Complainant represented to Hickam that Complainant had several years of experience installing mufflers. As was his practice, Hickam considered Complainant a trainee because Hickam did not know Complainant and Complainant would have to be trained to install exhaust systems in the custom fashion used by Respondent's shops.

4) After Complainant was hired, Ed Hickam requested that Bob Chatterton, Jesse Garbrecht, and Jay Wright watch and work with Complainant to determine Complainant's level of experience.

5) On at least two occasions, Complainant operated a vehicle hoist at Respondent's Gresham shop in a dangerous manner, that is, in a way in which if someone had not intervened a vehicle could have slipped off of the hoist.

6) Bob Chatterton was Respondent's general manager and worked in the Gresham shop. Chatterton worked with Complainant and thought he was inexperienced and careless with the

welding and cutting torches, in that he did not watch where his co-workers were. Complainant nearly burned Chatterton with a welding or cutting torch. Chatterton told Ed Hickam about Complainant's unsafe use of the hoists and the torches, and that Complainant was inexperienced in muffler installation work.

7) Jesse Garbrecht was a journeyman muffler installer with 17 years of experience. He worked with Complainant and believed Complainant did not have much experience. Ken Jamieson was also an experienced muffler installer who worked with Complainant. Jamieson thought that Complainant was not a safe or experienced worker.

8) Jay Wright was the ranking journeyman muffler installer at the Gresham shop while Complainant was there. Wright worked with Complainant on several jobs, including muffler installations and a brake job, and considered Complainant neither an experienced nor a safe worker. On one occasion, Complainant nearly burned Wright with a welding or cutting torch. Wright advised Ed Hickam on three occasions to fire Complainant.

9) Before June 16, 1986, Complainant was not disciplined for his job performance, or advised that it was unsatisfactory by Respondent.

10) Complainant cut his finger on-the-job on June 16, 1986.

11) The cut occurred when Complainant touched the edge of a tail-pipe that had just been shortened with a pipe-cutter. The pipe-cutter leaves a sharp flange on the inside edge of the tail-pipe that can cut a person's finger, even with light-duty cloth gloves on.

Complainant was not wearing gloves when he was cut.

12) While small cuts and minor burns are common in the muffler installation business, experienced installers suffer fewer cuts and burns than inexperienced installers. Experienced installers know that the inside of a newly cut tail-pipe is sharp and should not be touched without heavy-duty gloves on.

13) Complainant reported the cut to Chatterton, who advised him to wash off the cut and put a band-aid on it. Complainant went into the office to get a first aid kit, and showed the cut to Janet Moody, the office receptionist and secretary. Complainant laughed about the cut. He reported the cut to Ed Hickam, who advised Complainant to bandage the cut and go to lunch. Complainant told Hickam that he wanted to go to the hospital because the cut continued to bleed.

14) Ed Hickam called Dr. Gary Maundy, an emergency department physician at the Mount Hood Medical Center, regarding sending in Complainant for medical treatment. The Mount Hood Medical Center is from one to three miles away from Respondent's Gresham shop, and it is the nearest medical center to the shop. Before Complainant was injured, Hickam had sent injured employees to Dr. Maundy for treatment of on-the-job injuries. Hickam asked Dr. Maundy to arrange to have the bill for Complainant's treatment sent directly to Hickam. Although the medical center fills out the workers' compensation claim forms in such cases, Hickam believed that by paying the bill directly his workers' compensation insurance rates would not increase.

15) Complainant applied for benefits or invoked or utilized the procedures provided for in the workers' compensation Law.

16) Dr. Maundy and his staff treated Complainant. The treatment consisted of cleaning and applying a steri-strip to a cut about one centimeter in length on Complainant's right fourth finger. He was released to return to work that afternoon by Dr. Maundy. Dr. Maundy called Ed Hickam to advise him that Complainant had been released to return to work, and that, in Dr. Maundy's opinion, Complainant's injury was minor enough that it did not require a trip to the doctor. Respondent was billed and paid for Complainant's treatment.

17) Complainant testified that he was dizzy and felt sick following the treatment at the clinic, and that he lay on a cot in the clinic for some time before he called his wife to pick him up and take him home. He said he was at the clinic for up to one and one-half hours. Maundy testified that he would not have given Complainant a full release to return to work if Complainant had felt dizzy or sick. In addition, Maundy said that it was part of his job to keep track of each patient who was occupying a cot in the emergency department. Maundy had no record or memory Complainant remaining in the clinic after he was treated. Complainant was admitted at 3:24 p.m., and discharged at 3:55 p.m. The Forum finds that Complainant was released and able to return to work at 3:55 p.m., and that he did not stay at the clinic due to sickness after that time.

18) Complainant neither returned to work that day nor called the shop to

inform them that he would not be returning. Complainant did not contact the Gresham shop again until June 20, 1986.

19) Between June 16 and June 20, 1986, Ed Hickam talked with Chatterton, Garbrecht, and Wright about Complainant. Hickam also talked with his attorney about discharging Complainant because he was afraid Complainant might file a discrimination complaint as another employee, Ira Bruce, had done a couple of years before. Bruce had received an on-the-job injury and filed a claim for workers' compensation benefits. Respondent terminated him and he was told that it was because he was a danger to the shop. Bruce later dropped his discrimination complaint.

20) On June 19, 1986, Ed Hickam received a call from St. Joseph Community Hospital in Vancouver, Washington, regarding Complainant. Hickam verified that Complainant's injury was suffered on-the-job, and requested that the hospital send the bill for Complainant's medical treatment directly to Respondent. Complainant visited the hospital because his finger was red and tender. Hospital staff washed the cut and applied steri-strips. Respondent paid the bill for Complainant's treatment.

21) On June 20, 1986, Complainant called Respondent's Gresham shop regarding his paycheck. He talked with Ed Hickam, who advised Complainant that his paycheck would be ready and that he should pick up his tools because he would no longer be working for Respondent. Later Complainant went to the Gresham shop with a friend, Tim Orteig. Hickam told Complainant that he was fired

because he was not safety conscious enough.

22) Prior to the period when Complainant worked for Respondent, Respondent held a meeting for its employees at Mt. Hood Security Bank. Between 30 and 45 employees attended. At the meeting, Ed Hickam discussed several business matters, including workers' compensation claims and the group health insurance that the company offers to its employees. The insurance broker, Rich Lalor, who sold the group health insurance to Respondent, also spoke. Testimony about what Hickam and Lalor said at the meeting regarding workers' compensation insurance was conflicting. Several witnesses, called by both the Agency and Respondent and representing both former and current employees, testified that Hickam's and Lalor's comments were, in essence, that when employees suffer off-the-job injuries, they should file claims with their health insurance; they should not come into work with the injury, then act as though it happened on-the-job and file a workers' compensation claim; Hickam indicated that workers' compensation claims cost the Respondent a great deal of money, and he emphasized that the employees had to be more safety conscious and not file workers' compensation claims for minor on-the-job injuries; Lalor described the benefits available to the employees through their health insurance; he encouraged them to call him if they had any questions about how to make claims or about the coverage. Lalor did not advise employees to file claims with the health insurance company for on-the-job injuries. Other witnesses

testified that Hickam's and Lalor's comments at the meeting left the clear message that Respondent did not want its employees to file workers' compensation claims for on-the-job injuries, that Respondent's worker's compensation insurance rates were too high and could jeopardize the business, and that Hickam would rather pay directly for medical expenses arising from on-the-job injuries than have the employees file workers' compensation claims. There was also the impression that Hickam encouraged employees to file claims with the group medical insurance company for on-the-job injuries. The Forum finds that neither Hickam nor Lalor told employees not to file workers' compensation insurance claims for any on-the-job injuries; however, the Forum finds that Hickam told the employees that he did not expect them to file workers' compensation claims for minor on-the-job injuries, and that the company would pay directly for some injuries — so the employees did not have to use workers' compensation insurance. The Forum finds that Hickam intended to, in effect, discourage the employees from filing workers' compensation insurance claims for at least some on-the-job injuries.

23) Ira Bruce worked for Respondent during the summer of 1983. Before he was hired he had no experience as a muffler installer; however, he told Hickam that he had experience. On one job, Bruce blistered the paint on a vehicle with a torch. On another job, he punctured the gas tank of a vehicle with a drill. He was disciplined for that. At that time the shop manager advised Hickam that Bruce

did not have the experience he said he had. Several days later, Bruce drove a van which was overloaded with mufflers and had a traffic accident in which he was injured. He was taken to a hospital for treatment and filed a workers' compensation claim. Bruce testified that Hickam told Bruce to retract his workers' compensation claim if possible, and Hickam would pay for the medical bills directly; Hickam said that such claims would drive up Respondent's workers' compensation insurance rates and damage the company. Bruce did not retract the claim and workers' compensation insurance paid for the medical bills. He returned to work four days after the van accident. Bruce testified that he worked one-half of a day when Hickam called Bruce into the office and fired him because he was a danger to the shop. As indicated above in Finding of Fact 19, Bruce filed a complaint with the Agency against Respondent alleging discrimination on the basis of having an on-the-job injury and invoking the workers' compensation procedures. He later withdrew his complaint because he was starting a new business and did not have time to pursue it.

24) Dan O'Neill, also known as Dan Price, was employed by Respondent during 1985. He cut a finger on-the-job. Hickam made arrangements for O'Neill to go to a clinic for treatment. Hickam gave O'Neill money to cover the medical expenses at the clinic. Later, O'Neill learned that the injury was more severe than he first thought. O'Neill testified that Hickam had initially told O'Neill to tell the clinic that the injury occurred off-the-job, and that

Hickam wanted O'Neill to file a claim with the health insurance company. When it was discovered that the injury was more severe than expected, that the medical costs would be higher than expected, and that O'Neill was not covered by the health insurance, Hickam told O'Neill to file a workers' compensation claim. O'Neill was given a limited release by his doctor and returned to work for Respondent. He was later terminated due to a problem with alcohol.

25) Michelle Crouch Phillips was a receptionist/secretary for Respondent during 1985. She was injured on-the-job twice. On the first occasion she injured her hand. On the second occasion a box of header pipes fell off of a shelf and hit her head. She received medical treatment following both injuries. In both cases she informed the doctor that the accident occurred at home instead of at work because she feared that Ed Hickam would be angry if she filed a claim for workers' compensation benefits. Phillips and two other employees who were involved when Phillips' head was injured were suspended by Respondent for one week without pay for their participation in the events before the injury.

26) Anita Ternes worked for Respondent as a receptionist during the summer of 1985. On August 29, 1985, she had a fight with Janet Moody in the office. Moody struck Ternes, who fell and injured her wrist. Either that afternoon or the next day, Ternes went to a doctor about her wrist. When she reported the injury to Ed Hickam and informed him that she planned to file a workers' compensation claim, he told her that she should have told the

doctor that she injured herself at home; he said she should use her own insurance company and not workers' compensation because he felt that her argument with Moody was a personal matter. When she informed Hickam that she would pursue a workers' compensation claim, he said he had better attorneys than she had and he would fight and win if she filed a claim. She later filed the claim and was compensated by a workers' compensation insurance company. Prior to filing her claim, she voluntarily quit working for Respondent.

27) Jay Wright was formerly the ranking installer at Respondent's Gresham shop. He was fired in October 1986, and admitted to some hard feelings toward Respondent. He said employees were expected to file workers' compensation claims if they were hurt on the job and needed medical attention; employees were only discouraged from filing workers' compensation claims if the injury did not occur on-the-job. He testified that he got something in his eye once, got medical attention, and filed a workers' compensation claim. He said he never heard anything more about it.

28) There was conflicting testimony from several former receptionist/ secretaries about statements by Ed Hickam regarding workers' compensation. Anita Ternes and Nina Kaericher testified that they heard Hickam say he did not want Respondent's employees to file workers' compensation claims; he would rather pay for the medical bills directly than have the employees file such claims. Janet Moody testified that Hickam did not want claims turned in for minor injuries or injuries that

happened at home. Connie Denson testified that she never heard any statements by Hickam or Respondent's management that an employee would be in "hot water" for filing a workers' compensation claim. The Forum finds that Hickam made statements in which he discouraged employees from filing workers' compensation claims, especially for minor injuries and for injuries not suffered on-the-job. For minor injuries, Hickam wanted Respondent to pay for the related medical expenses directly rather than have the employees file claims for workers' compensation benefits.

29) Complainant's rate of pay was \$900 per month, based upon a schedule of six days per week, nine hours per day. Respondent's employees were eligible for \$300 per month of fringe benefits after working for 90 days or three months.

30) Following his employment with Respondent, Complainant worked for Bald Knob Land and Timber Co., and earned \$187. He then worked for Morris Arlington Construction Co., Inc., earning \$1074. Next, he worked for Royal Care Convalescent Center and earned \$57 before he voluntarily quit on November 18, 1986. Complainant had no other employment between June 20 and November 18, 1986.

31) Complainant testified that following his termination by Respondent his marriage failed, he began receiving welfare until his wife and child left him, he had to live in shelters and eventually moved back in with his parents. He said he was ineligible for unemployment benefits even though he said he had worked full-time for eight to nine months during the year

before he worked for Respondent. Complainant testified that he was angry and suffered depression due to his termination. Based on the Forum's finding on Complainant's credibility (see Finding of Fact 32), the Forum cannot find that the suffering that he complains of was the result of Respondent's termination of Complainant.

32) Complainant's testimony was not found to be credible. The Hearings Referee observed his demeanor during the hearing, and found his testimony to be deliberately vague and inconsistent on many points. His testimony on some points was contradicted by witnesses for both the Agency and Respondent. As a result, his testimony was given less weight whenever it conflicted with other credible evidence on the record. In some cases, due to inconsistencies his testimony was not believed even when it was not controverted by other evidence.

33) Ken Jamieson's testimony was not found to be credible due to the inconsistencies that existed between his testimony and statements he made to the Agency during its investigation of this case. Thus his testimony was given less weight when it conflicted with other credible evidence on the record.

34) David Phillips was not a credible witness. He admitted to giving false statements to the Agency because, he testified, he was angry at Respondent when he made the statements to the Agency. At that time, he had recently been fired by Respondent for drinking on the job. At the time of the hearing, he was again an employee of Respondent. In addition, his

demeanor at the hearing, along with inconsistent statements made at the hearing, caused his testimony to be unbelievable. Accordingly, his testimony was given little weight whenever it conflicted with credible evidence.

ULTIMATE FINDINGS OF FACTS

1) At all times material herein, Respondent employed six or more persons within the state of Oregon.

2) Prior to Complainant's employment with Respondent, Respondent had discouraged employees from filing workers' compensation claims, at least for what were considered minor on-the-job injuries.

3) Complainant was a worker employed by Respondent. Complainant was hired on June 5, 1986.

4) When he was interviewed for the job, Complainant told Respondent that Complainant had several years of experience as a muffler installer.

5) On separate occasions, Complainant twice operated a vehicle hoist in a dangerous way and twice nearly burned co-workers with a cutting or welding torch.

6) Following those events, Respondent's president, Ed Hickam, was advised by employees who had worked with Complainant that he was an inexperienced and unsafe worker. Respondent took no action of a disciplinary nature against Complainant following those events.

7) On June 16, 1986, Complainant received an on-the-job injury, which he reported to Respondent. He received medical treatment and filed a claim for workers' compensation benefits.

8) Following that injury, Ed Hickam talked with his shop manager and

other employees, as well as his attorney, about Complainant. Hickam decided to terminate Complainant.

9) On June 20, 1986, Respondent terminated Complainant.

10) Respondent would not have terminated Complainant if Complainant had not been injured on the job and reported it to Respondent.

11) Between June 20, 1986, and November 18, 1986, Complainant would have earned approximately \$4500 in wages from Respondent (five months at \$900 per month). In addition, Complainant would have received approximately \$750 in fringe benefits from Respondent (two and one-half months - from September 5 to November 18, 1986 - at \$300 per month). Thus, Complainant would have received in total \$5250 from Respondent in wages and fringe benefits if he had not been terminated.

12) Between June 20 and November 18, 1986, Complainant earned \$1318 from alternate employment.

CONCLUSIONS OF LAW

1) At all times material herein, Respondent was an employer subject to the provisions of ORS 659.010 to 659.110 and ORS 659.400 to 659.435.

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

3) The actions, inactions, and knowledge of Ed Hickam, an employee or agent of Respondent, are properly imputed to Respondent.

4) ORS 659.410 provides:

"It is an unlawful employment practice for an employer to discriminate

against a workman with respect to hire or tenure or any term or condition of employment because the workman has applied for benefits or invoked or utilized the procedures provided for in ORS 656.001 to 656.794 and 656 802 to 656 824, or of 659.400 to 659.435 or has given testimony under the provisions of such sections."

Respondent violated ORS 659.410.

5) 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 659.400 to 659.435, to perform any act or series of acts reasonably calculated to carry out the purposes of said statutes, to eliminate the effects of an unlawful practice found, and to protect the rights of others similarly situated.

OPINION

This case presents the issue of whether an employer can terminate an employee, who has shown some evidence of being an unsafe worker, after the worker has had an on-the-job injury and has invoked the Oregon workers' compensation procedures.

OAR 839-06-125 provides that

"Under ORS 659.410 an employer has the responsibility not to discriminate against a worker who applies for benefits under, gives testimony in connection with, invokes, or uses the Oregon Workers' Compensation procedures or

who gives testimony in connection with or uses the civil rights procedures provided in ORS 659.410 - 659.435."

OAR 839-06-105(2) provides that

"Invoke' for the purposes of ORS 659.410 includes a worker's reporting of an on-the-job injury to his/her employer."

It was stipulated that Respondent was an employer as defined by the statute, and that Complainant was a member of a protected class, namely, a worker who was employed by Respondent, who suffered an on-the-job injury, and who invoked the Oregon Workers' Compensation procedures. The Forum found that Complainant was terminated from employment by Respondent, and said termination harmed Complainant.

The question was whether Respondent's action, that is, the termination of Complainant, was taken because of Complainant's membership in the protected class. Respondent asserted that Complainant was terminated because he was an unsafe worker and had misrepresented his experience to Respondent during his interview. Respondent presented credible evidence that Complainant had worked in an unsafe fashion, and had less experience than he had represented to Respondent. But that evidence alone does not end the inquiry.

OAR 839-05-015 states that

"Frequently, the evidence indicates that several factors contribute to causing the Respondent's action, of which only one factor is the Complainant's protected class.

* * * The crucial question is

whether or not the harmful action would have occurred had the Complainant not been a member of the protected class."

The answer in this case is that the harmful action would not have occurred if the Complainant had not been injured and invoked the workers' compensation procedures. Respondent knew what kind of worker Complainant was before he was injured; in other words, Respondent already had evidence that complainant was an unsafe and inexperienced worker before June 16, 1986. However there was no evidence that Respondent had disciplined Complainant for or otherwise warned him about his performance. It was Complainant's on-the-job injury that caused Respondent to seek advice and then terminate Complainant. In addition, there was ample credible evidence on the record that Respondent discouraged employees with minor on-the-job injuries from filing worker's compensation claims. Hickam would rather pay directly for medical expenses than have employees file workers' compensation claims. Other evidence, although disputed, revealed a general attitude on the part of Ed Hickam that workers who received on-the-job injuries were unsafe workers, who were to be disciplined. An adverse employment decision must be separate from an on-the-job injury when Oregon's workers' compensation procedures have been invoked. Here it was not, and therefore the Respondent was found to have violated ORS 659.410.

In its exceptions to the Proposed Order, Respondent objected to Findings of Fact numbers 10 and 11 and

Ultimate Finding of Fact number 10 on the grounds that Ed Hickam testified that Complainant intentionally cut his finger, when Hickam observed that, it was the "straw that broke the camel's back," due to Complainant's safety problems. The Forum finds the Respondent's exception on this point legally irrelevant.

The issue before the Forum is not whether Complainant's workers' compensation claim would ultimately fail for the reason that his injury was intentionally self-inflicted and, therefore, uncompensable. See ORS 656.156(1). ORS 659.410 does not require a compensable injury. All that is required is the invocation of the workers' compensation system. Compare ORS 659.410 with ORS 659.415 and 659.420 (which do require compensability before granting reinstatement rights). The purpose of ORS 659.410 is to free workers of the threat of adverse employer action for invoking that system, regardless of the eventual compensability of the claim.

Respondent also took exception to Ultimate Finding of Fact number 11, stating that there was no evidence to support the findings about fringe benefits. The evidence supporting those findings is listed in Finding of Fact number 29, with which Respondent took no exception.

Finally, Respondent suggests there is something incongruous in finding an unlawful employment practice despite also finding that Complainant's testimony was not credible. The Forum appreciates Respondent's sentiments in this connection, and sympathizes with Respondent's frustration at the system and its misuses. However, in order for this Forum to find a violation

of the law, the Complainant need only be a victim of illegal discrimination. There is no requirement that he be credible.

In conclusion, an employer may make employment decisions which are adverse to an unsafe worker, as long as those decisions are made without regard to any on-the-job injuries the employee has had, when the employee has invoked Oregon's workers' compensation procedures.

ORDER

NOW, THEREFORE, as authorized by ORS 659.060(3) and 659.010(2), and in order to eliminate the effects of the unlawful practice found, 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 BILLY VOLK in the amount of THREE THOUSAND NINE HUNDRED THIRTY TWO DOLLARS (\$3932.00), minus lawful deductions for taxes, social security and workers' compensation insurance, plus interest upon that sum (minus the deductions mentioned above) 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 practice until the date paid. This award represents damages for compensation Complainant lost as a result of Respondent's unlawful practice found herein.

2) Cease and desist from discriminating against any worker who applies for benefits under, gives testimony in

connection with, invokes, or uses the Oregon workers' compensation procedures or who gives testimony in connection with or uses the civil rights procedures provided in ORS 659.410 - 659.435.

3) Post in a conspicuous place on the premises of each of Respondent's shops a copy of ORS 659.410, together with a notice that anyone who believes that he or she has been discriminated against may notify the Oregon Bureau of Labor and Industries.

4) Provide seminars for all of its employees outlining employee rights under the workers' compensation laws and procedures for invoking the benefits and protections of the workers' compensation system. The content of such seminars are to be pre-approved by the Civil Rights Division of the Oregon Bureau of Labor and Industries.

to work on Saturday. However, the Commissioner held that Respondent did not violate ORS 659.030(1)(a), because Respondent made reasonable, good faith efforts to accommodate Complainant's religious beliefs, although those efforts were unsuccessful; options to replace Complainant would have resulted in more than *de minimis* costs, and thus caused Respondent an undue hardship; and Complainant's absence resulted in more than *de minimis* costs, and thus caused Respondent an undue hardship. ORS 659.030(1)(a).

The above-entitled matter came on regularly for hearing before Douglas A. McKean, designated as Hearings Referee by Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on March 31, April 1, and April 4, 1988, in Room 311 of the Portland State Office Building, 1400 S.W. Fifth Avenue, Portland, Oregon. The Bureau of Labor and Industries (hereinafter Agency) was represented by Robb Haskins, Assistant Attorney General of the Department of Justice of the State of Oregon. Albertson's, Inc., (hereinafter Respondent) was represented by Corbett Gordon, Attorney at Law. Kenneth Stark Miller (hereinafter Complainant) was present throughout the hearing.

The Agency called as its witnesses the following: Complainant; Judith A. Bracanovich, Quality Assurance Manager for the Civil Rights Division (CRD) of the Agency; Donna Broadsword, Senior Investigator, CRD; Warner W. Gregg, former Quality Assurance Manager of CRD; and Lawrence Michael

**In the Matter of
ALBERTSON'S, INC.,
a Delaware corporation,
Respondent.**

Case Number 08-87
Final Order of the Commissioner
Mary Wendy Roberts
Issued October 14, 1988.

SYNOPSIS

Respondent discharged Complainant, a Seventh-day Adventist, for failing

Peck, a former meatcutter for Respondent.

Respondent called as its witnesses the following: Norman A. Alverson, a vocational consultant; Gary Arambarri, the meat department manager for Respondent's Corvallis store during times material herein; Julius Baker, a meat market manager for McPike's Sentry Markets; Donald Burpo, a meatcutter at Respondent's Corvallis store; David Carter, the grocery department manager at Respondent's Corvallis store; Chuck Finlayson, the store director for Respondent's Corvallis store; Jerome Kiolbasa, Human Relations Manager for Safeway Stores, Inc.; Bruce Paolini, Labor Relations Manager for Respondent; Maureen Rafferty, a vocational consultant; Michael L. Slattery, a vocational consultant; Deborah Turner, the bookkeeper at Respondent's Corvallis store.

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) On June 12, 1985, Complainant filed a verified complaint with the Civil Rights Division of the Agency alleging that he had been discriminated against because of his religious beliefs.

2) After investigation and review, CRD issued an Administrative Determination finding substantial evidence of an alleged unlawful employment practice, pursuant to ORS 659.030, by Respondent.

3) CRD attempted to resolve the Complaint by conference, conciliation, and persuasion, but was unsuccessful.

4) On October 7, 1987, the Agency prepared and duly served on Respondent Specific Charges alleging that Respondent had discharged Complainant from employment because of Complainant's religion, and violated ORS 659.030(1)(a).

5) With the Specific Charges, the Forum served on Respondent the following: a) a Notice of Hearing setting forth the time and place of the hearing in this matter; b) a 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 regarding the contested case process; and d) a separate copy of the specific administrative rule regarding responsive pleadings. Following a postponement, the Forum duly served an Amended Notice of Hearing on Respondent and the Agency. A second request for a postponement was denied.

6) On November 25, 1987, Respondent filed an answer in which it denied the allegation mentioned above in the Specific Charges, and stated numerous affirmative defenses.

7) Pursuant to OAR 839-30-071, Respondent filed a Summary of the Case.

8) A pre-hearing conference was held on March 31, 1988, at which time the Agency and Respondent stipulated to facts which were admitted by the pleadings. Those facts were admitted into the record by the Hearings Referee at the beginning of the hearing.

9) At the commencement of the hearing, the attorney for Respondent stated that she had read the Notice of Contested Case Rights and Procedures and had no questions about it.

10) The 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).

11) During the hearing and pursuant to OAR 839-30-075(2)(b), the Agency moved to amend the Specific Charges to conform the damages requested therein to the evidence presented at the hearing. The motion was granted.

12) Pursuant to requests from Respondent and the Agency and in accordance with OAR 839-30-155, the Hearings Referee allowed post-hearings briefs to be submitted. The record of the hearing was left open until April 15, 1988, for those briefs. Respondent and the Agency each submitted timely briefs, which were admitted to the record. During the hearing, the Hearings Referee allowed Respondent to submit a post-hearing affidavit from witness Alverson; it is admitted to the record. After the hearing and before April 15, Respondent requested permission to supplement an uncontroverted exhibit; the Hearings Referee granted the request. In addition, Respondent requested that it be allowed to supplement an Agency exhibit regarding a bankruptcy filed by Complainant. That request is hereby granted, and Respondent's exhibit is admitted to the record.

13) A Proposed Order in this contested case was issued on May 16,

1988. The Proposed Order contained an Exceptions Notice which indicated that exceptions, if any, were to be filed within 10 days of the issuance date. No exceptions were received on or before close of business Thursday, May 26, 1988.

14) On May 26, 1988, the Agency timely submitted a document entitled "Statement of Policy" pursuant to OAR 839-30-165(2). The Statement of Policy asserted positions not raised at hearing. Specifically, the Agency's contention was that the Forum should depart from Title VII precedent in the interpretation of ORS 659.030(1)(a). The participants proceeded at hearing on the assumption that such precedent enunciated the controlling principles under Oregon Law.

15) On May 27, 1988, Respondent wrote a letter to the Forum advising the Forum that Respondent intended to respond to the Statement of Policy submitted by the Agency. On June 3, 1988, the Agency submitted a letter objecting to Respondent's response, on the grounds that OAR 839-30-165 makes no provision for a response to a Statement of Agency Policy. The Agency requested an opportunity to submit a reply to Respondent's response in the event that the Forum accepted Respondent's response. On June 6, 1988, Respondent submitted a cover letter and a document entitled "Respondent's Reply to Division's Statement of Proposed Agency Policy." The Hearings Referee did not request reply documents from either the Respondent or the Agency.

FINDINGS OF FACT – THE MERITS

1) At all times material herein, Respondent was a Delaware corporation

that owned and operated Albertson's Food Center 2514 in Corvallis, Oregon, and was an employer within this state utilizing the personal services of one or more employees, subject to the provisions of ORS 659.010 to 659.435.

2) Respondent employed Complainant intermittently from 1969 through March 18, 1985. From January or February 1983 until March 18, 1985, Complainant worked at Respondent's Corvallis store in the meat department as a meatcutter. After several months, Complainant was promoted to manager of the meat department. Around March 1984, Complainant requested a transfer to Idaho. Due to the possible transfer, Gary Arambarri was moved to Respondent's Corvallis store and made meat manager, Complainant was demoted to the position of "second man." The "second man" normally worked with the meat manager and performed the meat manager's duties in his absence.

3) During February 1985 Complainant received information by mail about Revelations Seminars that were being taught by the Seventh-day Adventist church in Albany. Complainant's wife had been raised as a Seventh-day Adventist, and Complainant and his wife had previously consulted with the pastor of the Albany church about their marriage. Although religion was not a part of Complainant's upbringing, he had attended churches of several denominations "in sort of an inquiring fashion." Complainant and his wife began attending the religious seminars and studying the written materials during February 1985. The classes met three

times per week, on Monday, Wednesday, and Friday, for eight weeks.

4) Complainant took the subject matter of the classes seriously. From the classes he came to believe that Saturday was the Sabbath. This belief is a tenet of the Seventh-day Adventist church. On Monday, March 11, 1985, Complainant attended a seminar in which the subject was "The Mark of the Beast." As a result of this lesson, Complainant decided to observe the Saturday Sabbath, which begins at sundown Friday and continues until sundown Saturday. According to his belief, Complainant could not perform secular work on the Sabbath, except in emergencies.

5) At around 5 p.m. on Tuesday, March 12, 1985, Complainant told Chuck Finlayson, the store director at Respondent's Corvallis store, that he (Complainant) had been studying the Book of Revelations, and that he could no longer work from sundown on Fridays until sundown on Saturdays. Before March 12, Complainant was scheduled to work on Saturday, March 16, from 9 a.m. until 6 p.m. Finlayson called Fred Luxson, Respondent's Regional Meat Manager in Portland, about available meatcutters.

6) Before March 12, Complainant had not told Respondent's management about his religious classes. Although he had worked during the day on March 12 with Gary Arambarri, who was the meat manager and Complainant's supervisor, Complainant did not tell Arambarri about Complainant's decision to observe the Saturday Sabbath and his inability to work on the upcoming Saturday, March 16.

7) On March 12, Finlayson did not take Complainant's statements seriously because Complainant had shown no previous interest in religion. Finlayson knew Complainant to be a "partier." Finlayson had bailed Complainant out of jail about two weeks before, when Complainant had been drinking alcohol and had had a fight with his wife. Complainant had never previously discussed religion with Finlayson. In their conversation on March 12, Finlayson disagreed with Complainant's beliefs about the Sabbath, and told Complainant that if he could not work on Saturdays it could reduce his hours and pay.

8) On Wednesday, March 13, 1985, Complainant was off work as scheduled. Finlayson told Arambarri about the conversation with Complainant, and that Complainant said he could no longer work from sundown Fridays to sundown Saturdays. Arambarri had worked closely with Complainant for nearly a year and had socialized with him. Arambarri had never heard before March 13 that Complainant was attending religion classes. He did not consider Complainant to be a religious person, and was reluctant to believe that Complainant would not work the upcoming Saturday. Arambarri and Finlayson decided that they needed to talk some more with Complainant to confirm whether Complainant had adopted the Seventh-day Adventist beliefs about the Saturday Sabbath.

9) On Thursday morning, March 14, 1985, Complainant met with Arambarri and Finlayson. He repeated his beliefs about the Sabbath, and Arambarri and Finlayson accepted that

Complainant was serious about not working on Saturdays. Finlayson told Complainant that Respondent would try to cover Complainant's shift on Saturday, March 16. Thereafter, Finlayson and Arambarri discussed various ways to cover Complainant's Saturday shift. At Luxson's suggestion, Arambarri called the meatcutters' union regarding available meatcutters. He received four names from the union, but Arambarri was unsuccessful in reaching any of those people by telephone during the day. He also called Respondent's Albany store and its Salem store. He did not discover any available meatcutters. At around noon, the schedule for the week of March 17 to March 23 was posted; it showed that Complainant was scheduled to work on Saturday, March 23. Complainant again met with Arambarri and Finlayson. He asked them why he had been scheduled for March 23. Arambarri told Complainant that they were having difficulty finding a replacement, and asked him to reconsider not working. Finlayson and Arambarri asked Complainant to assist them in finding a replacement. They advised him that if a replacement could not be found, then they expected him to work as scheduled; further, they advised him that if he did not show up for work, they would consider his absence a voluntary quit. Complainant said he could not work on Saturday. Arambarri took the list of names home with him that evening and again attempted to contact replacement meatcutters. Arambarri and Finlayson, together, spent several hours either discussing options for covering Complainant's Saturday shift or attempting to contact replacement meatcutters. Arambarri spent

over three hours on Thursday attempting to find replacements.

10) Among the options which Arambarri and Finlayson considered to cover Complainant's Saturday shift were:

a) Work a meatcutter Friday night. Respondent rejected this option because of the increased labor costs, lost efficiency, lost profits, and deviations from company policy that it would cause. This option would involve paying the employee a night premium after 7 p.m. of fifty cents per hour over the regular rate of pay, pursuant to Respondent's collective bargaining agreement with the United Food and Commercial Workers Union. It could entail overtime pay at one and one-half times the regular rate for any employee who would work over eight hours in one day, again pursuant to the labor agreement. The option would require Respondent to cut more meat ahead than usual for sale on Saturday, which does not follow the company's policy of "cutting to the point of sale." That policy did not apply on Sundays. Meat cut ahead, or "overcut," results in lost profits because, with time, meat bleeds in the package, it loses water and becomes discolored as the meat deteriorates; it then must be recut or marked down in price. This option would require working one meatcutter after peak customer hours, and without the assistance of the meat manager, another meatcutter, a meatwrapper, or a cleanup person. The meat manager directs other meatcutters on what types and quantities of meat to cut. Two or three meatcutters working together are each more efficient than one meatcutter working alone because

of coordination and competitiveness among them. Respondent found that it was not "smart business" to pay a meatcutter, at meatcutter wages, to perform meatwrapper and cleanup duties. Meatcutters are paid at a higher rate than meat-wrappers or cleanup persons.

b) Work a "floater" meatcutter on Saturday. A floater is a temporary employee hired to fill in when a permanent employee is off work. Respondent attempted to find floaters who could work on March 16, but was unsuccessful. Saturday was the busiest day of the week. Normally, the meat manager and the second man were scheduled to work together on Saturdays, along with one meatwrapper. On extra busy Saturdays, a floater or part-time meatcutter was added for one-half of a shift. Generally, floater meatcutters were not as productive as either the meat manager or the second man. Employing a floater in the place of either the meat manager or the second man was less efficient than working the manager and second man together because the floater would need more supervision, and often the floater's meat would require recutting to ensure that it met Respondent's standards.

c) Work a meatcutter on Saturday night. Respondent rejected this option for the same reasons that it rejected working a meatcutter on Friday night. In addition, the labor contract required a minimum show-up pay; that is, Respondent agreed to pay for no less than four hours of work to each meatcutter called to work. Respondent's store closed at 11:30 p.m. Respondent would have to pay Complainant the minimum show-up pay even if he

were unable to work four hours due to starting work after sundown.

d) Work a meatcutter on Sunday. During the times material herein, Respondent did not usually schedule any meatcutters to work on Sundays. Respondent rejected this option in part because the labor contract required premium pay of \$1.75 per hour on Sundays. Premium pay was pay in addition to an employee's straight time rate of pay. In addition, Respondent did not want to work one meatcutter alone on Sundays for the same reasons as described above regarding working a lone meatcutter on Friday nights. Due to high labor costs, Respondent allowed only a certain total number of hours per week for meatcutters to work. It was Arambarri's job to schedule the meatcutters and meatwrappers to work during the most productive times in the week. In order to work a meatcutter on a Sunday (or Friday or Saturday nights), Respondent would have to reduce the number of hours that it employed a meatcutter during another part of the week. Saturday was a more productive day than Sunday; thus, Respondent did not choose to switch Complainant's Saturday hours for Sunday hours.

11) On Friday, March 15, 1985, Complainant worked with Don Burpo and Mike Peck.

12) Don Burpo was a permanent meatcutter for Respondent, and had been Complainant's second man when Complainant was the meat manager. Burpo had been off work for around one year due to an injury. During March 1985 he was gradually returning to work with Respondent. He was not able to work more than four hours per

day. Arambarri talked with Burpo about Burpo working on Saturday as a replacement for Complainant. Burpo checked with his doctor, who left the decision up to Burpo. Burpo notified Respondent that he would work for four hours.

13) Mike Peck was a part-time floater meatcutter. When they worked together on Friday, Complainant told Peck that Complainant was going to observe the Sabbath. They discussed various ways they thought Respondent could accommodate Complainant's absence on Saturday. Complainant did not discuss those ways with Arambarri or Finlayson. When Arambarri contacted Respondent's Albany store, he learned that Peck was scheduled to work there for eight hours on Saturday, March 16.

14) Complainant testified in a deposition that he called a meatcutter from Albany on Friday night in order to find a replacement for Saturday. Although he initially thought that he called someone other than Mike Peck, Complainant later identified the Albany meatcutter as Mike Peck. Peck testified that Complainant never called him on Friday night, and never asked him to work on Saturday. Following Peck's testimony at hearing, Complainant testified that he could not remember who he called Friday night. Complainant testified that he learned that the Albany meatcutter called the Corvallis store on Saturday, March 16, and offered to work but Arambarri said he did not need any help. Peck testified that he called Arambarri from the Albany store at around noon on Saturday, when Peck was let off work early. According to Peck, Arambarri said that

Complainant was not due to start work until 2 p.m., and that Arambarri "had it covered." Peck testified that he did not want to wait around for two hours to find out if Complainant would show up, so Peck went home. Peck's time record shows that he did not get off work in Albany until a few minutes before 1 p.m. Arambarri testified that he never received a telephone call from Peck on Saturday and, if he had, he would have had Peck come to work because Arambarri needed the help. By 1 p.m. on Saturday, Arambarri already knew that Complainant was not coming to work, since Complainant's shift was scheduled to begin at 9 a.m.

Regarding whether Complainant called an Albany meatcutter on Friday night, the Forum is unable to find that Complainant called anyone on Friday night. Based on Complainant's inconsistent testimony regarding who he called on Friday, his poor memory, and Peck's denial that Complainant called him (even though the balance of Complainant's statements point to Peck being the Albany meatcutter), the Forum finds that Complainant's testimony on this point was not credible.

Regarding whether Peck called Arambarri on Saturday, the Forum finds that he did not. Peck's testimony conflicted with his time records regarding when he was let off of work at the Albany store, and thus when he would have called Arambarri. It also conflicted with the weight of the evidence regarding when Complainant was expected to work and the state of the meat department on Saturday. His testimony was directly contradicted by Arambarri, who the Forum finds was a credible witness. Finally, Peck had

reason to be biased against Respondent due to a workers' compensation dispute, and his admitted hard feelings toward Respondent as a result of that dispute. Accordingly, the Forum finds that Peck's testimony was not credible on this point.

15) Gary Arambarri was not scheduled to work on Friday, March 15. However, he went to the store and, along with Finlayson, tried periodically throughout the day to reach replacement meatcutters. That morning, Complainant gave Arambarri and Finlayson a letter confirming their earlier conversations and repeating his religious beliefs regarding the Sabbath. Complainant began drafting the letter on Tuesday, March 12, with the assistance of his pastor because he was certain he would lose his job over his observance of the Saturday Sabbath. Arambarri talked with Complainant about his inability to find a replacement, and requested Complainant's help. Complainant offered to work late on Friday, on Saturday after sundown, or on Sunday. Arambarri consulted with Finlayson about his progress in finding a replacement and other alternatives (see Finding of Fact number 10, above). Arambarri also talked with Burpo about working on Saturday (see Finding of Fact number 12, above). Friday afternoon, Finlayson told Complainant that Burpo could work for one-half of Complainant's shift. Finlayson told Complainant that the alternatives that Complainant suggested were poor options. He advised Complainant that unless another replacement were found or Complainant worked the remainder of his shift, Finlayson would

consider that Complainant had abandoned his job.

16) Friday evening Arambarri made telephone calls from home to possible replacements. On either Thursday evening or Friday evening, he contacted Tracy Williams, who lived about 100 miles away in Reedsport. Williams refused to drive that far for four or possibly eight hours of work; Arambarri did not require Williams to work.

17) Arambarri estimated that he worked four hours on Friday attempting to accommodate Complainant. In total, Finlayson spent an estimated five hours on seeking ways to accommodate Complainant's request for Saturdays off. The amount of time and effort Arambarri and Finlayson spent trying to accommodate Complainant exceeded that normally spent attempting to accommodate a request for time off.

18) On Saturday, March 16, 1985, Complainant did not report for work for Respondent.

19) Arambarri worked as a meatcutter from 5:25 a.m. to about 6 p.m. on Saturday, although he signed out at 2:28 p.m. Burpo worked from 2 to 6 p.m., which was the busiest part of Complainant's shift. Respondent called in an additional meat-wrapper to provide extra help, which allowed Arambarri more time to cut meat rather than do tasks which meat-wrappers were qualified to perform, namely, wrap meat and put meat in the meat case. Normally, the meat manager fills the meat case. A meat-wrapper is not qualified to cut meat. Normally, Respondent scheduled only one meat-wrapper on Saturdays.

20) The quality, selection, and quantity of meat in the meat case was below Respondent's standards on Saturday, March 16, because the meatcutters did not have enough time to cut the required variety and quantity of meat. The meat department was not able to meet Respondent's policy requirement of "cutting to the point of sale." Finlayson checked the meat department at ten, twelve, two, and four o'clock, which times were within the peak sales period of the day. He could see the "grate," or the shelf, in the meat case each time. Ordinarily, packages of meat would be stacked at least two deep from front to back. By 6 p.m., Arambarri and Burpo had been able to get the meat case stocked to about eighty percent of Respondent's standards. The "normal cut" for Sunday was "extremely weak."

21) The gross profit of the meat department was affected by the quality, selection, and quantity of meat available to customers. Based on their observation of the meat case on Saturday, both Arambarri and Finlayson believed that there were lost sales in the meat department. Lost sales decreased profits. No studies were done to verify lost sales on Saturday. Finlayson estimated that the meat department usually made 14 to 18 percent profit on gross sales of 14 to 15 thousand dollars per week. The profit for the whole store was not higher than three-fourths of one percent. The meat department had high labor costs and was the fourth most profitable department out of six departments in the store.

22) On Monday morning, March 18, 1985, Complainant went to

Respondent's store to work. Arambarri informed him that he no longer worked for Respondent because, in Respondent's view, Complainant had abandoned his job when he did not show up for work on Saturday. Complainant asked Arambarri to put that in writing. On Tuesday, March 19, 1985, Complainant received a handwritten note dated March 18, 1985, from Finlayson describing Complainant's termination.

23) During all times material herein, Respondent employed Dave Carter, whose religion observes the Saturday Sabbath and prohibits work from sundown Friday to sundown Saturday. Respondent, and particularly Finlayson, accommodated Carter's religious beliefs during Carter's employment in several positions at the Corvallis store. In those positions, Respondent was able to schedule Carter around the Sabbath.

24) Arambarri and Finlayson believed that employees preferred not to work on weekends. They believed that the morale would go down of employees who were regularly scheduled to work on weekends in order to accommodate Complainant, unless such employees had volunteered to work weekends.

ULTIMATE FINDINGS OF FACT

1) At all times material herein, Respondent was a Delaware corporation that owned and operated Albertson's Food Center 2514 in Corvallis, Oregon, and was an employer within this state utilizing the personal services of one or more employees.

2) Respondent employed Complainant intermittently from 1969 until March 18, 1985. From 1983 until

March 18, 1985, Complainant worked at Respondent's Corvallis store as a meatcutter. During times material herein, Complainant was Respondent's "second man" in the meat department; that is, Complainant normally worked with the meat manager and performed the duties of the meat manager in his absence.

3) During February and March 1985, Complainant attended a series of seminars put on by the Seventh-day Adventist church. He learned that one of the basic beliefs of the religion is that Sabbath is observed from sundown Friday to sundown Saturday, and secular work is prohibited on the Sabbath except in emergencies. Following a seminar on Monday, March 11, 1985, Complainant sincerely adopted this belief as his own.

4) At around 5 p.m. on March 12, 1985, Complainant informed Respondent's store director, Chuck Finlayson, of his religious belief about the Sabbath, and that he was unable to work as scheduled on Saturday, March 16, 1985. Before that conversation with Finlayson, Complainant had never discussed the seminars or his religious beliefs with Respondent's management.

5) Finlayson did not take Complainant seriously at that time because he had never known Complainant to study religion or to be a religious person. He knew Complainant to be a "partier" and someone who Finlayson had recently bailed out of jail because of drinking and domestic violence.

6) Complainant was not scheduled to and did not work on Wednesday, March 13, 1985. On that day, Finlayson told Complainant's

supervisor, meat manager Gary Arambarri, about Complainant's declaration of religious beliefs and his need to have Saturday off from work. Arambarri had worked closely with Complainant for around one year, and knew Complainant socially. Arambarri did not know previously that Complainant was attending religious seminars or that he had adopted the declared religious views. Arambarri did not consider Complainant to be a religious person. Arambarri and Finlayson decided they needed to talk with Complainant to confirm whether he had adopted the declared religious beliefs.

7) On Thursday morning, March 14, 1985, Arambarri and Finlayson met with Complainant, who repeated his religious beliefs and his need to have Saturday, March 16 off from work. Arambarri and Finlayson accepted that Complainant was serious about not working on Saturdays.

8) On Thursday and Friday, Arambarri and Finlayson met with Complainant several more times and discussed their progress in finding a replacement for Complainant and their other options. Arambarri and Finlayson requested Complainant's help in finding a solution. Complainant offered to work overtime on Friday, after sundown on Saturday, or on Sunday.

9) On Thursday and Friday, Arambarri and Finlayson attempted to find a replacement meatcutter for Complainant. Arambarri talked with Fred Luxson, Respondent's regional meat manager in Portland, about replacement meatcutters. Arambarri called the meat-cutter's union and received four names. He called Respondent's stores in Salem and Albany, but did not

discover any available replacement meatcutters for Saturday. He learned that Mike Peck, a floater meatcutter who worked for Respondent part-time at the Corvallis store, was scheduled to work eight hours on Saturday at the Albany store. He asked Don Burpo to work on Saturday. Burpo was gradually returning to work as a meatcutter at Respondent's Corvallis store following a year off due to an injury. Burpo checked with his doctor, and agreed to work for four hours on Saturday. Periodically during the day on Thursday and Friday, Arambarri and Finlayson telephoned the other possible replacement meatcutters, but were unable to contact them. Arambarri made attempts from home on Thursday and Friday evenings to contact replacements. He contacted Tracy Williams in Reedsport. Williams refused to drive the approximately 100 miles to Corvallis for only four or eight hours of work.

10) In addition to trying to find replacements to fill Complainant's Saturday shift, Finlayson and Arambarri considered working a meatcutter on Friday or Saturday nights and on Sunday. They rejected those options because of increased labor costs, lost efficiency, lost profits, and deviations from company policy. Pursuant to its collective bargaining agreement with the meatcutters union, Respondent was required to pay premium pay of fifty cents per hour over the straight-time rate of pay to a meatcutter working after 7 p.m. A meatcutter who worked over eight hours per day had to be paid at one and one-half times the regular rate for the overtime hours. The collective bargaining agreement also required Respondent to pay for a

minimum of four hours of work, even if a meatcutter did not work four hours before the store closed. Respondent did not schedule any meatcutters on Sundays. The union contract required premium pay of \$1.75 per hour over straight-time pay on Sundays. Due to labor costs in the meat department, working a meatcutter during the evenings or on Sundays would reduce the number of hours available to Respondent to employ a meatcutter during other more productive times during the week, particularly Saturdays. A meatcutter working evenings or Sundays would be without the assistance of the meat manager, other meatcutters, a meat-wrapper, or a cleanup person. The meat manager decided what and how much meat to cut. Two or three meatcutters working together are each more efficient than one meatcutter working alone, due to coordination and competitiveness. It would increase Respondent's labor costs to have a meatcutter performing meat-wrapping and cleanup duties, which a meatcutter working alone would be required to do. Meatwrappers, who were not qualified to cut meat, and cleanup persons were paid less than meatcutters.

Respondent's policy in the meat department was to "cut to the point of sale," that is, to cut the variety and quantity of meat necessary to meet its customers demands at that time. Meat cut ahead of time, or "overcut," resulted in lost profits because meat deteriorates with time and must be recut or reduced in price. Saturday was the meat department's busiest day. Evenings were not peak customer hours. To overcut meat on Friday or Friday evening for Saturday, instead of cutting

it on Saturday "to the point of sale," deviated from Respondent's policy. The policy was not applied on Sundays.

The Forum finds that the proposed options would have imposed more than *de minimis* costs on Respondent, and thus would constitute an undue hardship on Respondent.

11) On Thursday and Friday (his day off), Arambarri spent over seven hours attempting to accommodate Complainant. Finlayson spent, in total, approximately five hours seeking ways to accommodate Complainant. Those efforts exceeded the efforts normally used by Respondent when attempting to accommodate an employee's request for time off. The Forum finds that Respondent made reasonable, good faith efforts to accommodate Complainant.

12) Finlayson advised Complainant that Respondent was unable to find a replacement meatcutter for all of Complainant's Saturday shift, and that the other options had been considered but were unacceptable. Complainant was advised that he was expected to work the balance of his Saturday shift unless a replacement was found, and that if he failed to work, Respondent would consider that he had abandoned his job and voluntarily quit.

13) On Saturday, March 16, 1985, Complainant did not report for work. Respondent was unable to find a replacement for all of Complainant's shift. Arambarri worked uncompensated overtime hours, and Respondent called in an additional meat-wrapper to work. The quality, selection, and quantity of meat in the meat department was below Respondent's standards on both Saturday and Sunday.

Respondent lost sales and profit in the meat department. The Forum finds that the costs in lost profits and lost efficiency were more than *de minimis*, and thus caused Respondent an undue hardship.

14) On Monday, March 18, 1985, Respondent advised Complainant that he had terminated his employment with Respondent by failing to report for work on Saturday.

CONCLUSIONS OF LAW

1) At all times material herein, Respondent was an employer subject to the provisions of ORS 659.010 to 659.435.

2) At all times material herein, Complainant was an individual employed by Respondent.

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) The actions, inactions, and knowledge of Chuck Finlayson and Gary Arambarri, employees or agents of Respondent, are properly imputed to Respondent.

5) ORS 659.030 provides, in pertinent part, that:

"(1) * * * [I]t is an unlawful employment practice:

"(a) For an employer, because of an individual's * * * religion, * * * to discharge from employment such individual. * * *"

This Forum has previously followed federal case law in resolving a matter of an alleged unlawful employment practice based upon religion. In *In the Matter of Union Pacific Railroad Com-*

pany, 2 BOLI 234, 237 (1982), the Forum stated that

"an employer has an affirmative duty to make reasonable accommodation for religious observances of sincere believers among its employees to the extent that such accommodation does not cause undue hardship in the conduct of the employer's business," citing *Trans World Airlines, Inc. v. Hardison*, 432 US 63, 14 FEP 1697 (1977).

Because Respondent was able to show that making reasonable accommodation for Complainant, namely, giving him time off from sundown Friday to sundown Saturday, would cause undue hardship in the conduct of its business, Respondent did not violate ORS 659.030(1)(a).

6) OAR 839-30-165 provides that a party may file exceptions to a proposed order and that the Agency may file a Statement of Policy to the Hearings Referee through the Hearings Unit within 10 days from the date of issuance of the proposed order. No other submissions are provided for or allowed, unless the Hearings Referee so requests. See OAR 839-30-175. Accordingly, no documents received after May 26, 1988, were considered by the Forum.

OPINION

As noted in the Conclusions of Law, this Forum has previously looked to federal case law for guidance in deciding matters of religious discrimination. During the hearing, neither the Agency nor Respondent suggested that the Forum do otherwise in this case. Accordingly, the Forum has

looked to the guidelines as set forth by the Supreme Court in *Trans World Airlines, Inc. v. Hardison*, 432 US 63, 14 FEP Cases 1697 (1977), and later federal cases in deciding the issues present in this case.

The Agency responded to the Proposed Order with a "Statement of Policy" pursuant to OAR 839-30-165(2) challenging the use of federal case law to interpret ORS 659.030(1)(a). The Commissioner declines to consider this argument in preparing this Final Order as the Statement of Policy fails to articulate a limit on the accommodation required of Respondent and as Respondent was not afforded the opportunity to rebut at hearing or in its exceptions the policy proposed by the Agency. However, the Commissioner may hereafter revisit by rule or by order the issue of whether Oregon's statute grants broader protection than the federal statute. Cf. ORS 659.030(1)(a) (1987) and 42 USC 2000(e)(j), (e)(2)(a) (1982).

A. Prima Facie Case.

To establish a prima facie case of an unlawful employment practice based upon religion under ORS 659.030(1)(a), the Agency has the burden of pleading and proving that (1) Complainant had a bona fide religious belief; (2) he informed Respondent of his religious views and that they were in conflict with his responsibilities as an employee; and (3) he was discharged because of his observance of that belief. *Proctor v. Consolidated Freightways Corporation of Delaware*, 795 F2d 1472, 41 FEP Cases 704, 706 (9th Cir 1986).

The Agency has established a prima facie case. It showed that

(1) Complainant had a bona fide belief that working on Saturday was contrary to his religious faith;

(2) he informed Respondent of his religious views and their conflict with working as scheduled on Saturday, March 16, 1985, and on Saturdays thereafter; and

(3) he was discharged for his failure to show up for work on Saturday, March 16, 1985.

B. Reasonable Accommodation.

Once the Agency has established a prima facie case, the burden shifts to Respondent to prove that it made good faith efforts to accommodate the Complainant's religious beliefs. *Anderson v. General Dynamics Convair Aerospace Division*, 589 F2d 397, 401, 17 FEP Cases 1644, 1647 (9th Cir 1978), cert denied, 442 US 921, 19 FEP Cases 1377 (1979).

Respondent proved that it made good faith efforts to accommodate Complainant's religious beliefs, but those efforts were unsuccessful. Finlayson and Arambarri did not act unreasonably when they were first informed about Complainant's religious beliefs and decided that they needed to confirm Complainant's sincerity, because Complainant had not previously demonstrated or communicated religious beliefs, or that he was studying any religion. Arambarri had worked closely and socialized with Complainant, and Finlayson knew that Complainant had drinking and domestic problems. The fact that they did not take Complainant's sudden adoption and declaration of religious beliefs seriously until Thursday morning when they sat down with him and discussed

his beliefs does not show lack of good faith. Respondent had no duty to accommodate Complainant's religious beliefs until Complainant established that he had sincere beliefs. It was reasonable for Respondent to require something more than a mere declaration of sincerity. See B. Sclai and P. Grossman, *Employment Discrimination Law*, p. 210 (2nd Ed 1983).

An employer is required to take some steps in negotiating with the employee to reach a reasonable accommodation to the particular religious beliefs at issue. *Burns v. Southern Pacific Transportation Co.*, 589 F2d 403, 405, 17 FEP Cases 1648, 1650 (9th Cir 1978), cert. denied 439 US 1072, 18 FEP Cases 1430 (1979). Here, Respondent held several meetings with Complainant in an attempt to find a solution to the problem. Complainant suggested to Respondent that he could work overtime on Friday, after sundown on Saturday, or on Sunday. Respondent considered those options and rejected them for the reasons listed in the Findings of Facts.

In addition, Respondent spent numerous hours attempting to contact possible replacement meatcutters. In *Turpen v. Missouri-Kansas-Texas Railroad Co.*, 573 FSupp 820, 33 FEP Cases 30, 34 (ND Tex 1983), aff'd 736 F2d 1022, 35 FEP Cases 492 (5th Cir 1984), the court found that one and one-half hours was a reasonable amount of time for an employer to spend considering the rearrangement of schedules, before determining that such rescheduling would be impossible. In this case, the fact that Respondent was unsuccessful in contacting sufficient replacement meatcutters to

cover Complainant's shift does not show a lack of good faith effort. Nor does the fact that Respondent failed to ask others, such as Fred Luxson, the regional meat manager in Portland, to work as a replacement show a lack of good faith effort. The question is whether the efforts Respondent made were reasonable and made in good faith. The Forum found that they were. The Forum also found as evidence of good faith the Respondent's employment of another person, David Carter, who believed in the Saturday Sabbath, and Respondent's successful accommodation of Carter's beliefs.

It is well recognized that although complainants are under no burden to propose to their employers specific means of accommodating their religious practices, complainants have a duty to cooperate with the measures suggested by their employers in reaching an accommodation. Employees are not required to modify their religious beliefs, only to attempt to satisfy them within the procedures offered by the employer. *Brener v. Diagnostic Center Hospital*, 671 F2d 141, 28 FEP Cases 907-10 (5th Cir 1982). Here, Respondent required Complainant to work one-half of his shift on Saturday. Such a requirement did not eliminate the conflict with Complainant's religious beliefs, since that belief did not permit secular work, either full-time or part-time. Thus, Respondent failed to reasonably accommodate Complainant's religious belief.

C. Undue Hardship.

"Once the employer has made more than a negligible effort to accommodate the employee (*Trans World Airlines v. Hardison*, *supra*,

432 US at 77, 14 FEP Cases at 1702-1703) and that effort is viewed by the worker as inadequate, the question becomes whether the further accommodation requested would constitute 'undue hardship.'" *Burns v. Southern Pacific Transportation Co.*, 539 F2d 403, 17 FEP Cases at 1650.

The Supreme Court held in *Hardison* that an accommodation which would impose more than *de minimis* costs in higher wages or lost efficiency would constitute an undue hardship. *Hardison*, *supra*, 14 FEP Cases at 1705.

Respondent showed that the Corvallis store meat department employed two full-time meatcutters – the meat manager and the second man. In addition, it employed a part-time meatcutter, Don Burpo, to fill in when the meat manager or second man had a day off, or to work as the third meatcutter on Saturdays. Due to Burpo's injury and gradual return to work, Respondent employed Mike Peck part-time. Respondent showed that usually the meat manager, Arambarri, and the second man, Complainant, worked together each day with one meat-wrapper. On Saturdays, Respondent would often call in a third meatcutter. Saturday was the meat department's busiest day.

Respondent proved that Complainant's absence, for even one-half of his shift, on Saturday caused it undue hardship. The uncontroverted evidence was that the meat case was not sufficiently stocked in either variety or quantity of meat during the peak times of the day, and was only up to 80 percent of Respondent's standards when Arambarri and Burpo left at 6 p.m.

There was insufficient meat cut on Saturday for Sunday. Although no study was made of lost sales or profit, Arambarri and Finlayson testified losses occurred. Although the proof was not precise, it was proper for the Forum to find from the evidence presented that losses occurred on both Saturday and Sunday. This occurred despite the overtime, albeit uncompensated, put in by Arambarri and the added assistance of a second meat-wrapper. Arambarri worked half of the Saturday shift unassisted by another meatcutter. Respondent adequately showed that a sole meatcutter was not as efficient as one working together with other meatcutters, due to the absence the coordination and competitiveness which takes place when meatcutters work as a team. Respondent proved that the loss of Complainant, Respondent's second man in the meat department, on Saturday resulted in lost efficiency and profits. Such losses constitute more than *de minimis* costs, and imposed an undue hardship on Respondent.

Allowing Complainant to work overtime on Fridays to cut meat ahead for Saturday would require Respondent to pay him over-time wages under the collective bargaining agreement. It would require premium pay after 7 p.m. The Supreme Court found in *Hardison* that payment of premium wages constituted an undue hardship for an employer. *Hardison*, *supra*. Federal Regulations provide that regular payment of premium wages of substitutes can constitute undue hardship. 29 CFR Sec. 1605.2(e)(1). Respondent showed that "overcut" resulted in lost profits, due to the need later to

recut or sell the meat at reduced prices because the meat deteriorated. Complainant would be working by himself, which would be inefficient and costly because he would have to do extra meat-wrapping and cleanup duties. Finally, working those hours would reduce the number of hours available to the meat department to schedule a meatcutter during more productive hours in the week. The Forum found the above costs in higher wages and lost efficiency to be more than *de minimis*, and they therefore constituted an undue hardship on Respondent.

Respondent showed that allowing Complainant to work on Saturday nights after sundown would result in some of the same costs as described above, namely, lost efficiency due to Complainant working alone, premium pay after 7 p.m., and the reduction in the number of hours available during more productive hours of the week. In addition, the collective bargaining agreement required Respondent to pay "show up" pay, that is, to pay for a minimum of four hours to any meatcutter called in to work, even if the meatcutter was unable to work for four hours. Depending on the season, there would be Saturdays when Complainant would be unable to work for four hours after sunset and before the store closed at 11:30 p.m. The Forum found that these costs to Respondent would be more than *de minimis*, and therefore would impose an undue hardship.

Allowing Complainant to work on Sundays would impose some of the same costs on Respondent as described above, principally, the inefficiency of working alone, the payment

of premium pay for every hour worked, and the loss to the meat department of meatcutter hours during more productive times in the week. Again, the Forum found that these costs would be more than *de minimis*, and would impose an undue hardship on Respondent.

It is arguable that the one-time payment of overtime or premium wages, or the other costs associated with accommodating Complainant on Saturday, March 16, would be *de minimis*. However, that argument requires the Forum to ignore that the Corvallis store meat department was essentially a two-meatcutter operation, made up of the meat manager and the second man. Complainant, the second man, was demanding not only March 16th off, but every Saturday off. Saturday was the meat department's busiest day. In order to regularly accommodate Complainant, Respondent would have had to adopt one of the options, which it had rejected, on a permanent basis. The costs of any of those options on a regular basis are more than *de minimis*. In addition, if the meat manager needed a Saturday off, the meat department would have been left without either a manager or a second man. To appoint a different second man and give Complainant fewer hours would have changed his status, and would not satisfy Respondent's obligation of reasonable accommodation. See *American Postal Workers Union v. Postmaster General*, 781 F2d 772, 39 FEP Cases 1847, 1850 (9th Cir 1986).

ORDER

NOW, THEREFORE, as Respondent has not been found to have

engaged in any unlawful practice charged, the Complaint and Specific Charges filed against Respondent are hereby dismissed according to the provisions of ORS 659.060(3).

**In the Matter of
DILLARD HASS CONTRACTOR, INC.,
an Oregon corporation, Respondent.**

Case Number 24-87

Final Order of the Commissioner
Mary Wendy Roberts
Issued November 7, 1988.

SYNOPSIS

In violation of ORS 659.410, Respondent discharged Complainant because he was injured on the job and invoked the workers' compensation system. The Commissioner awarded Complainant back pay and mental suffering damages. ORS 659.410; OAR 839-30-185.

The above-entitled matter came on regularly for hearing before Douglas A. McKean, designated as Hearings Referee by Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on July 26, 1988, in Room 220 of the Bureau of Labor and Industries Office at 165 E. 7th, Eugene, Oregon. The Bureau of Labor and Industries (hereinafter the

Agency) was represented by Murray MacNeill, an employee of the Agency. Vernon E. Summers (hereinafter Complainant) was present throughout the hearing. Dillard Hass Contractor, Inc. (hereinafter Respondent) did not appear at the hearing.

The Agency called the following witnesses: Vernon E. Summers, Complainant; Richard Billman (who testified by telephone), former employee of Respondent; David Munz, investigator for the Agency; Beverly Russell, investigative supervisor for the Agency; and Jo Sturtevant, Vocational Consultant, who was once assigned to work with Complainant.

Having fully considered the entire record in this matter, I, Mary Wendy 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) On February 18, 1986, Complainant filed a verified complaint with the Civil Rights Division of the Agency. He alleged that Respondent discriminated against him because he had an on-the-job injury and utilized the workers' compensation system. Complainant alleged that, following the injury and a release to return to work in November 1985, Complainant returned to work for several days in November and December 1985, but Respondent did not recall Complainant to work after December 31, 1985, when work was available, and when persons hired after Complainant were working.

2) After investigation and review, the Agency issued an Administrative Determination finding substantial evidence of an unlawful employment practice, under ORS 659.410, by Respondent.

3) The Agency attempted to resolve the Complaint by conference, conciliation, and persuasion, but was unsuccessful.

4) On June 10, 1988, the Agency issued and duly served on Respondent Specific Charges which alleged that Respondent had failed to recall Complainant for work because he had suffered an on-the-job injury and utilized the procedures provided in Oregon's workers' compensation statutes. The Specific Charges alleged that Respondent's action violated ORS 659.410.

5) With the Specific Charges, the Forum served on Respondent the following: a) a Notice of Hearing setting forth the time and place of the hearing in this matter, b) a 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 regarding the contested case process, and d) a separate copy of the specific administrative rule regarding responsive pleadings.

6) On June 16, 1988, the Forum sent Respondent a copy of the Agency's revised rules regarding contested case hearings, OAR 839-30-020 to 839-30-200, which became effective on June 16, 1988.

7) On June 22, 1988, the Forum sent the Agency and Respondent each a copy of a revised "Notice of

Contested Case Rights and Procedures." The revised notice reflects the provisions of the revised hearings rules referred to in procedural Finding of Fact 6, above.

8) On July 6, 1988, the Agency notified the Forum by letter that Respondent corporation had been administratively dissolved by the state Corporations Division, and that, pursuant to ORS 60.121, the Agency had served the Respondent through the Secretary of State with the Specific Charges. In addition, the Agency requested that the Forum find Respondent in default pursuant to OAR 839-30-185.

9) As of July 6, 1988, and through the date of hearing, the Forum had not received a responsive pleading from Respondent as required by OAR 839-30-060.

10) On July 7, 1988, the Forum issued to Respondent a "Notice of Default," which notified Respondent that its failure to file a responsive pleading within the time required constituted a default to the Specific Charges, pursuant to OAR 839-30-185. The notice advised Respondent that it had 10 days in which to request relief from the default. As of the date of hearing, July 26, 1988, no such request was received by the Forum.

11) Pursuant to OAR 839-30-071, the Agency filed a Summary of the Case, including documents from the Agency's file. On July 19, 1988, the Agency filed a Supplement to its Summary.

12) At the commencement of the hearing, pursuant to ORS 183.415(7), the Agency was 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.

13) During the hearing the Hearings Referee requested and received from the Agency replacement pages for one exhibit. The replacement pages, which were more readable than the original pages, were inserted into the hearing record and the originals were removed.

14) The Forum issued the Proposed Order in this contested case on August 23, 1988. The Proposed Order was mailed to all persons at their last known addresses listed on the face of the certificate of mailing attached thereto. Exceptions, if any, were to be filed by September 2, 1988. No exceptions were received by the Hearings Unit as of September 8, 1988.

FINDINGS OF FACT – THE MERITS

1) At all times material herein, Respondent employed at least six persons in Oregon. Respondent's business was timber falling. Dillard A. Hass was a director of Respondent, as well as its president. Rex Hass, Dillard's son, managed Respondent and supervised employee crews at job sites.

2) Complainant was a worker employed by Respondent on August 6, 1985, as a timber faller. He had previously worked for Respondent during 1983 and 1984.

3) On August 7, 1985, Complainant was injured on-the-job when he was hit by a tree he had cut. His left shoulder was fractured. He reported the injury to his supervisor, Edward Wilson.

4) Complainant made a claim for and received workers' compensation benefits as a result of the on-the-job injury described in Finding of Fact 3, above. Respondent did not dispute the claim. Complainant was paid by Respondent's workers' compensation insurance carrier for 178 days of time lost from work.

5) On November 11, 1985, Timothy Straub, M.D., Complainant's treating physician, fully released Complainant to return to work.

6) Complainant worked one day in November 1985 for Respondent. Due to stiffness in his neck, Complainant did not return to work until December 12, 1985. Complainant worked for 12 or 13 days in December. His last day of work for Respondent was December 31, 1985.

7) Complainant was eager and able to return to work for Respondent after December 31, 1985. Complainant made telephone calls regarding work to Respondent on January 3, 8, 9, 10, 16, 26, and 30, 1986. The telephone call on January 9, was to Ed Wilson, Complainant's supervisor, who knew how to contact Complainant by telephone. All of the remaining calls, with one exception, were to Dillard Hass. Respondent's replies to Complainant's inquiries about available work were that Complainant would have to wait a few days until work was available. On January 6, 1986, Complainant talked with Ralph Welch, an employee of Respondent, who said that Respondent was working on two projects at that time. At no time during times material herein or in 1983 or 1984 did Complainant refuse or turn down work offered by Respondent. At

no time did Respondent tell Complainant that his work was unsatisfactory, or discipline Complainant for his job performance. During the period between January 1 and at least May 23, 1986, Respondent was aware that Complainant was willing and able to return to his former job.

8) During 1985 Respondent employed around 30 workers. During 1986, Respondent recalled 18 workers who had worked for Respondent in 1985. Some of those workers had been laid off during 1985. Respondent recalled no workers in 1986 who had been injured in 1985. In addition, in 1986 Respondent hired 25 workers who had not worked for Respondent during 1985. Complainant was not recalled by Respondent during 1986.

9) Richard Billman was an employee of Respondent during 1982 and 1983. Billman had worked with Complainant on several jobs for Respondent during 1983, when he twisted his ankle on-the-job. As a result of that accident, Billman claimed and received workers' compensation benefits. He was off of work for around three months. He returned to work for Respondent for two days, and was then laid off. He was never recalled to work for Respondent. During an interview with an Agency investigator, Rex Hass described Billman as a "guy who cry babbied around" about his boots after he returned to work from the injury to his ankle. The particular timber cutting job that Billman was working on was not finished when he was laid off. Two new employees were hired by Respondent at the same time that Billman went back to work. They continued to work after Billman was laid off.

10) Respondent was aware of the costs of its workers' compensation insurance, and the effects of Complainant's claim upon that insurance expense, during January 1986. Complainant's claim had "escalated in estimated total cost of (sic) \$13,046." The insurance company's injury and loss analysis, reported for the period material herein, showed that Complainant was paid for 178 days of time lost from the job. None of the four other workers who had made claims were paid for any time lost from the job.

11) Respondent told the Agency's investigator that it knew the requirements of the workers' compensation laws, and that workers should be reinstated to their jobs after injuries.

12) Complainant's wage agreement with Respondent was that he would receive \$120 per day as a timber faller. This was the same rate of pay that other workers, both fallers and buckers, received. The rate of pay increased to \$125 per day during 1986.

13) During the first quarter of 1986, which included the months of January, February, and March, Respondent employed 30 workers, who worked a total of 241 weeks. Respondent's total payroll for the quarter was \$78,820.04. The Agency used two alternative methods for calculating the average amount of wages each employee earned:

a) divide the total payroll for the quarter by the number of workers; thus, each worker earned an average of \$2627.33 during the quarter (\$78,820.04 divided by 30 workers); or

b) calculate the average earnings per week, and multiply that by the

average number of weeks that each worker worked during the quarter; thus, each worker earned an average of \$327.05 per week (\$78,820.04 divided by 241 weeks) and worked an average of eight weeks (241 weeks divided by 30 workers); thus, each worker earned an average of \$2616.40 during the quarter (\$327.05 multiplied by eight weeks). The difference between the two amounts (\$2627.33 and \$2616.40) reached using the alternative methods of calculation is caused by rounding the numbers during the calculations.

14) During the second quarter of 1986, which included the months of April, May, and June, Respondent employed 28 workers, who worked a total of 185 weeks. Respondent's total payroll for the quarter was \$62,646.15. Using the two calculation methods described above in Finding of Fact 13, the average amount of wages each employee earned was:

a) \$2237.36 (\$62,646.15 divided by 28 workers), or

b) \$2234.96 (\$338.63 (\$62,646.15 divided by 185 weeks) multiplied by 6.6 weeks (185 weeks divided by 28 workers)).

The difference between the two amounts is caused, again, by rounding the numbers during the calculations.

15) Between January 1 and June 30, 1986, Complainant was unemployed. During February 1986 he applied for unemployment benefits, which he began to receive in March 1986. Although he contacted timber companies for work, he was offered no employment until around July 1, 1986. Complainant then was hired by

another employer. Complainant did not seek back wages from Respondent for any period after June 30, 1986.

16) Complainant suffered from worry and loss of sleep as a result of the loss of employment with Respondent, and the drop in his income from over \$500 per week to \$137 per week that he received as unemployment compensation.

17) The Forum found the testimony of the Complainant and the other Agency witnesses to be credible. Complainant appeared sincere and straight forward with his answers, and his testimony was corroborated by other testimony and documentation. Although parts of his testimony regarding which days he worked in November and December 1985, were inconsistent, he readily admitted that he had some difficulty with his memory of dates due to the amount of time between when he worked for Respondent and the hearing. The testimony of the other witnesses was consistent and supported by their records.

The only contribution to the record from Respondent was in the form of summaries of interviews between the Agency's investigator, David Munz, and Dillard and Rex Hass. During those interviews, Respondent asserted several reasons for not recalling Complainant to work after January 1, 1986. In summary, those reasons were:

a) there was not sufficient work for Complainant,

b) Respondent could not contact Complainant,

c) Respondent was only recalling its senior employees,

d) Complainant did not want to work, and

e) Complainant had previously refused work at the coast, where Respondent had a current job.

Since Respondent's representatives, Dillard and Rex Hass, made conflicting statements regarding many of the above assertions, and since many of the assertions conflicted with the great weight of credible, sworn testimony and documentary evidence on the record, the Forum accepted Respondent's summarized statements only on points that did not bear directly on the issues in this matter and only where they did not conflict with testimony or other evidence that the Forum found to be credible.

ULTIMATE FINDINGS OF FACTS

1) At all times material herein, Respondent employed six or more persons within the state of Oregon.

2) Complainant was a worker employed by Respondent as a timber faller during times material herein.

3) Complainant was injured while on-the-job and notified Respondent of the injury. He applied for and received benefits in accordance with the Oregon workers' compensation procedures, including payments for substantial time lost from work.

4) Complainant was fully released by his treating physician to return to his former job. Respondent reinstated Complainant to his former job, where Complainant worked for around 13 days before he was terminated by Respondent on December 31, 1985.

5) Following Complainant's termination, Respondent knew that Complainant was willing and able to return

to work. During 1986, Respondent recalled 18 of its workers employed during 1985, and hired 25 new employees. Respondent did not recall in 1986 any of its workers who had been injured in 1985.

6) Richard Billman was employed by Respondent in 1983. He injured his ankle on-the-job, and received workers' compensation benefits. After three months off of work, Respondent reinstated Billman to his former job. He worked two days before he was terminated by Respondent. Other workers, including two workers who were hired when Billman was reinstated, continued to work on the same project where Billman had worked.

7) At times material herein, Respondent knew that Complainant's claim was affecting its workers' compensation insurance rates. Respondent knew of its obligations under the law to reinstate injured workers to their former jobs.

8) Respondent terminated Complainant because he was an injured worker who had utilized the procedures of Oregon's Workers' Compensation Law.

9) Between January 1 and June 30, 1986, Complainant was unemployed. He received unemployment compensation beginning in March 1986. During the first quarter of 1986, each of Respondent's employees earned an average of \$2627.33. During the second quarter of 1986, each of Respondent's employees earned an average of \$2237.36.

10) Complainant suffered sleeplessness and worry due to his

termination by Respondent and the resulting loss of income.

CONCLUSIONS OF LAW

1) At all times material herein, Respondent was an employer subject to the provisions of ORS 659.010 to 659.110 and ORS 659.400 to 659.435.

2) Between August 6, 1985, and December 31, 1985, Complainant was Respondent's "worker," as that term is used in ORS 659.410.

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) The actions, inactions, and knowledge of Dillard Hass and Rex Hass, employees or agents of Respondent, are properly imputed to Respondent.

5) ORS 659.410 provides:

"It is an unlawful employment practice for an employer to discriminate against a worker with respect to hire or tenure or any term or condition of employment because the worker has applied for benefits or invoked or utilized the procedures provided for in ORS 656.001 to 656.794 and 656.802 to 656.807, or of 659.400 to 659.435 or has given testimony under the provisions of such sections."

Respondent violated ORS 659.410.

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 659.400 to

659.435, to perform any act or series of acts reasonably calculated to carry out the purposes of said statutes, to eliminate the effects of an unlawful practice found, and to protect the rights of others similarly situated.

OPINION

Respondent was found in default, pursuant to OAR 839-30-185(1)(a), for failure to file an answer to the Specific Charges. Respondent made no request for relief from default, although the Forum advised Respondent about that option. In addition, Respondent failed to appear at the scheduled hearing, and thus defaulted pursuant to OAR 839-30-185(1)(b).

In default situations, the Agency must present a prima facie case in support of the Specific Charges and to establish damages. ORS 183.415(6).

Prima Facie Case

To present a prima facie case in this matter, the Agency must prove the following four elements:

- (1) The Respondent is a Respondent as defined by statute;
- (2) The Complainant is a member of a protected class;
- (3) The Complainant was harmed by an action of the Respondent;
- (4) The Respondent's action was taken because of the Complainant's membership in the protected class. OAR 839-05-010(1).

The Agency has established a prima facie case. The credible testimony of Agency witnesses together with documentary evidence submitted was accepted and relied upon herein. Regarding the first three elements, the evidence showed that:

(1) Respondent was an employer that employed six or more persons in Oregon (See ORS 659.010(11) and (12), 659.400(1), and OAR 839-06-115).

(2) Complainant was a worker employed by the Respondent (See OAR 839-06-105(4)(a)). He became a member of a protected class as soon as he reported his on-the-job injury to Respondent, and thereby invoked the procedures provided for in the Workers' Compensation Law (See OAR 839-06-105(2)). In addition, Complainant applied for and received benefits provided for in Oregon's Workers' Compensation Law.

(3) Respondent terminated Complainant by never recalling him to work after December 31, 1985, when other workers were recalled and new workers were hired. The termination, which is covered under ORS 659.410 by the word "tenure," harmed Complainant both financially and by causing him to worry and suffer sleeplessness.

Regarding the fourth element, that is, the causal connection between Respondent's action and Complainant's membership in the protected class, both direct and comparative evidence established this element. Credible evidence on the record showed that Complainant worked for Respondent in 1983, 1984, and 1985. He was injured on-the-job in August 1985, and missed work until November 1985. During that time he received benefits from Respondent's workers' compensation insurance company. Once Complainant was fully released by his doctor to return to work, Respondent

reinstated him to his former job for approximately 13 days. Respondent then permanently "laid off" Complainant. He was not recalled to work by Respondent after December 31, 1985, when 18 other workers who had not been injured in 1985 were recalled and 25 new workers were hired. Respondent did not recall any worker who had been injured in 1985. Respondent was aware that Complainant wanted to work. Complainant called Respondent seven times in January about work. Respondent was also aware during January 1986 of the effect of Complainant's workers' compensation claim upon Respondent's workers' compensation insurance rates. There was evidence that Respondent treated another worker, Billman, who was a member of Complainant's protected class, like it treated Complainant. Billman was reinstated by Respondent to his job for two days following an on-the-job injury and substantial time lost from work. He had filed a workers' compensation claim. After Billman worked for the two days, Respondent terminated him and kept other employees, including new employees, on the job. All of these facts show that Respondent treated Complainant differently than other workers who were not members of his protected class, and permit a reasonable inference that Respondent terminated Complainant because of his membership in the protected class.

Although Respondent submitted no evidence for the record, the Agency's documents and testimony reveal that Respondent suggested several non-discriminatory reasons for its termination of Complainant. See Finding of

Fact – The Merits, number 17. The Agency determined that those reasons were not credible and were a pretext for discrimination; accordingly, the Agency issued its Administrative Determination finding substantial evidence of an unlawful employment practice under ORS 659.410. Likewise, this Forum found Respondent's stated reasons not credible. The credible evidence on the whole record was sufficient to persuade the Forum that Respondent terminated Complainant because of his membership in the protected class.

Damages

The evidence showed that few of Respondent's employees worked every week during either the first or the second quarter of 1986. Thus, Complainant's lost wages had to be estimated by calculating the average wages earned by other employees during each quarter. As noted in the Findings of Facts, the Agency computed Complainant's back wages in two alternative ways. The Forum accepted the first way, that is, to divide the total payroll for the quarter by the number of workers to determine the average wages earned by each worker. That method did not require rounding several numbers during the calculation, and therefore produced a truer estimate of Complainant's lost wages. Following that method, Complainant's lost wages during the period of January 1 through June 30, 1986, equaled \$4864.69 (\$2627.33 from the first quarter, plus \$2237.36 from the second quarter).

This Forum has long held that unemployment benefits received by a successful complainant in an

employment discrimination case are not offsets against a back pay award. See *In the Matter of Metco Manufacturing, Inc.*, 7 BOLI 55, 67 (1987), and the cases cited therein.

ORDER

NOW, THEREFORE, as authorized by ORS 659.060(3) and 659.010(2), and in order to eliminate the effects of the unlawful practice found, 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 VERNON E. SUMMERS, in the amount of:

a. FOUR THOUSAND EIGHT HUNDRED SIXTY FOUR DOLLARS AND SIXTY NINE CENTS (\$4864.69), representing wages Complainant lost as a result of Respondent's unlawful practice found herein; PLUS,

b. ONE THOUSAND ONE HUNDRED TWENTY TWO DOLLARS AND SIXTY NINE CENTS (\$1122.69), representing interest on the lost wages at the annual rate of nine percent accrued between April 1, 1986, and September 30, 1988, computed and compounded annually; PLUS,

c. Interest on the foregoing, at the legal rate, accrued between October 1, 1988, and the date Respondent complies herewith, to be computed and compounded annually; PLUS,

d. TWO THOUSAND DOLLARS (\$2000.00), representing compensatory damages for the mental distress Complainant suffered as a result of Respondent's unlawful practice found herein; PLUS,

e. Interest on the compensatory damages for mental distress, at the legal rate, accrued between the date of this Final Order and the date Respondent complies herewith, to be computed and compounded annually.

2) Cease and desist from discriminating against any worker who applies for benefits under, gives testimony in connection with, invokes, or uses the Oregon workers' compensation procedures or who gives testimony in connection with or uses the civil rights procedures provided in ORS 659.410 to 659.435.

3) Post in a conspicuous place at each of the premises of Respondent's offices and all worksites a copy of ORS 659.410, together with a notice that anyone who believes that he or she has been discriminated against may notify the Oregon Bureau of Labor and Industries.

4) Adopt a non-discriminatory policy and practice regarding layoff and recall procedures and workers' rights. The content of such policy is to be pre-approved by the Civil Rights Division of the Oregon Bureau of Labor and Industries.

In the Matter of PORTLAND GENERAL ELECTRIC COMPANY, Respondent.

Case Number 03-89
Final Order of the Commissioner
Mary Wendy Roberts
Issued December 28, 1988.

SYNOPSIS

Respondent violated ORS 659.360 (1) by denying Complainant the use of his accrued sick leave during his parental leave. The plain language and the legislative history of ORS 659.360 (3) reveal that an employee is entitled to "utilize any accrued vacation leave, sick leave or other compensatory leave, paid or unpaid, during parental leave." That entitlement is not governed by any agreement between the employer or employee, by collective bargaining agreement, or by employer policy. The Commissioner awarded Complainant back pay equal to the value of the accrued sick leave pay Respondent should have paid under the parental leave statute, plus mental suffering damages, and ordered Respondent to deduct from Complainant's accrued sick leave the number of hours paid. ORS 659.360, 659.365; OAR 839-07-805, 839-07-850, 839-07-865, 839-07-875.

The above-entitled contested case came on regularly for hearing before Warner W. Gregg, 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 August 30, 1988, in Room 311 of the State Office Building, 1400 S.W. 5th Avenue, Portland, Oregon. Linda Lohr, Case Presenter for the Civil Rights Division of the Bureau of Labor and Industries (hereinafter the Agency), presented a Summary of the Case for the Agency, argued Agency policy at and after the hearing, and examined the witness. Mary Ellen Eckhardt, Attorney at Law, represented the Portland General Electric Company (hereinafter the Respondent), filed a Summary of the Case for the Respondent, cross-examined the witness, and filed a post-hearing brief at the Hearings Referee's request. Joseph E. Clague (hereinafter the Complainant) was present throughout the hearing.

The Agency called the Complainant as a witness. Pursuant to the ruling of the Hearings Referee, the Respondent presented affidavit evidence regarding the Respondent's personnel policy and a collective bargaining agreement to which the Complainant's union and the Respondent were parties at times material.

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

FINDINGS OF FACT -- PROCEDURAL

1) On April 1, 1988, Complainant filed a verified complaint with the Civil Rights Division (CRD) of the Agency alleging that he was the victim of an unlawful employment practice of the

Respondent. Complainant accused the Respondent of denying him the use of accrued sick leave to which he was entitled during a parental leave

2) After investigation and review, the CRD issued an Administrative Determination finding substantial evidence supporting the allegations of the complaint that the Respondent was in violation of ORS 659.360.

3) The Administrative Determination further found that "Respondent's interpretation and application of OAR 839-07-805(2) is punitive in effect and contrary to the purpose and intent of the statute and administrative rules. Respondent has articulated a specific intent not to comply with the provisions of ORS 659.360(3) and its applicable rules."

4) Pursuant to ORS 659.060(1), it was found that the interest of justice required a hearing without first proceeding by conference, conciliation, and persuasion, and on July 13, 1988, the Agency prepared and duly served on the Respondent the Specific Charges herein, together with written notice of the time and place of such hearing.

5) Said Specific Charges alleged that the Respondent had denied Complainant use of accrued sick leave to which he was entitled in connection with a period of parental leave, in violation of ORS 659.360(1)(a) and (3).

6) Served with the Specific Charges on the Respondent were the following: a) a Notice of Hearing setting forth the time and place of the hearing in this matter; b) a 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 regarding the contested case process; and d) a separate copy of the specific administrative rule regarding responsive pleadings.

7) On July 21, 1988, the Hearings Referee received a telephone inquiry from counsel for the Respondent regarding the possibility of an extension of time for answer to the Specific Charges, based upon the expected issuance of an Attorney General's opinion concerning the Agency's administrative rules on Parental Leave (OAR 839-07-800 to 839-07-875), which counsel stated might resolve the within proceeding. The Referee expressed reluctance to grant an extension *ex parte*, based upon the Agency's Hearings Rules (OAR 839-30-000 to 839-30-200), particularly those regarding responsive pleadings and timeliness, and upon the unknown timing, content, and effect of the pending opinion. Counsel was either to file a timely response or to consult with the Agency regarding any delay.

8) On July 25, 1988, the Respondent filed a Motion to Dismiss the Agency's charging document on the ground that it failed to state a claim upon which relief could be granted.

9) On July 27, 1988, the Hearings Referee denied the Motion to Dismiss and allowed the Respondent until August 3, 1988, to respond to the charging document.

10) On August 3, 1988, the Respondent filed its answer to the Specific Charges in which Respondent admitted certain allegations therein and denied that any unlawful employment practice had occurred.

11) Pursuant to OAR 839-30-071, on August 22, 1988, both the Agency and the Respondent timely filed a Summary of the Case.

12) A pre-hearing conference was held on August 26, 1988, at which time the Agency and the Respondent stipulated to certain facts alleged or admitted by the pleadings. Those facts, in written form, were admitted into the record by the Hearings Referee during the course of the hearing.

13) It was also proposed at the pre-hearing conference that the Respondent could introduce, in certificate form, a current copy of the collective bargaining agreement between Complainant's union and the Respondent, as well as a current copy of the Respondent's leave policy for employees in Complainant's job category. They were received and are part of the record herein.

14) At the commencement of the hearing, the Respondent's counsel stated that she had read the Notice of Contested Case Rights and Procedures and had no questions about it.

15) Pursuant to ORS 183.415(7), the Agency and the Respondent were orally 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.

16) Included among those procedures, as agreed at the pre-hearing conference, were the provisions that the participants could present oral argument at the close of evidence and that the Referee would allow through September 22, 1988, for the filing of written briefs.

17) The Hearings Referee also advised the participants of his involvement, in a prior job assignment, with the development, promulgation, and publication of OAR 839-07-800 to 839-07-875.

18) At the commencement of the hearing, the Hearings Referee took official notice of the Oregon Attorney General's Opinion No. 8195 concerning the Oregon Parental Leave Statute (ORS 659.360 to 659.370) and the administrative rules (OAR 839-07-800, *et seq*) adopted to implement it. The Opinion was issued August 18, 1988, during the pendency of this proceeding.

19) Following the hearing, prior to the issuance of the Proposed Order, the Hearings Referee took official notice of the written legislative history of House Bill 2321, 1987 Legislative Session, as amended, which became Or Laws 1987, c. 319, and which was codified as ORS 659.360 to 659.370. With notice to the participants as provided by the Forum's rules, this legislative history was admitted as administrative exhibits as follows:

Exhibit X-15: House Labor Committee minutes, HB 2321, February 20, 1987, with exhibits A through K, and March 18, 1987, with exhibits A through M (re-paged for reference by the Hearings Referee);

Exhibit X-16: Senate Labor Committee minutes, HB 2321, April 28, 1987, with exhibits A through L (exhibit C being not relevant); April 30, 1987, with exhibits K through P; May 5, 1987, with exhibits G through I; and exhibit A of May 12, 1987, (re-paged for

reference by the Hearings Referee);

Exhibit X-17: HB 2321, from original through House Amendments with House Staff Measure Analysis, House Action, and Senate Amendments with Senate Staff Measure Analysis, and Senate Action (re-paged for reference by the Hearings Referee).

20) On November 18, 1988, a Proposed Order in this matter was issued and mailed to all persons listed on the face of the certificate of mailing at their last known addressee. Included in the Proposed Order was an Exceptions Notice that allowed ten (10) days for the filing of exceptions. Thereafter, and in a timely manner, the Respondent requested and was granted an extension for filing exceptions, to be received by and/or postmarked by December 5, 1988, due to the intervening Thanksgiving Holiday, in order to be accepted. Exceptions were received from the Respondent in a timely manner, and are dealt with in Finding of Fact -- Procedural 12 and in the Opinion section of this Order.

FINDINGS OF FACT -- THE MERITS

1) The Respondent was an Oregon corporation with a work force of 25 or more permanent employees in Oregon at all times material.

2) The Complainant has been employed by the Respondent since January 2, 1979.

3) The Complainant was employed as a Service Inspector, and was a member of Local 125, International Brotherhood of Electrical Workers (IBEW).

4) The Complainant's wife, the other parent of the child anticipated to be born in late May 1988, was employed part-time outside the home with a property management firm.

5) In March 1988, the Complainant was anticipating the birth of his child in late May 1988.

6) On March 9, 1988, the Complainant, in writing, requested parental leave pursuant to ORS 659.360 for the period May 23, 1988, through August 12, 1988.

7) The period of May 23, 1988, to August 12, 1988, is a period of time commencing with the anticipated date of birth of Complainant's child and ending with the date the child would attain the age of 12 weeks.

8) The Complainant's request included the use of accrued sick leave benefits for the portion of the parental leave from June 6, 1988, through August 12, 1988.

9) The Complainant's request specifically asked to use two weeks accrued vacation, three days of accrued sick leave for elective surgery, and nine weeks and two days of accrued sick leave as parental leave, for a total parental leave period of twelve (12) weeks.

10) On March 19, 1988, the Respondent denied the Complainant's request to utilize his accrued sick leave benefits as part of the parental leave, stating that the Complainant's request "to use the sick benefit plan for parental leave is not in accordance with the terms of the labor agreement."

11) As a result, the Complainant thereafter submitted an amended written request for parental leave, asking

to use two weeks accrued vacation, three days of accrued sick leave for elective surgery, and seven weeks and two days as unpaid leave, for a total parental leave period of ten (10) weeks, which was two weeks less than his original request.

12) The Respondent granted the Complainant's amended request; the leave he actually took from on or about May 23, 1988, to July 27, 1988, consisted of two weeks vacation leave (paid), three days sick leave for elective surgery (paid), and seven weeks and two days unpaid parental leave.

13) The Collective Bargaining Agreement between the Respondent and IBEW that was in effect at times material provided (in part):

"3. SEPARABILITY

"3.1 If any part of this Agreement is, or is hereafter found to be, in contravention of the laws or regulations of the United States or of any state having jurisdiction, such part shall be superseded by the appropriate provisions of such law or regulation so long as the same is in effect, but all other provisions of this Agreement shall continue in full force and effect. Upon any such determination being made, the Company and the Union will promptly negotiate and endeavor to reach an agreement upon a suitable substitute therefore.

"12. SICK BENEFIT PLAN

"12.1 COST OF PLAN. The entire cost of the Portland General Electric Company sick benefit plan shall be borne by the Company.

"12.2 DEFINITION OF SICKNESS. Any sickness which prevents an employee from performing any work for pay is considered as sickness under this plan. A non-occupational accident which prevents an employee from performing any work for pay is also considered as being sickness under this plan.

"12.3 ELIGIBILITY OF EMPLOYEES. All Regular, Probationary, or Temporary Employees covered by this Agreement who have completed six (6) months' service with the Company within one (1) year of their being employed shall become eligible for benefits on the first (1st) day of the month after the completion of such six (6) months' service.

"12.6 NOTICE AND EVIDENCE OF DISABILITY * * * If the employee is off work for more than three (3) consecutive working days because of any illness or a non-occupational injury, in order to receive benefits under this plan he shall be required to submit evidence of his disability from a regularly licensed physician * * *

"12.8 RATE OF BENEFITS. The benefits allowed to the employee shall be computed at the employee's regular straight-time rate of pay * * *

"12.9 AMOUNT OF BENEFITS. Upon becoming eligible for benefits under Section 12.3, an employee shall be entitled to accrue sick leave at the rate of one day for

each month commencing with the first day of employment. All of any current year's benefits unused in that year shall be carried forward at the end of such year, to be added to any accumulated prior benefits."

14) The Respondent's Corporate Management Document (CMD-302-3) on Sick Benefits, which was in effect at all times material, provided (in part):

"SICK BENEFITS

"PRACTICE The Company pays eligible employees their regular rate of pay when they are sick or have routine medical or dental examinations to ease difficulties due to illness or health maintenance. Employees may not use sick time for any other purpose * * *. The Company reserves the right to require a physician's examination to verify an employee's use of sick time * * *.

"ELIGIBILITY * * * Bargaining unit employees are eligible for sick time in accordance with the terms of the agreement * * *."

15) Under the IBEW Agreement and the Respondent's policy, the Complainant had accrued 519.5 hours of available sick leave time at the rate of \$15.59 per hour on March 9, 1988.

16) The Complainant's initial response to the Respondent's denial of his request to use nine weeks and two days of his accrued sick leave for parental leave was

"anger - there was a lot of anger and frustration, a lot of anxiety or fear - reluctance to butt heads with my employer."

17) The Complainant, at the time of the expected birth of his second child (approximately 1986), had asked the Respondent for accrued vacation time of two weeks plus an unpaid leave to be with his family.

18) At the time, the Respondent denied the Complainant's request for the reason that it was not company policy to grant parental leave.

19) When Oregon's parental leave law was passed, the Complainant was delighted and "jumped on it right away."

20) The Complainant was present in the delivery room at Woodland Park Hospital, Portland, during the birth of his first child in 1984, and had participated in Lamaze childbirth coaching classes.

21) In 1986, the Complainant again participated in Lamaze classes. His second child was born in a birthing home, where he assisted the midwife.

22) At the birth of his child born in late May 1988, under the supervision of the midwife, the Complainant caught the baby, cut the umbilical cord, and cleaned and weighed the baby.

23) During his leave from May 23, to late July 1988, the Complainant shared the care of the newborn as well as that of his other two children; he cared for all three while his wife took a three day trip away from home.

24) The Complainant has actively participated in the care of his children and has read books on parenting; he is familiar with the concept of bonding.

25) The Complainant would have taken some parental leave whether or not all or a portion were paid, but he believed he was entitled to use his

accrued leave with pay under the statute.

26) The Complainant and his wife used an income tax refund, a cash prize won by his wife on "On The Spot," a quiz show, and savings to offset the unpaid leave.

27) The Complainant had expected some negative financial effect from an unpaid leave, but found that the financial outflow had a drastic effect, much more than anticipated.

28) The Complainant and his wife fought much more than usual as a result of the financial tension, and not merely because there was another child in the family.

29) The Complainant's "usually loving, melodic" family life was disrupted by tension caused by the money going faster than planned; the leave period was "very tense at the end."

30) Both at the time of his parental leave request and following his return to work in late July, Complainant suffered extreme nervousness, loss of sleep, and lost appetite, and experienced a feeling of being outcast and isolated as a result of his perception of the attitudes of some co-workers.

31) Some of the Complainant's co-workers gave him "a hard time". In his perception, they believed that he should not take parental leave at all, that it was not proper for the father to stay home, nor for the Complainant to fight the company decision by filing a complaint. The Complainant was made quite nervous by the hearing itself.

32) The Complainant did not consult a physician, a counselor, or a minister regarding his discomfort.

33) Following the unpaid leave and his return to work on July 27, 1988, the Complainant received his first full paycheck on August 26, 1988.

34) The economic value of nine weeks and two days of sick leave in Complainant's pay grade at times material was \$5,861.84, representing 47 days, at eight hours per day, at \$15.59 per hour.

35) The Complainant was forthright and responsive while testifying and was found to be entirely credible.

ULTIMATE FINDINGS OF FACT

1) The Complainant had been employed for over 90 days as a Service Inspector by the Respondent, an employer with over 25 employees on or about March 9, 1988, and was a member of Local 125, IBEW.

2) The Complainant and his wife were anticipating the birth of a child in late May 1988.

3) On March 9, 1988, the Complainant, in writing, requested parental leave pursuant to ORS 659.360 for the period May 23, 1988, through August 12, 1988, a period of time commencing with the anticipated date of birth of the child and ending with the date the child would attain the age of 12 weeks.

4) The Complainant's request included the use of accrued sick leave benefits for the portion of the parental

leave from June 6, 1988, through August 12, 1988.

5) By the terms of the Collective Bargaining Agreement between the Respondent and IBEW, as well as by the Respondent's personnel policy, Complainant was entitled as a member of the bargaining unit to 12 days paid sick leave per year, and could accumulate days not utilized from year to year; the Complainant had accumulated almost 13 weeks paid sick leave.

6) By the terms of the Collective Bargaining Agreement between the Respondent and IBEW, as well as by the Respondent's personnel policy, Complainant, as a member of the bargaining unit, in order to collect sick leave benefits, had to certify by way of a physician's statement any disability absence of over three days.

7) On March 19, 1988, the Respondent denied the Complainant's request to utilize his accrued sick leave benefits as part of the parental leave, stating that the Complainant's request "to use the sick benefit plan for parental leave is not in accordance with the terms of the labor agreement."

8) The Complainant's original request asked to use two weeks accrued vacation, three days of accrued sick leave for elective surgery, and nine weeks and two days of accrued sick leave as parental leave. Following the

denial of that request, an amended written request was granted by the Respondent.

9) The Complainant experienced anger and frustration, as well as fear and anxiety, as a result of the denial of the use of paid sick leave for parental leave; he suffered further anxiety, tension and discomfort because of the financial hardship occasioned by the unpaid portion of the leave.

10) Pursuant to his amended request, the leave the Complainant actually took from on or about May 23, 1988, to July 27, 1988, consisted of two weeks vacation leave (paid), three days sick leave for elective surgery (paid), and seven weeks and two days unpaid; Complainant reduced his leave request by two weeks out of concern for the financial burden of the unpaid leave.

11) In about 1986, at the time of the expected birth of Complainant's second child, the Respondent denied the Complainant's request for accrued vacation time of two weeks plus an unpaid leave to be with his family because it was not company policy to grant parental leave.

12) When Oregon's parental leave law was passed, the Complainant was delighted and "jumped on it right away." He believed he was entitled to use his accrued leave with pay under the statute, but he would have taken some parental leave in 1988 whether or not all or a portion were paid.

13) The Complainant was present in the hospital delivery room during the birth of his first child in 1984, and participated in the delivery of his second child in 1986 and of his third child born

in late May 1988, under the supervision of a midwife.

14) During his leave from May 23 to late July 1988, the Complainant shared the care of the newborn as well as that of his other two children; he cared for all three while his wife took a three day trip away from home.

15) The Complainant actively participated in both the birth and the care of his children, sharing parental duties with his wife, and is a dedicated and concerned parent.

16) During the unpaid portion of his leave in 1988, the Complainant used savings, a quiz show prize, and a tax refund to support his family; he had expected that the absence of a paycheck would cause financial dislocation, and reluctantly reduced his leave request when paid leave was denied, but he actually experienced a drastic effect, characterized by increasing tension over finances through the end of the leave until receipt of his first regular check after his return to work. This adversely affected the quality of the leave.

17) At the time of his parental leave request and following his return to work in late July, Complainant suffered extreme nervousness, loss of sleep, and lost appetite, and experienced a feeling of being outcast and isolated as a result of his perception of the attitudes of some co-workers, who gave him "a hard time," believing that he should not take parental leave at all, that it was not proper for the father to stay home, or for the Complainant to fight the company decision by filing a complaint. The Complainant was made quite nervous by the hearing itself.

* The Complainant testified that his wife was employed part-time at times material. The statute, as well as the Bureau's rules, declares that the employment of the second parent may affect the length of a parent's parental leave. The Respondent has not interposed a defense on this issue, which the Commissioner sees as an affirmative defense and therefore waived. No evidence was offered by either participant nor elicited by the Referee beyond the mere existence of employment. There is no showing from which it could be found that the Complainant would be entitled to less than 12 weeks' total parental leave.

18) The Complainant did not consult a physician, a counselor, or a minister regarding either his discomfort occasioned by the financial stress or that attributable to his co-workers or to this proceeding.

19) Had the Complainant's initial request been granted, he would have expended an additional 47 days (376 hours) of accumulated sick leave for his parental leave, for which he would have been paid \$5,861.84.

20) The Legislative history of ORS 659.360 *et seq* shows that the Legislature dealt with the concept of paid leave use as well as unpaid leave use in connection with parental leave.

CONCLUSIONS OF LAW

1) ORS 659.360 provides, in pertinent part:

"(1) It shall be an unlawful employment practice for an employer to refuse to grant an employee's request for a parental leave of absence for.

"(a) All or part of the time between the birth of that employee's infant and the time the infant reaches 12 weeks of age, ***

"(3) The employee seeking parental leave shall be entitled to utilize any accrued vacation leave, sick leave or other compensatory leave, paid or unpaid, during the parental leave. The employer may require the employee seeking parental leave to utilize any accrued leave during the parental leave unless otherwise provided by an agreement of the employer and the employee, by collective bar-

gaining agreement or by employer policy.

"(4) The employer may require an employee to give the employer written notice at least 30 days in advance of the anticipated date of delivery, ***

"(10) This section is not applicable if.

"(a) The employee was employed by the employer for fewer than 90 days immediately prior to the first day of the parental leave of absence;

"(b) The employee is employed by the employer on a seasonal or temporary basis for a period of time defined at the time of hire to be less than six months;

"(c) The employer employs fewer than 25 persons immediately prior to the first day of the leave of absence; ***

OAR 839-07-805 provides, in pertinent part:

"(2) 'Sick leave' means a period of an employee's absence from work, based upon the employee's temporary disability from the employee's regular duties; the term may also refer to the entitlement to or accrual of entitlement to such absence based on temporary disability from the employee's regular duties. Eligibility for sick leave and its accrual are governed by agreement between employer and employee, by a valid collective bargaining agreement, or by the employer's policy.

"(5) 'Parent' means an employee with parental rights and duties as defined by law who is responsible for the care and nurturance of a child, ***

"(7) 'Parental leave of absence' or 'parental leave' means an employee's absence from work, paid or unpaid, allowed under ORS 659.360 and these rules based on the employee's status as a parent ***

OAR 839-07-850 provides, in pertinent part:

"(1) The statute anticipates unpaid parental leave, but gives the employee the right to use accumulated leave of any kind. It also provides that the employer may require the parent to use accumulated leave in accordance with a bargaining agreement or established policy. Use of leave is subject to OAR 839-07-865 ***

OAR 839-07-865 provides:

"It shall not be a violation of any statute or rule under ORS Chapter 659 for a covered employer to count any period of sick, disability, vacation or other leave taken by either parent during the parental leave period towards the parental leave required by ORS 659.360 and these rules."

In refusing to grant to the Complainant parental leave wherein the Complainant could utilize his accrued paid sick leave during May to August 1988, the Respondent was guilty of an unlawful employment practice in violation of ORS 659.360.

2) ORS 659.365 provides:

"(1) Complaints may be filed by employees with the Commissioner of the Bureau of Labor and Industries. The Commissioner of the Bureau of Labor and Industries shall enforce ORS 659.360 in the manner as provided in ORS 659.010 to 659.110 and 659.121 for the enforcement of other unlawful employment practices.

"(2) Violation of ORS 659.360 subjects the violator to the same civil remedies and penalties as provided in ORS 659.010 to 659.110 and 659.121."

OAR 839-07-875 provides:

"In accordance with ORS 659.365, an individual who claims a violation of ORS 659.360 or these rules may file a complaint with the Civil Rights Division."

See OAR 839-03-025 - Filing a Complaint.

Under ORS 659.060(3) and 659.010(2), the Commissioner of the Bureau of Labor and Industries may determine the remedy for any unlawful employment practice found to have been committed by the Respondent.

OPINION

The Agency takes the position that its administrative rules merely reflect the plain language of the statute in regard to the use of accrued sick leave as part of parental leave. The Agency asserts that the definition of sick leave in the rules describes the type of leave accrued, but does not limit or define its use. The Agency further asserts that the intent of the unambiguous language of subsection (3) of ORS 659.360 is restated in OAR 839-07-850, and gives the employee-

parent the right to use accumulated leave of any kind during the parental leave.

The Respondent argues that parental leave, as envisioned by the Legislative Assembly, was to be unpaid. In support of this, counsel cites the remarks of Representative Kopetski, who introduced and carried the bill in the House of Representatives, and the language in subsection (6) of ORS 659.360. It is the Respondent's position that the refusal to grant to Complainant the use of paid sick leave for the portion of his parental leave during which he would not be disabled by illness or injury was not unlawful, in that it did not violate ORS 659.360. The Respondent argues that, having defined the parameters of sick leave in its administrative rules, the Agency misinterpreted its own rules in alleging that failure to grant paid sick leave for use as parental leave is an unlawful employment practice. The Respondent relies on the various references in ORS 659.360 to the language in connection with collective bargaining agreements, particularly the language in subsections (3) and (6), as an indication of the legislative intent that the use of sick leave be governed solely by collective bargaining where such an agreement exists. Finally, the Respondent cites Attorney General Opinion No. 8195 as supporting the Respondent's argument.

The Commissioner concludes that the Agency's interpretation is correct.

In its original House version, which passed the House and went to the Senate for consideration, HB 2321 was initially a maternity leave bill. Quite naturally, it made provision for

the use of sick leave by the mother. Failure to do so would have put the enactment in conflict with existing statutes (see ORS 659.029 and 659.030) and with this Forum's rulings under ORS 659.030: *In the Matter of Polk County ESD*, 1 BOLI 280 (1980); *In the Matter of School District Union High 7J*, 1 BOLI 163 (1979); as well as that of the Oregon Supreme Court, *School Dist. No. 1 v. Nilsen*, 269 Or 461, 534 P2d 1135 (1975). This Forum has previously enunciated its standard for determining legislative intent, which is to read the statute in connection with all statutes relating to the same subject matter and to give effect to every word, phrase, sentence, and section of all statutes where possible. *In the Matter of Mini-Mart Food Stores, Inc.*, 3 BOLI 262 (1983).

While still in the House (and still referring only to the female parent), the language regarding unpaid leave was amended from:

"(2) The leave required by subsection (1) of this Act may be unpaid leave or any other leave the employer and employee agree upon or any leave specified or allowed by any collective bargaining agreement."

to (deletions bracketed, insertions underlined):

"(2) The leave, with preference given to accumulated sick leave and vacation leave, required by subsection (1) of this [Act] section may be paid or unpaid leave or any other leave the employer and employee agree upon or any leave specified or allowed by any collective bargaining agreement."

The same amendment adds:

"(7) This section applies to a male employee who is the parent of a newly born infant and is the husband of a woman who is the parent of a newly born infant if the mother dies or is incapacitated by the birth."

HB 2321 passed out of the House and was described as follows in its Summary:

"Specifies grounds for mandatory parental leave for female parents and certain male parents. Takes effect January 1, 1988."

The Senate Labor Committee, to which HB 2321 was referred, substantially revised the operative portion, Section 2, making it applicable to either parent, not just a female parent or a male parent where the mother dies or is incapacitated. The Senate Committee changed the language regarding leave by adding a new subsection:

"(2) The employee seeking leave shall be entitled to utilize any accrued vacation leave, sick leave or other compensatory leave, paid or unpaid, during the leave. The employer may require the employee seeking leave to utilize any such accrued leave during the leave unless otherwise provided by an agreement of the employer [and] the employee, by collective bargaining agreement or by employer policy."

The Committee substantially revised the original subsection (2) (deletions bracketed):

"(4) [(2)] The leave [, with preference given to accumulated sick leave and vacation leave.] required

by subsection (1) of this section [may be paid or unpaid leave or any other leave the employer and employee agree upon or any leave specified or allowed by any collective bargaining agreement.] is not required to be granted with pay unless so specified by agreement of the employer and the employee, by collective bargaining agreement or by employer policy."

With minor changes, subsections (2) and (4) were passed by the Senate and re-passed by the House. They are now codified as subsections (3) and (6), respectively, of ORS 659.360. The fact that the present subsection (3) survived several amendments and the votes of both houses should lay to rest the suggestion that there was an inadvertent failure to connect the two sentences of the subsection. In addition to the changes in these subsections, and the major extension of coverage from the female parent to either parent, other substantial changes of HB 2321 included revision of the employers to whom the Act applied (i.e., from 15 to 25 employees), definitions of the categories of employees not eligible, and detailed notice provisions from employee to employer. It cannot be said that HB 2321, as it passed, was the same legislation about which Representative Kopetski commented on February 20, 1988, to the effect that

"most parents will not be able to afford to take 12 weeks off, but [he] hopes that they will take as much unpaid leave as possible."

Moreover, comments by individuals following enactment of a statute are of little value. *Thompson v. IDS Life Ins.*

Co., 274 Or 649, 653, 549 P2d 510 (1976); (See also, Frohnmayer, *Of Legislative Intent, The Perils of Legislative Abdication, And The Growth of Administrative and Judicial Power*, 22 Willamette Law Review 219, 225 (Summer, 1986).

The Bureau has previously been instructed by the courts that the Legislature is able to say what it means when it wishes to do so:

"We point out that in the 1973 legislation the legislature demonstrated that it was able to call an unlawful employment practice an unlawful employment practice when it wanted to. See Or. Laws 1973, ch. 660, §§ 7 and 9. It still is. Or. Laws 1979, ch. 813, §§ 3 and 4." Joseph, J., *Corvallis Disposal Co. v. Bureau of Labor and Industries*, 49 Or App 245, 248, 619 P2d 663, 665 n. 3 (1980)

Had the Legislature intended that the statutory benefit be restricted by or "subject to *** restrictions contained in a valid collective bargaining agreement," for instance, it could have said so, as it did quite clearly in ORS 659.415(2) (by amendment),^{*} and in ORS 659.420(3) (in the original enactment).^{**} In each of those statutes, the Legislature has specifically subordinated an employee's statutory rights to a collective bargaining agreement.

Similarly, in each instance in ORS 659.360 where an employer policy, individual employment contract, or collective bargaining agreement is to affect the employer's duty to grant parental leave, the Legislature has

specifically, subsection by subsection, so provided. There are five (5) such instances in four (4) subsections:

1) ORS 659.360 (3): The first sentence declares that the employee has an unqualified right to use ("shall be entitled to utilize"):

"[a]ny accrued vacation leave, sick leave, or other compensatory leave, paid or unpaid, during the parental leave."

The second sentence of subsection (3) then continues:

"The employer may require the employee seeking parental leave to utilize any accrued leave during the parental leave unless otherwise provided by an agreement of the employer and the employee, by collective bargaining agreement or by employer policy."

Subsection (3) does not restrict the employee's right to paid leave, rather it limits the employee's option to choose unpaid leave. This enables the employer to control the length and frequency of absence, and the attendant disruption of the work force, by reducing the likelihood that an employee could be gone for the parental leave period and later utilize accrued leave for an additional absence. If the intent were that the policy, contract, or collective bargaining agreement control the unqualified employee right to use any kind of accrued leave, paid or not, the two sentences would have been combined to that purpose.

2) ORS 659.360(6) provides:

"The parental leave required by subsection (1) of this section is not

required to be granted with pay unless so specified by agreement of the employer and employee, by collective bargaining agreement or by employer policy."

The subsection provides that parental leave need not be paid unless so specified by employer policy, individual contract or collective bargaining agreement. This carries out the theme of the legislation that parental leave, *per se*, is an unpaid leave. It does not affect or delimit any other kind or type of leave or the use thereof in combination with parental leave which the initial sentence of subsection (3) authorizes, and is thus compatible with subsection (3). Subsection (6) merely reserves to the parties the ability to adjust benefits under the agreement in the future.

3) ORS 659.360(8): Allows restoration of the parent returning from parental leave:

"[t]o the former or equivalent job without loss of seniority, vacation credits, sick leave credits, service credits under a pension plan or any other employee benefit or right which had been earned at the time of the leave of absence but reduced by any paid leave that the employee used during the parental leave of absence. Benefits are not required to accrue during the parental leave of absence unless accrual is required under an agreement of the employer and the employee, a collective bargaining agreement or by employer policy." (Emphasis supplied.)

Clearly, the use of paid leave, where such has been accrued, is not prohibited, but rather is anticipated. Accrual of benefits during the leave is

allowed only when such accrual is required by employer policy, individual contract, or collective bargaining agreement. The Agency's rules acknowledge that eligibility for and the accrual of the defined types of leave are governed by employer policy, an individual employment contract, or a collective bargaining agreement. They do not acknowledge that the use of accrued leave by the employee in conjunction with parental leave is so governed. OAR 839-07-805(2).

4) ORS 659.360(8): This subsection continues:

"* * * If the employer's circumstances have so changed that the employee cannot be reinstated to the former or equivalent job, the employee shall be reinstated in any other position which is available and suitable. However, the employer is not required to discharge any employee in order to reinstate the employee to any job other than the former or equivalent job unless required by an agreement of the employer and the employee, by collective bargaining agreement or by employer policy."

A suitable job is not available if it is occupied, unless "bumping" is required by collective bargaining agreement, employer policy, or individual contract.

5) ORS 659.360(11) provides:

"Nothing in this section is intended to reduce the rights to parental leave to which an employee may be entitled under any agreement between the employer and the employee, collective bargaining agreement or employer policy."

* Or Laws 1981, ch 874, § 14.

** Or Laws 1973, ch 660, § 6.

Simply, the statute is not intended to reduce any pre-existing rights to parental leave benefits.

The Legislature carefully limited those situations where an employer policy, individual employment contract, or collective bargaining agreement were to have influence or affect upon parental leave. Such policy, contract, or collective bargaining agreement does not affect the right to parental leave *per se*, the date of commencement of the leave, the length of the leave, the notice requirements regarding requesting leave, the basic eligibility for the leave or the definition of parent, or the right to reinstatement to the pre-leave job (absent change of employer circumstances). It may be assumed that repeated statutory terms have the same meaning throughout a statute. *Knapp v. City of North Bend*, 304 Or 34, 41, 741 P2d 505 (1987), citing *Pense v. McCall*, 243 Or 383, 389, 413 P2d 722 (1966). It is the position of the Commissioner that, in order to give the statute as a whole its intended effect, neither employer policy, individual employment contract, nor collective bargaining agreement govern the employee's statutory entitlement to utilize any accrued leave in conjunction with parental leave.

Although divining legislative intent is an essentially judicial function, the courts give careful consideration to the interpretation of a statute by the agency charged with its enforcement and administration; *Knapp v. City of North Bend*, *supra*; and find agency rules which provide practical interpretations persuasive. *Robinson v. School District No. 1*, 92 Or App 627, 759 P2d 1116 (1988).

ORS 174.010 provides a standard of statutory interpretation which is also binding on this Forum: The adjudicator may neither insert in a statute that which is not included nor eliminate from the text that which is included. Similarly, an administrative agency may not by its rules amend, alter, enlarge, or limit the terms of the statute. *Cook v. Workers Compensation Dept.*, 306 Or 134, 138, 758 P2d 854 (1988), citing *U. of O. Co-Oper. v. Dept. of Revenue*, 273 Or 539, 550, 542 P2d 900 (1975). Accordingly, the Commissioner is unable to ignore the plain language of the statute authorizing the utilization of sick leave by a parent, at the parent's request, during a period of parental leave.

The Respondent excepted to the Proposed Order to the effect that the Referee ignored relevant legislative history which should be explored when, as in this instance, no case law exists. However, the House Labor Committee Hearings minutes and the (House) Staff Measure Analysis address the Act prior to the sweeping Senate Amendments. Moreover, the unspecified "contemporary history" from which the Respondent urges the Commissioner to ascertain legislative intent cannot overcome the plain language of the statute in respect to the utilization of accrued leave. The question of legislative intent should be resolved not by speculation on what the Legislature might have thought it was doing, but rather by the unquestioned evidence of what it actually did.

The Respondent also argues that the Agency has misapplied its own rules in the present case, referring to OAR 839-07-805(2), which defines

"sick leave." The Respondent asserts that by acknowledging the control of employer policy, employment contract, or collective bargaining agreement over the "[e]ligibility for *** and *** accrual" of sick leave, the Agency's rule concedes that sick leave as defined by the Respondent's contract "cannot be used for any purpose other than illness or non-occupational injury, thereby excluding parental leave." This is the core of the Respondent's construction of ORS 659.360(3) as well, a construction which, as discussed *supra*, inexplicably grafts onto the first sentence of the subsection the qualifying language of the second sentence, and which ignores the express reference of that qualifying language to the employer's right to require the use of accrued leave.

The Respondent's interpretation of OAR 839-07-805(2) is similarly bizarre. The crux of the Respondent's argument is that "eligibility" for sick leave under the rule is somehow synonymous with the "use" or, in the words of the statute, the "utilization" of sick leave. ORS 659.360(3) (first sentence). Thus, the Respondent argues in its Motion to Dismiss that

"an employee is only eligible to use sick leave when illness [sic], which prevents the employee from performing his or her job."

This argument fails for at least three reasons.

First, the argument assumes that which it is attempting to prove: namely, that employer policy, employment contract, or collective bargaining agreement may restrict the statutory entitlement to use accrued leave of any kind. As demonstrated above, this

assumption flies in the face of the unambiguous and unqualified declaration of the statute that

"the employee *** shall be entitled to utilize any accrued vacation leave, sick leave or other compensatory leave, paid or unpaid, during the parental leave." ORS 659.360(3).

Second, it should go without saying that "eligibility" and "use" or "utilization" are entirely different concepts; they are words with clearly distinct meanings. The Respondent's equation of these concepts is logically absurd, and would result in nonsensical interpretations of its own agreement. How, for example, would sick leave be accrued under the agreement if eligibility for sick leave is equivalent to its use?

Third, the Respondent's own collective bargaining agreement and written policies distinguish the terms "eligible," "accrue" and "use." All three are used, for example, in obviously different ways in the same paragraph that is Section 12.9 of the agreement:

"12.9 AMOUNT OF BENEFITS Upon becoming eligible for benefits under Section 12.3, an employee shall be entitled to accrue sick leave at the rate of one day for each month commencing with the first day of employment. All of any current year's benefits unused in that year shall be carried forward at the end of such year, to be added to any accumulated prior benefits." (Emphasis supplied.)

OAR 839-07-805(2) anticipates the common use in employment agreements of benefit eligibility requirements and accrual formulas. The

Respondent's Section 12.3, for example, is typical of such contract terms. The effect of the rule is to leave these terms undisturbed, and it is intended to assure employers of both continuity and flexibility in the structuring of employee benefit plans. The manifest purpose of the rule is clearly not, as the Respondent would have it, to undo what the Legislature has done and to deny to employees by private agreement or policy the unqualified statutory right to utilize "any accrued * * * sick leave". ORS 659.360(3).

The Commissioner is charged with enforcing the state's unlawful employment practice laws, and with interpreting them in the first instance. This duty brings with it the authority to make rules under such enactments. ORS 651.060 provides, in pertinent part:

"(4) In accordance with any applicable provisions of ORS 183.310 to 183.550, the Commissioner of the Bureau of Labor and Industries may adopt such reasonable rules as may be necessary to administer and enforce any statutes over which the commissioner or the Bureau of Labor and Industries has jurisdiction."

The Respondent excepted to the distinction in the Proposed Order between legal interpretation and policy interpretation, citing ORS 180.060(2), and implied that the Commissioner is bound by the Attorney General's opinion, citing 31 Op Atty Gen'l 271. However, that same opinion concedes that

"[l]egal opinions of the Attorney General are only advisory" and that "a state officer may not be required to heed * * * the legal advice of the Attorney General * * *." *Id.* at 271-72.

The undisputed advisory nature of the Attorney General's opinion makes it unnecessary to embark on a delineation of legal and policy spheres of authority in order to decide this case, and no portion of this Order is dependent on such delineation. Suffice to say, the Commissioner cannot accept the reasoning of the Attorney General's opinion regarding the parental leave law. To the extent that the statute poses genuine issues of interpretation, they are matters left by the Legislature in the first instance to the rulemaking and decisional authority of the Commissioner. In the final analysis, of course, it is the judiciary which must eventually pass on the validity of the Commissioner's rules and action.

The Complainant testified convincingly regarding his parental experience and interest. The Forum has no doubt of Complainant's dedication to his family or of his commitment as a parent. His uncontroverted statements illustrate a deep and ongoing concern about the family, and make his upset relative to the financial tension of the unpaid leave both credible and understandable.

Respondent excepted to certain factual findings in the Proposed Order, viz, Findings of Fact – The Merits 17, 19, and 20 through 24, and Ultimate

* "The Attorney General shall give opinion in writing, when requested, upon any question of law in which the State of Oregon or any public subdivision thereof may have an interest, submitted to the Attorney General by the Governor, any officer, department, agency, board or commission of the state or any member of the legislature."

Findings of Fact 11, and 13 through 15, as being irrelevant both to the statutory interpretation and to the issue of any mental suffering incurred by the Complainant. The cited Findings deal with Complainant's history as a parent, and serve to illustrate this Complainant's parental dedication and concern, and to provide an understanding of his evaluation of the parental leave opportunity and his reaction to Respondent's limitation of it. Employment decisions do not occur in a vacuum, and respondent employers must take complainants as they find them.

The Complainant was most honest in describing and differentiating to the Forum's satisfaction the two stressors to which he reacted:

1) The attitude of co-workers about the concept of a father using parental leave, and opposing the wishes of the employer to the extent of actually filing a complaint, combined with the turmoil and isolation of attempting to enforce a statutory grievance through government, and

2) The anger, frustration, and anxiety attributable to the denial of use of accrued sick leave, marked by the necessary reduction in the length of time requested and the attendant increasing economic tension once the unpaid portion of the leave started.

The first of these stressors is not compensable, in that the co-workers were not acting as the Respondent's agents in their criticism, and the discomfort of litigating the issue is shared by all complainants. *School Dist. No. 1 v. Nilsen, supra.*

The second cause of distress to Complainant is attributable to the

Respondent's denial of the use of sick leave in connection with parental leave, and is identifiable both as to its timing and its nature, and is accordingly a quantifiable effect of the unlawful practice found. The Commissioner is authorized to eliminate such an effect.

The Respondent argues that mere economic distress is not sufficient to support an award for mental anguish and distress. This Forum has previously held otherwise, basing a mental suffering award on stress caused by inability to economically support the household, forcing a pregnant wife to work longer than planned and thereby causing medical problems, by inability to afford heating oil, and by creditors harassing both complainant and his wife, all causing complainant to suffer fear and anxiety. *In the Matter of Spear Beverage Company*, 2 BOLI 240 (1982). Where the Respondent's adverse employment decision is the primary reason for the Complainant's suffering, even though other factors may contribute to the Complainant's discomfort, this Forum may award compensation. *In the Matter of Boost Program*, 3 BOLI 72 (1982).

The Respondent excepted to any award for mental suffering as not being based on substantial evidence, citing Complainant's willingness to take unpaid leave in any event, his lack of counseling or medical treatment, and what to the Respondent seemed like minimal economic disruption. There is, in fact, evidence from which to conclude that the denial of paid leave resulted in a stressful and anxious period economically, as well as a frustrating and disappointing foreshortening of the

leave period, neither of which would have occurred but for that denial. The lack of medical consultation or the failure to seek counseling goes to the severity of the mental suffering, and not necessarily to its existence. Indeed, the Respondent's fourth exception tacitly acknowledges that mental suffering can be based upon economic distress and argues on the basis of its lack of severity in this case rather than its *per se* legal inadequacy.

ORDER

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

1) Deliver to the Business Office at the Portland office of the Bureau of Labor and Industries a certified check payable to JOSEPH E. CLAGUE in the amount of SEVEN THOUSAND EIGHT HUNDRED SIXTY ONE DOLLARS AND EIGHTY-FOUR CENTS (\$7,861.84), PLUS interest on \$5,861.84 thereof, calculated at nine percent per annum from August 26, 1988, until paid, PLUS interest on the remaining \$2,000 from the date of this Order until paid. This award constitutes the value of the nine weeks and two days accrued sick leave that should have been paid to the Complainant under the statute in connection with the requested 12 weeks of parental leave to which the Complainant was entitled, plus compensatory damages in the sum of \$2,000 for the mental anguish and distress caused by the unlawful employment practice of the Respondent in refusing the use of

accrued sick leave in connection with parental leave.

2) Deduct from the Complainant's accrued sick leave, at the time of payment of the above, a total of 376 hours.

3) Cease and desist from refusing to allow employees to utilize accrued leave of any kind, and particularly sick leave, when requested in connection with parental leave for which they otherwise qualify.

**In the Matter of
CENTRAL PACIFIC FREIGHT
LINES, INC.,
an Oregon corporation, Respondent.**

Case Number 08-89
Final Order of the Commissioner
Mary Wendy Roberts
Issued January 13, 1989.

SYNOPSIS

Respondent failed to pay Claimant all wages earned and unpaid at the time he quit, where Claimant gave Respondent more than 48 hours notice of quitting, and where claimant was paid 14 days later on this regular payday, in violation of ORS 652.140(2). The Commissioner held that reimbursable expenses (mileage) were properly included in the wage claim under ORS chapter 652; however, Claimant failed to satisfy Respondent's conditions for being reimbursed, and so no expenses

were reimbursable. State or federal minimum wage laws and regulations do not require employers to keep records regarding reimbursable expenses. Respondent's failure to pay final wages when due was willful, and Claimant was awarded 14 days' penalty wages. ORS 652.140(2), 652.150, 652.320(9), 653.045; FLSA § 11; 29 CFR Part 516.

The above-entitled matter came on regularly for hearing before Douglas A. McKean, designated as Hearings Referee by Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on October 20, 1988, in room 220 of the State Office Building, 165 East Seventh Street, Eugene, Oregon. The Bureau of Labor and Industries (hereinafter the Agency) was represented by Lee Bercot, an employee of the Agency. Richard E. Green (hereinafter Claimant) was present throughout the hearing. Central Pacific Freight Lines, Inc., (hereinafter Employer) was represented by Gary F. Deal, Attorney at Law. Stephen Bellotti, Employer's secretary and controller, was present throughout the hearing.

The Agency called the following witnesses: Claimant; and Robert Von Weller, Compliance Specialist with the Wage and Hour Division of the Agency. Employer called the following witnesses: Diana Schlegel, Employer's president; and Stephen Bellotti.

Having fully considered the entire record in this matter, I, Mary Wendy 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) On July 6, 1987, Claimant filed a wage claim with the Agency. He alleged that he had been employed by Employer and that Employer had failed to pay wages earned and due to him.

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

3) On March 1, 1988, 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 \$97.88 in wages and \$2213.70 in penalty wages. The Order of Determination required that, within 20 days, Employer either pay these sums in trust to the Agency, or request an administrative hearing and submit an answer to the charges.

4) Following an extension of time, Employer filed a timely request for an administrative hearing and an answer to the charges. That answer denied that any wages or penalty wages were due to Claimant.

5) On August 22, 1988, the Agency sent the Forum a request for a hearing date. On that same day, this Forum issued 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, and a copy of the Forum's contested case hearings rules, OAR 839-30-020 to 839-30-200.

6) On August 23, 1988, the Forum sent Employer a letter which, pursuant to OAR 839-30-060, required Employer to submit an amended answer containing a "statement of each relevant defense to the allegations." On September 1, 1988, Employer submitted an amended answer. Again, Employer denied that any wages or penalty wages were due, and alleged that Claimant was hired on a monthly salary of \$1600, payable at \$800 twice per month; Claimant worked flexible hours and was subject to working weekends; Claimant's pay was determined by time of employment; Claimant worked from June 1 to June 12, and was paid \$640, or 12/15 of \$800; and therefore, Claimant was paid all the salary due him.

7) Employer requested a postponement of the hearing. On September 8, 1988, the Forum granted the request. An amended Notice of Hearing was issued to the Employer, the Agency, and the Claimant setting the hearing for October 20, 1988, and re-assigning the case to Hearings Referee Douglas A. McKean.

8) Pursuant to OAR 839-30-071, Employer and the Agency each submitted a Summary of the Case.

9) On October 13, 1987, Agency submitted to the Hearings Unit a motion to amend the Order of Determination to reflect revised calculations of Claimant's earned and unpaid wages,

mileage compensation, and penalty wage calculations. The revisions resulted from the discovery of a mathematical error and the need to add mileage reimbursement. At hearing, Employer consented to the amendment to correct the mathematical error, but objected to the addition of mileage expenses because it would result in surprise and insufficient time to answer the allegation. Employer also asserted that mileage expenses are not wages under the statute. Pursuant to OAR 839-30-075(2), the Hearings Referee listened to arguments on the motion and granted it.

10) During a pre-hearing conference, Employer and the Agency stipulated to certain facts, which were read into the record by the Hearings Referee at the beginning of the hearing.

11) At the commencement of the hearing, Employer's counsel said that he had reviewed the "Notice of Contested Case Rights and Procedures" and had no questions about it.

12) Pursuant to ORS 183.415(7), the Hearings Referee verbally advised the Employer and the Agency of the issues to be addressed, the matters to be proved or disproved, and the procedures governing the conduct of the hearing.

13) The Hearings Referee left the hearing record open until October 28, 1988, to allow Employer and the Agency to submit additional information and evidence. In addition, on October 28, 1987, Employer moved to reopen the record to submit two documents regarding the issue of reimbursement of mileage expenses. The Agency did not oppose the motion and it is hereby granted. All of the

documents submitted by the Agency and Employer were received.

14) On November 15, 1988, the Hearings Referee requested from the Agency a written statement of agency policy regarding prorating a worker's final paycheck. The request was made pursuant to OAR 839-30-175.

15) On November 18, 1988, the Agency submitted a written statement of agency policy.

16) On November 22, 1988, the Hearings Unit of the Bureau of Labor and Industries mailed copies of the Proposed Order in this matter to all persons listed on the certificate of mailing, including the Employer. Participants in this contested case had 10 days to file exceptions to the Proposed Order. No exceptions were received by the Hearings Unit.

FINDINGS OF FACT - THE MERITS

1) During all times material herein, Employer was an Oregon corporation engaged in the trucking business. Employer employed one or more persons in the State of Oregon.

2) Employer hired Claimant on March 1, 1987, as the terminal manager for Employer's terminal in Eugene, Oregon. Claimant's duties included hiring, firing, and supervising employees, coordinating freight distribution, driving trucks and delivering freight, loading and unloading freight, and sales.

3) Claimant was hired by Diana Schlegel, Employer's president. The oral employment agreement between Claimant and Employer included a salary of \$1600 per month; Claimant was paid \$800 (gross wages) twice per month. The pay periods ran from the

first to the fifteenth of the month, and from the sixteenth to the end of the month. The salary was "a flat fee for whatever time was worked," according to Claimant. The salary agreement was intended to compensate Claimant for achieving certain results during his employment. There was no agreement about the number of days per week Claimant was required to work.

4) Claimant's daily hours of work were not fixed. There was no agreed upon total number of hours per week. He chose his own hours, and could take days off at his own discretion. He often worked on Saturdays and Sundays. When he was hired he did not expect to work on weekends very often. During the period of the wage claim, that is from June 1 to June 12, Claimant worked 11 out of 12 days. Claimant agreed to work hours beyond those when the terminal was open. He was subject to being called in at any time, including evenings, nights, and weekends. He was expected to transfer equipment from one terminal to another as needed; such transfer might take place at any time, and quite often happened on weekends. He wore a pager so that he could be summoned to work when he was off work; Claimant testified that "everybody" had his pager number, and they knew it was available 24 hours per day. His salary remained constant regardless of the number of hours or days worked. Employer and Claimant had no agreement regarding prorating Claimant's salary upon his termination from employment.

5) Claimant filled out time cards for each pay period and submitted them to Employer. During the pay period beginning on June 1 and ending on June

15, 1987, Claimant worked Monday, June 1, through Friday, June 5. He did not work Saturday, June 6. He worked Sunday, June 7. He worked Monday, June 8, through Friday, June 12. Claimant worked hours in excess to those shown on his time cards.

6) Pursuant to the employment agreement, Claimant was expected to use his own pickup truck for Employer's business. Employer reimbursed mileage expenses at 18 cents per mile. During the period the employment agreement was being negotiated, Schlegel showed Claimant expense account forms which had to be filled out for reimbursement, and she explained their use. In order to be eligible for the mileage reimbursement, Claimant was required to submit detailed information about the dates, contacts, places, mileage, and business purposes of his trips. This was information that Employer believed was necessary to collect to satisfy Internal Revenue Service (IRS) requirements regarding business expense deductions. Employer had a similar requirement for reimbursement of mileage expenses during 1983, when Claimant had previously worked for Employer.

7) Claimant used his own pickup truck for company business. In his truck he kept a record of his odometer readings. During the entire period of his employment with Employer, Claimant drove 2206 miles on company business. At the end of his first month of employment, March 1987, Claimant submitted to Employer a piece of paper which said "milage (sic) expense for March 388 miles x .20 = \$77.60." Mr. Bellotti sent Claimant a note stating that the information Claimant submitted

was unacceptable for the IRS, and that Claimant needed to list odometer readings, dates, places, and business purposes. Bellotti wrote, "Next time please comply with their requirements." Claimant wrote back that he "figured this would be unacceptable. I was expecting a company form." Bellotti sent Claimant a form that called for the information that IRS required, and he told Claimant to justify the March mileage. Claimant never attempted to fill out the form for his March mileage; nor did he use the form thereafter. Until the time of the contested case hearing, Claimant never made a demand on Employer for any mileage expenses incurred after March 1987.

8) Claimant quit on Friday, June 12, 1987. He gave Employer a written notice of his intent to quit a week earlier. Employer paid Claimant \$640 for the period June 1 to June 15, 1987. Employer prorated Claimant's salary, paying him 12/15 of \$800, because Claimant was employed 12 of the 15 days in the pay period. Employer had used for several years the same method of proration with other employees.

9) Claimant testified that he did not receive his final paycheck on Friday, June 12, or on Monday, June 15, 1987. At one point, Claimant testified that he received the final paycheck sometime during the week following June 12, 1987. Later, Claimant corrected his testimony to state that paydays were always on the 10th and the 26th days of each month. Bellotti confirmed that paydays were on the 10th and 26th of each month. Claimant sent Ms. Schlegel a letter dated June 30, 1987, to complain about the

proration method used to compute the amount of his final paycheck. Mr. Bellotti responded to Claimant's letter on July 1, 1987. Employer's payment of Claimant's final wages after June 12 was done of free will.

10) Civil penalty wages were computed in accordance with agency policy, using an average daily rate method of calculation. Under that method, the total wages earned during the claim period are divided by the number of days worked during the claim period, and that equals the average daily rate of pay during the claim period. That rate of pay is multiplied by the number of days, up to 30, during which the employer failed to pay all wages due pursuant to ORS 652.140. Pursuant to agency policy, civil penalty wages are rounded to the nearest dollar.

ULTIMATE FINDINGS OF FACT

1) During all times material herein, Employer was an Oregon corporation engaged in the trucking business, and employed one or more persons in the State of Oregon.

2) Employer employed Claimant as its terminal manager in Eugene, Oregon.

3) The employment agreement included a salary of \$1600 per month for all hours worked. There was no agreement about how many days per week Claimant was required to work; Claimant was expected to be available as needed, and could take time off when he chose.

4) Claimant was paid \$800 twice per month, over two pay periods. One ran from the 1st to the 15th, and the other ran from the 16th to the end of

the month. Paydays were on the 10th and 26th days of each month.

5) The employment agreement included reimbursement of Claimant's mileage expenses at 18 cents per mile, provided that Claimant first submit detailed records about his trips. Claimant did not submit such records to Employer. Employer did not reimburse Claimant for his mileage expenses.

6) Claimant quit employment with Employer on June 12, 1987. He gave Employer not less than 48 hours' notice, excluding Saturdays, Sundays and holidays, of his intention to quit employment.

7) Employer paid Claimant his final wages on June 26, 1987. Employer calculated Claimant's final wages by figuring that he had been employed for 12 days of a 15 day period, and thus paid him 12/15 of \$800, or \$640.

8) During the period June 1 to June 12, 1987, Claimant earned \$640.00 based upon Employer's proration method.

9) Employer willfully failed to pay Claimant all wages earned and unpaid immediately upon his quitting on June 12, 1987.

10) During the period of his wage claim, Claimant worked 11 days.

11) Claimant's average daily rate for the wage claim period of employment was \$58.18 (\$640 earned divided by 11 days equals \$58.18 average rate per day).

12) Civil penalty wages, computed pursuant to ORS 652.150 and agency policy, equal \$815.00 (Claimant's average daily rate, \$58.18, continuing for 14 days equals \$814.52; rounded to the nearest dollar, it equals \$815.00).

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 jurisdiction over the subject matter and the Employer in this matter.

3) Employer was notified of its 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 652.140(2) provides:

"When any such employee, not having a contract for a definite period, shall quit employment, all wages earned and unpaid at the time of such quitting shall become due and payable immediately if such employee has given not less than 48 hours' notice, excluding Saturdays, Sundays and holidays, of an intention to quit employment."
* * *

Employer violated ORS 652.140(2) by its failure to pay Claimant all wages earned and unpaid at the time he quit on June 12, 1987.

5) ORS 652.150 provides a civil penalty for an employer's willful failure to pay final wages at the termination of an employee's employment. To enforce ORS 652.150, the Commissioner has adopted an average daily rate method for calculating the rate of pay due for each day, up to 30 days, that an employer has failed to pay final wages due. Pursuant to ORS 652.150, Claimant's wages continued

from the date due, which was June 12, 1987, at the same rate until paid, which was June 26, 1987.

6) Under the facts and circumstances of this record, and according to the law applicable to this matter, the Commissioner of the Bureau of Labor and Industries has the authority to order Employer to pay civil penalty wages, plus interest on that sum.

OPINION

Claimant filed a wage claim with the Agency because he felt that Employer had shorted him for three days' pay when Employer paid him 12/15 of his salary for the pay period. When he quit on Friday, June 12, he thought that he was only one working day – Monday – short of completing the pay period on Monday, June 15. He testified that he had not expected to work very often on weekends. He later amended his claim to add reimbursement for mileage expenses.

The evidence on the whole record showed that Claimant's employment agreement with Employer was for \$1600 per month for all hours worked. Claimant knew that the job included weekend work, and he often worked on Saturday and Sunday. Employer stated that Claimant was paid for the time of employment and to achieve results. He was not paid by the hour or day. Evidence on the record, including Claimant's testimony about the employment agreement and his actual work, support Employer's statement.

The amount of Claimant's final wage in this case is controlled by the parties' agreement and not by statute or administrative rule. An employment agreement may include terms reached

by negotiation and by the conduct of the parties. Claimant was hired for an indefinite period to perform certain services at a stipulated compensation per month. That employment agreement was terminated when Claimant quit work, and Employer had no obligation to pay for Claimant's services beyond June 12, 1987. Employer's method of prorating Claimant's final pay – that is to pay Claimant 12/15 of \$800, or \$640 – was a reasonable method consistent with the employment agreement.

Regarding the mileage expense reimbursement, job related reimbursable expenses are properly included in a wage claim under ORS chapter 652. Oregon law provides that the Commissioner of the Bureau of Labor and Industries has authority to enforce wage claims, which are defined in ORS 652.320(9) as

"claim[s] * * * for compensation for the employee's own personal services."

It is the policy of the Bureau of Labor and Industries that unpaid job related expenses can be included in a wage claim if there has been an explicit agreement between the parties that the employer would pay for such expenses, or if the employer does in fact pay other such expenses. *In the Matter of All Season Insulation Company, Inc.*, 2 BOLI 264, 273, 278 (1982).

Reimbursable expenses are governed entirely by the employment agreement. As with fringe benefits, an employer is free to set the terms and conditions of an expense reimbursement, and an employee may accept or reject those conditions. Here, the greater weight of evidence supported

the finding that mileage reimbursement was conditioned on Claimant first submitting required information about his trips on forms supplied by Employer. Claimant failed to satisfy that condition, and thus Employer's obligation to reimburse Claimant did not arise.

The Agency argued at hearing that employers have a statutory obligation to keep records, and Employer's failure to obtain Claimant's mileage records, when Employer knew he was using his own truck on company business, should not insulate Employer from its obligation to reimburse Claimant. Neither the state minimum wage law nor the federal Fair Labor Standards Act, with their accompanying regulations, requires an employer to keep records regarding reimbursable expenses. See ORS 653.045, Fair Labor Standards Act Sec. 11, and 29 CFR Part 516.

The law has imposed upon employers the duty to know the amount of wages due to an employee. *McGinnis v. Keen*, 189 Or 445 (1950); *In the Matter of Jack Coke*, 3 BOLI 238, 242, (1983). Where wages are based on a mileage rate, as with truck drivers, then an employer has a duty to keep track of a driver's mileage in order to properly compensate the driver, and the employer would take payroll deductions from those wages. See, for example, *In the Matter of Ebony Express, Inc.*, 7 BOLI 91, 93 (1988).

In this case, Claimant's wages are not based upon the mileage he drove. Rather, Claimant was required to make trips as a condition of his job, a condition he could accept or reject when offered employment. When he accepted the job, he accepted the

condition that he make some trips. Employer offered to reimburse Claimant's expenses if he first submitted records about his trips. He did not submit the required records, so Employer did not have to reimburse him.

The Agency stated at hearing that it did not include the claimed mileage expenses in Claimant's rate of pay, which it used for purposes calculating a civil penalty. The Forum finds that the correct policy is, as the Agency stated, not to include reimbursable expenses in the wages used to calculate a civil penalty. In this very limited respect, the Forum hereby overrules *In the Matter of Anita's Flowers & Boutique*, 6 BOLI 258, 266-67 (1987).

Employer argued at hearing that the Agency's use of the average daily rate method to calculate civil penalties was inappropriate because by that method the full penalty — Claimant's wages continued for 30 days — would be greater than Claimant's monthly salary. ORS 652.150 requires that the employee's wages continue "at the same rate." Employer argued that Claimant's monthly rate was \$1600, and therefore the civil penalty could not exceed that amount. The Forum has used this method consistently, and finds that it is an appropriate method of determining an employee's rate of pay based on actual earnings. See, for example, *Ebony Express, Inc.*, *supra*, at 94; and *In the Matter of Mary Rock*, 7 BOLI 85, 88 (1988). Although the Forum found that Employer's method of prorating Claimant's final wages was a reasonable and acceptable method consistent with the employment agreement, the average daily rate method is the Commissioner's established

method for determining a claimant's rate of pay when calculating civil penalties. Claimant's average daily rate, based upon his actual earnings during the wage claim period, is the "same rate" for purposes of ORS 652.150 as his agreed rate. A 30 day civil penalty could be more than Claimant's monthly salary because the penalty accrues each day, for no more than 30 consecutive days, while Claimant's employment agreement allowed for, and in fact Claimant took, days off. Such a result does not render the average daily rate method invalid. This method accurately measures the rate of pay per day that Claimant received under his agreement. Pursuant to Agency policy, penalty wages due under ORS 652.150 are rounded to the nearest dollar. *In the Matter of Waylon & Willes, Inc.*, 7 BOLI 68, 72 (1988).

Awarding a civil penalty turns on the issue of willfulness. The Attorney General has advised the Commissioner that "willful," under ORS 652.150, "simply means conduct done of free will." A.G. Letter Opinion No. Op. 6056 (9/26/86). "Willful" does not necessarily imply anything blamable, or any malice or wrong toward the other party, or perverseness or moral delinquency. *State ex rel Nilsen v. Johnston et ux*, 233 Or 103, 377 P2d 331 (1962). "A financially able employer is liable for a penalty when it has willfully done or failed to do any act which foreseeably would, and in fact did, result in its failure to meet its statutory wage obligations." A.G. Letter Opinion, above. The Employer in this case must be deemed to have acted willfully under this test.

ORDER

NOW, THEREFORE, as authorized by ORS 652.332, the Commissioner of the Bureau of Labor and Industries hereby orders CENTRAL PACIFIC FREIGHT LINES, INC. to deliver to the Business Office of the Bureau of Labor and Industries, 305 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 E. GREEN in the amount of EIGHT HUNDRED AND FIFTEEN DOLLARS (\$815.00), representing a civil penalty, plus interest at the rate of nine percent per year on that sum from August 1, 1987, until paid.

**In the Matter of
Peggy R. Gay, dba
PEGGY'S CAFE,
Respondent.**

Case Number 12-89
Final Order of the Commissioner
Mary Wendy Roberts
Issued January 13, 1989.

SYNOPSIS

Respondent violated ORS 654.062 (5) by discharging Complainant because she opposed an unsafe condition and unsafe practice, namely, she

refused to change a fuse in a fuse box that was blowing fuses, hot, melting, and throwing sparks. The Commissioner awarded Complainant back wages and mental suffering damages. ORS 654.010, 654.015, 654.062(5); OAR 839-05-010, 839-05-015

The above-entitled matter came on regularly for hearing before Douglas A. McKean, designated as Hearings Referee by Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on November 15, 1988, in Conference 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 Nadine Faith, a legal intern with the Agency. Bonnie V. Haddix (hereinafter Complainant) was present throughout the hearing. Peggy R. Gay (hereinafter Respondent) was present throughout the hearing.

The Agency called the following witnesses: Complainant; Leonard C. Brush, Inspector, Accident Prevention Division, Workers' Compensation Department; America Henry, Complainant's former coworker and Respondent's former employee; Ahmad Muhammad, Senior Investigator, Civil Rights Division of the Agency; and Joseph Tam, Investigative Supervisor, Civil Rights Division of the Agency. Respondent was in default and so presented no evidence.

Having fully considered the entire record in this matter, I, Mary Wendy 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) On November 30, 1987, Complainant filed a verified complaint with the Civil Rights Division of the Agency. She alleged that Respondent discriminated against her because of her opposition to unsafe working conditions at Respondent's place of employment, in that, on November 15, 1987, Respondent terminated Complainant for refusing to follow orders to change a fuse in an unsafe electrical box.

2) After investigation and review, the Agency issued an Administrative Determination finding substantial evidence of an unlawful employment practice, under ORS 654.062(5), by Respondent.

3) The Agency attempted to resolve the complaint by conference, conciliation, and persuasion, but was unsuccessful.

4) On September 27, 1988, the Agency prepared and duly served on Respondent Specific Charges that alleged that Respondent had discharged Complainant from employment because Complainant opposed unsafe practices and working conditions. The Specific Charges alleged that Respondent's action violated ORS 654.062 (5)(a).

5) With the Specific Charges, the Forum served on Respondent the following: a) a Notice of Hearing setting forth the time and place of the hearing in this matter; b) a 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 regarding the contested case process; and d) a separate copy of the specific administrative rule regarding responsive pleadings.

6) As of October 21, 1988, the Forum had not received a responsive pleading from Respondent as required by OAR 839-30-060. The Forum issued a Notice of Intent to Default to Respondent.

7) On October 25, 1988, the Hearings Unit received a telephone call from Respondent's attorney, H. Kenneth Zenger, in which he requested clarification regarding the Notice of Intent to Default. Mr. Zenger indicated that Respondent had not filed a responsive pleading on or before October 17, 1988.

8) On October 25, 1988, the Forum issued to Respondent a "Notice of Default," which notified Respondent that her failure to file a responsive pleading within the time required constituted a default to the Specific Charges, pursuant to OAR 839-30-185. The notice advised Respondent that she had 10 days in which to request relief from the default.

9) On November 3, 1988, Respondent filed a Request for Relief from Default with a supporting affidavit and exhibits, and an answer in which she denied the allegation mentioned above in the Specific Charges, and stated several defenses.

10) On November 4, 1988, the Forum denied Respondent's request for relief.

11) Pursuant to OAR 839-30-071, the Agency filed a Summary of the Case. In addition, on the date of

hearing, the Agency filed a supplement to its summary. The Hearings Referee left the record open to receive the supplement, and it is hereby received.

12) Pursuant to ORS 183.415(7), the 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.

13) Pursuant to OAR 839-30-195, the Hearings Referee reopened the record to receive the Notice of Intent to Default document, which was inadvertently left out of the administrative exhibits.

14) On December 5, 1988, the Hearings Unit of the Bureau of Labor and Industries mailed copies of the Proposed Order in this matter to all persons listed on the certificate of mailing, including the Respondent. Participants had 10 days to file exceptions to the Proposed Order. On December 20, 1988, the Hearings Unit received Respondent's exceptions, postmarked December 12, 1988. Respondent's exceptions are addressed in the Opinion section of this Final Order.

FINDINGS OF FACT -- THE MERITS

1) At all times material herein, Respondent owned and operated two cafes in Oregon, one in Forest Grove and the other in Gaston. Respondent employed one or more employees in Oregon.

2) Complainant was employed by Respondent on February 9, 1987, as a fry cook.

3) Complainant worked 38 hours per week. She was paid \$3.50 per hour when she was terminated on November 15, 1987.

4) During November 1987, Complainant worked at the Gaston cafe with America Henry, who worked as a waitress. Respondent was Complainant's and Henry's supervisor.

5) The cafe was open from 6 a.m. to 2 p.m.

6) At around 11 to 11:30 a.m., on Saturday, November 14, 1987, a fuse blew at the cafe while Complainant was working. The fuse was on a circuit that operated the cafe's lights and cooling equipment. Complainant telephoned Respondent, and she instructed Complainant and Henry to unscrew the fuse with a pair of pliers and change the fuse in the fuse box. Complainant told Respondent that Complainant was afraid to change the fuse because the fuse box was hot and melting, and was throwing sparks. Complainant said she did not believe the fuse box was safe. The wires coming out of the fuse box were hot. The wall behind the fuse box was hot. The paint on the fuse box was melting. Complainant did not change the fuse. She was afraid of getting shocked; she thought she could be killed by the shock. Henry removed the fuse with a towel. When Henry attempted to put in a new fuse, "it threw sparks about ten feet, and blew the fuse out of my hand, and I refused to touch it again." Henry was afraid to touch the fuse box for fear of burns or death. Respondent was angry that Complainant and Henry refused to change the fuse.

7) Complainant worked the rest of the day in the dark, using a trouble light, until the cafe closed at 2 p.m.

8) Complainant did not call the Accident Prevention Division (APD). She did not know that APD could help her.

In addition, because it was Saturday, she did not know who would have been open that could have helped her. She believed that if she called someone, Respondent would have been angry.

9) On Sunday, November 15, 1987, Complainant arrived for work at around 5:30 a.m. and found a letter from Respondent. The letter said, in part,

"my refer's and freezers were off be-cuz you was afraid to take pliers & screw that fuse in enough to get the juice on * * * those fuses aren't going to hurt you if you do as your told - else we'd have been dead long ago * * *"

Complainant worked until 2 p.m. Respondent called for a meeting of employees at 3 p.m. at the cafe in Forest Grove. During the meeting with 12 or 13 employees, Respondent told Complainant and Henry that, since they could not follow instructions, they were no longer on the schedule and could leave. Respondent asked Complainant and Henry for their keys to the cafe. Complainant believed she was fired. Respondent never called Complainant back to work.

10) During the investigation of Complainant's complaint, Ahmad Muhammad, a senior investigator for the Civil Rights Division of the Agency, interviewed Respondent. She acknowledged that fuses often blew out at the cafe, and that employees were expected to change them. She also acknowledged that often the fuses would arc if they were installed at a small angle, but that it was nothing to be alarmed about. She told Muhammad that she had terminated Complainant

for not following instructions and one of those instructions was to change the electrical fuse. The other instruction was that Complainant was not to use the cafe telephone for Complainant's own business purposes. Respondent said that when Complainant continued to use the phone, and when she refused to change the fuse, Respondent decided that Complainant's behavior warranted termination.

11) During the next three weeks, Complainant looked for other work. She worked at Safeway in Hillsboro for two days. She collected unemployment insurance checks for two weeks. Around December 9, 1987, she went to work for Jack Pot Food Mart in Cornelius, Oregon. Complainant did not seek any damages from Respondent beyond December 9, 1987.

12) Before she was fired, Complainant and her husband had relied on her income to pay electric and auto insurance bills. Due to the loss of her income, Complainant got behind on paying her bills.

13) Complainant was anxious and nervous about losing her job and the loss of income. She was afraid of trying to find a new job.

14) On January 4, 1988, Leonard Brush, an inspector for the Accident Prevention Division (APD), inspected Respondent's Gaston cafe because of a safety complaint about its electrical fuse box. During his inspection, Brush observed a new electrical panel. Employees at the cafe said that it had been replaced about one month earlier, which was the first part of December 1987. Respondent told Brush that she had fired the two employees who had filed the complaint.

ULTIMATE FINDINGS OF FACT

1) At all times material herein, Respondent was a person who had one or more employees in the State of Oregon.

2) Complainant was employed by Respondent. Complainant was hired on February 9, 1987.

3) Respondent maintained an unsafe working condition at the Gaston cafe, namely, a fuse box which was blowing fuses, hot, and throwing sparks.

4) On November 14, 1987, Respondent required Complainant to change a blown fuse. To do so would have been an unsafe practice.

5) Complainant opposed the unsafe condition and unsafe practice described in the Ultimate Findings of Fact numbered three and four by refusing to change the fuse.

6) Complainant reasonably believed that to change the fuse posed an imminent risk of serious injury or death.

7) Complainant sought redress from Respondent, but Respondent failed to correct the hazard on November 14, 1987. Complainant did not contact any regulatory agency because it was Saturday, and she was not aware of any agency which was open. APD was closed on Saturday. In addition, she believed that Respondent would be angry at her if she called anyone.

8) On November 15, 1987, Respondent discharged Complainant because Complainant opposed the unsafe condition and the unsafe practice of changing a fuse in a hot and sparking fuse box.

15) Brush had worked for APD for ten years, and conducted routine safety inspections. He had received training about electrical hazards and their effects on people. The Accident Prevention Division enforces the Oregon Safe Employment Act, Oregon Revised Statutes (ORS) chapter 654, and its related regulations, Oregon Administrative Rules (OAR) chapter 437. Brush testified that, in his opinion, a fuse box which was hot, melting, and throwing sparks would be in an unsafe condition. To change a fuse in such a fuse box would be an unsafe practice. Injuries could range from burns to death. To have a fuse box in that condition or to require an employee to perform that unsafe practice would violate laws enforced by APD. Brush said that it was reasonable to fear imminent risk of serious injury by changing a fuse in such a fuse box. If Brush would have found the fuse box in the condition described by Complainant and Henry, he would have tried to contact Respondent to request immediate correction of the situation and, if warranted due to the risk of imminent injury or death, he could have "red tagged" the business, which shuts the business until the problem is corrected.

16) Offices of APD are not open on Saturday. Inspectors could be reached on weekends by the police.

17) The testimony of each witness was entirely credible. The Hearings Referee observed the demeanor of each witness and found each to be forthright and direct in his or her answers. Each witness's answers were consistent with the answers of the other witnesses as well as the documentary evidence.

9) Complainant was harmed by the discharge in that she lost income in the amount of \$399 (\$3.50 per hour multiplied by 38 hours per week equals \$133 per week, multiplied by three weeks). In addition, she suffered anxiety and nervousness due to her loss of employment and income, to her bills going unpaid, and to the stress of searching for a new job.

CONCLUSIONS OF LAW

1) At all times material herein, Respondent was an employer subject to the provisions of ORS 659.010 to 659.110, and ORS 659.400 to 659.435.

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

3) ORS 654.010 requires every employer to furnish a safe place of employment and

"do every other thing reasonably necessary to protect the life, safety and health of such employees."

ORS 654.015 prohibits any employer from maintaining any place of employment that is unsafe or detrimental to health. Respondent carried on a practice forbidden by ORS 654.010 and 654.015 by maintaining an unsafe electrical fuse box and by requiring Complainant to perform the unsafe operation of replacing a fuse in the fuse box.

4) ORS 654.062(5)(a) provides:

"It is an unlawful employment practice for any person to bar or discharge from employment or otherwise discriminate against any employee or prospective employee because such employee

has opposed any practice forbidden by ORS 654.001 to 654.295 and 654.750 to 654.780 ***"

Respondent violated ORS 654.062.

5) Pursuant to ORS 654.062 and 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 659.400 to 659.435, to perform any act or series of acts reasonably calculated to carry out the purposes of said statutes, to eliminate the effects of an unlawful practice found, and to protect the rights of other persons similarly situated.

OPINION

Respondent was found in default, pursuant to OAR 839-30-185(1)(a), for failure to file an answer to the Specific Charges. Respondent requested relief from default, but the Forum denied Respondent's request.

In default situations, the Agency must present a prima facie case in support of the Specific Charges and to establish damages. ORS 183.415(6). Respondent's default results in the admission of factual matters alleged in the Specific Charges and the waiver of any affirmative defenses. Respondent lost her right to address by any means, including cross-examination, issues raised in the Specific Charges. *Metco Manufacturing, Inc. v. Bureau of Labor and Industries*, 93 Or App 317, 321, 761 P2d 1362, 1365 (1988).

Prima Facie Case

To present a prima facie case in this matter, the Agency must prove the following four elements:

- (1) The Respondent is a Respondent as defined by statute;
- (2) The Complainant is a member of a protected class;
- (3) The Complainant was harmed by an action of the Respondent;
- (4) The Respondent's action was taken because of the Complainant's membership in the protected class. OAR 839-05-010(1).

The Agency has established a prima facie case. The credible testimony of Agency witnesses together with documentary evidence submitted was accepted and relied upon herein. The evidence showed that

- (1) Respondent was a person who employed one or more persons in Oregon (See ORS 654.005(6), and OAR 839-06-010).
- (2) Complainant was an employee employed by Respondent. She became a member of a protected class as soon as she opposed a practice forbidden by the Oregon Safe Employment Act, ORS 654.001 to 654.295, 654.750 to 654.780 and 654.991 (See OAR 839-06-005 and 839-06-020).
- (3) Complainant was harmed when Respondent discharged her. She suffered lost income, as well as anxiety and nervousness due to the discharge, the loss of income, and the stress of searching for a new job.
- (4) Respondent discharged Complainant because she opposed

unsafe practices and working conditions, namely, she refused to change a fuse in a fuse box which was hot and sparking.

Credible evidence on the record, including Respondent's admissions by way of default, showed that Respondent discharged Complainant because of Complainant's failure to follow orders, including her refusal to follow Respondent's order to change the fuse. During the investigation of this complaint, Respondent said that part of the reason she fired Complainant was because Complainant continued to use the cafe telephone for her personal business after Respondent ordered her to cease. Frequently, the evidence indicates that several factors contribute to causing a respondent's action, of which only one factor is the complainant's protected class. In such cases, the Agency uses the key role test, OAR 839-05-015. Under that test, the crucial question is whether or not the harmful action – here, the discharge – would have occurred had the Complainant not been a member of the protected class.

The answer in this case is that Complainant would not have been discharged if she had not been a member of a protected class. Put another way, the Forum found by a preponderance of the evidence that Respondent discharged Complainant because she opposed a practice forbidden by the Oregon Safe Employment Act. Respondent specifically stated that one of the reasons that she discharged Complainant was Complainant's refusal to follow Respondent's order to change the fuse in the unsafe electrical fuse box. Respondent also discharged

Henry for the same reason. Both Complainant and Henry were discharged the day after they refused to follow Respondent's order. These facts show that Complainant's protected class played a sufficient part in, and was more than minimal cause of, Respondent's action of discharging Complainant. Without question, such facts permit the inference that Complainant's membership in the protected class was the cause of Respondent's action.

Damages

The evidence showed that Complainant would have earned \$399 during the three weeks between her discharge and when she was hired by Jack Pot Food Mart. There was also evidence that she worked for Safeway for two days during that three week period. However there was no evidence to show that she worked during hours that would require any income from that job to be treated as a set off against her lost wages. Such evidence is in the nature of an affirmative defense, which is the Respondent's burden to plead and prove. By her default, Respondent waived her right to present that defense.

This Forum has long held that unemployment benefits received by a successful complainant in an employment discrimination case are not offsets against a back pay award. See *In the Matter of Metco Manufacturing, Inc.*, 7 BOLI 55, 67 (1987), and the cases cited therein.

This Forum has also held that a mental suffering award may be based on economic stress that causes fear and anxiety. *In the Matter of Spear*

Beverage Company, 2 BOLI 240, 243-44 (1982).

Exceptions

In Respondent's exceptions to the Proposed Order, she again raised the reasons why she failed to file an answer to the Specific Charges. Those facts were previously considered and ruled upon by the Hearings Referee in the Forum's denial of Respondent's request for relief from default. The Forum reaffirms that ruling. When Respondent was held in default, she lost her opportunity to present evidence at hearing. In her exceptions, she asserts new facts that were not part of the hearing record. What Respondent lost due to her default -- that is, her opportunity to present her evidence -- she may not retrieve with her exceptions. Accordingly, the Forum has not considered any facts asserted by Respondent in her exceptions that were not presented at hearing. This Forum's determinations are made exclusively from evidence on the record and facts officially noticed pursuant to OAR 839-30-130.

ORDER

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

1) Deliver to the Business Office 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 BONNIE HADDIX, in the amount of:

a) THREE HUNDRED NINETY NINE DOLLARS (\$399), representing

wages Complainant lost as a result of Respondent's unlawful practice found herein; PLUS,

b) THIRTY FIVE DOLLARS AND TWELVE CENTS (\$35.12), representing interest on the lost wages at the annual rate of nine percent accrued between December 10, 1987, and November 30, 1988, computed and compounded annually; PLUS,

c) Interest on the foregoing, at the legal rate, accrued between December 1, 1988, and the date Respondent complies herewith, to be computed and compounded annually; PLUS,

d) TWO THOUSAND DOLLARS (\$2000), representing compensatory damages for the mental distress Complainant suffered as a result of Respondent's unlawful practice found herein; PLUS,

e) Interest on the compensatory damages for mental distress, at the legal rate, accrued between the date of this Final Order and the date Respondent complies herewith, to be computed and compounded annually.

2) Cease and desist from discriminating against any worker who opposes any practice forbidden by ORS 654.001 to 654.295 and 654.750 to 654.780, makes any complaint or institutes or causes to be instituted any proceeding under or has testified or is about to testify in any such proceeding, or because of the exercise of such employee on behalf of the employee or others of any right afforded by ORS 654.001 to 654.295 and 654.750 to 654.780.