

CIVIL RIGHTS

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□

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- 2.1 --- Cease and Desist Orders (*see also* 103.0)

□ The commissioner has the authority to fashion a remedy adequate to eliminate the effects of unlawful employment practices. ----- *In the Matter of Charles Edward Minor, 31 BOLI 88, 104 (2010)*. *See also In*

the Matter of From the Wilderness, Inc., 30 BOLI 227, 290 (2009), appeal pending.

- 2.2 --- Commissioner's Complaint
- 2.3 --- Damages and Penalties
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- 7.0 GENERAL PRINCIPLES OF CONSTRUCTION
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III. THEORIES OF DISCRIMINATION (*see also* Part VII)

10.0 SPECIFIC INTENT

□ While specific intent may be established by direct evidence of a respondent's discriminatory motive, it may also be shown through circumstantial evidence. - ---- *In the Matter of Income Property Management, 31 BOLI 18, 39 (2010)*.

□ Evidence includes inferences. There may be more than one inference to be drawn from the basic fact found; it is the forum's task to decide which inference to draw. Thus, the absence of direct evidence of respondent's specific intent is not determinative because such intent may be shown by circumstantial evidence. ----- *In the Matter of Income Property Management, 31 BOLI 18, 39 (2010)*.

11.0 DIFFERENT OR UNEQUAL TREATMENT

12.0 HARASSMENT (GENERALLY)

- 12.1 --- Types of Harassment in Employment
 - 12.1.1 --- Intimidating, Hostile, or Offensive Working Environment

□ The standard for determining whether conduct is sufficiently severe or pervasive to have created a hostile, intimidating or offensive working environment is from the objective standpoint of a reasonable person in complainant's particular circumstances. ----- *In the Matter of From the Wilderness, Inc., 30 BOLI 227, 287 (2009)*.

Appeal pending.

□ In determining whether conduct is sufficiently severe or pervasive to have created a hostile, intimidating or offensive working environment, the forum looks at the totality of the circumstances, i.e.,

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the nature of the conduct and its context, the frequency of the conduct, its severity or pervasiveness, whether it is physically threatening or humiliating, and whether it unreasonably interferes with an employee's work performance. ---- *In the Matter of From the Wilderness, Inc., 30 BOLI 227, 287 (2009).*

Appeal pending.

□ To establish sexual harassment, the agency is required to prove the following elements: (1) respondent was an employer subject to ORS 659A.001 to 659A.030; (2) respondent employed complainant; (3) complainant is a member of a protected class (sex); (4) respondent, through its proxy, engaged in unwelcome conduct (verbal or physical) directed at complainant because of her sex; (5) the unwelcome conduct was sufficiently severe or pervasive to have the purpose or effect of creating a hostile, intimidating or offensive work environment; and (6) complainant was harmed by the unwelcome conduct. ---- *In the Matter of From the Wilderness, Inc., 30 BOLI 227, 285 (2009).*

Appeal pending.

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12.2.1 --- Harassment by Supervisor

12.2.2 --- Harassment by Coworker or Agent

12.2.3 --- Harassment by Non-Employee

12.2.4 --- Harassment by Employer Proxy

□ As respondent's sole shareholder, complainant's immediate supervisor was respondent's proxy whose conduct was properly imputed to respondent and respondent was strictly liable for any of its proxy's unlawful harassment under OAR 839-005-0030(3). --- *In the Matter of From the Wilderness, Inc., 30 BOLI 227, 286 (2009).*

Appeal pending.

□ Since respondent did not incorporate and thereby become complainant's employer until April 5, 2006, respondent could not be held liable for any harassment by respondent's proxy that occurred before April 5, 2006. ---- *In the Matter of From the Wilderness, Inc., 30 BOLI 227, 286 (2009).*

Appeal pending.

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- 26.1 --- Generally
 - A violation of ORS 659A.030(1)(f) is established by evidence that shows a complainant opposed an unlawful practice, the respondent subjected the complainant to an adverse employment action, and that there is a causal connection between the complainant's opposition and the respondent's adverse action. ---- *In the Matter of From the Wilderness, Inc., 30 BOLI 227, 288 (2009).*
 - Appeal pending.
- 26.2 --- Prima Facie Case
- 26.3 --- Nature of Opposition
 - Complainant opposed sexual harassment on May 30, 2006, after respondent's proxy had proposed a sexual relationship and left a pornographic CD in her desk drawer that morning, by confronting the proxy, complaining that she did not appreciate the pornographic CD and, with regard to his proposal, telling him she had no sexual feelings towards him. Complainant then let the proxy know that she had told a co-worker about the CD. By doing this, she engaged in behavior protected by ORS 659A.030(1)(f). ---- *In the Matter of From the Wilderness, Inc., 30 BOLI 227, 288-89 (2009).*
 - Appeal pending.
- 26.4 --- Term or Condition of Employment
 - When the agency alleged that respondent retaliated against complainant for telling him not to call her "muchacha caliente" and complaining to the police about the same, causing respondent to cut her work hours, but the evidence showed respondent was not aware of the complaint to the police and the large number of hours worked by complainant during her first two weeks of employment was attributable to fact that most of respondent's employees had just quit, the forum concluded that the evidence did not rise to the level of the preponderance of evidence the agency needed to prove retaliation. ---- *In the Matter of Spud Cellar Deli, Inc., 31 BOLI 106, 136, 143-44 (2010).*
- 26.5 --- Discharge/Constructive Discharge
 - When the agency alleged that complainant was

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fired for opposing sexual harassment, respondent claimed that that complainant was fired based on her longstanding performance issues, and respondent had already been planning to fire her that same day because it coincided with a co-worker's last day of work. The forum found this argument pretextual for several reasons detailed in its opinion. ---- *In the Matter of From the Wilderness, Inc., 30 BOLI 227, 289-90 (2009).*

Appeal pending.

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 - 31.2.3.1 --- Intimidating, Hostile, or Offensive Work Environment

□ The forum found that complainant was subjected to unwelcome sexual conduct that was sufficiently severe and pervasive to have had the purpose or effect of creating an offensive work environment and that a reasonable person in complainant's circumstances would have so perceived it based on the following: the harasser was respondent's president, owner, and manager and complainant's immediate supervisor; his conduct was purely oral; all his remarks were specifically directed at complainant and all were made in the workplace; the first time the harasser said "muchacha caliente" he understood it to mean "hot chick" and "very beautiful" and after the second time the harasser referred to complainant as "muchacha caliente," he clearly understood that the term meant "horny girl" to her and she told him directly that she did not want to hear it; he again called complainant "muchacha caliente" after his Hispanic friends confirmed that "muchacha caliente" meant "horny girl" and was disrespectful; and the term "horny girl" has a specific sexual connotation; the remarks were all made in a seven week period of time; and complainant credibly testified that the remarks made her feel disrespected and insulted and that she objected to the remarks for those reasons. . ---- *In the Matter of Spud Cellar Deli, Inc., 31 BOLI 106, 133, 142-43 (2010).*

□ When testimony by respondent's proxy established that he understood "muchacha caliente" to mean "hot chick" and "very beautiful" the first time he directed the term "muchacha caliente" at complainant and, after that he understood that it meant "horny girl" to complainant, the forum concluded that the harasser directed the words "muchacha caliente" at complainant because of her female gender. Her objections to the comments and credible testimony that she found the comments insulting and disrespectful established that they were unwelcome. ---- *In the Matter of Spud Cellar Deli, Inc., 31 BOLI 106, 133, 142 (2010).*

□ The sexual conduct of a harasser who was corporate officer was properly imputed to respondent and respondent was strictly liable for any unlawful harassment. ---- *In the Matter of Spud Cellar Deli, Inc., 31 BOLI 106, 133, 142-43 (2010).*

□ Complainant's credible testimony established that she felt intimidated and offended by her harasser's unwelcome sexual conduct, in that she tried to avoid being physically near him as much as possible and was offended by him touching her and asking her for a kiss. This established the "harm" element of the agency's prima facie case. ---- *In the Matter of Spud*

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Cellar Deli, Inc., 31 BOLI 106, 136 (2010).

□ Complainant's testimony that her harasser's touching and "kiss" proposal made her feel "gross" and "not happy" like she "had been violated" and her "personal boundary had been crossed" established that the behavior was offensive to her, and her complaint to a coworker established that this was compounded because she was married. ---- ***In the Matter of Spud Cellar Deli, Inc., 31 BOLI 106, 135 (2010).***

□ Isolated incidents of verbal harassment, standing alone, do not constitute unlawful sexual harassment unless they are extremely serious. ---- ***In the Matter of Spud Cellar Deli, Inc., 31 BOLI 106, 135, 142 (2010).***

□ The forum recognizes an inverse relationship between the requisite severity and pervasiveness of harassing conduct – as the severity of the conduct increases, the frequency of the conduct necessary to establish harassment decreases. ---- ***In the Matter of Spud Cellar Deli, Inc., 31 BOLI 106, 134-35 (2010).***

□ Complainant's credible testimony that the sexual conduct she observed her harasser directing at other women caused her to change her behavior to make sure she was not alone with or physically close to him led the forum to infer that she found that conduct unwelcome, along with her credible testimony describing her reaction to the harasser's request to kiss her and her decision to quit as a direct result of that conduct left no doubt in the forum's mind that complainant found that behavior unwelcome. The sexual nature of the conduct showed it was directed towards complainant and her female coworkers because they were women. ---- ***In the Matter of Spud Cellar Deli, Inc., 31 BOLI 106, 134 (2010).***

□ The agency's prima facie case under the "hostile environment" theory consisted of the following elements: (1) respondent was an employer subject to ORS 659A.001 to 659A.030; (2) respondent employed complainant; (3) complainant is a member of a protected class (sex); (4) respondent, through its proxy, engaged in unwelcome conduct (verbal or physical) directed at complainant because of her sex; (5) the unwelcome conduct was sufficiently severe or pervasive to have the purpose or effect of creating a hostile, intimidating or offensive work environment; and (6) complainant was harmed by the unwelcome conduct. ---- ***In the Matter of Spud Cellar Deli, Inc., 31 BOLI 106, 133, 141-42 (2010).*** See also ***In the Matter of Charles Edward Minor, 31 BOLI 88, 100 (2010); In the Matter of From the Wilderness, Inc., 30 BOLI 227, 285 (2009), appeal pending.***

□ When complainant was sexually harassed by a male who was respondent's owner, president, and manager, the male was respondent's proxy and his conduct was properly imputed to respondent. Respondent was held strictly liable for any unlawful harassment found. ---- ***In the Matter of Spud Cellar Deli, Inc., 31 BOLI 106, 133 (2010).***

□ The forum's determination of whether or not a

harasser's conduct was unwelcome includes conduct that specifically targeted complainant as well as the harasser's other sexual conduct directed at women that complainant observed or that was reported to her. ---- ***In the Matter of Spud Cellar Deli, Inc., 31 BOLI 106, 133 (2010).***

□ The standard for determining whether harassment based on an individual's sex is sufficiently severe or pervasive to create a hostile, intimidating or offensive working environment is "whether a reasonable person in the circumstances of the complaining individual would so perceive it." ---- ***In the Matter of Spud Cellar Deli, Inc., 31 BOLI 106, 134 (2010).***

□ In determining whether conduct is sufficiently severe or pervasive to have created a hostile, intimidating or offensive working environment, the forum looks at the totality of the circumstances, i.e., the nature of the conduct and its context, the frequency of the conduct, its severity or pervasiveness, whether it is physically threatening or humiliating, and whether it unreasonably interferes with an employee's work performance. ---- ***In the Matter of Spud Cellar Deli, Inc., 31 BOLI 106, 134 (2010).*** See also ***In the Matter of Charles Edward Minor, 31 BOLI 88, 101 (2010); In the Matter of From the Wilderness, Inc., 30 BOLI 227, 287 (2009), appeal pending.***

□ At the times respondent sexually harassed complainant, she experienced the emotions of being "scared," "embarrassed," "awful," "disgusting," "sickened," and "scared that I was alone in there with him," which fulfilled the "harm" element of the agency's prima facie case. ---- ***In the Matter of Charles Edward Minor, 31 BOLI 88, 102 (2010).***

□ Complainant's reactions to respondent's sexual conduct, culminating in her quitting her job, demonstrated that respondent's conduct unreasonably interfered with her job performance. ---- ***In the Matter of Charles Edward Minor, 31 BOLI 88, 102 (2010).***

□ Respondent's conduct was sufficiently severe or pervasive to have created a hostile, intimidating or offensive working environment when, over eight days, the conduct included full-frontal hugs from respondent that respondent insisted upon; suggestions that complainant lean out the window and expose more cleavage; telling complainant he had hired her friend because of her "juicy boobs" and he liked girls with bigger chests; talking to complainant about an attractive woman who was a customer and saying he would like to take her to the opera and then "wreck her," a statement complainant interpreted as meaning that respondent wanted to take the woman to the opera and then have sex with her; telling complainant, if she was stunned by a wasp that he "would put a long needle in [her] thigh" and would be glad to give her "mouth to mouth," at the same time winking and raising his eyebrows, then repeating the "mouth to mouth" comment; and telling complainant, when she bent over, "you like bending over, don't you." The severity of this conduct was intensified by the fact that

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all of it occurred when respondent and complainant were working alone together, as shown by complainant's credible testimony that the conduct made her feel "scared," "embarrassed," "awful," "disgusting," "sickened," and "scared that I was alone in there with him," and that she quit because she did not feel safe in respondent's presence. ---- ***In the Matter of Charles Edward Minor, 31 BOLI 88, 101-02 (2010).***

□ The standard for determining whether conduct is sufficiently severe or pervasive to have created a hostile, intimidating or offensive working environment is from the objective standpoint of a reasonable person in complainant's particular circumstances. ---- ***In the Matter of Charles Edward Minor, 31 BOLI 88, 101 (2010).*** See also *In the Matter of From the Wilderness, Inc., 30 BOLI 227, 287 (2009), appeal pending.*

□ The forum concluded that respondent's unwelcome conduct was due to complainant's sex because of respondent's implied and direct references to sexual behavior, e.g. telling complainant he had hired her friend because of her "juicy boobs" and telling complainant that she "liked bending over." ---- ***In the Matter of Charles Edward Minor, 31 BOLI 88, 101 (2010).***

□ The forum concluded that the respondent's sexual conduct was unwelcome based on complainant's credible testimony that it made her "scared," "embarrassed," "awful," "disgusting," "sickened," and "scared that I was alone in there with him," because of her complaints to a friend and the police about the conduct, and because she ultimately quit her job because of the conduct. ---- ***In the Matter of Charles Edward Minor, 31 BOLI 88, 101 (2010).***

□ When complainant was harassed, complainant experienced the emotions of being "uncomfortable," "shocked," "taken aback," "distracted," "belittled," "upset," and "frightened." This fulfilled the "harm" element of the agency's prima facie case. ---- ***In the Matter of From the Wilderness, Inc., 30 BOLI 227, 288 (2009).***

Appeal pending.

□ The conduct of respondent's proxy was sufficiently severe or pervasive to have created a hostile, intimidating or offensive working environment when: (1) Complainant was 25 years old, working at her first professional job, whereas respondent's proxy was not only complainant's boss, but a former Los Angeles policeman, an experienced investigative journalist, and a "celebrity" in his field; (2) Six incidents of actionable conduct occurred in a seven week period; (3) The actionable conduct included exposure to internet pornography, questions about sexual preference, a comment about a specific sexual practice, written romantic expression, spoken romantic expression, semi-naked exposure, a pornographic CD, and a proposal for a sexual relationship, all intensified by the fact that most of it occurred when the proxy and complainant were

working alone; (4) Two specific incidents of the actionable conduct "frightened" or "scared" complainant – the proxy's exposure of his appendectomy scar and his statement to complainant that he was ready to have a sexual relationship with her if she was willing; (5) and complainant's credible testimony that she liked her work very much because writing was her chosen field, she was excited by the subject matter, and it was a possible stepping stone in the writing career she hoped to have, and the proxy's harassment made it more difficult for her to do her work. ---- ***In the Matter of From the Wilderness, Inc., 30 BOLI 227, 287-88 (2009).***

Appeal pending.

□ Complainant's immediate supervisor and respondent's sole shareholder engaged in numerous instances of unwelcome conduct, both verbal and physical, directed at complainant because of her sex. The forum concluded that the conduct was unwelcome based on complainant's credible testimony that it made her "uncomfortable," "shocked," "taken aback," "distracted," "belittled," "upset," and "frightened" and because of her complaints to others about the conduct. The forum concluded that the unwelcome conduct detailed below was due to complainant's sex because of its very nature and the fact that there was no evidence that the supervisor behaved similarly towards male employees. ---- ***In the Matter of From the Wilderness, Inc., 30 BOLI 227, 285-86 (2009).***

Appeal pending.

31.2.3.2 --- Tangible Employment Action

□ When there was no evidence that submission to sexual conduct by respondent's proxy was implicitly made a condition of a female complainant's employment or was used as a basis for employment decisions, a preponderance of the evidence did not support the agency's allegation that respondent's proxy made negative employment decisions concerning complainant based on her objections to his conduct that specifically included reducing her work hours, discharging her, and denying her privileges of employment, and complainant was not constructively discharged, the forum concluded that respondent did not sexually harass complainant based under a tangible employment action theory. ---- ***In the Matter of Spud Cellar Deli, Inc., 31 BOLI 106, 132, 141 (2010).***

□ The agency's prima facie case under the tangible employment action theory consisted of the following elements: (1) respondent was an employer subject to ORS 659A.001 to 659A.030; (2) respondent employed complainant; (3) complainant is a member of a protected class (sex); (4) respondent, through its proxy, engaged in unwelcome conduct (verbal or physical) directed at complainant because of her sex; (5) submission to that conduct was implicitly made a condition of complainant's employment or was used as a basis for employment decisions; and (6) complainant suffered harm through a tangible employment action taken by respondent based on its proxy's conduct. ---- ***In the Matter of Spud Cellar***

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Deli, Inc., 31 BOLI 106, 132, 140 (2010).

□ Among other things, “tangible employment action” includes constructive discharge. ---- ***In the Matter of Spud Cellar Deli, Inc., 31 BOLI 106, 132 (2010).***

□ When the evidence shows that an employee is constructively discharged as a direct result of a employer’s request that the employee submit to unwelcome sexual conduct, that constructive discharge is properly considered an employment decision that was made as a result of a request for submission to the conduct. ---- ***In the Matter of Spud Cellar Deli, Inc., 31 BOLI 106, 132-33 (2010).***

31.2.3--- Discharge/Constructive Discharge

□ The forum concluded that complainant was not constructively discharged when complainant quit because she believed her harasser had created and used a peephole to spy on women in respondent’s bathroom and there was no evidence to establish that this was a discriminatory working condition created or maintained by the harasser. ---- ***In the Matter of Spud Cellar Deli, Inc., 31 BOLI 106, 139 (2010).***

□ The forum concluded that complainant quit as a result of the working conditions imposed by her harasser based on complainant’s unequivocal testimony that she quit as a direct result of the harasser’s putting his hand on her without permission, as though he was going to hug her, then asked her if he could kiss her on the lips. ---- ***In the Matter of Spud Cellar Deli, Inc., 31 BOLI 106, 139 (2010).***

□ The forum found that respondent’s proxy, the harasser, should have known that complainant would quit as a result of her working conditions when several of respondent’s female employees had already quit, at least in part because of the harasser’s conduct; when another female had complained that his putting his hand on her shoulder was harassment; and when the harasser then put his hand on complainant without permission, as though he was going to hug her, then asked her if he could kiss her on the lips. ---- ***In the Matter of Spud Cellar Deli, Inc., 31 BOLI 106, 138-39 (2010).***

□ The forum found that complainant’s working conditions were so intolerable that a reasonable person in complainant’s circumstances would have resigned because of them when complainant, who was married, observed her harasser engage in sexual conduct towards other female employees and went out of her way to avoid physical contact with him because she was afraid she would be the next target of his unsolicited touching; when complainant was aware that respondent’s other female employees had walked off the job after one employee’s father had confronted the harasser about touching his daughter and other female employees; and when the harasser placed his hand on complainant as though to hug her, then asked if he could kiss her. ---- ***In the Matter of Spud Cellar Deli, Inc., 31 BOLI 106, 138 (2010).***

□ The forum found that respondent intentionally created or maintained discriminatory working

conditions related to complainant’s sex when at least one female employee found the harasser’s touching to be offensive prior to complainant’s employment and the harasser told complainant that when he first asked permission to put his hand on her shoulder; the harasser routinely made gestures towards other female employees, acting as though he were squeezing or going to smack them on the bottom and came up behind other female employees and put his arm around their waist or on their shoulder and complainant witnessed that behavior, overheard those other employees talking about how that made them feel uncomfortable, and other employees complained directly to her about the harasser’s behavior; and the behavior was clearly of a sexual nature. ---- ***In the Matter of Spud Cellar Deli, Inc., 31 BOLI 106, 137 (2010).***

□ In a case alleging constructive discharge based on hostile work environment, the agency must prove that respondent: (1) intentionally created or maintained discriminatory working conditions related to complainant’s gender that were (2) so intolerable that a reasonable person in complainant’s circumstances would resign because of them, (3) respondent desired to cause complainant to leave his employment as a result, or knew or should have known complainant was certain, or substantially certain, to leave his employment as a result of the working conditions, and (4) complainant left respondent’s employment as a result of the working conditions. ---- ***In the Matter of Spud Cellar Deli, Inc., 31 BOLI 106, 137 (2010).*** See also ***In the Matter of Charles Edward Minor, 31 BOLI 88, 102-03 (2010).***

□ This forum has consistently held that if an employer imposes objectively intolerable working conditions, *i.e.*, that a reasonable person in complainant’s position would have resigned under those conditions, the employee’s resignation due to those conditions is a constructive discharge. ---- ***In the Matter of Spud Cellar Deli, Inc., 31 BOLI 106, 137 (2010).***

□ Complainant was constructively discharged when she was subjected to sexual conduct by respondent throughout her brief employment that made her afraid to be alone with him; on her last day of work, respondent hit her on the head twice in succession with his fist, the second time over her objection, and causing her serious pain; complainant filed a complaint of respondent’s fisticuff with the police and gave them her work keys and asked that they be returned to respondent and that respondent be told that she quit and wanted no further contact with him. She also complained to the police about respondent’s sexual conduct during her employment, indicating that in her mind it was linked to respondent’s fisticuff. Her stated reason for quitting was her fear for her safety, a fear respondent had already generated because of his previous sexual conduct towards complainant. The forum viewed respondent’s use of his fists on complainant as the last link in the chain of respondent’s continuing conduct throughout complainant’s brief employment that made her fear for

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her safety. Under these circumstances, the forum found that respondent's fisticuff was inextricably linked to his previous objectionable sexual conduct, that respondent imposed objectively intolerable working conditions that he should have known would have caused complainant to resign and would have caused a reasonable person in complainant's position to resign, and that complainant resigned because of those conditions, constituting a constructive discharge. ---- *In the Matter of Charles Edward Minor, 31 BOLI 88, 103 (2010).*

31.2.4--- Term or Condition of Employment

31.3 --- Public Accommodation

31.4 --- Real Property

32.0 SEXUAL ORIENTATION (CITY CODES)

V. OTHER BASES OF DISCRIMINATION

40.0 ACCESS TO EMPLOYER-OWNED HOUSING

41.0 BONE MARROW DONATION

42.0 BREATHALYZER, POLYGRAPH, AND OTHER TESTS

43.0 EXPUNGED JUVENILE RECORD

44.0 FAMILIAL RELATIONSHIP

45.0 FAMILIAL STATUS

46.0 GENETIC INFORMATION

47.0 LEGISLATIVE TESTIMONY

48.0 LIMITING ELIGIBILITY FOR EMPLOYEE HEALTH OR BENEFIT PLAN

49.0 REPORTING PATIENT ABUSE

50.0 REQUIRED PAYMENT FOR MEDICAL EXAMINATIONS

51.0 SOURCE OF INCOME

52.0 UNEMPLOYMENT HEARING TESTIMONY

53.0 USE OF TOBACCO DURING NONWORKING HOURS

54.0 WHISTLEBLOWING BY PUBLIC EMPLOYEES

55.0 REPORTING CRIMINAL ACITIVITY BY PUBLIC AND PRIVATE EMPLOYEES

55.1 --- Generally

□ When complainant testified that she believed the interest overcharges and respondent's pay stub policy she reported were unlawful, but did not believe they were a "crime," and there was no other evidence that complainant believed that respondent's activity was a crime, the agency's case failed because complainant did not report activity that she believed to be criminal.

---- *In the Matter of Northwestern Title Loans LLC, 30 BOLI 1, 29 (2008).*

□ ORS 659A.230(1) protects employees who either in good faith report criminal activity or employees who in good faith report activity they believe to be criminal.

---- *In the Matter of Northwestern Title Loans LLC, 30 BOLI 1, 28 (2008).*

55.2 --- Prima Facie Case

55.3 --- Making a "Report"

55.4 --- "Civil Proceeding"

□ An employee is protected when the employee initiates a civil proceeding and the employer knows or believes that the employee has initiated a civil proceeding. ---- *In the Matter of Northwestern Title Loans LLC, 30 BOLI 1, 30 (2008).*

□ Complainant initiated a civil proceeding when she was aware that DCBS was the regulatory agency that regularly conducted examinations of respondent's stores and issued a written report containing the examination results and complainant contacted DCBS and complained about Respondent's practices. ---- *In the Matter of Northwestern Title Loans LLC, 30 BOLI 1, 30 (2008).*

□ An employee has initiated a civil proceeding when the employee has contacted an administrative agency the employee believes in good faith to have jurisdiction and the ability to sanction the employer. --- *In the Matter of Northwestern Title Loans LLC, 30 BOLI 1, 30 (2008).*

55.5 --- "Criminal Activity"

□ A crime carries with it the possibility of a prison sentence. When there was no evidence that complainant believed or told anyone else that she or anyone else could be sent to prison for participating in respondent's interest overcharges, and there was no evidence that respondent's activities were a felony or misdemeanor, complainant did not complain of a criminal activity. ---- *In the Matter of Northwestern Title Loans LLC, 30 BOLI 1, 29 (2008).*

55.6 --- "Good Faith"

55.7 --- Terms and Conditions

55.8 --- Discharge/Constructive Discharge

□ When respondent did not learn that complainant had engaged in whistleblowing activity until three months after complainant was terminated, the forum concluded that respondent could not have terminated complainant for that activity. ---- *In the Matter of Northwestern Title Loans LLC, 30 BOLI 1, 34 (2008).*

□ When complainant testified that she told no one of her complaint to DCBS that initiated a civil proceeding; there was no evidence that DCBS told respondent that complainant had contacted DCBS; and respondent's manager who made the decision to discharge complainant credibly testified that he was not aware that complainant had contacted DCBS before making that decision, the forum concluded that

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respondent did not know or believe that complainant had contacted DCBS when it discharged complainant. ---- *In the Matter of Northwestern Title Loans LLC, 30 BOLI 1, 30 (2008).*

□ The six and four month intervals separating complainant's initial complaint to DCBS and DCBS's Medford examination from complainant's discharge were too remote for the forum to infer causation from the timing of her discharge. ---- *In the Matter of Northwestern Title Loans LLC, 30 BOLI 1, 31 (2008).*

□ Because respondent did not know or believe that complainant had engaged in whistleblowing activity by making a report to DCBS, the forum concluded that respondent could not have and did not discharge complainant based on her contact with DCBS. ---- *In the Matter of Northwestern Title Loans LLC, 30 BOLI 1, 31 (2008).*

□ The forum concluded that complainant was not terminated for whistleblowing activity when respondent was not aware of the activity, there was credible evidence that respondent was discharged for a legitimate, nondiscriminatory reason, and there was no comparator evidence that other non-whistleblowing employees engaged in these same behaviors and were not discharged. ---- *In the Matter of Northwestern Title Loans LLC, 30 BOLI 1, 30-31 (2008).*

55.9 --- "Perceived" Whistleblowers

VI. COMPLAINT AND HEARING PROCESS

60.0 COMPLAINT OF UNLAWFUL EMPLOYMENT PRACTICE (see also Ch. I, sec. 5.0)

60.1 --- Generally

60.2 --- Commissioner's Complaint (see also 2.2)

61.0 COMPLAINT OF DISCRIMINATION IN HOUSING OR PUBLIC ACCOMMODATION

62.0 INVESTIGATION; SUBSTANTIAL EVIDENCE DETERMINATION

62.1 --- Generally (see also Ch. I, secs. 6.0 - 6.7, 8.2)

62.2 --- Conciliation (see also Ch. I, sec. 7.0)

62.3 --- Cease and Desist Orders (Prior to Hearing)

62.4 --- Civil Penalties (ORS 659A.855)

62.5 --- Request for Contested Case Hearing

63.0 CONTESTED CASE PROCESS (see generally Ch. I -- Admin. Proc.)

63.1 --- Formal/Specific Charges (see also Ch. 1, secs. 8.0 - 8.5)

63.2 --- Cease and Desist Orders (After Hearing)

63.3 --- Dismissal of Charges

64.0 ELECTION OF REMEDIES (see also Ch. I, sec. 8.6)

VII. ESTABLISHING DISCRIMINATION

70.0 AGENCY'S BURDEN OF PROOF (see also Ch. I, secs. 21.3 - 21.4)

70.1 --- Generally

70.2 --- Specific Intent

□ Proof of a causal connection can be established [1] indirectly, by showing that the protected activity was followed closely by discriminatory treatment or through other evidence such as disparate treatment of fellow employees who engaged in similar conduct, or [2] directly, through evidence of retaliatory animus directed against a complainant by the respondent. The agency, at all times, has the burden of proving that complainant was terminated or otherwise discriminated against for unlawful reasons. ---- *In the Matter of Income Property Management, 31 BOLI 18, 40 (2010).*

□ Proof of a causal connection may be established through evidence that shows respondent knowingly and purposefully discriminated against complainant because she engaged in protected activity ["specific intent" test] or by showing that respondent treated complainant differently than her co-workers who were not engaged in the same protected activity ["different treatment" test]. ---- *In the Matter of Income Property Management, 31 BOLI 18, 39 (2010).*

70.3 --- Different or Unequal Treatment

□ Proof of a causal connection can be established [1] indirectly, by showing that the protected activity was followed closely by discriminatory treatment or through other evidence such as disparate treatment of fellow employees who engaged in similar conduct, or [2] directly, through evidence of retaliatory animus directed against a complainant by the respondent. The agency, at all times, has the burden of proving that complainant was terminated or otherwise discriminated against for unlawful reasons. ---- *In the Matter of Income Property Management, 31 BOLI 18, 40 (2010).*

□ Proof of a causal connection may be established through evidence that shows respondent knowingly and purposefully discriminated against complainant because she engaged in protected activity ["specific intent" test] or by showing that respondent treated complainant differently than her co-workers who were not engaged in the same protected activity ["different treatment" test]. ---- *In the Matter of Income Property Management, 31 BOLI 18, 39 (2010).*

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□ The forum concluded that complainant was not terminated for whistleblowing activity when respondent was not aware of the activity, there was credible evidence that respondent was discharged for a legitimate, nondiscriminatory reason, and there was no comparator evidence that other non-whistleblowing employees engaged in these same behaviors and were not discharged. ---- *In the Matter of Northwestern Title Loans LLC, 30 BOLI 1, 30-31 (2008)*.

70.4 --- Pretext

70.5 --- Harassment

70.6 --- Discharge/Constructive Discharge

70.7 --- Adverse Impact

70.8 --- Mixed Motive

71.0 KEY ROLE

72.0 EVIDENCE (see also Ch. I, secs. 20.0 - 20.18)

72.1 --- Generally

72.2 --- Statistics

73.0 RESPONDENTS

73.1 --- Aider/Abettor

73.2 --- Corporation Association

73.3 --- Coworker

73.4 --- Employment Agency

73.5 --- Franchisor

73.6 --- Labor Organization

73.7 --- Limited Liability Company

73.8 --- Owner of Real Property

73.9 --- Partnership

73.10 --- Public Accommodation

73.11 --- Public Employer

73.12 --- Sole Proprietor

73.13 --- Successor in Interest (see also Ch. IX, sec. 3.6)

□ The ALJ granted respondent's motion for partial summary judgment dismissed respondent as a successor in interest when, looking at the record in a manner most favorable to the agency, the ALJ concluded that the agency had only raised a genuine issue of material fact with regard to three of the nine factors used to determine whether a respondent is a successor employer and could not prevail on its allegation that respondent was a successor in interest. ---- *In the Matter of From the Wilderness, Inc., 30 BOLI 227, 242 (2009)*.

Appeal pending.

73.14 --- Supervisor

73.15 --- Temporary Employment Agencies

73.16 --- Trusts

74.0 RESPONDENTS' LIABILITY FOR ACTS OF OTHERS

74.1 --- Agent

74.2 --- Coworker

74.3 --- Legal Representative

74.4 --- Partner

74.5 --- Proxy

□ Respondent's affirmative defense that it exercised reasonable care to prevent and correct sexual harassment and that complainant unreasonably failed to take advantage of preventative or corrective opportunities failed because respondent's proxy was the harasser. ---- *In the Matter of Spud Cellar Deli, Inc., 31 BOLI 106, 136, 142-43 (2010)*.

□ When complainant was sexually harassed by a male who was respondent's owner, president, and manager, the male was respondent's proxy and his conduct was properly imputed to respondent. Respondent was held strictly liable for any unlawful harassment found. ---- *In the Matter of Spud Cellar Deli, Inc., 31 BOLI 106, 133 (2010)*.

□ As respondent's sole shareholder, complainant's immediate supervisor was respondent's proxy whose conduct was properly imputed to respondent and respondent was strictly liable for any of its proxy's unlawful harassment under OAR 839-005-0030(3). --- *In the Matter of From the Wilderness, Inc., 30 BOLI 227, 286 (2009)*.

Appeal pending.

74.6 --- Supervisor

74.7 --- Other

□ The sexual conduct of a harasser who was corporate officer was properly imputed to respondent and respondent was strictly liable for any unlawful harassment. ---- *In the Matter of Spud Cellar Deli, Inc., 31 BOLI 106, 133, 142 (2010)*.

75.0 CONTINUING VIOLATION

VIII. DEFENSES TO CHARGES OF DISCRIMINATION

80.0 AFFIRMATIVE ACTION

81.0 BONA FIDE SENIORITY SYSTEM

82.0 BONA FIDE EMPLOYEE BENEFIT PLAN

83.0 BONA FIDE OCCUPATIONAL REQUIREMENT

83.1 --- Generally

83.2 --- Age

83.3 --- Sex

83.4 --- Other

84.0 COLLECTIVE BARGAINING

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AGREEMENTS

85.0 CORRECTIVE ACTION AND PREVENTIVE MEASURES

□ Respondent's affirmative defense that it exercised reasonable care to prevent and correct sexual harassment and that complainant unreasonably failed to take advantage of preventative or corrective opportunities failed because respondent's proxy was the harasser. ---- *In the Matter of Spud Cellar Deli, Inc., 31 BOLI 106, 136 (2010).*

86.0 ESTOPPEL (see also Ch. VII, sec. 18.1)

87.0 EXHAUSTION/ELECTION OF REMEDIES (see also 64.0)

88.0 FAILURE TO MITIGATE

89.0 INDEPENDENT CONTRACTOR

90.0 LACHES (see also Ch. IX, sec. 11.2)

91.0 LACK OF JURISDICTION (see also Ch. I, sec. 1.0)

92.0 LEGITIMATE NONDISCRIMINATORY REASON/PRETEXT

□ When the agency alleged that complainant was fired for opposing sexual harassment, respondent claimed that that complainant was fired based on her longstanding performance issues, and respondent had already been planning to fire her that same day because it coincided with a co-worker's last day of work. The forum found this argument pretextual for several reasons detailed in its opinion. ---- *In the Matter of From the Wilderness, Inc., 30 BOLI 227, 289-90 (2009).*

Appeal pending.

93.0 PRECLUSION (see also Ch. IX, sec. 11.1)

93.1 --- Claim Preclusion

93.2 --- Issue Preclusion

94.0 PREEMPTION BY FEDERAL LAW

□ At hearing, respondent moved to amend its answer to affirmatively allege that ERISA preempted the agency's OFLA case. Respondent acknowledged that its affirmative defense was waivable, but argued that the defense was not viable until complainant gave specific testimony that implicated ERISA. However, the agency did not move to amend its pleading "to conform to the evidence and to reflect issues presented" as required under OAR 839-050-0140. Consequently, forum held that the only issues properly before it were the ones raised in the agency's formal charges and none of those issues relate to or are in any way connected with ERISA. Without an amended charging document, complainant's brief testimony did not constitute a proper claim for relief, and respondent had no viable basis for amending its answer and raising an additional affirmative defense. Respondent's motions to amend the answer and to dismiss the formal

charges were denied. ---- *In the Matter of Income Property Management, 31 BOLI 18, 21-22 (2010).*

95.0 STATUTE OF LIMITATIONS (see also Ch. I, sec. 5.0)

96.0 UNCONSTITUTIONALITY (see also Ch. I, sec. 29.0)

97.0 UNDUE HARDSHIP TO ACCOMMODATE

97.1 --- Disability (see also 21.3.7)

97.2 --- Religion (see also 15.2, 29.1.4)

98.0 OTHER

IX. REMEDIES

100.0 ATTORNEY FEES

101.0 BACK PAY

101.1 --- Purpose

□ The purpose of back pay awards in employment discrimination cases is to compensate a complainant for the loss of wages and benefits the complainant would have received but for the respondent's unlawful employment practices. ---- *In the Matter of Spud Cellar Deli, Inc., 31 BOLI 106, 139 (2010).* See also *In the Matter of Charles Edward Minor, 31 BOLI 88, 104 (2010); In the Matter of From the Wilderness, Inc., 30 BOLI 227, 290 (2009), appeal pending.*

101.2 --- Calculation

101.2.1 --- Generally

□ When complainant was paid by the hour on a weekly basis, but worked variable hours, the forum calculated one week's back pay, estimated to be \$309.58, by dividing her gross wages in the four pay periods immediately prior to her termination by four. -- *In the Matter of Spud Cellar Deli, Inc., 31 BOLI 106, 139 (2010).*

□ When there is no evidence that respondent's failure to pay complainant for 12 hours worked was in any way related to unlawful discrimination, the forum did not award back pay for those hours. ---- *In the Matter of Charles Edward Minor, 31 BOLI 88, 104 (2010).*

□ Back pay awards are calculated to make a complainant whole for injuries suffered as a result of the discrimination. ---- *In the Matter of Charles Edward Minor, 31 BOLI 88, 104 (2010).*

□ Respondent paid complainant a salary of \$500 per week. Had she continued to work for respondent until respondent went out of business six weeks after her discharge, she would have earned an additional \$3,300 in gross wages. After complainant was fired, she promptly sought work and earned \$586.57 in gross wages while working at two limited, part-time jobs. In total, she suffered a net loss of \$2,713.42 in gross wages as a result of being fired by respondent and was awarded back pay award in that amount. ---- *In the Matter of From the Wilderness, Inc., 30 BOLI*

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227, 290 (2009).

Appeal pending.

101.2.2 --- Deductions

101.2.3 --- Duration

□ When complainant's last day of work was October 28, 2005; and she immediately began looking for work and started work at another job that paid the same as respondent on November 7, 2005, the forum awarded her one week's back pay, estimated to be \$309.58. ---- *In the Matter of Spud Cellar Deli, Inc., 31 BOLI 106, 139 (2010).*

□ The duration of complainant's back pay was limited by the fact that respondent ceased doing business on or about July 17, 2006, when respondent's president moved to Venezuela, and there was no evidence that respondent employed anyone after that date. ---- *In the Matter of From the Wilderness, Inc., 30 BOLI 227, 290 (2009).*

Appeal pending.

101.2.4 --- Duty to Mitigate

□ A complainant who seeks back pay is required to mitigate damages by using reasonable diligence in finding other suitable employment. ---- *In the Matter of Charles Edward Minor, 31 BOLI 88, 104 (2010).* See also *In the Matter of From the Wilderness, Inc., 30 BOLI 227, 290 (2009), appeal pending.*

101.2.5 --- Raises

101.2.6 --- Setoff

101.2.7 --- Tips

102.0 BACK BENEFITS

102.1 --- Insurance

102.2 --- Retirement Plan

102.3 --- Vacation

102.4 --- Other

□ When no evidence of "lost benefits" was presented at the hearing, the forum awards no damages for them. ---- *In the Matter of From the Wilderness, Inc., 30 BOLI 227, 291 (2009).*

Appeal pending.

103.0 CEASE AND DESIST ORDERS (see also 2.1)

103.1 --- Generally

103.2 --- Cessation of Unlawful Practice

104.0 CORRECTION OF RECORDS

105.0 EXPENSES

□ The agency sought "out-of-pocket" expenses to compensate an unlawfully discharged complainant for the \$5,000 in life savings that complainant testified that she had to spend to meet living expenses after she was fired. The forum declined to make a separate award for these expenses because this expense was caused by complainant's lost income, her lost income from only amounted to \$3,300, and the forum awarded compensation for that loss in its

back pay award, less her interim earnings, and awarding complainant additional damages for her "out-of-pocket" loss would be a double award for the same loss. ---- *In the Matter of From the Wilderness, Inc., 30 BOLI 227, 290-91 (2009).*

Appeal pending.

□ Economic loss that is directly attributable to an unlawful practice is recoverable from a respondent as a means to eliminate the effects of any unlawful practice found, including actual expenses. ---- *In the Matter of From the Wilderness, Inc., 30 BOLI 227, 290 (2009).*

Appeal pending.

106.0 FRONT PAY

107.0 INTEREST

108.0 MENTAL SUFFERING DAMAGES

108.1 --- Generally

□ In determining an award for emotional and mental suffering, the forum considers the type of discriminatory conduct, and the duration, frequency, and severity of the conduct. It also considers the type and duration of the mental distress and the vulnerability of the complainant. The actual amount depends on the facts presented by each complainant. A complainant's testimony, if believed, is sufficient to support a claim for mental suffering damages. ---- *In the Matter of Spud Cellar Deli, Inc., 31 BOLI 106, 139 (2010).*

□ In determining an award for emotional and mental suffering, the forum considers the type of discriminatory conduct, and the duration, frequency, and severity of the conduct. The actual amount depends on the facts presented by each complainant. A complainant's testimony, if believed, is sufficient to support a claim for mental suffering damages. It also considers the type and duration of the mental distress and the vulnerability of the complainant. ---- *In the Matter of Charles Edward Minor, 31 BOLI 88, 104 (2010).*

□ With regard to the particular sensitivity of a complainant, respondents must take complainants "as they find them." ---- *In the Matter of Charles Edward Minor, 31 BOLI 88, 104 (2010).*

□ The agency established the emotional, mental, and physical suffering experienced by complainant as a result of respondent's unlawful conduct through the credible testimony of complainant and her friend. ---- *In the Matter of Charles Edward Minor, 31 BOLI 88, 104 (2010).*

□ The forum was not limited to making a damage award in the amount \$35,000 for mental and emotional suffering when the agency's formal charges sought "at least \$35,000" in damages for mental and emotional suffering. ---- *In the Matter of From the Wilderness, Inc., 30 BOLI 227, 293 (2009).*

Appeal pending.

□ In determining an award for emotional and mental suffering, the forum considers the type of

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discriminatory conduct, and the duration, frequency, and severity of the conduct. It also considers the type and duration of the mental distress and the vulnerability of the complainant. The actual amount depends on the facts presented by each complainant. A complainant's testimony, if believed, is sufficient to support a claim for mental suffering damages. ---- *In the Matter of From the Wilderness, Inc., 30 BOLI 227, 291-92 (2009).*

Appeal pending.

□ Although complainant was not entitled to any additional compensation for "out-of-pocket" expense based on the expenditure of her life savings, the forum noted that this issue was relevant to an award of damages for emotional and mental suffering. ---- *In the Matter of From the Wilderness, Inc., 30 BOLI 227, 291 (2009).*

Appeal pending.

108.2 --- Basis of Discrimination

108.2.1 --- Age

108.2.2 --- Disability

108.2.3 --- Injured Worker

108.2.4 --- Marital Status

108.2.5 --- National Origin

108.2.6 --- Opposition to Safety Hazard

108.2.7 --- Opposition to Unlawful Practice

□ Complainant, who was fired for opposing respondent's unlawful sexual harassment, suffered significant financial distress as a result of being fired. She had to move from her apartment because she could no longer afford the rent and move in with a friend who rented a room to her. When she began work for respondent, she had saved \$5,000 from her last job. After being fired, she had to spend all of it to meet living expenses. Although the part of this expenditure that was attributable to her discharge could be potentially recouped by complainant as a back pay award, the emotional impact on complainant of having to spend that portion of her life savings was also an element of an award for emotional suffering. In addition, Complainant had to ask her mother and stepfather for financial help for a few months. Finally, as late as May 2008, complainant saw a mental health counselor and discussed this case with the counselor. These facts constituted elements of an award for mental suffering damages. ---- *In the Matter of From the Wilderness, Inc., 30 BOLI 227, 292-93 (2009).*

Appeal pending.

□ Complainant, who was fired for opposing respondent's unlawful sexual harassment, had never been fired before, and losing her job caused a large blow to her self esteem, causing her to begin to second guess her work ethic and ability to create a positive work experience with an employer. She became distrustful of working with a male supervisor, and it took her a few months to be comfortable working for an employer with a male in authority.

These facts constituted elements of an award for mental suffering damages. ---- *In the Matter of From the Wilderness, Inc., 30 BOLI 227, 292 (2009).*

Appeal pending.

□ After complainant was discharged because she opposed respondent's unlawful sexual harassment, complainant became very upset, and called her mother. Complainant had thought she "was on her way with her career" and being fired was a "big blow" to her. Her anxiety snowballed, and she experienced almost immediate panic attacks, for which she visited a doctor and was prescribed the generic form of Xanax. Subsequently, she had to have the prescription refilled. These all constituted elements of an award for mental suffering damages. ---- *In the Matter of From the Wilderness, Inc., 30 BOLI 227, 292 (2009).*

Appeal pending.

108.2.8 --- Race or Color

108.2.9 --- Race, Religion, Color, Sex, National Origin, Marital Status or Age of Person with Whom Individual Associates

108.2.10 --- Religion

108.2.11 --- Retaliation (see 108.2.7)

108.2.12 --- Sex

□ The forum awarded complainant \$5,000 in damages for emotional and mental suffering based on her testimony that she felt insulted and disrespected by her harasser's remarks, in part because of the very nature of the remarks. ---- *In the Matter of Spud Cellar Deli, Inc., 31 BOLI 106, 144-45 (2010).*

□ The forum awarded complainant \$10,000 in damages for emotional and mental suffering based on her testimony that: (1) during her employment, as a result of the harasser's sexual conduct that she saw and heard about, she tried to make sure she was not alone with or physically close to the harasser; (2) the harasser's touching and proposal for a kiss made her feel "shocked," "gross" and "not happy" like she "had been violated" and her "personal boundary had been crossed; (3) the harasser's sexual conduct was "upsetting" to her and she tried not to think about it and tried not to let it affect her; and (4) the harasser's sexual conduct was "disturbing" to her and "still upsets" her and she has been more cautious with male employers since leaving respondent's employment. In limiting the award to \$10,000, the forum also considered complainant's lack of testimony concerning (a) how the harasser's sexual conduct and her discharge affected her subsequent employment; (b) how her discharge had caused her any financial stress; (c) the degree to which she has been "upset" since leaving respondent's employment; or (d) how that "upset" has manifested itself. ---- *In the Matter of Spud Cellar Deli, Inc., 31 BOLI 106, 139-40 (2010).*

□ Complainant was subjected to a variety of types of verbal and physical sexual harassment by

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respondent in her eight days of employment, ending in her constructive discharge after respondent hit her on the head with his fist. The harassment itself, while ongoing, made her feel “scared” and “embarrassed,” “awful,” “disgusting,” “sickened,” “scared that I was alone in there with him,” and “on edge.” When respondent hit her on the head, she was still recovering from major dental surgery and the blows caused her serious physical pain. Her reaction was to finish her shift, then call her friend and her father, both of whom advised her to file a report with the police. The friend credibly testified that complainant was crying, hyperventilating, and barely able to talk when complainant called her, and that complainant was very shaken up, had “large red bags under her eyes,” her face was “splotchy,” and she was still crying when she arrived at the friend’s house after making the police report. Complainant was only 21 years old when she worked for respondent and her only prior work experience was part time child care for friends. After she quit working for respondent, complainant quit looking for work altogether because of her anxiety about encountering a similar situation with a new employer and turned into a “recluse” for the next 1½ months. Her attitude towards strangers changed and she became “anxious about everything” and nervous around strangers. After leaving respondent’s employment, complainant attended fall term at a community college, where she sought counseling for the anxiety she had because of her experience working for respondent and attended four counseling sessions, once a week for four weeks. To get to one of her classes, she had to walk past the school cafeteria that had a coffee stand. Because of her experience with respondent, the smell of the coffee made her feel as though she was going to vomit, so to avoid the smell she began walking around the outside of the building to get to the elevator. On one occasion after she quit respondent’s employment, complainant became nervous because she thought respondent’s car was following her. At the time of hearing, she still got anxious when seeing cars that look like respondent’s, when she sees people who remind her of respondent, and when she hears people talk like respondent. She still does not like driving past respondent’s coffee booth. Having to be in respondent’s presence at the hearing made her very nervous, and her friend credibly testified that complainant “has turned into a little bit of an anxiety box” since working for respondent. Finally, she still has nightmares about respondent. the forum awarded \$50,000 to compensate complainant for her mental and emotional suffering. ---- ***In the Matter of Charles Edward Minor, 31 BOLI 88, 104-05 (2010).***

□ When the evidence established that complainant was employed by respondent and sexually harassed at her first professional job, fired in retaliation for complaining about the harassment, suffered serious emotional distress that required medical consultation and treatment, had to move out of her apartment, and was portrayed by her harasser in the media, on the internet, to the police, and to her harasser’s internet rival as sexually promiscuous, a sexual blackmailer, and a criminal over the 17-month period following her

discharge, the forum awarded \$125,000 to compensate Complainant for her mental and emotional suffering. ---- ***In the Matter of From the Wilderness, Inc., 30 BOLI 227, 293 (2009).***

Appeal pending.

□ The duration of complainant’s emotional distress was extended by her harasser’s subsequent communications to the Ashland City Police, his internet rival, the local newspaper, and his internet blog, which continued for 17 months after complainant was fired. In these communication, complainant’s harasser: (1) described complainant as a troubled and disgruntled employee and attractive sexual smorgasbord who engaged in sexual blackmail and showed naked photographs of herself to male co-workers; (2) accused her of burglary, vandalism, being a meth addict and facilitating the use of respondent’s office to smuggle meth; (3) stated she was having sexual affairs with two employees and a writer for the local newspaper; and (4) questioned who was the father of her child. Complainant became aware of these communications at different times between late June 2006 and October 2007. She reasonably believed that the articles published in the local newspaper and on the internet would be read by the public and would affect the public’s perception of her as a person and potential employee. They embarrassed and mortified her and made her feel “like a criminal.” She felt that her career was threatened and that her harasser was attempting to intimidate her. Although these communications did not occur during the time period encompassed by the unlawful practices pleaded in the agency’s formal charges and proved by the agency at hearing, they constituted a basis for part of the forum’s award of damages for emotional and mental suffering because they arose directly out of complainant’s employment and served as a constant reminder to complainant of those unlawful practices. ---- ***In the Matter of From the Wilderness, Inc., 30 BOLI 227, 293 (2009).***

Appeal pending.

□ Complainant’s feelings of being “uncomfortable,” “shocked,” “taken aback,” “distracted,” “belittled,” “upset,” and “frightened” as a result of respondent’s sexual harassment were elements of an award for mental suffering damages. ---- ***In the Matter of From the Wilderness, Inc., 30 BOLI 227, 292 (2009).***

Appeal pending.

□ Complainant, who was fired for opposing respondent’s unlawful sexual harassment, had never been fired before, and losing her job caused a large blow to her self esteem, causing her to begin to second guess her work ethic and ability to create a positive work experience with an employer. She became distrustful of working with a male supervisor, and it took her a few months to be comfortable working for an employer with a male in authority. These facts constituted elements of an award for mental suffering damages. ---- ***In the Matter of From the Wilderness, Inc., 30 BOLI 227, 292 (2009).***

Appeal pending.

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108.2.13 --- Sexual Orientation (City Codes)

108.2.14 --- Violation of Leave Laws

108.2.15 --- Whistleblower

108.216 --- Other

109.0 POSTINGS

110.0 REFERENCES

111.0 REINSTATEMENT

112.0 SURVIVAL OF DAMAGE AWARD

X. OREGON FAMILY LEAVE ACT

115.0 UNLAWFUL ACTS

115.1 --- Denial of Leave

□ When respondent and the complainant's employment by applying its absentee policy in a manner that was not consistent with OFLA provisions, and abruptly in the complainant's employment, respondent denied complainant the use of the OFLA leave to which she was entitled under ORS 659A.150 to 659A.186. ----- *In the Matter of Income Property Management, 31 BOLI 18, 39 (2010).*

□ Under OAR 839-009-0270(8)(a), even if complainant had told respondent that she had no intention of returning to work after her leave expired, she was still entitled to complete her OFLA leave. ----- *In the Matter of Income Property Management, 31 BOLI 18, 38 (2010).*

□ When respondent had more than enough reason to believe that complainant's continuing absence qualified as OFLA leave, respondent had a duty to request additional information and treat the continuing absence as authorized unless complainant failed to provide the requested information. ----- *In the Matter of Income Property Management, 31 BOLI 18, 38 (2010).*

□ OFLA establishes an entitlement providing that eligible employees working for covered employers are entitled to OFLA leave for the purposes set out in the statute, and job protection during that leave. ----- *In the Matter of Income Property Management, 31 BOLI 18, 36 (2010).*

115.2 --- Failure to Restore to Previous Position of Employment (see 125.0)

115.3 --- Harassment

115.4 --- Retaliation

116.0 PRIMA FACIE CASE

116.1 --- Unlawful Denial of Leave

□ Under the OFLA, it is an unlawful employment practice for an employer to deny an eligible employee leave to recover from or seek treatment for a serious health condition "in the manner required by ORS 659A.150 to 659A.186." ----- *In the Matter of Income Property Management, 31 BOLI 18, 36 (2010).*

□ To prevail in an OFLA denial of leave case, the agency must prove by a preponderance of credible evidence that: 1) respondent was a covered employer as defined in ORS 659A.153(1); 2) complainant was an eligible employee, i.e., she was employed by a covered employer at least 180 calendar days immediately preceding the date her medical leave began; 3) complainant had a "serious health condition" as defined in OAR 839-009-0210(14)(e); 4) complainant used or would have used OFLA leave to recover from or seek treatment for her serious health condition; and 5) respondent did not allow complaint to use OFLA leave to which she was entitled in the manner required by ORS 659A.150 to 659A.186. ----- *In the Matter of Income Property Management, 31 BOLI 18, 36 (2010).*

116.2 --- Failure to Restore to Previous Position of Employment

116.3 --- Harassment

116.4 --- Retaliation

□ Proof of a causal connection can be established [1] indirectly, by showing that the protected activity was followed closely by discriminatory treatment or through other evidence such as disparate treatment of fellow employees who engaged in similar conduct, or [2] directly, through evidence of retaliatory animus directed against a complainant by the respondent. The agency, at all times, has the burden of proving that complainant was terminated or otherwise discriminated against for unlawful reasons. ----- *In the Matter of Income Property Management, 31 BOLI 18, 40 (2010).*

□ To establish a prima facie case of retaliation or discrimination for purposes of ORS 659A.183, the agency must show that: 1) complainant invoked a protected right under the OFLA; 2) respondent made an employment decision that adversely affected complainant; and 3) there is a causal connection between the complainant's protected OFLA activity and respondent's adverse action. ----- *In the Matter of Income Property Management, 31 BOLI 18, 39 (2010).*

□ Proof of a causal connection may be established through evidence that shows respondent knowingly and purposefully discriminated against complainant because she engaged in protected activity ["specific intent" test] or by showing that respondent treated complainant differently than her co-workers who were not engaged in the same protected activity ["different treatment" test]. ----- *In the Matter of Income Property Management, 31 BOLI 18, 39 (2010).*

116.5 --- Discharge/Constructive Discharge

120.0 DEFINITIONS

120.1 --- "Covered Employer"

120.2 --- "Eligible Employee"

120.3 --- "Serious Health Condition"

121.0 PURPOSES FOR WHICH LEAVE MAY BE TAKEN

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- 121.1 --- **Caring for Family Member with Serious Health Condition**
- 121.2 --- **Sick Child Care**
- 121.3 --- **Newly Born, Adopted, or Placed Child**
- 121.4 --- **Recovering from or Seeking Treatment for Employee's Own Serious Health Condition**

□ Complainant's back injury that involved possible surgery was a serious health condition under OFLA. --
--- *In the Matter of Income Property Management, 31 BOLI 18, 37-38 (2010).*

- 121.5 --- **Inability to Perform Essential Job Function**

122.0 LENGTH OF LEAVE

- 122.1 --- **Generally**

□ Under OAR 839-009-0270(8)(a), even if complainant had told respondent that she had no intention of returning to work after her leave expired, she was still entitled to complete her OFLA leave. ----
In the Matter of Income Property Management, 31 BOLI 18, 38 (2010).

- 122.2 --- **Use of Paid Leave**

- 122.3 --- **Teachers**

123.0 NOTICE TO EMPLOYER

□ When complainant gave respondent verbal notice that she did not know when she was going to return to work, i.e., that she may need more leave than originally authorized, and there was nothing in respondent's policy manual or OFLA leave policies suggesting that complainant was not following respondent's "known, reasonable and customary procedures" when she verbally indicated she may need additional leave, she gave sufficient notice of her need for additional leave. ---- *In the Matter of Income Property Management, 31 BOLI 18, 38 (2010).*

124.0 MEDICAL VERIFICATION

□ When respondent and the complainant's employment by applying its absentee policy in a manner that was not consistent with OFLA provisions, and abruptly in the complainant's employment, respondent denied complainant the use of the OFLA leave to which she was entitled under ORS 659A.150 to 659A.186. ---- *In the Matter of Income Property Management, 31 BOLI 18, 39 (2010).*

□ Respondent violated OAR 839-009-0250(1)(d) by failing to request additional information from the complainant when it had reason to believe her continuing absence qualified as OFLA leave. ---- *In the Matter of Income Property Management, 31 BOLI 18, 39 (2010).*

□ Respondent's argument that complainant had notice she was required to submit medical verification when her release expired was inconsistent with the law. Merely handing Complainant a packet of OFLA papers in December 2005, without any follow-up, and

expecting her to determine what her obligations are under OFLA dated not satisfy respondent's obligation to provide her with written notice each time respondent required her to provide medical verification and of the consequences if she failed to do so. ---- *In the Matter of Income Property Management, 31 BOLI 18, 38 (2010).*

125.0 RESTORATION TO POSITION OF EMPLOYMENT

126.0 RETALIATION

□ The forum concluded that there was no causal connection between complainant's invocation or use of OFLA and the application of respondent's absentee policy to complainant when there was no direct or circumstantial evidence of discriminatory intent on respondent's part, no evidence that management or other supervisory employees made any adverse statements about complainant's use of OFLA leave, no evidence respondent concocted the absentee policy to apply exclusively to complainant because she invoked OFLA provisions and credible evidence that respondent's absentee policy was uniformly applied to all employees and the agency offered no evidence to the contrary. Although the forum has found that respondent's application of the absentee policy effectively denied complainant full use of her OFLA leave, the agency failed to establish that the policy was enforced because complainant was using her OFLA leave. Instead, the entire record showed that respondent's policy was applied to complainant only because she failed to communicate with respondent in any manner after her OFLA leave expired. ---- *In the Matter of Income Property Management, 31 BOLI 18, 40 (2010).*

□ OFLA prohibits retaliation or discrimination against any employee based on inquiry about or use of OFLA. ---- *In the Matter of Income Property Management, 31 BOLI 18, 36 (2010).*

127.0 REMEDIES

127.1 --- **Back Pay and Benefits**

□ The agency alleges that complainant lost wages, benefits and out of pocket expenses estimated to be \$56,000 due to respondent's unlawful practices. However, credible evidence established that complainant was not released to return to work until she was released for light duty, well after her entitlement to OFLA leave had expired in loss no wages that showed respondent would have employed complainant after she was released to light duty. In addition, there was no credible evidence that she sought employment after she was released for light duty. The forum concluded that complainant lost no wages as a result of being denied her remaining weeks of leave. ---- *In the Matter of Income Property Management, 31 BOLI 18, 40-41 (2010).*

127.2 --- **Mental Suffering Damages (see also 108.0)**

□ Although the record was replete with evidence that complainant suffered from many stressors unrelated to her employment before and after her

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employment ended, her daughter's credible testimony corroborated complainant's testimony that for a period of time she was upset and unhappy that her employment had abruptly ended. Although her doctor often referred to the other stressors in Complainant's life, she credibly testified that complainant was worried and concerned about the sudden loss of income to the family and was embarrassed about asking her children to help out with the rent. The financial stress of losing her job lessened in 2007 as evidenced by her tax return for that year that shows she made well over what she earned in 2005 while working for this respondent. However, for the emotional distress she suffered over the sudden loss of her job, the forum held that complainant was entitled to compensatory damages the amount of \$15,000 to offset the effects of Respondent's unlawful practice. ---- *In the Matter of Income Property Management, 31 BOLI 18, 41 (2010).*

127.3 --- Expenses

□ The agency claimed lost benefits and out-of-pocket expenses for complainant; however, credible evidence established that respondent and the insurance carrier notified complainant she was entitled to continue her medical benefits, uninterrupted, when her employment ended, a complainant did not continue her insurance coverage. Although complainant apparently accrued medical bills in 2004, 2005, and 2006 that remained unpaid as of the date of hearing, none of those bills accrued after her employment and insurance coverage ended. In addition, there was no evidence that the bills were related to the medical condition that caused her need for OFLA leave, as most of the bills accrued in 2004 and 2005 before respondent employed her. Consequently, respondent is not liable for complainant's out of pocket medical expenses. The agency presented no evidence showing the value of any benefits complainant would have been paid had she continued the remaining seven weeks of OFLA leave and without such evidence, complainant had no claim. ---- *In the Matter of Income Property Management, 31 BOLI 18, 41 (2010).*

128.0 PREVIOUS OREGON LEAVE LAWS

128.1 --- Parental Leave Under *Former* ORS 659.360

129.0 INTERACTION WITH FEDERAL LEAVE LAWS

□

XI. OTHER REQUIREMENTS

130.0 RECORD KEEPING

131.0 REQUIRED POSTINGS